



Digital platform services inquiry

Interim report No. 5 – Regulatory reform

September 2022



Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601
© Commonwealth of Australia 2022

This work is copyright. In addition to any use permitted under the *Copyright Act 1968*, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos
- any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

Parties who wish to re-publish or otherwise use the information in this publication must check this information for currency and accuracy prior to publication. This should be done prior to each publication edition, as ACCC guidance and relevant transitional legislation frequently change. Any queries parties have should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

ACCC 09/22_22-68

www.accc.gov.au

Table of contents

Key points	3
Overview	4
Executive Summary	6
Significant risk of consumer and competition harms on digital platforms	6
Current competition and consumer laws are insufficient	8
New measures to protect consumers and promote trust and confidence	9
New measures required to address competition harms	11
Implementation	14
List of recommendations	16
Glossary and acronyms	18
1. Digital platforms and risks to competition and consumers	26
1.1. Introduction	26
1.2. Structure of report	28
1.3. The importance of digital platform services	29
1.4. Economic and commercial characteristics of digital platforms	31
1.5. Lack of effective competition	35
1.6. The market power of large digital platforms risks harms to Australian businesses and consumers	40
1.7. Other consumer harms have been identified across digital platform services of all sizes	44
2. The need for new regulation	47
2.1. Ex post enforcement of existing laws can be slow to address harms in digital platform services	48
2.2. Enforcement of traditional laws alone won't achieve the broad remedies necessary for digital platform services	51
2.3. There are gaps in current laws and the analytical toolkit	51
2.4. New competition and consumer measures are required	54
2.5. International recognition and consensus that regulatory reform is required for digital platforms	60
3. Strengthening economy-wide consumer protections	64
3.1. Addressing unfair trading practices	64

3.2. Amending unfair contract terms laws	71
4. Additional consumer protections for users of digital platforms	72
4.1. Addressing scams, harmful apps and fake reviews	73
4.2. Improving internal dispute resolution processes.....	88
4.3. Ensuring access to an independent external dispute resolution scheme.....	98
4.4. Regulatory design considerations for new measures to protect users of digital platforms	104
5. A new regulatory regime to promote competition in digital platform services	108
5.1. Attributes of a new regime with additional competition measures for digital platforms	109
5.2. Codes of conduct for different types of digital platform services	111
5.3. Principles in legislation should guide obligations in codes.....	112
5.4. Competition measures should only apply to Designated Digital Platforms	114
5.5. Alternative ways to introduce additional competition measures for digital platforms	120
6. Targeted obligations to promote competition	123
6.1. Addressing anti-competitive self-preferencing.....	124
6.2. Addressing anti-competitive tying.....	132
6.3. Addressing exclusive pre-installation and defaults	139
6.4. Facilitating switching	151
6.5. Effective interoperability	156
6.6. Addressing data-related barriers to entry and expansion	165
6.7. Improved transparency	174
6.8. Fair trading protections for business users.....	180
6.9. Addressing exclusivity and price parity clauses.....	185
7. Implementation and next steps.....	188
7.1. Implementation	188
7.2. Compliance and enforcement	189
7.3. Coordination and consultation with other government entities.....	195
Appendix A – Concentration in digital platform services	198
Appendix B – Ministerial Direction.....	207

Key points



Digital platforms offer valuable services for consumers and businesses

Consumers rely on these services to connect with others, to find and buy products, to seek and sort vast quantities of information and to access entertainment. Many Australian businesses, particularly small businesses, depend on these services to reach consumers in an effective and low-cost way.



The ACCC has concerns about significant consumer and competition harms

The ACCC has identified a range of consumer and competition issues with digital platforms. These include scams, harmful apps and fake reviews, inadequate dispute resolution, increased market concentration and instances of anti-competitive conduct. Current competition and consumer laws are not well-suited to addressing these issues.



Stronger consumer protections are needed for all digital platforms

Stronger safeguards are needed for consumers and small businesses to promote trust and confidence and minimise harm. The ACCC recommends:

- targeted measures to protect consumer and business users of digital platforms against scams, harmful apps and fake reviews
- minimum standards for digital platform dispute resolution processes and the ability for users to escalate complaints to an independent ombuds.

The ACCC continues to support an economy-wide ban on unfair practices to address certain business practices that occur online and offline, including those that involve digital platforms.

These consumer protections should be given effect in legislation and apply to all digital platforms that supply search, social media, online private messaging, app stores, online retail marketplaces and digital advertising.



We need targeted competition measures for certain digital platforms

The ACCC recommends legally binding codes of conduct, applied service-by-service, which require certain Designated Digital Platforms to address issues including anti-competitive self-preferencing, tying and exclusive pre-installation agreements.

New obligations in these codes could also aim to improve consumer switching, information transparency and interoperability between different services, and to better protect business users of digital platform services.



Reforms are happening globally

Similar reforms are already happening overseas. These include the European Union's Digital Services Act and Digital Markets Act, the United Kingdom's proposed pro-competition regime for digital markets, and Japan's Act on Improving Transparency and Fairness of Digital Platforms.

Overview

Digital platforms have significantly changed our society, bringing huge benefits to Australian consumers and businesses. They have changed how we work, study, communicate, shop, entertain ourselves and do business, with many holding 'gatekeeper' or 'intermediary' positions between businesses and their target users. The significance of these services means that ensuring effective user protections and competition in their supply is crucial for productivity and the future prosperity of Australians.

The ACCC has been considering the competition and consumer impacts of digital platforms since 2017. This report considers whether reform is needed to address the challenges posed by digital platforms, so Australians can benefit from continued competition, investment and innovation in these services.

Our analysis has identified significant consumer and competition harms across a range of digital platform services. These include financial losses to scams and unresolved disputes, reduced choice and an inability to make informed choices, reduced innovation and quality, and higher (monetary and non-monetary) prices. The conduct causing these harms is widespread, entrenched, and systemic. However, enforcement of existing laws, while important, has proven insufficient in Australia and overseas to address such conduct quickly or effectively, further increasing the risk and magnitude of harm.

The ACCC recommends new and strengthened laws to better protect Australian consumers and small businesses, who are increasingly reliant on digital platforms, and new measures to promote competition in the supply of digital platform services. We believe these proposed reforms are reasonable, proportionate, and provide the flexibility appropriate for these dynamic and fast-evolving services.

Similar reforms are occurring in many overseas jurisdictions. Reform in Australia would align with the global shift towards placing greater onus on digital platforms to be more responsible and responsive. It would also provide Australians with equivalent protections to those being introduced and contemplated overseas.

To protect consumers and small businesses, the ACCC recommends new targeted requirements on digital platforms to:

- provide user-friendly processes for reporting scams, harmful apps, and fake reviews, and to respond to such reports ('notice and action' requirements)
- verify certain business users (e.g. advertisers, app developers and merchants)
- publish review verification processes
- report on scams, harmful apps and fake reviews on their services, and measures taken to address them
- meet minimum internal dispute resolution standards. This obligation would be supported by the establishment of a new digital platform ombuds scheme to resolve disputes that cannot be resolved via internal dispute resolution processes.

These obligations would apply to digital platforms providing search, social media, online private messaging, app stores, online retail marketplaces and digital advertising services.

The ACCC also continues to support a new economy-wide unfair trading practices prohibition and strengthening of the existing unfair contract term laws. This would address previously identified consumer harms occurring both online and offline, including a range of harms occurring on digital platforms.

In relation to the competition concerns, the ACCC recommends a new regulatory regime to promote competition in digital platform services. This regime would introduce new competition measures for digital platforms, which would work alongside the continued enforcement of Australia's existing competition laws, to keep pace with developments in dynamic digital platform markets.

The new measures would address anti-competitive conduct, unfair treatment of business users and barriers to entry and expansion that prevent effective competition in digital platform markets. They would do this by supporting targeted obligations to:

- prevent anti-competitive self-preferencing, tying and exclusive pre-installation
- address data advantages
- ensure fair treatment of business users
- improve switching, interoperability and transparency.

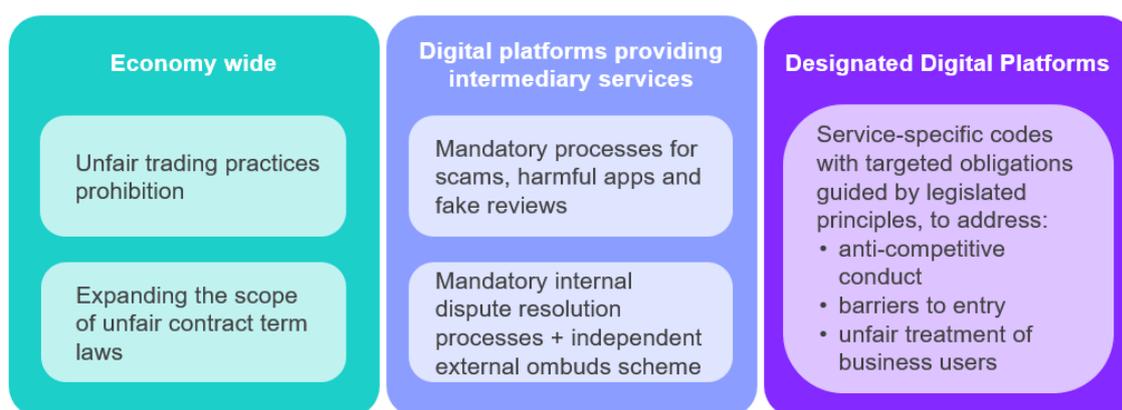
We see benefit in implementing such obligations through service-specific codes of conduct that would operate under and be guided by high-level principles established in legislation.

This would ensure the obligations are appropriately tailored to the particular competition issues identified in the supply of specific digital platform services, particularly where there is a need to balance competing interests. It would also allow sufficient opportunity to consult with relevant stakeholders, enable sequential prioritisation and implementation of new codes and provide the flexibility to address emerging issues and new forms of harmful conduct.

These codes would only apply to those digital platform services that meet designation criteria reflecting their importance to Australian consumers, businesses and markets, and their ability and incentive to harm competition.

The reforms proposed in this report are critical to ensuring consumers and businesses using digital platform services can exercise choice and benefit from new, innovative business models and services. Protecting and promoting competition in digital platform markets will also stimulate innovation and investment, with benefits for consumers and business users of these services, and the Australian economy.

Recommendations for more competitive and fair digital platform services



Executive Summary

This report, provided to the Treasurer on 30 September 2022, is the ACCC's fifth report as part of the Digital Platforms Services Inquiry (DPSI), and considers whether new competition and consumer laws are required to address the harms identified on these services.

Significant risk of consumer and competition harms on digital platforms

While digital platforms provide valuable services to Australian consumers, their importance and widespread use creates opportunities and incentives for these platforms, and unscrupulous parties using their services, to engage in conduct that harms consumers, competition and the economy.

A lack of competitive constraint can reduce digital platforms' incentives to innovate and improve the quality of their products and services. Reduced competition in markets for digital platform services is also likely to result in higher prices than would be expected in a more competitive market. For zero-priced services, price increases could take the form of greater exposure to advertising or greater harvesting of personal data. A lack of competition can also lead to less choice, including regarding the types of business models offered by digital platforms, as well as the ability and incentive to engage in strategic conduct to entrench and extend market power.

Further, digital platforms and unscrupulous actors can take advantage of inadequate consumer and business user protections to exploit vulnerabilities, biases and power imbalances. Not only does this directly harm affected digital platform users, it also reduces trust in digital services and has a dampening effect on the digital and wider economy.

These issues have been discussed at length in past ACCC reports on digital platforms and the recommendations in this report build on those findings.¹

Economic characteristics of digital platforms contribute to market power

A number of characteristics of digital platforms can lead to market outcomes where one or 2 large providers service the vast majority of users, including:

- **Strong network effects:** where the value of a service depends on the number of users with whom other users can interact. In markets with strong positive network effects, users will be drawn to the platform with the largest number of users.
- **Significant economies of scale and sunk costs:** economies of scale occur where the average cost of providing services decreases with increased use, giving larger platforms a cost advantage. Further, new entrants can face greater risk where the high fixed costs of entering cannot be recovered if they are unsuccessful (that is, where costs are 'sunk'). This can raise barriers to entry and put smaller rivals at a cost disadvantage.
- **Advantages of scope and expansive ecosystems:** where supplying multiple related services creates advantages through the ability to share and combine data across these services, the ability to leverage existing users bases across services, or lower average costs. While this can benefit consumers, it also has the potential to raise barriers to entry and expansion. These barriers may be reinforced when platforms restrict interoperability, making their services incompatible with other services outside their own ecosystem.

¹ Including the ACCC's 2019 Digital Platforms Inquiry and previous reports of the Digital Platform Services Inquiry (DPSI) that focused on private messaging and social network services, app stores, search and browser services and online retail marketplaces; and the ACCC's 2021 Digital Advertising Services Inquiry (the Ad Tech Inquiry).

- Barriers to switching: where consumer inertia, switching costs and a platform's interface design can increase consumer lock-in, often to the incumbent's advantage.
- Access to high-quality user data: where vast amounts of individual-level data are required to train algorithms and offer higher-quality and personalised services (including targeted advertising). Access to such data provides a considerable competitive advantage to established digital platforms.

In combination, these characteristics can contribute to high barriers to entry and expansion and high degrees of concentration in digital platform markets.

Many digital platform markets are dominated by one or 2 large providers that face limited competitive constraint from actual or potential rivals. The ACCC has observed high levels of concentration and entrenched market power in relation to app store (Google and Apple), search (Google), ad tech (Google) and social media (Meta) services. Our observations about social media services will be revisited in the March 2023 interim report of this inquiry.

These are large and influential companies, not only in Australia but internationally, that can draw on significant financial resources. For example, as at April 2022, the market values of both Apple and Alphabet (Google's parent company) each exceeded Australia's total annual gross domestic product in 2021 (see section 1.3).

Substantial market power creates the risk of anti-competitive conduct

The positions of substantial market power held by large digital platforms give them the ability and incentive to engage in strategic conduct to entrench and extend that market power.

Digital platform markets have a tendency to tip (leaving one or 2 firms dominating a market) and feature high barriers to entry and expansion. This means that dominant digital platform firms have a particularly strong ability and incentive to protect their market power, including through exclusionary conduct and acquiring potential rivals.

The ACCC has observed a range of conduct being undertaken by the most powerful digital platforms and has concerns that this conduct is interfering with the process of competition. This includes self-preferencing, tying, exclusivity agreements, impeding switching, denying interoperability, and withholding access to important hardware, software, and data inputs. We are also concerned about lack of transparency and the ability of digital platforms with market power to degrade the quality of the services they offer, including in the terms on which services are provided to business users. The need to prevent and deter such conduct where it reduces competition is a major focus of this report.

In addition, observers worldwide have cited the hundreds of acquisitions made by platforms such as Google, Meta, Apple, Microsoft and Amazon, many involving nascent or potential competitors. While this report does not make specific recommendations for merger reform, the ACCC notes that any future economy-wide reforms to Australia's merger laws should consider the challenges involved in adequately addressing the competition effects of serial strategic acquisitions, including by digital platforms.

Inadequate consumer and small business protections, including access to dispute resolution

The ACCC has identified the following concerns about potential harms to users of digital platform services:

- A range of unfair trading practices, including choice architecture that exploits consumers' behavioural biases and undermines consumer choice, have been observed on digital platforms of all sizes irrespective of their market power.

- A significant and sustained increase in scams on digital platforms. Scammers have found digital platforms to be an effective means of accessing consumers, including those experiencing vulnerability; particularly as more consumers spend time online. Inadequate verification of digital platform users and content, combined with some other channels becoming subject to greater scrutiny and protection, means that digital platforms are an increasingly common and effective means for scammers to target and access their victims.
- Harms from inappropriate and fraudulent apps that are made available on app stores, despite app store review processes.
- The practice of creating, buying and selling fake reviews and otherwise engaging in review manipulation is distorting competition in related markets and undermining trust in digital platforms. Fake negative reviews also have substantial consequences for affected businesses.

A lack of redress and avenues for dispute resolution compound these problems, as many consumers and small businesses simply give up on enforcing their consumer guarantees and other rights.

Current competition and consumer laws are insufficient

While Australia has robust competition and consumer laws capable of addressing many forms of harmful conduct across the economy, they are not well-suited to addressing the range and scale of consumer and competition harms identified in digital platform markets. Key gaps in consumer law that have been identified in previous reports also remain. The ACCC therefore considers that there is a need for new up-front (ex ante) measures for digital platforms.

Enforcement of current competition and consumer law is not sufficient

Enforcement of the *Competition and Consumer Act 2010* (CCA) and Australian Consumer Law (ACL), particularly through the courts, can take considerable time. It is also necessarily retrospective, addressing competition and consumer harms on a case-by-case basis after a particular instance of conduct has already occurred (ex post).

The dynamic nature and economic characteristics of digital platform services means that the harm from anti-competitive conduct can be significant. Enforcement of existing laws through litigation may take a long time, and available remedies may have a limited ability to address the effects of the conduct. The fast-moving, opaque, and complex nature of digital platform markets also makes it difficult to address systemic competition issues in these markets through enforcement of economy-wide competition law alone. Even when enforcement action is successful, it may not be able to adequately address systemic and widespread harmful conduct. This can be a particular challenge where digital platforms change their conduct to achieve a similar outcome by a different means.

In relation to the ACL, consumers and small businesses seeking to enforce their existing rights against digital platforms face significant obstacles. Dispute resolution processes are often unclear, costly and uncertain; and consumers and small businesses have both an informational and power disadvantage. In this regard, better measures are required to make it easier for consumers and small businesses to seek redress from digital platforms.

Key gaps in consumer law

As noted in past reports, there are a range of unfair trading practices in relation to digital platform services that currently fall outside of the ACL. While unfair practices are common in the supply of digital platform services, they also occur across the broader economy.

Accordingly, we consider that economy-wide measures are needed to ensure consumers are protected both online and offline.

Trust and confidence underpin effective markets. For consumers and small businesses to trust providers of goods and services, they must feel confident that providers will act fairly, meet their obligations and respond to their concerns if problems arise. Not only do unfair practices harm consumers and reduce trust, but this gap is also out of step with many international jurisdictions that already have unfair trading practices prohibitions.

In addition to any direct harm caused, poor experiences online can erode consumer trust, not only in a specific business or service, but also in digital businesses and services generally. This is exacerbated if there are not adequate consumer protections to fall back on.

The ACCC has observed distrust of and dissatisfaction with digital platforms from both consumers and business users. Given the important role these platforms play in the digital economy, such distrust has the potential to dampen the economic benefits of digitalisation. This can be minimised by closing gaps in the existing consumer laws, strengthening consumer protections against scams, harmful apps, and fake reviews, and ensuring adequate dispute resolution processes when issues arise.

New measures to protect consumers and promote trust and confidence

The ACCC recommends legislative reform to better protect consumers and small businesses, and to promote trust and confidence in the digital economy.

Strengthening economy-wide consumer protections

Australian consumers and small businesses often face information asymmetries and bargaining power imbalances when using digital platform services. This leaves consumers and businesses vulnerable to unfair trading practices, such as business practices which dissuade a consumer from exercising their contractual or other legal rights, and onerous contract terms which can be unilaterally varied by digital platform services without notice or recourse.

They may also be influenced by digital platforms' use of 'dark patterns' that are designed to confuse users, make it difficult for them to express their actual preferences, or manipulate them into taking certain actions.

The ACCC continues to support the adoption of an economy-wide prohibition on unfair trading practices to address certain business practices not currently covered by the ACL, including some dark patterns. The ACCC also maintains its support for reforms to strengthen enforcement of the economy-wide unfair contract term laws, including by enabling penalties to be imposed for breaches.

Digital platforms need to do more to stop scams, harmful apps and fake reviews

Australian consumers and businesses are increasingly experiencing losses to scams and harmful apps on digital platforms. For example, losses reported to Scamwatch from scams conducted via social networking and mobile apps almost doubled between 2020 (\$49 million) and 2021 (\$92 million). Given low levels of reporting – only an estimated 13% of victims report their scam to Scamwatch² – the actual sum of money lost to scams is likely much higher.

² ACCC, [Targeting scams: report of the ACCC on scam activity 2021](#), 4 July 2022, p 17.

Digital platforms that host or otherwise act as intermediaries between scammers and their victims are in a unique position to identify and stop scams and harmful apps, and are well placed to remove harmful apps. However, platforms are relatively free to choose how they deal with these issues, and the ACCC considers that platforms could do more to protect consumers. This includes providers of search, social media, online private messaging, app store, online retail marketplace and digital advertising services.

Scams and harmful apps can erode trust in the intermediaries involved and the broader digital ecosystem. They can have a negative financial and psychological impact on victims and a negative effect on the broader economy.

While the ACCC recognises the efforts of many digital platforms to address scams and harmful apps, we consider that further protections are necessary. These include:

- a notice-and-action mechanism allowing users to report a scam or harmful app, and requiring the platform receiving this report to act in response, communicate its actions, share information with relevant agencies, and offer redress, as appropriate
- verification of certain business users, including advertisers, app developers and merchants, to minimise scams and harmful apps, and additional verification of advertisers of financial services and products
- public reporting on mitigation efforts.

These measures align with the ACCC's three-pronged approach to making Australia a harder target for scammers by disrupting how they contact their would-be victims.³

Fake ratings and reviews, and the manipulation of ratings and reviews, also have the potential to harm both consumers and businesses. While much of this conduct is unlawful under the ACL, the proliferation of such conduct on platforms, and their intermediary role in these transactions, places increased onus on platforms to ensure fake reviews are addressed in an effective and efficient way, alongside continued enforcement action by regulators. Digital platforms that host ratings and reviews, such as those providing search, social media, app store, online retail marketplace and digital advertising services, have a role to play in addressing fake reviews. The ACCC considers these digital platforms should be required to:

- provide an accessible avenue for consumers to report fake reviews and respond to such reports
- publish information on their review verification processes, including where no verification is undertaken
- report on their mitigation efforts.

Improved dispute resolution processes are required to reduce the risk and magnitude of harm

Effective processes for dispute resolution are important to consumers and small businesses. However, the ACCC has learned during its inquiries that many Australian consumers and small businesses find it hard to resolve disputes quickly and easily on digital platforms.

While the ACL provides strong protections for consumers, the online environment poses challenges when trying to enforce these rights. It can be difficult for consumers to raise disputes directly with digital platforms, particularly where these companies do not have a

³ G Cass-Gottlieb, [Making Australia a harder target for scammers](#), Speech, Law Council of Australia's 2022 Consumer Rights Forum, 19 July 2022.

physical store or office located in Australia, or where users cannot easily contact a human representative.

While there are various avenues for consumers, and to a more limited extent businesses, to raise concerns (for example, with state and territory fair trading offices, small business commissioners or small claims tribunals), digital platform users still face obstacles in seeking redress. Existing bodies are simply not resourced to deal with the range, volume and complexity of disputes occurring on digital platforms, or may not be able to deliver adequate remedies. The inability for some agencies to engage with digital platforms in a meaningful way can also impede their ability to assist consumers and small businesses to obtain redress.

The ACCC considers that setting minimum standards for internal dispute resolution processes, and providing the ability to escalate disputes to an independent ombuds scheme, are both essential to improving outcomes for Australian consumers and small business users of digital platforms.

Obligations around internal dispute resolution would ensure that digital platforms meet minimum standards of accessibility, timeliness, accountability (regarding how the platform has responded to the complaint and options for escalating the complaint), the ability to speak to a human representative, and transparency of processes and outcomes.

The ability to refer disputes to an independent external ombuds is important for ensuring the effectiveness of internal dispute resolution measures. The ombuds should have the ability to make binding decisions on digital platforms and to investigate systemic conduct. Any ombuds scheme would need to be carefully designed to align with other avenues for redress (for example, in relation to online harms, privacy and dis/misinformation).

New measures required to address competition harms

The characteristics and dynamic nature of digital platform markets mean that enforcement of existing economy-wide competition laws is, on its own, unlikely to adequately protect and promote competition in these markets. Therefore, the ACCC recommends that new targeted up-front (or ex ante) competition obligations should be implemented through mandatory service-specific codes.

These codes would apply to digital platforms that meet designation criteria in respect of specific digital services they supply and would complement enforcement of existing competition laws.

Service-specific codes would allow for flexibility in dynamic markets

The form of any new regulatory regime for protecting and promoting competition in digital platform markets should be:

- flexible, to account for the dynamic nature of these markets
- targeted, applying only to those platforms with the ability and incentive to harm competition, and to the specific competition issues identified
- clear and certain, to promote investment and innovation.

The ACCC considers that introducing mandatory service-specific codes of conduct applying only to 'designated' digital platforms appropriately captures these attributes. These codes would be developed by the relevant regulator, in consultation with the relevant policy agency.

Such a model would provide the flexibility to account for the material differences across digital platform services. It would also allow measures to appropriately target the conduct

that poses the greatest risks to competition, while reducing the risk of unintended consequences. Additionally, it would also allow for sequential prioritisation by the relevant regulator and policy agency, with a focus on developing codes for services where the risks to competition are the most immediate and significant, and where they would have the greatest net benefit.

Such codes should be guided by the objective of promoting competition and innovation in the provision of digital platform services and related products and services. This objective could be supported by overarching principles set out in primary legislation. The ACCC recommends that such principles should focus on promoting:

- competition on the merits
- informed and effective consumer choice
- fair trading and transparency for users of digital platforms.

New measures would only apply to Designated Digital Platforms

The ACCC considers that new competition obligations should only apply to 'Designated Digital Platforms' in respect of specific digital platform services.

The designation criteria should aim to identify the digital platforms that hold a critical position in the Australian economy and that have the ability and incentive to harm competition. For example, designation could be based on consideration of:

- quantitative criteria, such as the number of monthly active Australian users, and the platform's Australian and/or global revenue
- qualitative criteria, such as whether the digital platform holds an important intermediary position, whether it has substantial market power in the provision of the digital platform service, and whether it operates multiple digital platform services
- a combination of both quantitative and qualitative criteria.

Where a digital platform meets the designation criteria, designation would apply both in respect of the digital platform itself and a service (or services) it supplies (e.g. a platform might be designated in its role as an app store provider). Designation would then give effect to obligations contained in any codes that have been developed for those services.

New competition measures

The ACCC has identified a range of conduct undertaken by dominant digital platforms across numerous services that may have anti-competitive impacts. While there can be pro-competitive reasons for some of this conduct, such conduct can have the effect of extending or entrenching the positions of platforms with market power.

Targeted and detailed ex ante regulatory obligations that limit the scope for anti-competitive conduct would protect competition, while providing necessary clarity and certainty to participants in digital platform markets. In addition, obligations could proactively promote competition by addressing substantial barriers to entry and expansion and by ensuring fair treatment of business users of digital platform services.

The ACCC recommends that new service-specific codes should be able to support targeted obligations to address, as required:

- **Anti-competitive self-preferencing:** Measures could prevent Designated Digital Platforms from providing favourable treatment to their own services over those of third-party providers in specific circumstances. Measures could also mandate data separation between information a digital platform collects in its role as an intermediary from its role

as a rival in a related market. The ACCC is concerned about self-preferencing conduct by:

- app store providers, in their treatment of third-party app developers, including the ability to use data about third-party apps gained in operating an app store
- search providers, in their treatment of third-party content in search results
- ad tech providers, in their treatment of third-party ad tech providers.
- **Anti-competitive tying:** Measures could prevent Designated Digital Platforms, in specific circumstances, from making the purchase or use of one of their services conditional on the purchase or use of another service they supply. The ACCC is concerned about tying conduct by:
 - app store providers, in tying the supply of app store services to the use of their in-app payment services, and tying pre-installation of their app stores to the pre-installation of other apps that they offer
 - ad tech services, in tying ad inventory to the use of their ad tech services.
- **Exclusive pre-installation agreements and defaults:** Measures could prohibit Designated Digital Platforms from having their services exclusively pre-installed on devices; require Designated Digital Platforms to allow default services to be changed; or require Designated Digital Platforms to apply choice screens to reduce barriers to entry and allow greater access to users. The ACCC is concerned about such conduct by app store and search providers.
- **Frustrating consumer switching:** Measures could prohibit conduct that frustrates consumer switching, including user interfaces that inhibit consumer choice and arrangements that limit a business user's ability to communicate alternative payment options to its users. The ACCC is concerned about such conduct by app store, mobile operating system (OS) and search providers.
- **Denying interoperability:** Measures could ensure that Designated Digital Platforms provide third parties with access to their hardware, software and systems that is equivalent to the access available to the platform's own services, while allowing the Designated Digital Platform to protect the safety and integrity of their software and hardware as required. The ACCC is concerned about restrictions on interoperability that affect third-party app developers, browser engines and app stores.
- **Data advantages:** Measures could require targeted data portability, access, or separation measures, as appropriate. However, careful consideration would need to be given to ensure any measures safeguard consumers' privacy. These measures should not be considered for inclusion in any code until after the introduction of any privacy law reforms that result from the review of the Privacy Act.
- **Lack of transparency:** Measures could require Designated Digital Platforms to make necessary information widely available and freely accessible to market participants. The ACCC is concerned about a lack of transparency in ad tech (specifically, auction, verification and pricing transparency), and the app review processes of app stores.
- **Unfair dealings with business users:** Measures could restrict Designated Digital Platforms' ability to impose unfair terms of service on business users, including clauses that restrict a business's ability to exercise its rights (e.g. in respect of intellectual property). The ACCC is concerned about such conduct by app stores, but similar concerns could arise for any intermediary services offered by a Designated Digital Platform.
- **Exclusive agreements and price parity clauses with business users:** Measures could prohibit Designated Digital Platforms from unnecessarily restricting business users from providing their products and services through other sales channels, or at different

prices on other sales channels. While the ACCC has not identified widespread use of such clauses in any digital platform markets considered to date, if such clauses were used by a Designated Digital Platform, this would likely have significant implications for competition in the relevant market.

Obligations developed to address these issues could also consider and account for any potential reasons why, and the circumstances in which, the conduct may provide a net benefit to consumers, as well as potential unintended consequences. The development of codes of conduct would be subject to further analysis and consultation.

While many of the types of conduct listed above could potentially breach the competition provisions of the CCA, it could take many years to progress cases against the full range of conduct observed. In that time, harm to competition would continue, with potentially significant detrimental outcomes. The resulting economic losses to Australians in terms of choice, innovation, privacy and potentially, higher prices (for example, for digital advertising) would be substantial. Targeted ex ante obligations would also be able to address systemic issues in a way that current competition laws cannot.

Other countries have also identified the same detriments from the market power of certain digital platforms, and many are implementing or considering reforms to address these issues.

Digital platforms stand to gain substantially from anti-competitive conduct that entrenches their market power, even in a smaller economy such as Australia. Hence, there are incentives for digital platforms to limit any changes to comply with requirements overseas to those jurisdictions where this is legally required. Indeed, there are several examples of multinational digital platforms only implementing competition remedies in the jurisdiction(s) in which those remedies were required.

For these reasons, the ACCC sees considerable benefit in developing new competition measures – for Designated Digital Platforms in key digital platform services – that align, where possible, with new obligations in jurisdictions such as Europe and the United Kingdom (UK). Doing so would reduce the potential regulatory burden placed on Designated Digital Platforms. It would also ensure that any pro-competitive changes implemented overseas would also be rolled out in Australia, which would benefit Australian consumers, businesses, and our economy more broadly.

Implementation

The new regulatory arrangements for digital platforms that are recommended in this report are a significant but necessary complement to and expansion of Australia's existing competition and consumer laws.

To support such new arrangements, the relevant regulator should publish guidance materials to assist compliance and give additional clarity to the market. This is important to promoting investment and innovation.

Information-gathering and monitoring powers would allow the relevant regulator to obtain information from digital platforms, including from parent companies and related bodies corporate in overseas jurisdictions. Such powers are essential for the enforcement of the new regulatory arrangements.

Given the size and economic resources of many digital platforms, and experience overseas which suggests that some digital platforms do not have a strong compliance culture, there will need to be significant penalties attached to breaches. This would be consistent with similar regulation being developed overseas. Consideration should also be given to an exemption mechanism to mitigate the risk of unintended consequences.

These regulatory arrangements should be developed through close consultation with relevant Australian Government departments and agencies given the overlapping jurisdiction of multiple agencies in respect of digital platforms.

Lastly, the global nature of the largest digital platforms makes international cooperation with other relevant regulators especially important. Australia can learn from first movers overseas, such as in the EU and the UK, but also from our Pacific neighbours, including Japan.

There is international consensus that the current competition and consumer laws are not sufficient for digital platforms, and Australia should continue to be an active participant in developing best practice approaches to address these issues to the benefit of Australians and the Australian economy.

List of recommendations

Consumer recommendations

Recommendation 1: Economy-wide consumer measures

The ACCC continues to recommend the introduction of new and expanded economy-wide consumer measures, including an economy-wide prohibition against unfair trading practices and strengthening of the unfair contract terms laws.

These reforms, alongside targeted digital platform specific obligations, would assist in addressing some of the consumer protection concerns identified for digital platform services.

Recommendation 2: Digital platform specific consumer measures

The ACCC recommends additional targeted measures to protect users of digital platforms, which should apply to all relevant digital platform services, including:

- Mandatory processes to prevent and remove scams, harmful apps and fake reviews including:
 - a notice-and-action mechanism
 - verification of certain business users
 - additional verification of advertisers of financial services and products
 - improved review verification disclosures
 - public reporting on mitigation efforts.
- Mandatory internal dispute resolution standards that ensure accessibility, timeliness, accountability, the ability to escalate to a human representative and transparency.
- Ensuring consumers and small business have access to an independent external ombuds scheme.

Competition recommendations

Recommendation 3: Additional competition measures for digital platforms

The ACCC recommends the introduction of additional competition measures to protect and promote competition in markets for digital platform services. These should be implemented through a new power to make mandatory codes of conduct for 'designated' digital platforms based on principles set out in legislation.

Each code would be for a single type of digital platform service (i.e. service-specific codes) and contain targeted obligations based on the legislated principles. This would allow flexibility to tailor the obligations to the specific competition issues relevant to that service as these change over time.

These codes would only apply to 'designated' digital platforms that meet clear criteria relevant to their incentive and ability to harm competition.

Recommendation 4: Targeted competition obligations

The framework for mandatory service-specific codes for Designated Digital Platforms (proposed under Recommendation 3) should support targeted obligations based on legislated principles to address, as required:

- anti-competitive self-preferencing
- anti-competitive tying
- exclusive pre-installation and default agreements that hinder competition
- impediments to consumer switching
- impediments to interoperability
- data-related barriers to entry and expansion, where privacy impacts can be managed
- a lack of transparency
- unfair dealings with business users
- exclusivity and price parity clauses in contracts with business users.

The codes should be drafted so that compliance with their obligations can be assessed clearly and objectively. Obligations should be developed in consultation with industry and other stakeholders and targeted at the specific competition issues relevant to the type of service to which the code will apply. The drafting of obligations should consider any justifiable reasons for the conduct (such as necessary and proportionate privacy or security justifications).

Glossary and acronyms

Term	Description
ACCC	Australian Competition and Consumer Commission
ACCC 2021 consumer survey	Online survey on consumers' usage of web browsers and search services. This survey conducted by Roy Morgan for the ACCC in May 2021 to inform the Report on Search Defaults and Choice Screens, and received 2,647 responses.
ACL	Australian Consumer Law
ACM	Authority for Consumers and Markets (Autoriteit Consument & Markt, The Netherlands)
ACMA	Australian Communications and Media Authority
Ad Tech Inquiry	Digital Advertising Services Inquiry (2020–21). The ACCC conducted an inquiry into markets for the supply of digital advertising technology services and digital advertising agency services.
Ad tech services	Digital advertising technology services. In this Report, digital advertising technology services refers to services that provide for, or assist with, the automated buying, selling and delivery of display advertising.
Ad verification	The process of checking whether an advertisement could be viewed by a consumer, was displayed in a brand safe context and webpage, and/or whether fraud took place.
AFCA	Australian Financial Complaints Authority
Android	Google-owned OS for supported devices, such as mobile phones.
Android device	A mobile device that uses the Android OS and have installed the Google Mobile Services suite of apps.
API	Application Program Interface. A computing interface that allows interactions between multiple software programs, such as apps and the OS, for the purpose of simplifying programming.
App	Application. A software program that allows a user to perform a specific task either on a particular device or online.
App store	A digital distribution platform or storefront for apps that typically allows users to search and review software programs offered electronically, and provides associated services for app providers, app developers and consumers (also known as an app marketplace or app distribution service).
Apple App Store	The app store operated by Apple for iOS devices.
ASIC	Australian Securities and Investments Commission

Browser	An application that enables users to visit web pages on the internet. Well-known browsers include Google Chrome, Firefox, Safari, and Microsoft Edge.
Browser engine	A critical piece of software required by all browsers to run, which interprets the code behind a website and presents it in the graphical format that the user sees and interacts with.
Bundeskartellamt	Federal Cartel Office (Germany)
Bundling	Bundling occurs when a supplier only offers 2 or more products as a package, or offers a lower price if the products are purchased as a package.
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
Choice architecture	The design of the way that choices are presented to users. User interface design is a form of choice architecture and can influence consumer choices by appealing to certain psychological or behavioural biases.
Choice screen	Choice screens allow users to choose their preferred service (such as a search engine) as the default on a device, OS or application, rather than relying on the pre-installed or pre-set default.
Click-and-query data	Click-and-query data includes data on the queries that users enter into a search engine, along with their actions taken in response to the results.
CMA	Competition and Markets Authority (UK)
Competition Roundtable	A meeting with the ACCC and stakeholders on 1 June 2022 to facilitate discussion on the competition issues and potential remedies identified in the Discussion Paper and in stakeholder submissions to the Discussion Paper.
Consumer Data Right	Under the Consumer Data Right, a consumer can direct a data holder such as a bank to share their data in a standardised machine-readable format with accredited service providers.
Consumer Roundtable	A meeting with the ACCC and stakeholders on 7 June 2022 to facilitate discussion on the consumer protection issues and potential remedies identified in the Discussion Paper and in stakeholder submissions to the Discussion Paper.
CPRC	Consumer Policy and Research Centre
Cross-side network effects	Present where an increase (or decrease) 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.
Designated Digital Platform	A digital platform which meets the recommended designation criteria that could be subject to a code of conduct.

Default arrangements	<p>Arrangements between 2 parties for:</p> <ul style="list-style-type: none"> • a search engine to be set as the pre-set search engine on a browser/search access point, or • a browser to be the default browser on a device.
Default bias	The tendency for consumers to remain with a default option, service or setting.
Demand-side platform or DSP	A platform used by advertisers to help them purchase ad inventory from suppliers of ad inventory as effectively and cheaply as possible, and which utilise various data to provide ad targeting services.
Desktop device	Personal computer devices, including laptops.
Device ecosystem	Integrated suites of hardware and software services that connect and relate to one another (namely, search services, web browsers, OS and devices). This includes device ecosystems on mobile devices (mobile ecosystems) and device ecosystems on desktop devices (desktop ecosystems).
Digital advertising services	Digital advertising services supplied by digital platform service providers
Digital literacy	In this Report, digital literacy refers to a user's understanding of how platforms operate and are monetised, knowledge of how to switch to alternative services and awareness of alternative suppliers, and an understanding of how to use platforms safely.
Digital platform	<p>A network that enables users (either consumers, businesses, or both) to interact with one another.</p> <p>Where necessary, the Report distinguishes between the digital platform firm (i.e. the corporate entity) and the digital platform service or services that the firm operates.</p>
Discussion Paper	The Discussion Paper for the fifth interim report of the DPSI, published on 28 February 2022.
Display advertising	The supply of opportunities for the placement of advertising, by way of the internet, other than classified advertising and search advertising.
Digital Markets Act	<p>Regulation (EU) 2022/.... Of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). Based on text adopted by the European Parliament and Council published 18 July 2022.</p> <p>The Digital Markets Act (EU) will apply to platforms that act as 'gatekeepers' in the digital sector. It aims to prevent gatekeepers from imposing unfair conditions on businesses and consumers and ensure the openness of important digital services.</p>
Digital Markets Unit	A specialist unit established within the UK's CMA to oversee a regime applying to digital firms that are designated as having 'strategic market status'.

Digital Platforms Inquiry or DPI	Digital Platforms Inquiry (2017–2019). An inquiry conducted by the ACCC into digital search engines, social media platforms and other digital content aggregation platforms, and their effect on markets for media and advertising services.
DPI Final Report	The final report of the ACCC’s Digital Platforms Inquiry, published on 26 July 2019.
Digital Platform Services Inquiry or DPSI	Digital Platform Services Inquiry (2020–2025) . The ACCC’s 5-year inquiry into the supply of digital platform services.
Digital Services Act	Regulation (EU) .../... on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Article 17(2). Based on text adopted by the European Parliament on 5 July 2022 . The recently agreed 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.
DOJ	Department of Justice (US)
Downstream search services	Search services that provide search results and adverts through negotiated syndication agreements with upstream search providers. Downstream providers may supplement the syndicated results and adverts with additional information and features.
DV360	Display & Video 360. Google’s demand-side platform.
Economies of scale	Cost advantages obtained by a supplier, where average costs decrease with increasing scale.
EU	European Union
Ex ante regulation	Rules that are imposed ‘up-front’ or ‘ahead of time’ to guide the future conduct of regulated entities.
Exclusivity clauses	Exclusivity clauses refer to clauses in contracts that impose restrictions on one party’s freedom to choose with whom, in what, or where they deal. For example, in digital platform services, an exclusivity clause could require a business user to only offer its products or services through the platform the business user is contracting with.
Ex post regulation	A system that addresses potentially unlawful conduct on a case-by-case basis after a particular instance of conduct has occurred.
General online retail marketplaces	Online platforms that facilitate the supply of general goods between suppliers and Australian consumers, excluding platforms which operate only as classified services.
Google Mobile Services	A collection of Google-owned apps, including Google Search, Google Chrome, YouTube, and the Play Store, and APIs that support functionality across Android devices.
Google Play Store	The app store operated by Google for Android devices.

Header bidding	A process for conducting ad tech auctions between supply-side platforms that allows multiple supply-side platforms to compete against one another in real-time for the same ad inventory, with the winning bid selected via auction.
In-app payments	Payments made within an app, which 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.
In-app payment systems	Systems that facilitate in-app payments
Interoperability	The ability of different digital platform services to work together and communicate with one another.
iOS	Apple's OS for mobile devices, including the iPhone. The iPad runs iPadOS, which is based on iOS.
MacOS	Apple's OS for desktop devices, including MacBooks.
Meta	The company formerly known as Facebook Inc.
Most-favoured-nation clauses (also known as price parity clauses)	Most-favoured-nation or price parity clauses refer to clauses in contracts that require sellers not to offer their products for sale at a higher price than the prices they offer for the same product on other websites.
Mobile Application Distribution Agreement (also known as a MADA)	A free licence available to original equipment manufacturers and mobile carriers that license the Android OS to pre-install the Google Mobile Services suite of apps on their smartphone devices.
Mobile Incentive Agreements (also known as a MIA)	Agreements between Google and original equipment manufacturers, where original equipment manufacturers agree to certain obligations in exchange for a specified share of revenue to be provided by the other party. For some original equipment manufacturers, Mobile Incentive Agreements have replaced Revenue Sharing Agreements.
Mobile device	Smartphones and tablet devices.
Multi-homing	The practice of using more than one supplier of the same type of service.
Network effect	Present where an increase (or decrease) in the number of platform users on one side of the platform affects the value of the service to other users of the platform. <i>Also see cross-side network effects and same-side network effects</i>
News Media and Digital Platforms Bargaining Code	<i>Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 (Cth)</i>
NFC	Near-field communication. The NFC chip/technology allows devices within a few centimetres of each other to exchange information wirelessly, and is used, among other things, to facilitate 'tap-and-go' payments through an app on mobile devices.
OAIC	Office of the Australian Information Commissioner

OECD	Organisation for Economic Cooperation and Development
Online private messaging services	Services that enable users to communicate privately and in real-time with friends, family members, colleagues and other contacts, one-to-one and/or with a group using text, voice or video.
Online retail marketplace	Refers to general online retail marketplaces.
Online Safety Bill	The proposed Online Safety Bill (UK) seeks to create a new framework for online safety, requiring providers of regulated user-to-user and search services to operate their service using proportionate systems and processes designed to address illegal content, with a particular provision targeted specifically at scam advertisements.
Original equipment manufacturer	A company that manufactures and supplies a hardware that integrates and uses software services and applications. Examples of original equipment manufacturers include Apple, Samsung, Sony, Huawei and Xiaomi. Also referred to as a device manufacturer or device maker.
OS	Operating systems. Operating systems manage computer hardware (e.g. processing, memory, and storage) and all other programs in a computer. In the traditional IT stack, operating systems sit above hardware and below middleware and applications.
Owned-and-operated inventory	Refers to ad inventory where the ads are sold by the publisher directly to advertisers (i.e. without the use of a third-party ad tech service). For example, Google sells ads on YouTube, and also operates the demand-side platform that advertisers use to buy YouTube ads.
Owned-and-operated websites and services	Refers to websites and services operated by the digital platform.
P2B Regulation	Platform-to-Business Regulation (EU)
Platform ecosystem	Where large platforms provide a wide range of related or complementary products and services that are able to interoperate.
Pre-installation arrangements	Arrangements between 2 parties for: <ul style="list-style-type: none"> • a search engine app to be pre-installed on a mobile device • a browser to be pre-installed on a device.
Price parity clauses (also known as most-favoured-nation clauses)	Price parity or most-favoured-nation clauses refer to clauses in contracts that require sellers not to offer their products for sale at a higher price than the prices they offer for the same product on other websites.
Primary legislation	Legislation passed by the Parliament, known as an Act of Parliament. For example, the <i>Competition and Consumer Act 2010</i> (Cth).
Privacy Act	<i>Privacy Act 1988</i> (Cth)
Publisher ad server	A server used by publishers to organise and manage ad inventory on their websites. For example, publisher ad

	servers typically determine what ads will be shown, serve ads, and also collect information on the performance of those ads.
Report	The fifth interim report of the DPSI, in relation to regulatory reform, which the ACCC will submit to the Treasurer by 30 September 2022.
Report on App Marketplaces	The second interim report of the DPSI on app marketplaces, published 28 April 2021.
Report on General Online Retail Marketplaces	The fourth interim report of the DPSI on general online retail marketplaces, published on 28 April 2022.
Report on Online Private Messaging Services	The first interim report of the DPSI on online private messaging, search and social media services, published on 23 October 2020.
Report on Search Defaults and Choice Screens	The third interim report of the DPSI on web browsers, general search services and choice screens, published on 28 October 2021.
Revenue Sharing Agreements (also known as an RSA)	Agreements between Google and original equipment manufacturers, where the original equipment manufacturer agrees to certain obligations in exchange for a specified share of revenue to be provided by the other party.
Same-side network effects	Present where an increase (or decrease) 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.
Search access point	Components or software within a device ecosystem that facilitate access to search services, including but not limited to browsers, search apps, search widgets and voice assistants.
Search services / search engines	Software systems designed to search for information on the internet, generally returning a curated, ranked set of links to content websites. Refers to general search services only, and not specialised search.
Self-preferencing	In this Report, self-preferencing refers to circumstances in which a platform gives preferential treatment to its own products and services when they are in competition with products and services provided by third parties using the platform.
Sideloading	The installation of an app on a mobile device without using the device's official application-distribution method (that is, the app store associated with the device's OS).
Smartphone	A mobile phone with a touch screen, variety of hardware sensors and multimedia functionality.
Strategic market status	A designation that the CMA will be allowed to make under a proposed pro-competition 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 'strategic market status' will be subject to additional regulation including a legally binding code of conduct, pro-competitive market interventions by the CMA, and enhanced merger rules.
Social media services	Online services that allow users to participate in social networking, communicate with other users, and share and consume content generated by other users (including professional publishers).
Specialised search	Search engines that specialise in different types of search. For example, Expedia provides vertical search services for travel.
Subordinate legislation	Legislation made not directly by an Act of the Parliament, but under the authority of an Act of the Parliament such as regulations, Ministerial rules or determinations.
Supply-side platform or SSP	A platform used by publishers to set price floors, decide which buyers can bid, and to connect to demand-side platforms (often via programmatic auctions). Historically, a separate ad exchange would run the real-time auctions, but the functions of supply-side platforms are increasingly integrated with those of ad exchanges. For this reason, ad tech providers performing both supply-side platform and ad exchange functions are referred to as supply-side platforms in this Report.
Syndicated search services	Organic search results provided by upstream search services to downstream search services.
TIO	Telecommunications Industry Ombudsman
Tying	Tying occurs when a supplier sells one product or service on the condition that the purchaser buys another product or service from the supplier.
Upstream search services	Search services that crawl the internet for new or updated websites, maintain an index of websites and use algorithms to determine which results to serve in response to a query.
UK	United Kingdom
US	United States
UWB	Ultra-wideband. UWB is considered the 'next-step' from Bluetooth and facilitates accurate, short-range proximity tracking (including better spatial awareness) and data transfer.
Voice assistant	Software accessed via an application or device that uses voice recognition, speech synthesis and natural language processing to perform tasks or services for an individual based on commands or questions. Examples include Google Assistant, Siri and Alexa.
Windows	Microsoft's OS for devices including desktop devices manufactured by Microsoft (such as Microsoft's Surface Books) and third-party desktop devices (such as devices manufactured by Lenovo, HP and Dell).

1. Digital platforms and risks to competition and consumers

Digital platform services are now an indispensable part of the daily lives of Australians. They provide new and effective ways for Australians to interact, and for Australian businesses to reach consumers, creating value and contributing to economic growth.

However, as explored in this chapter and throughout the rest of this report, many of the economic characteristics, business models and forms of conduct that have supported the success of leading digital platforms can pose significant risks of harm to consumers, businesses and competition in Australia.

This chapter discusses these issues and provides some background to the report. The chapter is structured as follows:

- Sections 1.1 and 1.2 provide an introduction to the report, including scope, process and consultation, and structure.
- Section 1.3 discusses the increasing importance of digital platform services to the Australian economy and the lives of Australians.
- Section 1.4 discusses the characteristics of digital platforms that give them critical positions in the economy.
- Section 1.5 discusses the lack of effective competition in digital platform services and the market power of some digital platforms.
- Section 1.6 notes the potential harms arising from the market power of large digital platforms.
- Section 1.7 discusses other harms to consumers that can occur across digital platform services of all sizes.

1.1. Introduction

On 10 February 2020, the Treasurer directed the ACCC to hold an inquiry into markets for the supply of digital platform services (the Digital Platform Services Inquiry (DPSI)).⁴ This direction, included at Appendix B, requires the ACCC to provide the Treasurer with a report every 6 months until the inquiry concludes on 31 March 2025.

To date, the ACCC has published 4 interim reports, including reports focusing on:

- online private messaging services⁵
- app stores⁶
- search defaults and choice screens⁷
- general online retail marketplaces.⁸

The ACCC's work on this inquiry also builds upon its work in the Digital Platforms Inquiry (DPI)⁹ and the Ad Tech Inquiry.¹⁰

⁴ Digital platform services covered by this direction include internet search engine services, social media services, online private messaging services, digital content aggregation platform services, media referral services and electronic marketplace services.

⁵ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020.

⁶ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021.

⁷ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021.

⁸ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022.

This report is the fifth interim report and marks the mid-point of the inquiry. Unlike previous interim reports of the DPSI, it draws on all the work undertaken to date to make important recommendations for government consideration.

1.1.1. Scope of report

This report considers whether Australia's existing competition and consumer protection laws, under the *Competition and Consumer Act 2010* (CCA) and the Australian Consumer Law (ACL), are sufficient to address the significant competition and consumer protection issues the ACCC has identified in relation to digital platform services in Australia. Further, it examines possible options for reform.

The recommendations in this report build on findings and recommendations from previous reports, as well as contributions from a wide range of stakeholders.

1.1.2. Process and consultation

The ACCC released its Discussion Paper on 28 February 2022.¹¹ The Discussion Paper invited views from interested stakeholders on the following topics:

- The competition and consumer harms arising from digital platform services.
- The adequacy of competition and consumer protection law enforcement in Australia to address those harms.
- Possible regulatory tools to implement potential reform.
- Potential new rules and measures:
 - for improved consumer and small business protections and greater transparency
 - to address anti-competitive conduct and data advantages
 - to ensure adequate scrutiny of acquisitions.

The ACCC received over 90 submissions from industry, consumer bodies, small business representative bodies, academics and research groups, regulators, and other interested stakeholders. Public submissions are published on our website.¹² Many stakeholders also took the opportunity to meet with the ACCC to discuss their submissions and to provide additional information.

The ACCC also held 2 stakeholder roundtables: one on competition issues on 1 June 2022, and one on consumer protection issues on 7 June 2022.¹³ The purpose of these roundtables was to facilitate discussion between key stakeholders on issues identified in the Discussion Paper. Additionally, the ACCC published a questionnaire on its consultation hub for small businesses regarding their dealings with digital platforms. The ACCC received over 60 responses to the questionnaire.¹⁴

⁹ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019.

¹⁰ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021.

¹¹ ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022.

¹² ACCC website, [Digital platform services inquiry 2020-2025: September 2022 interim report, Submissions to Discussion Paper](#), accessed 15 September 2022. Note that confidential submissions and information were treated in accordance with the ACCC's [Guidelines on section 95ZN claims in price inquiries](#) (July 2021).

¹³ For a summary of the discussions, see ACCC, [Regulatory Reform Report competition roundtable summary](#), 7 July 2022; ACCC, [Regulatory Reform Report consumer roundtable summary](#), 7 July 2022.

¹⁴ ACCC, [DPSI September 2022 report – Small business questionnaire responses](#), 10 June 2022.

The ACCC also benefited from the assistance provided through discussions with international agencies, including:

- the Competition and Markets Authority (UK)
- the Department for Digital, Culture, Media and Sport (UK)
- the Department of Justice (US)
- the Federal Trade Commission (US)
- the European Commission (EU)
- the Bundeskartellamt (Germany)
- the Japan Fair Trade Commission (Japan)
- the Korea Fair Trade Commission (Republic of Korea (South Korea)).

The ACCC would also like to acknowledge the valuable work and discussions on competition and consumer issues relating to digital platform services which have been organised by the International Competition Network, the International Consumer Protection Enforcement Network, the G7, and the Organisation for Economic Cooperation and Development.

1.2. Structure of report

This report is structured as follows:

- **Chapter 1 – Digital platforms and risks to competition and consumers:** outlines the importance of digital platform services to Australian consumers and businesses, the reasons for and nature of the market power of some large platforms, and the harms to competition and consumers they can cause.
- **Chapter 2 – The need for new regulation:** outlines the ACCC's case for change, including why ex post enforcement of existing laws alone cannot fully address the issues identified. It provides the ACCC's view that new regulation is needed and sets out the desired objectives and attributes of such regulation.
- **Chapter 3 – Strengthening economy-wide consumer protections:** outlines the ACCC's continued support for a new unfair trading practices prohibition and strengthening unfair contract terms laws.
- **Chapter 4 – Additional consumer protections for users of digital platforms:** recommends additional measures to apply to digital platforms to address scams, harmful apps, and fake reviews. It also discusses the need for improved dispute resolution processes, including minimum internal dispute resolution standards and access to a digital platform ombuds.
- **Chapter 5 – A new regulatory regime to promote competition in digital platform services:** recommends that additional competition measures for digital platforms are implemented through mandatory service-specific codes of conduct based on legislated principles, and discusses the criteria that should be considered in determining which digital platforms should be subject to these measures.
- **Chapter 6 – Targeted obligations to promote competition:** sets out the types of conduct and barriers to effective competition that the additional competition measures for digital platforms should be able to address, as well as examples of the types of obligations that could be incorporated into new regulation.
- **Chapter 7 – Implementation and next steps:** includes key enforcement and compliance considerations relevant to the ACCC's proposals. It also discusses the need

for close coordination and consultation with domestic and international government entities in the further development and implementation of the ACCC's proposals.

- **Appendix A – Concentration in digital platform services:** presents market concentration analysis for a number of digital platform services.
- **Appendix B – Ministerial Direction:** reproduces *The Competition and Consumer (Price Inquiry— Digital Platforms) Direction 2020*, which is the Ministerial Direction for the Digital Platform Services Inquiry.

1.3. The importance of digital platform services

Digital platform services are critically important to Australian consumers and businesses and are major drivers of productivity growth in our economy, now more than ever. The COVID-19 pandemic changed the way people work, socialise and shop, with Australians dramatically increasing the time, attention, and money they spend online.¹⁵

These services provide many benefits to consumers. Social media and online private messaging services make it simple and quick to connect with friends, family and loved ones – and over 96% of adult Australians used a communication or social media website or app in the first half of 2021.¹⁶ Search engines, app stores, and online retail marketplaces make it easy to access a vast range of information, apps, services and products online. In 2021, most adult Australians made daily use of a search engine¹⁷ and apps installed on a smartphone.¹⁸

Many Australian businesses also benefit from accessible and user-friendly digital platform services. These include search and display advertising that allows businesses to reach larger markets, and tools for developing, promoting, and distributing physical or digital products (including apps). The global availability of digital platform services reduces the friction of trading across borders, making it easier for Australian businesses to reach international customers. Such services are particularly beneficial for small and medium-sized businesses that lack the resources of larger firms to access customers through other channels. Digital platform services have also created opportunities for businesses to innovate with their own products, services, and business models, such as through the development of apps available on app stores.

By expanding the opportunities available to businesses, digital platform services can have a significant positive impact on their productivity, for example, by providing small and medium-sized businesses with access to larger markets.¹⁹ The tech sector, in which digital platforms play an extremely significant role, contributed an estimated \$167 billion to the Australian economy in the 2021 financial year, equivalent to 8.5% of gross domestic product.²⁰ Digital platform industry group DIGI estimates that platforms generate an estimated consumer surplus of approximately \$5,000 per Australian household per year through free, cheaper and more convenient goods and services.²¹ A report prepared for Google estimated that Google's services alone create over \$50 billion of annual economic value that flows to

¹⁵ OECD, [Ex ante regulation in digital markets – Background Note](#), 1 December 2021, p 6; Department of the Prime Minister and Cabinet, [Digital Economy Strategy](#), 2021, p 5; Reserve Bank of Australia, [Tracking consumption during the Covid-19 pandemic](#), 17 March 2022.

¹⁶ ACMA, [Communications and media in Australia: How we communicate](#), December 2021.

¹⁷ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 9.

¹⁸ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 3.

¹⁹ OECD, [Harnessing the productivity benefits of platforms online: Background Paper](#), 2021, p 11–12.

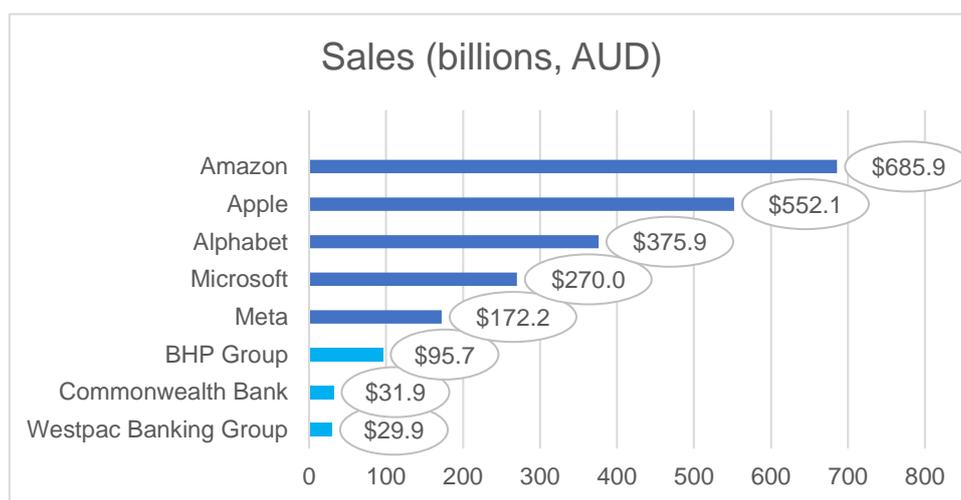
²⁰ Tech Council, [The economic contribution of Australia's tech sector](#), p 5; Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6. Made up of a direct contribution from tech-related industries of A\$76 billion and an indirect contribution of A\$92 billion.

²¹ DIGI, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 7. These estimates are for 2018.

Australian businesses and consumers.²² As Australian businesses conduct more of their activities online, digital platform services are likely to become increasingly crucial to their success and productivity.

This success with both consumers and businesses has allowed certain digital platforms to become some of the world's biggest companies, dwarfing the scale of even the largest Australian businesses, as shown in figure 1.1.

Figure 1.1 Global sales of largest digital platforms vs. largest Australian firms (May 2021 to April 2022)



Source: Forbes, [Global 2000 2022](#).²³

As at April 2022, the market values of both Apple (A\$3.84 trillion) and Google's parent company Alphabet (A\$2.3 trillion)²⁴ exceeded Australia's total annual gross domestic product in 2021 (A\$2.24 trillion).²⁵

Although not as widely used as the services of the largest platforms operating in Australia (such as Apple, Google, Meta and Microsoft), a range of other platform services are also used by significant numbers of Australian consumers. This includes TikTok, Snapchat and Twitter (social media services), Signal and Telegram (online private messaging services) and Zoom (a video conferencing service). eBay and Amazon, which supply online retail marketplace services, were the largest suppliers of those services in Australia in the 2020–2021 financial year.²⁶

Because of the significance of digital platform services, and because competition is important for markets to function well, ensuring effective competition in the supply of these services is crucial for productivity and the future prosperity of Australians.

Competition encourages platforms to continue to innovate and improve the value of their offerings to users. Competition also leads to a process of creative destruction, where more productive and innovative platforms replace less productive ones. Those that fail to innovate,

²² AlphaBeta, [Google Economic Impact in Australia](#), December 2020, p 5. This figure is comprised of an estimated A\$39 billion for Australian businesses and an estimated A\$14 billion for Australian consumers.

²³ All Forbes figures are based on the most recent 12 months of financial data available to Forbes on 22 April 2022. Converted from AUD to USD based on 1 USD to 1.46 AUD on 13 September 2022.

²⁴ Forbes, [Global 2000 2022](#), 12 May 2022, accessed 15 September 2022. Converted from AUD to USD based on 1 USD to 1.46 AUD on 13 September 2022.

²⁵ World Bank, [GDP \(current US\\$\) – Australia](#), accessed 15 September 2022. Converted from AUD to USD based on 1 USD to 1.46 AUD on 13 September 2022.

²⁶ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 12.

adopt better technologies or adapt to changing consumer demands are replaced by those that do.²⁷ These processes benefit businesses and consumers that gain access to better products and services.

Competition can also drive prices down – including both prices paid by businesses (e.g. prices paid by app developers or the price of advertising) and prices paid by consumers, as platforms compete to attract and retain both sets of users. Often the ‘price’ that consumers pay in an online environment is in the form of exposure to advertising and use of personal data rather than a monetary price (see also section 1.6.4).

1.4. Economic and commercial characteristics of digital platforms

Digital platform services are generally multi-sided, providing services to 2 or more distinct groups of users who interact on the service. The value that users obtain from the service is affected by the number and identity of other users of that service. However, there are significant differences between the business models employed by different digital platforms and their specific services.

Many digital platform firms, including Google (which operates services including Google Search and YouTube) and Meta (which operates services including Facebook and Instagram), are predominantly funded by advertising. These platforms seek to attract large numbers of consumers by providing valuable consumer-facing services (such as general search or social media services). They also build rich databases of information (user data) about those consumers based on their online activities, collected from their consumer-facing services as well as other tracking technologies. This user attention and user data is used to generate revenue by selling digital advertising to advertisers, including for online search advertising and online display advertising on both first- and third-party websites and apps.²⁸ The success of each digital platform is driven by its ability to capture user attention and individual-level user data which is used to improve the effectiveness of advertisements through better targeting or personalisation.²⁹ This is discussed further in section 1.4.6.

However, not all digital platforms rely on advertising for the bulk of their revenue. Apple currently generates most of its revenue from sales of mobile phones or devices, although it is expanding its advertising services.³⁰ Apple devices supply a range of services through pre-installed apps, including the Apple App Store, and subscription service apps such as Apple Music, Apple TV, and Apple News. These services enable Apple to attract and retain consumers within its platform ecosystem. While app store services, such as the Apple App Store, as well as the Google Play Store, generate revenue from multiple sources, the commission applied to in-app payments is a key way in which Apple and Google recover costs and generate profits directly from their app stores, and possibly from their platform ecosystems more broadly.³¹

Other digital platforms operate primarily as intermediaries that bring together buyers and sellers. For example, Amazon, eBay and other platforms that operate general online retail marketplaces charge sellers for facilitating the sale of products to consumers on their behalf, and providing other services (such as sales, logistics and advertising) to sellers. Some

²⁷ ACCC, [Submission to Productivity Commission Inquiry into Australia's productivity performance](#), 22 April 2022, p 1.

²⁸ For example, in the case of Google, search advertising (ads shown when a consumer performs a search query on a search engine), and display advertising (all types of online advertising other than search advertising and classified advertising, including advertising in banners or videos on webpages, in mobile apps, and alongside social media content) and in the case of Meta, display advertising.

²⁹ ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, pp 33–36.

³⁰ M Gurman, ['Newsletter: Apple Finds Its Next Big Business: Showing Ads on Your iPhone'](#), *Bloomberg*, 14 August 2022, accessed 15 September 2022.

³¹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 67.

general online retail marketplaces, including Amazon and Kogan, also generate significant revenue from selling 'own brand' products on their marketplaces.³²

The examples above demonstrate the central role some large digital platforms play, both in the everyday lives of Australian consumers, and in the productivity and success of many Australian businesses.

1.4.1. Characteristics that can raise barriers to entry and expansion

A number of characteristics of digital platforms create market outcomes where one or 2 large providers service the vast majority of users. These characteristics also make it difficult for smaller or new platforms to develop services that users consider to be comparable to the services offered by the large providers. These characteristics include:

- network effects (direct and indirect)
- substantial economies of scale
- expansive ecosystems and advantages of scope
- consumer inertia, switching costs and defaults
- access to, and use of, vast amounts of individual-level and other high-quality data.

While many of these characteristics are not unique to digital platforms, their strength and presence in combination makes their effects on market dynamics and outcomes significantly greater than in most other areas of the economy.³³

While digital platforms typically achieve strong market positions by supplying innovative and valuable services to users, these characteristics can create and reinforce barriers to entry and expansion that strongly favour large incumbent platforms, in ways that may be unrelated to their efficiency or ability to offer the highest quality services.³⁴ This creates the risk that large digital platforms will gain substantial market power, with little constraint from actual or potential competition.

Moreover, digital platforms have strong incentives to protect their positions of market power through both competitive and anti-competitive means, such as by disadvantaging their rivals, copying features of new entrants or acquiring nascent competitors which may emerge as a competitive threat.

1.4.2. Network effects

Network effects occur when the value of a platform service to a user depends on the number and identity of other users with whom they can interact. Digital platform services can exhibit 2 types of network effects:

- Same-side or direct network effects – where the value of the platform service to a user depends on the number of users of the same type (e.g. consumers using a social media service).
- Cross-side or indirect network effects – where the value of the platform service to a user depends on the number of users of a different type that also use the platform (e.g. consumers and app developers using an app store).

³² ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 15.

³³ For a more detailed discussion of the relationship between the characteristics of digital platforms and market power see OECD, [The Evolving Concept of Market Power in the Digital Economy – Note by Australia](#), 22 June 2022. This note was prepared by the ACCC.

³⁴ J Cremer, Y de Motjoe and H Schweitzer, [Competition Policy for the Digital Era](#), European Commission Directorate-General for Competition, 20 May 2019, p 54.

Network effects can be self-reinforcing: The more users that use a platform service, the more attractive it will be to new users, which in turn will attract more users, and so on.

This has 2 potential consequences. First, markets for digital platform services can be prone to 'tipping' where one large platform supplies, or a very small number of large platforms supply, the vast majority of users. Once this occurs, the most effective form of competition may be competition 'for the market' rather than competition 'in the market'. In such a circumstance, the most significant competitive rivalry is likely to come from disruptive entry – that is, entry on a scale that is likely to displace the incumbent. Such disruptive entry is unlikely to come from an entrant that largely replicates the service offered by the incumbent platform.

Second, the presence of strong network effects, especially when coupled with single-homing (where users use one platform service exclusively), and high costs of switching between platform services, make new entry risky. Even if entry does occur, difficulties in establishing a user base can mean new entrants remain too small to generate strong network effects and provide only a limited competitive constraint on large incumbent platforms.

Strong network effects exist in the supply of a range of digital platform services including search services, social media services, online private messaging services, general online retail marketplaces and app store services.³⁵

1.4.3. Economies of scale and sunk costs

Economies of scale occur when the average cost of providing services decreases with increased use. Many digital platforms incur high up-front or fixed costs to establish and maintain their service but then incur very low costs in servicing additional users. For example, Google incurs substantial fixed costs in operating its search services (in particular, the crawling and indexing of webpages and in developing their algorithms), but low costs in providing search services to each additional user.³⁶

The presence of substantial economies of scale places smaller platforms at a significant cost disadvantage and can make them uncommercial. Significant economies of scale can also deter new entry to the extent that the high fixed costs of entering a market cannot be recovered if an entrant is unsuccessful (that is, the costs are 'sunk').

