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Digital Platforms: Australian Government consultation on ACCC's regulatory reform recommendations

Daily Mail Australia response to December 2022 consultation paper

I. Introduction

Daily Mail Australia forms part of one of the world's largest English-language group of newspaper websites, with more than 183 million global unique browsers.[1] Daily Mail Australia has a loyal readership of 8.8 million monthly unique visitors, with an average time of 24 minutes spent per person.[2]

We welcome the opportunity to contribute to the Australian Government's development of a regulatory regime for the large digital platforms. The platforms such as Google, Apple and Meta are a major source of concern because they act as gatekeepers between journalists and their audiences. They use their market power to benefit their own businesses to the detriment of our business and to journalism more generally. It is no surprise that their practices are being investigated and are subject to litigation in multiple jurisdictions, while at the same time governments are designing new regimes to mitigate the effects of their market power. From our point of view, the main concerns include:

- Digital platforms, such as Google and Meta, may take advantage of news publishers' content, as well as the data generated by users' interaction with that content, without paying news publishers proper compensation.

- Google's monopolization of the ad tech stack through a combination of acquisitions and anticompetitive practices has deprived news publishers from the benefits of competition in ad tech services in terms of lower prices, product choice and innovation.

- Apple is taking advantage of its market power on the market for the distribution of apps on iOS devices to set the rules of the game in a manner that is unfavourable to app developers, such as the Daily Mail. In particular, as observed by the UK Competition and Markets

[1] Google Analytics, January 2023.

[2] https://mumbrella.com.au/wp-content/uploads/2021/01/Nielsen-DCR-CEGN-December-2020-1.png.

Authority ("CMA"),[3] Apple has engaged in "privacy washing" at the expense of app developers' ability to monetise their content through ads in order to favour its own advertising activities. Google also has market power relating to the distribution of apps on Android devices and its announcement that it is extending is Privacy Sandbox proposals to include Android may be evidence that it intends to take advantage of that market power.

Daily Mail Australia therefore welcomes and supports the Australian authorities' work in digital markets. The ACCC has been doing excellent – and world-leading – work and we hope that the Australian Government adopts its recommendations and continues to provide the support it requires. In particular, we agree with the following analyses:

- In early 2021, the Australian Government passed legislation giving effect to the News Media and Digital Platforms Mandatory Bargaining Code (the "News Media Code") in order to address the consequences of the bargaining power imbalances between news media and digital platforms and, in doing so, promote the sustainability of public interest journalism in Australia. The News Media Code has yet to achieve all its objectives, but we agree with its analysis of the problem that needs to be solved.

- In April 2021, the ACCC issued the second interim report in its digital platform services inquiry, which covered app marketplaces. It 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 September 2021, the ACCC issued the third interim report, which covered digital advertising. It found that competition for ad tech services in Australia is ineffective, with Google dominating the supply of ad tech services. The ACCC recommended it should be allowed to address conflicts of interest, self-preferencing behaviour, data advantage issues, and transparency problems, where these create efficiency or competition concerns.

Given this significant background of analytical work, we believe the ACCC's proposals for how to deal with the problems it has rightly found are well founded.

We would like to make the following observations upfront:

[3] Mobile ecosystems market study final report (the "Mobile Ecosystems Report"), 10 June 2022, available at https://www.gov.uk/cma-cases/mobile-ecosystems-market-study, para. 6.264 ("*we are concerned that Apple may not be applying the same standards to itself as to third parties, and the design and implementation of the [App Tracking Transparency] prompt to users may be distorting consumer choices. Ultimately this could further entrench the App Store's position as the main way of users discovering apps, advantage Apple's own advertising services and drive app developers to begin charging for previously free, ad-funded apps.*")

- The Australian government should proceed with a greater sense of urgency. Australia was at the forefront in identifying the competitive issues raised by large digital platforms and its analytical work – in the form of reports – has been truly remarkable. Yet, because the harm created by large digital platform has already materialized and is significant, Daily Mail Australia considers that it is now time for action. While Australia was at the forefront of the debates over what needs to be done with large digital platforms, other jurisdictions have now taken the lead. For instance, the European Union ("EU") has already adopted the Digital Markets Act ("DMA"), an ambitious piece of legislation, which will apply special rules to digital gatekeepers to ensure the fairness and contestability of digital markets where gatekeepers are present. The UK Government is expected to bring its legislation for the Digital Markets Unit ("DMU") before Parliament any day now.

