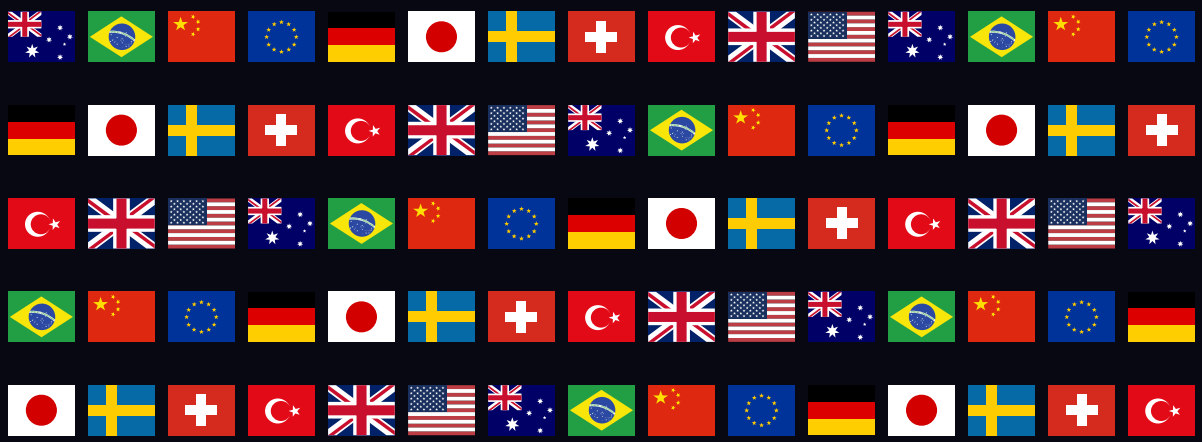
COMPETITION IN DIGITAL MARKETS

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.

Generated 26 November 2021

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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 that governs competition in digital markets is the Competition and Consumer Act 2010 (Cth) (Act), which is the standard competition law framework in Australia. There are no special rules or exemptions for digital markets. The Act also includes the Australian Consumer Law (ACL), which covers consumer protection issues.

Other legislation may touch on regulating competition-related issues in digital markets in particular circumstances, including the Foreign Acquisitions and Takeovers Act 1975 (Cth) (in reviewing foreign transactions) and the Privacy Act 1988 (Cth) (use of personal information online and requisite disclosures).

In March 2021, the Act was amended to include the News Media and Digital Platforms Mandatory Bargaining Code (Code), intended to address the bargaining power imbalance between news media businesses and digital platforms.

Law stated - 18 August 2021

Enforcement authorities

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

The Australian Competition and Consumer Commission (ACCC) enforces the Act in Australia. Within the ACCC, the Digital Platforms branch is responsible for the ongoing scrutiny of digital platform markets, including conducting relevant inquiries and current and future competition and consumer law enforcement cases. The Digital Platforms branch sits within the Mergers, Exemptions and Digital division of the ACCC, and also works with other units within the ACCC on specific matters, for example, the Merger Investigations branch and the Competition division.

Law stated - 18 August 2021

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 generally is reflected in various guidelines including its merger guidelines and authorisation guidelines (merger and non-merger), misuse of market power guidelines and concerted practices guidelines.

Law stated - 18 August 2021

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, published July 2019 (the DPI Report). The DPI Report explores the effect that digital search engines, social media

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

Similar advisory reports have been produced by the ACCC as part of its Digital Advertising Services Inquiry 2020–2021 (Ad Tech Inquiry) and the ongoing Digital Platform Services Inquiry 2020–2025 (DPSI), both of which were established following recommendations in the DPI Report. The Ad Tech Inquiry Interim Report was published in January 2021 and sought feedback on proposals aimed at addressing concerns about low levels of competition in the supply of ad tech services, conflicts of interest, self-preferencing and supply chain opacity. The final report is due on 31 August 2021.

The DPSI has published two interim reports with further reports expected every six months through March 2025. The first interim report examined online private messaging, search and social media services; the second examined app marketplaces; and the third (due September 2021) will consider web browsers and search services.

Law stated - 18 August 2021

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?

There is no formal process in Australia to obtain advance guidance from the ACCC on competition law compliance before entering into agreements or determining pricing strategy. However, there are two processes for seeking exemptions from the Act:

- apply to the ACCC for authorisation, which provides a statutory exemption for any conduct that may breach the Act; and
- lodge a notification with the ACCC in relation to exclusive dealing, resale price maintenance or small business collective bargaining (or they can rely on a new small business class exemption).

