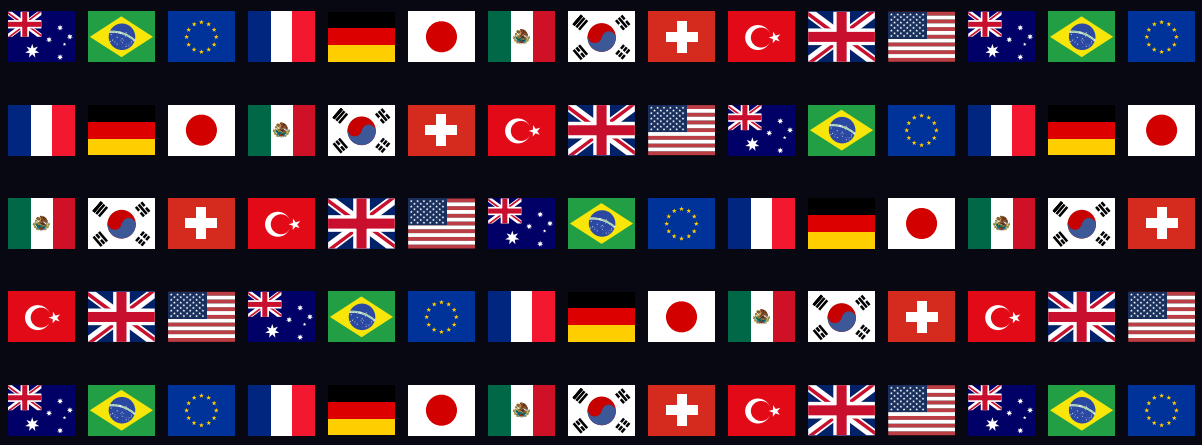
COMPETITION IN DIGITAL MARKETS

Australia



LEXOLOGY
Getting The Deal Through

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Competition in Digital Markets

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Quick reference guide enabling side-by-side comparison of local insights into applicable legislation, enforcement authorities and regulatory guidelines; horizontal agreements; vertical agreements; unilateral anticompetitive conduct; merger control; and recent trends.

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LEGAL AND REGULATORY FRAMEWORK

Legislation

What legislation governs competition in digital markets in your jurisdiction? Does the standard competition law framework apply or are there any special rules or exemptions?

The legislation governing competition in digital markets is the Competition and Consumer Act 2010 (Cth) (Act), which is the standard competition law framework in Australia. There are currently no special rules or exemptions for digital markets. The Australian Consumer Law (ACL) covers consumer protection issues. The Act was amended in March 2021 to include the News Media and Digital Platforms Mandatory Bargaining Code which was intended to address bargaining power imbalances between news media businesses and digital platforms.

However, in its fifth Digital Platform Services Inquiry (DPSI) interim report published on 11 November 2022 (Fifth DPSI Report), the Australian Competition and Consumer Commission (ACCC) made recommendations for legislative reform to address issues relating to digital markets, including service-specific codes which would apply to designated digital platforms. The Treasury has consulted on the ACCC's recommendations, and policy decisions by the Australian Government are currently awaited.

Law stated - 29 June 2023

Enforcement authorities

Which authorities enforce the competition law framework in your jurisdiction's digital markets?

The ACCC enforces the Competition and Consumer Act 2010 (Cth) in Australia. The Digital Platforms Branch of the ACCC sits within the Mergers, Exemptions and Digital division of the ACCC. It is responsible for the ongoing scrutiny of digital platform markets, including conducting relevant inquiries and current and future competition and consumer law enforcement cases.

Law stated - 29 June 2023

Regulatory guidelines

Have the authorities in your jurisdiction issued any guidelines on the application of competition law to digital markets?

In Australia, there are no guidelines on the application of competition law specific to digital markets. Practical guidelines on the ACCC's approach to competition law are generally reflected in various guidelines, including its merger and authorisation guidelines (merger and non-merger), misuse of market power guidelines and concerted practices guidelines.

Law stated - 29 June 2023

Advisory reports

Have any advisory reports been prepared in your jurisdiction on competition law issues in digital markets?

The ACCC produced a policy advisory report for the Australian Government following its Digital Platforms Inquiry 2017–2019 (DPI), published in July 2019 (the DPI Report). The DPI Report explored how digital search engines, social media

platforms and other digital content aggregation platforms affect competition in media and advertising services markets.

Since then, advisory reports have been produced by the ACCC as part of its Digital Advertising Services Inquiry 2020–2021 (Ad Tech Inquiry) and DPSI 2020–2025, both of which were established following recommendations in the DPI Report. The Ad Tech Inquiry final report was published in September 2021 and made recommendations to address concerns about low levels of competition in the supply of ad tech services, conflicts of interest, self-preferencing and supply chain opacity.

The ACCC has published six interim DPSI reports, with further interim reports expected every six months until the final report is released in March 2025. The DPSI interim reports have examined the following topics to date: online private messaging services; app marketplaces; web browsers, general search services and choice screens; online retail marketplaces; and social media services. The Fifth DPSI Report served as the halfway point in the DPSI and made policy recommendations to address issues the ACCC had identified as impacting digital markets in the DPSI to date. The seventh DPSI interim report is due to be submitted to the Federal Treasurer in September 2023 and will examine the expanding ecosystems of digital platform service providers.

Law stated - 29 June 2023

Advance compliance guidance

Can companies active in digital markets ask the competition authority for advance guidance on competition law compliance before entering into an agreement or determining a pricing strategy?

