

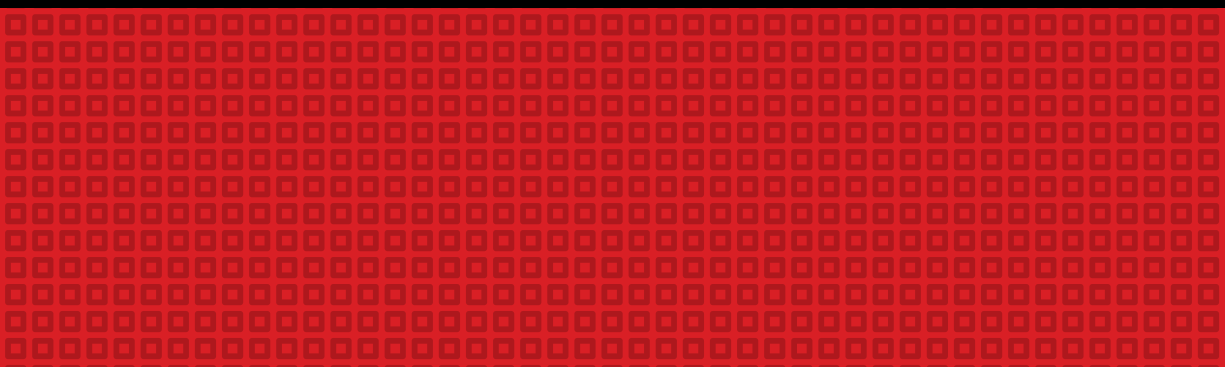


# DIGITAL MARKETS GUIDE

THIRD EDITION

Editors

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# Publisher's Note

The digital economy is transforming day-to-day lives, and we are seeing a rise in connectivity not only between people but also between vehicles, sensors, meters and other aspects of the internet of things. Yet, as noted by Claire Jeffs and Nele Dhondt in their introduction, even as the Fourth Industrial Revolution accelerates, traditional concerns are keeping pace, and the digital economy has also been a powerful force, increasing competition across a broad sweep of products and services. Regulation is a growing concern, with the European Commission's review of transactions – including the much-discussed *Illumina/GRAIL* case – illustrating the impact the EU Merger Regulation is having in Europe and beyond. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is thus critical.

The third edition of the *Digital Markets Guide* – edited by Claire Jeffs of Slaughter and May, Daniel Sokol of White & Case and Susan Ning of King & Wood Mallesons – provides just such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The guide draws on the wisdom and expertise of distinguished practitioners globally and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as how pricing algorithms intersect with competition law and antitrust enforcement in certain tech mergers – for all competition professionals.

## CHAPTER 12

# Australia: Key Reforms and their Effect on Digital Economic Competition

Louise Klamka, Andrew Low, Amelia Douglass and Michelle Xu<sup>1</sup>

### Australian approach to digital markets

#### Relevant legislation

The legislation governing competition in digital markets is the Competition and Consumer Act 2010 (Cth) (the Act), which is the competition law framework that applies economy-wide in Australia. In addition to competition law, the Act also contains:

- the Australian Consumer Law (ACL), which covers consumer protection issues; and
- the News Media and Digital Platforms Mandatory Bargaining Code (the News Media Bargaining Code), which is intended to address bargaining power imbalances between news media businesses and certain designated digital platforms.

The Australian Competition and Consumer Commission (ACCC) is the independent government agency responsible for enforcing the Act in Australia. With a few exceptions (such as small administrative fines under the ACL and the grant of exemptions), the ACCC is not a determinative body and must apply to the Federal Court of Australia to seek orders enforcing the Act. The Act gives the ACCC standing to do so and powers to seek penalties and injunctions in court.

There are currently no special rules or exemptions applying to digital markets (though, as noted below, this is currently the subject of debate in Australia).

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<sup>1</sup> Louise Klamka and Andrew Low are partners and Amelia Douglass and Michelle Xu are lawyers at Gilbert + Tobin.

The Act gives the ACCC the power to conduct an inquiry into markets or undertake price monitoring activities at the direction of the Australian Treasurer. Once directed, the Act gives the ACCC compulsory information-gathering powers (including documents, information and testimony) to allow it to report on and make recommendations to the government on matters of competition and broader policy.

