

*CPI's Oceania Column Presents:*

# The ACCC's Continued Digital Inquiry: Online Private Messaging and App Stores

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## I. Introduction

Concern from consumers, businesses, governments and antitrust regulators about the growing power of digital platforms, their increasing ubiquity in all facets of public and private life, and their impact on competition and data privacy continues to grow globally.

The circumstances brought about by the COVID-19 pandemic accelerated the need for businesses to operate digitally and serve their customers through digital means.<sup>2</sup> As businesses “pivoted” to operating and serving customers in a digital way, the importance of the architecture of our digital economy became acutely apparent. A future in which *all* businesses are “digital” necessitates reflecting on how digital platforms shape our markets and society, and what regulatory and policy responses might be required to deal with the challenges created by the increasing role that digital platforms play in our supply chains, as well as our daily lives, both business and personal.

The Australian Competition and Consumer Commission (**ACCC**) continues its examination of developments in digital platforms issues through its ongoing *Digital Platforms Services Inquiry 2020-2025 (DPSI)*.<sup>3</sup> The DPSI follows the ACCC's original Digital Platforms Inquiry Final Report (*DPI Final Report*), released in July 2019.<sup>4</sup>

The Australian Government's direction to conduct the DPSI provides the ACCC with an extensive remit to examine, among other things, the impact on competition and consumers of internet search engine services, social media services, online private messaging services, digital content aggregation platform services, media referral services, and electronic marketplace services.<sup>5</sup>

This article summarizes the key findings and implications of the ACCC's first DPSI interim report covering “online private messaging services” (*Messaging Report*).<sup>6</sup> It also considers the main concerns identified in the ACCC's issues paper for its next DPSI interim report covering app stores (*App Store Report*),<sup>7</sup> relevant international antitrust cases and the public submissions received in response to the App Store Report's issues paper.

## II. The DPSI Messaging Report (October 23, 2020)<sup>8</sup>

The focus of the ACCC's Messaging Report was on competition and consumer (including privacy) issues associated with online private messaging services. The Messaging Report also updated the findings reached by the ACCC in its original DPI Final Report in relation to social media and search services.

The impetus for the ACCC's focus on messaging services in this report no doubt relates to the COVID-19-related uptake of these services, with the ACCC remarking upon releasing its Messaging Report that it “*shows how the use of online private messaging services has grown significantly during the COVID-19 pandemic, as workplaces and schools moved to remote access and people sought alternatives to face-to-face communication.*”<sup>9</sup>

The ACCC's findings included:

- **Online private messaging services:** Facebook (through its Messenger and WhatsApp services) and Apple (through its iMessage and FaceTime services) are among the largest suppliers of standalone online messaging services in Australia. The ACCC found that Facebook's large user base gives Facebook a significant competitive advantage

and a degree of freedom from competitive restraint when compared with Apple and smaller suppliers of standalone messaging services.