Economies of scale are present in most digital platform services but are particularly significant in the supply of search services, social media services, app store services, mobile operating system (OS) services and advertising services.³⁷

1.4.4. Platform ecosystems and advantages of scope

Some large platforms have established extensive ecosystems of related or complementary products and services (see figure 1.2). Platform ecosystems benefit consumers by making it easier to move between services and devices within the same ecosystem. However, limited interoperability between different platform ecosystems, in combination with default biases

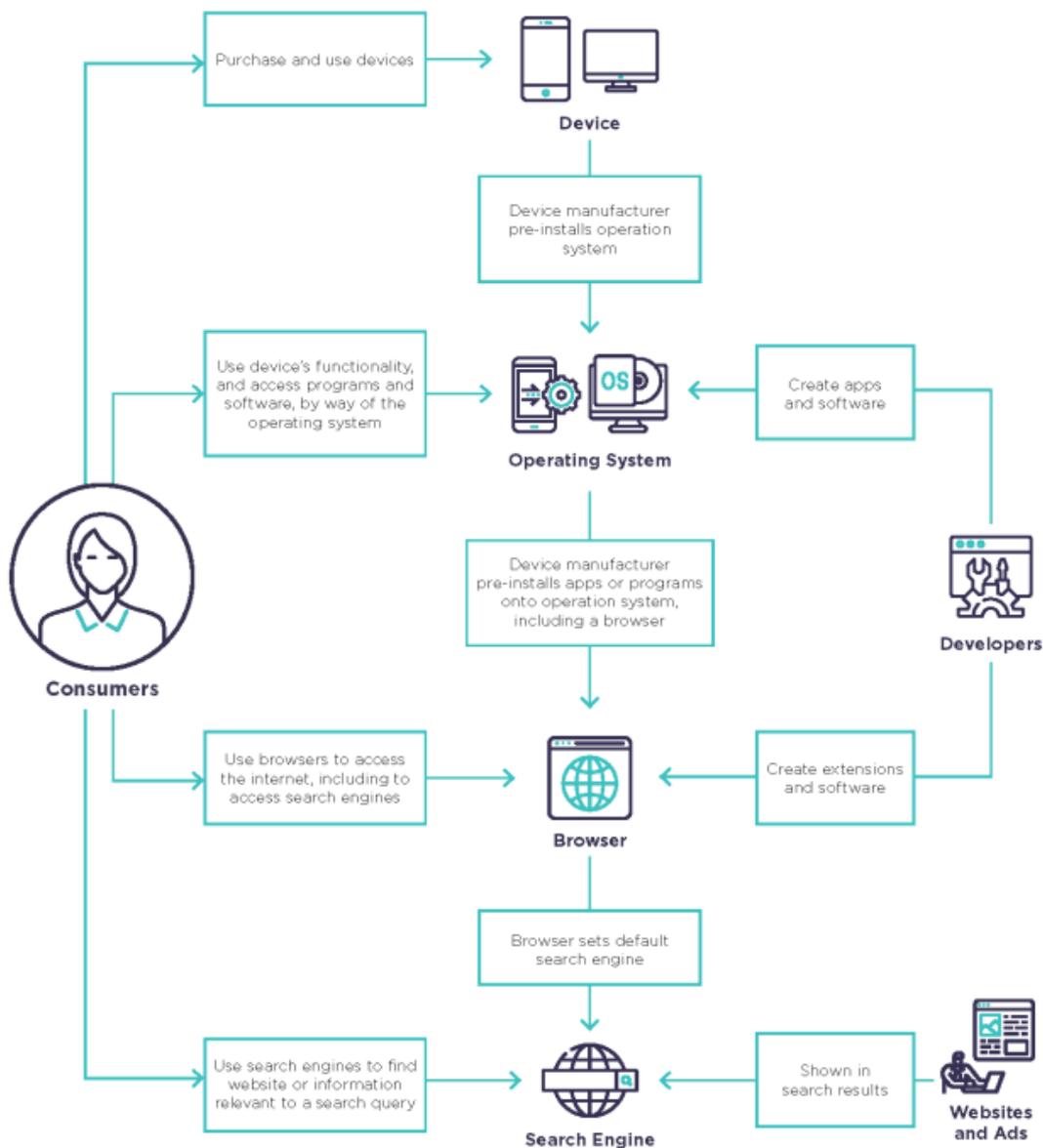
³⁵ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 88–92; ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 11, 78–79; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp 32–33; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 28, 40; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 27–28, 40.

³⁶ ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, p 27. Similarly, these extreme economies of scale are enjoyed by Meta's social media business in relation to its R&D expenditure and by Apple and Google in relation to the establishment and operation of mobile operating systems and app marketplaces.

³⁷ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 73, 79, 86–87; ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, B2; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 40; CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 68; ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 68.

(which mean consumers tend to stick with the default options), can result in limited competition in services supplied within platform ecosystems, and potentially limited competition between ecosystems themselves.

Figure 1.2 Example components of the platform ecosystem, including browsers and search engines



Source: ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 26.

Platforms can often gain significant advantages from supplying a range of related services (advantages of scope). For example, Google accumulates data about users from a range of sources including its owned-and-operated websites and services, and third-party websites and services. Access to this data allows Google to provide high-quality ad targeting, and potentially grants it substantial advantages in providing advertising services. Platforms can also benefit from economies of scope where they can redeploy technology (such as device hardware, or a search algorithm), or leverage an existing, trusting user base, to supply multiple services.

Where such advantages of scope are significant, the competitive constraint imposed by providers of standalone services is likely to be limited.³⁸ That is, smaller and potential rivals may have to provide a similar range of services as the incumbent to offer users an attractive alternative, which raises barriers to entry.

1.4.5. Consumer inertia, switching costs and defaults

Consumers have a tendency to use a particular service or product if they are familiar with it, have experience using it, or if it is the default option available to them. This tendency can result in consumers staying with a familiar or default platform service or ecosystem rather than switching to a different one. This may reflect a consumer's brand loyalty, the 'learning costs' involved with using new services, or a behavioural bias.

New entrants and smaller platforms may be able to overcome these switching barriers and encourage consumers to use their competing platform service if it is easy to do so and involves little cost.

However, switching can also be limited by other factors controlled or influenced by the platform. These factors may include a lack of transparency that inhibits consumers from comparing different products or services, the use of choice architecture that makes it difficult for consumers to switch, restrictions that prevent consumers from accessing alternative providers (such as payment systems), and the use of exclusive pre-installation arrangements and default settings.

These factors can impede consumers from making fully informed, rational choices or to exercise their preferences. In turn, they can exacerbate the barriers to entry and expansion for rivals resulting from the presence of network effects and economies of scale.

1.4.6. Access to user data

Exclusive access to – and control of – large volumes of high-quality unique individual-level user data can provide established digital platforms with a considerable competitive advantage over smaller rivals. Collecting and controlling vast amounts of rich and high-quality data can provide a range of benefits, including: the ability to improve products and services and develop new ones; the ability to improve the performance of targeted advertising; the ability to accurately forecast product demand and market trends.

The user data that large digital platforms such as Google and Meta collect and use is particularly valuable not just because of its volume and scope, but also because it is largely first-party data (i.e. data collected via their own services) that may not be available to potential rivals.

The lack of access to comparable data makes entry or expansion by smaller rivals difficult and less likely, and ultimately weakens present and future competitive constraints on large platforms.

1.5. Lack of effective competition

The characteristics of digital platforms that underpin their value to consumers and business users can also create a strong tendency for one or possibly 2 platforms to attract and retain the vast majority of users in a market for digital platform services. While smaller platforms may operate services in the same markets, their services may be viewed as being inferior by

³⁸ ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, p 31.

many platform users.³⁹ For the range of reasons outlined above many markets for digital platform services can also exhibit high barriers to entry, which can result in a small number of platforms holding market power that persists over time.

1.5.1. Market power of large digital platforms

The market power of some large digital platforms is substantial and enduring (i.e. non-transitory). The market positions and power of these platforms appear unlikely to be challenged, at least in the foreseeable future. This is due to the characteristics of digital platforms described above that have raised barriers to entry and expansion, which have in some cases been reinforced by the conduct of the large digital platforms.

Platforms that have attained positions of substantial market power have strong commercial incentives to maintain those positions. This may be through legitimate means, such as continual innovation to remain ahead of potential rivals.

However, these positions may also be maintained through anti-competitive means, such as engaging in conduct to make it more difficult for rivals to compete or for new competitors to emerge. Examples of conduct by the largest digital platforms that has raised concerns in this respect are discussed below and throughout chapter 6.

Further, between 2008 and 2018, Amazon, Facebook (now Meta) and Google made approximately 300 acquisitions, 60% of which involved firms that were less than 4 years old.⁴⁰ While many acquisitions by large digital platforms are likely to be pro-competitive or benign, there appears to be a pattern of acquisitions of businesses that may evolve into potential competitors which has strengthened the acquirer's position of market power.

The significance of the market power held by some large digital platforms increases the risk of widespread use or misuse of that market power, and its enduring nature means that any resulting harms are likely to be long-lasting. The degree to which market power is exercised depends upon the likelihood that it causes a reaction from rivals or potential rivals and causes consumers to switch to alternatives. Given the significant hurdles rivals face in contesting the positions of the large digital platforms, that likelihood seems small.

Most importantly, the enduring nature of this market power suggests that markets for digital platform services will not quickly self-correct to more competitive conditions. Despite the fast-moving nature of markets for digital platform services, some large digital platforms have been able to maintain strong market positions for a decade or more.

The ACCC has previously concluded that (see box 1.1):

- **Google** has substantial market power in the supply of general search services, search advertising and mobile OS, likely significant market power in mobile app distribution, and dominance in the ad tech supply chain.⁴¹
- **Apple** has significant market power in the supply of mobile OS and likely significant market power in mobile app distribution.⁴²

³⁹ For example, due to the size of its user bases and the presence of strong same-side network effects across its social media services, consumers may prefer one of Meta's services over a rival standalone service. See ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 2.

⁴⁰ E Argentesi, P Buccrossi, E Calvano, T Duso, A Marrazzo and S Nava, [Merger Policy in Digital Markets: An Ex-Post Assessment](#), CESifo Working Paper No. 7985, December 2019.

⁴¹ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 64, 89; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 14.

²³ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 24; ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 1; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 4, 43.

- **Meta** has substantial market power in the supply of social media services and the supply of display advertising.⁴³

Box 1.1 ACCC's previous conclusions on market power of Google, Apple and Meta

Google's market power in general search and search advertising services

Google is the largest supplier of general search services in Australia, in 2021 providing services in relation to around 94% of search queries.⁴⁴ Google's position in general search services is supported by a range of factors, including its scale and significant data advantage over other search engines, and its position as the pre-set default search engine on the 2 leading browsers in Australia, Google Chrome and Apple Safari.⁴⁵ This dominance in search services underpins Google's dominance in the supply of search advertising services.⁴⁶

Google's market power in the ad tech supply chain

Google is the leading supplier of ad tech services in Australia. The ACCC estimated that in 2020 over 90% of ad impressions traded via the ad tech supply chain passed through at least one Google service.⁴⁷ Its share of impressions is over 70% at each stage of the supply chain and it is a key 'publisher' or source of ad space.⁴⁸ Google's dominance in the ad tech supply chain is underpinned by multiple factors including its data advantage, access to exclusive inventory and advertiser demand, and integration across its services.

Market power of Apple and Google in mobile OS and mobile app distribution

In 2021 the ACCC concluded that Apple iOS and Google Android account for close to 100% of users of mobile operating systems in Australia.⁴⁹ The duopoly structure of the market for mobile OS and the significant barriers to entry and expansion, including the high cost and time to develop a mobile OS and the difficulty in attracting app developer and device manufacturers to a new OS, provide each of Apple and Google with significant market power in the supply of mobile OS systems in Australia.

The Google Play Store is by far the largest mobile app distribution platform on Android OS. The Play Store's position is supported by strong network effects in app distribution and Google's control of Android OS which has enabled Google to position the Play Store as the official app store for Android OS, which is pre-installed on almost all Android devices.⁵⁰

The Apple App Store is the only mobile app distribution platform on Apple iOS. iOS users and app developers wishing to access iOS users have no choice but to use the App Store.⁵¹ Moreover, Apple's terms of access to the App Store make the emergence of alternatives highly unlikely.⁵²

⁴² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 4, 43.

⁴³ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 9, 77; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 14.

⁴⁴ Statcounter, [Search engine market share Australia – June 2012 – June 2022](#), accessed 15 September 2022.

⁴⁵ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 9.

⁴⁶ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 91; ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, p 17.

⁴⁷ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 1.

⁴⁸ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 1. The share of impressions is an ad tech provider's share of the total impressions traded or served by the main providers of the service in Australia, in relation to open display advertising served to users in Australia.

⁴⁹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 4.

⁵⁰ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 21.

⁵¹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 29.

⁵² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 23.

While the Apple App Store and Google Play Store may place some competitive constraints on one another, these constraints are limited by the costs incurred by users in switching mobile operating systems, which would involve switching their mobile device, and the commercial value for many app developers to access both iOS and Android users.

Meta's market power in social media services and display advertising services

In 2019, the ACCC concluded that Meta (then Facebook) had substantial market power in the supply of social media services in Australia, through Instagram and Facebook.⁵³ The ACCC considered that Meta's strong position was underpinned by a range of factors, including strong network effects and economies of scale. This strength in social media services contributed to Meta's substantial market power in the supply of display advertising services in Australia.⁵⁴

The sixth interim report of the ACCC's DPSI will examine social media services in recognition of recent changes in the competitive landscape since the ACCC last closely examined this market. This interim report will be provided to the Treasurer in March 2023.

Google and Apple have both had consistently high (and in some cases increasing) market shares in supplying certain services over the last decade. While there have been some examples of new entry and growth by smaller platforms in some digital platform services (such as social media, which is the subject of the sixth interim report of the DPSI⁵⁵), Meta has also maintained a strong position in multiple services over a number of years.

While not determinative of market power alone, a consistently high share of supply can be an indicator of high barriers to entry and expansion and a platform's enduring market power. The ACCC notes that:

- Google consistently provided between 93% to 95% of general search services between 2012 and 2022.⁵⁶
- Google had a 96% share of general search advertising revenue in Australia in 2018, and approximately 97% in 2020.⁵⁷
- Between 2012 and 2022, 96% to 99.9% of mobile devices used either Google's Android or Apple's iOS mobile OS.⁵⁸
- In 2022, the Apple App Store accounted for approximately 60% of combined app downloads and the Google Play Store accounted for approximately 40% of app downloads.⁵⁹
- Over 90% of ad impressions traded via the ad tech supply chain passed through at least one Google service in 2020, and Google had a share of 40–70% of revenue for ad tech services where revenue data was available.⁶⁰
- Over the period June 2018 to May 2022, Meta's Facebook and Instagram combined supplied 79% of social media services in Australia (by time spent), and both services had

⁵³ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 9.

⁵⁴ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 20.

⁵⁵ ACCC, [Digital Platform Services Inquiry Sixth Interim Report - Issues Paper](#), 16 August 2022.

⁵⁶ Statcounter, [Search engine market share Australia – June 2012 – June 2022](#), accessed 15 September 2022.

⁵⁷ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 24. Information provided to the ACCC. The ACCC notes that this market share figure was the ACCC's best estimate, based on information from a number of sources.

⁵⁸ Statcounter, [OS market share mobile Australia yearly 2009-2022](#), accessed 15 September 2022.

⁵⁹ ACCC analysis using Sensor Tower data, accessed 15 September 2022.

⁶⁰ The share of revenue is an ad tech provider's share of the total impressions traded or served by the main providers of the service in Australia, in relation to open display advertising served to users in Australia. The ACCC estimated the shares of revenue and impressions using information obtained from ad tech providers, including from s95ZK notices.

higher user numbers than all other social media services.⁶¹ This will be considered in the ACCC's sixth DPSI interim report, as noted above.

- Meta's Facebook and Instagram earned an estimated 51% of total revenues from display advertising services supplied to users in Australia in 2018, and 62% in 2019.⁶² Given Meta's enduring strength in the supply of social media services, Meta likely remains a leading supplier of display advertising services.⁶³ As noted above, the ACCC will undertake a thorough analysis of the competitive landscape for social media services in its next interim report for the DPSI.
- The combined share of the Google Chrome and Apple Safari browsers supplied to mobile and desktop users has grown from around 40% in 2012 to over 80% in 2022.⁶⁴

See Appendix A for more detail on the concentration in digital platform services.

The strength and endurance of the market power we have identified suggests that, absent any intervention, competitive dynamics in the supply of certain digital platform services are unlikely to change enough to support levels of competition required to constrain the large digital platforms, at least for the foreseeable future.

1.5.2. Expansion of market power across services

Large digital platforms have, over time, extended their presence and influence across numerous related services. While there has been some organic growth, commentary and analysis suggests that the rapid expansion of a number of large digital platforms has likely been driven by acquisitions,⁶⁵ particularly for Google and Meta.⁶⁶ Google's major acquisitions include YouTube, DoubleClick, and Waze. Meta's major acquisitions include Instagram and WhatsApp.

Increasing the scope of the services that large digital platforms provide can be pro-competitive and improve the range and quality of service available to users. However, this is not always the case.

Many large digital platforms offer important intermediary services for business users, while also supplying products and services to consumers in competition with the business users of their intermediary services. This creates the risk of behaviours that distort competition in the provision of these services. For example, many third-party manufacturers of wearable products rely on access to one or more Google products, such as the Android smartphone OS, to enable their wearables to communicate with users' smartphones.⁶⁷ The ACCC has previously expressed concern that Google may have the incentive to foreclose or otherwise inhibit access to some of these products in order to increase the sales of its own wearables at the expense of its rivals.⁶⁸ For similar reasons, Google and Apple's control of their app

⁶¹ Nielsen, Digital Content Ratings, June 2022, Persons 13+, Various Entities, Unique Audience. Based on the period from June 2018 to May 2022.

⁶² ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp B10–B11.

⁶³ This will be reassessed in the ACCC's sixth interim report of the DPSI, as noted above.

⁶⁴ Statcounter, [Browser market share – all – Australia - yearly-2009-2022](#), accessed 15 September 2022.

⁶⁵ C Alcantara et al, 'How Big Tech got so big: Hundreds of acquisitions', *The Washington Post*, 21 April 2021, accessed 15 September 2022; G De Vyck et al, 'Tech giants quietly buy up dozens of companies a year. Regulators are finally noticing', *The Washington Post*, 22 September 2021, accessed 15 September 2022; N Rivero, 'The acquisitions that made Google a search monopoly', *Quartz*, 21 October 2021, accessed 15 September 2022; Federal Trade Commission, [Non-MSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study](#), 15 September 2021, pp 27–35; Parker et al., [Platform mergers and antitrust](#), Industrial and Corporate Change, Volume 30, Issue 5, October 2021, pp 1,307–1,336; A Gautier et al., [Mergers in the digital economy](#), *Information Economics and Policy*, Volume 54, March 2021.

⁶⁶ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 74–75, 80–84, 9.

⁶⁷ ACCC, [Statement of Issues, Google LLC – proposed acquisition of Fitbit Inc](#), 18 June 2020, pp 4, 10.

⁶⁸ ACCC, [Statement of Issues, Google LLC – proposed acquisition of Fitbit Inc](#), 18 June 2020, p 4.

stores raises risks they will favour their own apps over third-party apps, as discussed in section 6.1.2.

The expansion of large digital platforms into more and more services also risks entrenching their positions of market power. For example, while adding more services and products to a platform ecosystem may provide benefits by enabling users to move seamlessly between more services, it can also make switching to third-party alternatives more difficult particularly where interoperability with third-party products and services is constrained. This can raise barriers to entry and expansion for rivals and reduce competition across a range of digital platform services.

1.6. The market power of large digital platforms risks harms to Australian businesses and consumers

A lack of effective competition in digital platform services creates significant risks. How these risks manifest depends on the particular business models of the large platforms. However, the potential for harm arising from the lack of effective competition across digital platform services is considerably higher than in many other sectors of the economy. This is the case for several reasons, including:

- the position of large digital platforms as important intermediaries between consumers and businesses
- the presence of large digital platforms across multiple services
- the market power of some large digital platforms, and
- large digital platforms' access to resources, both financial resources and user data.

Markets work better if firms face effective competition. Competition ensures the pursuit of profits works in the interests of consumers, by encouraging firms to strive to win and retain customers by lowering their prices and improving their services, including by innovating to provide a superior offer. The lack of effective competition in the provision of some digital platform services provides large platforms with the freedom to engage in behaviours that, while privately beneficial, are harmful to consumers and businesses.

The intrinsic value of many digital platforms is that their services facilitate the 'matching' of consumers and businesses. Google Search enables users to quickly and easily find information and service providers. Amazon Marketplace provides sellers of a product with access to consumers who are interested in purchasing that product. App store services such as the Google Play Store and the Apple App Store allow developers to make their apps available to a substantial number of consumers in a cost-effective manner.

In some cases, a large digital platform is the sole provider of this service or is one of only a few providers.⁶⁹ This can provide the platform with the position of 'gatekeeper' or 'important intermediary' to substantial volumes of online commerce and make them a 'must have' for a large number of businesses and consumers.⁷⁰ If an app store holds market power and controls access to a significant proportion of a developer's target market, the developer may have little option but to make its apps available on that app store. This can mean the app developer has little or no bargaining power and few, if any, options if it is dissatisfied with the app store provider's services.

⁶⁹ For example, Google in general search services (see ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 9) and Google and Apple in mobile OS and app store services (see ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 4).

⁷⁰ For example, see discussion of Apple and Google's 'must have' status for mobile app developers and gatekeeper positions in respect of their app stores. ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 43–44, 47.

Large digital platforms now control the ways in which many consumers locate service providers and many businesses access consumers. The rules a platform sets for the operation of its services and, just as importantly, the predictability and transparency of those rules, can have substantial implications for the commercial success of businesses and the value that consumers gain from the use of the service.

Absent effective competitive constraints, large digital platforms have the ability and incentive to engage in exclusionary and exploitative conduct.

- Exclusionary conduct prevents or inhibits rivals from competing on their merits. It can harm rivals and ultimately consumers who are subject to the negative consequences of reduced competition, choice and innovation. In the context of digital platforms, such conduct can include:
 - Self-preferencing, where a platform gives preferential treatment to its own products and services when they compete with products and services provided by third parties using their service (see section 6.1).
 - Making access to a service conditional on using another service (e.g. tying conduct) (see section 6.2).
 - Restricting access to users through exclusive pre-installation and default agreements (see section 6.3).
 - Creating barriers to switching and multi-homing, which can be particularly problematic where there are strong network effects (see section 6.4).
 - Restricting access to hardware, software and device functionality, including by denying interoperability (see section 6.5).
 - Restricting third-party access to data (see section 6.6).
 - Not providing sufficient information to market participants, limiting the efficient functioning of markets (see section 6.7).
 - Restricting business users from providing services or products through different sales channels or at different prices on other sales channels (see section 6.9).
- Exploitative conduct involves the use of market power to ‘give less and charge more’. For consumers, this may involve lower quality services or the excessive costs of providing personal data to access services. For business users, this may involve paying higher commissions or advertising fees, or unfair trading practices (see section 6.8). Exploitative conduct may ultimately lead to lower consumer choice where it reduces the incentives for businesses to enter, improve and innovate, or be passed onto consumers in the form of higher prices for products or services.

Collectively, the wide-ranging and systemic nature of these types of conduct can lead to significant and potentially long-lasting harms to competition and ultimately consumers.⁷¹ Without appropriate regulation, such conduct (or variations thereof) is likely to continue.

1.6.1. Leveraging market power into related markets

Certain digital platforms have the ability and incentive to leverage their market power across their services, which can harm competition where it prevents or inhibits rivals from competing on their merits.⁷²

⁷¹ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 19; ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 5; ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, p 62.

⁷² For example, see ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 15.

As set out above and explored in greater detail in chapter 6, there are many different types of conduct that large digital platforms can engage in to leverage their market power across their services and to limit competitive threats. This conduct can reduce effective competition, including by making it difficult for consumers to exercise meaningful choices, and creating or increasing barriers to consumers switching or multi-homing between the services of different platforms.

Such behaviour can damage competition in downstream or related markets by, for example, preventing competing firms from providing innovative services or increasing costs for rival businesses, such as by limiting their access to users or otherwise reducing their ability to gain sufficient scale to effectively compete in the relevant market. By reducing competitors' incentives to enter or expand into a market, anti-competitive conduct can ultimately harm consumers through reduced choice, higher prices, or inferior products compared to the choice, prices and products that would exist in a more competitive market. For example, see the discussion of the way in which Apple and Google have tied in-app payment services to their app store services in section 6.2.

1.6.2. The quality and innovation of services may be lower

A lack of competition increases the risk that a platform with market power will reduce or limit the quality of its services. This is because a lack of competitive constraint can reduce incentives to invest in service improvements, innovative new features (such as alternative business models, algorithms, or different privacy options for users), or entirely new services and features, to the detriment of consumers. A specific example is Apple's possible favourable treatment of its own apps in app store search result rankings, discussed in section 6.1.

Reduced competition in markets for digital platform services also increases the risk that business users will have access to lower-quality business-facing services, such as ad tech services or payment system services.

In addition, the ACCC has previously considered that, in some markets for digital platform services, arrangements or features that contribute to locking consumers into an incumbent's ecosystem have likely hindered consumer choice and reduced the quality and innovation of services. These can include high costs of switching to alternative platform services, the challenges in coordinating a network of connected users to switch to an alternative service, or a lack of alternative services that are close substitutes. Relevantly for mobile devices, this includes restrictions on access to device functionality (such as ultra-wideband, considered the 'next-step' technology from Bluetooth) that prevent, delay or inhibit service innovations by third-party app developers;⁷³ the inability to delete certain apps; and information asymmetries between consumers and platforms that hinder consumers from changing their default browser or search engine.⁷⁴

1.6.3. Prices may be higher

Digital platforms with substantial market power may charge excessive prices because they face a low risk of losing substantial sales to competitors. For example, the ACCC has previously stated that the commission rates Apple and Google charge app developers are highly likely to be inflated by the market power of Apple and Google in app distribution services.⁷⁵ Reduced competition that leads to higher prices can also impact consumers, including those who are not users of the digital platform service. For example, high

⁷³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 59.

⁷⁴ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 43, 52.

⁷⁵ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 9.

advertising prices charged by digital platforms, which are incurred by businesses that collectively supply a wide range of consumer products, may be passed on to consumers in the form of higher prices or lower quality services.⁷⁶

1.6.4. Consumers may experience reduced privacy and autonomy from excessive data collection and use

A lack of effective competition in the supply of some digital platform services can reduce consumer choice.

Where there are few (or no) comparable alternatives available, or consumers feel compelled to use the service because their social or work networks are on them, consumers may need to accept undesirable terms of use. These undesirable ‘take-it-or-leave-it’ terms can involve the unwanted collection and use of consumers’ data, or greater exposure to unsolicited targeted advertising.⁷⁷

Effective competition, in combination with effective regulation of privacy and data collection, may encourage platforms to compete based on the level of privacy and data protection they offer. This may become a catalyst for the introduction and adoption of more privacy-focused and security-focused business models that reflect consumers’ data preferences, rather than the preferences of a large platform.⁷⁸ However, where competition between digital platforms is driven by extracting more individual-level consumer data and using that data to more effectively target advertising, this can have the opposite effect on privacy, and may further reduce trust in digital markets.⁷⁹

We also recognise that there may be other factors that impact the degree to which consumers allow access to their data. For example, information asymmetries between a platform and consumers in respect of the platform’s data collection and use can make it difficult for consumers to make informed choices about whether and how a platform can collect and use their individual-level data.

1.6.5. Digital platforms may capture the value from complementary services supplied by other businesses

The value of a digital platform service often depends on the range of complementary services it allows consumers to access. A key risk for business users arising from the market power held by some digital platforms is the ability of those platforms to capture the value created by those users. For example, consumers value mobile ecosystems because they can access games and apps on that system offered by third parties (and possibly also the ecosystem provider). Businesses that develop these complementary services rely on the platform to access customers. In many circumstances they have no realistic alternative but to make their service available on the platform service under whatever terms the platform offers.

Once these businesses have incurred the cost of developing a service, the platform can have significant power in its dealings with them, enabling the platform to attain much of the value created by the complementary service.⁸⁰ The platform could do this in a variety of

⁷⁶ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 3.

⁷⁷ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 393–394.

⁷⁸ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 5.

⁷⁹ M E Stucke, [The relationship between privacy and antitrust](#), Draft, *University of Tennessee College of Law*, Research paper No. 434, 23 February 2022, p 15.

⁸⁰ D Biggar and A Heimler, [Digital Platforms and the Transactions Cost Approach to Competition Law](#), Industrial and Corporate Change, 1 September 2021, pp 10–11; Stigler Center for the Study of the Economy and the State, [Stigler Committee on Digital Platforms: Final Report](#), 16 September 2019, p 89.

ways including by changing the terms and conditions for the use of the platform service (e.g. raising their costs), or by steering customers elsewhere.⁸¹ Not only does this harm the business user, but it can have broader harmful effects by discouraging investment and innovation in complementary services.

1.7. Other consumer harms have been identified across digital platform services of all sizes

Some of the harms identified by the ACCC are not limited to conduct by digital platforms with substantial market power. The ACCC has observed a range of harms to businesses and consumers resulting from a broader range of digital platforms:

- failing to take sufficient steps to prevent scams, harmful apps, and misleading or fake reviews from proliferating on their services
- using dark patterns and engaging in unfair practices in their dealings with consumers and small businesses
- failing to provide adequate dispute resolution processes.

Many of these issues arise in other industries across the economy. However, these issues raise particular challenges when they occur on digital platform services. This is because of their ability to reach consumers at scale and at low cost, and the inability for users to easily contact them to raise concerns, as discussed in chapter 4.

The ACCC remains concerned about the prevalence of these practices in digital platform services. As discussed below, consumers and small businesses may experience a range of harms, including financial losses, a lack of ability to make informed choices, reduced control over their personal data, or reduced confidence in their ability to engage in transactions and other interactions online. Importantly, these practices can undermine trust in online markets, reducing the economic and other benefits that should flow from the use of digital platform services. During the course of its inquiries, the ACCC has observed distrust and dissatisfaction from many consumers and business users about the role and behaviour of digital platforms.⁸²

1.7.1. Unfair trading practices and contract terms harm consumers and small businesses

In previous reports, the ACCC has identified a range of unfair trading practices occurring on digital platform services that harm consumers and business. These are discussed in more detail in chapter 3.

These include 'dark patterns', which exploit psychological or behavioural biases and limit the ability of consumers to express and act on their preferences online. For example, the ACCC has previously expressed concern about the prevalence of dark patterns in apps, including where app developers offer trials at introductory prices, or for 'free', and then make them very difficult to cancel. This can trap consumers into subscriptions for services that they don't want to continue using.⁸³

⁸¹ Stigler Center for the Study of the Economy and the State, [Stigler Committee on Digital Platforms: Final Report](#), 16 September 2019, pp 89–90.

⁸² ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 44, 68–69; ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 25; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 41.

⁸³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 110.

Other unfair practices of concern include engaging in excessive tracking, and the collection and use of user data. For example, the ACCC has previously raised concerns that the data practices of online marketplaces may not align with the strong preference for limitations on the collection and use of their data expressed by many consumers.⁸⁴

Significant power imbalances between digital platforms and their users can also lead to 'take-it-or-leave-it' contract terms that may be unfair to users. For example, the ACCC has previously identified that policies governing sanctions against sellers on online marketplaces often provide the marketplaces with broad discretion. One consequence of this is that issues can arise where disputes are handled unfairly or opaquely (such as disputes regarding a seller's adherence to performance metrics set out in the marketplace's policy).⁸⁵ App developers have also previously expressed strong concerns about the level of discretion app store providers have to amend terms and conditions governing app development and distribution through their app stores.⁸⁶

1.7.2. Scams, harmful apps and fake reviews harm consumers and undermine confidence online

Due to the growth of digital platform services and the time consumers spend on them, scammers are increasingly using digital platforms to target Australian consumers, as discussed in section 4.1. The ACCC has previously concluded that unscrupulous actors can target large numbers of consumers efficiently through the largest digital platform services. This makes those services susceptible to scams and, in the case of app stores, harmful apps, despite measures by platforms to address these.⁸⁷

As discussed in section 4.1.1, the ACCC is particularly concerned by the rapid growth of scams on digital platform services, including investment scams which can result in substantial financial losses. The ACCC remains concerned that some scammers target content or services that carry greater risk of harm to certain vulnerable consumer groups, based on attributes those groups share. In 2021, Indigenous Australians, older Australians, people from culturally and linguistically diverse communities and people with disability reported record high losses to scams.⁸⁸

The ACCC notes the valuable continuing work of the Australian Communications and Media Authority (ACMA) in this context. The ACMA has been taking steps to combat phone scams in Australia under the *Telecommunications Act 1997*.⁸⁹ This has included making new rules requiring telecommunications providers to identify, trace and block scam calls and text messages.⁹⁰

Since the requirement to block scam calls came into effect, telecommunications providers have blocked over 660 million scam calls, and there has been a significant drop in consumer complaints about scam calls.⁹¹ While this is a good outcome for consumers, the nature of

⁸⁴ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 5, 23.

⁸⁵ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 71–72.

⁸⁶ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 46–48.

⁸⁷ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp 56–60; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 109–114; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 45.

⁸⁸ For example, see ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 119–120.

⁸⁸ ACCC, [Targeting Scams – Report of the ACCC on scams activity](#), 4 July 2022, p 1. Reported losses are likely to significantly underestimate actual losses.

⁸⁹ ACMA, [Phone scams](#), 9 June 2022, accessed 15 September 2022.

⁹⁰ ACMA, [New rules to fight SMS scams](#), 12 July 2022, accessed 15 September 2022.

⁹¹ N O'Loughlin, [ACMA compliance priorities for telco customers](#), Speech, ACCANect 2022 – Better Basics, 14 September 2022.

scam activity means that as it becomes harder for scammers to use calls and texts to perpetrate fraud, they will look to exploit other channels, including on digital platforms.

The ACCC is also concerned that fake and misleading online reviews on digital platform services reduce the ability of consumers to make informed choices and undermine their trust in the digital economy, while causing financial and reputational damage to businesses (discussed in section 4.1.1). By one estimate, 4% of all online reviews are fake, impacting \$900 million of spending in 2021 in Australia alone.⁹²

Fake reviews have proliferated on the largest digital platform services because there are so many potential customers to target. While fake reviews are found across e-commerce sites, major general online retail marketplaces such as Amazon and eBay have been an enduring target for review manipulation.⁹³ Fake reviews are also prevalent on social media services, including Meta's Facebook and Instagram,⁹⁴ and in results returned in response to Google search queries and the reviews feature on Google Maps.⁹⁵

1.7.3. Dispute resolution processes do not meet the expectations of users

The ACCC has previously identified a lack of effective redress available to users of digital platform services as another significant problem,⁹⁶ and remains concerned that digital platforms are not sufficiently accountable for complaints and disputes involving users of their services, as discussed in section 4.2.

Consumers and businesses have expressed dissatisfaction with digital platforms' dispute resolution processes,⁹⁷ including in relation to suspensions or terminations of user accounts and addressing scams and harmful apps. A range of factors can contribute to ineffective dispute resolution between digital platforms and their users, including information asymmetries, consumer vulnerabilities, and power imbalances. The lack of a physical location and/or easily contactable staff in Australia can also make it harder for consumers and business users to access redress when problems arise.

As a result, consumers may lose access to valuable services or continue to be exposed to scams, fake reviews, or harmful apps. Unscrupulous actors can also take advantage of inadequate resolution of complaints to proliferate harmful conduct on digital platforms. For owners of small businesses, deficiencies in complaints handling have the potential to threaten their livelihoods. For example, if negative fake reviews on a seller's page on an online marketplace are not removed, or if a developer's app is rejected without clear, actionable reasons.⁹⁸

⁹² World Economic Forum, [Fake online reviews cost \\$152 billion a year. Here's how e-commerce sites can stop them](#), 10 August 2021. Estimates based on self-reporting by large e-commerce sites including Trip Advisor, Yelp, TrustPilot and Amazon and other sources.

⁹³ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 44.

⁹⁴ CMA, [Fake and misleading online reviews trading](#), 21 June 2019 (updated 9 April 2021), accessed 15 September 2022.

⁹⁵ Which?, [Facebook, Google and Trustpilot fail to filter out fake reviews](#), 28 July 2022, accessed 15 September 2022; M Pierce et al., [Black market in Google reviews means you can't believe everything you read](#), 24 May 2021, accessed 15 September 2022.

⁹⁶ For example, see ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 125–126.

⁹⁷ CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 52–53; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 68–72.

⁹⁸ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 69; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 51–53.

2. The need for new regulation

The *Competition and Consumer Act 2010* (CCA) and the *Australian Consumer Law* (ACL) establish a robust competition and consumer law regime capable of addressing harmful conduct across the economy. The object of the CCA and the ACL is to enhance the welfare of Australians through the promotion of competition and fair trading, and the provision for consumer protection. This remains relevant to markets for digital platform services. Enforcement of these laws can address a range of conduct through broad, flexible provisions, and allows for nuanced assessments of the actual effects of discrete conduct based on the specific facts of a case.⁹⁹

However, enforcement of existing competition and consumer laws alone is unlikely to be enough to efficiently address harms to competition arising from the strong and entrenched market positions of some digital platforms, or to adequately protect Australian business users and consumers from harmful conduct occurring in markets for digital platform services. Given the importance of digital platform services to the lives and livelihoods of Australian consumers and businesses, the costs of not addressing these harms are likely to be felt throughout the economy.

The ACCC agrees with the growing international consensus that digital platforms require specific and tailored regulation. While various jurisdictions are taking different approaches to implementing such measures, it is clear to the ACCC that enforcing existing competition and consumer laws 'ex post' (i.e. after conduct has occurred) cannot by itself address the systemic and significant problems arising in markets for digital platform services. Rather, this will require new regulation focused on safeguarding and enhancing existing competition and contestability, and ensuring fair treatment of platform users. Many other jurisdictions are already introducing new competition and consumer measures for digital platforms. In the ACCC's view, it is in the interests of Australian consumers and businesses to consider reforms here in Australia in parallel with the reforms occurring internationally.

This chapter establishes the case for addressing the issues outlined in chapter 1 by introducing competition measures for particular digital platform services, stronger economy-wide consumer protections, and additional new measures to better protect digital platform users. It is structured as follows:

- Section 2.1 discusses how enforcement of current competition and consumer laws alone may not achieve timely and desired outcomes in these services.
- Section 2.2 discusses the limitations of the enforcement of existing laws in addressing the broad range of systemic conduct occurring in digital platform services.
- Section 2.3 notes gaps in current competition and consumer laws, and the issues that arise when these laws are applied to digital platform services.
- Section 2.4 discusses how new measures could address these problems.
- Section 2.5 notes relevant regulatory developments occurring internationally.

⁹⁹ For example, see P Akman, [Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act](#), 47 *European Law Review* 85, 1 December 2021, (Posted: 10 December 2021 Last revised: 30 March 2022), p 17.

2.1. Ex post enforcement of existing laws can be slow to address harms in digital platform services

The enforcement of competition and consumer laws through ‘traditional’ investigations and court proceedings may be lengthy and is necessarily retrospective, as it addresses competition and consumer harms after conduct has already occurred. This approach is not well-suited as a standalone method for addressing issues in markets for digital platform services. Achieving a litigated outcome usually takes a long time and individual case-by-case actions are not efficient in the context of these dynamic and interrelated markets.

2.1.1. Court proceedings against digital platforms are generally lengthy

Based on the ACCC’s observation of international enforcement actions against large digital platforms (see box 2.1), the ACCC considers that the enforcement of traditional competition laws against digital platforms in Australia would likewise generally be a slow process. Further, the immense scale and financial resources of large digital platforms may impede traditional enforcement through the courts, resulting in protracted litigated outcomes.

This is consistent with Australian experience of enforcement actions against other large and sophisticated firms. For example:

- In 2008, the ACCC first brought proceedings against Cement Australia Pty Ltd. After the liability judgment, relief judgment and an appeal, the Federal Court handed down judgment in 2017 upholding the ACCC’s appeal.¹⁰⁰
- Between 2008 and 2010, the ACCC commenced proceedings against 15 international airlines for price fixing agreements. One proceeding (against PT Garuda Indonesia Ltd) was not finalised until 2021, when the airline withdrew its appeal against the penalty judgement.¹⁰¹
- The ACCC initiated proceedings against Flight Centre in March 2012 for attempting to induce 3 international airlines into price fixing arrangements. Final penalties were ordered by the Full Court of the Federal Court in April 2018.¹⁰²

A private litigant, Epic Games, initiated legal proceedings in Australia against Apple in 2020 and Google in 2021 over Apple and Google’s in-app payment requirements, including the level of their commissions. The cases won’t go to trial until March 2024.¹⁰³

Such lengthy proceedings can impede the effectiveness of efforts to address competition problems in markets for digital platform services, in a way that proceedings of similar length may not in other markets. This is due to the tendency of digital platform markets towards a concentration of market power, and the speed with which technologies central to digital platform services change and develop. The central role of digital platform services to the productivity of the Australian economy also means that any anti-competitive conduct that is not addressed in a timely way may have significant costs for the economy.

We note that some stakeholders have submitted that it is premature to consider additional competition measures for digital platforms when the ACCC is yet to prosecute a case

¹⁰⁰ ACCC, [Full Federal Court orders \\$206 million penalties against Cement Australia companies](#), Press release, 5 October 2017.

¹⁰¹ ACCC, [Garuda drops appeal to pay \\$19 million price fixing penalty in instalments](#), Press release, 20 April 2021.

¹⁰² ACCC, [Flight Centre ordered to pay \\$125 million in penalties](#), Press release, 4 April 2018.

¹⁰³ Federal Court of Australia, [Epic Games, Inc v Apple Inc \(Case Management\) \[2022\] FCA 341](#), 4 April 2022.

against a digital platform for a suspected breach of existing competition law.¹⁰⁴ However, given our expectations of the complexity and duration of any such action – as outlined above – we do not consider it appropriate to delay consideration of law reforms for this reason, particularly when several large international jurisdictions (including those in which successful enforcement action has occurred) are already implementing competition law reforms for large digital platforms.

Box 2.1 Duration of select competition law cases in overseas jurisdictions

Several European Commission abuse of dominance cases against Google have been lengthy:

- The Google Shopping case, which led to Google being fined EUR2.4 billion in 2017,¹⁰⁵ took more than 7 years after the European Commission opened a formal investigation,¹⁰⁶ with a decision on Google’s appeal to the General Court in November 2021.¹⁰⁷
- The Google Android investigation, which led to Google being fined EUR4.125 billion in 2022 took more than 7 years after the European Commission opened a formal investigation in 2015,¹⁰⁸ and a decision on Google’s appeal to the General Court in September 2022.¹⁰⁹
- The Google AdSense case, in which Google was fined EUR1.49 billion in 2019, took 9 years after the European Commission opened a formal investigation in 2010.¹¹⁰
- In the US, a Department of Justice case alleging Google unlawfully maintained monopolies in search and search advertising is scheduled to go to trial in September 2023, 3 years after the agency filed a complaint.¹¹¹
- A much earlier Department of Justice case against Microsoft for the tying of software products to its Windows OS and other anti-competitive activities took almost 3 years after the Department of Justice filed a complaint, concluding in 2001.¹¹²

¹⁰⁴ For example, see Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 9–10; Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 15–16, 66–67, 70–71.

¹⁰⁵ Google was found to have abused its dominance in online general search services by favouring its own comparison-shopping service. See European Commission, Google and Alphabet v Commission (Google Shopping), [Statement by Commissioner Vestager on Commission decision to fine Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service](#), 27 June 2017; N M Belloso, [Google v Commission \(Google Shopping\): A Case Summary](#), 17 November 2022.

¹⁰⁶ European Commission, [Antitrust: Commission probes allegations of antitrust violations by Google](#), Press release, 30 November 2010.

¹⁰⁷ 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.

¹⁰⁸ European Commission, [Antitrust: Commission sends Statement of Objections to Google on comparison shopping service: opens separate formal investigation on Android](#), Press release, 15 April 2015.

¹⁰⁹ On 18 July 2018 the European Commission fined Google EUR4.3 billion for having abused its dominant position by imposing anti-competitive contractual restrictions on manufacturers of mobile devices and on mobile network operators. On 14 September 2022, the General Court largely confirmed the Commission’s decision but revised the fine to EUR4.125 billion as its reasoning differed in certain respects to the Commission. See Court of Justice of the European Union, [Judgement of the General Court in Case T-604/18, Google and Alphabet V Commission \(Google Android\)](#), Press Release, No. 147/22, 14 September 2022.

¹¹⁰ European Commission, [Commission Decision of 20.3.2019 – At.40411 – Google Search \(AdSense\)](#), 20 March 2019. Google was found to have engaged in abusive practices in online advertising. European Commission, [Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising](#), Press release, 20 March 2019.

¹¹¹ This [complaint](#) was filed in October 2020. See US Department of Justice v Google LLC, [U.S. and Plaintiff States V. Google LLC](#).

¹¹² US Department of Justice, [Complaint: U.S. V. Microsoft Corp.](#), 18 May 1998.

2.1.2. Harmful conduct may continue despite regulatory action

Markets for digital platform services are characterised by fast-moving technological developments and frequent innovations in products and services. Given the long duration typical of enforcement cases, this creates a risk that additional harm may occur too quickly for individual cases to address. For example, a digital platform's market power may be extended and/or entrenched, or irreversible market tipping could occur during the time enforcement action is taking place.

Additionally, it appears that several enforcement actions overseas, including cases that have resulted in significant penalties (see box 2.1), have not been sufficient to prevent further instances of harmful conduct by digital platforms.

For example, the Autorità Garante della Concorrenza e del Mercato (the Italian Competition Authority) has issued numerous fines to Meta (then Facebook) for data practices that breached the Italian Consumer Code. In 2017, the Autorità fined WhatsApp EUR3 million for infringing the Italian Consumer Code, by forcing users to accept new terms of service in full through a provision on sharing of user data with Meta (then Facebook).¹¹³

In 2018, the Autorità issued 2 fines further totalling EUR10 million to Meta for infringing the Italian Consumer Code by:

- 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 they provide will be used for commercial purposes
- exerting undue influence on signed-up Facebook users to allow their data to be shared between Meta and third-party websites and apps for commercial purposes.¹¹⁴

In February 2021, the Autorità issued a fine of EUR7 million to Meta for failing to comply with an earlier order to adequately inform users about the commercial uses Meta makes of data collected through Facebook.¹¹⁵

The ACCC's ongoing proceedings against Meta for false, misleading or deceptive conduct when promoting Meta's Onavo Protect mobile virtual private network (VPN) app are also discussed in box 2.2.

In addition, despite a number of concerns about the Apple App Store and the Google Play Store raised by the ACCC in its Report on App Marketplaces¹¹⁶, it does not appear that Google or Apple have taken action to address many of those concerns. In some instances, Apple and Google have more stringently enforced terms we previously identified as problematic, such as continuing to enforce in-app payment requirements (see also section 6.2).

¹¹³ 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](#), Press release, 12 May 2017.

¹¹⁴ 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, 7 December 2018.

¹¹⁵ Autorità Garante della Concorrenza e del Mercato, [Sanzione a Facebook per 7 milioni](#), Press release, 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 15 September 2022.

¹¹⁶ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 9, 72–73, 78–79, 56, 103–106, 114–120, 123, 124–125, 139.

2.2. Enforcement of traditional laws alone won't achieve the broad remedies necessary for digital platform services

No single type of measure will address all the types of harm that can occur in markets for digital platform services.¹¹⁷ While there are benefits to flexible, general laws, without other complementary measures, the case-by-case enforcement of competition and consumer laws through the courts may also be poorly suited to the range of broad and systemic conduct that a single digital platform can engage in. This includes conduct across multiple interrelated services within a platform's ecosystem and at different levels of a supply chain (such as in the ad tech supply chain).¹¹⁸

Further, enforcement of traditional competition and consumer laws may not adequately address patterns of platform behaviour. This may occur when one instance of conduct ceases due to enforcement action taken by a regulator, but the platform adapts its practices to achieve the same outcome with different conduct. In this case, the platform may evade detection, or the regulator may be required to bring a new case on different facts.

2.2.1. Remedies applied in one case may be insufficient to address the sources of harms in digital platform services

There is a risk that applying remedies in response to a single instance of conduct in a market for digital platform services may not address the effects of the conduct, or the underlying source of harms, such as structural issues not directly connected to the illegal conduct. Given the potential for irreversible market tipping or the extension of an incumbent digital platform's dominance in a way that weakens competition in a related market, even the best designed remedy ordered by a court may be insufficient to address the competitive harm by the time the remedy can be implemented.

In particular, the effects of exclusionary conduct that has allowed an incumbent to benefit from structural factors, such as high barriers to entry and strong network effects, may be difficult to reverse even if the platform ceases that conduct. The short window of opportunity for competing platforms to enter the market will have closed.¹¹⁹

Further, financial penalties that exceed the expected gains generated by prohibited conduct, including systemic conduct, are necessary to effectively deter future instances of such conduct. Sufficient penalties are particularly important where the firm engaging in the conduct derives a large economic advantage from the continuation of that conduct, or where the conduct has the potential to harm a significant proportion of Australian consumers. Financial penalties are discussed in more detail in section 7.2.3.

2.3. There are gaps in current laws and the analytical toolkit

The technical complexity of many digital platform services, combined with low levels of price and non-price transparency (such as in the operation of algorithms), can make it difficult to detect conduct that may breach competition or consumer laws in the first place.

However, where such conduct is detected and sufficient evidence is gathered to mount a case against a digital platform, issues with the analytical tools used to prove anti-competitive conduct can be a particular challenge, due to the highly technical and opaque nature of digital platform services.

¹¹⁷ N Guggenberger, [Essential Platforms](#), *Stanford Technology Law Review*, Vol. 24, Issue 2, 28 May 2021, p 326.

¹¹⁸ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 10.

¹¹⁹ N Guggenberger, [Essential Platforms](#), *Stanford Technology Law Review*, Vol. 24, Issue 2, 28 May 2021, p 329.

2.3.1. Issues with the analytical tools used to prove anti-competitive conduct

Achieving effective enforcement outcomes for conduct that may harm competition can be difficult for a number of reasons:

- Legal proceedings against digital platforms under Part IV of the CCA may be hindered by the nature of the legal tests within specific provisions. These tests require establishing the likely events that would have occurred, or would occur in the future, without the conduct (i.e. the counterfactual) to the civil standard of proof. The ACCC has previously noted the high burden associated with obtaining evidence of this type rather than, for example, focusing on the disruption to the competitive process caused by alleged anti-competitive conduct.¹²⁰
- Currently, market definition is used as an analytical tool for assessing the competitive impact of particular conduct. However, market definition raises conceptual and analytical challenges for many digital platform services. For example, determining the most appropriate market definition can be difficult where a digital platform provides a range of interrelated services to different groups of users, and the relevant conduct affects competition across a platform's ecosystem, and in other parts of the economy.¹²¹
- The complex and fast-moving nature of markets for digital platform services mean that harms to competition affecting these markets can be somewhat novel and prospective. Therefore, those harms may be more difficult for a court to assess. In the ACCC's view, this is not a reason to err on the side of taking less action to address the potential for harms in these services either through traditional enforcement tools or the new proposals in this report. While the costs of over-enforcement (e.g. through 'false positives' or 'Type 1 errors') can be higher in dynamic markets, the costs of under-enforcement (e.g. through 'false negatives' or 'Type 2 errors') can be too, and there is no justification to prefer minimising the first over the second.¹²²
- Competition enforcement has traditionally focused on transactions based on monetary prices. Because many of the services digital platforms supply to consumers do not have a monetary price (i.e. they appear to be 'free' for consumers to use), competition regulators and courts must often instead analyse changes in quality as an indicator of competitive detriment. This presents a challenge due in part to the inherently less-quantifiable nature of changes in quality compared to price, which are exacerbated by a lack of sophisticated tools for analysing changes in quality in markets for digital platform services.¹²³

2.3.2. Gaps in consumer laws

For consumer issues, the ACCC has brought cases against digital platforms under the ACL,¹²⁴ with a number currently underway, as summarised in box 2.2.

Some stakeholders submitted that these cases demonstrate there is no 'gap' in Australia's consumer protection laws.¹²⁵ However, the ACCC has previously identified damaging

¹²⁰ R Sims, [Competition in Australia faces big challenges](#), Speech, UniSA & ACCC Competition Law & Economics Workshop, 15 October 2021.

¹²¹ J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 3.

¹²² N Guggenberger, [Essential Platforms](#), *Stanford Technology Law Review*, Vol. 24, Issue 2, 28 May 2021, p 326.

¹²³ Stigler Committee on Digital Platforms, [Final Report](#), September 2019, pp 87-88.

¹²⁴ The ACL, administered by the ACCC along with state and territory consumer protection agencies, protects consumers from a range of harmful practices.

conduct occurring on digital platform services that may not be captured by the ACL. This includes platforms making it difficult to leave a subscription or opt out of a service (i.e. subscription traps) and other interface design strategies that infringe on the autonomy of consumers.¹²⁶ Given the scale of harms currently occurring (see also chapters 3 and 4), we consider that testing the scope of existing laws through individual cases focussed on specific issues would not provide necessary protection to Australian consumers.

Box 2.2 ACCC cases under the ACL involving digital platforms

- Proceedings against Google LLC and Google Australia filed in October 2019 for misleading consumers about the collection of their personal location data.¹²⁷ In April 2021, the Federal Court ruled in favour of the ACCC in relation to some of these allegations.¹²⁸ In August 2022, the Federal Court ordered Google LLC to pay \$60 million in penalties.¹²⁹
- Ongoing proceedings against Google LLC filed 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.¹³⁰
- Ongoing proceedings against Meta Platforms Inc. (then Facebook Inc.) and 2 subsidiaries filed in December 2020 for alleged false, misleading or deceptive conduct when promoting Meta's Onavo Protect mobile VPN app to consumers.¹³¹
- Ongoing proceedings against Meta Platforms, Inc. filed in March 2022 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.¹³²

The ACCC has previously recommended and continues to support amendments to strengthen the ACL in response to conduct that is prevalent across the economy as well as on digital platform services. This includes making unfair contract terms unlawful (rather than just void) and giving courts the power to impose civil pecuniary penalties for contraventions, as discussed in section 3.2.¹³³ On 28 September 2022, the Government introduced the *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022* into Parliament. This Bill proposes amendments to the ACL which will make unfair contract terms unlawful. The Bill had not been passed as of 30 September 2022.¹³⁴

¹²⁵ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 14–16. University of Technology Sydney, Centre for Media Transition, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5.

¹²⁶ For a discussion of subscription traps, see ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 110–111.

¹²⁷ ACCC, [Google allegedly misled consumers on the collection and use of location data](#), Press Release, 29 October 2019.

¹²⁸ ACCC, [Google misled consumers about the collection and use of location data](#), Press Release, 16 April 2021.

¹²⁹ ACCC, [Google LLC to pay \\$60 million for misleading representations](#), Press Release, 12 August 2022.

¹³⁰ ACCC, [Correction: ACCC alleges Google misled consumers about expanded use of personal data](#), Press Release, 27 July 2020.

¹³¹ ACCC v Facebook Inc, [Concise Statement](#), Federal Court of Australia, NSD1339/2020, 16 December 2020. Onavo Protect was a free downloadable software application providing a virtual private network service.

¹³² ACCC, [ACCC takes action over alleged misleading conduct by Meta for publishing scam celebrity crypto ads on Facebook](#), Press release, 18 March 2022.

¹³³ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 497.

¹³⁴ Parliament of Australia, [Treasury Laws Amendment \(More Competition, Better Prices\) Bill 2022](#), accessed 29 September 2022. Under the existing unfair contract term laws, there are no penalties for the use of unfair contract terms in standard-form contracts, instead they are currently only voidable if found to breach the ACL.

The ACCC has also previously advocated for the ACL to be amended to include a general prohibition on unfair trading practices. This would address problematic conduct which is currently unlikely to breach the ACL, such as discouraging consumers from exercising their contractual rights, as discussed in section 3.1.

The ACCC has also previously identified persistent inadequacies in digital platforms' own safeguards against scams, harmful apps and fake reviews, and in their dispute resolution processes (as discussed in chapter 4). The ACCC remains supportive of measures to improve access to complaints handling and redress for consumers and business users.¹³⁵

2.4. New competition and consumer measures are required

Having considered the issues with applying the existing law to digital platforms as set out in the sections above the ACCC considers that there is a need for new sector-specific 'ex ante' or 'up-front' regulation to address the harms occurring in markets for the supply of certain digital platform services.

In contrast to traditional competition and consumer laws, ex ante regulation can apply specific and well-defined obligations (i.e. requirements on firms to take or not take certain actions) to address and deter harmful conduct. Such obligations could be precisely targeted to particular forms of harmful conduct in specific circumstances. These could also be designed to take into account the unique combination of characteristics of digital platforms that create the risks of harm discussed throughout this report. Where practical, ex ante obligations could also be designed to address systemic or structural obstacles to effective competition in some of these services (such as access to data and other barriers to entry and expansion), in addition to specific types of harmful conduct.

By clearly establishing the types of conduct that would not be compliant and requiring platforms to modify their behaviour in advance of any breaches, ex ante regulation has greater potential than ex post enforcement to address problems before harm occurs.

In this way, new ex ante obligations would address harms to competition and consumers in markets for digital platform services in a quicker, more streamlined and more flexible way than is currently possible. They would also enhance the ability of relevant regulators to detect, assess and act against harmful conduct in these often technically complex and opaque markets.

New ex ante obligations in the form we propose in this report would also provide an opportunity for high-level regulatory coherence and consistency with overseas jurisdictions that are already implementing similar reforms for digital platform services (see section 2.4). This has received broad support from stakeholders.¹³⁶

As discussed in section 7.3.2, while differences in legal systems and regulatory environments would need to be taken into account, such coherence would provide several important benefits.¹³⁷ These include a lower compliance burden for platforms, greater legal certainty, and enhanced ability for the relevant regulator to coordinate on cross-jurisdictional issues. For example, alignment with jurisdictions that have larger numbers of platform users

¹³⁵ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 72.

¹³⁶ Stakeholders generally supportive of alignment with other jurisdictions internationally include Pinterest, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8; eftpos, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5.

¹³⁷ Relevantly, the European Union-wide scope of the Digital Markets Act, ex ante regulation which will apply to 'gatekeeper' platforms, has been described as one of its main strengths. P Akman, [Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act](#), 47 *European Law Review* 85, 1 December 2021 (Posted: 10 December 2021 Last revised: 30 March 2022), p 4.

than Australia would likely facilitate better outcomes for Australian consumers and businesses, such as by making it simpler for platforms to extend beneficial changes implemented in those jurisdictions to services in Australia.

2.4.1. Ex ante regulation would complement enforcement of existing laws

Sector-specific ex ante regulation and the enforcement of traditional laws are not mutually exclusive. Rather, when their broad goals, such as the protection and promotion of competition, are aligned, these 2 approaches can complement and reinforce each other.

Australia has previously introduced sector-specific legislation, rather than relying only on enforcement of economy-wide provisions of competition law, with far-reaching benefits. For example, the reforms that followed the 1993 National Competition Policy Review (Hilmer Report) created specific regulation to address the lack of competition in certain economic facilities that exhibit ‘natural monopoly’ characteristics, such as electricity transmission grids, telecommunication networks and major pipelines. While the need for such reforms was subject to much debate in the 1990s, they have greatly improved productivity across the Australian economy.¹³⁸ Although digital platforms don’t have the physical characteristics of ‘essential facilities’ described by the Hilmer Report, there are similarities in their strategic positions, the extent to which firms in other areas of the economy depend on their services and products, and the small number of digital platforms that have substantial market power.

As part of this Inquiry, some stakeholders, including several large digital platforms, have queried the need for reform.¹³⁹ However, other stakeholders, including app developers (such as Match Group), Australian businesses (such as the eftpos, Nine and Afterpay), consumer advocates (such as Choice), industry groups (such as Free TV and Commercial Radio Australia), and other suppliers of digital platform services (such as Microsoft, Mozilla, DuckDuckGo), consider that there is a clear, and in some cases urgent, need for reform.¹⁴⁰

The new measures would complement Australia’s existing competition and consumer law enforcement. While the specificity and targeting under the new sector-specific rules would address many of the issues raised above, the flexibility possible through existing case-by-case enforcement under the broad general provisions of existing laws remains critical. For example, existing enforcement tools would be required to address competition issues for digital platform services not covered by the new regulation, such as issues that have not been anticipated by the design of the new measures, or conduct emerging due to changes in technology or business models used by digital platforms.

¹³⁸ See Industry Commission, [The growth and revenue implications of Hilmer and related reforms](#), Final Report, March 1995.

¹³⁹ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1; Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1; Amazon, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1; Business Council of Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

¹⁴⁰ Match Group, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2; eftpos, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Nine Entertainment, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 1–2; Afterpay, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2; CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 4–5; Commercial Radio Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2; Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1; Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1; DuckDuckGo, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 1–2.

2.4.2. Objectives and attributes underpinning recommended regulatory measures

The measures proposed in the following chapters have been informed by the competition and consumer issues they are intended to address.

On this basis, the overall objectives guiding the reforms recommended in this report are to:

- (a) promote competition and innovation in the provision of digital platform services, and the products and services that interact with these platforms
- (b) protect Australian consumers and businesses from conduct that may cause significant harm, and which deters them from engaging with the digital economy.

The design of the report's recommendations has also been guided by several desired attributes that are important for designing regulation specific to digital platform services. These include:

- **Targeted application** – Additional competition measures should address the specific issues identified in a proportionate way, and minimise the potential for any adverse impacts on innovation.
- **Flexibility** – They should be sufficiently flexible and adaptable to remain effective when market conditions and competitive dynamics change, without sacrificing specificity.
- **Certainty** – Through clear and objective rules, and transparent and predictable processes, they should provide certainty for digital platforms and the businesses that depend on them.
- **International regulatory coherence** – While accounting for differences in the legal systems and regulatory environments in Australia and other jurisdictions, there are benefits to aligning the substances of new measures with key overseas regulatory measures, such as promoting compliance and reducing burden on businesses operating in multiple jurisdictions. This consideration is particularly relevant to the competition measures recommended in this report.
- **Domestic regulatory coherence** – Many of the issues that arise in the context of digital platform services are relevant to, or intersect with, the responsibilities of multiple different regulators in Australia. Coherence with other relevant domestic regulation will contribute to a regulatory landscape that works for all stakeholders.
- **Trust and confidence** – The digital economy will not achieve its potential unless consumers trust that they can use online services without losing money, giving up their privacy or being subject to other harms, and have confidence that there are effective avenues for addressing harms that do occur. This is particularly relevant to the consumer measures recommended in this report.

We note that there is a potential for some of these attributes to come into conflict – for example, measures that are too flexible may compromise certainty and specificity, and vice versa. Where necessary, the measures recommended in this report are designed to strike an appropriate balance between these attributes.

Several other considerations are also likely to be important to inform the design of new competition and consumer measures. The design of additional regulations should take into account that the growth and success of many Australian businesses of all sizes are tied to the productivity of the digital economy, and therefore to digital platforms. Further, achieving the best outcomes for consumers and competition will depend on relevant regulators having the tools to detect and respond to problematic conduct efficiently, and quickly act to address repeated or systemic conduct.

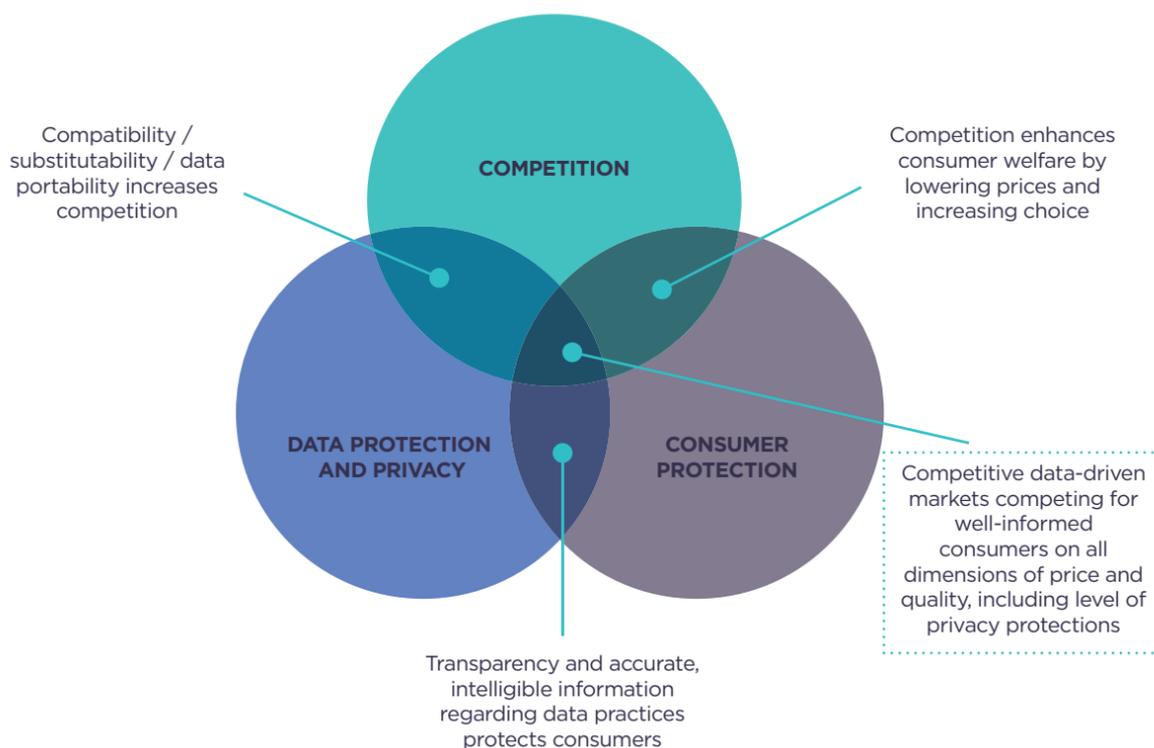
2.4.3. Data protection, competition and consumer protection

Effective competition, consumer and privacy protections are all important to ensure that digital platform markets work for consumers and businesses. As noted in the ACCC’s DPI Final Report, there continues to be a growing interaction between data protection, competition and consumer protection, particularly in relation to the collection and use of data.

Data is fundamental to the digital economy. It can deliver important societal benefits in the form of new products, better delivery of services, including government services, and advances in medicine, communications, and responses to threats such as natural disasters. Equally it is clear from multiple surveys that Australians have strong concerns about the use of their data.¹⁴¹ Most Australian consumers are uncomfortable with how their personal information is handled by digital platforms, and expect the government to provide protections that allow them to participate in the digital economy without excessive tracking and surveillance.¹⁴² They are also concerned about profiling, discrimination and data being used in ways they did not anticipate.¹⁴³

There is a complex relationship between privacy and competition, as discussed in section 1.6.4. Digital platform services are often provided to consumers at a zero monetary cost. Consumers effectively ‘pay’ to use these services by providing digital platforms with their user data and attention when they view or engage with advertising.¹⁴⁴

Figure 2.1 Overlap between data protection, competition and consumer protection



¹⁴¹ Roy Morgan Research, [Consumer Views and Use of Web Browsers and Search Engines - Final Report - September 2021](#), 28 October 2021, p 18; Roy Morgan Research, [ACCC consumer survey - Consumer views and behaviours on digital platforms](#), 10 December 2018, pp 6–7.

¹⁴² CPRC, [New research finds Australian consumers want more control over their personal information and expect fair treatment](#), CPRC 2020 Data and Technology Consumer Survey, 7 December 2020.

¹⁴³ CPRC, [CPRC 2020 Data and Technology Consumer Survey](#), 7 December 2020, pp 17, 23, 33.

¹⁴⁴ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 66–73, 115.

New measures to protect competition and consumers in markets for digital platform services must deal with the transformation of individual-level data into an asset that is routinely monetised. The ACCC has previously highlighted the need to holistically consider the complex set of interrelated privacy, competition and consumer protection issues that intersect in these markets.¹⁴⁵

With this in mind, the ACCC has previously recommended changes to Australia's privacy regime to better account for the ways in which consumer privacy can be degraded in the online economy,¹⁴⁶ and continues to support reforms to the Privacy Act in the context of the Attorney-General's review. Australians need to have confidence that there are appropriate safeguards that provide meaningful privacy protections for individuals.

We also continue to support a big picture approach to addressing the range of overlapping issues that arise in the supply of digital platform services. As part of this, the ACCC works with the members of the Digital Platform Regulators Forum on overlapping and common areas of concern, including the use of data by digital platforms (as discussed further in section 7.3.1).¹⁴⁷ Although the goals of these agencies differ, they share a focus on improving Australia's digital economy by making it a safe, trusted space where companies compete on the merits to deliver consumers good and services.

