



Ministerial Submission
MS22-002023

FOR ACTION - ACCC Digital Platform Services Inquiry - Response to Fifth Interim Report

TO: Treasurer - The Hon Jim Chalmers MP

CC: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP,
Assistant Minister for Competition, Charities and Treasury - The Hon Dr Andrew Leigh MP

TIMING

By 28 October 2022, to enable the release of the ACCC’s report in the week of 7 November 2022.

Recommendations

- That you **agree** to Treasury undertaking public consultation on the recommendations of the ACCC’s report in late 2022 (through the release of a discussion paper) to inform a submission that you could bring forward in the May 2023 Budget process.

Agree / Not approved

- That you **agree** to publicly releasing the report in the week of 7 November 2022 and **sign** the letter to the Chair of the ACCC approving its release (Attachment F).

Signed / Not signed

Signature	Date: / /2022
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KEY POINTS

- The Australian Competition and Consumer Commission (ACCC) provided its fifth interim report (the Report) on the Digital Platform Services Inquiry 2020-2025 (the Inquiry) to you on 30 September 2022.
 - An overview of the Inquiry is at [Attachment E](#). The final report of the Inquiry is due by 31 March 2025.
- The Report was informed by consultation on a discussion paper released by the ACCC on 28 February 2022. The Report focuses on whether Australia’s current competition and consumer protection laws are sufficient to address the issues identified in the course of the ACCC’s Digital Platform Services Inquiry (2020-2025), Digital Advertising Services Inquiry (2020-2021) and Digital Platforms Inquiry (2017-2019).
 - Issues identified by the ACCC include various anti-competitive behaviours exhibited by large digital platforms, such as self-preferencing their own related services, as well as broader consumer harms including inadequate management of scams which use digital platforms.
 - The issues align with concerns raised in various international jurisdictions including the European Union (EU), United Kingdom (UK) and United States (US).
 - The Report argues these issues cannot be adequately addressed under the current competition and consumer framework.
- To address this, the ACCC has recommended:
 1. Economy-wide consumer measures, including a prohibition against unfair trading practices and unfair contract terms.
 2. Consumer measures specific to digital platforms, including mandating internal and external dispute resolution processes and obligations on platforms to prevent and remove scams, harmful apps and fake reviews.
 3. A new competition framework which would subject ‘designated’ digital platforms to mandatory codes applying to the services they provide (such as app stores or search functions).
 4. Targeted competition obligations for designated digital platforms to be included in the framework and codes proposed under Recommendation 3 (to address the harms identified by the ACCC such as anti-competitive self-preferencing or impediments to consumer switching).
- The consumer-focused recommendations, which align with existing reforms being progressed by you and the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP, are an opportunity for making early progress on the report.

- In September 2022, Minister Jones met with state and territory consumer ministers to agree consumer reform priorities including consultation on a possible unfair trading prohibition in early 2023.
- The Government’s election commitment on fighting scams included introducing new codes for platforms to clearly define responsibilities for protecting consumers and businesses from scams, and the ACCC’s recommendations will inform work on this aspect of the commitment.
- Additionally, the Government recently introduced legislation to make unfair contract terms unlawful.
- We note the ACCC’s view that a new policy and regulatory framework is required for digital platforms given the particular anti-competitive risks they pose and dynamic nature of digital markets.

s 47E(d)



- We consider that recommendations 2, 3 and 4 would benefit from stakeholder consultation, which could run in late 2022. This would provide stakeholders with an opportunity to comment on the recommendations, further scope the operational challenges, and inform our in-principle position, particularly in relation to the proposed competition regime. We propose to brief you on this position in early 2023.
- Should the Government be minded to proceed with substantial reform, we will need to carefully work through the operational detail of any new regime, which will involve close engagement across Government and with overseas jurisdictions.

Handling strategy and next steps:

- As per section 7(2) of the Ministerial Direction, the ACCC requires your permission to publish the Report. Previous reports have generally been published within 28 days of submission to Government.

