

# Undertaking to the Australian Competition and Consumer Commission

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Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by Alphabet Inc and Google LLC

## Index

1	Person giving the undertaking	1
2	Background	1
3	Commencement of this undertaking	2
4	Duration of Undertaking	2
5	Obligations	3
6	Monitoring Trustee	6
7	Dispute Resolution	8
8	Cessation of ongoing obligations	8
9	Jurisdiction	9
10	General Provisions	9
11	Provision of information to the ACCC	9
12	Disclosure of this Undertaking	10
13	Obligation to procure	10
14	No derogation	10
15	Change of Control	11
16	Costs	11
17	Notices	11
18	Defined terms and interpretation	11
Schedule 1	Dictionary and Interpretation	14
Schedule 2	Data Points Google Will Document With Respect To Individual Access	24
Schedule 3	Data Points Google Will Document With Respect to Service-Level Access	24
Schedule 4	List of Minimum Audit Points	24
Schedule 5	Indicative List of Current Data Types that Can Qualify as Measured Body Data and Health and Fitness Activity Location Data (as of 2 November 2020)	25
Schedule 6	Fast Track Dispute Resolution Procedure	27
Schedule 7	Indicative List of Supported Measured Body Data (as of 2 November 2020)	30

## 1 Person giving the undertaking

This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Alphabet Inc and Google LLC (**Google**).

## 2 Background

### The parties to the proposed acquisition

#### Google

2.1 Google is a US-based information technology company. Google is the largest subsidiary of Alphabet Inc., specialising in internet-related services and products. Google's principal activities include the provision of online search services, advertising and information management technology services, and the provision of marketing and sales support for web search engine services and advertising services. In addition to these core services, Google is also present in:

- (a) technology hardware, including mobile phones (Pixel), earbuds (Pixel Buds), and Nest smart home devices;
- (b) operating systems for mobile phones, wearable devices and laptops;
- (c) other software such as Chrome, Google Maps, Google Calendar and Gmail; and
- (d) payment systems through Google Pay.

#### Fitbit

2.2 Fitbit, Inc. (**Fitbit**) is an American company headquartered in San Francisco, California that develops, manufactures and distributes wearable devices, software, and services in the health and wellness sector under the brand name 'Fitbit'.

2.3 Fitbit's products include fitness trackers, smartwatches, smart scales, and software. Fitbit's wrist-worn wearable devices are supported by the Fitbit mobile app and Fitbit's proprietary non-licensed operating systems.

### The Proposed Acquisition

2.4 Google proposes to acquire all of the issued and outstanding shares of Fitbit subject to the terms and conditions of a 1 November 2019 Agreement and Plan of Merger between Google, Fitbit and Magnoliophytia Inc. (**Proposed Acquisition**). The Proposed Acquisition will result in Fitbit becoming a subsidiary of Google.

### The ACCC's review

2.5 On 27 February 2020, the ACCC commenced its public review of the Proposed Acquisition.

2.6 The ACCC undertook market inquiries and considered information provided by the parties to the Proposed Acquisition, industry participants and others. The purpose of the ACCC's inquiries was to assess whether the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia in contravention of section 50 of the Act.

### The ACCC's competition concerns

2.7 [ACCC to insert]

2.8 [ACCC to insert]

- 2.9 Google does not consider that the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in the Relevant Markets. However, to address these concerns, Google has offered this Undertaking pursuant to section 87B of the Act.

### **The Undertaking remedy**

- 2.10 The objective of this Undertaking is to address the ACCC's competition concerns as set out above that might potentially otherwise arise as a consequence of the Proposed Acquisition. In summary, the Undertaking aims to achieve this objective by placing obligations on Google:
- (a) not to use any Measured Body Data or Health and Fitness Activity Location Data in or for Google Ads;
  - (b) to maintain the auditable holding separate of Measured Body Data and Health and Fitness Activity Location Data from any dataset within Google accessible for use in or for Google Ads;
  - (c) to present each Australian User the choice to grant or deny use by Other Google Services of any Measured Body Data stored in their Google Account or Fitbit Account;
  - (d) to maintain access, subject to user consent consistent with applicable laws and without charge for access, to Supported Measured Body Data for API Users;
  - (e) to make the Core Interoperability APIs available, without charge for access, under the same license terms and conditions that apply to other Android APIs that Google makes available as part of AOSP and on a non-discriminatory basis;
  - (f) not to degrade the Core Interoperability APIs by reducing their functionality to Third-Party Wrist-Worn Wearable Devices relative to First-Party Wrist-Worn Wearable Devices; and
  - (g) not to discriminate against Wrist-Worn Wearable Device OEMs by withholding, denying, or delaying their access to functionalities of Android APIs that Google makes generally available to other Android Smartphone App Developers for use with an Android App, and not to discriminate between Wrist-Worn Wearable Device OEMs and other Android Smartphone App Developers in relation to changing, replacing, or retiring Android APIs, or in terms of the access it provides to Developer Previews and Developer Documentation,

in each case in accordance with, and subject to the conditions set out in, this Undertaking.

## **3 Commencement of this Undertaking**

- 3.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Google; and
  - (b) this Undertaking so executed is accepted by the ACCC.

## **4 Duration of Undertaking**

- 4.1 Subject to clause 4.2, this Undertaking shall remain in effect for ten years from the Control Date.
- 4.2 The ACCC may, during the final year of the initial ten year period, decide to extend the duration of clauses 5.1 to 5.4 of this Undertaking (and any associated clauses or definitions that relate to these paragraphs of the Undertaking) by up to an additional ten years if, in the

ACCC's full discretion, it considers that an extension is necessary to address the issues raised in clauses [2.7 and 2.8] of this Undertaking.

## 5 Obligations

### Google's obligations in relation to Ads

5.1 Google must not use any Measured Body Data or Health and Fitness Activity Location Data in or for Google Ads.

5.2 Google must maintain Data Separation.

5.3 Compliance with the obligations set out in clauses 5.1 and 5.2 above is to be achieved through a technical structure for data storage consisting of auditable technical and process controls, reflected in the following approach:

- (a) **Fitbit Account data.** To the extent either Measured Body Data or Health and Fitness Activity Location Data is written to a Fitbit Account, and this data is not subsequently transferred to a Google Account following the Control Date, this data will not be available to Google Ads. Google must maintain existing separations that are in place as of the Commencement Date between (i) any data that is not transferred to a Google Account and (ii) any dataset or data storage within Google. For clarity, the foregoing does not prohibit Fitbit's use of Google solely as a data processor (i.e. a service provider) following the Control Date, pursuant to a customary data controller to processor agreement (i.e. a service provider agreement), as permitted pursuant to applicable law (including the EU General Data Protection Regulation).
- (b) **Maintenance of an Access Restricted Data Store.** Google will maintain a strictly permissioned virtual storage environment within Google. Measured Body Data and Health and Fitness Activity Location Data sent to Google (i) as part of any migration from a Fitbit Account to a Google Account, or (ii) having been collected using a Google Account from future First-Party Wrist-Worn Wearable Devices, First-Party Connected Scales or Fitbit Other Devices, will be stored in such an Access Restricted Data Store. Access to the compartment of Google's backend storage layer housing such an Access Restricted Data Store will be controlled through Access Permissioning.
- (c) **Implementation of Access Permissioning to the Access Restricted Data Store.** Google will restrict access to such an Access Restricted Data Store through Access Permissioning. Access Permissioning will apply to both individuals and Google Services and Fitbit Services that seek to access Measured Body Data or Health and Fitness Activity Location Data stored in the Access Restricted Data Store:
  - (i) **Individual level access:** Google will limit individual-level Access Permissioning to an authorised, restricted group of personnel for engineering, product, and other related business activities, such as product development or improvement, research, and other service provision, maintenance, or enhancement work, excluding any uses in or for Google Ads. Google will require a fully documented compliance review and approval process for the grant of Access Permissioning. Google will log each access session in Individual Level Access Documentation, which will include at least the criteria set out in **Schedule 2**.
  - (ii) **Service level access:** Google will limit Access Permissioning to Google Services or Fitbit Services that comply with the Data Protection System, thus excluding any uses in or for Google Ads. Any such access will be documented in Service Level Access Documentation, which will include, at least, the criteria set out in **Schedule 3**. Google will log each Service that is granted access in Auditable Service Logs.

