Coalition for APP FAIRNESS

Confidential

15 February 2023

Australian Treasury consultation on the ACCC's digital regulation proposals

Response from the Coalition for App Fairness

Introduction

The Coalition for App Fairness is an independent non-profit organisation founded by industry-leading companies to advocate for freedom of choice and fair competition across the app ecosystem. It currently has over 70 members who are large and small app developers operating in many countries worldwide.[1]

The world's most popular online platforms and the app stores that govern access to them have become a critical gateway to the consumers of digital products and services in Australia and worldwide. While they can be beneficial when operated fairly, they can also be used by platform owners to hurt developers and consumers. As regulators and legislators around the world seek to address these important issues, the Coalition urges them to recognise that every app developer, regardless of size or the nature of their business, is entitled to compete in a fair marketplace. We were therefore particularly pleased to read the ACCC's findings relating to app stores in its second interim report in the digital platform services inquiry, which we believe showed a deep and sophisticated understanding of the sector.

The Coalition welcomes the Treasury's December 2022 consultation document. The Australian authorities have been playing an important role in developing evidence-led, pro-competitive rules to ensure consumers are well served in the modern global economy, and the recommendations in the ACCC's fifth interim report are a vital step in that process.

The Australian Government should feel confident in taking these measures forward as quickly as possible. It should not add unnecessary stages to the process. Time is of the essence. There are now many impressive reports proving the significant existing harms in this sector and showing a clear case for regulating the gatekeeper platforms such as Google and Apple.[2] In the Coalition's view,

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1 For more information, visit our website at https://appfairness.org/.

2 In addition to the ACCC's reports, please see reports in the UK, EU and US such as the following: UK Competition and Markets Authority, online platforms and digital advertising market study report, published 1 July 2020, available at: https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study; mobile ecosystems market study report (the "Mobile Ecosystems Report"), published 10 June 2022, available at: https://www.gov.uk/cma-cases/mobile-ecosystems-market-study#final-report; the report of the digital markets taskforce, published 8 December 2020, available at: https://www.gov.uk/cma-cases/digital-markets-taskforce; Report of the Digital Competition Expert Panel, Unlocking digital competition, published March 2019, available

there should be no need for further in-depth analysis to decide if platforms such as Google and Apple justify regulatory intervention. We therefore encourage the Government to consider how to streamline the roadmap to the new regime being fully in force so that duplication of analysis can be avoided. For example, the designation process for these companies could be reduced to a brief formality. Similarly, the Government should streamline the design of the new regime to ensure that the platforms cannot obstruct and delay by using the relevant processes to their advantage. For example, multiple consultations on similar issues and an expansive right of appeal would undermine the objectives of the regime. There is a long history of competition law processes being used by well-resourced firms to delay authorities' decisions and the implementation of remedies to the detriment of competitors and consumers. As discussed below, the most shocking example of this is the way in which Apple has obstructed the implementation of the app store remedies of the Dutch competition authority and the app store legislation in Korea by limiting the practical ability of app developers to navigate around Apple's payment system with its restrictive terms and conditions and excessive fees. The drafters of the Australian regime (like the drafters of the UK regime) can learn a great deal from the recent defiance of Apple in the face of its legal obligations.

The European Union ("EU") has already passed the Digital Markets Act ("DMA") and is now in the process of implementing the new regime. The UK is also moving forward with its Digital Markets Unit ("DMU"). These two regimes take slightly different approaches, but they have similar objectives and are well-crafted. We believe the necessary Australian legislation should be moved forward quickly so that the ACCC can play its part in the development of these new rules globally rather than simply replicating other countries' rules at a later stage. We believe countries that introduce their rules later will choose to copy the existing regimes for the sake of international consistency and strength in numbers.

The remainder of this response provides our responses to the consultation questions, focusing on the competition recommendations. The consumer recommendations (questions 7 to 12) are less directly relevant to our interests, but we provide some high level views. Our focus is on the app economy, whereby Apple and Google – having an effective duopoly over mobile ecosystems, and controlling the iOS and Android operating systems and the App Store and Play Store, respectively – are able to dictate the rules of the game, harming app developers and their users.

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at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Stigler Center report on digital platforms, published September 2019, available at: https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report; the US House of Representatives Subcommittee on Antitrust, Investigation of Competition in Digital Markets, published October 2020, available at: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519/; and the Cremer report, Competition Policy for the Digital Era, published April 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

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Question 1: Do you agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses? What are the likely benefits and risks of relying primarily on existing regulatory frameworks?

