Submission by Free TV Australia

Inquiry into international digital platforms operated by Big Tech companies

Senate Economics References Committee

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Table of contents

1. Executive Summary

- Free TV warmly welcomes the inquiry into digital platforms being undertaken by the Senate Economics References Committee. The Inquiry is occurring at a pivotal time for the future regulation of digital platforms, both globally and domestically.
- Australia led the world in legislating the News Media Bargaining Code that addressed the imbalance of bargaining power between news media businesses and the dominant digital platforms. While this ground-breaking reform was a significant achievement, further action is urgently required to address the misuse of market power by the digital platforms.
- Already numerous countries are taking action to create new regulatory frameworks to address anti-competitive conduct in digital platform services markets. In addition, the US Department of Justice has commenced proceedings in the US Federal Court seeking structural remedies to address alleged anti-competitive conduct of Google. While the US proceedings are an important recognition of the need to address anti-competitive conduct, Australia cannot afford to wait until such litigation is resolved before taking action to protect Australian businesses and consumers.
- As part of its thorough and systematic inquiry into digital platform services, the Australian Competition and Consumer Commission (ACCC) has recently recommended that new targeted mandatory industry codes be created to address anti-competitive conduct such as:
    - **Self-preferencing** - the preferential treatment given to a dominant platform's own products and services to the detriment of competing services
    - **Bundling and tying** – consumers and businesses being forced to use a platform's own products and services instead of those offered by competitors
    - **Leveraging data collection for an anti-competitive advantage -** using a dominant position in one market to collect vast quantities of data and making these datasets exclusively available through the platform's own products and services in related markets
    - **Imposition of restrictive terms and conditions of service** – the use of a dominant position to impose non-negotiable and anti-competitive terms of service for products
    - **Interoperability restrictions** – dominant platforms designing their products so they are not interoperable with competing products and services or refusing to participate in industry standard processes.
- Free TV strongly supports the view that new ex-ante rules are required to promote competition and to correct the anti-competitive conduct that has been found in the sector. We submit that a key finding of this Committee's inquiry should be for the Government to implement the ACCC's recommendations as soon as possible.
- Urgent action is also needed to implement the Government's commitment to ensure that Australians can easily find local TV services on their smart TVs and connected devices. The user interfaces on these devices are designed by manufacturers to position them as critical gateways to the audience in a way that puts at risk the availability, prominence and discoverability of important free Australian news, entertainment and sports content and threatens the viability of the FTA broadcast sector.
- The longer that these digital platforms continue to operate with limited constraints on the use of their market position to harm competitors, the harder it will become to maintain Australia's digital sovereignty.
- It is therefore critical that the momentum for reform is harnessed. This Committee's Inquiry will form an important part of ensuring that Australia does not fall off the pace of international action to create an open, competitive and sustainable digital economy.

2. Introduction

Free TV Australia appreciates the opportunity to comment on the Senate Economics References Committee Issues Paper as part of the inquiry into international digital platforms operated by Big Tech companies.

2.1 About Free TV

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

Free TV members provide vital local services to all Australians, investing more than $1.5 billion on Australian content every year. In fact, over 85% of their total content expenditure is committed to local programming.

A report released in September 2022 by Deloitte Access Economics, *Everybody Gets It: Revaluing the economic and social benefits of commercial television in Australia,* highlighted that in 2021, the commercial TV industry supported over 16,000 full-time equivalent jobs and contributed a total of $2.5 billion into the local economy. Further, advertising on commercial TV contributed $161 billion in brand value. Commercial television reaches an audience of 16 million Australians in an average week, with viewers watching around 3 hours per day.

The commercial television industry creates these benefits by delivering content across a wide range of genres, including news and current affairs, sport, entertainment, lifestyle and Australian drama. At no cost to the public, our members provide a wide array of channels across a range of genres, as well as rich online and mobile offerings.

A strong commercial broadcasting industry delivers important public policy outcomes for all Australians and is key to a healthy local production ecosystem. This in turn sustains Australian storytelling and local voices and is critical to maintaining and developing our national identity.

Commercial broadcasters have a complex relationship with the dominant digital platforms, ranging from networks being clients of digital platform service providers through to competing as advertiser funded content service providers. As a result, Free TV members are uniquely placed to comment on the impact of big tech companies and their power and influence over key markets in the economy.

2.2 Structure of this submission

This submission is separated into the following sections:

- **Section 3** – Describes the market power issues inherent in the digital platform services markets and the harm caused by the observed anti-competitive conduct
- **Section 4** – Outlines an approach to regulating big tech companies to address the identified harms

- **Section 5** – Highlights the issues specific to the connected TV and related devices market and the need for the Government's commitment to legislate a prominence framework to be supported and implemented.

3. The market power of the digital platforms

It is clear that the products and services offered by big tech companies have transformed many aspects of our lives and how we conduct business. In many cases, this transformation has been positive, with the growth of the digital sector driving productivity and efficiency improvements across the broader economy.

However, Australia's digital services markets are characterised by high levels of concentration, with significant markets such as search, social, digital advertising services and app marketplaces (including those offered on connected TVs) each dominated by a limited number of platforms with substantial market power.

Since 2017, the ACCC has been undertaking a world-leading and systematic inquiry into digital platform services. This began with the digital platforms inquiry following a direction from the then Treasurer in December of 2017.

In relation to the market power held by the two largest platforms that impact upon the media sector, Google and Meta (then known as Facebook), the key conclusions from that inquiry process were 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.[1]

In its Final Report, the ACCC described Google and Facebook (now Meta) as unavoidable trading partners for a significant number of media businesses and notes:

> *"There is a fundamental bargaining power imbalance between media businesses and Google and Facebook that results in media businesses accepting terms of service that are less favourable."*[2]

It was this combination of significant bargaining power imbalance and the unavoidable trading partner status between Australian media companies and Google and Meta that led to the creation of the news media bargaining code as a new part of the *Competition and Consumer Act 2010*. The passage of this legislation was crucial in levelling the bargaining playing field between news media companies and digital platforms and has led to around $200 million being paid by Google and Meta to Australian media companies for the use of their valuable news content.

Until this legislation had passed, neither Google nor Meta had made meaningful payments for the news content that was driving significant value for the platforms on their services. This successful model is now being considered for implementation in a number of other jurisdictions including the UK, US, Canada, South Africa and Indonesia.

[1] ACCC, Digital Platforms Inquiry – Preliminary Report, pg 2
[2] ACCC, Digital Platforms Inquiry, Final Report, pg 206

Beyond the bargaining power imbalance in relation to payment for news content, the market power held by big technology companies is leading to anti-competitive behaviour across a number of digital platform services, as we expand on in the next section.

