Australia

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1. Introduction

The Australian competition-law regime is primarily governed by the Competition and Consumer Act 2010 (Cth) (CCA).[1] Australian competition law is enforced via public and private enforcement, with the Australian Competition and Consumer Commission (ACCC) as the public enforcer of federal competition and consumer laws.[2] The ACCC has investigative and information-gathering powers under Part XID of the CCA; it resolves matters either by administratively encouraging consultation or negotiation to settle disputes,[3] or via litigation. Nevertheless, with Australia being a common-law jurisdiction, only the court has the power to declare whether particular conduct contravenes the CCA and make findings of liability. The ACCC is empowered to institute proceedings in the court for the declaration of an infringement of the CCA and for the recovery of a pecuniary penalty on behalf of the Commonwealth and may apply for injunctions, damages and a range of orders.[4] The ACCC can also be instructed to conduct inquiries and can initiate studies of markets of its own accord.

Australia has been active with regards to competition law in the digital economy, with the ACCC entrusted to lead and overview several inquiries. This inquiry boom commenced with the ACCC being directed by the Treasurer to conduct the Digital Platforms Inquiry (DPI) on the 4th of December 2017.[5] The ACCC issued its final report on this matter on 26 July 2019 (DPI Final Report). The DPI has been followed by the Digital Advertising Services Inquiry (DASI) [6] and Digital Platform Services Inquiry (DPSI),[7] both announced in February 2020. While DASI's focus is specifically limited to the 'markets for the supply of digital advertising technology services

1 The Act was previously named the Trade Practices Act 1974 (Cth).

2 The ACCC was established by the Competition Policy Reform Act 1995 (Cth). It replaced the existing Trade Practices Commission.

3 See ACCC (2014) Compliance & enforcement policy, available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy. Accessed 10 September 2021.

4 See ss 76-77 of the CCA.

5 Some less significant studies were conducted prior to the DPI. In 2015, the ACCC commissioned a study on 'The Sharing Economy and the Competition and Consumer Act' (the 'Deloitte Study'): Deloitte Access Economics (2015) The sharing economy and the Competition and Consumer Act 2015, ACCC, available at https://www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf. Accessed 10 September 2021. Also, see discussions in Australian Government Productivity Commission, Digital Disruption: What do government need to do? 2016, p. 61, available at http://www.pc.gov.au/research/completed/digital-disruption. Accessed 10 September 2021; and also I. Harper, P. Anderson, S. McCluskey and M. O'Bryan QC (2015) Competition Policy Review: Final Report, 2015, p. 26, available at https://treasury.gov.au/publication/p2015-cpr-final-report Accessed 10 September 2021.

6 The final report due 31 August 2021.

7 The final report due 31 March 2025.

and digital advertising agency services',[8] the DPSI's scope is broad, covering digital platform services.[9] The DPSI will consist of a number of interim reports with scope for a new interim report being announced every 6 months in the period between 2020 and 2025. The ACCC's first DPSI interim report was published in September 2020 ('DPSI2020') and the second in March 2021 ('DPSI2021'). The DPSI2020 investigates 'competition and consumer issues associated with online private messaging services, updates previous findings reached by the ACCC as regards social media and online search services and also identifies some common concerns across different types of platforms',[10] while the DPSI2021 considers 'competition and consumer issues associated with the distribution of mobile apps to users of smartphones and other mobile devices'.[11]

The next interim report, which will examine 'the provision of web browsers and general search services to Australian consumers and the effectiveness of choice screens in facilitating competition and improving consumer choice', is due to be published at the end of September 2021.[12] The last interim review will analyse 'potential competition and consumer issues in the provision of general online retail marketplaces' and will be published in March 2022.[13]

Despite the broad title of the inquiry, 'Digital Platforms Inquiry', the DPI's scope was narrow and market-specific; it focused only on 'digital search engines, social media platforms and other digital content aggregation platforms … on the state of competition in media and advertising services markets'.[14] However, this narrow scope did not stop the ACCC from recommending an economy-wide application of some of the findings around privacy protection.[15] Indeed, a significant feature of the DPI is that it involved not only issues related to Australian competition and consumer laws, but also data and privacy protection, which are areas otherwise outside of the ACCC's authority, and their intersections. The DPI's scope reflects the ACCC's broad portfolio as well as its ability to incorporate public interest issues beyond its usual scope of competition and consumer laws.

Since the DPI Final Report, the ACCC has enacted a new Digital Platforms Branch (DPB) that overviews competition and consumer law issues arising from the digital economy, in particular digital platforms, thus proving that matters of the digital economy are one of the ACCC's current enforcement priorities.[16] The DPB monitors the activities of digital platforms, takes enforcement actions in that space and conducts inquiries, including the DASI and DPSI.

2. Platform

The term 'platform' is central when dealing with the digital economy. While Australia has yet to define the term in its legislation or cases,[17] the ACCC's view on this term is clear from the DPI Final Report, which contains a definition of the term for the purposes of the inquiry. The DPI Final Report refers to 'multi-sided platforms',

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[8] ACCC (2020) Issues Paper Ad Tech Inquiry, available at https://www.accc.gov.au/system/files/Ad%20tech%20inquiry%20-%20issues%20paper.pdf. Accessed 10 September 2021.

[9] See, ACCC (2020) Ministerial Direction 'Digital Platform services inquiry', available at https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/ministerial-direction. Accessed 10 September 2021.

[10] ACCC (2020) Digital Platform Services Inquiry: Interim 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. Accessed 10 September 2021.

[11] ACCC (2021) Digital Platform Services Inquiry: Interim Report No. 2, available at https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-march-2021-interim-report. Accessed 10 September 2021.

[12] ACCC (2021) September 2021 Interim Report, available at https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/september-2021-interim-report. Accessed 10 September 2021. Also highlights that the ACCC will provide 'its advice to the Australian Government on Google's rollout of search engine choice options on new Android devices in Europe.'

[13] ACCC (2021) March 2022 Interim Report https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/march-2022-interim-report. Accessed 10 September 2021.

[14] Ministerial Direction (2017) Inquiry into digital platforms, available at https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry/terms-of-reference. Accessed 10 September 2021

[15] See, DPI, pp. 452-453.

[16] ACCC (2020) ACCC 2020 Compliance and Enforcement Priorities, available at https://www.accc.gov.au/media-release/accc-2020-compliance-and-enforcement-priorities. Accessed 10 September 2021.

[17] A brief explanation of the term platform is contained in The *Corporations Act 2001* (Cth) s 9, which defines platforms to include 'a website or other electronic facility'.

which 'are applications that serve multiple groups of users at once, providing value to each group based on the presence of other users'.[18] It further explains that:

> The multiple sides of these platforms consist of groups of individuals who use the platforms for different reasons. For example, one side of a platform may consist of individuals who use its search services to find content or products, while another side may consist of businesses wanting to advertise to targeted groups of those individuals.[19]

For the purposes of the DPI, the ACCC considered and evaluated the meanings of three kinds of digital platforms: search engines, social media platforms and digital content aggregation platforms:

(i) Search engines: software systems designed to search for information on the World Wide Web, generally returning a curated, ranked set of links to content websites. Search engines operate in an automated fashion using sophisticated algorithms to collect information (commonly known as 'crawling') and to provide search results…

(ii) Social media platforms: online services that allow users to participate in social networking, communicate with other users, and share and consume content generated by other users (including professional publishers). Social media platforms generally display content for consumption as linear 'feeds', curated by algorithms or displayed chronologically… Platforms may also offer additional functions including instant messaging services.

(iii) Digital content aggregation platforms: online intermediaries that collect information from disparate sources and present them to consumers as a collated, curated product… Users may be able to customise, filter or search their aggregation results. Examples include Google News, Apple News, and Flipboard. [20]

The DPI did not include other digital platforms such as online shopping platforms, for instance Amazon.

The DPI Final Report explained that some of the digital platforms it examined also involved other services. In particular, the ACCC noted that Facebook offered online sales of goods and services while Google included services such as mapping, email and cloud storage.[21]

Despite specific challenges that 'two-sided platforms' can comprise for the purposes of the application of competition law, the ACCC has suggested that the existing Australian 'legislative framework has been sufficiently flexible to date in accommodating the consideration of two-sided platforms and the issues they create for market analyses'.[22] Indeed, the ACCC has already been considering the two-sided nature of online platforms and their implications when applying competition law, as was the case in the review of Expedia's proposed acquisition of Wotif in 2014.[23] Nevertheless, there is a current lack of cases to make any conclusion on those issues that the analysis of platforms can contain with regards to Australian competition law, especially the definition of the relevant market.

3. Relevant Market and Free Services

Market definition is essential to an assessment of whether or not competition provisions have been contravened under the CCA. For the CCA to effectively capture potential anticompetitive conduct occurring in the digital world it is essential to, amongst other things, acknowledge the existence of the relevant markets for free services. In the DPI, the ACCC expressed that free services can form relevant markets by referring to markets for supplying social media services and supplying general search services, arguing that Facebook and Google had significant market power in their respective markets.[24]

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18 DPI Final Report, p.41.

19 DPI Final Report, p.41.

20 DPI Final Report, p.41.

21 DPI Final Report, p.41.

22 OECD, 'Two-Sided Markets', Policy Roundtables, DAF/COMP(2009)20, 17 December 2009, p. 80.

23 ACCC Public Register (n.d.) Expedia Inc - proposed acquisition of Wotif.com Holdings Limited, available at http://registers.accc.gov.au/content/index.phtml/itemId/1182044/fromItemId/751046. Accessed 10 September 2021.

24 See, e.g. DPI, pp. 64, 77. The DPI did not provide a detailed analysis of setting these 'relevant markets'.

Whether free services can form relevant markets has not been tested by the courts as yet. In the case of *ASX v Pont Data,*[25] the court confirmed that the digital flow of information could constitute a relevant market. However, this market did not involve free services.

