

The ACCC's Ongoing Digital Platforms Inquiry: Online Retail Marketplaces

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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 include 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 article considered the ACCC's findings 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 choice in the supply of web browsers and general search services (*Browser and Search Report*).⁸ Our earlier work considered the ACCC's findings in its second DPSI interim report on app stores,⁹ 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.¹⁰

This article provides a comprehensive overview of the fourth DPSI interim report covering the provision of general online marketplaces to consumers in Australia (*Online Marketplaces Issues Paper*).¹¹ First, this article summaries the

¹ Jacqueline Downes: Partner at Allens. Melissa Camp: Lawyer at Allens. Bella Cameron: 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 Jacqueline Downes and Melissa Camp, "The ACCC's Ongoing Digital Platforms Inquiry: Choice Screens and the ACCC's Plan for an Ex Ante Regime for Digital Platforms" (January 24, 2022). Available at https://www.competitionpolicyinternational.com/the-acccs-ongoing-digital-platforms-inquiry-choice-screens-online-retail-marketplaces-and-the-acccs-plan-for-an-ex-ante-regime-for-digital-platforms/?utm_source=CPI+Subscribers&utm_campaign=10bc6cacdc-EMAIL_CAMPAIGN_2022_01_24_10_27&utm_medium=email&utm_term=0_0ea61134a5-10bc6cacdc-236929961; 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/>; 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/>.

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. 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>.

⁹ ACCC, "Digital platform services inquiry Interim report No. 2 – App marketplaces" (published April 28, 2021) Available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2021-interim-report>.

¹⁰ 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>.

¹¹ ACCC, *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>.

key concerns identified in the ACCC's Online Marketplaces Issues Paper and the public submissions received in response to those concerns. This article then sets out the findings released by the ACCC in its third DPSI interim report on 28 April 2022 (**Online Marketplaces Report**).¹²

The ACCC has also released a consultation paper for its fifth DPSI interim report (to be released in September 2022) (**Ex-ante Consultation**).¹³ As part of the Ex-ante Consultation the ACCC will examine whether there is a need for upfront 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**).¹⁴

II. The Fourth DPSI Report Regarding Online Retail Marketplaces

The focus of the ACCC's fourth interim DPSI report is on general online retail marketplaces. The Online Marketplaces Report focuses on the current state of competition in the supply of online retail marketplaces, including how business users and consumers use these marketplaces and any relevant consumer protection issues.¹⁵

The ACCC's decision to focus on general online retail marketplaces for its fourth interim DPSI report is two-fold. First, the ACCC notes that it has received a number of concerns about the conduct of some marketplaces and the risk of harm to both sellers and consumers.¹⁶ Second, the ACCC considers that while no online marketplace currently holds a significant degree of market power in Australia, it is cognisant of potential future risks posed in these markets,

noting international regulatory investigations into certain marketplaces and their potential impact on consumers and the competitive process.¹⁷

A. The Issues Paper

To inform the Online Marketplaces Report, the ACCC released its issues paper on general online retail marketplaces (**Marketplaces Issues Paper**) seeking feedback from interested stakeholders to understand several key issues, including:

the current market structure and competitive conditions, including barriers to entry and expansion, the extent to which third-party sellers and consumers switch or concurrently use multiple marketplaces, and whether any online marketplaces are considered a 'must have';¹⁸

the relationship between online marketplaces and sellers, including the process for getting products listed or removed, how marketplaces determine the display of goods, the extent to which marketplaces collect and use seller data, and seller satisfaction with the complaint resolution process;¹⁹ and

the relationship between online marketplaces and consumers, including whether processes are sufficient to remove misleading and deceptive products or scams, consumer satisfaction with the complaint resolution process, and collection and use of consumer data.²⁰

B. The Submissions in Response

The ACCC received a number of submissions in response to the Marketplaces Issues Paper.²¹ These are summarised according to key themes below.

¹² ACCC, "Digital platform services inquiry Interim report No. 4 – [#].

¹³ 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>.

¹⁴ 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>.

¹⁵ ACCC, "Digital Platform Services Inquiry – March 2022 Report on general online retail marketplaces: Issues Paper July 2021" (July 22, 2021) (**Marketplaces Issue Paper**). Available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202022%20report%20-%20Issues%20paper.pdf>.