3.1 The use of market power in digital platform services

The extent of the market concentration (combined with the strong network effects that are inherent in such markets) for a number of digital platform services is such that dominant digital platforms have both the incentive and the opportunity to behave anti-competitively to leverage that market power and to insulate themselves from the emergence of competitors. This includes conduct such as:

- Creating systems and processes that preference products and services offered by the same company in related markets (self-preferencing)
- Forcing businesses and consumers to use particular products and services by limiting the availability or interoperability of services offered in related markets (bundling and tying)
- Using a dominant position in one market to gain vast quantities of user data and making that data exclusively available through products and services offered by the same company in related markets (data integration)
- Using a dominant market position to force businesses and consumers to accept restrictive terms of service
- Creating opaque supply chains where neither buyer or seller can adequately assess the true cost or value associated with digital platform services
- Failure to take action to address the harms associated with the use of a digital platform service.

The reports of the ACCC into various digital platform services has confirmed the prevalence of such conduct. In the sections below we highlight for the Committee the experience of Free TV members that demonstrates how our sector has been impacted by these anti-competitive behaviours.

3.1.1 Self-preferencing, bundling and tying

Self-preferencing refers to the practice of a platform using a dominant or gateway position in one market to provide an advantage to products and services the same company offers in related markets. Examples of this type of conduct have been found by the ACCC in a number of digital platform services including ad tech, app marketplaces, social media and search results.

Self-preferencing also occurs when a digital platform service forces businesses and consumers to use particular products or services of that platform in order to use the platform's products or services in a related market. This bundling and tying of products and services can occur, for example, through digital platform services only being available through one of its own offerings, or the imposition of interoperability restrictions.

During its comprehensive Ad Tech Inquiry, the ACCC carefully considered the evidence of the conduct of Google across the ad tech stack. The ACCC found that Google "has engaged in conduct that has lessened competition and efficiency the ad tech supply chain."[3] The box below highlights the key findings of the ACCC in the Final Report.

[3] ACCC, Digital advertising services inquiry – Final Report, pg 93

ACCC Ad Tech Final Report Findings:

"We are also concerned that Google has been able to leverage its strength in particular ad tech services or in the supply of particular ad inventory, into related ad tech services. There are many examples of Google favouring its own related services at the expense of third-party ad tech services (self-preferencing). In particular, Google has:

- *restricted purchase of YouTube inventory to its DSPs*
- *directed demand from its DSPs (particularly Google Ads) to its own SSP*
- *used its publisher ad server to preference its SSP over time*
- *restricted how its SSP works with third-party ad servers*
- *used its control over auction rules in its publisher ad server to advantage its other services*
- *announced plans which could allow it to use its position in providing the Chrome browser to preference its ad tech services."*[4]

Free TV notes the ACCC has publicly stated that it is continuing to consider the specific allegations that have been made against Google over the course of the Ad Tech Inquiry under the competition provisions of the CCA. Notwithstanding the ongoing investigation being pursued by the ACCC, there has been no change to the market conduct of Google since these matters were brought to light. In fact, Google has continued to strengthen its control of the video advertising market—YouTube is thought to capture two-thirds of the video advertising market in Australia, with ad spending in that segment expected to reach US$3.59 billion in 2023.[5]

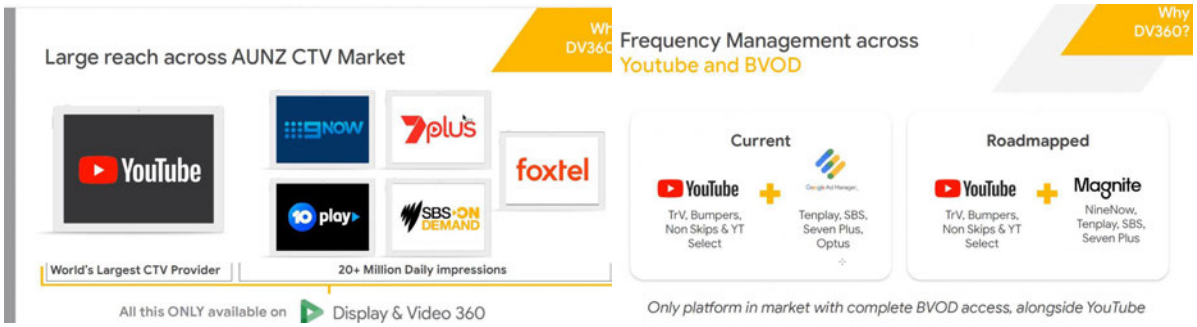
Google continues to bundle exclusive access to Google data—which includes 'click and query data'—and exclusive access to YouTube video inventory with Display and Video 360 (**DV360**). By extending its extensive market power in data and video inventory, Google is consolidating buying power in its DSP, making DV360 a "must use" DSP for advertisers. This means Google controls the allocation of advertisers' budgets across YouTube and third-party inventory supply — giving it both the ability and the incentive to self-preference its own inventory.

Google has continued to openly market this exclusivity in its trade material. In launching a new frequency capping product, Google notes that it is "only available" on DV360 and the "only platform in market with complete BVOD access, alongside YouTube" the new product offers to cap advertising frequency across YouTube and other connected TV apps, including BVOD.

The Google frequency capping product does not allow publishers to 'opt-out' of having their inventory subject to a frequency cap. Approaches made to Google to request this opt-out feature, have so far not been successful, despite the fact that the option to turn off capping for some publishers exists on the buy side of the market.

[4] ACCC, Digital advertising services inquiry – Final Report, pg 87
[5] https://www.statista.com/outlook/dmo/digital-advertising/video-advertising/australia

Google: building new products that rely on the exclusivity of YouTube inventory access



Conflicts of interest

There is an inherent conflict of interest caused by Google being the dominant participant on both the buy and sell sides of the market. This is evident in relation to Google's DV360 product automatically allocating an advertiser's spend across the inventory of different publishers as it sees fit.

As noted in the Google blog post on the product: [6]

- Google uses its proprietary data sources "(t)o determine the number of times a CTV ad is shown, Display & Video 360 uses Google data on YouTube and the IAB standard Identifier for Advertising on other CTV inventory."
- "Once we've modelled that duplication of viewers across YouTube and other CTV apps, we can determine the appropriate budget placement to control average ad frequency."

That is, Google's own DSP, DV360, automatically allocates the client's spend across inventory sources as it sees fit. Not only does this place Google's inventory (in this example YouTube) at a significant competitive advantage to other publishers, but it demonstrates the conflict of interest Google has in acting for both buy-side clients and as a seller of inventory.

