Supplementary submission
Free TV Australia

Digital Platforms Inquiry

Ex-ante regulatory models and ad-tech competition

Australian Competition & Consumer Commission

May 2019

1 Summary

- Free TV made a comprehensive submission to the ACCC on its digital platform inquiry Preliminary Report. Our recommendations included the need for:
  - a new ex-ante approach to regulating dominant digital platforms;
  - a principles-based approach to regulating algorithms outputs to ensure fairness, impartiality and to promote Australian content;
  - further financial support measures for Australian news production to be provided through a new tax offset arrangement;
  - urgent action to redress the most obvious cases of regulatory disparity;
  - an efficient and effective process for taking down illegal material; and
  - a primary focus on effective informed consent for the use of consumer data.
- This supplementary submission builds on a new approach to regulation, drawing particularly on the growing number of reviews across the world into the impact of dominant digital platforms on media companies' ability to sustainably produce original content.
- From these reviews, a common theme is emerging regarding the need to move away from slow and inefficient ex-post regulation of conduct, towards ex-ante models that directly target the impact of dominant digital platforms.
- Free TV maintains that a new form of ex-ante regulation should be included in the Competition and Consumer Act. Dominant digital platforms should be subject to a declaration process (initially set in regulation), with the relevant services they provide being subject to either a negotiate-arbitrate process or a rules-based framework administered by the ACCC.
- The aim of our approach is to provide the appropriate incentives for the dominant digital platforms to enter into effective bilateral negotiation with media companies. In the event that agreement cannot be reached, the ACCC should retain an arbitral role.
- Free TV notes the Cairncross review report and the proposed code of conduct model with regulatory oversight. It is important not to get caught in a debate on the labels to be used for various models.
- What is critical is ensuring that an ex-ante regulatory approach emerges from this review process that incentivises genuine negotiation where this is possible/desirable (in particular in relation to content aggregation platforms) and provides appropriate rules and remedies for other aspects of the market.
- In relation to collective bargaining, Free TV agrees with the conclusions of the Cairncross review that this is unlikely to be successful as a remedy. However, we do support a collective licensing regime for news content within search results.

2 Introduction

Free TV Australia thanks the ACCC for the opportunity to make this supplementary submission on the Digital Platforms Inquiry Preliminary Report.

We make this supplementary submission in the context of the ACCC's preliminary findings that:

- Google has substantial market power in the supply of online search in Australia with approximately 94 per cent of online searches in Australia currently performed through Google.

- Google has substantial market power in the supply of online search advertising. This flows directly from its substantial market power in the consumer facing market for online search.
- Facebook has substantial market power in display advertising. Facebook and Instagram together obtain approximately 46 per cent of Australian display advertising revenue. No other website or application has a market share of more than five per cent.
- This widespread and frequent use of Google and Facebook means that these platforms occupy a key position for businesses looking to reach Australian consumers, including advertisers and news media businesses.
- Google and Facebook are critical and, in many cases, unavoidable business partners.[1]

In our substantive submission on the Preliminary Report, we recommended that the fact that Facebook and Google enjoy substantial market power and are insulated against dynamic competition, should lead to the creation of a new bespoke ex-ante regulatory model.

This supplementary submission expands upon the ex-ante regulatory model, particularly drawing on more recent publications in the UK, namely the Furman and Cairncross reports.

3 Ex-ante regulation should be the focus of the ACCC work

Regardless of the label used, the focus of the ACCC final report should be recommendations on a strong and effective ex-ante regulatory framework to apply to dominant digital platforms.

In our submission on the Preliminary Report, we set out a model that we described as an access regime. We conceived of this model operating as a new chapter in the CCA which would effectively set the basis on which dominant platforms engage with their customers.

Whether implemented as an access regime or an authorisation process there are two main objectives:

- Establish appropriate incentives for media companies and dominant digital platforms to negotiate as they would in an open competitive market;
- Provide the ACCC with the power to arbitrate where agreement cannot be reached, including the ability to establish market rules governing the terms and conditions under which dominant platforms are allowed to offer services within Australia.