- Given the timing of the October Budget, Treasury recommends publishing in the week of 7 November 2022.
- A letter to the Chair of the ACCC approving the Report to be published is at Attachment F.
- We recommend publicly acknowledging the Report when it is published and indicating Treasury’s role in reviewing and consulting on its recommendations over the coming months. A draft media release is at Attachment G.
- Following the publication of the Report, we recommend Treasury conduct a public consultation on recommendations 2, 3 and 4, with the consultation proposed to run until the end of the year.
 - We consider that recommendation 1 does not need to be part of this consultation given the other processes that are progressing an unfair trading prohibition and unfair contract terms.
 - Following the outcomes of consultation, you will be briefed on next steps, including a recommended Government response, in early 2023. A proposed timeline is at Attachment C.
- Separately, as you are aware, on 26 September 2022 the Senate referred a review into the Influence of international digital platforms to the Senate Economics References Committee for inquiry and report by the last sitting day of 2023.
 - The terms of reference are broadly similar to the scope of the ACCC’s Inquiry. Treasury will monitor the Senate inquiry and inform your office of any developments.

Clearance Officer
David Pearl
A/g First Assistant Secretary
Market Conduct Division
12 October 2022

Contact Officer
s 22
Director
Ph: s 22

ATTACHMENTS

- A: ACCC’s September 2022 interim report
- B: Interim report recommendations and Treasury views
- C: Handling strategy
- D: International developments
- E: Digital Platform Services Inquiry 2020-2025 overview
- F: Letter to Chair of ACCC
- G: Draft media release

ATTACHMENT A – ACCC’S SEPTEMBER 2022 INTERIM REPORT

ATTACHMENT B – INTERIM REPORT RECOMMENDATIONS AND TREASURY VIEWS

	Recommendation	Details	Treasury initial views
<p>Consumer protection recommendations</p>	<p>Introduce economy-wide consumer measures, including banning unfair trading practices and strengthen unfair contract terms.</p>	<ul style="list-style-type: none"> • Introduce a general prohibition on unfair trading practices into the Australian Consumer Law (ACL). <ul style="list-style-type: none"> – Unfair practices noted by the ACCC include engaging in excessive and harmful tracking and collection of data and using dark patterns to impede and harm consumer choice. • This proposal was previously discussed by Commonwealth and state consumer ministers, and the progression of a consultation regulatory impact statement (CRIS) was agreed in 2020. Following the 9 September 2022 Consumer Ministers’ meeting, it was agreed that Commonwealth Treasury would finalise the CRIS and release it for public consultation in the first half of 2023. 	<p>s 47E(d)</p>
		<ul style="list-style-type: none"> • Amend the ACL to include a general prohibition on unfair contract terms practices. • Support the amendments introduced into Parliament on 28 September 2022, as part of 	

		<p>the Treasury Laws Amendment (More Competition, Better Prices) Bill 2022.</p> <ul style="list-style-type: none">– The Bill includes a prohibition on the use of, and reliance on, unfair terms in standard form contracts and civil pecuniary penalties for non-compliance.	s 47E(d)
	<p>Mandatory processes to prevent and remove scams, harmful apps and fake reviews, including internal and external dispute resolution processes.</p>	<ul style="list-style-type: none">• Legislation mandating notice and action mechanisms regarding harmful content hosted on platforms (e.g. scams, harmful apps and fake online reviews) for all digital platforms.• Legislation mandating internal and external dispute resolution processes across the digital economy. External dispute resolution should be completed by a new digital platforms' ombudsman with powers to compel information and investigate complaints.	

s 47E(d)

Competition recommendations	Mandatory codes of conduct for DDPs to address competition harms.	<ul style="list-style-type: none">• Legislation that would allow for specific 'dominant' digital platforms to be designated with respect to particular services (e.g. search or app marketplace) based on quantitative and qualitative attributes.• Mandatory codes should be developed with targeted obligations on designated entities.• Entities would only be subject to a code if they are designated.• Codes could be developed sequentially, based on prioritisation of issues. ACCC have indicated app marketplaces and search would likely be early code priorities.	
	Targeted competition obligations for DDPs based on legislated principles	<ul style="list-style-type: none">• Codes would specify prohibited conduct (e.g. self-preferencing and exclusive dealing) as well as impose specific obligations (e.g. facilitating interoperability).	

s 47E(d)

- Codes would be developed by the relevant regulator, in consultation with the relevant policy agency.
- Legislation would set out broad principles that digital platforms should adhere to and provide powers to develop mandatory codes of conduct for particular platform services.

