

Submission to ACCC Ad-tech Inquiry – Issues Paper

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The Consumer Policy Research Centre (CPRC) welcomes the opportunity to provide a submission to the Australian Competition and Consumer Commission (ACCC) Ad Tech Inquiry (the Inquiry) Issues Paper.

CPRC is an independent, not-for-profit consumer research organisation. Our mission is to improve the lives and welfare of consumers by producing evidence-based research that drives policy and practice change. Data and technology issues are a research focus for CPRC, including emerging consumer risks and harms and the opportunities to better use data to improve consumer wellbeing and welfare.

The ACCC's current consideration of competition and efficiency in markets that supply digital advertising technology services and digital advertising agency services (collectively referred to as "digital advertising services" in this submission) is an important step following the broader Digital Platforms Inquiry. We agree with the ACCC's previous conclusion¹ that these markets are characterised by opacity – both for consumers trying to make informed choices regarding their exposure to online advertisements, and for advertisers trying to understand the factors that influence the display of online advertising.² This inquiry is a chance to deepen understanding of these markets and, most importantly, provide an evidence-base for interventions that prevent concentrations of market power and drive positive consumer outcomes.

Areas of focus for CPRC

While the scope of this Inquiry revolves around the behaviours of companies that may not have a direct interface with consumers, we note that the ACCC is seeking views on how "ad tech services, ad agency services, and display advertising services are being provided to the satisfaction of *all market participants*" (our emphasis).³ The ACCC's consideration of the role and use of consumers' personal data within the digital advertising supply chain is welcomed, as it is essential to acknowledge that the commodity digital advertising services are transacting over is largely provided by consumers.⁴ It follows that consumer policy issues such as fairness, safety and privacy should be a key consideration when assessing how

¹ ACCC, [Digital Platforms Inquiry – Final Report](#), 2019, p. 12.

² CPRC has previously highlighted significant amounts of research regarding the opacity consumers and advertisers experience, especially in the delivery of online advertising via digital platforms. See: CPRC's 2019 [Submission to the Australian Treasury consultation on the ACCC Digital Platforms Inquiry Final Report](#) (p. 6) and CPRC's 2019 [Submission to the Consultation on the ACCC Digital Platforms Inquiry Preliminary Report](#) (pp. 4-5).

³ ACCC, [Ad Tech Inquiry – Issues Paper](#), 2020, p. 5.

⁴ Question 13 (p. 16) in the ACCC's [Issues Paper](#) asks: "What types of data are of value to ad tech services providers? Do ad tech services providers and ad agencies use both personal and non-personal information?"

competition and efficiency in these markets satisfies the interests of all participants. This aligns with views in the UK⁵, Europe⁶ and the USA⁷ – where competition in digital markets and regulation that seeks to prevent consumer harms (concerning fairness, safety and privacy) have been seen as complementary policy areas that can be considered together.

Our submission draws attention to how broad consumer impacts can be considered by the ACCC in this Inquiry. We also identify evidence of how the use of consumers' personal data in the digital advertising services supply chain could lead to negative externalities which deserve consideration when assessing the overall efficiency of this market. Finally, we provide some discussion on policy outcomes that would protect the interests of consumers in digital markets, including digital advertising service markets.

Broad consumer impacts

The Inquiry's focus on the activities and behaviours of firms that make up the digital advertising services supply chain is understandable, given the levels of opacity identified in the Digital Platform Inquiry. While this means that interactions between consumers and the firms in question can be limited, it does not mean risks to consumers are absent. The Furman Review in the UK noted the *indirect impacts* a lack of competition and efficiency in digital advertising can create for consumers. Such sub-optimal impacts can result from digital advertising service providers limiting advertisers' fair access to consumers, charging advertisers unfair prices for services and restricting advertisers from competing freely through anti-competitive conduct or clauses in contracts.⁸

A lack of efficient and effective competition in digital advertising services can also lead to harmful outcomes that have a *direct impact* on consumers. Such outcomes include reduced innovation, poor returns to consumers, excessive extraction of data and lower quality of service - including lower quality of privacy protections. The Furman review considered that "the misuse of consumer data and harm to privacy is arguably an indicator of low quality caused by a lack of competition" noting that some companies "have not historically taken the issues of privacy and treatment of consumer data as seriously as consumers would like."⁹ Similar observations were made by the George J Stigler Centre's Committee on Digital Platforms. This committee noted that harms in digital markets extend beyond "advertising prices that are higher than would be expected in a more competitive environment" and include more direct "quality harms" such as consumer exploitation, manipulation and poor information.¹⁰