The goals of promoting competition and protecting consumer privacy and security online often complement each other. However, this is not always the case. There is now greater recognition that traditional policy responses focused on privacy, consumer protection and competition can interfere with each other if their interactions are not managed.¹⁴⁸ The ACCC is conscious there are likely to be tensions between achieving the benefits of increased competition while protecting privacy and security.

Different types of data-related measures intended to promote competition can provide different benefits as well as raise different risks. For example, from the perspective of promoting competition, 'data access' requirements (i.e. requiring platforms to provide access to specific data sources to rivals on an agreed basis) may more quickly and effectively promote competition and address data-related barriers to entry than 'data portability' requirements (i.e. where consumers can individually request that their data be transferred to them or a third party). However, data portability measures may be less likely to raise privacy concerns because they give consumers some control over who gets access to their data.

Apple, in particular, has raised concerns that potential regulatory interventions intended to increase interoperability and data sharing raise an unacceptable risk of undermining its mechanisms for protecting consumers' privacy and security when using its ecosystem of products and services (as discussed in section 6.5.3). As discussed in chapter 6, these trade-offs should be carefully considered in order to implement new competition measures in a way that promotes effective competition while providing appropriate safeguards to maintain and protect user security and privacy.

It is also important to recognise that data-driven companies have incentives to define and implement privacy and data-sharing measures strategically, in ways that maximise the benefits that accrue to them, and potentially cause detriment to their rivals. The ACCC is strongly of the view that it should not be left to digital platforms and other companies alone to

¹⁴⁵ For example, see ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 5; R Sims, [Data \(R\)Evolution: Consumer welfare and growth in the digital economy](#), Speech, CPRC Conference, 19 November 2019.

¹⁴⁶ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 456–496.

¹⁴⁷ The Digital Platform Regulators Forum includes the ACCC, the Office of the Australia Information Commissioner, the Office of the eSafety Commissioner, and the Australian Communications and Media Authority.

¹⁴⁸ G7, [Compendium of approaches to improving competition in digital markets](#), 29 November 2021, accessed 15 September 2022, pp 32–33.

define and implement data protection and privacy, or to dictate the form and level of privacy that individuals are entitled to, and in what circumstances.

For example, voluntary initiatives introduced to address legitimate privacy concerns may also have negative impacts on competition. Such issues arose in relation to Google's Privacy Sandbox initiative. In 2019, Google announced it intended to remove support for third-party cookies (a key feature used by ad tech services) on its Chrome browser and replace their targeting and measurement capabilities with new technologies.¹⁴⁹ The primary reason it gave for doing so was to protect users' privacy by preventing the tracking of consumers across the web.¹⁵⁰ The fact that the use of cookies can present privacy concerns has been widely acknowledged by the ACCC and others.¹⁵¹ However, the ACCC expressed concern that Google's proposals would give Google greater control over the ad tech supply chain, providing it with opportunities to advantage its own services, and distort competition in the supply of ad tech services.¹⁵² See section 6.6 for a more detailed discussion of Google's Privacy Sandbox proposals, including the CMA's investigation of this.

2.4.4. Consideration of merger laws

The ACCC and many overseas competition authorities are actively considering whether there is a need for changes to merger laws, including to address acquisitions of nascent competitors that prevent the emergence of new rivals in existing and emerging markets. This can occur in various markets but is particularly concerning where firms adopt a strategy of acquiring rivals to protect their substantial and long-lasting market power. For example, the ACCC has previously identified that acquisitions by Meta (then Facebook) – including its acquisitions of WhatsApp and Instagram – have had the effect of entrenching its market power in the supply of social media services by removing potential competitors, providing it with advantages of scope, and reducing competition.¹⁵³

The ACCC's Discussion Paper outlined the challenges that Australia's current merger settings pose for assessing acquisitions by digital platforms, and some possible options for reform.¹⁵⁴ Although such challenges are not unique to acquisitions by digital platforms, they are particularly acute in markets for digital platform services due to their fast-paced and dynamic nature, significant market concentration, high barriers to entry and expanding ecosystems. Network effects also mean that the gains from achieving market power are substantial, as such market power is more likely to be enduring.

As part of our consultation following the Discussion Paper, the ACCC received a range of differing views about the need for merger law reform for digital platforms. Several stakeholders submitted that the current merger regime is adequate, and reform is unnecessary.¹⁵⁵ The Law Council of Australia and Business Council of Australia opposed sector-specific merger rules, as they believed such measures could stifle innovation, reduce investment, and delay pro-competitive deals.¹⁵⁶

¹⁴⁹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 11, 127.

¹⁵⁰ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 11.

¹⁵¹ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 393, 490–491; CMA, [CMA to investigate Google's 'Privacy Sandbox' browser changes](#), Press release, 8 January 2021.

¹⁵² ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 129–131.

¹⁵³ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 80–84.

¹⁵⁴ ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, pp 66–69.

¹⁵⁵ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 78; Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 5–6; Business Council of Australia, [Submission to the ACCC Digital Platforms Services Inquiry Fifth Interim Report](#), May 2022, p 6.

¹⁵⁶ Law Council of Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; Business Council of Australia, [Submission to the ACCC Digital Platforms Services Inquiry Fifth Interim Report](#), May 2022., pp 6–7.

Some stakeholders also submitted that sector-specific merger reform should not be considered before economy-wide reform has been pursued, if required.¹⁵⁷ The Developers Alliance and the Computer and Communications Industry Association also noted the importance of acquisitions as an exit strategy and route to market for innovators and investors.¹⁵⁸

Many other stakeholders were supportive of digital platform-specific merger reform.¹⁵⁹ Microsoft, for example, noted that greater scrutiny of mergers is needed in digital markets¹⁶⁰, while Mozilla supported reforms that address cases where digital platforms may stifle innovation and competition by acquiring nascent competitors, or technologies in adjacent markets.¹⁶¹ Stakeholders such as eftpos, Australian Communications Consumer Action Network, and academics from Monash Business School similarly recommended tailored rules for acquisitions involving digital platforms.¹⁶²

This report does not make any specific recommendations related to reform of merger law. The ACCC considers that this would be best assessed in the context of a broader economy-wide review of the Australian merger regime.¹⁶³ We consider that it would be appropriate and necessary for any such future economy-wide review of Australia's merger laws to examine the challenges involved in adequately addressing the competition effects of serial strategic acquisitions by digital platforms.

2.5. International recognition and consensus that regulatory reform is required for digital platforms

In recent years, international scrutiny of digital platforms, their business models and potentially harmful practices has increased, reflecting the magnitude of their impact globally. There is now a common recognition in numerous jurisdictions that the harms arising from the activities of digital platforms across a range of issues are significant, and that competitive pressures, self-regulation or industry-led initiatives are not enough to address these harms.

There is also broad consensus that enforcement of traditional competition law is proving insufficient in the context of these services. This follows cases and fines against large platforms brought by the European Commission, the UK's Competition and Markets

¹⁵⁷ Asia Internet Coalition, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; Computer and Communications Industry Association, May 2022, p 6.

¹⁵⁸ Developers Alliance, May 2022, p 14; Computer and Communications Industry Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 5–6.

¹⁵⁹ The following were broadly supportive of merger reform in submissions to the ACCC: ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 8-9; Carmelo Cennamo and Panos Constantinides, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 6-8; Department of Home Affairs, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; eftpos, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; Marque Lawyers, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1; Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; Monash Business School, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 1, 6-9; Optus, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 11; University of Western Australia Minderoo Tech and Policy Lab, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3-4.

¹⁶⁰ Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4.

¹⁶¹ Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4.

¹⁶² eftpos, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2 & 5. ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8; Monash Business School, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2.

¹⁶³ In August 2021, the ACCC outlined some proposals for economy-wide merger law reform and noted that measures specific to acquisitions by digital platforms may be necessary. These options were noted in the Discussion Paper. See R Sims, [Protecting and promoting competition in Australia](#), Speech, Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021

Authority, the German Bundeskartellamt, the Japan Fair Trade Commission, and the US Federal Trade Commission and Department of Justice, among other measures.¹⁶⁴

Alongside this consensus is an assessment that new rules, other new legal instruments, or revisions to existing laws are warranted, particularly for competition law regimes.¹⁶⁵ Several jurisdictions have implemented, or are considering implementing, new proposals to provide fast and efficient remedies to competition and consumer harms in markets for digital platform services.

Although the Australian legal system is not directly comparable to the legal systems of other jurisdictions, it is useful to consider international reform efforts in the context of considering possible regime designs and measures that could apply in Australia. It is also important to consider how any reforms in Australia would facilitate cooperation across jurisdictions, as discussed in section 7.3.2.

Some of the key reforms in the EU, the UK, Germany, Japan and the US are summarised below.

2.5.1. European Union

Digital Markets Act

The Digital Markets Act, the EU's approach to comprehensively regulating the 'gatekeeper power' of the largest digital companies, has the objectives of ensuring contestability and fairness in the digital sector.¹⁶⁶ The EU reached provisional political agreement on the Digital Markets Act in March 2022 and the final text was subsequently approved by the European Parliament and the Council in July 2022.¹⁶⁷ It complements existing competition rules in the EU through new obligations and prohibitions.¹⁶⁸ These include prohibitions on anti-steering provisions (which restrict business users from informing customers or potential customers about alternative services, such as payment services),¹⁶⁹ prohibitions on requiring business users to use certain ancillary services,¹⁷⁰ prohibitions on self-preferencing in ranking,¹⁷¹ obligations to allow apps to be uninstalled and changes made to default settings,¹⁷² and interoperability with hardware and software features,¹⁷³ among others.

¹⁶⁴ For example, Federal Trade Commission, Case Summary, [FTC v. Facebook, Inc.](#), 17 November 2021; European Commission, Opening of Proceedings, [AT. 40670 Google - AdTech and Data Related Practices](#), 22 June 2021; US Department of Justice, [Justice Department Sues Monopolist Google For Violating Antitrust Laws](#), Press release, 20 October 2020; European Commission, Opening of Proceedings, [Case AT.40437 – Apple – App Store Practices \(Music Streaming\)](#), 16 June 2020; European Commission, Commission Decision, [Case AT.40411 – Google Search \(adSense\)](#), 20 March 2019; Bundeskartellamt, Case Summary [Case B6-22/16 Facebook](#), 6 February 2019; European Commission, Commission Decision, [Case AT.40099 – Google Android](#), 18 July 2018; Japan Fair Trade Commission, [Closing the investigation on the suspected violation of the Antimonopoly Act by Apple Inc.](#), 1 September 2021, accessed 15 September 2022; CMA, [CMA fines Facebook over enforcement order breach](#), 20 October 2021.

¹⁶⁵ P Akman, [Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act](#), 47 *European Law Review* 85, 1 December 2021 (Posted: 10 December 2021, Last revised: 30 March 2022), p 4.

¹⁶⁶ EU Digital Markets Act. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

¹⁶⁷ Council of the EU, [DMA: Council gives final approval to new rules for fair competition online](#), 18 July 2022, accessed 15 September 2022.

¹⁶⁸ European Commission, [The Digital Services Act package](#), 5 July 2022, accessed 15 September 2022.

¹⁶⁹ EU Digital Markets Act, Article 5(4). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

¹⁷⁰ EU Digital Markets Act, Article 5(7). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

¹⁷¹ EU Digital Markets Act, Article 6(5). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

¹⁷² EU Digital Markets Act, Article 6(3). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

¹⁷³ EU Digital Markets Act, Article 6(7). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

The first gatekeepers are expected to be designated during 2023 and will be required to comply with obligations and prohibitions 6 months later.

Digital Services Act

The Digital Services Act aims to better protect consumers and their rights online.¹⁷⁴ It sets out new rules regulating the responsibilities of all digital services that act as intermediaries in the EU. It applies a tiered approach with different types of online intermediaries being subject to different rules, with the strictest rules applying to ‘very large online platforms’. The Digital Services Act requires mechanisms for users to flag illegal content,¹⁷⁵ obligations on traceability of business users in online marketplaces,¹⁷⁶ safeguards for users including the possibility to challenge content moderation decisions,¹⁷⁷ bans on certain types of targeted advertisements (such as targeting children),¹⁷⁸ and transparency measures.¹⁷⁹ Once adopted, the Digital Services Act will apply 15 months after entry into force or from 1 January 2024, whichever is later.¹⁸⁰

2.5.2. United Kingdom

The UK Government has proposed a pro-competition regime for digital markets to address concerns about the market power of large digital platforms and facilitate competition. A Digital Markets Unit in the Competition and Markets Authority would administer the regime, and designate platforms with ‘strategic market status’ if they have substantial and entrenched market power which provides them with a strategic position in a designated digital activity.¹⁸¹

Designated platforms would be subject to binding conduct requirements based on proposed high-level objectives of ‘fair trading’, ‘open choices’ and ‘trust and transparency’. The Digital Markets Unit would also have the discretion to require pro-competitive interventions to rectify an ‘adverse effect on competition or consumers’,¹⁸² such as obligations to mandate third-party access to data, software compatibility, access to an operating system/online marketplace, or operational or functional separation.¹⁸³ A draft bill is expected to be developed during the parliamentary year concluding April 2023 and introduced in the following parliamentary year.¹⁸⁴

2.5.3. Germany

In January 2021, new provisions of the German Competition Act came into effect. The provisions enable Germany’s competition authority, the Bundeskartellamt, to designate platforms of ‘paramount significance for competition across markets’ through criteria such as having a dominant position in one or more markets, financial strength, vertical integration

¹⁷⁴ European Commission, [The Digital Services Act package](#), 5 July 2022, accessed 15 September 2022.

¹⁷⁵ EU Digital Services Act, Articles 14, 17(2). Based on [text adopted by the European Parliament on 5 July 2022](#).

¹⁷⁶ EU Digital Services Act, Articles 17(2), 24(c). Based on [text adopted by the European Parliament on 5 July 2022](#).

¹⁷⁷ EU Digital Services Act, Articles 17(2), 44. Based on [text adopted by the European Parliament on 5 July 2022](#).

¹⁷⁸ EU Digital Services Act, Articles 17(2), 52b. Based on [text adopted by the European Parliament on 5 July 2022](#).

¹⁷⁹ EU Digital Services Act, Article 17(2). Based on [text adopted by the European Parliament on 5 July 2022](#); European Commission, [Questions and Answers: Digital Services Act](#), 20 May 2022, accessed 15 September 2022.

¹⁸⁰ European Commission, [Questions and Answers: Digital Services Act](#), 20 May 2022, accessed 15 September 2022. For very large online platforms and very large online search engines, the Digital Services Act will apply 4 months after they have been designated as such. See European Parliament, [Digital Services: landmark rules adopted for a safer, open online environment](#), 5 July 2022, accessed 15 September 2022.

¹⁸¹ UK Government, [A new pro-competition regime for digital markets - government response to consultation](#), 6 May 2022.

¹⁸² UK Government, [A new pro-competition regime for digital markets - government response to consultation](#), 6 May 2022.

¹⁸³ UK Government, [A new pro-competition regime for digital markets - government response to consultation](#), 6 May 2022.

¹⁸⁴ The draft bill is the Digital Markets, Competition and Consumer Bill. A Adam and S Hiremath, [The UK competition regulatory regime for digital markets: overview](#), Practice Note, *Thomson Reuters - Practical Law*, 26 July 2022.

and activities on related markets, and/or access to data relevant for competition.¹⁸⁵ The Bundeskartellamt may then ‘activate’ certain prohibitions to prevent these platforms from engaging in anti-competitive practices.¹⁸⁶

These practices include impeding competitors by treating their offers differently from the platform’s own offers when providing access to supply and sales markets, creating or raising barriers to entry by using data obtained from the opposite side of a dominated market, making the interoperability of products or services or data portability more difficult, or using tying or bundling offers to rapidly expand its position in a market.¹⁸⁷

2.5.4. Japan

The Act on Improving Transparency and Fairness of Digital Platforms, overseen by the Ministry of Economy, Trade and Industry, came into effect in February 2021 and is intended to address low transparency and deficiencies in handling user requests in digital platform services.¹⁸⁸ It enables designation of ‘specified digital platform providers’ to be subject to specific rules, including requirements to disclose their terms and conditions and other information, requirements to develop certain fair procedures and systems, and requirements to submit yearly reports on their operations and to conduct self-assessments.¹⁸⁹

2.5.5. United States

In June 2021, the US House Antitrust Subcommittee introduced several bipartisan bills directed at countering the anti-competitive practices of large digital platforms.¹⁹⁰ This includes the American Choice and Innovation Online Act and Open Markets Act referred to elsewhere in this report and a number of other bills have introduced since. A number of these bills provide that the US Federal Trade Commission would designate a platform as a ‘covered digital platform’ based on the size of its US consumer or business user bases, net annual sales or market capitalisation, and position as a ‘critical trading partner’.¹⁹¹

¹⁸⁵ Federal Ministry of Justice, [Act against Restraints of Competition](#), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p 2506).

¹⁸⁶ To ‘activate’ the prohibitions the Bundeskartellamt must conduct proceedings which includes consultation and a final decision. Three platforms have been designated (Google, Meta and Amazon) and designation proceedings have been initiated for Apple. Bundeskartellamt, [Alphabet/Google subject to new abuse control applicable to large digital companies](#), 5 January 2021, accessed 15 September 2022; Bundeskartellamt, [New rules apply to meta \(formerly Facebook\) – Bundeskartellamt determines its “paramount significance for competition across markets”](#), 4 May 2022, accessed 15 September 2022; Bundeskartellamt, [Amazon now subject to stricter regulations – Bundeskartellamt determines its paramount significance for competition across markets](#), 6 July 2022, accessed 15 September 2022; Bundeskartellamt, [Proceeding against Apple based on new rules for large digital companies \(Section 19a\(1\) \(GWB\) – Bundeskartellamt examines Apple’s significance for competition across markets](#), 21 June 2021, accessed 15 September 2022.

¹⁸⁷ Bundeskartellamt, [Control of abusive practices](#), accessed 15 September 2022.

¹⁸⁸ Ministry of Economy, Trade and Industry, [Cabinet Decision on the Bill for the Act on Improving Transparency and Fairness of Digital Platforms](#), Press release, 18 February 2020, revised 16 February 2021.

¹⁸⁹ Ministry of Economy, Trade and Industry, [Key points of the Act on Improving Transparency and Fairness of Digital Platforms \(TFDPA\)](#), 16 April 2021, accessed 15 September 2022; Ministry of Economy, Trade and Industry, [Key points on the Act on Improving Transparency and Fairness of Digital Platforms](#), accessed 15 September 2022. Amazon Japan, Google, Apple, Yahoo Japan and e-commerce platform Rakuten have been designated. Ministry of Economy, Trade and Industry, [Digital Platforms](#), 29 July 2022, accessed 15 September 2022. In July 2022, Japan’s Cabinet announced operators of digital advertising platforms that meet revenue thresholds would be designated later in 2022. Ministry of Economy, Trade and Industry, [Cabinet Decision on the Cabinet Order to Partially Amend the Cabinet Order for Stipulating the Business Category and Scale under Article 4, Paragraph 1 of the Act on Improving Transparency and Fairness of Digital Platforms](#), 5 July 2022, accessed 15 September 2022.

¹⁹⁰ D N Cicilline, [House Lawmakers Release Anti-Monopoly Agenda for “A Stronger Online Economy: Opportunity, Innovation, Choice”](#), Press release, 11 June 2021.

¹⁹¹ [American Innovation and Choice Online Act](#), S. 2992, 117th Congress (2021-2022); [Open App Markets Act](#), S. 2710, 117th Congress (2021-22).

3. Strengthening economy-wide consumer protections

Recommendation 1: Economy-wide consumer measures

The ACCC continues to recommend the introduction of new and expanded economy-wide consumer measures, including an economy-wide prohibition against unfair trading practices (section 3.1) and strengthening of the unfair contract terms laws (section 3.2).

These reforms, alongside targeted digital platform specific obligations (see chapter 4), would assist in addressing some of the consumer protection concerns identified for digital platform services.

The ACCC recommends that the Australian Consumer Law (ACL) be amended to include new and expanded consumer safeguards to help address the range of consumer issues identified for digital platform services.

As many of the issues identified are prevalent across the economy as well as on digital platform services, the ACCC considers that these protections should apply economy wide. This would ensure that consumers receive similar protections both online and offline and would promote consistency. In particular, unfair trading practices (see section 3.1) and unfair contract terms (see section 3.2) distort consumer choice and lead to poor outcomes for individuals, small businesses, and the Australian economy more broadly.

In addition, we recommend several targeted obligations which would apply specifically to digital platforms to address issues that are either specific to digital platform services, or where the risk of harm is greater. These are discussed in chapter 4.

3.1. Addressing unfair trading practices

The ACCC continues to strongly support the introduction of a general prohibition on unfair trading practices into the Australian Consumer Law. Consideration of this is currently underway.

3.1.1. Unfair practices are not caught by existing consumer law

The ACCC has previously identified numerous examples of problematic conduct, including on digital platforms, which are currently unlikely to breach the ACL. These include, but are not limited to:

- **Adopting business practices to dissuade a consumer from exercising their contractual or other legal rights.**¹⁹² For example, online service providers making it difficult for consumers to cancel subscriptions after free trials, with the consequence that many subscriptions roll-over to paid subscriptions despite consumers no longer utilising or wanting them. This contrasts with easy and frictionless sign-up processes. In the EU, for example, the European Commission received complaints about consumers facing difficulties in cancelling their Amazon Prime account, which could constitute an aggressive commercial practice and is illegal in the EU. In response, Amazon agreed to simplify the process for unsubscribing.¹⁹³

¹⁹² ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 26, 498.

¹⁹³ European Commission, [Consumer protection: Amazon Prime changes its cancellation practices to comply with EU consumer rules](#), 1 July 2022, accessed 15 September 2022. Note that, in considering whether a commercial practice is aggressive, consideration is given to 'any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to

- **Inducing consent or agreement by very long contracts, providing insufficient time to consider contracts or all-or-nothing ‘clickwrap’ consents.** These practices are likely to prevent consumers from reading, or contribute to consumers’ tendency not to read online terms of service or privacy policies. This creates significant information asymmetries between consumers and digital platforms regarding the terms of their agreement.¹⁹⁴ In this regard, the Office of the Australian Information Commissioner’s (OAIC) 2020 Australian Community Attitudes to Privacy Survey found that only 31% of Australians read online privacy policies. One of the main reasons included the length of the policies.¹⁹⁵
- **Engaging in harmful and excessive tracking, collection and use of data.**¹⁹⁶ The ACCC has previously identified that the extent of collection, use and disclosure of data by digital platforms often does not align with consumer preferences.¹⁹⁷ This can leave consumers open to various risks and harms, including reduced privacy and security, increased profiling which can be used to manipulate consumers, increased risk of discrimination and exclusion, increased risks for vulnerable consumers and children who may be more easily identified and targeted, and reduced choice and quality of services.¹⁹⁸ The OAIC 2020 survey found that over 50% of Australians are uncomfortable with online businesses and digital platforms keeping information on what they have said and done online.¹⁹⁹ It also found that 81% of Australians believe asking for personal information that does not seem relevant for the purpose of the transaction to be misuse.²⁰⁰ Similarly, in the Consumer Policy and Research Centre (CPRC) 2020 Data and Technology Consumer Survey, 94% of consumers indicated that they did not feel comfortable with how their personal information is collected by platforms.²⁰¹
- **Using dark patterns and other interface design strategies (such as prominence and framing) which impede choice and harm consumers,** including in relation to consumers changing their default search engine²⁰² or making purchases on online retail marketplaces.²⁰³ For example, Mozilla submits that when users download a third-party application (app), they are often bombarded with pop-ups and warning messages that urge them to switch to the firm’s affiliated app based on claims regarding quality, security and privacy.²⁰⁴ While these practices can be justified and useful for users when faced with online threats, they may also be used unfairly to undermine consumers’ ability to benefit from using the app of their choice. Dark patterns are discussed in more detail below.

another product or another trader’. See [Directive \(EC\) 2005/29](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices (Unfair Commercial Practices Directive), Articles 8, 9(d).

- ¹⁹⁴ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 26, 394–396, 498. Clickwrap consents are online agreements using digital prompts that request users to provide their consent to online terms and conditions without requiring them to fully engage with the terms and policies of use: J Obar and A Oeldorf-Hirsch, [The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media](#), Social Media + Society, July–September 2018.
- ¹⁹⁵ OAIC, [2020 Australian Community Attitudes to Privacy Survey](#), September 2020, p 69.
- ¹⁹⁶ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 384–393; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp 45–56; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 11, 136–147; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 30–40.
- ¹⁹⁷ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 382–385, 389–390; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 52; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 11, 136–138; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 32–40.
- ¹⁹⁸ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 444–448; ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 40; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 55, Appendix D; ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, pp 44–45.
- ¹⁹⁹ OAIC, [2020 Australian Community Attitudes to Privacy Survey](#), September 2020, p 29.
- ²⁰⁰ OAIC, [2020 Australian Community Attitudes to Privacy Survey](#), September 2020, p 31.
- ²⁰¹ CPRC, [2020 Data and Technology Consumer Survey](#), December 2020, p 14.
- ²⁰² ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 58–67.
- ²⁰³ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 5.
- ²⁰⁴ Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 12–13.

The CPRC also raised concerns about platforms inducing consumer consent or agreement to data collection through concealed data practices.²⁰⁵ The CPRC notes these practices can:

- reduce consumers' ability to make informed choices (including how to protect themselves in the future)
- make it difficult for consumers to stop their personal information from being used in a way that conflicts with their preferences
- disincentivise firms from competing to provide products and services that best meet consumers' data and privacy preferences.

Some of the above examples, such as platforms making it difficult to leave a subscription or opt out of a service, were also raised in the Consumer Roundtable.²⁰⁶

Many of these forms of conduct, while detrimental to consumers, would be unlikely to breach the ACL because the conduct is:

- harmful, but not sufficiently severe to constitute unconscionable conduct
- not misleading or deceptive but distorts consumer choice by creating confusion or hiding or omitting relevant information
- not captured by the unfair contract term provisions such as harmful terms in non-standard form contracts or unfair conduct engaged in pursuant to a contract term that is, on the face of it, a reasonable contract term.

Further, as set out in the DPI Final Report,²⁰⁷ consumers often transact with digital platforms in an environment where acute information asymmetries and power imbalances exist, or where their behavioural biases may be exploited. Practices such as those mentioned above can exacerbate these issues and the resulting consumer harms.

These gaps in the ACL (both in the online and offline environment) warrant new protections against unfair trading practices, as previously advocated by the ACCC. In particular, the ACCC recommended the ACL be amended to include an economy-wide prohibition on unfair trading practices in the DPI Final Report,²⁰⁸ the Ad Tech Inquiry Final Report,²⁰⁹ and in Digital Platform Services Inquiry interim reports into Online Private Messaging Services,²¹⁰ App Marketplaces,²¹¹ Search Defaults and Choice Screens,²¹² and General Online Retail Marketplaces.²¹³ The ACCC has also advocated for an unfair trading practices prohibition in other contexts, including in inquiries in other markets,²¹⁴ submissions²¹⁵ and speeches.²¹⁶

²⁰⁵ CPRC, [Unfair Trading Practices in Digital Markets – Evidence and Regulatory Gaps](#), December 2020, pp 6–8.

²⁰⁶ ACCC, [Regulatory Reform Report consumer roundtable summary](#), 7 July 2022.

²⁰⁷ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 499.

²⁰⁸ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 26.

²⁰⁹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 40.

²¹⁰ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 74.

²¹¹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 11.

²¹² ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 67.

²¹³ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 5.

²¹⁴ ACCC, [Perishable Agricultural Goods Inquiry Report](#), 10 December 2020, p xvii.

²¹⁵ ACCC, [Submission to the Productivity Commission's Inquiry into Australia's productivity performance](#), April 2022, p 9; ACCC, [Submission to the Productivity Commission's Study into Aboriginal and Torres Strait Islander Visual Arts and Crafts](#), 10 December 2021, p 4.

²¹⁶ R Sims, [An Agenda to boost Australia's economic prosperity and fairness](#), Speech, National Press Club, 23 February 2022.

Multiple consumer groups, academics and other stakeholders expressed support for an unfair trading practices prohibition in their submissions to the ACCC's Discussion Paper.²¹⁷ The Centre for AI and Digital Ethics noted that the prohibition on misleading conduct has been successfully used to prompt greater transparency in data collection practices. However, it agrees that prohibition has been of limited use in ruling out unfair or manipulative practices and that an unfair trading practices prohibition could act as a 'safety net'.²¹⁸ The UTS Centre for Media Transition also expressed support for a targeted and calibrated prohibition on unfair trading practices which could provide an ex-post safeguard against concerning practices such as the use of dark patterns.²¹⁹

Dark patterns can cause harm and need further consideration

'Dark patterns' is a term used to describe 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.²²⁰

The ACCC has considered dark patterns on digital platforms both in the context of its general enforcement priorities,²²¹ and in its Digital Platform Services Inquiry.²²² There is also significant work occurring in Australia and overseas to further understand dark patterns and their impact on consumers.²²³

The ACCC has identified numerous practices that are being used to manipulate, exploit, or pressure Australian consumers, and which may be classified as dark patterns. This includes false scarcity reminders (such as low stock warnings) or false countdown timers.²²⁴ Other techniques may include preselected add-ons, illogical colours for click options (e.g. red is yes, and green is no) or changing click sequences (e.g. halfway through the website, the yes and no buttons are reversed, or the colour changed). Some of these tactics can be used both online and offline.

The Report on Search Defaults and Choice Screens identified instances of search engines frustrating consumer choice through the user interface design, including the use of dark patterns, and the framing and prominence of options.²²⁵ For example, during the process of downloading the Ecosia search engine browser extension on Microsoft Edge, friction was encountered at multiple stages. This included pop-up warnings and requiring users to enable

²¹⁷ CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Report](#), May 2022, p 6; eftpos, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 3-4; Centre for AI and Digital Ethics and Melbourne Law School, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; University of Technology Sydney Centre for Media Transition, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; Association for Data-driven Marketing and Advertising, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

²¹⁸ Centre for AI and Digital Ethics and Melbourne Law School, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 3-4.

²¹⁹ University of Technology Sydney Centre for Media Transition, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 7.

²²⁰ J Luguri and L Strahilevitz, [Shining a Light on Dark Patterns](#), *Journal of Legal Analysis*, 13:1 (2021), p 44. See also ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 57.

²²¹ R Sims, [ACCC's enforcement and compliance policy update 2022-2023](#), Speech, Committee for Economic Development of Australia, 3 March 2022.

²²² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 110, 121; ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 15-16, 56-67.

²²³ See, e.g. CMA, [Online Choice Architecture: How digital design can harm competition and consumers](#), Discussion Paper, April 2022; European Commission, [Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation](#), April 2022.

²²⁴ R Sims, [ACCC's enforcement and compliance policy update 2022-2023](#), Speech, Committee for Economic Development of Australia, 3 March 2022.

²²⁵ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 58-61.

settings before being able to use the browser extension, as well as disabling the extension even after a user confirms their decision to install.²²⁶

A number of submissions to the Discussion Paper raised concerns with the use of dark patterns on digital platforms.²²⁷ For example, the CPRC noted various examples outlined in the literature of online interface design strategies (in addition to those set out above) that negatively undermine consumer autonomy, such as:

- ‘false hierarchy’ where one choice option is made to stand out over others through size, placement, or colour
- ‘confirm shaming’ where wording on a button or link is presented in a such a way that it may use guilt to push the consumer into doing something they wouldn’t have otherwise done. Examples provided in the literature include encouragements for users to provide email addresses in exchange for a discount with links to statements such as ‘No thanks, I hate saving money’ if they do not wish to do so.²²⁸

The CPRC also noted concerns about the use of opaque data-driven targeting practices, and particularly, data practices that target consumers’ vulnerabilities.²²⁹ Similarly, the Cyber Security Cooperative Research Centre (CSCRC) expressed concern about the use of dark patterns to manipulate consumers into selecting more intrusive privacy controls and settings.²³⁰

Existing prohibitions in the ACL may cover some types of dark patterns (and similar offline practices). These include the prohibitions on misleading or deceptive conduct, false or misleading representations, unfair contract terms, and in the case of extremely harmful dark pattern practices, unconscionable conduct. However, the ACCC has expressed concerns that many dark patterns would fall outside existing prohibitions. We consider that an economy-wide unfair trading practices prohibition could potentially help address this gap.²³¹

The ACCC supports an unfair trade practices prohibition to help address dark patterns

The ACCC continues to support an unfair trading practices prohibition to help address the use of dark patterns by digital platforms. This position was supported in several submissions to the Discussion Paper including from the CPRC, CSCRC, CHOICE, the University of New South Wales Allens Hub and the Association for Data-driven Marketing and Advertising.²³²

²²⁶ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 15, 58–59. This was observed during an ACCC review of the user journey to change search engines and browsers.

²²⁷ CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 7; CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 10; Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Report](#), May 2022, p 6; University of New South Wales Allens Hub for Technology, Law and Innovation, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8; Association for Data-driven Marketing and Advertising, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9.

²²⁸ CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4. For the examples of confirm shaming, see Mathur et al, ‘Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites,’ *Proceedings of the ACM on Human-Computer Interaction*, 1(CSCW) (2019):019, pp 16–17.

²²⁹ CPRC, [Unfair Trading Practices in Digital Markets – Evidence and Regulatory Gaps](#), December 2020, pp 8–10. This refers to the tailoring of online experiences, particularly using data tracking technology, during the display and ordering of products and services online that are subtle and opaque, such that the consumer may be steered towards particular choices without realising it.

²³⁰ Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Report](#), May 2022, p 3.

²³¹ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 66; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 5. See also discussion of other measures considered: ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 121.

²³² CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 7; CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 4–5; Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Report](#), May 2022, p 6;

CHOICE submits that an economy-wide unfair trading practices prohibition would remove or avoid the need for sector-specific regulation to address these harms as it can be broadly applied to the market.²³³ In contrast, Professor Kimberlee Weatherall et al., submit that a new prohibition on unfair trade practices alone would not be adequate to ensure a fair market, and that further digital platform specific measures are required.²³⁴

Amazon submits that the ACCC should allow time for existing (i.e. unfair contract terms) and pending (an unfair trading practices prohibition) reforms to be implemented and enforced before seeking further new regulatory reforms regarding dark patterns.²³⁵ Google, similarly, submits that the concept of 'dark patterns' is new and not yet clearly defined and that further exploration is needed to better understand its prevalence and characteristics.²³⁶

Depending on how an unfair trading practices prohibition is ultimately framed, it may be that not all instances of dark patterns would (or should) amount to an unfair trading practice. The ACCC supports further consideration of the use and effect of dark patterns in Australia. This includes the types of practices that should be covered under the ACL as part of the Government's development of a regulatory impact statement to assess the merits of a possible unfair trading practices prohibition (see section 3.1.3). This will help ensure that any unfair trading practices prohibition appropriately captures harmful 'dark patterns' that are not currently captured by existing provisions of the ACL.

However, should the Government choose not to progress an economy-wide unfair trading practices prohibition, further consideration should be given to whether specific measures are required to address dark patterns in relation to digital platforms.

The ACCC further considers that the use of dark patterns by digital platforms with market power to frustrate consumer switching may warrant further competition-related measures. This conduct can reduce consumer switching and reduce competition. Some stakeholders support additional obligations that would apply specifically to digital platforms with market power that engage in such practices.²³⁷ The ACCC considers that any such obligations should be targeted at those firms with market power, and form part of any broader competition measures. This is discussed in more detail in section 6.4.

3.1.2. An unfair practices prohibition should apply economy wide and is necessary to bring Australia in line with other jurisdictions

As acknowledged in previous reports, many of the practices of concern identified by the ACCC are not confined to digital platforms. For example, as noted by Google, the practice of making the process for cancelling a service more difficult than signing up also applies to offline businesses such as pay television, newspaper subscriptions, health and fitness centre memberships and holiday packages.²³⁸ Multiple participants to the Consumer Roundtable

University of New South Wales Allens Hub for Technology, Law and Innovation, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 7–8; Australian Association of National Advertisers, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 6.

²³³ CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8.

²³⁴ Professor Kimberlee Weatherall, Barry Wang, and Jacky Zeng, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1.

²³⁵ Amazon, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4.

²³⁶ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 32.

²³⁷ ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 15; Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 20; Professor Kimberlee Weatherall, Barry Wang, and Jacky Zeng, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 16.

²³⁸ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 33.

agreed that many of the unfair trading practices experienced on digital platforms occur more widely across the whole economy.²³⁹

Consequently, the ACCC remains of the view that an unfair trading practices prohibition that applies across the economy is appropriate. This would ensure that harms occurring economy wide are addressed and would support consistent application across industries.²⁴⁰ This position received support in submissions with both Google and Meta submitting that, if there is an identified need for an unfair trading practices prohibition, it should not be limited to digital platforms as the identified consumer protection issues occur economy wide.²⁴¹ There was also significant support for an economy-wide unfair trading practices prohibition in the Consumer Roundtable.²⁴²

The introduction of an unfair trading practices prohibition would complement reforms already in train to improve the protections offered by the unfair contract terms prohibition in the ACL (see section 3.2). It would also bring Australia's consumer protections in line with many jurisdictions overseas (see box 3.1).

Box 3.1 International examples of unfair trading practices prohibitions

Multiple jurisdictions (including the EU, UK, US, Canada and Singapore) have general or specific protections against unfair trading practices. Examples from the EU and US are provided below.

European Union

The EU Unfair Commercial Practices Directive came into effect in 2005 and has been transposed into national law in all EU member states.²⁴³ The UPCD describes 3 tiers of unfair commercial practices:

- under the tier one general prohibition, a practice is unfair if it materially distorts or is likely to distort the economic behaviour of the average consumer with regards to the good or service or is contrary to the requirements of professional diligence²⁴⁴
- the second tier prohibits misleading acts and omissions and aggressive practices where they would cause average consumers to make decisions they would not otherwise make²⁴⁵
- the third tier prohibits 31 specific commercial practices referred to as a 'blacklist'.²⁴⁶ This includes providing online search results without clearly disclosing paid results, and measures to combat fake reviews.

The Unfair Commercial Practices Directive is complemented by a range of guidance about conduct that may constitute unfair commercial practices, including conduct that may occur

²³⁹ ACCC, [Regulatory Reform Report consumer roundtable summary](#), 7 July 2022, p 2.

²⁴⁰ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 499.

²⁴¹ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 13.

²⁴² ACCC, [Regulatory Reform Report consumer roundtable summary](#), 7 July 2022.

²⁴³ [Directive \(EC\) 2005/29](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. Note that the Unfair Commercial Practices Directive was amended in 2019 to address e.g. fake online reviews and paid higher rankings in online search engine queries. Many member states are yet to fully transpose these amendments. See [Directive \(EU\) 2019/2161](#).

²⁴⁴ [Directive \(EC\) 2005/29](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, section 1. The EU defines 'professional diligence' as "the special standard of skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or general principle of good faith in the trader's field of activity".

²⁴⁵ [Directive \(EC\) 2005/29](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, Article 2.

²⁴⁶ [Directive \(EC\) 2005/29](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, Annex 1.

across a range of digital platform services.²⁴⁷

United States

The US has long prohibited unfair or deceptive acts or practices in or affecting commerce, through legislation introduced in 1938. The Federal Trade Commission Act considers an act or practice unfair when:

- it causes or is likely to cause substantial injury (including financial) to consumers
- the injury is not outweighed by countervailing benefits to consumers or to competition
- the injury cannot be reasonably avoided by consumers themselves.²⁴⁸

3.1.3. Current consideration

Commonwealth, state and territory consumer Ministers have previously agreed to progress consideration of this issue through the development of a regulatory impact statement. This process will consider the nature and extent of unfair trading practices that are not currently captured by existing provisions of the ACL. It also considers options to address the problems, including a potential unfair trading practices prohibition. The ACCC is participating in this work. The Government will release a regulatory impact statement for public consultation in due course.²⁴⁹

3.2. Amending unfair contract terms laws

In the 2019 DPI Final Report, the ACCC recommended the ACL be amended so that unfair contract terms are prohibited (not just voidable). As discussed in section 1.6.1, the ACCC has observed that significant power imbalances between users and digital platforms can result in terms that are potentially unfair to consumers and small businesses.²⁵⁰

The ACCC considered that the current unfair contract terms provisions do not provide sufficient deterrence and recommended amendments to allow the ACCC to seek pecuniary penalties for the use of unfair contract terms to provide a greater deterrent for their use.²⁵¹ For example, certain practices – such as firms changing the terms on which products or services are provided without reasonable notice or the ability for consumers or small businesses to consider the new terms – continue to be a problem and would benefit from strengthened enforcement powers.²⁵²

On 28 September 2022, the Government introduced the *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022* into Parliament. The amendments proposed by the Bill include a prohibition on the use of, and reliance on, unfair terms in standard form contracts and civil pecuniary penalties for non-compliance.²⁵³ As of 30 September 2022, the Bill has not been passed. The ACCC continues to support amendments to the existing unfair contract term laws.

²⁴⁷ European Commission, [Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market](#), 29 December 2021.

²⁴⁸ *Federal Trade Commission Act*, 15 USC §§ 45(n).

²⁴⁹ Australian Consumer Law, [Meeting of Ministers for Consumer Affairs Friday 6 November 2020](#), accessed 15 September 2022.

²⁵⁰ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 37, 497–498.

²⁵¹ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 497.

²⁵² ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 497.

²⁵³ Parliament of Australia, [Treasury Laws Amendment \(More Competition, Better Prices\) Bill 2022](#), accessed 29 September 2022.

4. Additional consumer protections for users of digital platforms

Recommendation 2: Digital platform specific consumer measures

The ACCC recommends additional targeted measures to protect users of digital platforms, which should apply to all relevant digital platform services, including:

- Mandatory processes to prevent and remove scams, harmful apps and fake reviews (section 4.1) including:
 - a notice-and-action mechanism
 - verification of certain business users
 - additional verification of advertisers of financial services and products
 - improved review verification disclosures
 - public reporting on mitigation efforts.
- Mandatory internal dispute resolution standards that ensure accessibility, timeliness, accountability, the ability to escalate to a human representative and transparency (section 4.2).
- Ensuring consumers and small business have access to an independent external ombuds scheme (section 4.3).

Trust and confidence in the digital economy is essential to its long-term success. Consumers and businesses will only embrace digital opportunities if they are confident that they can trust the technologies and the entities they interact with online.

Scams, harmful apps, fake reviews, an inability to resolve concerns and a lack of trust in the internal processes adopted by digital platforms, all threaten a thriving digital economy. The ACCC considers these harms warrant new digital platform-specific regulation to reduce scams, harmful apps and fake reviews (section 4.1) and to improve dispute resolution (sections 4.2 and 4.3). The regulatory framework for such measures is discussed in section 4.4.

Addressing these issues will promote consumer trust and confidence in digital platforms, with benefits for the industry and the broader economy. Additional measures should build on the existing processes that digital platforms have in place and aim to establish a common minimum standard of protection for consumers and business users across different platforms. Scammers and other unscrupulous actors are likely to target any services that are not effectively protected, irrespective of platform size, so all firms providing the relevant platform services in Australia should be required to meet this minimum standard. In general, we consider that the compliance burden of the obligations would be proportionate to a platform's size, which lessens concerns that these obligations would disproportionately disadvantage smaller platforms.

New obligations for digital platforms would apply in addition to the existing (and any future) general provisions of the Australian Consumer Law (ACL) and should be designed to address specific issues that are not efficiently and effectively addressed under existing economy-wide legislation.

4.1. Addressing scams, harmful apps and fake reviews

Digital platforms should be required to implement processes to prevent and remove scams, harmful apps, and fake reviews on the platforms' services. This should include:

- a notice-and-action mechanism
- verification of certain business users
- additional verification of advertisers of financial services and products
- improved review verification disclosures
- public reporting on mitigation efforts.

The ACCC considers that such measures should apply, at a minimum, to:

- search, social media, online private messaging, app store, online retail marketplace, and digital advertising services, in respect of scams
- app stores in respect of harmful apps
- search, social media, app stores, online retail marketplace, and digital advertising services, in respect of fake reviews.

The growth of digital platforms and the significant time that consumers now spend on them means that scammers are increasingly using digital platform services to target Australian consumers and small businesses. The ACCC has observed rapid and sustained growth in the number and quantum of losses to scams and harmful apps on digital platforms.²⁵⁴ Similarly, as Australians spend more time and money online, consumers and small businesses are more reliant on online reviews and more vulnerable to harms from fake or manipulated reviews.²⁵⁵ Digital platforms currently provide a low-cost way for unscrupulous actors to efficiently target large numbers of consumers. The ACCC considers that absent targeted measures these trends are likely to increase as consumers spend more time online and digital platform services continue to grow.

The most effective way to prevent widespread scam victimisation is to prevent scammers from reaching consumers in the first place. This is the first prong of the ACCC's three-pronged approach to making Australia a harder target for scammers.²⁵⁶ Disrupting scams on digital platforms is of significant importance to reduce the extent of harm currently experienced by consumers online. Digital platforms have some incentive to take measures to stop scams and harmful apps,²⁵⁷ and there are examples of platforms taking proactive steps in this direction. However, platforms can also profit from scams that are spread by online ads or transactions on harmful apps. Further, platforms' incentives to effectively minimise scams may be lessened where a lack of competition limits the cost of reputational damage to the platform. Similarly, the high volume of consumer activity on digital platforms and the relative speed and ease with which reviews and ratings can be published online increase the degree of consumer harm posed by fake reviews on digital platforms.

²⁵⁴ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 504–507; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 56; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 114–115; ACCC, [Targeting scams: report of the ACCC on scam activity 2020](#), 7 June 2021, pp 22–24; ACCC, [Targeting scams: report of the ACCC on scam activity 2021](#), 4 July 2022, p 19.

²⁵⁵ CPRC, [Online reviews: a guide not a gospel](#), December 2019, p 3.

²⁵⁶ G Cass-Gottlieb, [Making Australia a harder target for scammers](#), Speech, Law Council of Australia's 2022 Consumer Rights Forum, 19 July 2022.

²⁵⁷ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 67; Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, Annex Q.11, pp 31–32.

The ACL will continue to play an essential role in protecting Australian consumers, including in markets for digital platform services. However, the ACCC considers that the scale of harm from scams, harmful apps and fake reviews on digital platforms warrants additional measures which would supplement the ACL in a targeted manner.

4.1.1. Growing consumer harms on digital platforms

As Australians adopt digital platform services for a larger variety of daily activities, scammers and other unscrupulous actors are increasingly targeting consumers and small businesses using digital platform services. During the consultation process and in submissions to the ACCC's Discussion Paper, stakeholders expressed concern regarding the adequacy of digital platforms' processes to address online scams, harmful apps and fake reviews.²⁵⁸

Scams

In 2021, Australians reported losses of over \$144 million to scams on social media, mobile apps, and other internet scams.²⁵⁹ This is almost double compared to 2020,²⁶⁰ and over 4 times the amount reported in 2017 (see figure 4.1).²⁶¹ Given estimates that only 13% of scam victims report scams to Scamwatch, the total sum lost annually to online scams is likely to be substantially higher.²⁶²

Scammers use digital platform services to target potential victims including through paid advertising, scam websites, fraudulent business pages, and fake accounts. The ACCC has identified that scams can be a particular problem in respect of the following digital platform services: search, social media, online private messaging,²⁶³ app stores,²⁶⁴ online marketplaces²⁶⁵ and digital advertising services.²⁶⁶ Like telecommunication services, digital platform services are situated at the start of the 'scam chain of events'.²⁶⁷ This term reflects the notion that scammers typically utilise multiple services to defraud their victims. The ACCC has received increasing numbers of reports to Scamwatch where victims were targeted via a digital platform service, then drawn to an encrypted messaging app, before being induced to make payments through a bank or cryptocurrency service.

²⁵⁸ ACCC, [Regulatory Reform Report consumer roundtable summary](#), 7 July 2022, pp 1–2; See, e.g. ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 13; Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 1–4; Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; Council of Small Business Organisations Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2.

²⁵⁹ For example, the ACCC's Targeting Scams report found that in 2021, reported losses from internet scams (\$52 million), social networking (\$56 million) and mobile apps (\$36 million) totalled \$144 million. See ACCC, [Targeting scams: report of the ACCC on scam activity 2021](#), 4 July 2022, p 19.

²⁶⁰ ACCC, [Targeting scams: Report of the ACCC on scam activity 2021](#), 4 July 2022, p 19; ACCC, [Targeting scams: report of the ACCC on scam activity 2020](#), 7 June 2021, p 2.

²⁶¹ ACCC, [Targeting scams: report of the ACCC on scam activity 2017](#), 21 May 2018, p 11.

²⁶² ACCC, [Targeting scams: report of the ACCC on scam activity 2021](#), 4 July 2022, p 17 (quoting Roy Morgan Consumer Panel research commissioned by the ACCC in 2021).

²⁶³ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 6.

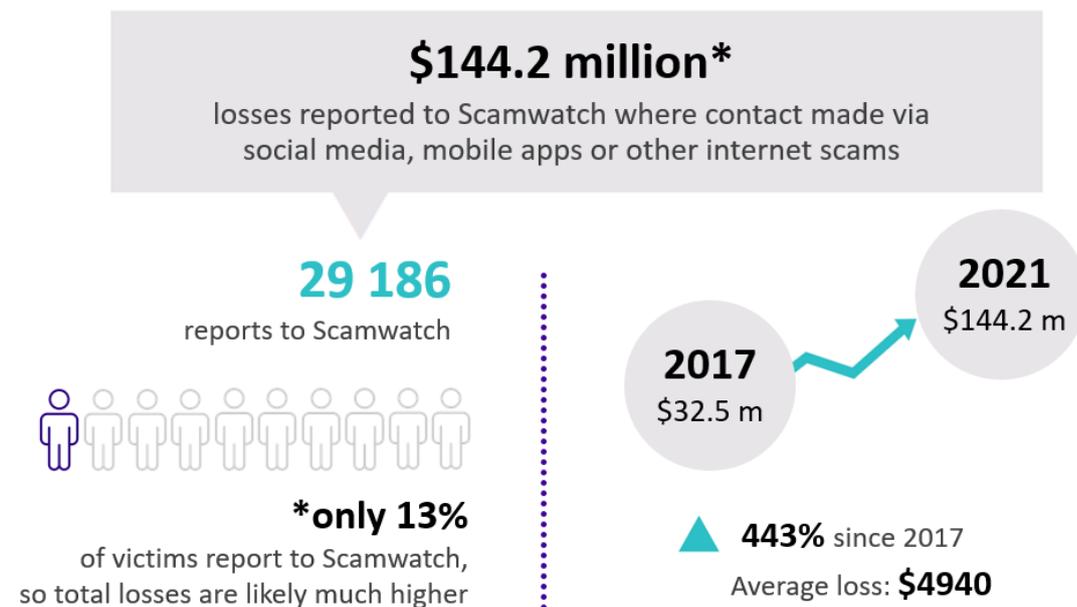
²⁶⁴ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 11.

²⁶⁵ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 45.

²⁶⁶ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 167.

²⁶⁷ Australian Payments Network, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

Figure 4.1 Harms from scams via digital platforms in Australia in 2021



Source: ACCC, [Targeting Scams: report on scams activity](#), 2017 – 2021

The ACCC is particularly concerned by the rapid growth of investment scams. Australians reported losses of \$158 million to investment scams between 1 January and 1 May this year, more than 3 times the amount lost over the same period last year.²⁶⁸ Because most scam losses are not reported, the true sum lost to investment scams is likely much higher.²⁶⁹ Investment scam losses made up over 3 quarters of all losses reported to Scamwatch over this period.²⁷⁰ The majority of losses to investment scams involved crypto-assets, comprising \$113 million of the reported losses in the period.²⁷¹ Cryptocurrency was also the most common payment method for investment scams.²⁷² Scamwatch data and consumer reports to the ACCC suggest many investment scams use digital platform services to target victims.²⁷³

The ACCC recognises that many digital platforms are already taking steps to protect consumers from scams. For example, Google outlines a number of measures it takes to remove and reduce scams and harmful content on its services.²⁷⁴ Despite these positive steps, the number of and losses to scams continues to rise on digital platforms. Hence, the ACCC considers that digital platforms should be required to implement specific processes to prevent and disrupt these harms, and better protect Australian consumers and small businesses from unscrupulous actors.

²⁶⁸ ACCC, [Australians are losing more money to investment scams](#), 6 June 2022, accessed 15 September 2022.

²⁶⁹ ACCC, [Targeting scams: report of the ACCC on scam activity 2021](#), 4 July 2022, p 10.

²⁷⁰ ACCC, [Australians are losing more money to investment scams](#), 6 June 2022, accessed 15 September 2022.

²⁷¹ ACCC, [Australians are losing more money to investment scams](#), 6 June 2022, accessed 15 September 2022.

²⁷² ACCC, [Australians are losing more money to investment scams](#), 6 June 2022, accessed 15 September 2022.

²⁷³ For example, scammers may use a digital platform’s advertising service to host advertisements which lead consumers to investment scams – see, e.g. ACCC, [ACCC takes action over alleged misleading conduct by Meta for publishing scam celebrity crypto ads on Facebook](#), 18 March 2022, accessed 15 September 2022.

²⁷⁴ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, Annexes Q.11 and Q.13, pp 36–47; Google, [First Supplementary Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), August 2022, pp 9, 14–15, 23–28.

Harmful apps

The ACCC has identified that despite Apple and Google's app review processes, exploitative, misleading, and otherwise harmful apps continue to appear on their app stores.²⁷⁵

Some harmful apps are essentially scams, relying on fraudulent representations to harm consumers and benefit the developer or a third party. Other apps are not outright scams but are nonetheless harmful, for example, apps with age-inappropriate functions that target children.

The ACCC recognises that Apple and Google prevent many harmful apps from reaching their app stores through a combination of technology and human-led app review,²⁷⁶ and their app stores are generally considered safer than third-party app stores.²⁷⁷ However, the ACCC considers that both platforms should take additional measures to protect consumers from harmful apps. In the Report on App Marketplaces, the ACCC identified an example of an app with thousands of negative reviews citing security, privacy and billing concerns, which was still available on the Google Play Store.²⁷⁸ The ACCC also identified that Apple and Google do not appear to provide adequate public reporting on the extent of harmful apps on their platforms.²⁷⁹

Fake reviews

The ACCC is concerned by the continuing prevalence of fake reviews on digital platforms. Misleading and deceptive practices around reviews can include writing or commissioning fake reviews, publishing incentivised reviews without disclosing incentives to consumers, or selectively moderating reviews (for example, by preventing or removing negative feedback).²⁸⁰

Many consumers rely on online reviews to inform their purchase decisions, whether purchasing online or in physical retail environments. Small businesses similarly rely on online ratings and reviews to attract customers, particularly if the business lacks an existing customer base. The combination of high demand for positive reviews and the fact that only some consumers may be willing to provide reviews creates an incentive for businesses to manipulate or pay for (through payments or other incentives) online ratings and reviews.²⁸¹

While the ACCC recognises that fake reviews are not isolated to digital platform services, the ACCC is concerned by the scale of harm that fake reviews on digital platforms pose to consumers and small businesses. Many digital platforms enable users to rate or review businesses on their platform and some platforms play an important intermediary role connecting consumers and businesses (see chapter 1). For example, one report identified that many consumers (64%) said they were likely to check Google reviews before visiting a

²⁷⁵ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 109.

²⁷⁶ CMA, [Mobile Ecosystems Market Study Final Report](#), 10 June 2022, p 257; Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 7; Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 35.

²⁷⁷ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 109.

²⁷⁸ See, e.g. ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 114.

²⁷⁹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 109.

²⁸⁰ OECD, [Understanding Online Consumer Ratings and Reviews](#), 9 September 2019, p 4. Additionally, a business may misuse digital platform services to manipulate consumers' perceptions of the business in other ways, for example by purchasing fake followers and fake "likes" to artificially inflate the business' apparent popularity – see Authority for Consumers and Markets, [ACM takes action against trade in fake reviews and fake likes](#), 25 June 2020, accessed 15 September 2022.

²⁸¹ Bundeskartellamt, [Consumer rights and online reviews: Need for action](#), October 2020, p 6.

business location.²⁸² This statistic supports the Council of Small Business Organisations Australia's (COSBOA) submission that manipulated Google reviews can cause severe financial impacts and reputational damage to businesses that are subject to fake negative reviews (or competing with businesses with fake positive reviews).²⁸³ Further, the high levels of consumer activity on the largest digital platforms (and the resulting value of good reviews for businesses) has led to large-scale review manipulation targeting reviews on large platforms including Facebook,²⁸⁴ Google,²⁸⁵ and Amazon.²⁸⁶ This is a persistent problem highlighted in media reports from as early as 2009.²⁸⁷

These practices frustrate consumer choice, distort competition and erode consumer trust in the digital economy. A survey of 1,000 Australian consumers commissioned by Reviews.org reported that 52% of respondents believed they had fallen for fake reviews and 28% did not trust online reviews.²⁸⁸ This distrust impedes consumers' participation in online commerce, with flow on effects for the wider Australian economy.

Submissions from Meta and Google highlight their voluntary efforts to address fake reviews and note that in many cases it is impossible to conclusively ascertain whether a review is genuine or fake.²⁸⁹ However, the ACCC is concerned that digital platforms are not doing enough to proactively prevent, detect and remove fake reviews from their platforms. We are also concerned they do not act promptly enough or consistently in responding to user reports when notified about potential fake reviews or reviewer profiles on their services. COSBOA and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) submit that small businesses face substantial difficulty in getting platforms to act on suspected fake review campaigns.²⁹⁰ Similarly, the UK consumer advocacy body Which? conducted a covert study on Facebook using a fake business account to purchase reviews from fake reviewer profiles. The authors made reports to Facebook about their actions, the fake reviewer profiles, and other business pages with suspicious reviews from the same profiles but found that Facebook was slow to remove the reviewer profiles and failed to remove the business pages involved.²⁹¹

²⁸² ReviewTrackers, [Online reviews statistics and trends: a 2022 report by ReviewTrackers](#), 1 December 2021, accessed 15 September 2022.

²⁸³ Council of Small Business Organisations Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2.

²⁸⁴ M Calnan, ['How fake reviews help boost businesses on Facebook'](#), *Which?*, 6 October 2021, accessed 15 September 2022.

²⁸⁵ H Walsh, ['Facebook, Google and Trustpilot fail to filter out fake reviews'](#), *Which?*, 28 July 2022, accessed 15 September 2022.

²⁸⁶ S He, B Hollenbeck and D Proserpio, ['The Market for Fake Reviews'](#), *SSRN*, 30 June 2022.

²⁸⁷ P Miller, ['Belkin rep hiring folks to write fake reviews on Amazon'](#), *engadget*, 17 January 2009, accessed 15 September 2022; A Hern, ['Amazon blames social media for struggle with fake reviews'](#), *The Guardian*, 16 June 2021, accessed 15 September 2022; N Nguyen, ['Fake Reviews and Inflated Ratings Are Still a Problem for Amazon'](#), *The Wall Street Journal*, 13 June 2021, accessed 15 September 2022.

²⁸⁸ G Dixon, ['More than 50% of Australians Believe They've Fallen for Fake Reviews'](#), *Reviews.org*, 13 August 2021, accessed 15 September 2022.

²⁸⁹ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 53–54; Google, [First Supplementary Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), August 2022, pp 26–28.

²⁹⁰ Council of Small Business Organisations Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

²⁹¹ H Walsh, ['Facebook, Google and Trustpilot fail to filter out fake reviews'](#), *Which?*, 28 July 2022, accessed 15 September 2022.

4.1.2. Further protections are required

The ACCC has repeatedly expressed concern about the growing risk to consumers posed by online scams and harmful apps.²⁹² Digital platforms that host these scams and harmful apps are likely well positioned to assist the fight against these harms.²⁹³

In a 2020 report on Australian scam trends, the ACCC recognised that technological changes over the preceding decade had provided unscrupulous actors with new low-cost ways to target large numbers of Australian consumers and small businesses.²⁹⁴ The ACCC identified in the DPI Final Report that large digital platforms needed to do more to take down scams and similar harmful content.²⁹⁵ The ACCC also recommended that large platforms needed to improve their dispute resolution processes and should provide redress, where appropriate, for consumers that have been harmed by scams on their platforms.²⁹⁶

Since then, Australian consumers and small businesses have reported rapidly increasing losses to scams and harmful apps enabled by digital platform services.²⁹⁷

The Australian Government has committed to implementing new measures to fight online scams across various industries of concern, including in respect of specific digital platform services.²⁹⁸ Overseas governments are also introducing or considering measures requiring digital platforms to do more to protect consumers from scams, harmful apps, and fake reviews.²⁹⁹

In addition, fake and misleading online reviews are one of the ACCC's 2022–23 Compliance and Enforcement Priorities (under the umbrella term consumer and fair-trading issues relating to deceptive practices in the digital economy).³⁰⁰ The ACCC has also previously taken action under the ACL against Australian businesses that have misled consumers by manipulating online reviews.³⁰¹ However, enforcement of the ACL is not sufficient to fully address this harm, especially when many individuals involved are based overseas and may use false user accounts to evade identification. Further, even when the ACCC brings a successful enforcement action under the ACL, consumers harmed by scams or harmful apps are not reimbursed for the losses they have experienced. For these reasons, platforms can and should do more to pro-actively address these problems to prevent harm to consumers.

Given the accelerating growth of scams and harmful apps on digital platforms and noting the success of targeted measures in other sectors (see box 4.2), the ACCC recommends that digital platforms also be required to implement specific processes to protect Australian consumers and small businesses online.

²⁹² See, e.g. ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 503–507; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 6; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 11; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 45.

²⁹³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 120.

²⁹⁴ ACCC, [Targeting Scams 2019: a review of scam activity since 2009](#), 22 June 2020, p i.

²⁹⁵ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 507.

²⁹⁶ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 507.

²⁹⁷ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 56; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 114–115; ACCC, [Targeting scams: report of the ACCC on scam activity 2020](#), 7 June 2021, p 2; ACCC, [Targeting scams: report of the ACCC on scam activity 2021](#), 4 July 2022, p 19.

²⁹⁸ Australian Labor Party, [Fighting Online Scams](#), accessed 15 September 2022.

²⁹⁹ See, e.g. European Commission, [Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment](#), 23 April 2022, accessed 15 September 2022; Government of the United Kingdom, [Online Safety Bill: factsheet](#), 19 April 2022, accessed 15 September 2022; United Kingdom Department for Business, Energy & Industrial Strategy, [New rules to protect consumers' hard-earned cash](#), 20 April 2022, accessed 15 September 2022.

³⁰⁰ ACCC, [Compliance & enforcement policy and priorities](#), March 2022, accessed 15 September 2022.

³⁰¹ See, e.g. ACCC, [Meriton to pay \\$3 million for misleading consumers on TripAdvisor](#), 31 July 2018, accessed 15 September 2022; ACCC, [HealthEngine to pay \\$2.9 million for misleading reviews and patient referrals](#), 20 August 2020, accessed 15 September 2022.

In relation to fake reviews on digital platforms, the ACCC recommends new measures be imposed on platforms to require them to promptly respond to reports about fake reviews and provide the public with information about their review verification measures. The ACCC also considers that improved dispute resolution processes are required to assist affected businesses to effectively escalate their concerns in respect of scams, harmful apps and fake reviews (see section 4.2 and 4.3).

4.1.3. Sector-specific measures to provide targeted protection

The ACCC considers that the growing consumer harms on digital platform services warrant a targeted response. While scams occur throughout the economy, some digital platform services have characteristics that make them an attractive mode of contact for scammers: specifically, the ability to reach many victims at low cost and the ability to target consumers based on specific vulnerabilities. Many submissions addressing consumer issues³⁰² and most stakeholders at the Consumer Roundtable³⁰³ supported specific obligations on digital platforms aimed at reducing consumer harms from scams and harmful apps.

Some submissions argued that existing economy-wide consumer measures under the ACL are sufficient to protect Australian consumers from harms arising on digital platform services.³⁰⁴ While the ACL will continue to play an important role in protecting Australian consumers, including in markets for digital platform services, the ACCC considers that the scale of harm from scams, harmful apps and fake reviews warrants targeted measures for digital platforms.

Throughout the Digital Platforms Inquiry and ongoing Digital Platform Services Inquiry, the ACCC has repeatedly expressed concern about the continued growth of scams, harmful apps and fake reviews across many kinds of digital platform services (see box 4.1).

Box 4.1 Past findings about increasing consumer harms on digital platforms

- **DPI Final Report:** In June 2019, the ACCC raised concerns about the risk to consumers posed by increasing numbers of scams on social media services, internet search engine services, online marketplaces and digital advertising.³⁰⁵ The ACCC also highlighted stakeholders' dissatisfaction with Google and Facebook's efforts to address fake reviews.³⁰⁶
- **Report on Online Private Messaging Services:** In September 2020, the ACCC expressed the view that all platforms needed to do more to remove scam activity on their services.³⁰⁷ This report expressed particular concern about the growing use of online private messaging apps to perpetrate scams,³⁰⁸ and noted continued increases in scams on social media and search services. This report also noted that despite

³⁰² ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 14; Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 11; Reset Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 9–10; Financial Services Council, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2; Free TV Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 8; Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Report](#), May 2022, p 6; Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 18.

³⁰³ ACCC, [Regulatory Reform Report consumer roundtable summary](#), 7 July 2022, p 1.

³⁰⁴ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 15–16; Law Council of Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 9–10.

³⁰⁵ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 504–506.

³⁰⁶ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 507.

³⁰⁷ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 6.

³⁰⁸ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 56.

warnings about celebrity endorsement scams in the DPI Final Report, these scams continued to be common.³⁰⁹

- **Report on App Marketplaces:** In March 2021, the ACCC described the continued prevalence of harmful apps on both Apple and Google’s app stores. The ACCC concluded that given these platforms’ gatekeeper roles, the representations they make to consumers about the safety of their stores, and their ability to monitor apps on their app stores, both firms should take more proactive steps to prevent and remove harmful apps.³¹⁰
- **Report on General Online Retail Marketplaces:** In March 2022, the ACCC identified that online shopping scams are increasing in Australia.³¹¹ The ACCC also noted that more Australian online shopping scam reports relate to online marketplaces, as compared to reports relating to domestic online retailers.³¹² This report also identified that fake reviews are an ongoing issue on online marketplaces.³¹³

This trend supports the ACCC’s view that without targeted measures, these consumer harms are likely to continue to increase. Further, consumer harms arising from scams, fake reviews and harmful apps occur in multiple markets regardless of the degree of market power of platforms in those markets. This means that improved competition resulting from the implementation of proposed competition measures would likely not reduce these issues. Unscrupulous actors are adaptable and opportunistic and are likely to use any available services to target consumers.

While the ACCC considers the ACL provides invaluable protection to consumers, enforcement of the ACL alone is likely insufficient to protect Australian consumers and small businesses from these growing harms on digital platforms. The ACL is not an efficient mechanism to prevent harm when most scams are perpetrated by individuals or organised criminals based overseas who are difficult to identify and prosecute. Consequently, the ACCC’s recommendation focuses on measures to prevent and remove scams, harmful apps, and fake reviews on digital platform services. This approach is consistent with targeted efforts in other sectors, including the telecommunications and payments sectors (see box 4.2). New measures should match protections in these sectors to reduce the capacity of scammers to migrate from telecommunications services to encrypted private messaging services such as WhatsApp.³¹⁴

Box 4.2 Targeted measures in other sectors at high risk of scams

Telecommunications industry

In February 2020, the *Telecommunications (Mobile Number Pre-Porting Additional Identity Verification) Industry Standard 2020* commenced, requiring telecommunications providers to use multifactor identity verification before porting mobile numbers.³¹⁵ This standard has led to a significant drop in unauthorised mobile porting and related scams.³¹⁶

In December 2020, the *Reducing Scam Calls Industry Code* commenced and placed obligations on telecommunications providers to monitor, trace and block scam phone

³⁰⁹ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 57.

³¹⁰ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 119–120.

³¹¹ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 45.

³¹² ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 45.

³¹³ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 43–44.

³¹⁴ ACCC, [Australians are losing more money to investment scams](#), 6 June 2022, accessed 15 September 2022.

³¹⁵ ACMA, [ACMA announces new measures to fight mobile number fraud](#), 28 February 2020, accessed 15 September 2022.

³¹⁶ ACMA, [Reducing the impact of unauthorised high-risk customer transactions](#), February 2022, p 11.

calls.³¹⁷ In August 2022, the Australian Communications and Media Authority announced that the code had prevented over 660 million scam calls from reaching consumers.³¹⁸ From January to July 2022, phone scams reported to Scamwatch had decreased 48% compared to the same period in 2021.³¹⁹

In July 2022, the *Reducing Scam Calls Industry Code* was revised to become the *Reducing Scam Calls and Scam SMS Code* to expand the earlier rules, now requiring telecommunications providers to identify, trace and block SMS scams as well as phone calls.³²⁰

Collaborative strategy in the Australian payments industry

In November 2021, the Australian payments industry launched its collaborative scam mitigation strategy. The voluntary strategy involves information sharing, standard setting, and data collection between industry participants (led by Australian Payments Network) and agencies including the Australian Banking Association, Australian Financial Crimes Exchange and IDCARE (Australia and New Zealand's identity and cyber support service).³²¹

Contingent reimbursement in the United Kingdom payments industry

In May 2019, the UK Payment Systems Regulator and payments industry launched the Contingent Reimbursement Model Code (CRM Code) to target authorised push payment scams.³²² Authorised push payment scams involve tricking a victim into transferring money to a fraudster via a bank transfer. The CRM Code was further strengthened with additional requirements in April 2022.³²³ Today, the CRM Code requires signatory payment service providers to:

- take steps to educate their customers about scams
- take steps to identify higher risk payments and customers who have a higher risk of becoming a victim of scams
- provide warnings to customers if the bank identifies an authorised push payment scam risk
- act quickly when a scam is reported
- take steps to stop fraudsters opening bank accounts
- reimburse customers who have lost money to scams in some circumstances.