- After several years of hard work in analysing these complex markets in jurisdictions such as the US, the EU, Germany, the UK, France, the Netherlands, Japan, and Korea, their respected agencies are coming to remarkably similar conclusions. This should give the Treasury confidence that Australia is on the right track. It also reduces the implementation risks that are inherent in a new regime. For example, the digital platforms will be less able to obstruct the implementation if a number of major economies are moving forward together in a similar way. And Australia will be able to learn quickly from (e.g.) any wrinkles that arise in the early days of the EU's DMA, which is already being implemented.

- International experience teaches us that the implementation and enforcement of the regulatory regimes that will be adopted to constrain digital gatekeepers is likely to be a major issue. Digital gatekeepers have immense resources, which they are willing to deploy to obfuscate the implementation of such regimes. Constructive non-compliance is a tactic that gatekeepers already use in the competition law field, as illustrated by the struggle experienced by the Dutch authorities. Apple preferred to pay periodic fines rather than implement the app store remedy imposed by the Dutch Competition Authority to bring a competition law infringement to an end, and eventually implemented the remedy in a deficient manner. Thus, any regulatory regime aimed at constraining digital gatekeepers must be backed up by strong sanctions.

- The ACCC should take care to avoid the mistakes that were made in relation to the News Media Code. When the ACCC first announced its draft News Media Code, Daily Mail Australia greeted it with unreserved approval. It promised not only to oblige digital platforms to enter into negotiations over payment for content, but included an arbitration mechanism to guarantee a fair outcome, a requirement that the platforms supply the information publishers need to determine the true value of their content, and restraints on the platforms using algorithms to direct traffic away from publishers which secured a fair

deal. It promised to deliver fair rewards for all publishers, both large and small, and those long established in Australia along with newer entrants to the market. In practice that has not been achieved. After the News Media Code became law Google and Facebook (now Meta) rapidly concluded lucrative deals with the largest, longest-established news publishers in Australia. However, as the political pressure eased, a fatal flaw in the legislation was exposed – that the arbitration process does not become binding unless a platform is designated under the News Media Code by the Federal Treasurer. So far no designation has taken place, nor does any decision look likely to be adopted in the future. Meanwhile smaller and more newly established news publishers have struggled to secure payment for content deals on anything like the terms offered to the major publishers.

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This response therefore explains our support for the ACCC's proposals. The response focuses on the competition aspects of the ACCC's proposals, which are more directly relevant to Daily Mail Australia's business. We therefore have not responded to Consultation Questions 7-12, although we broadly agree with the consumer law findings, especially if the reforms help to ensure that the platforms' algorithms do not mislead consumers.

II. Responses to consultation questions

Consultation 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 agree with the ACCC. As has been recognised in many authoritative reports, the existing economy-wide competition and consumer laws are not fit for purpose in the context of digital platforms.[4] We see the following adverse outcomes from continuing to rely on the existing laws:

1. **Clarity**: Under current competition laws, it is not always clear ahead of time precisely what conduct is, and is not, allowed. A new framework could provide welcome clarity for platforms and other market participants through tailored rules. Their increased confidence to invest and innovate would benefit consumers.

[4] See, for example, Furman Review (2019), Unlocking Digital Competition; Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019), Competition for the digital era, final report for the European Commission; Stigler Center (2019); US House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law (2020), Investigation of Competition in Digital Markets; the UK Competition and Markets Authority (2020), Advice of the Digital Markets Taskforce.

2. **Timing of intervention**: Under current competition laws, the authorities can only address concerns after they have happened, at which point substantial and irremediable harm may already have occurred. For example, in the famous Google Shopping case in the EU, several of the victims of Google's anti-competitive conduct (e.g. Foundem) went bankrupt many years before Google's conduct was ruled to be illegal. Consumers lost the benefit of the increased competition that would have occurred if the conduct had been prevented *ex ante*.

