

ACCC PROPOSALS ON REGULATORY REFORM FOR DIGITAL PLATFORMS EXPECTED SOON

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Legal Briefings - By **Patrick Clark, Philip Aitken, Saloni Sharma** and **Nikita Sivakumaran**

Digital platforms remain squarely on the agenda of the Australian Competition and Consumer Commission (**ACCC**), as the five-year Digital Platform Services Inquiry continues, with its biggest report yet due to land any moment.

The ACCC has provided the Treasurer with its much anticipated fifth interim Digital Platform Services Inquiry report, following its consultation with industry stakeholders throughout 2022. The report is expected to resolve whether the ACCC will propose a new or revised regulatory framework to address its competition and consumer concerns with digital platforms. See our [previous update](#) on the options the ACCC is considering.

We anticipate the next report will address whether the ACCC considers that there is a need for regulatory reforms to: address data advantages; improve consumer protection measures online; prevent anticompetitive conduct in the supply of social media, private messaging and electronic marketplace services.

We expect the ACCC's proposals to draw significantly on reforms in other jurisdictions. Recent developments include the UK Government's publication of a proposal for a new pro-competition regime for digital markets (see our briefing [here](#)) and progression of the Digital Markets Act through the EU process (see our briefing [here](#) and recent update [here](#)).

In the meantime, we reflect on some recent competition and consumer regulatory developments relevant to the tech sector.

ONLINE MARKETPLACES HAVE NOT BEEN SPARED AND SHOULD BE PREPARED

The ACCC's March 2022 interim report concentrated on consumer and competition issues around online retail marketplaces, with a particular focus on Amazon, Catch, eBay and Kogan.

The ACCC recognised that online retail marketplaces are performing an increasingly important role in the economy, and this was accelerated by the pandemic, with online purchases by Australian consumers increasing by almost a third in FY21 compared to FY20.

KEY IMPLICATIONS FOR ONLINE MARKETPLACES

- **Increased transparency** – the ACCC found there is insufficient transparency in product ranking algorithms and have called for more transparency around factors that influence the display and ranking of products.
- **Self-preferencing marketplace operators are on the radar, without a clear path forward as yet** - concerns have been raised about the potential for hybrid marketplaces, selling their own products and those of third parties. Specifically, whether those marketplaces self-preferece through algorithms and policies at the expense of third-party sellers. Online marketplaces can generate rich data to promote purchases and tailor product offerings to consumers, which increases efficiency. But third-party sellers may have more limited access to those data.
- **M&A activity will face close scrutiny** – the ACCC considered that, unlike in other countries, no online marketplace in Australia has reached a dominant position. Overseas experience suggests there is a potential for markets to “tip” in favour of a single dominant marketplace. The ACCC will be keeping a close watch on mergers in this sector that may lead to a dominant marketplace engaging in anti-competitive conduct.

We expect that transparency and self-preferencing will be considered more closely as part of the potential law reform agenda in the impending interim report.

ACCC FOCUS ON CONSUMER DATA DISCLOSURES

In August 2022, the Federal Court ordered Google LLC to pay \$60 million in penalties for misleading consumers in relation to the collection and use of their personal location data on Android phones (see our earlier briefing on the Court's decision on liability in April 2021 [here](#)).

The decisions are relevant to all businesses that collect and use consumers' personal data.

Although the majority of contraventions occurred prior to 1 September 2018 (ie under the previous penalty regime), the Court considered the maximum penalty for all contraventions by reference to Google's annual turnover, consistent with the current penalty regime.

The Court accepted that the conduct was not deliberate, and Google made changes to address all contravening conduct by December 2018. However, the Court also indicated that commercial entities that collect personal information should keep front of mind consumer concerns about privacy, storage and use of personal information.

PARLIAMENT PASSES MAXIMUM PENALTY INCREASES TO \$50 MILLION!

Separately, the Commonwealth Government has today passed legislation increasing the maximum penalties for competition and consumer law breaches.

The maximum penalties increase to the greater of **\$50 million** (up from \$10 million) or **30% of Australian turnover** during the period of the contravention (up from 10% turnover in the prior 12 months). The changes are effective immediately on receiving royal assent.

Stay tuned for our detailed update.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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