The CRM Code has currently been signed by 10 major banking groups and covers 90% of relevant transactions in the UK.³²⁴

³¹⁷ ACMA, [New rules to detect, trace and block scam calls](#), 2 December 2020, accessed 15 September 2022.

³¹⁸ ACMA, [Action on spam and telemarketing: April to June 2022](#), accessed 15 September 2022. See also N O'Loughlin, [ACMA compliance priorities for telco customers](#), Speech, ACCANect 2022 – Better Basics, 14 September 2022.

³¹⁹ ACCC, [Targeting scams: report of the ACCC on scam activity 2021](#), 4 July 2022, p 44.

³²⁰ Communications Alliance Ltd, [Industry Code C661:2022 Reducing Scam Calls and Scam SMS](#), July 2022, pp i–iii.

³²¹ Australian Payments Network, [AusPayNet reinforces industry collaboration to tackle scams, together](#), 12 November 2021, accessed 15 September 2022.

³²² Lending Standards Board, [Contingent Reimbursement Model Code](#), accessed 15 September 2022.

³²³ Lending Standards Board, [Updates to CRM Code made to protect more customers](#), April 28 2022, accessed 15 September 2022.

³²⁴ UK Government, [Government approach to authorised push payment scam reimbursement](#), 10 May 2022, accessed 15 September 2022.

4.1.4. Concerns about inadequate processes

In the context of digital platform services, the ACCC is particularly concerned about the following areas, and calls for immediate improvement.

- **Failure to act on user reports:** platforms have at times failed to remove scams, harmful apps and fake reviews when notified by consumers, businesses, media, and other concerned parties (for example, public figures whose identities have been misused).³²⁵
- **Inadequate business user verification systems:** scammers continue to proliferate fraudulent pages on digital platforms, including pages impersonating public figures and legitimate businesses.³²⁶ Not only does this harm consumers, but it also harms those public figures and businesses that have been impersonated.
- **Platforms hosting ads for investment scams:** digital platforms continue to host insufficiently vetted ads that direct consumers to investment scams.³²⁷
- **Platforms providing insufficient detail about what verification steps they use for reviews, if any:** many platforms do not inform consumers about whether they have measures to check or verify the legitimacy of reviews and if so, what those measures are. This prevents consumers from making informed choices based on the most reliable sources.
- **Inconsistent and vague transparency reporting by digital platforms:** digital platforms' voluntary transparency reports do not allow consumer advocacy groups or regulators to effectively evaluate their consumer protection strategies or provide sufficient accountability to users.³²⁸

The recommendations below target each of these issues. These recommendations are intended to work together with the recommendations for internal and external dispute resolution (see sections 4.2 and 4.3), which enable consumers and business users to better enforce their rights through effective dispute resolution processes, including disputes involving scams, fake reviews, and harmful apps.

4.1.5. Processes platforms should implement

Platforms should promptly act when notified about scams, harmful apps, or fake reviews

The ACCC recommends that digital platforms should be required to provide a way for individuals and entities to notify the platform about suspected scams, harmful apps and fake reviews and that platforms must promptly act in response to these reports ('notice-and-action').

³²⁵ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp 59–60; ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 505–507; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 122.

³²⁶ E McPherson, '[Radio announcers caught up in fake Facebook profile scam](#)', *9 News*, 25 May 2022, accessed 15 September 2022.

³²⁷ See, e.g. M Roddan and J Shapiro, '[Google promotes bond scam amid police probe](#)', *The Australian Financial Review*, 31 May 2021, accessed 15 September 2022; M Roddan and J Shapiro, '[Millions vanish into crypto world in high-yield bond scam](#)', *The Australian Financial Review*, 5 March 2021, accessed 15 September 2022.

³²⁸ U Gal, '["Transparency reports" from tech giants are vague on how they're combating misinformation. It's time for legislation](#)', *The Conversation*, 10 June 2022, accessed 15 September 2022; N Lomas, '[Meta has a new scam ads problem down under](#)', *TechCrunch*, 18 March 2022, accessed 15 September 2022.

Several stakeholders called for mandatory notice-and-action mechanisms in submissions to the Discussion Paper.³²⁹ Notice-and-action mechanisms are also being considered for digital platforms in the UK and will soon be required in Europe (see box 4.3).

Box 4.3 International approaches to notice-and-action mechanisms

Digital Services Act, European Union

The Digital Services Act requires all providers of hosting services, including online platforms, to put mechanisms in place to allow any individual or entity to notify them of suspected illegal content on their service (including scams). Notices will be considered to give rise to actual knowledge or awareness of the content, and thereby liability, where they allow a diligent provider to identify the illegality of the content without a detailed legal examination. Providers must make a decision about the content of the notice in a timely, diligent, non-arbitrary and objective manner, and must notify the reporting person of its decision and provide information about redress possibilities in respect of the decision.³³⁰

Proposed Online Safety Bill, United Kingdom

The draft Online Safety Bill, currently before the House of Commons, requires providers of regulated user-to-user and search services to operate their service using proportionate systems and processes designed to address illegal content³³¹, with a particular provision targeted specifically at scam ads.³³² This includes a requirement that where a provider is alerted to the presence of such content, the provider must swiftly take down the content.

The ACCC considers a notice-and-action mechanism should include the following elements:

- **Notice:** platforms must provide user-friendly mechanisms for individuals and entities to report scams, harmful apps, or suspected review manipulation.
- **Action:** platforms must promptly respond to notices, for example, by removing suspected scam content, harmful apps or fake reviews or providing advice about the basis on which the content is permitted.
- **Communication:** platforms must promptly notify the reporting person and potentially affected consumers of processes and actions undertaken in response to the report. Potentially affected consumers include, for example, consumers that were shown a scam ad or interacted with a scam page.
- **Information sharing:** platforms must promptly share information about identified issues with other platforms and relevant agencies to aid consumer protection efforts. This aspect is particularly important given that many scams operate across platforms and are likely to migrate to less protected platforms or services.

³²⁹ Financial Services Council, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 14; Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; Free TV Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 8; Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Report](#), May 2022, p 7; Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2.

³³⁰ EU Digital Services Act, Article 14. Based on [text adopted by the European Parliament on 5 July 2022](#).

³³¹ Online Safety Bill (UK), s 9. Based on [Bill 121 2022-23 \(as amended in Public Bill Committee\)](#), 28 June 2022.

³³² Online Safety Bill (UK), s 34. Based on [Bill 121 2022-23 \(as amended in Public Bill Committee\)](#), 28 June 2022.

- **Redress:** platforms should be required to provide redress to users who have been harmed by the platform failing to meet its obligations under these measures (for example, by failing to act within a certain time after being notified of a scam on the platform).³³³

Platforms should proactively verify the identity of certain business users to prevent scams and harmful apps

The ACCC recommends that digital platforms should be required to take steps to verify the identity of certain business users, including advertisers, app developers and merchants, in order to minimise scams and harmful apps. For example, a digital platform that hosts ads should be required to obtain identifying documentation and business details from prospective advertisers, and take steps to verify these documents, before hosting paid promotions.³³⁴ Verification requirements are mandated for telecommunications service providers in Australia and for digital platforms in Europe under the Digital Services Act (see box 4.4).

Box 4.4 Examples of verification requirements

Telecommunications sector customer identity authentication rules

The *Telecommunications (Mobile Number Pre-Porting Additional Identity Verification) Industry Standard 2020*³³⁵ and *Telecommunications Service Provider (Customer Identity Authentication) Determination 2022*³³⁶ prevent telecommunications scams by imposing customer identity verification standards on telecommunications providers. These rules require providers to use multifactor identity verification to verify a customer's identity before providing higher risk transactions including mobile number porting and SIM-swap requests.

Digital Services Act, European Union

The Digital Services Act's 'Know Your Business Customer' obligations require platforms, that enable users to make distance contracts with traders, to receive identity information from all traders including:

- the trader's name, address, telephone number and email address
- a copy of the trader's identification documentation
- bank account details of the trader
- where registered in a public register, appropriate registration details of the trader.

Prior to enabling traders to use their services, platforms must make best efforts to assess whether the information received is reliable and complete. They may do this using an online database made available by the EU or member states, or through requests to the trader to provide supporting documents.³³⁷

Combined with the information sharing aspect of the notice-and-action recommendation above, this identity verification recommendation intends to reduce the capacity of unscrupulous actors to proliferate scams or harmful apps across platforms. For example, where identity documentation has been identified by one platform as involved with a scam,

³³³ Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Report](#), May 2022, p 7; Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 2–3.

³³⁴ ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 14; Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2.

³³⁵ ACMA, [ACMA announces new measures to fight mobile number fraud](#), 28 February 2020.

³³⁶ ACMA, [New ID check anti-scam rules apply from today](#), 30 June 2022.

³³⁷ EU Digital Services Act, Article 24(c). Based on [text adopted by the European Parliament on 5 July 2022](#).

other digital platforms could restrict services offered to accounts linked to that documentation and investigate their activities (including where users have interacted with the account or its advertisements).

This recommendation is also intended to reduce scammers' capacity to appropriate the identities of public figures to mislead consumers.³³⁸

The ACCC acknowledges the risk that scammers may use stolen identity information in attempting to evade verification requirements. Banking authorities in Germany, India and Singapore are addressing this risk by implementing video call verification protocols.³³⁹ An appropriate standard for identity verification processes should be determined subject to future assessment of the potential regulatory impact of different approaches.

Platforms should check financial advertisers are appropriately authorised

In addition to the identity verification recommendation, the ACCC further recommends that where platforms allow advertising of financial products and services (including crypto-assets),³⁴⁰ they should take additional steps to verify the legitimacy of the advertiser and the product or service. At minimum, this should require platforms to check that a prospective advertiser of financial products and services holds an appropriate licence from the Australian Securities and Investments Commission (ASIC). Submissions from the Financial Services Council (FSC) and Customer Owned Banking Association (COBA) support this recommendation.³⁴¹ This measure is also consistent with initiatives being implemented overseas (see box 4.5).

Box 4.5 International and domestic financial advertising developments

After the UK withdrew from the EU, the Financial Conduct Authority (FCA) of the UK became empowered to bring enforcement actions against platforms hosting financial ads for unlicensed entities.

The FCA issued a warning about this development to platforms in June 2021.³⁴² In response, Google updated its verification policy to require proof of FCA licensing from relevant advertisers on 30 August 2021.³⁴³ Since this update, Google reports seeing a substantial decline in reports of ads promoting financial scams.³⁴⁴

Google has voluntarily implemented equivalent policies in Australia, Singapore, and Taiwan, which took effect on 30 August 2022.³⁴⁵ The ACCC considers that digital platforms offering digital advertising in Australia should be required to incorporate similar checks before hosting financial ads.

³³⁸ Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

³³⁹ C Christensen, ['The Four e-KYC Models Around the World'](#), *Regulation Asia*, 5 April 2020, accessed 15 September 2022.

³⁴⁰ ASIC, [Crypto-assets \(Information Sheet 225\)](#), October 2021, accessed 15 September 2022.

³⁴¹ Financial Services Council, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

³⁴² K Makortoff, ['UK regulator warns Google about accepting scam adverts'](#), *The Guardian*, 15 June 2021, accessed 15 September 2022.

³⁴³ N Lomas, ['Google tightens UK policy on financial ads after watchdog pressure over scams'](#), *TechCrunch*, 30 June 2021, accessed 15 September 2022.

³⁴⁴ Google, [Australian Financial Services Advertisers Verification](#), 9 June 2022, accessed 15 September 2022.

³⁴⁵ Google, [Australian Financial Services Advertisers Verification](#), 9 June 2022, accessed 15 September 2022; A de Kretser, ['Google to act on scam ads for financial services'](#), *The Australian Financial Review*, 9 June 2022, accessed 15 September 2022.

This recommendation intends to reduce the proliferation of investment scams on digital platforms, which are currently the most financially harmful type of scam for Australian consumers by a substantial margin.³⁴⁶ This recommendation also recognises that consumers may assume a platform has performed appropriate due diligence before accepting a paid promotion.³⁴⁷

COBA further submits that platforms should be required to take additional steps to determine that the advertised product or service exists before providing paid-for advertising services.³⁴⁸

Platforms should inform consumers about their review verification measures

The ACCC recommends that where platforms show reviews and ratings of products or services, they should be required to provide users with information about whether the platform takes steps to help ensure that reviews are legitimate, and if steps are taken, what they are. This may include platforms outlining their policies for preventing, detecting and removing fake or misleading reviews. If no steps have been taken, this should be clearly disclosed to users. A similar requirement applies to all online traders that provide access to reviews in the EU, where a failure to include this information may be deemed a misleading omission.³⁴⁹

Prompts shown pursuant to this recommendation could also warn consumers about the possibility of reviews being fake or misleading and educate consumers about how to identify and report potentially fake reviews. A study by the UK consumer advocacy group Which? found that including a warning banner about fake reviews on a marketplace user interface reduced the extent of consumer harm arising from fake reviews.³⁵⁰

Platforms should provide clear and consistent public reports

The ACCC recommends that digital platforms should be required to publish easily comprehensible reports on actions taken to prevent scams, harmful apps and fake reviews on their platforms.³⁵¹ The relevant regulator should be empowered to specify mandatory information for inclusion in public reports, for example, the number and kind of notices submitted to the platform pursuant to the notice-and-action requirement above, and actions taken by the platform in response. Similar reporting requirements will soon apply in Europe and are being considered in the UK (see box 4.6).

The relevant regulator should also be able to request that certain detailed information is provided confidentially. For example, specific information about platforms' processes to prevent scams, harmful apps and fake reviews. This would allow the relevant regulator to assess platforms' voluntary consumer protection efforts, as well as platforms' compliance with regulatory requirements. Specific information about such processes should remain confidential to prevent unscrupulous actors from gaming platforms' consumer protection systems.

³⁴⁶ ACCC, [Targeting scams: report of the ACCC on scam activity 2021](#), 4 July 2022, p 6. In 2021, Australians reported to Scamwatch investment scam losses of \$177 million, comprising more than half of the \$324 million total reported lost to Scamwatch that year.

³⁴⁷ Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

³⁴⁸ Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2.

³⁴⁹ [Directive 2005/29/EC](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (EU), Article 7.

³⁵⁰ Which?, [The real impact of fake reviews: Summary report](#), 29 May 2020, p 8.

³⁵¹ ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 13; Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Report](#), May 2022, p 7.

Box 4.6 Examples of public reporting requirements

Digital Services Act, European Union

The Digital Services Act contains stepped transparency reporting requirements for intermediary services, online platforms and very large online platforms.³⁵² All 3 categories of platform must publish easily comprehensible reports on content moderation undertaken during the relevant period (annually, or 6-monthly for very large online platforms). The reports must include specific information including, for example:

- the number of notices submitted in accordance with the notice-and-action mechanism categorised by the type of alleged illegal content concerned
- actions taken pursuant to those notices
- the proportion of notices processed using automated means
- the median time needed to process these notices.³⁵³

The reports must also include meaningful and comprehensible information about content moderation engaged in at the providers' own initiative, including as specified in legislation.³⁵⁴

Online platforms are also required to publish information on the number and outcome of disputes submitted to dispute resolution bodies.³⁵⁵

Very large online platforms are additionally required to publish reports setting out the results of risk assessments, specific mitigation measures and independent audits required by the legislation.³⁵⁶

Micro and small enterprises are exempt from these reporting requirements.³⁵⁷ Micro and small enterprises are defined as those employing fewer than 50 people and whose annual turnover and/or annual balance sheet total does not exceed EUR10 million.³⁵⁸

Proposed Online Safety Bill, United Kingdom

The draft Online Safety Bill requires the Office of Communications (Ofcom) to provide providers of user-to-user and search services with an annual transparency notice. Upon receiving a notice, the service provider must produce a report containing all the information described in the notice.³⁵⁹

Ofcom is required to consult with providers of regulated services and produce guidance about how it will determine which information it will require in transparency reports, how this information will be used, and any other information it considers relevant to the production and publication of these reports.³⁶⁰

Schedule 8 to the Online Safety Bill contains a non-exhaustive list of 30 matters about which information may be required, including the incidence of illegal and harmful content on the platform, the number of users who are assumed to have encountered this content, and the systems and processes for users to report this content.³⁶¹

³⁵² EU Digital Services Act, Articles 13, 23, 33. Based on [text adopted by the European Parliament on 5 July 2022](#).

³⁵³ EU Digital Services Act, Article 13. Based on [text adopted by the European Parliament on 5 July 2022](#).

³⁵⁴ EU Digital Services Act, Article 13(1)(c). Based on [text adopted by the European Parliament on 5 July 2022](#).

³⁵⁵ EU Digital Services Act, Article 23. Based on [text adopted by the European Parliament on 5 July 2022](#).

³⁵⁶ EU Digital Services Act, Article 33. Based on [text adopted by the European Parliament on 5 July 2022](#).

³⁵⁷ EU Digital Services Act, Article 13(2). Based on [text adopted by the European Parliament on 5 July 2022](#).

³⁵⁸ European Commission, [Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises](#), 2003/361/EC, Annex, Article 2.

³⁵⁹ Online Safety Bill (UK), s 64. Based on [Bill 121 2022-23 \(as amended in Public Bill Committee\)](#), 28 June 2022.

³⁶⁰ Online Safety Bill (UK), s 65. Based on [Bill 121 2022-23 \(as amended in Public Bill Committee\)](#), 28 June 2022.

³⁶¹ Online Safety Bill (UK), schedule 8. Based on [Bill 121 2022-23 \(as amended in Public Bill Committee\)](#), 28 June 2022.

This recommendation would assist the relevant regulator and the broader public to:

- assess platforms' efforts to address scams, fake reviews and harmful apps
- compare similar platforms on consistent metrics
- monitor emerging areas of concern and assess the effectiveness of the measures proposed in this section
- identify where scammers and other unscrupulous actors may have adapted in response to new measures.

Public reporting and confidential information provided pursuant to this recommendation could also inform future policy decisions related to protecting consumers from these forms of online harms.

4.2. Improving internal dispute resolution processes

Digital platforms should be obliged to meet mandatory minimum internal dispute resolution standards, which should ensure accessibility, timeliness, accountability, the ability to escalate to a human representative, and transparency.

The ACCC considers that such measures should apply, at a minimum, to search, social media, online private messaging, app stores, online retail marketplaces and digital advertising services.

4.2.1. Lack of access to quick and easy dispute resolution and accountability

The ACCC has observed that Australian consumers and small businesses often find it hard to achieve quick and easy resolution of complaints and disputes with digital platforms.³⁶² Unscrupulous actors (e.g. untrustworthy sellers and scam advertisers) can take advantage of a digital platform's inadequate dispute resolution processes to proliferate harm on the platform.

While digital platform services are easy to access and are often inexpensive or free, there are often frictions and transaction costs associated with resolving problems when they arise.

The types of complaints where concerns have been raised include complaints regarding the decisions of digital platforms to suspend or terminate services or user accounts, and in relation to scam content, harmful apps and fake reviews.

While the ACCC considers the ACL provides protections for consumers, the online environment provides challenges when trying to enforce these rights. For example, given the online nature of the service, and a lack of contact details, users may not be able to contact a representative of a digital platform to resolve an issue with the platform. In addition, the ACCC has observed that where disputes are largely low in individual value but high in volume, and involve multiple jurisdictions, use of the State and Courts as an enforcement mechanism is not practicable or cost effective.³⁶³ In a study by the CPRC, consumers expressed the view that they would not seek a refund or challenge a fee if resolution was too costly or complex to pursue.³⁶⁴

³⁶² ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 163–164, 507–510; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 71; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 122; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 50–51, 70–72.

³⁶³ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 50.

³⁶⁴ CPRC, [Australian consumers in their own words](#), 29 June 2022, p 29.

Digital platforms are also increasingly acting as economic and social gatekeepers between various users of their services and as moderators of online content. This creates a significant power imbalance between digital platforms and their users, particularly where users have incurred material sunk investments in reliance on these services. The ACCC considers that additional obligations are required to ensure that digital platforms act responsibly and transparently in their dealings with users; and those users, particularly business users, have sufficient certainty to make efficient investment decisions. Robust dispute resolution processes are important to achieving this and for building consumer and small business trust in digital platforms.

In turn, adequate dispute resolution processes can enhance the integrity of all users operating on digital platforms by making it more difficult for unscrupulous actors to engage in harmful conduct. This also has benefits by enhancing trust in digital platform services.

4.2.2. Positive obligations to improve internal dispute resolution standards

The ACCC has considered various ways to improve the ability for consumers and small businesses to resolve complaints and disputes quickly and efficiently. The ACCC concludes that positive obligations on digital platforms to implement minimum internal dispute resolution standards would be an effective means of achieving this.

The ACCC first recommended more effective internal dispute resolution processes for digital platforms in the 2019 DPI Final Report.³⁶⁵ Since then, the ACCC has repeatedly made additional findings regarding the need for improved dispute resolution processes in the Digital Platform Services Inquiry for a broad range of consumer and business user complaints across a range of services including social media, online private messaging, online marketplaces and app store services.³⁶⁶

The ACCC remains concerned by digital platforms' lack of accountability and the inability for consumers and business users to effectively enforce their rights when disputes arise on digital platform services. As such, the ACCC reiterates its support for the introduction of positive obligations mandating minimum internal dispute resolution standards to be imposed on digital platforms, supported by an independent external dispute resolution scheme (see section 4.3).

4.2.3. Significant concerns around accountability and transparency

Given the prevalence of digital platform services and their importance for many consumers and businesses, it is important that users have effective means to lodge complaints and resolve disputes with digital platforms in a timely and fair way.

In submissions to the Discussion Paper, stakeholders have continued to identify a lack of effective dispute resolution processes as a key issue in their dealings with digital platforms.³⁶⁷ In particular, concerns have been raised with the ACCC regarding the complexity, time and cost of existing dispute resolution processes, as well as a lack of

³⁶⁵ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 508–509.

³⁶⁶ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp 61, 73; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 12, 56; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 52, 72.

³⁶⁷ ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 17–18; Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 1–2; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, pp 20–21; Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; ACCC, [Summary of Small Business and Franchising Consultative Committee \(Out-of-session\) Meeting](#), 22 February 2019, pp 3–4.

responsiveness, inconsistent and unfair handling of complaints, and a lack of transparency over the decision-making of digital platforms.³⁶⁸

Research from the Australian Communications Consumer Action Network (ACCAN) found that almost 3 in 4 Australians surveyed agree that it needs to be easier to make a complaint and to get issues resolved with digital platforms.³⁶⁹ ACCAN also found that 78% of Australians surveyed agree that it needs to be easier for people to get their issues resolved, and 60% feel like there is not much they can do when something goes wrong online.

Most stakeholders therefore supported a specific requirement on digital platforms to improve aspects of their processes for resolving disputes with consumers and small businesses.³⁷⁰ Minimum standards for an internal dispute resolution scheme, alongside an external dispute resolution scheme, would enable digital platform users to gain access to quick, meaningful and direct resolution of complaints, and be able to trust that their concerns have been dealt with fairly and efficiently. Research published by United Nations Conference on Trade and Development (UNCTAD) found that fast and fair dispute resolution processes in e-commerce increase consumer confidence, brand/service loyalty and satisfaction, and trust in online services.³⁷¹

The need for trust and meaningful engagement with digital platforms has become even more urgent in light of the significant increase in consumers' and businesses' use of, and reliance on, digital platform services during the COVID-19 pandemic.

Numerous studies since the beginning of the pandemic have observed an accelerated rate of digitisation of services across sectors, with many businesses offering goods and services via digital platforms for the first time in order to reach customers.³⁷² The Organisation for Economic Cooperation and Development (OECD) found that lockdown and physical distancing measures imposed in many countries during 2020 contributed to a shift of economic activity to some digital platforms (e.g. online marketplaces and restaurant delivery).³⁷³ The inability for users to effectively resolve issues on digital platforms is likely to reduce trust of both consumers and small business users, both in terms of the digital platforms themselves and the users that operate on digital platforms (e.g. sellers and advertisers). Further, this is likely to dampen the economic benefits of digitisation (discussed further below).

Overseas, there are numerous examples of proposals that include positive obligations on relevant digital platforms to provide effective dispute resolution processes (see box 4.7).

³⁶⁸ See, e.g. ACCC, [Summary of Small Business and Franchising Consultative Committee \(Out-of-session\) Meeting](#), 22 February 2019.

³⁶⁹ ACCAN, [New research finds nearly three-quarters of Australians want better complaints handling from digital platform](#), 29 November 2021. Note that this includes Government online services.

³⁷⁰ This refers to the stakeholders that expressed a view on dispute resolution. For example, ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 17–18; Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 20; Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; Office of the Australian Information Commissioner, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 11–12; Telecommunications Industry Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 2; University of New South Wales Allens Hub for Technology, Law and Innovation, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9.

³⁷¹ United Nations Conference on Trade and Development, [Consumer trust in the digital economy: The case for online dispute resolution](#), Research Paper No. 72 (2021), p 28.

³⁷² For example, Australian Broadband Advisory Council, [Riding the digital wave: Report on COVID-19 Trends and Forward Work Program](#), November 2020, pp 9–17; CPRC, [COVID-19 and Consumers: from crisis to recovery](#), June 2020, p 17; UNCTAD, [COVID-19 and e-Commerce: A Global Review](#), 2021, pp 37–43.

³⁷³ OECD Policy Responses to Coronavirus, [The role of online platforms in weathering the COVID-19 shock](#), updated 8 January 2021, p 6.

Box 4.7 International approaches to internal dispute resolution requirements for digital platforms

European Union

The Platform to Business (P2B) Regulation came into effect in July 2020. It requires online intermediation services (including app stores, e-commerce and social media³⁷⁴) to provide for an internal system for handling complaints of business users that is free, easily accessible and guarantees that complaints are dealt with in a reasonable time period.³⁷⁵ The system must be based on the principles of transparency, equal treatment for equivalent situations and treating complaints in a manner proportionate to their importance and complexity. Business users can lodge complaints for (a) non-compliance with the P2B Regulations, (b) technological issues which affect the complainant, and (c) measures taken by, or the behaviour of, the online intermediary which affect the complainant.

In addition, the Digital Services Act requires providers of online platforms to ensure that their internal complaint-handling systems are easy to access and user friendly.³⁷⁶ Online platforms are also required to handle complaints submitted in a timely, non-discriminatory, diligent and non-arbitrary manner.³⁷⁷ Users can lodge complaints against decisions of the platform including whether to remove, disable access or restrict visibility of information, to suspend or terminate provision of a service, or to suspend or terminate the users' account.

Japan

In Japan, co-regulatory obligations have been introduced on specified digital platforms to develop systems and procedures for settling complaints and disputes (in addition to reporting obligations).³⁷⁸

Types of complaints and disputes

Mandatory minimum standards for internal dispute resolution processes would assist in the following types of complaints and disputes arising on relevant digital platforms that the ACCC has observed:

- **Losses caused by harmful apps, low quality apps that fail to meet consumer guarantees, and unauthorised billing issues:** the ACCC has previously expressed concern that both Apple and Google appear to place much of the responsibility on app developers for providing refunds, limiting their own role while promoting the value of their centralised payment systems for consumers.³⁷⁹ The ACCC noted that clear guidance from digital platforms about a consumer's entitlements to access a refund, and the pathway for doing so if a developer is uncontactable or slow to respond, is necessary for consumers to access refunds in accordance with their rights.³⁸⁰
- **The supply of products on general online retail marketplaces that fail to meet the ACL consumer guarantees:** this includes where the costs of pursuing a dispute is higher than the purchase price of the product. While some online marketplaces do have

³⁷⁴ Covers online intermediary service providers industry wide, but *excluding* online advertising tools, online advertising exchanges, and online search engines.

³⁷⁵ [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 (P2B Regulation), Article 11.

³⁷⁶ EU Digital Services Act, Article 17(2). Based on [text adopted by the European Parliament on 5 July 2022](#).

³⁷⁷ EU Digital Services Act, Article 17(3). Based on [text adopted by the European Parliament on 5 July 2022](#).

³⁷⁸ The Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms came into effect on 1 February 2021. For more information: see Japanese Ministry of Economy Trade, and Industry, [Key Points of the Act on Improving Transparency and Fairness of Digital Platforms](#), accessed 15 September 2022.

³⁷⁹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 124.

³⁸⁰ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 125.

processes in place that can assist consumers in this situation, such as money-back guarantees, these do not apply to all types of disputes.³⁸¹

- **Disputes between sellers and online marketplaces:** the ACCC has previously noted its concerns that sellers have inadequate access to avenues for redress when they have disputes with an online retail marketplace and that dispute resolution measures would assist to provide them with an avenue to challenge or appeal decisions.³⁸²
- **Disputes in relation to the app review process:** the ACCC has previously noted that there is an opportunity for app stores to improve how they interpret and enforce terms and conditions in the app review process; as well as how they communicate with third-party app developers. The ACCC also noted that improved dispute resolution could address concerns raised by third-party app developers.³⁸³ See also sections 6.7 and 6.8 for additional discussion of app review processes.
- **Decisions to suspend services or terminate a user's account:** the ACCC has raised concerns that digital platforms often have an unqualified unilateral discretion regarding decisions to suspend or terminate a user's account for any reason and often do not adequately explain their reasons or allow for review of the decision. Such decisions may have significant impacts on users.³⁸⁴ This is particularly the case for business users reliant on digital platforms to reach consumers.
- **Decisions to suspend or terminate the provision of a digital platform service or part of a service (e.g. blocking of content, suspension of ad campaigns):** the ACCC has also raised concerns that digital platforms often have unqualified unilateral discretion to suspend or terminate a user's ad campaign for any reason or to remove or block advertising or other content for any reason, and often do not adequately explain the reasons or allow a review of the decision.³⁸⁵ This discretion could have a significant impact on, for example, businesses that are reliant on producing content for or on platforms.³⁸⁶
- **Reporting and removal of scam content:** the ACCC has repeatedly expressed a need for large digital platforms to do more (including providing redress where appropriate) in response to consumer complaints or disputes in relation to scam content, which results in significant losses for consumers and small businesses (see also section 4.1).³⁸⁷
- **Reporting and removal of fake reviews:** the ACCC is concerned by the prevalence of fake reviews that mislead consumers or unfairly harm a business's reputation.³⁸⁸ Various stakeholders previously raised concerns with Google and Meta's processes for managing fake reviews (see also section 4.1).³⁸⁹

As the examples above illustrate, consumers and business users may experience different types of complaints. As such, the ACCC considers that mandatory minimum internal dispute resolution standards should apply to complaints made by both consumer and business users.

³⁸¹ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 50.

³⁸² ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 8.

³⁸³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 56, 125–126.

³⁸⁴ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp 70–71.

³⁸⁵ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp 70–71.

³⁸⁶ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 70.

³⁸⁷ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 503 and 507; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 73; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 45.

³⁸⁸ ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, pp 51–52.

³⁸⁹ ACCC, [Summary of Small Business and Franchising Consultative Committee \(Out-of-session\) Meeting](#), 22 February 2019, pp 2–4. See also ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 507.

Consumer and business harms from inadequate dispute resolution

As mentioned above, ineffective dispute resolution can reduce user trust in digital platforms and the broader online environment, which can have negative impacts on the economy. It can also increase the time taken and cost associated with resolving disputes.³⁹⁰

The inability for Australian users to sufficiently resolve disputes with digital platforms has the potential to result in significant consumer harm, such as financial loss, loss of time and effort, social exclusion, negative impacts on physical and mental health, and reputational damage. It can deter consumers from pursuing complaints and seeking redress. For example, participants in qualitative research conducted by the CPRC conducted between June and August 2021 noted they did not pursue redress for issues with products and services purchased online, including via digital platforms, as they felt the likelihood of being compensated was low.³⁹¹

Similarly, the ACCC considers that affected business users, including small businesses, may face significant harms from inadequate dispute resolution, particularly where business users are dependent on digital platforms to reach customers. These could include financial losses, reputational harm, loss of customers or data, and negative health impacts.

A lack of adequate dispute resolution and transparency regarding certain types of decisions also amplifies the power imbalance between digital platforms and their individual users. This has the potential to both exacerbate the broader harms, such as financial losses arising from the inability to access a digital platform or the impact of fake reviews, and to prolong the specific harms relating to each complaint or dispute, such as harms that arise when a platform fails to remove scam content.³⁹²

4.2.4. More transparency and accountability are required

The ACCC considers that more effective internal dispute resolution processes are essential to address some of the consumer harms arising on digital platform services. Mandatory minimum standards for internal dispute resolution should be implemented to improve the accessibility, responsiveness, and accountability of platforms' resolution of complaints or disputes raised by consumers and business users.

The ACCC has previously noted that mandatory standards could be modelled on the ASIC Regulatory Guide 165: Licensing: Internal and external dispute resolution (RG165), which has since been superseded by the Regulatory Guide 271: Internal dispute resolution (RG271).³⁹³ The ASIC standards include requirements with regards to visibility, accessibility, cost, responsiveness, remedies, timeliness, objectivity and fairness, privacy and record keeping.

Accessible processes

Digital platforms' internal processes for resolving complaints and disputes, including contact information and any applicable guidelines used in the settling of complaints and disputes, should be easily accessible from a link on the platform's website, or app. The link could be available on the home or landing page of the digital platform, or available via a drop-down menu or a link at the bottom of the page.

³⁹⁰ For example, the 2016 Australian Consumer Survey found that it costs Australians \$16.31 billion a year to resolve consumer issues (not specific to digital platforms). EY Sweeny, [Australian Consumer Survey 2016](#), The Treasury on behalf of Consumer Affairs Australia and New Zealand, May 2016.

³⁹¹ CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12.

³⁹² ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 2022, pp 56, 100.

³⁹³ ASIC, [Regulatory Guide 271: Internal Dispute Resolution](#) (RG 271), September 2021. Note that ASIC has the power to create such standards as part of the financial services licensing scheme.

In this regard, the CPRC submits that consumers often struggle to know, understand, and enforce their rights and are therefore frequently left to navigate any form of recourse themselves or simply give up.³⁹⁴ In another recent study conducted by the CPRC, many consumers expressed the view that they would not continue to seek a refund or challenge a fee if resolution was too costly or complex to pursue.³⁹⁵

Not knowing how to raise complaints, where to find information about this or who to contact creates barriers for users in resolving disputes and enforcing their rights. An obligation to make these processes easily accessible would provide users with the information needed to raise a complaint or dispute and may also increase the transparency of digital platforms' decision-making processes for disputes, making them clearer and easier to navigate.

Not only would this help to reduce consumer and small business harm, to the extent that complaints are resolved in a less costly and more timely manner, but it would also increase consumer and small business trust in digital platforms. This would benefit individual platforms, as well as digital platform services more broadly.

In the EU, accessibility is a key part of allowing users to contest certain decisions of online platforms easily and effectively. The Digital Services Act requires online platforms³⁹⁶ to ensure their internal dispute resolution scheme is easy to access and user friendly. In addition, the EU Regulation on Consumer Online Dispute Resolution (ODR) sets up a common online platform for all online disputes to allow consumers in the EU, Iceland, Liechtenstein, and Norway to quickly and easily contact an online trader to resolve a dispute (and also to seek external dispute resolution). Under the ODR, online retailers and traders must provide an easily accessible link to this platform, which enables direct communication between the parties (including the ability to upload photos and schedule a meeting), as well as a contact e-mail address.³⁹⁷

Timely responses

The ACCC recommends that users who lodge complaints or raise disputes with a digital platform must receive a prompt acknowledgement of receipt setting out next steps in the dispute resolution process, as well as reasonable timeframes for a substantive response.

Prompt action can be critical in limiting both the financial and non-financial harm on digital platform users from a digital platform's decisions, such as the harm caused to a business user from an unwarranted account suspension or negative fake reviews. For example, ASBFEO noted that a 7-day timeframe for resolving account access issues can be extremely damaging for business users, especially those who rely on social media services (e.g. Facebook or Instagram) for the entirety of their trade.³⁹⁸ Delays in responding to complaints and disputes not only increases the risk of harm and magnitude of harm, it also creates significant barriers to users pursuing disputes and reduces trust in digital platforms.

Google advocates for sufficient flexibility, noting that rigid requirements can have unintended consequences. For example, timelines for resolving disputes can lead to over-removal of content or apps to the detriment of legitimate traders.³⁹⁹ Whether a platform provides a substantive response to a complaint within a reasonable timeframe will depend on the nature

³⁹⁴ CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12.

³⁹⁵ CPRC, [Australian consumers in their own words](#), June 2022, p 29.

³⁹⁶ For example, online marketplaces, app stores, collaborative economy platforms, social networks.

³⁹⁷ [Regulation \(EU\) No 524/2013](#) of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

³⁹⁸ Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

³⁹⁹ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 41.

of the complaint and the user, and platforms should consider tailoring their procedures to reflect the above considerations (including the nature and magnitude of any ongoing harms). However, the ACCC recommends a timeframe of no more than 30 days to respond, at which point a consumer or small business can elect to continue progressing the dispute directly with the platform or to escalate the matter to the ombuds (see section 4.3).

Accountability

Digital platforms should be required to provide the user with a substantive response to their complaint or dispute setting out:

- a description of the resolution of the complaint or dispute
- an explanation of how any relevant terms of service or any applicable guidelines have been applied
- the extent to which automated decision-making was used in making the decision
- ways to escalate the complaint or dispute (including if the platform considers the complaint or dispute resolved) to a human representative or external dispute resolution scheme.

Providing users with information regarding the decision-making process and reasons for the substantive decision increases trust, clarity and certainty about how issues will be dealt with on digital platforms.

Google notes that its policies work best when consumers and partners are aware of the rules and understand how it enforces them. Google submits that it works to make this information clear and easily available to all, including via blog posts, dedicated Help Centres, Community Guidelines, and YouTube videos.⁴⁰⁰ On the other hand, it also noted that too much transparency about platforms' decisions (for example, the details of how the platforms detected issues that resulted in the termination and suspension of accounts) could expose the system to abuse and gaming by unscrupulous actors.⁴⁰¹

While a platform's response should allow users to understand the reasons behind the decision and should reflect the complexity of the complaint and the nature and extent of any investigation conducted by the platform, the ACCC considers that digital platforms should not be expected to provide information that is commercially sensitive, or that would breach privacy laws or otherwise harm legitimate interests.

Human representative and monitoring

Any users whose disputes have been processed via automated decision-making must be provided with the opportunity to escalate their complaint or dispute to a human representative, who would be responsible for considering and communicating substantively with the user. This measure should also be expanded to require the human representative to be based in Australia (i.e. a local contact).

This recommended measure was supported by numerous stakeholders. These stakeholders submit that it is important for users to be able to inquire about the status of their complaint, ask for clarification or explanation or otherwise escalate a complaint to a human representative.⁴⁰² This would not prevent the use of automated decision making in the first

⁴⁰⁰ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 41.

⁴⁰¹ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 40.

⁴⁰² Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; University of New South Wales Allens Hub for Technology, Law and Innovation, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9; Daily Mail Australia,

instance but would provide users with an avenue to escalate if they have not been able to receive a satisfactory response (including being caught in an automated response loop⁴⁰³) or otherwise wish to progress their complaint. ASBFEO also advocated for digital platforms to provide a direct support line for small businesses.⁴⁰⁴

Transparency

Any effective dispute resolution scheme should also include accountability measures which allow the relevant regulator to monitor effectiveness of and compliance with the minimum standards.

In this context, the ACCC considers that digital platforms should be required to publicly report on, or at least keep records (i.e. via record keeping rules) on key metrics including:

- (a) number and type of complaints and disputes received and resolved
- (b) the percentage of complaints resolved in favour of the user and the platform respectively (and any third-party, where relevant)
- (c) the extent to which automated decision-making was used
- (d) time taken to resolve complaints and disputes.

In the case of record keeping rules, these records would need to be made available to the relevant regulator upon request. Such measures would allow the relevant regulator to monitor compliance with and the success of the measures. It could also allow for the identification of systemic issues or trends which can be raised with the platforms for attention or for further regulatory response. The relevant regulator may also consider publishing this information to increase transparency and accountability of digital platforms' decisions.

4.2.5. Managing compliance burden and ensuring scalability

The ACCC recognises that minimum internal dispute resolution standards are likely to have compliance costs for digital platforms.

Digital platforms have raised the need to ensure 'scalability' of dispute resolution mechanisms. This includes being able to continue to use automated means to resolve a large proportion of consumer complaints and disputes that arise. For example, Google noted that its policies, enforcement and dispute resolution processes reflect the nature of the product, users and the type of issues and complaints that arise. It also noted that these processes may involve a combination of machine learning, artificial intelligence and specialist review which in the vast majority of cases can address issues before they result in a complaint or a dispute.⁴⁰⁵ These existing processes allow it to respond to issues at scale. For example, Google disabled 1.7 million ad accounts for policy violations (including fraudulent behaviour and scams) and blocked or removed approximately 101 million ads for violating its misrepresentation policies in 2020.⁴⁰⁶ As noted above, the ACCC considers that transparent and accountable automated decision-making should continue to play a role in effectively addressing large volumes of complaints and disputes. However, these must be

[Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 20.

⁴⁰³ For example, when a company uses automatic means to respond to contacts, users can get stuck in a loop whereby the user raises a complaint via the means specified by the company (e.g. email, chat), they receive an automated response from the company, the user then tries to contact the company regarding the unsatisfactory response and gets another automated response etc.

⁴⁰⁴ Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 3–4.

⁴⁰⁵ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 39.

⁴⁰⁶ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 32.

accompanied by opportunities to escalate complaints and disputes to human representatives where necessary.

Similarly, the ACCC recognises the potential for gaming of the dispute resolution process by users and the need to design the measures in such ways as to minimise the scope for misuse. For example, the EU Digital Services Act allows digital platforms to suspend, for a reasonable period of time, the processing of takedown notices and complaints by individuals or entities that frequently submit notices or complaints that are manifestly unfounded.⁴⁰⁷ Such suspensions under the Digital Services Act require prior warning and are also subject to oversight. Further consideration could be given to whether such measures would be beneficial in Australia to reduce the likelihood and impacts of any misuse of dispute resolution processes.

The ACCC also sees the need for careful design and alignment between Australian regulators to avoid overlap with any existing or proposed internal dispute resolution standards (see box 4.8 for more information).

Box 4.8 Complaint handling functions for digital platforms in Australia

The Australian Communications and Media Authority (ACMA) is responsible for regulating communication and media services in Australia. As part of this role, it handles complaints regarding telecommunications and media providers, including regarding the receipt of unwanted texts or emails.

The ACMA also oversees the voluntary Australian Code of Practice on Disinformation and Misinformation, developed by the industry association DIGI.⁴⁰⁸ Misinformation can include false news articles, doctored images or videos, false information shared on social media and scam advertisements. Under the Code, the Australian public can complain to DIGI if they believe a signatory has materially breached commitments in the Code to protect Australians from online dis/misinformation and to adopt scalable (though not prescriptive) measures to reduce its spread and visibility. This code does not cover individual complaints about decisions of signatories to remove or retain specific content on their platforms, which should be directed to signatories via platform reporting tools.⁴⁰⁹

The Office of the eSafety Commissioner is responsible for safeguarding Australians at risk from online harms and to promote safer, more positive online experiences. The Office of the eSafety Commissioner can investigate instances of serious online abuse (such as cyberbullying) and illegal or restricted online content (such as child sexual abuse material) and direct such material to be taken down.⁴¹⁰

The Office of the Australian Information Commissioner (OAIC) also deals with complaints about the mishandling of personal details and provides the Australian public with the ability to report data breaches. The OAIC acts as an impartial third party to investigate breaches of the Privacy Act and can seek redress for the complainant (e.g. to take steps to remove access to private information, an apology, compensation for financial or non-financial loss).⁴¹¹

⁴⁰⁷ EU Digital Services Act, Article 20(2). Based on [text adopted by the European Parliament on 5 July 2022](#).

⁴⁰⁸ DIGI, [Australian Code of Practice on Disinformation and Misinformation](#), February 2021, accessed 15 September 2022. Note, not all providers of digital platform services are signatories. As at the time of writing, the Code has been adopted by Adobe, Apple, Facebook, Google, Microsoft, Redbubble, TikTok and Twitter.

⁴⁰⁹ See ACMA, [Online misinformation](#), accessed 15 September 2022.

⁴¹⁰ See eSafety Commissioner, [What you can report to eSafety](#), accessed 15 September 2022.

⁴¹¹ See OAIC, [How we investigate and resolve your complaint](#), accessed 15 September 2022.

4.3. Ensuring access to an independent external dispute resolution scheme

An independent ombuds scheme should be established to handle any complaints and disputes that are subject to the mandatory minimum internal dispute resolution standards, and which have not been resolved to the consumer or business user's satisfaction.

The ombuds should have the ability to compel information, make decisions that are binding on relevant digital platforms (such as requiring digital platforms to take down scams or fake reviews), order compensation in appropriate cases, and investigate and refer systemic issues in complaints and disputes received.

The ACCC has also repeatedly called for and continues to recommend an external dispute resolution scheme for digital platforms in the form of an ombuds scheme.⁴¹² Such a scheme would go hand-in-hand with and support the mandatory internal dispute resolution standards outlined in section 4.2. The ombuds scheme would ideally be introduced in primary legislation to ensure enforceability (see also section 4.4).

4.3.1. A new ombuds scheme to support internal dispute resolution measures

An ombuds scheme and the ability to escalate complaints and disputes to an independent body is critical to ensuring the effectiveness of internal dispute resolution measures.

This measure recognises and seeks to address the power imbalances between digital platforms and their users. In this regard, the ACCC has previously found that many small businesses are unable to negotiate the terms on which they do business with platforms such as Google and Meta and that this can be evident in the difficulties they encounter when attempting to seek effective dispute resolution.⁴¹³ The Centre for AI and Digital Ethics submits that ombuds schemes, which typically offer both mediation and an inquisitorial model for resolving disputes, address the stark inequality of resources and experience between individual complainants and firms.⁴¹⁴ In addition to this power imbalance, the lack of transparency over the decision-making and processes of digital platforms creates additional mistrust.

The ACCC considers that a prohibition on unfair trading practices and strengthening of the unfair contract terms provisions (see sections 3.1 and 3.2) would go some way towards addressing the ability of firms to take advantage of such power imbalances. However, an external, independent, and impartial dispute resolution process offers more immediate and practical solutions for individual platform users than enforcement of ACL prohibitions. Further, these economy-wide reforms to the ACL would not address the lack of independence and oversight over how digital platforms' terms, conditions and policies are applied or enforced and how appeals are assessed. An external, independent, and impartial decision-maker is essential to address both actual and a perceived lack of independence, to improve the quality of decision making and maintain trust between digital platforms and their users.

⁴¹² ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 509–510; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp 6, 61, 73; ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 12, 56, 125; ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 4, 23, 52.

⁴¹³ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 163.

⁴¹⁴ Centre for AI and Digital Ethics and Melbourne Law School, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5.

As noted previously, it is important that users can escalate their complaints to an external body if they are not satisfied with the outcome of a digital platform's internal dispute resolution processes.⁴¹⁵ Many stakeholders have pointed out such avenues are non-existent or lacking at present, particularly compared to other sectors (such as telecommunications, energy and water).⁴¹⁶ In this regard, we note that the majority of submissions to the Discussion Paper were supportive of the need for an external dispute resolution scheme,⁴¹⁷ although Meta noted that not all types of disputes are equally suited to external dispute resolution.⁴¹⁸

On the other hand, some stakeholders noted that there are some existing dispute resolution schemes available in Australia.⁴¹⁹ For example, Google noted that Australian consumers and businesses have access to a range of government and industry dispute resolution mechanisms.⁴²⁰ However, these avenues are not available for all types of complaints and users (particularly those issues sought to be addressed by the ACCC's recommended measures), may be inaccessible or may not deliver adequate remedies. Furthermore, existing bodies are simply not resourced to deal with the range, volume and complexity of disputes occurring on digital platforms. The inability for some agencies to engage with digital platforms in a meaningful way can also impede their ability to assist consumers and small businesses to obtain redress. As noted in section 4.2.5, any external dispute mechanism would need to take into account existing frameworks to avoid overlap.

In relation to small business disputes, ASBFEO notes that it has had some success in advocating on a case-by-case basis for small businesses and would be able to function as an additional level of dispute resolution recourse for more complex matters requiring an external and independent perspective.⁴²¹ The Telecommunications Industry Ombudsman (TIO) also agreed that some business-to-business complaints could be dealt with by ASBFEO.⁴²² However, while ASBFEO provides dispute resolution support, it does not have powers to make binding decisions or to order compensation. COSBOA submits that while ASBFEO can give one-on-one assistance, including providing referrals to government resources and alternative dispute resolution, there are no avenues for seeking redress.⁴²³ COSBOA argues that empowering and effectively resourcing ASBFEO to make binding

⁴¹⁵ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 51.

⁴¹⁶ See Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 3–4; TIO, [Submission to the Treasury consultation on the Final Digital Platforms Inquiry Report](#), September 2019, p 5.

⁴¹⁷ ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 6, 17–18; Centre for AI and Digital Ethics and Melbourne Law School, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 10; CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; Customer Owned Banking Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 2; Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 13; Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 68–69; Office of the Australian Information Commissioner, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 11–12; Telecommunications Industry Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 2; University of New South Wales Allens Hub for Technology, Law and Innovation, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9.

⁴¹⁸ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 69.

⁴¹⁹ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 39; DIGI, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 27–28.

⁴²⁰ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 39–40.

⁴²¹ Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 3–4.

⁴²² TIO, [Submission to the Treasury consultation on the Final Digital Platforms Inquiry Report](#), September 2019, p 18.

⁴²³ Council of Small Business Organisations Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

decisions, including awarding compensation, might be a solution to allow small businesses to address any disagreements.⁴²⁴

For an ombuds scheme to be effective, the ombuds would need to have the ability to compel information and make binding decisions on digital platforms. Such decisions should be subject to the principles of fairness. This is in line with the Australian Government's Benchmarks for Industry-based Customer Dispute Resolution which state that determinations should be based 'on what is fair and reasonable, having regard to good industry practice, relevant industry codes of practice and the law'.⁴²⁵

The mechanism for the ACCC's recommended independent ombuds to award compensation for losses caused directly by actions or inactions of the digital platform may be similar to the TIO's powers in relation to compensation, which are subject to the loss being directly caused by the telecommunications provider and additional limits on the compensation (see box 4.9). Similar parameters and limitations could apply to the application of an ombuds scheme in this context. An independent ombuds with the ability to order compensation is likely to further encourage digital platforms to ensure that their own internal dispute resolution processes provide users with adequate remedies and that they act quickly to resolve disputes involving ongoing losses.

In the EU, the P2B Regulation introduced mandatory obligations for online intermediation services to identify 2 or more mediators in their terms and conditions that they are willing to engage in out of court dispute resolution, where an internal complaint handling system was not able to resolve the issue.⁴²⁶ Under the Digital Services Act, online platforms are required to implement out-of-court dispute settlement mechanisms. Online platforms captured by the Digital Services Act must also engage in good faith and are bound by the decisions taken by the external body.

Increased accountability of internal processes and higher standards of service

The ACCC considers that an independent body is essential to ensure accountability and objective decision making in disputes between users and digital platforms. External and impartial monitoring of complaints and disputes increases the incentive for the platforms to implement more effective internal processes and enables the identification of systemic issues or trends which can be raised with the platforms for attention or for further regulatory response.

The Australian Government's Benchmarks for Industry-based Customer Dispute Resolution highlights the importance of independence in terms of both processes and decisions, as well as the importance of reporting on systemic problems to participating organisations, policy agencies and regulators.⁴²⁷ Independence is key, noting it has been reported that allowing companies to pick their own review boards – such as Meta's Oversight Board⁴²⁸ – can enable them to effectively control the outcomes of independent reviews over time.⁴²⁹

⁴²⁴ Council of Small Business Organisations Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

⁴²⁵ Australian Government, [Key Practices for Industry-based Customer Dispute Resolution](#), February 2015, p 15.

⁴²⁶ [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 (P2B Regulation), Article 12–13.

⁴²⁷ Australian Government, [Benchmarks for Industry-based Customer Dispute Resolution](#), February 2015, p 7; Australian Government, [Key Practices for Industry-based Customer Dispute Resolution](#), February 2015, p 11.

⁴²⁸ Meta, [Oversight Board](#), accessed 15 September 2022.

⁴²⁹ M MacCarthy, Brookings Institution, [Report: A dispute resolution program for social media companies](#), 9 October 2020.

An alternative to litigation

An ombuds scheme would also provide effective independent means of dispute resolution without requiring parties to resort to costly and time-consuming litigation. The Centre for AI and Digital Ethics, for example, submits that consumer and small business ombuds schemes are an accessible and effective way of supporting individuals to assert their rights and protect their interests, in circumstances where they are unlikely to have the resources to pursue a matter in court.⁴³⁰ The ACCC considers that providing an alternative to litigation is essential to reducing barriers to enabling users to enforce their rights and ultimately build trust in digital platform services.

Enables monitoring and investigation of systemic issues

An effective ombuds scheme would assist regulators, such as the ACCC, ASIC, the ACMA and the OAIC, to better enforce consumer protection, industry codes and other relevant legislation. It would not be an alternative to enforcement action by a regulator where platform conduct breaches relevant laws but would rather provide individual platform users with more immediate and practical resolutions than enforcement of legislation can achieve.

In this context, the ACCC considers that an independent ombuds should be given powers and sufficient resources to share information directly with regulators, refer and report annually on systemic issues and make recommendations for (and engage with) industry to make improvements. The TIO suggests that any digital platform ombuds scheme should include a clear pathway between the ombuds and the regulator to enable the scheme to refer non-compliance with membership obligations, ombuds decisions and unresolved systemic issues for regulatory action.⁴³¹

Scope of ombuds scheme

There is the potential for many different types of disputes to arise on digital platforms that may not be satisfactorily resolved via internal dispute resolution processes. In the event that the Australian Government chooses to implement such a scheme, further consideration should be given to whether all of the types of disputes subject to minimum internal dispute resolution standards would be appropriately handled by an ombuds scheme (particularly given potential areas of overlap with other regulatory regimes as set out in box 4.8).

The ACCC recommends that such a scheme be introduced into primary legislation to ensure enforceability, with failure to participate in the scheme or to comply with an ombuds decision attracting penalties (see chapter 7).

As with the independent dispute resolution scheme, the ACCC proposes that an ombuds scheme would apply to all digital platforms providing relevant services. However, some stakeholders have suggested that dispute resolution measures could be applied only to certain digital platforms (e.g. based on size, importance).⁴³²

Box 4.9 provides some examples of effective dispute resolution schemes in other sectors.

⁴³⁰ Centre for AI and Digital Ethics and Melbourne Law School, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5.

⁴³¹ Telecommunications Industry Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 2, 6.

⁴³² See, e.g. Australian Small Business and Family Enterprise Ombudsman, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5.

Box 4.9 Examples of effective external dispute resolution schemes in other sectors

Australian Financial Complaints Authority (AFCA)

AFCA provides consumers and small businesses⁴³³ with free, independent external dispute resolution for financial complaints that have not been able to be resolved via mandatory internal dispute resolution obligations, as an alternative to going to court.⁴³⁴ AFCA has power to make binding decisions, including to award compensation for losses suffered because of a financial service providers' error or inappropriate conduct. AFCA is also required to identify, refer, and report systemic issues, serious contraventions and other reportable breaches to ASIC. All providers of specified financial services are required to be members of and fund the AFCA scheme (through annual registration fees and complaint-related charges). There are, however, limited exceptions for certain types of financial service providers.

Telecommunications Industry Ombudsman (TIO)

The TIO provides independent external dispute resolution for consumers and small businesses⁴³⁵ who have been unable to resolve their complaint directly with a telecommunication service provider.⁴³⁶ The TIO can make binding decisions, including requiring compensation (up to \$100,000) for financial and non-financial losses caused directly by the provider. The TIO can also investigate systemic issues and, where applicable, report systemic conduct to the ACMA and the ACCC. All telecommunication service providers are required to be members of and fund the TIO scheme (through an industry levy). The ACMA may, however, provide exemptions to specific providers having regard to the extent to which the provider deals with consumers and small business, and the potential for complaints about their services.⁴³⁷

State and territory energy and water ombuds schemes

The Australian Capital Territory, New South Wales (NSW), Queensland, South Australia, Tasmania, Victoria, and Western Australia all have free, independent ombudsman schemes to assist consumers with resolving complaints about electricity, gas and water service providers that have not been able to be resolved directly with the provider.⁴³⁸ For example, in NSW, the Energy & Water Ombudsman NSW (EWON) can make binding decisions, including compensation orders.⁴³⁹ All electricity networks, gas networks, retailers and water providers are required to be members of the EWON (subject to limited exemptions⁴⁴⁰), which is funded by membership fees and complaint-related charges.

⁴³³ Defined as businesses with fewer than 100 employees. See AFCA, [Information for small business](#), accessed 15 September 2022.

⁴³⁴ Financial complaints include complaints regarding credit, finance and loans, insurance, banking, investments, financial advice and superannuation. See AFCA, [About AFCA](#), accessed 15 September 2022; ASIC, [Dispute Resolution](#), accessed 15 September 2022.

⁴³⁵ Includes small business and not-for-profit companies with up to \$3m annual turnover and no more than 20 full-time employees. See TIO, [Addressing the causes of small business complaints](#), June 2020, p 4.

⁴³⁶ For more information, see [TIO website](#).

⁴³⁷ *Telecommunications (Consumer Protection and Service Standards) Act 1999*, section 129.

⁴³⁸ The relevant bodies are the [ACT Civil and Administrative Tribunal](#), [Energy & Water Ombudsman NSW](#), [Energy and Water Ombudsman Queensland](#), [Energy and Water Ombudsman South Australia](#), [Energy Ombudsman Tasmania](#), [Energy and Water Ombudsman \(Victoria\)](#), and the [Energy and Water Ombudsman \(Western Australia\)](#).

⁴³⁹ For more information, see [Energy & Water Ombudsman NSW website](#).

⁴⁴⁰ For example, energy providers that only provide services to commercial/large customers (non-residential). For more information, see AER, [Exempt entities - dispute resolution and ombudsman membership](#), accessed 15 September 2022; Energy & Water Ombudsman NSW, [Types of member providers](#), accessed 15 September 2022.

4.3.2. Need for careful design and industry consultation

Any ombuds scheme would need to be carefully designed with consideration of any potential for overlap or conflict with other existing avenues for redress (for example, in relation to online harms, advertising standards, privacy, disinformation and misinformation). This would need to be subject to further consultation.

As noted above, there has been significant support for an industry-specific ombuds to address complaints and disputes arising in relation to different types of digital services and tailored to these services. However, DIGI notes that more channels for complaints may create greater consumer confusion as users are given the 'run-around' to call different agencies to resolve a single issue.⁴⁴¹ Furthermore, the UTS Centre for Media Transition has raised concerns that some types of complaints and disputes may continue to be handled by other bodies and that creation of a new digital platform ombuds (which does not have jurisdiction over all digital platform-related complaints) would not be cost effective.⁴⁴²

While the ACCC recognises that a 'one-stop-shop' for digital platform complaints would significantly improve accessibility for users, a 'no wrong door' policy should also be sufficient to ensure that consumers are able to be directed to the appropriate agency. If the Australian Government were to adopt such a scheme, further consideration could be given to how consumers can be provided with additional information to easily self-determine the appropriate body for their dispute (e.g. by digital platforms in their own internal dispute resolution procedures, or the ombuds website). The UTS Centre for Media Transition has suggested that this could be undertaken by a clearing house or portal that enables a user to be directed to the appropriate body.⁴⁴³

Stakeholders have raised concerns about whether a single ombuds would have the capability and capacity to effectively address the wide range of consumer concerns and online harms that arise in the digital world, especially given the level of subject matter and technical expertise required to meaningfully assist consumers.⁴⁴⁴ The ACCC recognises that a digital platform ombuds scheme would likely need to handle a high volume of complaints and disputes and would need to be appropriately resourced. In this regard, the AFCA (which is a one-stop-shop for consumers and small businesses who have a dispute with their financial firm) could be a useful example. The AFCA dealt with over 72,000 complaints in 2021–22 and has a chief and deputy chief ombuds, along with 60 specialist ombuds and adjudicators.⁴⁴⁵ The ACCC has previously suggested that the TIO may be an appropriate body to implement the scheme.⁴⁴⁶ After further consideration, the ACCC now suggests that an industry-specific ombuds would be preferable given that an existing body may not have the capability and capacity to undertake this role.

The ACCC notes that the Australian Government could also use an appropriately designed funding model to fund the establishment of a new digital platforms ombuds. This would limit the cost to consumers and the government. As demonstrated in box 4.9, ombuds schemes

⁴⁴¹ DIGI, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 29.

⁴⁴² University of Technology Sydney Centre for Media Transition, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 15. See also University of Technology Sydney Centre for Media Transition, [Digital Platform Complaint Handling: Options for an external dispute resolution scheme](#), July 2022, pp 47–49.

⁴⁴³ University of Technology Sydney Centre for Media Transition, [Digital Platform Complaint Handling: Options for an external dispute resolution scheme](#), July 2022, p 49.

⁴⁴⁴ DIGI, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 29.

⁴⁴⁵ See AFCA, [Decision maker profiles](#), accessed 15 September 2022; AFCA, Media Release, [Over 72,000 complaints taken to financial ombudsman in 2021-22](#), 26 July 2022, accessed 15 September 2022.

⁴⁴⁶ Note, this was supported by the TIO and OAIC in response to the Discussion Paper, noting that the TIO's powers could be expanded to address certain types of complaints. See TIO, [Submission to the Treasury consultation on the Final Digital Platforms Inquiry Report](#), September 2019, p 15; Office of the Australian Information Commissioner, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 12.

can be funded in various ways, including through industry levies, membership fees and complaint-related fees. Other industry complaints handling bodies, such as DIGI in relation to the Australian Code of Practice on Disinformation and Misinformation and the Australian Association of National Advertisers in relation to ads standards, are funded by membership fees and levies.⁴⁴⁷ However, the ACCC notes that funding arrangements should be designed in a manner that preserves independence and does not incentivise digital platforms to outsource their internal dispute resolution obligations to the ombuds (including, for example, by linking fees to user numbers, number of complaints, or outcome of complaints).

4.4. Regulatory design considerations for new measures to protect users of digital platforms

This section offers some initial views on regulatory design considerations for the development and implementation of any new measures to protect users of digital platforms from consumer harms. This includes whether new consumer protections in relation to scams, harmful apps, fake reviews and dispute resolution should be placed in legislation or codes and the consideration of transparency and reporting requirements.

4.4.1. New consumer measures should be separate from any competition measures

The ACCC considers that new regulation targeting consumer and business user protection in relation to digital platform services should be separate from any additional competition measures.⁴⁴⁸ Competition issues typically arise in respect of specific services that are dominated by a very small number of digital platforms (as discussed in chapters 1 and 5), whereas consumer issues tend to arise in respect of multiple services irrespective of the degree of market power digital platforms hold in respect of those services. Separate regulatory regimes to target consumer and competition harms could address the different sources of these issues.

The ACCC also considers that new consumer protections for users of digital platforms should be mandatory given the severity of the issues and harms occurring. This would help ensure there is adequate protection of consumers and business users across different platforms.

4.4.2. Implementation of new consumer protections for digital platform users

The ACCC is of the initial view that there would be benefits from introducing new measures to protect users of digital platforms in primary legislation. In particular, the ACCC considers that a new ombuds scheme should be established in primary legislation.

The new measures in relation to scams, harmful apps, fake reviews and internal dispute resolution would also benefit from being established in primary legislation as this would give digital platforms up-front certainty and clarity about acceptable and unacceptable practices. It would also help set clear expectations about how digital platforms should treat consumers and business users. Having one regime applying to all relevant platforms would help to establish a common minimum standard for consumer protection across different digital

⁴⁴⁷ Australian Association of National Advertisers, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 2 (for example, the funding of Ad Standards and its secretariat support of the Ad Standards Community Panel and Ad Standards Industry Jury is provided through a voluntary levy on advertising spend).

⁴⁴⁸ For example, Yahoo submits it is important to separate competition issues, such as self-preferencing and other exclusionary practices by firms with market power, from wider consumer protection matters that may concern a broader range of firms including small and medium-sized enterprises and those without market power. See Yahoo, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1.

platforms. This could be expected to reduce regulatory burden compared to multiple overlapping regulations.

There should be further consultation on the design and implementation of any new consumer protections outlined in this chapter, as well as consultation on the digital platform services subject to these obligations. Such consultation may further consider the extent to which the harms, such as those in relation to scams, harmful apps and fake reviews, arise on any specific platform service.

However, as discussed in section 4.1, obligations regarding scams, harmful apps and fake reviews would likely only be relevant to certain digital platform services.

These obligations should apply, at a minimum, to:

- search, social media, online private messaging, app stores, online retail marketplaces and digital advertising services, in respect of obligations around scams
- app stores in respect of obligations around harmful apps
- search, social media, app stores, and online retail marketplaces services, in respect of obligations around fake reviews.

As noted in sections 4.2 and 4.3, the ACCC considers that, subject to further consultation, dispute resolution requirements should apply across all digital platform services listed above.

The ACCC considers that there would be benefit in working in consultation with other relevant regulators and government departments to determine the scope of services that should be subject to the various consumer measures.⁴⁴⁹ This could help to reduce the scope for regulatory burden and overlap and to promote consistency, certainty and clarity across regulatory frameworks. There may also be benefit in using consistent definitions (e.g. for digital platform services) across the proposed consumer and competition measures.

Further, any definition of the services that are to be subject to the new consumer protections should be capable of capturing new services that may have similar issues. Alternatively, new consumer protections could include a mechanism that allows a determination to be made on which services will be subject to the regime. For example, a relevant decision maker, such as the Minister, could have the power to determine services that the new consumer protections must include, which would allow new services to be added (or removed) over time.⁴⁵⁰

4.4.3. Alternative ways to implement measures to protect users of digital platforms

While the ACCC sees the benefit of introducing the new consumer protections in primary legislation, as discussed above, there are many alternatives. For example, new consumer protections could be introduced in a single code containing all the new obligations, or separate codes that would each address a single issue (for example one code could target scams). These options are discussed below.

⁴⁴⁹ This could include, for example, the Digital Platform Regulators Forum (DP-REG) which shares information about, and collaborates on cross-cutting issues and activities relating to the regulation of digital platforms. The current members of DP-REG are the ACCC, the Australian Communications and Media Authority, the eSafety Commissioner and the Office of the Australian Information Commissioner. See Australian Communications and Media Authority, [DP-REG Terms of Reference](#), 11 March 2022.

⁴⁵⁰ This could be similar to how a Minister may make an instrument under section 56AC(2) of the *Competition and Consumer Act 2010* (CCA) to designate sectors of the Australian economy subject to the Consumer Data Right.

A single code of conduct for all consumer measures

An alternative to introducing obligations in primary legislation is to introduce all these obligations under a single code of conduct for digital platforms. This could apply to all digital platforms meeting the relevant definition.

This approach would replicate many of the same benefits of the approach discussed in section 4.4.2, with the added benefit of flexibility to more easily adapt obligations over time.

Some examples of industry-wide codes of conduct for consumer protection regulation include the Telecommunications Consumer Protection Code⁴⁵¹ and the Electricity Retail Code.⁴⁵²

Multiple codes of conduct to target different consumer issues

Another option to introduce the new consumer protections would be to use separate codes for a single issue. For example, one code to address scams on digital platform services, one code to address harmful apps, and one code to address fake reviews on digital platform services. This approach would enable clear prioritisation of issues and help mitigate risk of over-capture and allow for measures to be tailored to the specific issue.

This approach is very flexible as a new code could be developed at any time to address a new issue as it arises, or to adapt existing codes to market developments. However, if many codes are needed, it may be challenging to co-ordinate between different codes and ensure there is no overlap or conflict. In addition, as the number of codes related to digital platforms increases, there is likely a corresponding increase in complexity and potential regulatory burden. Issue-specific codes may be resource-intensive for the regulator to design and enforce in a timely manner (depending on the number of codes).

An example of an issue-specific code is the Australian Code of Practice on Disinformation and Misinformation, which is an industry-led, voluntary code that aims to address concerns regarding disinformation and credibility signalling for news content.⁴⁵³

4.4.4. Transparency and compliance

To promote transparency and compliance with the new measures in relation to scams, harmful apps and dispute resolution, the relevant regulator could publish guidelines about how to comply with the relevant obligations. For example, this may include providing examples of appropriate actions for different platforms.

