Response to The Treasury's consultation on ACCC's regulatory reform recommendations for digital platforms

Thank you for this opportunity to provide a submission to The Treasury's consultation regarding the proposals that the Australian Competition & Consumer Commission (**ACCC**) has put forward for the regulation of digital platform services.

Oracle strongly supports the need for sector specific regulation of digital platform services and agrees with the comments made by ACCC Chair, Gina Cass-Gottlieb, when the report recommending these reforms was released:

> ***Without effective regulation large digital platforms have the ability and incentive to engage in conduct that is harmful to competition. This can include preferencing their own services, or imposing tying arrangements where users of a digital product or service are pushed or compelled to use another service or product, such as smart phones pre-loaded with a certain bundle of apps. These poor competition outcomes harm consumers and business users.***

Urgent action is required

There is a clear need for urgent action to be taken in Australia to introduce ex ante regulation of the dominant digital platforms. That action should be taken to eliminate the significant competition and consumer harms that have arisen, and continue, in digital platform services markets as a result of the business practices of those platforms, particularly Google.

The ACCC has identified anti-competitive conduct by the dominant digital platforms in Australia, and associated market failures, which warrant intervention by the Government. Australia needs to act expeditiously as otherwise the actions of these digital platforms will stifle competition and innovation in Australia, which will be to the long-term detriment of the Australian economy including, in particular, the development of a vibrant and growing Australian tech sector. Claims that regulatory intervention will stifle innovation should be dismissed. To the contrary, the market power of digital "gatekeepers" impedes the competitive process and technological innovation.

Findings of the ACCC

The anti-competitive activities of Google, and other dominant platforms, are set out in detail in the reports from the many investigations of the sector that the ACCC has undertaken since 2017. This includes the ground breaking Digital Platforms Inquiry (finalised in 2019), the Digital Advertising Services Inquiry (**Ad Tech Inquiry**), finalised in 2021, and the ongoing 5 Year Digital Platform Services Inquiry (**5 Year Inquiry**), where the reports issued every 6 months set out the competition and consumer harms that the ACCC has unearthed in a broad range of different digital platform services markets.

Oracle is aware that The Treasury is very familiar with the findings of anti-competitive actions and consumer harms in the digital platform services sector that have been uncovered through the extensive and thorough investigations of the ACCC in the inquiries mentioned above. However, it is useful to refer to some of the comments from the ACCC in relation to its findings, which reinforce the problematic nature of the actions of Google and the other dominant platforms:

- When the ACCC issued its final report from the Ad Tech Inquiry, the ACCC said (emphasis added):[1]

> *"**Google has used its vertically integrated position to operate its ad tech services in a way that has, over time, led to a less competitive ad tech industry.** This conduct has helped Google to establish and entrench its dominant position in the ad tech supply chain," ACCC Chair Rod Sims said.*
>
> *…*
>
> *"The ACCC is considering specific allegations against Google under existing competition laws. However **new regulatory solutions are needed to address Google's dominance and to restore competition to the ad tech sector for the benefit of businesses and consumers.** We recommend rules be considered to manage conflicts of interest, prevent anti-competitive self-preferencing, and ensure rival ad tech providers can compete on their merits."*
>
> *…*
>
> *"We have identified systemic competition concerns relating to conduct over many years and multiple ad tech services, including conduct that harms rivals. **Investigation and enforcement proceedings under general competition laws are not well suited to deal with these sorts of broad concerns, and can take too long if anti-competitive harm is to be prevented**," Mr Sims said.*
>
> *…*
>
> *"**Many of the concerns we identified in the ad tech supply chain are similar to concerns in other digital platform markets, such as online search, social media and app marketplaces.** These markets are also dominated by one or two key providers, which benefit from vertical integration, leading to significant competition concerns. In many cases these are compounded by a lack of transparency."*

- When the ACCC released its final report from the Digital Platforms Inquiry, it stated (emphasis added):[2]

> *During the course of its Inquiry, **the ACCC identified many adverse effects associated with digital platforms, many of which flow from the dominance of Google and Facebook**.*
>
> *These include:*
>
> - ***The market power of Google and Facebook has distorted the ability of businesses to compete on their merits in advertising, media and a range of other markets***
> - ***The digital advertising markets are opaque** with highly uncertain money flows, particularly for automated and programmatic advertising*
> - ***Consumers are not adequately informed** about how their data is collected and used and have little control over the huge range of data collected*
>
> *…*