3.1.2 Leveraging dominant position to collect data and create anti-competitive advantages

Anonymised user related data is crucial in digital advertising and in the provision and use of ad tech services and there is no more valuable dataset in the world than the 'click and query' dataset collected by Google through its search product. Google bundles exclusive use of this data within its own products in related markets, to leverage this dominant data holding across the digital advertising supply chain. As a result, Google's user related data advantage has significantly contributed to its dominance in the market for ad tech services.

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

Given this, a stark choice exists, either regulatory intervention occurs or Google will continue to dominate the ad tech services market in Australia.

[6] https://blog.google/products/marketingplatform/360/dv360-frequency-ctv/#footnote-1

3.1.3 Restrictive terms and conditions of service

In markets where digital platforms hold market power for any of their products or services, the terms and conditions of service offered for those products are generally issued on a 'take it or leave it' basis with little or no ability for negotiation.

For example, Free TV is aware of instances where Google has sought to impose strict terms of service on clients as part of its ad server product. In these contracts, clients are required to allow Google to assume ownership of all data collected as part of providing ad server services. It is understood that Google provides publishers with the ability to opt out of Google using their data, but Google ties this opt-out provision with ceasing to deliver any Google data targeted ads across that publisher's inventory. This would significantly affect that publisher's revenue. In other words, if a publisher opts out of Google using the publisher's data, Google automatically disables eligibility of that publisher's inventory from accepting any Google data targeted campaigns.

A similar data collection issue arises in relation to Meta. Meta collects user data from publisher websites that have implemented social media sharing tools. With Meta being a significant source of traffic for many publishers, publishers must implement sharing tools on their pages to allow their articles to be shared by users on Meta's social media platforms (such as Facebook and Instagram). Those publishers therefore have no option other than to accept that Meta may collect such user data.

Free TV submits that imposing these terms of service is anti-competitive because there is no reason to link data collection with services offered in other markets, other than to provide such a financial disincentive for the publisher to opt out, that they continue to share the data with Google or Meta, as applicable, so as to not suffer revenue loss.

Similarly, Free TV is aware that the Google Ad Manager product for connected TVs is collecting user data and passing that data through into the ad tech stack for use in relation to other services. This means that a viewer using a BVOD application that employs Google Ad Manager is having their data shared with Google for use in other market segments. Free TV understands that when requests have been made by BVOD app developers to stop this data collection practice, Google stated that this feature is "part of their roadmap" and is not able to be switched off locally. In addition, Google has approached Free TV members requesting that they either use Google's SSP (AdX) and/or install a Google Software Development Kit (SDK) in their BVOD apps that would send data to Google to be used as part of the DV360 product. While Google has not been transparent about the precise nature of this data, it is understood that these signals would be used to enable the frequency capping product discussed above.

Finally, to demonstrate the dynamic nature of the digital platform service industry and the need for a flexible regulatory regime that can address new harms as they emerge, Free TV highlights Google's conduct in relation to Server Side Ad Insertion (SSAI). SSAI is a technology that creates a complete stream of content, including advertising content in a single stream, rather than having to switch content streams between programming and advertising. To use AdX programmatic deal types (except Programmatic Guaranteed) on any SSAI product, it is a requirement of the terms of service that the publisher either use Google Ad Manager's DAI (Google's own SSAI product) or use a third-party SSAI provider and install Google's SDK that would pass data back to Google. As the screenshot below demonstrates, it is not possible to use a third-party ad server without implementing Google's SDK

(Programmatic Access Libraries) that "that provide discrete access to targeting signals for Google Ad Manager programmatic ads."[7]

Google requiring SDK implementation as a condition of accessing Google's AdX

Configure the third-party ad server's request for Ad Manager.

Note: If you use multiple third-party solutions—for example, a third-party SSAI server calling another third-party ad server, you need to make sure the PAL SDK's encrypted nonce is forwarded to each third party.

These are more recent examples of Google using the market dominant position of its products to enforce contract terms that are non-negotiable and operate to the detriment of competing publishers. This type of behaviour is ongoing, and indeed expanding, in the Australian market notwithstanding that the ACCC has highlighted through its various digital platforms reports that this is anti-competitive.

3.1.4 Constraints on interoperability

Dominant digital platforms also put restrictions on how their products and services interoperate with those offered by competing companies. For example, Google imposes restrictions on how its products integrate with ad tech services such as header bidding (an ad tech service that enables a number of SSPs to bid against each other in real time). These restrictions have the effect of preferencing Google products and services, to the detriment of competitive outcomes.

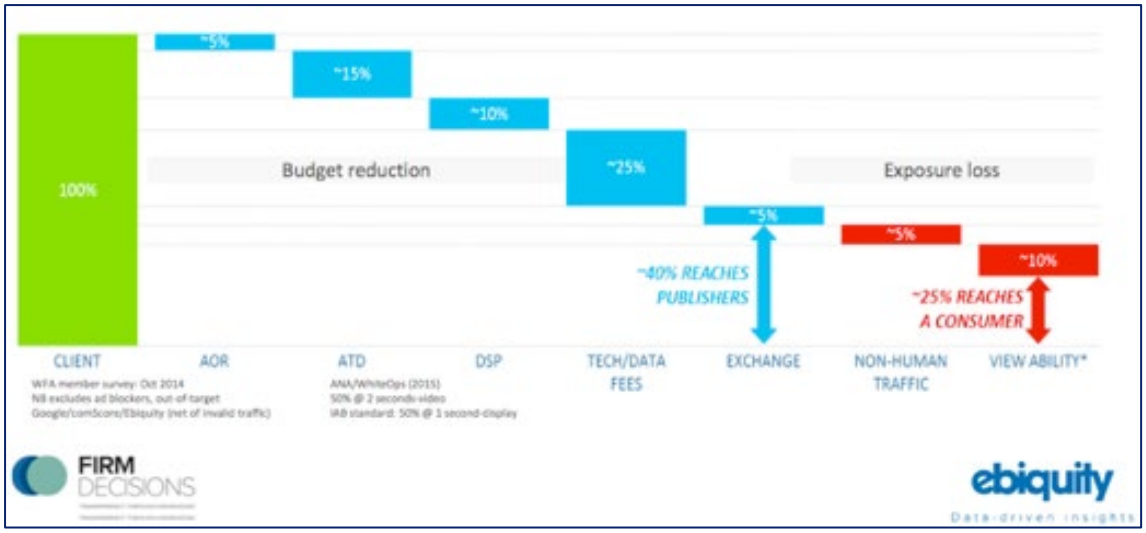
The ACCC has found that Google's refusal to participate in industry-developed header bidding preferences its own SSP product. While there are workarounds available to include Google's SSP at the final stage of a heading bidding process, this process is sub-optimal and still places the Google SSP at a structural competitive advantage to those SSPs limited to inclusion in the initial header bid auction. Google's proprietary service, Exchange Bidding, itself is characterised by self-preferencing with non-Google SSPs subject to an extra fee if they win the auction process.