3. **Speed**: Current competition investigations take many years to complete. This is sub-optimal in digital markets, which move quickly. Of those cases that have been brought by the European Commission against Google in recent years, the Android case took more than five years to come to a decision, the Shopping case took more than seven years, and the AdSense case took nine years. These periods do not even include their subsequent, lengthy appeal processes. Given the difficulty of imposing interim measures in competition cases, no improvements to the market for the benefit of competition and consumers are achieved until after these process have finished.

4. **Scope**: Current competition laws tend to be focused on a narrow range of established conduct categories, which do not necessarily encompass all the harmful conduct that occurs in digital markets. A tailored regime could be scoped more appropriately, and could cover a much wider (or indeed narrower) range of concerns than those which can be addressed under the parameters of competition law.

5. **Remedies**: Under current competition laws, market remedies are not the main focus, and the process for introducing them is sub-optimal. Competition cases are lengthy and difficult to complete, so they are often scoped to deal with one discrete aspect of a business's conduct, meaning that any remedy would not deal with aspects that would improve the functioning of the market more broadly. To bring the infringement to an end, it will often be sufficient to cease the conduct proved to be illegal, with the result that many remedies are simply an order to "cease and desist" the conduct. Also, authorities tend not to be able to revise the remedy over time, which is particularly important in this fast-moving sector. Under a new framework, the authorities can adopt a much more joined-up approach to improving outcomes, and they can periodically refine their interventions to ensure they work well for businesses and consumers and impose as little burden as necessary on the regulated firms.

6. **Expertise**: Under the current competition laws, authorities do not have the chance to build up expertise in a certain sector over time. In ensuring that digital markets serve Australian society as well as they possibly can, it will be hugely beneficial to have staff who understand how they work. This ongoing role will also help to improve trust and

transparency in the digital sector more generally in a way that is not possible in a regime whereby the authorities make one-off interventions relating to specific situations.

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

In dealing with the new issues arising from digital markets, existing frameworks suffer from the fundamental issues described in the response to Question 1 above. Improvements to existing frameworks would not cure these issues and therefore would not be sufficient to improve the functioning of digital markets. Governments around the world are choosing to enact new regimes to deal with these issues rather than trying to amend existing laws which are not fit for purpose.

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

We believe the ACCC's proposals are well crafted, and we do not see any better alternatives.

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

We do not see any conflicts between the recommendations. Indeed, the flexible way in which they have been framed means that any unforeseen conflicts that emerge can be dealt with quickly and effectively.

The framework is well designed to deal with some of the complex trade-offs that are inherent in competition policy. For example, it is sometimes argued that objectives relating to competition and privacy are in conflict with each other in the digital sector. The UK competition and privacy authorities recently published a well-regarded joint paper on the subject, which showed how these two important objectives can be synchronized.[5] The UK CMA has said, "*we have concluded that if interventions to promote greater competition are well thought out and designed carefully, they need not necessarily lead to compromises for users in the form of degraded privacy, security, or safety.*"[6]

[5] CMA-ICO joint statement on competition and data protection law, May 2021, available at https://www.gov.uk/government/publications/cma-ico-joint-statement-on-competition-and-data-protection-law.

[6] Mobile Ecosystems Report, para 7.80. See also para 7.77, which states: "*In relation to privacy, our close cooperation with the ICO [the UK data protection regulator] gives us confidence that our overlapping objectives regarding competition and data protection in the context of the digital economy are strongly aligned and*

Consultation Question 5

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

We do not see any conflicts between any of the recommendations and existing Government policy.

Consultation 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 forward.

Competition recommendations

Consultation 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?

We agree with the model proposed by the ACCC. The approach to designation promises to interfere only in those businesses who justify the interference. There is no strong justification for imposing detailed ex ante competition rules on digital platforms which do not act as gatekeepers between businesses and their customers. The regime will therefore be well targeted by applying only to a handful of the largest digital platforms (from our point of view, Apple, Google and Meta) which have significant market power and cause the ill effects set out in detail in the ACCC's reports.