- (d) **Implementation of a Data Protection System.** To the extent that a Google Service accesses Measured Body Data or Health and Fitness Activity Location Data, Google will apply a Data Protection System to ensure Data Separation of the accessed data, reflected in the following approach:
- (i) Measured Body Data and Health and Fitness Activity Location Data will either be stored in an Access Restricted Data Store or, if it is stored outside an Access Restricted Data Store, in Temporary Logs and subject to a retention and deletion plan supervised by the Monitoring Trustee. Measured Body Data or Health and Fitness Activity Location Data that a Google Service accesses as a result of an integration between a Google Service and the Fitbit Web API following the Commencement Date is subject to the requirements of Data Separation.
  - (ii) Google will strictly permission these Temporary Logs to enable only access pursuant to clause 5.3(c) above. For the avoidance of doubt, the Temporary Logs will not be accessible to Google Ads.
  - (iii) Google will maintain a Service Level Access Map.

- 5.4 The technical means by which Google achieves Data Separation may change over time to reflect evolving technologies and standards. Any changes will be subject to supervision by the Monitoring Trustee.
- 5.5 Google must present each Australian User the choice to grant or deny use by Other Google Services of any Measured Body Data stored in their Google Account or Fitbit Account.
- 5.6 The obligation set out in clause 5.5 above is without prejudice to, and should not be interpreted based on, any privacy or data protection laws or regulations, and does not come under the jurisdiction or purview of any privacy or data protection regulators.

#### **Google's obligations in relation to Web API Access**

- 5.7 Google must maintain access, subject to user consent consistent with applicable laws and without charge for access, to Supported Measured Body Data for API Users subject to the following conditions:
- (a) API Users' continued compliance with the Fitbit Platform Terms of Service (where access is made available via the Fitbit Web API) or the Terms of Service and the Services User Data Policy (where access is made available via the Relevant Google API).
  - (b) API Users' continued compliance with the Privacy and Security Requirements.
  - (c) Google can terminate access for violation of these requirements where Google has established such a violation or temporarily suspend access where Google has a reasonable belief of violation of such requirements. Google will notify the termination or suspension to the Monitoring Trustee within 14 days and indicate the reason for the termination or suspension.
- 5.8 Access may be provided through: (i) the existing Fitbit Web API (conditioned on the user whose Supported Measured Body Data are being accessed using a Fitbit Account); or (ii) the Relevant Google API (conditioned on the user whose Supported Measured Body Data are being accessed using a Google Account).
- 5.9 Following the Commencement Date and during the term of this Undertaking, Measured Body Data types may be added into the scope of Supported Measured Body Data, as set forth in the Update Mechanism.

#### **Google's obligations in relation to Android APIs**

- 5.10 Google must make the Core Interoperability APIs available, without charge for access, under the same license terms and conditions that apply to all other Android APIs that Google makes available as part of AOSP and on a non-discriminatory basis, meaning without differentiating their availability or functionality depending on whether they are accessed by a First-Party Wrist-Worn Wearable Device or Companion App or a Third-Party Wrist-Worn Wearable Device or Companion App.
- 5.11 Google must not degrade the Core Interoperability APIs by reducing their functionality to Third-Party Wrist-Worn Wearable Devices relative to First-Party Wrist-Worn Wearable Devices.
- 5.12 Google must:
- (a) Not discriminate against Wrist-Worn Wearable Device OEMs by withholding, denying, or delaying Wrist-Worn Wearable Device OEMs' access to functionalities of Android APIs that Google makes generally available to other Android Smartphone App Developers for use with an Android App.
  - (b) Not discriminate between Wrist-Worn Wearable Device OEMs and other Android Smartphone App Developers in relation to changing, replacing, or retiring Android APIs.
  - (c) Not discriminate between Wrist-Worn Wearable Device OEMs and other Android Smartphone App Developers in terms of the access it provides to Developer Previews.
  - (d) Not discriminate between Wrist-Worn Wearable Device OEMs and other Android Smartphone App Developers in terms of the access it provides to Developer Documentation.
- 5.13 Google must not circumvent these requirements:
- (a) By discriminating between Wrist-Worn Wearable Device OEMs and other Android Smartphone App Developers in terms of warnings, error messages, or permission requests displayed in Android Apps.
  - (b) Through conditions imposed on access to the Google Play Store by Wrist-Worn Wearable Device OEMs' Companion Apps (eg regarding the use of data gathered by the Wrist-Worn Wearable Device OEM or the use of Android APIs by the Third-Party Wrist-Worn Wearable Device).
- 5.14 For the avoidance of doubt, Google shall be permitted under this Undertaking to:
- (a) Make available, exclusively for API Development and Testing purposes, in-development Android APIs internally within Google, or to certain third parties.
  - (b) Develop features associated with first-party Google products, apps, or services, for use solely with a First-Party Wrist-Worn Wearable Device, or as part of a partnership with a third party, provided that the implementation of such features shall not impede in any way the functioning of Android APIs for Third-Party Wrist-Worn Wearable Devices. For the further avoidance of doubt, any third party shall remain free similarly to develop and make available features associated with their own first-party products, apps, or services, including for use solely on their own first-party Wrist-Worn Wearable Devices in a proprietary software layer. Nothing in this Undertaking shall require Google to license versions of its first-party applications or services for preinstallation or download onto a Third-Party Wrist-Worn Wearable Device.
- 5.15 Google shall not be in breach of this Undertaking in the event of any degradation of interoperability between an Android Smartphone and a Third-Party Wrist-Worn Wearable

Device that is solely or primarily attributable to any acts or omissions of an Android OEM, Android Smartphone App Developer, or Wrist-Worn Wearable Device OEM.