¹⁶ Marketplaces Issue Paper, p 2.

¹⁷ Ibid.

¹⁸ Marketplaces Issues Paper, p 11.

¹⁹ Marketplaces Issues Paper p 12–14.

²⁰ Marketplaces Issues Paper, p 15–16.

²¹ All submissions available at <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2022-interim-report>.

Network effects

A major theme of the submissions is how the multi-sided nature of online retail marketplaces drives network effects, and how this market structure benefits competition and consumers.

In the Marketplaces Issues Paper, the ACCC asserted that online retail marketplaces are multi-sided markets which compete with each other and physical retail businesses to attract both third-party sellers on one side of the platform, and consumers on the other.²² Submissions from key online marketplaces Amazon, eBay and Catch agreed with the ACCC's assertion, arguing that the market dynamic provides for significant competition between marketplaces as network effects drive expansion.²³ This is because customers are more likely to come to a marketplace with lots of sellers, and sellers are more likely to come to a marketplace with lots of customers.²⁴

However, unlike other digital markets examined by the ACCC in its DPSI to date, the network effects identified in online retail marketplaces do not appear to have resulted in any harm to the competitive process in Australia. Instead, network effects have provided online retail marketplaces with a strong economic and commercial incentive to provide tools and assistance to third-party sellers to enable them to manage and grow their businesses on the marketplace,²⁵ and to invest in a seamless customer experience and enhanced consumer protection to drive repeat visits to its websites and apps.²⁶

Barriers to entry and switching between retail channels

Another recurring theme through the submissions was the low nature of barriers to entry for online retail marketplaces and the retail sector more

broadly.²⁷ Submissions attribute low barriers to entry to decreasing technology costs, which provide new and existing retail businesses with a cost-effective way to enter the retail market and connect with consumers.²⁸

Technology has also reduced barriers to switching for third-party sellers, with the development of multi-channel listing software (eg, Shopify or Big Commerce) enabling sellers to manage product listings across multiple online retail marketplaces concurrently.²⁹ A number of submissions note that it is now very common for third-party sellers to be offering products on multiple retail marketplaces, online retail stores and physical retail stores to engage with customers,³⁰ suggesting that no one retail channel is a 'must have'. Kogan argues that the increased ability of retailers to pick and choose between a combination of channels provides sellers with an effective countervailing power, which prevents online retail marketplaces from engaging in anti-competitive behaviour.³¹

Kogan argues that in light of the above, the ACCC's focus should instead be on ensuring that incumbent brick-and-mortar retailers do not take steps to impede or hinder the development of online retail marketplaces.³² Kogan submits that it has faced substantial barriers to entry as an online retail marketplace as a result of several incumbent brick-and-mortar retail stores using their existing long-term relationships with certain sellers to prevent the supply of their products to competitors.³³ This is reinforced by the Asia Internet Coalition submission that considers to the extent that any competitors may have market power, it is likely to be incumbent brick-and-mortar retailers that have entrenched supply

²² Marketplaces Issues Paper, p 9.

²³ Amazon Australia submission, p 15; eBay submission, p 4; Catch submission, p 2-3.

²⁴ Amazon Australia submission, p 15; eBay submission, p 4; Catch submission, p 2-3.

²⁵ Amazon submission, p 2; Catch submission, p 3.

²⁶ Catch submission, p 2; Business Council of Australia submission, p 6.

²⁷ Amazon submission, p 1; Kogan submission, p 1; Business Council of Australia submission, p 6.

²⁸ Kogan submission, p 1; Amazon submission, p 4.

²⁹ Amazon submission, p 1; Business Council in Australia submission, p 2.

³⁰ Marketplaces Council, p 6; Asia Internet Coalition submission, p 2; Kogan submission, p 3; Amazon submission, p 4.

³¹ Kogan submission, p 7.

³² Kogan submission, p 4.

³³ Kogan submission, p 8.

arrangements, established brand recognition and extensive physical presence.³⁴

Collection and use of consumer data

Another key theme throughout the submissions was the collection and use of consumer data by online retail marketplaces.