We see no benefit, and significant risks, in continuing to rely on existing frameworks to make digital markets work well for consumers and businesses. The existing frameworks are already failing to prevent adverse outcomes, as has been extensively explained in reports such as the ACCC's second interim report on app stores. The ACCC found that Apple's App Store and Google's Play Store have significant market power in the distribution of mobile apps in Australia, and measures are needed to address this. In announcing the ACCC's strong findings, ACCC's then Chair, Rod Sims, stated, "*Apple and Google don't only run the app marketplaces, they also compete within them with their own apps. They have the ability and incentive to promote their own apps over others, and they control the terms that their competitors must comply with to gain access to their stores.*" He also said, "*[t]he ACCC is also concerned with restrictions imposed by Apple and Google which mean developers have no choice but to use Apple and Google's own payment systems for any in-app purchases. ... Further while Apple and Google have made efforts to remove malicious apps from the app stores, we believe they could do more to prevent and remove apps that feature, for example, subscription traps and other scams.*"[3] The digital sector should be a source of great innovation and dynamism, but the ACCC – in common with its peers across the world – paints a grim picture of competition being choked off in the sector. The Coalition agrees with the ACCC's findings.

Existing laws are disadvantageous in enabling authorities to achieve improvements in the functioning of digital markets. For example, the dynamics of competition law cases do not enable a constructive remedy process. This means that, whether or not an infringement is found after a lengthy and expensive investigation, it is difficult for the competition authority (or court) to impose meaningful behaviour change on the dominant company. The company under investigation has no incentive to co-operate, and the authority has no ability to properly test its remedies before imposing them. The remedy in a specific case can only address the specific, often narrowly framed, infringement that has been proven in that case, so it cannot take a more holistic view of the relevant market.

Competition law investigations and court proceedings take time and are retrospective in effect (i.e., they address competition and consumer harms that have already occurred). Because of the nature of fast-paced digital markets, which are prone to tipping and are characterised by winner-takes-all dynamics, by the time an investigation is concluded, the harm caused by the anti-competitive conduct of a large digital platform may already be irreversible. Despite the fact that numerous

[3] ACCC Digital Platform Services Inquiry, second interim report, press release 28 April 2021, available at: https://www.accc.gov.au/media-release/dominance-of-apple-and-googles-app-stores-impacting-competition-and-consumers.

courts and competition authorities are currently investigating Apple and Google for their app store practices, consumers can never receive the benefit of the increased competition that would have occurred if the conduct had been prevented *ex ante*. And companies that have been pushed out of business (or decided it was futile to compete with the tech giants) will never return. The ACCC's proposed regime would enable this harm to be avoided in the first place so that all market participants benefit from a level playing field.

We would even argue that the gatekeeper platforms do not benefit under the current system. For example, at the EU level alone, Google has been fighting the European Commission for well over a decade in the Google Shopping, Google AdSense and Google Android cases (and it has other cases ongoing with the European Commission). Other cases against Apple, Meta and Amazon have been going on for years. The enhanced speed and certainty of a set of *ex ante* rules would help all market participants to plan their businesses and know what practices are allowed. The current situation is sub-optimal.

Question 2: Can existing regulatory frameworks be improved or better utilised?

The ACCC's proposals are carefully tailored to the digital sector, and they will work well in combination with the similar laws being enacted in other leading economies such as the EU, UK, Germany, Japan and Korea. Specific rules are required for the handful of tech giants who hold gatekeeper positions in the modern economy, and competition and consumer laws are not sufficient for this task even if they are improve or better utilised.

Question 3: Are there alternative regulatory or non-regulatory options that may be better suited?

No, we do not believe so.

Question 4: Do you see any conflicts between the recommendations?

The recommendations have been thoughtfully designed and similar proposals have been extensively discussed and tested in multiple jurisdictions. We do not see any conflicts between them. Indeed, the framework is well suited to dealing with the balancing of competing objectives that is inherent in the digital sector. For example, improving consumers' ability to exercise choice online without being deceived will also help businesses to compete on a level playing field. The ability to consider and update the rules regularly without needing to go back to parliament to ask for the legislation to be updated is a significant benefit of the ACCC's proposed approach and it will mean that any conflicts that arise can be deal with efficiently.