## 6 Monitoring Trustee

### Appointment procedure

- 6.1 No later than the Control Date, Google must appoint a Monitoring Trustee to carry out the functions specified in this Undertaking for a Monitoring Trustee.
- 6.2 The Monitoring Trustee shall:
- (a) At the time of appointment, be independent of the Parties and each of their Related Bodies Corporate;
  - (b) Possess the necessary experience, competence, and qualifications to carry out its mandate. In particular, the Monitoring Trustee shall possess experience, competence, and qualifications in relation to cybersecurity, data governance, information technology systems (including algorithms), data protection, APIs, and privacy, as applicable, including via the technical expert appointed pursuant to clause 6.12 below; and
  - (c) Neither have nor become exposed to a Conflict of Interest.
- 6.3 Google must remunerate the Monitoring Trustee in a way that does not impede the independent and effective fulfillment of its mandate.
- 6.4 *Proposal by Google.* At least 15 Business Days before the Control Date, Google must submit the name or names of one or more natural or legal persons whom Google proposes to appoint as the Monitoring Trustee to the ACCC for approval. The proposal shall contain sufficient information for the ACCC to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements set out in clause 6.2 and shall include:
- (a) The full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under this Undertaking; and
  - (b) The outline of a work plan that describes how the Monitoring Trustee would carry out its duties under this Undertaking.
- 6.5 *Approval or rejection by the ACCC.* The ACCC shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations in relation to this Undertaking. If only one name is approved, Google shall appoint or cause to be appointed the person or persons concerned as Monitoring Trustee, in accordance with the mandate approved by the ACCC. If more than one name is approved, Google shall be free to choose the Monitoring Trustee to be appointed from among the names approved. Unless agreed by the ACCC in writing, the Monitoring Trustee shall be appointed within one week of the ACCC's approval, in accordance with the mandate approved by the ACCC.
- 6.6 *New proposal by Google.* If all the proposed Monitoring Trustees are rejected, Google shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with clauses 6.2 and 6.4 of this Undertaking.
- 6.7 *Monitoring Trustee nominated by the ACCC.* If all further proposed Monitoring Trustees are rejected by the ACCC, the ACCC shall nominate a Monitoring Trustee, whom Google must appoint, or cause to be appointed, in accordance with a Monitoring Trustee mandate approved by the ACCC.

### Functions of the Monitoring Trustee



- 6.8 The Monitoring Trustee shall assume its specified duties and obligations in order to ensure compliance with this Undertaking. The ACCC may, on its own initiative or at the request of the Monitoring Trustee or Google, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with this Undertaking.
- 6.9 The Monitoring Trustee shall:
- (a) Monitor the performance of this Undertaking by Google, including by auditing on a semiannual basis the Audit Points detailed in **Schedule 4**;
  - (b) Assess the technical means through which Google generates access logs and synthesises such logs and access information into Auditable Service Logs and Auditable Individual Logs that are provided to the Monitoring Trustee for review;
  - (c) Propose in its first report to the ACCC a detailed work plan describing how it intends to monitor compliance with this Undertaking;
  - (d) Provide to the ACCC a written report, sending Google a non-confidential copy at the same time, within fifteen working days after the end of each six-month period so that the ACCC can assess whether this Undertaking is being complied with;
  - (e) Propose, as applicable, to Google such measures as the Monitoring Trustee considers necessary to ensure Google's compliance with this Undertaking;
  - (f) Promptly report in writing to the ACCC, sending Google a non-confidential copy at the same time, if it concludes on reasonable grounds that Google has failed to comply with this Undertaking;
  - (g) Act as a contact point for questions from third parties about the nature and scope of this Undertaking; and
  - (h) Assume the other functions assigned to the Monitoring Trustee under this Undertaking.

#### **Duties and obligations of the Parties**

- 6.10 Google must provide and must cause its advisors to provide the Monitoring Trustee with all such cooperation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of Google's books, records, documents, management or other personnel, facilities, sites and technical information reasonably necessary for fulfilling its duties under this Undertaking and Google shall provide the Monitoring Trustee upon request with copies of any documents except where such disclosure would give rise to a loss of any applicable legal privilege. At any time it plans to start processing data that it reasonably considers qualifies as Measured Body Data or Health and Fitness Activity Location Data, Google shall provide the Monitoring Trustee with a proposed updated **Schedule 5**.
- 6.11 Google must indemnify the Monitoring Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Google for, any liabilities arising out of the performance of the Monitoring Trustee's duties under this Undertaking, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.
- 6.12 At the expense of Google, the Monitoring Trustee shall appoint a technical expert and may appoint other advisors, subject to Google's approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should Google refuse to approve the technical expert and/or advisors proposed by the

Monitoring Trustee the ACCC may approve the appointment of such technical expert and/or advisors instead, after having heard Google. Only the Monitoring Trustee shall be entitled to issue instructions to the technical expert and/or advisors. Clause 6.11 of this Undertaking shall apply *mutatis mutandis*.

- 6.13 Google agrees that the ACCC may share Confidential Information proprietary to Google with the Monitoring Trustee. The Monitoring Trustee shall not disclose Confidential Information received from the ACCC, Google, or Fitbit to any third party other than the ACCC and a technical expert appointed pursuant to clause 6.12.

#### **Replacement, discharge and reappointment of the Monitoring Trustee**

- 6.14 If the Monitoring Trustee ceases to perform its functions under this Undertaking or for any other good cause, including the exposure of the Monitoring Trustee to a Conflict of Interest:
- (a) The ACCC may, after hearing the Monitoring Trustee and Google, require Google to replace the Monitoring Trustee; or
  - (b) Google may, with the prior approval of the ACCC, replace the Monitoring Trustee.
- 6.15 If the Monitoring Trustee is removed according to clause 6.14 of this Undertaking, the Monitoring Trustee may be required to continue its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all the relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in clauses 6.1 to 6.7 of this Undertaking.
- 6.16 Unless removed according to clause 6.14 of this Undertaking, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the ACCC has discharged it from its duties after the Undertaking with which the Monitoring Trustee has been entrusted have been implemented.

### **7 Dispute Resolution**

- 7.1 In the event an API User or Wrist-Worn Wearable Device OEM informs Google and the Monitoring Trustee in writing that Google has either denied or revoked its access in violation of Google's obligations arising from the Web API Access Undertaking or failed to comply with its obligations arising from the Android APIs Undertaking, the Fast-Track Dispute Resolution Procedure described in Schedule 6 shall apply.

### **8 Cessation of ongoing obligations**

#### **Withdrawal**

- 8.1 Google may request withdrawal of this Undertaking pursuant to section 87B of the Act at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

#### **Revocation**

- 8.2 The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

#### **Waiver**

- 8.3 The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or extend the date by which any such obligation is to be satisfied.

#### **Survival**

- 8.4 Unless and until this Undertaking is withdrawn in accordance with clause 8.1, clauses 1, 2, 3, 4, 8, 10, 11, 13, 14, 15, 16, 17 and 18 survive completion of the obligations in clauses 5, 6, 7, 9 and 12.

## **9 Jurisdiction**

- 9.1 Google irrevocably submits to the jurisdiction of the Federal Court of Australia in relation to this Undertaking.
- 9.2 Unless and until notified in writing by Google to the ACCC of the appointment of another person as agent within Australia, Google appoints [ ] as its agent for the purposes of any service process in relation to this Undertaking.

## **10 General Provisions**

- 10.1 Google shall be permitted under this Undertaking to take steps to: (a) meet any applicable law, regulation, legal process, or enforceable governmental request; (b) detect, prevent, or otherwise address fraud, security, or technical issues; (c) improve user privacy or security; or (d) protect against harm to the rights, property, or safety of Google, Google users, or the public as required or permitted by law.

## **11 Provision of information to the ACCC**

- 11.1 Google must notify the ACCC in writing of:
- (a) the anticipated date of the Control Date, at least five Business Days before that date; and
  - (b) the occurrence of the Control Date, within one Business Day of that date.
- 11.2 Google must respond in a timely manner to any questions or requests for information or documents made by the ACCC about this Undertaking.
- 11.3 The ACCC may request information from the Monitoring Trustee directly at any time.
- 11.4 The ACCC may direct Google in respect of its compliance with this Undertaking to, and Google must:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents to the ACCC within Google's custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 11.5 Any direction made by the ACCC under clause 11.4 will be notified to Google, in accordance with clause 17.2.
- 11.6 In respect of Google's compliance with this Undertaking, the ACCC may request the Monitoring Trustee to:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC that may be within the Monitoring Trustee's custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.