The CCA, especially in its definition of the market, does not preclude the courts from agreeing with the ACCC in this matter. A market is defined in Section 4E CCA as:

> a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, other otherwise competitive with, the first-mentioned goods or services.[26]

While the wording of the CCA definition of a market does not preclude the court from finding the existence of relevant markets for free services, its interpretation could impose a hurdle in that matter. In particular, the elaborated interpretation of Section 4E by the (then) Trade Practices Tribunal in the *QCMA* case in 1976,[27] which has been used extensively by the courts, involves references to price and/or profit in ways in which the market for free services does not fulfil.

This passage from *QCMA* states that the market is:

> the area of close competition between firms or ... the field of rivalry between them. ... Within the bounds of a market there is substitution—substitution between one product and another and between one source of supply and another, in response to *changing prices*. So a market is the field of actual and potential *transactions* between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient *price incentive* … in determining the outer boundaries of the market we ask a quite simple but fundamental question: if the firm were to 'give less and *charge more*' would there be, to put the matter colloquially, much of a reaction.[28]

A case which could potentially introduce some clarification in this matter is *Dialogue Consulting Pty Ltd v Instagram Inc & Ors*, filed at the Federal Court in April 2019, which revolves around the misuse of market power and unconscionable conduct.

4. Market Power and Data

One of the questions that arises regarding the digital economy is whether the collection and usage of data can be a relevant factor for evaluating market power. Most importantly, the assessment of market power is essential for reviews of mergers and acquisitions and as part of the consideration as to whether the misuse of market power provision, s 46 of the CCA, was contravened. The CCA provides some guidance on the assessment of market power with regards to misuse of market power in s 46(4). It states that:

(a) regard must be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
  (i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
  (ii) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market; and
(b) regard may be had to the power the body corporate or bodies corporate have in that market that results from:
  (i) any contracts, arrangements or understandings that the body corporate or bodies corporate have with another party or other parties; or
  (ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.

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[25] *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2*) (1990) 21 FCR 385, appealed (1991) 27 FCR 492; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 26, (1990) 27 FCR 460 at 486.

[26] Market is defined separately in relation to mergers as a market for goods or services in Australia, or a State, or a Territory or a region of Australia. Section 50(6) CCA.

[27] *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (QCMA) (1976) 8 ALR 481.

[28] *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (QCMA) (1976) 8 ALR 481, 518. (Emphasis added.)

Although s 46(4) does not directly refer to the collection of data as a potential factor for assessing market power, which is relevant to the digital markets, its wording does not preclude it either. *ASX v Pont Data* clarified that trading with and profiteering from digitalised information and its ownership could be important for determining the relevant market and market power. However, this case did not include the collection of 'free' data.

The ACCC considers dynamic market characteristics when making competition and market power assessments.[29] Nevertheless, it missed an opportunity to expand on these factors and update them with regards to the features of the digital economy in its non-binding Guidelines on Misuse of Market Power from 2018. [30] Instead, the ACCC referred to a regularly quoted case with regards to factors that can influence the degree of competitive constraint faced by a firm which are likely to be relevant to the ACCC's assessment of the existence of substantial market power. Those are, in particular, the structural factors as set out by the Tribunal in the 1976 *QCMA* decision:

(i) the number and size distribution of independent sellers, especially the degree of market concentration;
(ii) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
(iii) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
(iv) the character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration; and
(v) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.[31]

These factors focus on static market structures, which may not be as relevant for digital markets. Therefore, previous concerns that the current approach by the ACCC and courts to the assessment of market power continues to place too much reliance on static market definitions and existing levels of market concentration remain.[32] The ACCC's approach to the determination of market power, which focuses on static market structures and utilises the competitive restraints test as applied in *QCMA*, is also used in digital inquiries, including the most recent DPSI2020.[33]

While the 2018 Guidelines on Misuse of Market Power do not refer to data collection, the ACCC's view on data collection as being a relevant factor for assessing market power is obvious in the DPI Final Report, where the ACCC's view is in line with findings from other competition authorities such as the Bundeskartellamt. The ACCC argued in the DPI Final Report that large digital platforms, in particular Google and Facebook, possess significant market power due to a number of factors, one being their accumulation of users' data.[34] The ACCC found that they obtained the data not only directly and from other sites they operated (such as YouTube, Google Maps, Instagram, Messenger), but also from third party sites when users used Facebook's or Google's devices and advertising systems.[35]

5. Misuse of Market Power

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[29] For example, in relation to the review of Expedia's acquisition of Wotif [ACCC Public Register (n.d.) Expedia Inc - proposed acquisition of Wotif.com Holdings Limited, available at http://registers.accc.gov.au/content/index.phtml/itemId/1182044/fromItemId/751046. Accessed 10 September 2021.] the level and pace of dynamic change in the market was a key factor in the ACCC's decision not to challenge the acquisition.

[30] ACCC (2018) Guidelines on misuse of market power, available at https://www.accc.gov.au/publications/guidelines-on-misuse-of-market-power. Accessed 10 September 2021.

[31] *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (QCMA)* (1976) 8 ALR 481, 515[40]; (1976) ATPR 40–012, 17,24.

[32] I. Harper, P. Anderson, S. McCluskey and M. O'Brya QC (2015) Competition Policy Review: Final Report, available at https://treasury.gov.au/publication/p2015-cpr-final-report. Accessed 10 September 2021.

[33] See, e.g., pp 20-34, where the ACCC assesses key online private messaging services provided by Facebook and Apple using the competitive restraint test discussed in *QCMA*. Although the ACCC applies this 'static' approach, it acknowledges the dynamic nature of platform markets (see, p. 28).

[34] DPI Final Report, pp. 73, 84-85.

[35] DPI Final Report, pp. 73, 84-88. In terms of the extensiveness of the data, Facebook and Google are leading platforms in that sense in Australia, whereas other websites or publishers have not been able to collect such an extensive amount of data (see, p. 86).

When considering the various issues which appeared in the DPI and discussions held across the globe, including in the EU, with regards to competition law and the digital economy, misuse of market power (or, as a similar area of EU law calls it, 'abuse of dominant position') is an area of competition law which possesses various issues. These include not only the understandings and interpretations of the terms 'platform', 'market' and 'market power' but also the core element of what constitutes a misuse, in other words abuse, of market power.

The provision on the misuse of market power, s 46 of the CCA, was changed significantly in November 2017 to introduce an effect-based test. The provision now prohibits a corporation with substantial market power from engaging in conduct that has the purpose or effect of substantially lessening competition. Previously, the provision prohibited firms with a substantial degree of market power from *taking advantage* of their market power for an anticompetitive purpose, where these purposes included:

(i) eliminating or substantially damaging a competitor … in that or any other market;
(ii) preventing the entry of a person into that *or* any other market; or
(iii) deterring or preventing a person from engaging in competitive conduct *in that or any other market.*

The new provision, s 46, has not yet been tested thoroughly in court.[36] Both the new and old provisions on the misuse of market power prohibit only exclusionary conduct. Other forms of abuses, which are covered in the EU law on abuse of dominant position, in particular exploitative practices, are not dealt with under s 46 in Australia. However, some areas of Australian consumer law, such as unconscionable conduct, can be used to tackle other issues arising from a dominant position.

Interestingly, with regards to the DPI, the ACCC referred to 'special responsibility' in relation to the conduct of dominant digital platforms, in particular Google and Facebook, in the 'Introductory Overview' of the DPI Final Report.[37] This appears to be confusing considering that, unlike in EU competition law, neither the new nor the old provisions or the interpretation of s 46 by the courts refer to 'special responsibility' and thus special responsibility is not analysed when determining the existence of misuse of market power.

However, when looking at the potential issues the DPI Final Report identified with regards to practices conducted by Google and Facebook, it is obvious that the connotation of 'special responsibilities' was used analogously in order to reflect the ACCC's 'findings' that market power or the dominant position of a 'giant' digital platform can be 'misused' or 'abused' in a way which can contravene not only Australian competition law but also the Australian Consumer Law (ACL), which is Schedule 2 to the CCA. These issues are:

(i) whether access restrictions imposed by a digital platform on a third-party app developer raise issues under section 46 of the CCA
(ii) whether representations made by Google to some users about the control users have over Google's collection of location data, raise issues under the ACL
(iii) whether representations by Google about its privacy policy, and the level of disclosure about subsequent privacy policy changes that enabled Google to combine or match different sets of user data, raise issues under the ACL
(iv) whether representations made by Facebook (and/or its related entities) in relation to the nature of its services and the scope of its terms and conditions, including terms and conditions that allowed user data to be shared with third parties, raise issues under the ACL

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[36] However, in *Unlockd Limited v Google Asia Pacific Pte Limited* [2018] FCA 826, Unlockd, an advertising technology start-up, succeeded in obtaining interim injunctive relief against Google in circumstances where Unlockd claimed that Google had threatened to ban Unlockd's app from its Google Play Store in contravention of s 46. The Federal Court made interim orders preventing Google from proceeding with the ban, noting that the likely effect of excluding Unlockd from distributing its app through the Google Play Store would be that Unlockd would cease to exist as a business. Subsequently, Unlockd entered voluntary administration, blaming the dispute with Google, whereupon the action against Google was discontinued by the liquidators. In November 2019, media reports suggested that the ACCC was preparing to launch legal action against Google in relation to the demise of Unlockd, alleging a breach of s 46: see, P. Smith (2019) ACCC to sue Google over Unlockd, available at https://www.afr.com/technology/accc-to-sue-google-over-unlockd-20191030-p535u9. Accessed 10 September 2021. To date, the case has not been commenced.

[37] DPI Final Report, p.1.

(v) whether terms of use and privacy policies used by Facebook (and/or its related entities) contain unfair contract terms.[38]

In these potential issues only one is relevant to the misuse of market power, while four are covered by the ACL. It is interesting to note that some of these ACL issues would be covered by competition law in (some) EU countries, for instance Germany, and this, indeed, raises the question of the objects of competition law and consumer law when dealing with business behaviour in the digital world. This, in turn, also raises the question as to the role of a competition authority (and not the consumer one) in the digital economy.

