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## The ACCC's Continued Digital Inquiry: App Stores and Choice Screens

*By Jacqueline Downes, Felicity McMahon,  
William Georgiou & Melissa Camp*



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## I. Introduction

This piece builds on our previous article<sup>2</sup> covering the Australian Competition and Consumer Commission's ("ACCC") examination of developments in digital platforms 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> Under the terms of reference for the DPSI, the ACCC must provide the Treasurer with an interim report on the inquiry every six months until the inquiry concludes. A final report will be provided to the Treasurer by 31 March 2025.<sup>5</sup> The services which the ACCC may hold inquiries in relation to include digital platform services, as well as digital advertising services and data services provided by digital platform service providers.<sup>6</sup> The terms of reference define digital platform services as search engines, social media, online private messaging services, digital content aggregation platforms, media referral services, and electronic marketplaces.<sup>7</sup>

Our previous work considered the main

concerns identified in the ACCC's issues paper for its second DPSI interim report covering app stores ("App Stores Issues Paper"),<sup>8</sup> relevant international antitrust cases, and the public submissions received in response to the App Store Issues Paper.

This article summarizes the key findings ultimately released by the ACCC in its second DPSI interim report on app stores ("App Stores Report"). It also considers the main concerns identified in the ACCC's issues paper for its third DPSI interim report covering choice screens in search services and default browsers ("*Choice Screen Issues Paper*")<sup>9</sup> and the public submissions received so far in response to this issues paper.

The ACCC has also released the issues paper for its fourth DPSI interim report (to be released in 2022).<sup>10</sup> As part of this issues paper the ACCC will examine competition and consumer law issues in online marketplaces that operate across product categories (e.g. eBay, Amazon, Catch, etc.).<sup>11</sup> Competition issues the ACCC will investigate as part of this report include: what the most significant online marketplaces

<sup>1</sup> Jacqueline Downes: Partner at Allens. Felicity McMahon: Partner at Allens. William Georgiou: Associate at Allens. Melissa Camp: Lawyer 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> Felicity McMahon and William Georgiou, "The ACCC's Continued Digital Inquiry: Online Private Messaging and App Stores" (January 20, 2021). Available at <https://www.competitionpolicyinternational.com/the-acccs-continued-digital-inquiry-online-private-messaging-and-app-stores/>.

<sup>3</sup> ACCC, "Digital Platform Services Inquiry 2020—2025". Available at <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> Australian Federal Government Treasurer, 'Competition and Consumer (Price Inquiry – Digital Platforms) Direction 2020' (10 February 2020). Available at <https://www.accc.gov.au/system/files/Ministerial%20direction%20-%20Digital%20platform%20services%20inquiry.pdf>.

<sup>6</sup> *Ibid.* s 5(2).

<sup>7</sup> *Ibid.* s 4.

<sup>8</sup> ACCC, "Digital platform services inquiry Interim report No. 2 – App marketplaces" (published April 28, 2021) (App Stores Report) Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2021-interim-report>.

<sup>9</sup> ACCC, "Digital Platform Services Inquiry – September 2021 Report on market dynamics and consumer choice screens in search services and web browsers: Issues Paper March 2021" (March 11, 2021) (Choice Screen Issues Paper). Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/september-2021-interim-report>.

<sup>10</sup> ACCC, "Digital Platform Services Inquiry – March 2022 Report on general online retail marketplaces" (July 22, 2021). Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2022-interim-report>.

<sup>11</sup> ACCC, "Digital Platform Services Inquiry – March 2022 Report on general online retail marketplaces Issues Paper" (July 22, 2021), see pp, 2 and 4. Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2022-interim-report>.

in Australia are, whether any of them are “must-haves” for third-party sellers, barriers to entry and expansion for online marketplaces, the extent that online marketplaces compete with third-party sellers supplying direct, and third-party seller multi-homing across marketplaces.<sup>12</sup>

The focus of the ACCC's App Stores Report (released April 28, 2021) was on the distribution of mobile apps to users of smartphones and other mobile devices. The ACCC focused on the two key distribution channels for such apps (i.e. “app stores”) in Australia: Apple's “App Store” for mobile devices running Apple's operating system, “iOS”; and, Google's “Play Store” for mobile devices running Google's operating system, “Android.”

