

The ACCC's Ongoing Digital Platforms Inquiry: Choice Screens and the ACCC's Plan for an *Ex Ante* Regime for Digital Platforms

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I. Introduction

This piece builds on our previous articles² 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").³ The DPSI follows the ACCC's original Digital Platforms Inquiry Final Report ("DPI Final Report"), released in July 2019.⁴ 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 2025.⁵ The services which the ACCC may hold inquiries in relation to including digital platform services, as well as digital advertising services and data services provided by digital platform service providers.⁶ 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.⁷

Our previous work considered the ACCC's findings in its second DPSI interim report on app stores ("App Stores Report"),⁸ as well as the key

concerns identified in the ACCC's issues paper and public submissions for the third DPSI interim report covering choice screens in search services and default browsers ("Browser and Search *Issues Paper*").⁹

The ACCC has also announced its intention to consult on a broader *ex ante* regulatory framework as the focus of its fifth DPSI interim report (to be released in September 2022).¹⁰ As part of this DPSI the ACCC will examine whether there is a need for sector-specific regulation to address the issues identified by the ACCC in the course of the DPSI and its concurrent Digital Advertising Services Inquiry (DASI).¹¹

This article summarises the key findings released by the ACCC in its third DPSI interim report on the effectiveness of choice screens in addressing the impact of pre-installation and default arrangements on competition and consumer

¹ Jacqueline Downes: Partner 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.

² 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/>; ; Jacqueline Downes, Felicity McMahon, William Georgiou and Melissa Camp, "The ACCC's Continued Digital Inquiry: App Stores and Choice Screens" (August 22, 2021). Available at <https://www.competitionpolicyinternational.com/the-acccs-continued-digital-inquiry-app-stores-and-choice-screens/>.

³ ACCC, "Digital Platform Services Inquiry 2020—2025." Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025>.

⁴ ACCC, "Digital Platforms Inquiry Final Report," (July 26, 2019) ("DPI Final Report"). Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

⁵ 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>.

⁶ *Ibid.* s 5(2).

⁷ *Ibid.* s 4.

⁸ 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>.

⁹ 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) ("Browser and Search Issues Paper"). Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/september-2021-interim-report>.

¹⁰ ACCC, "Digital Platform Services Inquiry – September 2022 interim report" ("*Ex ante* consultation"). Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/september-2022-interim-report>.

¹¹ ACCC, "Digital Advertising Services Inquiry – Final Report" (September 28, 2021). Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry/final-report>.

choice related to the supply of web browsers and general search services.¹²

II. Third Interim Report Regarding Browser and Search Services

The focus of the ACCC's Browser and Search Report (released October 28, 2021) was on pre-installation and default arrangements in the supply of web browsers and general search services. The ACCC's report is centered around two key issues: how vertical integration of operating systems, web browsers and search engines limits competition in the supply of search engine services, and how that limited competition may harm consumers.

The ACCC's decision to focus on these issues for its third DPSI report follows its recommendation in the June 2019 DPI Final Report. There, the ACCC recommended that Google introduce a choice screen for Australian Android users similar to the choice screen rolled out to existing Android users in Europe.¹³ Following the release of the DPI Final Report, the Federal Government directed the ACCC to monitor the rollout of the Android choice screen in Europe and report back in 2021.¹⁴ The ACCC's Browser and Search Report revisits this recommendation and provides advice to the Government on Google's rollout of a search engine choice screen on new Android devices in Europe. In particular, the ACCC advised against implementing a choice screen in Australia that is similar to that in Europe, instead recommending that consultation with industry participants and consumers should be undertaken to ensure the efficacy of any choice screen introduced in Australia. The ACCC's recommendations are discussed in more detail below.

The key concern expressed by respondents to the Browser and Search Issues Paper relates to the role of scale in driving network effects in search services and web browsers, and how a choice screen may address those impacts. Another key concern expressed by respondents is potential consumer harms flowing from pre-installation and default settings in relation to web browsers and search services on consumer devices. This part of the article will focus on these concerns.