Each of the main online retail marketplaces made submissions about their collection and use of consumer data, arguing that they collect and use consumer data to improve the operation of their marketplace by providing a personalised customer experience, publishing targeted advertising, facilitating product enhancements and recognising consumer preferences.³⁵ eBay and Catch also state that they share consumer data with third-parties in accordance with their respective privacy policies for advertising related purposes and in compliance with relevant privacy laws.³⁶ While Amazon states in its submission that it is not in the business of selling personal data,³⁷ the Australia Institute submits that Amazon has over 70 advertising and marketing companies who it shares consumer data with.³⁸

The majority of submissions argued that the ongoing collection and use of consumer data by online retail marketplaces is an ongoing concern to consumers.³⁹ While these submissions recognise that each respective online retail marketplace sets out its data collection and use activities in its respective privacy statement, they argue that the terms are typically burdensome for individual consumers to navigate and understand before being asked to provide their consent.⁴⁰ A number of submissions called for regulatory intervention such as purpose limitations that restrict unnecessary data capture,⁴¹ a

requirement to provide consumers with privacy terms that are clear, transparent and easily understandable,⁴² and establishes an opt-in regime instead of opt-out for cookies and other data collection.⁴³

Take-down algorithms and complaints handling

Amazon and eBay's respective submissions outlined the use of algorithms on their online retail marketplaces to proactively prevent the display of and removal of prohibited or counterfeit products, and identify bad actors that represent a potential risk to consumers.⁴⁴ However, a number of submissions from sellers and industry bodies considered that the use of algorithms are not always effective. Kathmandu and Arts Law submitted that despite the use of algorithms, third-party sellers can easily create a listing purporting to sell new items using a brands intellectual property, and online retail marketplaces provide little assistance to take these listings down.⁴⁵ On the other hand, the Small Business Commissioner argued that algorithms lack the sophistication to fully assess market conduct and may incorrectly exclude third-party sellers in situations where no breach of the online retail marketplace's terms and conditions have applied, or where there is genuine error that has not been adequately considered.⁴⁶

Submissions from both industry groups and government bodies noted that in both circumstances outlined above, third-party sellers have experienced difficulties communicating with online retail marketplaces to resolve their issue.⁴⁷ To address this issue, a number of submissions put forward proposals for an industry-led code of

³⁴ Asia Internet Coalition submission, p 3.

³⁵ Amazon submission, p 2; eBay submission, p 27; Catch submission, p 21; and Kogan submission, p 2.

³⁶ eBay submission, p 41; Catch submission, p 21.

³⁷ Amazon submission, p 13.

³⁸ Australia Institute submission, p 6.

³⁹ Consumer Policy Research Centre submission p4; Katharine Kemp submission, p 2; ACCAN submission, p 2; Australia Institute submission, p 5 - 6.

⁴⁰ Australia Institute submission, p 6; ACCAN submission, p 2; Consumer Policy Research Centre submission, p 4; Katharine Kemp submission, p 2.

⁴¹ Australia Institute submission, p 8; Katharine Kemp submission, p 4.

⁴² Australia institute submission, p 3; ACCAN submission, p 2;

⁴³ Katharine Kemp submission, p 6.

⁴⁴ Amazon submission, p 17; eBay submission, p 16; see also Marketplaces Council, p 30.

⁴⁵ Kathmandu submission, p 1; Arts Law submission, p 2.

⁴⁶ Small Business Commissioner submission, p 1.

⁴⁷ Small Business Commissioner submission, p 2; Telco Ombudsman submission, p 1; Marketplaces Council, p 23; Consumer Policy Research Centre submission, p 1.

practice for dispute resolution between sellers and online retail marketplaces to ensure the quick, transparent and efficient resolution of such issues.⁴⁸ The Small Business Commissioner submitted that such an effective dispute resolution process will become increasingly important as online retail marketplaces play an increasing role in retail markets.⁴⁹

III. Fourth Interim Report Regarding Online Retail Marketplaces

The ACCC's Online Marketplaces Report became publicly available on 28 April 2022.⁵⁰

A. The ACCC's Findings

The fourth DPSI interim report made a number of findings and recommendations in relation to the issues faced by consumers and sellers on online retail marketplaces, as well as economic considerations with the operation of these platforms generally.