- **Key data and privacy concerns:** The ACCC reported that data collection, use, and disclosure practices by messaging services raised concerns. The ACCC recognized that broad disclosures about these practices (e.g. via privacy policies or T&Cs) were unclear and did not provide sufficient information to enable consumers to understand what data was collected about them and how data would be used/sold to third parties (and who these third parties were).<sup>10</sup> While the ACCC is not Australia's privacy regulator, it is taking enforcement action for data and privacy-related issues through Australia's consumer protection laws in circumstances where it considers there have been misleading data collection and use disclosures made to consumers.<sup>11</sup> The ACCC has also shown a willingness to address data and privacy-related issues in its assessment of competition matters, most recently in its ongoing assessment of Google's proposed acquisition of Fitbit.<sup>12</sup>
- **Market power in advertising, search, and social media services:** The ACCC considered that an increasing number of consumers were choosing search platforms on the basis of privacy protections (e.g. DuckDuckGo). However, despite some shifts in consumer behavior and some instances of new entry and expansion, consumers continue to spend a large proportion of their time on Google and Facebook services. Google is by far the largest search services provider with over 95 percent of supply of search services in Australia, and Facebook/Instagram are the most used social media platforms. The ACCC observed that Google's and Facebook's dominance also translates to an increasing share of online advertising expenditure, and it explicitly noted that Google and Facebook both continue to have substantial market power in search (Google), social media (Facebook) and online advertising services (both Google and Facebook).<sup>13</sup>
- **Potential consumer harms across these services:** The ACCC considered that increased tracking and profiling of consumers by platforms and third parties (including data from private messaging services, mobile apps, websites, video games, etc.) has a range of potential and actual harms. These harms ranged from decreased consumer welfare and privacy to increased discrimination and exclusion.  
The ACCC considered that consumers' online activity is extensively tracked by Google and Facebook. This includes tracking via Google and Facebook software development kits installed in third party apps, and consumer data collection via voice assistants and other new technologies (e.g. Google Assistant). This data is often sensitive and includes, for example, location information, audio recordings, and personal health data. The ACCC outlined concerns that consumers have a limited understanding of the consents they give to allow their data to be used and aggregated and their online activity to be tracked. As discussed above, similar competition concerns regarding the aggregation and potential use of data (in this case, health data) have arisen in the ACCC's ongoing review of Google's potential acquisition of Fitbit.
- **Potential small business harms across these services:** Small businesses are increasingly reliant on the advertising services provided by platforms like Facebook and Google. The impact of sponsored posts and advertising searches impacts the ability of businesses to organically reach customers. Small businesses that rely on digital platforms to reach customers often have to accept disadvantageous default

terms, including broad discretions to suspend/terminate accounts or to remove content, and terms that seek to limit a small business' ability to dispute these issues. The report characterized both Google and Facebook as having a substantial degree of market power in relevant advertising markets, acting as “gatekeepers” controlling access to digital advertising services which small businesses require.<sup>14</sup> In relation to alleged concentrations of market power such as this, the ACCC has raised concerns with the ability for it to intervene in markets using Australia's competition laws. For example, ACCC Chair Rod Sims recently recognized “*you cannot rely on competition laws alone to stop or deal with all the adverse consequences from a growth in market power.*”<sup>15</sup> In order to fill this perceived gap, the ACCC continues to advocate for changes to Australia's consumer protection laws. This includes reforms to Australia's unfair contract terms regime to make such terms illegal and give courts powers to impose penalties for their use,<sup>16</sup> and for the addition of a broad 'unfair trading practices' prohibition (e.g. on business models that are arguably oppressive or exploitative).<sup>17</sup>

- **Emerging trends including platforms expanding their ecosystems:** The ACCC noted that large platforms such as Google, Facebook, Microsoft, Apple, and Amazon continue to expand their ecosystems by acquiring businesses and developing new products and services. While this is obviously not inherently illegal and can (in certain cases) result in efficiencies, innovation, and increased competition, the ACCC recognized that “[w]here a platform occupies a strong gateway position and acquires a business in a related market, the platform may have the ability and incentive to harm downstream rivals through high fees or restricted access.”<sup>18</sup> Like the UK Competition and Markets Authority,<sup>19</sup> the ACCC expressed concerns that expansion into adjacent markets by these platforms entrenches their incumbency and provides them with further opportunities to gather consumers' data.

The Messaging Report's findings also generally reiterated the consumer protection and privacy law recommendations that the ACCC previously made in its DPI Final Report.

### III. The forthcoming DPSI App Store Report (due March 31, 2021)<sup>20</sup>

#### A. *The Issues Paper*

To inform the ACCC's App Store Report, the ACCC released an Issues Paper seeking feedback from interested stakeholders to understand the extent of any competition and consumer issues with respect to app store markets (*Issues Paper*).

