



**AUSTRALIA**

# Submission by Free TV Australia

**Digital advertising  
services inquiry  
Interim Report**

**Australian Competition and  
Consumer Commission**

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# Table of contents

<b>1. EXECUTIVE SUMMARY .....</b>	<b>3</b>
<b>2. INTRODUCTION .....</b>	<b>4</b>
<b>3. THE IMPORTANCE OF USER RELATED DATA AND THE NEED FOR REGULATION .....</b>	<b>6</b>
3.1 THE CRITICAL ROLE OF DATA IN THE SUPPLY OF AD TECH SERVICES .....	6
3.2 THE USES OF USER RELATED DATA .....	7
3.3 DATA SEPARATION .....	8
3.4 COMMON TRANSACTION IDS .....	9
3.5 DATA PORTABILITY AND INTEROPERABILITY .....	10
3.6 COMMON USER IDS .....	10
<b>4. THE NEED FOR A COMPREHENSIVE BINDING CODE.....</b>	<b>12</b>
4.1 THE ACCC'S PROPOSALS AND THE NEED FOR ONE COMPREHENSIVE CODE .....	12
4.2 COVERAGE OF THE COMPREHENSIVE CODE .....	13
4.3 DEVELOPMENT AND IMPLEMENTATION OF THE PROPOSED CODE.....	15
4.4 PROPOSED CODE SHOULD BE ENFORCEABLE .....	16
<b>5. ENTITIES TO BE REGULATED.....</b>	<b>17</b>
5.1 THE APPROACH IN THE UK AND EC .....	17
5.2 SHOULD AUSTRALIA'S REGULATION ADOPT A SIMILAR APPROACH? .....	17
5.3 THE RIGHT TEST: THE NEED FOR OBJECTIVITY .....	17
5.4 MAKING DETERMINATIONS .....	18
5.5 APPLICATION TO FACEBOOK .....	18

## 1. Executive Summary

- Free TV supports the Interim Report from the Australian Competition and Consumer Commission's (ACCC) Digital advertising services inquiry (**Ad Tech Inquiry**) which has found that Google is by far the largest provider of each of the four key ad tech services (advertiser ad server, demand side platform (**DSP**), supply side platform (**SSP**) and publisher ad server services).
- These conclusions support the submission that Free TV made to the ACCC's Issues Paper for the Ad Tech Inquiry, which noted that Google is present at every level of the ad tech stack and in many of these cases Google enjoys market shares approaching 75 per cent (or more).
- Google's level of horizontal market power combined with its vertical integration affords it the opportunity to inhibit competition, from creating constraints on interoperability to the bundling and tying of products across market segments and taking other actions that reinforce Google's role as a data gatekeeper across the entire ad tech stack.
- Free TV welcomes the principles behind each of the reform proposals included in the Interim Report, which have the potential to address these underlying competition issues, while protecting or enhancing important user privacy concerns.
- The key reform proposals are Proposals 2 (data separation), 3 (rules to manage conflicts of interest and self-preferencing) and 5 (a common transaction ID).
- Proposal 2 is particularly important, given that the data that Google collects and uses includes the data of Free TV's members, which Google collects when providing ad tech services to them. That data is not owned by Google and therefore Google should not be able to use such data for purposes unrelated to the provision of such services. Given its vertical integration, Google should also be subject to restrictions on the use of data it collects from its consumer facing services.
- This data separation regulation could be supplemented by regulating to require access to the anonymised data associated with a common transaction ID (Proposal 5). As noted by the ACCC, this will provide benefits to publishers and advertisers. A common transaction ID is also not privacy intrusive. Data interoperability (part of Proposal 1) is supported as this will improve competition but it will be important to ensure that this would not create unintended consequences.
- Free TV submits that Proposal 3 must be implemented through a binding Code. As demonstrated by the recent News Media Bargaining Code development process, and given the stakeholders with an interest in the proposed rules, it is difficult to see how such arrangements could be implemented through a voluntary scheme. The Code should be binding, drafted and enforced by the ACCC and underpinned by legislation.
- That Code should address a number of other issues that have been highlighted in the Interim Report but which are not addressed in any of the proposals, including the selling of YouTube inventory through Google's own DSP, which creates self-preferencing issues in relation to Google's own inventory, not limited to YouTube. The Code should also restrict Google's other actions to preference its own supply side services, such as through its header bidding actions.
- The Proposals highlighted in this submission should apply to "strategic market participants"—those suppliers above a threshold share of key ad tech services in terms of revenue or impressions.
- The implementation of the proposed reforms will provide material improvements across the economy, as advertisers will make more efficient spending decisions in relation to digital advertising and, importantly for our members, publishers will receive a greater return on their inventory. This will directly assist in enhancing the ability of publishers, including our members, whose investment in great Australian content relies on a well-functioning advertising market.

