



Submission to

ACCC: Ad Tech Inquiry

on behalf of

Australian Association of National Advertisers

May 2020

Introduction

The AANA is the peak body for advertisers and has represented national advertisers for over 90 years. It represents the common interests and obligations of companies across all business sectors involved in advertising, marketing and media.

The advertising industry plays a fundamental economic role in society - contributing approximately \$40 billion to the Australian economy and employing over 200,000 people¹. It is the driver of consumer choice and, by promoting competition, helps consumers get better value for money. It enables innovation to be brought to market, underpins jobs - particularly in traditional media - and stimulates economic growth.

Submission

AANA has worked with all relevant parties in the marketing eco-system to improve the transparency of the ad tech supply chain. The current system remains unnecessarily complex and more work needs to be done if advertisers are going to have trust and confidence in the ad tech market.

However, despite these issues, the AANA and its members acknowledge that online advertising and programmatic advertising specifically do offer value to advertisers, their brands and their consumers and now form a necessary and welcome part of the 'marketing mix', alongside many other channels such as TV, outdoor and radio.

This submission highlights the key issues in the current ad tech supply chain that need to be addressed, proposes solutions that may help to address those issues and also answers those specific questions posed in the ACCC issues paper that are relevant to the AANA and its members.

The AANA's objective is to advocate for and help establish an open and transparent ad tech eco system where advertisers and their suppliers can deliver fair value return for the mix of services that are the appropriate choice for each advertiser. For this to work in practice, the AANA believes that the standardisation of data flows and contractual access to these will be critical. The AANA will work with the relevant industry bodies in the supply chain (particularly the Media Federation of Australia (MFA) and the Interactive Advertising Bureau (IAB)) to secure the AANA's objective of an open and transparent ad tech supply chain. The industry through its representative bodies has a strong track record of working together on industry matters such as the self-regulation of advertising content.

Current Ad Tech Market Is Opaque

The ad tech supply chain is currently opaque and un-auditable and whilst it continues to lack transparency, the AANA and its members will be suspicious and guarded about its efficient and effective operation. While we are not aware of instances of anti-competitive behaviour or fraud, continued lack of transparency results in continued lack of trust and confidence in its use by advertisers.

¹ *Advertising Pays: the economic, employment and business value of advertising*, June 2016
<http://www.advertisingpays.com.au/>

Attempts by advertisers to audit their ad spend are met with confusing approval processes and sometimes refusals to provide data to independent auditors. It is a feature of the current system that independent auditors are excluded under most media buying agreements from accessing all the data they need to complete a full and accurate audit of an advertiser's ad spend. Much of this can be driven by 'walled gardens.'

A recent in-depth UK study conducted by the Incorporated Society of British Advertisers (ISBA) and PwC² into the transparency of the programmatic supply chain found it almost impossible to determine with any certainty the amount of ad spend being retained by each level in the ad tech supply chain, with 15 per cent of advertiser spend being unattributable. Figure 1 summarises the average proportion of advertiser spend that can be attributed to each layer of the ad tech supply chain as determined in the ISBA/PwC study:

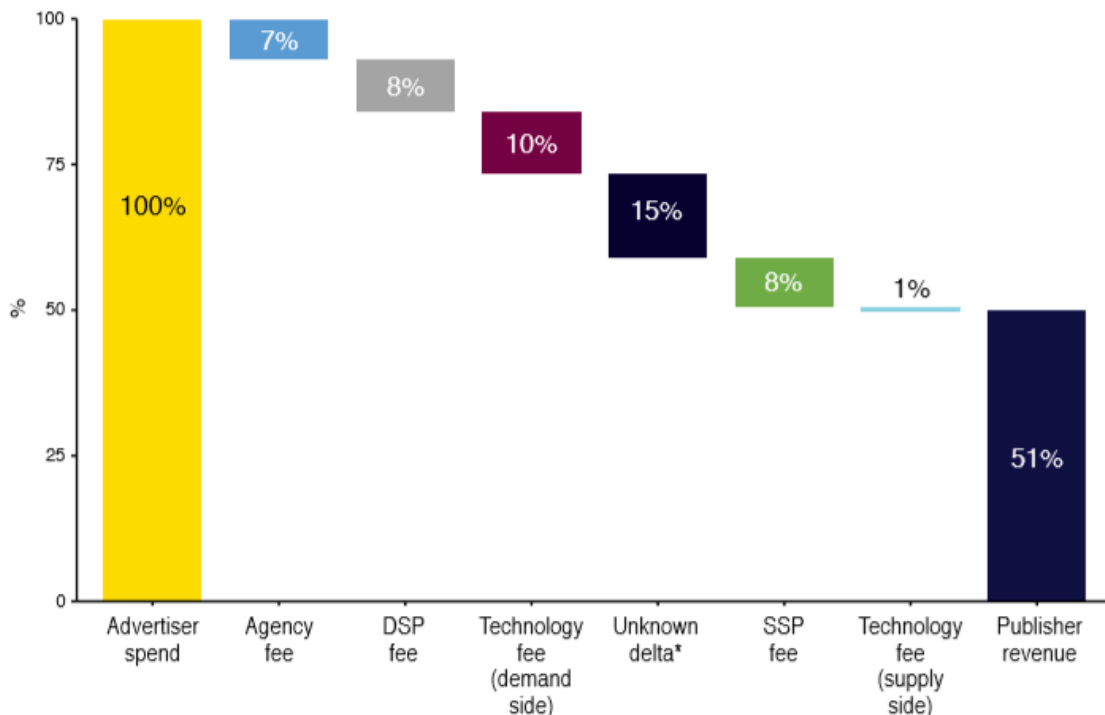


Figure 1

The ISBA/PwC study found that around 51 per cent of ad spend is received by the publishers. The study found that the causes for the unattributable amount - 15 per cent - (also known as the "unknown delta") were hard to pinpoint and further investigation is justified.

Key challenges highlighted in the ISBA/PwC study report included:

- **‘Chicken and egg’ permissioning** - up to four separate parties were required to approve the release of one data set for one part of the supply chain and a lack of clarity over which party’s approval is required for audit access frustrated attempts to carry out a meaningful audit and prevented full transparency being provided to the advertiser in a timely, cost-effective manner.

² ISBA Programmatic supply chain transparency April 2020 <https://www.isba.org.uk/media/2424/executive-summary-programmatic-supply-chain-transparency-study.pdf>

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- **Complex supply chain** – the 15 advertisers involved in the study used nearly 300 distinct supply chains to reach 12 publishers. This added to the complexity and opaqueness of the supply chain.
- **Access delays** – some parties in the supply chain were unclear as to what was required to gain access to the data, thereby delaying access to that data.
- **Data formatting and fidelity** – a lack of uniform data sets throughout the supply chain made it difficult to match and verify data.
- **Inflexible data retrieval** – the demand and sell side each capture impression data differently, thereby making it difficult for advertisers or their auditors to match impressions.

The AANA welcomes the ISBA/PwC report and supports its key findings and recommendations. The AANA believes these apply equally to the Australian market as they do to the UK's. The fact that only 12 per cent of impressions could be tracked and that 15 per cent of advertiser spend (on average) could not be attributed point to major deficiencies in the programmatic supply chain.

The AANA recognises that many advertisers, particularly small to medium sized businesses, lack the knowledge and expertise to navigate the complexities and known problems of the ad tech supply chain and, in particular, programmatic advertising. This has made it easier for some intermediaries to 'mark their own homework' or offer 'one stop solutions' to advertisers. This results in problems caused by non-disclosure, particularly the lack of transparency. Hence, the AANA does not support the use of 'undisclosed' programmatic platforms offered by some suppliers.

The AANA recognises that many advertisers use platforms where the supplier owns and operates the ad exchange and bidding systems as well as supplying the inventory that is bought. This can lead to a lack of transparency in the buying process and concerns that preferencing of inventory is occurring. This is very hard to substantiate due to this lack of transparency. Nevertheless, concern about this practise is prevalent within the advertiser community.

Data Formatting and Data Sharing Standards Required

The ISBA/PwC study revealed the need for industry consistency around data sharing and data formatting. The industry can and should work together to provide a supply chain framework that, in future, is built on principles of transparency, data transfer, independent audit rights, objective and robust accreditation, as well as verification of services offered and results declared. The AANA welcomes the ACCC's interest in the ad tech supply chain and supports the ACCC's continued involvement to help deliver a transparent, fair and competitive marketplace for all industry participants. However, the AANA believes that this is best achieved through industry working together and not for government to legislate to achieve transparency.

The AANA strongly advocates for urgent standardisation across a range of contractual and technology areas to facilitate data sharing and drive transparency. This will allow for the accurate verification and auditing of services provided and value delivered which, in turn, will deliver greater trust and confidence in the ad tech ecosystem, to the benefit of all participants.