Free TV also notes the example of Google's restriction on programmatic guaranteed (that is, arrangements where an advertiser buys inventory directly from a publisher) arising from the fact that its Google Ad Manager product is only interoperable with DV360. It is not possible to use a third-party ad server and access programmatic guaranteed inventory through DV360. While this conduct is to the detriment of Google's advertiser customers who may wish to transact via programmatic guaranteed with publishers on third party ad servers, Google uses interoperability restrictions as a mechanism to lock publishers into using their ad tech products.

3.1.5 Lack of pricing transparency in supply chains

The lack of pricing transparency, principally in relation to ad tech services, is a further key matter of concern for Free TV members. For example, when one of our members sells an impression into an SSP, there is no visibility of what the advertiser client actually pays at the end of the complex ad tech waterfall (see diagram below). Visibility of pricing is limited to knowing the fees that were paid on the sell side and the amount received by our members for the impression.

[7] https://developers.google.com/ad-manager/pal



Source: Ebiquity

The ACCC's final ad tech report estimated that between 20 and 75 per cent of the amount paid by an advertiser is taken up on ad tech related costs, with only the remainder filtering through to the publisher. Clearly, for the advertiser-funded business models of Free TV's members, the efficiency of the ad tech stack is directly related to the revenue that is available to reinvest in local services and content.

The current lack of transparency prevents advertisers and publishers from making decisions about how to most efficiently buy or sell ad inventory and also makes it difficult to monitor whether vertically integrated providers are engaging in self-preferencing conduct or charging hidden fees.[8]

Free TV supports the finding of the ACCC that "these fee levels are higher than they would be if the supply of ad tech services was more competitive, and likely reflect the market power that Google is able to exercise in its dealings with both advertisers and publishers."[9]

However, the harm caused by the lack of transparency in the ad tech stack goes beyond lost allocative efficiency and is also used as a tool to leverage a competitive advantage. For example, Google routinely refuses to pay a material percentage of the cost of inventory purchased by their DSP from third-party SSPs. The only information provided by Google for this refusal to pay for inventory is "Invalid Traffic". Google does not provide further information regarding how it has made the assessment regarding invalid traffic. However, Google has made the point that if its own SSP (AdX) was to be used, this would eliminate the invalid traffic issues. This is an example of the lack of transparency being used to create an advantage for the dominant platform.

3.1.6 App approval and other app marketplace issues

In respect of the app marketplaces offered by Apple (the App Store) and Google (Play Store), the terms and conditions of access to app marketplaces are also offered on a "take it or leave it" basis with no genuine opportunity to negotiate these terms. The terms are also subject to change with limited notice to app developers. This again reflects the unfair contract terms that are prevalent throughout the digital platform services markets.

[8] See for example, Chapter 6 of the ACCC's Ad Tech Inquiry Interim Report.
[9] ACCC, Digital advertising services inquiry – Final Report, pg 50

Free TV notes the example of the change to the terms and conditions implemented by Apple to the App Store for apps that required a sign-on, those apps must now offer "Sign in with Apple" as an option. This change was made with no ability to negotiate with Apple for alternative arrangements. The announcement was made on 12 September 2019. Any apps that were in development at that time had to immediately comply with the new terms and conditions. Existing apps had until April 2020 to comply. While the development costs associated with this change were significant, more fundamentally, this changed the nature of the relationship between the consumer and the app developer/provider. Rather than a more direct communication between local content providers and their users, Apple now controls that interaction through a hashed e-mail address that routes all communication via their servers. There is no transparency as to how Apple itself uses the information that it is able to be obtained by performing this intermediation role.

In addition, both the Google Play Store and Apple App Store require that any in-app purchased subscriptions share 30% of the subscription revenue in the first year and 15% in the second and subsequent years. This can lead to substantially different revenue outcomes for app developers/providers who offer premium subscription services through their apps, depending on whether the consumer subscribes through the marketplace or via a web-portal. Both Apple and Google are understood to have restrictive terms of service that bans app developers from offering users the option of visiting a web-portal to process subscription payments.

3.1.7 Failure to prevent harms on digital platform services

Free TV draws the Committee's attention to the issue of scam advertising and the significant consumer harm caused by fake or misleading advertisements and the inadequate takedown processes implemented by platforms, including Meta, to address this problem.

Free TV notes the ACCC's proceedings against Meta in relation to scam ads that feature prominent Australians without their consent, which was commenced in early 2022. Despite this action, it remains the case that the takedown processes for scam advertisements implemented by Meta (and other platforms) are inadequate. Fake ads continue to quickly reappear after they are taken down. These inadequate takedown processes damage the business reputations of broadcasters and also the personal reputations of the celebrities and media personalities that are misrepresented.

Recent examples of such scam advertising include:

- Fake endorsements that appear on Facebook suggesting that Georgie Gardner, a news reader and reporter for Channel 9, endorses the "Mayan Diamonds" app.
- A fake account purporting to belong to former Today show presenter Allison Langdon, encouraging individuals to enter a fake competition to win money. When an individual seeks to register for the competition, the link takes them to a page that promotes "Mega March Monday" and requests their bank account details.
- Images of Today Show presenter Karl Stefanovic used without his consent by advertiser Jimmy Napes on Instagram to give a misleading and deceptive endorsement of cryptocurrency.
- A Facebook page used sponsored posts with 9News branding and intellectual property without permission, suggesting that Channel 9 endorses the relevant company (QLD Rebate Finder) when this is not the case. The page also appears to be seeking to obtain personal information under false pretences.
- Unverified social media profiles impersonated Seven's Sydney Weekender Facebook page and targeted typically vulnerable audiences by falsely claiming that the user has won a prize in the comments section of Seven's Facebook posts.

- Seven's Sunrise host, David Koch, was used by fraudsters to scam social media users to invest in cryptocurrencies. His image was used as one of many fake celebrity endorsements that baited and lured users into scam Bitcoin investments.

Notwithstanding the significant consumer harm from these scams, in addition to the reputational harm to Free TV members, the digital platforms are persistently slow in responding to takedown requests.

