

Unclassified

English - Or. English

2 November 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

Competition in Digital Advertising Markets – Note by Australia

30 November 2020

This document reproduces a written contribution from Australia submitted for Item 1 of the 70th OECD Working Party 2 meeting on 30 November 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets.htm>

Please contact Mr Chris PIKE if you have any questions about this document
[Email: Chris.PIKE@oecd.org]

JT03467776

Australia

1. This submission draws on the Australian Competition and Consumer Commission's (ACCC) recent experience in considering issues relating to digital platforms and digital advertising markets.
2. It provides an overview of the ACCC's observations about online advertising in Australia,¹ with a focus on competition in online search and display advertising, including digital advertising technology services. It then offers four observations about economic concepts relevant to understanding digital advertising markets, including the substitutability of different types of digital advertising, multisided platforms, vertical integration and data as a competitive advantage.
3. The submission then moves beyond competition issues and discusses the interaction of competition, consumer protection and privacy issues, and the work of the ACCC and privacy regulators in considering the broad range of policy issues relevant to digital platforms and digital advertising.
4. Finally, the submission closes with some reflections about policy options for promoting competition in digital advertising markets, and the tools now available to the ACCC following the Australian Government's support of recommendations coming out of the Digital Platforms Inquiry.

1. Role of the ACCC

5. The ACCC is Australia's peak consumer protection and competition regulator. Most of the ACCC's work is conducted under the provisions of the Competition and Consumer Act 2010 (Cth) (CCA). The purpose of the Act is to enhance the welfare of Australians by:
 - promoting competition among business
 - promoting fair trading by business, and
 - protecting consumers in their dealings with business.
6. The ACCC has experience in analysing digital platforms and digital advertising markets through its enforcement², mergers³ and market studies/inquiries work.⁴

¹ In this submission the terms 'digital advertising' and 'online advertising' are used interchangeably.

² For example: In October 2019, the ACCC instituted Court proceedings against Google alleging that Google engaged in misleading or deceptive conduct and made false or misleading representations to users of Google Accounts on Android devices regarding the data about their location that Google stores when certain settings are enabled on their devices. Additionally each year, the ACCC reviews and identifies specific enforcement and compliance priorities. One of the priorities for 2020 is competition and consumer issues relating to digital platforms.

³ For example: The ACCC's current review of Google's proposed acquisition of Fitbit (see: <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/google-llc-proposed-acquisition-of-fitbit-inc>).

⁴ For example: The ACCC's Digital Platforms Inquiry (2017-2019) and the current Digital Advertising Services Inquiry (2020-2021).

1.1. Market studies conducted by the ACCC

7. The ACCC has undertaken, or is undertaking, two market studies relevant to digital advertising which are described in more detail below. These market studies have provided the ACCC with a number of insights into digital advertising.
8. Market studies aim to improve the ACCC's understanding of industry practices and competitive dynamics. This assists the ACCC to proactively identify risks to consumers and the competitive process that may require intervention by the ACCC or others. Market studies also assist the ACCC to identify any market failures and how to address them, including advocacy for law reform.
9. In conducting market studies that are directed by the Government, the ACCC has compulsory information gathering powers as well as the power to hold hearings in carrying out such inquiries. The ACCC publishes its findings in a formal report to help inform consumers and other interested parties, encourage public debate over competition and consumer matters and inform policy consideration.

1.2. Digital Platforms Inquiry Final Report (2017-2019)

10. On 4 December 2017, the Australian Government directed the ACCC to hold an inquiry into the impact of digital search engines, social media platforms and other digital content aggregation platforms on the state of competition in media and advertising services markets (**Digital Platforms Inquiry** or **DPI**). The ACCC published its final report (**DPI Final Report**) on 26 July 2019.⁵
11. The DPI Final Report made 23 recommendations to the Government for law or policy change to address behaviour identified in the report.
12. Most relevant to digital advertising, the ACCC recommended the establishment of a specialist digital platforms branch within the ACCC to pro-actively monitor developments in digital markets and an inquiry into competition in the supply of ad tech services and the supply of online advertising services by advertising and media agencies.
13. The Australian Government announced on 12 December 2019 that it supported this recommendation,⁶ and the digital platforms branch of the ACCC was established in early 2020 with the mandate to monitor and report on the state of competition and consumer protection in digital platform markets, take enforcement action as necessary, and undertake inquiries as directed by the Treasurer. The ACCC was also given a long term direction by the Treasurer to consider the competition and consumer impacts of a wide range of digital platform services including online search, social media, private messaging and electronic marketplace services (including app store marketplaces) and the digital advertising services associated with those services.⁷

⁵ The ACCC's DPI Final Report (26 July 2019) can be accessed here: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

⁶ Australian Government, Response and Implementation Roadmap for the Digital Platforms Inquiry (12 December 2019) (see: <https://treasury.gov.au/publication/p2019-41708>).