The first of these objectives cannot be achieved without a strong and effective framework that allows for the competition regulator to intervene.

In our view, this framework should be enshrined in a new CCA chapter that would set out the minimum criteria or principles that the terms and conditions under which declared platform services must be provided to media companies. This would set the foundation of negotiation between media companies and the dominant digital platforms.

Where agreement on terms for a service provided by a dominant digital platform cannot be reached, the ACCC should have the power to impose rules or mandate a particular form of undertaking, including replacing the terms and conditions of service.

3.1 Who does ex-ante regulation apply to?

Free TV's proposal is that only those platforms with substantial market power would be subject to this ex-ante regulatory power. Such dominant platforms would be subject to a declaration framework under the new chapter of the CCA.

To establish the regulatory environment as efficiently as possible, we consider that an initial list of declared platform services should be set in regulations. In the Preliminary Report, the

[1] ACCC, Digital Platforms Inquiry – Preliminary Report, pg 2

ACCC identified that each of Google and Facebook had substantial market power in several markets. For example, Google in the market for general search services and in the market for search advertising and Facebook in the market for social media services and display advertising. These markets should serve as the starting point for declaration and be informed by future market reviews.

Such a process of identifying dominant platforms is gaining traction in other jurisdictions. In the recent Furman report in the UK, the Panel used the notion of "strategic market status" to identify the circumstances in which this type of approach should be used.

Further, the Furman report also said that:

> *"Platforms that achieve dominance can hold a high degree of power over how their users access the market, and each other. On the other side of the market, there is a long tail of small, fragmented independent business that rely on the platforms to survive. This is often described as a competitive gateway – a position of control over other parties' market access."*

3.2 What services could be regulated?

While the dominant digital platforms are often referred to collectively, Google and Facebook are two separate entities offering different service propositions. Even within companies, there is an extensive range of product and service offerings that may require different forms of ex-ante regulation.

The next two sections discuss the two broad categories of services and the form of ex-ante regulation we consider should apply:

- Services where a commercial outcome would ordinarily be negotiated in a competitive market (negotiate-arbitrate framework)
- Services that are provided on an industry-wide basis, where competition issues are not firm specific and relate to matters such as interoperability and efficient auction design and implementation (rules-based framework).

3.2.1 Incentivising bilateral negotiation through a negotiate-arbitrate framework

From a media company's perspective, the ability to monetise content on content aggregation platforms such as Google's YouTube and the Facebook Newsfeed is a key concern.

Currently, both platforms present the same problem for media companies—a lack of ability to negotiate in the same way that would be expected if there was a competitive platform market. The result is that media companies cannot monetise their content on these platforms at a level that is sustainable.

For this class of service offerings, the focus of ex-ante regulation should be on creating the appropriate incentives for constructive bilateral negotiations between media companies and dominant platforms on these matters. These incentives would be created by vesting in the ACCC the power to issue binding determinations on the terms and conditions of service following an arbitration process.

Media companies would initially negotiate with the dominant platforms for access to advertising products and sales channels which allow publishers to monetise their content on these platforms.

In practice, media companies would be seeking an outcome that allowed:

- control over the sale of inventory, including pricing; and
- greater control in respect of the technical aspects of content monetisation, including all available ad products and access to all sales channels.

In the event that media companies and the dominant platform in question are unable to agree on terms, the ACCC would arbitrate on the dispute and determine the final terms and conditions of access by media companies to these services.

3.2.2 Industry-wide rules for digital programmatic advertising and associated ad-tech

The dominant digital platforms offer a range of services across the ad-tech supply chain. Some of these services can also be sourced from third-party vendors, which then rely on interoperability with other parts of the supply chain supplied by the dominant platform. This is an issue that primarily relates to Google.

Free TV submits that the most effective form of ex-ante regulation for this class of services is a rules-based framework that governs the terms and conditions of service for vertically integrated dominant digital platforms.