In addition, a practice has developed in Australia whereby companies may have informal engagements with the ACCC in industries of interest or matters of importance. For example, the informal clearance process allows parties to obtain comfort that the ACCC will not oppose a transaction.

Law stated - 18 August 2021

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 Mr Rod Sims on 23 February 2021, entitled 'ACCC 2021 compliance and enforcement priorities', Mr Sims noted that:

- "The establishment of the ACCC's permanent Digital Platforms branch in 2020 has led to a number of high-profile court actions against the better-known digital platforms". Mr Sims expressed that the ACCC will continue to advance investigations into the practices of the digital platforms in 2021, and that 'some more cases will follow';
- The ACCC is also examining 'Adtech' and 'apps' markets, to 'address fundamentally important and controversial issues', stating that the ACCC is 'working closely with our overseas counterparts and consulting widely with stakeholders.'

'Competition and consumer issues relating to digital platforms' is also a compliance and enforcement priority for the ACCC in 2021.

The ACCC's Digital Platforms Inquiry found that Google and Facebook have substantial market power in the supply of general search and of social media services in Australia respectively. It made 23 recommendations in its final report, mainly to monitor large digital platforms, to address issues of privacy and awareness overuse of consumer data, and to address bargaining imbalances between large digital platforms and news and media publishers. The Australian government has supported most of the ACCC's recommendations.

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 proactively scrutinise the digital sector and to actively enforce issues, establishing in 2019 a permanent Digital Platforms Branch. The ongoing Digital Advertising Services Inquiry 2020–2021 and Digital Platform Services Inquiry 2020–2025 also reflect this focus.

The ACCC has recently taken a number of proceedings, focused on misleading or deceptive conduct around the use of consumer data. In 2021, the Federal Court upheld the ACCC's allegations that Google misled consumers in relation to Google's communication to consumers on the collection and use of location data. The ACCC has also commenced 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 2020, the Federal Court ordered HealthEngine to pay A $2.9 million in penalties, in proceedings in which the ACCC alleged HealthEngine misled consumers around the use of their data. Most recently, the ACCC commenced proceedings against Facebook for misleading consumers as to the use of their personal activity data in its Onavo VPN app.

The recently enacted News Media and Digital Platforms Mandatory Bargaining Code sets out standard obligations for negotiations between designated 'digital platforms' and registered news businesses, and a compulsory arbitration process where a good faith agreement cannot be reached. However, the government has not designated any digital platforms yet, with Australian Treasurer Josh Frydenberg stating that Google's and Facebook's efforts to enter into high-profile commercial deals with news media businesses outside of the Code 'changes the equation' in deciding whether it is necessary to designate a platform under the Code.

Law stated - 18 August 2021

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 ACCC to engage in anticompetitive 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.

There are no special rules or exemptions applying to digital markets. The authorisation process has been used in the past for agreements between competitors acquiring or supplying services in digital markets. For example, in April 2021, the ACCC granted interim authorisation to members of Country Press Australia, a collection of independent regional and local newspapers, to collectively bargain with Facebook and Google concerning payments for producing content featured on those platforms, with final authorisation still under consideration. Several Australian banks also unsuccessfully sought to use the authorisation process to collectively bargain and boycott with Apple in relation to access to Apple's iPhone embedded 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 - 18 August 2021

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 Act.

The ACCC's Digital Platforms Inquiry found that agreements foreclosing competitor access to data, restrictions on user behaviour that may foreclose links to competitor platforms, or other exclusionary behaviour that is 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. For a further example, see Dialogue Consulting v Facebook (filed 11 April 2019).

Law stated - 18 August 2021

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 the breach of competition laws due to algorithmic pricing (including any action involving two algorithms coordinating pricing with no human input).

However, at Gilbert + Tobin by Chairman Rod Sims on 17 November 2017, entitled 'The ACCC's approach to colluding robots', the Chair identified potential competition issues in mergers and big data, potential for algorithmic collusion (though something more than parallel conduct) and liability for algorithms and noted whether the use of algorithms had contravened competition laws requiring a case-by-case analysis.