Some of the obligations could include reporting or record-keeping requirements. This could require a platform to submit information to the relevant regulator on an annual (or more

⁴⁵¹ The TCP Code applies to all carriage service providers in Australia (as defined by the *Telecommunications Act 1997*). The Code contains rules about how to communicate with or deal with customers, what to say in advertising and sales information, how to handle bills and disputes, how to help customers switch service providers and how to assess credit for new customers. The TCP Code is enforceable by the ACMA and the ACMA publishes quarterly reports about its actions taken under the Code. See Australian Communications and Media Authority, [Telecommunications Consumer Protections Code](#), last updated 18 May 2022, accessed 15 September 2022.

⁴⁵² The Electricity Retail Code is a mandatory code under the *Competition and Consumer Act 2010* that applies to all electricity retailers that supply electricity to residential and small business customers in applicable distribution regions. The Code aims to limit the standing offer prices charged to residential and small business customers, allow consumers to more easily compare market offers, and prohibit conditional headline discounting. The Code is enforceable by the ACCC. See ACCC, [Electricity Retail Code](#), accessed 15 September 2022.

⁴⁵³ Digital platforms including Apple, Google, Facebook, Microsoft, TikTok, and Twitter are signatories to the code and have implemented measures to address the propagation of disinformation and misinformation amongst users of their services. The code enables signatories to develop actions that are proportional and suitable to their individual business models and instances of disinformation and misinformation on their services. Signatories commit to releasing an annual transparency report about their efforts under the code to help improve understanding of online disinformation and misinformation. See DIGI, [Disinformation Code](#), accessed 15 September 2022.

frequent) basis. Information could relate to standard metrics relevant to the measures, such as the number of consumer and small business complaints received.

The relevant regulator could use this information to monitor and enforce compliance. It would also assist in monitoring the success of the various obligations. Where appropriate, the regulator could also publish information to improve transparency and consumer awareness of the effectiveness of a platform's complaints handling process, such as on an annual and/or more frequent basis. This reflects the successful approach of the TIO in the telecommunications sector, as outlined in box 4.10.

Box 4.10 TIO Complaints Report

The TIO publishes quarterly reports about the number and nature of complaints received for different telecommunication services.⁴⁵⁴ The reports include metrics such as:

- the top 5 most common issues
- the number of complaints unresolved by service providers
- the number of complaints that were escalated
- who complained (residential consumer or small business consumer)
- the number of complaints by service provider (for the top 10 largest providers).

The relevant regulator should be given tools to allow it to effectively monitor compliance with the measures, which may include additional information gathering powers to collect information as needed.

Where the relevant regulator has reasonable grounds to suspect conduct may constitute a contravention of an obligation, it should have appropriate mechanisms available to enforce compliance.

In the event the conduct is not addressed or rectified in a timely manner, the relevant regulator should have the ability to institute legal proceedings against the platform and seek penalties as appropriate. For further discussion about compliance and enforcement, see chapter 7.

⁴⁵⁴ For example, see TIO, [Quarter 3 Complaints Report \(FY2022\)](#), 25 May 2022.

5. A new regulatory regime to promote competition in digital platform services

Recommendation 3: Additional competition measures for digital platforms

The ACCC recommends the introduction of additional competition measures to protect and promote competition in markets for digital platform services. These should be implemented through a new power to make mandatory codes of conduct for 'designated' digital platforms based on principles set out in legislation.

Each code would be for a single type of digital platform service (i.e. service-specific codes) and contain targeted obligations based on the legislated principles. This would allow flexibility to tailor the obligations to the specific competition issues relevant to that service as these change over time.

These codes would only apply to 'designated' digital platforms that meet clear criteria relevant to their incentive and ability to harm competition.

Australia's existing competition laws are not, by themselves, sufficient to promote effective competition in markets for digital platform services, as established in chapter 2. The ACCC therefore considers that a new regime implementing additional competition measures for digital platforms is required to supplement existing competition law in Australia.

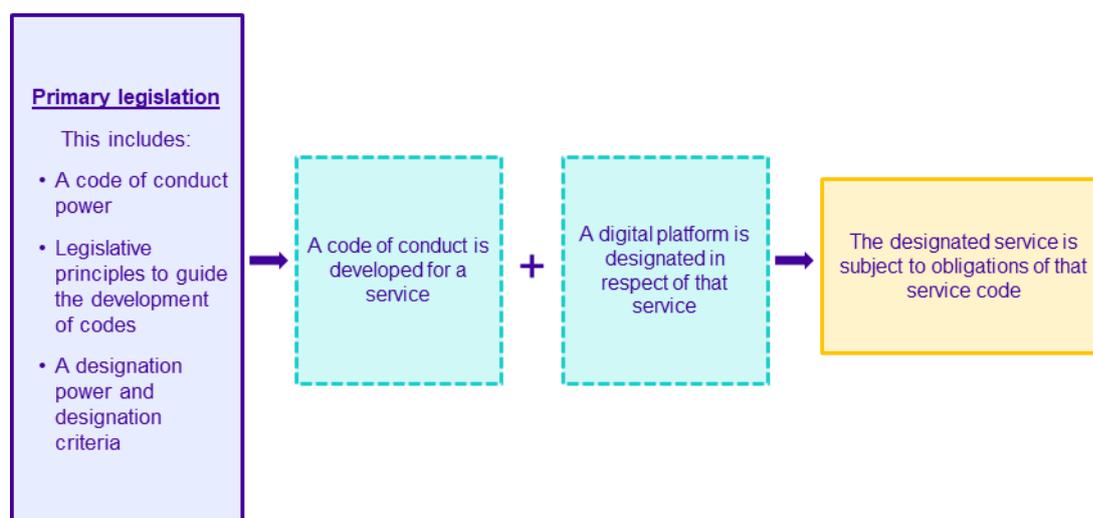
This new regime would be consistent with global trends, as other jurisdictions are proposing and implementing similar measures.

An illustrative example of the proposed regime is shown in figure 5.1.

Given the dynamic nature of digital platform services and the various and evolving business models used by digital platforms, new competition measures should:

- have the flexibility to quickly respond to changes in services and market dynamics
- allow for targeted obligations to address specific anti-competitive conduct and barriers to entry as they arise in respect of particular digital platform services
- be targeted at only those digital platform services where the competition concerns are greatest
- provide sufficient certainty to promote innovation, entry and expansion in markets for digital platform services.

Figure 5.1 Illustrative example of how the mandatory codes and additional competition measures would apply



Note: Developing a code of conduct and designation steps (in blue boxes above) can be completed in any order.

This chapter is set out as follows:

- Section 5.1 outlines the key attributes of additional competition measures for digital platforms.
- Section 5.2 recommends the implementation of additional competition measures for digital platforms through codes of conduct.
- Section 5.3 outlines the principles to guide the codes of conduct.
- Section 5.4 discusses the criteria that should be considered in determining who the additional competition measures should apply to.
- Section 5.5 discusses some alternative options for implementing additional competition measures.

5.1. Attributes of a new regime with additional competition measures for digital platforms

The ACCC considers that a new regime to promote competition in digital platform services should be flexible, targeted and provide certainty to address and deter harm to competition caused by some digital platforms. The regime should also promote coherence with emerging international regulation of digital platforms where relevant and appropriate.

We note that there is a potential for some of these attributes to come into conflict – for example, measures that are too flexible may compromise certainty and specificity, and vice versa. Where necessary, the measures recommended in this report are designed to strike an appropriate balance between these attributes.

5.1.1. Flexibility

Markets for digital platform services are characterised by fast-moving technological developments and frequent innovations in products and services, as discussed in chapter 1. This creates a risk that harm to competition may occur quickly, with widespread and significant effects.

A new regime should therefore also be dynamic and sufficiently flexible to enable timely responses to changes in digital platform services, market dynamics and conduct – as well as

to deter anti-competitive conduct from occurring in the first place. For instance, it should be possible to amend obligations over time if the nature of harmful conduct changes alongside the evolution of digital platform services.

5.1.2. Targeted application

Any new competition measures risk unintended consequences such as capturing pro-competitive conduct or conduct that is otherwise in the best interest of consumers. To minimise this risk, obligations should be reasonable and appropriate to address specific issues (such as anti-competitive conduct, barriers to entry and expansion or unfair treatment of business users) where they are relevant in the supply of specific digital platform services.

While applying a single uniform set of obligations to all relevant digital platforms may provide more initial up-front certainty to stakeholders, the ACCC considers that targeted obligations would likely be more effective. This is because targeting obligations to specific digital platform services would allow the obligations to account for the relevant market conditions, business models and practices of platforms providing those services. These factors can vary widely across different types of digital platform services.

Further, the additional competition measures should only apply to digital platforms that have been individually 'designated' on the basis that they meet certain criteria in respect of particular digital platform services (discussed in section 5.4). These platforms are referred to as 'Designated Digital Platforms' in this report.

Targeting obligations in this way would also mean the obligations can focus on addressing the competition issues most relevant to individual markets and addressing conduct that poses the greatest risk to competition.

5.1.3. Certainty

New measures should seek to provide a degree of certainty to market participants by setting clear expectations and requirements to guide decision making.

Certainty is important as it affects the investment and other decisions of the platforms subject to new measures. It is also important to ensuring that rival platforms and users of digital platform services can make investments in that market or related markets without risk of the value of these investments being reduced by exploitative conduct by platforms with substantial market power. This would promote innovation and investment in markets for digital platform services.

By establishing specific, up-front obligations about acceptable and unacceptable conduct, new measures can seek to avoid harm from occurring in the first place. They should also provide certainty about which digital platform services are subject to any new measures.

In the interests of clarity and regulatory certainty, these measures should also complement and support other Australian regulation of digital platforms (such as privacy and e-safety regulation). This would help to promote consistent outcomes and mitigate potential regulatory burden, as discussed further in chapter 7.

5.1.4. International coherence

Where possible, additional competition measures for digital platforms in Australia should seek to align with emerging international competition reforms for digital platforms. International coherence could help reduce the regulatory burden for affected digital platforms that operate across jurisdictions and provide greater certainty to digital platforms and related firms. International coherence may also help ensure that Australian consumers and businesses benefit from law reform implemented globally.

However, it is crucial that additional competition measures for digital platforms are designed and implemented in a way that best fits Australia's legal framework, considering the operation of the specific markets for digital platform services in Australia.

5.2. Codes of conduct for different types of digital platform services

The ACCC recommends implementing additional competition measures by empowering the relevant regulator to develop mandatory codes of conduct, with separate codes to apply to different types of digital platform services. These codes would be developed by the relevant regulator in consultation with the relevant policy agency and be set out in subordinate legislation. The development process for the codes is discussed further in chapter 7.

The ability to develop a separate code for each different type of digital platform service (where competition harms or risks have been identified) would allow for an appropriately flexible, targeted and effective approach. Specific obligations, such as those discussed in chapter 6, would only apply where they are included in a code of conduct for particular digital platform services, and that service has been designated (discussed further in section 5.4).

In considering the possible implementation of additional competition measures for digital platforms, the ACCC has had regard to submissions by stakeholders. The ACCC has also considered whether reforms being proposed and introduced overseas would be appropriate for an Australian context.

The ACCC considers a service-by-service code approach would protect and promote competition between providers of digital platform services, as well as between providers of goods and services in related markets. This approach would also allow strategic prioritisation of particular digital platform services, by the relevant regulator in consultation with the relevant policy agency, where the most urgent and significant harms are occurring. The types of digital platform services that could be subject to a code is discussed in section 5.2.1.

The ACCC also considers the codes of conduct, which would implement targeted obligations (such as those discussed in chapter 6), should operate under principles established in legislation (discussed in section 5.3), which would provide clarity about the scope of future codes.

The development of codes should be informed by analysis and assessment of competition issues related to the type of digital platform service that the code will apply to, as well as consultation with all relevant stakeholders.

Adopting a service-by-service approach is consistent with the key desired attributes of effective competition measures for digital platforms outlined in section 5.1. For example, service-specific codes would provide flexibility, as new codes could be developed in response to emerging concerns about anti-competitive conduct or limited competition in particular markets for new or existing digital platform services. It may also be more efficient and expedient to update subordinate legislation than primary legislation. This would allow obligations to be added, amended or removed in response to new concerns or developments as required. This approach also provides greater certainty and specificity to be incorporated in drafting obligations. This is because each code would be capable of establishing clear requirements for digital platform services.

However, we acknowledge that the need to develop multiple service-specific codes may increase implementation time, particularly if codes are developed sequentially. It may also increase the resources required for development and administration, particularly if some codes are developed simultaneously.

5.2.1. Types of digital platform services that could be subject to a code

To provide clarity about the potential future application of codes of conduct, the enabling legislation implementing new measures could include a list or define the types of digital platform services that could be subject to a code. The Digital Markets Act in the EU, for example, applies only to 'core platform services' which are defined as:

- (a) online intermediation services
- (b) online search engines
- (c) online social networking services
- (d) video-sharing platform services
- (e) number-independent interpersonal communications services
- (f) operating systems
- (g) web browsers
- (h) virtual assistants
- (i) cloud computing services
- (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i).⁴⁵⁵

The contents of such a list should be subject to appropriate public and industry consultation during the development of any new proposed legislation to apply to digital platforms in Australia. There should be a process to allow this list (or definition) to be amended over time, including to add new services in the future where required.

5.3. Principles in legislation should guide obligations in codes

The primary legislation that sets out the ACCC's recommended additional competition measures should include a set of high-level principles.

The principles should establish the scope and guide the design of specific obligations under a service-specific code of conduct. This would provide up-front certainty and clarity to digital platforms about the nature of the targeted obligations that the codes may apply.

New competition obligations would only apply to Designated Digital Platform services once a code that includes these obligations comes into force. However, the principles themselves would not constitute enforceable obligations on digital platforms.

While the exact drafting of these principles would be developed in progressing legislation to implement the additional competition measures, the ACCC recommends these principles focus on promoting:

- competition on the merits
- informed and effective consumer choice
- fair trading and transparency for users of digital platforms.

These principles align with the overarching objective of the additional competition measures for digital platforms, outlined in chapter 2, which is 'to promote competition and innovation in

⁴⁵⁵ EU Digital Markets Act, Article 2(2). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

the provision of digital platform services, and the products and services that interact with these platforms'. For example, a principle focusing on promoting:

- **Competition on the merits** seeks to promote competition by addressing anti-competitive conduct that hinders the ability of rival firms to compete. This could include obligations requiring that third-party services are treated at least as favourably as similar first-party services, as well as by addressing barriers to entry and expansion, including access to data. Together these should promote competition and encourage investment and innovation in digital platform services.
- **Informed and effective consumer choice** seeks to empower consumers to switch between alternative digital platforms by addressing switching costs, improving transparency over prices and quality, and promoting greater choice of services. Empowering consumers in this way would also promote greater competition between digital platforms.
- **Fair trading and transparency for business users** seeks to address the unfair and unreasonable terms faced by business users in their dealings with digital platforms by addressing specific terms and conditions or increasing transparency over certain processes. This would encourage investment and innovation by addressing significant risks faced by business users of digital platforms.

The inclusion of high-level principles in legislation is consistent with the approach proposed in the UK, as outlined in box 5.1.

Box 5.1 Proposed pro-competition regime for digital markets

The UK Government has proposed to include 3 high-level objectives in legislation to clearly set out the types of behaviour the conduct requirements will address under the proposed pro-competition regime for digital markets.

While the precise wording of the objectives is yet to be finalised, the substance of the objectives will relate to 'fair trading', 'open choices' and 'trust and transparency' as noted in the UK Government's consultation paper.⁴⁵⁶ Each of these objectives aims to prevent different types of conduct or behaviour.

Specifically, the objective related to 'fair trading' aims to prevent exploitative conduct and ensure users are treated fairly and that they can trade on reasonable commercial terms with digital platform firms designated to possess 'strategic market status'.

The objective relating to 'open choices' aims to prevent exclusionary conduct, such as the entrenchment, protection or extension of market power. Users should face no barriers to choosing freely and easily between services provided by firms with strategic market status and other firms.

The objective relating to 'trust and transparency' aims to promote informed and effective choices. Users should have clear and relevant information to understand the services provided by firms with strategic market status and should be able to make informed decisions about how they interact with the firm with strategic market status.⁴⁵⁷

⁴⁵⁶ UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 27–28; UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#), 6 May 2022, p 20.

⁴⁵⁷ UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 28.

5.4. Competition measures should only apply to Designated Digital Platforms

The ACCC considers that the additional competition measures should only apply to the digital platforms that pose the greatest risk of causing significant and widespread harm to competition for digital platform services, and for related products and services. Identifying these platforms for the purposes of the ACCC's recommended new competition measures would require the design and implementation of 'designation criteria'.

These designation criteria should have regard to the characteristics of digital platforms that give them critical positions in the Australian economy as well as the ability and incentive to engage in conduct harmful to competition. This would also minimise the risk of regulatory over-reach for example, by avoiding the capture of smaller market participants, or new entrants, who do not pose the same degree of risk to competition.

The decision to designate a digital platform could be made by the relevant regulator or a relevant government Minister such as the Treasurer. The designation decision should specify the digital platform service(s) supplied by the digital platform firm that could be subject to a code of conduct.

The ACCC recommends that Designated Digital Platforms only be subject to new competition obligations once a code applies to Designated Digital Platform's designated service. In other words, if a Designated Digital Platform were designated in respect of its app store service, but no app store code had taken effect, no new obligations would apply to its app store service.

5.4.1. Designation criteria for Designated Digital Platforms

Designation criteria should aim to identify the digital platform services that hold a critical position in the Australian economy and that have the ability and incentive to harm competition. To achieve this, designation could be based on consideration of:

- **Quantitative criteria:** setting 'minimum thresholds' using metrics such as numbers of monthly active Australian users of a platform's service(s), and the platform's Australian and/or global revenue.
- **Qualitative criteria:** requiring consideration of relevant characteristics, such as whether the digital platform holds an important intermediary position, whether it has substantial market power in the provision of a digital platform service, and/or whether it operates multiple digital platform services.
- A **combination of both** quantitative and qualitative criteria.

The ACCC considers that quantitative criteria would be effective and efficient as the primary threshold for designation to achieve the aims described above. This would provide a clear measure by which to determine whether market participants could become subject to new competition obligations and demonstrate that smaller market participants that fall under the minimum thresholds will not be captured.

However, while quantitative criteria should be sufficient to determine whether a platform should be designated in most cases, there may be particular circumstances where quantitative criteria are not suitable or cannot be verified, such as where necessary information is not available. In these circumstances it may be appropriate to refer to qualitative criteria.

The Government may also wish to consider whether there should be a mechanism to allow firms that meet the quantitative criteria to avoid designation in particular circumstances, including by reference to qualitative criteria.

Regardless of the criteria used, it will be important that enabling legislation provides the relevant decision maker with effective information-gathering powers applying to worldwide structures of global digital platforms that operate in Australia to establish whether digital platform firms have met these minimum thresholds (see also chapter 7).

In considering the design of the designation criteria, including how quantitative and qualitative assessments could be weighted, the Government should consider the risks and benefits of each of the types of criteria, which are discussed further below.

Quantitative criteria

Designation criteria could include quantitative criteria in the form of ‘minimum thresholds’. Such quantitative criteria should be designed to capture digital platforms that have a significant impact on the Australian economy, and are relied on by many Australian consumers and business users. These criteria could be based on metrics such as a platform’s financial strength (derived from revenue) and the platform’s reach (number of users), which are indicative of the importance of a particular digital platform’s services to the Australian economy and the lives of Australians.

The use of designation criteria based on minimum thresholds would provide certainty to market participants, particularly if it includes clear thresholds that make it obvious to smaller market participants and new entrants that they will not be subject to new competition measures.

However, there is also the risk that quantitative criteria, in the form of minimum thresholds, may fail to capture digital platforms that have a significant impact on the Australian economy. For example, it may be challenging to determine a single minimum threshold that can apply across a range of digital platform services and business models. Further, the information required to establish and evaluate minimum thresholds may not always be available. These risks should be considered when designing and implementing a quantitative threshold.

Using minimum thresholds would be somewhat similar to the EU’s Digital Markets Act where a digital platform is deemed to be a ‘gatekeeper’ and made subject to the obligations of this legislation if it meets certain quantitative criteria.⁴⁵⁸ However, while ‘gatekeepers’ under the Digital Markets Act are all subject to the same set of obligations set out in primary legislation, the ACCC recommends that Designated Digital Platforms should only be subject to new competition obligations once a code applies to a particular Designated Digital Platform service.

Revenue

Designation criteria should include a minimum threshold based on the Australian and/or global revenue of a digital platform firm. We note that while Australian revenue is likely to provide a good indication of a digital platform’s financial performance in this country, global revenue is a useful indicator of economic strength and access to financial resources. The use of a minimum threshold based on global revenue might also mitigate the risk that available Australian revenue figures may be unrepresentative of a platform’s economic activity in this country, for reasons such as revenue being recorded in other jurisdictions.⁴⁵⁹

Revenue-based thresholds have been incorporated or proposed in the designation criteria of digital platforms for overseas frameworks:

⁴⁵⁸ EU Digital Markets Act, Article 3(2)(a)–(c). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁴⁵⁹ M Mason, ‘[Facebook pays less than \\$17m in tax in Australia](#)’, *The Australian Financial Review*, 1 June 2020, accessed 15 September 2022.

- In the Digital Markets Act, a digital platform firm may be deemed a ‘gatekeeper’ if it achieves an annual EU turnover equal to or above EUR7.5 billion in each of the last 3 financial years.⁴⁶⁰
- In the proposed American Innovation and Choice Online Act, a covered platform is owned or controlled by a person with US net annual sales of greater than USD550 billion.⁴⁶¹
- In the Act on Improving Transparency and Fairness of Digital Platforms in Japan, businesses operating online shopping malls are designated if they have yearly sales of at least JPY300 billion; application stores are designated if they have yearly sales of at least JPY200 billion and platforms mediating between advertisers and website operators are designated if they have yearly sales of at least JPY50 billion.⁴⁶²

A revenue-based threshold is also currently being considered as part of the UK’s proposed pro-competition regime for digital markets.⁴⁶³

The relevant decision maker could publish guidance on the appropriate measure of revenue, including providing details on how this should be calculated by each individual digital platform. Such guidance would be particularly important where there are differences in digital platforms’ business models or approaches to reporting on revenue. For example, guidance could specify how domestic or global revenue should be calculated for the purposes of designation.

User numbers

Quantitative criteria should also include a threshold based on the ‘monthly active users’ of the digital platform service for which a code could be developed. Such a criterion would be indicative of the importance of the digital platform for users of that service in Australia.

The design of a user number threshold may be linked to a percentage of the Australian population. For example, the Digital Markets Act and the proposed bills targeting ‘covered platforms’ in the US, both employ user number thresholds of approximately 10% (45 million monthly active end-users located in the EU)⁴⁶⁴ and 15% (50 million monthly active users in the US)⁴⁶⁵ of the respective populations of these jurisdictions.

⁴⁶⁰ EU Digital Markets Act, Article 3(2)(a). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁴⁶¹ [American Innovation and Choice Online Act](#), S. 2992, 117th Congress (2021-2022) § 2(a)(5)(B)(ii)(III)(aa)(AA). Note also that a revenue threshold of USD600 billion is included in the definition of ‘covered platform’ under the [Platform Competition and Opportunity Act](#), S. 3197, 117th Congress (2021-2022), § 3(d)(2)(B) and the [Ending Platform Monopolies Act](#), H.R. 3825, 117th Congress (2021-2022), § 5(5)(B)(i)(ii).

⁴⁶² Ministry of Economy, Trade and Investment, [Cabinet Decisions Made on 2 Cabinet Orders for the Act on Improving Transparency and Fairness of Digital Platforms](#), 26 January 2021, accessed 15 September 2022; Ministry of Economy, Trade and Investment, [Cabinet Decision on the Cabinet Order to Partially Amend the Cabinet Order for Stipulating the Business Category and Scale under Article 4, Paragraph 1 of the Act on Improving Transparency and Fairness of Digital Platforms](#), 5 July 2022, accessed 15 September 2022.

⁴⁶³ UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#), 6 May 2022, p 16.

⁴⁶⁴ Percentage estimated based on population of the Europe Union being 447 million. See European Union, [Facts and figures on life in the European Union](#), accessed 15 September 2022; EU Digital Markets Act, Article 3(2)(b). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁴⁶⁵ Percentage estimated based on population of the US being 333 million. See United States Census Bureau, [U.S. and World Population Clock](#), 15 September 2022, accessed 15 September 2022; [American Innovation and Choice Online Act](#), S. 2992, 117th Congress (2021-2022), § 2(a)(5)(B)(ii)(aa); [Platform Competition and Opportunity Act](#), S. 3197, 117th Congress (2021-2022), § 3(d)(2)(A); [Ending Platform Monopolies Act](#), H.R. 3825, 117th Congress (2021 – 2022), § 5(5)(B)(i)(I).

As noted above, the relevant decision maker could publish guidance on how to calculate 'monthly active users' of a digital platform service in Australia and over what period.⁴⁶⁶

We consider that a minimum user threshold may be useful to ensure that a designation decision incorporates consideration of the importance of a digital platform's services to Australians, and not only the size and influence of the digital platform firm as a whole.

Qualitative criteria

As an alternative or addition to quantitative criteria, qualitative criteria could provide flexibility to consider the market characteristics in which platforms operate and to account for different business models.

Qualitative criteria have the advantage of enabling a broader consideration of the criticality of the position of a digital platform in the Australian economy. It also allows for consideration of the economic characteristics specific to digital platforms that provide them the ability and incentive to engage in anti-competitive conduct. However, basing each designation process on qualitative criteria alone may not be as clear or efficient as the use of quantitative minimum thresholds.

Some qualitative criteria that could be considered by the relevant decision maker could include:

- whether the firm occupies an **important intermediary position** in providing at least one digital platform service
- whether the firm has **substantial market power** in at least one digital platform service it operates
- whether the firm **operates multiple digital platform services**.

We note that qualitative criteria, if they are used, should not be individually determinative. Rather, they should be factors to be considered in combination and weighed up against one another by the relevant decision maker. Consistent with other domestic regulatory regimes that use qualitative criteria, the relevant regulator should provide guidance material on how these criteria will be interpreted to provide clarity to industry participants.⁴⁶⁷

Occupying an important intermediary position

If qualitative criteria were used, it would be relevant for a decision maker to consider whether a digital platform occupies an important intermediary position. A number of large digital platforms occupy important positions as online intermediaries between consumers and businesses, facilitating vast volumes of commerce. Relatedly, many Australian businesses (and especially small businesses) are heavily reliant on a single platform to gain access to a significant proportion of their potential customer base. In these situations, the success or otherwise of these businesses can be highly dependent on the 'rules' governing the operation of the platform. This role therefore provides some digital platforms with the capacity to engage in certain forms of potentially anti-competitive conduct (addressed in detail throughout chapter 6) and exacerbates the scale and impact of any harm to competition that such conduct causes.

⁴⁶⁶ For example, the ACCC is due to publish guidance to assist industry in understanding the superfast network separation obligations and how the ACCC will consider network operators have complied with them. This includes guidance on how the class exemptions for network operators providing retail services to no more than 12,000 residential end users will apply. See ACCC, [Proposed guidance on the carrier separation rules](#), 28 April 2022.

⁴⁶⁷ For example, the ACCC provides guidance on interpreting the long-term interests of end users when declaring services. ACCC, [A guideline to the declaration provisions for telecommunications services under Part XIX of the Competition and Consumer Act 2010](#), 11 August 2016, accessed 15 September 2022.

Some stakeholders submit that the criteria should consider the relationship digital platforms have to consumers and competitors which make them an unavoidable trading partner.⁴⁶⁸ Further, considering the strength of a digital platform's intermediary position in relation to individual consumers and businesses as part of a designation decision aligns with numerous relevant developments overseas. For example, the proposed new pro-competition regime for digital markets in the UK describes designated firms as having a 'strategic position',⁴⁶⁹ while the Digital Markets Act describes a designated platform as a 'gatekeeper'.⁴⁷⁰ The proposed bills for digital platforms in the US also describe covered platforms as 'critical trading partners'.⁴⁷¹

Having substantial market power in a digital platform service

If qualitative criteria were used, it would be relevant for a decision maker to consider whether a digital platform firm has substantial market power in the provision of a digital platform service. This is because it would not achieve the objectives of the additional competition measures to designate digital platform services that do not have a high degree of market power in the provision of a particular service.

To assess whether a digital platform service has substantial market power, the relevant decision maker could consider the following characteristics:

- The nature and strength of network effects for that service.
- Alternatives available to users of the platform and the costs involved with (or other barriers to) switching or multi-homing.
- The size of economies of scale and sunk costs involved with establishing the service.
- Whether the firm operates ecosystems, or multiple related digital services, and benefits from economies of scope.
- The extent of vertical integration.
- The control of large volumes of unique user data that is difficult to replicate and that could be used as a barrier to entry and expansion.

Including the characteristics listed above as part of a decision maker's assessment of market power would ensure that it is able to consider a range of factors that are highly relevant to competitive dynamics in the supply of digital platform services. As discussed in chapters 1 and 2, these factors are the key source of the ability of certain digital platforms to engage in anti-competitive conduct and to benefit from barriers to entry and expansion. Some stakeholders also expressed views that market power should be a focus of any threshold criteria.⁴⁷²

⁴⁶⁸ Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2; Information Technology Industry Council, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2.

⁴⁶⁹ UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#), 6 May 2022, pp 7, 15.

⁴⁷⁰ EU Digital Markets Act, Articles 2–3. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁴⁷¹ [American Innovation and Choice Online Act](#), S. 2992, 117th Congress (2021-2022), § 2(a)(5)(B)(ii)(III), § 2(a)(5)(C)(ii)(III), § 2(a)(6); [Ending Platform Monopolies Act](#), H.R. 3825, 117th Congress (2021-2022), § 5(5)(B)(iii), § 5(7); [Platform Competition and Opportunity Act](#), S. 3197, 117th Congress (2021-2022), § 3(d)(2)(C), § 3(f).

⁴⁷² PayPal, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; Association for Data-driven Marketing and Advertising, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8.

Operating multiple digital platform services

If qualitative criteria were used, it would be relevant for the decision maker to also consider whether a digital platform firm offers a number of digital platform services. This consideration describes situations where a digital platform firm may have established an 'ecosystem' of related digital platform services, and/or where it benefits from substantial economies of scope.

Some digital platforms operate multiple services across different markets, which can provide a competitive advantage (such as access to consumers or data across markets) allowing them to further entrench their market power in one market or another. Operating across multiple services can also provide platforms with the incentive and ability to engage in exclusionary conduct such as tying, pre-installation and restricting multi-homing.

5.4.2. Procedural elements of designation

It is important that the process to determine which specific digital platform services should be subject to regulation is objective, transparent and consultative, particularly where the decision is based on qualitative criteria. For example, it could include:

- a notice being given to the relevant digital platform that consideration will be given to designation of one or more of its services
- a consultation process
- guidance for industry on the process, including appropriate timelines
- an expiry date for the decision, with an opportunity for extension.

A fundamental element of designing a designation process will be the choice of decision maker.

One option would be for the relevant regulator to be empowered to designate digital platforms and their relevant services. In this case, the relevant regulator should be given the necessary information-gathering powers to determine if the digital platforms meet the quantitative designation criteria. The relevant regulator may also have existing expertise and knowledge of digital platform markets which would be particularly beneficial to the extent the designation decision takes into account qualitative criteria.

Alternatively, designation of digital platforms could be a legislative instrument made by a relevant government minister. In making this decision, it would also be appropriate for the Minister to consider advice provided by the relevant regulator for the reasons noted above.

Box 5.2 provides examples of existing mechanisms in the *Competition and Consumer Act 2010* (CCA) by which services become subject to the requirements of a specific regulatory regime. This includes declaration of services by a regulator and a designation of platforms by a Minister.

Box 5.2 Example of decision-making processes for sector-specific regimes

Declaring a service under the telecommunications access regime

The ACCC may 'declare' a carriage service for the purposes of applying the requirements of the telecommunications access regime under Part XIC of the CCA if it is satisfied the declaration will promote the long-term interests of end users. As part of the process, the ACCC must:

- conduct a public inquiry, providing a reasonable opportunity for public submissions⁴⁷³
- publish a report outlining the findings from the inquiry⁴⁷⁴
- specify an expiry date for the declaration between 3 and 5 years after the declaration is made, unless the ACCC considers that there are circumstances warranting a shorter or longer period.⁴⁷⁵

The ACCC has also published Declaration Guidelines which include indicative time frames. For example, the ACCC will typically take 6–12 months to complete a public inquiry.⁴⁷⁶

Designating a digital platform under the News Media and Digital Platforms Mandatory Bargaining Code

Under Part IVB of the CCA, the Treasurer may make a determination through a legislative instrument designating a digital platform service and corporation to become subject to the obligations of the News Media and Digital Platforms Mandatory Bargaining Code. In making the determination, the Minister must consider:

- whether there is a significant bargaining power imbalance between the platform corporation and Australian news businesses
- whether the platform corporation has made a significant contribution to the sustainability of the Australian news industry, including through agreements to remunerate those businesses for their news content.⁴⁷⁷

The Treasurer may consider any reports or advice of the ACCC in making the determination.⁴⁷⁸ The Treasurer is required to provide at least 30-days' notice to the digital platform it intends to designate before making the designation determination.⁴⁷⁹

5.5. Alternative ways to introduce additional competition measures for digital platforms

The ACCC has also considered some alternative ways to introduce additional competition measures for digital platform services, which are discussed below.

5.5.1. Issue-specific codes of conduct

An alternative approach to service-specific codes of conduct would be to establish competition measures in a thematic way with separate codes for different issues, such as different types of conduct.

⁴⁷³ Subsections 152AL(3) and (8A) of the *Competition and Consumer Act 2010*; Part 35, Division 3 of the *Telecommunications Act 1997*.

⁴⁷⁴ Section 505 of the *Telecommunications Act 1997*.

⁴⁷⁵ Subsections 152ALA(1)–(2) of the *Competition and Consumer Act 2010*.

⁴⁷⁶ ACCC, [A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010](#), 11 August 2016, accessed 15 September 2022, p 14.

⁴⁷⁷ Section 52E of the *Competition and Consumer Act 2010*.

⁴⁷⁸ Subsection 52E(4) of the *Competition and Consumer Act 2010*.

⁴⁷⁹ Subsection 52E(6) of the *Competition and Consumer Act 2010*.

The aim of this approach would be to effectively target a high-priority issue observed across multiple digital platform services. For example, one code could target anti-competitive self-preferencing conduct, while another code could target tying and bundling conduct. A new code may be developed at any time to address a new issue that arises in the future.

This approach would allow clear prioritisation of issues and could be a way to introduce new measures independently. It may also allow for a more immediate response to issues leading to harm across multiple types of digital platform services.

However, depending on the issue, it may be challenging to appropriately and cohesively capture conduct carried out by different services that use very different business models. It may also be difficult to address competition concerns effectively if conduct is considered in isolation and independent of other competitive dynamics at work in a particular digital platform service market.

5.5.2. Industry-wide obligations

Additional competition measures for digital platforms could also be established in detail in primary legislation and apply broadly to all Designated Digital Platforms. This approach would be similar to the Digital Markets Act, which includes detailed positive obligations and prohibitions that apply to all digital platforms found to be 'gatekeepers'.⁴⁸⁰

An Australian example of legislated sector-specific competition measures is the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019*, which inserted a new part into the CCA (Part XICA).⁴⁸¹ Part XICA prohibits 3 types of conduct in electricity markets related to retail pricing, electricity financial contract liquidity and electricity spot market. The ACCC is responsible for investigating whether conduct breaches the new prohibitions and has released guidelines on the new Part XICA.⁴⁸²

Industry-wide legislated obligations would provide up-front certainty to digital platforms about acceptable and unacceptable conduct, which may help promote investment and innovation. It also has potential to be less complex, for example, compared to an approach with multiple codes of conduct, as there would only be one set of measures to apply to all relevant digital platforms. This could also reduce the risk of potential overlapping obligations and reduce regulatory burden for digital platforms.

However, taking a broad, industry-wide approach for digital platform services may raise challenges in appropriately targeting measures to specific services and also increase the compliance burden for platforms. For example, a targeted description of anti-competitive self-preferencing conduct for search services may be considerably different to a targeted description of anti-competitive self-preferencing conduct for other digital platform services.

In order for competition measures to be relevant under an industry-wide approach, these would need to be:

- sufficiently broad to capture many different services and accompanied by detailed guidance applicable to the different services, or
- tailored for different services and exemptions made where measures are not applicable to a service.

⁴⁸⁰ EU Digital Markets Act. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁴⁸¹ See [Part XICA](#) of the *Competition and Consumer Act 2010*.

⁴⁸² ACCC, [Guidelines on Part XICA - Prohibited conduct in the energy market](#), 11 May 2020.

Measures in primary legislation may also be less flexible as it could be more resource-intensive and time-consuming to amend, so future changes to measures may be challenging.

Another option would be to establish industry-wide measures in a single code of conduct. In contrast to service-specific or issue-specific codes, a single code may reduce the risk of complexity and potential regulatory burden (compared to multiple codes) and may mitigate the lack of flexibility of primary legislation. However, it would not allow for any prioritisation of issues and would be resource-intensive to develop.

6. Targeted obligations to promote competition

Recommendation 4: Targeted competition obligations

The framework for mandatory service-specific codes for Designated Digital Platforms (proposed under Recommendation 3) should support targeted obligations based on legislated principles to address, as required:

- anti-competitive self-preferencing (section 6.1)
- anti-competitive tying (section 6.2)
- exclusive pre-installation and default agreements that hinder competition (section 6.3)
- impediments to consumer switching (section 6.4)
- impediments to interoperability (section 6.5)
- data-related barriers to entry and expansion, where privacy impacts can be managed (section 6.6)
- a lack of transparency (section 6.7)
- unfair dealings with business users (section 6.8)
- exclusivity and price parity clauses in contracts with business users (section 6.9).

The codes should be drafted so that compliance with their obligations can be assessed clearly and objectively. Obligations should be developed in consultation with industry and other stakeholders and targeted at the specific competition issues relevant to the type of service to which the code will apply. The drafting of obligations should consider any justifiable reasons for the conduct (such as necessary and proportionate privacy or security justifications).

The purpose of this chapter is to set out the types of conduct that a new regime to promote competition in digital platform services should be able to address. It also provides indicative examples of the kinds of obligations that new service-specific codes of conduct could potentially include, noting that final code development would involve further detailed consideration and significant consultation.

As explained in chapter 5, the ACCC recommends additional competition measures to promote and protect competition in digital platform services and related markets. The ACCC recommends that this be implemented through service-specific codes, which impose targeted competition obligations on Designated Digital Platforms based on high-level legislative principles.

It is not intended that every service-specific code would contain obligations to address all types of conduct, or barriers to entry and expansion discussed in this chapter. This chapter explores the types of competition issues that any new regime should be capable of addressing and provides indicative examples of targeted obligations to address these issues. The drafting and implementation of each service-specific code would need to consider the specific competition concerns for the relevant digital platform service, as well as the potential benefits and costs of each obligation, including any unintended consequences.

These examples should not be treated as exhaustive. They draw largely on the ACCC's previous work in monitoring specific markets for digital platform services. Future work may highlight other conduct or competition concerns. The scope and nature of potentially anti-competitive conduct may also change as services and markets evolve over time. Any

new regime should be flexible and future-proof so that it can address a wide range of known, emerging and anticipated conduct and barriers to entry.

If these recommendations are adopted by the Government, this would necessarily include a new process for developing the codes, involving further consultation on the drafting and introduction of individual obligations, as discussed in chapters 5 and 7. Further, the introduction of codes would likely be 'staged' (i.e. not all codes would take effect at once), based on an assessment, by the relevant regulator and policy agency, of the urgency of addressing competition concerns for a particular type of digital platform service and the potential effectiveness of a new code at that time.

6.1. Addressing anti-competitive self-preferencing

The ACCC is concerned that some digital platforms with market power are engaging in self-preferencing conduct that may have anti-competitive impacts, including:

- Google promoting its own services in search results on Google Search.
- Apple ranking its own apps more favourably than third-party apps in its App Store search results.
- Apple and Google using data collected in the provision of app store services to inform the development of their own apps.
- Google giving its own ad tech services favourable treatment compared to ad tech services provided by third parties.

Service-specific codes should include targeted obligations to address self-preferencing where relevant and appropriate. For example:

- a code for search services could prohibit Designated Digital Platforms from providing favourable treatment to their own products and services in ranking, indexing, and crawling
- a code for app store services could prohibit Designated Digital Platforms from providing favourable treatment to their own apps in app stores search result rankings
- a code for app store services could prohibit Designated Digital Platforms from using commercially sensitive data collected from the app review process to develop their own apps, for example, through data separation requirements
- a code for ad tech services could prohibit Designated Digital Platforms from treating their own ad tech services more favourably than ad tech services provided by third parties.

Codes could also restrict the sharing of information between services where this could provide an anti-competitive advantage to a Designated Digital Platform.

Measures to address self-preferencing are included in the Digital Markets Act in the EU and the 10th Amendment to the German Competition Act. Self-preferencing conduct has also been identified as something that the UK Government's proposed pro-competition regime for digital markets would be able to address through conduct requirements.

6.1.1. Self-preferencing can harm competition

Some digital platforms offer services that directly compete with third-party services that use their platform. This can lead to competition concerns where the digital platform has the ability and incentive to use its control over access to its platform to affect competition with third-party services. A digital platform could do this through:

- self-preferencing, where a platform gives preferential treatment to its own products and services when they are in competition with products and services provided by third parties using the platform⁴⁸³
- tying conduct, where the provision of one service is conditional on the provision of another service (see section 6.2).⁴⁸⁴

When a firm with market power leverages its strong position to favour its own products or services in a related market, this can have an adverse effect on competition by affecting rivals' ability to compete. For example, this can occur where digital platforms exercise their strong position to:

- reduce the discoverability of rivals' products and services in search rankings
- raise rivals' costs through discriminatory terms and conditions of access
- prevent competitors from providing innovative services by limiting, delaying or denying interoperability
- utilise non-public data to free ride off the innovation efforts of their rivals.

This ultimately reduces the incentives for competitors to enter or expand into related markets, which can cause harm through reduced innovation and consumer choice, increased prices for consumers and steering consumers towards products that do not align with their preferences.

Not all forms of self-preferencing by digital platforms are problematic, and some may be benign or even pro-competitive. For example, if self-preferencing leads to stronger competition between ecosystems by making a platform more attractive or beneficial (e.g. secure) to consumers, this might outweigh competition impacts in other markets (especially if such benefits cannot be achieved in other ways).

There may also be circumstances where a digital platform's first-party offering is better suited to a consumer's requirements (for example, in terms of cost, compatibility or features) than third-party offerings. In such circumstances, giving higher ranking to a first-party offering would not likely constitute anti-competitive self-preferencing.

We also recognise that in many situations digital platforms do not have an incentive to engage in anti-competitive self-preferencing. For example, where the presence of third parties on a platform increases the value of the platform to users. It will be important to have regard to such issues and trade-offs in the design of any obligations to address self-preferencing.

Based on the ACCC's analysis in previous inquiry reports and international monitoring, we consider that anti-competitive self-preferencing may have caused harm in the supply of several different digital platform services including search, app store and ad tech services. These are discussed in more detail below. Similar conduct could also arise in other markets for digital platform services in the future.

As discussed in box 6.1, multiple overseas jurisdictions are introducing measures to address anti-competitive self-preferencing. The UK Digital Competition Expert Panel also raised concerns that platforms can use their power in one market to strengthen their position in another.⁴⁸⁵ Further, several stakeholders, including Open Web Advocacy, Pinterest, Oracle,

⁴⁸³ 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.

⁴⁸⁴ There can also be some overlap between these. For example, some conduct that is described as self-preferencing could also be described as tying, and vice versa. See OECD, [Abuse of Dominance in Digital Markets](#), December 2020, p 54.

⁴⁸⁵ Digital Competition Expert Panel, [Unlocking digital competition report](#), March 2019, p 47.

Epic Games, the Coalition for App Fairness and Gumtree, made submissions to the ACCC outlining harms from self-preferencing conduct across different digital platform services.⁴⁸⁶

Box 6.1 International approaches to addressing anti-competitive self-preferencing by digital platforms

European Union: The Digital Markets Act prohibits ‘gatekeeper’ digital platforms from providing favourable treatment in ranking, indexing and crawling of their own products and services compared to similar services or products of a third party. This legislation also requires gatekeeper platforms to apply transparent, fair and non-discriminatory conditions to such ranking.⁴⁸⁷ Gatekeeper platforms are also prohibited from using, in competition with business users, data that is not publicly available and generated by their business users.⁴⁸⁸

United Kingdom: The Competition and Markets Authority in its market studies⁴⁸⁹ recommended that the UK Government’s proposed pro-competition regime for digital markets⁴⁹⁰ include measures to address anti-competitive self-preferencing. This includes principles in the proposed enforceable conduct requirements that:

- require digital platforms designated with strategic market status to not influence competitive processes or outcomes in a way that unduly self-preferences a platform’s own services over those of rivals⁴⁹¹
- limit the ability of firms designated with strategic market status to use data collected from customers and business users through their app stores for reasons other than the app review process.⁴⁹²

Germany: The 10th Amendment to the German Competition Act gives the Bundeskartellamt the ability to prohibit companies designated as having ‘paramount significance across markets’ from treating the offers of competitors differently from its own services.⁴⁹³

United States: The proposed American Innovation and Choice Online Act includes provisions that would prohibit ‘covered platforms’ from preferencing their own products, services or lines of business over those of another business user in a manner that would materially harm competition.⁴⁹⁴

⁴⁸⁶ Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; Pinterest, [Submission to the ACCC Digital Platform Inquiry Fifth Interim Report](#), May 2022, p 4; Oracle, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1; Epic Games, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 7–8; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 8–9; Gumtree Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 3–4.

⁴⁸⁷ EU Digital Markets Act, Article 6(5). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁴⁸⁸ EU Digital Markets Act, Article 6(2). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁴⁸⁹ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020; CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022.

⁴⁹⁰ UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 31.

⁴⁹¹ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 345; CMA, [Mobile ecosystems market study, Appendix M: examples of practices that could be addressed by SMS Conduct Requirements](#), 10 June 2022, p M12.

⁴⁹² CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 325.

⁴⁹³ Federal Ministry of Justice, [Act against Restraints of Competition](#), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p 2506), section 19a(1)–(2).

⁴⁹⁴ [American Innovation and Choice Online Act](#), S. 2992, 117th Congress (2021-2022), § 3(a)(1).

6.1.2. Self-preferencing can harm competition in the supply of apps

The ACCC has previously identified competition issues that are linked to the supply of mobile operating systems (mobile OS) and app stores due to Apple and Google's market power in these services.⁴⁹⁵ This includes the risk of anti-competitive self-preferencing by Apple and Google given each has their own first-party apps that compete directly with apps developed by third parties.⁴⁹⁶

This can distort app developers' decisions to innovate, develop and upgrade their apps, particularly where these are similar to Apple and Google's offerings. It can also steer consumers towards inferior or more expensive apps.⁴⁹⁷

Several stakeholders have raised concerns with harmful self-preferencing in app markets, including Microsoft, Epic Games, Match Group, the Coalition for App Fairness and Pinterest.⁴⁹⁸

The ACCC's Report on App Marketplaces identified multiple ways that an app store could treat its first-party apps more favourably than third-party apps, including by:

- ranking first-party apps more favourably in app store search results⁴⁹⁹
- removing consumers' ability to rate and review first-party apps, which may result in a more positive ranking of first-party apps than otherwise⁵⁰⁰
- providing first-party app developers with superior access to data, including information about rival apps. This includes information collected through app review processes, the operation of the app stores, and app developers' use of in-app payment systems⁵⁰¹
- delaying or blocking competing third-party apps' access to their app stores.⁵⁰²

Further issues associated with app review processes are discussed at section 6.7.

The Coalition for App Fairness notes its members (which include app developers such as Spotify, Epic, Basecamp, Tile, Blix and Deezer) have had issues with Apple's app review process, particularly when Apple intends to launch a product, service or feature that competes with the third-party app. They note that:

- Screen time and parental control apps: following Apple's announcement that it would roll out Screen Time, a feature that would help people limit the time they and their children

⁴⁹⁵ The ACCC's Report on App Marketplaces identified that Google and Apple have significant market power in the supply of mobile OS in Australia. The ACCC also identified that Apple and Google face limited competitive constraints in mobile app distribution, providing them with market power in mobile app distribution that is likely to be significant. See ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 5, 23.

⁴⁹⁶ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 92–95.

⁴⁹⁷ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 131.

⁴⁹⁸ Microsoft, [Submission to ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Epic Games, [Submission to ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 7–9; Match Group, [Submission to ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 8–9; Coalition for App Fairness, [Submission to ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 8–10; Pinterest, [Submission to ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4.

⁴⁹⁹ For example, independent investigations by The New York Times and the Wall Street Journal found that Apple may have systematically ranked its own apps more favourably than apps owned by competitors. The Wall Street Journal conducted searches with a set of popular keywords for each app category to see if an Apple app surfaced first in those search results. For Apple apps falling within the music category, for example, The Wall Street Journal searched for 'music,' 'songs' and 'playlist.' See J Nicas and K Collins, ['How Apple's Apps Topped Rivals in the App Store It Controls'](#), *The New York Times*, 9 September 2019, accessed 15 September 2022; T Mickle, ['Apple Dominates App Store Search Results, Thwarting Competitors'](#), *The Wall Street Journal*, 23 July 2019, accessed 15 September 2022.

⁵⁰⁰ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 93–95.

⁵⁰¹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 8–9, 129–136.

⁵⁰² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 54–55.

spend on their iPhone, Apple removed or restricted at least 11 of the 17 most downloaded screen-time and parental control apps.⁵⁰³

- BlueMail: Blix, an app developer that created a feature similar to Apple's 'Sign in with Apple' functionality, was removed from the App Store for several months following Apple's announcement of 'Sign in with Apple'.⁵⁰⁴
- Tile: Tile testified to US Congress in 2021 that Apple degraded user experience on its app, while simultaneously introducing its own 'Find My' app and Air Tags, which are functionally similar to Tile's app and product.⁵⁰⁵ See also sections 6.6 and 6.8.

6.1.3. Self-preferencing can harm competition in services related to search services

In the DPI Final Report and the Report on Search Defaults and Choice Screens, the ACCC identified that Google has substantial market power in the supply of general search services in Australia.⁵⁰⁶

The ACCC has not, to date, examined whether Google has engaged in anti-competitive self-preferencing in the supply of general search services in Australia. However, we have raised concerns that Google could use its substantial market power in general search to foreclose competition in related markets.⁵⁰⁷ Given Google's substantial market power in search, its presence in a significant number of related markets and the opacity of its key algorithms, there is significant potential that any self-preferencing by Google in respect of its search services could substantially lessen competition in related markets.⁵⁰⁸

In 2017, the European Commission found that Google abused its market dominance as a search engine by promoting its own comparison-shopping service in its search results and demoting competing comparison-shopping services.⁵⁰⁹ In 2021, the EU General Court upheld this finding and the EUR2.7 billion fine imposed on Google.⁵¹⁰ The European Commission found that Google's conduct raised significant barriers to rival comparison-shopping services reaching a critical mass of users that would allow them to compete effectively against Google. It also found that Google's conduct was anti-competitive due to the importance of traffic volumes for comparison-shopping services to compete effectively, and the fact that Google Search results accounted for a large proportion of traffic, which could not be effectively replaced by other sources.⁵¹¹

Anti-competitive self-preferencing conduct by Google as a supplier of search services could affect multiple categories of related services. While competition from Google in related markets may benefit consumers, we are concerned that Google may seek to increase the popularity of these services by giving them favourable treatment over services supplied by third parties, rather than competing on the merits. As Google also supplies services such as

⁵⁰³ Coalition for App Fairness, [How Apple's App Store practices are stifling innovation](#), p 4.

⁵⁰⁴ Coalition for App Fairness, [How Apple's App Store practices are stifling innovation](#), pp 4–5.

⁵⁰⁵ [Testimony of Kirsten Daru](#), Chief Privacy Officer and General Counsel for Tile, Inc., before the Senate Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Washington DC, 21 April 2021. Tile makes tracker devices that can attach to items (such as keys, wallets and mobile phones) to help users to find these items through an app if they are misplaced or lost. Tile also developed a 'finding network' to support this functionality.

⁵⁰⁶ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 8; ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 24–25.

⁵⁰⁷ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 529.

⁵⁰⁸ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 12.

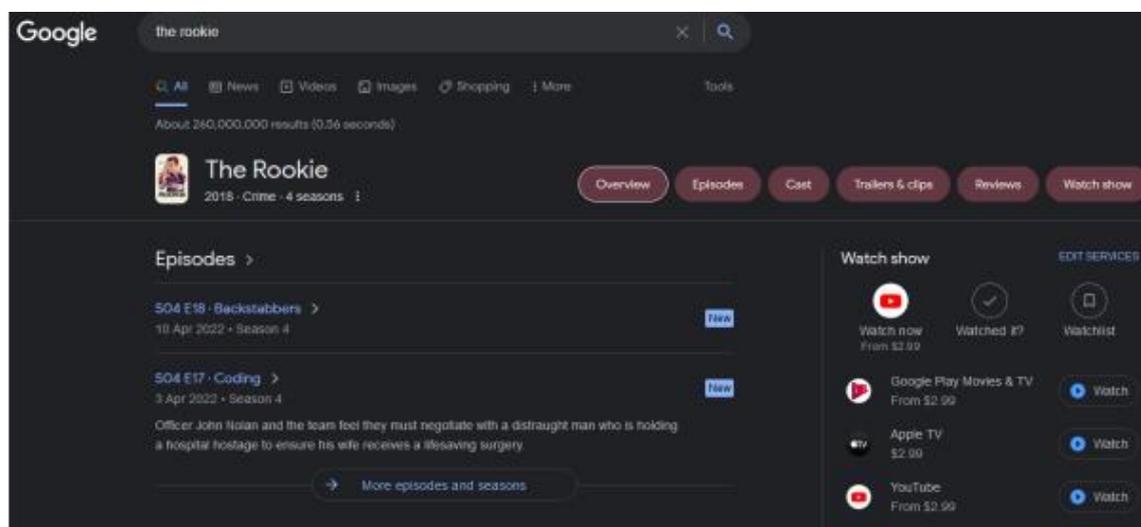
⁵⁰⁹ European Commission, Commission Decision, [Case AT.39740 Google Search \(Shopping\)](#), 27 June 2017, pp 77, 120.

⁵¹⁰ 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](#), 10 November 2021.

⁵¹¹ European Commission, Commission Decision, [Case AT.39740 Google Search \(Shopping\)](#), 27 June 2017, p 120.

YouTube, Google Hotels and Google Flights, Google has the ability and incentive to provide favourable treatment to these services on its search results page. Free TV Australia provided an example of Google Search preferencing its (paid) Google Play and YouTube services in the search results for a popular television show that could be viewed for free through other channels that were not displayed (see figure 6.1).⁵¹²

Figure 6.1 Google search results for The Rookie⁵¹³



6.1.4. Self-preferencing can harm competition in ad tech services

Ad tech refers to the services used by advertisers and online publishers to facilitate the automatic buying, selling and serving of some types of display advertisements that appear on publisher websites or in mobile applications. The ad tech supply chain is used for the supply of display advertising (rather than search advertising).

The ACCC's Ad Tech Inquiry Final Report⁵¹⁴ identified that Google was the dominant provider of key parts of the ad tech supply chain in Australia and had a strong position in other ad tech services and related markets.⁵¹⁵ We expressed concerns that Google had been able to leverage its strength in particular ad tech services, or in the supply of particular ad inventory, into related ad tech services through self-preferencing conduct.⁵¹⁶

We identified many examples of Google favouring its own related services at the expense of third-party ad tech services. We found that Google had:

- restricted purchase of YouTube inventory to its demand-side platforms⁵¹⁷
- directed demand from its demand-side platforms (particularly Google Ads) to its own supply-side platform⁵¹⁸

⁵¹² Free TV Australia provided an example where Google may be steering consumers towards a paid option on YouTube, when an option to watch television the program 'The Rookie' is available for zero monetary cost from another supplier that is not shown in the results. Free TV Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 25.

⁵¹³ Free TV Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 25.

⁵¹⁴ On 28 September 2021, the ACCC published the Ad Tech Inquiry Final Report as part of its Inquiry into the markets for the supply of ad tech services and ad agency services. This report provides in-depth analysis of competition and efficiency in the supply of ad tech services. It also details the ACCC's recommendations to improve competition and efficiency in the supply of ad tech services. See ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021.

⁵¹⁵ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 87.

⁵¹⁶ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 87.

⁵¹⁷ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 95–100.

- used its publisher ad server to preference its supply-side platform over time⁵¹⁹
- restricted how its supply-side platform works with third-party ad servers⁵²⁰
- used its control over auction rules in its publisher ad server to advantage its other services⁵²¹
- announced plans which could allow it to use its position in providing the Chrome browser to preference its ad tech services.⁵²²

While the ACCC did not reach a definitive view on the competitive impact of any single example of Google's self-preferencing behaviour, we considered that the cumulative effect of this behaviour over time had been to lessen competition in the supply of a range of ad tech services.⁵²³

The ACCC therefore recommended that sector-specific rules should be developed to address competition issues with ad tech services.⁵²⁴ Such rules would apply to ad tech providers that meet certain criteria linked to their market power and/or strategic position and would address conflicts of interest and anti-competitive self-preferencing, ensure rivals can compete on their merits by having non-discriminatory access to certain services, and address transparency concerns.⁵²⁵

A number of international regulators share the ACCC's concerns regarding Google's self-preferencing conduct, including the European Commission's Directorate General of Competition,⁵²⁶ a number of US State Attorneys-General,⁵²⁷ France's Autorité de la Concurrence,⁵²⁸ and the UK Competition and Markets Authority.⁵²⁹ Each of these agencies is either investigating or has taken enforcement action against Google in relation to its ad tech services. Some details on the European Commission's investigation are in box 6.2. It has also been widely reported that the US Department of Justice is investigating Google's ad tech business.⁵³⁰ The German Bundeskartellamt's 2022 report into non-search online advertising also identified that Google has considerable influence on the overall programmatic advertising system, including significant power to set rules.⁵³¹

We have also heard concerns through the Ad Tech Inquiry and received submissions from Free TV Australia and Nine in support of measures to prevent self-preferencing in ad tech

⁵¹⁸ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 101–104.

⁵¹⁹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 104–114.

⁵²⁰ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 114–119.

⁵²¹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 119–126.

⁵²² ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 126–131.

⁵²³ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 87.

⁵²⁴ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 11, 131–132.

⁵²⁵ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 132–142.

⁵²⁶ European Commission, [Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector](#), 22 June 2022, accessed 15 September 2022.

⁵²⁷ T Hatmaker, ['Texas leads ten states in lawsuit over Google's ad business'](#), *TechCrunch*, 17 December 2020, accessed 15 September 2022.

⁵²⁸ Autorité de la concurrence, [The Autorité de la concurrence hands out a €220 millions \[sic\] fine to Google for favouring its own services in the online advertising sector](#), 7 June 2021, accessed 15 September 2022.

⁵²⁹ CMA, [Google probed over potential abuse of dominance in ad tech](#), 26 May 2022, accessed 15 September 2022.

⁵³⁰ L Nysten and G Smith, ['DOJ Is Preparing to Sue Google Over Ad Market as Soon as September'](#), *Bloomberg*, 10 August 2022, accessed 15 September 2022.

⁵³¹ Bundeskartellamt, [Bundeskartellamt publishes report on non-search online advertising for public discussion](#), 29 August 2022, accessed 15 September 2022.

services.⁵³² We consider that these measures will benefit publishers, advertisers and ultimately consumers.

Box 6.2 European Commission investigation into Google’s ad tech services

On 22 June 2021, the European Commission commenced a formal antitrust investigation to assess whether Google violated EU competition rules by favouring its own online display advertising technology services in the ad tech supply chain, to the detriment of competing providers of advertising technology services, advertisers and online publishers.

The formal investigation will examine a range of conduct including:

- the apparent favouring of Google's ad exchange 'AdX' by its demand-side platforms (Display and Video 360 (DV360) and/or Google Ads) and the potential favouring of DV360 and/or Google Ads by AdX
- the restrictions placed by Google on the ability of third parties, such as advertisers, publishers or competing online display advertising intermediaries, to access data about user identity or user behaviour which is available to Google's own advertising intermediation services.⁵³³

6.1.5. Potential obligations to address harmful self-preferencing to promote competition on the merits

We consider that additional competition measures for digital platforms could include obligations on relevant Designated Digital Platforms to prevent them providing favourable treatment to their own products and services over those supplied by third parties. Such obligations would promote competition on the merits, and benefit consumers and business users of digital platform services.

Several stakeholders, including Open Web Advocacy, Microsoft, Pinterest, Epic Games and the Coalition for App Fairness, support measures targeted at self-preferencing conduct by platforms.⁵³⁴ Other stakeholders, such as Apple and Meta, consider that harmful self-preferencing can be captured by current competition law and new competition measures are unnecessary.⁵³⁵ Google submits that 'outright bans on self-preferencing – without considering benefits to consumers and whether there is competitive harm – could deprive Australians of useful innovation'.⁵³⁶

The ACCC recognises that there may be legitimate justifications for some types of self-preferencing conduct, such as promoting efficiency, or addressing security or privacy concerns, which would need to be carefully considered in developing new obligations. Any new obligations to prevent self-preferencing should be tailored to address specific conduct likely to harm competition, rather than amounting to a broad prohibition on any and all self-preferencing by Designated Digital Platforms. As noted above, additional analysis and consultation would be required before targeted obligations could be implemented.

⁵³² Free TV Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 31–32; Nine Entertainment, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3.

⁵³³ European Commission, '[Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector](#)', 22 June 2022, accessed 15 September 2022.

⁵³⁴ Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9; Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Pinterest, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 4–5; Epic Games, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 12–13; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 13–15.

⁵³⁵ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 1–3, 6–7; Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 2, 56–57.

⁵³⁶ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5.

In addition to the examples above, other forms of anti-competitive self-preferencing by digital platforms likely exist and could arise over time. Such conduct should be considered on a case-by-case basis in the development of future service-specific codes. We also note that these self-preferencing issues may also arise in markets outside of, but related to, those considered in this Inquiry. For example, the US Federal Trade Commission is reportedly investigating self-preferencing conduct in respect of Meta's virtual reality division. Third-party developers have claimed that Meta frequently copies their best ideas and then makes it harder for their apps to function on Meta's headsets.⁵³⁷

The complexity of digital platform services, including ranking algorithms, means that detailed information and technical expertise may be required to assess whether self-preferencing conduct is likely to be anti-competitive. As a result, it will be important to ensure that the relevant regulator is appropriately equipped to make such an assessment.

6.2. Addressing anti-competitive tying

The ACCC is concerned that some digital platforms with market power are engaging in tying conduct that may have anti-competitive impacts, including:

- Apple and Google requiring their own in-app payment systems to be used for certain in-app payments made on apps accessed through the Apple App Store and Google Play Store.
- Google requiring mobile device manufacturers that pre-install the Google Play Store to also pre-install other Google services.
- Google requiring advertisers to use Google's own demand-side platforms to programmatically purchase ad inventory on YouTube.

Service-specific codes should include targeted obligations to address anti-competitive tying where relevant and appropriate. For example:

- a code for app store services could prohibit Designated Digital Platforms from requiring app developers to use their first party in-app payment systems as a condition of using their app store
- a code for app store services could prohibit Designated Digital Platforms from requiring device manufacturers to pre-install other first-party apps as a condition of pre-installing their app stores
- a code for ad tech services could prohibit Designated Digital Platforms from requiring advertisers to use their own ad tech services to purchase ad inventory that they supply.

These codes could also include obligations to address conduct that has a similar effect to anti-competitive tying, such as anti-competitive bundling.

Measures to address tying conduct are included in the EU's Digital Markets Act and the 10th Amendment to the German Competition Act. Tying conduct has also been identified as something that the UK Government's proposed pro-competition regime for digital markets would be able to address through conduct requirements.

Broadly, tying conduct occurs when a supplier provides one product or service on the condition that the purchaser buys another product or service from the same supplier. A digital platform with market power may exclude or hinder its competitors by tying a service in which it has market power to a product or service it provides in a related market. This can damage competition in the related market by limiting access to users and/or reducing the

⁵³⁷ I Bonifacic, '[The FTC is reportedly investigating Meta's VR unit for anticompetitive practices](#)', *engadget*, 14 January 2022, accessed 15 September 2022.

ability of rivals to gain sufficient scale to profitably and/or effectively compete in that market. Bundling – where a supplier only offers 2 products or services as a package, or for a lower price if the 2 products or services are purchased together – can cause similar competition concerns.⁵³⁸

The ACCC has previously raised concerns about tying in respect of Apple and Google’s app store and their own in-app payment services,⁵³⁹ pre-installation of the Google Play Store with other apps for Android original equipment manufacturers,⁵⁴⁰ and YouTube ad inventory being tied to Google’s ad tech services.⁵⁴¹ We are concerned that such conduct may have limited, and will continue to limit, the ability of rivals to compete with these platforms.

The discussion below is intended to present examples of the types of competition concerns that additional competition measures for digital platforms should be capable of considering and addressing. Additional analysis and consultation would be required before targeted obligations could be implemented.

6.2.1. Tying can cause harm in app stores and related markets

Tying of app store services to in-app payment systems can impact competition for in-app payment systems

Apple and Google’s market power in their dealings with app developers is highly likely to enable them to unilaterally set and enforce the rules that app developers must satisfy.⁵⁴² These rules have generally included requirements for certain app developers to use the in-app payment system provided by each of Apple and Google.⁵⁴³ However, on 1 September 2022, Google launched a pilot program in Australia, Europe, India, Indonesia and Japan allowing developers of non-gaming apps to offer alternative in-app payment options.⁵⁴⁴

Tying of app store services to in-app payment systems leads to a loss of consumer choice as consumers are unable to use (and developers are unable to offer) any other payment option when making payments in apps.⁵⁴⁵ This could negatively impact the quality and functionality of the apps and services that app developers wish to provide their users, such as by limiting their ability to issue refunds or cancel subscriptions.⁵⁴⁶ It could also affect:

- app developers’ ability to make changes to the prices of in-app purchases⁵⁴⁷
- competition between apps that are subject to the requirement and apps that are not
- the choice of business model for app developers.⁵⁴⁸

Some stakeholders, including the Coalition for App Fairness, Epic Games and Match Group, submit that the requirement to use Apple and Google’s in-app payment systems has resulted

⁵³⁸ ACCC, [Guidelines on misuse of market power](#), August 2018, p 14.

⁵³⁹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 65.

⁵⁴⁰ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 73.

⁵⁴¹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 95–96.

⁵⁴² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 78.

⁵⁴³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 65.

⁵⁴⁴ Google will require all developers offering their own payment systems to meet safety and security requirements. Google, [Enrolling in the user choice billing pilot](#), accessed 15 September 2022.

⁵⁴⁵ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 77.

⁵⁴⁶ Transcript of Proceedings, Epic Games v. Apple (United States District Court Northern District of California No C-20-5640 Judge Yvonne Gonzalez Rogers, 4 May 2021), p 355.

⁵⁴⁷ Transcript of Proceedings, Epic Games v. Apple (United States District Court Northern District of California No C-20-5640 Judge Yvonne Gonzalez Rogers, 4 May 2021), pp 357–358.

⁵⁴⁸ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 63.

in higher prices for consumers.⁵⁴⁹ In particular, Google and Apple typically impose a 15–30% commission on the sale of every paid app and every payment made to purchase digital goods (i.e. in-app payments for in-app content) processed through their app stores.⁵⁵⁰ The ACCC's Report on App Marketplaces identified that it is highly likely that the commission rates charged by Apple and Google are inflated by their likely significant market power in app distribution.⁵⁵¹ However, assessing the degree to which commission rates are inflated by Apple and Google's market power is difficult, owing to the complex interrelated nature of the platforms' ecosystems.⁵⁵²

While we consider that a prohibition on tying app stores services to in-app payment systems would promote competition in in-app payment systems, further consideration is required to assess the full impacts of any measures targeted at addressing this conduct, which would be informed by the implementation of such measures overseas. It is not clear how effectively the unbundling of these service would address Apple and Google's control over of their respective app stores and in-app payment systems.

The implications of any changes to Apple and Google's revenue raising model on app developers and consumers are also not clear.⁵⁵³ The commission applied to in-app payments allows Apple and Google to recover costs and generate profit from their app stores.⁵⁵⁴ There is the potential risk that, if unbundling were to undermine Apple and Google's ability to collect commissions on in-app payments, this may lead to less efficient forms of charges.⁵⁵⁵

In addition to Google's recent changes in Australia, a degree of unbundling has occurred overseas in response to new legal requirements:

- In response to legislative changes in South Korea:
 - Google announced that developers that sell in-app digital goods and services will be given the option to add an alternative in-app billing system alongside Google Play's billing system for their users in South Korea.⁵⁵⁶ Google stated that it still intends to collect its commission from developers who sell digital content but will deduct 4% when a user selects a developer's alternative in-app billing system, to account for the developer's costs in supporting it.⁵⁵⁷
 - Apple announced that it would allow apps distributed on the App Store in South Korea the ability to provide an alternative in-app payment processing option.⁵⁵⁸ Apps that are granted an entitlement to use a third-party in-app payment provider will still be charged a 26% commission on the price paid by the user (rather than the previous 30%). Further, developers would be required to provide a report to Apple

⁵⁴⁹ For example, Coalition for App Fairness submitted that because app developers cannot choose their payment processor, users ultimately lose out on flexible payment options and features such as targeted discounts and the ability to pay in instalments. See Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; Epic Games, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 3–4, 12–13; Match Group, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 10.