The ACCC's decision to focus on these app stores for its second DPSI report is no doubt related to the growing international attention they have received, particularly as a result of proceedings brought by Epic Games against Apple and Google in the United States<sup>13</sup> and the European Commission's investigation of complaints against Apple from a number of complainants, including Spotify, an unidentified e-book distributor, and an unidentified audiobook distributor.<sup>14</sup>

The concerns expressed by app developers like Epic Games and Spotify in these disputes and regulatory investigations, and those expressed by app developers in submissions responding to the ACCC's App Store Issues Paper relate to a variety of issues. A key concern is Apple and Google's requirements that apps offering “digital goods and services”

use only Apple or Google's respective in-app purchase (“IAP”) systems and pay a 30 percent commission on every transaction. This article will focus on this concern.

### **A. The ACCC's Findings**

The ACCC made a number of important findings which appeared broadly consistent with concerns expressed by stakeholders.

#### *Competition Assessment and Market Power*

While the ACCC did not formally define the markets in which the App Store and Play Store participate, it concluded that Apple and Google each have “*significant market power*” in the supply of **mobile operating systems** and **mobile app distribution** in Australia.<sup>15</sup> Interestingly, the ACCC did not use the phrase “substantial market power” in its findings, which is a threshold requirement for establishing whether a company has contravened Australia's prohibition on misuses of market power.<sup>16</sup> It is unclear why the ACCC avoided engaging the language of the statutory prohibition in its findings here, though it may be that the ACCC is exercising caution and not revealing its hand too soon.

The ACCC also considered that the two app stores were “effectively isolated” from competition.<sup>17</sup> While the App Store and Play Store place some constraint on each other, the ACCC found that this constraint is limited, for example, by high user switching costs, the tendency of users to single-home, and because both app stores are “must haves” for app

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<sup>12</sup> App Stores Report. Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2021-interim-report>.

<sup>13</sup> 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. See: *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>14</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>15</sup> App Stores Report, pp 4 and 43.

<sup>16</sup> See s 46, *Competition and Consumer Act 2010* (Cth).

<sup>17</sup> App Stores Report, p 5.

developers.<sup>18</sup> The ACCC also recognized that there were no alternatives to the App Store for iOS devices and it did not consider alternative Android app stores as significant constraints on the Play Store (particularly given the Play Store's pre-installation on Android devices).<sup>19</sup>

### *Terms and Conditions of Access to the App Stores*

The ACCC found that Apple and Google were “gatekeepers” for their respective app stores, and as such they have the power to set, amend and enforce their app store terms and conditions on a “take it or leave it” basis.<sup>20</sup> The ACCC considered that while some of these terms seek to promote and maintain the quality and safety of apps, there are also issues with their implementation.<sup>21</sup> In particular, the ACCC noted that businesses whose products or services are not clearly defined within the terms set by digital platforms face risks and uncertainties which may lead to inefficient investment decisions and unduly restrict or prevent the emergence of alternative business models.<sup>22</sup>

The ACCC noted that the need to protect users and the stability, performance and integrity of Apple and Google's respective operating systems did not negate the need for fair and reasonable terms and timely processes.<sup>23</sup> It referred to broad concerns expressed by app developers that challenging an app review process (whereby Apple or Google approve new apps or app updates for distribution on their app stores) was like “navigating a black box,” and to the desire of app developers for

transparent dispute resolution mechanisms.<sup>24</sup>

### *Mandatory IAP Requirements and 30 Percent Commissions*

In announcing the release of the App Stores Report, ACCC Chair Rod Sims said “*the ACCC is also concerned with restrictions imposed by Apple and Google which mean developers have no choice but to use Apple and Google's own payment systems for any in-app purchases.*”<sup>25</sup> The requirement for apps to use Apple and Google's mandatory IAP systems depends on whether the app is deemed to offer “digital goods and services” by Apple and Google. In this respect, the ACCC highlighted the “*discretion exercised by both Apple and Google in how their terms and conditions are modified and applied.*”<sup>26</sup> This creates risk and uncertainty for businesses whose products or services are not clearly within the definitions set by Apple and Google.

The ACCC indicated that there were divergent views on the appropriateness of the level of the 30 percent commission charged by Apple and Google.<sup>27</sup> However the ACCC ultimately concluded that “... *it is highly likely that the commission rates are inflated by the market power that Apple and Google have...*”<sup>28</sup> The ACCC recognized that, irrespective of whether IAP fees were inflated, mandatory IAP requirements may impact downstream competition between apps that are subject to the requirement and apps that are not, including raising “... *costs for their* [Apple and

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<sup>18</sup> App Stores Report, pp 34 – 43.

<sup>19</sup> App Stores Report, pp 41-2.