- 11.7 Google will use its best endeavours to ensure that the Monitoring Trustee complies with any request from the ACCC in accordance with clauses 11.3 and 11.6.
- 11.8 Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 11 may be used by the ACCC for any purpose consistent with its statutory duties.
- 11.9 In respect of Google's compliance with this Undertaking, the ACCC may in its discretion:
- (a) advise the Monitoring Trustee of any request made by it under this clause 11; and/or
  - (b) provide copies to the Monitoring Trustee of any information furnished, documents and material produced or information given to it under this clause 11.
- 11.10 Nothing in this clause 11 requires the provision of information or documents in respect of which Google has a claim of legal professional privilege.

## **12 Disclosure of this Undertaking**

- 12.1 Google acknowledges that the ACCC may:
- (a) make this Undertaking publicly available;
  - (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
  - (c) from time to time publicly refer to this Undertaking.
- 12.2 Nothing in this clause 12 prevents the ACCC from disclosing such information as is:
- (a) required by law;
  - (b) permitted by section 155AAA of the Act;
  - (c) necessary for the purpose of enforcement action under section 87B of the Act; or
  - (d) necessary for the purpose of making such market inquiries as the ACCC thinks fit to assess the impact on competition arising in connection with this Undertaking.
- 12.3 Nothing in this clause 12 prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

## **13 Obligation to procure**

- 13.1 Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Google to take or refrain from taking some action, Google will procure that Related Body Corporate to take or refrain from taking that action.

## **14 No derogation**

- 14.1 This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Google of any term of this Undertaking.
- 14.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Google does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

## 15 Change of Control

15.1 In the event that a Change of Control is reasonably expected to occur, Google must:

- (a) notify the ACCC of this expectation as soon as practicable; and
- (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on Google pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Google in writing that a section 87B undertaking under this clause is not required.

## 16 Costs

16.1 Google must pay all of its own costs incurred in relation to this Undertaking.

## 17 Notices

17.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)  
Attention: Executive General Manager  
Mergers, Exemptions and Digital

With a copy sent to: [mergersru@acc.gov.au](mailto:mergersru@acc.gov.au)  
Attention: Director, Remedies Unit  
Policy, Coordination and Remedies Branch  
Mergers, Exemptions, and Digital

17.2 Any notice, direction or communication to Google pursuant to this Undertaking must be sent to:

[REDACTED]

17.3 If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).

17.4 If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

### **Change of contact details**

17.5 Google must notify the ACCC of a change to its contact details within three Business Days.

17.6 Any notice or communication will be sent to the most recently advised contact details and subject to clauses 17.3 and 17.4, will be taken to be received.

## 18 Defined terms and interpretation

### **Definitions in the Dictionary**

18.1 A term or expression starting with a capital letter:

- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (**Dictionary**) has the meaning given to it in the Dictionary; or
- (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

## **Interpretation**

18.2 Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

Executed as an Undertaking

Executed by Alphabet Inc by its authorised signatory

.....

(Signature)

.....

(Name and title

.....

(Date)

Executed by Google LLC by its authorised signatory

.....

(Signature)

.....

(Name and title

.....

(Date)

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* on:

.....

And signed on behalf of the Commission:

..... 2020

Chairman

Date

## Schedule 1: Dictionary and Interpretation

### Part 1: Dictionary

**ACCC** means the Australian Competition and Consumer Commission.

**Access Permissioning** means the auditable control of access rights to an Access Restricted Data Store.

**Access Restricted Data Store** means a strictly permissioned virtual data storage environment within Google that holds Measured Body Data and Health and Fitness Activity Location Data, separate from any dataset within Google accessible for use in or for Google Ads. If Google creates any dataset that stores Measured Body Data and/or Health and Fitness Activity Location Data together with another Google dataset, that dataset shall be treated either as an Access Restricted Data Store or as Temporary Logs.

**Act** means the *Competition and Consumer Act 2010* (Cth).

**Ads Undertaking** means the obligations set out in clauses 5.1 to 5.6 of this Undertaking.

**Android APIs** means the APIs, including any improvements or bug fixes, that Google licenses to Android OEMs without charge for access, either as part of AOSP or GMS, for use by Android Smartphone App Developers with an Android App.

**Android APIs Undertaking** means the obligations set out in clauses 5.10 to 5.15 of this Undertaking.

**Android App** means a mobile application designed to run on a compatible Android Smartphone.

**Android Compatibility Definition Document** means the document published at <https://source.android.com/compatibility/cdd> (or any successor site).

**Android OEM** means any actual or potential supplier of Android Smartphones, excluding the Parties.

**Android Smartphone** means a handheld device (as defined in the Android Compatibility Definition Document) running AOSP.

**Android Smartphone App Developer** means a third-party developer of an Android App.

**AOSP** means the open-source Android binary code available at <https://source.android.com> (or any successor site) or any successor open-source smartphone operating system.

**API Development and Testing** means the process by which Google develops and tests new versions of Android APIs, prior to their simultaneous release to Android Smartphone App Developers. For the avoidance of doubt, this may include Google's use of a lead device to develop and test new software.

**API User** means any third party with a software application distributed or made available to Australian Users that requests access to the Fitbit Web API or the Relevant Google API, meets the Privacy and Security Requirements, and agrees to the Fitbit Platform Terms of Service (where access is made available via the Fitbit Web API) or the Terms of Service and the Services User Data Policy (where access is made available via the Relevant Google API).



**Audit Points** means the minimum data and information points that the Monitoring Trustee will audit on a regular basis.

**Auditable Individual Logs** means a list of all individuals that have accessed an Access Restricted Data Store or Temporary Logs and the date of that access.

**Auditable Service Logs** means a list of all Google Services that have access to an Access Restricted Data Store or Temporary Logs.

**Australian User** means a user that has during the period of the Undertaking been (i) located in Australia as determined by Google Account information or Fitbit Account information, as applicable, or (ii) located outside of Australia according to Google Account information or Fitbit Account information, as applicable, but whose IP address associated with use of Google or Fitbit Health and Fitness Apps, as applicable, has been located in Australia for more than 30 consecutive days.

**Benchmark OEMs** means the 5 largest suppliers of consumer wrist-worn wearable devices that process the data types that qualify as Measured Body Data and/or Health and Fitness Activity Location Data if processed by Google or Fitbit as measured in the Industry Report, excluding Fitbit, Google, and any Wrist-Worn Wearable Device OEMs using Wear OS and that provide developers with access to their health and wellness data solely through the Fitbit Web API or the Relevant Google API.

**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

**Change of Control** means:

- (i) the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of Google to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- (ii) the sale or transfer of any assets necessary, or which may be necessary, to enable Google to continue to comply with this Undertaking in its entirety.

**Companion App** means a mobile app available for an Android Smartphone whose functionality includes but is not limited to pairing, notification bridging, and device management and settings for a Wrist-Worn Wearable Device.