⁷ ACCC, Digital platform services inquiry webpage: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025>.

14. The first Digital Platform Services Inquiry monitoring report on online private messaging was released on 23 October 2020.⁸

1.3. Digital Advertising Services Inquiry (2020-2021)

15. Also in response to the DPI Final Report, on 10 February 2020, the Australian Government directed the ACCC to conduct an inquiry into markets for the supply of digital advertising technology services and digital advertising agency services (**Digital Advertising Services Inquiry**). The ACCC must give the Treasurer an interim report on the inquiry by 31 December 2020, and complete the inquiry and provide a final report to the Treasurer by 31 August 2021.⁹
16. The Digital Advertising Services Inquiry seeks to answer some of the same questions outlined in the OECD discussion paper. It is focused on examining the competitiveness, efficiency, transparency and effectiveness of markets for the supply of ad tech services and ad agency services, including:
- the intensity of competition in markets for the supply of, and the efficiency of markets for the supply of, ad tech services and ad agency services
 - the relationships between suppliers and customers in markets for ad tech services, ad agency services, and display advertising services, and
 - whether ad tech services, ad agency services, and display advertising services are being provided to the satisfaction of all market participants.¹⁰

2. Online advertising in Australia

17. In the DPI Final Report, the ACCC examined the role digital advertising performed in the Australian market. It found that in the 12 months to March 2018, Australians are estimated to have spent 21.9 billion hours online, 18.6 billion hours watching television, 14.6 billion hours listening to the radio, and 1.8 billion hours reading newspapers.¹¹
18. The ACCC found that over the past decade there has been a strong fall in the print advertising revenue of commercial Australian media publishers and a rise in spending on online advertising. Digital platforms account for an increasing share of advertising expenditure, with a significant portion of the increase in online advertising revenue from 2014-2018 going to Google and Facebook.¹²

⁸ The ACCC's Digital Platform Services Inquiry Interim Report (23 October 2020) can be accessed here: <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report>.

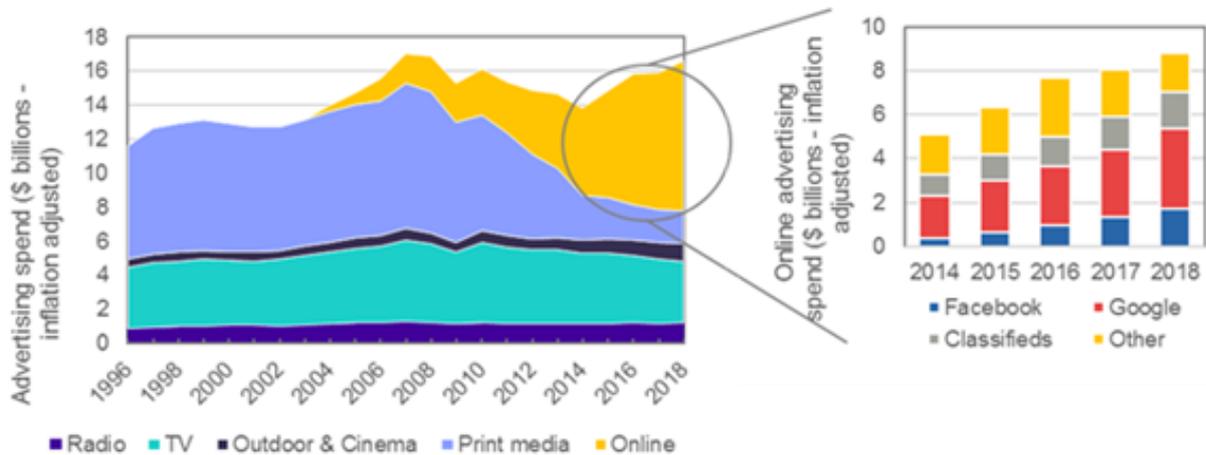
⁹ ACCC, Digital advertising services inquiry webpage: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry>. This webpage will contain links to the Interim and Final Report once published.

¹⁰ *Competition and Consumer (Price Inquiry – Digital Advertising Services) Direction 2020*.

¹¹ ACCC, DPI Final Report (26 July 2019), p 18.

¹² ACCC, DPI Final Report (26 July 2019), p 18.