Again, there are various ways this could be achieved. In our February 2019 submission, we proposed a mandatory undertaking that must be submitted to the ACCC. The terms and conditions set out in the platform's undertaking would be required to meet minimum criteria set by the ACCC (the ad-tech market rules). We consider that these minimum criteria should include:

- Strong and effective protections that ensure interoperability with third party vendors and mechanisms to ensure that the platform cannot unduly incentivise or lock participants into using the platform's products or services as opposed to acting in the best interests of the participant's customers
- Effective mechanisms to ensure that no company can use its substantial market power in in one market to extend or leverage that power into other markets to the detriment of competitors
- Industry participants must not favour 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
- In respect of auction processes, a transparent and unbiased market maker role that clearly sets out how and when buy and sell orders will be matched (including auction mechanics and other aspects)
- Intermediary fees must be disclosed and accessible to buyers and sellers.

In effect, the ACCC ad-tech market conduct rules would be analogous to the ASX Operating Rules. The undertaking submitted by the dominant platform would essentially be a statement of how it intends to meet these operating rules.

Crucially this process involves the ACCC consulting on and approving the court enforceable undertaking. The consultation stage in this process is vital, as it is likely that the initial proposal from the dominant platform would not cover all matters that media companies and other ad-tech operators consider should be included. The consultation process would allow these players to highlight to the ACCC areas of deficiency in coverage or problematic terms and conditions.

After taking into consideration the consultation process and its own analysis, the ACCC would form a view on whether the proposed terms and conditions in the undertaking met the ad-tech market rules. To the extent that the ACCC formed the view that any of the terms and conditions included in the undertaking failed to meet the market rules, the ACCC would have the power to make its own determination on the terms and conditions of service.

Both the ad-tech market rules and the authorisation of the terms and conditions would be subject to 5-yearly reviews to ensure that the focus of regulation remained relevant as technology and the ad-tech market evolves.

Free TV submits that this process is far more efficient and effective than waiting for anti-competitive conduct to surface and be dealt with through the existing competition law provisions. As highlighted in our February submission, such an ex-post process is slow and is likely to miss some welfare-harming conduct.

3.2.3 What's the justification for this intervention in the ad-tech market?

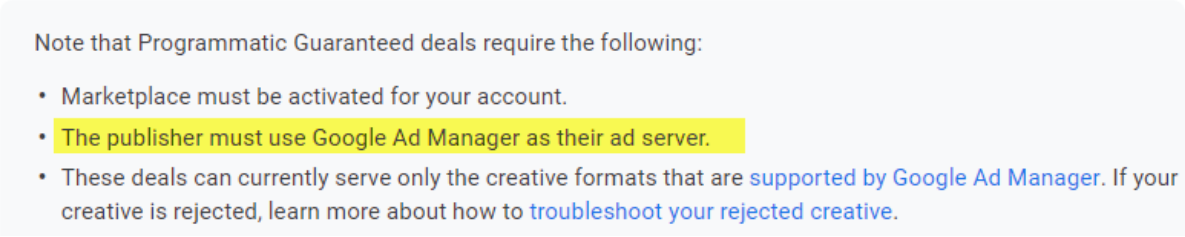
The dominant digital platforms limit interoperability with third party vendors and bundle their services to exclude rivals or extend their market power in one market into other markets in which they operate to the detriment of competitors. Below are examples of limiting interoperability and bundling of services.

Interoperability between DV360 Programmatic Guaranteed and third-party ad servers

Programmatic Guaranteed (PG) is a programmatic deal type that allows buyers to buy reserved inventory through programmatic channels by pushing orders directly into a publisher's ad server.

Google's DSP, DV360, does not integrate with third party ad servers – only Google's Ad Manager ad server (formerly DFP).

https://support.google.com/displayvideo/answer/7067656?hl=en


Note that Programmatic Guaranteed deals require the following:

- Marketplace must be activated for your account.
- The publisher must use Google Ad Manager as their ad server.
- These deals can currently serve only the creative formats that are supported by Google Ad Manager. If your creative is rejected, learn more about how to troubleshoot your rejected creative.