The ACCC's focus for this report is on “mobile apps” and their related app stores (i.e. not app stores generally, such as on gaming consoles or personal computers). The ACCC defined 'mobile apps' as software applications that are downloaded onto, and run on, a mobile operating system such as on a smartphone, tablet, smartwatch or smart car.<sup>21</sup>

At the outset, the ACCC recognized that the two major app stores were the Apple App Store (for Apple mobile devices running Apple's “iOS” operating system) and the Google Play Store (for mobile devices running Google's “Android” operating system).

The ACCC stated that “[w]hile there are various app stores or marketplaces, app sales are dominated by the Apple App Store, for iOS, and the Google Play Store, for Android devices.”<sup>22</sup> It referred to estimates that in 2019, consumers spent around \$54 billion USD on the Apple

App Store and around \$29 billion USD on the Google Play Store.<sup>23</sup> The ACCC also noted that 99 percent of smartphones globally use either the Apple iOS or Google Android operating systems.<sup>24</sup>

Some of the key issues the ACCC sought to understand in its Issues Paper included:<sup>25</sup>

how Apple's and Google's various roles as the key suppliers of app stores (but also simultaneously as app developers, operators, and licensors of their mobile operating systems and device manufacturers) affects the ability of third-party app developers to compete, including the impact of app store fee structures on rivals' costs;

terms, conditions, and fees (including "in-app purchases" (*IAP*)) imposed on businesses to place apps on app stores. In particular, app developers offering "digital goods and services" are required to use Apple's or Google's proprietary IAP systems. These developers are also charged a 30 percent commission by Apple/Google for each transaction through the IAP system;

how app stores determine whether an app is allowed on their app store, and the effect of this on app providers, developers, and consumers; and

how the app search, display and ranking system works on an app store and whether being "featured" on an app store is important to an app's success.

The ACCC's Issues Paper also sought to understand substitutability and potential market definitions with regard to app stores. For example, question three asked about the extent to which app developers could bypass the Apple App Store and Google Play Store to distribute apps; question five asked about the extent to which app developers list apps on different marketplaces; and question eight asked about the extent to which web-versions of mobile apps are substitutes for their mobile version counterparts.

Consistent with the Messaging Report and DPI Final Report, the ACCC also highlighted in the Issues Paper that it sought views on the collection and use of consumer data by app store providers (e.g. Google and Apple) and app developers, as well as whether consumers are provided with adequate disclosures about these practices and can control the data that is collected about them.

### ***B. The International Context***

The key issues canvassed in the ACCC's Issues Paper closely follow those aired in a variety of private litigation cases, regulatory investigations and inquiries.

For example, Epic Games is litigating against Apple and Google in the U.S. after its video game app, Fortnite, was removed from both the App Store by Apple and Play Store by Google. This was, alleges Epic Games, in response to Epic Games allowing Fortnite users the option to use Epic Games' own IAP system on Apple and Android devices.<sup>26</sup> There are also a number of class actions on foot against both Apple and Google regarding the IAP and 30 percent commission requirements.<sup>27</sup> Epic Games recently instituted proceedings against Apple in the Federal Court of Australia, alleging that Apple misused its market power by restricting developers from creating rival app stores on iOS and by requiring that developers use Apple's own proprietary IAP system.<sup>28</sup>

The European Commission is also investigating complaints against Apple from a number of complainants, including Spotify, an e-book distributor, and an audiobook distributor. These complaints allege that the 30 percent commission distorts competition.<sup>29</sup>

The Netherlands Authority for Consumers and Markets (**ACM**) published a report into mobile app stores, outlining developer concerns that a 30 percent IAP commission is excessive, particularly when fees of 2-3 percent can be found in alternative financial services.<sup>30</sup> The U.S. House Judiciary Committee's Subcommittee on Antitrust also examined these issues, among a variety of others, in its investigation into competition in digital markets (the House released its report on October 7, 2020).<sup>31</sup>

### **C. The Submissions in Response**

The ACCC received a number of submissions in response to the Issues Paper. The table below briefly summarizes key points from some of these submissions:<sup>32</sup>