In relation to the designation criteria, it is not clear whether the quantitative criteria would be used to establish merely whether a firm is eligible to be designated (with a further qualitative analysis also required before making a designation), or whether meeting the criteria would be sufficient for a firm to be automatically designated. The former would be similar to the UK approach whereby the minimum threshold would operate as a safe harbour for firms that fall beneath it; the latter would be similar to the EU approach whereby meeting the thresholds is intended to be definitive

complementary. We share the view that any areas of perceived tension between competition and data protection can be overcome through careful consideration of the issues on a case-by-case basis, with consistent and appropriate application of competition and data protection law, and through close cooperation between our two organisations."

in most cases as to whether the new regime applies to a firm. On balance, we would recommend the EU approach, i.e., that meeting the quantitative thresholds would automatically designate a platform, subject perhaps only to a subsequent override in certain narrow and exceptional circumtances. This would help to streamline the process and minimise the need for lengthy investigations into matters that are essentially repeating the now well-established findings that platforms such as Google and Apple hold gatekeeper positions. A qualitative assessment could be reserved for more marginal cases as and when they arise. There is no due process argument against the use of quantitative thresholds because the ACCC's analysis, and indeed the analysis of the same issues by other authorities such as the UK's CMA, has been subject to extensive consultation already.

In setting the levels of the thresholds, the Australian regime can learn from the experience of the EU's DMA. It will be clearer which platforms have been captured by these EU thresholds by the time the Australian regime is implemented, although the Australian regime would presumably wish to incorporate Australian revenues or user numbers into its thresholds.

In relation to the codes of conduct, like the UK's DMU regime, the ACCC's tailored approach promises the necessary flexibility to deal with the fast-moving digital sector and is therefore preferable to the more rigid model enacted by the EU's DMA (although for the most part, both models aim to achieve the same results). The business models and anti-competitive practices of the gatekeeper firms differ substantially, so it is preferable to draft rules that fit each firm's business appropriately. The relevant rules can be revised as time goes on.

We see three possible downsides to the flexible regime being proposed:

- **Certainty**: An approach that is too flexible might lack legal certainty for the regulated firms when planning their businesses. This concern is minimised by the ACCC's proposals because the rules would be fully consulted upon and established *ex ante*. There would be a standing regulator available with whom the regulated business can discuss any arising issues. This is considerably more certain for businesses than the current competition law regime, which has no specific upfront rules.

- **Delay**: The EU's more rigid approach has resulted in it being able to enact the relevant legislation quickly, which is a major benefit. The Australian authorities must ensure that a desire for flexibility does not give rise to lengthy debate, and therefore inaction, despite the identified harms to consumers and businesses continuing to exist. Timely action can be achieved if there is a strong cross-government will to push this important legislation forward as fast as possible.

- **Complexity**: Obliging detailed rules to be drafted for each gatekeeper firm is not the easy option. It would be far easier (and probably cheaper) to draft some simple and rigid rules

in the legislation, even if they risk hindering innovation and may quickly seem outdated. The codes of conduct will require great skill on the part of the drafters. In this regard, the Australian government can draw comfort from the high standard of the ACCC's analysis in its ongoing digital platform services inquiry. Steps should be taken to make sure the regulator is well funded and continues to be seen as an attractive place for ambitious and skilful lawyers and economists to spend their careers.

The main implementation challenge will be the recalcitrance of the gatekeeper platforms (and indeed the large-scale lobbying efforts we can expect to see in opposing the legislation). This can be mitigated by making sure the legal processes do not enable obstruction and delay. For example, the law should allow processes to be undertaken in parallel instead of sequentially, it should include strict deadlines, it should stipulate a proportionate amount of public consultation, it should reduce the scope of appeals, and it should give the regulator strong information gathering powers supported by heavy penalties for non-compliance.