Issues faced by consumers on online marketplaces

The report raised a number of consumer related concerns, including the following:

- The ACCC highlighted issues relating to the impact of display algorithms on consumer choice and transparency around these processes. The ACCC noted that the tools used by online marketplaces to display products can have a significant effect on what consumers view and purchase. Whilst there can be clear benefits for consumers in highlighting a small number of relevant products, it is not always clear to consumers why particular products are being shown to them in prominent positions in search results or highlighted in other ways.⁵¹

- In relation to ensuring consumers have appropriate redress from harmful products, the report noted that consumers must have adequate access to dispute resolution avenues.⁵²
- Under the topic of data collection and use, the ACCC noted that many consumers express strong preferences for limitations on the collection and use of their data and yet data practices of online marketplaces often do not align with these preferences.⁵³

Issues arising for sellers on online marketplaces

The report raised a number of concerns relating to sellers on online marketplaces, such as those stemming from the imbalance of bargaining power.⁵⁴ The ACCC's findings on this topic included the following:

- In relation to terms, conditions and fees, the ACCC noted that different sellers may receive different terms and conditions, and larger sellers are more likely to be able to negotiate these terms than smaller sellers. It was also noted that certain terms and conditions (eg, seller fees and pricing restriction) may adversely affect a sellers' ability to compete effectively.⁵⁵
- The report noted that prominence of products on a marketplace is critical to sellers and that a lack of transparency around the algorithms or processes that determine when and how a product is seen makes it more difficult for third-party sellers to improve their product offerings and compete with hybrid marketplaces.⁵⁶
- In relation to access to consumers and consumer data, the ACCC noted sellers' concerns about the imbalance between the consumer data collected by the marketplace

⁴⁸ Marketplaces Council, p 23; Business Council of Australia submission, p 6; Telco Ombudsman submission, p 1; Small Business Commissioner submission, p 2; Asia Internet Coalition submission, p 8.

⁴⁹ Small Business Commissioner submission, p 2.

⁵⁰ ACCC, 'Digital platform services inquiry - March 2022 interim report' (published April 28, 2022) (**Online Marketplaces Report**). Available at: <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-march-2022-interim-report>.

⁵¹ Online Marketplaces Report, p 3, 8, 23.

⁵² Online Marketplaces Report, p 4, 23.

⁵³ Online Marketplaces Report, p 23.

⁵⁴ Online Marketplaces Report, p 8, 53.

⁵⁵ Online Marketplaces Report, p 7, 54.

⁵⁶ Online Marketplaces Report, p 8, 53.

and the information that sellers are able to obtain. The ACCC commented that this disparity inhibits sellers from tailoring their product offerings to consumers and increases sellers' reliance on online marketplaces to reach the relevant consumers.⁵⁷

- The report also discussed the importance of sellers having adequate access to avenues to resolve disputes with the online marketplace and consumers.⁵⁸

Competition between online marketplaces

The report noted that Australian consumers have a number of alternatives to shopping on a given marketplace.⁵⁹ Further, the ACCC stated that information it had received indicated that barriers to entry for new online marketplaces are not insurmountable for some firms, particularly those with an existing physical or online presence.⁶⁰

In contrast to international jurisdictions, the ACCC currently does not consider any one marketplace to hold a dominant position in Australia. Notwithstanding this observation, the ACCC will continue to monitor the competition and concerns associated with online marketplaces, given the potential for these markets to tip to a dominant firm.⁶¹

Switching costs of sellers on online marketplaces

The ACCC noted that sellers may face significant costs when switching from an online marketplace to alternative channels, such as selling via one's own website or a physical store.⁶²

Network effects of online marketplaces

While acknowledging that network effects and data are important to the business models of online marketplaces and in driving expansion, the ACCC noted that these can also create challenges for sellers and potential new entrants. In addition, network effects mean there is the

potential for tipping in favour of a single dominant firm, although the ACCC noted this has not happened yet in Australia.⁶³

Concerns with hybrid marketplaces

The report noted that a key concern of the ACCC's in relation to hybrid marketplaces is the harms to competition that can stem from anti-competitive, preferential treatment of their own products over third-party products (through algorithms, policies, decision making or access to data).⁶⁴ Where a hybrid marketplace has a substantial degree of market power, they may have the ability or incentive to prevent or inhibit third party sellers from competing on their merits and lead to significant harms to competition.⁶⁵

