



GOOGLE AUSTRALIA PTY LTD

DIGITAL PLATFORMS INQUIRY

SUBMISSION IN RESPONSE TO THE ACCC'S PRELIMINARY REPORT

18 FEBRUARY 2019

TABLE OF CONTENTS

Executive Summary	3
Responses to Preliminary Recommendations and Areas for Further Analysis	14
1. Google Supports Public Interest Journalism	15
2. Google Supports Effective and Transparent Regulatory Review of Mergers	17
3. Comprehensive Privacy Regulation Requires Further Study	18
3.1. Google Gives Users the Ability to Delete Their Personal Information	19
3.2. Google Supports Voluntary Third-Party Certification Schemes	20
3.3. Companies Can Encourage Users to Make Informed Choices without a “One-Size-Fits-All” Requirement for Express Opt-In Consent	20
3.4. Further Analysis is Needed on Increasing Penalties for Privacy Breaches	21
3.5. Further Analysis is Needed on Impact of Direct Individual Causes of Action	22
3.6. Google Supports Users’ Ability to Transfer and Delete Their Data, But Encourages Deeper Examination of the Practicalities of Mandatory Deletion Requirements	22
3.7. Further Analysis is Needed of an Opt-in Ad Targeting Requirement	24
3.8. Clarifying the Record on Google Products and Agreements	27
4. Google Faces Many Competitors for Users and Advertisers	30
4.1. Google Competes for Users, Not to Provide “News Media Referral Services”	30
4.2. Google Faces Strong Competition in Search and Search Advertising	33
5. The Preliminary Report Does Not Substantiate the Need for New Regulatory Oversight	39
5.1. No New Regulation is Necessary to Address Claims of Anticompetitive Favoursing	39
5.2. Regulation of News Ranking is Not Supported by Guiding Principles or Evidence, and Would Not Achieve the ACCC’s Goals	41
5.3. Google’s Existing Complaint Resolution Protocols are Robust	48
6. Review of Media Regulation May be Appropriate in Certain Circumstances	50
6.1. Aspects of Media Regulation in Australia May Benefit from Review	50
6.2. Google Supports Extension of the Copyright Act’s Take-Down Scheme to Online Platforms; But Does Not Support a Mandatory Standard	51

7. Rules Against Browser Default Settings Would Disrupt Procompetitive Benefits for Users and Industry Participants	58
7.1. Users Can and Do Easily Switch to Their Preferred Service	58
7.2. Google Faces Significant Competition for Distribution of Chrome	61
7.3. Removing Defaults Would Undermine Incentives to Develop and Distribute Browsers	62
8. Government Price Monitoring Would Not Address Transparency Concerns for Advertisers	65
9. Google Provides Advertisers Accurate, Independently Verifiable Measurement in a Privacy Protective Manner	67
10. Competition in Advertising and Related Intermediary Services has Benefitted Advertisers and Publishers	70
11. The Australian Consumer Law, Including the Unfair Contracts Regime, is Effective	73

Executive Summary

Google welcomes the opportunity to engage with the Australian Competition and Consumer Commission on its Preliminary Report as part of the Digital Platforms Inquiry. We appreciate the considerable time and effort the ACCC has spent reviewing submissions, meeting with interested parties, and assembling the Preliminary Report. We recognise the significance of the issues addressed in the Preliminary Report. We also appreciate the ACCC's willingness to consider further input from interested parties to refine its analysis and recommendations.

This executive summary provides an overview of Google's support for journalism and our approach to regulation, followed by our position on the specific Preliminary Recommendations and Areas for Further Analysis in the Preliminary Report.

A. Journalism in a Time of New Opportunities and Challenges

The growth of new online technologies has brought tremendous benefits to consumers and businesses alike. Google provides tools and services that many people in Australia use in their everyday lives such as Search, Maps, and YouTube. Millions of businesses have flourished by using online platforms like ours to provide new products and services to consumers globally.¹

The Preliminary Report observes that the Internet has presented new opportunities and challenges for news publishers, a situation Google has long acknowledged.² The Internet has brought increased competition through expanded user access to news from publications around the world. The cost of researching and distributing news online has declined and sparked competition from new entrants such as specialist blogs and online-only news sites. Traditionally profitable sections of print newspapers such as real estate and classifieds, which once offset the cost of researching and reporting quality journalism, now face competition from online sites. At the same time, advertising has evolved. Online advertising provides advertisers of all sizes with richer tools to reach their target audience and measure the impact of their investment.³ These trends have been ongoing for more than two decades and present challenges for news publishers, just as the growth of television and radio presented challenges in years past.

Even in the face of these challenges, Google and the news industry have common goals. People come to Google Search to find relevant and useful search results. Google's business model centres on making its search results as relevant and useful as possible in order to attract users, which is necessary to draw in advertisers. For this reason, when users search for news, we want to provide them with relevant results from sites with quality journalism. This is why we invest in helping news organisations develop innovative ways to serve consumers and generate revenues that will sustain the news industry's continued vitality. We help users discover news content from more than 1,000 Australian publishers and 80,000 publishers globally. When we provide relevant search results to users, news publishers receive valuable traffic that generates ad revenue and new subscribers. We also help publishers of all sizes earn

¹ In 2015, AlphaBeta calculated that Australian businesses generated \$15.1 billion using Google platforms. AlphaBeta Strategy Economics, *Google Economic Impact Australia 2015* (2015), http://media.wix.com/ugd/f01257_178469dfca6e48ef9ae11f34efb2ff0b.pdf.

² Pablo Chavez, *Business problems need business solutions*, Google Public Policy Blog (20 July 2010), <https://publicpolicy.googleblog.com/2010/07/business-problems-need-business.html>.

³ Australian Government, *Advertising*, Department of Industry, Innovation and Science (9 July 2018) ("This form of advertising allows you to reach a larger target audience and has the potential to reach customers all over the world. You can also track your customers and analyse their purchasing behaviour while customising your message to their preferences."), <https://www.business.gov.au/marketing/advertising>. Despite the benefits of online advertising, free-to-air TV advertising remains the largest single advertising channel in Australia. PwC, *Outlook: Australian Entertainment and Media 2017-2021* (16th ed. 2017), <https://www.pwc.com.au/publications/entertainment-and-media-outlook-2017.html>.

revenue through AdSense and other publisher tools. In 2018, we paid USD\$14.2 billion to partners globally, which constituted more than 70% of the revenues earned from displaying ads served by Google on partners' properties.⁴ We also support public interest journalism directly through initiatives like the Google News Initiative. Australian publishers have already benefited from funding for development in video storytelling, cost offsets for cloud computing, and newsroom training.

B. Google Supports Smart Regulation

Many laws and regulations have contributed to the Internet's vitality: competition and consumer protection laws, privacy, and advertising regulations to name just a few. These laws reflect trade-offs that help society reap the benefits of new technologies, minimise societal costs, and respect fundamental rights. As technology evolves, legal frameworks must evolve as well. The ACCC's inquiry provides a timely opportunity to review these issues in light of technological change.

Google supports smart regulation. As we noted in a recent blog post, "We don't see smart regulation as a singular end state; it must develop and evolve. In an era (and a sector) of rapid change, one-size-fits-all solutions are unlikely to work out well. Instead, it's important to start with a focus on a specific problem and seek well-tailored and well-informed solutions, thinking through the benefits, the second-order impacts, and the potential for unintended side-effects."⁵

Legal and regulatory development is most effective when it starts with a focus on specific problems and seeks tailored solutions based on robust evidence and the potential benefits and negative consequences. This approach is consistent with the *Australian Government Guide to Regulation*, which states that any regulation imposed should "offer an overall net benefit."⁶ The *Guide* requires that new regulations be accompanied by an assessment that:

- defines the problem;
- considers whether the problem should be addressed by the government and whether government intervention will work;
- considers all of the viable solutions including the option of not increasing regulation; and
- considers the cost of the regulation, including to consumers and other parties, and whether it is greater than the benefit.⁷

We believe the Preliminary Recommendations and Areas for Further Analysis should be assessed in light of these guidelines.

⁴ Alphabet Inc., Annual Report (Form 10-K) (2018), at 32, within Cost of Revenues, https://abc.xyz/investor/static/pdf/20180204_alphabet_10K.pdf?cache=11336e3.

⁵ Kent Walker, *How we're supporting smart regulation and policy innovation in 2019*, The Keyword Blog (8 January 2019), <https://www.blog.google/perspectives/kent-walker-perspectives/principles-evolving-technology-policy-2019/>.

⁶ Australian Government, *The Australian Government Guide to Regulation* (14 March 2014), at 2, https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf.

⁷ *Id.* at 6-7.

C. Google's Position on the Preliminary Recommendations and Areas for Further Analysis in the Preliminary Report

The remainder of the executive summary addresses the Preliminary Recommendations and Areas for Further Analysis in the Preliminary Report.

1. Google Supports Public Interest Journalism

Google users benefit when they are able to find high quality authoritative sources relevant to their search queries. We benefit when users are able to find what they are searching for on Google because they are more likely to return. It is in our interest to support quality digital journalism. We do so through the global USD\$300 million Google News Initiative and we work directly with news publishers to help them succeed online. This includes encouraging quality local journalism through training and technical support programs and assisting the efforts of news publishers to generate additional revenue through advertising, paid content, and reader revenue.⁸ As part of the Google News Initiative, we recently launched the Asia-Pacific Innovation Challenge, which will fund news organisation proposals that increase revenue from readers, with selected projects receiving funding of up to USD\$300,000 and 70% of the total project cost.⁹

We also help news publishers (both large and small) distribute their content to a broader audience at a lower cost relative to traditional print distribution methods. In 2018, we referred more than two billion clicks to Australian news websites. Our efforts to help news publishers succeed online benefit our users who search Google to find relevant information from a broad range of high quality publishers.

The Preliminary Report suggests a number of ways in which government can directly support public interest journalism. As the Issues Paper and Preliminary Report both recognise, the benefit to society from public interest journalism is greater than the amount many individual news subscribers are willing to pay. The Preliminary Report proposes mechanisms to bridge the gap between the public benefit and the private willingness to pay. For example, the Preliminary Report considers direct support of public interest journalism through tax offsets for costs to produce public interest journalism, making personal news subscriptions tax deductible, and continuing and potentially expanding the Regional and Small Publishers' Jobs and Innovation Package. Google supports these proposals.

Google also supports the Preliminary Report's news literacy proposal, which suggests a broad campaign targeted at all Australians to improve their understanding of how news is displayed on digital platforms.

2. Google Supports Effective and Transparent Regulatory Review of Mergers

The vast majority of mergers do not give rise to competition concerns. Only a small percentage of mergers that are notified in Australia are reviewed in-depth by the ACCC. Mergers and acquisitions in the technology sector have been an important driver of innovation and investment.¹⁰ Early stage acquisitions, for example, provide an opportunity for early investors who risked their capital in a startup to exit with a positive return (even before a public offering). Mergers can also unlock significant efficiencies, including new products that could not be successfully developed or brought to market by either firm alone. Nonetheless, effective regulatory review is critical to ensure that such activity is not anticompetitive.

⁸ Google, *Google News Initiative*, <https://newsinitiative.withgoogle.com/> (last visited 14 February 2019).

⁹ Kate Beddoe, *Google News Initiative kicks off Asia-Pacific Innovation Challenge*, The Keyword (20 November 2018), <https://blog.google/outreach-initiatives/google-news-initiative/asia-pacific-challenge/>.

¹⁰ Jim Price, *Why Innovation Through Acquisition Is Such A Darn Good Idea*, Business Insider (22 October 2012), <https://www.businessinsider.com/innovation-through-acquisition-2012-10>.

Google supports amendment of Australia’s merger law to improve transparency. We support the ACCC’s proposal to amend Section 50(3) of the *Competition and Consumer Act 2010* (Cth) (“CCA”) to add (i) “the likelihood that an acquisition would result in the removal of a potential competitor” and (ii) “the amount and nature of data to which the acquirer would likely have access,” as statutory factors to be considered in merger analysis. Those factors are already routinely considered by the ACCC in appropriate cases. This Preliminary Recommendation will make current practice explicit in the CCA and add valuable transparency to the merger review process.

Google welcomes engagement with the ACCC about advanced notice of transactions. The Preliminary Report also recommends that “large digital platforms” provide advanced notice of their acquisitions of businesses with activities in Australia. We would welcome discussions with the ACCC about the appropriate circumstances and process for providing prior notice of any acquisitions.

3. Google Supports Strong and Balanced Privacy and Data Protection Regulation—Further Analysis is Needed Before Implementing Specific Changes

Google is committed to transparency and empowering users to control their data. Our Privacy Policy is informed by feedback from user testing and explains what information we collect and why we collect it. We use clear and easy to understand language and include explanatory videos to illustrate how our Privacy Policy works. Google users can visit their Google Account page at any time to update, manage, export, and delete their information.

Google supports smart regulation and innovative ways to address consumer concerns related to privacy and data protection in Australia and around the world. This includes the development of baseline “rules of the road” for data protection like those that currently exist in the Australian *Privacy Act 1988* (Cth) (“Privacy Act”). We published a “Framework for Responsible Data Protection Regulation” and an accompanying blog post in September 2018 to outline our views on privacy law reform.¹¹ This Framework addresses the requirements, scope, and enforcement expectations that we believe should be reflected in all effective data protection laws, and is based on our experience providing services that rely on personal data and our work to comply with evolving data protection laws around the world.

The Preliminary Report proposes various privacy and data protection initiatives, including amendments to the Privacy Act, codes of conduct, a third-party certification scheme, and individual causes of action. We appreciate that the Preliminary Report presents a number of options, which reflects the ACCC’s willingness to explore a range of legal proposals for smart, interoperable, and adaptable data protection regulations. We look forward to further dialogue to ensure the final recommendations serve the interests of consumers while enabling the growth of businesses that generate revenues from online advertising. Any new legislation as a result of these Preliminary Recommendations and Areas for Further Analysis should also be subject to consultation with Australian consumers and businesses.

It is our firm belief that any privacy-related recommendations made by the ACCC should apply to *all* organisations that are currently subject to the Privacy Act, not just digital platforms or organisations that meet a particular threshold. Any new legislation should also reflect widely shared principles of data protection.¹² Organisations, including Google, have invested heavily in compliance with the Privacy Act, the General Data Protection Regulation (EU) 2016/679 (“GDPR”), the Fair Information Practices Principles (“FIPPs”), Organisation for Economic Co-operation and Development (“OECD”) Privacy

¹¹ Keith Enright, *Proposing a Framework for Data Protection Legislation*, The Keyword (24 September 2018), <https://www.blog.google/outreach-initiatives/public-policy/proposing-framework-data-protection-legislation/>; Google, *Framework for Responsible Data Protection Regulation* (September 2018), https://services.google.com/fh/files/blogs/google_framework_responsible_data_protection_regulation.pdf.

¹² For example, the Australian Law Reform Commission could conduct an inquiry on these issues, as they have in previous reviews of the Privacy Act.

Principles, the Asia-Pacific Economic Cooperation (“APEC”) Privacy Framework, and other existing regulatory approaches.

Finally, some of the Preliminary Recommendations address areas that are already governed by the Privacy Act and the Australian Privacy Principles. We believe it would be beneficial if the Final Report provided an analysis of the specific deficiencies in existing laws to be remedied by the suggested legislative amendments.

4. Additional Regulatory Oversight of Favouring and News Ranking is Unnecessary

The Preliminary Report proposes new regulatory oversight of digital platforms’ favouring of their own products and ranking of news. However, the Preliminary Report does not identify any instances in which Google allegedly favours its own products that is anticompetitive. Should the ACCC believe there are credible concerns in the future, it has the power and authority under existing law to investigate them. The Preliminary Report also provides no evidence that regulatory review of Google’s algorithms and potential recommendations for more disclosure about Google’s news ranking would lead to higher quality search results as opposed to incentivising gaming of Google’s algorithms.

4.1. Claims of Anticompetitive Favouring Can be Addressed by Existing Regulations

The ACCC has long acknowledged that vertical integration, and the development and promotion of new products and services are often procompetitive.¹³ We integrate products to create a better end-to-end solution for our customers or introduce a new type of search result to better respond to user queries. These are examples of innovations that clearly benefit consumers and that will rarely raise competition law concerns. Yet the Preliminary Report suggests monitoring and reporting on *all* instances where a digital platform promotes or allegedly favours its own products and services, when it is clear that most of these cases do not present any competitive concern.

In display advertising, the Preliminary Report makes no finding that Google has market power and does not allege any specific anticompetitive favouring. In fact, the Preliminary Recommendation is based on a few hypothetical scenarios that are either implausible or unlikely to be anticompetitive.

In relation to Search, the Preliminary Report notes that Google’s promotion of certain results (such as Google Shopping) *could* raise concerns. The Preliminary Report cites the European Commission’s decision on Google Shopping, which Google is appealing, as the basis for such concerns. The Preliminary Report does not, however, acknowledge the numerous agencies and courts throughout the world that have cleared Google of allegations of anticompetitive favouring. Courts and agencies in the United Kingdom, the United States, Canada, Brazil, Taiwan, and Germany analysed various types of Google’s search results (shopping, local, weather, maps, etc.) and found clear consumer benefits that outweighed complaints from competitors or websites seeking more traffic. Notably, all of the investigations of Google’s search and search advertising around the world have been conducted under existing competition laws, without the need for the creation of new sectoral regulators or regulations.

4.2. Publisher Concerns About Referral Traffic Do Not Justify New Regulation

Search is Google’s core business and has driven Google’s success since our earliest days as a company. As the Preliminary Report acknowledges, Google provides users with relevant search results, including

¹³ See, e.g., ACCC, *Merger Guidelines 2008* (updated November 2017), at paras 5.18-5.21 (“It is often the case that vertical mergers will promote efficiency by combining complementary assets/services which may benefit consumers...In the majority of cases, non-horizontal mergers will raise no competition concerns”), <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>.

results related to news.¹⁴ Google’s search results represent our view of the results most relevant to a user query, as reflected in how we design our algorithms. We provide explanations and tools for publishers and businesses to understand how Google Search works. However, the fine details of how our algorithms work are some of our most sensitive business secrets, are critical to our competitive success, and are the output of enormous investment in continuous innovation. We believe government regulation of our search results with regard to the treatment of certain news publishers’ content should be considered only in response to the strongest, clearest evidence of harm to consumers. The Preliminary Report does not find any such evidence—to the contrary, the Preliminary Report correctly explains that Google has an interest in providing relevant news results to users.¹⁵ There is also no evidence that Google is reducing search result quality in order to divert traffic from news publishers.

Google’s product is search; news media referrals are only possible if we provide users relevant results. Google’s objective is to provide users with relevant search results. News sites receive valuable traffic from Google only when users are able to find relevant results in response to their queries. Google is not competing in a market for “news media referrals.” News sites do not contract with us to receive referrals, and news sites do not pay us to receive referrals from our organic results. The Preliminary Report does not contain any evidence or analysis showing that there is a market for “news media referral services,” or that Google even competes in such a market. The Preliminary Report also does not give proper weight to the fact that these referrals exist because Google provides relevant results to users.

We also dispute the Preliminary Report’s finding of market power in “news media referrals” based on Google’s alleged 28% of referrals to news publishers. Third-party available data show that Google only accounts for approximately 18% of total traffic that the top 40 Australian news sites receive from apps, direct navigation, and third-party sites (excluding navigational queries, over which Google has no influence because users would otherwise input the site directly into the browser’s URL field).¹⁶ Moreover, the Preliminary Report finds that consumers directly accessing news sites is the largest source of visits, accounting for 43% of all visits to news sites.¹⁷

Google provides transparency without allowing algorithm gaming. The Preliminary Report acknowledges that Google provides a level of transparency about our algorithms and that more detailed disclosure of information about how Google ranks news articles could allow some sites to “game” or “manipulate” Google’s algorithms. Without revealing our exact ranking criteria, we have provided extensive guidance to publishers about how Google approaches search ranking,¹⁸ a tutorial *How Search Works*,¹⁹ as well as a 164-page document laying out the principles Google uses to determine what makes for a good-quality set of search results.²⁰ Furthermore, the output of Search is freely available to all and is generally consistent across users in the same region. As a result, experiments can readily be performed to test how media content is treated by our algorithms without additional regulation.²¹ The Preliminary Report suggests that Google could disclose more. However, we do not have any incentive to withhold useful information about ranking where it would help sites improve instead of game the results to the

¹⁴ Preliminary Report at 100.

¹⁵ *Id.* at 109.

¹⁶ Calculations based on data from Similarweb and App Annie; *see, id.* at section 4.1.2.

¹⁷ *Id.* at 62.

¹⁸ *See, e.g.*, Google, *Ways to succeed in Google News*, Google Webmasters Blog (17 January 2019), <https://webmasters.googleblog.com/2019/01/ways-to-succeed-in-google-news.html>.

¹⁹ Google, *How Search Works*, <https://www.google.com/search/howsearchworks/> (last visited 14 February 2019).

²⁰ Google, *Search Quality Evaluator General Guidelines* (20 July 2018), <https://static.googleusercontent.com/media/www.google.com/en//insidesearch/howsearchworks/assets/searchqualityevaluatorguidelines.pdf>.

²¹ *See, e.g.*, The Economist, *Googling the news – Are Google searches biased in favour of left-leaning news outlets?* (30 August 2018), <https://www.economist.com/united-states/2018/08/30/googling-the-news>.

detriment of users, nor does the Preliminary Report make such a finding. The Preliminary Report also does not explain how a regulator would be better equipped to determine the optimal amount of disclosure about Google’s ranking algorithms.

Snippets benefit users and news publishers. Google, like other search engines, displays “snippets,” which are short extracts of text from websites, in our search results to help users decide whether a particular site’s content is relevant before they click the link. The Preliminary Report acknowledges that snippets benefit users and news publishers, but suggests that news headlines combined with snippets “may” cause “some consumers” not to click on article links. However, the Preliminary Report finds no evidence that snippet length “significantly adversely affects click-through rates” or of any “direct correlation or causation” between the two.²² While we are open to suggestions about “optimising” snippet length, nothing suggests that concerns about snippets are a basis for monitoring of our ranking of news by a regulator.

Flexible Sampling provides news publishers control of access to free content. It is a fundamental principle of Google Search that a user should see what our systems see when they access the same web page. Having a publisher present the full text of an article to us, but not to our users (instead, a pop-up, a paywall, or other more nefarious forms of “bait-and-switch” practices) harms the user experience. Nevertheless, to encourage users to access subscription-based news content and create promotional opportunities for publishers, Google created an opt-in technology for publishers called First Click Free (“FCF”) in 2008. Publishers that implemented FCF would enable users to click from Google results to a news article without hitting a paywall. While FCF balanced the interests of users in being able to access content with the interests of news publishers in promoting subscription and paywall models, Google went further in advancing publisher interests when we replaced FCF with Flexible Sampling in 2017. This approach lets news publishers determine the amount of free content they provide users. The Preliminary Report concludes that Flexible Sampling appears to have “made a meaningful difference to news publishers” and recognises the benefits of allowing users to sample content while providing publishers with control over the amount of free content. Indeed, Flexible Sampling shows that publisher concerns can be addressed through constructive dialogue with publishers without the need of a special regulator.

Google’s algorithms are designed to promote high quality content. The Preliminary Report suggests that digital platforms may incentivise sites to promote “emotive click bait” (primarily social media) and do not “reward” original content.²³ We design our algorithms to rank high quality content over so-called “click bait,” and the Preliminary Report does not provide any evidence to the contrary. Unlike social media feeds that are highly personalised, we provide search results and headline news for all users based on language and region.²⁴ These results can be tested to see that they provide high quality results from a range of sources, without the need for increased regulatory oversight or monitoring. For example, the ACCC has conducted its own experiment, which showed that high quality news content from “the ABC, *The Sydney Morning Herald*, *The Guardian* and *The Australian Financial Review* were consistently featured in [Google’s] Top Stories carousel and the first page of organic search results[.]”²⁵

²² Preliminary Report at 114. See also, *id.* at 113 (“the ACCC has not received any evidence that Australian consumers are choosing not to click through to news websites on Google Search due to snippets.”).

²³ Preliminary Report at 260, 278; *id.* at 280 (“particularly on forms of social media, there are incentives for outlets to produce a diluted, more emotive, news product, and to leverage off ‘viral’ entertainment content.”).

²⁴ Google News Help, *How Google News stories are selected*, Google News Help Center, <https://support.google.com/googlenews/answer/9005749?hl=en> (last visited 14 February 2019); Trystan Upstill, *The new Google News: AI meets human intelligence*, *The Keyword* (8 May 2018), <https://www.blog.google/products/news/new-google-news-ai-meets-human-intelligence/>.

²⁵ Preliminary Report at 103.

On the issue of ranking of “original content,” Google’s Webmaster Guidelines caution sites against duplicating original content, but in some cases this is unavoidable, for example when newspapers run articles from a wire service.²⁶ The Preliminary Report also explains that there is no standard for what constitutes original content, particularly as news stories evolve with a mix of original content and attribution to other publications.²⁷ We consider these types of challenging ranking issues in our efforts to provide relevant results to users. Our objective is to provide the most relevant results to our users and it is not clear from the Preliminary Report how a regulator would help to improve these rankings.

4.3. The Consumer Welfare Standard Should Guide the Final Recommendations

The ACCC Chairman recently confirmed that “competition law and policy should be first and foremost about protecting and promoting competition for the welfare of consumers” and that “it is inadvisable and counterproductive to import [broader public interest] considerations into the core of competition.”²⁸ Some of the Preliminary Recommendations depart from the consumer welfare standard by seeking to impose new burdens on digital platforms in the absence of any finding of competitive harm (e.g., harm to consumers or advertisers). Quite the contrary, the Preliminary Report acknowledges the concrete benefits that digital platforms have delivered to consumers. For example, it notes that digital platforms provide Australians with access to “unprecedented breadth and depth of information” without “geographic limitations.”²⁹ Additionally, the Preliminary Report acknowledges the benefits that digital platforms have delivered to advertisers and notes the “numerous and significant benefits” online advertising provides “above those of traditional advertising,” including the “robust targeting and format options,” and “cost efficient buying methodologies[.]”³⁰

In contrast, the Preliminary Recommendations regarding news ranking have the potential to protect some incumbent news suppliers at the expense of consumers and competition, including newer, more specialised or more innovative publishers. The Preliminary Report notes that the traditional print media businesses are the most significantly impacted by the changes to consumer preferences and habits brought about by digital media, and that News Corp and Fairfax comprise 88.2% of the supply of traditional print media.³¹ The report also acknowledges that Google’s search rankings are based on the objective of providing users with the most relevant and useful results for their query. Yet the Preliminary Recommendations to impose regulatory oversight of ranking based on feedback from news publishers could result in Google’s algorithms being modified to better serve incumbent news suppliers’ interests to the detriment of the interests of smaller publishers and consumers.

The Final Report should weigh concrete benefits alongside other concerns in a way that is consistent with the ACCC’s goal of ensuring consumer welfare. This includes examining the impact of its recommendations on the quality and cost of services that digital platforms provide to consumers and advertisers.³²

²⁶ Google, *Duplicate Content*, Search Console Help, <https://support.google.com/webmasters/answer/66359?hl=en> (last visited 14 February 2019).

²⁷ Preliminary Report at 278.

²⁸ ACCC, *Competition Law Should Remain Focused on Consumer Welfare* (29 November 2018), <https://www.accc.gov.au/media-release/competition-law-should-remain-focused-on-consumer-welfare>.

²⁹ Preliminary Report at 26.

³⁰ *Id.* at 34, 76 (quoting the Australian Association of National Advertisers).

³¹ *Id.* at 251, 272.

³² The Preliminary Report also considers a new ombudsman to administer complaints against Google. We have comprehensive and efficient complaint resolution systems for our customers, including for small to medium-sized businesses. Google actively promotes these support services to its customers and they are explicitly incorporated into the terms of its service level agreements with advertisers. Beyond this, several public bodies, including state

4.4. Regulation Should Account for Differences in Functionality Across Business Models

The term “digital platforms” is broad, and it is important to distinguish between different types of digital platforms and business models. We believe the ACCC’s analysis needs to consider the impact of each type of digital platform on the various participants in the news media, including content creators, advertisers, and consumers.

The Preliminary Report misses critical differences between social media and search. The most obvious difference is that news sites receive referral traffic as a result of search engines providing users with relevant search results, while news articles on social media are often provided in response to user sharing on the platform or “liking” the pages of news publishers on the platform. Social media sites often operate in largely closed environments designed to keep users on their platform. In contrast, search relies on the open web and the existence of high quality and accessible content. Google has no financial interest in preventing users from clicking through to news sites appearing in our search results. News-related queries rarely return advertisements and there are no ads in Google News or when users click on the News tab on the search results page.

Despite these differences, the Preliminary Report’s analysis and recommendations are often presented as applying equally to both search and social network business models, even when the stated concerns relate to only one. As noted at the outset, in line with the *Australian Government Guide to Regulation*, the Final Report should describe specific problems and assess the possibility of tailored solutions that are likely to improve the welfare of consumers, including through the use of existing regulatory powers.