Australia has no formal process to obtain advance guidance from the ACCC on competition law compliance before entering into agreements or determining a pricing strategy. However, there are two processes for seeking exemptions from the Competition and Consumer Act 2010 (Cth) (Act). Companies can:

- make an application to the ACCC for authorisation, which provides an exemption from the application of the Act to any conduct that may breach the Act; and
- lodge a notification with the ACCC where they wish to engage in exclusive dealing, resale price maintenance, or small business collective bargaining (although a new class exemption reduces the need for notification).

Law stated - 29 June 2023

Regulatory climate and enforcement practice

How would you describe government policy and the competition authorities' general regulatory and enforcement approach towards digital companies in your jurisdiction?

Digital issues are an area of priority for the ACCC. In a speech made by ACCC Chair Ms Gina Cass-Gottlieb announcing the ACCC's 2023-24 compliance and enforcement priorities, she noted that:

- competition and consumer issues relating to digital platforms and consumer and fair-trading issues relating to manipulative or deceptive advertising and marketing practices in the digital economy are priorities for the ACCC; and
- introducing sector-specific codes for designated digital platforms (as recommended by the ACCC) would complement the continued enforcement of Australia's existing competition laws and ensure that the law keeps pace with fast-moving digital markets.

In the Fifth DPSI Report, the ACCC proposed legislative reforms to address competition and consumer law issues relating to digital markets, including service-specific codes which would apply to designated digital platforms. The Treasury has consulted on the ACCC's recommendations, and the Australian Government's policy decisions are awaited.

The ACCC's stated core focus is to protect consumers and businesses in the digital age, noting that, in its view, existing regulation has not held up well to the challenges of digitalisation. Its approach is to scrutinise the digital sector proactively and enforce issues actively, establishing in 2019 a permanent Digital Platforms Branch. The recently completed Ad Tech Inquiry and ongoing DPSI reflect this focus.

The ACCC takes regular enforcement action against digital platforms for misleading and deceptive conduct:

- In August 2019, the ACCC commenced proceedings against HealthEngine for misleading consumers about the use of their data. In August 2020, by consent of the parties, the Federal Court ordered HealthEngine to pay A$2.9 million in penalties for engaging in misleading and deceptive conduct.
- In October 2019, the ACCC commenced enforcement action against Google, alleging misleading and deceptive conduct in relation to Google's communication to consumers on the collection and use of location data. In April 2021, the Federal Court found Google misled consumers and, in August 2022, ordered Google to pay $60 million in penalties for this conduct.
- In July 2020, the ACCC commenced an action against Google alleging misleading or deceptive conduct involving Google's collection and combination of consumers' personal data and internet activity to deliver ads. In December 2022, the Federal Court dismissed the ACCC's case.
- In December 2020, the ACCC commenced proceedings against Facebook (now Meta) for misleading consumers about the use of their personal activity data in its Onavo VPN app. In June 2023, Meta agreed to pay $20 million in penalties.
- In March 2022, the ACCC commenced proceedings against Meta for its role in publishing advertisements featuring Australian public figures, which the ACCC alleges gave the misleading appearance that those public figures used or endorsed the cryptocurrency or money-making schemes that were scams.

In its fifth DPSI discussion paper, the ACCC noted that it is also investigating the conduct of multiple digital platforms, including Apple and Google, for potential breaches of Australia's competition laws.

Law stated - 29 June 2023

HORIZONTAL AGREEMENTS

Special rules and exemptions

Do any special rules or exemptions apply to the assessment of anticompetitive agreements between competitors in digital markets in your jurisdiction?

In Australia, companies can seek authorisation from the Australian Competition and Consumer Commission (ACCC) to engage in anti-competitive agreements or conduct between competitors or notification for small business collective bargaining, exclusive dealing and resale price maintenance which applies in all sectors, including digital markets.

No special rules or exemptions apply to digital markets. The authorisation process has been used for agreements between competitors acquiring or supplying services in digital markets. For example, in 2021, the ACCC granted authorisations to members of Country Press Australia (a collection of independent regional and local newspapers) and Commercial Radio Australia (a national radio industry association) to collectively bargain with Facebook and Google concerning payments for producing content featured on those platforms.

The authorisation process has also been used by banks to collectively bargain with and boycott Apple in relation to access to Apple's iPhone embedded near field communication (NFC) controller; by an industry and Reserve Bank of Australia joint venture for the suspension and termination provisions of the New Payments Platform Regulations regulating a new open access real-time payments infrastructure in Australia; and by ihail Pty Ltd, a joint venture between a number of taxi companies and other participants, to launch the 'ihail' smartphone taxi booking app.

Law stated - 29 June 2023

Access to online platforms

How has the competition authority in your jurisdiction addressed horizontal restrictions on access to online platforms?

There are no specific rules or regulations addressing horizontal restrictions on access to online platforms in Australia. These arrangements are subject to the general competition prohibitions under the Competition and Consumer Act 2010 (Cth) (Act).

The ACCC's Digital Platforms Inquiry 2017–2019 (DPI) Report found that agreements foreclosing competitor access to data, restrictions on user behaviour that may foreclose links to competitor platforms, or other exclusionary behaviour being investigated by other regulators globally, are examples of potential misuse of market power by online platforms. While the ACCC has yet to commence any actions against online platforms addressing such conduct, there are ongoing third-party actions in relation to horizontal restrictions on access.

The most high-profile cases are the two private proceedings brought by Epic Games against Apple in November 2020 and Google in March 2021, in which Epic alleges a misuse of market power by both platforms for a range of conduct allegedly hindering its ability to supply its popular Fortnite game on the platforms. In 2022, separate class actions were also filed against Apple and Google, alleging they engaged in anticompetitive conduct in the operation of their respective app stores, resulting in consumers paying inflated commissions on certain apps and in-app purchases.

The ACCC has also previously indicated that it is investigating Apple's refusal to offer competing mobile wallets access to its NFC chip on Apple mobile devices while reserving the tap-and-go, contactless payments using the NFC for its own Apple Pay mobile wallet.