Specifically, the AANA wants:

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1. Standardised terms and conditions for data access and sharing to be implemented in all contracts along the supply chain;
2. Standardised data taxonomies to provide consistency in reporting and sharing of data that supports robust and independent verification of services and value delivered. This may also include an accreditation process to demonstrate compliance with the industry standard;
3. All costs in the supply chain to be attributable to a service provided and agreed by the advertiser.
4. Optimisation of the amount of advertiser's spend reaching the end publisher; and
5. Advertisers to be able to access, through their media agencies or other intermediaries, buy-side log-level data that can be used for the purpose of audit and verification of services in a consistent way.

Solution Should Be Led by Industry

As previously stated the AANA believes that an industry-led solution is the best way to resolve the challenges of the ad tech supply chain. Any solution needs to provide standardisation of key metrics while also allowing sufficient flexibility for individual commercial arrangements so as to reflect differing commercial needs and avoid stifling competition.

Since 2016, the AANA has worked with the Media Federation of Australia (MFA) and the Interactive Advertising Bureau (IAB) to tackle some of these issues:

- **Media Contract Template** - In an effort to guide advertisers through this complex area and also promote fair, transparent and sustainable agency arrangements, the AANA worked with advertisers and agencies to formulate the AANA Media Contract Template and Guideline (Media Contract) as a starting point for negotiation between the parties. The Media Contract is intended as a guide so that both parties understand the various clauses in a functioning agency agreement and the impact those can have on the relationship. The AANA advises advertisers to use the Media Contract to deliver a mutually beneficial commercial arrangement with their media services partners.
- **Australian Digital Advertising Practises** - Following feedback from advertisers that they did not fully understand the ad tech market, in August 2018 the AANA, IAB and MFA published the Australian Digital Advertising Practises (ADAPs) for use across the marketing industry. Their purpose is primarily to educate industry participants and particularly advertisers, on topics such as ad fraud, brand safety, viewability and data privacy. The ADAPs were updated in May 2020 and will now be offered to industry participants through a training and capability program. Again, the focus is on awareness, understanding and educating the industry to adopt best practise.

The release of the ISBA/PwC report has provided clarity on the areas within the ad tech supply chain where further work is required. The industry has a proven track record of working together to provide increased transparency in the ad tech space. Internationally, the ISBA/PwC report has prompted advertisers in both the UK and Canada to call for standardisation in the data formatting and sharing space. Given the global span of many major advertisers, media agencies and digital platforms, it is vital that we aim for a global solution.

Specific Questions

Question 3 - How competitive do you consider the market for ad agency services to be and why?

History and Evolution of Media Agency Pricing in Australia

In 1996, the Australian Competition Tribunal (Tribunal) upheld a decision of the ACCC to revoke an authorisation (Authorisation No. A3005) originally granted in 1978 to the Media Council of Australia ('MCA')³. The AANA, on behalf of advertisers, supported the revocation of the authorisation and joined the ACCC as a party in the proceedings before the Tribunal. The MCA was the body responsible for the accreditation of advertising buying agencies.

Under the MCA accreditation system, approved as part of the 1978 authorisation, only accredited agencies could receive commission from a media proprietor and commission paid by media proprietors to advertising agencies could not be rebated to or shared with the advertiser client. As such, advertising agencies derived income from both the media proprietors and their advertiser clients. This arrangement also allowed for advertising buying agencies to receive credit terms from media proprietors while at the same time being responsible and accepting full credit risk for the payment of that advertising cost. One of the stated benefits of the accreditation system was the elimination of the need for media proprietors to carry out credit worthiness checks.

In deciding to revoke the authorisation in 1996, the ACCC found that the MCA accreditation system continued to maintain severe anti-competitive detriment through:

- financial and other restrictions on membership of the system;
- imposition of maximum rates of commission (conventionally at a rate of 10%);
- restriction of payment of commission by media proprietors to accredited agencies;
- and
- prohibition on the rebating of commissions to advertiser clients.

The Commission also found enormous changes had occurred to the market in the form of the rise of television, the development of alternative media, technological advances in the creation, planning and placement of advertising and shifts in public attitudes and competition policy. However, the ACCC found that the MCA accreditation system had acted as a shackle to prevent advertising agencies from adjusting to the new market conditions. Accordingly, the Commission found that the public benefit of the accreditation system had significantly diminished since 1978 and such public benefit was no longer sufficient to offset the anti-competitive detriment.