## 2. Introduction

Free TV Australia is the peak industry body for Australia's commercial free-to-air broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial free-to-air television makes to Australia's culture and economy.

Free TV proudly represents all of Australia's commercial free-to-air television broadcasters in metropolitan, regional and remote licence areas.



Free TV and its members were heavily involved in the ACCC's Digital Platforms Inquiry process. We welcomed recommendation 5 from the ACCC's final report that led to the direction from the Government for the formation of the Ad Tech Inquiry. The comprehensive and clear picture of the competition and consumer protection issues raised by Google's dominance of the market for the provision of ad tech services that is set out in the ACCC's Interim Report demonstrates that the Ad Tech Inquiry is an important process and that there is a need for significant regulatory reform.

As set out in our original submission, Free TV members have a complex relationship with the ad tech stack:

- In our television markets, our members are rapidly evolving with traditional sales channels being supplemented by programmatic advertising sales. Our metropolitan members sell video inventory associated with their BVOD content, offering advertisers the opportunity to target their desired audience with the benefits of the big screen and a 'sound on' environment.
- Our members also have rich online offerings through digital properties such as 7news.com.au, 9news.com.au and 10play.com.au. In this environment, we act as publishers selling online display advertising through SSPs and ad exchanges.
- Our members are also advertisers in their own right, promoting the great Australian content they produce across a number of different platforms.

This places our members in a unique position to respond on the Interim Report and to contribute to the Ad Tech Inquiry process. The ACCC has rightly concluded the problems that it has observed as a result of Google's significant presence across the whole ad tech services supply chain have the potential to impact both publishers and advertisers. Consumers suffer as a result – through publishers, including Free TV's members, being unable to produce as much content as a result of reduced revenues and advertisers charging higher prices for their goods and services as a result of inefficient spending on digital advertising.

Regulatory reform is required to address these issues. This reform should address the vast quantities of data that Google holds. But, more broadly, the reform needs to impose a code that addresses a broad range of problematic issues, including those arising as a result of Google's dominance in both ad tech services and in a broad range of separate consumer facing services markets. The bundling/tying of Google's different services to extend its market power in relation to buy-side ad tech services, which also enhances Google's ability and incentive to self-preference its own inventory and inventory sold through Google's sell-side ad tech services, is a concerning competition issue which it will be necessary for regulatory reform to remedy. The lack of transparency in the operation of the ad tech stack must also be urgently addressed.

In commenting on the proposals that have been put forward by the ACCC as potential regulatory solutions it is also important to ensure that unintended consequences are minimised and unnecessary regulatory burdens are not placed on smaller ad tech services providers or on publishers or advertisers – in other words new regulation should be appropriately targeted.

This submission is structured as follows:

- Responding on the proposals that address user related data collection, use and sharing, that is, proposals 1, 2, 5 and 6 (section 3).
- Outlining the need for a comprehensive, and enforceable, code, which includes a consideration of proposals 3 and 4 (section 4).
- A consideration of the entities to whom the new regulation should apply (section 5).

### 3. The importance of user related data and the need for regulation

- User related data is critical to the supply of ad tech services. Google obtains user data from a wide variety of sources. This includes user data that it collects from its own consumer facing services. It also includes data that it collects through providing ad tech services to third parties (whether advertisers or publishers).
- Sensible data separation arrangements, applied to strategic market participants (defined in the manner outlined in section 5 of this submission) under a regulatory framework will assist in promoting competition. In addition, this will recognise that the user data collected through the provision of ad tech services should not be considered to be data that Google (or any other strategic market participant) is free to exploit for its own purposes.
- An appropriately structured data separation regulation will be privacy enhancing. It will restrict the use of personal information for purposes which consumers may not expect when they interact with different businesses online.
- Google acts as a “gatekeeper” in respect of the different user related data sets that are relevant to ad tech services. Google has taken action in the past, and has stated it will take action in the future (through the Google “privacy sandbox”), to limit the ability not only of other providers of ad tech services, but also advertisers and publishers, to access the user related data they need. This significantly inhibits transparency for the users of ad tech services.
- The use of common transaction IDs has the potential to provide to both publishers and advertisers information that they need to measure the effectiveness of digital advertising and therefore address in part these transparency issues. As such IDs would track impressions, not consumers, the use of such IDs would not create privacy issues.
- An appropriately structured data interoperability regulation (part of Proposal 1) would also assist both publishers and advertisers by providing useful data, though it would be important to ensure that this regulation did not create unintended consequences.