**Confidential Information** means any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

**Conflict of Interest** means any conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under this Undertaking.

**Control Date** means the date on which the Proposed Acquisition is completed.

**Commencement Date** means the date described in clause 3.1 of this Undertaking.

**Core Interoperability APIs** means Android APIs licensed as part of AOSP offering at least the functionality of Android APIs that currently exist in AOSP, including any improvements of those functionalities as a result of updates or bug fixes, that, when properly implemented by an Android OEM on an Android Smartphone, and with appropriate user consent, provide the means for a Third-Party Wrist-Worn Wearable Device (or, as appropriate, associated Companion App) to:

- (i) Connect to the Android Smartphone via Bluetooth (or any successor technology), maintain such a connection, and transfer data between the Wrist-Worn Wearable Device and the Android Smartphone;
- (ii) Scan for any nearby Wrist-Worn Wearable Devices and/or make the Android Smartphone visible to those devices;
- (iii) Display and act upon notifications (including phone calls, text messages, and calendar events) from the Android Smartphone on the connected Wrist-Worn Wearable Device;
- (iv) Read, initiate, and reply to a text message sent to the paired Android Smartphone;
- (v) Display controls for initiating, answering or declining phone calls on the paired Android Smartphone;
- (vi) Display, initiate, and edit calendar events on the paired Android Smartphone;
- (vii) Access and control the camera on the paired Android Smartphone;
- (viii) Access a geolocation sensor (eg GPS) on the paired Android Smartphone that is capable of providing geolocation coordinates;
- (ix) Control media playback on the paired Android Smartphone; and
- (x) View and sync contacts stored on the paired Android Smartphone.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Data Protection System** means the auditable set of requirements supervised by the Monitoring Trustee to ensure that Measured Body Data and Health and Fitness Activity Location Data to which a Google Service gains access is permissioned in a manner that prevents its use in or for Google Ads.

**Data Separation** means the auditable holding separate of Measured Body Data and Health and Fitness Activity Location Data from any dataset within Google accessible for use in or for Google Ads.

**Developer Documentation** means information that Google makes generally available to facilitate the use of Android APIs, of the kind that is currently provided for existing APIs on developer.android.com (or any successor site) and <https://developers.google.com/android/> (or any successor site).

**Developer Previews** means a process by which Google makes forthcoming Android software available to Android Smartphone App Developers to facilitate their development of apps for an upcoming Android release.

**Equivalent Data Type** means a commonly defined and standardised consumer health and fitness data type sent to a supplier of consumer wrist-worn wearable devices from sensors on such supplier's wrist-worn wearable devices or that is manually inputted into such supplier's apps usable with such devices.

**First-Party Connected Scale** means any consumer connected scale for measuring a user's weight developed or manufactured by Fitbit or Google, regardless of its branding, that collects or processes Measured Body Data and/or Health and Fitness Activity Location Data. For the avoidance of doubt, this definition does not capture devices that are not sold or otherwise provided to customers for everyday use.

**First-Party Wrist-Worn Wearable Device** means any consumer wrist-worn wearable device developed or manufactured by Fitbit or Google, regardless of its branding, that collects or processes Measured Body Data and/or Health and Fitness Activity Location Data. For the avoidance of doubt, this definition does not capture devices that are not sold or otherwise provided to customers for everyday use.

**Fitbit** means Fitbit, Inc. or any Related Body Corporate of Fitbit, Inc, or any successor entities.

**Fitbit Account** means a user account subject to the Fitbit Terms of Service and Fitbit Privacy Policy during the term of this Undertaking.

**Fitbit Other Device** means any device developed or in development or manufactured by Fitbit at the Commencement Date that is not a First-Party Wrist-Worn Wearable Device or a First-Party Connected Scale and that collects or processes Measured Body Data and/or Health and Fitness Activity Location Data, such as Fitbit Clips.

**Fitbit Platform Terms of Service** means the terms of service applicable to the Fitbit Platform available at: <https://dev.fitbit.com/legal/platform-terms-of-service/>, or any successor site, as may be updated from time-to-time, for instance to comply with changes to applicable privacy laws or regulations. Any updates to the Fitbit Platform Terms of Service following the Commencement Date specific to access to the Fitbit Web API will be consistent with the spirit of the Web API Access Undertaking. Google will notify the Monitoring Trustee of changes to these Fitbit Platform Terms of Service ten days prior to their becoming effective, unless the change is urgent in which case Google will notify the Monitoring Trustee as soon as reasonably practicable and no later than five days after such terms become effective.

**Fitbit Service** means any product or service (including algorithms) operated by Fitbit at any time during the term of this Undertaking.

**Fitbit Web API** means Fitbit's web-based API as described at <https://dev.fitbit.com/build/reference/web-api/> or any successor site that enables third-party applications and services to access and modify Fitbit users' Supported Measured Body Data on their behalf subject to the Fitbit Platform Terms of Service.

**GMS** means Google's proprietary software layer as licensed to OEMs for preinstallation on a compatible Android Smartphone.

**Google** means Google LLC or any Related Body Corporate of Google LLC.

**Google Account** means a user account (as described in [account.google.com](https://account.google.com) or any successor site) created subject to the Google Terms of Service and Google Privacy Policy and used during the term of this Undertaking.

**Google Ads** means any current or future Google Service providing search advertising, display advertising, and advertising intermediation, including advertising measurement, regardless of the property on which ads are displayed, including any Google owned and operated properties. For the avoidance of any doubt, any Fitbit Services providing search advertising, display advertising, and advertising intermediation developed, offered, or sold following the Control Date would constitute Google Ads for the purposes of this Undertaking. Google Ads currently includes the following services: Google Ads (includes Google Display Network, Google Search Network, YouTube Ads, Gmail Ads), Google Marketing Platform (includes Display & Video 360, Search Ads 360, Campaign Manager, Google Analytics, Google Tag Manager, Optimize, Data Studio, Google Surveys), AdSense (includes AdSense for Search, AdSense for Shopping, AdSense for Content, AdSense for Games, AdSense for Video, AdSense for Domains), AdMob (includes Open Bidding), Google Ad Manager (includes Open Bidding, Network Bidding, Dynamic Ad Insertion), Authorized Buyers, Ad Connector, Ads Data Hub, Google Hotel Ads, Google

Shopping Ads, Local Inventory Ads, Manufacturer Center, Merchant Center, and Waze Local Ads.

**Google or Fitbit Health and Fitness App** means a Google or Fitbit web, mobile or wearable application used with either a Google Account or a Fitbit Account and designed to enable a registered user to measure, track, and manage their health and fitness using Measured Body Data and/or Health and Fitness Activity Location Data. As of the Commencement Date these consist of the iOS, Android, and WearOS versions of the Google Fit app and the iOS, Android, Amazon, and Windows versions of the Fitbit apps, including the Fitbit Coach and Fitbit Premium services.

**Google Play Store** means Google's app store for Android Smartphones, available at: <https://play.google.com/store>, or any successor Google app store for Android Smartphones.

**Google Service** means any product or service (including algorithms) operated by Google at any time during the term of this Undertaking. For the avoidance of any doubt, Google Services include any product or service Google may develop in the future, including via acquisitions, regardless of its branding.

**Google Smartphone** means an Android Smartphone that is developed or manufactured by Google.

**Health and Fitness Activity Location Data** means any data (including processed data and derived data) relating to identified or identifiable (as defined under applicable data protection laws) Australian Users' geolocation collected by a health and fitness activity tracking feature on Google or Fitbit Health and Fitness Apps (or any replacement or successor Google or Fitbit Health and Fitness Apps), where such geolocation data is collected and sent to Google or Fitbit from the First-Party Wrist-Worn Wearable Device, First-Party Connected Scale or Fitbit Other Devices.