The ACCC's approach following the Digital Platforms Inquiry 2017–2019 and with its new Digital Platforms Branch, is to focus on the proactive monitoring and enforcement of potentially anticompetitive conduct associated with the use of algorithms, so it is likely there will be more activity in this area in the near future. In January 2020, Rod Sims noted that the ACCC would 'be testing Facebook and Google algorithms to see whether there's any anti-competitive or misleading behaviour'. Additionally, the recently enacted 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 distribution of content with a significant effect on the news media business's referral traffic. This is consistent with the ACCC's desire to make platform algorithms more transparent.

Law stated - 18 August 2021

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?

The extension of Australian competition law to hub and spoke information exchanges was one of the issues considered during a recent policy review of the Act which led to reforms in November 2017. A key reform was the introduction of a prohibition on concerted practices which has the purpose, or is likely to have the effect, of, substantially lessening competition.

Since the provision was introduced, the ACCC has only taken one enforcement action, in 2019 alleging anticompetitive concerted practices. The conduct by ANZ Roofing Pty Ltd and Ivy Contractors Pty Ltd involved posts on social media and 'likes' about setting minimum rates for the repair of homes damaged by hail. The matter did not result in any court action. There have been no actions taken in relation to digital markets.

Law stated - 18 August 2021

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 (a travel agent) in which it alleged Flight Centre had engaged in attempted price-fixing with certain airlines by attempting to induce three airlines to enter into a contract, arrangement or understanding to fix, control or maintain prices for air travel: see ACCC v Flight Centre [2016] HCA 49. The conduct related to fixing, controlling or maintaining the price offered by airlines through their own direct online channels and the prices made available to Flight Centre.

The High Court found that where an agent exercises their own discretion in the pricing of the principal's goods or services, and where the agent is not obliged to act in the interest of the principal, this may mean that the principal and agent are in competition with each other.

The decision highlights the potential for horizontal agreement risks where businesses use dual distribution models (direct and indirect distribution) , which have long been employed by businesses including in online distribution. Typically, such models have been considered as vertical arrangements, thus arrangements between suppliers and distributors where suppliers also distribute directly to end customers have not raised many competition concerns. This decision potentially broadens the scope of the relationship between suppliers and distributors to an extent that may see certain aspects of supply relationships considered as horizontal in nature.

Law stated - 18 August 2021

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 the assessment of anticompetitive agreements between undertakings active at different levels of the supply chain in digital markets. Section 47 of the Act generally concerns agreements

between undertakings at different levels of the supply chain. Section 47 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 conduct to which the cartel prohibitions do not apply (section 45AR of the Act).

Law stated - 18 August 2021

Online sales bans

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

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

Law stated - 18 August 2021

Resale price maintenance

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

There is no provision in the Act that deals specifically 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). The ACCC has been very active in enforcing the prohibition on RPM, including in relation to online markets. Most recently, 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] FCA 260).

Since 2017, companies have had the ability to seek notification to obtain protection from legal action for RPM, the legal test for which is whether the likely benefit from the RPM conduct would outweigh the likely public detriment. This is assessed on a case-by-case basis, and there has only been one notification in relation to online RPM, which was allowed to stand in October 2020 (HP PPS Australia notification RPN10000456).

Law stated - 18 August 2021

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 well as the Federal Government 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 Act that carved out certain prohibitions on anticompetitive conduct for IP owners and enabled them to determine the manner in which 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 2020' (Cth), August 2019). Based on this, geoblocking and other territorial restrictions online are subject to the general competition law prohibitions and will be assessed on a case by case basis.

Law stated - 18 August 2021

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), Compare the Market (2014), Energy Watch (2012) and iSelect (2007), and it has 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 general competition prohibitions in the Act preventing conduct giving rise to a substantial lessening of competition (in ACCC v Fila Sport Oceania (2004) ATPR 41-983 and TPC v CSR (1991) ATPR 41-076), but has not done so recently in relation to online platforms.

There have been no decisions or developments in Australia in relation to platform bans specifically; however, the ACCC's Digital Platform Services Inquiry 2020–2025 is considering (among a number of other things): the behaviour of suppliers of digital platform services in relation to pricing and other terms and conditions offered to businesses and supplier policies relating to privacy; data collection; and management and disclosure, so it can be expected that the ACCC's approach in this area may evolve.