#### 3.1 The critical role of data in the supply of ad tech services

As the ACCC concluded in chapter 2 of its Interim Report, user related data is crucial in digital advertising and in the provision and use of ad tech services. Google’s user related data advantage has significantly contributed to its dominance in the market for ad tech services. The ACCC has concluded that there are three key factors underlying Google’s user related data advantage:

- Google has the largest range of digital consumer facing services, which provides Google with vast amounts of first party data. Most other ad tech services providers do not offer any consumer facing services, which precludes those other providers from directly collecting this type of data. In addition, Google owns the only significant licensable mobile operating system (OS) available in Australia, Android, which itself allows the direct collection of large quantities of first party data.<sup>1</sup>
- Google has the widest network of trackers on third party websites and apps in Australia which enables it to gather third party data.
- Finally, historically Google has access to unique identifiers that it can use to identify and link a user across different devices and browsing sessions. These identifiers include DoubleClick IDs, which

<sup>1</sup> And noting that Android OS is not used for mobile smart devices but is increasingly used for, amongst other devices, smart TVs manufacturers such as Sony, Hisense and the like.

are not accessible to any third party. This means that although implementation of Google's "privacy sandbox" may limit this advantage in future, Google, as the ACCC has pointed out, has at the current time the capacity to track users across the internet through its ad tech services in a manner that no other digital services provider is able to replicate.

Google has imposed significant restrictions on the sharing of any of the user related data that it collects (including on an anonymised basis), as outlined in the Interim Report. Google's user related data holdings create an insurmountable barrier to entry (and expansion) in the market for the provision of ad tech services. It is not practically feasible, in the short to medium term, for any other ad tech services providers to collect such broad ranging and unique data sets in relation to users to compete effectively with Google.

**Given this, a stark choice exists, either regulatory intervention occurs or Google will continue to dominate the ad tech services market in Australia, and the issues identified in the Interim Report will continue to inhibit competition in the provision of ad tech services to the detriment of the Australian economy and consumers.**

### 3.2 The uses of user related data

A wide range of different types of user related data is required for different purposes in digital advertising and for the delivery of ad tech services:

- *Targeting advertising:* the more data that is available regarding a consumer's preferences, the greater the ability to target ads to that consumer that will be of interest to him or her.
- *Advertising verification:* that is, verification that an ad has been delivered in an appropriate environment that is consistent with the advertiser's brand, that the ad was able to be viewed by a user, whether the user engaged with the ad and whether the ad was subject to ad fraud.
- *Attribution:* which refers to determining what ad (or ads) prompted a user to take action to purchase particular goods or services.

These types of data are considered in this section 3. There is however other data that is important, particularly:

- *Pricing information:* Pricing information is essential for both advertisers and publishers. The market for ad tech services is highly unusual in that, as noted in the final report from the ACCC's Digital Platforms Inquiry and the Interim Report, both advertisers and publishers often do not know what proportion of ad spend is consumed by ad tech services. It is difficult to point to another market where pricing, and the fees received by different market participants, is similarly obscured.
- *Information required by publishers:* Publishers require additional categories of data, for example, in relation to how specific inventory is sold via auctions, to assist in determining how best to generate advertising revenues.

Free TV believes that transparency in relation to pricing and access to data that publishers require should be addressed through the rules and standard that the ACCC has suggested in its Proposals 3 and 4,<sup>2</sup> which we have commented on in section 4 of this submission. This section 3 focuses on user related data.

<sup>2</sup> This acknowledges that the information collected through common transaction IDs will be helpful as a source of information required by publishers as to the workings of auctions.

### 3.3 Data separation

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The ACCC's Proposal 2 is that mechanisms should be introduced to mandate the separation of data sets of large incumbents. The ACCC has suggested that this could be achieved by direct regulation such as restricting particular types of data combination or restricting the use of certain types of data (such as health or medical condition information) for ad targeting purposes. The ACCC has stated that, alternatively, this could be implemented by restricting the ability of regulated entities to use data collected from user facing services for advertising purposes without the consent of the user.

There would only be one effective mechanism by which data separation could be imposed, which is by prohibiting strategic market participants combining particular types of data. We believe that this regulation should have three key components. First, data collected by a strategic market participant from consumer facing services should not be able to be combined with data collected by that participant from the provision of ad tech services.

The second component would be that data collected by a strategic market participant from the provision of any ad tech services should not be able to be used for any other purpose other than the direct purpose for which it was collected. For example, a publisher should not have to accept that the publisher's data which is collected through its use of Google's sell-side ad tech services is able to be used by Google to strengthen Google's buy-side ad tech services. At the current time, publishers and advertisers have no choice but to grant Google broad rights of data use because of the lack of competition in the supply of ad tech services.