Question 5: Do you see any conflicts between any of the recommendations and existing Government policy?

No, we do not believe so.

Question 6: What is the best way to ensure coherence between Government policies relating to digital platforms? Are any of the recommendations better addressed through other Government reforms or processes?

We believe the ACCC's proposals are the best way.

Questions 7 to 12: Consumer recommendations

The Coalition is primarily focused on the competition recommendations and therefore will not address the consumer law recommendations in detail. However, we are generally supportive of measures that would protect consumers against harm arising from the use of dark patterns as well as from scams, harmful content or malicious apps.

Ensuring a high standard of security for app store users is important for the Coalition's members that rely on app stores to reach their user base. If the quality of app stores is reduced because of the presence of fraudulent apps that harm users, this will have spill-over effects, harming app developers that distribute legitimate apps through app stores. It is true that the App Store is not the epitome of security, as it counts numerous fraudulent apps. An analysis carried out by The Washington Post found that out of "*the 1,000 highest-grossing apps on the App Store, nearly 2 percent are scams […]. And those apps have bilked consumers out of an estimated $48 million during the time they've been on the App Store.*"[4] It may, therefore, perhaps be necessary to take additional measures to ensure the security of app stores.

However, it is of utmost importance that any requirements placed on Apple and Google to monitor their app stores for malicious or exploitative apps do not allow them leeway to adopt measures that harm developers of legitimate apps. Apple has time and again used security and privacy as justifications for anti-competitive conduct, for example to restrict sideloading or alternative app stores on security grounds, while at the same time the App Store does not conform to strict security standards. In fact, it seems that how apps and developers are treated by Apple is heavily dependent on whether they pose a competitive threat to Apple, with Apple having been accused of approving and distributing "scam apps" that target and deceive consumers so long as they do not compete

[4] Reed Albergotti and Chris Alcantara, "Apple's tightly controlled App Store is teeming with scams", The Washington Post, 6 June 2021, available at https://www.washingtonpost.com/technology/2021/06/06/apple-app-store-scams-fraud/.

with Apple's own apps.[5] It is, therefore, necessary that sufficient safeguards are put in place to ensure that any additional monitoring that takes place is truly to the benefit of App Store users, and that it is consistently and objectively enforced. Monitoring by an independent, external body will be important in this regard. It is desirable for the ACCC to be responsible for both the consumer and competition reforms so that it can effectively balance the enforcement of both of these important initiatives.

We support the proposal to impose mandatory dispute resolution standards that ensure accessibility timeliness, accountability, the ability to escalate to a human representative, and transparency.

Question 13: Do you agree with the designation and code of conduct model proposed by the ACCC for the new competition regime? What would be the main implementation challenges for such a regime?

On balance, we support the designation and code of conduct model proposed by the ACCC, which is more akin to the DMU regime than the DMA regime, as long as steps are taken to ensure it can be implemented quickly.

One of the possible regulatory approaches considered by the ACCC was the adoption of a list of prohibitions and obligations contained in legislation. That is the approach of the EU's DMA, which is already legally in force and is being implemented. The main advantages of this approach are generally thought to be speed and clarity:

- **Speed**: The EU succeeded in enacting the DMA extremely quickly, taking less than 18 months from the publication of the Commission proposal in December 2020 to the Council and the Parliament agreeing on the final text. This is an important factor given that the ACCC and many other agencies have proven that significant harms already exist and continue to have adverse effects on businesses and consumers.

- **Clarity**: Once the law is in place, the platforms falling under its scope will have to comply with a predefined list of dos and don'ts. The relevant legislative instrument could contain obligations and prohibitions that would apply to the digital platforms falling under its scope and/or could include obligations that would apply to certain sub-categories of digital platforms (e.g., app stores), or even prescribe different rules to different business models. The high-level rules are therefore clear, but there is nevertheless a lot of work still to be done to decide precisely what the high-level rules will mean in practice in the specific circumstances of each gatekeeper's activities. Therefore the advantage of the DMA in terms of clarity is perhaps not as great as it first seems.

[5] Nick Statt, "Apple's App Store is hosting multimillion-dollar scams, says this iOS developer", The Verge, 8 February 2021, available at https://www.theverge.com/2021/2/8/22272849/apple-app-store-scams-ios-fraud-reviews-ratings-flicktype.