ATTACHMENT C – HANDLING STRATEGY

Consultation process

- Following the release of the interim report, Treasury recommends consulting with stakeholders on recommendations 2,3 and 4.
- To support this process, Treasury will develop a consultation paper outlining the current state of play, international developments and the recommendations by the ACCC, as well as questions for stakeholders to respond to.
 - During the consultation period, Treasury will conduct bilateral meetings and roundtables with key stakeholders, including representatives of digital platforms, regulators, industry associations and government agencies involved in related policy projects.
 - : Key areas of the discussions will be options for regulatory reform, the practical implications of designating certain digital platforms to codes of conduct and to gather evidence of harm caused by digital platforms.
 - Following consultation, Treasury will provide key outcomes and recommendations for the Government to consider. Final policy decisions will require authority through the Cabinet or Expenditure Review Committee process.
 - The policy development process will require a regulation impact statement in accordance with the Office of Best Practice and Regulation (OBPR) in the Department of Prime Minister (PM&C) as well as engagement with Department of Finance and other relevant agencies on potential financial implications, which would require approval through the Budget or MYEFO process.
 - Close engagement with the Office of Parliamentary Council (OPC) will be required if the Government is to develop legislation or codes of conduct, which will require further public consultation.
- Given the alignment with existing consumer protection reforms being progressed by Minister Jones, the consumer-focused recommendations could be an area of early focus for the Government in its response to the report.

Table 1 – Proposed project timeline

Milestone	Timing
Fifth interim report published	November 2022
Public consultation	November – December 2022
Briefing on the outcomes of consultation and suggested Government response	February 2023
Decision on Government response including potential proposals for 2023-24 Budget	February 2023
Depending on Government decision, Treasury to progress Cabinet Submission and NPPs for 2023-24 Budget	February – April 2023

ATTACHMENT D – INTERNATIONAL DEVELOPMENTS

European Union

- The EU's regulation to curb the market power of online platforms is currently considered the most far-reaching and advanced of all digital regulation. The measures impose strict obligations on the platforms covered by the regime, and given the untested nature of the reforms, may result in unintended consequences.
- The Digital Markets Act (DMA) was signed by the European Council and Parliament on 14 September 2022 as part of the Digital Service Package.
 - The DMA outlines specific obligations for 'gatekeeper' platforms – platforms that have significant market power and presence, which makes it challenging for consumers to avoid using the platform.
 - Gatekeepers will have to adhere to specific rules such as allowing third-party interoperability and access to data and will no longer be able to self-preference its products or services, use personal data for targeted advertising and prohibit the uninstallation of pre-loaded software of apps.
 - The law will start applying in March 2023, when the EU will begin the process of designating gatekeepers. Gatekeepers will need to comply with the obligations under the DMA within six months of designation. Given the designation process will likely take several months, DMA obligations are not expected to be applied until early 2024.
- There remain significant questions about the implementation and administration of the DMA, with no designations or actions having occurred to date.
- The Digital Services Act (DSA), which is also part of the Digital Service Package was provisionally signed by the European Council and Parliament on 23 April 2022.
 - The DSA focuses on online safety, illegal content and protecting users. Similar to the DMA, service providers are required to adhere to obligations proportionate to their influence and size.

United Kingdom

- In September 2018 the UK Government established the Digital Competition Expert Panel, headed by Professor Jason Furman. This panel considered the potential opportunities and challenges the emerging digital economy may pose for competition and pro-competition policy, and to make recommendations on any changes that may be needed. The panel provided the Government with a report (The Furman Review) in March 2019, with the key recommendation being to establish a Digital Markets Unit (DMU), tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses.
- In March 2020, the Competition and Markets Authority (CMA) was commissioned by the government to lead a Digital Markets Taskforce to advise the UK government on the design and implementation of a pro-competitive regime for digital markets based on the findings of the

Furman Review. The taskforce agreed with the Furman Review's key recommendation to establish a DMU as a centre of expertise for digital markets, with capabilities to understand the business models and incentives of digital firms.

In November 2020 the government responded to the CMA, agreeing to establish the DMU on a non-statutory basis and to progress a Digital Markets, Competition and Consumer Bill to give the DMU oversight and enforcement capabilities of the proposed regime. It is proposed that certain firms will be designated a strategic market status (SMS) if they meet certain thresholds, such as revenue, evidence of market power and strategic position and scope of digital activities. The DMU will have discretion to designate firms and then require them to meet certain conduct requirements.