Inquiries may also result in ACCC enforcement action. This power has been used to examine digital markets in three separate inquiries (one ongoing): the Digital Platforms Inquiry 2017–2019 (DPI), the Digital Advertising Services Inquiry 2020–2021 (the Ad Tech Inquiry) and the Digital Platform Services Inquiry 2020–2025 (DPSI).

### Structure of the ACCC

The ACCC has a number of divisions, including the Mergers, Exemptions and Digital Division. Within that Division is the Digital Platforms Branch, which is responsible for the ongoing scrutiny of digital platform markets through conducting its digital inquiries. The Digital Platforms Branch also works with other units within the ACCC on specific matters, such as the Merger Investigations Branch (responsible for merger control) and the Competition Division (responsible for competition law enforcement).

### Cooperation with other regulators

The ACCC actively cooperates with international competition agencies with respect to digital enforcement and regulation. In September 2020, it signed a memorandum of understanding with competition regulators in the United States, the United Kingdom, Canada and New Zealand to share intelligence, case theories and investigative techniques. The ACCC announced that cooperation was needed to better coordinate investigations across international borders, as the global economy is increasingly interconnected and many large companies, especially in digital markets, operate internationally.

ACCC chair Gina Cass-Gottlieb has also stated the importance of international cooperation on regulating digital platforms, including considering the obstacles for intervention in the digital economy.

The ACCC also cooperates with other domestic regulators with respect to digital regulation. In March 2022, the ACCC, the Australian Communications and Media Authority, the Office of the Australian Information Commissioner and the Office of the eSafety Commissioner formed the Digital Platform Regulators Forum (DP-REG) to share information and collaborate on issues relating to the regulation of digital platforms. DP-REG's strategic priorities for

2023–2024 include assessing the benefits, risks and harms of generative artificial intelligence, improving transparency, and increasing collaboration and capacity building between the four regulators.<sup>2</sup>

## Key developments to date

### ACCC inquiries and advocacy in digital markets

Over the past five years, the ACCC has conducted three key inquiries in relation to digital platforms: the DPI, the DPSI and the Ad Tech Inquiry.

The primary purpose of these inquiries is to examine digital markets and make any relevant findings or recommendations to the federal government. The inquiries also present an opportunity for the ACCC to proactively monitor digital markets and develop institutional capabilities in digital markets. They may also result in enforcement actions.

### DPI report

In July 2019, the ACCC published the DPI report following the DPI. The DPI report was the ACCC's first substantive inquiry into digital markets, focused on the impact that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets.

The DPI report has played a major role in shaping the future direction of the legal framework relating to competition in and regulation of digital markets, including by:

- recommending subsequent inquiries into digital markets (the Ad Tech Inquiry and the DPSI);
- establishing the specialist Digital Platforms Branch within the ACCC;
- introducing the News Media Bargaining Code, which is intended to address bargaining power imbalances between news media businesses and digital platforms by setting standard obligations for registered news businesses to bargain individually or collectively with designated digital platforms, and to provide a compulsory arbitration process where an agreement cannot be reached. To date, the government has not designated any digital platforms; rather, commercial deals have been struck between news media businesses and Google and Meta;

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2 Australian Communications and Media Authority, Digital Platform Regulators Forum communique: <https://www.acma.gov.au/sites/default/files/2023-07/DP-REG%202023-24%20Communique%20-%20Final%20Draft.DOCX>.

- introducing a review of the Privacy Act 1988 (Cth) (the Privacy Act) and proposing amendments to the unfair contract terms (UCT) regime of the Act;
- flagging multiple investigations, which have since resulted in consumer law enforcement actions commenced by the ACCC against Google and Meta; and
- identifying conduct specific to digital markets that is considered to possibly result in anticompetitive harm.

Most of the ACCC's recommendations were accepted by the government, and a road map to advance the recommendations from the DPI report is in place.<sup>3</sup>

### DPSI

Following the DPI report, the government directed the ACCC to conduct an inquiry into markets for the supply of digital platform services (the DPSI), in particular search engines, social media, online private messaging, digital content aggregation, media referral services and electronic marketplaces. The ACCC was tasked with investigating the intensity of competition in these markets, practices that may result in consumer harm, market trends that may affect the degree of market power and the durability of that market power, changes to the nature of these services arising from innovation, and technological change and developments in markets outside Australia.