Law stated - 29 June 2023

Algorithms

Has the competition authority in your jurisdiction considered the application of competition law to the use of algorithms, in particular to algorithmic pricing?

The ACCC has not taken public action against any company alleging a breach of competition laws due to algorithmic pricing (including any action involving two algorithms coordinating pricing with no human input).

However, the ACCC's approach following the DPI and with its new Digital Platforms Branch is to focus on the proactive monitoring and enforcement of potentially anti-competitive conduct associated with the use of algorithms (eg, anti-competitive self-preferencing), so there will likely be more activity in this area. In its fourth Digital Platform Services Inquiry (DPSI) interim report, the ACCC expressed concerns about online marketplaces using algorithms to decide how products are ranked and displayed, including self-preferencing their own products.

The ACCC also raised concerns about algorithm transparency in its Ad Tech Inquiry and second and fifth DPSI interim reports and noted that additional transparency measures may be required in relation to certain algorithms (eg, ranking apps). Consistent with this focus, the News Media and Digital Platforms Mandatory Bargaining Code requires Google

and Facebook to give all news businesses advance notice of algorithm changes that will bring about identified alterations to the distribution of content with a significant effect on the news media business's referral traffic.

More recently, the ACCC instituted proceedings against Uber, which admitted it had breached the Australian Consumer Law (ACL) by making false or misleading statements in cancellation warning messages and Uber Taxi fare estimates. The Federal Court imposed a $21 million penalty, finding that Uber had employed algorithms to power its 'UberTaxi' ride option, resulting in misleading estimated prices to consumers.

Law stated - 29 June 2023

Data collection and sharing

Has the competition authority in your jurisdiction considered the application of competition law to 'hub and spoke' information exchanges or data collection in the context of digital markets?

In 2017, the Competition and Consumer Act 2010 (Cth) was amended to introduce a prohibition on concerted practices that have the purpose or are likely to have the effect of substantially lessening competition.

There is yet to be a contested court case in relation to the concerted practices provision in Australia. Since the provision was introduced, the ACCC has taken two enforcement actions: alleging that ANZ Roofing Pty Ltd and Ivy Contractors Pty Ltd engaged in concerted practices due to discussions and 'likes' on social media about setting minimum rates for the repair of homes damaged by hail, and alleging that Lawn Solutions Australia engaged in concerted practices by communicating with turf growers and resellers about turf prices. These matters did not result in any court action.

Law stated - 29 June 2023

Other issues

Have any other key issues emerged in your jurisdiction in relation to the application of competition law to horizontal agreements in digital markets?

On 14 December 2016, the ACCC was successful in its appeal to the High Court of Australia against Flight Centre (an online and bricks-and-mortar travel agent). The ACCC alleged Flight Centre engaged in attempted price-fixing by attempting to induce three airlines to enter into a contract, arrangement or understanding to fix, control or maintain prices offered by airlines through their own direct online channels and the prices made available to Flight Centre: ACCC v Flight Centre (2016).

The High Court found that where an agent exercises their discretion in pricing the principal's goods or services, and where the agent is not obliged to act in the principal's interest, this may mean that the principal and agent are in competition with each other. This decision potentially broadens the scope of the relationship between suppliers and distributors to an extent that may see certain aspects of supply relationships, typically considered as vertical arrangements, be considered horizontal.

Law stated - 29 June 2023

VERTICAL AGREEMENTS

Special rules and exemptions

Do any special rules or exemptions apply to the assessment of anticompetitive agreements between undertakings active at different levels of the supply chain in digital markets in your jurisdiction?

There are no special rules or exemptions to assessing anti-competitive agreements between undertakings active at different levels of the supply chain in digital markets. Section 47 of the Competition and Consumer Act 2010 (Cth) (Act) generally concerns agreements between corporations at different levels of the supply chain and prohibits exclusive dealing if the exclusive dealing has the purpose, effect or likely effect of substantially lessening competition. There is an anti-overlap provision within the Act to the effect that conduct which constitutes exclusive dealing within the meaning of section 47 is to be assessed based on a substantial lessening of competition standard and is exempt from the cartel prohibitions under the Act (section 45AR).

Law stated - 29 June 2023

Online sales bans

How has the competition authority in your jurisdiction addressed absolute bans on online sales in digital markets?

The Australian Competition and Consumer Commission (ACCC) has not addressed absolute bans on online sales in digital markets. Such vertical restrictions would be assessed under section 47 of the Competition and Consumer Act 2010 (Cth) and prohibited if such restrictions had the purpose, effect or likely effect of substantially lessening competition.

Law stated - 29 June 2023

Resale price maintenance

How has the competition authority in your jurisdiction addressed online resale price maintenance?

No provision in the Competition and Consumer Act 2010 (Cth) (Act) deals explicitly with resale price maintenance (RPM) online. RPM is per se prohibited in Australia, whether online or otherwise (section 48 of the Act). There is an exception for genuine recommended prices (section 97 of the Act) so long as the prices remain a recommendation and are not obligatory. The ACCC has actively enforced the prohibition on RPM, including in relation to online markets. In March 2021, the Federal Court ordered B & K Holdings (a wholesale distributor of cycling and sporting products) to pay a $350,000 penalty after declaring by consent that it had engaged in RPM by prohibiting its dealers from advertising certain products online below the recommended retail price (ACCC v B & K Holdings (2021)).

Since 2017, companies have been able to lodge a notification with the ACCC to obtain protection from legal action for RPM on the basis that the likely benefit from the RPM conduct would outweigh the likely public detriment.

Law stated - 29 June 2023

Geoblocking and territorial restrictions

How has the competition authority in your jurisdiction addressed geoblocking and other territorial restrictions?