[1] The media release is available here: https://www.accc.gov.au/media-release/googles-dominance-in-ad-tech-supply-chain-harms-businesses-and-consumers

[2] Media release available here: https://www.accc.gov.au/media-release/holistic-dynamic-reforms-needed-to-address-dominance-of-digital-platforms

> *"There is nothing wrong with being highly focused on revenue growth and providing increasing value to shareholders; indeed it can be admired. But we believe **the issues we have uncovered during this Inquiry are too important to be left to the companies themselves.**"*
>
> *"**Action on consumer law and privacy issues, as well as on competition law and policy, will all be vital** in dealing with the problems associated with digital platforms' market power and the accumulation of consumers' data," Mr Sims said.*

The extracts above highlight only a few of the competition and consumer issues that the ACCC has uncovered in Australia's digital platform services markets. It is well past time for the Australian Government to take action to address this conduct.

It must also be remembered that, in undertaking its inquiries since 2017, the ACCC has been able to rely on its powers under section 95ZK of the Competition and Consumer Act 2010 (**CCA**) to compel the production of evidence from Google and other digital platforms. That power has enabled the ACCC to undertake a detailed forensic analysis of the practices of the platforms, in a manner that is not possible for other stakeholders, including The Treasury through the current consultation process, to replicate.

Australia cannot rely on action taken in other jurisdictions

Australia cannot rely on regulatory enforcement action in the US, discussed below, which is likely to take a decade or more to resolve, or reforms in other jurisdictions, such as the introduction of the Digital Markets Act (**DMA**)[3] in the European Union, which will benefit only the citizens of those other jurisdictions.

Neither litigation nor regulatory reforms adopted elsewhere will see digital platforms that act as gatekeepers of online commerce change their ways in Australia for the benefit of Australian businesses and consumers. Dominant platforms have economic incentives not to change their practices and will embark on delaying tactics, including costly litigation, to avoid making such changes. Even in cases where a dominant platform may consider modifying its anti-competitive behaviour, such as to comply with the DMA, there is already evidence that such changes will be implemented only in the relevant jurisdiction (in the case of the DMA, the European Union) and it appears unlikely that those changes will be extended to other jurisdictions.

*US Department of Justice (**DOJ**) proceedings against Google*

On 24 January 2023, the DOJ (supported by seven US States and the Commonwealth of Virginia) commenced proceedings against Google in relation to its anti-competitive conduct in the ad tech sector. Google's anti-competitive conduct, as set out in the DOJ's complaint, includes the conduct that the ACCC identified in the final report from the Ad Tech Inquiry.

> ***… for 15 years, Google has pursued a course of anticompetitive conduct that has allowed it to halt the rise of rival technologies, manipulate auction mechanics to insulate itself from competition, and force advertisers and publishers to use its tools.***
>
> ***In so doing, Google has engaged in exclusionary conduct to severely weaken, if not destroy, competition in the ad tech industry.***

[3] Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925&from=EN

US Attorney General Merrick B. Garland, commenting on the US proceedings against Google.[4]

As set out in the DOJ's complaint:

- Google controls the technology used by nearly every major website publisher to offer advertising space for sale;
- Google controls the leading tool used by advertisers to buy that advertising space; and
- Google controls the largest ad exchange that matches publishers and advertisers together each time that ad space is sold.

This is true not only in the US, but globally, including in the Australian ad tech services markets.[5]

As the DOJ complaint describes in detail,[6] the impact of Google's persistent and ongoing anti-competitive activities has, for all intents and purposes, destroyed competition in the ad tech sector. The DOJ complaint eloquently describes the "flywheel effects"[7] of Google's behaviour – a term that describes the fact that the anti-competitive actions of Google have continued to have impacts many years after the conduct first occurred, and have also amplified the impacts of Google's later anti-competitive conduct. The cumulative impact of this conduct has permanently stymied innovation, efficiency, customer choice and control in the markets for ad tech services.