According to Datanyze, DV360 represents more than 50% share of the DSP market in Australia. Furthermore, according to this Boston Consulting Group report, PG is a fast-rising driver of the growth of programmatic advertising, forecasted to comprise 18% of total display and video programmatic in Australia by 2020.

With the market share held by DV360 and the revenue opportunity from PG, Google's limiting of interoperability between DV360 PG and third-party ad servers provides a significant incentive for publishers to use Google Ad Manager. If they use a third-party ad server they will be unable to access PG advertising demand through DV360.

Whilst limiting interoperability between DV360 PG and third-party ad servers is to the detriment of Google's DV360 customers who may wish to transact via PG with publishers on third party ad servers, Google use interoperability as a mechanism to lock publishers into using their ad stack.

Interoperability between Google AdX and third-party header bidding technology

Header bidding is a technology that allows publishers to bring multiple ad exchanges into competition with one another and with their reserved campaigns to allocate an impression to the advertiser willing to pay the most. It was developed as technology to maximise yield for publisher's and get around AdX's 'last look' advantage over other supply side platforms (SSPs).

Unlike most sell-side platforms (SSPs) or ad exchanges, Google's own SSP (AdX) does not integrate with any third-party header bidding technologies. Publishers who wish to access AdX

demand—which is significant particularly in display—in a header bidding set up must implement Google's own header bidding technology called 'Exchange Bidding'.

There is a significant movement from publishers to adopt open source header bidding technologies to create transparency around how bids and impressions are matched in the auction processes.

Prebid is an open source header bidding technology developed by AppNexus. It is the most widely used header bidding technology globally, a list of its members and integrated vendors can be found here. All major SSPs, except Google's AdX support the Prebid open source initiative and integrate with Prebid.

Google has chosen not to make AdX interoperable with third party open source header bidding technologies to force publishers who want access to AdX demand to use their own header bidding technology. Exchange Bidding is not open source. If a publisher wishes to use AdX 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 AdX. It's therefore not possible to determine if Google is favouring its own business interests when using Exchange Bidding.

Bundling access to YouTube inventory with DV360

YouTube is the largest source of video ad inventory in Australia and an unavoidable media partner for advertisers wishing to achieve maximum reach of Australians using video ad formats.

Google bundle YouTube inventory access exclusively with Google's DSP, DV360 (formerly DBM). Because no advertiser using a competing DSP can buy across YouTube, this offers a significant incentive to advertisers to use the Google DV360 DSP. This bundling practice has the effect of locking companies into Google advertising technology services by extending their market power in YouTube advertising inventory into the DSP market.

Bundling of Google search data with DV360

Google has significant market power in search, as the ACCC established in the Preliminary Report, and operate the largest web browser, Chrome.

Google bundle web browsing and search data with DV360 by making this data available as Affinity Audiences and In Market Audiences in the DSP for advertisers to use to target their campaigns for free. This is powerful data, particularly the search data which is the strongest signal of user intent, and highly valuable to advertisers.

The ability to access highly targeted audience data which they cannot access with other DSPs who do not operate a search engine or web browser provides a material incentive for advertisers to use the DV360 DSP. Google uses bundling to extend their market power in search and web browsing into the adjacent DSP market, strengthen their position across the advertising supply chain.

Facebook's bundling of user data collection with social sharing tools

Facebook is a significant source of traffic for many publishers, as established in the ACCC Preliminary Report. For publishers to have discoverable content on Facebook they need to implement sharing tools on their pages to allow their articles to be shared by users on Facebook.