Unlike many other competition regulators across the globe, the ACCC's remit encompasses competition law and consumer law. The ACCC considers the goals and functions of these two areas of law to be 'mutually-reinforcing'.[39] For its part, competition law facilitates competitive markets so as to increase consumer choice and enhance consumer welfare, while consumer law protects consumers' ability to make free and informed choices that maximise their own utility which, in turn, promotes competitive markets.[40]

The DPI Final Report noted that consumer transactions with digital platforms are impacted by significant information asymmetries and imbalances in bargaining power.[41] The former compromises the ability of consumers to make informed choices, the latter leaves consumers open to exploitation, and both can lead to market failure. It follows, therefore, that consumer law is as critical as competition law in addressing issues of market inefficiencies and market power arising in digital markets.[42]

5.1 Sector-Specific Regulation: Telecommunications Industry

The DPSI2020 identified a current trend on the part of large digital platforms to integrate vertically into the telecommunications supply chain.[43] This is an efficient strategy for these platforms, given their heavy reliance on telecommunications networks and corresponding incentive to ensure that telecommunications services are reliable and far-reaching.[44] It allows the platforms to achieve lower costs and greater control over the quality and capacity of telecommunications services.[45]

In Australia, the expansion by digital platforms into telecommunications infrastructure and companies raises the spectre of the sector-specific competition regulation that applies to the telecommunications industry. This operates alongside the general misuse of market power prohibition in s 46 CCA.

The sector-specific misuse of market power provision in Part XIB CCA, s 151AJ, applies to telecommunications carriers and carriage service providers only.[46] Section 151AJ – a variant of both the old and new s 46 – provides that a telecommunications carrier or carriage service provider that has a substantial degree of power in a telecommunications market is prohibited from taking advantage of that power with the effect or likely effect of substantially lessening competition in that or any other telecommunications market. Additionally, Part XIC CCA

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38 DPI Final Report, p. 38. Since the publication of the DPI Final Report, the ACCC initiated only one court proceeding, against Google, for misleading consumers on the collection and use of location data. ACCC (2019) Google allegedly misled consumers on collection and use of location data, available at https://www.accc.gov.au/media-release/google-allegedly-misled-consumers-on-collection-and-use-of-location-data. Accessed 10 September 2021.

39 DPI Final Report, pp. 139-140.

40 DPI Final Report, pp. 139-140.

41 DPI Final Report, p. 384.

42 DPI Final Report, pp. 139-140. In Australia, the ACL regulates the unilateral behaviour of all corporations in relation to how they deal with consumers and other businesses. The ACL prohibits misleading or deceptive conduct (Part 2-1), false or misleading representations (Part 3-1) and unconscionable conduct (Part 2-2), and provides for unfair contract terms in standard form consumer and small business contracts to be declared void and unenforceable (Part 2-3).

43 DPSI2020, p. 79.

44 DPSI2020, p. 80.

45 DPSI2020, p. 80.

46 In the Australian telecommunications industry, carriers operate the telecommunications facilities and infrastructure, and carriage service providers use carriers' facilities to provide telecommunication services to businesses and consumers. See, Department of Infrastructure, Transport, Regional Development and Communications (n.d.) A competitive telecommunications regime for Australia available at https://www.communications.gov.au/policy/policy-listing/competitive-telecommunications-regime-australia. Accessed 10 September 2021.

allows the ACCC to 'declare' a carriage service or service that facilitates the supply of a carriage service.[47] Once a service is declared, the carrier must allow carriage service providers to obtain access to the service.[48]

In terms of consumer protection, the telecommunications industry is well-served by the following three 'watchdogs'. First, the ACCC, which not only regulates telecommunications infrastructure and competition, but also enforces the ACL to protect consumers and businesses. Second, the Australian Communications and Media Authority (ACMA), which works closely with industry players to ensure that appropriate and active self-regulation is developed and compliance with relevant codes and standards is met.[49] Third, the Telecommunications Industry Ombudsman (TIO), which is a free service to consumers and small businesses that facilitates the resolution of minor disputes.[50]

Mindful no doubt of the role of the TIO, the ACCC's primary concern in the DPI was the absence of effective dispute resolution processes for consumers and businesses in their dealings with digital platforms.[51] The DPI Final Report recommended that the ACMA develop minimum internal dispute resolution standards to apply to those digital platforms that supply services in Australia and have over one million active users per month nationally.[52] At a minimum, these standards should require large digital platforms to comply with best-practice principles of internal dispute resolution design relating to visibility, accessibility, responsiveness, objectivity, confidentiality, accountability, collection of information, resourcing, no charging and continual improvement.[53]

In the event that complaints or disputes are not resolved internally, the DPI Final Report also recommended the establishment of an independent ombudsman scheme to resolve complaints and disputes between businesses and digital platforms, and consumers and digital platforms.[54] While the scope of the ombudsman scheme would be determined by the ACMA following broad consultation with relevant stakeholders, it was anticipated that the scheme would cover, at the least, the following matters: complaints or disputes from businesses relating to the purchase or performance of advertising services from digital platforms; and complaints or disputes from consumers, including in relation to scams and the removal of such content.[55] The ombudsman would have the power to compel information, make decisions that are binding on digital platforms, require digital platforms to take down scam content and order compensation in appropriate cases.[56] The ACCC considers that the TIO may be an appropriate body to implement the scheme and has asked the ACMA and the TIO to investigate the feasibility of the TIO taking on the role, before considering whether a standalone ombudsman should be created to resolve complaints about digital platforms.[57]

The Australian Government has expressed in-principle support for the above recommendations, but has also committed to developing a pilot external dispute resolution scheme in consultation with major digital platforms, consumer groups and relevant governmental agencies.[58] The outcomes of the pilot scheme, along with any parallel improvements in internal dispute resolution processes generally, will inform consideration of whether to establish a Digital Platforms Ombudsman to resolve complaints and disputes between digital platforms and the individual consumers and businesses using their services.

6. Acquisition of Market Power

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47 See CCA Part XIC, Division 2.

48 See CCA Part XIC, Division 4.

49 An example of one such code is the Telecommunications Consumer Protections Code, which includes standards for advertisements, contracts and billing: see, Australian Communications and Media Authority (2021) Telecommunications Consumer Protections Code, available at https://www.acma.gov.au/telecommunications-consumer-protection-code. Accessed 10 September 2021.

50 See, Telecommunications Industry Ombudsman (n.d.), available at https://www.tio.com.au/. Accessed 10 September 2021.

51 DPI Final Report, p. 507.

52 DPI Final Report, p. 509 (Recommendation 22). This recommendation was also endorsed in the DPSI2021, p. 12.

53 DPI Final Report, pp. 508-509.

54 DPI Final Report, p. 510 (Recommendation 23). This recommendation was also endorsed in the DPSI2021, p. 12.

55 DPI Final Report, pp. 509-510.

56 DPI Final Report, p 510.

57 DPI Final Report, p. 510.

58 Australian Treasury (2019) Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, available at https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf. Accessed 10 September 2021.

The processes whereby digital platforms may gain market power through mergers and acquisitions were the focus of specific scrutiny in the DPI.[59] The DPSI2020 pursued the theme, tying the expansion of digital platforms to concerns about the propensity of larger platforms to build 'ecosystems' of products and services that interoperate with each other.[60] While this practice may benefit consumers by allowing them to access multiple services on the same platform and enjoy improvements in product quality stemming from the bundling of hardware and software, it also has potential anticompetitive effects as rival platforms will need to incur significant costs and offer a greater range of services to attract consumers away from entrenched ecosystems.[61]

The current provision of the CCA dealing with mergers and acquisitions, s 50, sets out the legal test for considering a proposed acquisition of shares or assets. In general terms, s 50 CCA prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market. Concern was expressed in the DPI Final Report that acquisitions in digital markets, or acquisitions in markets involving emerging technologies, may have the effect or likely effect of substantially lessening competition if the transaction involves the acquisition of nascent competitors (i.e. start-ups) by established platforms, or the acquisition of any business with access to a large volume and scope of data or which otherwise collects and monetises data.[62]

The merger-law case, *Vodafone Hutchison*,[63] no doubt reinforced the ACCC's view that current merger laws are not effectively preventing the acquisition of new entrants by established firms.[64] In 2019, the ACCC opposed a proposed merger between TPG Telecom Ltd and Vodafone Hutchison Australia Pty Ltd largely on the basis that it would reduce competition and contestability in the market for mobile phone services.[65] However, Vodafone successfully applied for a declaration from the Federal Court that the merger would not be in breach of the CCA.[66]

Given the prevailing concerns, the DPI Final Report recommended amending s 50(3) CCA to include two additional factors that must be taken into account when assessing whether a proposed acquisition has the effect or likely effect of substantially lessening competition. These factors are: (i) the likelihood that the acquisition would result in the removal of a potential competitor; and (ii) the nature and significance of the assets, including data and technology, being acquired directly or through the body corporate.[67] There is no bar at present to considering these matters under s 50(3), as the list of factors currently set out therein is expressly non-exhaustive. However, the DPI Final Report cited the need to 'highlight the significance' of these two factors by articulating them in the CCA.[68]

While the two additional factors are intended to apply to all proposed acquisitions, not simply those involving digital platforms, they clearly reflect the ACCC's view that 'strategic' and 'killer' acquisitions by Google and Facebook have contributed to the market power these platforms currently hold.[69] They also speak to the ACCC's concern that, where a proposed acquisition will combine sets of data between the target and the acquirer, competitors may not be able to match the scale or scope of those combined data sets, which may then have the

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59 See DPI Final Report, p. 30 (Recommendations 1 and 2).

60 DPSI2020, p. 82.

61 DPSI2020, p. 85.

62 DPI Final Report, p. 105. This concern has been echoed by the UK, Australian and German competition authorities in a joint statement on the need for rigorous merger enforcement: see, Competition and Markets Authority, ACCC and Bundeskartellamt (2021) Joint statement on merger control enforcement, available at https://www.accc.gov.au/publications/joint-statement-on-merger-control-enforcement. Accessed 10 September 2021.

63 *Vodafone Hutchison Australia Pty Ltd v ACCC* [2020] FCA 117.

64 Indeed, in the DPI Final Report, the ACCC indicated that it may lobby for the introduction of a rebuttable presumption when it challenges an acquisition, such that the starting point for court proceedings is that the acquisition is presumed likely to substantially lessen competition, in the absence of clear and convincing evidence to the contrary: DPI Final Report, p. 105.