The DOJ's complaint, which is approximately 150 pages in length, lays bare the anti-competitive conduct of Google in the ad tech services markets, much of which involves to the misuse of the vast volumes not only of personal information, but also other data, that Google holds. Google's egregious conduct referred to in the DOJ complaint includes:[8]

- Google's restriction of Google Ads (the ad tech tool used by advertisers to purchase advertising space on publisher websites) advertiser demand exclusively to AdX (Google's ad exchange platform, these platforms are used to bring publishers and advertisers together);
- Google's restriction of effective real-time access to AdX exclusively to DFP (Google's publisher ad server), which we discuss in further detail below;
- Google's actions to secretly and artificially manipulate DV360's (Display & Video 360, Google's demand side platform) advertiser bids on rival ad exchanges using header bidding in order to ensure transactions were won by AdX; and
- Google's introduction of so-called "Unified Pricing Rules" that took away publishers' power to transact with rival ad exchanges at certain prices.

While it is welcome that the DOJ is taking this action, as noted earlier in this submission, it will take many years to make its way through the US courts and for remedies to be granted. Australia cannot rely on that action to resolve the issues that the ACCC has already identified as problematic in Australia. Instead, the Australian Government should recognise that the DOJ complaint highlights the importance of it taking appropriate regulatory action to address Google's anti-competitive conduct in Australia.

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[4] Media release available here: https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-lawsuit-against-google-monopolizing

[5] This is supported by the findings in the final report from the ACCC's Ad Tech Inquiry.

[6] Referred to in paragraph 37 of the DOJ complaint.

[7] Referred to in paragraph 264 of the DOJ complaint.

[8] Summarised in paragraph 319 of the DOJ complaint.

Linkages between data collection practices and anti-competitive conduct

There is an undeniable link between the anti-competitive behaviour of the dominant digital platforms and the data collection practices of those platforms.

This is clearly demonstrated by considering the case of Google and its dominant position in ad tech services markets. Google's dominant position across a range of consumer facing digital services means that Google is able to impose unfair data collection and combination terms on consumers through its privacy policy and terms of service. Consumers have little choice but to agree to these terms. As it is able to impose these unfair terms on consumers, Google collects vast quantities of consumer data through Android OS and its consumer facing services. Google also collects consumer data through its ad tech services as, through these services, Google obtains data about how consumers interact with ads, which is data about a consumer's interests and preferences.

Consumer data plays a crucial role in the provision of ad tech services. Google's unrivalled data position creates network effects in the form of a feedback loop in the ad tech services market. The more robust Google's consumer data pool is, the better Google's ad targeting becomes, and the more advertisers are driven to Google's ad tech services. Google's dominant position in the ad tech services market has, in turn, allowed it to engage in many of the different types of anti-competitive conduct that the ACCC identified in the final report from the Ad Tech Inquiry.

The DOJ complaint refers to Google's "massive trove of user data",[9] which it uses to entrench its ad tech monopoly. The complaint includes many examples of how Google uses this data to foreclose competition.

For example,[10] under its previously used "dynamic allocation" model, Google configured its ad server to allow AdX, its ad exchange, to compete on the basis of real-time pricing, but rival ad exchanges received only historical average pricing information. As an ad exchange works to select which advertiser bids will win an ad impression, this provided a significant advantage to Google.

When this data advantage was combined with Google's overwhelming volume of user and website contextual data, only Google had sufficient information to appropriately target ads and to determine the value of ad inventory. Its conduct effectively excluded competing ad exchanges from being able to sensibly target, or price, those ads. As a consequence, including because the negative impacts of this behaviour were amplified by the other anti-competitive conduct of Google, it is no surprise that Google now faces very limited competition in the ad exchange market.[11]

To take another example, when Google moved away from its dynamic allocation model, it used the vast quantities of information it had accumulated from seeing trillions of auctions for digital ads to develop an algorithm to predict the pricing of its rivals, thereby allowing it to continue to have an insurmountable data advantage over those rivals.

These examples demonstrates why the data collection practices of dominant digital platforms, which also cause significant harm to Australians who lose control of their own information, must be addressed in the proposed digital platforms regulation. Without addressing those practices, the new regime will not be fully effective.

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[9] Referred to in paragraph 36 of the DOJ complaint.
[10] As discussed in paragraph 116 of the DOJ complaint.
[11] As described in the ACCC's final report from the Ad Tech Inquiry.

An appropriate model for Australia

Addressing competition law reform

As set out in Oracle's submission to the ACCC on the appropriate regulatory reform model,[12] Oracle recommends the adoption of specific provisions of the EU's DMA. Article 5 of the DMA contains a simple set of rules that ban the practices of designated digital platforms in the designated services markets.