<sup>20</sup> App Stores Report, p 81.

<sup>21</sup> App Stores Report, p 45.

<sup>22</sup> App Stores Report, p 48.

<sup>23</sup> App Stores Report, pp 5 – 6.

<sup>24</sup> App Stores Report, p 52.

<sup>25</sup> ACCC, Media Release “Dominance of Apple and Google's app stores impacting competition and consumers” (April 28, 2021).

Available at <https://www.accc.gov.au/media-release/dominance-of-apple-and-google%E2%80%99s-app-stores-impacting-competition-and-consumers>.

<sup>26</sup> App Stores Report, p 75, see also p 74.

<sup>27</sup> App Stores Report, p 71.

<sup>28</sup> App Stores Report, p 72.

Google's] *rivals*.”<sup>29</sup> However, the ACCC said that it was difficult to determine how inflated these commissions were, including because charges for the use of a mobile ecosystem are not directly cost-based and costs may be common to the range of ecosystem-wide services supplied (e.g. cost of developing and maintaining the mobile operating system).<sup>30</sup>

The ACCC did not ultimately recommend that Apple or Google be precluded from imposing the mandatory use of their IAP systems at this stage. It found that the benefits and risks of such action (e.g. the impact of Apple/Google imposing alternative fee structures in response) required further analysis and industry consultation.<sup>31</sup> It did note, however, that removing mandatory IAP requirements would “*allow app developers to offer consumers alternative methods to pay for goods and services, including potentially cheaper prices*.”<sup>32</sup>

### *Search, Discovery, and Display of Apps*

The ACCC found a number of instances where the systems for prioritization of apps in search and discovery rankings were unclear. In particular, the ACCC said that Apple and Google's app stores appear to prioritize apps which offer in-app payments, presumably because Apple and Google gain commissions from the use of those apps.<sup>33</sup> The ACCC also referred to studies by the Wall Street Journal and New York Times to suggest that Apple's App Store search algorithm may have systematically ranked Apple's own apps more favorably than competitors'.<sup>34</sup> Finally, the ACCC found that users were unable to leave

written reviews or rate first-party Apple apps on the App Store,<sup>35</sup> which likely impacts these apps' rankings in app store search results.

In relation to the display of apps, the ACCC noted that pre-installed apps tend to be placed in highly visible locations on iOS and Android device displays and may also be set as default apps. It said this can heighten barriers to entry and expansion in downstream app markets.<sup>36</sup>

### *Data*

Finally, the ACCC expressed concerns that Apple and Google have the ability and incentive to use information gathered from apps to gain a competitive insight into rival apps' businesses, in order to assist their own strategic or commercial decisions regarding app development.<sup>37</sup>

### ***B. The ACCC's Recommendations***

The ACCC did not at this stage propose any Government or regulatory intervention as it did with respect to the Media Bargaining Code of Conduct in the DPI Final Report.

Instead, the ACCC proposed six “potential measures” that could be implemented by Apple and Google in response to the concerns identified in the App Stores Report. The ACCC said that “*regulation may be required*” if Apple and Google fail to implement these potential measures.<sup>38</sup> The ACCC also said that it would revisit app store-related concerns during the course of the five-year DPSI and would take into account steps taken by Apple and Google to address them.<sup>39</sup>

The potential measures for Apple and Google

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<sup>29</sup> App Stores Report, pp 63, 73 and 76.

<sup>30</sup> App Stores Report, p 72.

<sup>31</sup> App Stores Report, pp 78-9.

<sup>32</sup> App Stores Report, p 78.

<sup>33</sup> App Stores Report, section 5.3.2.

<sup>34</sup> App Stores Report, p 92.

<sup>35</sup> App Stores Report, pp 94-5.

<sup>36</sup> App Stores Report, p 103.

<sup>37</sup> App Stores Report, p 130.

<sup>38</sup> App Stores Report, p 3.