Therefore, if Australia takes an approach that is nearer to the DMU than the DMA, we believe that speed is the main disadvantage. Throughout the remainder of the legislative process, we therefore urge the Australian authorities to consider how to minimise the speed disadvantage at every turn.

The EU approach has the important disadvantage of inflexibility. It makes little allowance for the firms' different business models. The ACCC's approach therefore mirrors the widely-praised UK approach, which enables detailed rules to be tailored to the specific requirements of particular activities within each firm. It also enables those rules to be updated efficiently by the regulator as time goes on, which is important as tech regulation is in its infancy and one would expect regulators to learn a lot in the first few years.

The designation process envisaged under the UK and ACCC approaches will ensure that only those platforms who act as gatekeepers will be subject to the new regime. It is those companies who have a unique ability to tilt the playing field in their favour and prevent innovation. As the UK's Competition and Markets Authority ("CMA") said, "*Apple and Google have cemented their powerful position as the two main gatekeepers that hold the 'keys' to these increasingly vital mobile ecosystems. Both firms are well placed to leverage their power into other markets linked to their ecosystems, including new emerging ones. It is extremely difficult for other firms to enter, expand and compete meaningfully – Apple's and Google's positions are unassailable without steps to level the playing field.*"[6] This is the intellectual basis for the new regulatory regimes. Smaller platforms do not have that type of "make or break" market power because they do not set the rules of the game and businesses and consumers can readily avoid them if they want to do. The ACCC's designation process can be well suited to making sure the regime is neither over- nor under-inclusive.

In addition, from an enforcement perspective, it is better to focus on a few companies whose practices harm competition and consumers rather than seek to regulate a large number of companies. As enforcement resources will inevitably be limited, it should be ensured that they are sufficient to address the practices of the companies whose conducts have the largest impact on the market.

Once the necessary designations have taken place, codes of conduct can be carefully tailored to each firm's unique business model. The regulator can draw on the ACCC's analysis to develop these, and it can also work in close collaboration with the UK authorities who will be undertaking a similar process. A sophisticated and targeted set of rules will emerge, to the benefit of the app economy and ultimately consumers.

We are confident in the ability of the ACCC (or the new regulator, which would presumably contain many ex-ACCC staff) to draft appropriate rules and implement the new regime successfully. We

[6] Mobile Ecosystems Report, final report summary, page 3, available at: https://assets.publishing.service.gov.uk/media/62a228228fa8f50395c0a104/Final_report_summary_doc.pdf.

therefore believe that the main implementation challenge will be the obstruction of the gatekeeper firms for whom these new regimes are highly unwelcome. We hope that the legal processes set out in the legislation do not lean too heavily towards protecting their interests, for example by over-engineering the various processes, at the expense of protecting consumers' interests in a workable new regime being in place as soon as possible. Of course, an over-engineered process would also increase the costs of the new regime unnecessarily. The new regime needs simple processes without duplicative consultation processes and exceptions that the gatekeepers' legal teams can capitalise upon. It requires strong enforcement powers to deal with powerful overseas firms who have an incentive to obstruct its work.

In order to assist in the efficient implementation of the regime, there should be explicit provision made in the legislation for the regulator to be able to rely on the ACCC's published interim reports when making designation decisions, with no further consultation required on the matters contained in the published analysis. The gatekeeper firms may argue that the analysis needs to be brought up to date, in which case the burden of proof could be on them to show that the situation has fundamentally changed (which will be difficult considering the entrenched nature of their market power). The nature of the ACCC's findings – that their substantial market power is entrenched – means that we can discount the risk that such fundamental changes have occurred. The regulator will need legal cover such as this to avoid being pushed to rerun its analysis and therefore delay the launch of the regime even further.

Question 14: Do you agree with the proposed framework of prescribing general obligations in legislation, and specific requirements in codes?

This framework enables the legislature to dictate the boundaries of the regime, while preserving the expert regulator's ability to design the complex requirements relating to each gatekeeper service. It therefore reaches a good balance between certainty and flexibility.

The proposed principles of "competition on the merits", "informed and effective consumer choice" and "fair trading and transparency for business users" are fairly similar to the proposed objectives in the UK's approach, and such consistency across jurisdictions is very welcome. These three principles cover all the main issues as we see them.

