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Australian Competition and Consumer Commission
By email: AdTechInquiry@acc.gov.au

Ad Tech Inquiry

About us

The Allens Hub for Technology, Law and Innovation ('the Allens Hub') is an independent community of scholars based at UNSW Sydney. As a partnership between Allens and UNSW Law, the Allens Hub aims to add depth to research on the diverse interactions among technology, law, and society. The partnership enriches academic and policy debates and drives considered reform of law and practice through engagement with the legal profession, the judiciary, government, industry, civil society and the broader community. More information about the Allens Hub can be found at <http://www.allenshub.unsw.edu.au/>.

About this Submission

Our submission is not intended as a comprehensive response to all of the issues in the inquiry, but rather focuses on topics on which our research can shed light. We thus limit our submission to two issues:

1. the scope of the inquiry, particularly the focus on ad tech markets in isolation; and
2. the role and use of data and, in particular, transparency in how suppliers deal with consumer and other data.

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

Scope of the inquiry and market structures

The inquiry focuses on the market power within the ad tech industry but should also explicitly recognise that market concentration in this domain can often result from concentration in other markets. Many ad tech market participants operate across multiple markets and ad tech activities are sometimes ancillary or additional to their other activities. Where that is the case, market participants may be able to leverage existing market power for competitive advantages in ad tech markets.

As the ACCC recognised in its *Digital Platforms Inquiry*,¹ digital platforms are able to leverage across markets their existing market power as social media companies, search engines, retailers, and so on. Digital platforms may be able to capitalise on their expansive and privileged access to both user and

¹ See ACCC, *Digital Platforms Inquiry Final Report* (Report, June 2019), in particular parts Part 1.2, Part 3.3.

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advertiser data. As ‘gatekeepers’ in their respective domains, platforms are able to rely on network effects and accrued data to entrench their power across all markets – including ad tech markets.² The *Digital Platforms Inquiry’s* recommendations address these concerns in relation to digital platforms.³ The present inquiry should also recognise that other ad tech market participants, those with power in markets outside of the ‘attention economy’, might similarly be able to leverage that power to gain ad tech market power.

One example – which the ACCC noted in its *Customer Loyalty Schemes* inquiry⁴ – arises in the supermarket industry. Coles and Woolworths each command a significant share of the grocery market and have both recently launched ad tech initiatives, offering suppliers-as-advertisers access to vertically integrated ad tech platforms and promising guaranteed results on the back of the supermarkets’ existing troves of consumer data.⁵ Their ad tech products include targeted search advertising, beyond the scope of this enquiry, as well as personalized banner and email advertising products.⁶ Neither supermarket could be considered a ‘main competitor’ in broader ad tech markets. However, their grocery industry market power (their ‘gatekeeper’ roles and the ‘network effects’ generated by their market share, sheer size, and geographic pervasion; their financial capacity for leveraging power into new markets) may enable them to behave as quasi-monopolists within their own ad tech sub-category. This transferred ad tech market power may then be reinforced by a number of additional factors: the supermarkets’ unique ability to offer ads reaching consumers at (or accompanying them to) the point of sale;⁷ their unique claims to highly detailed loyalty card and other shopper data, and their access to similarly detailed advertising and sales data;⁸ and their ability to offer potential ad tech customers a complementary range of non-tech ad products, providing one-stop ‘ad campaign solutions’.⁹

For large digital platforms and those companies aspiring to platformization, underlying market power – in social media, retail, etc. – may create, reinforce, and be reinforced by ad tech market power. Fair conditions for all ad tech market participants will be best served by an inquiry that, taking into account the ACCC’s existing work in the *Digital Platforms* and *Customer Loyalty Schemes* inquiries, examines the interaction and intersection of these multiple markets and mechanisms.

² Lina M Khan, ‘Sources of Tech Platform Power’ (2018) 2 *Georgetown Law Technology Review* 325, 325–31. See also Julie E Cohen, ‘Law for the Platform Economy’ (2017) 51 *UC Davis Law Review* 133, 139.

³ ACCC, *Digital Platforms Inquiry Final Report* (Report, June 2019), Recommendation 4; Recommendation 5.

⁴ ACCC, *Customer Loyalty Schemes Final Report* (Report, December 2019) 101–2.

⁵ Paul McIntyre, ‘Coles, Woolies rush to compete with ad platforms’, *Australian Financial Review* (3 June 2019) 30.

⁶ Woolworths: Cartology, *Media Kit - Woolworths* (2020) 7 <https://www.cartology.com.au/content/dam/cartology/about-us/our-solutions/Supermarkets%20Media%20Kit%202020.pdf#zoom=45>; Coles: ‘CitrusAd for Retailers’, *CitrusAd* (Web Page) <https://www.citrusad.com/retailers>.

⁷ ACCC, *Customer Loyalty Schemes Final Report* (Report, December 2019) 50–1.

⁸ *Ibid* 89, 101–2.

⁹ See, eg, Cartology, *Media Kit - Woolworths* (2020) <https://www.cartology.com.au/content/dam/cartology/about-us/our-solutions/Supermarkets%20Media%20Kit%202020.pdf#zoom=45>.