4. Regulatory reforms to better regulate big tech

4.1 Existing competition law insufficient to address identified harms

Free TV has consistently set out the case for two pieces of ex-ante regulation. First, a negotiate-arbitrate framework to ensure that publishers received fair value for their content on digital platforms. This has now been legislated, with the passage of the news media bargaining code in February 2021 as discussed above.

Second, Free TV has advocated for a new ex-ante regulatory framework to address the anti-competitive conduct outlined throughout section 3. Our view is, consistent with the recent recommendations to Government now made by the ACCC, that existing competition law by itself is not sufficient to promote effective competition in the digital platform sector. Notwithstanding the enforcement success that the ACCC has had in some areas, for example, its successful action against Google for misleading and deceptive conduct in its data collection practices, the ACCC has not been able to take enforcement action using its existing powers to comprehensively address the competition (or consumer) harms it has identified across this sector. Further, as digital platform services are continually evolving, new forms of anti-competitive conduct, and harm, can emerge rapidly. For these reasons the ACCC, consistent with the approach that is being implemented in other jurisdictions, has recommended the creation of an ex-ante competition regulatory model for digital platforms.

Free TV has consistently submitted that existing competition law, that relies on the ACCC identifying anti-competitive activities and then taking enforcement action to address those activities on a case-by-case basis is not an efficient or effective solution. That approach is expensive, slow and is only capable of addressing discrete categories of conduct. As shown in Figure 1, international experience highlights the lengthy period involved between the start of the alleged anti-competitive conduct, investigation by the regulator and the completion of enforcement action. As a consequence of these problems, enforcement action by the ACCC relying on its existing powers is unlikely to have broad deterrent value in the Digital Platform sector, where there are a small number of dominant providers engaging in a broad range of different types of anti-competitive conduct.

Figure 1: Slow enforcement of existing competition laws

Google shopping case study – 9 years to decision

In June 2017, the European Commission imposed a €2.42 billion fine on Google for abusing its dominance as a search engine by giving illegal advantage to its own comparison-shopping service. In announcing that decision, the Commission stated:

> *"From 2008, Google began to implement in European markets a fundamental change in strategy to push its comparison shopping service. This strategy relied on Google's dominance in general internet search, instead of competition on the merits in comparison shopping markets"*

Litigation in that case was only finalised in 2021, when the European General Court dismissed an appeal by Google and upheld the decision of the European Commission. That it took 13 years from the commencement of the conduct to the final resolution is illustrative of the issues with ex-post enforcement action.

Android and search case – 7 years to decision

Similarly, in July 2018, the European Commission fined Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine. The fine was imposed due to illegal restrictions Google had imposed on Android device manufacturers and mobile network operators since 2011 to cement its dominant position in general internet search.

Again, Google lost its appeal to the European General Court in relation to that fine, with that decision being handed down in September 2021. Ten years elapsed between the start of the conduct and the final decision.

Following completion of the Ad Tech Inquiry, the ACCC stated that enforcement action regarding anti-competitive conduct in the ad tech sector was being considered by the ACCC. No enforcement action has been taken to date. Even if such enforcement action was taken, we agree with previous statements by the ACCC that noted that it "does not consider that proceedings under existing legislation will be sufficient alone to address the systemic competition concerns" identified in the Ad Tech Inquiry final report. That same conclusion applies to the systemic competition concerns in the other digital services markets that are proposed to be covered by the Code regime.

In light of the findings of the ACCC and the international experience in relation to repeated anti-competitive conduct, there is a strong case for an ex-ante regulatory framework that ameliorates the potential for such conduct. This will address not only existing conduct, across a broad range of areas in this sector, but will also act as a deterrent to future anti-competitive conduct, given action may quickly be taken by the regulator to address emerging anti-competitive practices.

4.2 New mandatory industry code should be created to address anti-competitive conduct

We submit that a key recommendation of the Committee's report should be that the Government move to create new mandatory industry Codes to address the anti-competitive conduct discussed in Section 3. This approach is consistent with the recommendations of the ACCC to the Government in its *Digital platform services inquiry - September 2022 interim report - Regulatory reform.*

Under the ACCC's recommendations, new industry codes (registered as mandatory codes under a new Part of the *Competition and Consumer Commission Act 2010* (CCA)) would be created as the most administratively straightforward and timely mechanism to create the new regulatory framework. This will ensure broad consistency with the approaches being pursued internationally, in particular in the UK, EU and the USA.

The use of mandatory codes to address the competition concerns is not unique or novel. Indeed, the ACCC has stated on many occasions that industry codes under Part IVB of the CCA are able to be used to address industry-specific market failures and to set out obligations and standards of commercial conduct for industry participants. Similarly, the Government has acknowledged that industry codes are able to provide regulatory support to guard against misconduct and promote long term changes to business culture to achieve competitiveness and sustainability.

A code regime, similar to that in Part IVB of the CCA, would accordingly be an appropriate tool to regulate the anti-competitive conduct described above in numerous digital platform services markets. Such a regime would be flexible, as the terms of each code would be tailored to respond to the specific competition and consumer protection concerns, and able to address concerns quickly, as and when these arise.

4.3 Drafting the mandatory Codes and designation process

4.3.1 Drafting the first Codes

Free TV submits that the ACCC should be responsible for the development of the Codes under the new framework, rather than a Government department. Tasking the ACCC with the role of establishing these codes is recommended as the most timely way to implement the required reforms. This is consistent with other regulatory approaches adopted in Australia, where a regulator (including the ACCC) has made and enforced codes, standards or similar. The requirement for the codes to be registered by the Treasurer, as included in our proposed model together with the fact that each code will be disallowable, retains Government and Parliamentary scrutiny.

Further, as the need for mandatory code making powers in this sector has been demonstrated through the ACCC's ground-breaking work from 2017 onwards, it is appropriate to expedite the normal code making process under Part IVB of the CCA. Under this expedited approach, the ACCC should not need to demonstrate there are no existing laws that could be used to address the competition or consumer protection issues, whether industry self-regulation has been attempted or the like, which are typically considered at the commencement of a code making process under Part IVB. Those questions have already been considered in the case of digital services markets and the proposed designated entities and there is a clear overall public benefit in implementing mandatory codes.

An illustration of the process for drafting the required Codes is included at Appendix A.

4.3.2 Designation of dominant digital platform services

Each code made under the new Part of the CCA should apply to designated entities.