5. Review of Media Regulation May be Appropriate in Certain Circumstances

Any review of media regulation should be conducted with the guiding principle that companies engaged in the same activity should be consistently regulated in respect of that activity. The review should similarly account for differences among online activities, for example, the difference between providing links to existing content that has already been generated and the writing of articles and editorial selection. The review should also weigh the costs and benefits of any regulatory intervention.

Google would support a recommendation to amend the existing take-down scheme in the *Copyright Act 1968* (Cth) (“Copyright Act”) so that it applies to all online service providers, including digital platforms. However, Google does not support the Preliminary Recommendation for the Australian Communications and Media Authority to set a “Mandatory Standard” for the take-down of copyright-infringing content applicable only to digital platforms. The Preliminary Recommendation appears to be based on incorrect and incomplete information about Google’s anti-piracy tools and processes.

Google provides copyright owners with industry-leading tools, from bulk removal notices to more sophisticated tools like YouTube’s Content Verification Program, Copyright Match Tool, and Content ID. In 2018, we removed over 99% of URLs and nearly 94% of videos requested by Australian claimants, and did so, on average, in a little over 18 hours. YouTube answered Australian live stream copyright requests, on average, in just two minutes. YouTube’s Content ID system, in which we have invested over USD\$100 million, is used to identify rightsholders’ content, and allows rightsholders to block, track, or monetise infringing content. We have paid out over USD\$3 billion to rightsholders who have monetised use of their content in other videos through Content ID.

based and a national small business ombudsman and state based fair trading departments, already provide practical and accessible means by which consumers and businesses can resolve the types of disputes that the ACCC has identified as potentially being directed to the proposed ombudsman. We believe our existing protocols and public bodies are sufficient to meet the needs of Australian businesses and consumers, but we remain open to further discussion with the ACCC about how to handle consumer complaints.

A Mandatory Standard would represent a significant departure from the globally accepted standard that requires digital platforms to respond “expeditiously” upon notification to disable access to material that is claimed to be infringing. A Mandatory Standard would compromise the flexibility and efficiency of existing tools, stifle innovation, and result in a system that serves neither the Australian creative industries nor the Australian public.

We suggest that the ACCC consider the benefits of the existing global take-down standard, as well as previous inquiries into the area of online copyright infringement, alternative proposals such as the extension of the Safe Harbour Scheme, an analysis of the abuses and misuses of take-down processes, and the potential consequences of any amendments.

6. Existing Browser and Search Default Practices are Procompetitive

We believe the Preliminary Report’s concern about browser search defaults is misplaced. Search services have long competed for default status on browsers through two principal means: (i) building browsers themselves to showcase their search services in the default position; and (ii) bidding to be set as the default on third-party browsers. Both of these approaches are significant forms of competition that provide consumers with more browser choice, as well as lower-priced devices preloaded with high quality services.

Users can and do access competing browsers and search services of their choice, including easily and quickly downloading alternatives to Google apps. For example, Opera’s Browser and Mini Browser have each been downloaded more than 100 million times from Google’s Play Store globally, despite the preinstallation of browsers from Google, Samsung, and others. Downloading is easy; users download apps billions of times every year.³³

The Preliminary Report’s proposal to prevent search providers from bidding for default settings would unduly interfere with the robust competition that currently exists for user attention, would disincentivise investment by industry participants, and would undermine a business model that has consistently supported pro-user innovation by browser developers and device manufacturers. Moreover, it is not clear from the Preliminary Report that the ACCC consulted with the browser developers, device makers, and operating system developers whose business models could be adversely impacted by these recommendations.

7. Government Price Monitoring is Unnecessary

Pricing transparency is in the best interests of Google and our customers. When our customers can evaluate the value they receive from our products they are more likely to continue working with us. Google provides our advertiser and publisher customers with a clear breakdown of the services we provided and the amount we charged for each. We also negotiate contracts with separate pricing for each of our intermediary services, with aggregate prices being used rarely and only at a customer’s request.

We support transparency for our customers and partners in a fragmented space, but we disagree with the appropriateness of price monitoring as a solution. The transparency concerns identified in the Preliminary Report are primarily caused by the variety and number of intermediary services and service providers rather than the conduct of particular companies. The Preliminary Report does not cite examples of market failure or instances in which price monitoring would have improved the functioning of the market. As noted above, Google already provides significant transparency for our customers. Government price

³³ In 2017, the total number of mobile app downloads was 197 billion. Business of Apps, *App Download and Usage Statistics (2018)* (8 October 2018), <http://www.businessofapps.com/data/app-statistics/>.

monitoring would add an additional layer of regulation that would be burdensome and provide no clear benefits to advertisers or consumers.

8. Advertisers Can Use a Variety of Third-Party Measurement Services with Google

Google understands that advertisers require trustworthy, intelligent, and actionable measurement of advertising performance and that they have many alternatives for where to spend their ad budget. We have invested heavily in building accurate, reliable measurement solutions, which are subject to independent audits and accreditation. None of the concerns noted by the Preliminary Report regarding overstated metrics or otherwise misleading advertisers are supported by any specific allegations against Google. Where market forces are already driving such robust innovation and investment, we do not believe regulatory intervention of the type contemplated by the Preliminary Report is necessary.

In addition, alternative proposals such as calls for software development kits (“SDKs”) could involve sharing user data with third parties, which could have significant privacy impacts. We believe that Google’s current implementations have struck the right balance between avoiding these potential negative impacts, while still providing accurate measurement data.

9. Competition in the Sale of Display Advertising and Related Intermediary Services

The Preliminary Report seeks feedback on various practices in display advertising and related intermediary services. The Preliminary Report recognises that “[b]undling and tying are common commercial arrangements which usually do not harm competition and in many scenarios promote competition by offering consumers more compelling offers.”³⁴ In fact, the examples of purported bundling and tying practices in the Preliminary Report point to procompetitive practices, such as Google’s offering of “convenient one-stop shop” services, a suite of “intermediary services across all functional levels of the programmatic supply chain,” and “enhance[d]” offerings that provide “higher levels of targeting.”³⁵ These practices are beneficial to advertisers and publishers.

The ACCC nevertheless is evaluating whether Google’s bundling of ad inventory and intermediary services could lessen competition, though it “has not yet reached a concluded view.”³⁶ The “intermediary services products” referred to in the Preliminary Report are overwhelmingly, if not exclusively, used in connection with *display* advertising, not search advertising. Based on the data in the Preliminary Report, Google accounts for five percent or less of revenues of display advertising.³⁷ In other words, Google does not have market power in display advertising. Google also does not require advertisers who want to purchase search advertising also to buy display advertising or use Google’s ad intermediary services. Google operates in a highly competitive environment in selling display advertising and related intermediary services.

10. The Existing Australian Consumer Law is Effective

The Preliminary Report considers changes to the Australian Consumer Law to prohibit “unfair practices” and impose civil pecuniary penalties where standard form contracts contain “unfair” terms. Google considers the existing unfair contracts regime, and the related protections in the Australian Consumer Law to be working effectively for consumers and businesses.

³⁴ Preliminary Report at 82.

³⁵ *Id.* at 84.

³⁶ *Id.*

³⁷ *Id.* at 59.

Responses to Preliminary Recommendations and Areas for Further Analysis

Pg	Section	Preliminary Recommendations / Areas for Further Analysis / Topics addressed
15	1. Google Supports Public Interest Journalism	AFA 2 Improving digital media literacy AFA 3 Improving the ability of news media businesses to fund the production of news and journalism
17	2. Google Supports Effective and Transparent Regulatory Review of Mergers	PR 1 Merger law PR 2 Prior notice of acquisitions
18	3. Comprehensive Privacy Regulation Requires Further Study	PR 8 Use and collection of personal information PR 9 OAIC Code of Practice for digital platforms PR 10 Serious invasions of privacy AFA 7 Deletion of user data AFA 8 Opt-in targeted advertising
30	4. Google Faces Many Competitors for Users and Advertisers	The Preliminary Report's findings about Google's alleged market power
39	5. The Preliminary Report Does Not Substantiate the Need for New Regulatory Oversight	PR 4 Advertising and related business oversight PR 5 News and digital platform regulatory oversight AFA 1 Improving the ability of consumers to make informed choices about news and journalism accessed via digital platforms AFA 4 A digital platforms ombudsman
50	6. Review of Media Regulation May be Appropriate in Certain Circumstances	PR 6 Review of media regulatory frameworks PR 7 Take-down standard
58	7. Rules Against Browser Default Settings Would Disrupt Procompetitive Benefits for Users and Industry Participants	PR 3 Choice of browser and search engine
65	8. Government Price Monitoring Would Not Address Transparency Concerns for Advertisers	AFA 5 Monitoring of intermediary pricing
67	9. Google Provides Advertisers Accurate, Independently Verifiable Measurement in a Privacy Protective Manner	AFA 6 Third party measurement of advertisements served on digital platforms
70	10. Competition in Advertising and Related Intermediary Services has Benefitted Advertisers and Publishers	The Preliminary Report's findings about competition in the advertising and intermediary services market
73	11. The Australian Consumer Law, Including the Unfair Contracts Regime, is Effective	PR 11 Unfair contract terms AFA 9 Prohibition against unfair practices

1. Google Supports Public Interest Journalism

Google users benefit when they are able to easily find high quality news articles when searching for information related to current events. We have long supported the development and expansion of digital public interest journalism. Among other initiatives, Google has launched a USD\$300 million global Google News Initiative (“GNI”), working directly with news publishers to help them succeed online.³⁸ The initiative includes training and technical support programs, along with a program of free or reduced-cost G Suite or Google Cloud Platform services for small and mid-size news organisations. Google also supports the efforts of news creators to generate revenue through advertising, paid content, and reader revenue.³⁹ As part of the GNI, Google recently launched the Asia-Pacific Innovation Challenge, which will fund innovative proposals that increase revenue from readers, with selected projects receiving funding of up to USD\$300,000 and 70% of the total project cost.⁴⁰ In December 2018, YouTube announced that 87 recipients from 23 countries—including Nine News in Australia—will receive innovation funding to support their online video capabilities and experiment with new formats for video journalism.⁴¹ The GNI is part of our effort to work with the news industry to ensure quality journalism does not just survive, but thrives.

In addition to the GNI, Google has also collaborated specifically with Australian news organisations. We help Australian media content creators integrate new technology and innovative tools into their work through Google’s News Lab. Google, ABC, and Fairfax are members of the First Draft Coalition, which is a group of thought leaders and educators in social media journalism that are dedicated to addressing challenges related to trust and truth on the Internet. The First Draft Coalition provides training on the latest digital tools and tactics to fact check and verify online content. For example, Google’s News Lab worked with the First Draft Coalition to support CrossCheck, an initiative to promote collaboration between journalists from different agencies that was used to cross check claims made in the lead up to the French election. Google collaborated with 37 newsrooms in the 2017 French election effort, including Agence France-Presse and *Libération*.⁴²

Google Search and Google News are a large source of revenue for news organisations that provide public interest journalism. In 2018, Google referred more than two billion clicks to Australian news websites. A Deloitte study commissioned by Google found that in Europe, each free referral click to a news site is worth between four and eight Euro cents.⁴³ At the same time, distribution of news online, including through Google, can also be much cheaper than traditional print distribution. Free traffic and

³⁸ Google, *Google News Initiative*, <https://newsinitiative.withgoogle.com/> (last visited 14 February 2019).

³⁹ *Id.*

⁴⁰ Kate Beddoe, *Google News Initiative kicks off Asia-Pacific Innovation Challenge*, *The Keyword* (20 November 2018), <https://blog.google/outreach-initiatives/google-news-initiative/asia-pacific-challenge/>.

⁴¹ YouTube, *GNI YouTube innovation funding: supporting 87 news organizations in 23 countries to build video capabilities and innovate with new formats*, YouTube Official Blog (17 December 2018), <https://youtube.googleblog.com/2018/12/gni-youtube-innovation-funding.html>.

⁴² David Dieudonné, *Fact-checking the French election: lessons from CrossCheck, a collaborative effort to combat misinformation*, *The Keyword* (17 November 2017), <https://www.blog.google/outreach-initiatives/google-news-initiative/fact-checking-french-election-lessons-crosscheck-collaborative-effort-combat-misinformation/>.

⁴³ Richard Gingras, *Proposed copyright rules: bad for small publishers, European consumers and online services*, *The Keyword* (6 December 2018), <https://www.blog.google/around-the-globe/google-europe/proposed-copyright-rules-bad-small-publishers-european-consumers-and-online-services/>; Deloitte, *The impact of web traffic on revenues of traditional newspaper publishers* (March 2016), <https://www2.deloitte.com/uk/en/pages/technology-media-and-telecommunications/articles/the-impact-of-web-traffic-on-revenues.html>.

lowered distribution costs have enabled many smaller publishers in Australia to get discovered, grow a business, and contribute to the public's knowledge of current events.

Google is working to increase revenue opportunities for public interest journalism, because our business is only successful if we can continue to provide users with the high quality relevant information they seek. We have partnered with news organisations of all sizes to develop their online businesses and increase the distribution and profitability of high quality public interest journalism. For example, in December 2017 Google and Fairfax Media, the largest media organisation in Australia at the time, established a partnership to drive digital subscriptions.⁴⁴ Under the partnership, Google works with Fairfax to sell and market programmatic advertising across *The Sydney Morning Herald*, *The Age*, *The Australian Financial Review*, *WAtoday*, *Brisbane Times*, and lifestyle properties.⁴⁵ The partnership also includes optimising publishing technology, digital innovation, driving digital subscriptions growth, and extending Fairfax's use of data. It aims to create opportunities for advertisers that neither party could create alone, while freeing up Fairfax staff to focus on journalism and Fairfax's most valuable commercial relationships. Former Fairfax CEO Greg Hywood said of Fairfax's partnership with Google to drive digital subscriptions: "I can't sing the praises of our relationship with Google higher . . . it's been a really good, productive partnership so far. And we think that there's a lot of upside across the world in a range of areas."⁴⁶ More recently, *The Telegraph* announced that it is moving to the Google Cloud Platform, where it will use cloud data analytics and machine learning to better predict demand for physical newspapers and reduce waste.⁴⁷

The Preliminary Report outlines a number of different proposals for public support of high quality public interest journalism, recognising that the benefit to society from public interest journalism is greater than the amount many individual news subscribers are willing to pay. A diversity of voices is crucial for Australians to understand competing perspectives on issues of public importance.⁴⁸ Consequently, the Preliminary Report proposes mechanisms to bridge the gap between the public benefit and the private willingness to pay. For example, the Preliminary Report considers direct support of public interest journalism through favourable tax treatment, making personal news subscriptions tax deductible, and continuing and potentially expanding the Regional and Small Publishers' Jobs and Innovation Package.⁴⁹ Google supports those proposals.

Google also supports efforts to improve news literacy online.⁵⁰ We look forward to the opportunity to work with the Australian Communications and Media Authority to help Australians improve their understanding of news curation and display on digital platforms.

⁴⁴ Fairfax Media recently merged with Nine Entertainment Co.

⁴⁵ See, Fairfax Media, *Fairfax Media partners with Google on digital advertising and technology*, ASX Release (12 December 2017), <https://www.asx.com.au/asxpdf/20171212/pdf/43q2y5fwfrvpsg.pdf>.

⁴⁶ Thomson Reuters StreetEvents, *Edited Transcript of Fairfax Media Ltd earnings conference call or presentation Tuesday, February 20, 2018 at 11:30:00pm GMT*, Yahoo! Finance (19 March 2018), <https://finance.yahoo.com/news/edited-transcript-fxj-ax-earnings-192116147.html>.

⁴⁷ Matt McNeill, *The Telegraph UK: Reimagining media with the help of Google Cloud*, Google Cloud Blog (6 February 2019), <https://cloud.google.com/blog/topics/customers/the-telegraph-uk-reimagining-media-with-the-help-of-google-cloud>.

⁴⁸ Preliminary Report at 245.

⁴⁹ *Id.* at 15-16.

⁵⁰ As suggested in Area for Further Analysis 2.

2. Google Supports Effective and Transparent Regulatory Review of Mergers

Mergers play an important role in the global economy, providing new and useful product features, unlocking economies of scale, facilitating the expansion of product lines into new geographies, and enabling enhanced investment in R&D, leading to new and better products. In the technology space, mergers and acquisitions have been an important driver of innovation and investment. For example, the opportunity for a lucrative exit through an acquisition has driven investors to take risks that have resulted in the emergence of some of the world's most innovative companies, thus creating significant value for consumers. Mergers can also unlock significant efficiencies, including new products that could not be successfully developed or brought to market by either firm alone. While procompetitive mergers represent an unqualified positive for consumers, sensible regulation and enforcement is necessary to guard against transactions likely to have a negative impact on competition.

Google supports amendment of Australia's merger law to improve transparency. We support the ACCC's efforts to keep Australia's merger law up-to-date, including the Preliminary Recommendation that Section 50(3) of the CCA be amended to make it clearer that the relevant factors for assessing the likely competitive effects of mergers and acquisitions include: (i) "the likelihood that an acquisition would result in the removal of a potential competitor;" and (ii) "the amount and nature of data which the acquirer would likely have access to as a result of the acquisition."⁵¹

While the ACCC already takes these factors into account when doing so is relevant and appropriate,⁵² adding these factors to Section 50(3) would improve transparency in the ACCC's processes and decisions by making express that these factors may be relevant in merger reviews.

In introducing these proposed amendments to the merger law, it will be important to explain that:

- the proposed addition of these two factors to the list in Section 50(3) is not intended to introduce new standards of merger review or inject non-competition considerations into merger review;
- their proposed addition to the statute (or the omission of other factors) should not be interpreted as according special or greater importance or weight to these two factors as compared to others; and

⁵¹ Preliminary Report at 10.

⁵² See, *id.* at 63 ("The ACCC notes that it is currently not prevented from taking these factors into account in reaching a view as to whether a merger or acquisition is likely to substantially lessen competition and the ACCC will likely consider such factors in relevant cases even without the legislative amendment."). One such example was Tabcorp Holdings Limited's proposed acquisition of Intecq Limited, where the ACCC considered whether the acquisition could enable Tabcorp to use data gathered from Intecq's customer gaming venues to favour venues that use a full suite of Tabcorp products. See, ACCC, *ACCC will not oppose Tabcorp's proposed acquisition of Intecq*, Press Release (3 November 2016),

<https://www.accc.gov.au/media-release/accc-will-not-oppose-tabcorp%E2%80%99s-proposed-acquisition-of-intecq>.

In the ACCC's Statement of Issues dated 13 December 2018 in respect of the proposed merger between TPG Telecom Limited and Vodafone Hutchison Australia Pty Ltd, the ACCC expresses a preliminary view that the proposed merger may substantially lessen competition by removing TPG as a potential fourth wholesale mobile services provider for mobile virtual network operators. See, ACCC, *Statement of Issues: TPG Telecom – proposed merger with Vodafone* (13 December 2018),

<https://www.accc.gov.au/system/files/public-registers/documents/Statement%20of%20Issues%20-%2013%20December%202018.pdf>.

- these two factors are not relevant in every merger review and, in fact, are likely to be relevant in only a limited number of mergers and acquisitions.

Google welcomes engagement with the ACCC about advance notice of transactions. The Preliminary Report also recommends asking “large digital platforms (such as Facebook and Google) to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition.”⁵³ We would be grateful to discuss with the ACCC the circumstances and process for providing prior notice of any such acquisitions. For example, we would want to ensure that notice is triggered only where there is a sufficient connection to Australia and does not put Google at a disadvantage compared to other firms competing to buy the same target company. Selective application of advance notice rules could have the unintended effect of depriving sellers of the opportunity to maximise the recovery of their investments.

3. Comprehensive Privacy Regulation Requires Further Study

Maintaining user trust and protecting user privacy is central to how we design and build our products. Google products and features that involve personal data cannot launch until they are approved by internal privacy specialists. We also work to provide users choice, transparency, control, and security over their data. Our commitment to these issues is why we built—and continue to develop—industry-leading tools like Google Account,⁵⁴ Download your data (formerly Takeout),⁵⁵ Privacy Checkup,⁵⁶ and Security Checkup.⁵⁷ We strive to be a leader in user privacy. We support smart regulation and other innovative ways to address emerging privacy and data protection issues here in Australia and around the world.

In a series of Preliminary Recommendations and Areas for Further Analysis, the Preliminary Report outlines proposed legislative amendments to strengthen user notifications and other data privacy protections for consumers.⁵⁸ In this section, we provide some overall feedback regarding privacy frameworks, as well as specific comments on certain of these proposals.

We support the development of baseline “rules of the road” for data protection that apply to *all* organisations that process personal information, not just digital platforms or organisations that meet a particular threshold. Google’s views on reforms of privacy regulatory frameworks are outlined in our September 2018 document, “Framework for Responsible Data Protection Regulation,” and an accompanying explanatory blog post.⁵⁹ This Framework provides our view on the requirements, scope, and enforcement expectations that should be reflected in all responsible data protection laws, and is based on our experience providing services that rely on personal data, as well as our work to comply with

⁵³ Preliminary Report at 10.

⁵⁴ Google, Google Account, <https://myaccount.google.com/> (last visited 14 February 2019).

⁵⁵ Google, *Download your data* (formerly Takeout), Google Account, <https://takeout.google.com/settings/takeout> (last visited 14 February 2019).

⁵⁶ Google, *Privacy Checkup*, Google Account, <https://myaccount.google.com/privacycheckup> (last visited 14 February 2019).

⁵⁷ Google, *Security Checkup*, Google Account, <https://myaccount.google.com/security-checkup> (last visited 14 February 2019).

⁵⁸ Preliminary Report at Chapter 5.

⁵⁹ See, Google, *Framework for Responsible Data Protection Regulation* (September 2018), https://services.google.com/fh/files/blogs/google_framework_responsible_data_protection_regulation.pdf; Keith Enright, *Proposing a framework for data protection legislation*, The Keyword (24 September 2018), <https://www.blog.google/outreach-initiatives/public-policy/proposing-framework-data-protection-legislation/>.

evolving data protection laws around the world. The principles in the Framework also draw from established privacy frameworks globally, from the OECD to the APEC Privacy Framework to the European Union's GDPR.

New legislation should be integrated with, and reflect widely shared principles of, data protection. Organisations, including Google, have invested heavily to comply with and understand the Privacy Act, the GDPR, the FIPPs, OECD Privacy Principles, the APEC Privacy Framework, and other existing regulatory approaches. New privacy laws that are inconsistent with the principles of major existing privacy legislation and frameworks could increase compliance costs, confuse consumers, and force companies to create different and potentially incompatible versions of products to comply with regional compliance frameworks. If compliance becomes overly complex and cost-prohibitive, companies may withdraw products and services from particular markets (just as some publishers withdrew from Europe following implementation of the GDPR).⁶⁰ In this way, regulation could have detrimental effects on consumer choice and access.

Finally, some of the Preliminary Recommendations address areas already covered by the Privacy Act and the Australian Privacy Principles. The Preliminary Report provides a high-level rationale for proposed amendments, but does not identify specific deficiencies that would be remedied by the proposed legislative amendments. This context would be useful for organisations to further evaluate the proposals. Any new legislation as a result of these Preliminary Recommendations and Areas for Further Analysis should be subject to consultation with Australian consumers and businesses.

The rest of this section provides our comments on some of the key privacy recommendations.

3.1. Google Gives Users the Ability to Delete Their Personal Information

Preliminary Recommendation 8(d) calls for enabling “consumers to require the erasure of their personal information, where they have withdrawn their consent and the personal information is no longer necessary to provide the customer with a service.”⁶¹ Other privacy frameworks, including the GDPR, have a similar requirement. Consistent with our understanding of the recommendation, Google already gives users the ability to delete and manage their personal information from Google services.⁶² For example, users can delete some or all of their search history in My Activity (available at <https://myactivity.google.com>).⁶³ And in 2011, we were among the first companies to allow users to download their data via the Download your data tool (available at <https://takeout.google.com>).⁶⁴ Detailed

⁶⁰ See, Jeff South, *More than 1,000 U.S. news sites are still unavailable in Europe, two months after GDPR took effect*, NiemanLab blog (7 August 2018), <http://www.niemanlab.org/2018/08/more-than-1000-u-s-news-sites-are-still-unavailable-in-europe-two-months-after-gdpr-took-effect/>.

⁶¹ Google also responds in Section 3.6 below to the Preliminary Report's proposal regarding mandatory deletion of data (Area for Further Analysis 7). As we discuss, a mandatory requirement for organisations to delete information when a user ceases to use a product or platform raises some practical considerations worth evaluating.

⁶² Google, *Exporting & deleting your information*, Google Privacy and Terms, <https://policies.google.com/privacy?hl=en#infodelete> (last visited 14 February 2019).

⁶³ Google, *Privacy Checkup*, Google Account, <https://myaccount.google.com/privacycheckup> (last visited 14 February 2019); See *Control & delete the info in your Google Account*, Google Account Help, <https://support.google.com/accounts/answer/7660719?hl=en> (last visited 14 February 2019).

⁶⁴ Google, *Download your data* (formerly Takeout), Google Account, Takeout, <https://takeout.google.com/settings/takeout> (last visited 14 February 2019).

information about our retention practices is available as part of our Privacy Policy, where we also have a video explanation to help make this important information available to a broad set of users.⁶⁵

Additionally, Google's Framework for Responsible Data Protection Regulation calls for giving users the ability to delete their data, and also the ability to access, correct and download their personal information (consistent with Australian Privacy Principles 12 and 13 and the forthcoming Consumer Data Right⁶⁶). This empowers individuals, and also keeps the market innovative, competitive, and open to new entrants.

3.2. Google Supports Voluntary Third-Party Certification Schemes

Preliminary Recommendation 8(b) proposes introducing an independent "third-party certification scheme" that would require certain businesses "to undergo external audits to monitor and publicly demonstrate compliance" with privacy regulations.⁶⁷ The Office of the Australian Information Commissioner ("OAIC") would certify the parties carrying out the audits. Compliance with privacy regulations would result in use of a privacy seal or mark. The proposal for a mandatory requirement that companies undergo audits differs from the encouragement of voluntary certification mechanisms under the GDPR and other privacy regulations.

Google supports voluntary certification or other similar schemes that promote organisational accountability and serve as flexible tools for organisations to build compliance programs that match their resources and needs. Several voluntary privacy certification schemes currently exist.⁶⁸ It is not yet clear whether mutual recognition of other certification schemes would be possible if a mandatory certification scheme were to be adopted. We would welcome greater detail on that, as well as about the scope of proposed audits or review, and how the audit process would improve user understanding of data protection and assist them gaining more control over their personal information. Further information about the type of third party that the ACCC would designate to perform the certifications and the nature of their expertise would also be helpful in evaluating whether the proposed certification scheme would better inform users.

Finally, the proposed mandatory certification would apply only to entities that meet high data collection thresholds or other criteria. We would like to understand why the proposed mandatory certification should be limited only to certain companies that collect user information. While we support voluntary certification schemes, if a mandatory scheme is to be introduced, this should logically apply to all companies that collect or process personal information and are currently subject to the Privacy Act.

3.3. Companies Can Encourage Users to Make Informed Choices without a "One-Size-Fits-All" Requirement for Express Opt-In Consent

Our approach to privacy has been to encourage and empower users to make informed choices about their personal information by providing and promoting a robust set of privacy tools. These tools include clear explanations that allow users to modify privacy settings at a granular level based on their individual comfort levels.

⁶⁵ Google, *How Google retains data we collect*, Google Privacy & Terms, <https://policies.google.com/technologies/retention?hl=en> (last visited 14 February 2019).

⁶⁶ ACCC, *Consumer Data Right: Project Overview*, ACCC Focus Areas, <https://www.accc.gov.au/focus-areas/consumer-data-right> (last visited 14 February 2019).

⁶⁷ Preliminary Report at 13; *see also*, at 223.

⁶⁸ *See, e.g.*, Singapore's Data Protection Trustmark Certification, TRUSTe's various Privacy Certifications, New Zealand's Privacy Trust Mark.

Preliminary Recommendation 8(c) proposes amendments to the Privacy Act to “strengthen consent requirements” by amending the definition of consent to mean express opt-in consent.⁶⁹ This “one-size-fits-all” approach is unlikely to be compatible with the huge variety of business operating environments and situations where personal data is processed. While organisations certainly should provide appropriate mechanisms for individual control over how personal data is processed, this does not require a narrowly defined meaning of consent or control over every use of data. For example, many companies process users’ IP addresses in order to ensure that the user sees the appropriate terms of service or country-specific legal requirements and notices. If a user were to decline to consent to such processing of data, it could significantly limit the ability for companies to operate in compliance with various laws.⁷⁰ Requiring individuals to control every aspect of data processing can also be time-consuming and disruptive and result in “consent fatigue” such that users choose to opt-in or opt-out of every request, regardless of the privacy implications. This approach could inadvertently divert attention from the most important controls for users, without delivering corresponding benefits.

