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Submission to Digital Advertising Services ('AdTech') Inquiry

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Digital Advertising Services ("AdTech") Inquiry

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About this Submission

Our submission is not intended as a comprehensive response to all of the issues raised in the ACCC's *Digital Advertising Services Inquiry: Interim Report* ('*Interim Report*'), but rather focuses on topics on which our research can shed light. We thus limit our submission to three issues:

1. the scope and focus of the inquiry;
2. the analysis of issues at the intersection of competition and privacy; and
3. international (trade and conflicts of laws) considerations that should be included in the analysis.

Our submissions reflect our views as researchers and are not an institutional position.

Scope and focus of the inquiry

In our earlier submission dated 20 April 2020, we discussed the need to recognise the relationship between concentration in Ad Tech markets and concentration in other domains. Here, we make an additional point about the limited range of interests considered in the *Interim Report*.

In particular, we think it critical that the scope of the inquiry explicitly includes and focuses upon what drives the behaviour that produces economic opportunities for advertisers, being the content and brand identities of creators. The most valuable data in this media ecosystem includes professionally created content and the brand identities attached to them. This includes brands and traditional copyright content such as the output of bands, film makers, copy writers, editors but it also includes the thought bubbles of celebrities and social influencers. These content/brand creators are one of the most significant classes of participants whose efforts drive the interest of consumers in participating on a particular platform, generating advertising opportunities at all the layers of this data ecosystem. Without these contributors, there is little advertising pull. This content is often more central to the longevity of participants within the new media landscape than news.

While today the commercial viability and sustainability of professional classes of content creators is dependent upon their capacity to generate revenue from online advertising and data streams similar to a traditional media owner as, for example, Spotify has demonstrated, their interests are not well catered for by either incumbent media owners or the large digital platforms. Content creators need more experimentation with the development of new platforms that allow for different kinds of engagement with them; doing this requires them to have a better understanding of and management of data relationships with followers, fans and those incidentally interested. These interests and data needs are not currently considered in the *Interim Report* because the publisher's interest is only imagined with respect to the economy of incumbent traditional media owners. There is an oversight of the data interests of those whose contributions are most central: those who actually create and produce the high value content and data relationships that drive the information ecosystem that brings value to brand.

The *Interim Report* reflects an argument among major intermediaries, whereas disintermediation, or more sympathetic intermediation respectful of all interests, may offer potentially fruitful and innovative opportunities to both 'creators' and 'consumers'.

Privacy

In this section, we focus on the privacy elements of the *Interim Report's* Proposals and related questions for stakeholders. Accordingly, and subject to our comments concerning the definition of 'personal information', these remarks only relate to processes within the digital advertising supply chain that collect, use, or disclose personal information.

From a 'first-principle' perspective, individuals should be able to exercise control over the way information about them is collected, used, and disclosed. This is the goal of data protection and privacy laws. At present it is profoundly, and perhaps deliberately, difficult for individual data subjects to exercise such control within the digital advertising ecosystem. The structure of the supply chain, and the way data is used, is opaque and complex.[1] The opacity is compounded by the imprecise definition of 'personal information'[2] in the *Privacy Act 1988* (Cth) ('*Privacy Act')*, particularly within the context of information that has undergone a de-identification process but where a risk remains that information could be re-identified in part or in full by entities with access to other data sets and re-identification techniques. Moreover, Australian privacy law falls below

[1] Australian Competition & Consumer Commission, *Digital Advertising Services Inquiry: Interim Report* (Report, December 2020) 143.

[2] *Privacy Act 1988* (Cth) s 6 ('*Privacy Act').*

European standards on matters such as the right to restrict processing[3] and the right to erasure ('right to be forgotten').[4] Lastly, and more generally, effective oversight of the use of personal information by the private sector in this country is currently limited because of inadequate funding of the Office of the Australian Information Commissioner ('OAIC'),[5] the absence of a dedicated Privacy Commissioner, and the continuing lack of a private right of action to protect one's interests if OAIC is unable or unwilling to assist.

Privacy ought to be a central consideration for this inquiry. For most Australians, their concern about AdTech is not "how do we make this market more efficient?" but rather, "how can I avoid creepy advertising that seems to track me online?" This is especially so if they get a glimpse behind the usually opaque, bland privacy policies and realise the extent and global reach of the entities who track and profile them online.