The government directed the ACCC to provide interim reports on the inquiry every six months for five years. A final report is due on 31 March 2025. To date, the DPSI has published six interim reports and has released discussion papers for the seventh and eighth interim reports.

The first interim report examined competition, consumer and privacy issues associated with online private messaging, and to a lesser extent search services and social media. Key findings of this report were that Facebook and Apple are the two largest suppliers of stand-alone online private messaging in Australia, Facebook has a competitive advantage relative to alternative stand-alone services that Apple cannot constrain, and Apple has a degree of freedom from competitive constraint over Apple users (limited by Facebook).

The second interim report examined app marketplaces (primarily Apple App Store and the Google Play store). The ACCC found that Apple and Google operate a global duopoly in the market for mobile operating systems and this provides them with significant market power in the market for app marketplaces.

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3 Treasury, Government Response and Implementation Roadmap for the Digital Platforms Inquiry: <https://treasury.gov.au/publication/p2019-41708>.



The ACCC identified that a lack of competitive constraint allows both platforms to charge 15 to 30 per cent commission rates for in-app purchases. The ACCC put forward a set of interim measures that Apple and Google could implement to address the concerns raised in the report and indicated that it will continue to monitor and explore these issues (including overseas developments).

The third interim report examined web browsers and search services. The ACCC expressed concerns regarding Google's dominant position in general search services and recommended that it be given the power to implement a mandatory choice screen and consider other measures to improve competition and consumer choice in search services.

The fourth interim report examined online retail marketplaces. The ACCC did not identify any one dominant marketplace, instead expressing concerns regarding transparency of factors influencing marketplace display, self-preferencing behaviour in hybrid marketplaces and data practices.

The fifth interim report found that Australia's competition and consumer laws are insufficient to address identified concerns relating to digital platform services, and made recommendations for legislative reform to address these issues. Treasury has consulted on the ACCC's recommendations, and policy decisions by the Australian government are currently awaited.

The sixth interim report examined social media services, noting the significant harms they pose through their data collection practices, the prevalence of scams and the lack of transparency for advertisers, among other issues.

The seventh interim report, due to the Treasurer by 30 September 2023, will explore the expanding ecosystems of digital platform providers, including their expansion strategies, the role of data, and potential competition and consumer issues and harms. The ACCC published an issues paper in March 2023, seeking views from stakeholders.

The eighth interim report, which is due to the Treasurer by 31 March 2024, will consider data broker services. The ACCC published an issues paper in July 2023, seeking views from stakeholders.

## Ad Tech Inquiry

Following the DPI report, the ACCC was directed to commence the Ad Tech Inquiry, which examined markets for the supply of digital advertising technology services and digital advertising agency services. These services are both concerned with personalised digital display advertising on websites or apps, namely advertisements that are shown before or alongside online content, as distinct from search advertising or classified advertising.

The Ad Tech Inquiry final report was published on 28 September 2021. The ACCC recommended a range of remedies to promote more robust competition in the supply of ad tech services, encourage transparency in the supply chain and address concerns surrounding conflicts of interest and self-preferencing. The ACCC reiterated some of these concerns and recommendations in its fifth interim DPSI report (see above).

### Payments system reform

On 7 June 2023, Treasury published its A Strategic Plan for Australia's Payments System, which sets out policy objectives and priorities for the Australian payments system, including modernising payments infrastructure and uplifting competition, productivity and innovation across the economy.<sup>4</sup>

As part of the broader plan, Treasury has completed consultations on proposals to reform the Payment Systems (Regulation) Act 1998 (PSRA) and introduce new payment functions intended to underpin a new licensing framework for payment service providers.

The proposals to reform the PSRA are intended to allow the central bank, the Reserve Bank of Australia, to regulate new and emerging payment systems such as digital wallets providers. Some proposed new payment functions are also intended to cover digital wallets, including those that store value, as well as 'pass-through' digital wallets.

Treasury's Strategic Plan indicates that legislation implementing reforms to the PSRA will be implemented by the end of 2023 and that legislation for a new licensing framework will be introduced in 2024.