Thirdly, Google (and any other strategic market participant who has consumer facing services) should only be able to use the data it collects from those consumer facing services to sell advertising on the relevant service. For example, data collected from Google search should only be able to be used to sell advertising on Google search and should not be able to be used for other ad tech services. In particular, it should not be able to be used to create audience segments for targeting data for Google's advertiser ad tech services. To take a simple example, if a user searches for "running shoes" on Google search, Google should be able to use that data to sell targeted ads *on Google search* to Nike, ASICS or similar. But it should not be able to use that data to enable advertisers such as Nike or ASICS who use Display and Video 360 to target the same user on other sites, such as smh.com.au.

This final component is necessary to truly address the anticompetitive outcomes arising from the vertical integration of Google. As the ACCC has recognised in its Interim Report, and outlined above, Google is the *only* large ad tech services provider that also provides consumer facing services. The data it collects from those consumer facing services significantly contributes to Google's insurmountable data advantage in the provision of ad tech services. Imposing this separation requirement would not limit Google's ability to earn advertising revenue from its consumer facing services, in this same way as any other publisher is able to, but would assist in limiting Google's data advantage, and so assist in facilitating competition. This would also reflect consumer expectations as to the use of their data. While a user may expect to see ads on Google search based on their search terms, a user would not expect Google to use that data to enable every advertiser that uses Google's Display and Video 360 to target display advertising to them across the open internet.

The framing of the data separation arrangements would need to be carefully considered to ensure that there are no unintended consequences to promoting further competition in the ad tech stack from such a separation arrangement.



This would reflect that the data collected from the provision of ad tech services is, in reality, not the data of the ad tech services provider but the data of the entity to whom the ad tech services are provided, for example, data about the visitors to a publisher's website or data about an advertiser's existing customer base provided to enhance targeted advertising. In other words, the benefit of the data would be retained by the publisher (as the true data owner).

This type of separation arrangement is not a new or unique form of regulatory intervention. This technique has been used in different markets over Australia for a period of time. For example the pre-National Broadband Network (NBN) regulatory arrangements in place in the telecommunications sector required operational separation of Telstra which included information separation arrangements (though the effectiveness of those provisions was hampered by the lack of direct enforcement powers given to the ACCC). It is also used in the electricity market, through the current ring-fencing requirements that mandate information firewalls and impose access controls to secure commercially sensitive information.

The other alternatives put forward by the ACCC would not achieve the intended data separation outcome. For example, the Privacy Act already requires consent to be obtained from individuals for the collection and use of sensitive information, such as health or medical condition information. In addition a mechanism that adds another consent requirement for individuals is likely to achieve little in light of the prevailing notice and consent "fatigue" of Australians.

If Proposal 2 is implemented, there would be no short-term reduction in the efficiency of the ad tech services market, given the inefficiencies created by Google's current dominance across the ad tech stack. On the other hand, the data separation mechanism would have positive long term effects on innovation and competition for the reasons set out in the Interim Report. This would enable smaller ad tech services providers to better compete. It may also potentially reduce reliance on the use of personal information for the delivery of ad tech services.<sup>3</sup> The regulatory burden from the implementation of this initiative would also be minimal, as it would not be applied broadly – it would only be applied to strategic market participants.

Finally, data separation is privacy enhancing. If personal information collected through consumer facing services cannot be combined with other data for ad targeting this assists in addressing one of the more significant concerns that Australians have with the collection of data online.

### 3.4 Common transaction IDs

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The common transaction ID, as provided for in Proposal 5, would track transactions – enabling a single transaction (that is, an ad) to be traced through the entire ad tech ecosystem. This will be helpful in both verification and in determining attribution. The adoption of a common transaction ID could be privacy enhancing. This would be the case as the information collected would be anonymised. The use of that information could be regulated in a manner that protected privacy, for example, entities that used the data could be restricted from combining it with other data for the purposes of identifying specific individuals. The role of creating this common transaction ID should not be given to Google (or Apple). An independent industry body could potentially undertake that development role.

Greater data availability, even on an anonymised basis, will assist in enabling advertisers to undertake independent verification and attribution activities based on raw data. This will provide significant

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<sup>3</sup> As discussed in paragraph 2.6.2 of the Interim Report.

improvements in transparency, contributing to improved competition in the ad tech services market. The process for implementation should be carefully considered to ensure that the experience of advertisers in the automation of booking campaigns is not adversely impacted.

### 3.5 Data portability and interoperability

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The first part of the ACCC's Proposal 1 is the implementation of measures to support data portability, that is, tools that enable a user to determine who will be entitled to receive that user's data. This is a right that is currently not provided to users of digital services in Australia in any meaningful sense.<sup>4</sup> Free TV is supportive of such a proposal, as it will have benefits in empowering individuals in controlling their privacy. However, this would not be a critical regulatory reform in promoting competition in the delivery of ad tech services as it is not clear how the data consumers would be able to port could be effectively used by other ad tech services providers.