The Review of the *Privacy Act 1988* – and the prospect of accompanying legislative changes – complicates any discussion of specific privacy law issues applicable to digital advertising. Many of the reforms proposed in the 'Review of the *Privacy Act 1998*' issues paper ('Issues Paper') have direct bearing on the proposals and issues raised in the *Interim Report*. For example, the Issues Paper canvasses including technical data, inferred and de-identified data in the statutory definition of 'Personal Information'. Such a change would directly implicate Proposals 5 and 6 – bringing both within the ambit of the *Privacy Act* and the attendant compliance regime. Similarly, improving collection notification and consent processes[6] would seem to be necessary for effective implementation of Proposals 1, 5 and 6. Accordingly, care should be taken to harmonise recommendations flowing from both the Ad Tech Inquiry and the Review of the *Privacy Act 1988*.

We also note that 'Chapter 7: APP 7 – Direct Marketing' ('APP 7') of the OAIC's Australian Privacy Principles Guidelines, in combination with the *Spam Act 2003* (Cth) ('*Spam Act*'), are unfit to regulate the use of personal information within the current and future digital advertising supply chain. The entire supply chain uses and discloses personal information. However, APP 7 and the *Spam Act* only envisage a direct relationship between the advertiser and the data subject (assuming targeted digital display advertising is direct marketing).[7] This, coupled with the lack of a right to erasure, makes it practically difficult for data subjects to opt out at some later point after opting in, or after being treated as giving some form of implicit consent.

Proposal 1: Measures to Improve Data Portability and Interoperability

We note that the aim of Proposal 1 is to address barriers to entry rather than to give data subjects increased control over their personal information. However, we support a data portability framework where that framework enhances data subject's ability to exercise control over that data.

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[3] *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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)* [2016] OJ L 119/1 art 18.

[4] Ibid art 17.

[5] Denham Sadler, 'Privacy Office is Still "Severely Underfunded"', *InnovationAus* (online, 13 October 2020) < https://www.innovationaus.com/privacy-office-is-still-severely-underfunded/>.

[6] As discussed in Issue Paper pages 37–40, 41–2.

[7] 'What is Targeted Display Advertising?', *3D Digital* (Blog Post, 1 August 2017) < https://www.3ddigital.com/digital-marketing/targeted-display-advertising/>; Office of the Australian Information Commissioner, 'Australian Privacy Principles Guidelines: Chapter 7: APP 7 – Direct Marketing' (Guidelines, 22 July 2019); *Spam Act 2003* (Cth) s 5(1), 6(1), 18.

The regulation of any such framework should be harmonised with existing frameworks such as the Consumer Data Right.

Conversely, we do not support interoperability measures that facilitate the transfer of data between firms without a request from the data subject. Such a measure is contrary to the principle that individuals should have control over how their data is use and would exacerbate the concerns outlined by the *Interim Report.*[8]

The *Interim Report* does acknowledge that this proposal would 'require safeguards to ensure that consumers have sufficient control over the sharing and processing of their data'. However, this is a vague and broad recommendation which does not address whether it is possible or feasible to improve data portability and interoperability while protecting consumer privacy simultaneously. Given the concerns the *Interim Report* raises, it would be pertinent for the ACCC to outline what these safeguards would look like and how they can effectively protect a consumer's privacy while expanding and promoting competition in the Ad Tech sphere.

Proposal 2: Data Separation Mechanisms

As with Proposal 1, we support purpose limitations provided they are transparently, clearly and concisely framed so that data subjects can exercise meaningful control over the collection, use, and disclosure of information about them. In our submission to the *Privacy Act 1988* Review, we also propose mechanisms for communicating privacy policies and purpose limitations more efficiently to consumers.

Proposal 2 suggests using purpose limitations, which are provided for in the *Privacy Act*.[9] However, the law does not currently provide for the kind of fine-grained purpose siloing envisaged by this Proposal. Accordingly, for this to work, there would need to be a significant shift in industry practice for obtaining consent to process and disclosing purposes of processing.

Proposal 6 – Implementation of a Common User ID to Allow Tracking of Attribution Activity in a Way which Protects Consumers' Privacy

We do not support the proposal of implementing or using a common user ID. The claim that invisible, non-user-controlled technical identifiers can be disclosed and treated as common property amongst an open-ended industry devoted to tracking and psychographic profiling without fundamentally compromising both privacy and trust is not credible. Implementing or using a common user ID will allow advertisers to re-identify the customers as long as they have a customer base and be able to link the common user ID back to the customer. The risk of re-identification is even more critical so for organisations with a large customer base such as Facebook and Google.

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[8] See, eg, Australian Competition & Consumer Commission, *Digital Advertising Services Inquiry: Interim Report* (Report, December 2020) 78–9 and Box 2.8.

[9] Office of the Australian Information Commissioner, 'Australian Privacy Principles Guidelines: Chapter 3: APP 7 – Collection of Solicited Personal Information' (Guidelines, 22 July 2019); Office of the Australian Information Commissioner, 'Australian Privacy Principles Guidelines: Chapter 6: APP 7 – Use or Disclosure of Personal Information' (Guidelines, 22 July 2019).