## Enforcement actions

### ACCC actions

The ACCC has not taken action against a digital platform alleging breaches of the competition law provisions of the Act; however, it has disclosed that it is currently investigating:

- Apple's restriction of third-party access to NFC technology on its mobile devices and the terms it imposes for use of Apple Pay by third parties; and

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<sup>4</sup> Treasury, A Strategic Plan for Australia's Payments System, 7 June 2023: <https://treasury.gov.au/sites/default/files/2023-06/p2023-404960.pdf>.

- Google's limitation of access of third-party demand-side platforms to YouTube ad inventory, its channelling of demand from its demand-side platforms to its own supply-side platforms, and its use of its publisher ad server to preference its supply-side platform.

The ACCC took action against digital platforms under the ACL in the following circumstances where it alleged that consumers had been misled about the data collection practices of digital platforms:

- On 29 October 2019, the ACCC commenced enforcement action against Google, alleging misleading or 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 in favour of the ACCC and held that Google misled consumers, with penalties yet to be determined.
- On 27 July 2020, the ACCC commenced action against Google, alleging misleading or deceptive conduct around Google's use of consumers' personal data. In December 2022, the Federal Court dismissed the ACCC's case.
- On 16 December 2020, the ACCC commenced proceedings against two Meta subsidiaries for misleading consumers about the use of their personal activity data in its Onavo VPN app. In July 2023, the Federal Court declared that the two subsidiaries engaged in conduct liable to mislead the public in promotions for the Onavo VPN app and ordered total penalties of A\$20 million.
- On 7 August 2019, the ACCC commenced proceedings against HealthEngine for misleading consumers about the use of their data. On 20 August 2020, the Federal Court ordered by consent that HealthEngine pay A\$2.9 million in penalties for engaging in misleading or deceptive conduct.

More recently, the ACCC has instituted proceedings against:

- Uber, which admitted it breached the ACL by making false or misleading statements in cancellation warning messages and Uber taxi fare estimates. The Federal Court ordered Uber to pay a penalty of A\$21 million; and
- Airbnb, alleging that it misled consumers into believing that prices for Australian accommodation were in Australian dollars when, in fact, for many consumers they were in US dollars. Although the case entered mediation on 20 March 2023, a hearing date has been set for 14 December 2023.<sup>5</sup>

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5 Commonwealth Courts Portal, VID311/2012.

The ACCC also identified competition and consumer issues relating to digital platforms and consumer issues relating to manipulative or deceptive advertising and marketing practices in the digital economy as two 2023–2024 compliance and enforcement priorities.<sup>6</sup>

### **ACCC consideration of transactions in digital markets**

Section 50 of the Act prohibits mergers that have the effect or likely effect of substantially lessening competition. The ACCC has an informal merger clearance process and a formal merger authorisation process. The ACCC does not itself have the power to block an acquisition; however, it can bring an action in the Federal Court to prevent an acquisition that it considers breaches Section 50 of the Act. If a transaction completes and the ACCC successfully brings an action against the parties, the Court may order divestiture of assets.

This framework governs all mergers, including transactions involving digital platforms. The vast majority of mergers are reviewed within the informal merger clearance framework.

The ACCC's most recent opposition of a merger of two online businesses was in relation to Carsales.com's proposed acquisition of the Trading Post on 20 December 2012, in the context of online car classifieds.<sup>7</sup>

In Google's proposed acquisition of Fitbit, the ACCC did not reach a decision before the deal ultimately completed in January 2021. In June 2020, the ACCC raised a number of competition concerns in its statement of issues (SOI). In the SOI, 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).

In response, Google offered court enforceable undertakings, which were ultimately rejected by the ACCC. Google proposed a number of behavioural remedies to address the ACCC's concerns about data aggregation by restricting the ways in which Google would use Fitbit data. The ACCC has not taken any enforcement action in relation to the parties closing the deal.

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6 ACCC, Compliance and Enforcement Priorities 2023-24, 7 March 2023: <https://www.accc.gov.au/about-us/publications/compliance-and-enforcement-priorities-2023-24>.