Figure 1. Australian advertising expenditure by media format and digital platform



Source: ACCC, DPI Final Report (26 July 2019), p 18

19. In the course of examining media and advertising markets the ACCC considered three categories of digital advertising:

1. **search advertising**, which appear when a user performs a search query on a general search engine (such as Google and Bing) or a specialised search engine (such as Amazon or Expedia)
2. **classified advertising**, which appear on general classifieds websites (such as Gumtree) or specific classifieds websites (e.g. sites that specialise in jobs or real-estate classifieds), and
3. **display advertising**, which refers to all other types of online advertising, including advertising in banners or videos on webpages, in mobile apps, and alongside social media content.¹³

20. Advertisers in Australia acquire online advertising space from various firms, including digital platforms and media businesses. As part of the ACCC's market study work into digital platforms, it has focused on competition and consumer issues relating to online search and display advertising.¹⁴

2.1. General search advertising

21. In Australia, there are a number of general search engines, but Google has been the dominant provider since 2009, with a market share between 93 to 95 per cent for general search services from 2009-2020.¹⁵

22. In the DPI Final Report and the recent Digital Platform Services Inquiry Interim Report, the ACCC expressed the view that Google has substantial market power in the supply of search advertising. The ACCC found that in supplying search advertising inventory, Google faced little competitive constraint, either from suppliers of general search advertising or from suppliers of specific search advertising. In addition, large-scale entry

¹³ ACCC, DPI Final Report (26 July 2019), p 89.

¹⁴ ACCC, DPI Final Report (26 July 2019), p 59.

¹⁵ ACCC, Digital Platform Services Inquiry Interim Report (23 October 2020), Appendix B, p 2.

by a search platform was unlikely in at least the short- to medium-term, because of barriers to entry and expansion for search platforms, Google’s advantages of scope, and its strategic acquisitions. Accordingly, the ACCC considered that Google’s market power in search advertising was not merely transitory.¹⁶

23. While some larger advertisers have been able to negotiate pricing discounts from Google for search advertising, the ACCC found that advertisers generally have little bargaining power in negotiations with Google because advertisers ‘need’ and value Google Search more than Google Search ‘needs’ any individual advertiser.¹⁷

2.2. Display advertising

24. Display advertising includes banner advertisements, video advertisements, as well as advertisements that appear on social media platforms. The ACCC considered in the DPI Final Report that it is particularly suitable for promoting brand awareness, in contrast to search and classified advertising.¹⁸
25. Within the range of display advertising, there are differentiated offerings, such as advertising specifically on social media services, video advertising and display advertising supplied through various channels (such as owned and operated properties, and open display). These offerings may be differentiated as some advertisers may see certain types of display advertising as closer substitutes than others.
26. In the Digital Platform Services Inquiry Interim Report and the earlier DPI Final Report, the ACCC expressed the view that Facebook has substantial market power in the overall supply of display advertising in Australia, with a market share of around 62 per cent, and the rest of the market is highly fragmented.¹⁹
27. The ACCC found that Facebook was subject to little competitive constraint, either from suppliers of social media advertising or, more generally, from suppliers of display advertising. Moreover, given the high barriers to entry and expansion in social media services, advantages of scope and Facebook’s strategic acquisitions, large-scale entry or expansion by a provider of social media services is unlikely in the short- to medium-term. Given the significance of Facebook’s platforms for advertisers looking to reach an online Australian audience, advertisers have little bargaining power.²⁰

2.3. The ad tech supply chain used for display advertising

28. Display advertising that uses ad tech (or ‘advertising technology’) is a very complex form of online advertising and is the focus of the ACCC’s current Digital Advertising Services Inquiry.
29. The ad tech supply chain consists of a number of different ad tech services, which assist advertisers and publishers in the automatic purchasing and selling of digital display advertising. Ad tech services allow targeted ads to be shown to consumers in a matter of

¹⁶ Chapter 2 of the ACCC DPI Final report provides the reasoning and evidence that underpin these conclusions. See also: ACCC, Digital Platform Services Inquiry Interim Report (23 October 2020), Appendix B, p 4.

¹⁷ ACCC, DPI Final Report (26 July 2019), p 97.

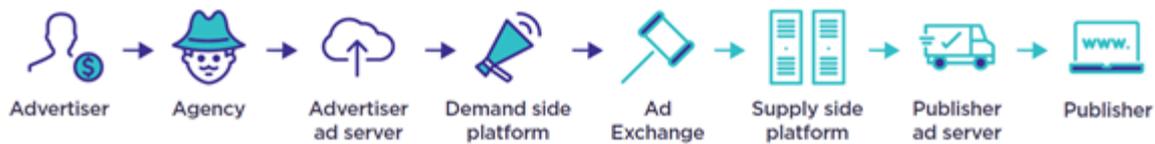
¹⁸ ACCC, DPI Final Report (26 July 2019), pp 97-98.

¹⁹ ACCC, Digital Platform Services Inquiry Interim Report (23 October 2020), Appendix B, p 11; ACCC, DPI Final Report (26 July 2019), p 97.

²⁰ ACCC, DPI Final Report (26 July 2019), p 99.

milliseconds. The following diagram shows a simplified version of the ad tech supply chain.