<p><b>Apple submission</b></p>	<p>Apple considered it brought innovation and competition to apps through the App Store. Apple outlined that its focus is on device sales such that it has an incentive to promote a rich app ecosystem. Apple's submission generally referred to privacy and data security as central to its various practices, including its app store review process, and restrictions which do not allow rival iOS app stores to compete with the App Store.</p> <p>Apple defined an app store market broadly, arguing that all app stores compete with Apple's App Store, including app stores managed by Android device manufacturers (called "OEMs") (e.g. Google, Samsung, Oppo, Huawei, etc.), those on desktop computers, notebooks, televisions, cars, game consoles, etc. Apple also argued its App Store competes with web-apps and websites.</p> <p>Apple argued that its proprietary IAP system was necessary because it provided a safe purchasing mechanism for consumers and enabled Apple to record sales and collect commissions from developers to fund Apple's investment in, and maintenance of, the App Store (including developing technology that developers take advantage of, such as development tools). Apple also argued its 30 percent commission, collected through the use of its IAP system, was consistent with industry standards. Apple also noted that developers whose business model depended entirely on advertising and those who sold physical goods and services paid no commission.</p>
<p><b>Google submission</b></p>	<p>Similarly to Apple, Google argued that it delivered innovation and competition with the creation of Android and the Play Store.</p> <p>Google noted that Android was an open platform which allowed OEMs and others to create their own app stores which compete with the Play Store.</p> <p>Google did not appear to consider the relevant market to be as broad as Apple did. Instead, Google suggested the Play Store</p>

	<p>competed with other mobile app stores, including other Android app stores, Apple's App Store, and websites and web-apps.</p> <p>Google justified its 30 percent fee for IAP transactions on the basis that it enabled Google to maintain its investments in the Play Store and the Android ecosystem more broadly. It argued that Google's IAP system was a safe and secure payment system.</p>
<b>App developer submissions</b>	<p>Submissions included those from Microsoft, dating app provider Match Group, property advertising services provider REA Group and various television and radio broadcasting app developers (and their developer associations).</p> <p>Developers expressed concern with mandatory requirements by Apple and Google to use their respective IAP systems. They considered that the 30 percent commission raises developers' costs, with REA Group noting it was a significant disincentive to improving its paid app services.</p> <p>Submissions noted that there was confusion as to when an app would be required to use Apple's or Google's IAP systems, arguing there is no clear distinction between apps that provide "digital goods and services" (which must use a proprietary IAP according to Apple and Google) and those offering "physical goods and services" (which do not use a proprietary IAP). Developers disputed the justifications put forward by Apple and Google in this regard.</p> <p>Submissions also indicated that there were no technical reasons for mandating the use of these proprietary IAP systems for certain transactions over others. Submissions referred to Apple's decision to allow Amazon to use its own IAP system to deliver digital content as an example of an inconsistency which undermines arguments in favor of such mandatory requirements.</p> <p>Submissions noted that the app review process for the approval of apps or new content (in updated apps) was opaque and led to inefficiencies and uncertainties for developers. It was suggested that the requirement to use an IAP system and pay a 30 percent commission favored a data-monetization business. Concerns were also raised with the transparency of the app search, display and ranking processes, the app review process and the collection of transaction data by IAP systems that can be used by Apple/Google later to target that particular app segment.</p>
<b>Association submissions</b>	<p>Submissions included those from the Australian Investment Council (<b>AIC</b>), Australian Business Software Industry Association and the Developers Alliance.</p> <p>The Developers Alliance, whose membership includes Google and Facebook, argued that app ecosystems currently work well but a market-driven code of conduct, with dispute resolution and</p>