- This Digital Markets, Competition and Consumer Bill has subsequently been delayed several times and is now expected to be introduced to Parliament in 2023.
- The UK government has also introduced the Online Safety Bill, legislation similar to the EU DSA, which establishes a new regime to address illegal content, content that is harmful to children and harmful content to adults. The Bill is expected to pass in early 2023, with the Office of Communications having oversight and enforcement capabilities.

United States

- In the United States both houses of Congress have proposed a raft of new bills to address competition in the digital arena.
- In June 2021, the US House Antitrust Subcommittee introduced several bipartisan bills directed at countering the anti-competitive practices of large digital platforms including the American Choice and Innovation Online Act and Open App Markets Act.
- A number of these bills enable the US Federal Trade Commission to 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.
 - However, these and other bills are yet to progress to the floor of either house for a vote, and their passage remains uncertain.
- Despite a lack of progress in sector specific regulation, the Department of Justice and Federal Trade Commission (FTC) have been active in enforcing antitrust laws on technology companies and digital services, with the FTC in particular taking a forward-looking approach to new technology when examining potential issues with mergers.
- Some action on digital regulation has been taken at a state level, with California passing the California Consumer Privacy Act, which took effect in 2020. This allows users to request the deletion of their data, and obliges companies to disclose data collection and to provide equal pricing and service.

Japan

- The Japanese Government created the Digital Market Competition Headquarters in 2019, to address the issues within digital markets including unfair business conditions and privacy.
- The Act of Improving Transparency and Fairness of Digital Platforms came into effect in early 2021. It requires platforms defined by certain characteristics ('specified digital platforms') to disclose contract terms and make efforts to voluntarily adhere to procedures and systems based on the guidelines by the Minister of Economy, Trade and Industry. The Act requires the Minister to conduct a yearly review and publish the results on the disclosure of the designated platforms.
 - Under the Act, the Minister can request the Japan Fair Trade Commission to take action against cases where they are in violation of the Antimonopoly Act.
 - In April 2021, platforms that facilitate online shopping (Amazon, Rakuten Group and Yahoo Japan) and operate app stores (Apple and Google) were designated.
 - Following a report into Evaluation of Competition in the Digital Advertising Market, a Cabinet decision in July 2022 resulted in the designation of certain media-integrated and ad intermediary platforms.

South Korea

- In August 2021 South Korea amended its *Telecommunications Business Act* to require 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. In August 2021 South Korea's communication watchdog, the Korea Communications Commission (KCC), said it would begin an investigation into Apple and Google over potential violations of the country's in-app payment rule.
- Under the current Yoon administration (elected March 2022), South Korean efforts to regulate the digital sector have stalled, with the preference for deregulation apparently killing a number of proposed bills aimed at regulating platforms more widely.
- Under the Yoon administration the Ministry of Science, Technology and Information and Communication is planned to become the main regulatory authority over tech platforms, rather than the Fair Trade Commission or the KCC.

Singapore

- In February 2022 The Competition and Consumer Commission of Singapore updated its guidelines to the *Competition Act 2004*. The changes clarify issues related to market definition, market power and potential abusive conduct to reflect the developments in the digital era.

Germany

- Germany's antitrust laws are governed by the German Act against Restraints of Competition (ARC). In early 2021, amendments were made to these laws, the most significant being the ability for the Federal Cartel Office (Bundeskartellamt), to intervene early in instances where

competition is threatened by large digital companies, and the ability to prohibit certain conduct, such as self-preferencing of services and manipulating data to impede new entrants into the market. Other amendments include:

- more specific provisions for control of abusive conduct, with the inclusion of internet-specific criteria;
- the requirement to take into account the inclusion of access to data relevant for competition, as well as a requirement to consider whether a platform has intermediary power, when assessing market power; and
- prohibiting companies that provide intermediary services in multi-sided markets from being dominant, even if the other company is not a small or medium business;
- companies being subject to merger control if they meet higher turnover thresholds; and
- shortening the legal process by taking proceedings directly to the Federal Court of Justice for any appeals against decisions by the Federal Cartel Office.

ATTACHMENT E – DIGITAL PLATFORM SERVICES INQUIRY 2020-2025 OVERVIEW

- On 10 February 2020, the previous Government directed the ACCC to conduct an inquiry into competition and consumer issues arising in relation to digital platform services.
- The ACCC is required to release reports every six months until 2025, with the final report to be provided to you by 31 March 2025.
- Four previous interim reports have been published, as well as one final report into the markets for the supply of advertising technology and agency services.