Work in other jurisdictions has drawn a clear link between a lack competitive pressures and both indirect and direct consumer harms. It would be beneficial for the ACCC's Ad-tech

⁵ The Competition and Markets Authority's (CMA) 2019 [Online Platforms and Digital Advertising Market Study Interim Report](#) (p. 8) states "Although consumers do not typically pay for the content that is supported by digital advertising, we all stand to experience harm in a variety of forms if competition in these markets is not working well."

⁶ In the European Union Commission's 2019 report [Competition policy for the digital era](#) (pp. 4-5) they broadly note that "competition law enforcement and regulation are not necessarily substitutes, but most often complements and can reinforce each other."

⁷ When providing comment in February 2020 on the [Federal Trade Commission's \(FTC\) decision to examine past acquisitions by large technology companies](#) Commissioners encouraged further study from the FTC into whether (and how) "content curation and targeted advertising practices impact data collection, use, and sharing, and how the monetization of data impacts the creation and refinement of algorithms that drive content curation and targeted advertising practices."

⁸ Jason Furman, [Unlocking digital Competition – Report of the Digital Competition Expert Panel](#), 2019, p. 45.

⁹ Jason Furman, [Unlocking digital Competition – Report of the Digital Competition Expert Panel](#), 2019, p. 43.

¹⁰ Stigler Centre for the Study of the Economy and the State, [Committee on Digital Platforms Final Report](#), 2019, pp. 58-60, 120.

Inquiry to fully explore this link when assessing Australia's digital advertising service markets. Below we set out some of the specific harms consumers are at risk of experiencing.

Negative externalities

Previous CPRC research¹¹ has revealed numerous examples of practices from participants in the digital advertising services market¹² that can lead to consumer harm. These practices (which are summarised below) represent externalities that have a negative effect on consumers, as consumers have little to no direct relations with the digital advertising services market where these risks stem from.

- **Discrimination and exclusion** – information about consumers can be used - and sometimes is used - to benefit commercial entities in discriminatory ways that are sometimes at direct odds with the needs and interests of consumers.¹³ For example, data can be used to build an “online profile” of a consumer and effectively “score” their value - with a view to identifying and retaining profitable customers through advertisements (and avoiding those who are not profitable).¹⁴ A lack of transparency and accountability within such processes means it is difficult for consumers to see how their profile is produced; understand the impact it will have on them; or influence, appeal or correct assumptions based on wrong information.¹⁵
- **Manipulation** - Sophisticated companies can have the power to design online user interfaces in very manipulative ways, for example, internet companies focused on increasing engagement to sell advertising can constantly promote interfaces that make users addicted to their products.¹⁶ The potential for consumers to be manipulated through the “online profile” companies hold about them is very concerning, as information and power asymmetries can be exacerbated, resulting in a loss of consumer autonomy. Such manipulation can also lead to unfair outcomes, violations of privacy, compromise the dignity of consumers and hinder or distort competition.¹⁷
- **Lack of control:** CPRC consumer research indicates consumers are uncomfortable with the amount of information collected about them and would prefer to have greater control over that data collection.¹⁸ Control is particularly lacking given that personal data can often be traded between firms deeply embedded in supply chains without a direct link to consumers or even the basic service they'd signed up for. In addition, it can be difficult for consumers to know where and how to remove their associated data from brokers' holdings.¹⁹ This issue is compounded by terms and conditions and privacy policies that are often ineffective at enabling consumers to make informed choices.²⁰

¹¹ See: Brigid Richmond, [A Day in the life of data](#), 2019, CPRC, pp. 34-40. CPRC also funded a research project that provided a literature review on data tracking. See: University of Melbourne, [State of the Art in Data Tracking Technology](#), 2019

¹² The [Issues Paper](#) (p. 13) sets out the “data services providers” who design services for analysing and/or have access to information about consumers, including Data Management Platforms, Data Analytics Services and Data Brokers.

¹³ University of Melbourne, [State of the Art in Data Tracking Technology](#), 2019, p. 14.