65 ACCC (2019) ACCC opposes TPG-Vodafone merger, available at https://www.accc.gov.au/media-release/accc-opposes-tpg-vodafone-merger. Accessed 10 September 2021.

66 *Vodafone Hutchison Australia Pty Ltd v ACCC* [2020] FCA 117.

67 DPI Final Report, p. 105 (Recommendation 1).

68 DPI Final Report, p. 106.

69 DPI Final Report, pp. 74-76 (Google) and 80-81 (Facebook). For clarity, a 'strategic' acquisition is an acquisition which benefits the acquiring digital platform through resulting advantages of scope and a reduction in potential competition. A commonly cited example is Facebook's acquisition of Instagram in 2012. A 'killer' acquisition is a specific type of strategic acquisition where the target is a smaller innovative company and the acquiring digital platform discontinues the target's innovative activities to eliminate potential rivalry: DPI Final Report, pp. 75, 105.

effect of raising barriers to entry or foreclosing access to markets.[70] The tension here is that it is often the precise goal of digital start-ups to be acquired by a large digital platform. If the founders/investors of the target company anticipate that it will be harder to sell their interest to a major platform, the recommendation could inadvertently dampen competition and innovation.[71]

The DPI Final Report also recommended that 'large' digital platforms agree to a notification protocol under which they would provide advance notice of any proposed acquisitions that could potentially impact competition in Australia. The protocol would specify the types of acquisitions requiring notification (including any threshold transaction value), and the minimum advance notification period to enable the ACCC to assess the proposed acquisition.[72] In effect, this recommendation would introduce a mandatory notification regime for 'large' digital platforms, principally Google and Facebook (as the ACCC has not clarified which other platforms are considered 'large'). As such, it represents a partial departure from Australia's current merger review process, which does not include mandatory notification. However, the ACCC already expects notification of all proposed acquisitions that it considers sensitive.[73] To this extent, the recommendation would simply codify and extend the notification commitment.

Overall, the DPI Final Report recommendations relating to mergers and acquisitions represent a shift towards increased scrutiny and intervention in relation to acquisitions in the digital/technology space. In December 2019, the Australian Government responded to these recommendations by committing to the introduction of a notification protocol and agreeing to undertake further public consultation on changes to s 50 CCA.[74] After twenty months of reflection, the ACCC has flagged the need for more sweeping merger reforms, including a proposal for 'a tailored test for acquisitions by certain digital platforms'.[75] According to the ACCC, the new test should be predicated on a lower probability of competitive harm than that which applies to acquisitions in the broader economy, and the application of this test to any given digital platform should depend on the size and scope of the platform's services in Australia and whether it acts as a 'gateway' in terms of controlling how other businesses interact with consumers.[76]

7. Consumer Protection

7.1 Data Collection

The collection and use of consumer data is central to the business model of most digital platforms and generally results in significant benefits to consumers, including improved services, new product recommendations and the provision of free content.[77] However, the DPI Final Report noted a general mismatch between the expectations of

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[70] DPI Final Report, p. 108. By way of example, on 18 June 2020, the ACCC released its Statement of Issues detailing its preliminary concerns about the proposed acquisition of Fitbit Inc, which is active in Australia via its subsidiary, Fitbit (Australia) Pty Ltd, by Google LLC (Google). In the ACCC's view, the proposed acquisition may provide Google with access to large volumes of consumer health data (in addition to the substantial amounts of individual user data already held by Google), further entrench Google's dominant position and adversely affect competition in several digital advertising and health markets. See, ACCC (2020) Statement of Issues: Google LLC – Proposed Acquisition of Fitbit Inc, available at https://www.accc.gov.au/system/files/public-registers/documents/Google%20Fitbit%20-%20Statement%20of%20Issues%20-%2018%20June%202020.pdf. Accessed 10 September 2021.

[71] Gilbert & Tobin (2020) Competition & Consumer Regulation: Review of 2019 & Insights for 2020, available at https://www.gtlaw.com.au/insights/australian-competition-consumer-law-insights-2020. Accessed 10 September 2021.

[72] DPI Final Report, p. 109 (Recommendation 2).

[73] ACCC (2017) Merger Guidelines, available at https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF. Accessed 10 September 2021.

[74] Australian Treasury (2019) Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, available at https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf. Accessed 10 September 2021.

[75] The ACCC's views have been expressed by its Chair: see, R. Sims (2021) Protecting and promoting competition in Australia, available at https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia. Accessed 10 September 2021.

[76] Ibid.

[77] See, R. Walters, B. Zeller and L. Trakman, Personal Data Law and Competition Law – Where is it Heading?, European Competition Law Review 2018(39), pp. 505-514.

consumers and the terms of their agreements with digital platforms regarding such matters as how much consumer data is collected by platforms,[78] how that data is used and the extent to which it is disclosed to third parties.[79]

The apparent disconnect between the privacy concerns expressed by consumers and their actual behaviour in continuing to deal with digital platforms on terms that do not prioritise privacy has been labelled the 'privacy paradox'.[80] However, this so-called 'paradox' ignores the fact that, in dealing with digital platforms, the typical consumer is disadvantaged by both a lack of bargaining power and acute information asymmetries.[81] The DPI Final Report emphasised that the ubiquity of digital platforms in the daily lives of consumers means that many have no real choice but to join or use these platforms and accept the terms of use offered.[82] Moreover, the terms often involve 'concealed data practices' – i.e. the extent of the terms and related data practices, and the consequences of those data practices, are hidden from consumers.[83]

The ACCC's review of digital platforms' terms and policies found the following practices to be commonplace:[84] terms are put forward on a take-it-or-leave-it basis; clickwrap agreements contain unobtrusive links to online documents that permit the collection, use and disclosure of extensive amounts of user data;[85] consents to the use of data are bundled across different uses and different services; and privacy policies are long, complex, vague and difficult to navigate.

The DPI Final Report and the DPSI2020 both affirmed that these practices leverage bargaining power imbalances between consumers and digital platforms, and deepen the information asymmetries between them.[86] Given the pervasiveness of data collection and use by both digital platforms and other businesses, and the consequential potential for significant detriment to consumers, it was deemed necessary to re-evaluate the current protections provided to consumers by the ACL in relation to these practices.[87]

7.2 ACL Provisions

In addition to its role as Australia's competition regulator, the ACCC has joint responsibility with state and territory consumer protection agencies for administering the ACL.

The DPI Final Report recognised that the ACL contains several effective tools for addressing digital platforms' practices (including 'concealed data practices') that give rise to consumer protection issues.[88] As is the case for all businesses subject to the ACL, digital platforms must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive,[89] or make false or misleading representations about their goods or services.[90] This includes, for example, incorrect or misleading statements about how user data is collected, used or shared.[91]

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78 Relevant here are developments in voice activated services, and augmented and virtual reality technology, which allow for more extensive data collection by digital platforms: DPSI2020, pp. 88, 99.

79 DPI Final Report, p. 448.

80 DPI Final Report, p. 384.

81 DPI Final Report, p. 448.

82 DPI Final Report, p. 400.

83 See, K. Kemp, Concealed Data Practices and Competition Law: Why Privacy Matters, August 7, 2019, available at https://www.competitionpolicyinternational.com/concealed-data-practices-and-competition-law-why-privacy-matters/. Accessed 10 September 2021.

84 See, DPI Final Report, pp. 400, 402. The DPSI2020 found these practices to be prevalent in the context of online messaging services as well: pp. 35-43.

85 This includes data practices of particular concern to consumers, such as location tracking, online tracking for targeted advertising purposes and disclosure of user data to third parties: DPI Final Report, p. 421. Similar concerns were noted in the DPSI2020: p. 50. The DPSI2020 also identified further potential for consumer harm arising from scams, prominence of non-organic search results, and price discrimination by online retailers: pp. 56, 62, 100.

86 DPI Final Report, p. 400; DPSI2020, p. 44.

87 DPI Final Report, p. 498. In addition, the DPSI2020 recommended an enforceable code which would require greater transparency on the part of digital platforms about their consent requirements, data sharing practices, and willingness to provide consumers with opt-out controls: p. 44.

88 DPI Final Report, pp. 436-437.

89 ACL s 18. An intention to mislead is irrelevant to a contravention of s 18: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

90 ACL ss 29, 33 and 34.

91 The ACCC recently commenced Federal Court proceedings against Google for allegedly misleading consumers about the way it collected, kept and used location data when certain Google Account settings were enabled or disabled. The ACCC alleges that Google did not properly disclose that both the 'Location History'

Digital platforms are also prohibited from engaging in unconscionable conduct in connection with the supply or acquisition of goods or services.[92] Additionally, as the ACCC considers digital platforms' consumer-facing terms of use and privacy policies to be standard form contracts,[93] digital platforms must comply with the unfair contract term provisions in the ACL.[94]

Nevertheless, in order to keep pace with the future, particularly as technology creates new opportunities for unfair conduct, the DPI Final Report and DPSI2020 focussed on the strengthening or introduction of ACL provisions dealing with unfair contract terms and unfair trading practices.