Scope of Inquiry:

- Matters to be considered by the inquiry as directed by the previous Government’s Minister include:
 - the intensity of competition in markets for the supply of digital platform services, with particular regard to the concentration of power, behaviour and changes in the services offered by suppliers, mergers and acquisitions and barriers to entry, expansion or exit;
 - practices of suppliers in digital platform services markets which may result in consumer harm;
 - market trends, including innovation and technology change, that may affect the nature, degree of market power and characteristics of digital platform services; and
 - developments in markets for the supply of digital platform services outside Australia.

Interim reports:

- The ACCC has published the following interim reports:
 - Interim report No. 1 - September 2020 – Private messaging services
 - Interim report No. 2 - March 2021 – App marketplaces
 - Interim report No. 3 - September 2021 – Search defaults and choice screens; and
 - Interim report No. 4 - March 2022 – General online retail marketplaces
 - Interim report No. 5 - September 2022 – Regulatory reform (to be published)
- The key findings to date indicate:
 - the entrenched market power of Google, Meta and Apple as providers of search services, operating systems, app distribution, social media and advertising respectively;
 - harms to consumers through online tracking, reduced privacy and data security, scams and reduced choice; and

- anti-competitive self-preferencing of products and services influence consumers and limits rival firms to compete and offer products.

ATTACHMENT F – LETTER TO CHAIR OF ACCC



THE HON JIM CHALMERS MP
TREASURER

Ref: MS22-002023

Ms Gina Cass-Gottlieb
Chair
Australian Competition and Consumer Commission
GPO Box 313
CANBERRA ACT 2601

Dear Ms Cass-Gottlieb

Thank you for your Executive Minute of 30 September 2022, providing the Government with the fifth interim report of the Digital Platform Services Inquiry 2020-25.

As per section 7(2) of the Ministerial Direction, I authorise the public release of this interim report in the week of 7 November 2022.

The Government will carefully examine the recommendations provided in the interim report and plans to consult with stakeholders on the proposed reforms, while continuing to liaise with the ACCC. Following consultation, I will inform you of any decisions made by the Government regarding the implementation of the interim report's recommendations.

I appreciate the ACCC's continued work in this important inquiry.

Thank you again for your letter.

Yours sincerely

The Hon Jim Chalmers MP

CC: The Hon Stephen Jones MP, Assistant Treasurer and Minister for Financial Services
The Hon Dr Andrew Leigh MP, Assistant Minister for Competition, Charities and Treasury

ATTACHMENT G – DRAFT MEDIA RELEASE



The Hon Jim Chalmers MP
Treasurer

MEDIA RELEASE

7 November 2022

RELEASE OF THE ACCC'S FIFTH INTERIM REPORT INTO DIGITAL PLATFORM SERVICES

The Albanese Government today welcomed the release of the Australian Competition and Consumer Commission's (ACCC) fifth interim report as part of its digital platform services inquiry.

In this milestone report, the ACCC recommends a blueprint for a new policy and regulatory framework for digital platform services. The inquiry identified significant consumer and competition harms across a range of digital platform services. To address these issues, the interim report released today makes four recommendations to strengthen existing consumer and competition laws:

- the introduction of economy wide consumer measures, including prohibiting unfair trading practices and unfair contract terms;
- digital platform-specific consumer measures to prevent and remove scams, harmful apps and fake reviews, including internal and external dispute resolution processes;
- mandatory sector-specific codes of conduct for designated digital platforms to address competition harms; and
- targeted competition obligations for designated platforms based on legislated principles.

The Government is considering the ACCC's recommendations and will consult publicly later this year to seek the views of stakeholders.

The Government is already strengthening consumer protections, including through recently introduced legislation to prohibit unfair contract terms and increase penalties for anti-competitive behaviour, and has committed to establish a new National Anti-Scam Centre.

The report is part of the ACCC's inquiry into markets for the supply of digital platform services, to examine the intensity of competition and identify practices of suppliers that may result in consumer harm. The ACCC is providing interim reports every six months until the inquiry concludes, with the final report due to the Treasurer by 31 March 2025.

Ends

Media contact: [Insert advisor name] [Insert mobile] | [Insert email address]