Figure 2. Overview of ad tech supply chain



30. The role of each of the ad tech providers in the above supply chain are summarised below:

- **Advertiser:** Buyers of ad inventory. Includes businesses of all sizes and across all industries, as well as nonprofit organisations and Government departments.
 - **Agency:** Offer a number of different services to advertisers including designing, launching and managing ad campaigns, and coordinating and executing the programmatic purchase of online ads.
 - **Advertiser ad server:** Used by advertisers to manage and track all ad and campaign information in one location. However, it is not involved in purchasing ad inventory.
 - **Demand-side platform (DSP):** Used by advertisers to help them purchase ad inventory as effectively and cheaply as possible. Uses data to provide ad targeting services.
 - **Supply-side platform (SSP) and ad exchanges:** The functions of supply-side platforms are increasingly integrated with those of ad exchanges. Ad exchanges connect demand-side platforms and supply-side platforms, often via a real-time bidding auction. SSP's are used by publishers to maximise the price at which ad inventory is sold. Includes setting price floors, determining data used and deciding which buyers can bid.
 - **Publisher ad server:** Used by publishers to organise and manage ad inventory on their website. Typically determines what ads will be shown, serves ads and collects information on performance.
 - **Publisher:** Suppliers of online content, mobile apps, social media or other services that attract consumer attention online and that host ad inventory.
31. Google is active across the entire ad tech supply chain and estimates suggest that Google's share of demand side platform services and supply side platform services may be as high as 63 per cent, with the next largest competitor having a share as low as 8 per cent. In addition, no other competitors appear to have the broad coverage across the ad tech supply chain that Google does.²¹
32. There are three other types of ad tech services that are not discussed above: data management platforms, data brokers, and ad measurement verification and attribution services providers. These all provide data related services which either assist in ad targeting, or verifying the performance of ads. In some instances, these services are inherent functions already integrated into the ad tech services described above. As such, these

²¹ ACCC, Google/Fitbit Statement of Issues (18 June 2020), paragraphs 106-107.

additional services are supplementary in assisting advertisers and publishers buying and selling ad inventory.

2.3.1. How is display advertising bought and sold?

33. Publishers may choose to sell their ad inventory in a variety of ways. The different ways of selling inventory are called ‘deal types’.
34. The way that a publisher will sell inventory will depend on a range of factors. For example, some deal types may generate higher sales prices for the publisher, while other deal types allow the publisher to have a more direct relationship with the advertiser, giving them more control over the ads that are shown on their website. The four key deal types are described below:
 - **Direct deals:** Deals where ad inventory is bought and sold via direct negotiation between advertisers and publishers. Generally, this manual process involves the sending of ads ahead of time to the publisher who then loads them onto their website. Direct deals generally generate the highest yield for the publisher.
 - **Programmatic guaranteed deals:** Direct deals between a publisher and an advertiser with the terms of the transaction agreed in advance, but executed programmatically (i.e. with the use of ad tech) instead of manually, which increases the efficiency of the order and allows the use of targeting tools for real-time personalised advertising.
 - **Private auctions:** Auctions where multiple advertisers participate in an invite-only auction, and are facilitated via programmatic means (i.e. using ad tech).
 - **Open auctions:** Auctions that are open to all buyers, and facilitated via programmatic means (i.e. using ad tech). Open auctions generally generate the lowest yield for the publisher.

2.4. Concerns about digital advertising markets

35. In the DPI Final Report, the ACCC found that there was a lack of pricing transparency regarding ad tech services and that this created significant issues for both advertisers and publishers.
36. The ACCC considered that this lack of transparency led to participants in the display advertising market questioning the efficiency of the ad tech supply chain. In particular, participants did not know what proportion of ad spend ad tech providers were retaining across the ad tech supply chain. The ACCC was concerned that this may make it difficult for advertisers to optimise their spending decisions, leading to increased costs for advertisers. Publishers may also be receiving less of the advertiser’s dollar than they would if advertisers were more easily able to optimise spend. This lack of transparency also increases search costs for advertisers and publishers in selecting ad tech providers, as they are not empowered to seek out more competitive deals.²²
37. The DPI Final Report also identified the potential for vertically integrated suppliers of ad tech services to engage in conduct such as:
 - favouring or preferencing their own ad inventory
 - favouring or preferencing their own ad tech services, or

²² ACCC, DPI Final Report (26 July 2019), p 154.

- limiting interoperability with third party ad tech services to incentivise the use of their own ad tech services.²³

38. The ACCC is continuing to explore issues relating to transparency and vertical integration in its ongoing Digital Advertising Services Inquiry. Vertical integration is also discussed in further detail below.

3. Economic concepts relevant to understanding digital advertising markets

39. The discussion paper asks questions about the appropriate economic framework for analysing digital advertising markets. From the ACCC's market study work there are four observations we can offer in relation to the substitutability between different types of digital advertising, multisided platforms, vertical integration and data as a competitive advantage.