7.2.1. Unfair Contract Terms

Due to the bargaining power imbalance in the relationship between digital platforms on one side and consumers or small businesses on the other, the latter parties are unable to negotiate terms of service, including terms relating to the collection, use and disclosure of personal data. This imbalance in bargaining power allows digital platforms to include potentially unfair contract terms in their terms of use or privacy policies.[95]

A review by the ACCC of the standard terms governing the supply of advertising services by large digital platforms identified the widespread use of several potentially unfair clauses. In the main, these involve broad discretions for the platforms to remove content for any reason; suspend or terminate a user's account for any reason; vary terms without notice; impose prohibitive dispute resolution process; and specify confidentiality or publicity limitations.[96]

At present, it is not a contravention of the ACL to include unfair terms in contracts, meaning that no penalties can be sought for this conduct per se; rather, if a particular term is declared unfair, it is simply void.[97] However, there is some potential for ACL penalties for unfair contract terms to be accessed indirectly. For example, by including unfair terms in a contract (e.g. relating to 'concealed data practices'), the digital platform may be engaging in misleading or deceptive conduct in contravention of s 18 ACL. Also, relying on unfair contract terms may amount to unconscionable conduct in contravention of ss 20 or 21 ACL. Breaches of these provisions give rise to a wide range of remedies, including the imposition of pecuniary penalties.[98] In addition, any loss a consumer or small business suffers as a result of an unfair contract term may be subject to a compensation order, which can be claimed by the aggrieved party or the ACCC on their behalf.[99]

Not surprisingly, the ACCC's view is that the current unfair contract terms regime does not itself provide sufficient deterrence.[100] Accordingly, the DPI Final Report and DPSI2020 have both recommended that the ACL be amended so that the inclusion of unfair terms in standard form consumer or small business contracts is prohibited and attracts the imposition of civil pecuniary penalties.[101] In response, the Australian Government committed to consultations on strengthening the unfair contract term provisions of the ACL,[102] and in August 2021 released

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setting and the 'Web & App Activity' setting had to be switched off if consumers did not want Google to collect, keep and use their location data. As a result, the ACCC alleges that Google dealt with highly sensitive and valuable personal information about consumers' locations without the consumers making an informed choice as to whether to share this data with Google. See, ACCC (2019), Google allegedly misled consumers on collection and use of location data, available at https://www.accc.gov.au/media-release/google-allegedly-misled-consumers-on-collection-and-use-of-location-data. Accessed 10 September 2021.

92 ACL Part 2-2. Although the concept has not been defined precisely in Australia, conduct is generally 'unconscionable' when it goes against good conscience by reference to the norms of society: *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

93 DPI Final Report, p. 437.

94 ACL Part 2-3.

95 DPI Final Report, p. 497.

96 DPSI2020, pp. 70-71.

97 ACL s 23.

98 ACL s 224. Currently, maximum penalties stand at the greater of AUD 10 million, three times the benefit obtained from the breach, or 10% of annual turnover connected with Australia.

99 ACL s 237.

100 DPI Final Report, p. 441.

101 DPI Final Report, p. 497 (Recommendation 20); DPSI2020, p. 74.

102 Australian Treasury (2019) Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, available at https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf. Accessed 10 September 2021. On 13 December 2019, the Australian Government announced a consultation on 'Enhancements to Unfair Contract Term Protections': see Australian

exposure draft legislation giving effect to the recommendation in full together with other enhancements.[103] If the legislation is passed, the changes to the unfair contract terms regime will have implications on an economy-wide scale for all firms that deal with consumers and small businesses, not only those that operate on digital platforms.

7.2.2. Unfair Trading Practices

The DPI Final Report identified various business practices that cause detriment to consumers but are not expressly prohibited by the ACL. These practices include:[104] collecting and/or disclosing consumer data without express informed consent; failing to comply with reasonable data security standards, including failing to put in place appropriate security measures to protect consumer data; inducing consumer consent to data collection and use by relying on long and complex contracts, or all-or-nothing clickwrap consents, and providing insufficient time or information to enable consumers to properly consider the contract terms; unilaterally changing the terms on which goods or services are provided to consumers without reasonable notice, and without the ability for consumers to consider the new terms, including in relation to subscription products and contracts that automatically renew; and seeking to dissuade consumers from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.

To address such instances of problematic conduct, the DPI Final Report recommended that the ACL be amended to include an economy-wide prohibition against unfair trading practices.[105] While similar laws exist in the European Union and the United States,[106] this would be a new provision in Australia and should be 'carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance'.[107] It is anticipated, for example, that the new prohibition would focus on practices that cause significant detriment to consumers or small businesses, thereby protecting both groups; operate in addition to existing ACL protections, including the prohibitions against misleading or deceptive conduct and unconscionable conduct; and attract the same maximum civil pecuniary penalties that currently apply under the ACL.[108]

The Australian Government has noted the recommendation in favour of a prohibition against unfair trading practices but has not specifically responded to it, preferring instead to reference the separate work on this issue being undertaken by Consumer Affairs Australia and New Zealand (CAANZ).[109]

7.3 Comparator Websites

The ACCC recognises that comparator websites have the potential to be of benefit to Australian consumers and to promote competition in the markets for the goods or services to which they relate. They achieve this by

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Treasury (2020), available at https://treasury.gov.au/consultation/enhancements-unfair-contract-term-protections. Accessed 10 September 2021.

103 See, Australian Treasury (2021) Exposure Draft, Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms, available at https://treasury.gov.au/sites/default/files/2021-08/c2021-201582_edl.pdf. Accessed 10 September. Other reforms proposed in the Bill include a rebuttable presumption that a contract term is unfair if the same or a substantially similar term (in a party's own contracts or other contracts in the industry) has previously been declared unfair.

104 DPI Final Report, p. 498. Similar practices were also outlined in the DPSI2020, pp. 35-43.

105 DPI Final Report, p. 498 (Recommendation 21). In lending support to this recommendation, the DASI interim report identified consumers' relationships with 'ad tech' providers as deserving of protection by a prohibition against unfair trading practices. Even though consumers are not customers of ad tech services, the data produced by their online activities is an essential input into many ad tech services. The potential for consumer harm arises where consumers are not sufficiently informed about, or do not have sufficient control over, how their data is collected and used for ad targeting purposes. See, ACCC (2020) Digital Advertising Services Inquiry: Interim Report, available at https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry/interim-report. Accessed 10 September 2021.

106 DPI Final Report, p. 498.

107 DPI Final Report, p. 498.

108 See, Gilbert & Tobin (2020) Competition & Consumer Regulation: Review of 2019 & Insights for 2020, available at https://www.gtlaw.com.au/insights/australian-competition-consumer-law-insights-2020. Accessed 10 September 2021.

109 Australian Treasury (2019) Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, available at https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf. Accessed 10 September 2021.

providing consumers with a convenient means of comparing deals offered by competing businesses and by assisting new market entrants to compete more effectively.[110]

However, the ACCC has also identified two primary areas of concern with respect to comparator websites.[111] The first relates to the material on these websites, broadly encompassing representations about the extent of the comparison service, representations about the savings to be achieved from using the comparison service and representations that the comparison service is independent, impartial or unbiased.[112] The second area of concern involves the 'behind-the-scenes' conduct of comparator websites. In this regard, the ACCC has expressed misgivings as to whether undisclosed commercial relationships between comparator websites and their suppliers are impacting the recommendations presented to consumers, and whether the information displayed on comparator websites is being updated in a timely fashion.[113]

As it stands, Australia's regulatory framework is well-positioned to deal with the concerns associated with comparator portals. The ACL prohibits businesses from engaging in misleading or deceptive conduct,[114] and from making a range of false or misleading representations.[115] All of the aforementioned concerns would likely constitute breaches of one or more of the existing provisions.

Consider, for example, the Full Federal Court's decision in *Trivago NV v ACCC*,[116] which upheld the first instance judgment,[117] that Trivago, a hotel comparator website, had misled consumers in its television advertising and on its website about hotel room rates in breach of ss 18, s 29(1)(i) and 34 ACL. Those provisions prohibit misleading or deceptive conduct, false or misleading representations with respect to the price of goods or services, and conduct that is liable to mislead the public as to the nature or characteristics of any services, respectively.

The Full Federal Court unanimously agreed that:

(i) Trivago had misled consumers by representing that its website would identify the cheapest rates available for a hotel room in response to a user's search. In fact, Trivago typically did not rank hotel rooms based on the cheapest rates, but rather according to which hotels paid it the highest 'cost-per-click' fee.[118]

(ii) Trivago's hotel room rate comparisons, through the use of strike-through prices or text in different colours, misrepresented that the comparison was between prices offered for the same room category in the same hotel. In fact, the comparison was often between prices offered for a standard room and a luxury room at the same hotel, which created a false impression of savings.[119]

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110 ACCC (2014) The Comparator Website Industry in Australia, available at https://www.accc.gov.au/system/files/926_Comparator%20website%20industry%20in%20Australia%20report_FA.pdf. Accessed 10 September 2021.

111 ACCC (2014) The Comparator Website Industry in Australia, available at https://www.accc.gov.au/system/files/926_Comparator%20website%20industry%20in%20Australia%20report_FA.pdf. Accessed 10 September 2021.

112 ACCC (2014) The Comparator Website Industry in Australia, available at https://www.accc.gov.au/system/files/926_Comparator%20website%20industry%20in%20Australia%20report_FA.pdf. Accessed 10 September 2021.

113 ACCC (2014) The Comparator Website Industry in Australia. Accessed 10 September 2021, pp. 18-19. Interestingly, it appears that Australian consumers are already attuned to these issues, with market research indicating that while most consumers make use of comparator websites, the majority do so for research purposes only and not as a purchasing channel: ACCC, *The Comparator Website Industry in Australia* (Commonwealth of Australia, 2014) p. 11. The ACCC has also published a webpage to assist consumers in using comparator websites effectively: see, ACCC (n.d.) Comparator Website, available at https://www.accc.gov.au/consumers/online-shopping/comparator-websites. Accessed 10 September 2021.

114 See ACL s 18.

115 See ACL Part 3-1, Division 1.

116 [2020] FCAFC 185.

117 *ACCC v Trivago NV* [2020] FCA 16.

118 [2020] FCAFC 185, [220]-[221]. Trivago operated its business such that it was paid by the featured hotels for each click it generated for them. This incentivised Trivago to promote the hotels that paid the highest amount per click, as opposed to those that provided the best value for customers.

119 [2020] FCAFC 185, [257].

(iii) Trivago had misled the public to believe that its website provided a price comparison service that was impartial, objective and transparent, particularly since it was not made clear to consumers that Trivago was receiving a 'cost-per-click' fee.[120]

In commenting on the decision, the ACCC said the case serves as 'an important warning to comparison sites that they must not mislead consumers about the results they recommend'.[121] The announcement of the DASI,[122] and DPSI,[123] sends the same message.