Law stated - 18 August 2021

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 in relation to restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising. The ACCC is considering as part of its Digital Advertising Services Inquiry 2020–2021 (Adtech Inquiry) the level of transparency in auction and bidding processes in online advertising and supplier behaviour (including vertically integrated suppliers offering ad tech services and ad agency services), which may be its first consideration of such restrictions. The Adtech Inquiry Interim Report considered header bidding and automated algorithms in bidding decisions and sought feedback on a number of proposals, but the ACCC has not made any recommendations to date. However, the ACCC has taken action against Google under

consumer law in relation to 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 (the final court of appeal) 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) HCA 1).

Law stated - 18 August 2021

Most-favoured-nation clauses

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

In 2016, the ACCC investigated Booking.com and Expedia in relation to 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 rate 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. The ACCC confirmed it had ceased its investigation into Expedia's conduct in relation to such rate parity provisions in November 2019.

Law stated - 18 August 2021

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 Act 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 and third-line forcing (section 47); and restraints on resale price maintenance (sections 48 and 96). The provisions do not directly take into account potential efficiencies; however, efficiencies or public benefits would be considered as part of an application for authorisation for conduct that would otherwise be prohibited. There are no specific provisions for, or applications of this regime to, digital markets.

Law stated - 18 August 2021

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?

There are no other key issues emerging in Australia in relation to vertical agreements in digital markets.

Law stated - 18 August 2021

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 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 a market.

The ACCC has released Guidelines on the misuse of market power (August 2018) that detail its general approach to section 46. The ACCC has indicated through its findings in its DPI 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 as a result of high barrier to entry is especially relevant to digital markets.

In particular, relevant criteria that the ACCC has considered include: the breadth and scale of collection of 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; and strategic acquisitions.

Law stated - 18 August 2021

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 Act (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. Irrespective, the terms of section 46 do not require that 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.

While there is no misuse of market power conduct (either general or specific to digital markets) that is prohibited per se, 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 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 switching. In the ACCC's first (and only) proceedings under the new section 46 (ACCC v Tasmanian Ports Corporation) the Federal Court declared by consent that Tasmanian Ports had breached section 46 by imposing new charges on one of its customers after the customer notified Tasmanian Ports that it would switch to a new provider of towage and pilotage services.

In July 2021, ACCC Chair Rod Sims disclosed that the ACCC was gathering evidence of misuse of market power by Facebook and Google, and was working with competition regulators in Europe, the US and Canada. He indicated that

there will be regulatory developments in the next one to two years to address their potential misuse of market power.

Law stated - 18 August 2021

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 so far taken any action regarding access to data held by companies with market power in digital markets; however, it has indicated in its DPI Report that such conduct has been raised by third parties in Australia and investigated globally, and are examples of potential misuse of market power considered under the section 46 framework.

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 previous section 46 of the Act which prevented a corporation that has a substantial power in the market from taking advantage of that power for specific purposes (ASX Operations v Pont Data Australia (1990) 27 FCR 260). At the time of writing, there are three 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) (which is currently subject to a stay of proceedings in favour of proceedings in the Northern District of California; the stay decision is currently subject to an appeal to the Full Federal Court) and Epic Games v Google (2021)). The ACCC has also indicated that it considers concerns surrounding access to data held by companies with market power in digital markets may be addressed through consumer protection laws, given the limitations that it perceives on applying the prohibition on misuse of market power to digital markets (for example, the ACCC's current lack of an evidence base or data on the sector; the length of time taken in investigations; and the 'black box' nature of the sector, which makes detection of conduct difficult).

Law stated - 18 August 2021

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 specifically addressed or taken action under the competition laws against the unilateral collection of data by companies with market power in digital markets. Rather, the ACCC has taken action around data collection practices under Australian Consumer Law in circumstances where consumers have allegedly been misled about the collection and use of their data. This includes the following:

- on 29 October 2019, the ACCC commenced enforcement actions against Google alleging misleading or deceptive conduct in relation to Google's communication to consumers on the collection and use of location data.On 16 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;
- on 16 December 2020, the ACCC commenced proceedings against Facebook for misleading consumers as to the use of their personal activity data in its Onavo VPN app; and

- 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 of the parties that HealthEngine pay A $2.9 million in penalties for engaging in misleading and deceptive conduct.

In its DPI Report, the ACCC recommended the strengthening of protections in the Privacy Act as well as broader reform of the Australian privacy law to effectively protect consumers' personal information in light of increasing volume and scope of data collection in the digital economy. The government is currently undertaking a review of the Privacy Act. In October 2020, it published an issues paper seeking views on a range of issues affecting consumers' data protection. It will publish a discussion paper for further comment later in 2021.