The Tribunal agreed with the Commission's finding that there had been a material change of circumstances since the authorisation was granted in 1978, the accreditation system operated as a fetter upon competition in risk bearing and credit management and had spill-over effects upon the structure of the agency services industry, thereby creating detriment in the form of economic inefficiency and the exercise of functionless market power. Accordingly, the Tribunal revoked the MCA's authorisation.

³ <https://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/1996/1996ACOMPT01.pdf>

Current Media Agency Pricing

The removal of the MCA authorisation had the effect of unbundling media buying and planning from creative. Advertiser clients were suddenly free to negotiate terms with advertising agencies that took into account the commissions being paid by media proprietors to the media agencies. In particular, advertiser clients could share in the commissions being paid to the agency.

In the decades since, advertising agency remuneration has become more competitive but also more complex. With the emergence of programmatic buying and multiple intermediaries involved in this process, remuneration and the transparent disclosure of this has become particularly complicated and challenging. However, as much as this is a problem, it is also an opportunity. Pricing is one way media agencies can differentiate themselves and some offer advertisers full disclosure of ad tech supply chain pricing.

Question 4 - Do ad agencies provide their customers with services that reflect the cost of providing that service and/or the value of that service to the customer?

Various agency remuneration models exist. Regardless of the remuneration model adopted, advertisers and their partners should 'follow the money' so that value is visible throughout the advertising supply chain. Parts of the supply chain may not be under the control of agency or advertiser but that doesn't negate the need to understand the entire value equation. Costs of compliance and audit need to be identified and form an input to the negotiation of fair agency remuneration.

There are a number of key clauses in media agency agreements that will determine ongoing transparency obligations, such as the need to disclose or share rebates with the advertisers. Chief amongst those clauses is the distinction between agency and principal.

The AANA makes it very clear in its media contract guidelines that before advertisers undertake a negotiation and sign a contract with a media agency, advertisers need to be fully aware of the difference between the definitions of "agent" and "principal" in commercial law. Many advertisers are confused as to the legal relationship they have with their media agency. Historically most media agencies have started life as an agent acting on behalf of a principal (the advertiser). The agent is the party who is legally authorised to act on behalf of the principal in the principal's business transaction. They stand in the shoes of the advertiser in that transaction. The agent owes the principal a fiduciary duty. This means the agent is obligated to act in the best interests of the principal. For example, a media agency uses their client's money to buy media on the client's behalf in return for a fee or a commission. In doing so, the agency must act in the best interest of their client.

However, it is now common practice for many media agencies in Australia to buy media direct from media owners for their own commercial interests. When they do so, they are acting in their own right as principal in that transaction and when they on-sell the media to a client. Importantly, in that situation, an agency does not have the same fiduciary responsibility when they on-sell media space to a client. This is a very important distinction and advertisers need to be completely aware of the difference and how this may impact their media buying and the remuneration the agency receives. For example, discounts, rebates and other benefits offered by media owners may not be passed onto clients when the media agency is acting as principal

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(because there is no fiduciary responsibility to act in the best interest of the client) whereas in the case where the media agency is acting as an agent the agency has a legal obligation not only to inform the client of the discounts but also to pass on those discounts, rebates and benefits where it receives them while standing in the shoes of the client and because it must act in the best interest of the client.

This does not mean that all contracts written as agent are good and those written as principal are bad. In the case where the agency acts on its own behalf, advertisers are still free to try to seek to negotiate a share of the benefits of discounts and rebates.

The majority of medium to large sized advertisers that the AANA represents have mutually productive relationships with media agencies. In fact, they prefer to access the expertise and specialist services of a media agency over buying media direct from a media owner or publisher. Hence the AANA believes that advertisers' media agency partners can play an important role in working together to drive transparency into the supply chain but can be prevented from doing so by 'walled gardens' and/or the inability to fully and accurately verify services that are paid for.

Question 23(a) - How are ad agency fees calculated?

Following the revocation of the MCA authorisation in 1996, there is no longer one fixed agency pricing model. Parties are free to negotiate terms and conditions. However, generally one of the following methods, or a combination, is most commonly used:

- **Retainer Based Model:** Payment for the people/ team who work on the business, together with an agreed overhead rate and profit margin. Staffing and retainer amount agreed annually and charged monthly.
- **Commission:** A percentage of the 'gross or net media' spend added onto each media plan.
- **Performance:** Payment terms based on the overall performance against agreed metrics.