**Schedule 5** lists the data types that can qualify as Health and Fitness Activity Location Data at the Commencement Date. **Schedule 5** will be updated on a semiannual basis, with the supervision of the Monitoring Trustee, and at such other times as the Monitoring Trustee may reasonably request, to include other data types meeting the definition of Health and Fitness Activity Location Data introduced during the term of this Undertaking. Health and Fitness Activity Location Data does not include (i) any data (including derived data) relating to identified or identifiable Australian Users' geolocation collected by any apps or services other than Google or Fitbit Health and Fitness Apps (or any replacement or successor Google or Fitbit Health and Fitness Apps), including background geolocation data; or (ii) data collected from participating Google Accounts or Fitbit Accounts, as the case may be, operated by Google employees or Fitbit employees as part of internal Google Services or Fitbit Services testing or development, including to test compliance with this Undertaking or any other commitment provided to a competition authority in relation to the Proposed Acquisition.

**Individual Level Access Documentation** means a record of Google's approval process for applying Access Permissioning to individuals.

**Industry Report** means global share of sales (excluding sales in the People's Republic of China) of wrist-worn wearable devices by volume over the most recent four quarters as measured by the most current IDC Worldwide Quarterly Wearable Device Tracker or, were IDC to suspend publication of this tracker, an equivalent industry report.

**Measured Body Data** means any data (including processed data and derived data) relating to identified or identifiable (as defined under applicable data protection laws) Australian Users that measures and tracks the user's body functions, physical condition, fitness activities, nutrition or wellness, and similar functions, and that is sent to:

- (i) Google or Fitbit, from sensors on First-Party Wrist-Worn Wearable Devices, First-Party Connected Scales, or Fitbit Other Devices; or
- (ii) Fitbit, having been manually inputted into a Fitbit Account through a Fitbit Health and Fitness App; or
- (iii) Google, having been manually inputted into a Google Account through a Google Health and Fitness App where such app is usable with First-Party Wrist-Worn Wearable Devices, First-Party Connected Scales, or Fitbit Other Devices.

**Schedule 5** lists the data types that qualify as Measured Body Data as of November 2, 2020. **Schedule 5** will be updated on a semiannual basis, with the supervision of the Monitoring Trustee, and at such other times as the Monitoring Trustee may reasonably request, to include other data types meeting the definition of Measured Body Data introduced during the term of this Undertaking. Measured Body Data does not include data collected from participating Google Accounts or Fitbit Accounts, as the case may be, operated by Google employees or Fitbit employees as part of internal Google Services or Fitbit Services testing or development, including to test compliance with this Undertaking or any other commitment provided to a competition authority in relation to the Proposed Acquisition. For the avoidance of doubt, and to avoid circumvention of the Ads Undertaking, if Google or Fitbit knowingly and intentionally transmits Measured Body Data to a third party for the purpose of receiving such data back to use in or for Google Ads, such received data shall also constitute Measured Body Data.

**Monitoring Trustee** means one or more natural or legal persons who are approved by the ACCC and appointed by Google, and who have the duty to carry out the functions specified in this Undertaking for a Monitoring Trustee.

**Other Google Services** means any Google Service (such as Google Search, Google Maps, Google Assistant, and YouTube) other than:

- (i) Any Google Service or Fitbit Service whose primary purpose is related to users' health and fitness or healthcare;
- (ii) Common or shared Google infrastructure and internal systems, tools, processes, programs, and services (e.g. hosting, network infrastructure, security or any other internal tools (including Google Takeout), platforms and operating systems, backup storage, personnel, or support services (including customer support), payment processing, and fraud prevention, technical engineering support, security, and troubleshooting services);
- (iii) Sharing with or use by Google of Measured Body Data where reasonably necessary for Google to: (a) meet any applicable law, regulation, legal process, or enforceable governmental request; (b) enforce applicable terms of service, including investigation of potential violations; (c) detect, prevent, or otherwise address fraud, security, or technical issues; or (d) protect against harm to the rights, property or safety of Google, Google users, or the public as required or permitted by law.

**Parties** means Google and Fitbit.

**Privacy and Security Requirements** means:

- (i) **Primary Purpose:** The primary purpose for requesting access and use of data must be related to users' health and fitness or healthcare;

- (ii) **Minimum and Proportionate Access:** The application or service must request only the minimum access to user data necessary to perform the functionality;
- (iii) **User Notice:** The application or service must provide adequate notice to the user about their data being accessed and used, prior to such access and use;
- (iv) **Express and Informed User Consent:** The application or service must obtain the user's express and informed consent under applicable data protection laws;
- (v) **Purpose Limitations:** The application or service may only use and transfer data for the permitted purposes for which the API User obtained access to the data and only to the extent necessary, for security purposes, to comply with applicable laws, or with express and informed user consent. The application or service may not use or transfer the data for prohibited purposes, such as personalised advertising purposes, to determine credit-worthiness, or provide the data to data brokers, advertising platforms, or other information resellers;
- (vi) **Security Requirements:** API Users are required to handle data securely in accordance with industry standard security requirements and practices. To ensure compliance with security requirements, Google may require third parties seeking to access Supported Measured Body Data to undergo standardised security assessments, for which API Users may incur a charge to be paid to the third parties conducting the security assessment.

**Public Mergers Register** means the ACCC's public register of merger clearances, available at [www.accc.gov.au](http://www.accc.gov.au)

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au)

**Related Bodies Corporate** has the meaning given to it by section 50 of the Corporations Act.

**Relevant Google API** means the existing Google Fit APIs, described at: <https://developers.google.com/fit>, or any successor site, or a successor Google API that enables third-party applications and services to access and modify Measured Body Data subject to Google's Terms of Service and offering substantially similar or increased functionality as the Fitbit Web API.

**Relevant Market** has the meaning provided in clause 2.7 of this Undertaking.

**Service Level Access Documentation** means a record of Google's approval process for applying Access Permissioning to Google Services.

**Service Level Access Map** means a record of all of the Google Services with service-level access pursuant to clause 5.3(c)(ii) and the storage locations in Google (eg a Temporary Log) in which those services store Measured Body Data or Health and Fitness Activity Location Data they may have accessed.

**Services User Data Policy** means the user data policies applicable to the use of the Relevant Google API (eg the Google API User Data Policy available at <https://developers.google.com/terms/api-services-user-data-policy> and the Fit Developer Guidelines available at <https://developers.google.com/fit/overview>) as may be updated from time-to-time, for instance to comply with changes to applicable privacy laws or regulations. Any updates to the Services User Data Policy following the Commencement Date specific to access to the Relevant Google API must be

consistent with the spirit of the Web API Access Undertaking. Google will provide the Monitoring Trustee on a semiannual basis a list of the changes, if any, that have been made to the Services User Data Policy in the preceding six months.

**Supported Measured Body Data:** as of the Commencement Date, Supported Measured Body Data consists of Measured Body Data collected from any global Google or Fitbit user (and not just from Australian Users) and made available to third parties through the Fitbit Web API under the Fitbit Platform Terms of Service. Such data types are listed in **Schedule 7**. The types of Measured Body Data that can constitute Supported Measured Body Data shall be updated pursuant to the Update Mechanism.