⁵⁵⁰ However, the vast majority of apps do not process payments via the in-app payment systems, principally because they do not sell digital goods and services directly through their apps. See ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 9, 68.

⁵⁵¹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 63.

⁵⁵² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 63.

⁵⁵³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 78.

⁵⁵⁴ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 63.

⁵⁵⁵ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 78.

⁵⁵⁶ Google Developers, [Enabling alternative billing systems for users in South Korea](#), 4 November 2021, accessed 15 September 2022.

⁵⁵⁷ CMA, [Mobile ecosystems market study, Appendix H: Apple's and Google's in-app purchase rules](#), 10 June 2022, p H8.

⁵⁵⁸ Apple Developer, [Distributing apps using a third-party payment provider in South Korea](#), accessed 15 September 2022.

recording each sale of digital goods and content that has been facilitated through the App Store.⁵⁵⁹

- The Korea Communications Commission (South Korea) is investigating Apple and Google over potential violations of the new legislation.⁵⁶⁰
- To comply with competition orders in the Netherlands, Apple now allows developers distributing dating apps on the App Store in the Netherlands to use a third-party payment system within the app.⁵⁶¹

In submissions to the ACCC's Report on App Marketplaces, Apple and Google provided several reasons for requiring developers to use their in-app payment systems, including:

- Consumer protection: a single app store-run payment system provides security which is valued by consumers and would be compromised if third-party payment systems were allowed.
- Value to app developers: the commission compensates app store providers for the general provision of their services, rather than just representing a payment processing fee. Apple and Google provide app developers with tools and support to develop apps, and the app stores provide a means by which app developers can reach and distribute to consumers.⁵⁶²

The ACCC notes that the in-app payment requirements typically only apply to apps that supply 'digital' goods and services and not apps that supply 'physical' goods and services.⁵⁶³

Further, as noted above, both Apple and Google have recently announced changes to their restrictions on the use of alternative in-app payment systems in several jurisdictions.⁵⁶⁴ The ACCC understands that in all of these jurisdictions, the platforms will be able to recoup commissions while offering choice of payment systems to app developers and their users.

Tying of app stores with other first-party apps can harm competition in related markets

The ACCC's Report on Search Defaults and Choice Screens considered the agreements between Google and mobile device original equipment manufacturers.⁵⁶⁵ Original equipment manufacturers require a mobile OS to ensure device functionality and most non-Apple mobile devices run on Android. Android original equipment manufacturers can choose to:

- use the free open-source Android code which does not require a contract with Google, or
- obtain a licence from Google (called a Mobile Application Distribution Agreement) to use the Android code and access the suite of apps known as Google Mobile Services which includes the Play Store, Google Maps, Chrome and Google Search.⁵⁶⁶

The Google Play Store is a key app in the Google Mobile Services suite of apps and most original equipment manufacturers see the Play Store as a 'must have' service.⁵⁶⁷

⁵⁵⁹ Apple Developer, [Distributing apps using a third-party payment provider in South Korea](#), accessed 15 September 2022.

⁵⁶⁰ N Mott, 'South Korea will investigate Google, Apple over in-app payments (Again)', *PC Mag Australia*, 10 August 2022, accessed 15 September 2022.

⁵⁶¹ N Lomas, 'Apple's payment options offer for Dutch dating apps is compliant, says ACM', *TechCrunch*, 13 June 2022, accessed 15 September 2022.

⁵⁶² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 66.

⁵⁶³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 73.

⁵⁶⁴ N Lomas, 'Apple's payment options offer for Dutch dating apps is compliant, says ACM', *TechCrunch*, 13 June 2022, accessed 15 September 2022.

⁵⁶⁵ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 72–73.

⁵⁶⁶ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 72–73.

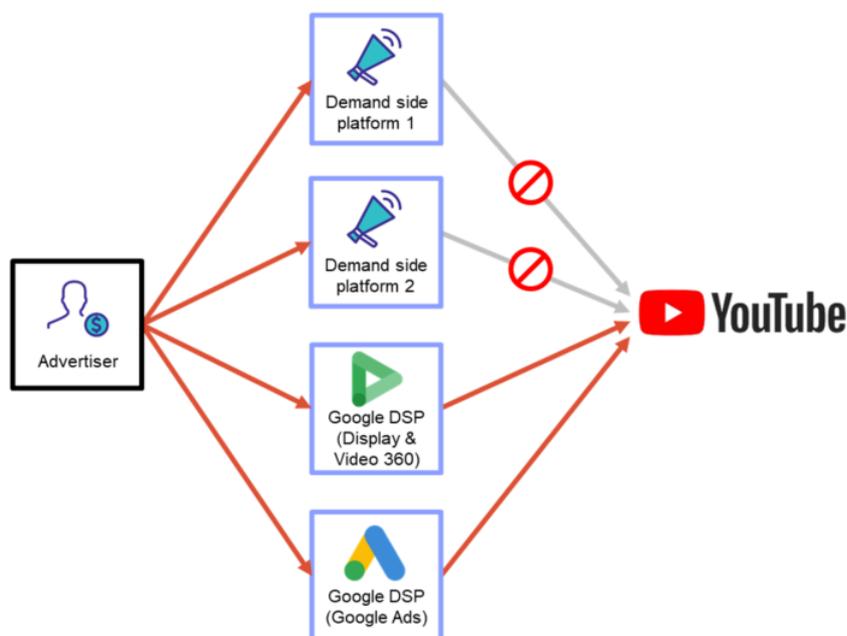
This allows Google to leverage its likely significant market power in app distribution to provide its apps the advantage of pre-installation on Android devices. Without this tying arrangement, Android original equipment manufacturers would have more options about what apps they pre-install on their devices. In a 2018 decision, the European Commission considered that Google’s early agreements which included tying conduct, constituted an abuse of Google’s dominant position. This decision was largely upheld by the General Court in 2022 following an appeal by Google.⁵⁶⁸

There are other factors that increase the likelihood of original equipment manufacturers choosing Google’s suite of apps and placing Google’s apps in prominent positions on the home screen.⁵⁶⁹ For example, Mobile Application Distribution Agreements are a pre-requisite to any revenue sharing arrangements with Google. This is discussed further in section 6.3.

6.2.2. Tying can harm competition in ad tech services

The ACCC’s Ad Tech Inquiry Final Report discussed our concerns about Google requiring advertisers to use its demand-side platforms (Google Ads and DV360) to programmatically purchase its YouTube ad inventory. This is illustrated in figure 6.2. We raised concerns that, due to YouTube’s importance to advertisers, the requirement to use Google’s demand-side platforms to programmatically purchase YouTube inventory limited the ability for rival demand-side platforms to compete with Google.⁵⁷⁰

Figure 6.2 The availability of YouTube inventory through the ad tech supply chain



Source: ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 95.

Google has provided the ACCC with its reasons for restricting access to YouTube ad inventory, including that it improves the way YouTube ads are sold programmatically⁵⁷¹ and

⁵⁶⁷ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 75.

⁵⁶⁸ Court of Justice of the European Union, [Judgement of the General Court in Case T-604/18, Google and Alphabet v Commission \(Google Android\)](#), Press release, 14 September 2022.

⁵⁶⁹ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 76.

⁵⁷⁰ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 95–96.

⁵⁷¹ N Mohan, [‘Focusing investments to improve buying on YouTube’](#), *DoubleClick Advertiser Blog* (Google Blog), 6 August 2015, accessed 15 September 2022.

that low sales at the time did not justify maintaining third-party demand-side platform access to YouTube.⁵⁷² During the Ad Tech Inquiry, the ACCC did not consider these reasons to be strong, particularly given that the 'must have' status of YouTube ad inventory has only grown over time.⁵⁷³ We note media reports that suggest that Google is considering opening access to YouTube in response to concerns from competition authorities in Europe.⁵⁷⁴

The ACCC remains concerned that this tying conduct may be harming competition in the supply of ad tech services, particularly for demand-side platform services. This may result in advertisers paying higher prices for advertising, which could have flow-on effects to the prices paid by consumers for goods and services.

Targeted obligations preventing this type of conduct would be consistent with the ACCC's recommendations in the Ad Tech Inquiry Final Report. Stakeholders such as Free TV Australia support broad measures to prohibit tying and self-preferencing conduct in ad tech services and consider that the tying of YouTube is particularly problematic.⁵⁷⁵

6.2.3. Potential obligations to address harmful tying to promote competition

We consider specific obligations addressing tying would promote competition, and benefit consumers and business users of digital platforms. Such obligations could address the harmful tying conduct detailed above, as well as other forms of anti-competitive tying that emerge.

Anti-competitive tying and bundling concerns may also arise in markets outside of but related to, those considered in this Inquiry, such as cloud computing services.⁵⁷⁶ Such conduct should be considered on a case-by-case basis in the development of any future service-specific codes.

The ACCC recognises that there may be legitimate justifications for some tying conduct, such as promoting efficiency, or addressing security or privacy concerns, which would need to be carefully considered. Consequently, any obligations should be tailored to address the specific tying conduct that is likely to cause anti-competitive harm, rather than being framed as a broad prohibition on any and all tying by Designated Digital Platforms.

In implementing and targeting new obligations for Designated Digital Platforms, it will be important to do so in a way that prevents narrow compliance or easy circumvention that may undercut the intended effect of these measures. For example, where Designated Digital Platforms are subject to measures that target anti-competitive tying, it may be important to also require these Designated Digital Platform not to provide unfavourable or discriminatory treatment to business users that choose to use alternative third-party providers. It may also be important to consider prohibiting these Designated Digital Platforms from imposing price parity clauses, or exclusivity arrangements, on users who choose to use alternative third-party providers. This is discussed further in sections 6.5 and 6.9.

While there is international consensus that tying by digital platforms can cause harm to consumers and the competitive process, different jurisdictions have taken different approaches to prohibiting this type of conduct, as shown in box 6.3.

⁵⁷² ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 99.

⁵⁷³ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 99.

⁵⁷⁴ F Y Chee, '[Google offers to let ad rivals place YouTube ads](#)', *Reuters*, 14 June 2022, accessed 15 September 2022.

⁵⁷⁵ Free TV Australia, [Submission to the Digital Platforms Inquiry Fifth Interim Report](#), May 2022, p 32.

⁵⁷⁶ For example, it has been reported that the European Commission is following up complaints alleging that Microsoft is using its position in workplace productivity software to harm competition in the market for cloud computing services, including through the alleged tying of Microsoft 365 to its own storage service One Drive. See P Dave, '[Microsoft's cloud business targeted by EU antitrust regulators](#)', *Reuters*, 2 April 2022, accessed 15 September.

Box 6.3 International approaches to address tying conduct, including for in-app payment services

International approaches to address tying

The EU's Digital Markets Act:

- prohibits gatekeepers from requiring 'end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service or technical services...of that gatekeeper in the context of services provided by the business users using that gatekeeper's core platform services'⁵⁷⁷
- prohibits gatekeepers from requiring 'business users or end users to subscribe to, or register with, any other core platform services... as a condition for being able to use, access, sign up for or registering with any of that gatekeeper's core platform services.'⁵⁷⁸

The 10th Amendment to the German Competition Act can require a firm of 'paramount significance' not to make the use of a service conditional on the use of another service.⁵⁷⁹

The UK Competition and Markets Authority recommended that the UK Government's proposed pro-competition regime for digital markets include measures to address tying.⁵⁸⁰ For example, it recommended specific conduct requirements that could require firms with strategic market status to not bundle or tie its services in a way which has an adverse effect on users.⁵⁸¹ It also recommended that the Digital Markets Unit have the ability to oblige firms with strategic market status to provide access to inventory on reasonable terms.⁵⁸²

The proposed US American Innovation and Choice Online Act and Open App Markets Act contain prohibitions on tying conduct. For example, section 2 of the American Innovation and Choice Online Act states that it shall be unlawful for a 'covered platform' to condition access, preferred status or placement on the purchase or use of other products or services offered by the covered platform operator.⁵⁸³

International approaches to address tying of in-app payment services

The EU's Digital Markets Act prohibits gatekeepers from 'requiring end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine, a payment service or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper...'⁵⁸⁴

⁵⁷⁷ EU Digital Markets Act, Article 5(7). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁵⁷⁸ EU Digital Markets Act, Article 5(8). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁵⁷⁹ Federal Ministry of Justice, [Act against Restraints of Competition](#), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p 2506).

⁵⁸⁰ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020; CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022.

⁵⁸¹ These requirements could be addressed under enforceable codes with firm-specific conduct requirements. CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 345; CMA, [Mobile ecosystems market study, Appendix M: examples of practices that could be addressed by SMS Conduct Requirements](#), 10 June 2022, p M12.

⁵⁸² CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 403.

⁵⁸³ For example, section 2(b)(2) of the proposed [American Choice and Innovation Online Act](#) S. 2992, 117th Congress (2021–2022) states that it shall be unlawful for a 'covered platform' to condition access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator'.

⁵⁸⁴ EU Digital Markets Act, Article 5(7). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

South Korea's amendments to the Telecommunications Business Act requires major app store operators such as Apple and Google to unbundle the use of their proprietary in-app payment systems from the use of app distribution services.⁵⁸⁵

The US's proposed Open App Markets Act prohibits covered app stores from requiring developers to use an in-app payment system owned or controlled by the company as a condition of distribution or accessibility.⁵⁸⁶

6.3. Addressing exclusive pre-installation and defaults

The ACCC is concerned that some digital platforms with market power are entering into exclusive pre-installation and default agreements that may have anti-competitive impacts. For example, Google's extensive, and often exclusive, pre-installation and default arrangements for its search service limit the ability of rival search services to easily reach consumers at scale.

Service-specific codes should include targeted obligations to address exclusive pre-installation and default agreements where relevant and appropriate. For example:

- a code for search services could prohibit Designated Digital Platforms from entering into pre-installation arrangements that are, in practice or effect, exclusive
- codes for mobile OS services or app store services could require Designated Digital Platforms to allow consumers to delete or uninstall certain pre-installed apps, and to change default settings to a third-party service
- a code for search services could require Designated Digital Platforms to provide choice screens in respect of specific services that act as 'search access points'.⁵⁸⁷ The design and implementation of any choice screen would need to be subject to detailed consultation with industry participants and user testing, and be informed by the implementation of choice screens overseas. Choice screens may also be appropriate for other services in the future.

The EU's Digital Markets Act includes requirements to display choice screens for search, browser and virtual assistant services, as well as requirements to allow users to un-install pre-installed apps. The UK Competition and Markets Authority has recommended that the Digital Markets Unit have the power to implement choice screens under the UK Government's proposed pro-competition regime for digital markets.

6.3.1. Exclusive pre-installation and defaults heighten barriers to entry and expansion and reduce active consumer choice

The ACCC recommends that additional competition measures for digital platforms should include obligations that address exclusive pre-installation arrangements and defaults where these harm competition. This would address advantages that incumbent providers have gained as a result of pre-installation and default arrangements, where these arrangements have heightened barriers to entry and expansion for rivals.

⁵⁸⁵ C Yun-hwan, 'S. Korea passes bill to curb sway of Google, Apple in app store fees', *Yonhap News Agency*, 31 August 2021, accessed 15 September 2022; Korea Communications Commission, [Telecommunications Business Act Prohibiting Forced In-App Payment Methods Goes Into Effect](#), Press Release, 14 September 2021, accessed 15 September 2022.

⁵⁸⁶ [Open App Markets Act](#), S. 2710, 117th Congress (2021-22) § 3.

⁵⁸⁷ 'Search access points' are components or software within a device ecosystem that facilitate access to search services, including but not limited to browsers, search apps, search widgets and voice assistants.

The ACCC's Report on Search Defaults and Choice Screens expressed concerns that Google's various pre-installation and default arrangements have increased barriers to entry and expansion for rival search services.⁵⁸⁸ In particular, Google's extensive and largely exclusive pre-installation and default arrangements provide a significant advantage in reaching consumers, achieving scale and improving its services through access to search data ('click-and-query' data).⁵⁸⁹ The ability of rivals to compete with Google for default positions is also limited by Google's tying conduct (Google's tying conduct is discussed in section 6.2).

In the context of apps and app stores, the ACCC is concerned that pre-installation arrangements can reduce active consumer choice and make it more difficult for consumers to access, find or switch to alternative providers. This advantages incumbent providers and can lock in consumers.

The ACCC is concerned that these arrangements collectively heighten barriers to entry and expansion in search, app stores and downstream app markets.⁵⁹⁰ Hence, additional competition measures for digital platforms should be able to address this conduct by, as required:

- restricting the use of exclusive pre-installation and default agreements by Designated Digital Platforms
- requiring Designated Digital Platforms to allow consumers to un-install or delete apps and to change their default services⁵⁹¹
- requiring Designated Digital Platforms to implement choice screens.⁵⁹²

This would complement other obligations such as those to address anti-competitive tying (see section 6.2) and facilitating consumer switching (see section 6.4).

Exclusive pre-installation and defaults can restrict competition in search services and benefit incumbent providers

Exclusive pre-installation and default arrangements allow platforms to access consumers at scale. Due to the tendency of many consumers to stick with the default or pre-installed service, this provides a significant advantage to the platform, especially where such agreements cover most access points, and where reach is important to achieve economies of scale and/or network effects. The ACCC has previously found that such factors benefit the dominant search provider, Google Search.⁵⁹³

Google's pre-installation and default arrangements, alongside its tying conduct (discussed in section 6.2), are critical to its substantial and enduring market power in search services and serve to maintain and entrench its dominance.⁵⁹⁴ Google Search is the pre-set default (and

⁵⁸⁸ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 9–10.

⁵⁸⁹ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 9–10.

⁵⁹⁰ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 101–103.

⁵⁹¹ See section 6.5 which discusses measures to promote effective interoperability, including that designated mobile OS providers and app store providers must allow third-party app stores (including cloud gaming stores) to be compatible with their own OS and made available for download in their own app store.

⁵⁹² 'Choice screens' allow users of digital platform services to choose their preferred service (such as a search engine) as the default on a device, operating system or application, rather than relying on the pre-installed or pre-set defaults.

⁵⁹³ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 9–13.

⁵⁹⁴ As discussed in section 1.5.1, in the past decade, Google has had a market share of 93% to 95% in the supply of search services in Australia. The ACCC previously identified that Google has substantial market power in the supply of general search services. See Statcounter, [Search engine market share Australia – June 2012 – June 2022](#), accessed 15 September 2022.

in some cases, exclusive) search service on the overwhelming majority of mobile devices and key search access points (such as browsers) in Australia.⁵⁹⁵

Android device agreements

Google is the pre-set default search engine across a range of pre-installed search access points on Android mobile devices.⁵⁹⁶ This is the result of Google's Mobile Application Distribution Agreements and Revenue Sharing Arrangements or Mobile Incentive Agreements.

As discussed in section 6.2, Mobile Application Distribution Agreements tie the pre-installation of Google Search (and other Google apps) with the pre-installation of the Google Play Store. Android original equipment manufacturers are incentivised to enter into Mobile Application Distribution Agreements with Google not only to get access to the 'must have' Play Store, but also to access Revenue Sharing Arrangements or Mobile Incentive Agreements.⁵⁹⁷

Many Android original equipment manufacturers that have Mobile Application Distribution Agreements also have Revenue Sharing Arrangements.⁵⁹⁸ The Revenue Sharing Arrangements seen by the ACCC contain incentives for the relevant original equipment manufacturer to set key Google apps, such as Google Play, Google Search, and Google Assistant, as default apps on their Android device. In some cases, to access financial incentives offered under the Revenue Sharing Arrangements, the original equipment manufacturer is required not to pre-install, or set as a default, alternatives to a limited number of Google apps.⁵⁹⁹

Even where there are exceptions to the exclusivity requirements regarding certain search access points, the revenue sharing arrangements are such that original equipment manufacturers are heavily incentivised to pre-install, and set as default, many of these search access points to Google Search in order to maximise their revenue.⁶⁰⁰

The UK Competition and Markets Authority has similarly noted that Google's agreements and payments to original equipment manufacturers are a material barrier to entry, and that switching away from Android would require original equipment manufacturers to forego significant financial incentives.⁶⁰¹

Apple and other agreements

Not only is Google the pre-set default on virtually all key access points on most Android devices, but Google also has default arrangements with Apple. Under these contracts, Apple receives a share of search advertising revenue generated by the use of Google Search on Apple devices. In its proceedings against Google, the DOJ referred to public estimates that the share of Google Search advertising revenue which Apple receives is between USD8-12 billion per year globally for Google's default status for search through Safari, and to use Google for Siri and Spotlight in response to general search queries, on Apple devices.

⁵⁹⁵ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 9.

⁵⁹⁶ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 9, 11–12, 23. Google Search is the default search engine on its Chrome web browser, search widgets and apps and voice assistant, which are pre-installed on most Android mobile devices.

⁵⁹⁷ Revenue Sharing Agreements and Mobile Incentive Agreements enable original equipment manufacturers to obtain revenue from Google's proprietary services such as Google Search. ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 76.

⁵⁹⁸ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 76.

⁵⁹⁹ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 77.

⁶⁰⁰ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 77; CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 77.

⁶⁰¹ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 80.

The ACCC has examined these revenue sharing arrangements between Apple and Google and confirms that the 2020 share of Google Search advertising revenue received by Apple was in the upper range of the public estimates.⁶⁰² The benefits gained through its conduct on Android put Google at a significant advantage in respect of the amount of revenue it can offer Apple, and its access to data which is used to improve the quality of its search results.

Google is also the default search service on a range of third-party browsers.⁶⁰³

Effect of agreements

Having considered the variety of pre-installation and default agreements between Google, original equipment manufacturers and browser providers, combined with Google's vertical integration and the tying conduct in section 6.2, it appears Google's rivals are foreclosed from obtaining default positions on most key access points for reaching consumers on mobile devices.⁶⁰⁴ In particular, the tying conduct and incentives to set Google Search as the default on all search access points (across all devices) mean rival search engines – none of which have an app store – are unable to negotiate pre-installation and default arrangements of the scale necessary to effectively compete with and alongside Google. While consumers often have the option to install rival search services and set these as the default, few consumers do, with some having only a limited understanding about how to do this.⁶⁰⁵

The difficulty that rival search engines face in obtaining default placement increases barriers to expansion for rivals through a reduced ability to access users at scale, which is critical to realising economies of scale and network effects. Rival search services also face significant challenges in making consumers aware of their services.⁶⁰⁶ Collectively, Google's conduct has cemented its dominance in search.

Overseas competition authorities have similarly raised concerns about Google's tying and exclusive pre-installation arrangements. These are discussed further in box 6.4.

Box 6.4 International proceedings regarding Google's pre-installation arrangements The European Commission's Android decision (2018)

In July 2018, the European Commission fined Google EUR4.34 billion for imposing restrictions on Android original equipment manufacturers and mobile network operators to cement its dominant position in general search services.⁶⁰⁷ The European Commission found that, between 2011 and 2014, Google:

- required Android original equipment manufacturers to pre-install the Google Search app and Chrome browser app as a condition for licensing the Google Play Store
- made payments to certain large original equipment manufacturers and mobile network

⁶⁰² ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 78.

⁶⁰³ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 9, 12.

⁶⁰⁴ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 86.

⁶⁰⁵ For example, the ACCC's 2021 consumer survey for the Report on Search Defaults and Choice Screens conducted by Roy Morgan found that consumers tend to stick with the pre-installed browser and pre-set search engine and particularly on mobile devices. This survey found 70% of consumers reported that the browser they used the most on their mobile device was pre-installed. Over a third of consumers stated that they either do not know how to change the default search engine used by their mobile browser (24%) or were unsure if they knew how to do this (12%). This online survey commissioned from Roy Morgan Research was conducted in May 2021 with 2,647 respondents on consumers' usage of web browsers and search services. See ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 43–48.

⁶⁰⁶ As noted in the Report on Search Defaults and Choice Screens, consumers that lack knowledge of alternative suppliers cannot meaningfully switch or choose the service that best meets their preferences, regardless of their willingness or desire to do so. See ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 48.

⁶⁰⁷ European Commission, [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.

operators on the condition that the Google Search app was exclusively pre-installed on their devices

- prevented Android original equipment manufacturers wishing to pre-install Google apps from selling devices running alternative versions of Android not approved by Google ('Android forks').

On 9 October 2018, Google appealed the European Commission's decision to the General Court of the EU.⁶⁰⁸ On 14 September 2022, the General Court upheld the Commission's ruling, stating it 'largely confirms the European Commission's decision that Google imposed unlawful restrictions on manufacturers of Android mobile devices and mobile network operators to consolidate the dominant position of its search engine'. The fine was reduced to EUR 4.125 billion.⁶⁰⁹

US Department of Justice and 11 State Attorneys-General complaint against Google LLC (2020)

On 20 October 2020, the US Department of Justice and 11 State Attorneys-General filed a civil antitrust lawsuit alleging that Google has unlawfully maintained monopolies in search and search advertising markets by:

- entering into exclusivity agreements, tying and other arrangements with original equipment manufacturers, which ensure Google's search and other applications are pre-installed, centrally placed, set as default and unable to be deleted while competing search engine services are barred from pre-installation.⁶¹⁰
- entering into long term contractual agreements with Apple that require Google Search to be the default search engine on Apple's Safari browser and other Apple search tools.⁶¹¹
- using monopoly profits to purchase preferential treatment for its search engine on devices, web browsers, and emerging search access points, creating 'self-reinforcing cycle of monopolisation'.⁶¹²

The Department of Justice requested that the Court, among other things, prohibit Google from continuing to engage in the practices which it has identified as anti-competitive and enter 'structural relief as needed' to remedy anti-competitive harm.⁶¹³

Mobile OS providers can use pre-installation to benefit their own apps

As mentioned in section 6.1 and 6.2, the ACCC's Report on App Marketplaces identified that there is a duopoly in the supply of mobile OS and app distribution in Australia, and high barriers to entry.⁶¹⁴ This may restrict the ability of app developers to access consumers, and the ability of consumers to access alternative services. For example, while other app stores

⁶⁰⁸ Official Journal of the European Union, Action brought on 9 October 2018 — Google and Alphabet/Commission (Case T-604/18), [C 445 English addition](#), 10 December 2018, pp 21–22.

⁶⁰⁹ Court of Justice of the European Union, [The General Court largely confirms the Commission's decision that Google imposed unlawful restrictions on manufacturers of Android mobile devices and mobile network operators in order to consolidate the dominant position of its search engine](#), Press Release, 14 September 2022, accessed 15 September 2022.

⁶¹⁰ US Department of Justice v Google LLC, [Complaint filed in the US District Court for the District of Columbia](#), 20 October 2020, para 4.

⁶¹¹ US Department of Justice v Google LLC, [Complaint filed in the US District Court for the District of Columbia](#), 20 October 2020, paras 118–122.

⁶¹² US Department of Justice, [Justice Department Sues Monopolist Google For Violating Antitrust Laws](#), Press release, 20 October 2020.

⁶¹³ US Department of Justice v Google LLC, [Complaint filed in the US District Court for the District of Columbia](#), 20 October 2020, para 194. The tentative start date for the trial is 12 September 2023. Reuters, ['Google trial judge suggests potential trial date, and it is in 2023'](#), Reuters, 19 December 2020, accessed 15 September 2022.

⁶¹⁴ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 4.

are permitted on Android, they cannot be downloaded through the Google Play Store.⁶¹⁵ Alternative app stores can only be pre-installed by original equipment manufacturers or 'sideloaded'⁶¹⁶ by users.⁶¹⁷ This is discussed in section 6.5.

App stores can also use pre-installation to benefit their own apps. Apple pre-installs various apps on its iOS devices and Google incentivises Android original equipment manufacturers to pre-install a suite of Google apps on their Android mobile devices, as discussed in section 6.1. While pre-installation of apps can be useful for consumers, pre-installing only one platform's apps can affect competition outcomes due to consumers' tendency to stick with default services.⁶¹⁸ For example, Google's and Apple's apps tend to be featured prominently on Android and iOS devices respectively and are often set as the default.⁶¹⁹ In addition, some pre-installed apps cannot be permanently deleted by consumers, and there are restrictions on the apps that can be set as the default.⁶²⁰

The ACCC is concerned that mobile OS providers can use pre-installation (and especially exclusive pre-installation) and defaults to further entrench market power in core markets and reduce innovation in related markets. Further, limitations on device and OS functionality in relation to pre-installed apps (including the inability to delete and un-install apps and to change default settings to third-party apps) can impact consumer choice and act as a barrier to consumers switching to alternative services (see section 6.3.3).

Measures to address exclusive pre-installation arrangements could be considered for future digital platform services

Building on the ACCC's previous reports, the examples above primarily relate to search services, apps and app stores. However, exclusive pre-installation arrangements are also used in other contexts, such as browsers,⁶²¹ and could be used in relation to future emerging services to protect or leverage a platform's market power, increase barriers to entry and expansion for rivals, and lock-in consumers.

6.3.2. Obligations to restrict exclusive pre-installation could improve competition in certain digital platform services

New targeted obligations to restrict exclusive pre-installation arrangements could improve competition in markets affected by these arrangements, such as for search services. These could prevent Designated Digital Platforms that provide search services entering into arrangements for exclusive pre-installation of key search access points. Such obligations

⁶¹⁵ Apple also pre-installs the App Store on its iOS devices and does not permit other app stores to be installed. Apple also does not allow the App Store to be installed on non-iOS devices, and does not allow users to install apps other than through the App Store. See ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 4, 21.

⁶¹⁶ 'Sideloaded' refers to the installation of an app on a mobile device without using the device's official application-distribution method (that is, the app store associated with the device's OS).

⁶¹⁷ Examples of other app stores include Samsung's Galaxy Store (which is pre-installed on Samsung devices alongside the Play Store) and Amazon's Appstore. CMA, [Mobile ecosystems market study Final Report](#), 10 June 2022, pp 83–85.

⁶¹⁸ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 39; ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 13.

⁶¹⁹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 6.

⁶²⁰ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 106. A 2020 US Department of Justice filing noted that Google requires original equipment manufacturers 'to pre-install Chrome, the Google search app, and other apps in a way that makes them undeletable by the user. See US Department of Justice v Google LLC, [Complaint filed in the US District Court for the District of Columbia](#), 20 October 2020, para 76. Currently, users can delete 26 pre-installed apps on iOS16 (including the Mail, News, and Music apps). However, several key apps – including Safari and the App Store – cannot be deleted. In addition, while devices running iOS10 can remove 'built-in' apps from the Home Screen, users cannot permanently delete them. See Apple, [Delete built-in Apple apps on your iOS 12, iOS 13, iPadOS device or Apple Watch](#), published date 1 October 2020, accessed 15 September 2022.

⁶²¹ For example, the ACCC previously identified that Google Chrome is the most used browser in Australia, in part due to it being pre-installed on almost all Android devices. See ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 36–37.

could give original equipment manufacturers more flexibility to pre-install other search services on their devices, or to have different arrangements for different device models or search access points (for example, to allow a different provider's search services to be installed on some devices).

This could foster greater choice for original equipment manufacturers and, ultimately, consumers. For example, it could allow original equipment manufacturers to trial search engines with innovative offerings (such as search engines that offer increased privacy protections) and alternative businesses models (such as services that are not funded through search advertising).⁶²² To the extent that such services can achieve scale and increase competition in search, this could also improve the quality of search services. This could mean that consumers face less advertising or paid results or have increased access to trusted information and organic search results.⁶²³

To ensure that such obligations are not circumvented, there should be consideration of how and whether to prohibit Designated Digital Platforms from including other terms in commercial arrangements with third parties that have a similar effect. These may include, for example, terms requiring original equipment manufacturers to display particular pre-installed apps with minimum levels of 'prominence' or 'screen real estate', or terms that link financial incentives with exclusive pre-installation.⁶²⁴

However, the development of such obligations would need to consider their broader competitive and economic impacts, including revenue impacts on third-party original equipment manufacturers. Obligations to address the competitive impacts of exclusive pre-installation and defaults have been contemplated internationally. For example, the UK Competition and Markets Authority's Online Platforms and Digital Advertising Market Study recommended that its Digital Markets Unit should have the power to introduce various remedies to address Google's status as the default search engine on most devices and browsers, including restrictions on Google's ability to hold or pay for certain default positions.⁶²⁵

Many stakeholders, including DuckDuckGo and Microsoft, support measures to limit exclusive pre-installation in respect of search services.⁶²⁶

⁶²² ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 10.

⁶²³ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 10.

⁶²⁴ Many stakeholders such as ACCAN, Coalition for App Fairness, CPRC, DuckDuckGo, Mozilla and Open Web Advocacy support measures to address the use of dark patterns by digital platforms and/or by native apps. For example, DuckDuckGo submits that Google's use of dark patterns, such as prominence, nudges consumers to choose Google, and discourages consumers from switching to alternative services. See DuckDuckGo, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 16; ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 13–14; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 18; CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 3-4; Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 4, 7; Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9,13.

⁶²⁵ The Competition and Markets Authority noted that the Digital Markets Unit could implement remedies that could range from '... the implementation of choice screens to restrictions on which positions Google can hold or pay for (for example stopping Google paying to be a pre-installed or default app on the mobile phones of a manufacturer which reinforces their market power by removing the incentive or ability for consumers to make an active choice).' See CMA, [A new pro-competitive regime for digital markets, Advice of the Digital Markets Taskforce, Appendix D: The SMS regime: pro-competitive interventions](#), December 2020, p D15; CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 24.

⁶²⁶ For example, Microsoft, DuckDuckGo, Dr Katharine Kemp and Dr Rob Nicholls, UTS Centre for Media Transition and Associate Professor Ramon Lobato (RMIT School of Media and Communication). See Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; DuckDuckGo, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; University of Technology Sydney Centre for Media Transition, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022; Associate Professor Ramon Lobato, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022.

Some stakeholders caution against broad restrictions against pre-installation and default agreements. Pinterest notes this may have adverse effects on users and developers,⁶²⁷ while Mozilla cautions against measures that prevent smaller digital platforms from receiving payments for default positions⁶²⁸ given that such payments are 'the primary revenue source for many independent browsers, including Firefox'.⁶²⁹

Google and Apple oppose measures to restrict exclusive pre-installation with respect to search services. Apple emphasises the importance of pre-installed apps to provide a 'seamless out-of-the-box experience for users',⁶³⁰ and argues that it does not restrict users' ability to download and use alternative apps.⁶³¹ Apple previously submitted that it chooses Google as its default search engine on Safari for reasons including that it creates a superior experience for users.⁶³² Google submits that evidence to support the case for new rules in search has not been established.⁶³³ Google previously submitted that any future measure restricting only Google from paying to acquire default positions could be discriminatory.⁶³⁴

While the ACCC recognises stakeholders' concerns about measures to address pre-installation and defaults, we consider such measures may be required to address conduct that increases barriers to entry and forecloses competitors from accessing consumers and realising economies of scale and network effects. Such measures would be targeted to apply only to Designated Digital Platforms in respect of services where such conduct is prevalent and is likely to hinder competition with significant and widespread impacts on consumers.

The ACCC recognises that these obligations may have other potential costs and consequences, such as reconfiguration of mobile devices to ensure compliance and associated implementation costs. However, these obligations would not prevent Designated Digital Platforms entering non-exclusive arrangements for the pre-installation of their services. These obligations would also provide original equipment manufacturers with increased flexibility in the type of pre-installation arrangements they can enter, such as the ability to enter arrangements with multiple digital platforms for pre-installation on different search access points or different device models. These costs, as well as the benefits of more contestable services, should be considered further before any new obligations are introduced.

The ability for consumers to change defaults and delete and un-install apps would provide benefits

The additional competition measures for digital platforms recommended in chapter 5 should also support the application of obligations requiring platforms to allow consumers to change default services and to delete or un-install non-crucial apps. Such obligations would help address the competitive impacts of pre-installed services, such as apps and app stores, and facilitate consumer choice.

⁶²⁷ Pinterest, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5.

⁶²⁸ Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 6.

⁶²⁹ Mozilla, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 14 May 2021, p 7.

⁶³⁰ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

⁶³¹ For example, Apple submits that Australian users can quickly change their default settings, such as their default browser and that 'Australian users have downloaded alternative browser apps or search-enabled apps millions of times on Apple mobile devices'. Apple also considers that prohibiting exclusive pre-installation arrangements 'would fundamentally change the iPhone and related Apple services ... and would have substantial implications for consumers'. Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 1–2, 6–7.

⁶³² ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 126.

⁶³³ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 15.

⁶³⁴ Google, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 7 May 2021, p 22.

The ACCC considers that consumers should have a greater choice of default services (including third-party apps and app stores) and greater freedom in how they use apps and services. Designated Digital Platforms could be subject to targeted obligations that:

- allow users to un-install and/or delete pre-installed services/apps (except apps that are essential to the functioning of the OS or device, and which cannot be offered by third parties on a standalone basis)
- allow users to change their default settings to a third-party app.

Overseas proposals have recognised that consumers should have greater choice, with similar requirements contained in the EU Digital Markets Act, the 10th Amendment to the German Competition Act⁶³⁵ and in the proposed Open App Markets Act in the US.⁶³⁶ For example, Article 6(3) of the Digital Markets Act requires 'gatekeeper firms' to 'allow and technically enable end users to easily un-install any software applications on the operating system of the gatekeeper'⁶³⁷ and Article 6(4) requires 'gatekeeper firms' to allow and technically enable the installation and effective use of third-party app stores.⁶³⁸ The UK Government's proposed pro-competition regime for digital markets also proposes to support such a measure.⁶³⁹

Many stakeholders supported measures to allow users to change their default settings and to un-install and/or delete pre-installed apps in their submissions to the ACCC's Discussion Paper.⁶⁴⁰

Some digital platforms have already taken steps to allow users to delete and/or un-install pre-installed apps, as noted above.⁶⁴¹ Further, there may be justifications for why certain

⁶³⁵ The 10th Amendment to the German Competition Act can require a firm of 'paramount significance' not to favour its services over competitors, such as by exclusively pre-installing its own services on devices or otherwise integrating them into its other services. See Federal Ministry of Justice, [Act against Restraints of Competition](#), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p 2506), section 19a(2)(1) and (2)(2).

⁶³⁶ The US proposed Open Markets Act (S.2710) provides that a 'covered company' 'shall allow and provide readily accessible means for users of that operating system to (1) choose third-party apps or app stores as defaults for categories appropriate to the app or app store; (2) install third-party apps or app stores through means other than its app store; and (3) hide or delete apps or app stores provided or pre-installed by the app store owner or any of its business partners.' See [Open App Markets Act](#), S. 2710, 117th Congress (2021-22).

⁶³⁷ See Article 6(3) which states, 'The gatekeeper shall allow and technically enable end users to easily uninstall any software applications on its operating system, without prejudice to the possibility for that gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third parties'. See EU Digital Markets Act. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁶³⁸ Article 6(4) requires gatekeepers to 'allow and technically enable the installation and effective use of third-party software applications or software application stores using or interoperating with its operating system and allow those software application stores to be accessed by means other than the relevant core platform services'. See also Article 6(6), which provides that 'The gatekeeper shall not restrict technically or otherwise the ability of end users to switch between, and subscribe to, different software applications and services that are accessed using the core platform services of the gatekeeper, including as regards the choice of Internet access services for end users'. See EU Digital Markets Act. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁶³⁹ For example, under its principle of 'open choices', firms with strategic market status should not 'unduly influence competitive processes or outcomes in a way that self-preferences or entrenches the firm's position'. See CMA, [A new pro-competition regime for digital markets](#), July 2021, p 31.

⁶⁴⁰ Stakeholders that supported measures to address pre-installation and defaults included Microsoft, Mozilla, DuckDuckGo, Coalition for App Fairness, Dr Katharine Kemp and Dr Rob Nicholls, UTS Centre for Media Transition and Associate Professor Ramon Lobato. The Coalition for App Fairness submits that any new competition framework should contain obligations to allow the use of alternative distribution channels, allow the removal of any pre-installed apps and a prohibition on app store and/or mobile OS providers from self-preferencing their own apps or interfering with users' preferences or defaults. Microsoft stated that its Open App Store Principles are consistent with protecting choice, ensuring fairness and promoting innovation and include commitments to 'enable Windows users use alternative app stores and third-party apps, including by changing default settings in appropriate categories'. See Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Microsoft, [Adapting ahead of regulation: a principled approach to app stores](#), 9 February 2022, accessed 15 September 2022. Also see Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), March 2022, pp 13–14.

⁶⁴¹ Currently, users can delete 26 pre-installed apps on iOS16 (including the Mail, News, and Music apps). However, several key apps – including Safari and the App Store – cannot be deleted. In addition, while devices running iOS10 can remove

pre-installed apps should not be deleted and/or un-installed. For example, some apps may be essential to the device’s functioning. It would be appropriate to consider such justifications when drafting any new obligations. However, having access to a greater choice of default services and apps and improved flexibility in the use of these services apps (such as deleting apps that are not essential) would both respect consumer autonomy and facilitate greater competition in app stores and downstream app markets. Such obligations could be closely aligned with recent overseas proposals to reduce compliance burden on Designated Digital Platforms.

6.3.3. Choice screens could promote competition in some circumstances

Choice screens, which allow users to choose their preferred service (such as a search engine) as the default on a device, OS or application, rather than relying on the pre-installed or pre-set default, could help reduce barriers to expansion for alternative service providers.⁶⁴² Choice screens provide consumers with an opportunity to make an active and informed choice of which service is pre-installed and set as the default.

In the ACCC’s Report on Search Defaults and Choice Screens, we considered that mandating choice screens, in combination with other measures, could improve competition and increase proactive consumer choice in the supply of search services.⁶⁴³ Mandatory choice screens may also be an appropriate measure to address competition issues in respect of other services in the future.

While some consumers make a considered choice about their search engine, many do not.⁶⁴⁴ This can be due to default biases, a lack of knowledge, or because some consumers do not turn their minds to the need to choose which service provider best meets their preferences.⁶⁴⁵ A lack of awareness of alternatives is a particular issue.⁶⁴⁶ This can limit a consumer’s ability to switch to other search services.⁶⁴⁷ Choice screens could help increase consumers’ awareness of alternative search engine providers. Greater consumer awareness and control could improve competition in search.

6.3.4. Overseas examples of choice screens

There are several examples of choice screens in overseas jurisdictions, including the Android choice screen voluntarily implemented by Google in the European Economic Area following the European Commission’s Android decision in 2018 (see box 6.5). Choice screens have also been implemented in Russia.⁶⁴⁸

‘built-in’ apps from the Home Screen, users cannot permanently delete them. See Apple, [Delete built-in Apple apps on your iOS 12, iOS 13, iPadOS device or Apple Watch](#), published date 1 October 2020, accessed 15 September 2022.

⁶⁴² The US DOJ and 11 State Attorneys General noted the importance of the default position, noting that ‘for both mobile and computer search access points, being preset as the default is the most effective way for general search engines to reach users, develop scale, and become or remain competitive.’ See DOJ and US State Attorneys General, [Google Antitrust Complaint](#), 20 October 2020, p 18.

⁶⁴³ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 17.

⁶⁴⁴ For example, the ACCC 2021 consumer survey found that very high proportions (86%) of consumers reported that they mainly use the search engine that is the default of their main browser, and particularly on smartphones. The ACCC 2021 consumer survey was an online survey commissioned from Roy Morgan Research and conducted in May 2021 with 2,647 respondents on consumers’ usage of web browsers and search services. See Roy Morgan Research, [Consumer Views and Use of Web Browsers and Search Engines - Final Report](#), 28 October 2021, p 13.

⁶⁴⁵ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 13.

⁶⁴⁶ The ACCC 2021 consumer survey to inform the Report on Search Defaults and Choice Screens found that respondents had almost universal awareness of Google Search, but considerably less awareness of other search services such as DuckDuckGo and Ecosia. For example, 96% of respondents were aware of Google Search, compared to 30% for DuckDuckGo and 7% for Ecosia. See ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 49.

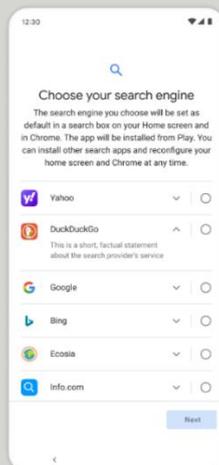
⁶⁴⁷ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 48–49.

⁶⁴⁸ Google introduced a choice screen for search on Android mobile devices in Russia in August 2017 as part of a settlement agreement with the Federal Anti-Monopoly Service. The ACCC has previously observed that the Russian Android choice

Box 6.5 Google’s choice screens in the EU

There have been various iterations of the EU Android choice screen. The most recent version for search services (in effect from 1 September 2021) is displayed to users during initial device setup and only appears on new devices distributed in the European Economic Area where the Google Search app is pre-installed. It includes 5 to 12 search engines (including Google Search), and participation is free for eligible services (see figure 6.3).

Figure 6.3 EU Android choice screen (implemented from September 2021)



Source: Android, [About the choice screen](#), last updated 29 August 2022.

Further, Microsoft provided a commitment to the European Commission to implement a choice screen for browsers on Windows OS devices in Europe between 2010 and 2014.⁶⁴⁹ A number of stakeholders consider this to be an effective remedy that increased the usage of other browsers.⁶⁵⁰

The EU’s Digital Markets Act also includes a choice screen obligation.⁶⁵¹ This requires particular ‘gatekeeper’ digital platforms to prompt end users when they first use an online search engine, virtual assistant or web browser to choose the respective service that will be used by default.⁶⁵² The UK Competition and Markets Authority has previously recommended that its Digital Markets Unit have the power to introduce choice screens⁶⁵³, and noted in its

screen has had a greater impact than Google’s EU choice screens, which may be due to Yandex’s considerable market share prior to the implementation of the choice screen. Yandex had a market share of over 30% for search on mobile devices in Russia. Yandex’s market share increased to 48% by the end of 2018, while Google’s share decreased from 68% to 51%. See ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 121.

⁶⁴⁹ In December 2009, the European Commission adopted a decision giving effect to Microsoft’s commitment to implement a choice screen for browsers on Windows OS devices in Europe between 2010 and 2014. Microsoft’s commitments sought to address the EC’s concerns that Microsoft may have tied its Internet Explorer browser to the Windows OS, in breach of rules on abuse of a dominant market position. European Commission, [Antitrust: Commission accepts Microsoft commitments to give users browser choice](#), Press release, 16 December 2009.

⁶⁵⁰ See Ecosia, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 14 April 2021, p 2; FairSearch, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 22 April 2021, pp 7–10. Oracle, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 16 April 2021, p 3.

⁶⁵¹ EU Digital Markets Act. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁶⁵² Article 6(3) requires that ‘the gatekeeper shall allow and technically enable end users to easily change default settings on its operating system, virtual assistant and web browser that direct or steer end users to products or services provided by the gatekeeper. That includes prompting end users, at the moment of the end users’ first use of an online search engine, virtual assistant or web browser listed in the designation decision pursuant to Article 3(9), to choose, from a list of the main available service providers, the online search engine, virtual assistant or web browser to which the operating system of the gatekeeper directs or steers users by default, and the online search engine to which the virtual assistant and the web browser of the gatekeeper directs or steers users by default’. EU Digital Markets Act. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁶⁵³ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 25.

Mobile Ecosystems Market Study final report that it is considering this as a potential intervention in future markets.⁶⁵⁴

6.3.5. Careful design of any choice screens is important

The ACCC considers that choice screens could play a role in improving competition in search services, particularly when implemented alongside other obligations. Any choice screen should be well-designed and carefully implemented.⁶⁵⁵

The ACCC has previously recommended that a choice screen for search services should apply to both new and existing Android OS mobile devices⁶⁵⁶ and to all search access points on those devices (for example, browsers, search apps and widgets and voice assistants) in a way that respects user choice, minimises friction and limits the ways that it could be circumvented.⁶⁵⁷ Applying a choice screen to new and existing mobile devices would increase the ability of competing services to reach a critical mass of users and increase its effectiveness.⁶⁵⁸ The ACCC also considers that participation in the choice screen should be free.⁶⁵⁹ Further consideration should be given to whether the choice screen should apply to only Android devices or Android and iOS devices (and potentially other operating systems).⁶⁶⁰

It would be useful to observe international developments, such as the implementation of the EU's Digital Markets Act choice screen for search services, browsers and virtual assistants, prior to implementing any choice screen in Australia. This would enable Australia to consider any relevant lessons from overseas to ensure the effectiveness of any such measure in Australia. It may also be appropriate to design and implement choice screens that are

⁶⁵⁴ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 316.

⁶⁵⁵ If poorly designed and implemented, choice screens may frustrate consumers and result in decision fatigue. See CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 316. Key elements requiring careful consideration and user testing include the design of the choice screen, the number and order of options presented, and the frequency and timing of its display (such as on device set-up, or during first use). These considerations would be important for a choice screen for search services, and potentially for other services. Stakeholders have previously noted the importance of presenting options in random order to avoid default bias. See ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 114; Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 15 April 2021, p 7. Many stakeholders have stressed the importance of design in relation to choice screens for search services to ensure it achieves its objectives. For example, Mozilla submits there should be 'careful consideration to the timing, design, level of oversight and assessment in partnership with oversight bodies, browser developers, and others'. See Mozilla, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 11. Some stakeholders also raised concerns that dark patterns can negate the effectiveness of the choice screen and that regulatory oversight is needed. For example, DuckDuckGo submits that the EU Android choice screen has dark patterns that discourage users from choosing an alternative search service, and that this prevents switching and undermines user autonomy. See Mozilla, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 11; DuckDuckGo, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 2, 77; DuckDuckGo, [10 Principles for Fair Choice Screens and Effective Switching Mechanisms – An Open Letter signed by DuckDuckGo, Ecosia and Qwant](#), 5 July 2022, accessed 15 September 2022.

⁶⁵⁶ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 17–18.

⁶⁵⁷ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 107. DuckDuckGo, Ecosia, Qwant, Microsoft and Mozilla support having choice screens apply to key search access points. See DuckDuckGo, [10 Principles for Fair Choice Screens and Effective Switching Mechanisms – An Open Letter signed by DuckDuckGo, Ecosia and Qwant](#), 5 July 2022, accessed 15 September 2022; Microsoft, [Submission to the ACCC's Digital Platform Services Inquiry Third Interim Report](#), 15 April 2021, p 8; Mozilla, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

⁶⁵⁸ Several stakeholders including Microsoft, DuckDuckGo and FairSearch support having choice screens apply to new and existing mobile devices. For example, see Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 15 April 2021, p 7; DuckDuckGo, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 14 April 2021, p 9; FairSearch, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 22 April 2021, p 4.

⁶⁵⁹ The ACCC considers that search engines should not have to pay to be featured in a choice screen for search services. The services featured should be based on an objective measure by an independent third party, as noted in the ACCC's Report on Search Defaults and Choice Screens. Many stakeholders support free participation. See Microsoft, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 15 April 2021, p 8; Ecosia, [Submission to the ACCC Digital Platform Services Inquiry Third Interim Report](#), 14 April 2021, p 7; DuckDuckGo, [10 Principles for Fair Choice Screens and Effective Switching Mechanisms](#), 5 July 2022, accessed 15 September 2022.

⁶⁶⁰ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 17–18.

consistent with overseas proposals to assist with compliance and reduce burden on Designated Digital Platforms. Consideration should also be given to whether a choice screen would be beneficial for other services, such as browsers⁶⁶¹ and virtual assistants.

6.4. Facilitating switching

The ACCC is concerned that some digital platforms with market power are restricting or frustrating consumer switching, including:

- Digital platforms designing user interfaces that are likely to discourage users from switching services (e.g. changing the default search service).
- Apple and Google, in the provision of app store services, using contractual clauses to limit business users' ability to inform consumers about alternative payment options.

Service-specific codes should include targeted obligations to address conduct that impedes switching where relevant and appropriate. For example:

- codes for search services, mobile OS services or app store services could prohibit Designated Digital Platforms from using dark patterns to restrict a consumer's ability to change defaults and switch to alternative services
- a code for app store services could prohibit Designated Digital Platforms from restricting an app developer's ability to communicate with consumers both within and outside their apps about alternative payment options, including information about cost and pricing.

Measures to address such conduct are included in the EU's Digital Markets Act, which requires that gatekeepers must not restrict (technically or otherwise) the ability of end users to switch between and subscribe to different apps and services to be accessed via its core platform services. Measures to allow app developers to communicate with consumers are also included in the Digital Markets Act and are within the scope of the UK Government's proposed pro-competition regime for digital markets.

6.4.1. Barriers to switching impacts competition in markets for digital platform services

The ability of consumers to compare offers and switch to products or services that better meet their needs is fundamental to the process of competition. It ensures that new entrants and smaller competitors can present a more attractive offer to consumers and win users from larger incumbents. However, switching can be inhibited by consumer behavioural biases and information asymmetries, as well as by the conduct of firms. In particular, firms with market power may have the ability and incentive to engage in conduct that makes switching more difficult to protect their market position. This can impede the ability of new entrants to reach consumers and compete on the merits.

Changing services and defaults

We are particularly concerned about the use of choice architecture⁶⁶² and dark patterns⁶⁶³ by digital platforms with market power to frustrate consumer switching, as was identified in the

⁶⁶¹ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 17–18.

⁶⁶² Choice architecture refers to the design of the way that choices are presented to decision makers. User interface design is a form of choice architecture and can influence consumer choices by appealing to certain psychological or behavioural biases.

⁶⁶³ Dark patterns refer to 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.

ACCC's Report on Search Defaults and Choice Screens (see box 6.6).⁶⁶⁴

Box 6.6 Example of choice architecture examined in the ACCC's Report on Search Defaults and Choice Screens

The ACCC identified that, during the process of downloading the Ecosia search engine browser extension on Chrome, Google presented a pop-up message to users.⁶⁶⁵ The message stated that the Ecosia extension can 'read and change your data...' and 'read a list of your most frequently visited websites'. Google also provided 2 options to users: 'Add extension' or 'Cancel', with the 'Cancel' option displayed more prominently.

Pop-up warnings can have particularly negative connotations and impact consumers' willingness to switch to other services. While consumers should be informed of the impacts of their decisions, we are concerned about warnings and pop-ups that highlight issues with a new provider (i.e. Ecosia) that might concern users, without also noting that the current provider (i.e. Google) may operate in the same way.⁶⁶⁶

Google submits that its notifications and prompts, such as those identified in box 6.6, support (rather than subvert) user choice and are proportional to potential consumer harms, including managing potential privacy risks.⁶⁶⁷

In its Report on Search Defaults and Choice Screens, the ACCC concluded that platforms' choice architecture may exacerbate behavioural biases, such as consumers' limited attention, and consumers' sensitivity to the framing and wording of options to discourage users from changing their default search engine or browser.⁶⁶⁸

Communication of payment options

Additionally, the ACCC's Report on App Marketplaces identified concerns about rules set by certain app store providers that restrict app developers from communicating the availability of alternative payment options.⁶⁶⁹ Specifically, Apple and Google's respective in-app payment⁶⁷⁰ terms and conditions prohibit app developers informing consumers about any alternative payment options other than the app stores' respective in-app payment systems.⁶⁷¹ We concluded that Apple and Google's respective restrictions result in insufficient information for informed choice. We also considered that these restrictions limit the business models available to app developers, which can in turn lead to a loss of innovation and consumer choice.⁶⁷²

6.4.2. Potential obligations to prohibit restrictions on switching

Obligations, where appropriate, to not impede switching could be an important tool to promote competition in markets for digital platform services and ensure the efficacy of the other measures considered in this report.

⁶⁶⁴ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 63.

⁶⁶⁵ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 61.

⁶⁶⁶ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 61.

⁶⁶⁷ Google, [First Supplementary Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), August 2022, pp 21–22.

⁶⁶⁸ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 61.

⁶⁶⁹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 79–83.

⁶⁷⁰ See section 6.2 for a more detailed discussion of in-app payment services.

⁶⁷¹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 79.

⁶⁷² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 82.

Changing services and defaults

Where there are concerns about conduct that impedes switching, service-specific codes should include targeted obligations to address such conduct. For example, codes for search services, mobile OS services or app store services could include obligations to prevent Designated Digital Platforms from using dark patterns to restrict a consumer's ability to change defaults and switch to alternative services.

This is consistent with one of the potential measures proposed in the ACCC's Report on Search Defaults and Choice Screens. Namely, that platforms should design user interfaces in a way that facilitates consumer choice and respects individual autonomy.⁶⁷³ Positive obligations to educate consumers about alternatives and ways of switching could also be considered.

Importantly, these obligations are essential to ensure that other proposed obligations for Designated Digital Platforms are effective. For example, measures to give consumers greater choice of default apps (see section 6.3) will be less effective where dark patterns impede their ability to engage effectively with a choice to change a default app.

There was significant stakeholder support for obligations in relation to dark patterns to apply to gatekeeper firms, including from ACCAN, the Consumer Policy and Research Centre, and Associate Professor Roman Lobato.⁶⁷⁴ DuckDuckGo was strongly supportive of measures to facilitate switching, particularly in relation to search engines,⁶⁷⁵ and Mozilla also supported regulatory measures to address the harms arising from harmful design practices.⁶⁷⁶ Similar measures have also been passed or proposed in other jurisdictions (see box 6.7). In contrast, and as discussed in chapter 3, a number of submissions, including Google, Meta and the Developers Alliance, suggested that any regulation of dark patterns should apply economy wide, if at all.⁶⁷⁷

The ACCC continues to support an economy-wide unfair trading practices prohibition to address unfair trading practices including the use of dark patterns (see section 3.1). However, we think that specific obligations for Designated Digital Platforms, as proposed in this section, are appropriate due to the ability and incentive of digital platforms with market power to make switching more difficult. In particular, such conduct can be an effective means for digital platforms with market power to protect and further entrench their market position and impede the ability of rivals to compete on their merits.

⁶⁷³ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 16.

⁶⁷⁴ ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 13; CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6; Associate Professor Ramon Lobato, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9.

⁶⁷⁵ DuckDuckGo, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 77–78.

⁶⁷⁶ Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12.

⁶⁷⁷ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 33; Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 16, 67; Developers Alliance, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 11.

Box 6.7 International approaches to choice architecture and switching

Several international jurisdictions have passed or proposed measures in relation to choice architecture and switching.

The EU's Digital Markets Act states that a gatekeeper cannot restrict (technically or otherwise) the ability of end users to switch between and subscribe to different apps and services that are accessed via its core platform services.⁶⁷⁸ While the Digital Markets Act is still to be fully implemented and enforced, we expect that this requirement will extend to the use of dark patterns to impede switching. Moreover, the Digital Market Act's anti-circumvention article also notes that gatekeepers shall not use 'behavioural techniques or interface design' to undermine effective compliance with obligations.⁶⁷⁹

Regarding browsers specifically, the UK Competition and Markets Authority's Mobile Ecosystems Market Study final report 'found that the competitive advantages to Apple and Google that arise as a result of pre-installation would be better addressed through rules around defaults and effective choice architecture.'⁶⁸⁰ The Competition and Markets Authority intends to consider such rules, including their likely cost and effectiveness, in more detail as part of its proposed market investigation.⁶⁸¹

Communication of payment options

The ACCC considers that a code of conduct for app stores could include an obligation to prohibit Designated Digital Platforms from restricting an app developer's ability to communicate with consumers about alternative payment options. This could include alternatives to purchasing through the Designated Digital Platform's app store or through their in-app payment system.

Any such measure should be designed to ensure that Designated Digital Platforms cannot achieve the same outcome in a different way (i.e. to ensure that the obligations cannot be circumvented). For example, consideration could be given to additional obligations to prevent Designated Digital Platforms from imposing price parity clauses for third-party apps that use alternative payment options (price parity clauses are also discussed in section 6.9).

This follows the potential measure proposed in the ACCC's Report on App Marketplaces:

To address inadequate payment option information and limitations on developers:
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.⁶⁸²

This would have the objective of promoting competition between in-app payment services by enabling app developers to provide consumers with increased information about, and choice of, payment options. This could potentially result in consumers paying less for apps and app features.

⁶⁷⁸ EU Digital Markets Act, Article 6(6). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁶⁷⁹ EU Digital Markets Act, Article 13(4), based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁶⁸⁰ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, pp 314–316, 337.

⁶⁸¹ Where the CMA considers that there is a case for a more detailed examination of a market (or markets) it may refer the market(s) for an in-depth market investigation. A market investigation seeks to determine whether features of the market(s) have an adverse effect on competition, and if so, decides what remedial action, if any, is appropriate to take using its order making powers, or recommends remedial actions for others to take. See: CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 339.

⁶⁸² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 10.

Match Group, the Coalition for App Fairness and Epic, as well as some stakeholders at the ACCC's Competition Roundtable, supported the application of such measures to Apple and Google in respect of their app stores.⁶⁸³ Similar measures have also been implemented in other jurisdictions (see discussion in box 6.8).

Box 6.8 International approaches to restrictions on communicating alternative payment options

Several jurisdictions internationally have passed, proposed or otherwise implemented measures in relation to the communication of alternative methods of purchase and payment:

- The EU's Digital Markets Act requires gatekeepers to allow business users of their services to communicate and promote offers, including under different conditions, and conclude contracts with end users.⁶⁸⁴
- Apple's settlement with web developers in the US (in their class action against Apple) has resulted in it allowing developers to share alternative purchase options with users.⁶⁸⁵
- Following the Netherlands Authority for Consumers and Markets' investigation into Apple's in-app payment requirements, the District Court of Rotterdam ordered that Apple amend its terms and conditions to allow Dutch dating apps to direct their customers to payment options outside the app. In June 2022, following a series of periodic penalty payments for non-compliance, Apple amended its terms and conditions to the satisfaction of Authority for Consumers and Markets. The changes allow developers of Dutch dating apps to use an independent payment system within their app, to point to a different website to complete a purchase, or to present both options to app users.⁶⁸⁶
- The UK Competition and Markets Authority considers that many potential competitive harms could be avoided if app developers were able to choose their own payments service provider and transact directly with users. It considers that meaningful choice between the use of Apple's and Google's payment systems and alternative payment solutions would drive competition and innovation between payment solutions.⁶⁸⁷

Other options for promoting switching should be considered

Options for introducing obligations to address barriers to switching are not limited to the examples outlined above. For example, one option that could be considered is a requirement on relevant Designated Digital Platforms to provide sufficient APIs⁶⁸⁸ to enable consumers to switch between mobile OS (or other ecosystems) and to transfer app purchases and subscriptions between app stores.

In its Mobile Ecosystems Market Study final report, the UK Competition and Markets Authority considered that there was a good case for requiring Apple and Google to provide necessary APIs to support effective switching between iOS and Android devices, with survey

⁶⁸³ Match Group, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 13; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 14; Epic, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 11–12; ACCC, [Regulatory Reform Report competition roundtable summary](#), 7 July 2022, p 1.

⁶⁸⁴ EU Digital Markets Act, Article 5(4). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁶⁸⁵ Apple, [Apple, US developers agree to App Store updates that will support businesses and maintain a great experience for users](#), 26 August 2021, accessed 15 September 2022.

⁶⁸⁶ ACM, [ACM: Apple changes unfair conditions, allows alternative payments methods in dating apps](#), 11 June 2022, accessed 15 September 2022; Apple, [Distributing dating apps in the Netherlands](#), accessed 15 September 2022.

⁶⁸⁷ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 326.

⁶⁸⁸ An Application Programming Interface, or API, is a computing interface that allows interactions between multiple software programs, such as apps and the OS, for the purpose of simplifying programming.

results indicating that the difficulty of transferring data to a new device is a significant concern for users.⁶⁸⁹ It found that the case for interventions to facilitate the transfer of subscriptions is less clear but considered that this could become a higher priority if the number of users with at least one subscription continues to grow.⁶⁹⁰

While this has not yet been examined by the ACCC, further consideration could also be given to switching obligations for Designated Digital Platform that provide cloud services. We note that the EU is considering rules that would require cloud-service providers such as Amazon, Microsoft and Google to ensure 'switchability' between providers.⁶⁹¹

6.5. Effective interoperability

The ACCC is concerned that some digital platforms with market power have the ability and incentive to restrict interoperability between their own services and those provided by third parties. This includes:

- Apple and Google restricting interoperability for third-party app stores on their mobile OS and app stores
- Apple restricting interoperability between its mobile OS and third-party browser engines
- Apple, and to a lesser extent Google, restricting interoperability for providers of third-party apps and services with hardware, software and functionality through its mobile OS.

Service-specific codes should include targeted obligations to address interoperability restrictions where relevant and appropriate. For example:

- codes for mobile OS services or app store services could require Designated Digital Platforms to allow third-party app stores (including cloud gaming stores) to be compatible with their OS and made available for download in their own app stores
- a code for mobile OS services could require Designated Digital Platforms to allow third-party browser engines to be used on their OS
- a code for mobile OS services could require Designated Digital Platforms to provide third-party providers of apps and services with reasonable and equivalent access to hardware, software, and functionality.

Any such obligations would need to be implemented in a way that does not prevent a Designated Digital Platform from taking necessary and proportionate measures to safeguard the integrity of their software and hardware.

The EU's Digital Markets Act includes measures requiring gatekeeper digital platforms to allow competing service and hardware providers to have effective interoperability with the same OS, hardware or software features as their own services or hardware, for free. The Digital Markets Act also prohibits gatekeepers from mandating the use of a particular browser engine. In addition, the UK Competition and Markets Authority recently proposed potential interventions for mobile ecosystems to allow access for third-party app stores, browser engines and apps, subject to appropriate safeguards.

⁶⁸⁹ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, pp 285–287, 290.

⁶⁹⁰ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 290.

⁶⁹¹ M Newman and N Wallace, '[EU Data Act aims to 'unlock' industrial data](#)', *MLex*, 23 February 2022, accessed 15 September 2022; N Wallace and M Newman, '[Data Act cloud switching rules need more work, EU governments worry](#)', *MLex*, 27 May 2022, accessed 15 September 2022.

Apple, and to a lesser extent Google, restricts interoperability on their mobile OS and app stores.⁶⁹² We are concerned that these restrictions are likely to have impacted competition, including in related markets where Apple and Google compete with third-party providers of apps and services. In circumstances where interoperability restrictions harm competition, interoperability obligations could promote competition by enabling rivals to compete on their merits. Any such obligations should be drafted in a way that does not impede a Designated Digital Platform from taking reasonable and necessary actions to protect user privacy and the security and integrity of their hardware or software.

6.5.1. Restrictions on interoperability are likely to have affected competition

We consider that digital platforms' interoperability restrictions, particularly relating to mobile OS and app stores, are likely to have impacted competition in related markets.

Third-party app stores

Apple and Google's dominance in mobile OS, combined with the control they exert over the app stores permitted into their mobile ecosystems, means that the Apple App Store and the Google Play Store are the key gateways through which app developers can access consumers on mobile devices.⁶⁹³

Both Apple and Google have limited interoperability for their app stores. For example, Apple does not allow the installation of app stores (other than the Apple App Store) on iOS mobile devices and requires app developers to use its proprietary in-app payment system (see section 6.2.1). This prevents app developers from providing or using competing app stores to distribute apps to iOS device users.

In contrast, Google allows third-party app stores on its mobile OS, Android. It is also possible to download apps directly from a web browser onto Android devices (known as 'side loading'). However, third-party app stores are not available to be downloaded through the Google Play Store and must either be pre-installed by device manufactures or sideloaded by users.

Third-party browser engines

Apple requires all browsers on iOS to be built using its WebKit browser engine.⁶⁹⁴ Further, Apple prevents WebKit from accessing certain APIs and iOS functionality, which restricts the functionality of web apps⁶⁹⁵ compared to native apps (for example, push notifications can be accessed by native apps but not web apps).⁶⁹⁶

⁶⁹² Interoperability means that services from outside a digital platform's ecosystem can work together with services from inside that ecosystem, such as mobile OS that run third-party apps.

⁶⁹³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 4.

⁶⁹⁴ A 'browser engine' is a critical piece of software required by all browsers to run, which interprets the code behind a website and presents it in the graphical format that the user sees and interacts with. There are 3 main browser engines in the market: WebKit (owned by Apple), Blink (owned by Google) and Gecko (owned by Mozilla). The vast majority of browsers use Apple's WebKit or Google's Blink. See ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 37-38.

⁶⁹⁵ Web apps are internet-enabled apps that are accessible via the web browsers of mobile devices like a regular webpage. They have more functions than a regular webpage, including opportunities for interactions, partially operating offline, and providing push notifications (Android only). Web apps are available to all consumers, regardless of whether they use an iOS or Android device (ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 30). In contrast, 'native apps' refers to apps that run directly on the mobile OS. On Apple's iOS, native apps are only available through Apple's App Store.

⁶⁹⁶ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 38; Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 4-5; CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, pp 157-161; Mozilla, [Submission to the ACCC Digital Platforms Inquiry Third Interim Report](#), April 2021, p 11 (referred to in Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8).