The ACCC has not specifically taken enforcement action in relation to geoblocking and other territorial restrictions online and has not released any specific guidelines on the issue.

In Australia, the issue of geoblocking was considered by the Productivity Commission (PC) as part of the PC's inquiry into Australia's Intellectual Property arrangements (the PC Inquiry). A final report of the PC Inquiry was released on 20 December 2016.

The ACCC submitted to the PC Inquiry that it supported the government providing clarity on the issue of geoblocking; such clarity would remove impediments to consumers accessing legitimate content and thereby promote competition (ACCC, 'Submission to the Productivity Commission's Draft Report into Australia's IP Arrangements', 6 June 2016).

Following the PC Inquiry, the longstanding exemption in the Competition and Consumer Act 2010 (Cth) that carved out certain prohibitions on anti-competitive conduct for IP owners and enabled them to determine how their IP is commercialised, including through territorial restrictions, was repealed in September 2019, and the ACCC issued guidelines outlining its general interpretation of the application of the law following the repeal ('Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)', 30 August 2019). Geoblocking and other online territorial restrictions are subject to the general competition law prohibitions and will be assessed case-by-case.

Law stated - 29 June 2023

Platform bans

How has the competition authority in your jurisdiction addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators themselves?

The ACCC has generally addressed supplier-imposed restrictions on the use of online platforms and restrictions on online platform operators through its consumer protection powers under the ACL. The ACCC has taken a number of enforcement actions against comparator website operators for misleading and deceiving consumers or false or misleading representations, including against Trivago (2020), iSelect (2019), Finder (2017), Compare the Market (2014), Energy Watch (2012) and iSelect (2007), and it released consumer and industry guidance on the operation and use of comparator websites in 2015.

The ACCC has previously addressed selective distribution systems and other vertical supplier restrictions under the misuse of market power and exclusive dealing provisions in the Competition and Consumer Act 2010 (Cth) preventing conduct that gives rise to a substantial lessening of competition (in ACCC v Mastercard Asia/Pacific Pte Ltd (NSD401/2022), ACCC v Australasian Food Group Pty Ltd (2022) and ACCC v Fila Sport Oceania (2004)), but has not done so recently in relation to online platforms.

Law stated - 29 June 2023

Targeted online advertising

How has the competition authority in your jurisdiction addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising?

The ACCC has not taken any action to date regarding restrictions on using or bidding for a manufacturer's brand name for targeted online advertising. However, the ACCC considered as part of its Ad Tech Inquiry that there was a lack of transparency in auction and bidding processes in online advertising and supplier behaviour (including vertically integrated suppliers like Google), recommending (among other things) that the ACCC should be given powers to develop and enforce rules to improve price and performance transparency of ad tech services.

In the Fifth Digital Platform Services Inquiry (DPSI) Report, the ACCC advised that if recent industry-led initiatives following the Ad Tech Inquiry prove ineffective then mandatory obligations to address price, auction and ad verification transparency should be developed under an ad tech services code of conduct. The Federal Treasury consulted on the ACCC's proposed measures in February 2023, and a response from the Australian Government is expected later this year.

The ACCC has also taken action against Google under consumer law concerning the display of ads by advertisers which used unrelated business names or website links in the headline of sponsored links on its search results pages. The case was appealed twice, and the High Court of Australia ultimately found that the ads or links were misleading and were displayed by Google, but Google did not create them and was not responsible for their content (Google v ACCC (2013)).

Law stated - 29 June 2023

Most-favoured-nation clauses

How has the competition authority in your jurisdiction addressed most-favoured-nation clauses?

IIn 2016, the ACCC investigated Booking.com and Expedia about the use of price and availability most-favoured-nation clauses (MFN) in their contracts with Australian hotels and accommodation providers. In late 2016, Booking.com and Expedia reached an agreement to amend their agreements with accommodation providers, removing narrow room rates and inventory MFNs.

With effect from 22 March 2019, Expedia voluntarily and unilaterally waived certain additional rate parity provisions in agreements with Australian hotel partners. In November 2019, the ACCC confirmed it had ceased its investigation into Expedia's conduct. Following the ACCC's investigations into Booking.com and Expedia, the Federal Treasury held a consultation (November 2022 to January 2023) seeking feedback on the use of price parity clauses and similar restrictions by online accommodation booking platforms in Australia.

The consultation paper identified potential issues with price parity clauses, including that they can prevent accommodation providers from setting lower prices on rival platforms that offer more competitive commission rates, keeping commissions high and leading to consumers paying more. Further, that such clauses could prevent or discourage entry from new low-cost platforms and reduce innovation.

The ACCC's Fifth DPSI Report also recommended that proposed service-specific codes of conduct for designated digital platforms should include a prohibition on price parity and exclusivity clauses, particularly with respect to the intermediary services they supply.

Law stated - 29 June 2023

Multisided digital markets

How has the competition authority in your jurisdiction addressed vertical restraints imposed in multisided digital markets? How have potential efficiency arguments been addressed?

There is no single vertical restraints prohibition in Australia, rather the Competition and Consumer Act 2010 (Cth) regulates vertical restraint conduct under the general prohibition against anticompetitive agreements and concerted practices (section 45); the prohibition on misuse of market power (section 46); the prohibition of exclusive dealing conduct that has a purpose or effect of substantially lessening competition (section 47); and on the prohibition of resale price maintenance (sections 48 and 96).

The provisions do not directly consider potential efficiencies; however, efficiencies or public benefits are considered as

part of any application for authorisation or notification of conduct that would otherwise be prohibited.

Law stated - 29 June 2023

Other issues

Have any other key issues emerged in your jurisdiction in relation to the application of competition law to vertical agreements in digital markets?