There may also be unintended consequences for other stakeholders, including publishers and advertisers. If consumers were opted out of online advertisements by default, it may result in the loss of potential customers for advertisers and the loss of advertising revenue for publishers, as the U.S. Federal Trade Commission recently warned.⁷¹ Such losses would be particularly damaging for smaller and medium-sized businesses.

3.4. Further Analysis is Needed on Increasing Penalties for Privacy Breaches

Preliminary Recommendation 8(e) proposes to increase penalties for breaches of the Privacy Act to “at least mirror” the increased penalties for breaches of the Australian Consumer Law (“ACL”).⁷² It is worth noting that the Privacy Act was updated in 2018 to include mandatory obligations to report data breaches and increase penalties to over AUD\$2 million. We suggest that further analysis is needed to determine whether the proposed maximum penalty of 10% of turnover in Australia is proportionate to the risks posed by potential violations. We also note that businesses have a clear incentive to protect user data from a user trust and corporate reputation perspective.

Google’s Framework for Responsible Data Protection Regulation recommends tying enforcement to risk of harm to users, such that civil fines and other penalties are proportionate to the risks to users posed by the behaviour in question.⁷³ This creates the right incentives for businesses without over-penalising technical violations of the law that pose little or no risk to users. This is consistent with the approach taken in the 2018 amendments to the Privacy Act in the context of data breach notifications. In addition, although monetary penalties may have a deterrent effect on certain violations, disproportionate penalties may discourage companies from directly engaging with users and enforcement agencies to seek feedback that would improve products and services. For instance, companies may be reluctant to survey

⁶⁹ Preliminary Report at 229.

⁷⁰ We note that the GDPR requires explicit opt-in consent only in specific circumstances, and further consideration may be needed regarding potential inconsistencies with the GDPR and other existing frameworks.

⁷¹ See, FTC Staff Comments to National Telecommunications and Information Administration, In the Matter of Developing the Administration’s Approach to Consumer Privacy, at 15 (9 November 2018) (“[C]ertain controls can be costly to implement and may have unintended consequences. For example, if consumers were opted out of online advertisements by default (with the choice of opting in), the likely result would include the loss of advertising-funded online content.”), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

⁷² Preliminary Report at 225.

⁷³ See, Google, *Framework for Responsible Data Protection Regulation*, at 2 (September 2018), https://services.google.com/fh/files/blogs/google_framework_responsible_data_protection_regulation.pdf.

customers for feedback to improve their products, including notifications or consent language, if they are concerned that the results could be used against them to levy such fines.

3.5. Further Analysis is Needed on Impact of Direct Individual Causes of Action

The Preliminary Report makes two recommendations relating to individual causes of action for privacy law violations. Preliminary Recommendation 8(f) proposes that individual consumers should have a right of action in the Federal Court or the Federal Circuit Court to seek compensatory damages, and in some circumstances, aggravated and exemplary damages for infringements of the Privacy Act and the Australian Privacy Principles.⁷⁴ Relatedly, Preliminary Recommendation 10⁷⁵ proposes that the Australian Government adopt the Australian Law Reform Commission's 2014 recommendation for a new cause of action for "serious invasions of privacy."⁷⁶ The purpose of both of these recommendations is to increase the legal remedies available to individuals. While we support accountability for companies when users have been harmed by privacy law violations, we would welcome more analysis on whether the rights of action are likely to increase users' control over their personal data and create positive incentives for companies to be more protective of user data.

The Preliminary Report does not detail how such new causes of action would result in an increase in consumers' control over their data or assess the adequacy of existing avenues for legal redress (e.g., defamation, breach of confidence) under Australian law. For example, consideration could be given to jurisdictions in which monetary damages can be awarded, and whether the availability of such relief effectively deters violations, constitutes appropriate redress for users, meets other regulatory and compliance objectives, and minimises any unintended consequences. We encourage further discussion of these points.

3.6. Google Supports Users' Ability to Transfer and Delete Their Data, But Encourages Deeper Examination of the Practicalities of Mandatory Deletion Requirements

Area for Further Analysis 7 requests feedback about proposed mandatory data deletion requirements once a user ceases to use a service, or after a set period of time.⁷⁷ We agree that more analysis is needed before a mandatory deletion requirement is adopted, as any requirement needs to address the practical challenges companies would face, including legal, regulatory, and law enforcement mandates to preserve data. We also suggest consideration of important threshold questions about when deletion would occur, e.g., defining clearly when a user is viewed as ceasing use of a service, and to what extent the deletion requirement would extend to aggregated, pseudonymised, or otherwise anonymised data that does not identify an individual.

⁷⁴ Preliminary Report at 232.

⁷⁵ *Id.* at 235.

⁷⁶ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era: Final Report* (June 2014), https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_123_whole_report.pdf; Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era: Summary Report* (June 2014), https://www.alrc.gov.au/sites/default/files/pdfs/publications/summary_report_whole_pdf_.pdf.

⁷⁷ As is discussed in Section 3.1 above, Google supports users being able to delete their user data and take their data with them if they want to change services. We believe it is important to give users the freedom to port their data to other services if they so choose. The planned Consumer Data Right legislation seeks to codify a data portability right into law. The Preliminary Report's Area for Further Analysis 8 regarding required mandatory deletion by organisations raises different considerations, which we describe in this section.

3.6.1. Many Organisations Already Comply with the GDPR’s Data Deletion Requirement

Existing privacy frameworks such as the GDPR contain data deletion requirements that recognise the different reasons why organisations process data. User consent is often only one of these reasons. The Preliminary Report’s proposals for the deletion of user data are not detailed, but appear to intend to reflect principles outlined in Article 17 of the GDPR.⁷⁸ As explained above, we encourage a regulatory scheme that incorporates, or is compatible with, existing regulation in other jurisdictions.

3.6.2. Data Deletion Requirements Should Not Conflict with Legitimate Reasons for Companies to Retain Data

There are many reasons why companies need to retain user data that are not directly related to the provision of goods and services the company offers. For example, companies subject to Australia’s data retention and other laws must retain user data to comply with requests from law enforcement. Additionally, customer financial and tax data must be retained for certain periods to comply with tax regulations. Further, an organisation may need to retain data necessary for the establishment, exercise, or defence of legal claims.

Data needed for the purposes described above would, in most situations, be a combination of business data and user data. For example, the same data that organisations keep for tax purposes, such as consumers’ purchase transaction history, is necessary for business purposes such as accounting, auditing, warranty, or other reasons. Data deletion requirements should not conflict with such legitimate data retention requirements.

3.6.3. Further Legislation Must Carefully Consider a Number of Threshold and Definitional Issues Regarding When Users Cease Using a Service

There are a number of threshold and definitional issues regarding a mandatory deletion standard that require further consideration. For example, what constitutes a user leaving a service? Does “leaving” require actual deletion of an account? In many cases, users abandon their accounts without ever making a request for its formal deletion or cancellation. Others, however, may discontinue using a service for some period of time and return to it later. A returning user may be surprised if their data had been deleted, especially if it included their photos, documents, or contacts’ information.

3.6.4. Any Mandatory Data Deletion Requirement Should Expressly Exclude Derivative and Anonymised Content

Companies use aggregated and anonymised data to provide users with improved services and provide valuable research that can help solve problems. For example, Google can use the average speed of drivers to determine peak hour traffic in Sydney, providing a useful data set for different parties to improve transport planning. Given the potential public benefits such use cases can bring, any mandatory deletion requirement should expressly exclude anonymised data so it can be processed without regulatory uncertainty. Further, once a user deletes their account, any disassociated, de-identified or anonymous information cannot be deleted without establishing a means of re-linking data to the original user. That re-linking might violate a user’s privacy and be against the spirit and intent of any such law. For de-identified or anonymised data, creation of retention schedules may be a more workable alternative

⁷⁸ The Preliminary Report states, “Enabling consumers to request erasure of their personal information provides them greater control over their personal information and is likely to assist to mitigate the bargaining power imbalance between consumers and digital platforms. These proposed amendments reflect the principles outlined in Article 17 of the GDPR that provide EU citizens with a right to erasure of their personal data without undue delay where the personal data is no longer necessary or the data subject has withdrawn consent, unless the personal data processing is necessary in certain circumstances.” Preliminary Report at 231.

than mandatory deletion. Retention schedules can provide for deletion when the data is no longer needed for the purpose for which it was collected.

In addition, as noted above, many organisations, including Google, create products to help public research using derivative data. For example, this could include data that has been transformed into anonymous information and aggregated to help power products like Google Trends (<https://trends.google.com>). Google Trends allows the public to explore trends based on searches, for example, seeing a map and data showing interest in the World Cup by regions.⁷⁹ The GDPR specifically provides for secondary data processing and for longer data retention for archiving purposes in the public interest and for scientific, historical and statistical purposes or research.⁸⁰ The preservation of such data should be considered when crafting any new laws. We welcome further engagement on this topic.

3.7. Further Analysis is Needed of an Opt-in Ad Targeting Requirement

The Preliminary Report has also proposed further consideration of a prohibition on the collection, use, and disclosure of personal information for targeted advertising unless consumers have provided express opt-in consent. Under Area for Further Analysis 8, users of advertising-funded services could be required by a digital platform to consent to view ads.⁸¹ Digital platforms could not, however, require users to give consent for targeted ads based on user data or personal information in order to use the platform. There are many other ways for users to maintain control, beyond this narrow approach to opt-in consent, that might more effectively balance the interests of users and other stakeholders, including publishers.

3.7.1. Maintaining User Trust: Greater Transparency and User Control in Advertising Products

There are many ways for companies to promote transparency and user control in their advertising products. We understand that our success depends on designing and building our products to maintain user trust and protect user privacy. We continually work to develop and improve tools that allow users to better manage how their data is used.⁸²

Google's ads personalisation settings are an example of this ongoing effort. Our users have the ability to control the ads they see when using Google services.⁸³ We explain the Ads Personalisation⁸⁴ setting to users when they create a Google Account, at which time users can make the choice to turn this setting off. Once a user turns the setting off, we do not access the user's Google Account information to serve personalised ads. Ads can still be targeted based on contextual information such as the user's general location or the content of the website the user is viewing.

⁷⁹ See, Google, Google Trends, <https://trends.google.com/trends/?geo=AU> (last visited 14 February 2019).

⁸⁰ See, Council Regulation 2016/679, 2016 O.J. L 119/1 (on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)), at 156 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>.

⁸¹ Preliminary Report at 230.

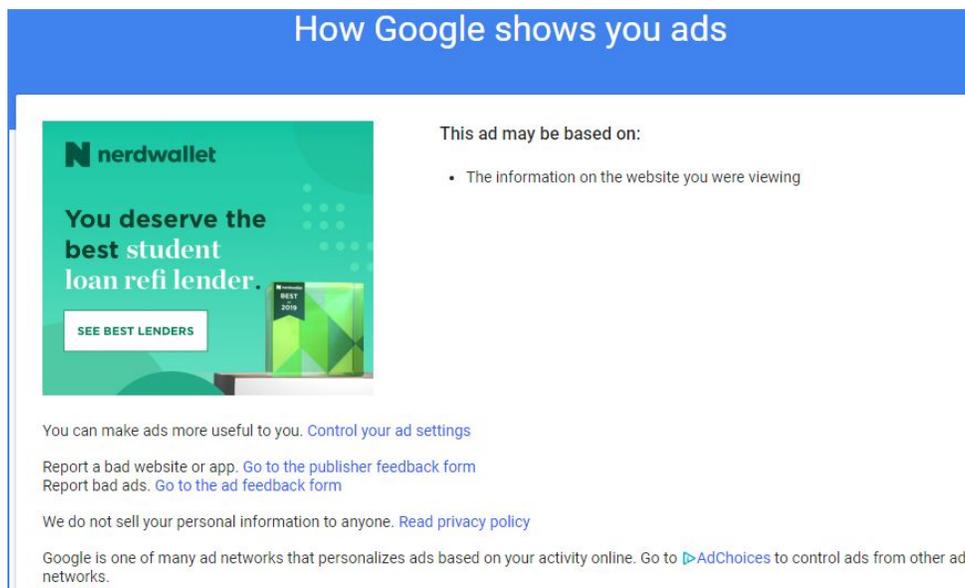
⁸² See, Philippe de Lurand Pierre-Paul, *Greater Transparency and Control Over Your Google Ad Experience*, The Keyword (14 June 2018), <https://www.blog.google/technology/ads/greater-transparency-and-control-over-your-google-ad-experience/>.

⁸³ See, Google, *Control the Ads You See*, Google Ads Help (last visited 14 February 2019), https://support.google.com/ads/answer/2662856?hl=en&ref_topic=7048998 (Google Ads help page with a step-by-step guide for users to control ads personalisation settings, including when the user does not want personalised ads).

⁸⁴ See, Google, *Ads personalization*, Google Ad Settings, <https://adssettings.google.com/authenticated> (last visited 14 February 2019).

We also periodically prompt users to reassess their settings with the Privacy Checkup tool, which walks users through their most important privacy controls in about 2.5 minutes, and is tailored to their account.⁸⁵ This tool asks users to confirm or change their ad settings along with several other important privacy choices. We remind users of the Privacy Checkup through in-product notifications, homepage promotions on Google.com.au, and more. Most users will be prompted to complete a Privacy Checkup two to three times a year.

Users can also view “Why This Ad?” or AdChoices notices in the corner of almost every ad that we show. By clicking on “Why This Ad?” and AdChoices, users can see more details about the reasons that they are seeing an ad and choose not to receive further ads from that advertiser. For example, “Why this Ad?” might tell users they are seeing ads for cameras because they searched for cameras, visited photography websites, or clicked on ads for cameras before. As part of our commitment to improve user privacy controls, we have expanded this feature over time in response to users’ feedback that they want to better understand why they see certain ads.



How Google shows you ads

nerdwallet

You deserve the best student loan refi lender.

SEE BEST LENDERS

This ad may be based on:

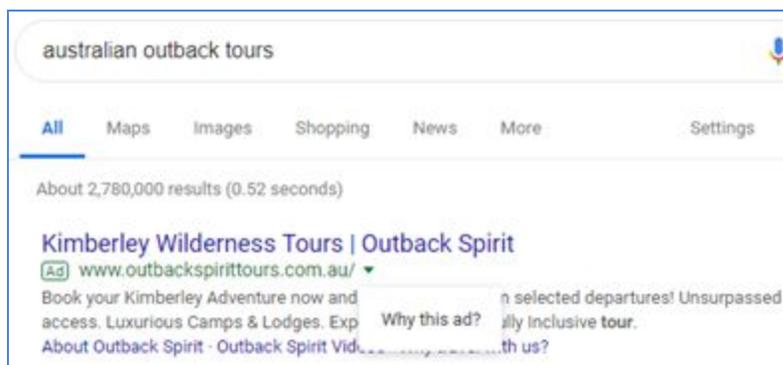
- The information on the website you were viewing

You can make ads more useful to you. [Control your ad settings](#)

Report a bad website or app. [Go to the publisher feedback form](#)
Report bad ads. [Go to the ad feedback form](#)

We do not sell your personal information to anyone. [Read privacy policy](#)

Google is one of many ad networks that personalizes ads based on your activity online. Go to [AdChoices](#) to control ads from other ad networks.



australian outback tours

All Maps Images Shopping News More Settings

About 2,780,000 results (0.52 seconds)

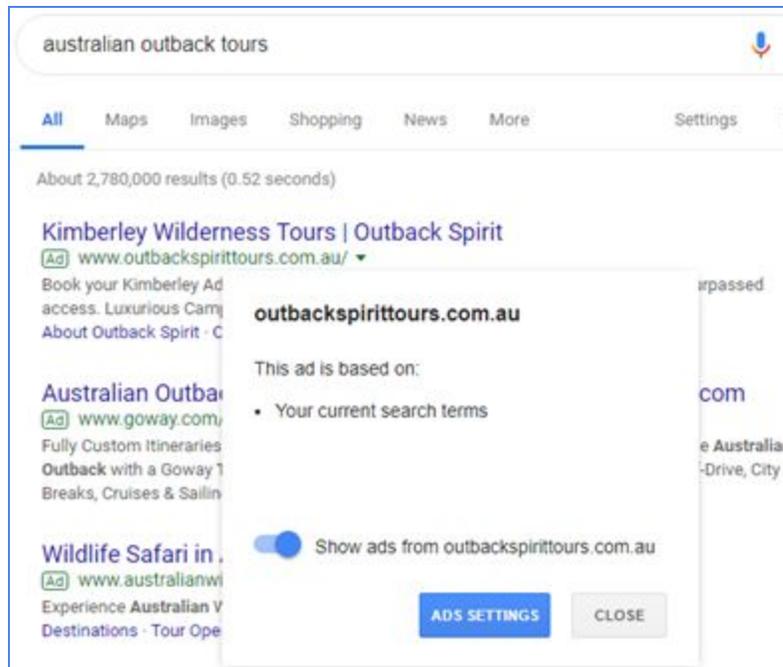
Kimberley Wilderness Tours | Outback Spirit

(Ad) www.outbackspirittours.com.au/

Book your Kimberley Adventure now and access. Luxurious Camps & Lodges. Exp... Why this ad? ...n selected departures! Unsurpassed fully inclusive tour.

About Outback Spirit - Outback Spirit Vid...th us?

⁸⁵ See, Google, *Privacy Checkup*, Google Account, <https://myaccount.google.com/privacycheckup> (last visited 14 February 2019).



3.7.2. Striking a Balance Between the Interests of Users and Publishers

Our approach to ads personalisation settings seeks to balance the interests of all stakeholders, including both the users of our products and the publishers that depend on ads for revenue. Any legislative amendments that require express user opt-in consent for targeted advertising should be evaluated with a view to consumer interests in the protection of their personal information and in receiving advertising and marketing, as well as the interests of publishers and other stakeholders in the advertising services industry.

Many web publishers depend on personalised ads for their livelihood. Advertising supports much of the freely available content on the Internet today. Widespread disabling of ads personalisation may cost publishers a significant percentage of their revenue and result in a loss of content for users. As the U.S. Federal Trade Commission noted in comments to the U.S. Department of Commerce’s request for information on privacy: “[C]ertain controls can be costly to implement and may have unintended consequences. For example, if consumers were opted out of online advertisements by default (with the choice of opting in), the likely result would include the loss of advertising-funded online content.”⁸⁶

Furthermore, if compliance with mandatory opt-in requirements results in declining revenue, some publishers may instead choose to close down their operations in Australia. This was borne out in the early days of the GDPR, which has an “opt in” requirement for personalised ads. Rather than complying with the GDPR, many publishers chose to block content for users in Europe.⁸⁷ We encourage further

⁸⁶ See, FTC Staff Comments to National Telecommunications and Information Administration, In the Matter of Developing the Administration’s Approach to Consumer Privacy, at 15 (9 November 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf

⁸⁷ See, Jeff South, *More than 1,000 U.S. news sites are still unavailable in Europe, two months after GDPR took effect*, NiemanLab blog (7 August 2018), <http://www.niemanlab.org/2018/08/more-than-1000-u-s-news-sites-are-still-unavailable-in-europe-two-months-after-gdpr-took-effect/>.

examination of the impact of existing frameworks before legislative amendments or other changes are made that may adversely impact stakeholders.

We would also welcome more detail on whether the opt-in requirement would apply only to digital platforms, or to all entities that collect, use, and disclose personal information for ad targeting purposes. As described above, we believe privacy and data protection regulations should apply consistently to all entities, not just certain platforms.

3.8. Clarifying the Record on Google Products and Agreements

There are a number of incorrect references to Google products and agreements in Chapter 5 of the Preliminary Report. We provide below more information to clarify and help inform the Final Report. We are happy to engage with the ACCC on any queries about our products to clarify how they work and answer any questions. We note the following:

3.8.1. Google Does Not Sell User-Uploaded Content and Images

The Preliminary Report states that Google has reserved the right in its Terms of Service⁸⁸ to sell user-uploaded content and images to third-parties without further agreement of the user.⁸⁹ This is not correct. Our Terms of Service describe rights granted to Google for the limited purposes of operating, promoting, and improving Google's Services, and to develop new ones. Nothing in Google's Terms of Service reserves the right to sell users' content and images to third-parties, as the relevant section makes clear:

When you upload, submit, store, send or receive content to or through our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content. *The rights you grant in this license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones.* This license continues even if you stop using our Services (for example, for a business listing you have added to Google Maps). Some Services may offer you ways to access and remove content that has been provided to that Service. Also, in some of our Services, there are terms or settings that narrow the scope of our use of the content submitted in those Services. Make sure you have the necessary rights to grant us this license for any content that you submit to our Services. (emphasis added).

3.8.2 Users are Not Faced with "Take-It-or-Leave-It" Decisions to Use Google Products and Services

The Preliminary Report includes a finding that "the clickwrap agreements used by digital platforms also contain take-it-or-leave-it terms and involve the bundling of a wide range of consents."⁹⁰ In the context of this finding, the Preliminary Report describes information asymmetries that exist when users are

⁸⁸ Google, *Terms of Service*, Google Privacy and Terms, <https://policies.google.com/terms?hl=en> (last modified 25 October 2017).

⁸⁹ Preliminary Report at 180.

⁹⁰ *Id.* at 175, 178.

prompted to provide their personal information in order to use products.⁹¹ There are many ways for Google users to use our products and services while leaving a minimal data footprint, contrary to the concerns about “take-it-or-leave-it” terms.⁹² For example, many of our most popular services, including Search, YouTube, Maps and Chrome, do not require a user to create an account. As a result, users are not required to provide any personal information in order to use these products. Our services also create easy methods to minimise data collection, such as using Chrome in “Incognito” mode, which means the browser will not store browsing history, cookies and site data, and information entered in forms after the user ends their browsing session.⁹³

Google users have many opportunities to minimise data collection, to turn off behavioural advertising, and to otherwise control their experience. The Preliminary Report omits any mention of these controls or of Google’s leadership in this area to empower consumers to make choices about their particular data settings and privacy controls. As noted above, users who do create a Google account have access to a centralised dashboard where they can manage preferences related to data collection, as well as a number of other options to tailor their experience. Google was one of the first companies to offer this service.⁹⁴ Google is open to further feedback on how to show users that our privacy settings are not “take-it-or-leave-it.”

3.8.3. Users Can Choose Whether to Upload and Store Photos from Their Devices to Their Google Account

The Preliminary Report relayed an anecdote about an ACCC staff member who downloaded the Google data attached to their Google account and found that Google “stored copies of photos from 2011-18, including photos which came from previous devices, and that had not been transferred to new devices or stored in the cloud.”⁹⁵ Google provides a backup sync feature that can be installed on a laptop or desktop to save photos to Google Cloud. On mobile devices, users can turn the backup feature on or off in the settings for Google Photos.⁹⁶ This feature prevents users from losing their photos if they lose a device.

3.8.4. Google’s Privacy Policy is Written in Plain English and Includes User-Friendly Explanations

The Preliminary Report states that digital platforms’ privacy policies should disclose data practices in detail while also noting that many privacy policies are “long, complex . . . and difficult to navigate.”⁹⁷ Google has invested significant resources to create a privacy policy that is accessible, understandable and useful to users. For example, Google evaluates and updates its Privacy Policy to balance the need

⁹¹ *Id.* at 178 (“Offering terms on a take-it-or-leave-it basis may contribute to information asymmetries between digital platforms and their users, as their terms of use and privacy policies are impersonal documents that do not clearly set out to each user what is occurring with their user data specifically. As a result, the terms of a consumer’s agreement with the digital platform cannot clearly outline to a consumer the extent of user data collected from them individually, in a way that takes into account that user’s particular data settings and privacy controls.”)

⁹² *Id.*

⁹³ Google, *Browse in private*, Google Chrome Help, <https://support.google.com/chrome/answer/95464?co=GENIE.Platform%3DDesktop&hl=en> (last visited 14 February 2019).

⁹⁴ Google launched the account dashboard feature in 2009 and My Account in 2015 (now called Google Account). See, Greg Fair, *Improving our privacy controls with a new Google Dashboard*, The Keyword (8 September 2017), <https://www.blog.google/technology/safety-security/improving-our-privacy-controls-new-google-dashboard/>.

⁹⁵ Preliminary Report at 171.

⁹⁶ Google, *Backup Photos and Videos*, Google Photos Help, <https://support.google.com/photos/answer/6193313> (explanations for desktop, Android, and iOS devices) (last visited 14 February 2019).

⁹⁷ Preliminary Report at 182.

to be comprehensive and accurate with the need to be understandable and accessible. Making this information available is critical to building and maintaining user trust, and helps users make informed decisions about their privacy.

One challenge is how to ensure users have the information they need, without overwhelming them with extraneous details. Google is constantly refining this balance based on feedback from users. Google's policies are intended to be understandable and accessible to users, and are also full and complete statements of our data practices for experts and regulators to hold us accountable. Google tries to meet both needs, via clear headings, easy navigation, overlays and examples, and explanatory videos. We regularly conduct surveys and interviews with users to inform our approach and ensure we strike this balance effectively. In the last two years, we have involved more than 10,000 people from over 18 countries in qualitative research related to privacy and security to better understand user concerns and needs. Perhaps as a result of these efforts, Google's Privacy Policy has been recognised as among the best in the industry.⁹⁸

The Preliminary Report suggests "[s]ome digital platforms also have policies where key terms can only be accessed by following a link that takes users away from the Privacy Policy web page."⁹⁹ In addition, the Preliminary Report describes "interlinking of separate pages [that] substantially increases the amount of navigation and reading time for a user."¹⁰⁰ In contrast, Google's Privacy Policy has embedded videos and additional text boxes that appear on the same page when a user clicks on them,¹⁰¹ which help users further understand important concepts. In addition, our Privacy Policy contains easy-to-follow links that go directly to a user's Google Account. For example, users can read about privacy controls and then click on a link which takes them to My Account to review and modify their ads personalisation and other settings to manage, review, and update their information.¹⁰²

3.8.5. The Preliminary Report Does Not Include Complete Information Regarding Location

The Preliminary Report refers to "location tracking," but does not discuss the location-specific sections of Google's Privacy Policy, including videos that clearly explain Google's uses of location information.¹⁰³ Information available on Google's Location information page, "Types of Location Information used by Google," also provides users with information about the categories of location information that are collected and used by Google products and services.¹⁰⁴

⁹⁸ See, Katy Steinmetz, *These Companies Have the Best (And Worst) Privacy Policies*, Time (6 August 2015), <http://time.com/3986016/google-facebook-twitter-privacy-policies/>. On January 21, 2019, the French National Data Protection Commission ("CNIL") imposed a financial penalty on Google LLC in connection with an investigation into compliance with the GDPR. Google is deeply committed to meeting its users' expectations and the consent requirements of the GDPR. Google has concerns about the impact of this ruling on publishers, original content creators and tech companies in Europe and beyond. For these reasons, Google has decided to appeal the CNIL ruling.

⁹⁹ Preliminary Report at 184.

¹⁰⁰ *Id.*

¹⁰¹ Google, Google Privacy and Terms (22 January 2019), <https://policies.google.com/privacy?hl=en>.

¹⁰² Google, *Managing, reviewing, and updating your information*, Google Privacy and Terms, <https://policies.google.com/privacy#infochoices> (last visited 14 February 2019) (providing direct links to a user's Google Account privacy controls, including Ad Settings; from Ads Settings, users can manage their preferences about ads shown on Google and on sites and apps that partner with Google).

¹⁰³ *Id.*

¹⁰⁴ Google, *Types of Location Data Used by Google*, Google Privacy and Terms, <https://policies.google.com/technologies/location-data?hl=en> (last visited 14 February 2019).

4. Google Faces Many Competitors for Users and Advertisers

The Preliminary Report bases many of its recommendations on the mistaken premise that Google has market power in search, search advertising, and news media referrals. We describe in this section why we do not compete in a market for “news media referrals,” as well as examples of the competition we face in search and search advertising.

- “News media referral services”: Google competes for users by providing high quality search results. Google does not compete to provide, or have market power in, “news media referral services” to news sites. Google provides search results to users and advertising to advertisers; any resulting “referrals” to third-party sites are the (valuable) byproduct of Google seeking to provide services to its users. Furthermore, Google is just one among many sources of traffic to news sites. Direct navigation by consumers to news sites is the largest source of traffic.¹⁰⁵
- Search: Google faces fierce competition from other providers, including vertical search sites like Amazon, Expedia, Domain and Carsales.com, many of which users access directly through mobile apps. The Preliminary Report is incorrect to conclude that there is limited substitutability between generalised and specialised search services, and that Google is insulated from dynamic competition.
- Search advertising: The Preliminary Report is incorrect to conclude that Google is unconstrained by other forms of advertising. Google faces competition from many sources including thousands of search, travel, ecommerce, and publisher sites along with other forms of online and offline advertising.