Google, Meta and Apple as well as, in each case, all of the related bodies corporate of these entities should be designated under the new Part of the CCA. As shown in earlier sections, the work the ACCC has undertaken under the Digital Platforms Inquiry, the Ad Tech Inquiry and the 5 Year Inquiry has clearly established that these entities are dominant in each of the digital platforms services markets in which that entity operates, though this dominance differs between the different corporate groups. Google dominates in services like search and ad tech, Meta dominates in social media platform services (and ad tech services for its own social media platform services) and both Google and Apple own and operate the dominant app marketplaces. Given the clear findings of dominant market position held by the platforms in relation to these services, no further investigation is required before an initial designation occurs. Future review processes can be used to update this analysis and confirm that these designations remain appropriate.

The new Part of the CCA should allow the ACCC to designate additional entities which would be subject to the new code making regime. Allowing the ACCC to designate additional entities would be consistent with the Furman Report[10] recommendation, which the UK Government has accepted, of allowing designations of the entities to be regulated in the area of digital markets to be made by the Digital Markets Unit within the UK's Competition & Markets Authority.

[10] The report of the Digital Competition Expert Panel, which was commissioned by the UK Government, available here:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

We also recommend the adoption of a designation approach that is similar to the approach included in the antitrust bills introduced to the US Congress in 2021. This would require that an entity is designated, if that entity reaches a particular threshold of users in respect of any digital platform service in Australia or, in the case of a digital platform service directed at businesses (such as for example ad tech services), if a specified Australian revenue threshold is met. These criteria are objective and the thresholds would be able to be set at appropriate levels to capture only platforms that hold market power, without adding the uncertainty of introducing an additional threshold test, such as whether the platform is considered to be a critical trading partner, as suggested in the US antitrust bills.

For transparency purposes, it is recommended that the new Part of the CCA provides that the ACCC should undertake a short consultation with all stakeholders, not simply the impacted entity, prior to a designation being made.

If an entity is designated, that entity should be subject to each code that applies to any digital platforms services provided by that designated entity.

4.4 Addressing digital advertising services conduct should be the priority

While the harms discussed above have been observed across a number of digital platform services, the most prevalent harms relate to those found in the ad tech and broader digital advertising services sector. The ACCC's comprehensive Ad Tech Inquiry final report clearly establishes the urgent need for a new regulatory framework to govern this burgeoning market.

Google is the dominant supplier of ad tech services across the supply chain and no other provider has the scale or reach that Google does.[11] For example, the ACCC found that:

- 90% of digital ad impressions passed through at least one Google service in the ad tech stack
- Google's share of impressions for each of the four main ad tech services was between 70 and 100%, with revenue shares of up to 70%.

While recognising that being a dominant firm is not in and of itself a justification for the imposition of regulation, in this case, it is the use of that dominant position to harm advertisers, publishers and consumers that justifies immediate regulatory intervention.

As such, although the first Codes would apply to all of the initial designated entities regarding the digital platform services they provide, the provisions of the Code addressing the digital advertising services markets would primarily apply to Google.

The ACCC has previously stated that it was considering enforcement action regarding anti-competitive conduct in the ad tech sector. However, no enforcement action has been taken to date. Even if such enforcement action was taken, we agree with previous statements by the ACCC that the ACCC "does not consider that proceedings under existing legislation will be sufficient alone to address the systemic competition concerns" identified in the Ad Tech Inquiry final report.

The digital advertising services Code should address:

- self-preferencing, including through the bundling and tying of services, which exacerbate conflicts of interest,

[11] See, for example, ACCC, Digital advertising services inquiry, Final Report, pg. 5

- limits on interoperability,
- the leveraging of anti-competitive advantage through data collection in one dominant market for exclusive use in other markets,
- restrictive terms and conditions, and
- lack of pricing transparency.

Further detail on each of these areas, and how these should be addressed in the digital advertising services Code, is included in the following sections.

A number of the competitive harms identified in this section are common across digital platform services. This has been demonstrated through the reports that have already been issued by the ACCC under the 5 Year Inquiry. Therefore while the focus of this section 5 is on the proposed digital advertising services Code, the Code terms discussed in this section will have application across each Code for different services.

4.4.1 Restrictions on self-preferencing behaviour in digital advertising services markets

A general prohibition on a designated entity favouring its own digital inventory or third-party inventory sold through its digital services by excluding rivals or providing an undue advantage to its own inventory or third-party inventory sold through its digital services whether through bundling, tying of services, access to inputs or any other technical or commercial means should be adopted in the initial Code. This prohibition should be targeted.[12] Nonetheless, to future proof the Code, it should not be limited to restricting only specific instances of self-preferencing. If only specific instances were restricted, the Code would require constant updating, as designated entities change their practices over time.

Restrictions in the Code on self-preferencing could include a general "best execution" requirement similar to that applicable in financial markets, requiring designated entities to seek to achieve the best outcome for the relevant client. This is not simply a question of achieving the lowest price for an advertiser, given the different quality of inventory and the intention of advertisers to target particular consumers. Such a requirement would protect both advertisers and publishers by ensuring designated entities do not place their own interests before those of their clients in any digital advertising services trading process. For advertiser clients, in the context of Google's ad tech services, this would mean implementing inventory purchases of the requested type at the lowest net price after ad tech services costs and, for publisher clients, this would mean implementing inventory sales at the highest net price after ad tech services costs.

The Code should specifically restrict the ability of any designated entity to use its substantial market power in any digital advertising services market to extend or leverage that power into other markets to the detriment of competitors. To take just one example, this would mean that, where a designated entity is also a publisher of one or more popular sites that is considered a "must have" by advertisers, it should not be allowed to restrict the access of other digital advertising services providers to those sites or inventory as this locks advertisers into particular digital advertising products, notwithstanding that it is not a direct restriction on interoperability. This is particularly problematic with respect to Google's DV360, which is a demand or advertiser-side platform for purchasing inventory, but the Code should not be limited in its application to these services.

[12] The ACCC has acknowledged this in section 6.1.5 of the Regulatory Reforms Report.

In addition, to address this type of anti-competitive practice, each designated entity must be legally prevented from combining, in relation to its ad tech buying services, that designated entity's own inventory with the inventory of other publishers. To take a practical example of how this would operate in the context of Google, DV360 would still be able to buy Google owned inventory and competing publisher inventory, however this inventory could not be purchased as a single "line item". Instead, the buyer would need to manually allocate spending in DV360 between Google owned inventory and third-party inventory. This would prevent Google from determining how advertiser budgets are allocated across Google owned inventory and competing inventory and therefore restrict Google's ability to leverage its power in the ad tech services markets into the publisher inventory market to the disadvantage of its competitors in that other market.