We believe this proposal presents unacceptable privacy risks and would be opposed by consumers. If such a proposal were adopted, a variety of measures would need to be put in place including:

- Each organisation to implement and use a unique user advertising ID for advertising and tracking purposes, without using existing customer reference numbers or loyalty numbers which may be subject to re-identification;
- Using aggregation technologies to advertise to customers on a cohort basis, which is what Google is doing under the GDPR, without the need to identify each individual;
- Consumers having the ability to opt-in, with clear information on how their data would be handled, including a means for ongoing tracking each of the entities handling of their ID, and this should be fully independent of other transactions in which they may wish to enter ('unbundled');
- Data subjects retaining knowledge and control over data associated with them (including all data associated with their ID);
- Data subjects having the knowledge of who has access to their data, including 3rd parties or advertising agencies which the data subjects did not directly share with;
- Data subjects having the right to delete data about themselves (including all data associated with their ID and inferences drawn therefrom);
- Consumers having the ability to pursue litigation, including class action litigation, for breach of privacy arising from the scheme, or from any misuse of the ID in other settings (including by fraudsters, hackers and ID thieves).[10]

The need to better define technical data and personal information

In figure 1.15, the ACCC listed five types of data:

1. Personal Data
2. Identifiable Data
3. Anonymised Data
4. Re-identifiable Data
5. Targetable Data

Based on the definition of personal information from the *Privacy Act 1988*, personal data, identifiable data and re-identifiable data are all subsets of personal information.

But if we look at the graph closely, not all data collected via online searches, web browser and online payment systems is identifiable or re-identifiable data. A lot of the collected data include hashed IDs, unique identifiers and temporary session IDs. Such data only becomes identifiable if it is linked to a customer reference number or a loyalty card number. In practice, such link may not always exist when sharing data with advertisers.

The industry needs better guidance on what constitutes personal information and mapping the personal information definition to technical data used today. Given individuals have a right to access and correct their personal information, some temporary technical identifiers may not be saved for future access. This presents additional challenges for organisations to maintain data governance. ACCC should not assume that all the technical identifiers can be used to identify or re-identify an

[10] This is broadly consistent with the recommendations of the five prior reviews of privacy law in Australia that a private right of action for breach of privacy, which is available in most other comparable countries including US, UK, NZ, Canada and the EU, is needed. The most recent was the Australian Law Reform Commission's *Final Report, Serious Invasions of Privacy in the Digital Era* (Report 123), 2014.

individual. It will be better to categorise data aligning with technical practices and the personal information definition, for example:

1. Personal Information
2. Technical Attributes
3. Anonymised Data
4. Analytics Data
5. Data for ad delivery

International (trade law and conflicts of laws) considerations

The global dimensions of the market in digital advertising services and global flows of digital data pose certain challenges for national jurisdictions seeking to address perceived failures in that market, such as anti-competitive behaviour, conflicts of interest, and opacity of pricing. Any proposals developed by the ACCC will need to be scrutinised carefully to ensure that they are not vulnerable to being characterised, in their effects, as arbitrary or unjustifiable discrimination or a disguised restriction on trade contrary to Australia's commitments under free trade agreements. Data separation mechanisms required of large digital platforms could, for instance, potentially be viewed in this light. On the more positive side (for the ACCC's purposes), most free trade agreements to which Australia is a party include chapters or provisions on competition that are designed to support states' adoption and implementation of competition law and policy and to facilitate exchange of evidence and other cooperation to aid competition law enforcement.

Conflicts of laws (or private international law) issues would also need careful attention in connection with any proposals to try to impose Australian regulatory requirements on Google or other dominant participants in the digital advertising services market. Existing practice indicates that platform operators often include choice of law clauses in their commercial agreements with other businesses by which they seek to exclude application of the laws of jurisdictions with regulatory requirements adverse to their interests (except where the application of that law is expressly rendered mandatory or non-excludable). Considering the dominance that Google enjoys across the ad tech supply chain, business counterparties may have little choice but to accept the choice of law clauses preferred by them or other large platforms. In the same vein, it would also be important to consider and evaluate a number of possible ways of framing the jurisdictional scope of any measures that the ACCC develops – that is, to identify which territorial link(s) to Australia would trigger the application of the measures in question. Some attention will need to be devoted to how any measures that Australia adopts are likely to interact in practice with comparable measures under consideration in the EU, the UK and elsewhere. For example, there may be conflicts between Proposal 6 (discussed above) and GDPR requirements, making it difficult for international organisations to comply. Fostering dialogues and links with departments with similar competition oversight to the ACCC to develop stronger international consensus around management of data markets is important to change commercial cultures in ways that maximise the public interest.

Yours sincerely,

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