Each of these is discussed in more detail below. As a general matter, the Preliminary Report does not include any standard analysis to define relevant markets or to assess market power in these purported markets.¹⁰⁶ Analysing the competitive constraints on Google would confirm that these spaces are dynamic and highly competitive for the reasons explained below.

4.1. Google Competes for Users, Not to Provide “News Media Referral Services”

4.1.1. Market Definition

The Preliminary Report does not contain any evidence or analysis showing that there is a market for “news media referral services,” or that Google even competes in such a market. We compete for two sets of customers: users that search Google for information and advertisers that advertise to users. News referral traffic is incidental to the provision of high quality search results to users.

There are countless examples in the Australian economy of rating, ranking, or reporting services that influence consumers—from simple word-of-mouth to specific review sites—but that does not create a relevant market for referrals. Restaurants that receive praise on a review site may receive an increase in customers, but that does not mean that the site is active in a market for restaurant referrals. Products favourably reviewed by a respected product review publication may receive increased sales, but again,

¹⁰⁵ Preliminary Report at 31.

¹⁰⁶ Product market definition requires careful, evidence-based analysis of all substitutable products; and an assessment of market power requires careful, evidence-based analysis of all competitive constraints (see, *Competition and Consumer Act 2010* (Cth), s 4E and s 46(4)). This analysis is largely absent in the Preliminary Report notwithstanding the significance of the findings and recommendations.

that does not mean that the publication or reviewer are active in a market for product sales referrals even if the publication includes unsponsored links assisting readers to find these products. What is common in each of these cases is that the referrals are ancillary to a separate product being provided for the benefit of the consumer and any advertisers, not the recipient of the referrals. Google Search is for the benefit of users searching on Google and valuable clicks to news sites are only possible due to Google's success in providing users with relevant results.

4.1.2. Market Power

The Preliminary Report does not account for relevant constraints on Google in concluding that Google has market power in news referrals: specifically, that if Google restricted user access to high quality sites, we would lose users and advertisers. The Preliminary Report ignores that the primary competitive constraint for Google (even as it pertains to policies affecting publishers) arises from competition for users and advertisers. The traffic news sites receive from Google is undoubtedly valuable to those sites, but our focus is not on referring traffic to those sites. Rather, our focus is on providing relevant search results to users, which we must do to attract the users who in turn click on news publisher sites. As such, the discussion of "market power" in "news media referral services" is besides the point given that we are incentivised by our users to provide high quality referrals via search results.

The approach in the Preliminary Report suggests that if a restaurant review site's favourable review caused restaurants to gain on average 30% more customers, that site has market power in restaurant referrals. Yet, the site is competing for readers of its reviews, not to provide restaurant referrals. Generally, review sites compete to attract users and sell advertising to advertisers who wish to reach those readers. If users do not value the opinions of reviewers, then the site will not attract readers and advertisers. Similarly, Google competes to provide search results to users and the resulting clicks to news publisher sites do not provide Google with market power in "news media referrals" any more than a popular restaurant critic has market power in restaurant referrals.

The conclusion in the Preliminary Report that Google has market power based on traffic referrals to news sites is also overstated. Even if "referral services" were a relevant market, it is clear that news publishers receive a significant share of their traffic from other sources. According to the Preliminary Report, Google accounted for 28% of news referrals to news websites, while 43% of consumers "accessed the websites directly by typing the address into the browser."¹⁰⁷ In other words, direct visits to news websites are the most popular way to access news information online. The Preliminary Report recognises the importance of traffic through sources other than digital platforms, noting that "even for people who use digital platforms, other media formats remain important sources for journalism that is particularly significant to the public interest."¹⁰⁸ As the ACCC's survey notes, 55% of Australians still use print or broadcast as their main source of news.¹⁰⁹ Even within the digital channel, there are many other sources of referral traffic to news sites, including direct access through a browser, television and radio ads, online ads, organic links in one news site to stories on others, native advertising platforms, and mobile apps.

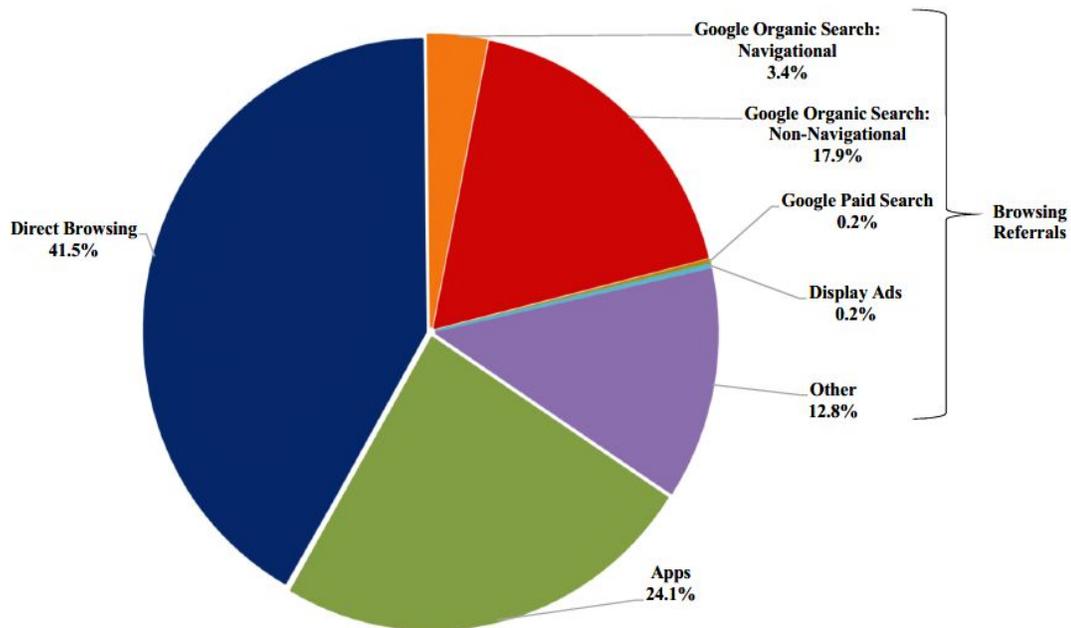
¹⁰⁷ Preliminary Report at 61-62.

¹⁰⁸ See, *id.* at 286. See also Roy Morgan Research, *Consumer Use of News*, at section 2.1, p. 6 ("Television is the most commonly reported 'main' platform for accessing news (32%)"); section 2.2, p. 7 ("[T]elevision (67%), radio (47%), and news websites (39%) were most commonly used to access 'news of the day'"), <https://www.accc.gov.au/system/files/ACCC%20consumer%20survey%20-%20Consumer%20use%20of%20news%20C%20Roy%20Morgan%20Research.pdf>; S Park, C Fisher, G Fuller & JY Lee, *Digital news report: Australia 2018*, Canberra: News and Media Research Centre (2018) at 13 ("[W]hen asked about the main source of news, Australians still preferred offline news. About 53% of Australians use offline and 47% use online as their primary sources of news."), <http://apo.org.au/sites/default/files/resource-files/2018/06/apo-nid174861-1241946.pdf>.

¹⁰⁹ Preliminary Report at 251.

The evidence also demonstrates that Australians access news through a variety of sources. Publicly available information shows that when app usage and navigational queries (queries with the name of the news publisher, e.g., “Sydney Morning Herald”) are taken into account, non-navigational Google queries (e.g., “Thai cave rescues”) represent only approximately 17.9% of traffic referrals across the top 40 Australian online news publications (see pie chart below). These results are consistent with research commissioned by the ACCC for the purpose of the Inquiry that showed that more than half of people who accessed news through a digital platform also accessed news websites or apps directly.¹¹⁰ A survey by the News and Media Research Centre also found more users search for news by referring to a specific media brand (29%) than a specific story (26%). In addition, it found that 37% of participants access news online by going direct to the news publishers’ website.¹¹¹

**Top 40 Australian News Website Traffic Sources
Australian Users (2018)**



Notes: Top 40 Australian news websites based on SimilarWeb “News and Media” category excluding weather websites, ranked by SimilarWeb monthly visits by Australian users in December 2018. All traffic other than apps is from browsing activity. Includes desktop and mobile devices. Mobile-specific traffic is imputed based on desktop-only shares if mobile-specific shares are not available. SimilarWeb visits include website subdomains. “Other” includes other search, social, emails, and third-party site referrals. App traffic calculated by multiplying monthly active user count by monthly sessions per user. Missing monthly active users and/or monthly sessions per user are estimated as the average of active users or sessions per user for months where data is available.
Sources: SimilarWeb; App Annie.

The Preliminary Report acknowledges Google’s compelling interest in providing relevant results to users.¹¹² Crucially, the interests of certain publishers and Google users are not necessarily always aligned: for example, if Google refers traffic to high quality sites, it can benefit both Google and our users because users who locate quality information on those sites are likely to use Google again. But low quality sites—particularly those that try to game Google’s ranking algorithms—can impose a cost on

¹¹⁰ *Id.* at 31; Roy Morgan Research, *Consumer Views and Behaviours on Digital Platforms*, (November 2018), at 33, <https://www.accc.gov.au/system/files/ACCC%20consumer%20survey%20-%20Consumer%20views%20and%20behaviours%20on%20digital%20platforms%2C%20Roy%20Morgan%20Research.pdf>.

¹¹¹ Preliminary Report at 62; Sora Park, Caroline Fisher, Glen Fuller & Jee Young Lee, *Digital news report: Australia 2018*, Canberra: News and Media Research Centre (2018), at 57, <http://apo.org.au/sites/default/files/resource-files/2018/06/apo-nid174861-1241946.pdf>.

¹¹² See, Preliminary Report at 116 (“Google has an incentive to maintain or increase the quality of its search service to attract users (and advertisers) to its platform. This includes providing high quality search results to users, with information relevant to the search term.”).

Google and on its users, both by creating a negative user experience and by crowding out sources of information that searchers would find useful. Not every news site can be ranked at the top of the search results page, but the overall percentage of user clicks that Google refers to news sites is consistently around three percent of total user clicks on Google. Although news publishers benefit from free traffic and Google benefits from displaying links to news sites in its search results, this relationship should not create an obligation for Google to alter its product or to prioritise the needs of certain publishers over those of its users and advertisers.

4.2. Google Faces Strong Competition in Search and Search Advertising

4.2.1. Competition for User Queries

The Preliminary Report does not consider the aggressive competition Google faces for user queries in reaching its conclusion that Google has market power in search. Every user query on Google is about a specific topic and for each topic there are many alternatives to searching on Google. Users can easily search on alternative sites or apps and increasingly do so.¹¹³ For any given query, we compete with all types of successful services that are able to answer the same query.

In addition to competing with general search providers like Bing and DuckDuckGo, Google competes directly with specialised search services for many categories of queries, including shopping, local, travel, and more. The most prominent example, of course, is Amazon, which is the most popular search service for product searches in the United States.¹¹⁴ In travel search, Webjet, Expedia, Trivago, TripAdvisor, Skyscanner and Wotif are very popular.¹¹⁵ Similarly, in local search, Yelp, TripAdvisor, Facebook, Instagram, OpenTable, and many country-specific platforms such as True Local or The Fork in Australia, are used to find restaurants and other retail establishments.¹¹⁶ Answer engines such as Wolfram Alpha and Britannica.com provide users with popular alternatives to search for historical, scientific, and other facts. And as the Preliminary Report recognises, users readily turn to both Facebook and Google, among many others, to find news even though the Preliminary Report alleges they compete in separate markets for “general search” and “social media services.”¹¹⁷

As a consequence, Google faces dynamic competition across a range of different types of queries. Solely looking at Google’s market share in “general search,” as the Preliminary Report does, is not an accurate indication of the relevant set of competitors or their shares for any given type of query. Even if specialised sites do not compete for all user queries, they do compete within their respective areas of expertise. Given the wide array of vertical sites, Google faces competitive pressure across a wide

¹¹³ In 2018, based on data from SimilarWeb and App Annie, 59% of the total traffic to the top four shopping platforms in Australia (eBay, Gumtree, Ozbargain, and Amazon) was via mobile apps, 23% of traffic came from users directly navigating to the provider website, and just 10% came from Google organic search referrals.

¹¹⁴ See, e.g., Krista Garcia, *More product searches start on Amazon*, Emarketer Retail (7 September 2018), <https://retail.emarketer.com/article/more-product-searches-start-on-amazon/5b92c0e0ebd40005bc4dc7ae>.

¹¹⁵ See, e.g., Chris Pash, *Webjet shares soar as revenue jumps by half*, Business Insider (23 August 2018), <https://www.businessinsider.com.au/webjet-results-profit-2018-8>; BBC News, *Skyscanner reports sharp rise in turnover and profits*, (26 July 2018), <https://www.bbc.com/news/uk-scotland-scotland-business-44954934>; Roy Morgan, *Online travel’s new dynamic duo: Expedia and Wotif* (10 July 2014), <http://www.roymorgan.com/findings/5673-online-travels-new-dynamic-duo-expedia-wotif-201407092352>.

¹¹⁶ Christine Long, *Online restaurant bookings explode*, Sydney Morning Herald (January 2015), <https://www.smh.com.au/business/small-business/online-restaurant-bookings-explode-20150113-12n8lw.html>; Alex Hughes, *Why TripAdvisor will go the distance*, The Australian (23 March 2016), <https://www.theaustralian.com.au/business/business-spectator/why-tripadvisor-will-go-the-distance/news-story/d62e1407a90b5eb8d6e22481c7657ebe>.

¹¹⁷ Preliminary Report at 94-97.

spectrum of user queries.¹¹⁸ This requires us to continually innovate on how we provide both specialised results (e.g., Top Stories) and “blue links” to the benefit of users.

4.2.2. Competition for Advertising

The Preliminary Report is incorrect to conclude that Google’s search advertising products are not constrained by other forms of advertising. Google faces fierce competition in advertising, of which search advertising is only one part. Advertisers allocate their advertising budgets amongst a wide spectrum of outlets such as TV, radio, outdoor, print media, and digital. Google must compete with players from all of these formats for its share of the overall advertising budget.¹¹⁹

Google faces especially intense competition from its digital advertising peers. We compete with many sites—not just “general search” sites—for ad spending within many different categories (e.g., shopping, travel, as set out above). Advertisers and ad agencies are sophisticated, and allocate spend based on return-on-investment (“ROI”) across a variety of ad providers, including but not limited to search, typically on the basis of advanced media mix optimisation models.¹²⁰ Marketing tools such as Kenshoo and Marin help advertisers and agencies manage and shift spend across all types of digital advertising providers.¹²¹ Even within search advertising, the Preliminary Report understates the competitive significance of vertical

¹¹⁸ *In re Google Inc.*, File No. 111-0163, Statement of the Federal Trade Commission Regarding Google’s Search Practices (3 January 2013) (“General purpose search engines are distinct from ‘vertical’ search engines, which focus on narrowly defined categories of content such as shopping or travel. Although vertical search engines are not wholesale substitutes for general purpose search engines, they present consumers with an alternative to Google for specific categories of searches.”), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

¹¹⁹ Matt Schruers, *Infographic: How Ad Dollars Are Spent*, Disruptive Competition Project (16 January 2018), (“Consider today’s reality: advertisers compete to reach the same consumers across multiple mediums. Services that deliver ads digitally to an individual’s mobile device don’t just compete against one another; they compete directly with television, print and outdoor options (e.g., highway billboards, subway stations, Times Square installations).”), <http://www.project-disco.org/competition/011618-how-ad-dollars-are-spent/#.XEtwmdJKiUk>. According to this source, only 41% of a typical company’s ad spend is spent on digital advertising.

¹²⁰ See, *Google Australia*, Submission to the Digital Platforms Inquiry, 19 October 2018 at 2 (“Firms typically allocate their ad spend across different ad types, both online and offline, by using sophisticated tools to measure return on investment. Technological advancements in ad measurement and targeting have created increased competition among different ad formats. For example, Seven, Nine and MCN jointly launched an addressable TV advertising solution with granular targeting capabilities, to compete head to head with digital ad formats. [...] For any particular ad format, there are typically many different options for advertisers. For example, there are online companies offering search advertising beyond Google, including not only general search engines like Bing and Yahoo! but also a host of specialised search sites such as Amazon, Gumtree, Domain, Carsales.com, eBay and social networks like Facebook for shopping / product searches; Expedia, Stayz, Travelocity, TripAdvisor and Travelzoo for travel (hotel and flight) searches; Opentable, Dimmi, Square and many similar popular country-specific platforms for local restaurant or retail searches. Similarly, there are countless online platforms, websites and mobile applications, as well as traditional TV media, showing targetable and measurable video advertising.”); see also, e.g., Case No COMP/M.4731, *Google / DoubleClick*, European Commission decision of 11 March 2008 at para. 52 (“The market investigation also showed that, from a technical point of view, the differences between the different types of ads seem to be diminishing. [...] More generally, the fact that the ad serving tools helping advertisers to assess their return on investment are progressively converging across different types of ads reinforces the conclusion according to which all kinds of ads could be substitutable...”); Case No COMP/M.5727, *Microsoft / Yahoo! Search Business*, European Commission decision of 18 February 2010 at para. 71 (“[A] majority of respondents agree with the statement that all types of online advertising compete because advertisers mix and match different ad formats and targeting technologies...”); Report of the UK Competition Commission of 4 February 2009 (BBC Worldwide Limited, Channel Four Television Corporation and ITV plc) at para 4.151 (“we conclude that for the parties’ advertising customers, the relevant market is online advertising, including both video and nonvideo advertising in the UK”).

¹²¹ Marin Software, marinsoftware.com (last visited 14 February 2019); Kenshoo, kenshoo.com (last visited 14 February 2019).

search sites such as Amazon (in shopping) and Expedia and Booking.com (in travel), despite its previous investigation recognising the latter as significant players.¹²²

The Preliminary Report's comparison of total search ad spending on Google to ad spend on Amazon and Expedia masks that Amazon and Expedia compete for only part of Google's total ad revenue.¹²³ But within their respective areas, they are much larger: according to recent reports, "some advertisers that sell on Amazon are moving 50 percent or more of their search budgets to Amazon."¹²⁴ This rapid rise underscores the ease with which an innovative entrant can become a significant competitor. Expedia's relative significance is also much greater than the Preliminary Report indicates; while their business model emphasises referral fees over advertising (the Preliminary Report discusses only the latter), such referral fees are another form of marketing spending that competes with Google. In addition, Google competes heavily for ad spending with Facebook and countless other types of online platforms, websites, and apps, as well as with offline media like TV, radio, outdoor, and print. As a consequence, Google and other digital platforms face significant and continual pressure to invest in innovation and quality improvements to their platforms.

4.2.3. Access to a Large User Base or Large-Scale User Data is Not an Entry Barrier

Google attracts users to its search engine by constantly innovating and improving it. This started with the PageRank algorithm, which helped us to become popular as a search engine despite the presence of more established search engines at the time, like Yahoo!, Lycos, AltaVista and Ask. Since then Google has grown and maintained its popularity by investing billions of dollars every year in the development of Google Search, leading to innovations like Google Translate, Google Maps integration, Universal Search, Voice Search, the Knowledge Graph, and RankBrain, to name just a few.¹²⁵ We remain focused on investments in engineering-driven search innovations because we are well aware that is the only way to maintain our popularity with users and, as a result, advertisers.¹²⁶ There are many examples of incumbents that had a large user base, yet were overtaken by newcomers that began with fewer users and less data (e.g., MySpace, AOL Instant Messenger, AltaVista, Lycos).

There are No Meaningful Network Effects in Search

The Preliminary Report suggests that new entrants in search may face entry barriers due to network effects. According to the Preliminary Report, Google's collection of user data allows Google to improve

¹²² ACCC, *Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels*, Press Release (2 September 2016), <https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels>.

¹²³ Preliminary Report at 58, Figure 2.8. The Preliminary Report's analysis of ad spend on Amazon, Google, and Expedia also does not account for competition for users. For example, when users search for products on Amazon, instead of Google, Google loses the ability to sell as many product-related ads. Irrespective of total ad spend on Amazon, competition for users places a competitive constraint on Google.

¹²⁴ Ginny Marvin, *Some large search budgets are moving to Amazon, say agency executives*, Search Engine Land (10 October 2018), <https://searchengineland.com/some-large-search-budgets-are-moving-to-amazon-say-agency-executives-306432>.

¹²⁵ See, e.g., David Goldman, *10 innovations that made Google great*, CNN Money (20 August 2014), <https://money.cnn.com/2014/08/20/technology/innovationnation/google-search/index.html>.

¹²⁶ In 2017, Google's parent company, Alphabet, spent US\$16.6 billion on research and development. See, Google 2017 10-K, <https://www.sec.gov/Archives/edgar/data/1652044/000165204418000007/goog10-kq42017.htm>. According to Boston Consulting Group, Apple and Google topped the list of the 50 most innovative companies in the world for 2018. See, Ruth Umoh, *The 50 most innovative companies to work for in 2018*, CNBC (18 January 2018), <https://www.cnbc.com/2018/01/18/apple-google-and-microsoft-top-list-of-the-most-innovative-companies-in-2018.html>

its algorithms and stay ahead of the competition.¹²⁷ This theory assumes the existence of feedback loops where more users and more advertisers result in better search and ad results, which in turn attracts more users. However, such feedback loops do not exist in search and search advertising. This is explained in further detail below.

Large-scale user data are not a key input in Google Search. Google’s search algorithms are not primarily reliant on large volumes of user data to provide a useful service to users. Providing relevant results to the most frequently entered user queries typically does not require analysis of a large set of user data. For example, for navigational queries (e.g., “eBay”) or queries for names of personalities (e.g., “Meghan Markle”), products (e.g., “galaxy s9”), or events (e.g., “world cup”), user intent is usually clear from the query itself. And although Google has processed a lot of user queries, the percentage of queries per day that we have never seen before has stayed constant over time.¹²⁸ This indicates that, while user query data may play some role in improving our search algorithms, it is not a key input and does not solve the challenges associated with providing relevant results to less common queries.¹²⁹ Instead, Google’s ability to return relevant results to queries, whether common or uncommon, derives primarily from the quality of its engineering (e.g., Google’s PageRank).

The number of advertisers does not drive the number of users in Google Search. The Preliminary Report also suggests there is a feedback loop on the theory that the number of advertisers that Google Search attracts make it more valuable to users.¹³⁰ That is not the case. While users benefit indirectly from Google’s ad revenue, because we allow them to use Google Search for free, users typically do not consider a search platform more valuable because it offers more or better ads, or a larger pool of advertising. Rather, users turn to Google Search primarily based on the quality of the organic search results it returns in response to queries.

Google’s pay-per-click model undercuts network effects in search advertising. It is true that advertisers would not be interested in buying ads on Google if we had no users, as is the case with any ad-supported business. However, the number of users does not create a meaningful network effect for ads on Google Search because we price search ads on a pay-per-click basis. In a pay-per-click model, more user clicks may represent more value, but more clicks come at a proportionately higher cost. This is different from more traditional advertising where an advertiser is charged a fixed price to place an ad, regardless of the amount of users who actually view the ad. Advertising on a larger pay-per-click platform therefore may not be any more profitable than advertising on a smaller advertising platform. In addition, under a pay-per-click model, the advertiser pays the same amount when it splits an ad campaign across different ad platforms as it does when it spends the campaign on a single platform. Pay-per-click models thus have facilitated multi-homing, which undercuts network effects.

¹²⁷ Preliminary Report at 42.

¹²⁸ Dan Farber, *Google Search scratches its brain 500 million times a day*, CNET (13 May 2013) (“On a daily basis, 15 percent of queries submitted -- 500 million -- have never been seen before by Google’s search engine, and that has continued for the nearly 15 years the company has existed, according to John Wiley, the lead designer for Google Search.”), <http://www.cnet.com/news/google-search-scratches-its-brain-500-million-times-a-day/>.

¹²⁹ See generally, Lesley Chiou and Catherine Tucker, *Search Engines and Data Retention: Implications for Privacy and Antitrust*, NBER Working Paper 23815 (September 2017); see also generally, William Terdoslavich, *Big Data and the Law of Diminishing Returns*, InformationWeek (27 November 2015), <https://www.informationweek.com/big-data/big-data-analytics/big-data-and-the-law-of-diminishing-returns/d/d-id/1323310>.

¹³⁰ Preliminary Report at 43.

User Data Scale and Scope are Not Entry Barriers in Advertising Services

The Preliminary Report suggests that the scale and scope of user data creates or increases barriers to entry or expansion for competing advertising platforms.¹³¹ The theory set forth in the Preliminary Report is that this gives digital platforms a comparative advantage in targeting ads. While user data can be valuable for some forms of ad targeting, there are strong indications that the scale and scope of the user data we collect has not created or increased barriers to entry in search advertising or other advertising formats or services.

Firms have entered online advertising successfully without large-scale user data. While user data can be valuable to target advertising, there is significant empirical evidence suggesting that access to large-scale user data typically is not a barrier to entry or success in online advertising.¹³² For example, Snapchat, Spotify, Pinterest, Etsy, Reddit and numerous other now-popular online brands that launched not so long ago, without any preexisting user data, are competing successfully for ad spend against established firms with access to much more user data. There are also many examples of industry incumbents that had a large user base and access to user data at a large scale, yet did not remain popular (e.g., MySpace, AOL Instant Messenger, AltaVista, Lycos). As such, the key to success in the online advertising world continues to be innovative consumer services, rather than just user data.

There are also several forms of targeted advertising, including search advertising, that do not require large user datasets to be effective. In the case of search advertising, the key parameter to target the ad is typically the query entered by the user into the search bar rather than any demographic or other data about the particular user. Moreover, search ads are primarily targeted by advertisers themselves, by selecting keywords, entering bids and budgets, and choosing other criteria (e.g., time of day, geography). In the case of display advertising, there are also targeted ad formats that typically do not require large-scale user data. For example, contextual advertising is primarily based on the content of the website on which the advertising is shown (e.g., rugby jerseys advertised on a website devoted to rugby fans). Finally, even where scale of user data may be advantageous in ad targeting, studies have shown that there are often diminishing returns to scale.¹³³

Consumers share data with many firms. Most consumers use many different online services on a given day and share data with most of the service providers they use. Studies suggest, for example, that Australians on average use their phone as much as 2.5 hours each day, use 10 apps per day and 36 different apps every month, and have about 100 apps on their phone.¹³⁴ Most of these mobile apps

¹³¹ *Id.* at 48.

¹³² See generally, Lesley Chiou and Catherine Tucker, *Search Engines and Data Retention: Implications for Privacy and Antitrust*, NBER Working Paper 23815 (September 2017); see also generally William Terdoslavich, *Big Data and the Law of Diminishing Returns*, InformationWeek (27 November 2015), <https://www.informationweek.com/big-data/big-data-analytics/big-data-and-the-law-of-diminishing-returns/d/d-id/1323310>.

¹³³ See, e.g., René Arnold, Scott J. Marcus, Georgios Petropoulos, and Anna Schneider, *Is data the new oil? Diminishing returns to scale*, 29th European Regional Conference of the International Telecommunications Society (ITS): "Towards a digital future: Turning technology into markets?", Trento, Italy, (1-4 August 2018), <https://www.econstor.eu/bitstream/10419/184927/1/Arnold-et-al.pdf>; Ye Chen et al., *Large-Scale Behavioral Targeting*, KDD 2009 (28 June - 1 July 2009), <https://www.cc.gatech.edu/~zha/CSE8801/ad/p209-chen.pdf>. Further, this has been more formally shown to be true of natural language analysis and image identification settings as well. Johnson et al., *Predicting accuracy on large datasets from smaller pilot data*, Proceedings of the 56th Annual Meeting of the Association for Computational Linguistics (Short Papers), Melbourne, Australia, (15-20 July 2018), at 450–455, <http://www.aclweb.org/anthology/P18-2072>; Khosla et al., *Stanford Dogs Dataset* <http://vision.stanford.edu/aditya86/ImageNetDogs/>.

¹³⁴ See, e.g., Bray Stoneham, *This is How Long the Average Australian Spends Using Their Phone Every Year*, Men's Health (7 February 2017), <https://www.menshealth.com.au/time-aussies-spend-on-phone>; Luke Frost, *Study:*

collect a variety of user data, including location information, device information, mobile platform information, web browsing information, billing information, etc.¹³⁵

There are many firms beyond Google with access to large volumes of user data, and it is unlikely that any one firm has unique access to user data. Examples include digital platforms like Amazon, Apple, Microsoft (Bing, LinkedIn, Skype), Uber, Airbnb, Netflix, Spotify, Pandora, Twitter, and countless other popular companies, as well as traditional firms including banks, phone companies, cable companies, airlines, credit card companies, large retailers, and many others.¹³⁶ Most companies collect user data on a large scale and use it to advertise or sell their products and services more effectively. Many are acquiring or developing digital technologies and relying on customer data to offer more targeted advertising that competes with online advertising, including Telstra and Multi Channel Network.¹³⁷

Third-parties facilitate access to data. Even where companies do not collect their own data, they can rely on advertising technology companies whose business is to help other companies target their advertising. Based on the data they collect, advertising technology companies are able to help advertisers or publishers (or both) improve the relevance of ads served to users, optimise monetisation of ad inventory, and improve sales conversions for advertisers. Publishers often use as many as 20 or more different advertising technology companies at any given time.¹³⁸ Each of these companies collect the same types of user data, and many do so on a large scale.¹³⁹ In addition, there are companies called data brokers that aggregate and sell large volumes of consumer data.¹⁴⁰ To the extent a company seeks access to large-scale user data for advertising purposes, it is not necessary to develop that data through a consumer service; large-scale data or data solutions can also be sourced from third-parties.