4.4.2 Interoperability

Building on the restrictions on self-preferencing, strong and effective protections should be included in the Code that ensure interoperability of the digital advertising services of designated entities with those of third-party vendors. This is to ensure that designated entities cannot use claimed technical limitations to entrench and extend their market power to unduly incentivise or lock other participants into using the designated entity's products or services.

Interoperability measures would in part be addressed by including in the Code requirements for designated entities to apply the same rules, provide access to key inputs on fair and non-discriminatory grounds and give the same information to all other digital advertising services providers.

The Code should also extend to imposing restrictions on the ability of designated entities to exclude other providers, such as by requiring that technologies used by other digital advertising services providers (for example, header bidding) integrate with supply–side (or publisher-side) platforms used by designated entities. This is particularly key for Google Ad Manager which, in relation to programmatic guaranteed services, is currently only interoperable with Google's DV360, as discussed earlier in this submission.

4.4.3 Data collection practices and the requirement for separation

Dealing with data advantages in respect of digital advertising services in a Code need not be challenging, even though it will be necessary to address both competition and privacy concerns. While noting the ACCC view that data access and data portability regimes may assist in addressing the insurmountable barriers to entry to markets created by the vast quantities of consumer data held by the dominant digital platforms, Free TV submits that given the legitimate privacy concerns raised by these approaches, the only effective way to remedy the identified competition harms at the current time would be to limit data use by designated entities. This would be privacy enhancing, in that it would limit the use of data about individuals as compared to data portability or interoperability arrangements, which would *increase* the use of such data. The pro-competitive effects of limiting the ability of designated entities to leverage their data advantages would far outweigh the decreases in efficiency for designated entities caused by the implementation of these measures.

Free TV considers that the digital advertising services Code should require that a designated entity must keep audience data collected from its own consumer services separate from its ad tech services that advertisers might use to target their campaigns. For example, this would prevent data collected from Google search, Google Maps, Google's Chrome browser or other consumer services from being used as targeting segments in DV360 for advertisers to be able to use to target campaigns across

publisher inventory. This would prevent Google from extending its data advantage derived from consumer services into ad tech markets to consolidate buying power in its DSP, where it can control the allocation of advertiser budgets across both its own inventory and third party publisher inventory. However, it would not prevent Google from using data collected from its consumer services to sell advertising inventory on its consumer services. It is expected that the latter would continue to be acceptable practice under a data separation arrangement.

4.4.4 Prohibit restrictive terms of service

The Code should include a requirement for designated entities to offer fair terms and conditions of service that:

- restrict the ability of designated entities to charge inflated prices;
- impose positive obligations to provide fair and non-discriminatory terms of access to key services and platforms, supported by an audit obligation;[13]
- prohibit terms of service that require acceptance of data collection by the platforms in the provision of services (such as Google's ad serving, or Meta's social sharing tools);
- address the restrictions on how publishers can seek to monetise their content, including by prohibiting restrictive terms relating to the placement and pricing of advertising and the sharing of their data with the digital platform (this also relates to social media services as discussed below).

4.4.5 Conflicts of interest in exchange operation and pricing transparency

Free TV supports the ACCC's view that increased transparency, including but not limited to pricing, is necessary for effective competition in relation to digital platform services. For example, transparency is necessary for both publishers and advertisers in digital advertising services markets, given it is not possible to make optimal investment and purchasing decisions without information on prices, terms of service and key functions.[14]

To address conflicts of interest, the Code should include ad exchange provisions that govern how auction processes, and any other ad tech services trading processes, are to be conducted by designated entities. This will ensure that exchange processes are both transparent and that conflicts of interest are adequately addressed.

When operating exchange services, designated entities should be obliged to clearly disclose how and when buy and sell orders will be matched (including mechanics of the sales process and other aspects). Further, designated entities that provide both DSP and SSP services must ensure that the auction, DSP bidding and SSP selection decisions for any transaction must be determined by an independent third-party.[15]

In relation to pricing, different models could be adopted in the Code to achieve transparency for discrete services. For example, in relation to ad tech services, a real time dashboard of ad tech service

[13] Discussed by the ACCC in section 6.8 of the Regulatory Reform Report.
[14] As referenced in section 6.7 of the Regulatory Reform Paper.
[15] The US Department of Justice is currently seeking structural separation of Google to address this conflict of interest.

provider costs for a campaign could be prescribed which would allow advertisers to consider the costs versus the potential benefits of going directly to publishers to engage in a direct deal.

A requirement for full, independent verification of digital advertising services provided by designated entities, not limited to demand side platform services, should also be included in the Code. This would require that verification services are able to access the data required for the effective provision of their services. The same approach should be mandated in the Code for attribution services so that advertisers are able to truly measure the value of their advertising spend.

The ACCC noted in its Ad Tech Inquiry final report that a voluntary industry-led standards process could require ad tech providers to publish average fees and take rates for ad tech services. Free TV cautions that there is no certainty that such a voluntary code would achieve the required transparency as the ACCC would not be able to determine the content of that code, designated entities may not agree to sign up to such a code and the ACCC could neither monitor compliance or take enforcement action in relation to the voluntary code. The last point is particularly important as neither Australian publishers nor Australian advertisers would have sufficient resources (or the necessary regulatory powers) to determine if designated entities were complying with a voluntary code and would be unable to take any meaningful enforcement action.

In addition, mandatory obligations would be consistent with the approach that the EU has adopted in the Digital Markets Act. This will impose an obligation on gatekeeper digital platforms to provide advertisers and publishers information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper.[16] The Digital Markets Act will also impose a mandatory requirement on those designated gatekeepers to provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory.[17]

The ACCC has proposed the imposition of other transparency measures in relation to ad tech services, such as a requirement that Google amend its public material to clearly describe how it uses first party data to provide ad tech services. Free TV would support the inclusion of such transparency measures in the digital advertising services Code.

4.5 Other sector specific Codes

While the examples given above on anti-competitive conduct in the provision of digital advertising services, the Code terms discussed in this section will have application across all of the different services identified below. This is because the full range of anti-competitive conduct engaged in by the dominant platforms in digital advertising services markets is engaged in across the markets for those other digital platform services. This has been demonstrated through the reports that have already been issued by the ACCC from its inquiries into digital services markets, including in connection with the 5 Year Inquiry, as well as through the engagement by Free TV's members with the dominant digital platforms.

[16] As discussed page 39: https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf

[17] As discussed on page 40: https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf

4.5.1 Social media services

Free TV submits that a Code for social media services should be implemented, including provisions that address the competitive harms discussed above. In addition, the social media services Code should target anti-competitive behaviour that has been observed on those services offered by the dominant digital platforms.