Consultation Question 14

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

This approach ensures that the rules can evolve as the market evolves, while also ensuring that the regulator does not have an unlimited ability to impose unjustified rules on those parts of the gatekeepers' businesses that do not enjoy substantial market power. It gives the regulator the necessary degree of discretion in specifying and updating the detailed rules, while making sure that discretion is exercised within the bounds set by law. Of course, there will be other checks and balances, not least the courts, in ensuring the regulator does not abuse its discretion.

The general obligations in the legislation will also make the scope of the new regime clear. This will ensure the regime stays well targeted at the precise harms that have been identified. The regime should be accountable for whether it meets the objectives set out in the legislation.

The proposed principles of "competition on the merits", "informed and effective consumer choice" and "fair trading and transparency for business users" seem reasonable to us and they are well-founded in the ACCC's extensive analysis. There is a benefit in maintaining consistency with like-minded economies such as the UK, so it is welcome that these principles are similar to the UK DMU's proposed objectives. The UK proposals are well thought out, and it will be more efficient to continue to share ideas back and forth between the two countries as these regimes develop.

The downside of this approach is the possibility of delay while the ACCC writes the detailed rules and defends the appeals brought by the gatekeepers. The regulator is more susceptible to legal

challenges and obstruction than the legislature. This downside can be mitigated by imposing a clear process, tight deadlines and a limited scope for appeals.

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

Please see the response to Question 13 above.

Consultation 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 competition issues listed in Recommendation 4 seem reasonable to us. Our understanding is that these issues would not be listed in the legislation, but would instead be the subject matter of the more detailed codes of conduct. This approach would work well because the issues are likely to evolve over time.

We believe the list of issues as currently drafted would be wide enough to cover the issues that are most relevant to our business. For example:

- "Anti-competitive self-preferencing" and "anti-competitive tying" would encompass measures to open up the ad tech stack to competition, remove the ability of Google to give an unfair advantage to certain products or links in its search results, remove the ability of Apple and Google to rank their own apps more favourably in their app stores, and enable app developers and their users to benefit from the freedom to choose alternative ways to distribute their products.

- "Exclusive pre-installation and default agreements that hinder competition" would encompass measures to deal with the way in which Apple and Google give their own products an unfair advantage by preinstalling them on devices. For example, Apple News is currently pre-installed on Apple's devices, which makes it more difficult for other news organisations' apps to compete on a level playing field.

- "Impediments to interoperability" would encompass measures to deal with Apple's App Tracking Transparency initiative, which limits third parties' access to its operating system while not applying the same standards to its own services.

- "Data-related barriers to entry and expansion" would encompass measures to deal with the way in which Apple and Google give themselves advantages against their competitors and

business customers due to their superior access to data and their gatekeeping position. The rules can limit their use of data at the same time as limiting their restrictions on other businesses' use of data.

- "Lack of transparency" would encompass measures to deal with transparency requirements for ad tech services and the app review processes. It is also very important that it includes transparency of algorithms. In recent years Google has made a series of changes to its algorithms, which have taken place without adequate warning or explanation and which have caused serious damage to our traffic and consequently our revenue. We are also concerned that for reasons that have never been properly explained Google's search algorithm appears to favour some news publishers against others.

- "Unfair dealings with business customers" would encompass measures to deal with conduct by the gatekeeper platforms that prevents media businesses from fully monetising their journalism, or otherwise imposes unfair terms and conditions.

In short, we believe that the list of issues presented by the ACCC is broad enough to cover the issues that most significantly affect our business, and many other media businesses, as long as the list is not interpreted too restrictively. We agree with the ACCC that the list should not be treated as exhaustive because that would undermine the flexibility that is one of the main strengths of the framework being proposed. Indeed, we believe the legislation should explicitly state that the ACCC is free to add rules on any subject (within the bounds of the three legislative principles) so long as it consults publicly on its proposals and is subject to normal judicial oversight.