Oracle does not intend to propose a detailed definition of the criteria that should be applied to determine which platforms are designated. The most important issue is that the new framework should recognise the circumstances of the Australian markets, and the concerns highlighted by the ACCC, to ensure that Australian businesses and consumers are protected. The criteria adopted could therefore build on the designation model used for the DMA, as was suggested in the ACCC's report, with the emphasis on quantitative criteria, with qualitative criteria taken into consideration only in limited circumstances.

It is very clear that there are a number of platforms that will meet whatever criteria the Australian Government determines to adopt. Google, and its parent company, Alphabet would top the list of the platforms that should be designated. Meta would also be designated. As is clear from the ACCC's investigation of online marketplaces under the 5 Year Inquiry, Amazon should also be included in the initial list of regulated platforms.

Similarly, while Oracle does not recommend a list of criteria for determining the digital platform services that should be designated under Australia's new regulatory regime, at the very least, that regulation should apply to all ad tech services; search services; social media services; online retail marketplaces; and app marketplaces.

Reflecting the DMA, the core obligations that should be imposed under the new regime are:

- ***Restrictions on the use of consumer data for purposes other than those for which it was collected:*** This is a key requirement, as the protection of consumers should be the first priority of this new regulatory regime. Designated digital platforms, which operate across many different markets and have a multitude of consumer facing products, should be restricted from taking data derived from one service and using it, without a consumer's knowledge or approval, for another service.
- ***A ban on self-preferencing:*** Designated platforms must be prohibited from discriminating against businesses that need to use the services of those dominant platforms or that compete with those platforms.
- ***Protections against tying and bundling:*** Designated platforms should be prohibited from forcing companies using their services to buy products or services they do not need or want in order to gain access to other products or services vital to their business.
- ***Requirements for greater transparency for advertisers:*** Australia's new regulation should provide advertisers with rights to find out the actual cost to run an ad, what data was used, how many impressions the ad made and the amount the publisher of the ad received, as well as allow neutral third parties to analyse the effectiveness of ads.

[12] Available here: https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202022%20Report%20-%20Submission%20-%20Oracle%20-%20Public.pdf

- ***Restrictions on the use of proprietary data:*** Finally, designated platforms should be prohibited from using proprietary data of competitors using their platform against those same competitors. To provide just one example, Amazon often takes pricing and other data it can see about third party sellers and uses it to undercut those sellers. That type of anti-competitive behaviour should be banned.

The ACCC has proposed that separate mandatory codes are implemented for different digital platform services. While codes may have an appropriate place in Australia's new regulatory regime to address particular anti-competitive conduct that is unique to one digital platform services market and to designate additional platforms and services over time as markets change, incorporating the above list of prohibitions in the CCA itself as core requirements that regulated platforms must comply with would address the most prevalent forms of anti-competitive conduct that are engaged in by dominant digital platforms across the markets for core digital platform services.

If a code making power is incorporated in the new regime, Oracle recommends that the ACCC, as the agency with the most relevant expertise, is given the task of both developing and enforcing those codes.

Additional action is required in relation to data collection practices of digital platforms

There are also consumer protection reforms in relation to data collection practices that it would be appropriate to incorporate in the Australian Consumer Law (**ACL**) as part of the current reform process to provide consumers with control and choice over the data they produce using the digital products and services that enable modern life. As set out below, these proposals are privacy enhancing and, as such, would not conflict with the reforms that are ultimately adopted for the Privacy Act 1988 (**Privacy Act**).

A. *Unfair contract terms*

The ACL should recognise the arrangements between the dominant platforms and consumers as egregious and unfair *contracts*. The unfair contract terms regime in the ACL should be modified to address those contracts by incorporating the following:

- *Make "opt-in" the default:* The ACL should mandate that the contracts between consumers and the dominant platforms provide for data collection to be explicit opt-in. That is, a dominant platform must not be able to collect data from any Australian unless that individual has expressly agreed to this occurring. Opt-in data collection is the only way to ensure consumers have rights, confidence, and control over who has access to their personal information.

- *Protect consumers from abusive contract changes:* Today, consumers are required to agree to various terms of service and so-called "privacy" policies as a condition of using different digital products and services. Those agreements provide clear protections for the service provider, particularly for the collection and use of consumers' data. But while these agreements are binding on the consumer, the service provider is not similarly bound if it wishes to change how it collects, processes, and uses consumer data, even if such changes will materially undermine the commitments made to consumers under previous policies.