The second part of the ACCC's Proposal 1 is the implementation of a data interoperability regime. Data interoperability, as noted by the ACCC, typically involves the transfer between businesses of data. As this occurs without the express consent of the individuals to whom the data relates, this data is typically aggregated, anonymised or non-personal data.

Although Free TV would support an appropriate data interoperability regulatory regime, our view is that unintended consequences must be avoided. As found by the ACCC, Google has up to 100% of the impressions in publisher ad serving. If the proposed data interoperability regime allowed all ad tech providers to access the data associated with those impressions, this would result in an unintended consequence as it would undermine our members' investment in premium digital content. This is because the tracking data gained from users' interaction with our high quality digital assets could be used to follow consumers to lower value assets where inventory costs are lower. In short, this type of data is not the ad tech services provider's data and should not be able to be shared by it with third parties.

If the data separation proposal that Free TV supports is implemented, each strategic market participant would, amongst other obligations, be required to separate data collected from consumer facing services from data collected by that participant from the provision of ad tech services. The data from the provision of ad tech services (which will be easy to identify given the separation obligation) should not be subject to the interoperability regime, as this is not the data of the strategic market participant.

Any data interoperability for consumer facing services information would need to be carefully structured to ensure that the information was truly anonymised, so that personal information was not shared.

### 3.6 Common user IDs

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The ACCC's Proposal 6 is that a common user ID is used by ad tech services providers to track users and assign data used for attribution purposes. The data linked to a common user ID would be

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information about the ads the user saw online, irrespective of which service provider delivered the ad and what sites the user saw the ad on. This data is currently not readily available.

A common user ID would have benefits not only in relation to attribution measurement, as the ACCC has referred to in its Interim Report, but also potentially in other respects, such as frequency capping. Nonetheless, Free TV and its members have concerns that the use of common user IDs is privacy intrusive. Proposal 6 would therefore only be supported if any regulation providing for the implementation of common user IDs was able to effectively protect privacy. It is not currently clear how this could be achieved.

## 4. The need for a comprehensive binding code

- Proposal 3 from the Interim Report suggests rules to manage conflicts of interest and self-preferencing in the supply of ad tech services and Proposal 4 recommends implementation of a voluntary standard to enable full, independent verification of DSP services.
- A more comprehensive code, applicable to strategic market participants, is required to address not only the Proposals 3 and 4 matters but also to address the additional issues that Free TV highlighted in its previous submission to the Ad Tech Inquiry and which the ACCC has also identified as problematic. A more comprehensive code should, in particular, also address bundling and pricing transparency.
- The Interim Report recommends that the Proposal 3 rules and the Proposal 4 standard be developed by industry. Free TV's view is that this is not practical. There is no industry body that would be sufficiently resourced to undertake the significant stakeholder consultation that would be required to produce a fair and balanced code. Further, the experience of the ACCC and the media sector in relation to the very recent News Media Bargaining Code demonstrates the difficulty of persuading Google and Facebook to voluntarily implement fair and balanced codes.
- Adopting a structure similar to that applicable to the Australian Securities & Investments Commission (**ASIC**), as the supervisor of licensed markets under the Corporations Act 2001 (Cth) (**Corporations Act**), would be appropriate. In other words, the ACCC – as the supervisor of the ad tech services market – should be tasked under the CCA with the development of the code.
- It is important not only that the code is fair and balanced but that the ACCC has a role to monitor compliance and that there are sanctions for breach.

### 4.1 The ACCC's proposals and the need for one comprehensive code

The ACCC has suggested:

- *Proposal 3*: An industry developed set of rules to address conflicts of interest and self-preferencing in the supply of ad tech services, which could, for example, impose “best interests” obligations, require equal access to ad tech services and increase transparency.
- *Proposal 4*: An industry developed standard that would enable independent verification of DSP services. This would primarily require that strategic market participants agree to allow access to the necessary raw data to enable verification to be undertaken.

There would be no need for both a set of rules and a standard. Although the rules and the standard address different concerns with the operation of the ad tech services market, both would impose obligations on strategic market participants and therefore could be included within one comprehensive operational code. Adopting one comprehensive code provides for a greater degree of clarity and simplicity and limits the risk of inconsistencies that may arise where two different sets of regulation apply to similar issues.

There would be merit in the ACCC, in its final report from the Ad Tech Inquiry, exploring technology interconnection as a means to assist in achieving the competition outcomes intended by the proposed comprehensive operational code.