The ACCC's Fifth DPSI Report proposes service-specific codes of conduct for designated digital platforms that may address issues arising from vertical agreements in digital markets. These include anticompetitive tying arrangements and agreements requiring exclusive pre-installation or default arrangements that harm competition.

The ACCC suggests that codes of conduct for mobile OS or app store services could require designated digital platforms to allow consumers to delete or uninstall certain pre-installed apps, and change default settings to a third-party service.

A code in relation to search services could prohibit exclusive pre-installation arrangements and require designated digital platforms to provide 'choice screens' for specific services that act as 'search access points'.

Law stated - 29 June 2023

UNILATERAL ANTICOMPETITIVE CONDUCT

Establishing market power

What are the relevant criteria for establishing market power in digital markets in your jurisdiction? Is there any concept of 'abuse of economic dependence' where a company's market power does not amount to a dominant position?

In Australia, the relevant concept under the Competition and Consumer Act 2010 (Cth) (Act) is a 'substantial degree of power in a market', which is a lower threshold than dominance. Such market power is the ability to act with a degree of freedom from competitors, potential competitors, suppliers and customers and while most obviously is the ability to profitably raise prices above competitive levels, there may also be the ability to raise barriers to entry, profitably reduce the quality of goods or services, or slow innovation. In Australia, more than one company can have a substantial degree of power in any market.

The Australian Competition and Consumer Commission (ACCC) has released Guidelines on the misuse of market power (August 2018) that detail its general approach to the misuse of market power provisions (section 46). The ACCC has indicated through its findings in its Digital Platforms Inquiry 2017–2019 (DPI) Report (and more recently in its Fifth Digital Platform Services Inquiry (DPSI) Report) that market share will provide some evidence of market power, but the extent of dynamic and disruptive competition and new entry or insulation from such competition because of high barriers to entry is especially relevant to digital markets.

In particular, relevant criteria that the ACCC has considered as relevant to an assessment of market power include access to high-quality user data; same-side and cross-side networks effects and feedback loops; economies of scale; advantages of scope and conglomeration effects; the role of default settings or default options; brand strength; bargaining power in dealings with customers and suppliers; lack of transparency; strategic acquisitions; and natural monopoly.

Law stated - 29 June 2023

Abuse of market power

To what extent are companies with market power in digital markets subject to the rules preventing abuse of that power in your jurisdiction?

Section 46 of the Competition and Consumer Act 2010 (Cth) (amended November 2017) prohibits companies with a substantial degree of market power (SDMP) from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition. It remains untested whether there needs to be any causal link between the conduct engaged in and the SDMP under this provision. The terms of section 46 do not require that the conduct with the purpose, effect or likely effect of substantially lessening competition be in the same market as that in which the company has SDMP to contravene the provision.

The ACCC identifies in its Guidelines on misuse of market power of August 2018 that the following types of conduct may involve a misuse of market power: refusal to deal; restricting access to an essential input; predatory pricing; loyalty rebates; margin or price squeezing; and tying and bundling.

Specific to digital markets, the ACCC has also indicated in its DPI Report and Fifth DPSI Report that potential examples of leveraging market power include: restrictions on access to data (for example, linking access to spend on a platform or excluding or denying rivals' access to data); self-preferencing (for example, through use of ranking algorithms, technical specifications, default settings or options presented to consumers); and restrictions on user behaviour foreclosing rival platforms or increasing barriers to consumers switching and to competitors' incentives to enter or expand in a market.

In its Fifth DPSI Report, the ACCC proposes service-specific mandatory codes of conduct for designated digital platforms to address these types of conduct where they are harmful to competition. Among the ACCC's proposed qualitative criteria for designation is whether a digital platform has substantial market power.

In June 2022, the ACCC commenced its second (and most recent) proceeding under the new section 46 against Mastercard. The ACCC alleges Mastercard breached section 46 by entering into agreements with major retail businesses which gave the businesses discounted rates for Mastercard credit card transactions, provided they commit to processing all or most of their Mastercard-eftpos debit card transactions through Mastercard rather than the eftpos network. The matter is listed for a four-week trial in the Federal Court, commencing on 8 July 2024.

Law stated - 29 June 2023

Data access

How has the competition authority in your jurisdiction addressed concerns surrounding access to data held by companies with market power in digital markets?

The ACCC has not taken enforcement action regarding access to data held by companies with market power in digital markets. However, it has indicated in its DPI Report that it considers such conduct is a potential misuse of market power under section 46.

There are precedents where refusal to supply and refusal of access could constitute a misuse of market power in Australia (see Queensland Wire Industries v Broken Hill (1989) and NT Power Generation v Power & Water Authority (2004)), albeit under the old prohibition and not in digital markets. Additionally, there has been one case where restrictions on third parties gaining access to data in a distribution agreement for a data feed was prohibited as a misuse of market power but under the old 'taking advantage' test in the previous section 46 of the Competition and Consumer Act 2010 (Cth) (ASX Operations v Pont Data Australia (1990)).

At the time of writing, there are five ongoing private actions alleging a contravention of section 46 involving digital platforms banning access to their data or platform (Dialogue Consulting v Facebook/Instagram (2019); Epic Games v Apple (2020); Epic Games v Google (2021); David Anthony v Apple (2022) (class action); and Brett McDonald v Google (2022) (class action)).

In the Fifth DPSI Report, the ACCC proposed service-specific codes of conduct with targeted obligations addressing data-related barriers to entry (the ACCC's sixth DPSI interim report re-iterated support for these recommendations). The ACCC provided relevant examples including:

- a code for search services requiring designated digital platforms to share certain click-and-query data (or facilitate data portability in respect of that data); or
- a code for ad tech services requiring designated digital platforms to share third-party data (or facilitate data portability in respect of that data) or impose data separation measures on a designated digital platform.