  Consumers have a valid reliance interest – they rightfully rely on the terms to which they originally agreed, particularly with respect to data collection. Such bait and switch tactics leave consumers with no meaningful choice – either they agree to the new terms, or stop using the service completely.

  This is a clear breach of the unfair contract terms provisions of the ACL – those provisions recognise that changes which adversely impact the consumer require mutual consent before they are binding. The unfair contract terms provisions of the ACL should be amended to ensure that unilateral changes to privacy policies and terms of service of the

dominant platforms are not binding unless agreed by consumers. Consumers should be treated fairly and have meaningful recourse if a service materially changes its data collection practices.

B. *Misleading and deceptive conduct*

Google and Meta – companies that generate nearly all their revenue from advertising – proudly claim they do not ***sell*** consumer data. If they do not sell consumer data, how do they make money? Advertising-dependent companies like Google and Meta are built on business models that depend on monetising the consumer data they collect across their products and services to sell targeted ads, keeping the consumer data to themselves. To retain market power, these advertising companies perform a matching service, that is, matching buyers of advertisements with consumers that meet advertisers' specific requirements. For example, Google and Meta match advertisers with consumers who are in a specific location, or are similar to current customers. While consumers' data is not directly transferred to an advertiser as such, it is clearly monetised – to the tune of $100s of billions of dollars globally each year.

The ACL should be amended to recognise that these types of statements constitute misleading and deceptive conduct. This will assist in ensuring consumers are protected from abuses related to the unfettered and uncontrolled use of their data. Fair competition requires a level playing field; Google, Meta, and other companies that generate revenue from the sale or monetisation of consumer data should all be required to acknowledge this in their engagement with consumers.

Coordination with privacy reforms

Australia is currently reforming its privacy regulation. In addition to the digital platforms specific regulation considered in this consultation process, the reforms made to the Privacy Act will be very important in providing appropriate protections against the excessive and intrusive data collection practices of Google and the other dominant platforms.

In this regard, the comments made by the Treasury in its consultation paper that there must be coordination between these digital platforms reforms and the reform of the Privacy Act are very important. Oracle will make a separate submission responding to the Privacy Act Review Report issued by the Attorney-General on 16 February 2023,[13] but at this stage commends the Government for seeking to ensure that the proposals in the Report are consistent with the digital platform specific regime that the Treasury is consulting on.

There are however further steps that could be taken in relation to the Privacy Act reforms to enhance that consistency. For example, the Report proposes that individuals will have an unqualified right to opt-out of their personal information being used or disclosed for direct marketing purposes and also an unqualified right to opt-out of receiving targeted advertising. Supporting the opt-in regime Oracle has proposed for the ACL in this submission, this onus should be reversed – consumers should opt-in to allow their personal information to be used for direct marketing or targeting and also opt-in to receive this type of advertising. This takes the onus off the consumer, which is needed to provide appropriate protections.

There is no time to wait and see

Oracle urges the Australian Government to ignore the pleas of Google and other dominant platforms that Australia should "wait and see" how effective the legislation introduced in other jurisdictions is

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[13] Available here: https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf

before implementing reforms here.[14] It would be appropriate for Australia to consider and adopt elements of reforms that have been implemented in other jurisdictions, as Oracle has suggested in this submission. But adopting a wait and see approach as to the effectiveness of those reforms is not sensible.

Australia has never adopted the approach of simply waiting to assess the efficacy of legislation in other jurisdictions before determining what regulatory steps should be taken to protect Australian businesses and citizens. The Australian Government, supported by an able federal public service, is very capable of designing effective regulation to address the competition and consumer harms that exist in digital platform services markets. While those competition and consumer harms are unique because they are so prevalent and entrenched across a number of different markets, and because those harms have had, and continue to have, such a significant impact on Australian businesses and consumers, the Australian Government has sufficient expertise and resources to design its own effective regulatory regime to address those harms.

Thank you for considering this submission. Oracle would be very happy to discuss any of the issues that we have raised with The Treasury.

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[14] As submitted by Google, for example, at page 7 of its supplementary submission to the ACCC's consultation on the new regulatory scheme under the 5 Year Inquiry, see: https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202022%20report%20-%20Submission%20-%20Google%20%28supplementary%20-%201%20of%202%29%20-%20Public%2814221357.2%29.pdf