<sup>39</sup> App Stores Report, p 13.

include:

1. Allowing developers to **provide users with information about alternative payment options** off-app to address inadequate payment option information and limitations on developers.<sup>40</sup>
2. Providing **greater transparency about key algorithms and processes determining discoverability** to enable app developers to adapt in a timely way – this will increase transparency and address the risk of self-preferencing in app discoverability and display.<sup>41</sup>
3. Providing consumers with **an option to rate and write reviews on all apps**, including first-party apps – this will enable third party apps to compete on their merits with first-party apps.<sup>42</sup>
4. Providing consumers with the **ability to choose default apps and to change pre-installed apps** that are not a core feature – this will “... *promote more robust competition in downstream markets for apps.*”<sup>43</sup> The ACCC will also be exploring this issue with respect to default search engines and browsers through its next DPSI report (see Section III below).
5. **Information collected by Apple and Google through their position as app store operators being ring-fenced** from their other operations and decisions to minimize the risk the information being used to gain an unfair competitive advantage.<sup>44</sup>

The ACCC appears at this stage to be taking a “wait and see” approach to the issues it identified in the App Stores Report. Unlike the

DPI Final Report, the ACCC has not yet proposed direct regulatory intervention in relation to app stores. The ACCC commented that it is “*considering the broader issues that arise when digital platforms occupy critical gatekeeper roles and at the same time compete with those businesses that rely on access...*”<sup>45</sup> Further, the ACCC noted that it is considering international regulatory developments, including “[t]he UK and EC draft proposals, as well as the reports which lead to these proposals, highlight the similarity of the issues across a range of gatekeeper platforms and services, including app marketplaces. The ACCC will continue to explore the issues highlighted here in relation to app marketplaces as well as in other digital platform markets through the course of the DPSI.”<sup>46</sup>

## II. The Forthcoming Third DPSI Report Regarding Choice Screens (due September 30, 2021)<sup>47</sup>

The focus of the ACCC's forthcoming third interim DPSI report is on the supply of web browsers and general search services to users (“Browser and Search Report”). The Browser and Search Report will also focus on the effectiveness of choice screens in facilitating competition and increasing consumer choice. A choice screen is effectively a pop-up display which enables users of a device to select a default web browser or search service from some, or all available providers on the market.

The ACCC's decision to focus on choice screens for web browser and search services for its third DPSI report relates to its recommendation in the original DPI Final

<sup>40</sup> See App Stores Report, Chapter 4.

<sup>41</sup> See App Stores Report, Chapter 5.

<sup>42</sup> See App Stores Report, Chapter 5.

<sup>43</sup> App Stores Report, p 14. See also Chapter 5.

<sup>44</sup> See App Stores Report, Chapter 7.

<sup>45</sup> See for example, App Stores Report, p 46, 56,

<sup>46</sup> App Stores Report, p 83.

<sup>47</sup> On March 11, 2021 the ACCC announced that it would prepare the Browser and Search Report as part of the DPSI. The ACCC is expected to issue this report to the Treasurer by September 30, 2021. See, ACCC, “Feedback sought on choice and competition in internet search and web browsers,” (March 11, 2021), available at <https://www.accc.gov.au/media-release/feedback-sought-on-choice-and-competition-in-internet-search-and-web-browsers>.

Report that:<sup>48</sup>

*Google should provide Australian users of Android devices with the same options being rolled out to existing Android users in Europe; that is, the ability to choose their default search engine and default internet browser from a number of options. If Google does not introduce similar options for Australian Android users by six months from the date of the Report, the ACCC will submit to the Government that it should consider compelling Google to offer this choice.*

In its December 2019 response to the DPI Final Report, the Australian Government asked the ACCC to monitor the rollout of the default internet browser and search services choice screen in Europe and report back in 2021.<sup>49</sup> Around two years have passed since the ACCC made its recommendation and Google has not yet introduced a similar choice screen option for its Australian users.

### **A. The Issues Paper**

To inform the Browser and Search Report, the ACCC released the “Choice Screen Issues Paper” seeking feedback from interested stakeholders to understand several key issues, including:

- how pre-installation or default settings can impact competition and consumer choice in the supply of web browsers and search services;<sup>50</sup>
- the effectiveness of the rollout of choice screens in Europe;<sup>51</sup> and
- whether there was another form of

intervention that may be implemented together with, or instead of choice screens that may facilitate competition and improve consumer choice. Examples include: restrictions on search services acquiring default positions, a requirement for Google to share click and query data with third-party search services, and mandating that Google and Bing provide syndicated search results on fair and reasonable terms.<sup>52</sup>

The ACCC's focus for this report is on desktop and mobile devices as these remain the primary way consumers access web browsers and search services.