A. The Issues Paper and Submissions in Response

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;¹⁵
- the effectiveness of the rollout of choice screens in Europe;¹⁶ 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.¹⁷

The ACCC received a number of submissions in response to the Browser and Search Issues Paper.¹⁸ The submissions contained a number of key themes, including the role of scale in driving

¹² ACCC, "Digital platform services inquiry Interim report No. 3 – Search defaults and choice screens" (published October 28, 2021) ("Browser and Search Report"). Available at <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2021-interim-report>.

¹³ DPI Final Report, Recommendation 3, p 30. C.

¹⁴ Australian Government, Treasury Department, "Government Response and Implementation Roadmap for the Digital Platforms Inquiry" (published December 12, 2019). Available at: <https://treasury.gov.au/publication/p2019-41708>.

¹⁵ Browser and Search Issues Paper, pp 18- 19.

¹⁶ *Ibid.* pp 18, 21 – 22.

¹⁷ *Ibid.* pp 22 – 23.

¹⁸ All submissions available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2021-interim-report>.

network effects in search services and web browsers, the efficacy of choice screens in other jurisdictions, and potential additional regulatory tools that the ACCC should consider introducing to promote competition in search services and web browsers. A detailed summary of the submissions responding to the Browser and Search Issues Paper can be found in our previous article.¹⁹

B. 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

The Browser and Search Report focuses on the market for the supply of search engine services in Australia, and its interplay with the market for the supply of search engine services with the market for supply of browser services and mobile operating systems in Australia. The ACCC considered that the key avenues for consumers to access search engine services is through browsers on mobile and desktop devices, or through search access points like apps or widgets on mobile operating systems.²⁰

Currently, the markets for the supply of browser services and mobile operating systems are concentrated between Google (through its Chrome browser and Android mobile operating system) and Apple (through its Safari browser and Apple iOS mobile operating system).²¹ Google occupied the position of pre-set default search engine on the majority of web browsers and other search access points on mobile operating systems. The Browser and Search Report considered that Google's position as the pre-set default search engine on the majority of

web browsers and search access points was due to its:

- vertical integration with Google Chrome and the Android operating system;
- commercial arrangements with competing web browsers including Apple Safari; and
- commercial arrangements with other OEMs that use the Android operating system.

The ACCC found that when considered cumulatively, Google's vertical integration and commercial arrangements resulted in a limited ability for rival search engines to gain access to consumers through default arrangements with browsers or OEMs. In addition to its findings outlined above, the ACCC built on its previous findings in its DPI Final Report, DPSI First Interim Report on search engine services and the DPSI Second Interim Report on the supply of mobile operating systems and mobile app distribution to support its finding that Google is able to leverage its dominant position across multiple markets to foreclose access to important search access points for rival search engines.²²

The ACCC concluded that Google has 'significant market power' in the market for the supply of search engine services.²³ 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.²⁴ The ACCC took a similar approach in the App Stores Report where it concluded that Apple and Google each have 'significant market power' in the supply of mobile operating systems and mobile app distribution in Australia,²⁵ but did not go so far as to conclude that they had 'substantial market power'. It remains unclear whether the ACCC has sought

¹⁹ Jacqueline Downes, Felicity McMahon, William Georgiou and Melissa Camp, "The ACCC's Continued Digital Inquiry: App Stores and Choice Screens" (August 22, 2021). Available at <https://www.competitionpolicyinternational.com/the-acccs-continued-digital-inquiry-app-stores-and-choice-screens/>.

²⁰ Browser and Search Report, p 27.

²¹ *Ibid.* p 23.

²² *Ibid.* p 21.

²³ DPI Final Report, p 65; ACCC, "Digital platform services inquiry Interim report No. 1" (September, 2020) ("Messaging Report"). Available at <https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Service%20Inquiry%20-%20September%202020%20interim%20report.pdf>.

²⁴ See s 46, *Competition and Consumer Act 2010* (Cth).

²⁵ App Stores Report, p 5.

to deliberately avoid using the language of the statutory prohibition in its DPSI findings to date.