As a result, Apple iOS users do not have the option to use browsers that can offer a wider range of innovative features and functionality. Instead, they are limited to using browsers built using Apple's WebKit browser engine. Stakeholders submit that, as a result, Safari faces very limited competitive pressure on iOS.⁶⁹⁷ We are also concerned that this limits the ability for web apps (which are accessible through browsers rather than through the Apple App Store) to impose a competitive constraint on native apps.

Apple submits that it has added new functionality to its WebKit API to offer improved features and functionality for web apps.⁶⁹⁸ However stakeholders have raised concerns about the limitations of WebKit and Safari relative to other browser engines and browsers.⁶⁹⁹ The Competition and Markets Authority recently identified that the significant revenue Apple generates from the Apple App Store and from Google's search default payments means that Apple benefits from limiting the ability of web apps to compete with native apps and from reducing competition in the supply of browsers.⁷⁰⁰

Hardware, software and functionality

Apple, and to a lesser extent Google, have also restricted interoperability with hardware, software and functionality through their mobile OS for providers of third-party apps and services.

For example, Apple uses its control of its mobile OS, iOS, to prevent third parties accessing the Near Field Communication (NFC) components⁷⁰¹ in Apple-branded mobile devices to facilitate contactless payments.⁷⁰² The restriction on access to the NFC components in Apple mobile devices means that any contactless payments on Apple-branded mobile devices must be made using Apple's own mobile wallet products, namely 'Apple Wallet' and 'Apple

⁶⁹⁷ Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 11–12; Alex, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Beau Nouvelle, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Jay Pratt, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Max Roper, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 1; Phil Nash, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Spencer Robertson, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Thomas Churack, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022.

⁶⁹⁸ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022 p 4.

⁶⁹⁹ Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 4–5; Mozilla, [Submission to the ACCC Digital Platforms Inquiry Third Interim Report](#), April 2021, p 11 (referred to in Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8); Alex, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Beau Nouvelle, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Ben Johnston, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Campbell Pedersen, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Jay Pratt, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Max Roper, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Michaela Merz, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Morgan Trench, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Phil Nash, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Spencer Robertson, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Thomas Allmer, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Thomas Churack, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Tim Cochrane, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Tristan Lynass, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022. See, also: CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, pp 157–161.

⁷⁰⁰ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, pp 161–162.

⁷⁰¹ NFC allows devices within a few centimetres of each other to exchange data wirelessly, and is used, amongst other things, to facilitate 'tap-and-go' (contactless) payments through an app on a mobile device. Since 2013, Android has supported third-party use of NFC functionality on enabled devices, allowing consumers to use 'tap-and-go' payments on Google Pay and Samsung Pay, for example. In contrast, while Apple has gradually rolled out various aspects of NFC functionality to third-party developers, it continues to reserve some aspects, such as 'tap-and-go' payment functionality, for its own Apple Pay app. See: ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 59.

⁷⁰² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 59; CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, pp 187–193; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Interim Report](#), May 2022, pp 9–10; European Commission, [Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay](#), 2 May 2022, accessed 15 September 2022.

Pay'. We are concerned that this conduct may reduce competition in the supply of alternative payment apps and services, including preventing third parties from providing mobile wallet services that effectively compete with Apple's on its devices. The Competition and Markets Authority has raised similar concerns, and this conduct is subject to an investigation by the European Commission and a class action in the US.⁷⁰³

Market participants have also identified other examples of interoperability restrictions by Apple, and to a lesser extent Google, in relation to their mobile OS:

- Apple restricted interoperability with the ultra-wideband (UWB) chip⁷⁰⁴ on its mobile devices, including to Tile (see section 6.1.2),⁷⁰⁵ until after Apple released its own 'AirTag'⁷⁰⁶ product that utilised the technology.⁷⁰⁷
- Apple and Google restrict interoperability with the mobile OS functionality required for parental control apps,⁷⁰⁸ while allowing their own first-party apps and other third-party business security apps to access this functionality.⁷⁰⁹

Apple and Google both submit that they make a significant number of APIs and technologies available to third-party app developers.⁷¹⁰ Apple submits that it faces strong incentives to increase the attractiveness of its devices, which means it wants to allow developers access to new technologies and innovations on its devices where it is safe to do so.⁷¹¹ While Apple does benefit from providing access to innovative products and services supplied by app developers through the App Store, we consider that the examples in this section indicate that Apple has the ability and incentive to prevent its rivals from effectively interoperating with its mobile OS.

Google submits that it already allows developer access to the NFC chip in Android devices and notes the ACCC's acknowledgement in its Report on App Marketplaces that it had not received complaints from developers about how Google provides access to Android and proprietary APIs.⁷¹² However, we are concerned that Google also has the ability to limit rivals' ability to interoperate with its Android mobile OS. Given Google has significant market power in the supply of mobile OS, and Google's extensive range of services, such behaviour would have a potentially significant impact on rivals' ability to compete on their merits.

⁷⁰³ See: CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 193; European Commission, [Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay](#), 2 May 2022, accessed 15 September 2022; Kyle Barr, ['U.S. Class Action Suit Wants to End Apple's Exclusive Use of Tap-and-Go Payments'](#), *Gizmodo*, 20 July 2022, accessed 15 September 2022.

⁷⁰⁴ UWB is considered the 'next-step' from Bluetooth and facilitates accurate, short-range proximity tracking (including better spatial awareness) and data transfer. Apple was the first to include this technology in a smartphone with the iPhone 11 in 2019, and uses this technology to support its AirTag products (launched in 2021). See: ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 59, and CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 192.

⁷⁰⁵ Tile makes tracker devices that can attach to items (such as keys, wallets and mobile phones) to help users to find these items through an app if they are misplaced or lost. Tile also developed a 'finding network' to support this functionality.

⁷⁰⁶ AirTag is a tracking device which helps people find personal objects such as keys.

⁷⁰⁷ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 59; CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 192; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, pp 9–10.

⁷⁰⁸ Parental controls are software tools that allow parents to monitor and limit what their children see and do online.

⁷⁰⁹ Family Zone, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, pp 3–4; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 10.

⁷¹⁰ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 116–117; Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 6.

⁷¹¹ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

⁷¹² Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 116–117. ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 62.

6.5.2. Potential new obligations to support effective interoperability

We consider that effective interoperability obligations for Designated Digital Platforms could promote competition in respect of services where a lack of interoperability impedes competition. Such obligations may be warranted, for example in respect of app distribution, apps and browsers.

Availability of third-party app stores

We consider that codes of conduct for mobile OS services and app store services could include obligations to require Designated Digital Platforms to allow third-party app stores (including cloud gaming stores) on their mobile OS, and to allow them to be made available for download in their app stores. These obligations could be designed to ensure that third-party app stores can be made available on equivalent terms to that offered to the Designated Digital Platform's app stores.

Such obligations would allow third-party app stores to offer services to consumers and app developers in competition with Designated Digital Platforms' app stores. This could facilitate greater competition in relation to fees for app store services (including in-app payments) and the quality of app developer services (including faster review times). Without these obligations, Designated Digital Platforms would retain considerable power over app store services on their mobile OS.

Any such obligations should be designed in a way that limits opportunities for circumvention. For example, it may be necessary to introduce these obligations in combination with obligations addressing exclusivity clauses, which could undermine the benefits provided by the availability of third-party app stores (see also section 6.9).

Due to potential security, privacy and consumer protection concerns, which we have not been able to test, we have not proposed broadly allowing side loading at this time. Rather, access through a Designated Digital Platform's app store provides scope for the app review process to be used to put safeguards in place regarding which third-party app stores are allowed on the mobile OS. Additional measures, such as certification, would be another avenue for ensuring that third-party app stores have sufficient privacy and security safeguards and app review processes to protect consumers (see also section 6.5.3).

Submissions from the Coalition for App Fairness, Match Group, Epic and other app developers, as well as some stakeholders at the Competition Roundtable supported these measures.⁷¹³ Similar measures have been included in the EU's Digital Markets Act and proposed by the UK Competition and Markets Authority (see box 6.9).

Apple submits that allowing third-party app stores on Apple devices would create significant security risks.⁷¹⁴ Further work would be required to determine an appropriate framework for access and to manage any security and privacy concerns. These issues are discussed further in section 6.5.3.

⁷¹³ Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 13; Epic, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 12; Match Group, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 19; Beau Nouvelle, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; Ben Johnston, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2; ACCC, [Regulatory Reform Report competition roundtable summary](#), 7 July 2022, p 1.

⁷¹⁴ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 8–9.

Box 6.9 International approaches to third-party app stores

The EU's Digital Markets Act requires gatekeepers to enable the installation and effective use of third-party apps and app stores. However, gatekeepers shall not be prevented from taking strictly necessary and proportionate measures to ensure that this does not endanger the integrity of the hardware or OS provided by the gatekeeper.⁷¹⁵

The UK Competition and Markets Authority's Mobile Ecosystems Market Study final report recommends potential interventions to allow third-party app stores on iOS devices, which could be implemented under the UK Government's proposed pro-competition regime for digital markets or using its market investigation powers.⁷¹⁶

Enabling third-party browser engines

The code of conduct for mobile OS services could require Designated Digital Platforms to allow third-party browser engines to be used on their mobile OS. This could allow third-party providers of browsers and web apps to compete on their merits.

Such measures are strongly supported by submissions from Open Web Advocacy, Mozilla and 14 individual developers. Similar measures have also been included in the EU's Digital Markets Act and proposed by the UK Competition and Markets Authority (see box 6.10).⁷¹⁷ Such an obligation could promote competition between:

- suppliers of browser engines, by allowing alternative browser engines to offer services on a Designated Digital Platform's mobile OS
- suppliers of browsers, by allowing suppliers of browsers on a Designated Digital Platform's mobile OS to use alternative browser engines and differentiate on features and service offerings
- app providers, by allowing web app providers to improve their offering on a Designated Digital Platform's mobile OS and compete more effectively with each other and with native apps. Improved support for web apps is likely to lower barriers to entry for smaller app developers. This is because web apps allow developers to make one app that is available through a browser on all mobile OS, rather than developing bespoke native apps for each mobile OS.⁷¹⁸

Some stakeholders have noted previously that requiring Apple to allow third-party browser engines is likely to increase the use of Google's browser engine Blink, increasing Blink's

⁷¹⁵ EU Digital Markets Act, Article 6(4). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁷¹⁶ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 337.

⁷¹⁷ Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 7; Alex, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Beau Nouvelle, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Ben Johnston, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Campbell Pedersen, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Jay Pratt, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Max Roper, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Michaela Merz, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Morgan Trench, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Phil Nash, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Spencer Robertson, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Thomas Allmer, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Thomas Churack, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Tim Cochrane, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Tristan Lynass, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022.

⁷¹⁸ Specifically, requiring companies to create multiple apps to run on each platform (i.e. mobile OS) significantly raises the cost and complexity of the development and maintenance of their apps. See Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4.

already strong position in the supply of browser engines.⁷¹⁹ However, we consider that the ability to use a different browser engine would drive competition among other browser engines (and browsers) to offer innovative, useful features in competition with Blink.

Box 6.10 International approaches to mobile OS interoperability

Several jurisdictions have passed or proposed measures to address mobile OS providers' restrictions on interoperability.

The EU's Digital Markets Act includes the following requirements:

- Gatekeepers must allow competing service and hardware providers effective interoperability with the same OS, hardware or software features as their own services or hardware, for free. However, gatekeepers shall not be prevented from taking necessary and proportionate measures to ensure that this does not compromise the integrity of the OS, hardware or software features, provided such measures are duly justified.⁷²⁰
- Gatekeepers must not require end users or business users to use a particular browser engine in the context of services provided by the business users using the gatekeeper's core platform services (OS are a core platform service).⁷²¹

The UK Competition and Markets Authority published the final report of its Mobile Ecosystems Market Study in June 2022, which recommended potential interventions under the UK Government's proposed pro-competition regime for digital markets or using its market investigation powers.⁷²² It proposed measures to allow reasonable and equitable access to device functionality and APIs by third-party apps, and to allow access for third-party browser engines, subject to appropriate safeguards (for example, relating to security concerns).⁷²³

In relation to NFC specifically, Germany introduced a requirement in 2020 for providers of technical infrastructure (e.g. NFC components) to grant payment service providers with access to that technical infrastructure.⁷²⁴

Access to hardware, software and functionality

We also consider that the additional competition measures should include the ability to provide third-party providers of apps and services with reasonable and equivalent access to hardware, software and functionality through their mobile OS (e.g. NFC functionality). Here, equivalent access refers to access on equivalent terms as the Designated Digital Platform provides to its own apps and services.⁷²⁵ Such obligations could promote competition by enabling app developers to compete on their merits with the related apps and services of the Designated Digital Platform.

We note that consumers would ultimately retain the choice over whether to use the Designated Digital Platform's apps and services, or to download an alternative third-party

⁷¹⁹ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 38.

⁷²⁰ EU Digital Markets Act, Article 6(7). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁷²¹ EU Digital Markets Act, Article 5(7). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁷²² CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022.

⁷²³ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 337.

⁷²⁴ Daniel Döderlein, ['Your Phone Is Not Yours... Except In Germany, Thanks To A New Law'](#), *Forbes*, 3 May 2020, accessed 15 September 2022.

⁷²⁵ Equivalent access could also require that any functionality made available to developers of the Designated Digital Platform must be shared with external developers as well, under equivalent terms. For example, see: Scott Morton et al, [Equitable Interoperability: The 'Super Tool' of Digital Platform Governance](#), July 13, 2021, p 20.

service. However, without such obligations, Designated Digital Platforms will retain considerable power to advantage their own apps and services over those of third parties. In addition to addressing harms at the point in time where these obligations are put in place, we consider that such requirements would ensure that Designated Digital Platforms allow access to new hardware, software and device functionality relating to their mobile OS in the future.

The Coalition for App Fairness, Family Zone, Open Web Advocacy and Mozilla support obligations for platforms to enable third-party interoperability with hardware, software and OS functionality.⁷²⁶ Similar measures have been included in the EU's Digital Markets Act and proposed by the UK's Competition and Markets Authority (see box 6.10).

Apple opposes any such requirement, submitting that '[t]o the extent that there are differences in access to Apple's proprietary technologies between third-party apps and Apple services, such differences are objectively justified by the need to ensure the safety and performance of Apple devices and the privacy and security of users'.⁷²⁷ We note that further work would be required to determine appropriate terms of access and to assess and address the security and privacy concerns raised by Apple, which are discussed further in section 6.5.3.

In relation to NFC, Apple also submits that other government processes on payment systems reforms are a more appropriate means of identifying and addressing any sector-specific reforms in payment systems regulation for digital wallets and in-app payment services.⁷²⁸ In October 2021, the Parliamentary Joint Committee on Corporations and Financial Services released its report on Mobile Payment and Digital Wallet Financial Services, noting its concerns that competition might be affected through reducing innovation in the provision of payment services.⁷²⁹ In December 2021, the Government asked Treasury to consult on and provide advice on payment systems reforms in Australia to address potential gaps in existing regulatory structures which may arise from the role of large digital platforms' in-app payment methods and digital wallets.⁷³⁰

We note that any issues that are resolved through other regulatory reform would be considered when developing and implementing additional competition measures. Specific obligations may not need to be incorporated where concerns have otherwise been addressed.

Other potential areas for enhancing interoperability

The ACCC recognises that other forms of interoperability restrictions exist and may be impacting competition in relation to various digital platform services. Additional interoperability obligations should be considered on a case-by-case basis in the development of any future service-specific codes.

For example, further consideration could be given to interoperability of online private messaging. We note that the EU Digital Markets Act will require gatekeepers to make

⁷²⁶ Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 14; Family Zone, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, pp 11–12; Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9; Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8.

⁷²⁷ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 7.

⁷²⁸ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

⁷²⁹ Parliamentary Joint Committee on Corporations and Financial Services, [Report on Mobile Payment and Digital Wallet Financial Services](#), October 2021, p xiv.

⁷³⁰ Australian Government, [Transforming Australia's Payments System \(Government Response\)](#), 8 December 2021

messaging and calls interoperable,⁷³¹ either when designated or within 2–4 years, depending on the specific type of messaging.⁷³² The Digital Markets Act also states that gatekeepers should preserve the level of security (including end-to-end encryption) that they provide to their own users across the interoperable services.⁷³³

6.5.3. Security and privacy concerns require further consideration

Apple argues the potential regulatory interventions referred to in the ACCC’s Discussion Paper would cause significant security and privacy issues.⁷³⁴ It submits that its approach to security is designed around its “walled garden” and single App Store. Through this it delivers robust systems of app review and quality control (it states that Google’s Android OS has a ‘significantly poorer track record on preventing malware’).⁷³⁵ Additionally, Apple states that its built-in privacy protections, such as App Tracking Transparency, would be rendered ineffective by such regulatory interventions.⁷³⁶

Ultimately, Apple considers that it would be ‘unreasonable to require a remedy that removes the existing necessary security and privacy protections available on the assumption that Apple could be expected to find alternative safeguards to replace them’, noting that any new safeguards would be less effective and very costly to implement.⁷³⁷

We note that several stakeholders provided detailed information rebutting Apple’s concerns about security and privacy.⁷³⁸ The UK Competition and Markets Authority also considered some of these concerns as part of its Mobile Ecosystems Market Study and stated that:

- In relation to alternative app distribution, ‘these concerns do not appear to be insurmountable’.⁷³⁹
- ‘[T]he evidence that we have seen does not suggest that [Apple’s] WebKit restriction is justified by security concerns’.⁷⁴⁰
- ‘Apple has overstated the security risks of opening up NFC access’.⁷⁴¹

The ACCC considers that further work is required to assess Apple’s concerns in detail for each of the measures proposed in this section, noting that these concerns are not identical for each of the examples discussed above.

Additionally, we suggest that any interoperability obligations should allow Designated Digital Platforms to take necessary and proportionate measures (such as appropriate app review) to safeguard the integrity of their mobile OS, software and hardware. This is similar to measures that have been passed or proposed in other jurisdictions:

⁷³¹ Messaging refers to text messaging, as well as image, voice, video and file messaging. Calls refers to voice and video calls.

⁷³² EU Digital Markets Act, Article 7(2). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁷³³ EU Digital Markets Act, Article 7(3). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁷³⁴ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8.

⁷³⁵ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8.

⁷³⁶ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8.

⁷³⁷ Apple, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9.

⁷³⁸ Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 13; Open Web Advocacy, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 121; Max Roper, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022; Epic, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8.

⁷³⁹ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 303.

⁷⁴⁰ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 163.

⁷⁴¹ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, pp 191–192.

- The EU's Digital Markets Act provides that gatekeepers shall not be prevented from taking necessary and proportionate measures to ensure that interoperability measures do not compromise the integrity of the OS, hardware or software features, provided such measures are duly justified.⁷⁴²
- The proposed US American Innovation and Choice Online Act would require that platforms must show by evidence that conduct that would otherwise breach requirements was 'narrowly tailored, could not be achieved through less discriminatory means, was non-pretextual and reasonably necessary to ... protect safety, user privacy and [security]'.⁷⁴³

We note that there is also a role for privacy law, including potential law reform, to provide additional safeguards for consumer privacy on mobile devices. The Privacy Law Review is discussed in more detail in section 6.6.3.

In addition, as discussed in section 1.6.4, digital platforms can compete through differentiation, including on the level of privacy and security protections they offer. When designing any interoperability obligations, consideration should be given to prevent diminishing digital platforms' ability to compete on this basis. However, in many cases interoperability will promote consumers' ability to choose the services that best meet their needs and preferences.

6.6. Addressing data-related barriers to entry and expansion

The ACCC is concerned that a lack of access to relevant data is a substantial barrier to entry and expansion in the supply of some digital platform services, including search and ad tech services.

Service-specific codes should include targeted obligations to address data-related barriers to entry where relevant and appropriate. For example:

- a code for search services could require Designated Digital Platforms to share certain click-and-query data (and/or facilitate data portability in respect of that data)
- a code for ad tech services could require Designated Digital Platforms to share third-party data (and/or facilitate data portability in respect of that data), or could impose data limitations on a Designated Digital Platform (e.g. to keep certain data separate).

These obligations would need to be drafted to be proportionate and targeted to the specific competition issue identified.

However, data portability and access obligations should not be introduced unless privacy and security risks can be appropriately managed. Obligations to increase data access would need to be underpinned by mechanisms that enable consumers to make informed decisions about whether their data can be used for this purpose or should otherwise incorporate safeguards to promote privacy and minimise privacy risks. Further, these obligations should not be considered for inclusion in any code until after the introduction of any privacy law reforms that result from the Review of the Privacy Act.

Requirements on gatekeepers to share 'click-and-query data' are included in the EU's Digital Markets Act and have been considered for inclusion in the UK Government's proposed pro-competition regime for digital markets. Further, data limitations are already being implemented for Google's ad tech services in response to the UK Competition and Markets Authority's investigation into Google's Privacy Sandbox.

⁷⁴² EU Digital Markets Act, Article 6(7). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁷⁴³ [American Innovation and Choice Online Act](#), S. 2992, 117th Congress (2021-2022), § 3(b).

6.6.1. Data as a competitive advantage and barrier to entry and expansion in markets for digital platform services

Data is an important input to the supply of many digital platform services, as described in section 1.4.6. The ACCC has identified that access to granular, high-quality data can be a source of competitive advantage for digital platforms that provide services where data is an important input. Conversely, a lack of access to such data can be a key barrier to entry and expansion in the supply of many digital platform services. The ACCC has previously identified a lack of access to data as a barrier to entry and expansion in ad tech and search services, as described further below, and has previously proposed potential measures and recommendations to address these issues.⁷⁴⁴

We remain concerned that data-related barriers are limiting the ability of rivals to compete with digital platforms that have large data holdings in search and ad tech services. Given the importance of data to a range of digital platform services, we are concerned that data-related barriers to entry and expansion are likely to arise in the supply of other digital platform services. Consequently, we consider that the service-specific codes recommended in chapter 5 should be capable of addressing data-related barriers to entry and expansion.

Obligations could include limitations on data use or, subject to privacy considerations, data portability or access measures for Designated Digital Platforms. Any obligations would need to be proportionate and targeted to the specific competition issue identified, consider risks to security and not come at the expense of consumer's privacy, as discussed in section 6.6.3.

Access to click-and-query data is important to providing search services

The ACCC's Report on Search Defaults and Choice Screens raised concerns that rival search services cannot access sufficient click-and-query data to enable them to compete effectively with Google Search.⁷⁴⁵

Google's market power in search, and its pre-installation and default arrangements with original equipment manufacturers and browser suppliers (see section 6.3) has provided Google with greater access to click-and-query data than its rivals.⁷⁴⁶

Click-and-query data⁷⁴⁷ is an important input for search engines, as it is used to train search algorithms to show relevant results each time a user enters a search query. The relevance of search results is a crucial factor in determining the quality of a search service and is a key driver of competition between search services.

The report recommended that the ACCC be given powers to require search services that meet certain criteria to provide other search services with access to its click-and-query data, to improve competition in search services. In making this recommendation, the ACCC emphasised the need to ensure that such measures should be subject to extensive consideration of privacy impacts and would require careful design and ongoing monitoring to ensure there are no adverse impacts on consumers.⁷⁴⁸

⁷⁴⁴ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 89–91, 127; ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 67–69, 78.

⁷⁴⁵ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 12–13, 89–90.

⁷⁴⁶ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 89–91, 127.

⁷⁴⁷ Click-and-query data includes data on the queries that users enter into a search engine, along with their actions taken in response to the results, and is used by search engines to improve their search algorithm and therefore the quality of their offering. ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 127.

⁷⁴⁸ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, pp 127–128.

Access to data is important to providing ad tech services

In the Ad Tech Inquiry Final Report, the ACCC considered that access to a broad range of high quality first and third-party data,⁷⁴⁹ and the ability to combine that data accurately, is a key barrier to entry and expansion in the supply of ad tech services.⁷⁵⁰ This is because it enables one of the main features of open display advertising – the ability to target ads to specific consumers.⁷⁵¹

The report concluded that Google's access to first and third-party data appears to have provided it with a competitive advantage in the supply of ad tech services, particularly for its demand-side platform services.⁷⁵² Similar findings have been made by the UK Competition and Markets Authority⁷⁵³ and as part of the US Subcommittee's Investigation of Competition in Digital Markets.⁷⁵⁴ Stakeholders have also expressed similar views.⁷⁵⁵

We also noted an industry perception that Google uses its first-party data for targeting on third-party ad inventory. We considered that this perception has likely contributed to Google's competitive advantage, despite Google stating in submissions that it makes extremely limited use of its first-party data from individual consumers when providing ad tech services that facilitate the sale of inventory on third-party sites.⁷⁵⁶

We recommended that Google update its public-facing materials to correct this misconception, by clearly describing how it uses first-party data on its ad tech services.⁷⁵⁷ In August 2022, Google submitted that it is taking steps to review and update its public-facing material,⁷⁵⁸ and will make further changes as part of its Privacy Sandbox Commitments to the UK Competition and Markets Authority (see box 6.13).

The ACCC's Ad Tech Inquiry Final Report also raised concerns that Google's proposal to deprecate third-party cookies on Chrome will provide it with an increased incentive to use its first-party data to target advertising on third-party advertising inventory, since rivals will no longer have access to the data provided by third-party cookies.⁷⁵⁹ The UK Competition and Markets Authority expressed similar concerns in its investigation of Google's Privacy Sandbox proposals.⁷⁶⁰ Google offered, and the Competition and Markets Authority accepted, data separation commitments in response to this investigation, discussed in box 6.13.

Due to concerns about the effect on competition if Google were to use its first-party data more extensively after third-party cookie deprecation, the Ad Tech Inquiry Final Report

⁷⁴⁹ First-party refers to data that digital platforms collect directly from consumers from the services and products they provide to consumers. Third-party data is data digital platforms collect from consumers from third parties, and from consumers' use of third-party websites and apps. See further ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 38, 84–85. First-party data is particularly valuable because it allows ad tech providers to target users with more accuracy and is easier to combine.

⁷⁵⁰ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 76.

⁷⁵¹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 70–71.

⁷⁵² ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 6, 67.

⁷⁵³ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p. 281–282; CMA, [Decision to accept commitments offered by Google in relation to the Privacy Sandbox Proposals](#), 11 February 2022, pp 35–36.

⁷⁵⁴ 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 207

⁷⁵⁵ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p. 68; Free TV, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 19; Nine Entertainment, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p. 3.

⁷⁵⁶ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 67–69.

⁷⁵⁷ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 79, 80–81.

⁷⁵⁸ Google, [Second Supplementary Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), August 2022, pp 3–4.

⁷⁵⁹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 83–85.

⁷⁶⁰ CMA, [Decision to accept commitments offered by Google in relation to the Privacy Sandbox Proposals](#), 11 February 2022, p 44.

recommended that the ACCC be given powers to implement measures to address competition issues arising from an ad tech provider's data advantage. It recommended that these measures should include, subject to privacy considerations, data access requirements (for example, requiring the provider to give other ad tech providers access to the provider's first-party data), or data separation (e.g. to prohibit an ad tech provider from combining certain data sets).⁷⁶¹

6.6.2. Potential new data obligations to promote competition

The ACCC considers that the additional competition measures recommended in chapter 5 should support obligations to address barriers to entry and expansion caused by a Designated Digital Platform's data advantage. Subject to privacy considerations, such obligations could include:

- data access requirements which require Designated Digital Platforms to provide access to specific data sources on an agreed basis to rivals (including in adjacent markets)
- data portability requirements which would allow a consumer to request a Designated Digital Platform transfer their data to them or a third party in a structured, commonly-used, and machine-readable format, either on an ad-hoc or continuous basis⁷⁶²
- data use limitations which would place restrictions on how a Designated Digital Platform collects, stores, or uses certain data.

However, as discussed further at section 6.6.3, given the high risk of consumer detriment resulting from increasing data access, data portability and access obligations should not be introduced unless privacy and security risks can be appropriately managed. Obligations to increase data access would need to be underpinned by mechanisms that enable consumers to make informed decisions about whether their data can be used for this purpose and/or should otherwise incorporate safeguards to promote privacy and minimise privacy risks. Further, these obligations should not be considered for inclusion in any code of conduct until after the introduction of any privacy law reforms that result from the review of the Privacy Act.

Data access obligations

As discussed above, the ACCC considers that data access obligations could promote competition in search and ad tech services. For example, subject to privacy issues being managed:

- A code of conduct for search services could include an obligation to require Designated Digital Platforms to share certain click-and-query data.
- A code of conduct for ad tech services could include an obligation to require Designated Digital Platforms to share first-party data, subject to data-related competition issues in ad tech not being managed through other measures (see below on data limitations).

Such obligations could directly address a major barrier to entry and expansion for rival or potential suppliers of these services. They could also be important in the future for promoting competition in other digital platform services in which access to data is or becomes a barrier to entry. However, data access requirements, especially those involving access to personal data, can raise privacy concerns, and any such risks would need to be appropriately managed.

⁷⁶¹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 78.

⁷⁶² Drawing on the definition of data portability referenced in OECD, [Data Portability, Interoperability and Digital Platform Competition](#), OECD Competition Committee Discussion Paper, 2021, p 10.

A benefit of data access obligations, compared to data portability or data use limitation measures, is that they could enable rivals to access a significant volume of data in a timely and efficient manner. This can be especially important where economies of scale and network effects are at play (see section 1.4), such as in the provision of search services.⁷⁶³

Access to click-and-query data appears likely to occur internationally (see box 6.11). This may benefit competition in search services in Australia, especially where such measures are introduced in English speaking countries. However, the ACCC considers that there could be benefits from including equivalent measures in any future search service code of conduct in Australia given that click-and-query data varies considerably between countries and regions.

Box 6.11 International approaches to click-and-query data access measures

The EU's Digital Markets Act requires gatekeepers to provide third-party online search engine providers with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data (for both free and paid search) generated by the end users of the gatekeeper's online search engine.⁷⁶⁴

Similarly, the UK Competition and Markets Authority's Online Platforms and Digital Advertising Market Study recommended that the Digital Markets Unit be given powers to implement an intervention to provide for third-party access to click-and-query data.⁷⁶⁵

As discussed above, data access was also recommended as a potential measure to address Google's data advantages in ad tech as part of the ACCC's Ad Tech Inquiry Final Report.⁷⁶⁶ Google strongly opposes data access obligations for both search and ad tech services. It submits that there is no evidence that rivals need such data to compete.⁷⁶⁷ It also submits that requirements to provide access to such data would reduce incentives for competition and innovation.⁷⁶⁸ Further, Google notes risks associated with consumer privacy, disclosure of confidential information, collusion, disinformation, and manipulation.⁷⁶⁹

Other stakeholders also raised concerns with data access measures. Some stakeholders were concerned about the potential for the measures to harm consumers, submitting that any data access requirements would need to require platforms to implement consumer-centric business practices,⁷⁷⁰ and ensure privacy impacts are minimised or eliminated.⁷⁷¹ Some stakeholders questioned whether data access is an appropriate policy intervention for improving competition, submitting that it would not encourage innovative business models (i.e. those not funded by data collection and use), could decrease incentives for firms to invest in data, and could facilitate collusion.⁷⁷²

⁷⁶³ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 123.

⁷⁶⁴ EU Digital Markets Act, Article 6(11). Based on [text adopted by the European Parliament and Council published 18 July 2022](#). Any such query, click and view data that constitutes personal data shall be anonymised.

⁷⁶⁵ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 367.

⁷⁶⁶ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 78.

⁷⁶⁷ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 22.

⁷⁶⁸ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 22–23.

⁷⁶⁹ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 23–25.

⁷⁷⁰ CPRC, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9; CHOICE, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 7.

⁷⁷¹ Office of the Australian Information Commissioner, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 4; University of Technology Sydney Centre for Media Transition, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 11–12; Dr Katherine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 3–4; Reset Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 9.

⁷⁷² Professor Kimberlee Weatherall, Barry Wang, and Jacky Zeng, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 17; University of Western Australia Munderoo Tech and Policy Lab, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 6–7; Antitrust Law Section of the American Bar Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 30, 72.

The ACCC acknowledges these concerns. Any data access measures should be targeted to the specific competition issue identified and consider effects on incentives to innovate. As noted above, we also acknowledge that sharing personal data has the potential to raise significant consumer privacy concerns. For this reason, we recommend careful consideration of these issues before any data access measures are implemented (see section 6.6.3).

Data portability requirements

Data portability requirements have the potential to benefit consumers and competition by facilitating consumer switching and encouraging new and innovative service offerings. In this respect, data portability requirements could be useful for services where the inability of consumers to move their data to an alternative provider, or where the high costs of doing so, serves to increase consumer lock in and switching costs.

In some circumstances, data portability measures may raise fewer privacy concerns than data access measures, as data portability measures generally involve consumers initiating such data transfers. However, this also depends on whether the third parties receiving data have sufficient privacy and security protections in place.

A further consideration is that data portability may not offer access to sufficient data to allow rivals to compete effectively with a digital platform with a data advantage. In particular, the Organisation for Economic Cooperation and Development notes that data portability is unlikely to be effective in promoting competition where strong network effects are present (such as in search services).⁷⁷³

We note that while there was broad stakeholder support for data portability measures,⁷⁷⁴ some stakeholders expressed scepticism or concerns about the effectiveness in some contexts.⁷⁷⁵ Potential models for data portability are set out in box 6.12.

Box 6.12 Potential models for data portability

- Consumer Data Right (Australia):** The Consumer Data Right is a competition and consumer reform that was legislated by the Australian Government in August 2019. The Consumer Data Right provides consumers with the ability to conveniently consent to having their data that is held by businesses (data holders) securely disclosed to trusted third parties (accredited data recipients). The Consumer Data Right includes rigorous consent requirements, and providers must make clear what information a consumer is sharing and how it will be used, who will have access to the data, how long they will have access to the data, and how to manage and withdraw consents. The consumer can also decide whether their data is de-identified or deleted at the end of their relationship with the accredited provider. Consumer data sharing commenced in the banking sector on 1 July 2020 and is being rolled out to cover a wider range of data holders and products. The Consumer Data Right will next be implemented in the energy and telecommunications sectors, with other sectors to be designated by the responsible

⁷⁷³ OECD, [Data Portability, Interoperability and Digital Platform Competition](#), OECD Competition Committee Discussion Paper, 2021, p 18.

⁷⁷⁴ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 20–21; Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 10; ACCAN, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 11–12; University of New South Wales Allens Hub for Technology, Law and Innovation, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Commercial Radio Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 3; Computer and Communications Industry Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; Pinterest, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8; Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 64.

⁷⁷⁵ Carmelo Cennamo and Panos Constantinides, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5.

minister over time.⁷⁷⁶

- **General Data Protection Regulation (EU):** Article 20 of the General Data Protection Regulation gives EU citizens the right to request their personal data be directly transmitted from one 'data controller' to another in a 'structured, commonly used, and machine-readable format'. This only applies to personal data, does not apply to data collected for the performance of a task carried out in the public interest or in the exercise of official authority, and is designed as a right to receive a copy of accumulated past data rather than a right to continuous data access.⁷⁷⁷
- **Digital Markets Act (EU):** The Digital Markets Act includes an obligation on gatekeeper platforms to provide end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the relevant core platform service, including by providing, free of charge, tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access to such data.⁷⁷⁸

Data use limitations

In contrast to data access and portability measures, data use limitation (also known as data separation) measures would restrict how a Designated Digital Platform can collect, store or use the data it has access to. This could be by prohibiting a platform from combining certain data sets, or to only do so after obtaining specific and clear user consent.

Data use limitation measures could address competition issues, particularly where a Designated Digital Platform leverages its data advantages across services without allowing rivals access to the same data, to adversely affect competition. In such circumstances a data limitation measure could require a Designated Digital Platform to hold certain data separate from some of the services it provides.

Measures to limit how a Designated Digital Platform can use certain data can also be an effective means of addressing certain self-preferencing conduct, as discussed in section 6.1. For example, data limitation measures could prevent a Designated Digital Platform that provides app store services from using commercially sensitive data collected through its app review processes to inform the development of its own apps (see section 6.1).

As noted above, the ACCC's Ad Tech Inquiry Final Report recommended that the ACCC be given powers in relation to data separation (e.g. limitation) measures.⁷⁷⁹ We stated that, if applied to Google, such measures could prevent Google using its first-party data for targeting on third-party ad inventory, following the removal of third-party cookies on Chrome. We note that Google has offered legally binding commitments to the UK Competition and Markets Authority that limit its use of first-party data for targeting and measurement on third-party ad inventory, as described in box 6.13.

⁷⁷⁶ For further information on the Consumer Data Right, see Australian Government - Consumer Data Right, [Giving you choice and control](#), accessed 15 September 2022; ACCC, [Annual Report: 2020-21](#), October 2021, p 66.

⁷⁷⁷ [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁷⁷⁸ EU Digital Markets Act, Article 6(9). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁷⁷⁹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 78.

Box 6.13 Google's Privacy Sandbox proposals and the UK Competition and Markets Authority's investigation

In 2019, Google announced its plans to remove support for third-party cookies on Chrome and replace the ad targeting and measurement functionalities they provide with its Privacy Sandbox proposals. In January 2021, the Competition and Markets Authority launched an investigation into suspected breaches of competition law arising from Google's announcement. To address the Competition and Markets Authority's competition concerns, Google has made commitments not to use its first-party data for ad targeting and measuring on advertisements it serves and hosts (Google's Privacy Sandbox proposals). While this was offered as a remedy in the UK, Google has stated that it will apply these commitments globally.⁷⁸⁰ In addition, while the commitments do not apply to targeting and measurement on Android, Google has stated that it will also apply the commitments in this context.

These changes mean that Google will not use its first-party data sources to provide targeted advertising on third-party ad inventory. However, Google will still use its first-party data to serve targeted advertising on its own advertising inventory, such as YouTube.

Specifically, Google has committed to:

- For targeted advertising Google provides on its owned-and-operated ad inventory (e.g. ads served on YouTube), to not use personal data collected from a user's browser history on Google Chrome or Google Analytics.
- For targeted advertising Google provides on non-Google (third-party) inventory (i.e. ads served on third-party websites and apps, but served using Google's ad tech services), to not use personal data collected from a user's browser history on Google Chrome or Google Analytics, or all other Google first-party data from its user-facing services.⁷⁸¹

Google has also stated that it will use the Privacy Sandbox proposals for targeting and measuring on third-party ad inventory.

Despite Google's commitments with the UK Competition and Markets Authority, we consider it important that the service-specific codes be able to include measures to address Designated Digital Platforms' data advantages in ad tech. To the extent that such issues are already resolved by changes to industry practices at the time of drafting such a code, this would be taken into consideration in developing the specific obligations under that code.

A concern with measures that limit data use is they could potentially lead to a reduction in efficiency, for example, by reducing the value of personalised advertising to advertisers, the ability to provide accurate attribution services, or the amount that publishers can earn for advertising inventory.⁷⁸² However, a potential advantage of data limitation requirements in the context of ad tech services is that they could promote the development of new methods of delivering relevant and valuable ads to consumers that better align with consumers' data use and privacy preferences.

Consistent with their submissions to the Ad Tech Inquiry Final Report, Commercial Radio Australia and Free TV, who are both publisher industry bodies, support data use limitation measures, as do Daily Mail Australia, Nine and Mozilla.⁷⁸³ Free TV, Nine and Mozilla submit

⁷⁸⁰ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 58.

⁷⁸¹ CMA, [Appendix 1A to Decision to accept commitments offered by Google in relation to the Privacy Sandbox Proposals](#), 11 February 2022, pp 11–12.

⁷⁸² ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 85.

⁷⁸³ Commercial Radio Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 3; Free TV Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 19, 30; Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 10; Nine

that data separation measures achieve a balance of producing pro-competitive outcomes while preserving consumers' privacy.⁷⁸⁴ The UTS Centre for Media Transition similarly submits that targeted and proportionate data separation rules may be one of the most effective measures to address the entrenched market power of digital platforms.⁷⁸⁵

Dr Katherine Kemp and Dr Rob Nicholls support measures that would limit or prohibit use of personal data, submitting that the objectives of privacy, competition and consumer regulation are aligned for such measures. They submit that the sharing and repurposing of data disadvantages individuals and hinders smaller rivals, who do not enjoy data advantages obtained by sharing large quantities of data across various services, against the reasonable expectations of consumers.⁷⁸⁶

Google opposes an 'absolute ban on any data combination across services' submitting that it would harm consumers and business customers, and distort competition.⁷⁸⁷

The ACCC does not support an absolute ban on data combination, and recognises the importance of platforms being able to combine data across services. Any data use limitation measures should be targeted to the specific competition issue identified and consider effects on security and user privacy. For example, such a measure as applied to ad tech services would likely be targeted at data sharing for the purpose of ad targeting on third-party ad inventory.

Meta similarly opposes data separation measures, submitting that data separation seeks to 'limit the commercial advantage of businesses that have obtained data (or the ability to draw insights from data) by heavily investing in innovative products that attract customers'.⁷⁸⁸ It considers that data separation measures protect competitors (including those with an inferior offering), and if adopted, would promote free-riding, and reduce investment and innovation.⁷⁸⁹ The Antonin Scalia Law School's Global Antitrust Institute agrees with Meta on this point.⁷⁹⁰ The ACCC agrees that these risks are important to consider before implementing any measures to limit data use in codes of conduct.

6.6.3. Further consideration is required before including data measures in any codes

Given the importance of data to competition for many digital platform services, data measures should be able to be included in codes of conduct where such measures could promote competition in the relevant market or markets. As described further at 2.4.3, for any measures, it will be particularly important to holistically consider interrelated privacy, competition and consumer protection issues.

Measures that propose to increase third-party access to data without appropriate safeguards in place risk harming consumers through reduced privacy and data security, and increase the risk of discrimination, exclusion, and profiling.

Entertainment, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9.

⁷⁸⁴ Free TV Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 19, 30; Nine Entertainment, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9.

⁷⁸⁵ University of Technology Sydney Centre for Media Transition, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 7.

⁷⁸⁶ Dr Katherine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 6.

⁷⁸⁷ Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 30.

⁷⁸⁸ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 66-67.

⁷⁸⁹ Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 67.

⁷⁹⁰ Global Antitrust Institute, George Mason University, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8.

Current privacy laws are insufficient to allow some data access measures to be implemented without risks of considerable consumer detriment. As the ACCC has previously stated, the current Privacy Act does not contain sufficient mechanisms to allow consumers to understand and control how their data is collected and for what purposes.⁷⁹¹ More effective notice and consent requirements and broadening the scope of data that the Privacy Act covers, would be important protections for any data access regime. Such issues are currently being considered in the Attorney General's review of the Privacy Act.

Consequently, before any data portability or access measures are considered for inclusion in any codes, consideration will need to be given to changes that result from the Privacy Act review, and whether there is a need for further safeguards. It will also be important to monitor developments overseas to see whether new technologies or other forms of consumer protections emerge to protect consumers in the context of the data sharing requirements being mandated in these jurisdictions.

Other factors that would need to be considered before implementing data sharing measures include the potential for increased risk of disclosure of confidential information, collusion, security risks, disinformation, and manipulation of algorithms, as discussed above. In addition, changes to the ways that industry players collect and use data (e.g. as a result of Google's Privacy Sandbox proposals or Apple's App Tracking Transparency update) would need to be considered in the development of any codes.

6.7. Improved transparency

The ACCC is concerned about a lack of transparency in some digital platform services, especially those characterised by market power. This includes a lack of transparency in:

- Apple's, and to a lesser extent, Google's, app review and approval processes
- Ad tech, especially for Google's ad tech services, including price, auction, and ad performance information.

Service-specific codes should include targeted obligations to address a lack of transparency where relevant and appropriate. For example:

- A code for app store services could require Designated Digital Platforms to provide a transparent app review process.
- If current industry initiatives to improve transparency in the ad tech supply chain are not effective, a code for ad tech services could require Designated Digital Platforms to:
 - provide publishers with the ability to compare bids received from all sources in an auction (auction transparency)
 - facilitate independent assessment of the performance of their services (ad verification transparency)
 - provide average fees and take rates for their services (pricing transparency).

These obligations could require Designated Digital Platforms to provide certain information to market participants, the public or the relevant regulator.

Transparency measures for digital platforms are a feature of the EU's Digital Market Act and laws in Japan. They are also being considered for inclusion in the UK Government's proposed pro-competition regime for digital markets.

⁷⁹¹ ACCC, [Submission to the Privacy Act Review Discussion Paper](#), December 2021, pp 4-6; ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 374.

6.7.1. Transparency is important to digital platform services

It is important for business users to have sufficient transparency over the prices, terms of service, and key functions undertaken by digital platforms (such as app store review processes). Without sufficient transparency, business users are likely to find it challenging to make optimal investment and purchasing decisions and may ultimately be deterred from entering or investing further in their businesses.

The ACCC has previously identified a lack of transparency as an issue in app store review processes,⁷⁹² and the operation, price, and performance of ad tech services.⁷⁹³ To address these, and any future issues concerning a lack of transparency in digital platform services, the ACCC considers that the additional competition measures for digital platforms recommended in chapter 5 should support transparency obligations for Designated Digital Platforms. These issues are discussed in more detail below.

6.7.2. Concerns with transparency of app store review processes

The ACCC's Report on App Marketplaces raised concerns about a lack of transparency in the policies and processes governing Apple's (and to a lesser extent Google's) app review and approval processes.⁷⁹⁴ This can raise app developers' costs, and limit developers' incentives to invest and innovate.⁷⁹⁵

App developers submitted that when feedback for apps is provided, it can be vague and lack specificity. This means app developers face difficulties understanding why their app has not been approved or has been removed from the app store, and what can be done to resolve it. App developers also submitted that their inability to export prior app approval information from Apple's app review platform prevented them from using prior approval history to assist with review processes.⁷⁹⁶

Concerns have also been raised about app stores' terms and conditions being broad and providing app stores with wide discretion. The Competition and Markets Authority and the Netherlands Authority for Consumers and Markets noted that Apple's rules provide it with wide discretion to reject apps for new reasons not covered by existing rules.⁷⁹⁷ Apple's App Store Review guidelines state that:

... new apps presenting new questions may result in new rules at any time ... we will reject apps for any content or behavior [*sic*] that we believe is over the line. What line, you ask? Well, as a Supreme Court Justice once said, "I'll know it when I see it". And we think that you will also know it when you cross it.⁷⁹⁸

Further concerns with app review, and measures suggested to address these concerns, are discussed in sections 6.1 (regarding self-preferencing) and 6.9 (regarding fair treatment of app developers).

⁷⁹² ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 5.

⁷⁹³ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 149.

⁷⁹⁴ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 5.

⁷⁹⁵ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 6.

⁷⁹⁶ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 53.

⁷⁹⁷ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 194; ACM, [Market study into mobile app stores](#), 11 April 2019, pp 76–77.

⁷⁹⁸ Apple, [App Store Review Guidelines](#), 6 June 2022, accessed 15 September 2022.

6.7.3. Concerns with transparency in ad tech services

In the Ad Tech Inquiry Final Report, we considered a broad range of issues relating to the transparency of ad tech services.⁷⁹⁹ We found that while some transparency issues exist across the ad tech industry, the greatest transparency issues relate to Google's services.⁸⁰⁰ The ACCC found that Google's vertical integration, strong position across the supply chain and the 'must have' nature of many of its services mean Google has less of an incentive to be transparent with users of its services.⁸⁰¹

The Ad Tech Inquiry Final Report identified 2 key concerns with the transparency of Google's publisher ad server and demand-side platform due to restrictions it placed on access to information:

- Publisher ad servers: Google's decision to limit publishers' ability to link certain bid data files limited publishers' ability to compare the performance of supply-side platforms for auctions in Google's publisher ad server.⁸⁰² In particular, the ACCC considered that these changes meant Google has made it difficult for publishers to assess, and for rival supply-side platforms to demonstrate, the value of using alternative services.⁸⁰³
- Demand-side platforms: changes Google made in May 2020 to the data available to ad verification providers had limited advertisers' ability to independently assess the performance of Google's demand-side Platform (DV360), and ads served on YouTube.⁸⁰⁴ The ACCC also expressed concerns that this change meant third-party verification providers do not have access to the data needed to compete with Google's own verification service.⁸⁰⁵

While outside the scope of the ACCC's Ad Tech Inquiry Final Report, the ACCC understands that there are also potentially issues relating to third-party access to verification data for Facebook and Instagram's advertising services. This may be an area for further service-specific code development in due course. The ACCC has sought feedback on ad performance for ads on social media platforms in the issues paper for the Sixth Digital Platform Services Inquiry Interim Report,⁸⁰⁶ which will be submitted to the Treasurer in March 2023.

The Ad Tech Inquiry Final Report also raised concerns about Google having the ability and incentive to retain 'hidden fees' in its auctions.⁸⁰⁷ We considered that Google is able to do this because of the conversion Google conducts when it receives bids from advertisers on Google Ads and bids into its own supply-side platform, and market participants cannot verify these calculations.⁸⁰⁸ While a number of studies suggest that it is unlikely Google is retaining hidden fees, we considered that despite this, Google still retains the ability and incentive to extract hidden fees, given the importance of Google Ads to advertisers.⁸⁰⁹

⁷⁹⁹ See further ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, chapter 5.

⁸⁰⁰ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 143.

⁸⁰¹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 143.

⁸⁰² ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 149–150, 152.

⁸⁰³ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 149–150, 152.

⁸⁰⁴ In particular, Google removed their ability to use their own pixels and tags to collect raw data on an ad, and instead providing access to aggregated information on Google's own verification product. See ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 159.

⁸⁰⁵ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 159–160.

⁸⁰⁶ ACCC, [Digital Platform Services Inquiry Sixth Interim Report](#), 2022.

⁸⁰⁷ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 155.

⁸⁰⁸ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 154–156.

⁸⁰⁹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 155.

ACCC Ad Tech Inquiry Final Report recommendations

In the Ad Tech Inquiry Final Report, the ACCC made 3 recommendations to address the transparency issues described above:

- Recommendation 4: Industry should establish standards to require ad tech providers to publish average fees and take rates for ad tech services, and to enable full, independent verification of demand-side platform services.⁸¹⁰
- Recommendation 5: Google should provide publishers with additional information about the operation and outcomes of its publisher ad server auctions. Google should provide publishers with sufficient information to compare bids received from different supply-side platforms. Specifically, publishers should be able to compare bids received through Google's supply-side platform (Google Ad Exchange) and Open Bidding, to bids received through header bidding. They should also be able to match bid information to the price an impression is sold for.⁸¹¹
- Recommendation 6: The ACCC should be given powers to develop and enforce rules to improve transparency of the price and performance of ad tech services. The rules would apply across the Australian ad tech supply chain.⁸¹²

The ACCC notes that industry is currently implementing recommendation 4 and taking steps to address the concerns raised in recommendation 6, as described below.

Industry response to Ad Tech Inquiry Final Report recommendations

In their submissions, the Australian Association of National Advertisers (AANA) and Google have provided updates on industry's response to recommendations 4–6 of the ACCC's Ad Tech Inquiry Final Report. This response includes:

- Creating a cross-industry working group, comprising of the AANA, the Interactive Advertising Bureau, and the Media Foundation of Australia to respond to recommendations 4 and 6.⁸¹³
- Google introducing a new feature allowing comparison of aggregate gross revenue amounts, that Google submits will show that there are no hidden fees;⁸¹⁴ and a new tool that Google submits enables publishers to compare all bids for an auction.⁸¹⁵

The ACCC has not been able to test the sufficiency of these voluntary initiatives with ad tech providers. As described below, we consider that transparency obligations should only be included in an ad tech code of conduct for relevant Designated Digital Platforms if these industry measures are not effective in resolving transparency issues.

6.7.4. Potential new obligations to improve transparency

The ACCC considers that to address the concerns described above, and any future transparency concerns, codes should be able to include obligations to promote transparency.

⁸¹⁰ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 168–170.

⁸¹¹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 171.

⁸¹² ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 172.

⁸¹³ Australian Association of National Advertisers, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, pp 5–6.

⁸¹⁴ Google, [Second Supplementary to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), August 2022, pp 4–7. Google has launched Confirming Gross Revenues as a closed beta with a full launch to occur after Google receives and addresses initial feedback.

⁸¹⁵ Google, [Second Supplementary to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), August 2022, pp 7–9.

Transparency obligations for app review processes

Targeted obligations in codes could address concerns about transparency in the app review process. For example, app stores could be required to:

- have terms and conditions and/or guidelines that describe in detail the requirements app developers must meet in listing an app (or making any app updates) in the Designated Digital Platform's app store. Such terms and conditions should list all requirements, as reasonably practicable, required for app and app update submission
- have public-facing documents that describe, in detail, the process for app review
- provide app developers with reasonable notice of changes to app store terms, conditions and/or guidelines.

We consider that these obligations, in conjunction with additional protections for business users discussed in the following section (section 6.8), would deliver a range of benefits including:

- Increasing app developers' incentives to invest in apps and app features: unclear processes, inadequate communication and subsequent product launch delays can raise app developers' costs and limit the introduction of new apps for consumers. Greater transparency has the potential to lower the costs and risks developers face in developing and innovating in apps and app features.
- Supporting a more level playing field: where guidelines and transparent processes assist to ensure consistent decision making, this enable app developers and the app store to manage the risk of the app review process being used to unduly inhibit competition from third-party apps (particularly those that compete with the app store's first-party apps). This can support a more level playing field for app developers (see also section 6.1).

Stakeholders including Match Group, the Coalition for App Fairness, and Pinterest all support these obligations.⁸¹⁶ Pinterest submits that guidelines for app review process should include specific and discrete requirements for approval, and the necessary steps for approval in app stores.⁸¹⁷ Other overseas jurisdictions are proposing to implement measures to increase app review transparency (see box 6.14).

Box 6.14 Overseas measures to increase transparency in app review processes

The EU's P2B regulation requires providers of online intermediation services (which includes app store providers) to ensure their terms and conditions are:

- drafted in plain and intelligible language
- easily available
- describe the grounds for a decision to restrict, terminate or impose restrictions on the provision of app store services.⁸¹⁸

In the UK, the Competition and Markets Authority's Mobile Ecosystems Market Study recommended that the government's proposed pro-competition regime impose conduct requirements on Apple and Google to provide more transparent app review processes.⁸¹⁹

⁸¹⁶ Match Group, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 33; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 15; Pinterest, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

⁸¹⁷ Pinterest, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

⁸¹⁸ [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 (P2B Regulation), Article 1.

⁸¹⁹ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 317.

In Japan, the Act on Improving Transparency and Fairness of Digital Platforms includes obligations such as requiring designated platforms to disclose terms and conditions, provide prior notification of changes, and to provide reasons for decisions.⁸²⁰

Transparency requirements for ad tech services

While the ACCC supports industry-led initiatives in relation to the findings of the Ad Tech Final Report discussed above, any ad tech code should be able to include measures to promote transparency if industry measures are not effective. Such obligations could ensure that Designated Digital Platforms that provide ad tech services:

- Provide publishers with the ability to compare bids received from all sources in an auction (auction transparency). This is particularly important to enable publishers to compare the value of header bidding with Google's open bidding auctions and to promote competition between supply-side platforms.
- Facilitate independent assessment of the performance of its services (ad verification transparency). This would assist to ensure that advertisers are able to independently assess the quality of demand-side platform services, and are not required to use the demand-side platforms' bundled systems for these verification services.
- Provide average fees and take rates for its services (pricing transparency). This would assist to ensure that advertisers and publishers understand the fees and take rates that are charged at each stage of the supply chain, increasing their ability to compare the price of different ad tech services. This should promote competition in the supply of ad tech services more generally.

These requirements are consistent with measures being considered or implemented internationally, as discussed in box 6.15.

Box 6.15 International approaches to transparency in ad tech services

The EU's Digital Markets Act requires gatekeepers to provide:

- advertisers and publishers with access to the gatekeeper's performance measuring tools and data necessary (including aggregated and non-aggregated data) to independently verify ad inventory. The data provided must be sufficient to enable advertisers and publishers to run their own verification and measurement tools to assess the gatekeepers' services⁸²¹
- advertisers (or authorised third parties) free information about: advertising inventory bought; prices and fees charged; and if a publisher agrees, the remuneration the publisher receives⁸²²
- publishers (or authorised third parties) free information about: advertising inventory sold; prices and fees charged, and if the advertiser agrees, the price the advertiser paid for the ad.⁸²³

The Competition and Markets Authority has recommended that the UK Government's proposed pro-competition regime for digital markets will include obligations on Google to

⁸²⁰ Ministry of Economy, Trade and Industry, [Key Points of the Act on Improving Transparency and Fairness of Digital Platforms](#), accessed 15 September 2022.

⁸²¹ EU Digital Markets Act, Article 6(8). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸²² EU Digital Markets Act, Article 5(1). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸²³ EU Digital Markets Act, Article 5(1). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

require within-contract fee transparency,⁸²⁴ and to provide advertisers with access to the tools or information necessary to carry out their own, independent verification of advertising purchased on inventory owned-and-operated by Google.⁸²⁵ It also recommended widespread publication of data on average fee or take rates by the proposed Digital Markets Unit,⁸²⁶ and that the Digital Markets Unit have the power to introduce a common transaction and common user IDs, subject to privacy considerations.⁸²⁷

Other transparency measures may be required

Other transparency measures may also be required. For example, measures to promote greater transparency over the basis on which Designated Digital Platforms rank search results in app stores or on search services could complement measures to address self-preferencing discussed in section 6.1. However, it may be that such transparency is more appropriately provided to the relevant enforcement agency rather than released publicly, to minimise the scope for businesses and unscrupulous actors to ‘game’ the algorithm. Other concerns about a lack of transparency may also arise in other services, and any code for those services should be able to include measures to address such concerns.

6.8. Fair trading protections for business users

The ACCC is concerned about business users of digital platform services being treated unfairly or having their access to legal rights limited by digital platforms, including:

- Apple, and to a lesser extent Google, inconsistently and arbitrarily applying app review policies
- Apple, and to a lesser extent Google, applying restrictive terms and conditions for access to app stores (for example, requiring business users to forfeit intellectual property and broad confidentiality clauses)
- intermediary platforms, including Apple and Google in their supply of app store services, unilaterally varying terms of service without adequate notice or recourse for business users to contest changes.

Service-specific codes should include targeted obligations to address unfair terms, conditions or processes applying to business users where relevant and appropriate. For example:

- A code for app store services could require Designated Digital Platforms to apply app review processes fairly and consistently.
- A code for app store services, or any other code for an intermediary platform service, could require Designated Digital Platforms to:
 - ensure that their terms and conditions do not unreasonably prevent business users from exercising or enforcing their legal rights.
 - address any significant and unwarranted deterioration in the terms of service due to a unilateral change made by the Designated Digital Platform.

The Digital Market Act includes protections around the ability of business users to raise a digital platform’s non-compliance with EU or national laws with authorities. Europe’s Platform to Business Regulation seeks to address the superior bargaining power of online platforms,

⁸²⁴ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 408.

⁸²⁵ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 411.

⁸²⁶ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 408.

⁸²⁷ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 409.

which enables them to behave unilaterally to the detriment of business users and consumers. Unfair app review processes and discriminatory terms, conditions or policies have also been identified as something that the UK Government's proposed pro-competition regime for digital markets would be able to address, consistent with the high-level objective that the regime promote fair trading.

Where digital platforms that offer intermediary services hold market power and control access to a business user's target market, these business users may have no option other than making their products or services available on that digital platform (noted in section 1.6).

In these circumstances, business users have little or no bargaining power in their dealings with the digital platform. With few, if any, alternative options if they are dissatisfied with the platform's services and charges, they may have no choice but to accept the platform's standard terms of service. Where these terms are unfair, unreasonable or give rise to significant risks to the business user's ability to generate profits, this will reduce the business user's incentives to invest and innovate.

The additional competition measures for digital platforms recommended in chapter 5 should include service-specific and targeted obligations on Designated Digital Platforms to address contractual terms, conditions or processes that unreasonably and unfairly disadvantage business users of a Designated Digital Platform's services. Such measures would protect business users' ability to access consumers through various channels and protect their ability to exercise or enforce their rights. They would also enable the relevant regulator to address changes to the terms and conditions that materially and adversely impact business users.

6.8.1. Unfair terms of service harm business users

App store providers

The ACCC is concerned that Apple and Google's likely significant market power in app distribution provides them with significant bargaining power in dealings with app developers, and the ability to offer their app store services on unfair terms and conditions, including in respect of how such terms and conditions are applied. We are concerned that such terms raise app developers' costs, and limit developers' incentives to invest and innovate, harming competition and consumer choice in apps.

In particular, app developers have raised concerns about:

- Apple, and to a lesser extent Google, inconsistently and arbitrarily applying app review policies
- restrictive terms and conditions for access to app stores.

App review processes

As discussed in section 6.7, numerous app developers submitted that Apple, and to a lesser extent Google's, application and enforcement of their app review policies is opaque and arbitrary.⁸²⁸

⁸²⁸ Submissions to the Discussion Paper also raised these concerns including: Match Group, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 33; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 15; Pinterest, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 6.

For example, Pinterest submits that while it has not had issues with obtaining approvals from the Google Play Store, Apple has rejected its app submissions for reasons it considers go beyond Apple's App Store Review Guidelines, or because Apple has interpreted the guidelines in a broad, subjective way. Pinterest notes that if it fails to address Apple's problems, it runs the risk of being delisted from the Apple App Store. Pinterest submits that this imposes costs on the company, and makes it harder to compete, innovate, and comply with regulatory obligations.⁸²⁹ Similarly, Match Group submits that Apple often changes its rules or its interpretation of the rules.⁸³⁰

Further, in submissions to the ACCC's Report on App Marketplaces, stakeholders described situations where one Apple app reviewer rejected their app or update, but another reviewer did not.⁸³¹ App developers have also publicly stated that these rules are applied arbitrarily and opaquely.⁸³² They submitted this means it is difficult for app developers to know when they have breached the rules, or whether Apple will accept app developers' updates.⁸³³

The Coalition for App Fairness submits that Apple applies its guidelines arbitrarily and capriciously, meaning the app developers cannot know in advance how Apple will act.⁸³⁴ It also notes its members (which include app developers such as Spotify, Epic, Tile, Basecamp, Tile, Blix and Deezer) have had issues with Apple's app review process. Some of these examples are discussed in section 6.1 and 6.7. In addition, FlickType, which developed an accessible iPhone keyboard for people with visual impairment, experienced issues with Apple rejecting an update to its app where Apple had previously approved similar updates and apps offering similar functions.⁸³⁵

Regarding the Google Play Store, app developers have also noted difficulties in understanding why an app was refused on the Google Play Store.⁸³⁶ However, app developers generally submit that Google's app review process is more transparent than Apple's, that Google provides more clarity on its reasons for rejection, and Google is more willing to engage with developers to resolve identified issues.⁸³⁷

Restrictive terms and conditions

The ACCC is aware of restrictive terms in Apple's developer program licence agreements that restrict developers' intellectual property rights. In particular, the Competition and Markets Authority has also identified clauses in Apple's Made for iPhone/iPod/iPad (MFi)⁸³⁸ agreement (Apple's licensing program agreement), that:

- allow Apple to use any information submitted by licensees to develop its own competing products
- require licensees to agree that they have no knowledge of any Apple product infringing on any of their patents

⁸²⁹ Pinterest, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 6.

⁸³⁰ Match Group, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 33.

⁸³¹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 52.

⁸³² B Lovejoy, '[App Store review process perplexing, random, discordant, asinine – ex-Tumblr developer](#)', *9to5Mac*, 28 December 2021.

⁸³³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 46–48, 51–53.

⁸³⁴ Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, pp 7–8.

⁸³⁵ Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, pp 7–8.

⁸³⁶ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 52.

⁸³⁷ CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 196.

⁸³⁸ MFi is a licensing program by which Apple licenses certain technologies that allow accessories to connect to Apple devices.

- allow Apple to terminate the agreement (forcing the licensee to stop selling their products which incorporate technology licensed from Apple under the MFi Program) if the licensee commences intellectual property or patent infringement proceedings against Apple.⁸³⁹

In addition, the ACCC's Report on App Marketplaces identified a term in Apple's Developer Program License Agreement that required app developers who wanted to express public grievances about Apple to seek Apple's 'express prior written approval, which may be withheld at Apple's discretion'.⁸⁴⁰

Intermediary platforms unilaterally changing terms of service

The ACCC is also concerned about the ability of digital platforms with market power to unilaterally change the terms and conditions of access to their services without providing users advance notice or any option to remain under existing terms and conditions. Given the substantial bargaining imbalance between digital platforms with market power and business users, this enables platforms to extract benefit from the platform-specific investments already made by the firm, such as platform-specific marketing and distribution costs. The possibility of digital platforms unilaterally altering terms and conditions without notice limits business users' incentives to invest and innovate.

For example, the ACCC's Report on App Marketplaces considered that changes made to app search functions without adequate notice, while possibly made with the intent of improving the quality of search for consumers, may have adverse effects for some app developers and for competition in downstream app markets.⁸⁴¹

6.8.2. Potential obligations to address unfair trading terms and conditions on business users

As discussed in chapter 3, the ACCC has advocated for additional economy-wide protections in the Australian Consumer Law to prohibit unfair trading practices. We also continue to support the changes being progressed to amend the unfair contract terms prohibitions. Such protections would apply to consumers and small businesses.

While these amendments would arguably address some of the concerns raised in this chapter for that set of users, they would likely not apply to larger business users that are nonetheless at a significant bargaining imbalance as compared to digital platforms with market power. As described in section 1.3, figure 1.1, large digital platforms are some of the world's biggest companies, and their size far exceeds that of the largest Australian businesses. The Daily Mail Australia, the Coalition for App Fairness and Professor Kimberlee Weatherall supported more general fair-trading obligations for gatekeeper firms specifically (additional to any economy-wide measures, as discussed in chapter 3).⁸⁴²

Consequently, the ACCC considers that there would be benefit in allowing for targeted fair-trading obligations to apply to Designated Digital Platforms that provide intermediary services. This could include obligations on:

- Designated Digital Platforms that provide app stores to apply app review processes fairly and consistently.

⁸³⁹ CMA, [Mobile ecosystems market study, Final Report](#), 10 June 2022, p 212.

⁸⁴⁰ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 46–47.

⁸⁴¹ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, p 89.

⁸⁴² Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 11; Coalition for App Fairness, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 20; Professor Kimberlee Weatherall, Barry Wang, and Jacky Zeng, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 15–16.

- Designated Digital Platforms that offer intermediary services connecting business users and consumers to:
 - ensure that their terms and conditions do not unreasonably prevent business users from exercising or enforcing their legal rights.
 - address any significant and unwarranted deterioration in the terms of service due to a unilateral change made by the platform.

This section has focussed on targeted obligations for Designated Digital Platforms that provide app store services. However, targeted fair-trading obligations should be capable of applying to other services, should concerns about exploitative conduct arise for other digital platform services that are covered by a competition code.

Fair trading obligations could assist in addressing the most harmful effects of bargaining power imbalances between Designated Digital Platforms and business users, including unfair terms and conditions and significant deteriorations in these terms and conditions. Such safeguards are required to assist in ensuring continued fair and reasonable access to these platforms' services, and to promote investment and innovation by business users of digital platform services.

These would be consistent with obligations being considered in other jurisdictions, as outlined in box 6.16. Any such obligations would be developed in consultation with relevant Designated Digital Platforms and business users to limit the scope for unintended consequences.

Box 6.16 International approaches to fair trading obligations

Other jurisdictions have implemented, or are proposing to implement, fair trading obligations for app stores.

As noted in box 6.14, the Competition and Markets Authority's Mobile Ecosystems Market Study recommended that the UK Government's proposed pro-competitive regime for digital markets include a fair-trading objective that imposes conduct requirements on Apple and Google to:

- act in a fair and reasonable manner when designing and implementing the app review process
- to not apply unduly discriminatory terms, conditions or policies to users or categories of users.

The EU's Digital Markets Act prohibits gatekeeper platforms from requiring business users, directly or indirectly, from raising issues of non-compliance with any relevant EU or national laws.⁸⁴³ This is intended to include confidentiality clauses in agreements.⁸⁴⁴

The EU's P2B Regulation seeks to address the superior bargaining power of online platforms, which enables them to behave unilaterally to the detriment of business users and consumers.⁸⁴⁵ It prohibits for example, failing to give appropriate notice of changes to the terms and conditions.

⁸⁴³ EU Digital Markets Act, Article 5(6). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸⁴⁴ EU Digital Markets Act, Recital 42. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸⁴⁵ [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 (P2B Regulation), Recital 2.

6.9. Addressing exclusivity and price parity clauses

The ACCC is concerned about the competitive harm that would arise if Designated Digital Platforms required business users to agree to exclusivity clauses or price parity clauses, especially if these were applied broadly to all or most business users.

This could be a concern where a Designated Digital Platform operates an intermediary service, such as an app store or online marketplace.

Service-specific codes should include targeted obligations to address exclusivity or price parity clauses where relevant and appropriate.

These obligations could prohibit such conduct or describe circumstances in which a Designated Digital Platform would be prohibited from engaging in such conduct. Alternatively, they could be framed positively to ensure business users have freedom in terms of which sales channels they offer their products or services through, and for what prices. For example, a code for app store services, or any other code for an intermediary platform service, could prohibit Designated Digital Platforms from using blanket exclusivity or price parity clauses.

Measures to address exclusivity clauses and price parity clauses are included in the EU's Digital Markets Act.