Average Aussie Uses 36 Apps Per Month, Bandt (13 November 2017), <http://www.bandt.com.au/technology/study-average-aussie-uses-36-apps-per-month>.

¹³⁵ See, e.g., Electronic Arts Inc., *Privacy and Cookie Policy*, <http://tos.ea.com/legalapp/WEBPRIVACY/US/en/PC/#section1> (last visited 14 February 2019).

¹³⁶ Yuyu Chen, *With Amazon looming, Walmart quietly grows as an advertising force*, Digiday (18 August 2017), <https://digiday.com/marketing/amazon-looming-walmart-quietly-grows-advertising-platform/>.

¹³⁷ See, e.g., Jon Brodtkin, *Yahoo and AOL are now a Verizon subsidiary called "Oath,"* Ars Technica (13 June 2017), <https://arstechnica.com/information-technology/2017/06/oath-verizon-completes-4-5-billion-buy-of-yahoo-and-merges-it-with-aol/>; Lara O'Reilly, *AT&T Plots New Marketplace for TV and Digital Video Advertising*, The Wall Street Journal (25 June 2018), <https://www.wsj.com/articles/at-t-to-acquire-digital-ad-firm-appnexus-for-1-6-billion-1529929278>; Arvind Hickman, *Australia to roll out 'world leading' addressable TV solutions this year*, AdNews (7 May 2018), <http://www.adnews.com.au/news/australia-to-roll-out-world-leading-addressable-tv-solutions-this-year>; Brendon Foye, *Telstra to roll out digital advertising for 900 vehicles for P2P Transport*, CRN (18 September 2018), <https://www.crn.com.au/news/telstra-to-roll-out-digital-advertising-for-900-vehicles-for-p2p-transport-512706>.

¹³⁸ Reports suggest that popular websites include an average of 20 different tracking cookies. Steven Englehardt and Arvind Narayanan (Princeton University), *Online Tracking: A 1-million-site Measurement and Analysis*, ACM Conference on Computer and Communication Security Submission, at 10, Figure 6 (October 2016), http://randomwalker.info/publications/OpenWPM_1_million_site_tracking_measurement.pdf.

¹³⁹ See, e.g., Marthy Swant, *With Its First Campaign, Verizon's Oath Promises Brand Safety and Scale*, AdWeek (25 September 2017), <https://www.adweek.com/digital/aols-first-campaign-for-oath-promises-brand-safety-and-scale/> ("Verizon now sees about 1 trillion data signals every month across its assets—data from search, content, mobile apps and mobile carrier relationships"); *Explained: Data in the Criteo Engine: Introduction*, Criteo, <https://www.criteo.com/insights/explained-data-in-the-criteo-engine/?slide=2> ("Criteo has the world's largest open shopper data set" amounting to "72% of all online shoppers globally"); MediaMath, *Audiences* ("Built on a backbone of observed and transactional data from more than 1 billion consumer records"), <http://www.mediamath.com/audiences/#audiences>.

¹⁴⁰ In 2018, one broker generated roughly 1.4 billion AUD in revenue, and in a U.S. government report, it was shown that that "broker had 3,000 'data segments' for nearly every US consumer." Sacha Molitorisz, *It's time for third-party data brokers to emerge from the shadows*, The Conversation (4 April 2018), <https://theconversation.com/its-time-for-third-party-data-brokers-to-emerge-from-the-shadows-94298>.

5. The Preliminary Report Does Not Substantiate the Need for New Regulatory Oversight

The Preliminary Report calls for new regulation to address perceived problems with digital platforms. Preliminary Recommendation 4 calls for a “regulatory authority” that is “tasked to monitor, investigate and report” on whether digital platforms are “favouring their own business interests above those of advertisers or potentially competing businesses.”¹⁴¹ Preliminary Recommendation 5 calls for the same authority to “monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.”¹⁴² Finally, the Preliminary Report notes that the ACCC is considering establishing an ombudsman “to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of digital platforms.”¹⁴³

Google believes smart regulation starts with a focus on a specific problem and seeks well-tailored and well-informed solutions, thinking through the benefits, the second-order impacts, and the potential for unintended side-effects. In this light, new regulatory oversight is not necessary for several reasons.

First, Preliminary Recommendation 4 calls for regulation to address potential anticompetitive favouring by digital platforms, but the Preliminary Report provides no evidence of such favouring by Google. Any investigation of claims of anticompetitive favouring would be possible under existing laws and regulations.

Second, Preliminary Recommendation 5 calls for regulation to address digital platforms’ news ranking and display practices, yet the Preliminary Report makes no finding that Google’s news ranking practices are harmful to users, news publishers, or the quality of journalistic content generally. To the contrary, the Preliminary Report highlights the quality and relevance of Google’s news results.¹⁴⁴ To the extent the ACCC is concerned about support for public interest journalism in Australia generally, there are other ways to address those concerns; regulation of ranking is not the answer.

Finally, Google has robust procedures in place for handling customer complaints and we believe that issues in relation to customer complaints can be addressed through existing laws and regulations. While we believe our procedures for handling complaints meet the needs of Australian businesses and consumers, we remain open to constructive dialogue about how to handle consumer complaints.

5.1. No New Regulation is Necessary to Address Claims of Anticompetitive Favouring

Courts, regulators, and commentators around the world, including the ACCC, have long recognised that vertical integration typically promotes competition.¹⁴⁵ For example, vertical integration enables

¹⁴¹ Preliminary Report at 11.

¹⁴² *Id.* at 11-12.

¹⁴³ *Id.* at 16.

¹⁴⁴ *Id.* at 47,103.

¹⁴⁵ ACCC, *Merger Guidelines 2008* (updated November 2017), at 5.18-5.21 (“It is often the case that vertical mergers will promote efficiency by combining complementary assets/services which may benefit consumers... In the majority of cases, non-horizontal mergers will raise no competition concerns”), <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>; *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 193 (D.D.C. 2018) (“Further complicating the Government's challenge is the recognition among academics, courts, and antitrust enforcement authorities alike that ‘many vertical mergers create vertical integration efficiencies between purchasers and sellers.’”); European Commission Guidelines on Non-Horizontal Mergers (“[] vertical and conglomerate mergers provide substantial scope for efficiencies.”); The Federal Trade Commission’s Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, *Comment of the Global*

businesses to reduce their supply and distribution costs and pass those savings on to consumers. In the absence of vertical integration, firms at different levels of a supply chain each take a profit margin. A vertically integrated firm, by contrast, only needs to factor in a single profit margin, which enables it to charge consumers lower prices. Further, seamless integration between products that work together can streamline the customer experience and create opportunities for innovation. As such, businesses routinely promote their own products and services and vertically integrate in order to offer consumers improved products and services. Consider, for example, how Netflix’s vertical expansion into the production of TV shows and movies and promotion of its own content on its service has enhanced its offering to consumers. Similarly, Tesla has been very successful in improving its products with a strategy of vertical integration.¹⁴⁶ Favouring—a business promoting its own products and services—as a general matter *is* competition on the merits. Not favouring—promoting rivals over your own offering—is an election to dampen competition. The vast majority of self-promotion is procompetitive, and only under narrow circumstances could be a competitive problem.

The Preliminary Report, however, suggests that a vertically integrated business promoting its own services is inherently suspect or concerning. As a result, the Preliminary Report recommends creating new regulation to investigate whether Google “could” engage in anticompetitive favouring of its own products and services. The recommendation is based on a few hypothetical scenarios that either are implausible or unlikely to be anticompetitive.¹⁴⁷

For example, the Preliminary Report suggests that Google may be “favouring or preferencing their own advertising inventory” in demand side platform (“DSP”) services “as opposed to acting in the best interests of the advertiser.”¹⁴⁸ However, such a practice would undercut the value of Google’s DSP service (Display & Video 360 or DV360). The value of a DSP is to enable advertisers to buy ad inventory across multiple ad exchanges in a way that maximises their return on investment. Google’s DSP service competes against many popular DSPs, including DSPs offered by Amazon, MediaMath, TheTradeDesk, Adobe, AppNexus, Dataxu, to name just a few. If Google used DV360 to favour its own ad inventory to the detriment of advertisers, it would degrade the quality of our DSP service and drive advertisers to these alternate DSPs. For similar reasons it would not make sense for Google to use DV360 to favour its ad inventory on Google’s ad exchange over inventory on other ad exchanges to the detriment of advertisers. That too would degrade the quality of DV360 and drive advertisers to alternative DSPs.

Another hypothetical scenario presented in the report is that Google might favour websites that are part of the Google Display Network (“GDN”) over other websites by ranking the former higher in Google Search results. Google does not change the ranking or display of websites in its organic search results based on whether they buy services from Google or participate in the GDN. Moreover, we would have no incentive to sacrifice search quality, which is by far the greatest source of Google’s revenue and profits, in order to promote a business in which Google earns a comparatively small proportion of revenue and profits.

Antitrust Institute, Antonin Scalia Law School, George Mason University (6 September 2018) (discussing empirical research relating to the effects of vertical mergers and concluding by finding “that recent empirical evidence continues to support the proposition that vertical integration generates abundant efficiencies and is generally procompetitive.”), <https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf>.

¹⁴⁶ See, e.g., Andrew Nammanga, *Applying Vertical Integration: What Companies Can Learn From Tesla’s Master Plan*, *Forbes* (19 April 2018), <https://www.forbes.com/sites/theyec/2018/04/19/applying-vertical-integration-what-companies-can-learn-from-teslas-master-plan/#47111e2b60ed>; Matthew DeBord, *Elon Musk may single-handedly revive a business practice that’s gone out of style*, *Business Insider* (1 November 2016), <https://www.businessinsider.com/elon-musk-tesla-solarcity-vertically-integrated-2016-11>.

¹⁴⁷ Preliminary Report at 66.

¹⁴⁸ *Id.*

The Preliminary Report cites the European Commission's *Shopping* case (which is still under appeal) as the basis for concerns about favouring in Search. However, the Preliminary Report does not establish why it cannot explore any search ranking concerns using existing investigative tools, just as the EC and competition authorities in several other countries have done. Notably, the Australian Government amended Section 46 of the CCA in 2016 in order to address the type of unilateral conduct described in the Preliminary Report.¹⁴⁹ Moreover, the Preliminary Report does not acknowledge jurisdictions around the world that have investigated Google's search practices and found no competitive harm (including the United Kingdom,¹⁵⁰ Canada,¹⁵¹ the United States,¹⁵² Brazil,¹⁵³ Taiwan,¹⁵⁴ and Germany¹⁵⁵). Creating new regulations is unnecessary and may result in duplicative regulations and enforcement standards.

5.2. Regulation of News Ranking is Not Supported by Guiding Principles or Evidence, and Would Not Achieve the ACCC's Goals

Google does not support the Preliminary Report's recommendation for new regulation over digital platforms' news ranking for several reasons. First, the *Australian Government Guide to Regulation* provides that "Regulation should not be the default option" but "should be imposed only when it can be shown to offer an overall net benefit."¹⁵⁶ It is in this context that proposals for increased regulation or regulatory oversight should be considered. As discussed below, the Preliminary Report's recommendation that new regulation be imposed on specified platforms requires further, more careful consideration of the costs and benefits, and serious consultation with all stakeholders. The fine details of how our algorithms work are some of our most sensitive business secrets, are critical to our competitive

¹⁴⁹ These amendments are commonly referred to as the Harper Amendments. Prior to these amendments, Section 46 required the ACCC to show that a company had "taken advantage of" its market power. The amendments removed this "take advantage" requirements and implemented an effects test in place of a purpose test. These amendments strengthened the prohibition on misuse of market power to better target anticompetitive unilateral conduct. As the ACCC Chair, Rod Sims, stated: "[W]e are, of course, aware of arguments in relation to dominant platforms and their entry into various 'vertical' businesses. . . . The EC's case against Google Shopping is one example. . . . The ACCC is turning its mind to such issues. The Harper changes now give us the tools to do so, which we did not have before." Speech by Chair Rod Sims, *Address to the Law Council of Australia Annual General Meeting*, Australian Competition & Consumer Commission (3 August 2018), <https://www.accc.gov.au/speech/address-to-the-law-council-of-australia-annual-general-meeting>.

¹⁵⁰ *Streetmap.EU Ltd v Google Inc. & Ors* [2016] EWHC 253 (Ch) (12 February 2016), <http://www.bailii.org/ew/cases/EWHC/Ch/2016/253.html>.

¹⁵¹ Competition Bureau Canada, Press Release, *Competition Bureau statement regarding its investigation into alleged anti-competitive conduct by Google* (19 April 2016), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html>.

¹⁵² *In re Google Inc.*, File No. 111-0163, Statement of the Federal Trade Commission Regarding Google's Search Practices (3 January 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

¹⁵³ Janith Aranze, *Google did not harm consumers, CADE investigators say*, *Global Competition Review* (21 November 2018), <https://globalcompetitionreview.com/article/1177140/google-did-not-harm-consumers-cade-investigators-say>.

¹⁵⁴ D. Daniel Sokol, *Taiwan Fair Trade Commission Closes Investigations Into Allegations that Google Abused Dominant Position*, *Antitrust & Competition Policy Blog* (8 August 2015), https://lawprofessors.typepad.com/antitrustprof_blog/2015/08/taiwan-fair-trade-commission-closes-investigations-into-allegations-that-google-abused-dominant-posi.html.

¹⁵⁵ District Court of Hamburg, 4 April 2013, 408 HKO 36/13 (Ger.), http://united-kingdom.taylorwessing.com/fileadmin/files/docs/pdf-german/Google_Weather_InBox_-_Court_Order_2013-04-04_Unofficial_Translation.pdf.

¹⁵⁶ Australian Government, *The Australian Government Guide to Regulation* (14 March 2014), at 2, https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf.

success, and are the output of enormous investment in continuous innovation. We believe government regulation of our search results with regard to the treatment of certain news publishers' content should be considered only in response to the strongest, clearest evidence of harm to consumers.

Second, new regulation over news ranking is not supported by the evidence. The Preliminary Report's recommendation is based primarily on concerns raised by news publishers, yet does not find that Google's news ranking practices harm news publishers. Australian news publishers receive considerable value from Google in the form of billions of free clicks (more than two billion in 2018).¹⁵⁷ The reason Google is able to provide these clicks is because Google provides relevant search results to users. The Preliminary Report finds that digital platforms, and Google's news results, benefit users. For example, the Preliminary Report states that "Google has an incentive to maintain or increase the quality of its search service to attract users (and advertisers) to its platform. This includes providing high quality search results to users, with information relevant to the search term."¹⁵⁸ The Preliminary Report also acknowledges that consumers have more diversity and choice of news today than ever before, and states that "digital platforms appear to have had some influence in increasing the number of news outlets operating in Australia"¹⁵⁹ and "are likely to have contributed to the increased number of media voices available and consumed by Australians, by facilitating the entrance of digital native publishers."¹⁶⁰ As these findings show, our interests are aligned with our users. The extensive evidence of consumer benefit when balanced against the weak evidence of harm to news publishers or competition should weigh heavily against regulating our search results.

Finally, we do not believe regulation of Google's news ranking is necessary. The ACCC can investigate digital platforms' handling of news content under existing laws and regulations. To the extent the ACCC has broader policy concerns about support for public interest journalism, there are better ways to address these concerns (e.g., direct public and private support).

5.2.1. The Preliminary Report has Not Satisfied Relevant Principles to Support New Regulation Over News Ranking

The Preliminary Report recommends new regulation over news ranking on digital platforms in large part to address a perceived public policy issue with the amount of transparency in digital platforms' algorithms. According to the Preliminary Report, a lack of transparency may create uncertainty over how news content is ranked and displayed to consumers.¹⁶¹ This may cause news publishers to expend resources on better rankings rather than producing quality content. However, the Preliminary Report does not:

- **Identify a legitimate reason for government intervention.** The Preliminary Report does not identify why Google would withhold information about ranking if disclosure of the information would likely increase the quality of its search results as opposed to allowing sites to use the information to game the algorithms. Rather, we are incentivised to provide our users with relevant and high quality search results, including news results. We compete to

¹⁵⁷ A Deloitte study commissioned by Google found that in Europe, each free referral click to a news site is worth between 4 and 8 cents (in euros). Deloitte, *The impact of web traffic on revenues of traditional newspaper publishers* (March 2016),

<https://www2.deloitte.com/uk/en/pages/technology-media-and-telecommunications/articles/the-impact-of-web-traffic-on-revenues.html>; Richard Gingras, *Proposed copyright rules: bad for small publishers, European consumers and online services*, The Keyword Blog (6 December 2018), <https://www.blog.google/around-the-globe/google/europe/proposed-copyright-rules-bad-small-publishers-european-consumers-and-online-services/>.

¹⁵⁸ Preliminary Report at 116.

¹⁵⁹ *Id.* at 272.

¹⁶⁰ *Id.* at 280.

¹⁶¹ *Id.* at 109.

attract users through the utility of our search engine, which would be limited if we fail to direct users to useful and relevant content. Google has no incentive to harm news publishers, through any alleged lack of algorithmic transparency (or otherwise) by providing low quality results for news-related queries, to the detriment of users. Our search engineers focus on designing algorithms to provide relevant results and they are separate from the engineers that work on advertising. Moreover, the output of Search is freely available to all and consistent across users in the same region. As a result, experiments can be performed to test how media content is treated by the algorithms without additional regulation.¹⁶²

- **Demonstrate that a regulatory authority would improve the quality of Google’s search results for users while addressing the concerns of publishers.** Google’s ranking decisions are informed by thousands of staff across many functional areas, including engineering and design; rating and testing; and functions dedicated to consumer / advertiser protections from abuse. It is not clear how a regulatory authority would undertake the complex task of assessing the appropriate ranking of news content.
- **Consider a range of other policy options, including the status quo.** This is an essential part of a regulatory cost / benefit analysis, and we encourage the ACCC to give more thought to each of the issues outlined above.

In considering the status quo, more consideration should be given to the substantial amount of information about our algorithms we provide in order to provide transparency and incentivise sites to improve.¹⁶³ At the same time, we are careful not to reveal too much information about our algorithms to protect against “gaming” of our algorithms. Ranking signals are an imperfect proxy for quality and relevance. If websites can optimise for these signals directly without improving quality, they can appear to the algorithm to have higher-quality content than is warranted. The Preliminary Report suggests that news publishers would benefit from more disclosure of how Google ranks news content. However, public interest journalism could be adversely affected if more transparency about how our algorithms work enables sites with low quality content to outrank high quality content.

¹⁶² See, e.g., The Economist, *Googling the news – Are Google searches biased in favour of left-leaning news outlets?* (30 August 2018), (In response to a claim by Donald Trump that 96% of Google search results for ‘Trump News’ were articles from perceived left-wing media outlets, *The Economist* wrote a program that searched for ‘Trump’ on Google News every day in that year. Ultimately, it was concluded that “[a]fter controlling for trustworthiness and volume of Trump articles published, we found there was no evidence that ideology influences Google News results.”), <https://www.economist.com/united-states/2018/08/30/googling-the-news>; see also, e.g., Matt Southern, *News Sites Benefitting From June’s Google Quality Update [STUDY]*, Search Engine Watch (13 July 2016), <https://www.searchenginejournal.com/news-sites-benefitting-junes-google-quality-update-study/168263/#close>.

¹⁶³ *Ways to succeed in Google News*, Google Webmasters Blog (17 January 2019), <https://webmasters.googleblog.com/2019/01/ways-to-succeed-in-google-news.html>. In addition, Google publishes the 164-page guidelines used by Google’s global team of raters in evaluating search results. The guidelines set out in clear language the instructions raters are provided when they evaluate search results. Google provides its Webmaster, Content and Quality guidelines to explain best practices and the types of techniques sites should avoid and also provides helpful explanations on its “How Search Works” webpage. Further, Google hosts webmaster forums where webmasters ask for help from Google employees and experts all around the world. They currently cover 15 languages and host more than 50,000 conversations per year (see, Vincent Courson, *Google is introducing its Product Experts Program!*, Google Webmaster Central Blog (11 October 2018), <https://webmasters.googleblog.com/2018/10/google-introducing-product-experts-program.html>); See also, Amit Singhal, *More guidance on building high-quality sites*, Google Webmaster Central Blog (6 May 2011) (“we aren’t disclosing the actual ranking signals used in our algorithms because we don’t want folks to game our search results; but if you want to step into Google’s mindset, the questions below provide some guidance on how we’ve been looking at the issue: Would you trust the information presented in this article? . . . Does the article provide original content or information, original reporting, original research, or original analysis?”), <https://webmasters.googleblog.com/2011/05/more-guidance-on-building-high-quality.html>.

As just one example, Google’s foundational ranking signal is PageRank, which treats a link to a webpage as a “vote” for the quality of that webpage. When Google Search launched in the late 1990s, PageRank’s ability to understand site quality yielded significantly higher-quality search results. But webmasters began to try to game the PageRank signal by artificially trading or buying links, or even in some cases hacking third-party sites to place links to their own site. This behaviour had little correlation with the quality of the site’s content, but PageRank had trouble telling the difference between honestly-placed “votes” and ones put in place solely to manipulate it. Google has therefore had to invest significant resources in detecting these sorts of link schemes. This specific example highlights that disclosure about how Google’s algorithms work can enable webmasters to spend their resources aiming at the details of the algorithm, rather than at providing high quality content that users want.

5.2.2. The Preliminary Report Provides Insufficient Evidence to Support Claims by News Publishers

News publishers have raised issues over several aspects of Google’s news products, including our use of snippets, our former First Click Free policy, adoption of AMP, and the quality of the news we surface to users. In each of these instances, the Preliminary Report’s conclusions either lack sufficient support or are contradicted by evidence contained in the Preliminary Report.

a. The Preliminary Report Finds that There is No “Optimal” Snippet Length and that Users Benefit from Snippets

The Preliminary Report acknowledges the usefulness of snippets for all parties, stating that, “[s]nippets or summaries are beneficial to digital platforms, news publishers, and consumers.”¹⁶⁴ The Preliminary Report suggests a snippet must strike a balance between providing enough information to a reader to entice the reader to click through to the news site and at the same time not providing so much information that the reader is no longer interested in clicking through to the news site.¹⁶⁵ While the Preliminary Report states that the ACCC does not have any evidence that snippets negatively affect Australian consumer click through rates,¹⁶⁶ the opposite evidence does exist. Germany enacted legislation requiring news aggregators to pay a levy to media businesses to display their snippets. Sites that required Google to pay saw their referral traffic drop when Google ceased displaying snippets to their sites.¹⁶⁷ In Spain, news publishers were required to charge news aggregators for displaying their content resulting in the closure of several news aggregators, including Google News.¹⁶⁸ We share the ACCC’s skepticism that requiring digital platforms to pay news platforms for the display of snippets is a good idea given the benefits of snippets to users.¹⁶⁹

b. The Preliminary Report Acknowledges that Flexible Sampling Benefits Both Users and Publishers

We believe that users should see what our systems see when they access the same web page. Having a publisher present the full text of an article to us, but not to our users (instead, a pop-up, a paywall, or other more nefarious forms of “bait-and-switch” practices) harms the user experience. Nevertheless, to encourage users to access subscription-based news content and create promotional opportunities for

¹⁶⁴ Preliminary Report at 279.

¹⁶⁵ *Id.* at 113-14.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 279.

¹⁶⁸ *Id.* at 279-80. Requiring search engines to pay website owners every time their site appears in a search result would make the search engine business model unsustainable, especially considering that the majority of queries (and in particular news queries) do not generate ads.

¹⁶⁹ *Id.*

publishers, Google created an opt-in technology for publishers called First Click Free in 2008. Google created FCF to encourage users to access subscription-based news content and create promotional opportunities for publishers. Publishers that implemented FCF would enable users to click from Google results to a news article without encountering a paywall. Publishers could then direct readers to a paywall if they tried to read other articles after the initial click. Google has revised FCF over time in response to feedback from news publishers. We reduced the number of articles a user could access from search results to a maximum of five per day in 2009, and then to a maximum of three articles per day in 2015. After working with publishers to investigate the effects of FCF on user satisfaction and the publishing ecosystem, Google replaced FCF with Flexible Sampling in 2017. This approach lets news publishers determine the amount of free content they provide to users. The Preliminary Report concludes that Flexible Sampling appears to have “made a meaningful difference to news publishers”¹⁷⁰ and recognises the benefits of allowing users to sample content while providing publishers with control over the amount of free content. Indeed, Flexible Sampling shows that publisher concerns can be addressed by Google without the need for special regulation.¹⁷¹

c. The Preliminary Report Acknowledges that it Does Not Have Evidence to Support the Claim that the Use of the AMP Format Reduces Publishers’ Advertising Revenue

AMP is an open-source project that, as the Preliminary Report acknowledges, has substantially improved page load times for mobile content, benefitting users, advertisers, and publishers alike.¹⁷² A few news publishers nevertheless have raised concerns about certain effects they claim AMP has had on their online business.¹⁷³

The ACCC evaluated these concerns and, for the most part, appears to correctly recognise that they lack sufficient factual support or have been resolved already. The ACCC appears, however, to still be considering the unsupported assertions by certain news publishers that “Google’s use and promotion of the AMP format may have led to suboptimal outcomes for news publishers in the form of reduced traffic and subsequently, advertising revenue” because “the AMP format necessarily reduces the amount of space or inventory for advertising opportunities.”¹⁷⁴ The Preliminary Report claims that this, in turn, “has the effect of reducing news publishers’ opportunities to monetise their content.”¹⁷⁵

These assertions are not correct. First, as the AMP Project has publicly stated, “There are no restrictions in AMP that would make a publisher have fewer ads on AMP pages than on non-AMP Pages.”¹⁷⁶ The AMP Project provides tips to help publishers, such as to “Place the same number of ads on AMP Pages as your non-AMP pages to generate maximum revenue per page.”¹⁷⁷ Second, focusing narrowly on the number of ads on a single page ignores the fact that AMP leads to improved page load times, increased

¹⁷⁰ *Id.* at 116.

¹⁷¹ Taneth Autumn Evans, *In bed with Google? What we’ve learned from Flexible Sampling six months on*, Digital Times - Medium (17 May 2018) (noting year-over-year traffic growth following Flexible Sampling and praising the impact of Flexible Sampling on *The Times*), <https://medium.com/digital-times/in-bed-with-google-what-weve-learnt-from-flexible-sampling-six-months-on-dc8ab52b4ca4>.

¹⁷² Preliminary Report at 116-117.

¹⁷³ *Id.* at 117.

¹⁷⁴ *Id.* at 117-18.

¹⁷⁵ *Id.* at 117.

¹⁷⁶ See, Vamsee Jasti, *Ensure Ad Density is equal on AMP & non-AMP pages*, AMP Blog (11 September 2018), <https://www.ampproject.org/id/latest/blog/ads-ensure-ad-density-is-equal-on-amp-non-amp-pages/>.

¹⁷⁷ AMP Project, *Best Practices*, AMP Project Docs, <https://www.ampproject.org/docs/ads/monetization#best-practices> (last visited 14 February 2019).

site traffic, superior ad engagement, and thus typically increases advertising revenue overall.¹⁷⁸ The AMP Project has implemented new innovations to allow publishers to use yield-maximisation techniques while also supporting quick load times.¹⁷⁹ Finally, as the Preliminary Report acknowledges, “content is not penalised in organic Google Search results for being non-AMP,” and non-AMP web pages can still rank highly in Google Search results if they offer relevant content.¹⁸⁰

d. Google Search Aims to Promote High Quality News Content

Google provides users with relevant search results as is confirmed in the Preliminary Report.¹⁸¹ However, the Preliminary Report’s recommendations appear to be based in part on concerns that digital platforms surface low quality news content to users. We believe these concerns are misplaced as to Google.¹⁸²

Google ranks and displays news content (and advertisements) to our users very differently than social media sites. Google, as the Preliminary Report acknowledges, ranks and displays content based almost entirely on search keywords and user intent. The Preliminary Report also acknowledges that Google displays news content “[w]hen a user types a search term in Google Search that Google considers to have a ‘news intent’ (i.e., relevant to a current news item)” and that “[t]he stronger the user intent for news and the higher the quality of the results, the higher on the page” Google will display its specialised news result (i.e., Top Stories).¹⁸³ The ACCC even went so far as to conduct an experiment comparing the relevancy of Google’s Top Stories results to a number of search terms and concluded that “it is clear that the search term influences the frequency with which news publishers are featured on the Top Stories carousel or organic search results.”¹⁸⁴

Social media sites, on the other hand, surface news content to users based on entirely different criteria. For example, unlike with Google, “[n]ews publishers are able to post news articles or links to news articles” on social networks, “which then show up on the news feeds of users who have liked or subscribed to receive posts from the media business.”¹⁸⁵ Furthermore, “social media platforms determine the circumstances in which journalistic content posted by media organisations is served to platform users, albeit in the context of non-journalistic and user-generated content, and based on the user’s profile as opposed to a search undertaken by the user.”¹⁸⁶

¹⁷⁸ For example, India Today has been receiving 23% more revenue from their AMP pages compared to non-AMP pages. Hearst saw a 29% improvement in ad viewability, with its news properties seeing a 237% increase in ad clickthrough rates. The Washington Post saw a 22% increase in mobile search users returning to its site in 7 days. Terra, the “largest online media company in the Spanish-Speaking world,” saw a 3,175% increase in total clicks in all countries, and a 33% increase in clickthrough rate in all countries. See, AMP Project, *Success stories of the domains publishing AMP pages*, AMP Project Case Studies, <https://www.ampproject.org/case-studies/publishers/> (last visited 14 February 2019).