Economies of Scale and Multi-sided Network Effects

The Browser and Search Report also assessed the how multi-sided nature of browser services and search engine services markets drive network effects. The ACCC considered that access to consumers is particularly important in these markets as they are subject to economies of scale and network effects.²⁶ The Browser and Search Report found that the multi-sided nature of search markets drives cross-side network effects.²⁷ This process occurs in a number of stages:

- Vertical integration of web browsers and search engines together with commercial arrangements for default status at key search access points provide certain search services with access to a large consumer base.
- The large scale of consumers on one side of the market attracts advertisers on the other side of the market as they generally receive a better return on their campaign investments.
- The presence of a large number of advertisers then incentivizes browsers to set default general search services that monetize the best so that they are able to negotiate a share of the advertising revenue.

The Browser and Search Report also found that economies of scale increase the amount of data available to search engines, allowing their search algorithms to learn faster and generally provide better quality results to consumers.²⁸ These cross-network effects demonstrate the importance of gaining access to consumers at key search access points on mobile operating systems and browsers as a mechanism to drive scale and compete effectively.

Impacts on Consumer Choice

²⁶ Browser and Search Report, p 68.

²⁷ *Ibid.* p 71.

²⁸ *Ibid.* p 89.

²⁹ *Ibid.* p 40.

³⁰ *Ibid.* p 102-103.

³¹ *Ibid.* p 40.

³² *Ibid.* p 43.

In addition to its competition assessment, the Browser and Search Report focused heavily on the potential consumer harms posed by lack of competition in search services. The ACCC considered there may be benefits to pre-installation and default settings for consumers in some instances, however there were also issues with their implementation.²⁹ In particular, the ACCC found that default bias and consumer inertia result in many consumers remaining with their pre-installed browser or default search engine as those consumers may face switching costs such as time taken to research alternative suppliers or learning how to switch to an alternative supplier.³⁰

The Browser and Search Report also considered that information asymmetries between the suppliers of mobile operating systems, browsers and search engine services and consumers may also lead consumers to remain with their pre-installed browser or default search engine as they either lack the technical know-how to switch their browser and/or search engine, or are not aware of alternative suppliers to switch to.³¹ The ACCC considered that the result of this was a lack of meaningful choice for consumers about their browser or search engine, which may result in them remaining with services that offer weaker privacy protections or less innovative offerings than what may otherwise be available to that consumer.³²

Choice Architecture and Dark Patterns

The Browser and Search Report also focused on the use of choice architecture (i.e. the design of the entirety of a display screen) and dark patterns (i.e. the design of user interfaces that appeals to certain behavioral biases) by mobile operating systems, browsers and search engine services to prevent consumer switching. The ACCC considered that choice architecture and dark patterns may impact individual autonomy and be used to limit consumer choice by suggesting

consumers make certain choices or by obscuring available choices to make it difficult for consumers to exercise their choice.³³

The Browser and Search Report is not the first time the ACCC has scrutinized choice architecture and dark patterns implemented in mobile operating systems, browsers and search engine services. In 2019, the ACCC commenced proceedings against Google alleging that it engaged in misleading conduct and made false or misleading representations to consumers for the way it presented information on its display regarding the collection, storage and use of users' personal location data.³⁴ The Federal Court of Australia found in favor of the ACCC.

Interestingly, at trial both the ACCC and Google relied heavily on expert evidence from economists specializing in behavioral economics to demonstrate how users' behavioral biases impact the way consumers navigate through relevant device displays.³⁵ The experts agreed that choice architecture can affect whether, how much and how carefully users will invest the effort to read and understand the content as well as affect the paths they will use to navigate through the screens.³⁶

Effectiveness of the EU Android Choice Screen

Finally, the Browser and Search Report analyzed the efficacy of the EU Android choice screen since its introduction in March 2020. The ACCC considered that there was a lack of any notable impact of the EU Android choice screen on market concentration in the European or the UK general search markets as:

- Google's commercial arrangements with other OEMs that use the Android operating system result in the pre-installed Google widget remaining on the device even when a consumer selects an alternative search engine from the choice screen;
- the choice screen currently only applies to new devices, meaning that Google retains its

pre-installed default status on all existing Android devices;

- the choice screen artificially limited the number of places on the choice screen to four, restricting the number of potential competitors to Google;
- Google required competitor search services to participate in an auction and pay to be displayed on the second iteration of its choice screen; and
- the use of nudges, negative choice architecture and dark patterns have limited consumer choice.