## 4.2 Coverage of the comprehensive code

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In order to ensure that the comprehensive code provides a framework to promote competition, economic efficiency and transparency:

- The code should address ad exchange provisions that govern how auction processes, and any other ad tech services trading processes, are to be conducted by strategic market participants in a transparent and unbiased manner and that require strategic market participants to clearly disclose how and when buy and sell orders will be matched (including the mechanics of the sales process and other aspects).
  - The Interim Report states that the Proposal 3 rules could include requirements to increase transparency on the basis that this would reduce problems arising from vertical integration, such as self-preferencing. However, more than transparency is needed to address this problem. A clear set of rules that govern how sales and purchases of inventory are to occur, which not only promote transparency but directly ensure that the scope for self-preferencing is curtailed, are necessary.
  - These rules could include a “best execution” requirement similar to that applicable in financial markets,<sup>5</sup> requiring strategic market participants to seek to achieve the best outcome for the relevant client. This would protect both advertisers and publishers by ensuring ad tech services providers do not place their own interests before those of their clients in any ad tech trading process.<sup>6</sup> For advertiser clients, this would mean implementing inventory purchases of the requested type at both the lowest price and ad tech services cost and for publisher clients, this would mean implementing inventory sales at the highest price minus ad tech services costs. Regulated entities would need to have the ability to interoperate with ad tech services other than their own to achieve such outcomes (see other points below).
- To foster a competitive market, strong and effective protections should be included in the code that ensure interoperability with third party vendors and mechanisms to ensure that strategic market participants cannot unduly incentivise or lock other participants into using the strategic market participant’s products or services as opposed to acting in the best interests of the other participant’s customers.
  - Interoperability measures would in part be addressed by the ACCC’s suggestion that the Proposal 3 rules include requirements for regulated ad tech services providers to apply the same rules and give the same information to all other ad tech services providers.
  - However, more is needed, as considered in the next two points below.
- Effective mechanisms are required to restrict the ability of strategic market participants to use their substantial market power in one market to extend or leverage that power into other markets to the detriment of competitors.
  - Where a strategic market participant is also a publisher of one or more popular sites that is considered a “must have” by advertisers it should not be allowed to restrict the access of other ad tech services providers to those sites or inventory as this locks advertisers into particular ad tech products, notwithstanding that it is not a direct restriction on interoperability. As Free TV highlighted in its previous submission to the Ad Tech Inquiry, and is detailed in the Interim

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<sup>5</sup> For example, as specified in Part 3.8 of the ASIC Market Integrity Rules (Securities Markets) 2017.

<sup>6</sup> This is discussed in section G of the ASIC Regulatory Guide 265: Guidance on ASIC market integrity rules for participants of securities markets, available here: <https://download.asic.gov.au/media/4720070/rg265-published-4-may-2018.pdf>

Report, Google does not allow any DSP that competes with Google's Display and Video 360 product to buy across YouTube. Making YouTube inventory exclusively available in Display and Video 360 provides Google with a unique ability to buy across YouTube and other video inventory, which no other DSP is able to offer. Where Display and Video 360 is used, Google makes the decision on which impression to buy. This means Google has both the ability and the incentive to favour YouTube inventory (or other Google video inventory) over our members' broadcast video on demand (**BVOD**) inventory. This type of conduct should be prohibited by the new code.

- Prohibitions on strategic market participants favouring their own advertising services or inventory by excluding rivals or providing an undue advantage to their own services through rankings, access or other technical or commercial means should be adopted in the code.
  - Specific clear restrictions should be imposed that would limit the scope for self-preferencing – either in relation to ad tech services or inventory. This would extend, for example, to ensuring that verification and attribution services providers were not restricted in their ability to access data collected through the proposed common transaction IDs.
  - The code should also extend to imposing restrictions on the ability of strategic market participants excluding other providers, such as by requiring that technologies used by other ad tech services providers (for example, header bidding) integrate with SSPs used by strategic market participants. This is particularly key in relation to header bidding. As stated in Free TV's submission to the ACCC's Issues Paper, Google has chosen not to make Google Ads interoperable with third party open source header bidding technologies. This forces publishers who want access to Google Ads to use Google's header bidding technology which is not open source. If a publisher wishes to use Google Ads in a header bidding set-up they must accept a lack of transparency around how Google matches impressions to bids from all SSPs including their own SSP. It is therefore not possible to determine if Google is favouring its own business interests when using Open Bidding (previously Exchange Bidding).
- The code will need to provide for the adoption of mechanisms for pricing transparency regarding the services of strategic market participants.
  - The lack of transparency in pricing and fees for ad tech services has created numerous difficulties, as acknowledged by the ACCC. This prevents advertisers and publishers from making decisions about how to most efficiently buy or sell ad inventory and also makes it difficult to monitor whether vertically integrated providers are engaging in self-preferencing conduct or charging hidden fees.<sup>7</sup> Given the economy wide inefficiencies that are created as a result, it is essential that a comprehensive code should directly address this issue.
  - Granular transaction level data is required by both publishers and advertisers in relation to the following:
    - Agency trading desk fees;
    - DSP buy side fees;
    - DSP sell side fees;
    - Ad Exchange / SSP sell side fees;
    - Ad Exchange / SSP buy side fees;
    - Ad network fees;
    - Third party data fees; and

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<sup>7</sup> This is discussed in detail in Chapter 6 of the Interim Report.