The ACCC's Recommendation 4 mentions the need to allow space for privacy or security justifications by the gatekeeper firms. The gatekeeper firms often use privacy or security objectives as a justification for their anti-competitive conduct. In its Mobile Ecosystems Report, the UK's CMA was notably disparaging about Apple's use of these arguments.[7] It has also investigated, and imposed remedies on, Google for its Privacy Sandbox initiative, which would have removed support for third-party cookies on its Chrome browser in the name of privacy, but which also benefited Google to the detriment of many other businesses and their customers.[8] Therefore, while

[7] See, for example, Mobile Ecosystems Report, para 5.75: "*the evidence that we have seen does not suggest that the WebKit restriction is justified by security concerns. We note that Apple benefits financially from weakening competition in browsers via the browser engine ban*"; para 6.37: "*we consider that Apple has overstated the security risks of opening up NFC access, particularly through the use of HCE, for a number of reasons…*"; 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*"; para 7.79: "*As with several security-based justifications, we do not find these justifications on online safety grounds to be compelling.*" This issue is referred to by the ACCC in its fifth interim report, page 164.

[8] https://www.gov.uk/government/news/cma-to-keep-close-eye-on-google-as-it-secures-final-privacy-sandbox-commitments.

it is superficially attractive to include the possibility to exclude conduct from the rules if it is justified on privacy or security grounds, this is an aspect of the regime that should be approached extremely cautiously. If the exception is drafted too widely, the regime will be impotent to address the harms it has been tasked with addressing. The burden of proof must rest on the gatekeeper firm arguing that its conduct is justified, and the law must make it clear how narrowly the exception is to be treated. It must be clear that the gatekeeper firms are obliged to devote resources to developing new processes that respect privacy and security while protecting competition.

Consultation 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?

The most important issues from our point of view are discussed in the introduction section above. We therefore believe the most urgent issues relate to search engines (Google), ad tech (Google and to a lesser extent Meta), app stores (Google and Apple), browsers (Google and Apple) and mobile operating systems (Google and Apple). To the extent that certain services need to be prioritised due to resourcing and scheduling issues, we believe these services should be addressed first. As part of this, we would recommend that the concerns of news media businesses be given the utmost priority, because new media issues have already been highlighted as an urgent issue by the Australian authorities and a well-functioning news sector is so important to Australian society.

As the problems stem from Google and Apple's gatekeeping positions between businesses (e.g., news media) and their customers (e.g., their readers), we do not see a strong justification for applying the new regime to all digital platforms. Other platforms do not enjoy such a strategic position in the modern economy.

Even within Google and Apple, there are aspects of their businesses that do not justify regulatory intervention, at least at first. For example, Google's mobile handset device has a small market share compared to Apple and Samsung, and we are not aware of the handset (i.e., the hardware as opposed to the Android operating system) causing competition concerns. Similarly, Apple's television streaming service is small compared to Netflix and Amazon Prime Video and, as far as we are aware, does not cause competition concerns. This reasoning leads us to agree with the ACCC that the new regime should be targeted at specified services where the relevant firm enjoys a gatekeeping position. The main proviso to this is that the new regime will need to oversee the platforms' ability to compete unfairly by leveraging their market power from one market to a new one. This problem is intended to be policed by the UK's DMU, and should also be included in the Australian rules.

Consultation Question 18
Should codes be mandatory or voluntary?

The codes should be mandatory and they should be backed up with detailed monitoring powers and heavy penalties for non-compliance. A voluntary approach would render the new regime meaningless. The gatekeeper platforms would ignore the Australian authorities and devote their resources to fighting those jurisdictions like the EU and UK with significant sanctions.

The new regime should also include personal sanctions for senior managers of the gatekeeper firms so as to ensure that the new rules are taken seriously at a senior level. This is to take account both of the significant harm being caused to markets by the gatekeeper firms and the difficulty in influencing the conduct of powerful, foreign-headquartered firms.

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

The ACCC is well placed to continue its excellent work in digital markets by designing the details of the new regime. The task requires an agency with deep knowledge of the sector.

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

The most important factor in this regard should be speed and efficiency. Given the experience of the News Media Code regime, in which the Minister has not to date designated any digital platforms, we would lean towards granting these powers to the ACCC or the relevant regulator, for whom the task is likely to be a higher priority.