Law stated - 29 June 2023

Data collection

How has the competition authority in your jurisdiction addressed concerns surrounding the collection of data by companies with market power in digital markets?

The ACCC has not taken enforcement action in relation to the unilateral collection of data by companies with market power in digital markets. Rather, the ACCC has focused on data collection practices under the Australian Consumer Law (ACL) in circumstances where it considers consumers were misled about the collection and use of their data. This includes:

- proceedings against Google for misleading or deceptive conduct in relation to Google's communication to consumers on the collection and use of location data. In August 2022, the Federal Court imposed a $60 million penalty on Google;
- proceedings against Google alleging misleading or deceptive conduct around Google's privacy policy and expanded use of consumers' personal data. The Federal Court dismissed the ACCC's case in December 2022;
- proceedings against Facebook (now Meta) for misleading consumers as to the use of their personal activity data in its Onavo VPN app, Meta has agreed to pay a $20 million penalty; and
- proceedings against HealthEngine for misleading consumers about the use of their data. In August 2020, the Federal Court ordered by consent of the parties that HealthEngine pay $2.9 million in penalties.

The ACCC has also recently expressed concerns in the DPSI about the conduct of digital platforms, including inducing users' consent by very long contracts (eg, to online terms of service); harmful and excessive data tracking, collection and use; and the use of dark patterns (ie, user interface design strategies which impede choice and harm consumers). The ACCC considers that reforms to the Privacy Act 1988 (Cth) and the introduction of a prohibition on unfair trading practices should be implemented to address these issues.

Law stated - 29 June 2023

Leveraging market power

Has the competition authority in your jurisdiction adopted any decisions involving theories of harm relating to leveraging market power in digital markets, such as through tying, bundling or self-preferencing?

The ACCC has not commenced enforcement action involving leveraging theories of harm in digital markets under the section 46 misuse of market power prohibition introduced in November 2017. However, there are reports that the ACCC is investigating self-preferencing conduct by Apple and Google.

Submissions to the fifth DPSI discussion paper suggest that the new section 46 provision provides more flexibility than the old provision and can be used in response to self-preferencing and leveraging behaviour (as Epic Games has done in its proceedings against Apple and Google). The ACCC has not recommended any changes to section 46 in its Fifth DPSI Report.

The ACCC has also successfully taken action against companies for self-preferencing conduct in the context of price comparison or ratings platforms but under the ACL rather than competition laws. For example, it has been successful in a recent case against Trivago for misleading and deceptive hotel pricing representations on its price comparison service, which prioritised rankings based on the highest cost per click received from advertisers (2020), and in a case against iSelect for misleading and deceptive price and energy plan comparisons which limited and favoured partner retailers which paid iSelect higher commissions (iSelect was ordered to pay $8.5 million by the Federal Court).

In the course of its DPSI and Ad Tech Inquiry, the ACCC:

- raised concerns that Google's vertical integration and dominance across the ad tech supply chain and in related services has allowed it to engage in leveraging and self-preferencing conduct that has interfered with the competitive process and lessened competition over time; and
- found that Apple and Google each have the ability and incentive to engage in anti-competitive self-preferencing to favour their own apps over rival third-party apps.

In its Fifth DPSI Report, the ACCC proposed mandatory service-specific codes for designated digital platforms. These codes would target anti-competitive self-preferencing and tying, among other forms of anti-competitive behaviour. Examples of proposed obligations under the codes include:

- prohibiting designated digital platforms from favouring their own apps in app store search result rankings;
- prohibiting designated digital platforms from requiring device manufacturers to pre-install other first-party apps as a condition of pre-installing their app stores; and
- prohibiting designated digital platforms from requiring advertisers to use their own ad tech services to purchase ad inventory they supply.

Law stated - 29 June 2023

Other theories of harm

What other types of conduct have been found to amount to abuse of market power in digital markets in your jurisdiction?

The ACCC's investigation and prosecution of conduct in digital markets in recent years under both the previous and the current misuse of market power prohibition has been limited and relatively undeveloped. However, what has been novel in Australia compared to other jurisdictions is the ACCC's use of consumer protection powers in relation to conduct by digital platforms with market power. The ACCC is currently focusing on developing and expanding its digital enforcement capabilities and proactively investigating, particularly the larger digital platforms.

In the March 2021 second DPSI interim report, the ACCC found that Google and Apple have 'significant power in the supply of mobile operating systems', allowing them to restrict other app marketplaces and preference their own app marketplaces through pre-installation. The ACCC considers that they control key gateways through which app

developers can access consumers. Terms of access, data practices and in-app payments were also identified as conduct that is enabled by and contributes to a control of the market. In the September 2021 third DPSI interim report, the ACCC found that Google's dominance in general search is related to it being the pre-set default engine on the two most popular browsers, Safari and Chrome. The ACCC considers Google's market power to be extended and entrenched by its vertical integration and arrangements with Apple (to be the default search engine on Safari) and device manufacturers.

Law stated - 29 June 2023

MERGER CONTROL

Merger control framework

How is the merger control framework applied to digital markets in your jurisdiction?

Section 50 of the Competition and Consumer Act 2010 (Cth) (Act) prohibits mergers that have the effect or likely effect of substantially lessening competition and applies economy-wide, including to digital markets. The Australian Competition and Consumer Commission (ACCC) has an informal merger clearance process and formal merger authorisation process, with most mergers reviewed in the informal process. Currently, no special rules or specific thresholds apply to digital markets.