Law stated - 18 August 2021

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 yet commenced any actions or taken any decisions involving leveraging theories of harm in digital markets under the current section 46 prohibition which was introduced in November 2017.

It has been explicitly noted in submissions to the Treasury regarding changes to this law following the Harper Review, that self-preferencing or bundling conduct which has been successfully dealt with by misuse of market power provisions in other jurisdictions (such as against Microsoft in the US and Google in Europe) was unlikely to be caught by the misuse of market power provision due to needing to prove that the company 'took advantage' of the market power.

The ACCC has, however, successfully taken action against companies for self-preferencing conduct in the context of price comparison or ratings platforms but under consumer protection laws, 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 that prioritised rankings based on the highest cost per click received from advertisers (2020), and has an ongoing action against iSelect for misleading and deceptive price and energy plan comparisons which limited and favoured partner retailers that paid iSelect higher commissions. The ACCC is considering self-preferencing conduct particularly with respect to digital advertising as part of its currently running Digital Advertising Services Inquiry 2020¬2021, which may lead to further developments in its approach. In its January 2021 interim report, the ACCC stated that it considers that 'due to Google's presence across the ad tech supply chain, its strong position in the supply of certain services, and the opacity of the supply chain', Google is likely to have the ability and incentive to self-preference in relation to digital advertising.

Law stated - 18 August 2021

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. The ACCC's DPI Report outlines a number of types of conduct that the ACCC has considered itself or following third-party complaints that have

generally reflected conduct investigated and prosecuted in overseas jurisdictions, rather than raising novel theories of harm. 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 that have market power. The ACCC currently has a clear focus on developing and expanding its digital enforcement capabilities and proactively investigating particularly the larger digital platforms, so its approach on potential abuses of market power is likely to develop rapidly.

In the March 2021 Digital Platform Services Inquiry 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.

Law stated - 18 August 2021

MERGER CONTROL

Merger control framework

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

The usual merger control framework in Australia applies to 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 formal merger authorisation process.

The vast majority of mergers are reviewed within the informal merger clearance framework. The ACCC's approach to merger review is set out in its Informal Merger Clearance Guidelines November 2008 (amended November 2017).

There are no special rules or specific thresholds that apply to digital markets.

The ACCC Chair Rod Sims, however, has continued to advocate for changes to Australia's merger regime. Although the ACCC has not yet put forward any proposed changes to the regime, based on Mr Sims' previous public comments it is possible that the ACCC will advocate for a separate notification regime for digital companies acquiring nascent competitors. The ACCC's announcement of proposed changes to Australia's merger regime is expected to take place in late August 2021.

Law stated - 18 August 2021

Prohibited mergers

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

The ACCC's last opposition of a merger of two online businesses was in relation to Carsales.com Limited's proposed acquisition of the Trading Post on 20 December 2012, 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 court-enforceable undertaking in December 2020, which were ultimately rejected by the ACCC. The undertaking proposed to remedy the ACCC's concerns about data aggregation by restricting the ways in which 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. To date, the ACCC has not taken any enforcement action in relation to the parties closing the deal.

Law stated - 18 August 2021

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, will apply 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] HCA 49 at [69].

Australian courts have assessed market definition as: 'the field of activity in which buyers and sellers interact, and the identification of market boundaries requires consideration of both the demand and supply side. . .The test of whether or not there are different markets is based on what happens (or would happen) on either the demand or the supply side in response to a change in relative price.' (TPC v Australian Meat Holdings (1988) 83 ALR 299 at [317]).

Digital markets present challenges for the application of the above approaches to market definition. The collection and use of data and user attention online for example are not paid for by consumers and do not lend themselves to concepts of economic activity.

In mergers, the ACCC's most recent approach to market definition of data markets is set out in its Statement of Issues (SOI) of Google's proposed acquisition of Fitbit of 18 June 2020. 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). 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 dimensions of the market such as product dimensions have not been precisely defined.

Law stated - 18 August 2021

'Killer' acquisitions

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

The ACCC has recently considered concerns surrounding 'killer' acquisitions in digital markets in its Digital Platforms Inquiry 2017–2019, 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 Act 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 former recommendation does not change the current substantive merger control test under the Act but signals an intention to focus on 'potential' competition of nascent competitors or nascent markets.