	<p>transparency enhancing mechanisms, could be an option to address concerns relating to the lack of transparency in the market (e.g. regarding app rankings or the strategic targeting of app segments by app store operators).</p> <p>Other associations, such as the AIC, argued that the mandatory IAP and 30 percent commission requirements raise barriers to entry and impact developers' ability to generate returns and reinvest in their businesses. The lack of transparency with respect to the app review process and the ability for app store operators to self-preference, including in their display rankings, was a feature of these submissions.</p>
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It remains to be seen what the ACCC's response will be to the views canvassed in response to its Issues Paper and concerns raised by the numerous app store-related disputes and inquiries. When the ACCC produces a report following an inquiry, it will usually result in a range of legal recommendations and reforms, as well as some enforcement action (as resulted from the Digital Platforms Inquiry<sup>33</sup>). The ACCC made a range of recommendations in the DPI Final Report which, among other things, led the Australian Government to request the ACCC develop a mandatory bargaining code for negotiations between Australian news media content producers and Facebook and Google. Legislation for this media bargaining code of conduct has recently been introduced to the Australian Parliament.<sup>34</sup>

The ACCC could also use the concerns expressed by developers to bolster its advocacy efforts in favor of the introduction of a general “unfair practices” prohibition.<sup>35</sup>



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- <sup>1</sup> Felicity McMahon: Partner at Allens. William Georgiou: Associate at Allens. The views and opinions expressed in this article are the authors' and not those of Allens or any clients of Allens.
- <sup>2</sup> McKinsey & Company, "How COVID-19 has pushed companies over the technology tipping point—and transformed business forever," (October 5, 2020) available at <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/how-covid-19-has-pushed-companies-over-the-technology-tipping-point-and-transformed-business-forever>.
- <sup>3</sup> ACCC, "Digital Platform Services Inquiry 2020—2025," see <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025>.
- <sup>4</sup> ACCC, "Digital Platforms Inquiry Final Report," (July 26, 2019), available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.
- <sup>5</sup> Competition and Consumer (Price Inquiry – Digital Platforms) Direction 2020 (February 10, 2020), available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/ministerial-direction>.
- <sup>6</sup> ACCC, DPSI September 2020 Interim Report (*Messaging Report*) available at <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report>.
- <sup>7</sup> ACCC, DPSI – March 2021 report (*App Store Report*), see <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2021-interim-report>.
- <sup>8</sup> Messaging Report, available at <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report>.
- <sup>9</sup> ACCC Media Release, "Surge in online messaging use as big digital platforms continue to expand," (October 23, 2020), available at <https://www.accc.gov.au/media-release/surge-in-online-messaging-use-as-big-digital-platforms-continue-to-expand>.
- <sup>10</sup> Appendix D of the ACCC's Messaging Report contains a detailed comparison of the privacy policies and terms and conditions of major messaging services.
- <sup>11</sup> The ACCC has taken court action for what it alleges are inadequate disclosures regarding the collection and use of consumer data. The ACCC has framed this conduct as a contravention of Australia's consumer laws (i.e. misleading or deceptive conduct), including in a recent action against HealthEngine and in two current cases against Google.
- <sup>12</sup> ACCC, "Statement of Issues – Google LLC – proposed acquisition of Fitbit Inc.," (June 18, 2020), available at <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/google-llc-proposed-acquisition-of-fitbit-inc>; and ACCC, "ACCC rejects Google behavioural undertakings for Fitbit acquisition," (December 22, 2020), see <https://www.accc.gov.au/media-release/accc-rejects-google-behavioural-undertakings-for-fitbit-acquisition>.
- <sup>13</sup> See Messaging Report, Appendix B.
- <sup>14</sup> See ACCC Messaging Report, Appendices B and G.
- <sup>15</sup> ACCC Chair Rod Sims' National Press Club address "Tackling market power in the COVID-19 era," (October 21, 2020) available at <https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era>.
- <sup>16</sup> The Federal Government recently released a Regulation Impact Statement setting out proposed amendments to these laws., see: Treasury, "Enhancements to Unfair Contract Term Protections - Regulation Impact Statement for Decision," (November 9, 2020), available at <https://treasury.gov.au/publication/p2020-125938>.
- <sup>17</sup> These "unfair trading practices" changes also appear to be progressing. Commonwealth, State and Territory Ministers for Consumer Affairs agreed that issues and options identified by the work of Consumer Affairs Australia and New Zealand in this regard warrant further exploration through a regulation impact assessment process: see Legislative and Governance Forum on Consumer Affairs, Meeting of Ministers for Consumer Affairs Joint Communique (November 6, 2020), available at <https://consumer.gov.au/sites/consumer/files/inline-files/CAFCommunique-20201106.pdf>.
- <sup>18</sup> DPSI Messaging Report, p 81.
- <sup>19</sup> UK CMA, "Online platforms and digital advertising Market study final report," (July 1, 2020), paras 58 – 60, available at <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.
- <sup>20</sup> On September 8, 2020 the ACCC announced that it would prepare the App Store Report as part of the DPSI. The ACCC is expected to issue the App Store Report to the Treasurer by March 31, 2021. See, ACCC, "Mobile apps market under scrutiny," (September 8, 2020), available at <https://www.accc.gov.au/media-release/mobile-apps-market-under-scrutiny>.
- <sup>21</sup> Issues Paper, p 9.