A key aspect of the ACCC's Choice Screen Issues Paper is requesting information on the position of international competition regulators.<sup>53</sup> The ACCC is focusing on the European Commission's Google Android decision in 2018 which resulted in Google committing to the rollout of a choice screen.<sup>54</sup> This rollout has gone through various stages:

- The initial choice screen announced by Google was to be included on all existing and new Android devices and provide users with a choice of five browsers and five search services.<sup>55</sup>
- During the rollout, Google announced the choice screen would only be implemented on new Android devices, display four search services and no browsers. Additionally, search services would have to bid in an action for a place on the choice screen and pay a price to Google each time a user selects them from the choice screen.
- Google has recently announced it will expand the choice screen to include more

<sup>48</sup> DPI Final Report, recommendation 3, available at [https://www.accc.gov.au/system/files/Digital\\_platforms\\_inquiry\\_-\\_final\\_report.pdf](https://www.accc.gov.au/system/files/Digital_platforms_inquiry_-_final_report.pdf).

<sup>49</sup> Government Response, p 11, available at <https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf>.

<sup>50</sup> Choice Screen Issues Paper, pp 18- 19.

<sup>51</sup> Choice Screen Issues Paper p 18, 21 – 22.

<sup>52</sup> Choice Screen Issues Paper, p 22 – 23.

<sup>53</sup> Choice Screen Issues Paper, pp 12 – 16.

<sup>54</sup> European Commission, *Google Android* Case AT.40099, available at [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40099/40099\\_9993\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf).

<sup>55</sup> K Walker, Google, Supporting choice and competition in Europe, 19 March 2019, accessed 28 January 2021. Available at <https://blog.google/around-the-globe/google-europe/supporting-choice-and-competition-europe/>.

search services and make participation free for eligible providers.<sup>56</sup>

## **B. The Submissions in Response**

The ACCC received a number of submissions in response to the Choice Screen Issues Paper.<sup>57</sup> These are summarized according to key themes below.

### *Network Effects*

A major theme of submissions is the role of scale in driving network effects in search services and web browsers, and how a choice screen may address those impacts.

Microsoft and Mozilla both argue that scale plays a large role in driving network effects across search services and web browsers, which may be further amplified by customer inertia or default settings.<sup>58</sup> In particular, they argue that scale drives network effects in the following ways:

- **Search services:** users are attracted to general search services with more users as the algorithms learn faster and generally provide better quality results. The scale of consumers then attracts advertisers as they generally receive a better return on their campaign investments as the algorithms are better at ad matching. The presence of advertisers then incentivizes browsers to set default general search services that monetize the best and share advertising revenue.<sup>59</sup>
- **Web browsers:** developers are more likely to spend time and money developing websites that are compatible with the underlying code of a dominant web browser

as it has the most user traffic. In turn, users are attracted to web browsers with the most compatible websites as they are less likely to break, load faster, and are more secure.<sup>60</sup>

However, Google submitted that the implementation of choice screens or any other regulatory measure is unnecessary as the popularity of its search engine and browser does not reflect a market failure, but rather the superior quality of its offering which makes it the preferred search service for most consumers.<sup>61</sup>

### *Choice Screen Efficacy*

Google submitted that the European Commission's decision on Google Android does not support the need for a choice screen in Australia. Google argued that a key element of the European Commission's decision was that Android and iOS do not compete. This, it argues, contradicts previous statements made by the ACCC that Android does face competition from iOS in Australia. While the ACCC acknowledged a level of competition *between* Apple and Google to attract consumers to their respective mobile ecosystems, the ACCC also acknowledged that measures may be required to increase competition *within* their respective mobile ecosystems.<sup>62</sup>

In contrast, the majority of non-Google submissions agreed that choice screens can be a beneficial tool to facilitate competition.<sup>63</sup> However, these submissions also considered that choice screens are unlikely to be effective on their own because the Australian markets for both search services and web browsers have

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<sup>56</sup> O Bethell, Google, Changes to the Android Choice Screen in Europe, 8 June 2021, accessed 20 June 2021. Available at <https://blog.google/around-the-globe/google-europe/changes-android-choice-screen-europe/>.

<sup>57</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>58</sup> Microsoft submission, p 2.

<sup>59</sup> Microsoft submission, pp 3 – 4.

<sup>60</sup> Mozilla submission, p 6.

<sup>61</sup> Google submission, pp 3 - 5.

<sup>62</sup> App stores report, p 5.