¹⁷⁹ Github, *AMP Real Time Config*, Github AMP Project, <https://github.com/ampproject/amhtml/blob/master/extensions/amp-a4a rtc-documentation.md> (last visited 14 February 2019).

¹⁸⁰ Preliminary Report at 119-20.

¹⁸¹ *Id.* at 114.

¹⁸² *Id.* at 274-276. In discussing concerns around the potential impact of digital platforms on the surfacing of low quality news content, the issues and examples identified are all in reference to social media and not search.

¹⁸³ *Id.* at 100.

¹⁸⁴ *Id.* at 103.

¹⁸⁵ *Id.* at 107.

¹⁸⁶ *Id.* at 274.

The Preliminary Report also raises issues about digital platforms surfacing low quality content or creating “filter bubbles,” but finds that these relate primarily to social media platforms. As the Preliminary Report states, “[c]onsumers who rely on social media as their sole source of news could be repeatedly exposed to news stories or sources that share similar views, but may also be exposed to unfamiliar news sources that they have not chosen.”¹⁸⁷ To the extent individual users of social media post or share content that complainants view as “clickbait,” this concern does not extend to Google’s search results.¹⁸⁸

5.2.3. Obstacles Print Newspapers Face are Due to Increased Competition and Changes Brought by the Internet

The Preliminary Report finds that the Internet, rapid technological changes, and digitalisation have changed the print news media in transformative ways, including its traditional value chain functions such as printing and distributing hard-copy newspapers.¹⁸⁹ This new “online news ecosystem” also has “shifting functions, revenue streams, and business models.”¹⁹⁰ The Preliminary Report notes that when journalistic content moved online due to the rapid uptake of the Internet, traditional print media started losing advertising revenue as advertising too moved online.¹⁹¹ Print media was impacted by the loss of classified advertising revenue as it moved to specialised online marketplaces like eBay and Carsales.com.¹⁹² Print media has faced challenges and competition from online news sources, blogs, and online marketplaces due to the rise of the Internet, not due to search engines.

The Preliminary Report similarly finds that there is no clear connection between the conduct of digital platforms and reduced investment in journalism and news production.¹⁹³ While traditional media may have declined as a source of employment, the Preliminary Report notes that digital platforms have enabled the rise of “digital native” news businesses, increasing competition in the industry and increasing the diversity of news sources available to consumers.¹⁹⁴

Furthermore, the Preliminary Report does not suggest that there has been an actual decline in the quality of journalism.¹⁹⁵ The decline in traditional print-media jobs in Australia due to loss of advertising revenue, as discussed in the Preliminary Report, does not mean there is less consumer interest in quality journalism or a decline in the number of journalists overall.¹⁹⁶ In fact, the lowered barriers between

¹⁸⁷ *Id.* at 274.

¹⁸⁸ One of the Preliminary Report’s proposed solutions to this issue is requiring digital platforms to signal in their display of news content, using a badge, whether the news media source has signed up to certain standards for the creation of news and journalistic content; Preliminary Report at 15. Google does not object to the creation of a badging system, or publications displaying badges on their sites should they earn them. However, we do not believe a government regulator should require digital platforms to treat news publications with badges any differently than other news publications. We aim to provide our users the most relevant search results. The most relevant result might be from a publication outside Australia that is not part of the badging system, for example, and any badging that is used to suggest otherwise would not benefit users. The proposed standards could also be used to deter new entrants as they would be at a competitive disadvantage to incumbents as they wait on the process of potentially qualifying for such a badge. Such an outcome would be harmful both to press freedom and to the quality of public discourse—both objectives that the Preliminary Report seeks to protect.

¹⁸⁹ Preliminary Report at 93.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 255.

¹⁹² *Id.*

¹⁹³ *Id.* at 3-4.

¹⁹⁴ *Id.* at 271.

¹⁹⁵ *Id.* at 123.

¹⁹⁶ *Id.* at 3.

publishers and readers enabled by the Internet and by platforms like Google have resulted in a world in which readers have access to more quality journalistic content, at lower prices.¹⁹⁷

5.3. Google’s Existing Complaint Resolution Protocols are Robust

Like any large business, Google receives complaints and requests for support from customers about a range of issues. We have built a process for providing assistance and resolving those complaints in effective and efficient ways. Together with existing laws and regulators such as the OAIC, the State Offices of Fair Trading, and the Office of the eSafety Commission, this ensures that consumers, advertisers, media companies and others have ways to further their interests and resolve their disputes with Google.

The ACCC has indicated in Area for Further Analysis 4 that it is considering a “digital platforms ombudsman” because it believes some advertisers, particularly small businesses, are unable to negotiate the terms on which they do business with Google, including seeking effective dispute resolution.¹⁹⁸ The Preliminary Report contemplates a range of disputes could be brought to a digital platforms ombudsman including: (a) business disputes about advertisement performance and false or misleading ads; (b) consumer disputes relating to scams and the removal of such content; and (c) media company disputes about the surfacing and ranking of news content.

For the reasons stated above, granting an ombudsman or a regulator powers to make decisions about the ranking of news content could lead to the promotion of lower quality, less relevant content instead of promoting public interest journalism. As detailed below, we also believe the combination of our dispute resolution processes, our efforts to combat ad fraud, existing laws, and public bodies are sufficient to handle the concerns identified in the Preliminary Report. However, we understand the concerns raised in the Preliminary Report and remain open to constructive dialogue about how to handle consumer complaints.

5.3.1. Google’s Internal Complaint Resolution Processes

Google delivers comprehensive and efficient complaint resolution solutions to its Australian customers, including small- and medium-sized businesses. Google promotes these support services as an advantage of using its products and services, and they are incorporated into the terms of its service-level agreements with advertisers. In Australia, advertising customers and users have access to 24-hour support via email and chat channels and phone support during business hours through which they can seek technical and other support services or seek resolution of a complaint or issue.

In 2017 and 2018, more than 90% of cases opened by Google in response to contact from small and medium-sized advertising customers were resolved within 96 hours.¹⁹⁹ After a case is closed, Google generally asks the relevant advertising customer to complete a survey as to whether they were satisfied with the service provided and the result obtained.²⁰⁰ In 2017 and 2018, 92% of advertising customers that completed the survey indicated they were satisfied.²⁰¹

¹⁹⁷ *Id.* at 26 (“The Internet made it possible for consumers of content to access an unprecedented breadth and depth of information, without the inherent geographic limitations of other mass media and information sources.”).

¹⁹⁸ *Id.* at 16.

¹⁹⁹ This data relates to cases opened for customers of Google’s sales division in Australia which typically manages accounts with small and medium sized customers.

²⁰⁰ On average over 2017 and 2018, 76% of advertising customers were sent a survey to complete after their case was closed.

²⁰¹ On average over 2017 and 2018, 24% of advertising customers completed the survey after receipt.

5.3.2. Industry Efforts to Combat Ad Fraud

Industry groups have also worked together to combat ad fraud. For example, the IAB Tech Lab released the ads.txt program in 2017. Ads.txt is an easily implemented text file that allows publishers to list authorised sellers of their inventory.²⁰² Advertisers who buy from authorised sellers can be confident that they are purchasing genuine inventory (and publishers who use ads.txt diminish the chances that someone will misrepresent their inventory). In 2018, Google and the *Guardian* conducted a test that proved the effectiveness of ads.txt in combating ad fraud. The test found that there was no revenue discrepancy when DSPs purchased *Guardian* inventory from authorised sellers listed in the *Guardian*'s ads.txt file, while revenue from inventory sold via unauthorised ad exchanges often did not reach the *Guardian*.²⁰³ Hundreds of thousands of domains have adopted ads.txt.²⁰⁴ Google and other players enable advertisers to purchase ads.txt authorised-only inventory on their ad systems.

Google has strong incentives to combat ad fraud. Maintaining advertisers' and publishers' trust in the online advertising ecosystem, and Google's offerings in particular, is critical to the continued success of Google's business model, and far outweighs whatever marginal, short-term benefits we could derive from tolerating fraud. Google's global fraud prevention team includes data scientists, engineers and researchers that have developed over 200 sophisticated filters (algorithms) to date and work with thousands of human reviewers.²⁰⁵ Google also has strict policies for joining its ad networks and applies them even where the result is fewer customers and therefore less revenue for Google, because a clean ads system is the priority. For example, Google rejected three million applications to join our ad networks in 2017 alone. If Google detects fraudulent activity, we will rectify the situation as soon as possible including via suspending suspected fraudulent accounts and refunding advertisers.²⁰⁶

5.3.3. Existing Laws and Public Agencies

Beyond Google's internal processes, existing government agencies and bodies, supported by current Australian law,²⁰⁷ are already equipped to resolve the types of disputes that the Preliminary Report contemplates could be directed to a digital platforms ombudsman. For instance, the Australian Small Business and Family Enterprise Ombudsman provides small businesses with access to dispute resolution services for their dealings with other businesses. It has the authority to direct parties to alternative dispute resolution processes and commonly deals with cases involving online advertising. Similarly, state

²⁰² *About ADS.TXT*, IAB Tech Lab, <https://iabtechlab.com/ads-txt-about/> (last visited 14 February 2019).

²⁰³ Guardian U.S. press office, *Guardian US teams up with Google and MightyHive to uncover programmatic ad fraud on the open exchange and test ads.txt*, *The Guardian* (23 July 2018), <https://www.theguardian.com/guardian-us-press-office/2018/jul/23/guardian-us-teams-up-with-google-and-mightyhive-to-uncover-programmatic-ad-on-the-open-exchange-and-test-ads.txt>.

²⁰⁴ Picalate, *Picalate Releases Q3 2018 ADS.TXT Trends Report*, Picalate Blog (7 December 2018), <http://blog.picalate.com/ads-txt-trends-report-q3-2018>.

²⁰⁵ Deepti Bhatnagar, *Connect with high-quality publishers and broadcasters in Display & Video 360's Inventory module*, Google Marketing Platform (13 November 2018), <https://www.blog.google/products/marketingplatform/360/connect-high-quality-publishers-and-broadcasters-display-video-360s-inventory-module/>; Google Ads, *How does Google prevent invalid activity?*, Google Ads Traffic Quality, <https://www.google.com/ads/adtrafficquality/how-we-prevent-it.html> (last visited 14 February 2019).

²⁰⁶ Google Ads, *How does Google prevent invalid activity?*, Google Ads Traffic Quality, <https://www.google.com/ads/adtrafficquality/how-we-prevent-it.html> (last visited 14 February 2019).

²⁰⁷ The ACL contains a general prohibition against misleading and deceptive conduct. It also provides mandatory statutory guarantees in connection with the purchase of goods and services, including a guarantee that services provide the results agreed to by the parties. Further, unfair contract provisions in the ACL (in relation to entering standard form contracts), and a general prohibition against unconscionable conduct, provide consumers and small businesses with protection in negotiating and entering commercial agreements.

and territory-level Small Business Commissioners and Fair Trading and Consumer Protection agencies help resolve disputes including those about misleading advertising or misrepresentations in the provision of advertising services. The ACCC is already undertaking significant work in order to prevent scams through its Scamwatch website,²⁰⁸ the ACCC *Scam Intermediaries Pilot Project*,²⁰⁹ and the *Scam Awareness Network*.²¹⁰ In 2017, the ACCC's Scamwatch webpage received over 2.4 million page views and Google partners with the ACCC on awareness raising activities such as Scam Awareness Week. The OAIC and the Office of the eSafety Commission are also both already empowered to receive complaints from consumers about digital platforms and we work closely with each of them.

6. Review of Media Regulation May be Appropriate in Certain Circumstances

6.1. Aspects of Media Regulation in Australia May Benefit from Review

Google understands that aspects of media regulation in Australia may benefit from review—for example, defamation law, which may need to adjust to modern technology and community expectations.

Any review of media regulation should be conducted with the guiding principle that companies engaged in the same activity should be consistently regulated in respect of that activity. The review should account for differences among online activities, such as the difference between providing links to existing content that has already been generated and the writing of articles and editorial selection. For example, the activities involved in the content generation and editorial selection undertaken by a print or television news publisher (i.e., which story to run and in what order and duration), are quite different from the activities of Google, which simply provides consumers with links to existing content that has already been generated. Any regulation that may be appropriate and necessary for editorial activities may not be appropriate for the surfacing of search results at the direction of the consumer. Regulation could also have unintended consequences on consumers' ease of access to information and on the ability of search engines to enable this functionality.

Any review should, consistent with the *Australian Government Guide to Regulation*:

- identify, with clarity, those activities and functions in the production and delivery of media content which, having regard to applicable government policy, law or community expectation, may require regulation;
- undertake the necessary assessment of the alternatives to regulation; and

²⁰⁸ See, ACCC, *Latest news and alerts*, ACCC ScamWatch, <https://www.scamwatch.gov.au/> (last visited 14 February 2019).

²⁰⁹ ACCC, *Scam disruption project*, <https://www.accc.gov.au/consumers/consumer-protection/protecting-yourself-from-scams/scam-disruption-project>, (last visited 14 February 2019).

²¹⁰ ACCC, *Scams Awareness Network*, ACCC ScamWatch, <https://www.scamwatch.gov.au/about-scamwatch/scams-awareness-network>, (last visited 14 February 2019).

- assess the cost consequences of any proposed regulation, including by reference to the scope and scale of the identified activities²¹¹ and the nature of the issue which is being addressed.

6.2. Google Supports Extension of the Copyright Act’s Take-Down Scheme to Online Platforms; But Does Not Support a Mandatory Standard

Google does not support the proposed setting of a Mandatory Standard regarding copyright removal requests, as proposed in Preliminary Recommendation 7. A Mandatory Standard would represent a departure from global best practices developed over the last two decades. In addition, the Preliminary Recommendation appears to be based on misinformed third-party submissions. These third-party concerns rely on misunderstandings about the complete set of tools we offer rightsholders and how they work. As explained below, we have developed industry-leading anti-piracy tools and we do not believe the third-party complaints form a proper basis for recommending a separate and inconsistent system from the existing take-down system in the Copyright Act.²¹² Such a proposal will necessarily compromise the flexibility and efficiency of the existing tools, as well as their future development, resulting in a system that serves neither rightsholders nor Australian consumers.

6.2.1. Google Provides Rightsholders Robust Tools to Combat Piracy

Google’s anti-piracy tools, such as the YouTube Content ID system,²¹³ are industry-leading and provide the means to efficiently and effectively deal with copyright infringing content on Google’s properties. Google has a wide range of other anti-piracy initiatives and has developed a variety of product mechanisms to discourage users from infringing on its services and discourage the use of its services to financially support infringing activities. These measures include:

- applying search ranking demotion signals to websites for which Google Search has received a large number of valid copyright take-down notices (in addition to removing the relevant webpages from search results);
- Trusted Copyright Removal Program for Search to facilitate the efficient, automated submission of take-down notices at scale;
- a system to prevent terms closely associated with piracy from appearing in Autocomplete and Related Search in Google Search;
- proactive and reactive measures to ensure Google ad services are not used to support infringing activity;²¹⁴
- Content Verification Program on YouTube to facilitate submission of take-down notices from trusted submitters on YouTube at scale;

²¹¹ Although it is not possible to be certain of the size of the Web, Google estimates that it has grown from at least 1 trillion unique URLs in 2008, to at least 60 trillion unique URLs in 2013, to over 130 trillion unique URLs today.

²¹² See, *Copyright Act 1968* (Cth), Part V Division 2 AA.

²¹³ Content ID is YouTube’s unique software system that was built (and launched in 2007) to help content owners manage if and when copies of their work appear on YouTube. Using Content ID, rightsholders can be automatically notified of user-uploaded videos that contain their creative work and can choose in advance what they want to happen when those videos are detected. See, Google, *How Content ID works*, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited 18 February 2019).

²¹⁴ Since 2012, Google has terminated over 13,000 AdSense accounts and ejected more than 100,000 sites from our AdSense program for violations of our policy on copyright material.

- a system on YouTube that creates an electronic hash of each video that is the subject of a copyright take-down to prevent re-uploads of that identical file;
- proactive measures to detect infringing apps on the Google Play App Store; and
- technical restrictions on Google Drive to deter those seeking to use this service to host infringing materials.²¹⁵

These initiatives and measures were not canvassed in the Preliminary Report, but are relevant to the consideration of whether a Mandatory Standard is necessary.

Webform Removal Notices. To help copyright owners submit copyright removal notices, Google has developed a streamlined submission process. This process is built around an online webform that copyright owners can use to submit removal notices for nearly all of Google’s services.²¹⁶ This webform provides a simple and efficient mechanism for copyright owners from countries around the world to submit notices to us. Since 2011, more than 135,000 different submitters have requested we remove web pages from search results for copyright violations. Google has never charged copyright owners for providing these services, and we continue to invest substantial resources and engineering efforts into improving our procedures for receiving and processing copyright removal notices. YouTube has its own online webform for making copyright removal requests,²¹⁷ as well as several scaled tools that enable bulk reporting.

Trusted Copyright Removal Program. Google also provides a tool for copyright owners with a proven track record of submitting accurate notices and a consistent need to submit large numbers of notices. Google created the Trusted Copyright Removal Program (“TCRP”) for Search to further streamline the submission process, allowing copyright owners or their enforcement agents to submit large volumes of take-down requests for webpages on a consistent basis. As of 2017, there were more than 178 TCRP partners, who together submit the vast majority of notices, including several Australian members of TCRP.

“Not in Index” URL removals. Google also processes take-down requests submitted to Search for URLs that have never been included in the Google Search index. We do this so that the URLs that are the subject of the take-down requests never appear in Google Search results—globally. Some organisations submit a substantial number of take-down requests for ‘not-in-index’ URLs. In 2017, three organisations collectively submitted take-down requests for 312,479,799 URLs²¹⁸ that had never appeared in Google Search results.

Content ID and other tools on YouTube. Removal requests are only a small part of the rights management options on YouTube. Over 98% of copyright issues on YouTube are handled through the Content ID system. Content ID scans YouTube’s vast corpus of videos for content that matches

²¹⁵ For more detail on Google’s anti-piracy tools and initiatives, see, Cedric Manara, *Protecting what we love about the internet: our efforts to stop online piracy*, The Keyword (7 November 2018), <https://www.blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-our-efforts-stop-online-piracy/> and *How Google Fights Piracy*, Google (November 2018), https://www.blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf.

²¹⁶ The webform is accessible from: <https://support.google.com/legal/troubleshooter/1114905> (last visited 14 February 2019).

²¹⁷ YouTube’s webform is accessible from: https://www.youtube.com/copyright_complaint_form (last visited 14 February 2019).

²¹⁸ In Australia, the number of take-down requests for URLs not in the Google Search index are a tiny fraction of this amount.

reference files provided by rightsholders, using powerful matching technology. Once a match is found, Content ID allows rightsholders to monetise, track, or block the content.

These actions can be flexibly applied depending on how the content has been used. Rightsholders can configure rules based on the amount of their content used in a video or on the percent of the video their content accounts for. To avoid claiming videos which may not be infringing, Content ID users have the flexibility to review certain claims, rather than taking automated action.

YouTube offers a range of rights management tools appropriate to various circumstances. Some people may have a very infrequent need to make a copyright take-down request and so emailing YouTube at copyright@youtube.com may work best. Others may need to report several URLs at once or want to be sure they include all the information required for a valid take-down request and so YouTube's webform may be their preference. Experienced rightsholders that need a bulk take-down tool can be provided with access to YouTube's Content Verification Program ("CVP"). This program makes it easier to search YouTube and quickly identify allegedly infringing videos. CVP also enables bulk removal requests, contrary to the claims in some submissions that a unique notice is required for every removal request.

In 2018, YouTube launched yet another new tool for rights management, the Copyright Match Tool. The new Copyright Match Tool is designed for smaller creators with a different problem. They often find that other people, whether fans or impersonators, re-upload nearly full copies of their videos, sometimes duplicating their entire channel in an unauthorised manner. The new Copyright Match Tool addresses this problem by using the power of Content ID matching to find these nearly identical re-uploads. Creators can then decide whether to request a take-down, contact the uploader, or do nothing and just archive the match. While this new tool is still being rolled out, there are already nearly 4,000 YouTube channels with access to the Copyright Match Tool that self-reported Australia as their country.

The different options that Content ID gives copyright owners means that it is not only an anti-piracy solution but also a revenue generation tool. Through Content ID creators and rightsholders can earn money even when their work hasn't been properly licensed by the uploader. In 2017, rightsholders chose to monetise over 90% of all Content ID claims, opening up a range of new revenue streams for themselves. In the music industry, rightsholders choose to monetise over 95% of Content ID claims. Google has paid out over USD\$3 billion to rightsholders who have monetised use of their content in other videos through Content ID. The Preliminary Report does not acknowledge any of these benefits. The proposal of a mandatory take-down standard could compromise the flexibility and efficiency of alternative approaches to combating copyright infringement, such as Content ID.

6.2.2. Misunderstandings in Third-Party Submissions

The Preliminary Report refers to third party assertions that Google's take-down procedures are not efficient or effective. Third-parties have asserted that rightsholders must issue individual notices for each infringing act.²¹⁹ In addition, criticisms of YouTube Content ID include assertions that: it is only offered to some copyright owners; it is ineffective for live content broadcasts such as sporting events; there is no retrospective remuneration for unauthorised content; and small edits to authorised content may defeat the matching program. Google vigorously disputes those assertions.

As stated above, individual notices are not required for each act of infringement. Numerous scaled tools exist for both Google Services and YouTube and indeed, the primary use of Content ID is to manage one's rights without individual notices. Google aims to put in place measures that can automate these processes as much as possible.

²¹⁹ See, e.g., Free TV, *Supplementary submission to ACCC Issues Paper* (September 2018), at 13; Foxtel and Fox Sports, *Submission to ACCC Issues Paper* (April 2018), at 6–8.

Content ID is effective for live events. The assertion that Content ID is ineffective at managing rights to live content, such as sporting events, is not accurate. YouTube scans all YouTube live streams for matches to copyrighted content. This includes live broadcasts such as a sporting event or music festival. For instance, in 2018, the Fuji Rock Music Festival was live streamed on YouTube, and the rightsholders used Live Content ID to keep unauthorised streams off the platform.²²⁰ Many premier sports leagues such as La Liga in Spain now also use Content ID to automatically detect and block full-length copies of their live-broadcast games.²²¹ When content from the Content ID database is identified, a placeholder image may replace the live stream until the content is no longer detected. In some cases, infringing live streams may be terminated and the YouTube channel owner may lose access to the live streaming feature.²²²

Google provides retrospective remuneration. YouTube shares revenue from advertising that runs on claimed content. If the content is not claimed, then advertisements do not run, and there is no revenue to share. However, since 2016, if a member of our partner program does initially claim the content and run advertisements, and then subsequently a rightsholder asserts that its content is present in that video and wishes to claim it, then we have provided “monetisation during dispute” for just this situation.²²³ In these cases we will hold revenue generated on that video from the first day the Content ID claim was placed or on the date the dispute is made. Throughout the dispute process, we'll hold the revenue separately and, once the dispute is resolved, we pay it out to the appropriate party.

Content ID effectively matches slightly edited content. The ACCC received some complaints that small edits to copyrighted content may defeat Content ID’s matching abilities. These complaints are also misplaced. Having invested over USD\$100 million in its development, there is no better audiovisual matching technology in the world. Since 2015 it has been a *learning* system where each attempt to evade the matching algorithms only teach it how to do better on future examples. Google does not claim the technology is perfect, but the assertion that trivial edits defeat it are incorrect. Google is constantly improving Content ID, including through the use of artificial intelligence, and increasingly infringers are having to resort to such cropped, distorted, or pitch-shifted versions of the original that the content becomes unwatchable.

Content ID is a powerful enterprise tool. Some of the third-party criticisms are based on misunderstandings concerning Content ID. It is true that Content ID is not the best tool for everyone. It is an enterprise tool that requires an advanced understanding of copyright law as well as technical and human resources to understand it and use it properly. For example, Content ID can assist with complex rights situations and licensing relationships such as where a partner has rights to content only in certain jurisdictions or shares ownership in other jurisdictions. Given these advanced features and the need to monitor and take action on disputes and potential claims, Content ID is best suited to enterprise partners that can dedicate personnel with sufficient technical and copyright knowledge to these tasks. When Content ID is not used properly, mistakes can be and are made, with serious consequences for other content owners and consumers. For example, non-infringing content might be removed or claimed by an inappropriate party, diverting revenue from its rightful owner.²²⁴ For this reason, YouTube offers

²²⁰ Daniel Robson, *Fuji Rock 2018 Livestream Highlights: Enjoy Japan’s Most Famous Rock Festival from Home*, Japan Forward (25 July 2018), <https://japan-forward.com/fuji-rock-2018-livestream-highlights-enjoy-japans-most-famous-rock-festival-from-home/>.

²²¹ Marcos Sierra, *LaLiga se vale de Google para evitar el pirateo del fútbol en Youtube*, Vozpópuli (24 May 2017) https://www.vozpopuli.com/altavoz/tecnologia/LaLiga-Youtube-evitar-pirateo-video_0_1028898343.html.

²²² For more information on Content ID and live streams, see, Google, *Copyright issues with live streams and Hangouts On Air*, Youtube Help, <https://goo.gl/PH9SZk> (last visited 14 February 2019).

²²³ See, Google, *Monetization during Content ID disputes*, Youtube Help, <https://support.google.com/youtube/answer/7000961?hl=en> (last visited 14 February 2019).

²²⁴ Eric Limer, *Bogus Copyright Claims Take Down NASA’s Official Mars Landing Video On YouTube*, Gizmodo Australia (7 August 2012),

Certification courses to assist rightsholders in training their operations teams to make use of this powerful tool. Of the over 9,000 YouTube partners using Content ID, there are many sophisticated copyright owners, including major network broadcasters, movie studios, and record labels. As previously discussed, Content ID may not be the best tool for every situation and that is why we provide a broad range of rights management tools tailored to each circumstance.

Google responds promptly to voluminous take-down requests. In response to requests from Australian claimants in 2018, when Google removed content, we did so, on average, in a little over 18 hours from the time of the report. When Google did not remove content and responded with either a request for additional information or some other concern, we provided that response, on average, in a little under 51 hours. YouTube's response times were comparable.

Google's content removal form allows a claimant to self-report their country. In 2018, across all Google services (such as Search, Drive, Blogger, Photos), excluding YouTube, we received 10,017 copyright removal requests from Australian claimants, reporting 1,542,731 URLs for removal. These included requests received by email to our designated agent, as well as those requests received through scaled processes such as the TCRP. In response to these requests, Google removed 1,530,081 URLs, over 99% of those requested.

In 2018, YouTube received 15,986 copyright removal requests from Australian claimants, requesting removal of 27,415 videos. YouTube removed 25,694 videos—nearly 94% of those requested. Additionally, in 2018, YouTube received 99 copyright removal requests against live streams from Australian claimants and 93 total live streams were removed. Requests that did not result in a removal were due to incomplete information, abuse, or misuse of the process.

The Preliminary Report refers to concerns expressed that removal requests against live-streaming content must be handled particularly swiftly due to the fleeting nature of live content. YouTube has prioritised such requests and in 2018, YouTube answered Australian live stream copyright removal requests, on average, in just two minutes. This turnaround time represents a *decision* to either remove or request further information, not merely an automated response indicating receipt of the request. In this context, suggestions that YouTube is not diligently handling these requests in a timely manner are simply not credible.