In addition, if the Minister is to make the decision, there is a risk of duplicative consultation processes. For example, in the UK's implementation of the DMU regime, there has been a tendency for the competition authority to recommend the new regime and fully consult on that decision several times through its inquiry, its interim report and its final recommendations, and then for the relevant government department to carry out its own further consultation on the same subject matter when it is considering whether to accept the competition authority's recommendations. This duplication obviously elongates the end-to-end process, and the gatekeepers use the delays to further entrench their market power and their monopoly rents while lobbying to dilute the new regime. We would therefore prefer that the body doing the detailed analysis is also the body making the final decision, and the ACCC is the body that has shown itself to be well suited to this task.

If Government involvement is thought appropriate, the regime could incorporate a referral process whereby the Minister can require the ACCC to investigate the designation of a specific firm, together with a statutory deadline for doing so.

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

The regulator is well placed to enforce the new rules directly using an administrative model. The regulator will be the leading expert in these matters, and there will be sufficient checks and balances, so it is best placed to enforce the rules. It would be undesirable to require the regulator to go to court to enforce the rules because this again would give rise to delays and the opportunity for obstruction.

Consultation 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)?

There is a delicate balance to be found between respecting firms' ability to defend themselves and making sure they cannot delay and obstruct the functioning of the regime. It is clear that European competition law has not found the right balance in its investigations into the gatekeeper firms as it often takes more than a decade to complete a case on one narrow issue, once all the appeals are finished. Therefore, the right position is clearly a more streamlined process than the existing competition law process. In the digital sector, regulation needs to be fast-moving if it is not to be redundant.

When designing the checks and balances of the new regime, please bear in mind that any expert regulator would have considerable checks and balances incorporated into its governance even before any judicial or other external oversight is added. For example, the regulator would have a legal service and an economic service to provide robust feedback to case teams. It would have senior management who oversee case teams. And it could have a Board who sets its direction and oversees the senior management. The regulator would be accountable to Parliament. Other checks and balances could be added. For example, the European Commission has an independent Hearing Officer (and the UK CMA has a similar Procedural Officer) to whom aggrieved parties can go without needing to take a matter to court.

Some regulators such as the UK CMA also operate a two-stage process in some circumstances whereby a fresh decision maker is appointed for the second stage, before a final decision is made, so that the regulator can minimise its confirmation bias when taking decisions. Of course, this

elongates the administrative process, so it should only be used where necessary to ensure due process.

Given the ability to design a robust internal governance process for the regulator, it would be duplicative if the merits of cases were simply re-run on appeal. The UK's approach of allowing appeals only on limited judicial review grounds therefore seems sensible, e.g. where the regulator has acted irrationally, illegally or with procedural impropriety.

It would be important for decision makers to consult widely on their decisions. Therefore, the legislation should require their full reasoning and underlying evidence to be published to allow stakeholders to contribute their views and evidence before any final decision is made. However, they should not need to consult more than once on any given piece of analysis as that simply adds delay to the process.

There might be an argument for making the designation decisions subject to more detailed judicial scrutiny than the day-to-day enforcement decisions. It would be particularly important for the latter decisions to be taken quickly and efficiently because urgent intervention might be needed before the victim of the infringement goes out of business or consumers are harmed. However, even in the case of designation decisions, these issues have already been considered in detail by numerous authorities worldwide and there is proven business and consumer harm that exists while any appeal process takes place.

Consultation 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?

Please see the response to Question 22 above.

Consultation 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 be asked to monitor the activities of powerful firms whose decisions are made overseas, and force them to change their business models against their will. It will be at a significant data disadvantage compared to those firms. It will therefore need full legislative support. This includes the explicit ability under Australian law to require the provision of data and documents

that is held abroad, and the ability to require firms to produce new analysis and carry out testing of proposed remedies.