In August 2021, the ACCC announced a proposed overhaul of the current economy-wide merger control regime, which included a proposal for a tailored test for acquisitions by certain digital platforms. On 11 November 2022, the ACCC published its Fifth Digital Platform Services Inquiry (DPSI) Report making recommendations for new competition and consumer measures targeted at digital platforms. While the ACCC did not make specific recommendations for merger reform in its Fifth DPSI Report, it considered that future economy-wide merger reforms should consider addressing the competition effects of serial strategic acquisitions, including by digital platforms.

The ACCC's recent proposals for economy-wide reforms in April 2023 did not propose any special rules or specific thresholds for digital markets. Still, some proposals will be of particular relevance to digital markets:

- mandatory notification of mergers above certain notification thresholds, which could be based on the size of the transaction, the size of the acquired business globally or in Australia, or a combination of those factors;
- introduction of a 'call in' power for the ACCC to formally review mergers that fall below the notification thresholds but still raise competition concerns; and
- an update to the merger factors that are considered when assessing a merger, including increased access to or control of data, technology, or other significant assets, and whether the acquisition is part of a series of relevant acquisitions.

Law stated - 29 June 2023

Prohibited mergers

Has the competition authority prohibited any mergers in digital markets in your jurisdiction?

The ACCC last opposed a merger of two online businesses in 2012 when it opposed Carsales.com Limited's proposed acquisition of the Trading Post in the context of online car classifieds.

In Google's proposed acquisition of Fitbit, the ACCC raised a number of competition concerns in its statement of issues, published in June 2020. In response, Google offered a court-enforceable undertaking in December 2020, which was ultimately rejected by the ACCC. The undertaking proposed to remedy the ACCC's concerns about data aggregation by restricting how Google would use Fitbit data. After a year of public review and before the ACCC made

its final decision on merger clearance, Google completed its acquisition of Fitbit in January 2021. The ACCC has not taken any enforcement action in relation to the parties closing the deal.

The ACCC is also investigating Meta's acquisition of Giphy, which completed in May 2020. Following Meta's decision to accept the Competition and Markets Authority's demands to reverse the acquisition in October 2022, the ACCC commented that it may choose to take no further action (to date, no enforcement action has been taken).

Law stated - 29 June 2023

Market definition

How has the competition authority in your jurisdiction addressed the issue of market definition in the context of digital markets?

The ACCC's approach to market definition, set out in its Merger Guidelines 2008, applies to digital markets. Under Australian jurisprudence, market definition is purposive and will require a case-by-case assessment having regard to the competitive process, commercial reality and the purposes of the law (see ACCC v Flight Centre (2016)).

In the ACCC's Statement of Issues (SOI) of Google's proposed acquisition of Fitbit (18 June 2020), the ACCC defined data relevant markets by reference to the potential commercial use of the data being aggregated (as opposed to any actual competitive overlap in that commercial use). For example, it has broadly defined 'data-dependent health services' as markets where certain health and wellness data may be useful; and 'ad tech markets' as markets in which such data would be useful. Traditional market dimensions, such as product dimensions, have not been precisely defined.

Most recently, the ACCC considered market definition in its informal review of Google's acquisition of Mandiant, a provider of cybersecurity consulting services and other internet security products. The ACCC did not oppose the acquisition on 11 August 2022 after considering the impact of the acquisition in markets for the supply of cybersecurity consulting and incident response services, cybersecurity software and managed services, and cloud infrastructure and platforms. However, the ACCC did not reach a concluded view on the precise definitions of these markets.

Law stated - 29 June 2023

'Killer' acquisitions

How has the competition authority in your jurisdiction addressed concerns surrounding 'killer' acquisitions in digital markets?

The ACCC has previously considered concerns surrounding 'killer' acquisitions in digital markets in its Digital Platforms Inquiry (DPI) Report, which recommended an update to Australia's voluntary merger control framework to:

- specifically take into account as a merger factor under section 50(3) of the Competition and Consumer Act 2010 (Cth) the likelihood that the acquisition would result in the removal from the market of a potential competitor; and
- implement a notification protocol between the ACCC and each large digital platform business (which the ACCC has said is principally aimed at, but may not be limited to, Google and Facebook) such that the ACCC receives advance notice of any proposed acquisitions potentially impacting competition in Australia.

The ACCC has maintained its position in relation to the first recommendation in both its economy-wide and digital-

specific merger reform proposals. However, it has since shifted away from the second recommendation and moved away from using the term 'killer acquisitions.'

The ACCC's proposed economy-wide merger reforms include elements which address the risk of under-enforcement associated with smaller acquisitions, such as a 'call in' power to formally review acquisitions that fall below notification thresholds but may raise competition concerns and an update to the relevant merger factors to include consideration of whether the acquisition is part of a series of acquisitions.

The ACCC's review of Google's proposed acquisition of Fitbit and Meta's proposed acquisition of Giphy (regarding which the ACCC has proactively commenced its own review) has signalled a more interventionist approach to strategic acquisitions in digital markets, the potential for the ACCC to advance more speculative counterfactuals, and the closer scrutiny of any theories of nascent and potential competition including through more extensive disclosure of internal strategy documents and strategic rationale or deal valuation documents.

Law stated - 29 June 2023

Substantive assessment

What factors does the competition authority in your jurisdiction consider in its substantive assessment of mergers in digital markets?

Section 50(1) of the Competition and Consumer Act 2010 (Cth) prohibits the acquisition of shares or assets that have the effect or likely effect of substantially lessening competition. Courts and the ACCC take an evidence-based, case-by-case analysis in their substantive assessment. The non-exhaustive list of mandatory factors that must be considered under section 50(3) of the Act includes import competition; barriers to entry; concentration; degree of countervailing power; the likelihood that the transaction would allow the acquirer to significantly and sustainably increase prices; availability of substitutes; dynamic characteristics of the market (including growth, innovation and product differentiation); the removal of a vigorous and effect competitor and the extent of vertical integration. Further factors that the ACCC will consider in its substantive assessment are set out in its Merger Guidelines 2008.