Supported Measured Body Data excludes:

- (i) Data collected solely for the purpose of product testing or development for Google Services or Fitbit Services (including as part of healthcare partner collaborations or early access end user testing), health-related research efforts (such as clinical research studies), or to test compliance with this Undertaking or any other commitment provided to a competition authority in relation to the Proposed Acquisition;
- (ii) Data subject to applicable health or privacy laws and regulations that Google or Fitbit may not lawfully make available to third parties under such applicable laws;
- (iii) Data exclusively made available to users as part of a paid service (such as Fitbit Premium);
- (iv) Data collected separately by Verily, Calico or other separately operated Alphabet companies as part of their separate business and product activities;
- (v) Data collected from Google Services or Fitbit Services offered solely outside of Australia.

**Temporary Logs** means a strictly permissioned, time-limited virtual dataset that contains Measured Body Data and/or Health and Fitness Activity Location Data that have been accessed by Google Services.

**Terms of Service** means the terms of service applicable to the use of the Relevant Google API available at: <https://developers.google.com/fit>, or any successor site, as may be updated from time to time, for instance to comply with changes to applicable privacy laws or regulations. Any updates to the Terms of Service following the Commencement Date specific to access to the Relevant Google API must be consistent with the spirit of the Web API Access Undertaking. Google will notify the Monitoring Trustee of changes to these Terms of Service ten days prior to their becoming effective, unless the change is urgent in which case Google will notify the Monitoring Trustee as soon as reasonably practicable and no later than five days after such terms become effective.

**Third-Party Wrist-Worn Wearable Device** means a Wrist-Worn Wearable Device that is designed by the third party to pair with an Android Smartphone and/or Google Smartphone and that is developed or manufactured by a Wrist-Worn Wearable Device OEM.

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

**Update Mechanism:** following the Commencement Date, Measured Body Data either (i) of a type listed in **Schedule 5** as of the Commencement Date; or (ii) of a type newly made available after the Commencement Date to users in a Google or

Fitbit Health and Fitness App, will come to constitute Supported Measured Body Data if: (i) such data meets the conditions of Supported Measured Body Data set forth above; and (ii) an Equivalent Data Type is made available to developers without charge through publicly documented APIs by at least 3 of the 5 Benchmark OEMs.

On a quarterly basis following the Commencement Date, Google will report to the Monitoring Trustee if a new data type meets the requirements in the preceding sentence. Such a data type will qualify as Supported Measured Body Data no later than one calendar year from the date of such reporting to the Monitoring Trustee, unless the data type met the requirements of the Update Mechanism within the first calendar year following the Commencement Date, in which case that data type will qualify as Supported Measured Body Data no later than two calendar years from the Commencement Date. **Schedule 7** will be updated on a semi-annual basis or at the request of the Monitoring Trustee to include any additional types of Supported Measured Body Data that arose during that period.

**Web API Access Undertaking** means the obligations set out in clauses 5.7 to 5.9 of this Undertaking.

**Wrist-Worn Wearable Device** means any consumer wrist-worn wearable device that is compatible with an Android Smartphone and/or Google Smartphone and that processes data types that would qualify as Measured Body Data and/or Health and Fitness Activity Location Data if processed by Google or Fitbit. For the avoidance of doubt, this definition does not capture devices that are not sold or otherwise provided to customers for everyday use.

**Wrist-Worn Wearable Device OEM** means any actual or potential supplier of Wrist-Worn Wearable Devices other than the Parties.

## Part 2: Interpretation

In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;



- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
  - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision-making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, Google will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.

## Schedule 2 – Data Points Google Will Document With Respect To Individual Access

1. Individual's name
2. Individual's Google ID
3. Individual's role
4. Confirmation that individual is not in a reporting line related to Google Ads
5. Reason for Individual receiving access
6. Date of access

## Schedule 3 – Data Points Google Will Document With Respect to Service-Level Access

1. Name of Google Service receiving access (eg Assistant)
2. List of data types from **Schedule 5** the Google Service can access from the Access Restricted Data Store
3. Reasons for Google Service receiving access
4. Start date of access
5. The Google Service's compliance proposal for adhering to the Data Protection System. This proposal will include at a minimum:
  - (a) An explanation of the process through which the Google Service will ensure that accessed Measured Body Data and Health and Fitness Activity Location Data will be stored in an Access Restricted Data Store or, if it is stored outside an Access Restricted Data Store, will be stored in Temporary Logs
  - (b) Type of storage location of such relevant data accessed by such a Google Service (eg in an Access Restricted Data Store, or Temporary Log(s))
  - (c) An updated version of the Service Level Access Map that accounts for any new storages of Measured Body Data or Health and Fitness Activity Location Data as a result of the new service level access
  - (d) The Google Service's retention and deletion plan with respect to the accessed Measured Body Data and Health and/or Fitness Activity Location Data
  - (e) If such a service creates Temporary Logs, the documentation will include a link to the Google Service's individual access documentation for such relevant Temporary Logs

## Schedule 4 – List of Minimum Audit Points

1. All individuals appearing in Auditable Individual Logs appear in Individual Level Access Documentation
2. All Individual Level Access Documentation provides a reason for access unrelated to Google Ads
3. At the time of access, no individual with a reporting line running into Google Ads appears in Auditable Individual Logs. Google will provide the Monitoring Trustee with the reporting lines up to the Google CEO for all individuals appearing in Auditable Individual Logs drawn directly from Google's Human Resource systems at the Monitoring Trustee's request

4. All Google Services appearing in Auditable Service Logs appear in Service Level Access Documentation
5. All Service Level Access Documentation provides a reason for the service receiving access that is unrelated to Google Ads
6. All Service Level Access Documentation includes an adequate Google Services' compliance proposal as described in **Schedule 3**
7. No Google Ads service appears in Auditable Service Logs
8. Following the Commencement Date, no Google Service has access to the Fitbit Web API or, if a service does, Google has provided to the Monitoring Trustee appropriate Service Level Access Documentation for that service prior to its gaining access. Google will provide the Monitoring Trustee with a list of all services having access to the Fitbit Web API drawn directly from Fitbit's systems at the Monitoring Trustee's request

**Schedule 5 – Indicative List of Current Data Types that Can Qualify as Measured Body Data and Health and Fitness Activity Location Data (as of 2 November 2020)**

Data Type	Measured Body Data	Health and Fitness Activity Location Data
Heart Rate	✓	
Heart Rate Variability	✓	
Cardio Fitness Score	✓	
Time In Heart Rate Zones	✓	
Resting Heart Rate	✓	
VO2 Max Values	✓	
Electrocardiogram	✓	
Breathing Rate	✓	
Height	✓	
Stride Length	✓	✓ <sup>1</sup>
Weight <sup>2</sup>	✓	
Body Mass Index	✓	
Body Fat Percentage	✓	
Steps	✓	
Distance	✓	✓ <sup>3</sup>
Floors	✓	
Altitude	✓	
Calories	✓	
Basal Metabolic Rate (BMR) Calories	✓	
Activity Name	✓	
Activity Minutes (duration)	✓	
Activity Calories	✓	
Activity Distance	✓	
Activity Steps	✓	

<sup>1</sup> When a Fitbit user tracks a run using Activity GPS, Stride Length is updated automatically. Stride Length thus may be partially derived from Activity GPS, which qualifies as Health and Fitness Activity Location data.

<sup>2</sup> Includes "weight" that is part of the user's profile information.

<sup>3</sup> "Distance" is calculated by multiplying "steps" by "stride length", and therefore may include input derived from "activity GPS", which qualifies as Health and Fitness Activity Location Data.