Lawsuits in foreign jurisdictions are not required to remove content. The Preliminary Report provides as a key finding that “Rights holders face considerable challenges in enforcing copyright against digital platforms because of the cost and delay involved in bringing court proceedings against overseas-based defendants hosting content outside Australia.”²²⁵ No copyright take-down process at Google requires a rightsholder to bring court proceedings in far-flung jurisdictions. Google removes allegedly infringing content upon valid notice without any requirement of a lawsuit. If an uploader disputes, Google never requires evidence of a lawsuit in the uploader's home country. Australian rightsholders are free to bring lawsuits in Australia and our practice is to keep disputed content down while such litigation is pending. To the extent that rightsholders choose to pursue litigation in the jurisdiction of the uploader, that is not due to any requirement imposed by Google or YouTube.

<https://www.gizmodo.com.au/2012/08/bogus-copyright-claims-take-down-nasas-official-mars-landing-video-on-youtube/>

²²⁵ Preliminary Report at 152.

6.2.3. Reaching Consensus Through Engagement with Governments and Industry Stakeholders

Google is active in engagement with governments and industry stakeholders all over the world in order to develop global best practices. For example:

- in April 2015, Google participated in the U.S. Department of Commerce’s internet policy task-force multi-stakeholder process to improve the operation of the Digital Millennium Copyright Act (“DMCA”) notice and take-down system, which resulted in a list of best practices for DMCA processes;
- in March 2016, Google partnered with the Australian Digital Alliance to organise a copyright forum in Canberra with the participation of industry leaders, policymakers, and international experts. It provided an opportunity for Australian and New Zealand government officials and advisers to meet with experts on copyright reform and learn from their experiences reforming copyright laws;
- in February 2017, Google joined a voluntary Code of Practice with the Motion Picture Association, British Phonographic Industries Ltd, Microsoft and representatives of other creative industries. As part of the Code, the UK Intellectual Property Office assesses, on a quarterly basis, the effectiveness of Google's voluntary efforts to combat piracy. Google has passed all independent assessments to date;
- in June 2018, Google joined a broad coalition of advertising businesses, rightsholders and industry groups in signing a voluntary Memorandum of Understanding with the European Commission. It endorses a “follow the money” strategy to stem the flow of ad revenues to sites and apps engaging in piracy and counterfeiting; and
- Google is presently engaged in a further effort of the UK Intellectual Property Office, a Social Media Roundtable, which brings together representatives of large copyright holders as well as individuals from Google, Facebook, and Twitter to identify and address areas for further collaboration on anti-piracy.

Australia’s existing take-down system has been the subject of extensive consideration and review, most recently by the Australian Productivity Commission, which recommended “[t]he Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services.”²²⁶ Recommendations relating to Australia’s take-down system should take into account previous inquiries into the area of online copyright infringement, alternative proposals, and the potential consequences and broader implications of any amendments.

A Mandatory Standard would depart from global standards and could cause unintended results. A Mandatory Standard would represent a significant departure from the globally accepted standard for issuing take-down notices that is relied upon by digital platforms, online service providers and content creators around the world. That system has been broadly adopted by many of Australia’s global trading partners including the UK, the EU, Canada, Japan, Singapore and South Korea. This standard requires digital platforms to respond “expeditiously” to disable access to the material that is claimed to be infringing upon notification. Thus, the “expeditious” standard is already followed by digital platforms in numerous other jurisdictions and, as a flexible standard, recognises the complexity that can arise in evaluating a request for removal. A more rigid standard with high fines for errors could incentivise automated

²²⁶ Productivity Commission, Intellectual Property Arrangements (Final Report No. 78, September 2016), Recommendation 19.1, 566-67, <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>.

ensorship on an unacceptable scale and a curtailment of innovation and investment in alternative rights management approaches.

As acknowledged in the Preliminary Report, the relevant area of copyright law is complex. This area has been subject to extensive previous inquiries and proposals, which are not canvassed in the Preliminary Report. In particular, there is no discussion of earlier consideration of the issue by Government departments,²²⁷ the Productivity Commission or the Australian Parliament.²²⁸ Australia's existing take-down system has been endorsed by the Australian Parliament as recently as 28 June 2017 with the passage of the *Copyright Amendment (Service Providers) Bill 2017* (Cth). That bill resulted in the expansion of Australia's take-down system to include service providers in the disability, education and cultural sectors, in addition to commercial ISPs.

In addition to taking into account previous inquiries, any recommendations to amend Australia's take-down system should consider potential broader consequences and implications, such as on Australia's existing international obligations under the the Australia-U.S. Free Trade Agreement. It is widely accepted that Australia is in breach of its obligations under Article 17.11.29 of that agreement.²²⁹ A Mandatory Standard of the kind envisaged in Preliminary Recommendation 7 would do nothing to rectify that breach and would likely compound it.

Additionally, new proposals in this complex policy space should also include an analysis of the abuses and misuses of these processes that are often motivated not by legitimate copyright interests, but by a desire to silence the speech of others.²³⁰ Digital platforms have large teams of individuals reviewing copyright removal requests, at great expense, to guard against such censorship. Google does not detail this issue at length here, but every day our teams encounter malicious and baseless attempts to remove content using copyright removal processes. Individuals and organisations large and small use digital platforms to express themselves and to share content. They should not be subject to a take-down regime that encourages platforms to remove first and ask questions later. Mandatory standards with high fines for errors will make it too risky to attempt to protect the legitimate speech interests of ordinary Australians. Australia's public dialogue and cultural life will only be diminished by such an approach and therefore it should be rejected.

Google supports extending the Copyright Act's Safe Harbour Scheme to online service providers. A more effective response to combating copyright infringement online would be to amend the current Safe Harbour Scheme in the Copyright Act by extending the application of Part V Division 2 AA to a broader set of online service providers so that it covers commercial digital platforms.

An extended Safe Harbour Scheme would give rightsholders an efficient way to seek removal of infringing content. It would also reward online service providers for collaborating with rightsholders by granting legal protection under the Scheme. It would include protections for consumers who wish to challenge incorrect claims of copyright infringement. Robust safe harbours provide legal certainty and minimise

²²⁷ Attorney-General's Department, Review of the Scope of Part V Division 2AA of the Copyright Act (2005); Department of Communications, Australia's Digital Economy: Future Directions – Final Report (2009); Attorney-General's Department, Consultation Paper: Revising the Scope of Copyright 'Safe Harbour Scheme' (2011); Attorney-General's Department and the Department of Communications, Online copyright infringement – discussion paper (2014), at p.7.

²²⁸ Joint Standing Committee on Treaties, Report 165 (2016), at 68.

²²⁹ *Id.*; Isabella Alexander, Robert Burrell, Michael Handle, Emily Hudson, and Kimberlee Weatherall, *Submission in Response to Online Copyright Infringement Discussion Paper*, 23 (2014); Jane Ginsburg and Sam Ricketson, "Separating Sony Sheep from Grokster (and Kazaa) Goats: Reckoning Future Plans of Copyright-Dependent Technology Entrepreneurs," 19 *Australian Intellectual Property Journal* 10, 29-30 (2008).

²³⁰ Some examples of abuses of take-down processes and invalid notices are provided in *How Google Fights Piracy* (November 2018), at 31-32 and 44-45, https://www.blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf.

compliance costs. The advantages and disadvantages of this approach as an alternative to the proposed Mandatory Standard are not canvassed in the Preliminary Report.

Google has developed sophisticated tools for combating piracy online and continually works to improve its technology and practices to benefit rightsholders. We meet globally accepted standards for the removal of infringing content and encourage the ACCC to consider the advantages of extending the Safe Harbour Scheme to digital platforms. Google suggests that a mandatory take-down standard should not be recommended in the Final Report.

7. Rules Against Browser Default Settings Would Disrupt Procompetitive Benefits for Users and Industry Participants

The Preliminary Report considers recommending that “suppliers of operating systems for mobile devices, computers and tablets be required to provide consumers with options for internet browsers (rather than providing a default browser)” and that “suppliers of internet browsers be required to provide consumers with options for search engines (rather than providing a default search engine).”²³¹ The Preliminary Recommendations are inconsistent with the strong competition Chrome faces in browser distribution and the ease with which users are able to switch to their preferred browser and search provider. We also believe that these proposals could undermine the financial incentives that are critical to browser development.

7.1. Users Can and Do Easily Switch to Their Preferred Service

Users can and do easily switch their default search provider if the existing default option is not satisfactory to them, meaning that users that keep Google as the default option are likely doing so out of preference rather than inertia. This conclusion is borne out by evidence of user behaviour:

- Google has a high share of search²³² and browsing²³³ on Windows PCs, even though Microsoft Edge is preinstalled and set as the default browser, and Bing is the default search service.
- In Korea, Google is a distant third behind Korea-based search providers Naver and Daum. In 2015, Naver and Daum were installed on approximately 70% and 30% of Android smartphones, respectively, despite Chrome being preinstalled and defaulting to Google Search on these devices. According to other sources, Naver’s overall search share (desktop and mobile) has consistently held above 70%.
- Mozilla entered into a deal in 2014 to set Yahoo! as the default search engine on its browser. However, users switched back to Google in such high volumes that Mozilla terminated the deal in 2017, two years ahead of time. It stated in a lawsuit that “Yahoo! Search consistently

²³¹ Preliminary Report at 65.

²³² See, e.g., Statista, Desktop Search Engine Market Share Worldwide, November 2017 – November 2018, <http://gs.statcounter.com/search-engine-market-share/desktop/worldwide>.

²³³ *Id.*

failed to retain users and search volume over time, reducing the potential revenue [for Mozilla] under the Strategic Agreement.”²³⁴

This evidence of actual user behaviour is consistent with a Eurobarometer survey conducted for the European Commission (“EC”), which found that “nearly eight in ten internet users would probably change search engine if the search results provided were not useful.”²³⁵ Our share of search therefore reflects the quality of our service and user preferences. As the Preliminary Report notes, “the strength of Google’s brand partly reflects the high quality of its search service . . . Google invests a considerable sum each year on improving the quality of its service.”²³⁶

The Preliminary Report speculates that users “may stick with Google Search rather than switch to Bing if they do not know whether Google provides a higher quality search service than Bing, and substantial information costs would have to be incurred to compare the quality of the two search services.”²³⁷ But the Preliminary Report does not explain why users should face particular costs or difficulties in deciding which service they prefer. Users can easily try out different search services for free, for as long or short as they like, and decide which service they want to use. The Eurobarometer survey conducted for the EC similarly confirms that users will likely try out an alternative if they are dissatisfied with the results that appear. The single paper cited in the Preliminary Report on this issue also acknowledges that “a competitor would easily be able to ‘produce’ products to meet the demand of those who were unsatisfied with Google’s products.”²³⁸

Experience too shows that users can and do decide which search service best meets their needs. As the Preliminary Report notes, “when Google entered the market, it rapidly overtook the incumbent search services, including those of Yahoo! and AltaVista, principally because it provided a superior relevance algorithm.”²³⁹ That Google is successful today, and that users trust us to provide the most relevant results, is a result of competition, not an impediment to competition.

It is fast and easy for users to access rival services. Even a consumer with “low information-technology skills” can access rival services.²⁴⁰ Consumers can access rival search services without needing to change the browser default setting in Chrome or Safari. They can (i) use a browser that defaults to a different search engine, such as Microsoft Edge; (ii) type the address of a different search engine in the URL bar (e.g., “Bing.com”); (iii) search for alternatives with a query such as “search engine,” or (iv) download a rival search app – a process that takes a matter of seconds, as the below chart shows, and is trivially easy; users download apps billions of times every year.²⁴¹

²³⁴ See, Greg Sterling, *Yahoo! parent sues Mozilla for replacing it with Google as Firefox default search*, Search Engine Land (6 December 2017), <https://searchengineland.com/yahoo-parent-sues-mozilla-replacing-google-firefox-default-search-287872>.

²³⁵ European Commission, Special Eurobarometer 447, June 2016, p.16, http://ec.europa.eu/information_society/newsroom/image/document/2016-24/ebs_447_en_16136.pdf.

²³⁶ Preliminary Report at 47.

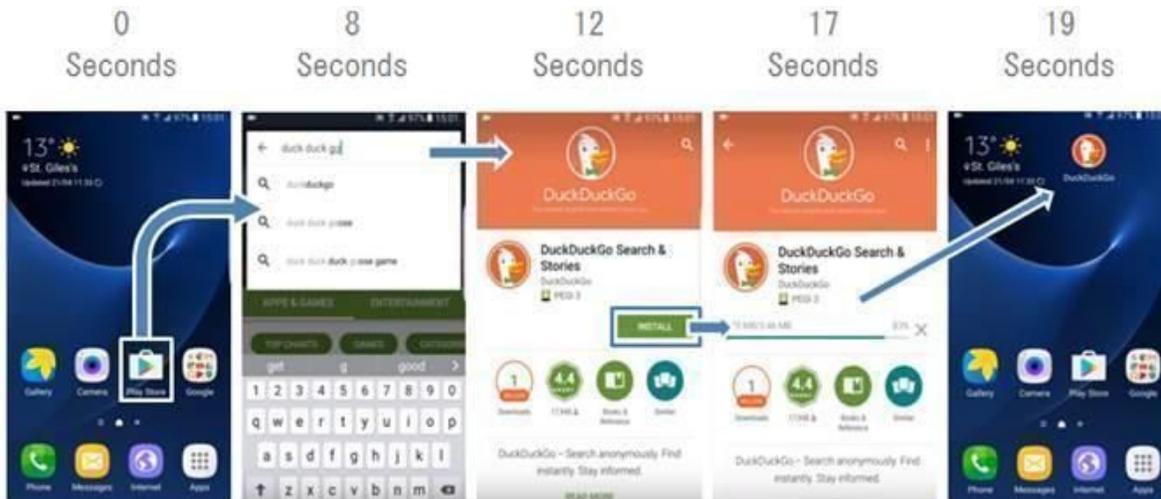
²³⁷ *Id.* at 44.

²³⁸ Mark R. Patterson, *Google and Search Engine Market Power*, Harvard Journal of Law & Technology (July 2013), at 6, <https://jolt.law.harvard.edu/assets/misc/Patterson.pdf>.

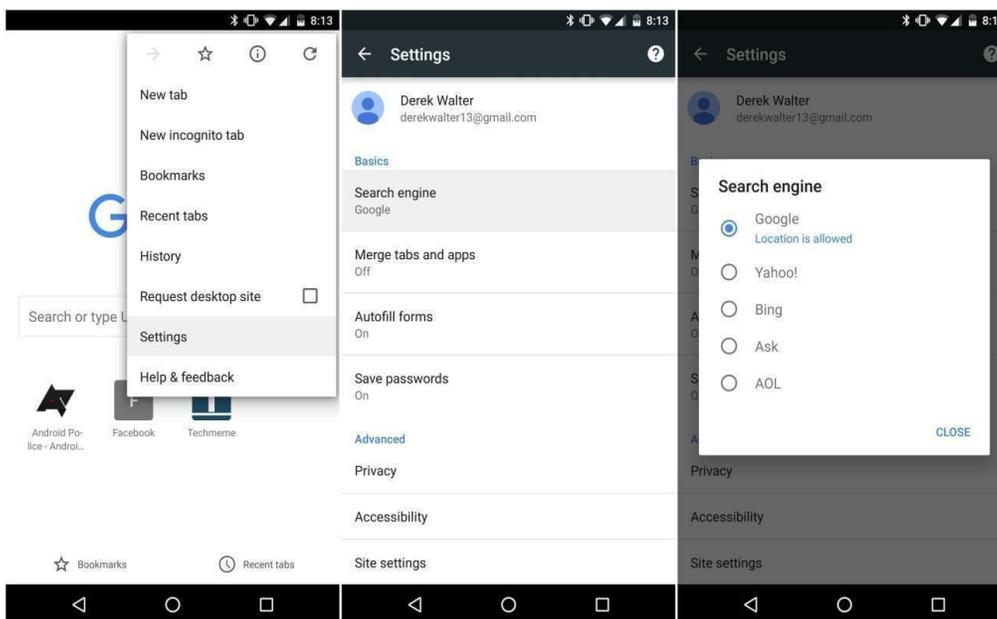
²³⁹ Preliminary Report at 42.

²⁴⁰ *Id.* at 44.

²⁴¹ In 2017, the total number of mobile app downloads was 197 billion: *Business of Apps, App Download and Usage Statistics (2018)*, (8 October 2018), <http://www.businessofapps.com/data/app-statistics/>.



Switching the default search engine is simple and intuitive in Chrome, which offers alternative defaults like Ask, Bing, and Yahoo!. The process for switching the default service is shown below, and only takes seconds. Clicking on “Settings” immediately provides a “Search engine” option, which presents users with a choice of different search engines.²⁴² These simple steps are also described in countless online articles and videos that are easy to find.

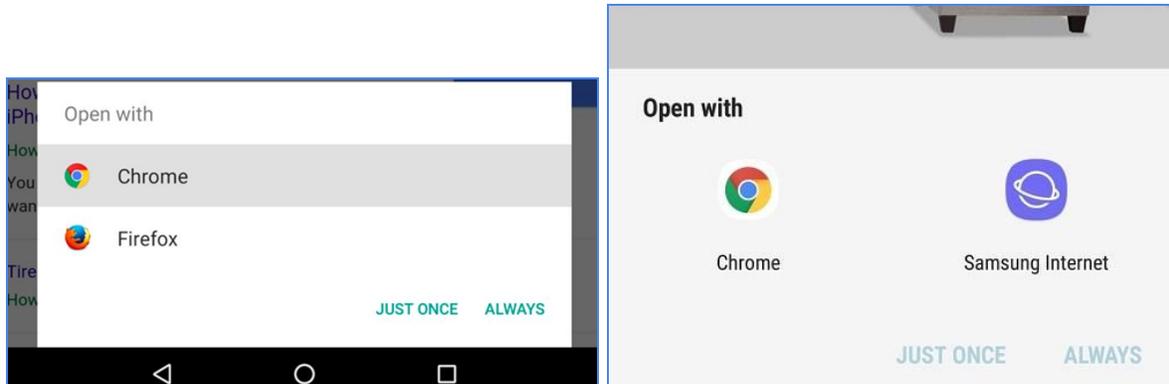


The EC has long recognised the ability of users to “change the default setting and access most competing services through the web browser of a device.”²⁴³

²⁴² Derek Walter, *How to change the default search engine in Chrome for Android*, Greenbot (7 March 2016) <http://www.greenbot.com/article/3041300/android/how-to-change-the-default-search-engine-in-chrome-for-android.html>.

²⁴³ Case COMP/M.6381 *Google/Motorola Mobility*, Commission decision of February 13, 2012, ¶180.

Android users also are shown “disambiguation” screens that prompt them to choose which browser or search app should complete a task when two or more are present on the device and neither has been set as default. This Android-specific form of choice screen is also displayed when a user triggers browser or search functionality for the first time after installing a new browser or search app. Examples are shown below.



Finally, it is important to note again that Google faces competitive pressure from more than just general search engines. Even if a user keeps or sets Google Search as the default on their browser, that user is likely choosing many other vertical search providers. Users frequently multihome by using many different services to answer questions, such as the Yelp app for local queries, Tripadvisor.com.au for travel information, britannica.com for scientific and other facts, and Amazon for shopping searches. As in any healthy competitive market, Google has a strong incentive to continue innovating on its search services given the many successful rivals for users, regardless of whether it is set as the default provider in Chrome and Safari.

7.2. Google Faces Significant Competition for Distribution of Chrome

The Preliminary Report’s recommendations are based in part on the assumption that Google has market power in browsers (i.e., that Chrome is dominant). However, Google faces significant competition for distribution of Chrome. Microsoft’s Edge browser comes preloaded on the 80-90% of PCs that run Windows,²⁴⁴ directing the more than 1.5 billion Windows PC and mobile app users worldwide to Bing.²⁴⁵ Similarly, Apple preloads its Safari browser on all iOS and MacOS devices.

While it is true that many Android OEMs preload our Chrome browser and set Chrome as the default, this is by choice. We do not restrict Android OEMs from preloading rival browsers and setting them as the default. For example, Samsung preloads its own browser on its Android devices, and often gives it more prominent placement than Chrome. This is significant because Samsung accounted for approximately 46% of Android shipments in Australia from Q4 2017 to Q3 2018, according to IDC data. The following screenshot of Samsung’s out-of-the-box set-up shows that its browser appears on the default home page:

²⁴⁴ Statista, *Global operating systems market share for desktop PCs from January 2013 to July 2018*, <https://www.statista.com/statistics/218089/global-market-share-of-windows-7/>. As of July 2018, Windows’ share was 83%.

²⁴⁵ Rafia Shaikh, *Microsoft Boasts 1.5 Billion Windows PC Users – 800 Million Have Yet to Install Windows 10*, WCCFTech (29 October 2018), <https://wccfttech.com/1-5-billion-pc-users-800-million-have-yet-to-install-windows-10/>.

Virgin Mobile Australia Galaxy S9+²⁴⁶



Additionally, we compete with browser providers such as Firefox and Opera that distribute their browsers directly to users. For example, Opera's Browser and Mini Browser have each been downloaded more than 100 million times from Google's Play Store.

Users' choice to use Chrome as their preferred browser reflects the quality of the browser, not a lack of choice or competition caused by preinstallation or default settings. For example, Chrome is the most frequently downloaded browser on iOS, where it is not preinstalled or set as the default.

7.3. Removing Defaults Would Undermine Incentives to Develop and Distribute Browsers

One of the primary reasons Google developed Chrome was to ensure consumers could access our products and services. When we launched the Chrome browser in 2008 nearly 90% of consumers accessed the Internet through Windows PCs where Internet Explorer had a significant share.²⁴⁷ We also wanted to make a browser that was open source²⁴⁸ and better performing than other browsers available at the time in order to spur competition.²⁴⁹ Today, we continue to improve Chrome to ensure that users can access our products and services. The Preliminary Recommendation to prohibit browsers from offering a

²⁴⁶ Virgin Mobile Australia, *SAMSUNG GALAXY S9+ GUIDE*, Virgin Mobile Device Guides, <https://deviceguides.virginmobile.com.au/samsung/galaxy-s9-plus-android-8-0/> (last visited 14 February 2019).

²⁴⁷ Gregg Keizer, *Windows market share dives below 90% for first time*, ComputerWorld (1 December 2008), <https://www.computerworld.com/article/2529379/microsoft-windows/windows-market-share-dives-below-90--for-first-time.html> (Windows share at 89.6%); Jim Dalrymple, *Safari, Google Chrome gain browser market share*, Macworld (24 November 2008), <https://www.macworld.com/article/1137084/safari.html> (Internet Explorer share at 81.3%).

²⁴⁸ Chrome is based on "Chromium" technology that Google makes available to rival browsers under an open source license. It is used by other browsers such as Opera and Vivaldi. See, Computerworld, *Google's Chromium browser explained*, Computerworld (7 March 2018), <https://www.computerworld.com/article/3261009/web-browsers/googles-chromium-browser-explained.html>.

²⁴⁹ Steven Levy, *Inside Chrome: The Secret Project To Crush Ie And Remake The Web*, Wired (2 September 2008), <https://www.wired.com/2008/09/mf-chrome/>.

default search engine would defeat one of the primary reasons we developed Chrome. The requirement would also prevent Microsoft from promoting Bing on its Edge Browser.

The majority of the revenue funding competition in browsers comes from selling the default search setting. Mozilla, Opera, Apple and Samsung all sell the default search position on their browsers and receive a percentage of the search revenue that results from searches accessed through the default. If no browser is able to promote a default search engine, there will be less incentive to develop and improve browsers. For example, Opera's second quarter 2018 financial results showed that it generated search revenue of USD\$19.8 million, while its operating profit in that quarter was USD\$10.5 million. Depriving Opera of the ability to earn search revenue would therefore push it from profitable to loss-making.²⁵⁰ Mozilla's audited accounts show that 97% of its 2016 revenues came from royalties, and 94% of those revenues came from "contracts with search engine providers."²⁵¹ In other words, it too depends on revenue from selling search default status.

Browser providers also care about the quality of the service that a search engine will provide to their users. When asked why Apple chose Google as the default, CEO Tim Cook explained: "I think their search engine is the best."²⁵² Like any participant in a competitive tender process, we bid based on the value we believe we can generate from the opportunity on offer. This process is similar to advertisers bidding to sponsor a sporting event. As the Preliminary Report indicates, Google is able to offer substantial bids for default status because we can monetise search queries efficiently. Less efficient rivals, who monetise their services less well, will likely offer lower bids. This is competition on the merits.

Google has not always won tenders for default status, as many of our rivals have the resources or product differentiation (or both) allowing them to compete and win default status for many different third-party search entry points. For example, as a result of a competitive Microsoft bid, Apple previously set Bing as the default search service for Siri (Apple's digital assistant), the search bar on iOS devices, and the Spotlight search bar on Mac OS products, only switching these search defaults to Google in 2017.²⁵³ Mozilla struck a deal to make Yahoo! the default search engine provider for its U.S. consumers in 2014.²⁵⁴ And Brave browser recently announced that it would set Qwant, a French search engine, as the default.²⁵⁵

There is also no guarantee that Google will continue to win tenders to be set as the default in the future. For example, Bing has previously been touted as a possible default service on Safari, as have smaller differentiated search providers.²⁵⁶ Bing is also used to power searches on Amazon's Echo devices (as

²⁵⁰ Opera, *Opera Limited announces second quarter 2018 financial results*, Press Release (23 August 2018), <https://investor.opera.com/node/6371/pdf>.

²⁵¹ Mozilla, *Consolidated Financial Statements, 2015 and 2016*, at pp.4 and 19, https://assets.mozilla.net/annualreport/2016/2016_Mozilla_Audited_Financial_Statement.pdf.

²⁵² Axios, *Tim Cook defends Apple's deal with Google*, Axios (19 November 2018), <https://www.axios.com/tim-cook-apple-google-search-engine-63f302b3-5a5d-4cb2-a07c-5e46f161baee.html>.

²⁵³ Shaun Nichols, *Bing fling sting: Apple dumps Microsoft search engine for Google*, The Register (25 September 2017), https://www.theregister.co.uk/2017/09/25/apple_dumps_microsoft_search_for_google/.

²⁵⁴ Stephen Shankland, *Firefox dumps Google for search, signs on with Yahoo*, CNet (19 November 2014), <https://www.cnet.com/news/in-major-shift-firefox-to-use-yahoo-search-by-default-in-us/>.

²⁵⁵ Qwant, *Fast and private Brave browser chooses Qwant as its default search engine in France and Germany*, Press Release (13 September 2018), <https://about.qwant.com/download/11239/PR-Qwant-Brave-EN.pdf>.

²⁵⁶ Alice Truong, *Google's search deal with Apple is expiring soon, and everyone wants a piece of the action*, Quartz (4 February 2015), <https://qz.com/338982/googles-search-deal-with-apple-is-expiring-soon-and-everyone-wants-a-piece-of-the-action/>.

well as for the Alexa assistant).²⁵⁷ Apple recently partnered with rival search provider DuckDuckGo to integrate Apple Maps into DuckDuckGo's search results,²⁵⁸ which could lay the groundwork for Apple replacing Google as its default search provider. Apple also has considerable resources that would allow it to build its own search provider,²⁵⁹ as it did when it replaced Google Maps with its own preloaded mapping app on iPhones. These dynamics maintain the pressure on Google to innovate, and to provide high quality search results regardless of its default status. Indeed, Google's default status on Safari is the outcome of free competition today; not a barrier to rivals expanding tomorrow.

Device manufacturers and operating system developers also sell distribution of the browser or promote their own browsers. Microsoft, Apple, and Samsung all promote their own browsers on their own devices and on their own operating systems (Windows, iOS, Tizen) and earn search revenues associated with the defaults. On Android, OEMs decide for themselves which browser (if any) to set as the default. OEMs are free to install our apps without setting Chrome as the default browser. Google also has not restricted OEMs' ability to preload rival browsers on their devices that use other search providers as the default. Android OEMs can either promote their own browser (Samsung) or sell distribution of a different browser such as Opera. Contrary to the Preliminary Report's statement that Chrome is the "default" browser on "a number of operating systems," Chrome is not the default browser on Windows, iOS, or even on Android devices unless the OEM chooses to make Chrome the default. In each case, the financial incentive to distribute the browser comes from the potential revenues derived from the browser search default.

For the following reasons, the Preliminary Recommendation would be harmful for search providers, browser developers, and OEMs:

- **Search providers.** Google and Microsoft have invested heavily in developing browsers with a view to promoting their search engines as the defaults. The contemplated recommendation would prevent them from doing so, thereby damaging the value of browsers that Google and Microsoft spent years building. In this circumstance, search providers would have less incentive to invest in creating new or improved browsers. Browser innovation would slow.
- **Browser developers.** For many browser developers, a substantial part of their income is based on default deals with search providers. Absent these possibilities, browser developers would likely make a loss, which might limit their long-term viability. This could result in a browser sector with less choice and less competition.
- **OEMs.** OEMs enter into distribution deals with browser and search providers to generate revenue and to create a device experience that is appealing to their consumers. These revenues also help lower device costs. The proposed recommendation would frustrate OEM choice, jeopardise the value of these distribution deals, and harm users.

It is not clear from the Preliminary Report that the ACCC consulted with the browser developers, device makers, and operating system developers whose business models could be adversely impacted by these recommendations.