7.4 Price Parity Clauses

Price parity clauses (also known as best price clauses) provide assurance to downstream platforms that the terms on which a supplier offers goods or services to them are at least as favourable as the terms the supplier offers to other purchasers. Such clauses encourage a downstream platform to invest in promoting the supplier's goods or services by eliminating the risk of the supplier free-riding on that investment and undercutting the platform's price. The classic example here involves the consumer who searches for accommodation through an online travel site and then makes the booking directly with the hotel in the expectation of obtaining a cheaper price.[124]

In Australia, price parity clauses are widely considered to increase competition in vertical relationships and feature commonly in contracts between online price comparator websites and their suppliers. However, concerns have been raised internationally, particularly in Europe, that price parity clauses in fact reduce competition by ensuring that the price available from one downstream platform will not be higher than the price available from the supplier directly or from any other platform.[125]

Awareness of these concerns prompted the ACCC, in September 2015, to request submissions from Australian accommodation providers about the use and extent of price parity clauses in their contracts with online travel sites such as Booking.com and Expedia.[126] The consultation process was intended to allow the ACCC to assess any competition issues associated with those clauses in the Australian context.[127] Twelve months later, the ACCC issued a media release commending Booking.com and Expedia for agreeing to changes that would 'increase the incentive for them to compete with each other and allow consumers to shop around to get the best deal'.[128] Specifically, Booking.com and Expedia agreed to the removal of contractual clauses requiring Australian accommodation providers to offer room rates equal to or lower than those offered on any other online travel site or on an accommodation provider's offline channels, to make all remaining room inventory available and to offer the same number and same type of rooms offered to any other online travel site.[129] Interestingly, however, the changes did not prevent Booking.com or Expedia from continuing to require that Australian accommodation providers not offer rates below those offered to online travel sites.

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120 [2020] FCAFC 185, [268].

121 ACCC (2020), Trivago loses appeal after misleading consumers over hotel ads, available at https://www.accc.gov.au/media-release/trivago-loses-appeal-after-misleading-consumers-over-hotel-ads. Accessed 10 September 2021.

122 See, ACCC (n.d.) Digital advertising services inquiry, available at https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry. Accessed 10 September 2021.

123 See, ACCC (n.d.) Digital advertising services inquiry, available at https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry. Accessed 10 September 2021.

124 M. Corrigan and J. McMahon (2016) Expedia and Booking.com's narrow price parity clauses OK, say ACCC – for now, available at https://www.claytonutz.com/knowledge/2016/september/expedia-and-booking-coms-narrow-price-parity-clauses-ok-say-accc-for-now. Accessed 10 September 2021.

125 See, M. Corrigan and J. McMahon (2016) Expedia and Booking.com's narrow price parity clauses OK, say ACCC – for now, available at https://www.claytonutz.com/knowledge/2016/september/expedia-and-booking-coms-narrow-price-parity-clauses-ok-say-accc-for-now. Accessed 10 September 2021.

126 See, ACCC (2015) ACCC consults on online travel agents, available at https://www.accc.gov.au/update/accc-consults-on-online-travel-agents. Accessed 10 September 2021.

127 See, ACCC (2015) ACCC consults on online travel agents, available at https://www.accc.gov.au/update/accc-consults-on-online-travel-agents. Accessed 10 September 2021.

128 ACCC (2016) Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels, available at https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels. Accessed 10 September 2021.

129 See, ACCC (2016) Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels, available at https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels. Accessed 10 September 2021.

The ACCC's equanimity over the latter outcome stands in contrast to its protracted legal dispute with Australia's largest travel agency company, Flight Centre, which was adjudicated by the High Court in 2016.[130] In brief, the ACCC alleged that Flight Centre had engaged in anti-competitive, price-fixing conduct in breach of s 45 CCA by attempting to reach a price parity agreement with Singapore Airlines, Malaysia Airlines and Emirates which would prevent those airlines from selling tickets directly to consumers at a lower price than those available through Flight Centre.[131] The High Court found for the ACCC on appeal,[132] confirming zero tolerance for anti-competitive conduct that arises under the guise of price parity clauses.

8. Data Protection

Australia has a comprehensive system of information privacy law,[133] historically based upon the 1980 OECD guidelines of transborder exchanges of personal data.[134] The key Australian law, The Privacy Act 1988 (Cth), is similar in overarching structure to the General Data Protection Regulation (GDPR), as it is based on the same types of principled protections.[135] However, there are some important differences in application, particularly regarding the involvement of regulatory activities that cross over information privacy law and competition law considerations. Actions taken against major platform companies have thus far been limited, especially by the federal Australian information privacy law regulator, the Office of the Australian Information Commissioner (OAIC). The limited actions against major platforms have not regarded the type of systemic concerns that arise from large-scale collection and use of device-related data across different platforms or services, as highlighted by the Bundeskartellamt decision. However, there are recent signals that this limited regulatory approach is changing, both by the OAIC and by the fact that the ACCC is increasingly active in the promotion of consumer privacy protection, as exemplified by the DPI and the advent of the newly implemented Consumer Data Right (CDR). These changes potentially signify a movement away from the purely comprehensive system of information privacy law to a more hybrid structure that is supplemented by the application of information privacy law in different jurisdictions, particularly the GDPR. The supplementation process is likely accelerated by the DPI.

8.1 Background to the Australian Information Privacy Law Framework

The Privacy Act implements into Australian law two supra-national instruments: the 1980 OECD Guidelines and Article 17 of the *International Covenant on Civil and Political Rights*. However, the Privacy Act's ambit is very much on the former rather than the latter, as a general right to privacy is not legally or constitutionally recognised in Australia. The Australian approach to privacy law protections, including information privacy, is thus fundamentally different to the EU where data protection is viewed as a foundational right of EU citizenship.[136] Instead, the Privacy Act provides a range of largely procedural, principled protections that are not intended to have the same substantive, rights-based application of the GDPR. The limited focus of the Privacy Act thus emanates in several important ways, including the historically self-constrained role that the OAIC has largely imposed on itself. This latter point is perhaps the key reason for the absence of systemic actions against the potentially infringing data collecting activities of platforms.

The basic purpose of the Act remains the same both to government agencies and private sector organisations – the Act regulates how entities are permitted to handle and manage personal information. However, the Act's coverage of the private sector remains a significant problem as it excludes coverage of different types of entities, most notably small- and medium-size enterprises with an annual turnover of less than three million dollars.[137] Approximately 94% of Australian businesses are excluded from the Act.[138] The Privacy Act also forms the basis

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130 *ACCC v Flight Centre Ltd (No 2)* [2013] FCA 1313; *Flight Centre Ltd v ACCC* [2015] FCAFC 104; *ACCC v Flight Centre Travel Group Ltd* [2016] HCA 49.

131 *ACCC v Flight Centre Travel Group Ltd* [2016] HCA 49, [25].

132 *ACCC v Flight Centre Travel Group Ltd* [2016] HCA 49, [93] (Kiefel and Gageler JJ), [148] (Nettle J), [186] (Gordon J), French CJ dissenting at [24].

133 The term information privacy has largely been used in Australia instead of data protection. However, as noted below, the DPI uses 'data protection' and 'privacy' separately, thus mirroring the general EU position. The term 'comprehensive' in the chapter refers to a regulatory structure predicated on one overarching information privacy law that is regulated by a specific information privacy regulator. See M. Burdon, Digital Data Collection and Information Privacy Law, Cambridge University Press, 2020.

134 *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (OECD, 1980).

135 See L. A Bygrave, Data Privacy Law: An International Perspective, Oxford University Press 2014.

136 See e.g. Article 8 of the *Charter of Fundamental Rights of the European Union OJ [2010] C 83/02 2010.*

137 S6D The Privacy Act 1988 (Cth). Certain exceptions exist to the exemption, such as SMEs that trade in personal information or an SME that would be classed as a health service provider.

138 See DPI 454. The ACCC estimates that the Act only covers approximately 100,000 entities.

of separate state-based legislation that regulates certain state government agencies. As such, federal and state information privacy laws share the same foundations both in terms of content and largely in application.

The Privacy Act is woefully under-litigated and many of the Act's foundational terms are still to be judicially considered, unlike state-based laws. Where the Act has been judicially considered, it has given rise to confusion, most notably involving the Act's definition of personal information in the Federal Court decision of *Privacy Commissioner v Telstra*.[139] Like the GDPR, this is a crucial question to resolve because the Act only covers acts and practices in relation to the handling of personal information.[140] Consequently, any information that is not personal information will not be covered by the Act. It is thus a threshold issue. Under section 6, personal information is 'information or an opinion about an identifiable or reasonably identifiable individual'.

The Privacy Act's definition of personal information is substantively different to the GDPR's definition of personal data. Under Article 4(1) of the GDPR, personal data is 'any information relating to an identified or identifiable natural person'. The semantic change of 'about' and 'relating to' signifies different policy emphases about the breadth accorded to information privacy protection in each jurisdiction. In Australia, the breadth is constrained and in the EU it is broadened, again in line with rights-based perspectives about the regulatory purpose of data protection. Recently implemented legislation involving attempts to broaden the scope of personal information, so that it captures device or system metadata for different statutory purposes to the Privacy Act, have attempted to obviate the confusion caused by the *Telstra* case by introducing a 'relates to' definition similar to the GDPR into Australian information privacy law, including the CDR and Australia's COVID contact tracing app, COVIDSafe.[141]

Other differences between the Privacy Act and the GDPR also exist. The Privacy Act implicitly regulates personal information processing and does not have a model of regulated process parties like the GDPR. Instead, information privacy obligations emanate from collecting, holding or using/disclosing personal information rather than from the processing of personal data, even though collection effectively begins a processing cycle of principled protection for most entities. These privacy principles are typical to most information privacy or data protection laws and are called the Australian Privacy Principles (APPs). The principles are inherently linked. The principled protections begin at the point of data collection (APPs 1-3, 5) and end with destruction or de-identification of no longer required personal information (APP 11). In the interim, data collection organisations have a range of obligations to fulfil.