By doing so however, Facebook collects data from publisher websites that have implemented those social sharing tools.

https://www.facebook.com/help/206635839404055?ref=dp

This forced bundling of use of social sharing tools with Facebook's collection of audience data effectively forces publishers to hand over their audience data and only serves to strengthen Facebook's massive trove of data to improve its audience targeting capabilities and commercial proposition to advertisers. Publishers do not have a mechanism to opt out of Facebook's collection of data from their websites when they have implemented Facebook's social sharing tools and Facebook does not compensate publishers for the data it collects.

Google's bundling of user data collection with monetisation tools

Google collects data from publisher websites and apps that implement its monetisation products such as Ad Manager, Ad Exchange or Google Analytics. This is stated in their privacy policy. https://policies.google.com/technologies/partner-sites?hl=en&gl=US

HOW GOOGLE USES INFORMATION FROM SITES OR APPS THAT USE OUR SERVICES

Many websites and apps use Google services to improve their content and keep it free. When they integrate our services, these sites and apps share information with Google.

For example, when you visit a website that uses advertising services like AdSense, including analytics tools like Google Analytics, or embeds video content from YouTube, your web browser automatically sends certain information to Google. This includes the URL of the page you're visiting and your IP address. We may also set cookies on your browser or read cookies that are already there. Apps that use Google advertising services also share information with Google, such as the name of the app and a unique identifier for advertising.

Google uses the information shared by sites and apps to deliver our services, maintain and improve them, develop new services, measure the effectiveness of advertising, protect against fraud and abuse, and personalize content and ads you see on Google and on our partners' sites and apps. See our Privacy Policy to learn more about how we process data for each of these purposes and our Advertising page for more about Google ads, how your information is used in the context of advertising, and how long Google stores this information.

4 Alternative ex-ante models

On 12 February 2019, the Cairncross review into a sustainable future for journalism was published. Relevant to this supplementary submission, the Cairncross review considered two forms of assistance for media companies negotiating with Google and Facebook. This section discusses those in turn.

4.1 Collective negotiation

Cairncross raises the prospect of publishers being granted exemptions from anti-cartel rules for the purposes of negotiating with the dominant platforms.

Free TV did note the potential for the ACCC to authorise a collective bargaining arrangement by local media companies with the digital platforms in our original submission. However, as noted in our response to the Preliminary Report, after considering the analysis presented by the ACCC on the extent of the dominance of Google and Facebook, we consider that more far reaching regulatory measures are required.

It is likely that media companies will have different starting points for negotiation with the platforms. Similarly, different media companies would have varying touch points with the platforms. For example, for some media companies the length and pricing of snippets would be the most significant issue, while for others the ability to set CPMs would be the focus of negotiations.

These issues are all noted in the Cairncross review, which leads to the conclusion that a better approach may be to seek a code of conduct to guide the negotiation.

We agree that authorising collective negotiation is unlikely to provide a satisfactory remedy, for all the reasons noted above. However, we do support a collective licensing regime for news content within search results. A statutory licence fee, calculated as a percentage of digital advertising revenues, could be distributed to news publishers via a collecting society without requiring competing publishers to seek to agree on collectively negotiated terms. We note that this is consistent with the proposal put forward by News Corporation in its Remedies Paper in which it argued for a collective licensing framework to provide licence fees to publishers who have made significant investments from which the digital platforms benefit.

4.2 Code of Conduct

The Cairncross review suggests that a code of conduct could be developed setting out what should be included in any individual negotiations with a publisher. For example:

> *"These might cover commitments such as a pledge to share some information with a publisher on its readers' behaviour; or a commitment to give appropriate notice for significant changes to algorithms that may impact on the prominence of a publisher's content; or an assurance not to index more than a certain amount of a publisher's content or snippets, without an explicit agreement to do so."*[2]

Importantly, Chapter 6 of the Cairncross review highlights that the codes of conduct should be subject to oversight by a regulator, with the power to develop a statutory code if it considers the codes proposed by the platforms are deficient. Accordingly, there are some similarities between the code of conduct model proposed by Cairncross and the models proposed by Free TV discussed above.