Example 1: An advertiser and agency agree on a remuneration model that reflects the actual cost of agency staff used to provide the services (account service, strategy, planning, buying or investment etc). Actual staff salaries can be used here, or they could also be sourced from published reports that show high, medium and low tiers for nominated positions. Such amounts should be auditable. An overhead rate should then be agreed to allow the agency to recoup some of its operating costs, which are also indirectly related to the servicing of the scope of works. These may be items such as office rent, travel, training, finance and administration support staff etc. A profit margin element should be added to allow the Agency to make money from providing the services. Agency fees = direct costs + overhead rate + margin.

Example 2: An advertiser and agency agree on a remuneration model based on commission. The commission may be a percentage of either gross or net media. There is often a big difference here, so both parties should be clear as to whether the percentage is on gross or net media. Most media owners provide a percentage rebate (in Australia, this is usually 10%, although some digital media do not provide any commission). This rebate is usually also

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passed on to the advertiser. This would result in a \$100 (gross) spot actually costing \$90 (net). To demonstrate, if both parties have agreed a commission of 7% is to apply, then assuming the total media expenditure is \$10m, the two scenarios are:

- Under a 'gross' model, the Agency fee would be - $\$10\text{m} \times 7\% = 700\text{k}$
- Under a 'net' model, the Agency fee would be (assuming all media owners provide a 10% commission rebate) - $\$10\text{m less } \$1\text{m} = \$9\text{m} \times 7\% = \630k

Question 48 - Are you satisfied with your ability to independently verify the brand-safety and viewability of display ads?

The recent ISBA/PwC study has highlighted the shortcomings in the current system relating to programmatic advertising. According to verification company Method Media Intelligence⁴ (MMI Report), "*one of the most overlooked inefficiencies in programmatic advertising is the misconception that advertisers are only charged for ads that get delivered and rendered on a webpage*". Once a programmatic auction bid is won, the advertiser is invoiced. The amount of advertising invoiced does not necessarily match the amount of advertising that is served. MMI claims that advertiser could be losing 15% of their ad spend from ads that do not render after winning a bid. MMI go onto list various 'leakages' from \$1m of typical digital advertising spend, attributed as follows:

"\$1,000,000 Spent on Digital Advertisements:

\$150,000 spent on non-rendered ads

\$150,000 spent on ads to robotic browsers

\$50,000 spent on ads outside of targeted context

\$250,000 spent on ads that are rendered but not displayed on user screen

This leaves only \$400,000 spent on ads that fit the requested targeting and have potential value to the advertiser."

The AANA notes that neither the findings of either the ISBA/PwC report nor the MMI report are drawn from the Australian market. However, with several globally based advertiser members and the knowledge they provide, the AANA is confident that there are many similarities and consistencies across markets. Likewise, a number of the supply side intermediaries are also globally based and operate consistently across markets.

To ensure the desired level of transparency has been achieved and both parties have adhered to the contractual terms, independent audits should be permitted.

Where independent audit rights have been specifically agreed in the contract, each relevant agency within the agency group needs to support the audit process and submit all relevant documents on request. However, the ISBA study has revealed the complexity and slow pace of the current data access approval process of an audit. Typically, non-disclosure agreements

⁴ *Lost In Transaction: Where Digital Media Leaks*, 4 May 2020

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are required before the audit data exchange takes place and often independent auditors are specifically excluded from accessing this data, meaning that, while the advertiser may be entitled to access the relevant data, the professionals who can understand and analyse the data have no such access. The AANA notes that independent verification services from companies such as IAS, Moat and DoubleVerify are available to advertisers to measure some important metrics such as brand safety and viewability but this does not constitute a full audit offering and does not provide a solution to the unattributable costs identified in the ISBA/PwC report's 'unknown delta.'

As stated above, in order to provide advertisers with timely transparency, more work needs to be done by the industry to specify and streamline the data capture, audit permission and data provision process in the ad tech supply chain so that advertisers and their auditors can easily access, verify and match data sets in a cost-effective manner. The AANA will continue to work with relevant parties, particularly the MFA, IAB and our international counterparts to further improve transparency for advertisers.

Further Consultation

The AANA would welcome an opportunity to discuss in more detail with the ACCC the issues raised in this submission. Please contact Megan McEwin on [REDACTED] [REDACTED] [REDACTED] or [REDACTED] regarding opportunities for further consultation.