(i) Personal information can only be used or disclosed for a defined purpose (APP 6 and APP 7 regarding direct marketing).
(ii) The individual must be notified about the purposes of collection and subsequent use (APP 5).
(iii) There must be a defined need for the collection (APP 3).
(iv) Individuals also have a range of interaction mechanisms that seek to ensure the maintenance of individual control by being able to affirm the accuracy and currency of collected personal information (APP 10, 12-13)
(v) Personal information must be held securely (APP 11).

8.2 The Platform Context

A continual criticism of the OAIC has been its perceived lack of firm regulatory activity, including in the platform context. The Privacy Act was significantly amended in 2014 to give the AUD greater investigatory powers, including the option of imposing higher civil penalties for serious privacy infringements of up to AUD 1.7 million dollars. However, this sanction has been under-utilised and most of the OAIC's regulatory activities, in both the platform and online contexts, have focussed on serious data breaches, which has culminated in the implementation of a mandatory data breach reporting regime in 2017. The OAIC's investigatory focus has thus far regarded an ostensible data breach context when applied to information privacy issues involving major online data collectors and platforms.[142] Accordingly, the small number of actions undertaken by the OAIC against online data collectors or platforms have involved discrete, highly publicised concerns, often involving other jurisdictional data protection investigations, rather than a serious consideration of systemic issues involving large-scale personal data collections across platforms. Even when such investigatory actions have been undertaken, such as the Google

139 *The Privacy Commissioner v Telstra Corporation Limited [2017] FCAFC 4 (19 January 2017* (2017)
140 S13(1) The Privacy Act 1988 (Cth).
141 S94D(5) Privacy Amendment (Public Health Contact Information) Act 2020.
142 J. Signato and M. Burdon, The Privacy Commissioner and Own-Motion Investigations into Serious Data Breaches: A Case of Going through the Motions?, University of New South Wales Law Journal (2015) 38(3), pp. 1145-1185.

Streetview WiFi collection,[143] or the Ashley Madison data breach,[144] the results have either been in contradiction to findings in other jurisdictions or have resulted in conciliatory outcomes.

There are recent signals that the OAIC is taking a different approach, as exemplified by its belated legal action against Facebook regarding the Australian impacts of the Cambridge Analytica scandal.[145] At face value, the OAIC action bears the same limited hallmarks of its previous investigations as it focuses on privacy infringements arising from unauthorised disclosures under APP 6 and breaches of security under APP 11. However, unlike previous investigations, in documents submitted to the Federal Court, the OAIC is construing harm as both an individually focused element and a broader systemic consideration.[146]

The OAIC's action against Facebook consequently has a much broader systemic reach than previous regulatory investigations, as it is specifically relevant to Facebook's context as a massive platform data collector that can shape perceptions about the applicable utility of Australian privacy law. The basis of the action is about individually focussed protections through the application of pertinent APPs but it is done so through the lens of the digital platform context and the market powers that flow. Why then the change in regulatory direction in 2020, given that the OAIC was provided with stronger regulatory powers in 2014 that are specifically relevant to systemic considerations? The answer to that question relates to the information privacy related developments that flow from the DPI report and the greater impetus the ACCC is attaching to consumer privacy protection as a demonstrable social good in its own right and as part of a broader digital economy imperative.

Further cementing the OAIC's action against Facebook, the DPI Final Report broadly considers the role of Google and Facebook as predominant data collectors and commercial re-users of personal information. Data protection and privacy,[147] thus have a much broader remit to 'help prevent consumer harm and protect and enhance consumer welfare'.[148] The implementation of stronger data protection and privacy mechanisms is recommended to encourage further growth in markets flowing from digital platforms by enhancing consumer trust and reducing the types of social and economic harms that can arise from systemic personal information misuse. Stronger data protection and privacy laws would also allow relevant regulators to better monitor and deter 'problematic data practices that result in consumer harm'.[149] Although the DPI is aimed at digital platforms, the data protection considerations are also intended to have an effect across the broader economic sector.[150] However, the ACCC acknowledges that recommendations aimed at the economy more broadly will also need to be supplemented by platform specific measures, particularly a new enforceable privacy code aimed at the major digital platforms.[151]

The ACCC argues that major changes to Australia's information privacy law framework are necessary to combat the market and regulatory failures arising from the market power of dominant digital platforms. The key failures include:

(i) Information asymmetries that undermine a consumer's ability to assess whether services align with their privacy preferences.
(ii) Bargaining power imbalances that prevent consumers from making genuine choices as to how their personal information is collected, used and shared.
(iii) Behavioural biases that work against consumers' ability to select privacy options that better align with their privacy concerns.
(iv) A lack of effective deterrence under current consumer protection and privacy laws against certain data practices by digital platforms.[152]

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143 M. Burdon and A. McKillip, The Google Street View Wi-Fi Scandal and Its Repercussions for Privacy Regulation, Monash University Law Review (2013) 39, p 702.

144 Joint investigation of Ashley Madison by the Privacy Commissioner of Canada and the Australian Privacy Commissioner and Acting Australian Information Commissioner [2016] (commissioner initiated investigation).

145 OAIC (2020) Commissioner launches Federal Court action against Facebook, available at https://www.oaic.gov.au/updates/news-and-media/commissioner-launches-federal-court-action-against-facebook/. Accessed 10 September 2021.

146 See [26] and the reference to 'systemic failures'.

147 As noted above, the ACCC differentiates between data protection and privacy in the DPI as two distinct concepts, similar to the general EU approach.

148 DPI Final Report, p. 454.

149 DPI Final Report, p. 448.

150 DPI Final Report, p. 452.

151 DPI Final Report, p. 454.

152 DPI Final Report, p. 454.

These failures require an overhaul of the current information privacy law framework, including amending the objects clause of the Privacy Act to include a specific consumer protection element.[153] The ACCC also recommends an update to the Privacy Act's definition of personal information to bring it in line with technological advances and to resolve the confusion arising from the *Telstra* case, as highlighted above. It is important to note, however, that the ACCC did not specifically recommend the adoption of the GDPR definition of personal data but, rather, called for further clarification of technological scope to align with other 'standards set by overseas regulators'.[154] More broadly, a range of remedial measures were put forward that would increase the ability of Australian consumers to litigate against platforms based on misuses of personal information. These measures include a new form of private action available through Privacy Act for breaches of the APPs,[155] yet another call to implement a statutory cause of action for serious invasions of privacy,[156] and increased financial penalties for Privacy Act infringements to better align with the ACL.

Given the types of harm identified by the ACCC, it should be no surprise that the DPI recommendations seek to enhance privacy policy requirements as an information disclosure mechanism and to promote stronger forms of consumer control over personal information, particularly centred around friendlier forms of consent acquisition. Stronger notification requirements at the point of collection are recommended to remove the discretion that data collecting organisations currently have regarding notice construction and replace it with more standardised forms of notice aimed at reducing the information asymmetry between consumers and collectors.[157] More profoundly, major changes were put forward to strengthen the consent requirements of the Privacy Act so that it better aligns with the GDPR.[158] Consent must specifically be obtained whenever a consumer's personal information is collected, used or disclosed unless an exception applies.[159] The ACCC acknowledges that enhanced requirements are likely to cause 'consent fatigue' which requires a foundational shift in the types of controls provided to consumers in the form of default selections turned to 'off' rather than 'on', as a means of legitimating collection purposes.[160] All of which will significantly impact upon the application of APP6, the disclosure principle, which currently accords far too much leeway for APPs entities in the construction of broad purposes of collection that result in equally broader forms of partially justified disclosure.[161]

The final recommendation of note, as highlighted above, is the development of a new enforceable privacy code for digital platforms. Under s 26G(2) of the Privacy Act, the OAIC has the power to develop, approve and register enforceable privacy codes. Thus far, the power has again been under-utilised and only three such codes have been registered.[162] However, during its 2019 budget speech, the Australian Government announced plans for a legislated code that would apply to social media and online platforms that trade in personal information.[163] The DPI proposed code is a consequence of wider governmental intention. It would be developed by the OAIC in consultation with relevant industry bodies and would apply to 'all digital platforms supplying online search, social media, and content aggregation services to Australian consumers and which meet an objective threshold regarding the collection of Australian consumers' personal information'.[164] The proposed code would be enforced by the OAIC, rather than the ACCC, although the latter would be involved from consumer protection and competition law perspectives. The aim of the code would be to supplement the economy-wide enhancements proposed and provide enhanced protections for consumers relevant to the platform data collection context. The code would

153 DPI Final Report, p. 477.

154 DPI Final Report, p. 460.

155 Currently, s 36(1) and s 40(1)(b) of the Privacy Act require a complainant to make a complaint to the OAIC for determination, which can then be pursued through OAIC investigation at first instance.

156 This aspect has been a continued bone of contention. It has been recommended by two Australian Law Reform Commission reports and has thus far been ignored by the Australian Government. See Australian Law Reform Commission (2008) For Your Information: Australian Privacy Law and Practice and Australian Law Reform Commission (2014) Serious Invasions of Privacy in the Digital Era.

157 DPI Final Report, p. 462.

158 DPI Final Report, p. 466.

159 The exceptions recommended are mirrored on the GDPR: 'unless the personal information is necessary for the performance of a contract to which the consumer is a party, is, is required under law, or is otherwise necessary for an overriding public interest reason.'

160 DPI Final Report, p. 468.

161 DPI Final Report, p. 465.

162 OAIC (n.d.) Privacy Codes Register, available at https://www.oaic.gov.au/privacy/privacy-registers/privacy-codes-register/. Accessed 10 September 2021.

163 DPI Final Report, p. 482. See G. Smith (2019) Government proposes major changes to privacy law, available at https://www.allens.com.au/insights-news/insights/2019/04/government-proposes-major-changes-to-privacy-law/. Accessed 10 September 2021.

164 DPI Final Report, p. 481.

further augment the DPI general proposals involving heightened privacy policy requirements, consent obligations, information security mechanisms and specific protections for children's data.