6.9.1. Restrictive clauses imposed by digital platforms with market power can harm competition

As discussed in the previous section, business users are often at a significant bargaining imbalance when dealing with digital platforms with market power and many must accept the service on whatever terms it is offered. This can provide an opportunity for digital platforms to impose a range of terms on business users that both undermine the freedom of the business user, as well as affecting competition between platforms.

In particular, the ACCC would be concerned about Designated Digital Platforms imposing exclusivity and price parity clauses (also known as most-favoured-nation clauses) on business users.⁸⁴⁶ These could be especially problematic where these are imposed by a platform with market power in a market for intermediary services, for example, an online marketplace or app store provider with market power. This is because they can limit competition between rival online marketplaces, by limiting rivals' ability to enter and expand by competing on pricing, or by limiting the range of goods and services that rivals are able to offer.

Exclusivity clauses

Exclusivity clauses imposed by an intermediary platform service provider would require its business users to only offer their products or services through its platform. This restricts business users' ability to offer their products or services on competing intermediary platforms. Depending on the clause, it might even restrict the business user from selling its products or services through any other sales channel. These clauses can be detrimental to business users as they limit their freedom to choose how they access consumers.

⁸⁴⁶ Price parity or most-favoured-nation clauses refer to clauses in contracts that require sellers not to offer their products for sale at a higher price than the prices they offer for the same product on other websites; Exclusivity clauses refer to clauses in contracts that impose restrictions on one party's freedom to choose what whom, in what, or where they deal. For example, in digital platform services, an exclusivity clause could require a business user to only offer its products or services through the platform the business user is contracting with.

Exclusivity clauses are more likely to undermine the freedom of business users where they are applied by platform intermediaries with market power. This is because there is more likely to be a bargaining power imbalance in these situations and business users are more likely to accept these terms. This limits business users' ability to generate greater profits by also using alternative intermediary platforms.

In addition, while exclusive arrangements might have some pro-competitive justifications, they have the potential to reduce competition between platforms (or between sales channels). This is especially the case for multi-sided platforms where exclusivity clauses can restrict the ability of smaller rivals to attract users, and subsequently generate network effects and economies of scale to compete with the larger incumbent(s). Extensive use of exclusivity agreements by digital platforms with substantial market power could limit the ability of smaller intermediary platforms to build their own networks to compete. This would likely reduce inter-platform competition.

Price parity clauses

Price parity clauses generally limit the freedom of sellers by prohibiting sellers from offering their products or services at lower prices on other platforms. While the ACCC did not identify any pricing parity provisions in online marketplaces' agreements in its Report on General Online Retail Marketplaces,⁸⁴⁷ it did identify terms and conditions that limit how sellers price their products. For example:

- Some Amazon seller agreements include an obligation to 'ensure that your offers on the Amazon Store deliver great value for our customers' and provides that 'discounted referral fees are provided in part to assist you offer great prices to customers on the Amazon Store'.⁸⁴⁸
- While eBay's broad User Agreement Policy does not contain any price parity like obligations on sellers at-large, eBay requests that some individual sellers offer competitive pricing for their products or maintain price parity for prices listed on their websites and on eBay. These obligations can carry across to discounts or promotions offered by at least some eBay sellers.⁸⁴⁹

Action has been taken in other jurisdictions against price parity clauses in Amazon's agreements with sellers on its marketplace:

- In 2017, Amazon and the European Commission agreed to rescind such clauses in e-book seller agreements across Europe, after the Commission raised concerns that these types of clauses 'made it more difficult for other e-book platforms to innovate and compete effectively with Amazon'.⁸⁵⁰
- On 25 May 2021, the District of Columbia Attorney-General's office filed a lawsuit against Amazon alleging that most-favoured-nation provisions in Amazon's contracts prohibit sellers from offering better prices or terms on other online retail platforms. The lawsuit includes allegations that third-party sellers are forced to incorporate Amazon's fees and costs into their product prices not only when selling on Amazon, but also when selling across the entire online retail sales market.⁸⁵¹

⁸⁴⁷ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 57–58.

⁸⁴⁸ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 58.

⁸⁴⁹ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, p 57.

⁸⁵⁰ K Cowdrey, '[European Commission makes Amazon's removal of MFN clauses legally binding](#)', *The Bookseller*, 4 May 2017, accessed 15 September 2022.

⁸⁵¹ District of Columbia v Amazon.com Inc, [Complaint filed in the Superior Court of the District of Columbia](#), 25 May 2021, p 2.

While these provisions can generate economic efficiencies, the ACCC raised concerns that such terms could limit competition between rival online marketplaces, by limiting their ability to enter and expand by competing on pricing.⁸⁵² In particular, the ACCC considered that price parity clauses may be more likely to cause competition concerns when they are imposed by an intermediary with market power. In that context, the report considered that no one marketplace holds a dominant position in Australia.⁸⁵³

6.9.2. Potential obligations to prohibit exclusivity and price parity clauses to promote competition

The ACCC is concerned that Designated Digital Platforms could use exclusionary clauses in business user agreements to reduce rivals' ability to attract business users or compete on price. Specifically, exclusive agreements and price parity clauses could be particularly damaging for competition if applied by a Designated Digital Platform in respect of an intermediary service it supplies. Hence, the ACCC considers that service-specific codes should be able to include targeted measures to address the use of such terms by Designated Digital Platforms. This is consistent with obligations in the EU's Digital Markets Act, as outlined in box 6.17.

Box 6.17 Prohibition on price parity and exclusivity clauses in the Digital Markets Act

Article 5 of the Digital Markets Act prohibits gatekeeper platforms from preventing business users from offering their products or services through third-party online intermediation services or through their own direct online sales channel at prices or conditions different to what they offer through the gatekeeper's own services.⁸⁵⁴

⁸⁵² ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 7, 57, 58.

⁸⁵³ ACCC, [Digital Platform Services Inquiry Fourth Interim Report](#), 28 April 2022, pp 11, 57–58.

⁸⁵⁴ EU Digital Markets Act, Article 5(3). Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

7. Implementation and next steps

A new regulatory framework for digital platforms will rely on a well-functioning enforcement and compliance toolkit that enables the relevant regulator to monitor, investigate and enforce obligations and requirements.⁸⁵⁵ Additionally, the relevant regulator should publish guidance material and reports, which are important elements of effective regulatory schemes.⁸⁵⁶

This chapter is structured as follows:

- Section 7.1 discusses the implementation of the new competition and consumer measures recommended in this report, with particular focus on the competition framework.
- Section 7.2 discusses some of the key elements of an enforcement and compliance framework that should apply in relation to the proposed new competition and consumer obligations.
- Section 7.3 looks at current and future engagement between domestic and international government agencies in relation to regulatory cooperation and policy coordination.

7.1. Implementation

The implementation of the new competition and consumer measures recommended in this report will require new legislation or amendment of existing legislation. The ACCC considers that it may be most appropriate for new consumer measures to be included within the existing Australian Consumer Law (ACL) at Schedule 2 to the *Competition and Consumer Act 2010* (CCA). Similarly, the competition framework recommended in this report may be most appropriately included in the CCA.

Both the consumer and competition measures will likely require subordinate legislation (such as regulations or Ministerial rules) to support their operation. However, while the substantive obligations of the consumer measures are well suited for inclusion in primary legislation, the recommended new competition obligations should be implemented *mainly* through codes made by way of subordinate legislation.

7.1.1. Implementation process for competition measures

As set out in chapter 5, implementation of the competition measures recommended in this report will first require passage of primary legislation with 3 main elements:

- 1) A power to make service-specific mandatory codes of conduct for Designated Digital Platforms. These codes would be developed by the relevant regulator in consultation with the relevant policy agency and be set out in subordinate legislation.
- 2) Broad principles to guide the scope of these codes.
- 3) A power for a decision maker (either the relevant regulator or a government minister) to designate digital platform firms in respect of the provision of particular services, alongside clear criteria for making this designation decision.

⁸⁵⁵ The recommendations of this report leave it open to the Government to determine which regulator or regulators should administer the various new consumer and competition measures. It is possible that the Government may allocate some of these functions to different regulators. However, for simplicity, this chapter uses 'relevant regulator' to refer to any regulator administering any new measures recommended in the report.

⁸⁵⁶ We note stakeholders making submissions to this report have been broadly consistent on the need for effective enforcement mechanisms. For example: Mozilla, [Submission to the Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6; Pinterest, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 4.

Designated Digital Platforms will only become subject to enforceable obligations if and when a relevant code of conduct comes into effect.

Development of codes

Once empowered to do so by the new legislation, the relevant regulator could commence the code development process for one or more codes. Each code will set out detailed obligations within the scope of the principles in the primary legislation. These obligations will be specific to, and tailored to, the type of digital platform service the code applies to.

As has been described in chapters 5 and 6, an important element of the code development process will be public consultation, including with the digital platforms to which a code will apply. This will ensure that the process is transparent and will help the regulator develop proportionate and well-targeted obligations while minimising unintended consequences.

The obligations set in codes will only apply to particular designated services. For example, a code for search services will only apply to a Designated Digital Platform's designated search services, and not to its app store services. Nor would it apply to a Designated Digital Platform that does not provide search services (or that platform's search services if it is not designated in respect of search services).

Codes could begin being developed before any digital platforms have been designated. However, the obligations in a code will only become enforceable once there is a Designated Digital Platform to which they can apply.

Once codes are developed and have commenced, the relevant regulator will investigate and enforce compliance with their obligations. Enforcement and compliance functions undertaken by the relevant regulator would necessarily be kept separate from the role that it plays in the development of codes.

The codes should be periodically reviewed to ensure the obligations remain appropriate and are achieving the intended outcomes.

Designation of digital platforms

As set out in chapter 5, the decision to designate a digital platform should be a separate process to that of developing a code.

This designation decision would likely be made in parallel to, or after, a relevant code of conduct has been developed. However, the designation of a digital platform firm would not by itself apply any new obligations to that platform until or unless a relevant code has taken effect.

7.2. Compliance and enforcement

7.2.1. Guidance materials

The relevant regulator should publish guidelines to support compliance with the consumer protections and competition measures for digital platforms recommended in this report. These guidelines should provide information about critical elements of the schemes such as necessary detail about the consumer measures proposed in chapters 3 and 4, and the designation criteria and code development process for the competition measures proposed in chapters 5 and 6. They should also provide practical assistance to regulated entities on how to comply with these new measures, as well as information for interested consumers and businesses that may benefit from the application and enforcement of these measures.

The Australian courts are ultimately responsible for interpreting the legislation that underpins a regulatory scheme. Nonetheless, a regulatory agency can provide information about how it proposes to interpret the law. It can also describe the general approach it will take to exercising its functions under the scheme, including in relation to investigating alleged contraventions.

Guidelines are a common tool used by regulators in Australia to assist a regulated population to comply or engage with a regulatory scheme and to understand how rules and obligations will be applied in practice.⁸⁵⁷ We also note that the competition regulatory regimes being proposed and implemented in the EU's Digital Markets Act and the UK Government's proposed pro-competition regime for digital markets will involve published guidelines from relevant regulators.⁸⁵⁸

7.2.2. Information gathering and record keeping

The ACCC considers that a new framework must provide the relevant regulator or regulators with the ability to collect necessary information, documents, and data from digital platform firms (and third parties where relevant). This includes where firms provide services in Australia, but some necessary information may be held by parent companies and related bodies corporate in overseas jurisdictions.

The use and inclusion of information-gathering powers should be targeted and proportionate.

To ensure the transparency, integrity and efficacy of these arrangements, the ACCC considers that at a minimum, the relevant regulator should have the ability to obtain information as part of:

- investigations into compliance with the new competition and consumer obligations
- other functions and powers given to the regulator for the purposes of the framework (such as establishing whether a digital platform meets relevant designation criteria for the proposed competition regime).

The ability to investigate breaches of the law and to compel information from companies assists regulators in making informed and balanced decisions.⁸⁵⁹ Allowing regulators to access accurate information benefits all market participants, including digital platform firms, by supporting well-targeted regulatory interventions (including regulatory forbearance when appropriate). Box 7.1 provides examples of such powers in other jurisdictions.

The dynamic nature of digital platform markets – as well as the scale and global operations of leading digital platform firms – poses particular challenges for enforcement that mean adequate information-gathering powers will be central to the effectiveness of new measures recommended in this report.⁸⁶⁰

While enforcement is a critical element of introducing effective new consumer and competition measures, the relevant regulators will also be required to perform other functions to support the administration of the proposed measures. For example, regular monitoring and reporting on competition and consumer issues could ensure that proposed new measures remain fit-for-purpose and inform the development and amendment of

⁸⁵⁷ See for example, ACCC, [Guidelines on misuse of market power](#), 31 August 2018; ACCC, [Consumer guarantees – a guide for consumers](#), 5 July 2021.

⁸⁵⁸ EU Digital Markets Act, Article 47. Based on [text adopted by the European Parliament and Council published 18 July 2022](#); UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#), May 2022, pp 7, 9, 16, 20, 26.

⁸⁵⁹ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 141.

⁸⁶⁰ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 140; J Furman et al, [UK Digital Competition Expert Panel, Unlocking Digital Competition](#), 13 March 2019, p 2.

mandatory competition codes. Information-gathering powers would need to be available to undertake such work.

Consideration should also be given to empowering relevant regulators to require any digital platform firm carrying on business in Australia to keep specific records. Such record-keeping requirements are common in Australia across sectors including telecommunications, banking, and finance⁸⁶¹ and can play an important role in ensuring well-functioning markets. Prescribed records should be required to be kept in Australia, in line with such requirements in other sectors.⁸⁶²

Box 7.1 Examples of information-gathering powers in other jurisdictions

United Kingdom

The UK Government is committed to ensuring the body administering the proposed pro-competition regime for digital markets – the Competition and Markets Authority Digital Markets Unit – can require provision of information stored overseas to investigate and enforce against conduct occurring overseas where there is sufficient connection to the UK. The Digital Markets Unit will have a range of information-gathering tools, subject to appropriate safeguards, such as to be able to interrogate algorithms' impact on competition and require that firms carry out field trials (including A/B testing).⁸⁶³

European Union

Article 21 of the Digital Markets Act empowers the European Commission to request access to any relevant documents, data, database, algorithm, and information necessary to open and conduct investigations and to monitor compliance with the obligations of the Act. This is irrespective of who possesses such information, and regardless of the information's form or format, storage medium, or storage location.⁸⁶⁴

7.2.3. Penalties

Substantial penalties should apply to the new regulatory framework

As discussed in chapter 2, the ACCC's view is that significant financial penalties must be available for breaches of new consumer and competition obligations for digital platforms. To effectively deter harmful conduct, the quantum of available penalties should reflect the financial strength of the global digital platform firms likely to be subject to the framework. Penalties should be available in addition to other types of orders currently available under the CCA, such as injunctions, declarations, and disqualification orders.

At a minimum, the ACCC considers that a new regulatory regime should provide for penalties equivalent to the largest penalties already available in the CCA.⁸⁶⁵ These penalties are available for breaches of numerous provisions of the CCA, including in relation to Part IV of the CCA and to certain breaches of the News Media and Digital Platforms Mandatory Bargaining Code.

⁸⁶¹ See for example, section 151BU of the *Competition and Consumer Act*; section 268 of the *Corporations Act 2001*.

⁸⁶² See for example, section 60 of the *Banking Act 1959*; section 76A of the *Life Insurance Act 1995*; section 49Q of the *Insurance Act 1973*.

⁸⁶³ UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#), May 2022, p 30.

⁸⁶⁴ EU Digital Markets Act, Article 21. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸⁶⁵ See for example, section 76 of the *Competition and Consumer Act 2010*.

For corporations, the maximum penalty amount for relevant breaches is currently the greatest of:

- 1) \$10,000,000
- 2) if it can be determined, 3 times the value of the benefit obtained that is reasonably attributable to that breach
- 3) if the value of the benefit of point 2) cannot be determined then 10% of the annual turnover of the body corporate (and any related body corporate) during the period of 12 months ending at the end of the month in which the breach occurred.

On 28 September 2022, the Government introduced the *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022* into Parliament.⁸⁶⁶ Schedule 1 to the Bill, if passed, will significantly increase the quantum of the penalties discussed above. In particular, a corporation can be liable for a maximum penalty up to 30% of their turnover for a relevant 12-month period. This Bill had not been passed as at 30 September 2022.

We note the calculation of 'turnover' must relate to turnover generated by supplies that are connected with Australia.⁸⁶⁷ As supplies connected with Australia may not form a significant part of total turnover of large multinational digital platform companies, the Government may wish to consider whether the existing operation of the 'turnover limb' of this 3 limb penalty provision results in penalty amounts that would provide an effective deterrent in these circumstances.

Box 7.2 provides examples of 2 jurisdictions implementing or proposing large penalties for digital platforms, including the calculation of penalties based on the turnover of head corporations and related bodies corporate.

Box 7.2 Examples of penalties in international digital platforms regulatory regimes

United Kingdom

Under the UK Government's proposed pro-competition regime for digital markets, the Competition and Markets Authority's Digital Markets Unit will be empowered to impose fines of up to a maximum 10% of a firm's global turnover for the most serious offences, with further daily penalties of up to 5% of daily worldwide turnover for continued breaches. Fines of up to 1% of the firm's global turnover will be available for information offences, with additional daily penalties of up to 5% of daily worldwide turnover available.⁸⁶⁸

The Digital Markets Unit will also be able to apply civil penalties to named senior managers who fail to ensure their firm complies with requests for information. In addition, it will also be a criminal offence to knowingly or recklessly provide false information to the Digital Markets Unit (as is the case for other parts of the Competition and Markets Authority).⁸⁶⁹

European Union

Under Article 30 of the Digital Markets Act, the European Commission will be able to impose fines for non-compliance of up to 10% of a firm's total worldwide annual turnover in the preceding financial year. In the event of repeated infringements, this fine may be up to 20%

⁸⁶⁶ Parliament of Australia, [Treasury Laws Amendment \(More Competition, Better Prices\) Bill 2022](#), accessed 29 September 2022.

⁸⁶⁷ Subsection 76(5) of the *Competition and consumer Act 2010*.

⁸⁶⁸ UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#), May 2022, p 29.

⁸⁶⁹ UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#), May 2022, p 30.

of worldwide turnover in the preceding financial year.⁸⁷⁰

Fines of up to 1% of a firm's total worldwide turnover will apply for information offences.⁸⁷¹

In the case of systematic infringements, the European Commission can impose additional remedies, such as structural remedies (obliging a gatekeeper to sell all or parts of a business) or banning the gatekeeper from acquiring any company that provides services (such as data collection) that may relate to the non-compliance.⁸⁷²

Article 31 of the Digital Markets Act also includes the option to impose periodic penalty payments, which can be up to 5% of the average daily worldwide turnover in the preceding financial year per day.⁸⁷³

New enforcement tools should be considered

The ACCC considers that any new regulation for digital platforms needs to be supported by enforcement tools that account for the particular nature of the digital platform services that are the subject to the new measures.

It will be important for the design of any new regulatory regime and accompanying enforcement mechanisms, including information-gathering powers, to take into account the manner in which digital platforms companies structure themselves, and how the services they provide to Australia are supplied through that corporate structure. In particular, while traditional businesses are usually either based in Australia or have significant infrastructure and employees here, digital platform firms may provide services in Australia largely from offshore locations.

Due to the scale, influence and global nature of leading digital platforms, pecuniary penalties and court-injunctive relief may not always be well suited to deter breaches of particular aspects of the consumer and competition measures recommended in this report. Consideration should be given to the most appropriate enforcement tools for these circumstances, which could include behavioural and structural remedies.

The CCA contains examples of strong remedies in sector-specific regulation, such as divestiture orders for prohibited conduct in the energy market⁸⁷⁴ and competition notices for certain anti-competitive conduct in the telecommunications industry.⁸⁷⁵

There are also examples in Commonwealth legislation of particular tools designed to apply to digital platforms, including take-down notices for copyright infringements and harmful online content.⁸⁷⁶

We also note that both the EU Digital Markets Act⁸⁷⁷ and the UK Government's proposed pro-competition regime for digital markets⁸⁷⁸ provide strong and meaningful powers for

⁸⁷⁰ EU Digital Markets Act, Article 30. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸⁷¹ EU Digital Markets Act, Article 30. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸⁷² EU Digital Markets Act. Based on [text adopted by the European Parliament and Council published 18 July 2022](#), pp 75, 161.

⁸⁷³ EU Digital Markets Act, Article 31. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸⁷⁴ See section 153ZB of the *Competition and Consumer Act 2010*.

⁸⁷⁵ See Part XIB of the *Competition and Consumer Act 2010*.

⁸⁷⁶ See for example, the Online content scheme in Part 9 of the *Online Safety Act 2021* and section 115A of the *Copyright Act 1968*.

⁸⁷⁷ EU Digital Markets Act. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸⁷⁸ UK Government, [A new pro-competition regime for digital markets](#), 6 May 2022, p 26.

regulators to address digital platforms' systemic infringements of their obligations by ordering proportionate behavioural and structural remedies (including structural separation). Consideration could be given to including a mechanism in the new regulatory framework requiring that, where a digital platform complies with such a remedy in a relevant overseas jurisdiction, these arrangements are also given effect to in relation to their activities in Australia.

7.2.4. Exemptions from competition obligations

As with any regulation, there is a risk that intervention may result in unintended consequences, which may reduce innovation and competition. To help ensure the competition measures recommended in chapters 5 and 6 of this report are proportionate and appropriately targeted to the harm being caused, consideration should be given to including an exemptions mechanism. Exemptions are a feature of Australian competition law⁸⁷⁹ as well as other digital-platform specific regulatory regimes in international jurisdictions, as outlined in box 7.3.

An exemptions mechanism would enable the relevant regulator to consider, on a case-by-case basis, whether a digital platform should be exempt from a particular competition obligation based on the likelihood and materiality of unintended consequences. It would also provide flexibility to the relevant regulator enforcing new measures, and act as a safeguard to prevent the imposition of requirements on different digital platforms that could negatively impact consumers. However, the inclusion of such a mechanism may have a material impact on the administration of the regulation, which should be taken into consideration.

The threshold test for any exemptions mechanism should be set sufficiently high to reflect the severity of harm that could result from conduct that would otherwise breach an obligation. There should also be a statutory timeframe for consideration of exemption applications to provide certainty for the platform and to ensure efficiency (and avoid delays) in the implementation of new competition measures. While an exemption is under consideration, the digital platform should be required to comply with the measure in question.

Box 7.3 Mechanisms to exempt digital platforms from competition obligations in international regimes

European Union

Article 10 of the Digital Markets Act provides for the European Commission to fully or partially exempt digital platforms from this Act's obligations on grounds of public health or public security only.

The Commission must provide a decision within 3 months of receiving an exemption request and must provide a reasoned statement explaining the grounds for the exemption. The Commission must review the exemption decision if the ground for the exemption no longer exists, or at least every year.⁸⁸⁰ The Commission also has the ability to provisionally suspend an obligation (in cases of urgency, following a request by a gatekeeper) at any time.⁸⁸¹

United Kingdom

The UK Government proposes to introduce a mechanism to ensure that conduct that provides net benefits to consumers will not breach any conduct requirements contained in

⁸⁷⁹ See Part VII of the *Competition and Consumer Act 2010*.

⁸⁸⁰ EU Digital Markets Act, Article 10. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

⁸⁸¹ EU Digital Markets Act, Article 10. Based on [text adopted by the European Parliament and Council published 18 July 2022](#).

this regime, which will apply to firms designated with ‘strategic market status’.

These firms will be able to give evidence to the Digital Markets Unit that certain conduct, which would otherwise breach a conduct requirement, will bring benefits to consumers. The Digital Markets Unit would need to be satisfied that the arguments prove the conduct is indispensable to achieving the benefits, and that the benefits outweigh the potential harm.⁸⁸²

7.3. Coordination and consultation with other government entities

7.3.1. Australian Government departments and agencies

The ACCC recognises this report focuses on competition and consumer issues, and therefore is directed at only a subset of broader issues and harms in relation to digital platform. These include cyber and data security, misinformation and disinformation, online safety, and privacy. For example, in the past 2 years alone:

- major digital platforms have developed a voluntary code of practice to address online disinformation and misinformation, overseen by the Australian Communications and Media Authority (ACMA)⁸⁸³
- the Government introduced a new *Online Safety Act* in 2021,⁸⁸⁴ which includes a number of new regulatory measures
- the Government introduced legislation implementing the News Media and Digital Platforms Mandatory Bargaining Code in 2021.⁸⁸⁵

The Government is also currently considering a range of further regulatory and policy initiatives to address these issues and harms in relation to digital platforms. These initiatives include the review of the Privacy Act and the Online Privacy Code,⁸⁸⁶ changes to the Australian Payments System,⁸⁸⁷ reviews to the State and Territory defamation laws,⁸⁸⁸ and the implementation of the Basic Online Safety Expectations by the Office of the eSafety Commissioner.⁸⁸⁹

As such, the ACCC considers that new competition and consumer measures for digital platforms should be developed and implemented in a way to ensure close consultation and involvement of all relevant government departments and agencies.

Cooperation between government departments and agencies during policy development and implementation will be important to ensure coherent, consistent and appropriate application of policies when designing and implementing any new competition and consumer measures for digital platforms.

Some stakeholders have made submissions on this issue. The Law Council of Australia raised concerns regarding the risk of fragmentation and the need for harmonisation of the

⁸⁸² UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#), May 2022, p 21.

⁸⁸³ DIGI, [Australian Code of Practice on Disinformation and Misinformation](#), 22 February 2021.

⁸⁸⁴ eSafety Commissioner, [Learn about the Online Safety Act](#), accessed 15 September 2022.

⁸⁸⁵ ACCC, [News media bargaining code](#), accessed 15 September 2022.

⁸⁸⁶ The Attorney-General's Department, [Review of the Privacy Act 1988](#), accessed 15 September 2022.

⁸⁸⁷ The Treasury, [Transforming Australia's Payments System](#), December 2021.

⁸⁸⁸ The Attorneys-General's Department, [Meeting of Attorneys-General \(MAG\) Communiqué – August 2022](#), 12 August 2022; NSW Government, [Review of Model Defamation Provisions](#), August 2022, accessed 15 September 2022.

⁸⁸⁹ eSafety Commissioner, [Basic Online Safety Expectations](#), accessed 15 September 2022.

rules applying to digital platform services.⁸⁹⁰ Several stakeholders also noted the need to avoid duplication or overlapping obligations.⁸⁹¹

Wherever possible, consideration should also be given to developing a consistent approach to certain concepts and terms being used across the various regulatory regimes, especially when these terms are used in legislation. In this regard, we note that both PayPal and the Law Council of Australia pointed out the need to ensure consistency of definitions, such as what constitutes a ‘digital platform’. The ACCC notes that in developing any new framework, consideration should be given to regulatory coherence and certainty in the definition of terms.

The ACCC notes that cooperation between government agencies is also important in the day-to-day administration of regulatory frameworks that govern digital platforms. The ACCC closely engages with a wide range of government departments and agencies (as well as industry, consumer, and other stakeholders) and will continue to focus on increasing our understanding of new, developing, and intersecting issues related to digital platforms. In particular, the ACCC recognises the need to draw on these relationships to understand and deal appropriately with important and increasing intersections between competition, consumer, privacy and other issues, as outlined in sections 1.6.4 and 2.4.3 of this report.

To this end, in March 2022, the ACCC, the Office of the Australian Information Commissioner, the Office of the eSafety Commissioner and the ACMA formed the Digital Platform Regulators Forum (DP-REG), formalising existing relationships between the 4 agencies.⁸⁹² DP-REG is a key avenue for these Australian regulators to share information about, and collaborate on, common issues and activities relating to the regulation of digital platforms.

DP-REG also provides a forum for members to promote proportionate, cohesive, well-designed, and efficiently implemented digital platform regulation, including through engagement with relevant policy departments. On 28 June 2022, the heads of the 4 agencies met to discuss priorities for 2022–23, which include increased collaboration and capacity building.⁸⁹³ Several stakeholders responding to the issues paper expressed support for the forum and noted the potential role for DP-REG in enhancing cooperation and ensuring that any new measures are consistent with existing rules.⁸⁹⁴

7.3.2. International agencies

While the ACCC is focussed on identifying the most appropriate solution for Australian businesses and consumers, we recognise the global reach of many digital platforms and the benefit to all stakeholders of international regulatory coherence and cooperation.⁸⁹⁵ The

⁸⁹⁰ Law Council of Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 6.

⁸⁹¹ Amazon, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 18; Computer and Communications Industry Association, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; DIGI, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 16; Google, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 10, 15; Internet Association of Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; Law Council of Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8; Meta, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 11; Yahoo, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2.

⁸⁹² Australian Communications and Media Authority, [DP-REG Terms of Reference](#), 11 March 2022.

⁸⁹³ ACCC, ACMA, eSafety and OAIC, [Communique – Digital Platforms Regulators Forum](#), 29 June 2022.

⁸⁹⁴ ARC Centre of Excellence, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Atlassian, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; DIGI, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), April 2022, p 15; University of Western Australia Minderoo Tech & Policy Lab, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, pp 5–6; Law Council of Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 9.

⁸⁹⁵ ACCC, [Digital Platform Services Inquiry Fifth Interim Report - Discussion Paper](#), 28 February 20, p 73.

global nature of many large digital platforms means that international regulators are increasingly working together to share their experiences of regulatory and enforcement challenges posed by these entities.

In this context, the ACCC actively participates in the international dialogue about how best to approach the competition and consumer issues arising in relation to digital platform services, including through participation in multilateral organisations such as the Organisation for Economic Cooperation and Development, the International Competition Network and the International Consumer Protection and Enforcement Network.

The ACCC has also been closely engaging with our counterparts in multiple jurisdictions, including the US, the UK, Germany, Japan, and the EU throughout the course of the Digital Platform Services Inquiry. As has been noted throughout this report, several of these jurisdictions have recently proposed or implemented new legislation to address digital platform-related competition and consumer issues, and the ACCC has benefited from consultation with our international counterparts and other stakeholders regarding the design and objectives of these various regimes overseas.

In responses to the ACCC's Discussion Paper, many stakeholders agreed with the need for consistency or coherence between international regulatory regimes (particularly where this can be consistent with best practice and implemented in a way suited to the Australian legal system).⁸⁹⁶

There are 2 key benefits of such international coherence. First, it would help to reduce regulatory burden and compliance costs on the digital platforms and other impacted stakeholders that might otherwise face substantially differing regulation across different jurisdictions. This would ultimately support greater compliance with any new obligations imposed in Australia.⁸⁹⁷ Secondly, it would help international agencies to coordinate on these cross-jurisdictional issues.⁸⁹⁸

The ACCC will continue to work closely with international regulators and policy makers to consider regulatory options and to assist our enforcement activities. Future development of the proposed measures would also benefit from the continued sharing of experiences with overseas counterparts, including through bilateral and multilateral discussions.

⁸⁹⁶ Centre for AI and Digital Ethics and Melbourne Law School, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 4; Cyber Security Cooperative Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; Daily Mail Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 8; Department of Home Affairs, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 7; eftpos, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 5; Epic, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 14; Free TV, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, pp 5, 7; Internet Association of Australia, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 2; Marque Lawyers, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 2; Obesity Policy, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 4; PayPal, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 3; Pinterest, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 4.

⁸⁹⁷ Pinterest noted that as digital platforms operate globally and are deeply connected, a patchwork of regulations creates burdens and divergent user experiences, which may in some instances serve to further entrench the market power of larger platforms. See Pinterest, [Submission to the ACCC Digital Platform Services Fifth Interim Report](#), May 2022, p 4.

⁸⁹⁸ Epic noted that multilateral cooperation is 'important to secure lasting change in business practices' of the digital platforms. See Epic, [Submission to the ACCC Digital Platform Services Inquiry Fifth Interim Report](#), May 2022, p 14.

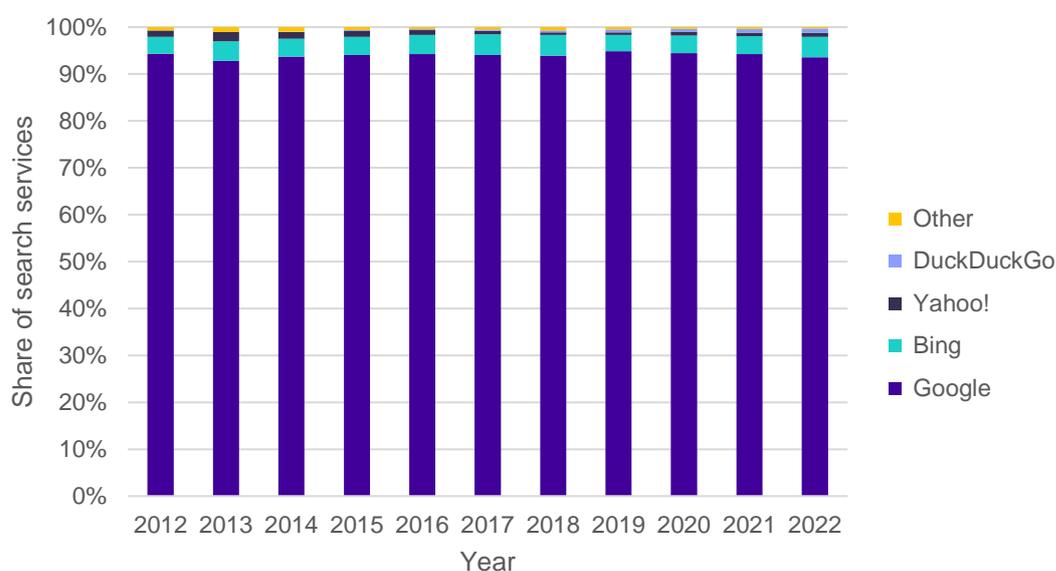
Appendix A – Concentration in digital platform services

Concentration in the supply of several digital platform services has been consistently high in recent years, reflecting the tendency for one or 2 digital platforms to achieve dominant positions, as set out below.

General search engine services

Google Search has consistently held 92.8% to 94.9% of the supply of general search services from 2012 to 2022, demonstrating the enduring nature of its market power, as shown in figure A.1.

Figure A.1 Share of search services in Australia (2012 – 2022)



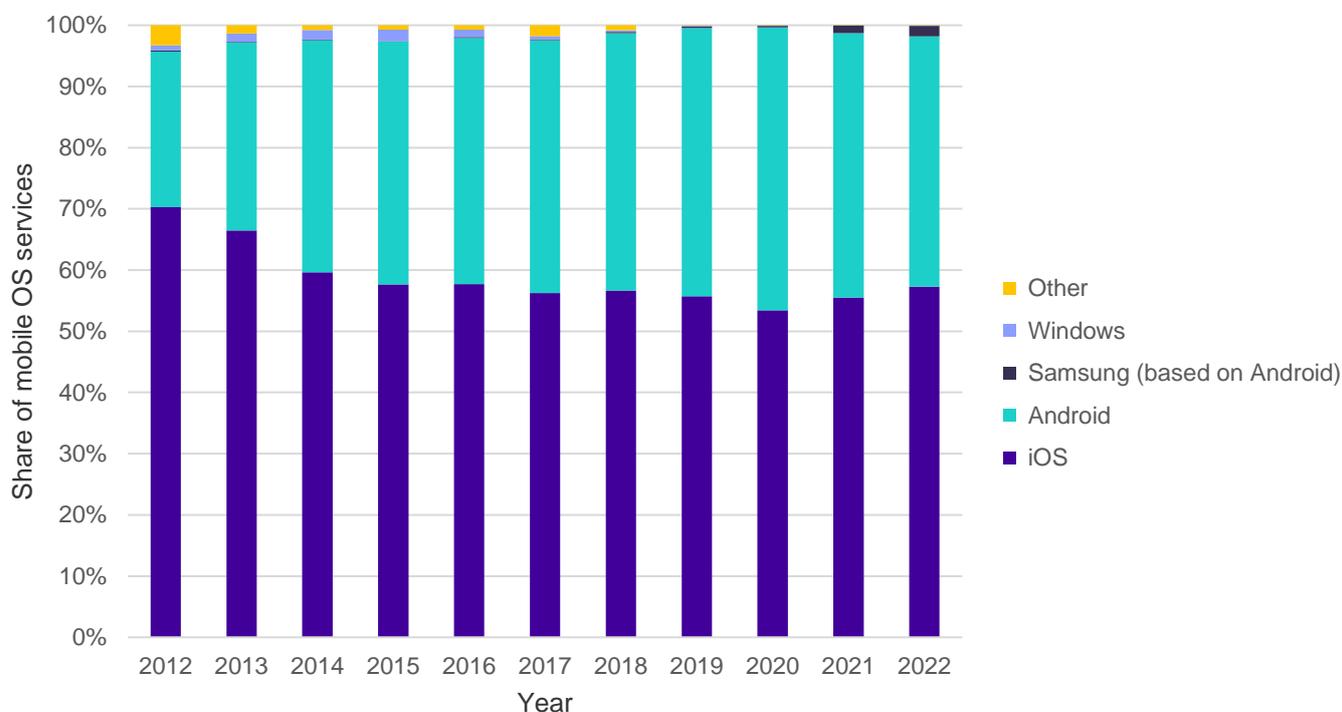
Source: ACCC analysis using Statcounter data, [Search engine market share Australia – June 2012 – June 2022](#).⁸⁹⁹

⁸⁹⁹ Statcounter estimates are based on tracking code installed on websites – see [Statcounter Methodology](#).

Mobile OS services

Google’s Android OS has increased its share of the supply of mobile OS services at the expense of Apple’s iOS since 2012, as shown in figure A.2. The combined share of these OS services also increased from 95% to 98% during this period. Australian consumers spent an average of 3.4 hours on mobile devices per day in 2021, up by one hour from 2019.⁹⁰⁰

Figure A.2 Share of mobile OS services in Australia (2012 – 2022)



Source: ACCC analysis using Statcounter data, [OS market share mobile Australia yearly 2009–2022](#).⁹⁰¹

In 2021, Android OS had a worldwide mobile OS share (excluding China) of approximately 73%, while Apple had a share of about 27% worldwide.⁹⁰²

Browser services

Apple and Google have both significantly increased their share of browser services in Australia since 2012. The Google Chrome browser and the Apple Safari browser now account for approximately 53% and approximately 31% respectively across mobile and desktop devices combined, as shown in figure A.3.

Their user numbers have also grown. Google Chrome grew from an estimated 6.8 million users in Australia in 2014 to an estimated 12.4 million users in 2022. Safari grew from an

⁹⁰⁰ Data.ai, [State of mobile 2022](#), accessed 15 September 2022.

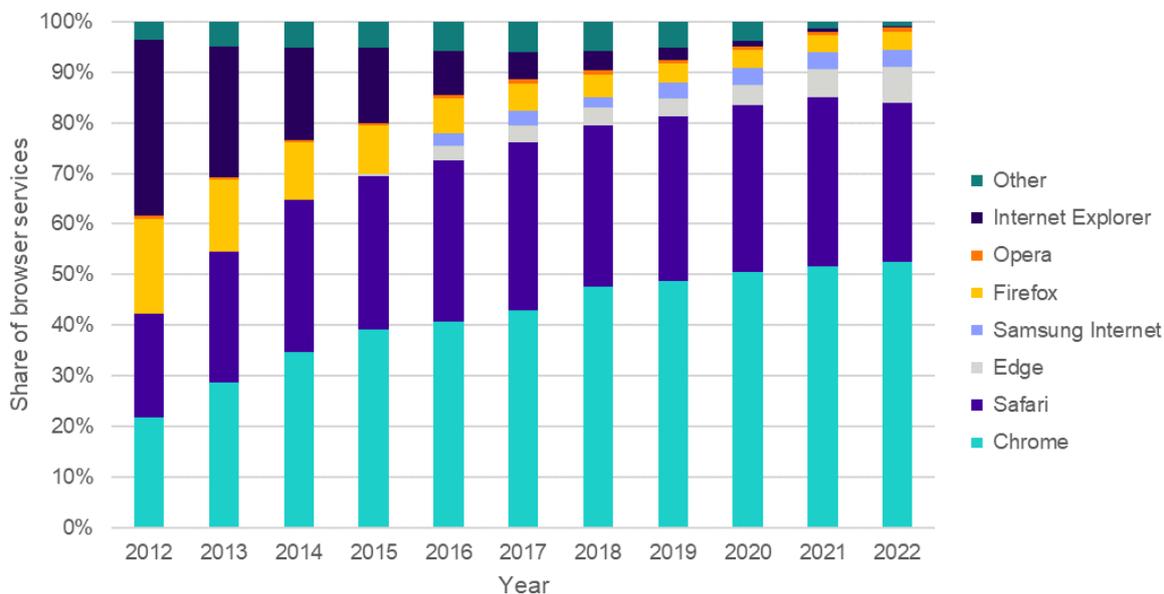
⁹⁰¹ Microsoft’s Windows mobile OS has been discontinued.

⁹⁰² 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 3 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.

estimated 5.9 million users in Australia to an estimated 7.4 million users over the same period.⁹⁰³

In contrast, Microsoft’s Edge browser grew only slightly, and use of its Internet Explorer browser decreased significantly before this browser was retired in mid-2022.

Figure A.3 Share of browser services in Australia – mobile and desktop (2012 – May 2022)



Source: ACCC analysis using Statcounter data, [Browser market share – all – Australia – yearly-2009-2022](#). Based on page views.

Social media services

Meta, through Facebook and Instagram, remains by far the largest provider of social media services used by Australian consumers, as shown in figure A.4. Meta’s share of social media services was similarly high over the last 4 years.⁹⁰⁴

Meta’s user numbers for both of these services have been growing in Australia since 2014, along with use of social media services more broadly.⁹⁰⁵ Bytedance’s TikTok has also grown rapidly in the last 2 years in Australia⁹⁰⁶, although it currently has fewer users than Meta’s services, and fewer than Twitter and Pinterest.

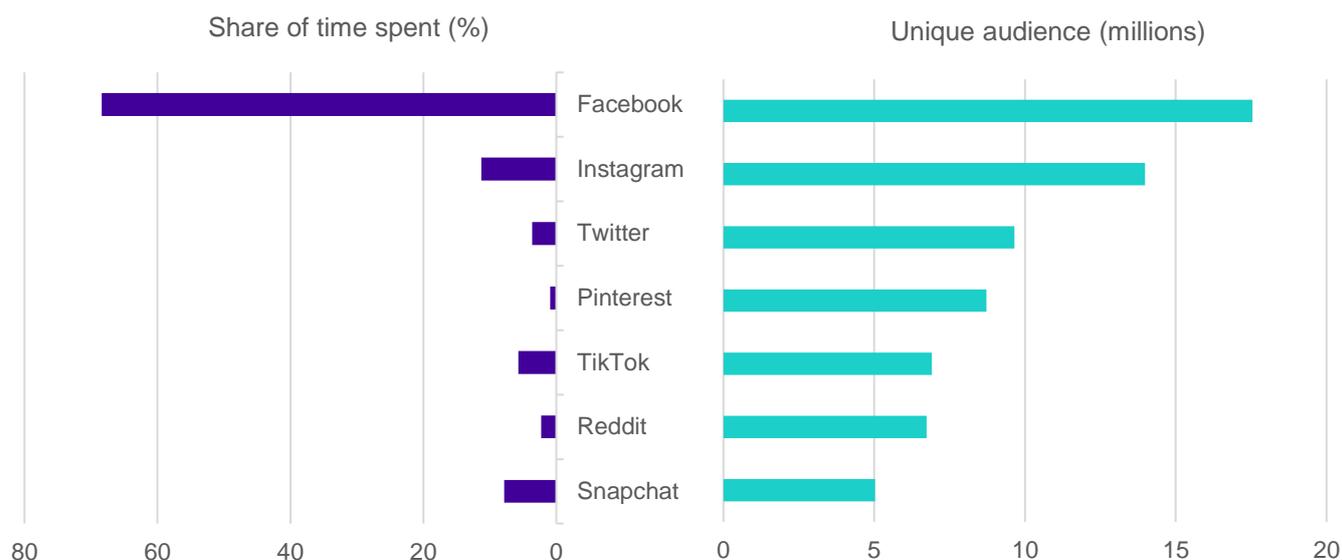
⁹⁰³ Statcounter, [Browser market share – all – Australia - yearly-2009-2022](#), accessed 15 September 2022; DataReportal, [Digital in Australia](#), accessed 15 September 2022.

⁹⁰⁴ Nielsen, Digital Content Ratings, June 2022, Persons 13+, Various Entities, Unique Audience. Based on the period from May 2018 to June 2022.

⁹⁰⁵ Statcounter, [Social media stats – all – australia – yearly - 2009-2022](#), accessed 15 September 2022; DataReportal, [Digital in Australia](#), accessed 15 September 2022.

⁹⁰⁶ DataReportal, [Most Used Social Media Platforms \(various reports 2015- 2022\)](#), accessed 15 September 2022.

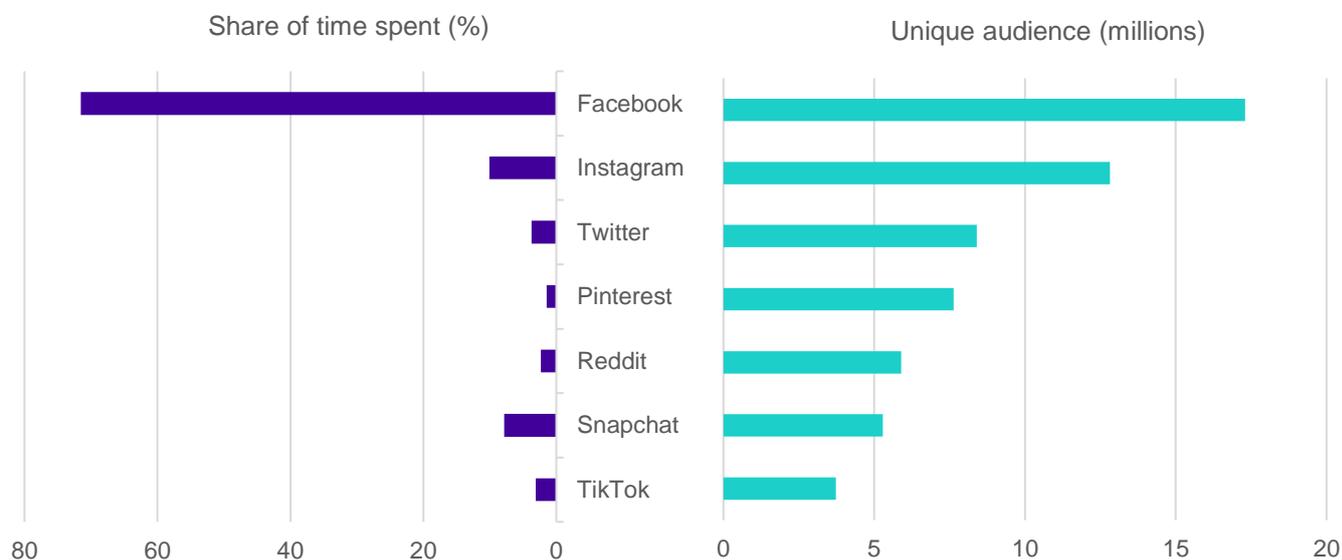
Figure A.4 Share of social media services in Australia (June 2021 – May 2022)



Source: Nielsen, Digital Content Ratings, June 2022, Persons 13+, Various Entities, Unique Audience. Based on the period from May 2018 to June 2022. Unique audience figures are on a monthly basis.

Figure A.5 shows Meta’s Facebook and Instagram were the largest social media services in Australia based on shares of time spent and monthly unique audience numbers over a longer period.

Figure A.5 Share of social media services in Australia (June 2018 – May 2022)



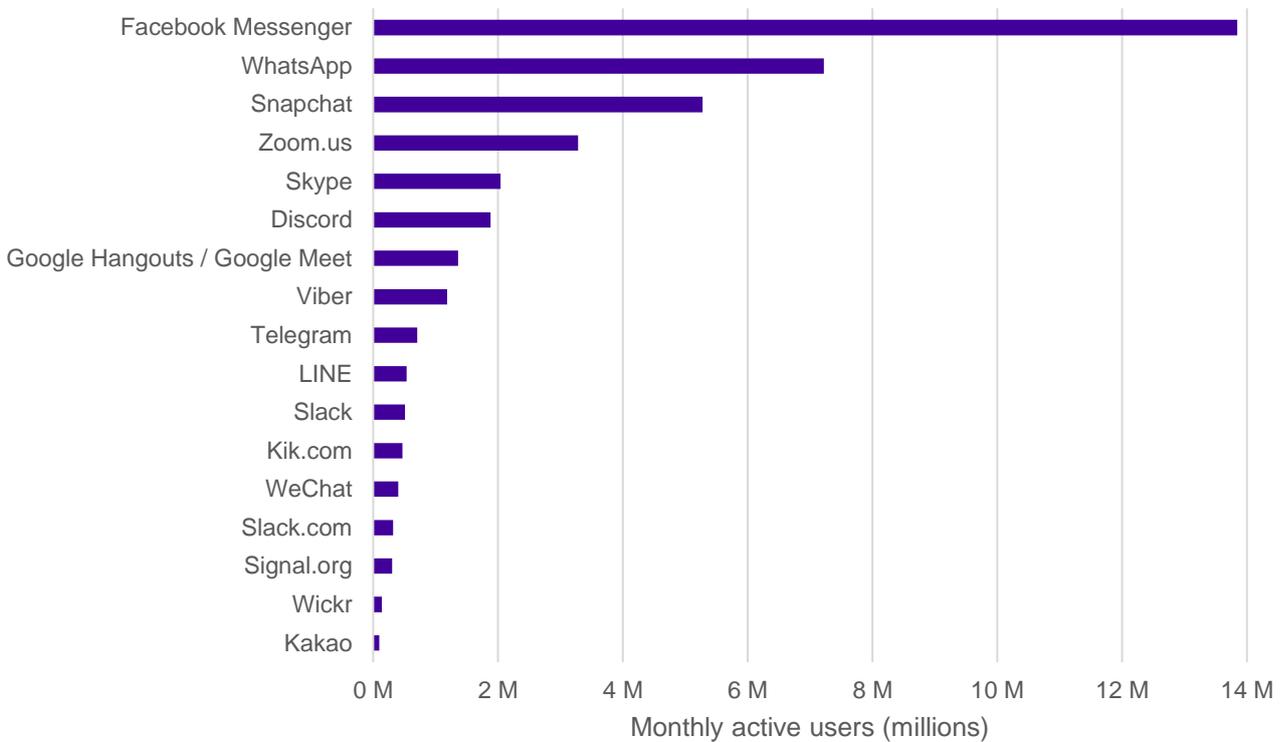
Source: Nielsen, Digital Content Ratings, June 2022, Persons 13+, Various Entities, Unique Audience. Based on the period from June 2018 to May 2022. Unique audience figures are on a monthly basis.

Online private messaging services

The number of Australians using online private messaging services has increased considerably in recent years.⁹⁰⁷ Based on information available to the ACCC, Meta and Apple were the 2 largest suppliers of standalone online private messaging services in Australia in 2020.⁹⁰⁸ Meta’s Messenger averaged 13.8 million monthly unique users in Australia between 2018 and 2022, while Meta’s WhatsApp averaged 7.2 million monthly unique users, as shown in figure A.6.⁹⁰⁹

While Apple is not captured below, in 2020, Apple’s iMessage had an estimated range of 6 million to 12 million daily active users in Australia, and an estimated 33% of online Australian adults used Apple’s FaceTime in the 6 months to June 2020.⁹¹⁰

Figure A.6 Australian monthly active users for selected online private messaging services (May 2018 – May 2022) (excluding iMessage, FaceTime and Google’s Chat feature)



Source: Nielsen, Digital Content Ratings, June 2022, Persons 13+, Various Entities, Unique Audience.

Note: Nielsen, Digital Content Ratings data does not capture use of iMessage, FaceTime or Google’s Chat feature. Skype includes Skype and Skype for Business.

App store services

Apple and Google are the dominant suppliers of app store services in Australia. The Apple App Store accounted for approximately 58.7% of combined downloads in 2021, a decrease

⁹⁰⁷ Nielsen, Digital Content Ratings, June 2022, Persons 13+, Various Entities, Unique Audience. The data is from May 2018 to June 2022.

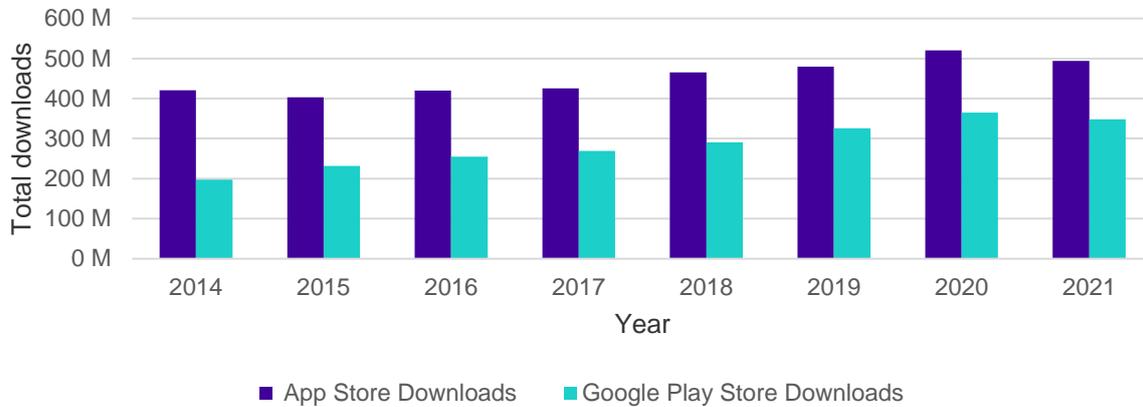
⁹⁰⁸ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 22.

⁹⁰⁹ Nielsen, Digital Content Ratings, June 2022, Persons 13+, Various Entities, Unique Audience.

⁹¹⁰ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 22.

from around 68% in 2014, and the Google Play Store increased to approximately 41.3% of downloads in 2021.⁹¹¹ Apple App Store downloads increased from approximately 421 million in 2014 to over 493 million in 2021, while Google Play Store downloads increased more significantly, from approximately 197 million to almost 348 million in 2021, as shown in figure A.7.⁹¹²

Figure A.7 Google Play and Apple App Store downloads by year in Australia



Source: ACCC analysis using Sensor Tower data.

The ACCC has previously concluded that Apple and Google impose only a weak competitive constraint on each other's ability to exercise market power in respect of their app stores.⁹¹³ Alternative sources of apps also impose a weak competitive constraint because the app stores are tied to the OS and hardware devices.⁹¹⁴ Consumers are limited in their ability to switch app stores.⁹¹⁵

Apple's Australian App Store revenue has increased significantly in recent years, from \$378 million in 2014 to more than \$1.4 billion in 2021. Google Play Store revenue in Australia also increased, from \$219 million to \$664 million in 2021, as shown in figure A.8.⁹¹⁶

⁹¹¹ ACCC analysis using Sensor Tower data, accessed 15 September 2022.

⁹¹² ACCC analysis using Sensor Tower data, accessed 15 September 2022.

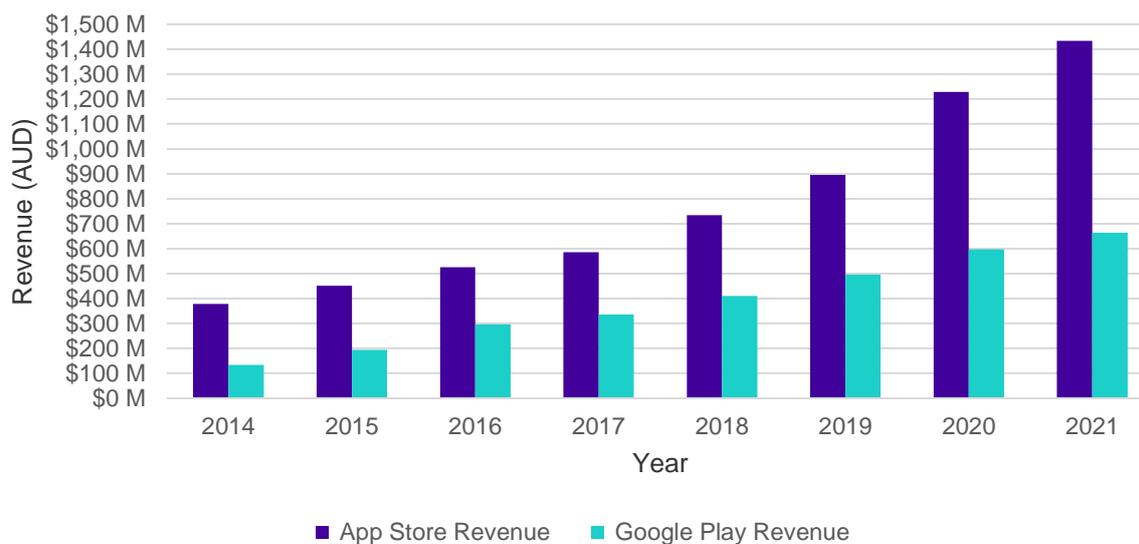
⁹¹³ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 41–42.

⁹¹⁴ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 41–42.

⁹¹⁵ ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 23, 28, 34, 42.

⁹¹⁶ ACCC analysis using Sensor Tower data, accessed 15 September 2022.

Figure A.8 Google Play and Apple App Store Australian revenue



Source: ACCC analysis using Sensor Tower data.

Ad tech services

The ad tech supply chain is made up of 4 key services used by publishers and advertisers. Publishers sell ad spaces on their websites or apps (called ad inventory) via the supply chain, using 2 main ‘publisher-side services’ – publisher ad servers and supply-side platforms. Advertisers buy ad inventory to show their ads, using 2 main ‘advertiser-side services’ – advertiser ad servers and demand-side platforms.⁹¹⁷

The ACCC’s Ad Tech Inquiry Final Report estimated that Google is the largest provider of services at each level of the ad tech supply chain and in 2020 over 90% of ad impressions traded via the ad tech supply chain passed through at least one Google service.⁹¹⁸

Google’s share of impressions is over 70% at each stage of the supply chain.⁹¹⁹ Google also has a share of between 40–70% of revenue for services where revenue data is available.⁹²⁰ Figure A.9 shows the ACCC’s estimates of Google’s share of revenue and impressions for these 4 main ad tech services in Australia in 2020.

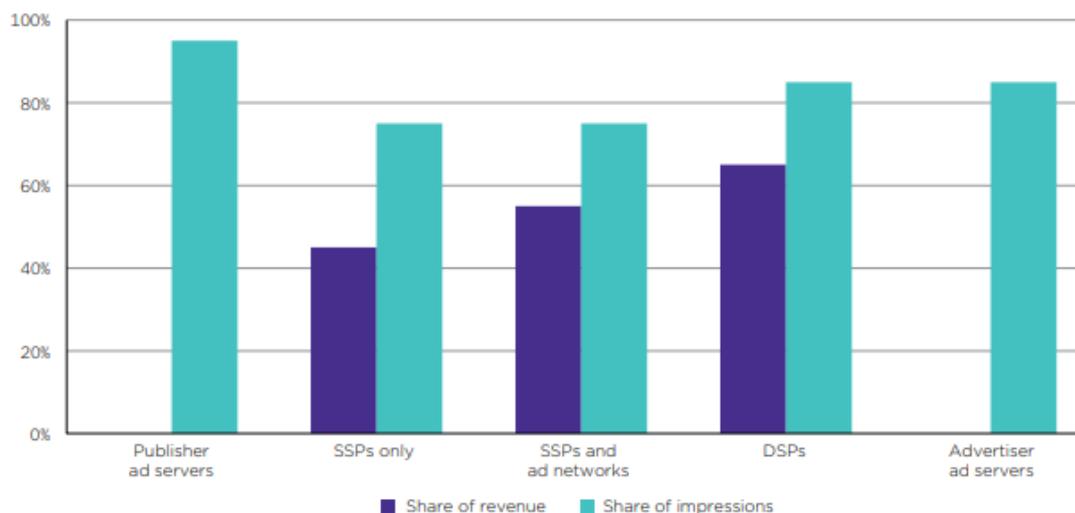
⁹¹⁷ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 29.

⁹¹⁸ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 51.

⁹¹⁹ The share of impressions is an ad tech provider’s share of the total impressions traded or served by the main providers of the service in Australia, in relation to open display advertising served to users in Australia. See ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 54.

⁹²⁰ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 54. The share of revenue is an ad tech provider’s share of the total impressions traded or served by the main providers of the service in Australia, in relation to open display advertising served to users in Australia. The ACCC estimated the shares of revenue and impressions using information obtained from ad tech providers, including from s95ZK notices.

Figure A.9 ACCC estimates of Google’s share of revenue and impressions for the main ad tech services, Australia, 2020⁹²¹



Note: The values in this chart are based represent the mid-point of the ranges included in the table below, and not the exact share of revenue or impressions for any service.

Source: ACCC, [Digital Advertising Services Inquiry Final Report](#).

In relation to publisher and advertiser ad server services, Google faces minimal competition from its rivals. Google had a 90–100% share of impressions for publisher ad server services, and its share has increased slightly from 2017 to 2020 (rising by approximately 2 percentage points). Google had an 80–90% share of impressions for advertiser ad server services in Australia in 2020.⁹²²

While there are multiple providers of demand-side platform and supply-side platform services, Google is still by far the largest supplier, and no other providers are close competitors.⁹²³ Google’s share of revenue for supply-side platform services has decreased slightly from 2017 to 2020 (by approximately 4 percentage points), however its share of impressions has increased substantially from year-to-year over the same period (by approximately 13 percentage points). This period aligns with the growth of broadcast video on demand (BVOD) advertising.⁹²⁴ Google’s share of revenue for demand-side platforms has decreased slightly from 2018 to 2020 (by approximately 7 percentage points), while its share of impressions has increased slightly (by approximately 2 percentage points).⁹²⁵

Search advertising services

The ACCC has previously found that Google’s dominance in search services underpins its dominance in the supply of search advertising services.⁹²⁶ In 2020, Google had a share of approximately 97% of general search advertising revenue in Australia.⁹²⁷ As shown in figure A.1, Google Search’s share of search services remains very high. Therefore, it is

⁹²¹ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 54.

⁹²² ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 5.

⁹²³ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 5.

⁹²⁴ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 58. BVOD ad inventory is higher in cost compared to other forms of advertising and has a significant impact on shares of revenue.

⁹²⁵ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 65.

⁹²⁶ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 89.

⁹²⁷ ACCC, [Digital Platform Services Inquiry Third Interim Report](#), 28 October 2021, p 24. Information provided to the ACCC. The ACCC notes that this market share figure was the ACCC’s best estimate, based on information from a number of sources.

highly likely that Google also remains by far the largest supplier of search advertising services in Australia, followed by Microsoft's Bing. Other very small search advertising providers include DuckDuckGo, Ecosia and Qwant.

Display advertising services

Advertiser expenditure on display advertising shown on mobile devices in Australia has grown significantly in recent years.⁹²⁸ In 2021, general display advertising online reached an estimated value of \$5.1 billion.⁹²⁹

In 2018, Meta's Facebook and Instagram accounted for 51% of revenues from Australian users of display advertising services, rising to 62% in 2019.⁹³⁰ Meta likely remains a leading supplier of display advertising services, based on its continued strength in the supply of social media services (as shown in figures A.4 and A.5). However, this will be considered in the sixth interim report of the ACCC's DPSI.

⁹²⁸ ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 44.

⁹²⁹ iab Australia, [Nickable slides: March 2022](#), 2 March 2022.

⁹³⁰ ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, pp B10–11.

Appendix B – Ministerial Direction



Competition and Consumer (Price Inquiry— Digital Platforms) Direction 2020

I, Josh Frydenberg, Treasurer, give the following direction to the Australian Competition and Consumer Commission.

Dated: 10 February 2020

Josh Frydenberg
Treasurer

Authorised Version F2020L00130 registered 14/02/2020

Contents

Part 1—Preliminary	1
1 Name	1
2 Commencement	1
3 Authority.....	1
4 Definitions	1
Part 2—Price inquiry into supply of digital platform services	3
5 Commission to hold an inquiry	3
6 Directions on matters to be taken into consideration in the inquiry	3
7 Directions as to holding of the inquiry.....	4
8 Period for completing the inquiry	4

Part 1—Preliminary

1 Name

This instrument is the *Competition and Consumer (Price Inquiry—Digital Platforms) Direction 2020*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Competition and Consumer Act 2010*.

4 Definitions

Note: Expressions have the same meaning in this instrument as in the *Competition and Consumer Act 2010* as in force from time to time—see paragraph 13(1)(b) of the *Legislation Act 2003*.

In this instrument:

Australian law means a law of the Commonwealth, a State, or a Territory (whether written or unwritten).

data broker means a supplier who collects personal or other information on persons, and sells this information to, or shares this information with, others.

digital content aggregation platform means an online system that collects information from disparate sources and presents it to consumers as a collated, curated product in which users may be able to customise or filter their aggregation, or to use a search function.

digital platform services means any of the following:

- (a) internet search engine services (including general search services and specialised search services);

Part 1 Preliminary

Section 4

- (b) social media services;
- (c) online private messaging services (including text messaging; audio messaging and visual messaging);
- (d) digital content aggregation platform services;
- (e) media referral services provided in the course of providing one or more of the services mentioned in paragraphs (a) to (d);
- (f) electronic marketplace services.

electronic marketplace services means a service (including a website, internet portal, gateway, store or marketplace) that:

- (a) facilitates the supply of goods or services between suppliers and consumers; and
- (b) is delivered by means of electronic communication; and
- (c) is *not* solely a carriage service (within the meaning of the *Telecommunications Act 1997*) or solely consisting of one or more of the following:
 - (i) providing access to a payment system;
 - (ii) processing payments.

exempt supply has the meaning given by subsection 95A(1) of the Act.

goods has the meaning given by subsection 95A(1) of the Act.

inquiry has the meaning given by subsection 95A(1) of the Act.

services has the meaning given by subsection 95A(1) of the Act.

State or Territory authority has the meaning given by subsection 95A(1) of the Act.

supply has the meaning given by subsection 95A(1) of the Act.

the Act means the *Competition and Consumer Act 2010*.

Part 2—Price inquiry into supply of digital platform services

5 Commission to hold an inquiry

- (1) Under subsection 95H(1) of the Act, the Commission is required to hold an inquiry into the markets for the supply of digital platform services. The inquiry is *not* to extend to any of the following:
 - (a) the supply of a good or service by a State or Territory authority;
 - (b) the supply of a good or service that is an exempt supply;
 - (c) reviewing the operation of any Australian law (other than the Act) relating to communications, broadcasting, media, privacy or taxation;
 - (d) reviewing the operation of any program funded by the Commonwealth, or any policy of the Commonwealth (other than policies relating to competition and consumer protection).
- (2) For the purposes of subsection 95J(1), the inquiry is to be held in relation to goods and services of the following descriptions:
 - (a) digital platform services;
 - (b) digital advertising services supplied by digital platform service providers;
 - (c) data collection, storage, supply, processing and analysis services supplied by:
 - (i) digital platform service providers; or
 - (ii) data brokers.
- (3) Under subsection 95J(2), the inquiry is not to be held in relation to the supply of goods and services by a particular person or persons.

6 Directions on matters to be taken into consideration in the inquiry

Under subsection 95J(6) of the Act, the Commission is directed to take into consideration all of the following matters in holding the inquiry:

- (a) the intensity of competition in the markets for the supply of digital platform services, with particular regard to:
 - (i) the concentration of power in the markets amongst and between suppliers; and
 - (ii) the behaviour of suppliers in the markets, including:
 - (A) the nature, characteristics and quality of the services they offer; and
 - (B) the pricing and other terms and conditions they offer to consumers and businesses; andExample: Terms and conditions relating to data collection and use.
- (iii) changes in the range of services offered by suppliers, and any associated impacts those changes had or may have on other markets; and
- (iv) mergers and acquisitions in the markets for digital platform services; and

Part 2 Price inquiry into supply of digital platform services

Section 7

- (v) matters that may act as a barrier to market entry, expansion or exit, and the extent to which those matters act as such a barrier;
- (b) practices of individual suppliers in the markets for digital platform services which may result in consumer harm, including supplier policies relating to privacy and data collection, management and disclosure;
- (c) market trends, including innovation and technology change, that may affect the degree of market power, and its durability, held by suppliers of digital platform services;
- (d) changes over time in the nature of, characteristics and quality of digital platform services arising from innovation and technological change;
- (e) developments in markets for the supply of digital platform services outside Australia.

7 Directions as to holding of the inquiry

- (1) Under subsection 95J(6) of the Act, the Commission is directed to do the following in holding the inquiry:
 - (a) regularly monitor the markets for the supply of digital platform services for changes in the markets, particularly focussing on the matters referred to in section 6 of this instrument; and
 - (b) give to the Treasurer an interim report on the inquiry by 30 September 2020, and then further interim reports every 6 months thereafter, on:
 - (i) any changes observed by the Commission in the markets since the last report; and
 - (ii) any other matter, within the scope of the inquiry, the Commission believes appropriate.
- (2) Under subsection 95P(3) of the Act, the Commission is directed not to make available for public inspection, copies of any interim report until the Treasurer, in writing, authorises the Commission to do so.

8 Period for completing the inquiry

For the purposes of subsection 95K(1) of the Act, the inquiry is to be completed, and a report on the matter of inquiry given to the Treasurer, by no later than 31 March 2025.