Please note that the experience of other regulators internationally has not always been a happy one when dealing with multi-national companies, so the ACCC is right to highlight it as an important issue. For example, the UK CMA had to deal with Meta's refusal to comply with its order twice in a recent merger case, and in December 2022 BMW refused to comply with its information request in a competition law case (the matter is now on appeal, but the CMA's investigation is obviously obstructed in the meantime).[9] The UK is now proposing to greatly increase its maximum fines for failing to comply with an information request, and to introduce personal liability for senior managers, because the current system is insufficient to persuade large companies to comply.[10]

Consultation Question 25

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

The issues that this new regime is designed to address are truly global in nature. This has now been well established by the various authoritative reports from jurisdictions including Australia, the US, the UK, the EU, Germany, Japan and Korea. There is a great benefit in leading economies moving forward together on these global issues. This will enable them to force pro-competitive change in the digital sector to the benefit of innovation and consumers. They can share learnings with each

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[9] For the Meta cases, see: https://www.gov.uk/government/news/cma-fines-meta-a-second-time-for-breaching-enforcement-order and https://www.gov.uk/government/news/cma-fines-facebook-over-enforcement-order-breach. For the BMW case, see: https://www.gov.uk/government/news/bmw-fined-for-failing-to-comply-with-cma-information-request.

[10] This is intended to form part of the UK's forthcoming Digital Markets, Competition and Consumer Bill. See Consultation outcome, Reforming competition and consumer policy: Government response, 20 April 2022 (available at: https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response#chapter-1-competition), which states: "*Government intends to proceed with the following reforms:*

- *where a business (or any other entity other than a natural person) fails to comply with an investigative measure, including failing to comply with an information request, concealing, falsifying or destroying evidence and providing false or misleading information, the CMA, and the concurrent regulators, should be able impose fixed penalties of up to 1% of a business' annual worldwide turnover, as well as the power to impose an additional daily penalty of up to 5% of daily worldwide turnover while non-compliance continues*
- *where a natural person fails to comply with an investigative measure the CMA should be able to impose fixed penalties of up £30,000, as well as the power to impose an additional daily penalty of up to £15,000 while non-compliance continues. These are the same thresholds that currently apply to breaches of competition investigative measures that are sanctionable by civil penalties. It is also intended that the statutory cap for these penalties should be able to be adjusted by a statutory instrument to ensure they remain relevant over time.*"

other and maybe even share some of the work between them (for example, the UK CMA has investigated Google's Privacy Sandbox and successfully imposed remedies on a worldwide basis, so perhaps it is less of a priority for other regulators to duplicate that work when there are plenty of other urgent issues to investigate). This will push the gatekeeper firms to eventually concede that these types of rules need to be complied with, rather than continuing their current policy of picking off each individual case and regulator one at a time.

From our point of view, the UK's general approach seems to be the best of the current proposals as long as the propensity for delay is mitigated. It gives a strong regulator the chance to improve the functioning of digital markets and adapt its approach as time goes on. There is one aspect in particular where the EU DMA might be preferable, and that is in the designation process whereby quantitative thresholds could be used to greater effect to make the process efficient. Under the UK's approach, the DMU risks becoming mired in appeals against its designation decisions.

Consultation 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?

The EU DMA is already in force, and the UK legislation is ready to be laid before Parliament. Therefore, Australia will not be moving in advance of other countries. Now is the time to move forward as quickly as possible. If Australia moves quickly, it can ensure that its regulator continues to be at the vanguard of these reforms internationally rather than following along behind. If Australia does not move quickly, it will in practice need to simply copy the rules that other countries have written because there is so much benefit in aligning with other countries. Many of the important decisions about the design and interpretation of the new rules will have been made. For example, if Australia's rules are slightly more permissive than the UK and EU's rules, the firms will simply apply the UK and EU approach in Australia. If Australia's rules are more strict, they will have a disproportionate and distortionary effect on the gatekeeper firms and the functioning of digital markets.

Consultation 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?

We would welcome any initiative that would shorten the implementation timetable. For example, we wonder if it would be possible to include the initial designations in the legislation and therefore avoid a subsequent, lengthy designation process and the inevitable appeals. It has been very well established that Google's search, ad tech, mobile operating system and app store, and Apple's mobile operating system, app store all hold gatekeeper positions.

Alternatively, the most urgent prohibitions could be included in the legislation in a similar way to the EU DMA. There would be a timing benefit in outlawing certain heinous practices (such as the app store practices) from Day 1 rather than waiting for the designation and rule-writing process to play out.

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