The ACCC noted that information provided to it indicated that at least some hybrid marketplace algorithms give an additional 'boost' to products sold by the marketplace in search results.⁶⁶ In addition, the report noted that collection of data by hybrid marketplaces can raise concerns if that data is used by the marketplace to inform its own product development, pricing or marketing strategy, particularly where it does not provide third-party sellers with access to a similar data. Such conduct may also give rise to significant competition concerns if engaged in by a dominant provider.⁶⁷ Any preferential treatment does not currently result in extensive competitive detriments because of the alternatives that are available to sellers. Nevertheless, the ACCC remains concerned about the potential detriment to consumers.⁶⁸

B. The ACCC's Conclusions

The importance of display in shaping consumer choice

The ACCC noted that consumers need to be sufficiently well informed about how marketplace algorithms work and that online marketplaces

⁵⁷ Online Marketplaces Report, p 8.

⁵⁸ Online Marketplaces Report, p 53.

⁵⁹ Online Marketplaces Report, p 73.

⁶⁰ Online Marketplaces Report, p 78.

⁶¹ Online Marketplaces Report, p 11.

⁶² Online Marketplaces Report, p 73.

⁶³ Online Marketplaces Report, p 73-74.

⁶⁴ Online Marketplaces Report, p 73.

⁶⁵ Online Marketplaces Report, p 73.

⁶⁶ Online Marketplaces Report, p 9, 60.

⁶⁷ Online Marketplaces Report, p 10.

⁶⁸ Online Marketplaces Report, p 9-10, 73, 81.

should be more transparent about the factors that influence how prominently products are displayed. Further, online marketplaces should ensure that any two-price comparison pricing offers are accurate and clear.⁶⁹

The ACCC considers that online marketplaces should offer a greater level of protection for consumers given their control and involvement in transactions. The ACCC reiterated its support to implement measures which it believes will help address some of the consumer protection concerns, namely the introduction of a prohibition against unfair trading practices, a general safety provision and making unfair contract terms illegal.⁷⁰

The ACCC stated its support for consumers having adequate access to avenues for redress from harmful products. The regulator expressed its continued support for the introduction of minimum internal dispute resolution requirements and an ombudsman scheme.⁷¹

In addition, the ACCC recommended that consumers be given sufficient information and adequate control to allow them to make informed choices about what data is collected and used.⁷²

Issues arising for sellers on online marketplaces

In relation to term, conditions and fees, the ACCC recommended that fees should be transparent and advance notice should be given of any changes to those fees.⁷³

The ACCC also stated that an external dispute resolution mechanism (such as an ombudsman

scheme accompanying minimum requirements for internal dispute resolution) would assist sellers obtain that redress and help address some of the consequences of the imbalance in bargaining power between sellers and the online marketplace.⁷⁴

Hybrid marketplaces

In light of the ACCC's concerns regarding self-preferential treatment by hybrid marketplaces, the report recommended that operators fully inform consumers and third-party sellers when favourable treatment is being provided to an online marketplaces' own product.⁷⁵

Future of market growth

The ACCC considers the developments in online marketplaces should continue to be monitored and that mergers and acquisitions in this sector should be closely scrutinised.⁷⁶ To the extent that a new framework is developed to address competition concerns caused by digital platforms, the ACCC's is of the view that such a framework should be capable of applying to an online marketplace accordingly to its market power and / or strategic and gatekeeper position.⁷⁷

C. What to Expect From the ACCC

In terms of next steps, the ACCC is currently consulting on whether a new regulatory framework or tools are required. The ACCC will report to the Government in its next report on whether any law reform is required. The ACCC's next report is due in September 2022.

⁶⁹ Online Marketplaces Report, p 23.

⁷⁰ Online Marketplaces Report, p 5-6, 23.

⁷¹ Online Marketplaces Report, p 4-5, 9, 23, 52.

⁷² Online Marketplaces Report, p 5, 36.

⁷³ Online Marketplaces Report, p 8, 56-57.

⁷⁴ Online Marketplaces Report, p 53.

⁷⁵ Online Marketplaces Report, p 10.

⁷⁶ Online Marketplaces Report, p 83, 13.

⁷⁷ Online Marketplaces Report, p 73, 13.