Regardless of whether the mechanism is referred to as a "code of conduct" or an "undertaking" what is important is the resulting incentives for the digital platform to genuinely negotiate. We note that under both the Cairncross code of conduct and the Free TV model discussed above, ultimate power to approve or authorise the instrument is vested in the competition regulator.

[2] The Cairncross Review, A Sustainable Future for Journalism, February 2019, pg 74

As such, appropriately implemented, a code of conduct model could operate similarly to the rules-based framework discussed above.

The key weakness in the code of conduct model is the lack of an arbitration role for the regulator in the event of disputes between media companies and the digital platforms. The absence of an arbitral role for the regulator means that the incentives for the digital platforms to enter constructive bilateral negotiations with media companies would be insufficient to achieve the desired outcome.

However, if the code of conduct model were to include the ability for the regulator to arbitrate disputes under its negotiating framework, the model would appear to have similar characteristics to the Free TV model.

In short, Free TV is less concerned about the architecture and labels used, than we are to ensure that any resulting model:

- Sets out the basis for commercial negotiations between the platforms and media companies, including minimum access terms on setting price;
- Has an ability for the regulator to issue binding resolutions to disputes heard under the negotiating framework;
- Sets out rules for the conduct of dominant platforms operating as market makers;
- Sets minimum levels of interoperability and includes protection against market power being used to exclude third-party providers in the supply chain; and
- Includes price disclosure arrangements to facilitate the ACCC's preferred price transparency model.

5 Ad-tech price transparency

The ACCC has sought further feedback on the proposed models of price transparency in the ad-tech stack. Free TV notes that the competition issues raised in the sections above would not be adequately (or even partly) addressed through greater price transparency measures. However, we maintain our view that greater levels of price transparency would increase the efficiency of the ad-tech stack and drive greater value for both advertisers and publishers.

Accordingly, this section provides additional analysis of a further price transparency model, building on the ACCC's preliminary recommendation 4 of creating a new regulatory function to:

> *"monitor, investigate and report on whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct (including, but not limited to, conduct which may be anti-competitive) by favouring their own business interests above those of advertisers or potentially competing businesses.*

Submissions to the Preliminary Report have suggested an expansion to this model, specifically related to intermediary price disclosure. For example, the Guardian has proposed a model of logging or receipting transactions through the supply chain, to provide complete transparency on the intermediary pricing.

Free TV understands that concerns have been raised regarding this model in terms of the impact on smaller vendors and the potential for inadvertently further concentrating the supply chain if the smaller players were to withdraw from the market. Free TV does not necessarily share those concerns.

However, if the ACCC were to conclude that the risks of that model outweighed its potential benefits, an alternative model should be introduced that would allow greater levels of price disclosure than is currently possible. While the remainder of this submission is prefaced on

additional regulation applying only to dominant platforms, we consider that the price transparency framework should apply to the entire programmatic supply chain.

Ultimately the aim of any price disclosure framework is to enable participants in the supply chain to have the best information possible on the performance of intermediaries so that advertising spending is driven towards the most efficient providers. This would mean better value for advertisers, more money for publishers and less distortions with other forms of advertising in terms of CPM measures.

As such, Free TV still urges the ACCC to go further than its preliminary recommendation 4. For example, a price indexing model could be developed that disclosed average prices for services provided by dominant providers in key sections of the ad-tech stack. The most value will be derived from publishing margins taken by intermediaries at key stages of the supply chain. These could be broadly grouped as:

- 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
- Brand safety and verification fees.

Ideally the ACCC would publish, by each group of the supply chain above, average margins taken by each of the major participants in that category over the course of all programmatic transactions they were a part of. For example under the “Ad Exchange SSP fees” category they would publish: Google Ad Exchange 20%; Rubicon 15%; AppNexus 12%; Telaria 10%; Pubmatic 12%; AOL 12%; SpotX 15%; Open X 12%.

This would allow media companies and advertisers to compare terms of trade to industry benchmarks and make arrangements to improve the efficiency of their supply partners.