3.1. Substitutability between different types of digital advertising

40. During the DPI, in the context of examining the effect of digital platforms on the state of competition in media and advertising services markets the ACCC considered that, while there may be a degree of substitutability between online and offline advertising, offline advertising did not place a substantial competitive constraint on online advertising.

41. In that same context, the ACCC also considered that display advertising was not a close substitute for search advertising. In part, this was because advertisers use search and display advertising for different purposes. The process of online search provided specific information to the search service about the purchasing intentions of a user. Given the evidence of a user's purchasing intention provided by their choice of keyword, search advertising is especially suitable for 'direct response campaigns' that focus on conversion. Conversely, display advertising is often used for promoting general brand awareness rather than inducing a direct response.²⁴

42. In analysing digital advertising markets for the DPI Final Report the ACCC did not reach a firm view of the segments within the display advertising market or whether there are likely to be separate multiple markets involving the supply of ad tech services.²⁵

3.2. Multi sided platforms

43. A multi-sided platform can be characterised by the following pair of properties:

- distinct types of users or parties ('economic agents') interact on the platform, and
- an increase in usage by one type of user or party increases the value of the platform to users of the other type.

44. In Australia Google and Facebook are the predominant suppliers of digital advertising opportunities. Both Google and Facebook operate multi-sided platforms. Box 3 below depicts these relationships.

²³ ACCC, Digital Advertising Services Inquiry Issues Paper (10 March 2020), pp 22-23 and ACCC, DPI Final Report (26 July 2019), p 135.

²⁴ ACCC, DPI Final Report (26 July 2019), pp 92-94.

²⁵ ACCC, Google/Fitbit Statement of Issues (18 June 2020), paragraph 105.

45. The business models used by Google and Facebook for consumer facing services, such as Google Search, YouTube, the Facebook platform and Instagram, is to charge a zero monetary price to consumers in return for their attention, the collection of their data, and the subsequent ability to sell targeted advertising opportunities.²⁶ Users effectively pay for these services by allowing Google and Facebook to collect and use their data and by viewing advertisements. Because Google and Facebook collect a great depth of information about their users (both on and off their own platforms), they are able to offer advertisers very specific targeting opportunities.
46. By offering compelling services to users at a zero monetary price, Google and Facebook have been able to attract a high number of users to their platforms. This increases the revenue that they are able to obtain from advertisers because by gaining the attention of more users, Google and Facebook increase the supply of advertising opportunities available to be sold; a higher number of users increases the quantity and quality of user data accessible to Google and Facebook, allowing them to provide higher calibre ad targeting services; and a higher number of users increases the quantity of traffic for an advertising campaign, which reduces the average fixed costs of advertising, making the platform more attractive to advertisers.²⁷
47. As Google collects more data on users, it is able to improve the relevance algorithm of its organic search service, which allows it to attract more users. Similarly, if Facebook obtains more data on users, it may be able to improve the quality of its news feed algorithm, which, in turn, may allow it to attract more users. These effects give rise to positive feedback loops.²⁸
48. In the DPI Final Report, the ACCC noted that multi-sided platforms have an incentive to cross-subsidise. That is, the platforms have an incentive to set a relatively low price to users on one side of the platform to attract a high number of users, in order to increase the revenue earned on another side of the platform. The prices charged by Google and Facebook involve a cross-subsidy: on one side, they offer services to consumers for a zero monetary price and on the other side they earn revenue from selling advertising opportunities to advertisers.²⁹
49. Additionally, in the DPI Final Report, recognising the multi-sided nature of these platforms, the ACCC was careful to take into account the competitive constraint provided by the different sides of the relevant platforms in determining whether market power is held in the relevant market(s).