<sup>63</sup> Mozilla submission, pp 13-14; DuckDuckGo submission, p 1; Ecosia submission, p 7; Matt Stoller submission, p 1.



arguably already reached their tipping point due to the network effects outlined above (see by comparison the Russian case study below).<sup>64</sup>

### *Russian Case Study on Scale and Choice Screen Efficacy*

In the Choice Screens Issues Paper, the ACCC reiterated its conclusion in the DPI Final Report that offering a choice screen may address customer inertia and the effect of default settings as a barrier to expansion for search engine suppliers and internet browsers.<sup>65</sup> To support this conclusion, the ACCC noted that Google had previously introduced a choice screen in Russia following a decision by the Russian Federal Antimonopoly Service that Google restricted competition through mandatory pre-installation and preferential placement on device home screens.<sup>66</sup>

A number of the submissions to the ACCC's Choice Screen Issues Paper referenced the effective implementation of this choice screen in Russia.<sup>67</sup> One submission pointed to a report by the UK's Competition and Markets Authority which evidenced the consistent growth in Russian search engine Yandex's market share since the implementation of a choice screen, surpassing Google in January 2019.<sup>68</sup> However, Microsoft noted that at the time the choice screen was implemented in Russia, Yandex had over 30 percent market share. This meant it was arguably not too far behind Google in scale, and had sufficient brand recognition among users, which made the choice screen approach more effective than it

might be in other contexts where the market has already reached its tipping point.

### *Additional Design Features of Choice Screens*

DuckDuckGo's submission, while broadly supportive of the ACCC's proposal to implement a choice screen, went further by proposing its own design.<sup>69</sup> DuckDuckGo's choice screen design increases the number of search services displayed on the choice screen and includes a short promotional pitch from the search service.<sup>70</sup> DuckDuckGo used its choice screen design to research consumer switching and found 24 percent of consumers selected a Google alternative when presented with more options (compared to 3 percent of consumers that switched to a Google alternative under the current design).<sup>71</sup> Ecosia supported DuckDuckGo's design in its submission<sup>72</sup> and stated that it considers DuckDuckGo's design proposal to have been widely endorsed by alternative search providers and academics.<sup>73</sup>

Microsoft also included a number of features that it considers critical to making a choice screen effective. These include, among other things, presenting the choice screen on all new and existing devices, listing competitors in an objectively randomized order, and removing the option for users to dismiss the screen.<sup>74</sup>

### *Additional Regulatory Actions Beyond Choice Screens*

A number of submissions put forward proposals for what further regulatory tools or

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<sup>64</sup> See e.g. Australian Communications Consumer Action Network submission, p 2; Centre for Responsible Technology submission pp 5-6.

<sup>65</sup> DPI Final Report, p 114.

<sup>66</sup> DPI Final Report, p 114.

<sup>67</sup> Matt Stoller submission, 'How Russia Defeated Google's Monopoly'; DuckDuckGo submission, p 5; Ecosia submission, p 2; Microsoft submission pp 6 – 7.

<sup>68</sup> CMA Report, Appendix V, paragraph 44.

<sup>69</sup> DuckDuckGo submission, p 1; Ecosia submission, p 7.

<sup>70</sup> DuckDuckGo blog post, available at: <https://spreadprivacy.com/search-preference-menu-design/>; DuckDuckGo submission, p 9.

<sup>71</sup> DuckDuckGo blog post, available at: <https://spreadprivacy.com/search-preference-menus-scrolling/>.

<sup>72</sup> Ecosia submission, p 7.

<sup>73</sup> Ecosia submission, p 7.

<sup>74</sup> Microsoft submission, p 8.

actions they felt were required to facilitate competition between browsers and search engines. These include providing consumers with accessible information about their choices and offering them greater control over the selection of alternative browsers and search engines,<sup>75</sup> introducing data portability and interoperability standards that promote web compatibility and address information asymmetries in data driven markets,<sup>76</sup> and considering further intervention if a breach of Australian competition law is found, such as self-preferencing.<sup>77</sup>

### ***C. What to expect from the ACCC***

It remains to be seen what the ACCC's response will be to the views canvassed in response to its Choice Screen Issues Paper and the concerns raised by alternative web browser and search engine providers. While the ACCC has not yet proposed any direct government or ACCC intervention in relation to app stores, it may be more likely to do so in its forthcoming Browser and Search Report given it already recommended in 2019 that Google implement choice screens in Australia. However, we have likely also not seen the final word on app stores and the ACCC may be considering broader digital regulatory reform.

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<sup>75</sup> ACCAN submission, p 2; Mozilla submission, pp 13 – 14.

<sup>76</sup> QUT Digital Media Research centre submission, p 2; Mozilla submission, pp 13 – 14.

<sup>77</sup> Centre for Responsible Technology, p 9; Mozilla submission, pp 13 – 14.