As discussed above, if this approach is taken, the legislature must give careful thought to designing a workable process for the regulator to draft the codes efficiently. Of course, it will be easier for gatekeeper firms to obstruct and delay a regulator than a piece of legislation that has been passed into law.

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Question 15: Do you agree with the proposed principles for designating platforms for the regime?

There is a trade-off to be made between quantitative criteria, which may be quicker and easier to apply, and qualitative criteria, which may enable the regime to be targeted more specifically at firms who exhibit gatekeeping power. The EU's DMA favours the former, whereas the UK's DMU favours the latter, but they both incorporate elements of both.

Gatekeeper platforms could be designated on the basis of quantitative or qualitative criteria or, ideally, a combination of both. For example, the DMA sets out a presumption that a digital platform is a gatekeeper if certain quantitative thresholds are met. However, the gatekeeper can rebut this presumption by arguing that, although it meets the quantitative thresholds, it is not a gatekeeper because of qualitative factors. In addition, according to the DMA proposal, it will be possible for a firm that does not meet the quantitative thresholds to be designated as a gatekeeper on the basis of a qualitative assessment, if it is considered that the firm acts as an unavoidable gateway between businesses and end users, it has an entrenched and durable position and a significant impact on the EU internal market. Subject to defining whether a business offers a "core platform service" for the purposes of the DMA, and establishing the relevant data for revenues and the number of users, the DMA approach should avoid the need for lengthy investigations and legal appeals. This is one factor where the DMA approach seems more efficient than the DMU approach, as long as the thresholds are set at the right level so as not to catch non-gatekeeper firms. Anecdotally, it does seem at this stage that the DMA will catch a surprising number of firms, although it is still at an early stage.

The DMU regime will rely more heavily on individual designation decisions based on qualitative criteria (e.g. "substantial and entrenched market power" with a "strategic position") for each gatekeeper firm, but will nevertheless include a safe harbour revenue threshold below which firms can be confident they are not even within scope of a designation investigation. As well as giving welcome certainty to most tech firms when they plan their businesses, it will help to secure their buy-in to the regime, which will be essential to its success.

In the face of the obvious gatekeeper positions held by firms like Apple and Google, the main risk is that the legal test leads to processes that are so detailed, and analysis that is so thorough, that the regime grinds to a halt from procedural challenges and arguments about datasets. The Coalition asks the Government to bear that in mind when drafting the legislation and include bright-line tests where possible.

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Question 16: Do you agree that the focus of any new regulation should be on the competition issues identified by the ACCC in Recommendation 4? Should any issues be removed or added?

The way Apple and Google operate their app stores – not least because of the gatekeeper role they have on mobile app distribution – has led to significant competition and consumer harms. In the Coalition's view, it is vital that competition in the app economy is opened up. For example, the new regime should prohibit arrangements that force app developers and their users to use a particular payment system, or otherwise compromise their freedom to use the payment system of their choice. The owners of mobile operating systems should be prohibited from disintermediating app developers from their users by inserting themselves between the two. They should be prohibited from preventing app developers from directly communicating with their users. We were pleased to see that the ACCC's second and fifth interim reports endorsed the Coalition's arguments.

In terms of the ACCC's Recommendation 4, we believe that all of the Coalition's primary concerns would be covered by issues listed, such as "anti-competitive self-preferencing", "anti-competitive tying", "exclusive pre-installation and default agreements that hinder competition", "impediments to consumer switching", "impediments to interoperability", "a lack of transparency" and "unfair dealings with business users". Under these headings, the fifth interim report (chapter 6) lists all of the main issues that the Coalition is most concerned about.

We do, however, sound a note of caution regarding Recommendation 4 where it refers to "*justifiable reasons for the conduct (such as necessary and proportionate privacy or security justifications)*". Regulatory regimes do tend to include the possibility for exceptions to rules where there is a good justification for the relevant conduct, so we can understand the ACCC's stance. However, in the digital sector in particular, privacy and security arguments have been abused by the gatekeeper firms. The ACCC in its fifth interim report rightly refers to this issue.[7] For a full demolition of Apple's arguments on these issues, please see the CMA's Mobile Ecosystems Report.[8] Any exception on grounds of privacy, security or online safety must be drafted to inject a high degree of scepticism about such claims, and it must place the burden of proof on the party seeking to rely on the exception. Drawing on the experience in other jurisdictions, the drafters of the codes of conduct can set out *ex ante* where such claims are likely to be allowed and where they are not.