Lack of transparency in how suppliers deal with consumer data and auction and bidding processes

Lack of transparency in how suppliers deal with consumer data requires broader reform of Australia's privacy law and better education of consumers. However, as a short-term measure, explicit informed consent should be required for processing and sharing any personal data in the ad tech industry.

A move to requiring explicit informed consent (our proposed short-term measure) would bring Australia closer to the data protection regime operating in Europe under the General Data Protection Regulation (GDPR).¹⁰ The interpretation of this requirement remains subject to debate and controversy, even in Europe. Data transfers within the ad tech industry are often difficult to explain to consumers in advance. One interpretation relied on by the ad tech industry suggests that these transfers should not require consent, instead being justified as a 'legitimate interest' for processing of personal data under Article 6 of the GDPR. However, as Hub researchers Zalnieriute and Churches have suggested, such an argument goes against the fundamental principle of transparency of data protection law.¹¹

Given the complex supply chains and amounts of personal data processed, it is unsurprising that data transfers and real time bidding have recently attracted special attention from the European Data Protection Authorities and UK's Information Commissioner. Australian industry is also implicated in these developments and should be aware of the implications from such regulatory action. For example, in May 2019, the Irish Data Protection Commission commenced a statutory inquiry into Google Ireland Limited's processing of personal data in the context of its online Ad Exchange.¹² 'The purpose of the inquiry is to establish whether processing of personal data carried out at each stage of an advertising transaction is in compliance with the relevant provisions of the GDPR principles of transparency and data minimisation.'¹³ In June 2019, the UK Information Commissioner has also published a report on real-time bidding.¹⁴ The report identified a range of issues that point to non-compliance with the GDPR, and gave ad tech industry a six-month deadline to make changes. There is no evidence that the industry has taken serious steps to reform its practices, and they (including potentially Australian companies) risk operating in breach of data protection law.

However, the proposed short-term measure of seeking explicit consent may not be sufficient. Making the process transparent and explaining to the average consumer how their personal data is used in a complex real time bidding supply chain, with multiple ad networks and technologies – Supply Side Platforms (SSPs), Content Delivery Networks (CDNs), Ad Exchanges, agency trade desks, Data Management Platforms (DMPs), Demand Side Platforms (DSPs) – is challenging. Commercial websites and giant Internet platforms, such as Facebook, often fail to explain much simpler things to consumers

¹⁰ Regulation 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 (2016) 119 OJ L 1 ('General Data Protection Regulation').

¹¹ Monika Zalnieriute and Genna Churches, 'When a "Like" Is Not a "Like": A New Fragmented Approach to Data Controllability' [2020] *Modern Law Review* 1 ('When a "Like" Is Not a "Like"').

¹² Irish DPA, Press Release, 'Data Protection Commission opens statutory inquiry into Google Ireland Limited,' 22nd May 2019, <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-opens-statutory-inquiry-google-ireland-limited>, accessed 23 October 2019.

¹³ Ibid.

¹⁴ "Update report into adtech and real time bidding", Information Commissioner's Office, 20 June 2019, <https://ico.org.uk/media/about-the-ico/documents/2615156/adtech-real-time-bidding-report-201906.pdf>.

– for example, that personal data is collected for further processing via website plug-ins and Facebook ‘Like’ buttons.¹⁵ Further, the risks to which data subjects are subjected (and which should be disclosed) are difficult to predict because the scale and speed of processing personal in this complex supply chain creates conditions for data leaks and unauthorised uses of data. We note that the difficulty of ensuring transparent disclosures of data uses is one motivation for ACCC’s focus on ad tech.

Broader privacy law reform incorporating greater transparency in how consumer data is used in ad tech supply chains is not only an important issue for competition and consumer law. As we suggest in Allens Hub submission to the Select Committee on Foreign Interference through Social Media, and our work on data protection and privacy,¹⁶ the lack of appropriate data protection and transparency in data use has broader implications for social and political lives. In particular, it is one thread that contributes the ability of corporate actors (such as Cambridge Analytica) and foreign powers to manipulate Australian voters through voter profiling.

In addition to reform of privacy law, transparency in data practices should be accompanied by broader education of citizens and consumers. The ability of the public to understand data practices depends not only on corporate disclosures but also on the underlying level of knowledge of the people with whom information is shared. For example, while many disclose that data is used for ‘marketing purposes’, those without an understanding of the ad tech industry may not realise that involves bringing different sources of data together to profile consumers for targeted commercial and/or political information campaigns and differentiated pricing. Transparency to consumers unfamiliar with current ad tech industry practices thus requires that prospective uses be made explicit. Over the longer term, it will also be important to educate consumers on how their data is used so that they can make more educated decisions, both about sharing data and about responding to information campaigns.¹⁷

Yours sincerely,

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¹⁵ Zalnierute and Churches (n 11).

¹⁶ Ibid.

¹⁷ Bennett Moses L, 2019, Helping future citizens navigate an automated, datafied world, <https://education.nsw.gov.au/content/dam/main-education/teaching-and-learning/education-for-a-changing-world/media/documents/Helping-Future-Citizens-Lyria-Bennett-Moses.pdf>