The latter recommendation would effectively require notification of all mergers by large digital platform businesses in circumstances where notification is currently voluntary. Although neither recommendation has been implemented so far, it is open for the ACCC to independently commence a review of any merger it becomes aware of. The ACCC's review of Google's proposed acquisition of Fitbit and Facebook'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. As regards the latter, however, the ACCC has recently faced some challenges in Court in establishing potential competition theories of harm in the mobile telecommunications market (Vodafone Hutchison Australia v ACCC (2020) FCA 117).

More recently, at a public virtual event at which Mr Sims and his counterparts at the Competition and Markets Authority (UK) and Bundeskartellamt (Germany) presented a joint statement on merger control enforcement, Mr Sims suggested that the Act should have provisions dealing specifically with the issue of tech companies buying nascent competitors.

Law stated - 18 August 2021

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 Act 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) include: import competition; barriers to entry; concentration; degree of countervailing power; 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 take into account the impact on innovation, the role of data, counterfactuals, and other laws provided that they relate to an assessment of whether an acquisition would result in a material impact on the process of competition. 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 AGL v ACCC , recently affirmed in ACCC v Pacific National Pty Limited [2020] FCAFC 77. This is likely to create challenges when assessing potential counterfactuals in digital markets where there is a high degree of uncertainty as to what might be the future state of markets. Mr Sims has been critical of the courts' focus on counterfactual scenarios, arguing that in some cases 'insufficient weight is placed on the risks to competition, such as potential competition being lost, barriers to entry being raised or competitors being foreclosed', with the result that the merger control regime is skewed towards clearance (see Mr Sims' ACCC 2021 Compliance and Enforcement Priorities speech on 23 February 2021). We expect that the ACCC will soon announce proposed changes to Australia's merger regime intended to deal with the ACCC's issues with counterfactual analysis.

Law stated - 18 August 2021

Remedies

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

The ACCC has a strong preference for 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 as a result of access to data, following its Digital Platform Inquiry, and it is likely that the ACCC will increasingly look to more novel design 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 the ways in which Google would use Fitbit data. Google then acquired Fitbit prior to the ACCC providing clearance. The ACCC has not taken any action to challenge the acquisition.

Law stated - 18 August 2021

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 has been shaped by the ACCC's Digital Platforms Inquiry 2017–2019 (DPI) as the ACCC's first holistic engagement with the sector, are as follows:

- Establishment of a permanent Digital Platforms Branch of the ACCC to ensure close scrutiny of the sector and drive enforcement and regulation activities in the sector.
- The ACCC is carrying out two further market inquiries to identify reforms to address perceived issues with conduct by digital platforms, with its Digital Advertising Services Inquiry 2020¬2021 and its Digital Platform Services Inquiry 2020–2025. So far, the ACCC has published two interim reports for the DPSI and one for the Ad Tech Inquiry. These are likely to result in further legislative and policy reforms, as well as enforcement actions.
- In terms of legislative reform, the News Media Bargaining Code came into effect in March 2021, as discussed above.
- The government intends to establish an unfair contract term regime to protect consumers and small businesses that are party to 'standard form' contracts. The ACCC is also advocating in favour of an 'unfair conduct' amendment to the Act. Although a draft of the legislation has not been publicly disclosed, it is expected to expose contravening parties to civil penalties (among other remedies).
- The ACCC has initiated some enforcement actions which have so far been based on its consumer protection powers, with two ongoing cases against Google and one against Facebook. In addition to this, there are four private competition law-based actions against digital platforms: against Facebook and Instagram in relation to

platform access (commenced by Dialogue Consulting), a class action against Facebook and Google in relation to cryptocurrency advertising bans and proceedings against Apple and Google in relation to app marketplace access. This area is likely to grow in the future.

- In relation to mergers, although its recommendation in the DPI Report of a framework requiring large digital platforms to provide advance notice of acquisitions has not been implemented, the ACCC has 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 (including its decision not to accept Google's proposed undertaking).
- Data portability is also likely to 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 - 18 August 2021

Jurisdictions

Australia	Gilbert + Tobin
Brazil	Advocacia José Del Chiaro
China	King & Wood Mallesons
European Union	Herbert Smith Freehills LLP
Germany	Herbert Smith Freehills LLP
Japan	Miura & Partners
Sweden	Advokatfirman Cederquist KB
Switzerland	Prager Dreifuss
Turkey	ELIG Gurkaynak Attorneys-at-Law
United Kingdom	Herbert Smith Freehills LLP
USA	Crowell & Moring LLP