In digital markets, the ACCC can consider the impact on innovation, the role of data, counterfactuals, and other laws if they relate to an assessment of whether an acquisition would result in a material impact on the competition process. A number of these factors on their own, however, do not neatly lend themselves to a substantial lessening of competition assessment; for example, a merger that might give rise to increased risks for breach of privacy laws would not on its own form part of the substantive analysis.

The treatment of the counterfactual has been a key issue in the ACCC's prosecution of merger cases, as courts have required that the counterfactual 'must operate in the real world and cannot rest upon speculation or theory', requiring assessment of 'real commercial likelihoods, not with mere possibilities however plausible they might be': see Australian Gas Light Company v ACCC (No 3) (2003) , recently affirmed in ACCC v Pacific National Pty Limited (2020). This is likely to create challenges when assessing potential counterfactuals in digital markets where there is a high degree of uncertainty as to the future state of markets.

As part of its April 2023 proposals for merger reforms, the ACCC recommended updating the factors considered in section 50 merger assessments to include the loss of actual or potential competitive rivalry, increased access to or control of data or technology, and whether the acquisition is part of a series of relevant acquisitions.

Law stated - 29 June 2023

Remedies

How has the competition authority in your jurisdiction approached the design of remedies in mergers in digital markets?

The ACCC strongly prefers structural remedies, most commonly divestitures, which provide an enduring remedy with relatively low monitoring and compliance costs. The ACCC considers behavioural remedies are rarely appropriate on their own to address competition concerns but, on occasion, may be appropriate as an adjunct to a structural remedy.

A notable recent behavioural remedy involving digital markets or data was in the ACCC's 2018 review of Transurban's acquisition of WestConnex, which was cleared subject to undertakings requiring Transurban to publish important traffic data, which the ACCC found would otherwise have been a barrier to bidders looking to compete against Transurban for future toll road concessions. This remedy is consistent with the ACCC's recent focus on incumbency advantages because of access to data, following its DPI, and it is likely that the ACCC will increasingly look to more novel designs of remedies as more complex, data-driven, innovation-driven theories of harm are pursued that are not readily remedied through structural solutions.

In December 2020, the ACCC rejected the behavioural undertakings that Google offered in its proposed acquisition of Fitbit intended to address the ACCC's concerns about data aggregation by restricting how Google would use Fitbit data. Google went on to acquire Fitbit before the ACCC provided clearance. The ACCC has not taken any action to challenge the acquisition.

Law stated - 29 June 2023

UPDATE AND TRENDS

Recent developments and future prospects

What are the current key trends, legislative and policy initiatives, recent case law developments and future prospects for the enforcement of competition law in digital markets in your jurisdiction?

The current key trends and future direction of competition and consumer protection law in digital markets, which have been shaped by the Australian Competition and Consumer Commission's (ACCC's) Digital Platforms Inquiry 2017–2019 (DPI), the Ad Tech Inquiry and the Digital Platform Services Inquiry (DPSI), are as follows:

- The Digital Platforms Branch of the ACCC will continue to closely scrutinise the sector and drive enforcement and regulation activities in the sector.
- The ACCC is conducting further market inquiries to identify reforms to address perceived issues with conduct by digital platforms through its DPSI. So far, the ACCC has published six interim reports for the DPSI and completed the Ad Tech Inquiry. The ACCC made recommendations for digital-specific regulation in its Fifth DPSI Report, informed by its findings in the first four DPSI interim reports and the Ad Tech Inquiry. The Australian Government has sought feedback on the ACCC's reform proposals in a consultation which closed in February 2023.
- The ACCC has successfully taken enforcement action against Google, HealthEngine, Trivago and Uber under the Australian Consumer Law. The ACCC also has a further ongoing two cases against Meta, and a case against Airbnb. In addition to this, there are six private competition law-based actions against digital platforms: against Meta in relation to platform access (commenced by Dialogue Consulting), a class action against Meta and Google in relation to cryptocurrency advertising bans, class action proceedings and proceedings brought by Epic Games against Apple and Google in relation to app marketplace access.
- Throughout the DPI, the Ad Tech Inquiry and the DPSI, the ACCC has made a number of findings in relation to the market power of digital platforms. However, to date, its prosecution of these issues under section 46 of the

Competition and Consumer Act 2010 (Cth) has been limited. Its approach to misuse of market power in digital markets will likely develop and draw on the work it has already undertaken as part of its inquiries.

- In relation to mergers, the ACCC has made recommendations for economy-wide merger reform, including the introduction of a mandatory notification requirement for acquisitions above certain thresholds, together with an ACCC 'call in' power for it to review acquisitions that fall below thresholds but still raise concerns. The ACCC has also signalled a clear policy shift to a more interventionist approach to strategic acquisitions in digital markets with its proactive review of Facebook's proposed acquisition of Giphy and its lengthy review of Google's acquisition of Fitbit.
- Data portability will likely be a key priority for the ACCC going forward. The Consumer Data Right (CDR) has been implemented in the financial industry, with the intention that it will apply to telecommunications and energy industries. There is the potential for the CDR to be implemented in other sectors of the economy.

Law stated - 29 June 2023

Jurisdictions

Australia	Gilbert + Tobin
Brazil	Advocacia José Del Chiaro
European Union	Herbert Smith Freehills LLP
France	Nomos
Germany	Herbert Smith Freehills LLP
Japan	Nishimura & Asahi
Mexico	Galicia Abogados SC
South Korea	Yoon & Yang LLC
Switzerland	Prager Dreifuss
Turkey	ELIG Gürkaynak Attorneys-at-Law
United Kingdom	Herbert Smith Freehills LLP
USA	Crowell & Moring LLP