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7 See page 164.

8 See, for example, para 7.76: "*[t]he evidence we have gathered through the course of this study suggests that many of these risks of unintended [privacy, security and online safety] consequences highlighted to us by Apple in particular are likely to be overstated*". See also paras 5.75, 6.37, 7.79 for similar points. See also the CMA's Google Privacy Sandbox case, which related to Google's use of privacy justifications to hand itself an unfair advantage over its competitors in its removal of support for third party cookies in its browser.

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Question 17: What services should be prioritised when developing a code? What harms should they be targeted on preventing?

17.1 Should codes be targeted at individual companies, a specific service, or all digital platform services?

App stores and mobile operating systems should be prioritised. This is an area that has been comprehensively written about by the ACCC and respected regulators around the world. The harms in this area are clear and they are having significant adverse effects every day. They include:

- harms arising from the mandatory use of Apple's and Google's payment systems, including an excessive commission rate of up to 30%;
- harms arising from the disintermediation of app developers from their users (including the notorious anti-steering provisions which prevent direct communication with users);
- harms arising from the collection of app developers' commercially sensitive information and using it when competing against them;
- harms arising from unpredictable app review processes whereby Apple and Google have unique power over app developers wishing to reach mobile users because they can reject their apps, sometimes for spurious reasons;
- harm arising from Apple's self-preferencing practices whereby Apple and Google's vertical integration enables them to give their own downstream apps an unfair advantage; and
- harms arising from restrictions on access to technology and functionalities such as APIs or chips (like the near-field communication chip or the ultra-wideband chip).

These are the issues that the Coalition is most focused on. However, we do not believe prioritising these issues needs to hinder the development of the overarching framework that the ACCC is proposing. Other issues can be tackled in parallel.

The rules should be targeted at Apple and Google and do not need to apply to smaller platforms that do not hold gatekeeper positions and therefore do not have the market power to impose unfair terms. We also believe the regime would be over-inclusive if it applies to every activity within the sprawling ecosystems of Apple and Google. It would be more precise and deliverable if the rules apply to the specific services such as app stores and mobile operating systems, which cause the competitive harm.

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Question 18: Should codes be mandatory or voluntary?

The codes should be mandatory. International experience shows that there is little chance pro-competitive change unless the gatekeepers are forced to open up their ecosystems to competition.

In addition, the codes must not be toothless. They must carry significant penalties for breaches and they must include the ability to order the gatekeeper firms to stop, reverse and change their conduct. This should include the ability to require them to develop new processes as directed by the regulator. The European Commission has been levying fines against Google in the billions of Euros and yet this has proven insufficient to improve the functioning of digital markets, hence the need for the DMA. We believe significant fines are a necessary, but not sufficient, factor in achieving compliance with the new regime. Behaviour change should be the primary objective.

Question 19: Who should be responsible for the design of the proposed codes of conduct and obligations?

The ACCC should be responsible for the codes of conduct. It is a body with great knowledge and experience in these matters. The new regulator could, for example, be situated within the ACCC. This is the approach taken in the UK whereby the DMU is a division of the CMA.

Question 20: Who should be responsible for selecting or designating platforms to be covered by particular regulatory requirements?

We would prefer a regime whereby the designation of platforms is near-automatic by virtue of clear-cut criteria in the legislation. This would assist in implementing the regime as soon as possible and with as few legal challenges as possible.

If there is to be a more lengthy designation process, we would recommend that the ACCC (or the new regulator) carries out the analysis and makes the final decision. It is preferable for the whole task to be done by a single body, rather than one body conducting the analysis and another making the decision, as that would reduce the scope for duplication of analysis or multiple consultation processes. The ACCC is the body with the most expertise in the issues. The use of an expert regulator would also ensure that the decision is entirely evidence-based and any interference of political lobbying by the gatekeeper firms is minimised.

Question 21: Who should enforce any potential codes and obligations?

The regulator should enforce the rules directly, with the power to investigate, find breaches, punish those breaches and impose remedies, subject only to judicial oversight on narrow grounds.