¹⁴ Wolfie Christl, [Corporate Surveillance in Everyday Life](#), 2017, Cracked Labs, p. 13 .

¹⁵ Cathy O'Neil, [Weapons of Math Destruction](#), 2016, Crown Books, p. 143.

¹⁶ These abilities are referred to as “Dark Patterns” that make it difficult for users to express their actual preferences or that manipulate users into taking actions that do not comport with their preferences or expectations. For more information see the Stigler Centre's 2019 [Committee on Digital Platforms – Final Report](#) (p. 12).

¹⁷ Kayleen Manwaring, “[Will emerging technologies outpace consumer protection law? The case of digital consumer manipulation](#)”, [Competition & Consumer Law Journal](#), 26, 2017, p.149.

¹⁸ Phuong Nguyen and Lauren Solomon, [Consumer data and the digital economy](#), 2018, CPRC, pp. 30-38.

¹⁹ Federal Trade Commission, [Data Brokers. A Call for Transparency and Accountability](#), 2014, p. 49

²⁰ Brigid Richmond, [A Day in the life of data](#), 2019, CPRC, pp. 25-33.

- **Personal security and safety of children:** the data and associated systems and infrastructure that participants in digital advertising service markets utilise can present risks that are outside of consumers' control.²¹ Breaches to these systems and infrastructure can result in significant harms, both for individual consumers and consumers collectively when confidence and trust in a company or market is degraded.²² A lack of control is particularly acute for children, who now grow up in the digital environment and are unlikely to understand risks online behaviour may present - but could still have "profiles" about them which go on to impact their adult lives.

Characterising the above harms as "negative externalities" is not a novel concept, with sub-optimal data sharing and collection practices viewed by Schneier²³ as "the pollution problem of the information age." Therefore, for an assessment of competition and efficiency of digital advertising service markets to be robust, it is important that such harms are considered alongside the benefits created by digital advertising service markets. Learning more about harmful data collection, use and sharing practices through this Inquiry – and the ongoing Digital Platform Services Inquiry – is critical to protecting consumers, particularly given that reliance on digital markets may be heightened for some time due to the COVID-19 pandemic.

Potential outcomes of the Inquiry

CPRC welcomes the Inquiry having a broad set of potential outcomes, including increasing information about the data practices in digital advertising services, potential action under the *Competition and Consumer Act 2010* and recommendations to Government for law and policy change. As the inquiry progresses, CPRC would encourage the ACCC to continue to investigate and pursue urgent policy changes that modernise consumer protections in Australia. In this context, this Inquiry should consider:

- How the ACCC's recommendation regarding a **prohibition on certain unfair trading practices**²⁴ could address issues identified in the opaque digital advertising services market. Particular consideration should be given to who is accountable for data misuse and unfair consumer outcomes (for example, unfair exclusion or manipulation of consumers) and whether the status quo provides effective incentives to participants in the digital advertising services market that will ensure consumers are treated fairly.
- The merits of a introducing a **general safety provision** into Australian Consumer Law, including consideration of data collection, sharing and use practices. The security of data and personal information presents all consumers with safety risks, especially children. A safety provision can help boost competition – as consumers will have more trust in digital markets and be further encouraged to engage.
- How an economy wide **principles-based governance framework** – which integrates competition law and consumer protections relevant to the ACCC, as well as privacy and human rights protections – could address issues of unfair treatment and safety risks stemming from the digital advertising market (and indeed the economy more broadly when different markets are considered during the Digital Platform Services Inquiry).

²¹ Jason Koebler, [The weakest link in cybersecurity isn't human, it's the infrastructure](#), 2018, Motherboard VICE.

²² Katherine Kemp, [Getting Data Right](#), 2018, Center for Financial Inclusion.

²³ Bruce Schneier, *Data and Goliath: The hidden battles to collect your data and control your world*, 2015, WW Norton & Company.

²⁴ ACCC, [Digital Platforms Inquiry – Final Report](#), 2019, p. 26.

Further engagement

We look forward to continuing discussions with the ACCC over the coming weeks as this Inquiry, and the broader Digital Platform Services Inquiry, progress.

For further discussions regarding our upcoming research and the contents of this submission, please contact Andrew Thomsen, Senior Policy and Research Officer, at andrew.thomsen@cprc.org.au

Yours sincerely



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