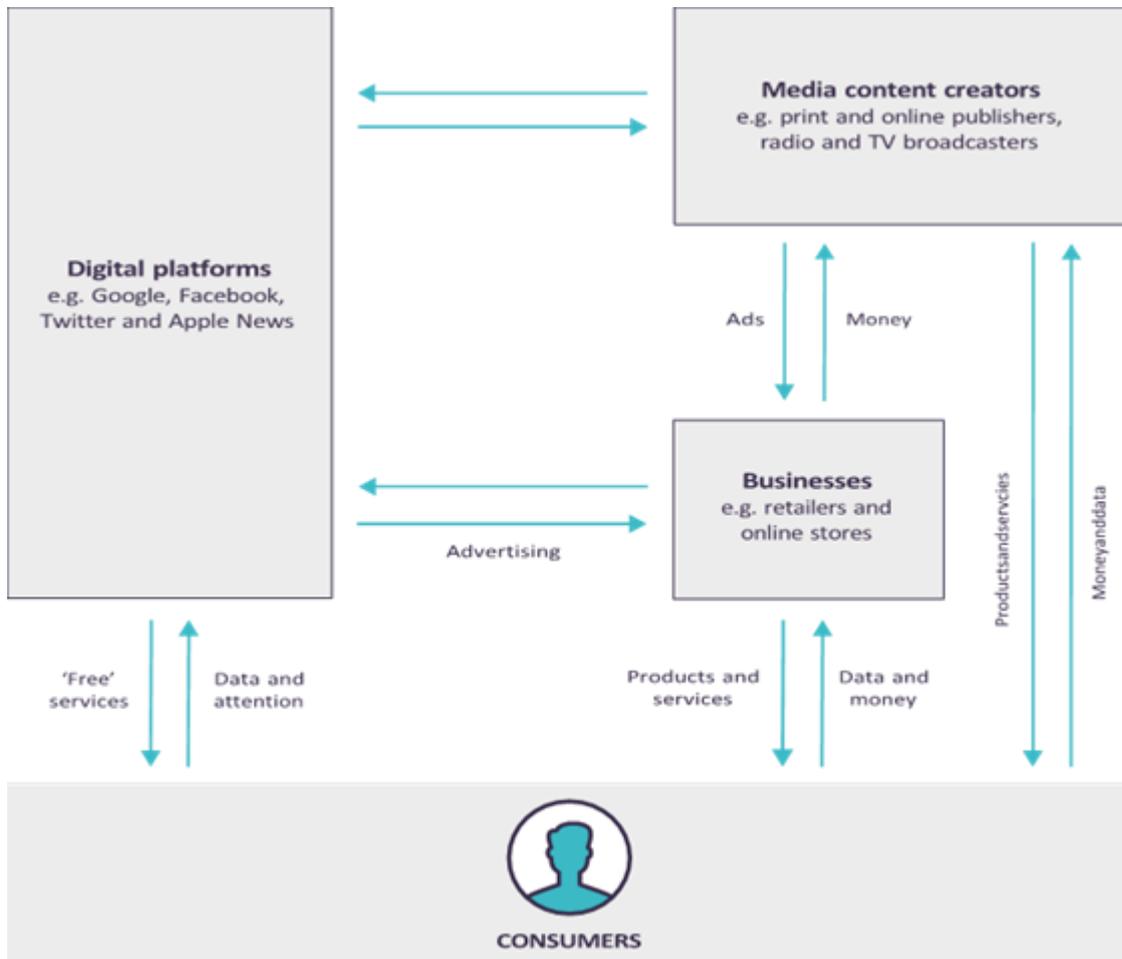
²⁶ ACCC, DPI Final Report (26 July 2019), p 61.

²⁷ ACCC, DPI Final Report (26 July 2019), p 61.

²⁸ ACCC, DPI Final Report (26 July 2019), p 61.

²⁹ ACCC, DPI Final Report (26 July 2019), pp 7 and 63.

Figure 3. Relationships between digital platforms, consumers, businesses (advertisers) and media content creators



Source: ACCC, DPI Final Report (26 July 2019), p 61, extracted from figure 3, 'Big Data Ecosystem' from OECD, Bringing Competition Policy to the Digital Era: Background note by the Secretariat, 29–30 November 2016, p. 12. Figure has been updated and adjusted as relevant to the Australian context.

3.3. Vertical integration

50. The ACCC has found vertical integration to be significant in its analysis of digital advertising markets and notes that there is a growing trend towards vertical integration in markets for ad tech services. As noted above, Google is active across the entire ad tech supply chain and no other competitors appear to have the broad coverage across the ad tech supply chain that Google does.³⁰
51. Vertical integration can give rise to efficiencies in the supply chain. For example, where the demand-side platform and the supply-side platform are provided by the same company those services may be able to operate together more effectively in terms of reduced latency between services, or working with common user IDs, allowing for more effective matching

³⁰ ACCC, Google/Fitbit Statement of Issues (18 June 2020), paragraphs 106-107.

of data provided by the publisher and advertiser for the purpose of advertising personalisation.³¹

52. However, vertical integration can also raise competition concerns, such as where it provides companies with the ability and incentive to influence other market participant's competitiveness, or to take advantage of information asymmetries.³²
53. The ACCC also identified that the growth of today's leading digital platforms can be partly explained by the vertical integration of platform businesses that has occurred through acquisitions.³³ The ACCC is continuing to explore these issues including concerns arising from vertical integration of ad tech providers in its ongoing Digital Advertising Services Inquiry.