- Brand safety and verification fees.
  - As the Code would impose obligations only on strategic market participants, there are different models that could be imposed to achieve pricing transparency. For example, a real time dashboard of ad tech service provider costs for a campaign could be prescribed which would allow publishers to consider the costs versus the potential benefits of going directly to publishers to engage in a direct deal. This would assist in creating some competitive tension on the market on a path to reach optimal price efficiency.
- Full, independent verification of ad tech services provided by strategic market participants should be facilitated by the code.
  - The ACCC's Proposal 4, which Free TV and its members support, is intended to facilitate independent verification of DSP services. As stated in the Interim Report,<sup>8</sup> this will enable advertisers to assess Google's ad tech services.

### 4.3 Development and implementation of the proposed code

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In the case of both Proposal 3 and 4, the ACCC has suggested in the Interim Report that the rules and standard could in the first instance be developed and implemented by industry. This is unlikely to be feasible either for those rules and the standard or the proposed alternative comprehensive code. Typically, where an industry develops rules or standards, the role of doing this is undertaken by an industry body.

An example of this is the Commercial Television Industry Code of Practice developed by Free TV on behalf of its members. If the ACCC's suggestion is that the ad tech services industry could undertake the development of the rules and standard (or the more comprehensive code which we have suggested in this submission) this will be impractical. There is no specific industry body for ad tech services providers in Australia. As the ACCC has noted in the Interim Report, although Google is the dominant provider across all of the different types of services, there are many different providers, for example, in addition to Google, Xandr provides a publisher ad server, and other SSPs include Index Exchange, OpenX and Xandr. These different companies are not all members of a common industry body. In addition, given the use of digital advertising (and therefore ad tech services) across all sectors of the Australian economy, significant stakeholder consultation will need to be undertaken to develop a code.

The experience of the ACCC in relation to the development of the News Media Bargaining Code should also inform the approach adopted here. The Australian Government directed the ACCC to progress a voluntary code in December 2019. By April 2020, the ACCC advised the Treasurer that progress towards a voluntary code had been limited and that it did not foresee that a voluntary code would be able to be agreed. For that reason, the Treasurer directed the ACCC to develop a mandatory code. It was only when the mandatory code was on the cusp of being enacted that Google and Facebook entered into serious negotiations with Australian media companies. Free TV believes that Google would adopt the same approach regarding any voluntary code – meaning that negotiations with Google would not prove to be productive and an appropriate voluntary code would not be able to be implemented.

Free TV suggests that an approach similar to that adopted in the Corporations Act for the development of market integrity rules by ASIC (as the supervisor of financial markets) is adopted here. The ACCC could be formally designated as the supervisor of the ad tech services market and given the role of

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<sup>8</sup> This is discussed in paragraph 6.6.1.

developing a comprehensive set of rules to be included in a code aimed at promoting competition, economic efficiency and transparency in the provision of ad tech services.

#### 4.4 Proposed code should be enforceable

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For the proposed code to be effective, an appropriate enforcement regime should be established. The code should be implemented under the Competition and Consumer Act 2010 (Cth) (**CCA**), ensuring that the ACCC is tasked with monitoring compliance and taking action in relation to breaches. The CCA has been amended to introduce the News Media and Digital Platforms Mandatory Bargaining Code and it would be appropriate for this new ad tech services code to also be incorporated within the CCA.

Breaches of the key provisions of the News Media and Digital Platforms Mandatory Bargaining Code (that is, provisions dealing with non-differentiation, good faith obligations and compliance with arbitral determinations) will attract maximum civil penalties of:

- \$10 million;
- If the court can determine the value of the benefit obtained and that is reasonably attributable to the act or omission giving rise to the breach, three times the value of that benefit; and
- If the court cannot determine the value of that benefit, 10% of annual turnover during previous 12 months.

It would be appropriate for serious breaches of the proposed ad tech services code to attract similar penalties to promote compliance.



## 5. Entities to be regulated

- The proposed new ad tech services regulation should be appropriately targeted. The regulation should apply only in respect of companies (or corporate groups) that are considered to be significant suppliers of ad tech services, that is, “strategic market participants”.
- New regulation of digital markets being considered by the UK and EC will generally be limited in its application to those companies that have strategic significance, or act as gatekeepers, in relevant digital markets. These tests are subjective and will potentially be difficult to apply. Free TV recommends a more objective test is adopted for the proposed Australian ad tech services regulation, to limit the potential for regulatory uncertainty.
- The ACCC should be given responsibility to designate which companies (or corporate groups) are “strategic market participants” and therefore will be subject to the new regulation. Designations should be considered on an annual basis.