7 In 2020, the ACCC subsequently granted Gumtree merger authorisation for its acquisition of Cox Media (which operates online platforms CarsGuide and Autotrader) in the same online car classifieds market: [www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/gumtree-au-pty-ltd-proposed-acquisition-of-cox-australia-media-solutions-pty-ltd](http://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/gumtree-au-pty-ltd-proposed-acquisition-of-cox-australia-media-solutions-pty-ltd).

The ACCC is also investigating Meta's acquisition of Giphy. The ACCC proactively commenced this review after the transaction was 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).

The ACCC is also currently considering Microsoft's proposed acquisition of Activision Blizzard. On 2 February 2023, the ACCC updated its timeline to note that it is engaging with overseas regulators and the timeline remains suspended. In digital markets, the ACCC's authorisation process has been used to obtain antitrust immunity agreements between competitors that may otherwise breach the Act:

- In 2021, the ACCC granted authorisation 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 in respect of payments for producing content featured on those platforms.
- In 2017, the ACCC denied granting authorisation to several Australian banks that sought to collectively bargain with and boycott Apple in relation to access to Apple's iPhone NFC controller.
- In March 2016, the ACCC allowed ihail Pty Ltd, a joint venture between a number of taxi companies and other participants, to launch its ihail smart-phone taxi booking app.

### **Private enforcement**

Private enforcement supplements the role of the ACCC in enforcing the provisions of the Act. These actions often allow for a faster resolution for the parties involved (i.e., injunctive or real-time relief) as opposed to ex post investigation by the ACCC.

Similar to ACCC enforcement proceedings, private actions can also have wider implications for the broader community (e.g., by deterring or prohibiting monopolistic behaviour) and contribute to the development of the relevant law (e.g., findings of the court in private enforcement actions will add to the jurisprudence for the relevant provisions).

In 2017, the legislative framework surrounding private enforcement (and competition law more generally) was amended. This change clarified that admissions of fact in one proceeding (e.g., in proceedings brought by the ACCC) may

be relied on by private litigants in other proceedings, which will likely increase the ease of commencing private enforcement actions (once more cases are tried and heard).

Currently, there are six private actions ongoing in Australia alleging a contravention of competition law involving digital platforms:

- *Epic Games v. Apple*: Epic Games, developer of Fortnite, commenced proceedings against Apple, alleging that Apple engaged in misuse of market power (among other things) by forcing developers to use Apple's App Store and Apple's payment platform for consumers making in-app purchases, while taking a 15 to 30 per cent commission on all payments. Epic also commenced similar proceedings in the United States and the United Kingdom. The trial is scheduled to commence in March 2024.
- *Epic Games v. Google*: Epic brought proceedings against Google, alleging misuse of market power (among other things) by Google for hindering Epic's ability to supply Fortnite in the Google Play store. The trial is scheduled to commence alongside the *Epic Games v. Apple* proceedings in March 2024.
- *Anthony v. Apple Inc & Anor and McDonald v. Google & Ors*: in June 2022, these two class actions were filed against Apple and Google in the Federal Court, alleging that they engaged in anticompetitive conduct in the operation of their respective app stores, which resulted in consumers paying inflated commissions on certain app and in-app purchases. The claims in these class actions largely replicate Epic's case against Apple and Google (respectively); however, the classes are seeking declarations and damages only (not injunctive relief) on behalf of end consumers of apps and in-app content (as opposed to app developers) for the same conduct.
- *Dialogue Consulting v. Instagram/Meta*: Dialogue, a start-up offering social media content scheduling, brought proceedings against Meta, alleging that Meta's decision to deactivate Dialogue's access to its platforms was designed to harm Dialogue's ability to compete with Instagram's content publishing software. Dialogue claims that Meta misused its market power, engaged in exclusive dealing and made contracts with the purpose or effect of substantially lessening competition. Meta argues that its decision to deactivate access was in response to contractual breaches by Dialogue. In April 2019, Dialogue was granted an interim injunction against Meta, restraining it from terminating, suspending or refusing Dialogue's access to its platforms.
- *Hamilton v. Facebook and Google*: in August 2020, a class action was commenced in the Federal Court against Google and Apple, claiming that they engaged in cartel conduct and concerted practices that substantially lessened competition

by banning all cryptocurrency-related advertising. The proceedings are being brought on behalf of 33 different cryptocurrency holders. The case is currently active.