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- <sup>22</sup> ACCC, “Mobile apps market under scrutiny,” (September 8, 2020), available at <https://www.accc.gov.au/media-release/mobile-apps-market-under-scrutiny>.
- <sup>23</sup> Issues Paper, p 10.
- <sup>24</sup> *Ibid.*
- <sup>25</sup> *Ibid.* p 5. The ACCC probed these issues with detailed questions it posed to stakeholders from page 11 onwards.
- <sup>26</sup> *Epic Games, Inc., v. Apple, Inc.*, (August 17, 2020) Case No. 3:20-CV-05640-EMC, available at <https://cdn2.unrealengine.com/apple-complaint-734589783.pdf>; *Epic Games, Inc v. Google LLC* (August 13, 2020) Case No 3:20-cv-05671, available at <https://cdn2.unrealengine.com/google-complaint-736372083.pdf>.
- <sup>27</sup> See e.g.: *Cameron and Pure Sweat Basketball, Inc v Apple, Inc* (4 June 2019) Case No 5:19-cv-03074, available at <https://www.classaction.org/media/cameron-et-al-v-apple-inc.pdf>; *Mary Carr v. Google LLC* (August 16, 2020), Case No 5:20-CV-5761, available at <https://www.classaction.org/media/carr-v-google-llc-et-al.pdf>; *Peekya Services, Inc v. Google LLC* (September 9, 2020), Case No 3:20-cv-06772.
- <sup>28</sup> *Epic Games, Inc v. Apple, Inc* (November 17, 2020) NSD1236/2020.
- <sup>29</sup> European Commission, “Antitrust: Commission opens investigations into Apple’s App Store rules,” (June 16, 2020) available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1073](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073).
- <sup>30</sup> ACM “Market study into mobile app stores,” (April 11, 2019), available at <https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf>.
- <sup>31</sup> U.S. House Subcommittee on Antitrust, Commercial and Administrative Law, “Investigation of Competition in Digital Markets,” (October 7, 2020) (**House Report**).
- <sup>32</sup> All submissions available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2021-interim-report>.
- <sup>33</sup> See e.g. ACCC Chair Rod Sims’ Australian-Israel Chamber of Commerce address “The ACCC’s Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses,” (August 6, 2020) available at <https://www.accc.gov.au/speech/the-acccs-digital-platforms-inquiry-and-the-need-for-competition-consumer-protection-and-regulatory-responses>.
- <sup>34</sup> December 8, 2020, News Media and Digital Platforms Mandatory Bargaining Code, Joint release with The Hon Paul Fletcher MP Minister for Communications, Cyber Safety and the Arts, <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/news-media-and-digital-platforms-mandatory-bargaining>.
- <sup>35</sup> See e.g. ACCC Chair Rod Sims’ National Press Club address “Tackling market power in the COVID-19 era,” (October 21, 2020) available at <https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era>.