Regardless of the approach to be ultimately followed, particular weight should be given to enforcement. If gatekeepers are able to escape the rules, then the harms arising from their conduct will only persist. The example of Apple and its non-compliance with the order of the Netherlands Authority for Consumers and Markets ("ACM") is representative of this concern. Apple first tried to delay the implementation of the ACM's order, which related to its app store practices. After exhausting every legal mechanism available to it, it chose to not change its practices, instead preferring to pay a €5 million weekly fine for non-compliance until it totalled €50 million (this was the maximum permitted by the law).[9] It has only more recently purported to comply with the order, but it has done so in a deliberately evasive way, which does not achieve the market repair that the ACM intended.[10] Despite the case being ostensibly completed, the legal battles continue across multiple jurisdictions with no sign of a conclusion. The Korean authorities also encountered similar problems with Apple when trying to implement their app store legislation.[11]

The ACCC, therefore, should pay particular attention to the issue of enforcement: any approach chosen should be accompanied by an effective implementation and enforcement regime, which will encompass strong sanctions that are effective in constraining the gatekeepers' harmful conduct. In this regard, it is of utmost importance that the enforcer be granted sufficient human and financial resources to monitor, implement and enforce the rules.

The Australian authorities should be aware that changing the behaviour of these historically large and powerful firms requires strong legislative and procedural support. The gatekeeper firms are large and complex organisations, and the new regime will potentially require actions from various parts of their firms. These firms are not accustomed to being regulated (unlike e.g., banks or telecoms firms) and may not have the requisite processes and culture in place. Their compliance will require senior buy-in and competent project management. It is important to require the regulated firms to identify an individual (or perhaps both a Australia-based individual and an individual at head office) at a very senior level who will be responsible for the firm's compliance with the new regime.

The issue of senior management liability is potentially multi-layered. The regulator should have a range of options at its disposal. We therefore encourage the drafters of the legislation to give the

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[9] See speech by the European Commission's Executive Vice-President Margrethe Vestager, 22 February 2022, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/shared-objectives-framing-tech-economy_en. She said, "*Some gatekeepers may be tempted to play for time or try to circumvent the rules. Apple's conduct in the Netherlands these days may be an example. As we understand it, Apple essentially prefers paying periodic fines, rather than comply with a decision of the Dutch Competition Authority on the terms and conditions for third parties to access its appstore.*"

[10] The ACM originally ordered Apple to make the relevant changes in August 2021 and eventually ruled that Apple was in compliance in June 2022 (although Apple still charges a 27% commission for app developers who do not use its in-app purchasing product, instead of the previous 30%, thus currently rendering the objectives of the remedy a failure in practice because it is not cost-effective to employ a third party payment service).

[11] The Korean example is discussed on pages 134-135 of the ACCC's fifth interim report.

regulator the ability to "name and shame" senior individuals who fail in their responsibility. It is also necessary to have the ability to impose individual sanctions that are similar to the existing competition law regime, such as director disqualification where there is personal culpability. One would hope that such individual sanctions will rarely be required, but the threat of them is necessary.

The Coalition would support the Australian regime having extra-territorial powers in certain respects. For example, as discussed in Question 24 below, it needs to be able to get hold of data held overseas and to interview individuals based overseas. It also needs to be able to enforce its decisions against foreign companies that affect competition in Australia.

Question 22: What checks and balances should be in place on decision makers and across the various stages of the policy (e.g. code making, designation process, code enforcement)?

The regime will of course need adequate public consultation rights, hearings, published decisions, and judicial oversight. Within the regulator, it would be advisable to ensure top level legal and economic advice is available, and it should have a decision-making structure that guards against political interference and confirmation bias. However, the regime should bear in mind the experience of many regulators internationally in the field of competition law, whereby the gatekeepers have been able to obstruct and delay the relevant processes. It can seem attractive to incorporate many checks and balances into the process, but great care should be taken not to allow the end-to-end process to be so long that the objectives of the regime are frustrated.

Question 23: What avenues of dispute or review should exist with regards to designation or decisions under any potential code? How can this best be implemented to ensure timely outcomes to allow for effective regulation in a fast-changing market?

The regime would benefit from tight deadlines within which to complete each process. This would help the regulator to keep its investigations proportionate in the context of a fast-moving sector. However, this would not remove the obligation to allow proper rights of defence for the investigated firms and rights of audience for all firms affected by the process.

We would recommend that the regulator has the power to impose standstill obligations on the regulated firms, which could be used to avoid significant harm materialising pending the outcome of a legal process.