While private actions in Australia are still rare compared with other jurisdictions, the recent uptick may be a sign of future growth in this area.

## **Upcoming developments and proposed reforms**

The ACCC's DPI, Ad Tech and DPSI reports have sparked major changes to the frameworks surrounding digital markets.

### **Privacy Act review**

In the DPI report, the ACCC recommended the strengthening of protections in the Privacy Act as well as broader reform of Australian privacy law to ensure that consumers' personal information is protected in light of the increasing volume and scope of data collection in the digital economy.

The Attorney-General's Department completed its review of the Privacy Act in February 2023, making proposals for reforms including introduction of a direct right of action of individuals to enforce privacy rights, regulation of the use of personal information in automated decision-making and introduction of a statutory tort for serious invasions of privacy.

The government sought feedback to inform its response to the Attorney-General's report, with the consultation closing in March 2023.

### **Proposed merger reform**

In August 2021, the previous ACCC chair announced a proposed overhaul of the current merger control regime.

In November 2022, the ACCC considered whether to introduce digital-specific merger reform in its fifth interim DPSI report; however, it also considered whether the future economy-wide reforms would address the competition effects of serial strategic acquisitions, including by digital platforms.

In April 2023, the new ACCC chair affirmed her support for significant reforms to Australia's current merger control regime and set out proposed changes to the regime. The proposed changes did not propose any special rules or specific thresholds for digital markets; however, some proposals are still of particular relevance to digital markets (including mandatory notification thresholds, a call-in power and updates to the merger factors). The proposed measures are set out in the table below.

Proposed measure	Description
<b>Proposed changes to the merger review process</b>	
Mandatory and suspensory notification	<p>Introducing a new formal merger notification and assessment process under which:</p> <ul style="list-style-type: none"> <li>• transactions over prescribed thresholds would require ACCC notification (the ACCC has not yet identified precise thresholds but has indicated that they could be based on the size of the proposed transaction, the size of the acquired business globally and within Australia, or a combination of these factors); and</li> <li>• merging parties would not be allowed to complete the transaction until the ACCC grants clearance.</li> </ul> <p>The ACCC has also proposed:</p> <ul style="list-style-type: none"> <li>• a notification waiver that parties can seek if they have a non-contentious merger that is nevertheless above the thresholds. This would not require parties to make a full formal application and would be dealt with expeditiously. The ACCC noted that most proposed transactions would be dealt with this way (like their current pre-assessment process); and</li> <li>• a call-in power for the ACCC to assess mergers in the formal system that fall below the thresholds but raise competition concerns.</li> </ul>
Upfront information requirements	<p>Parties would be required to provide all required information at the time of filing. The ACCC has not yet specified what the minimum upfront requirements would be.</p>
Reversing the onus of proof	<p>The parties demonstrate to the ACCC's positive satisfaction that their transaction is not likely to substantially lessen competition (SLC). This is consistent with the onus of proof applied in the current merger authorisation process.</p>
Second-stage public benefits	<p>If merger parties are unable to satisfy the ACCC that the transaction can be cleared on competition grounds, there is a 'second-stage' public benefits test whereby merger parties can seek approval on public benefit grounds.</p>
Merits review and recourse to the Federal Court	<p>The Australian Competition Tribunal is the appropriate review body for ACCC decisions. The Federal Court would continue to consider applications for declaration and judicial review.</p>
<b>Substantive merger test changes</b>	
Expansion of the prohibition on mergers	<p>Amending the test for an SLC to include 'entrenching, materially increasing or materially extending a position of substantial market power'. This expanded test is intended to address concerns surrounding 'creeping acquisitions' (the accretion of market power through a strategy of small serial acquisitions that may not amount to an SLC on their own).</p>
Updating the merger factors	<p>The ACCC is also proposing to expand the merger factors to be considered by the decision maker to include:</p> <ul style="list-style-type: none"> <li>• the loss of actual or potential competitive rivalry;</li> <li>• increased access to or control of data, technology or other significant assets;</li> <li>• whether the acquisition is part of a series of relevant acquisitions; and</li> <li>• whether the acquisition entrenches or extends a position of substantial market power.</li> </ul>



On 23 August 2023, Treasury announced that it would be conducting a review of competition policy in Australia. The ACCC has noted that it will advocate for the above changes to the merger regime as part of that review, and pivotal to that is the move to a merger clearance regime.