Data Type	Measured Body Data	Health and Fitness Activity Location Data
Activity Floors	✓	
Activity Altitude	✓	
Activity Heart Rate	✓	
Activity Speed	✓	
Activity GPS		✓
Lightly Active Minutes	✓	
Moderately Active Minutes	✓	
Sedentary Minutes	✓	
Very Active Minutes	✓	
Active Zone Minutes	✓	
Swimming (length, stroke style)	✓	
Activity Pace	✓	
Menstrual Cycle Log	✓	
Menstrual Cycle Dates	✓	
Birth Control Log	✓	
Average Period Stats	✓	
Sleep Log (eg date, duration)	✓	
Sleep Efficiency <sup>4</sup>	✓	
Sleep Stages (eg timestamp, length)	✓	
Sleep Score	✓	
Blood Glucose	✓	
Water Intake	✓	
Food Log Item	✓	
Favorite Foods	✓	
Food Log Item Nutritional Information (eg calories, macronutrients)	✓	
Estimated Oxygen Variation	✓	
Blood Oxygen Saturation (SpO2)	✓	
Electrodermal Activity Responses	✓	
Body Temperature	✓	
Sickness Symptoms Log	✓	
Skin Temperature Variation	✓	
Meditation Minutes	✓	
Mood Reflection	✓	
Stress Management Score	✓	
Fitbit Coach Workouts (eg Workout Duration, Calories Burned)	✓	
Fitbit Coach Achievements	✓	
Badges derived from Measured Body Data or Health and Fitness Activity Location Data	✓	
Trophies derived from Measured Body Data or Health and Fitness Activity Location Data	✓	

<sup>4</sup> Fitbit has not collected Sleep Efficiency since 2017. The Fitbit Web API nevertheless still calculates the data type (based on other sleep data) and it remains available to third parties.

## Schedule 6 – Fast Track Dispute Resolution Procedure

- 1 An API User or Wrist-Worn Wearable Device OEM that wishes to avail itself of the fast track dispute resolution procedure (the “**Requesting Party**”) shall inform Google and the Monitoring Trustee in writing, setting out in detail the reasons leading the Requesting Party to believe that Google is failing to comply with the requirements in the Undertaking. The Requesting Party and Google will use commercially reasonable efforts to settle all disputes that may arise through cooperation and consultation within a reasonable period of time not exceeding fifteen working days (such period being extendable by mutual consent of Google and the Requesting Party) (“**Consultation Period**”) after receipt of the request.
- 2 The Monitoring Trustee shall present its own proposal (the “**Trustee Proposal**”) for resolving the dispute within eight working days, specifying in writing the rationale for the Trustee Proposal, and the action, if any, to be taken by Google in order to ensure compliance with the Undertaking vis-à-vis the Requesting Party.
- 3 Should the Requesting Party and Google (together, the “**Parties to the Arbitration**”) fail to resolve their differences of opinion in the Consultation Period, then the Requesting Party may, within 20 working days after the Consultation Period has expired, serve a notice (the “**Notice**”), in the sense of a request for arbitration, to the International Chamber of Commerce (the “**Arbitral Institution**”), with a copy of such Notice and request for arbitration to Google.
- 4 The Notice shall set out in detail the dispute, difference or claim (the “**Dispute**”) and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g., documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by Google and the Trustee Proposal, including a comment as to its appropriateness.
- 5 Google shall, within ten working days from receipt of the Notice, submit its answer (the “**Answer**”), which shall provide detailed reasons for its conduct and set out, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g., documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which Google proposes to undertake vis-à-vis the Requesting Party and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

### *Appointment of the Arbitrators*

- 6 The Arbitral Tribunal shall consist of three persons. The Requesting Party shall nominate its arbitrator in the Notice; Google shall nominate its arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by Google shall, within five working days of the nomination of the latter, nominate the chairman, making such nomination known to the parties and the Arbitral Institution which shall forthwith confirm the appointment of all three arbitrators.
- 7 Should the Requesting Party wish to have the Dispute decided by a sole arbitrator it shall indicate this in the Notice. In this case, the Requesting Party and Google shall agree on the nomination of a sole arbitrator within five working days from the communication of the Answer, communicating this to the Arbitral Institution.
- 8 Should Google fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman, or should the Parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution.
- 9 The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the “**Arbitral Tribunal**”.

### *Arbitration Procedure*

- 10 The Dispute shall be finally resolved by arbitration under the International Chamber of Commerce Rules of Arbitration, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the “**Rules**”). The arbitration shall be conducted in London, United Kingdom, in the English language. For good cause, any Party may apply to the Arbitral Institution (or Arbitral Tribunal as may be appropriate) for an extension of the timelines provided in this Schedule.
- 11 The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of email for the exchange of documents.
- 12 The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitral Tribunal at the organisational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.
- 13 In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the bearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Parties to the Arbitration agree.
- 14 The Arbitral Tribunal shall not disclose confidential information. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee, and outside counsel and experts of the opposing party.
- 15 The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case; and (ii) if the Requesting Party produces evidence of a prima facie case, the Arbitral Tribunal must find in favor of the Requesting Party unless Google can produce evidence to the contrary.

### *Involvement of the ACCC*

- 16 The ACCC shall be allowed and enabled to participate in all stages of the procedure by
  - (a) Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
  - (b) Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural time-table);
  - (c) Giving the ACCC the opportunity to file amicus curiae briefs; and
  - (d) Being present at the hearing(s) and with the permission of the Arbitral Tribunal, it may also make oral observations.
- 17 The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the ACCC without delay.

- 18 In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Undertaking, the Arbitral Tribunal may seek the ACCC's interpretation of the Undertaking before finding in favour of any Party to the Arbitration and shall be bound by the interpretation in respect of the Undertaking.

*Decisions of the Arbitral Tribunal*

- 19 The Arbitral Tribunal shall decide the dispute on the basis of the Undertaking. The Arbitral Tribunal shall take all decisions by majority vote.
- 20 Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.
- 21 The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by Google in order to comply with the Undertaking vis-à-vis the Requesting Party (*i.e.*, specify that the Requesting Party gain access to the relevant API). The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.
- 22 The final award shall, as a rule, be rendered within six months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the ACCC takes to submit an interpretation of the Undertaking if asked by the Arbitral Tribunal.
- 23 The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The ACCC may publish the non-confidential version of the award. The Parties to the Arbitration, the Arbitral Tribunal, all other persons participating in the proceedings and all further persons involved, *i.e.* in the administration of the arbitral proceedings, shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings. All proceedings will be held in private and remain confidential.
- 24 Nothing in the arbitration procedure shall affect the power to the ACCC to take decisions in relation to the Undertaking in accordance with its powers under the Act.

**Schedule 7 – Indicative List of Supported Measured Body Data (as of 2 November 2020)**

<b>Supported Measured Body Data</b>
Heart Rate
Time In Heart Rate Zones
Resting Heart Rate
Weight
Height
Body Mass Index
Body Fat Percentage
Steps
Distance
Floors
Altitude
Basal Metabolic Rate (BMR) Calories
Calories
Activity Name
Activity Minutes (duration)
Activity Calories
Activity Speed
Activity Pace
Activity Steps
Activity Floors
Activity Altitude
Activity Heart Rate
Activity Distance
Lightly Active Minutes
Moderately Active Minutes
Sedentary Minutes
Very Active Minutes
Swimming (length, stroke style)
Sleep Log (eg date, duration)
Sleep Stages (eg timestamp, length)
Sleep Efficiency
Water Intake
Food Log Item
Favorite Foods
Food Log Item Nutritional Information (eg calories, macronutrients)