3.4. Data as source of competitive advantage

54. The main digital platforms (Google and Facebook) are able to collect and harness large volumes of user data, which are used for highly targeted digital display advertising. For instance, the availability and use of data by Google from other services (such as Google Search and YouTube) provides Google with a significant competitive advantage in the supply of services in the ad tech supply chain.
55. This significantly differentiates their advertising offering. It also means that the more time consumers spend on digital platforms, the more user data the platforms are able to collect, improving their ability to offer targeted advertising opportunities.³⁴ Advertisers have always sought to use information collected on potential audiences to target their advertising, but the granularity and immediacy of the targeting ability of digital platforms and the volume and scope of information that digital platforms have access to is a substantial step-change in the ability of advertisers to target their intended audience.³⁵

4. Investigations conducted by the ACCC

4.1. Relevant merger cases

4.1.1. Google LLC's proposed acquisition of Fitbit Inc.

56. The ACCC is considering digital advertising markets in the context of assessing Google's proposed acquisition of Fitbit. This includes investigating the effect of the proposed acquisition on the supply of certain ad tech services in Australia that rely on the collection and analysis of large amounts of individual data and in particular those services which enable targeting of online display advertising to consumer segments.³⁶

³¹ Competition & Markets Authority, Online Platforms and Digital Advertising Market Study Final Report (July 2020), Appendix M, pp. 34-35.

³² ACCC, Digital Advertising Services Inquiry Issues Paper (10 March 2020), p 22.

³³ ACCC, DPI Final Report (26 July 2019), p 44.

³⁴ ACCC, DPI Final Report (26 July 2019), p 296.

³⁵ ACCC, DPI Final Report (26 July 2019), p 2.

³⁶ ACCC, Google/Fitbit Statement of Issues (18 June 2020), paragraph 14.

57. The ACCC's proposed decision date for this matter is currently in December 2020.³⁷

4.2. Investigations of matters that may involve abuse of dominance

58. The ACCC's market study work has uncovered a number of concerns, which the ACCC continues to investigate. These relate to both potential breaches of consumer and competition laws, including potential breaches of section 46 of the CCA, which deals with companies misusing market power (i.e. the Australian provision relating to abuse of dominance). Specifically, section 46 of the CCA prohibits a firm with a substantial degree of market power (i.e. dominance) from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.

59. Some of these investigations have resulted in the ACCC commencing proceedings for potential breaches of consumer laws. Some of these cases are mentioned below.

5. Other relevant policy areas

5.1. Relationship between ACCC and privacy regulators

60. The ACCC is both the competition and consumer regulator in Australia. The Office of the Australian Information Commissioner (OAIC) is the main body responsible for data protection and privacy. Given the broad range of policy issues and potential enforcement actions raised by the conduct of the digital platforms, in carrying out the DPI, the ACCC worked closely with and continues to work closely with the OAIC and other relevant government agencies.³⁸

5.2. Interaction of competition, consumer and privacy issues

61. Data-driven markets, such as those in which digital platforms operate, raise new issues at the intersection of privacy, competition, and consumer protection considerations. Privacy and data protection laws can build trust in online markets. They can increase consumer protections by addressing sources of market inefficiencies such as information asymmetries and bargaining power imbalances. Strengthened privacy and data protection laws can also empower consumers to make more informed choices about how their data is processed. This, in turn, is likely to increase competition between digital platforms regarding the privacy dimension of their services. It may also encourage the emergence of alternative business models that generate value for, and from, consumers in other ways.

62. Digital platforms' supply of services to consumers and their data practices are governed under both privacy laws and competition and consumer protection laws.³⁹ As user data, including personal information, becomes an increasingly valuable input in a myriad of digital markets, the volume and scope of data collection has been growing. The collection,

³⁷ ACCC public informal merger review register, Google LLC proposed acquisition of Fitbit Inc, see: <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/google-llc-proposed-acquisition-of-fitbit-inc> (accessed on 21 October 2020). Refer to website for up to date decision date information.

³⁸ ACCC, DPI Final Report (26 July 2019), p 29.

³⁹ ACCC, DPI Final Report (26 July 2019), p 435.

use and disclosure of user data and personal information is therefore of increasing importance from a consumer, privacy and competition perspective.⁴⁰

5.2.1. Consumer protection issues

63. The CCA regulates the conduct of suppliers, wholesalers, retailers and consumers in Australia, including the conduct of any digital platforms carrying on business in Australia. Consumer laws apply to digital advertising in the same way they apply to other advertising channels. Schedule 2 of the CCA sets out the Australian Consumer Law, which prohibits businesses from engaging in the following forms of conduct:

- misleading or deceptive conduct and false or misleading representations
- unconscionable conduct
- unfair contract terms.