### UCT and unfair trading practices reforms

Following recommendations in the DPI and various DPSI reports, there have also been changes to Australia's existing UCT regime, and the Australian government is launching consultation on possible reforms to the ACL to consider unfair trading practices (UTPs).

The UCT regime is designed to protect consumers and small businesses from UCTs in standard form contracts. In the DPI report and the first DPSI report, the ACCC recommended additional protections from UCTs, owing to issues arising from the power imbalance between small businesses and consumers and large digital platforms.

In November 2022, the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 received Royal Assent and introduced a host of changes to the UCT regime. These include (among other things) introducing a prohibition for making a standard form contract containing a UCT and for applying or relying on a UCT, and introducing pecuniary penalties for a person who contravenes this prohibition.

These changes apply to standard form consumer contracts and small business contracts entered into from 10 November 2023 or renewed or varied from 10 November 2023.

In the DPI and DPSI, the ACCC recommended a prohibition on UTPs (including penalties applying to their use) to address practices it considers are significantly detrimental for consumers but that do not neatly fit under existing consumer laws, for example:

- digital platforms using 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; and
- certain data collection and analytics practices used by digital platforms, including:
  - changing terms on which products or services are provided without reasonable notice or the ability to consider the new terms; or
  - consent or agreement by very long contracts or providing insufficient time to consider them or all-or-nothing 'clickwrap' consents.

On 31 August 2023, the ACCC published a regulatory impact statement for consultation in relation to UTPs.

Treasury is seeking feedback on the following four policy options to address harms associated with UTPs:

- maintain the status quo;
- amend statutory unconscionable conduct;
- introduce general prohibition on UTPs; and
- introduce a combination of general and specific prohibitions on UTPs.

Submissions are due by 29 November 2023.

### **Parliamentary inquiries**

The Senate and House of Representatives are running two separate inquiries that consider competition issues in digital markets.

The House of Representatives Standing Committee on Economics commenced an inquiry on 31 January 2023 into promoting economic dynamism, competition and business formation. The terms of reference relevantly include the extent to which anticompetitive behaviour and changes in industry structures have contributed to rising market concentration in Australia. A second round of public hearings is scheduled for September 2023.

The Senate Economics References Committee commenced an inquiry on 26 September 2022 into the influence of international digital platforms. The inquiry concerns the nature and extent of international digital platforms exerting power over markets and public debate, to the detriment of Australian democracy and users. The inquiry will have particular reference to, among other things, vertical integration and resulting outcomes on users' ability to exercise choice, and the broader impacts of concentration of market power on consumers, competition and macroeconomic performance. The Senate's report for this inquiry is due by 7 December 2023.

### **Key themes and trends**

The ACCC is continuing its focus on digital platforms. Some of the key themes and trends we are likely to see develop are as follows:

- The Digital Platforms Branch will continue to proactively advance investigations and inquiries into the practices of digital platforms, and we are likely to see more court action.

- The ACCC has made a number of comments regarding market power of digital platforms, although its prosecution under Section 46 of the Act has been limited and undeveloped. It is likely that its approach to abuses of market power in digital markets will develop rapidly (and will substantially draw on work that it has already undertaken as part of its inquiries).
- Beyond merger control, the ACCC considers that there are broader issues in digital platform markets that may need rules that apply to conduct of specific companies in those markets. The ACCC is currently considering the introduction of regulatory tools targeted at addressing a broad range of issues identified in digital markets, as set out in its discussion paper for the fifth interim report of the DPSI.
- The ACCC has already made proposals for merger reform, including changes intended to address concerns arising in digital markets. The ACCC is likely to continue advocating for reform to address its concerns in digital markets.
- The ACCC is focused on the treatment of data and its role in competition law as well as through a consumer protection lens. The ACCC has considered excessive data collection practices as a consumer harm occurring in social media services. This focus also highlights the intersection between privacy and competition law, with data being the intersection point.