Finally, the proposed requirement is inconsistent with established competition principles. It effectively imposes a "must carry" obligation on developers of operating systems and browsers without establishing whether their services are essential facilities. Being displayed on a device via a choice screen is not an

²⁵⁷ Jason Hawkins, *5 Things to Know About Voice Search and Bing*, SEMrush Blog (4 August 2017), <https://www.semrush.com/blog/voice-search-bing/>.

²⁵⁸ Zack Whittaker, *DuckDuckGo debuts map search results using Apple Maps*, TechCrunch (17 January 2019), <https://techcrunch.com/2019/01/15/duckduckgo-apple-maps/>.

²⁵⁹ See, e.g., Jason Cross, *Should Apple have its own search engine?*, Macworld (30 November 2018), <https://www.macworld.com/article/3324042/technology-business/should-apple-have-its-own-search-engine.html>.

“essential input” within the meaning of Australian competition law.²⁶⁰ Imposing a “must carry” obligation in these circumstances is therefore an unwarranted interference with developers’ freedom to design and manage their own products.

8. Government Price Monitoring Would Not Address Transparency Concerns for Advertisers

In Area for Further Analysis 5, the Preliminary Report raises the question of whether digital advertising intermediary pricing is adequately transparent. The Preliminary Report solicits comments regarding a proposal to require ad tech intermediary services to provide detailed pricing information to a regulatory authority on an annual basis if they exceed a certain revenue threshold in Australia.²⁶¹ We support transparency for our customers and partners in a fragmented space, but disagree with the appropriateness of price monitoring as a solution, including some of the factual premises in the Preliminary Report.

Advertisers and publishers are entitled to an accurate understanding of how much they pay for services they use, and we make significant efforts to provide transparency for our services. Any alleged “opacity” of pricing for advertising intermediary services is due more to the variety of services and number of service providers in the programmatic display ad tech stack itself than pricing policies of individual intermediaries. Advertisers and their agencies multi-home among many different vendors and solutions, which contributes to complexity. Indeed, the Preliminary Report identifies a cause of the perceived opacity of pricing as “[t]he complexity and the large number of intermediaries involved in serving some forms of display advertising.”²⁶² Regulatory price monitoring would not address this issue because it cannot reduce the inherent complexity associated with the number of players involved in a typical programmatic ad placement.

As an illustration, if an advertiser places an ad through a demand-side platform and wins a real-time auction on an ad exchange, each of those intermediaries will charge the advertiser or publisher a fee or revenue share in addition to the actual winning bid. An advertiser may use several DSPs to buy on dozens of exchanges every day. In addition, publisher and advertiser ad servers may charge serving fees. To understand those fees, an advertiser or publisher might need to consult invoices from each of those separate services. This complexity exists because each of the intermediaries provides a distinct service that facilitates a transaction that might not otherwise have occurred, and would persist even if each intermediary were perfectly transparent with its customers.

For its part, Google negotiates contracts with separate pricing for each of its intermediary and other ad tech services. We also provide each of our advertiser and publisher customers with a clear breakdown of the services we have provided and the amount charged for each, rarely using aggregated prices and only at a customer’s request.

While we cannot confirm that other ad tech intermediaries are similarly transparent, in our experience even transparent pricing by intermediaries can be complicated for advertisers to understand when they rely on ad agencies to manage their programmatic ad campaigns. According to a 2016 study, many advertisers have empowered agencies to act on their own when engaged in programmatic media buying

²⁶⁰ ACCC, *ACCC Guidelines on misuse of market power* (August 2018), at 46 (“Essential inputs’ are non-substitutable resources which are indispensable for the provision of goods and services”), <https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Misuse%20of%20Market%20Power.pdf> .

²⁶¹ Preliminary Report at 86.

²⁶² *Id.*

enabled by ad tech. Specifically, an advertiser will permit an agency to purchase media on the advertiser's behalf, often pooling its purchases on behalf of all clients to secure volume discounts.²⁶³ The agency then resells advertising inventory to its clients without disclosing the original purchase price.²⁶⁴ Advertisers may not be fully aware that this is happening. In some cases, advertisers have explicitly agreed to these practices and limited their own audit rights via contract.²⁶⁵

Google considers government price monitoring an inappropriate solution to achieve price transparency for two main reasons. First, the ad tech intermediary services industry is already evolving in a way to resolve some of the complexity and associated pricing opacity. Although some successful companies offer only one product in the ad tech stack, there are several ad tech intermediary service providers that are vertically integrating to offer a suite of services, just like Google. This has in part happened through consolidation. For example, AT&T formed Xandr after acquiring AppNexus and Time Warner; Verizon Media Group was formed by Verizon after acquiring Yahoo! and AOL;²⁶⁶ Adobe acquired leading video DSP TubeMogul in 2016 and also offers a data management platform and marketing mix optimisation technologies;²⁶⁷ and mobile ad tech firm Amobee was acquired by the telecommunications giant Singtel in 2012, which also recently acquired popular ad tech companies Turn and Videology.²⁶⁸ Advertisers have welcomed this development because it reduces fragmentation, complexity, double marginalisation issues, and improves pricing transparency.²⁶⁹

Second, price monitoring imposes burdens. Complying with monitoring requirements tends to require affected companies to calculate and track more and different information than they would otherwise maintain and to establish special processes for reporting it to the monitor. Over time, the burdens of doing so could become significant. Depending on the level of burden, firms that fall below the monitoring threshold might even be deterred from expanding their businesses to avoid the compliance costs. Given

²⁶³ *An Independent Study of Media Transparency in the U.S. Advertising Industry Prepared for: The Association of National Advertisers*, K2 Intelligence (7 June 2016), at 14-15, 25-26, <https://www.ana.net/content/show/id/industry-initiative-media-transparency-report>.

²⁶⁴ *Id.* at 26-27, 38-41, 45-46.

²⁶⁵ *Id.* at 41, 51-52.

²⁶⁶ *Verizon completes Yahoo acquisition, creating a diverse house of 50+ brands under new Oath subsidiary*, Cision PR Newswire (13 June 2017), <https://www.prnewswire.com/news-releases/verizon-completes-yahoo-acquisition-creating-a-diverse-house-of-50-brands-under-new-oath-subsiary-300472958.html>.

²⁶⁷ Lauren Johnson, *Adobe Buys Programmatic Ad Player TubeMogul for \$540 Million*, AdWeek (10 November 2016), <https://www.adweek.com/digital/adobe-buys-programmatic-ad-player-tubemogul-540-million-174559/>.

²⁶⁸ Jon Russell, *Singapore's SingTel moves into mobile advertising with \$321 million acquisition of Amobee*, TNW (4 March 2012), <https://thenextweb.com/asia/2012/03/05/singapores-singtel-moves-into-mobile-advertising-with-321-million-us-acquisition/>; *Amobee Expands Digital Marketing Technology with Acquisition of Turn*, Amobee (22 February 2017), <https://www.amobee.com/newsroom/amobee-expands-digital-marketing-technology-with-acquisition-of-turn/>; Lee Meixian, *Singtel unit acquires Videology assets for about US\$101m*, The Business Times (17 July 2018), <https://www.businesstimes.com.sg/companies-markets/singtel-unit-acquires-videlogy-assets-for-about-us101m>.

²⁶⁹ See, e.g., Alexandra Bruell, *The Ad Agency of the Future is Coming. Are you Ready? Clients Want One Partner to Simplify the Fragmentation and Data -- and Today's Shops May Not Be Among Them*, AdAge (2 May 2016) ("At the nexus of this confusing and continually evolving mashup of business operations and marketing are clients, who need a partner to help them stave off their own impending winter."), <http://adage.com/article/print-edition/agency-future/303798/>; Alison Weissbrot, *Four Reasons Why Agencies Are Working With Fewer DSPs*, Adexchanger (19 June 2018) (Consolidation around fewer DSPs "has allowed teams to master certain platforms and find workflow efficiencies, while creating a more transparent and collaborative relationship with partners."), <https://adexchanger.com/agencies/four-reasons-why-agencies-are-working-with-fewer-dsps/>.

the nature of the ad tech intermediary services and the issues outlined above, the costs of price monitoring would outweigh any hypothesised benefits.

9. Google Provides Advertisers Accurate, Independently Verifiable Measurement in a Privacy Protective Manner

Google has strong incentives to both combat ad fraud and provide advertisers with trusted, accurate measurement solutions. Failing to do so would make advertisers less willing to advertise with Google (and could reduce their overall trust in the online advertising ecosystem). That would imperil a key source of revenue for Google. Google therefore has worked hard to develop effective measurement tools for its advertisers that are independently verified. We have also worked to develop partnerships with leading measurement technology providers to deliver third-party measurement solutions in a way that gives advertisers the ability to obtain independent measurement data if they so choose, whilst protecting user privacy.

Google participates in a variety of established industry organisations dedicated to combating ad fraud and developing industry standards for accurate, uniform ad measurement. For example, the Media Rating Council (“MRC”) is an independent body that oversees the process of developing standards in line with industry best practices, ensures compliance with those standards, and works with its membership to enhance compliance tools and collaborate on continually improving standards and practices.²⁷⁰ MRC accreditations require a rigorous vetting process, which consists of a full independent audit and a vote in favour of accreditation from MRC’s 160+ members. MRC members include leading advertisers and traditional media publishers like Unilever, Fox Sports, CBS, and Group M.²⁷¹ Australia’s leading advertising bodies recognise and are aligned with the MRC’s standard for measuring advertising viewability.²⁷² Google has obtained MRC accreditation for over 30 distinct measurement solutions, covering all of our billable metrics (such as clicks, impressions, and viewability) across search, video, and display for products including Google Ads, Google Marketing Platform, and Google Ad Manager.²⁷³

Google has similarly been certified by other trusted independent bodies including the Interactive Advertising Bureau (“IAB”),²⁷⁴ which works with 650 leading media and technology companies to develop

²⁷⁰ See, e.g., MRC, *Leading with Strength, The MRC - Presentation prepared for IAB Global Summit* (3 October 2012), at 2 (“MRC is ideally positioned to serve as cross-ecosystem standards-setting body...and has structural components in place to facilitate this process”), <https://archive.iab.com/www.iab.net/media/file/Georgelvie.ppt>.

²⁷¹ Media Rating Council, *2019 Membership*, <http://www.mediaratingcouncil.org/Member%20Companies.htm> (last visited 14 February 2019). See also, Media Rating Council, *The Benefits of MRC Membership*, <http://www.mediaratingcouncil.org/General.htm> <http://www.mediaratingcouncil.org/Member%20Companies.htm> (last visited 14 February 2019).

²⁷² AANA, IAB Australia and MFA, *Australian Digital Advertising Practices* (July 2018), at 11, 12, http://aana.com.au/content/uploads/2018/07/Australian-Digital-Advertising-Practices_July2018_Interactive_Final_300718.pdf.

²⁷³ Google Partners Blog, *Building trust and increasing transparency with MRC-accredited measurement* (21 February 2017), <https://agency.googleblog.com/2017/02/building-trust-and-increasing.html>. For a full list of Google’s MRC accreditations, see, Media Rating Council, *Digital Metrics, Companies Accredited by MRC*, <http://mediaratingcouncil.org/Digital%20Landscape.pdf>.

²⁷⁴ Google Ad Manager Help, *Data Integrity- IAB Compliance*, https://support.google.com/admanager/answer/141811?hl=en&ref_topic=28174 (last visited 14 February 2019).

industry standards and best practices in digital advertising.²⁷⁵ For example, the IAB partnered with the Australian Association of National Advertisers (“AANA”) and the Media Federation of Australia to develop the Australian Digital Advertising Practices²⁷⁶ as well as with the American Association of Advertising Agencies (“4A’s”) and the Association of National Advertisers to create the Trustworthy Accountability Group (“TAG”) Certified Against Fraud Program.²⁷⁷

We participate in these programs along with publishers and advertisers to help build trust and instill confidence in digital advertising.²⁷⁸ Many of our in-house subject matter experts are active participants in topical working groups,²⁷⁹ and we follow the guidelines established by these bodies.²⁸⁰

In addition to our own accredited measurement solutions, we have partnered with over 20 leading third-party measurement partners to provide independent measurement offerings.²⁸¹ These offerings give customers more choice and another independent method to verify the success of their advertising campaigns. They include integrations with Moat, Integral Ad Science, and DoubleVerify, three popular third-party measurement services, to enable independent viewability reporting on YouTube and the Google Display Network (Google’s display ad network for third-party publishers).²⁸² We have announced upcoming independent audits of, and MRC accreditation for, those partner integrations, among others. MRC accreditation will provide advertisers with additional confirmation, from a source independent of Google, that Google’s integrations provide accurate information to the measurement partners’ own systems.²⁸³

Together, our MRC-accredited metrics as well as third-party partnerships ensure our measurement solutions are trusted, align with industry standards, and can be compared across providers. As the chief brand officer of Procter & Gamble said in a statement, Google’s announced MRC accreditations will “bring more media transparency” and “should make a positive impact on creating a clean and productive media supply chain.”²⁸⁴

²⁷⁵ IAB, *IAB Measurement Guidelines*, <https://www.iab.com/guidelines/iab-measurement-guidelines/> (last visited 14 February 2019); IAB, IAB, *IAB Certification Program*, <https://www.iab.com/topics/certification/> (last visited 14 February 2019).

²⁷⁶ AANA, IAB Australia and MFA, *Australian Digital Advertising Practices* (July 2018), http://aana.com.au/content/uploads/2018/07/Australian-Digital-Advertising-Practices_July2018_Interactive_Final_300718.pdf.

²⁷⁷ See, TAG, *About the TAG Certified Against Fraud Program*, <https://www.tagtoday.net/certified-against-fraud-program/> (last visited 14 February 2019); TAG, *About Us*, <https://www.tagtoday.net/aboutus/> (last visited 14 February 2019).

²⁷⁸ *Id.*

²⁷⁹ TAG, *TAG Anti-Fraud Working Group*, <https://www.tagtoday.net/wg/fraud/> (last visited 14 February 2019).

²⁸⁰ See, e.g., *id.*; TAG, *TAG Registry*, <https://www.tagtoday.net/tagregistry/#tagregistry/> (last visited 14 February 2019).

²⁸¹ Google Marketing Platform, *Google Measurement Partners: Trusted measurement solutions for the entire customer journey* (12 July 2018), <https://www.blog.google/products/marketingplatform/360/introducing-measurement-partners/>. For more detail of the types of measurement services available from Google Measurement Partners, see, <https://measurementpartners.google.com/> (last visited 14 February 2019).

²⁸² Google, *YouTube Certified External Vendors, Third-Party Ad Serving Certifications*, <https://developers.google.com/third-party-ads/youtube-vendors> (last updated 8 February 2019).

²⁸³ Google Ads Blog, *New MRC accreditations and partners for Google and YouTube ads measurement* (28 September 2018), <https://www.blog.google/products/ads/transparency-choice-ads-measurement/>.

²⁸⁴ Ginny Marvin, *Google’s YouTube to undergo MRC audits for video viewability measurement*, Marketing Land (21 February 2017), <https://marketingland.com/google-youtube-mrc-audit-video-viewability-207223>.

Notably, none of the concerns noted by the Preliminary Report regarding overstated metrics or otherwise misleading advertisers are supported by any specific allegations against Google. For example, the Preliminary Report points to concerns that some sites are over-reporting their number of visitors or counting bot-generated views.²⁸⁵ However, none of the complaints cited by the Preliminary Report allege that Google does either of those things or otherwise provides inaccurate metrics.²⁸⁶ Indeed, as discussed above, we take such concerns seriously and have invested heavily for years in both preventing such errors and assuring advertisers of the reliability of our metrics.

Google has a strong competitive incentive to make those investments and prevent mis-measurement. The types of measurement concerns discussed in the Preliminary Report²⁸⁷ are most common in display advertising, in which page views or impressions are the most common metric for payment, as opposed to a metric like clicks, which is more prevalent in search advertising.²⁸⁸ The Preliminary Report observes, with the exception of Facebook, the supply of display advertising is “highly fragmented” in Australia, estimating that “no other firm has a market share of more than five per cent.”²⁸⁹ Given this fragmented and competitive environment, Google could not afford to offer inferior measurement solutions, much less to engage in over-reporting performance of its display ads. If advertisers are unsatisfied with the accuracy of our display metrics, they can and will simply take their business elsewhere. That creates a strong, market-based incentive for Google to invest and innovate in this area, which is reflected in the continually improving measurement solutions for our advertising products.

The Preliminary Report cites submissions from Free TV Australia which describe what Free TV views as deficiencies in how online ads are measured relative to the measurement of its members’ television ads.²⁹⁰ Free TV argues that large digital publishers should be required to “natively deploy accredited third-party” software development kits (“SDKs”) to enable external measurement.²⁹¹ The fact that Free TV would prefer an SDK-based approach, however, does not mean that other alternatives are necessarily inferior or insufficient. Google makes use of a variety of measurement solutions that offer equally accurate and verifiable results.

Moreover, Free TV’s preferred method does not take into account the significant privacy concerns that such an approach would generate for consumers. For example, Google gathers a range of information about users who view videos on YouTube, in accordance with its Privacy Policy, and uses it as permitted by the user. This includes information regarding the user’s IP address, the search query that led to the page view and other user data legitimately viewed as personal, including content viewed on YouTube that could reveal sensitive information about the user. Free TV’s method would create privacy and security risks for YouTube and its users.

SDKs can pose a significant risk of leaking consumer data. To avoid these risks, we ensure the availability of other third-party measurement solutions. Those alternatives seek to balance quality measurement for advertisers with rigorous protection of user privacy, whereas SDKs inherently involve

²⁸⁵ See, e.g., Preliminary Report at 77.

²⁸⁶ See, *id.*; Free TV Australia, *Submission to the ACCC Issues Paper* (April 2018), at 20.

²⁸⁷ Preliminary Report at 77.

²⁸⁸ See, e.g., Preliminary Report at 56; *Click Fraud is a Small Problem in Search These Days*, Search Engine Watch (9 January 2019), <https://searchenginewatch.com/sew/how-to/2261638/click-fraud-is-a-small-problem-in-search-these-days>; Andrew Mugridge, *CPC Bidding vs. CPM Bidding: What’s The Difference?* (2 August 2016), <https://www.ithinkmedia.co.uk/blog/paid-media/cpm-cpc-bidding/>.

²⁸⁹ Preliminary Report at 59.

²⁹⁰ See, *id.* at 77 n.146-149, 79 n.158-159.

²⁹¹ Free TV Australia, *Submission 3 to the Digital Platforms Inquiry* (November 2018), at 2.

sharing user data with third-parties, which can put such data at risk. Particularly in such a competitive market, there is no need to compel the use of one approach or another. Publishers compete for advertising dollars on many attributes including the options to allow advertisers to measure their campaigns. Advertisers are able to shift their spend to publishers that offer their desired measurement tools, including SDKs.

Ultimately, as the Preliminary Report observes, measuring the effectiveness of advertising is a ubiquitous challenge that is more than a century old and is far from unique to digital advertising.²⁹² The continued growth of advertising, particularly digital advertising, despite those issues, is empirical proof that the problem is not insurmountable—advertisers clearly believe that they are receiving significant measurable value from digital ads.²⁹³ Nor have measurement concerns stifled competition in either online or offline markets. Indeed, if anything, the success of online advertising is at least in part due to its superior ability to demonstrate verifiable return-on-investment for advertisers, compared with earlier offline formats.²⁹⁴ We believe regulatory mandates in this space would be unnecessary and potentially counter-productive. However, we remain open to continue engagement with the ACCC on this issue.

10. Competition in Advertising and Related Intermediary Services has Benefitted Advertisers and Publishers

As discussed above, the ACCC and other enforcement agencies, courts and commentators have long recognised that vertical integration often promotes competition by reducing costs, lowering prices, and enhancing the customer experience. The Preliminary Report likewise recognises that “[b]undling and tying are common commercial arrangements which usually do not harm competition and in many scenarios promote competition by offering consumers more compelling offers.”²⁹⁵ The ACCC nevertheless is evaluating whether Google’s bundling of ad inventory and intermediary services could lessen competition, though it “has not yet reached a concluded view.”²⁹⁶

The examples of purported bundling and tying practices in the Preliminary Report point to procompetitive practices, such as Google’s offering of “convenient one-stop shop” services, a suite of “intermediary services across all functional levels of the programmatic supply chain,” and “enhance[d]” offerings that provide “higher levels of targeting.”²⁹⁷ These practices are beneficial to advertisers and publishers and contradict the suggestion in the Preliminary Report that “there is likely to be less competition in the supply of intermediary services than otherwise might exist in a competitive market.”²⁹⁸ That is especially so given the lack of any evidence that other parties have been foreclosed. Indeed, the Preliminary Report

²⁹² Preliminary Report at 78.

²⁹³ See, e.g., IAB Australia, *Markets continue to reinvest strongly in digital advertising* (30 August 2018) (“Australian marketers support for digital advertising has continued to strengthen, with the latest data from PwC showing that overall digital advertising revenues have increased 11% year on year, while video has increased 45% year on year. The research has been supported by key marketers including Westpac, who have affirmed their support for digital advertising describing video advertising as both accountable and effective.”), <https://www.iabastralia.com.au/news-and-updates/iab-press-releases/item/22-iab-press-releases/2624-marketers-continue-to-reinvest-strongly-in-digital-advertising>.

²⁹⁴ See, e.g., Preliminary Report at 76.

²⁹⁵ *Id.* at 82.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 84.

²⁹⁸ *Id.*

notes that there have been no submissions from third-party intermediaries, which would be the foreclosed parties in case of anticompetitive tying or bundling.²⁹⁹

ACCC guidance recognises that tying and bundling can reduce competition only in the “limited circumstance” that the firm has a substantial degree of market power in the tying or bundled product.³⁰⁰ The requisite market power is lacking here. The purported bundling or tying practices outlined in the Preliminary Report primarily relate to display advertising and advertising intermediary services (not search advertising). As is evident from the finding in the Preliminary Report that Google accounts for five percent or less of revenues of display advertising,³⁰¹ Google does not have market power in display advertising. Nor does Google have market power in the provision of intermediary advertising products.

The Preliminary Report cites a claim by “media companies” that “if they want access to video advertising, they are effectively required to use Google’s intermediary services,”³⁰² referring to YouTube’s advertising inventory. This is not accurate because advertisers can purchase YouTube inventory directly from Google, without going through intermediary services. Advertisers can also make direct deals with certain YouTube content creators without going through buy-side or intermediary Google ads services.³⁰³ Moreover, Google, like any other seller of advertising space, can and should be able to choose the channels through which we sell our ad inventory.

The YouTube example illustrates that the bundling practices that third-parties take issue with do not involve market power and thus cannot be anticompetitive. If advertisers want to place video advertisements, but do not want to work with YouTube, they can place their ads on any number of other high-trafficked sites, including Facebook, other video sites such as Hulu, Twitch, and Yahoo! View and news sites such as News Corp or Fairfax. Indeed, virtually any website or mobile app offers the capacity for video advertising inventory. Media companies in particular are well-positioned to place video advertisements directly into their websites, catch-up TV offerings, or into broadcast or cable TV. Advertisers can avoid any attempt to “force” them to use Google’s intermediary services by simply placing their ads elsewhere.

The Preliminary Report suggests that Google “enjoy[s] strong advantages in the supply of [advertising] intermediary services products because of [its] substantial market power in search . . . advertising,” and that “most of Google’s inventory” is “only accessible through [its] proprietary platforms.”³⁰⁴ But the “intermediary services products” referred to in the Preliminary Report are overwhelmingly, if not exclusively, used in connection with *display* advertising, not search advertising. Google does not require advertisers who want to purchase search advertising to also buy display advertising or use Google’s ad intermediary services. Therefore, regardless of the Preliminary Report’s views on the strength of Google’s search advertising business, Google’s search advertising inventory would not give advertisers additional reasons to use Google’s intermediary services. And our owned and operated display inventory,

²⁹⁹ Indeed, it appears that the section of the Preliminary Report about bundling and tying concerns is based entirely on three third-party complaints (from News Corp., Nine and Free TV Australia).

³⁰⁰ ACCC, *ACCC Guidelines on Misuse of Market Power* (August 2018), at 14, <https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Misuse%20of%20Market%20Power.pdf>

³⁰¹ Preliminary Report at 59.

³⁰² *Id.* at 82.

³⁰³ Since 2010, certain YouTube content providers have been able to work directly with advertisers to source ads that serve on content they own, in addition to being able to use AdSense. These ads are called “partner-sold ads,” as content providers (partners) work directly with advertisers to serve ads on content they own. In order to qualify for partner-sold ads, the content provider is required to distribute content across multiple platforms, and will need to have the infrastructure (including sales forces) to sell ads against their own videos.

³⁰⁴ Preliminary Report at 83.

for its part, is simply not sufficiently significant to advertisers to result in anticompetitive effects, as the Preliminary Report observed.³⁰⁵

The other views in this section of the Preliminary Report describe “competitive advantages” that Google supposedly enjoys from things like the range of intermediary services we offer and the data we collect.³⁰⁶ But the Preliminary Report does not claim those advantages lead to or result from an abuse of market power. To the contrary, they reflect our efforts to offer better products to consumers. We offer a range of intermediary services that run on the same technical infrastructure so that our customers experience less latency and fewer glitches. In addition, the integration between our different services enables us to offer more comprehensive troubleshooting support to publishers, and maintain a higher standard of user experience, which benefits publishers, users, and advertisers.

Of course, advertisers and publishers have different preferences when it comes to intermediary services. Some prefer to use multiple services from one vendor, and therefore find our ability to offer a suite of intermediary services appealing. Many others, however, prefer mixing and matching among different vendors, and might choose Google for some but not other intermediary services. Responding to that demand, we have built over 100 different integrations with different ad servers, exchanges, supply side platforms (“SSPs”), DSPs, data management platforms (“DMPs”), ad measurement platforms and others offered by Google’s competitors. Many advertisers also use multiple vendors for the same intermediation needs (a practice called “multi-homing”), thereby increasing competition at each level of the ad tech stack. For example, the 100 largest U.S. advertisers on Pathmatics (a digital marketing platform) each use an average of four different DSPs to manage their bids for ad inventory across different ad exchanges.³⁰⁷ Similarly, the 500 largest U.S. publishers each use an average of six different SSPs to manage their ad inventory sales across different ad exchanges.³⁰⁸

The Preliminary Report refers to feedback that the ad intermediation firms listed in Table 3.1 of the Preliminary Report are smaller and less attractive than integrated players.³⁰⁹ This feedback is inconsistent with our own experience in the marketplace, where we face formidable competition from the ad intermediary firms listed in Table 3.1 and observe shifts in spend to competitor intermediary services regularly. Notably, several of the intermediary firms listed in Table 3.1 are also vertically integrated and owned by major corporations that have been investing billions of dollars to expand into online advertising, including AT&T, Verizon, Oracle, Comcast, and Adobe.

The result is a highly competitive intermediary services sector, with repeated instances of new entry and repositioning. Advertisers’ ability to multi-home further reduces barriers to competition. If Google or any other intermediary service provider were to try to increase prices, reduce the quality of their services or impose unwarranted contractual terms (including undesired bundling or tying), customers would quickly switch to other intermediary services.

³⁰⁵ *Id.* at 59.

³⁰⁶ *Id.* at 84.

³⁰⁷ eMarketer, *Average Number of DSPs Used by US Advertisers, Jan 2016-April 2018 (among the largest 100 advertisers on the Pathmatics platform)*, eMarketer Charts (29 May 2018), <https://www.emarketer.com/Chart/Average-Number-of-DSPs-Used-by-US-Advertisers-Jan-2016-April-2018-among-largest-100-advertisers-on-Pathmatics-platform/219189>.

³⁰⁸ Ross Benes, *‘More isn’t always better’: Publishers cut their SSPs by 20 percent this year*, DIGIDAY (13 December 2017), <https://digiday.com/media/isnt-always-better-publishers-cut-ssps-20-percent-year/>.

³⁰⁹ Preliminary Report at 74-75.

11. The Australian Consumer Law, Including the Unfair Contracts Regime, is Effective

The Preliminary Report recommends that contract terms contained in a standard form agreement which are 'unfair' should attract civil pecuniary penalties under the Australian Consumer Law. At present, unfair contract terms can be held to be void and unenforceable, but they do not attract a civil penalty. The Preliminary Report also considers the merits of a general prohibition against the use of unfair practices.

Google considers that the existing unfair contracts regime and the related protections in the Australian Consumer Law are working effectively for consumers and businesses. The Preliminary Report identifies potential consumer issues applicable to data-focused industries but does not provide evidence that the existing law is insufficient to protect consumers. If the Final Report concludes that further review is warranted, this should not be undertaken in the context of digital platforms alone because consumer laws rightly apply across the economy. Considering these issues in the context of the Digital Platforms Inquiry alone risks ignoring the valid viewpoints of many Australian businesses and consumers.