Question 24: Do information gathering powers for the relevant regulator need to be enhanced to better facilitate information gathering from multi-national companies? What balance

should a potential regime strike between compliance costs, user privacy and the regulators information needs?

The regulator will require extensive information-gathering powers. It will always be at an information disadvantage to the regulated firms, so it will need to be able to narrow that disadvantage as far as possible. The regime will obviously fail in its objectives if the regulator cannot compel foreign companies to provide the information it needs. The law must be exceptionally clear on that point in order to avoid lengthy legal appeals that mean the new regime gets off to a slow start.

Current competition law regimes tend to focus on the provision of documents because they were written before the current digital age. The new regulatory regimes for the digital gatekeepers obviously need to be written to take account of the way in which data is stored nowadays. The regulator will need access to documents (including data, coding, algorithms, emails and other forms of electronic messages) that are located on overseas servers. It will need to be able to compel foreign managers to answer detailed questions in interviews, including giving explanations of what data is held and how the regulator can interrogate that data. The regulator may particularly need the firms' assistance in understanding their extremely complex algorithms. The regulator will also need the firms to be legally obliged to co-operate in testing remedies, conducting fresh analysis, and undertaking research. The regime could incorporate a duty for regulated firms to co-operate with the regulator.

We do not see the costs of compliance to be a major issue for such large and profitable firms. Further, user privacy can be respected by imposing strong requirements on the regulator not to disclose data outside of its organisation. There would be no need to include detailed user data, or firms' commercially sensitive data, in the regulator's published reports.

The regulator will need the full legal ability to share information with, and receive it from, overseas regulators provided that the need to do so is reasonably related to the its functions and it is satisfied, acting reasonably, that the overseas regulator will protect the confidentiality of business secrets to a broadly equivalent standard.

The regulator's powers need to be supported by strong penalties for non-compliance. In the UK, for example, the forthcoming Digital Markets, Competition and Consumer Bill will increase the maximum fines to up to 1% of a business' annual worldwide turnover, plus a daily penalty of up to 5% of daily worldwide turnover, while non-compliance with an information request continues. The UK authorities have decided that the current levels of the fines are insufficient to guarantee compliance.

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Question 25: Should Australia seek to largely align with an existing or proposed international regime? If so, which is the most appropriate?

We believe it is very important for major economies to align themselves so that they can tackle these global challenges together. The case for new regulatory regimes for the digital gatekeepers has been thoroughly proven by leading authorities around the world, and now they should focus on sharing their knowledge and experience amongst themselves as they move forward. The ACCC has been a key player in these developments and can continue to be so.

In the app economy, the South Korean legislator has already adopted rules regulating the practices of app store providers. In the EU, the DMA has been adopted and will impose a number of obligations and prohibitions on app store providers. Therefore, if Australia decides to regulate the conduct of digital gatekeepers (which the Coalition believes it should), it should seek to ensure convergence (at least at the substantive level) with EU and Korean rules, as well as rules in other jurisdictions. As discussed throughout this response, UK rules covering very similar ground are in the process of being brought, and other countries are also moving forward in this area.

On balance, we consider the UK's DMU to be the best of the current proposals as long as the possibility of delays is fully mitigated. In certain respects, the UK regime seems to make life difficult for the regulator, for example with many sequential consultation processes and the possibility for the regulated firms to argue privacy and security exemptions. The Australian regime could perhaps improve on this aspect by making the regime more efficient to implement and enforce, while maintaining the strengths of the UK's flexible and tailored approach.

Question 26: What are the benefits and downsides of Australia acting in advance of other countries or waiting and seeking to align with other jurisdictions?

At this point, Australia will not be acting in advance of other countries, but it can still act alongside them if it moves efficiently to bring into force the new regime. The ACCC's voice is an extremely important one in this area and it would be a shame if Australia delayed its regime and the ACCC lost its leading role. The new regimes for the digital gatekeepers across the world will be better if the ACCC plays a hand in designing them rather than waits and merely copies them. Any delays to the new regime would also be unconscionable because it would result in significant harm for the Australian businesses and consumers who rely on digital platforms while they wait for the functioning of the digital sector to be improved.

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Question 27: Are there any particular aspects of the ACCC's proposed regime that would benefit from quick action or specific alignment with other jurisdictions?

As discussed throughout this response, app stores and mobile operating systems represent an extremely urgent issue that require quick action.