The proposed code, and the other recommended changes, would increase the level of hybridity that is currently taking place regarding Australian information privacy law developments, particularly in relation to the GDPR. The DPI makes clear that it does not intend to wholly adopt the component provisions of the GDPR into Australian law,[165] but the ACCC has, nonetheless, clearly been heavily influenced by the GDPR as part of its overall rationale.[166] In other words, parts of the GDPR are used as a model to supplement and enhance the Privacy Act.[167] This is evident in the new forms of notice collection similar to Articles 13 and 14, the new definition of consent in line with Article 7, a new mechanism of personal information erasure based on Article 17 and the new private right of action similar to Articles 79 and 82. All of these proposed changes seem to indicate the possibility of the Australian Government seeking an adequacy ruling from the European Commission that Australian law offers an adequate level of data protection to the GDPR,[168] as a further enhancement of digital economy endeavours. In October 2020, the Commonwealth Attorney-General's Department started its review of The Privacy Act with the release of an issues paper,[169] that broadly considers the implementation of the ACCC's key recommendations, including the degree of alignment with the GDPR. The review is expected to complete in late 2021 with legislative changes to the Act likely to be implemented the following year.

8.3 The CDR

Finally, it is also important to briefly include coverage of the newly implemented CDR, as it exemplifies the enhanced focus of the consumer privacy protection being driven the ACCC.

The CDR is a data portability legislative mechanism largely modelled on the Open Banking Scheme in the UK. It provides CDR consumers with the opportunity to seamlessly access and transfer different types of transaction data and personal information from one service provider to another. The overriding policy purpose of the CDR is to use data portability as a means of enhancing digital economy innovations by reducing the locking in of customers and the corresponding network effects. It is intended to have economy-wide application, but it is being implemented on a sector-by-sector basis, beginning with banking. The DPI did not recommend the application of the CDR to digital platforms because it is not likely to produce a short-term benefit.[170] As things currently stand, the ACCC believes that data portability would have a limited impact to facilitate consumer switching of services, because Google and Facebook have no significant competitors to switch to. It would therefore not reduce network effects and 'may not have a significant effect on barriers to entry and expansion'.[171] However, the DPI commits the ACCC to a future review of the CDR's operation in the platform context based on its use in the banking and other sectors for which it is initially intended.

The CDR has a unique approach to information privacy with the development of a separate set of Privacy Safeguards, which largely mirror the APPs, but are prescriptive, rather than principles-based. In the context of this chapter, the development of the Privacy Safeguards reflects the complex considerations behind data portability that incorporate competition law, consumer protection and information privacy law frameworks. It is this combination that provides the justification for the ACCC taking a stronger role in information privacy law that has previously been the sole domain of the OAIC.

The ACCC is undertaking a stronger role in the development of the Australian information privacy law framework; its focus on consumer privacy is becoming the dominant regulatory mode for enhancing the Privacy Act and as a basis for further developments in the digital economy. Given that the Australian Government has accepted almost all of the ACCC's data protection recommendations in the DPI,[172] it would be prudent to expect a greater alignment of information privacy, consumer protection and competition law imperatives that are intended

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165 DPI Final Report, p. 439.

166 See DPI Final Report 434, where the facilitation of data flow to overseas jurisdictions 'such as the EU' is at the base of broader reforms to the Privacy Act.

167 Ibid.

168 DPI Final Report, p. 480.

169 Attorney-General's Department (2020) Review of the Privacy Act 1988, available at https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988. Accessed 10 September 2021.

170 DPI Final Report, p. 115.

171 DPI Final Report, p. 116.

172 Australian Treasury (2019) Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, available at https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf. Accessed 10 September 2021. Note, however, there is still tacit scepticism about a statutory cause of action.

for the Australian economy as a whole and are specifically sharpened for the major digital platforms. Consequently, future regulatory actions against Google and Facebook are likely to be more commonplace in Australia in the near-term future especially when compared to the previous era of relative inaction.

The ACCC's recently successful action against Google in the Federal Court is an illuminating example of this new regulatory stance.[173] In that case, the Court found that Google's default location data settings, in conjunction with the presentation and substance of privacy policy statements, was conduct capable of being misleading and deceptive conduct under s 18 of the ACL.[174] The case potentially indicates that the ACCC and the ACL is going to be the primary vehicle of future regulatory response against the major platforms rather than the OAIC and the Privacy Act.

9. Online Advertising

As the existing and past ACCC inquiries suggest, one of the main concerns with regards to issues arising from the digital economy in Australia has been online advertising. While the DPI already dealt with online advertising in connection to competition in media and advertising services markets, the current DASI is directly focused on digital advertising.[175]

The aim of the DPI with regards to online advertising, as set out in the Terms of Reference, was to consider the impact digital platforms had on the state of competition in advertising markets. The ACCC was instructed to consider the following three factors:

(i) the extent to which digital platforms are exercising market power in commercial dealings with advertisers
(ii) the impact of digital platforms on advertising markets
(iii) the impact of information asymmetry between digital platforms, advertisers and consumers and the effect on competition in advertising markets.[176]

The ACCC found, as part of the DPI, that Google and Facebook played the most significant role in online advertising. This being the case for the following reasons:

(i) They constituted the most important channels for purchasing and selling the majority of online advertising in Australia.
(ii) They owned over 80 per cent of growth in online advertising in the period of 2016-2018 in Australia and received the majority of online advertising revenue in Australia.[177]

These reasons exist because both Google and Facebook offer various significant benefits such as targeting specific audiences usually for a lower price than traditional forms of advertising.[178]

In the DPI Final Report, the ACCC identified a number of potential competition law and other issues arising in online advertising. (These potential issues then led to the DASI).[179] In the DPI, the ACCC found that digital platforms with substantial market power had the ability to leverage their power into another market. The lack of transparency, such as the lack of transparency in the pricing of services, could also lead to a misuse of market power. Other competition-law issues included the bundling of advertising services. The ACCC also identified as issues the significant bargaining power possessed by Facebook and Google and the lack of effective dispute resolution. These issues are attributable to the fact that Facebook and Google are unavoidable platforms in Australia for securing advertising revenue.[180]

Unlike the DPI Final Report, which focused its analysis on Google and Facebook, the DASI is not just concerned with dominant platforms, but involves the analysis of the respective markets as a whole and their specific elements

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

174 *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367 at [330]. The Court held that Google also breached s 29(1)(g) of the ACL regarding misleading representations in connection with the supply of goods and services and s 34 of the ACL regarding conduct that was liable to mislead the public.

175 The DASI interim report, which will be submitted to the Australian Treasurer, is due by 31 December 2020, with the final report due on 31 August 2021.

176 DPI Final Report, p. 119.

177 DPI Final Report, pp. 119-130.

178 DPI Final Report, pp. 119, 131-132.

179 Australian Treasury (2019) Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, available at <https://treasury.gov.au/publication/p2019-41708>. Accessed 10 September 2021.

180 DPI Final Report, pp. 119, 133-164.

which (can) impact the competitiveness, efficiency and transparency of these markets. Indeed, the DASI added transparency to its focus, reflecting the findings in the DPI. In particular, the DASI investigates 'the competitiveness, efficiency, transparency and effectiveness of markets for the supply of ad tech services and ad agency services'.[181]

The questions the ACCC raises in the DASI are as follows:

(i) whether market participants have enough information (including about pricing, rebates and revenue flows) to make informed choices about the use of ad agency and ad tech services
(ii) competition throughout the ad tech supply chain and in the supply of ad agency services
(iii) the role and use of data in supplying these services, and
(iv) whether competition and efficiency are being affected by supplier behaviour, including vertically integrated suppliers preferencing their own services, or by ad tech services businesses or ad agencies not acting in the best interests of their clients.[182]

The ACCC intends to evaluate the intensity of competition and the efficiency of the markets by investigating:

(i) any concentration of market power in the hands of one or more suppliers of these services,
(ii) the availability of information (including pricing transparency) to advertisers, publishers and other market participants,
(iii) auction and bidding processes used to supply of digital display advertising,
(iv) the impact of mergers and acquisitions on those markets,
(v) supplier behaviour, and
(vi) how competition in these markets impacts on competition in the supply of digital display advertising services.[183]

In the DASI interim report, the ACCC mentioned that it would also consider similar inquiries and their findings in other jurisdictions.[184]

10. Conclusion

Digital platforms raise complex issues at the intersection of competition, consumer, privacy and data protection laws. The twenty-three recommendations in the DPI Final Report span each of these areas and have potentially broader implications than digital platform regulations per se. At this juncture, the ACCC appears well placed to deal with competition law issues arising in the digital space. Although the matters the ACCC is entrusted to deal with are broad, the ACCC's powers are limited by the common law approach, where only the court can find infringements. In that regard, it is obvious that there is a lack of competition law cases to make any conclusions regarding the effectiveness of Australian competition law in the digital economy, as it is something that is still due to be tested by the courts.

Competition law issues in the digital world are also likely to have close links with data protection, privacy and/or consumer law issues. As a multi-functional agency, the ACCC would seem to have natural advantages in addressing these issues as compared to a competition authority that deals only with competition law. In particular, as an experienced regulator of both competition and consumer laws, the ACCC can use its powers cumulatively to tackle issues from both areas of law. However, it currently remains uncertain as to whether it is the most appropriate regulator to lead on data protection and privacy issues. Furthermore, an inquiry can, and with regard to the digital economy the existing current and past inquiries did, broaden the scope of the areas that the ACCC would usually deal with in order to consider those public interests and laws beyond its standard parameters but that are essential for a particular inquiry. Although it shows that this is possible in specific inquiries, this does not necessarily mean that it is the best approach from the perspectives of a concentration of powers, the degree of expertise and parties' rights.

The digital economy is, indeed, the new frontier of competition law, presenting both challenges and opportunities for market participants and regulators alike. What is essential regarding the issues or potential issues which the digital economy encompasses is that all areas of law discussed in this chapter (competition, consumer, privacy

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181 ACCC (2020) Digital advertising services inquiry Issues Paper ('DASI Issue Paper'), available at https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry/issues-paper. Accessed 10 September 2021.

182 DASI Issues Paper (10 March 2020), p. 2.

183 DASI Issues Paper (10 March 2020), p. 5.

184 DASI Issues Paper (10 March 2020), p. 2.

and data protection laws) and their enforcement are effective, as they influence the effectiveness and the functioning of the markets, including market and bargaining powers, and competition in those markets.