While the ACCC supported some of the features of the EU Android choice screen, it ultimately did not recommend that the Government roll out a similar choice screen in Australia. The ACCC instead considered that further consultation should be conducted to design and implement a more efficient choice screen in Australia. The details of this recommendation are set out below.

C. The ACCC's Recommendations

The ACCC proposed a range of regulatory solutions to address the issues identified in its Browser and Search Report.

Introduction of a Mandatory Choice Screen

In the Browser and Search Report, the ACCC reaffirmed its earlier recommendation from the DPI Final Report that Google introduce a choice screen in Australia, considering that a mandatory choice screen would address the impact of Google's vertical integration and commercial arrangements outlined above. The ACCC considered that before the choice screen is introduced it should be subject to consultation with industry participants and consumers to ensure its efficacy. While the ACCC only recommended that a choice screen be introduced on new and existing Android mobile devices, it recommended that it be empowered to mandate

³³ *Ibid.* p 64.

³⁴ *Australian Competition and Consumer Commission v. Google LLC* (No 2) [2021] FCA 367.

³⁵ *Australian Competition and Consumer Commission v. Google LLC* (No 2) [2021] FCA 367, [50].

³⁶ *Ibid.* para 62.

the implementation of a choice screen on other devices and operating systems in the future.

The ACCC showed support for certain choice screen features proposed by respondents to the Browser and Search Issues Paper, including:

- applicability to both new and existing Android mobile devices;
- ensuring the choices presented on the choice screen are in a randomized order to minimize the impact of the display on behavioral biases;
- an introductory screen including a statement to make it clear that the selection of a search engine is not binding and can be changed at any time;
- periodic display of the choice screen to provide consumers with an ongoing option to switch between search services; and
- removal of any nudging or dark patterns that may adversely affect consumer choice.

Search Sector-specific Regulation

Importantly, the ACCC recommended that it be given the power to implement sector-specific regulation beyond choice screens as required to address consumer harms and facilitate competition in search services. The ACCC considered that these measures would apply to a search engine provider who meets certain criteria and could include:

- restrictions on tying and bundling search services with other goods or services (e.g. web browser or operating system);
- paying for certain default positions;
- requirement to provide access to click-and-query data to competing search engines; or

- requirement to provide syndicated search results to competing search engines on fair, reasonable and non-discriminatory terms.

Digital Platform Markets Regulation

The ACCC notes the similarity of the issues raised in the Browser and Search Report with the issues identified by it across the DPI Final Report, previous DPSI interim reports on online search, social media and app marketplaces, and Digital Advertising Services Inquiry Final Report on digital advertising technology markets. The ACCC stated its intention to commence consultation on a broader regulatory framework to address issues across digital platform markets in early 2022 as part of the DPSI. The introduction of digital platform-specific rules would align Australia with other countries that have introduced, or are planning to introduce, digital platform-specific regulation.

D. What to Expect from the ACCC

As outlined in Part I above, the ACCC has signaled its intention to commence consultation on a broader regulatory framework to address issues across digital platform markets in early 2022 as part of the DPSI. The ACCC has announced that it will release a concepts paper in early 2022, which is likely to draw on elements from similar regulatory frameworks being proposed by international competition authorities. The introduction of digital platform-specific rules would align Australia with other countries that have introduced, or are planning to introduce, digital platform-specific regulation including the European Union's *Digital Markets Act*,³⁷ United Kingdom's Pro-competition regime for digital markets,³⁸ and the United States' *American Choice and Innovation Online Act*.³⁹

³⁷ European Commission, *Digital Markets Act*. Available at:

[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/0374\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/0374(COD)).

³⁸ UK Government, "A new pro-competition regime for digital markets – Consultation Document" (Published 20 July 2021). Available here: <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets>.

³⁹ *American Choice and Innovation Online Act*. Bill available <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>.