### 5.1 The approach in the UK and EC

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In the Interim Report, the ACCC has noted the proposed approaches of the UK’s CMA and the EC in the regulation of digital markets. The UK Government has accepted the CMA recommendation to legislate to introduce an enforceable code of conduct to govern the behaviour of platforms funded by digital advertising that have “strategic market status” in their interactions with customers, users and competitors. The EC, on the other hand, is proposing to introduce both a Digital Markets Act and a Digital Services Act. The Digital Markets Act will apply to digital platforms who are “gatekeepers” for one or more of a defined set of digital services and will impose obligations on those gatekeepers to refrain from practices that are considered to limit competition or to otherwise be unfair.

### 5.2 Should Australia’s regulation adopt a similar approach?

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The regulation implemented in response to the final report from the ACCC’s Ad Tech Inquiry should, like the UK and EC proposals, be appropriately targeted. This is necessary to ensure that the regulation achieves its ultimate aim of improving competition and innovation. Poorly targeted regulation has the capacity to impose unnecessary regulatory burdens on market participants which may inhibit rather than assist the ability of those participants to compete, resulting in a chilling of competition.

Therefore Free TV strongly supports the position that the proposals put forward by the ACCC should each only apply to a targeted set of market participants, who meet designated criteria.

### 5.3 The right test: the need for objectivity

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Although the UK Government has not yet defined the test that must be satisfied before a company will have “strategic market status” it is likely that guidance will be taken from the report of the Digital Competition Expert Panel, which was commissioned by the UK Government (the **Furman Report**). The Furman Report defined a company with strategic market status as one that is “in a position to exercise

market power over a gateway or bottleneck in a digital market, where they control others' market access".<sup>9</sup>

The EC's draft Digital Markets Act, on the other hand, has a detailed definition of gatekeeper. A corporation will be considered to be a gatekeeper in respect of a relevant platform service if it:

- operates a relevant platform service which is an important gateway for business users to reach end users;
- has a significant impact on the EU single market; and
- enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

As the new Australian regulation will be concerned only with ad tech services, the test for determining which companies the new regulation should apply to should assess the dominance of each relevant company in the supply of the key ad tech services that the ACCC has highlighted in the Interim Report, that is, advertiser ad server, DSP, SSP and publisher ad server services. It is not necessary to consider the position of companies in other digital markets.

Free TV also recommends a more objective test than the test to be applied in the UK or under the EC's Digital Markets Act. Assessing, for example, what a "bottleneck" in a digital market is or whether a company has a "durable position" involves elements of subjectivity that will lead to regulatory uncertainty. To provide a clearer and objective threshold, a company (or a corporate group) could be determined to be subject to the new regulations if it had a particular threshold share of revenue or impressions in respect of any of the four key ad tech services. The ACCC has undertaken this analysis for the purposes of the Ad Tech Inquiry and could be tasked with undertaking this analysis on an ongoing annual basis. Those entities that would meet such thresholds are referred to as "strategic market participants" in this submission.

## 5.4 Making determinations

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This then leaves the question of who should determine which companies (or corporate groups) satisfy the test that is ultimately adopted. The Furman Report recommended that the designations of "strategic market status" should be made by the proposed new Digital Markets Unit within the CMA, a recommendation that the UK Government has accepted. This is an appropriate model for Australia's regulation. As the ACCC has an ongoing role, in its capacity as Australia's competition and consumer protection regulator, to monitor digital markets it is well placed to apply the tests that are adopted in the new regulation.

In addition the ACCC should be required to consider designations on an ongoing basis (potentially annually) to ensure that changes in market dynamics and participants are able to be considered.

## 5.5 Application to Facebook

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Free TV notes that the Ad Tech Inquiry has not considered online search advertising and does not focus on advertising that is sold by businesses such as Facebook that is not sold through the ad tech supply chain.

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<sup>9</sup> As referred to at page 55 of the Report, which is available here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)

Although Facebook is not the focus of the Ad Tech Inquiry, Facebook’s behaviour in relation to online advertising generally, including regarding the sale of inventory on Facebook and the other platforms owned by it (including Instagram) is also problematic from a competition point of view. For example, publishers are required to implement Facebook’s social sharing tools on their websites to be able to access audiences through Facebook, which is an unavoidable source of traffic. Facebook then takes data collected through those tools to target ads on Facebook and retains the revenue from those ad placements. In a competitive market, publishers would be able to restrict Facebook’s use of that data. For this reason, Free TV recommends that ACCC gives broader consideration to Facebook and to including Facebook within the category of “strategic market participants” to whom the new regulation would apply.