64. In July 2020, the ACCC instituted proceedings against Google, alleging that Google misled consumers when it failed to properly inform consumers, and did not gain their explicit informed consent, about its move in 2016 to start combining personal information in consumers' Google accounts with information about those individuals' activities on non-Google sites that used Google technology, formerly DoubleClick technology, to display targeted advertising.⁴¹

65. The ACCC has also instituted proceedings against Google alleging that Google engaged in misleading conduct and made false or misleading representations to consumers about the personal location data Google collects, keeps and uses.⁴²

66. Specifically, with regard to digital advertising, the ACCC has raised concerns about the increase of scams on digital platforms. Scams on digital platforms can occur in a number of different ways, including advertising displayed on Google or Facebook, or on websites that are part of Google's or Facebook's advertising networks, that contains false representations and scam content. This is damaging for businesses that inadvertently display these advertisements, individuals (because fake individual profiles, often belonging to celebrities, are used by scammers to attract users) and for consumers who fall victim to these scams and suffer both financial and non-financial loss.⁴³

5.2.2. Privacy and data protection issues

67. The ACCC's market study work has come across many issues where privacy, data protection and consumer law overlap. For example, many digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents. This means that a consumer's act of signing-up to a digital platform is deemed to signal their acceptance of both the terms of use as well as the

⁴⁰ ACCC, DPI Final Report (26 July 2019), p 434.

⁴¹ ACCC Media Release, 'ACCC alleges Google misled consumers about expanded use of personal data' (27 July 2020) (see: <https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data#:~:text=The%20ACCC%20alleges%20Google%20misled,Google%20sites%20that%20used%20Google>).

⁴² ACCC Media Release, 'Google allegedly misled consumers on collection and use of location data' (29 October 2019) (see: <https://www.accc.gov.au/media-release/google-allegedly-misled-consumers-on-collection-and-use-of-location-data>).

⁴³ ACCC, DPI Final Report (26 July 2019), p 27.

associated privacy policies of the digital platform, despite most digital platforms being able to unilaterally vary their privacy policies from time to time after the sign-up has occurred.⁴⁴

68. Despite consumers expressing particular concerns about location tracking, online tracking for targeted advertising purposes and third-party data-sharing, these data practices are generally permitted under digital platforms' privacy policies.⁴⁵
69. Many digital platforms collect a large amount and variety of user data, and the rate of data collection has been increasing over time. The data collected often extends beyond the data users actively provide. Digital platforms may passively collect data from users, including from online browsing behaviour, IP addresses, device specifications and location and movement data. Once collected, digital platforms often have broad discretion about how user data is used and disclosed to third parties. The user data collected can enable digital platforms to create detailed user profiles that are then available for use by advertisers to target advertisements.⁴⁶
70. However, a lack of privacy and control over data-sharing could also harm specific groups of consumers, for example by allowing a seller to use their knowledge of consumers to target vulnerable consumers or discriminate against customers based on gender, race or sexual orientation.

5.3. Privacy recommendations from ACCC DPI Final Report

71. The ACCC expressed concern that the existing Australian regulatory framework for the collection, use and disclosure of user data and personal information does not effectively deter certain data practices that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers.⁴⁷ The ACCC recommended a range of specific changes to enhance consumer control of their data as well as a broader review of existing privacy regulation.
72. On 12 December 2019, the Australian Government announced that it is committed to ensuring privacy settings empower consumers, protect their data and best serve the Australian economy. The Government also announced that it would seek to increase penalties and introduce a binding online privacy code.⁴⁸

6. Policy options for promoting competition and other policy goals in digital advertising markets

73. While the existing tools and goals of competition law and consumer law frameworks remain applicable to digital markets, the opacity and complexity of these markets make it difficult to detect issues. As a result, the ACCC considered in its DPI Final Report that existing investigative tools under competition and consumer law should be supplemented with additional proactive investigation, monitoring and enforcement powers.

⁴⁴ ACCC, DPI Final Report (26 July 2019), pp 374 and 395. See also ACCC, Digital Platform Services Inquiry Interim Report (23 October 2020), Chapter 3 and Appendix D.

⁴⁵ ACCC, DPI Final Report (26 July 2019), p 374.

⁴⁶ ACCC, DPI Final Report (26 July 2019), p 23.

⁴⁷ ACCC, DPI Final Report (26 July 2019), pp 374 and 434.

⁴⁸ Australian Government, Response and Implementation Roadmap for the Digital Platforms Inquiry (12 December 2019) (see: <https://treasury.gov.au/publication/p2019-41708>).

74. As discussed above, the recommendations of the DPI Final Report have now materialised through the creation of a digital platforms branch within the ACCC; Ministerial directions to hold an extended public inquiry over five years; and the specific Digital Advertising Services Inquiry.
75. An ongoing focus by the ACCC on digital platforms will facilitate greater and more consistent scrutiny of potentially anti-competitive behaviour and consumer harms. It enables the ACCC to build on its knowledge and expertise in the markets in which digital platforms operate, which will facilitate more timely outcomes of any competition or consumer enforcement action. Proactive investigation and collection of data and information is central to this.
76. Since the DPI commenced in 2017, the ACCC has begun several investigations into the conduct of digital platforms under the Competition and Consumer Act. It is unlikely that these investigations would have commenced without the proactive examination made possible by the DPI.