First, restrictive terms and conditions are imposed by dominant platforms in relation to how content can be monetised on social media and social video. That is, rather than the content owner determining how the content is to be monetised, it is the terms and conditions of the platform that dictate the placement (and often the pricing) of advertising.

For example, on Facebook's Newsfeed (now just known as the "Feed"), the use of logos, banners and the placement of a mid-roll advertisements is set by non-negotiable terms and conditions of service. This means that the terms and conditions of the monetisation of content created by Free TV members is controlled by Meta (or Google in the case of YouTube content), giving the content owner insufficient control over the content that it has created and which it is seeking to monetise.

Secondly, Free TV members have extensive experience of the use of network branding and identities in scam advertising on the platforms and the resulting harms to Australian businesses and individuals. It remains the case that the takedown processes for scam advertisements implemented by Meta (and other platforms) are inadequate. Fake ads continue to quickly reappear after they are taken down. These inadequate takedown processes damage the business reputations of broadcasters and also the personal reputations of the celebrities and media personalities that are misrepresented.

In submissions to the Digital Platforms Inquiry and the inquiry in relation to social media services the ACCC is currently undertaking under the 5 Year Inquiry, Free TV Australia has highlighted the problems caused by fake or scam advertisements and the inadequate takedown processes implemented by platforms, including Meta, to address this problem.

In early 2022, the ACCC commenced proceedings against Meta in the Federal Court in relation to scam advertising appearing on its platforms. At the time, the then ACCC Chair stated that Meta should be doing more to detect and then remove false or misleading ads on Facebook. We support the ACCC's actions in these proceedings and look forward to the ACCC being successful in that case. However, to address the underlying problem of ensuring that Meta (Facebook) and other platforms, including Google and TikTok, take actions to address this significant problem, further steps are required.

To address the problem with scam ads, social media platforms and other similar types of digital platforms, should be required to ensure that material which they have the ability to control (and accordingly which they have the ability to remove from their sites) is not fake, damaging, misleading or defamatory. We acknowledge that the Government is currently considering the possibility of a code to address scam advertising. However, Free TV submits that, given the role of social media platforms in relation to scam ads, the resolution for this significant issue may most easily be achieved by implementing a social media services specific Code under the new regulatory regime.

4.5.2 Addressing anti-competitive behaviour in app marketplaces

A Code for app marketplaces should include requirements for designated entities to treat competitors fairly and in a non-discriminatory manner.[18] This would require app store operators to provide third-party apps with fair terms and conditions of access to app stores and prohibit the self-preferencing of first-party apps.

Free TV's members are particularly concerned to ensure that designated entities are not able to provide preferential treatment to any apps in terms of discoverability. The Code should mandate that information be provided regarding the use of algorithms to determine the ranking and discoverability of apps in app stores and the disclosure of rankings that are driven by commercial arrangements.

In addition, the app marketplace Code should include:

- prohibitions on terms of service for app marketplaces that require that app developers use payment systems and sign on processes provided by the app marketplace provider.
- Transparency requirements for the approval process for developer apps to be accepted by the app marketplace provider.

4.6 Enforcement of the new Codes

The ACCC should be able to use all of the different types of enforcement tools available to it under the CCA in the event of a breach of any code. The breach of any provision of the code should be a civil penalty provision. This would differ from the existing Part IVB regime, which requires that a code made under that Part IVB specify whether provisions are civil penalty provisions. Specifying in the CCA that all provisions of the code are civil penalty provisions will emphasise the importance of these codes and the need for the ACCC to ensure strict compliance.

The ACCC's enforcement tools should include:

- **Infringement notices** - Issuing infringement notices as an alternative to commencing proceedings (equivalent to Division 2A of Part IVB of the CCA).
- **Penalties** - The maximum penalty for a breach of a code should reflect the penalties for other breaches of the CCA, including the Australian Consumer Law, and therefore be set at the greater of $10 million, three times the value of the benefit or (if the benefit is not known) 10% of the relevant designated entity's annual turnover (equivalent to section 76 of the CCA).
- **Injunctions** - The ACCC should be able to seek an order for an injunction, including a positive injunction to require compliance with a code (equivalent to section 80 of the CCA).
- **Court orders** - The ACCC, on behalf of third parties, should also be able to seek such orders as a court determines are appropriate in relation to a contravention of a code, if it considers that this will compensate a person who has suffered loss or damage or will prevent or reduce such loss or damage (equivalent of section 87 of the CCA).

The ACCC should have the ability to accept the equivalent of a section 87B undertaking in relation to breaches of any code, where it is appropriate in all of the circumstances to settle or avoid proceedings for possible breach.

[18] As discussed in section 6.8 of the Regulatory Reform Report.

In addition, any person who has suffered loss or damage as a result of a breach by a designated entity of a code should be able to seek:

- An order for an injunction, on the same terms which the ACCC would be able to obtain (equivalent to section 80 of the CCA).
- Damages against the relevant designated entity for breach of a code (equivalent of section 82 of the CCA). It is particularly important that an equivalent of section 83 of the CCA applies to breaches of any code. This will ensure that if the ACCC (or any other entity) is successful in proceedings for breach of a code, any third party that has suffered loss as a result of that breach may, in claiming for damages, rely on the findings of fact from the successful proceedings.
- Such other orders as a court determines is appropriate in relation to a contravention of a code, if it considers that this will compensate that person or reduce the loss or damage suffered by that person (equivalent of section 87 of the CCA).

4.7 The need for urgent action

The competition issues and the harm to advertisers, publishers and consumers documented by the ACCC since the Treasurer issued the initial terms of reference for the Digital Platforms Inquiry in late 2017 demonstrate an urgent need for action.

It is now critical that the reform momentum be realised, and that urgent action is taken to establish the rules-based framework. As we set out in this submission, the competition issues and the associated harms to competitors and consumers are only continuing to grow in the absence of appropriate regulation.

In this submission we lay out a way forward for the Committee to consider consistent with recommendations already before the Government from the ACCC. We submit that a key recommendation of the committee should be that the Government implement these recommendations as soon as is practicable, and in any event before the end of calendar year 2023.

4.7.1 Issues will become harder to address the longer reform takes

The digital platforms have achieved such a dominant and far-reaching position in the marketplace that they are already unavoidable for any digital business. As we expand on throughout this submission, the platforms, and in particular Google, have become so pervasive that even businesses that seek out alternative service partners can still be impacted by their use of their strategic market position.

It is critical that there are no further delays to the implementation of these reforms. The ACCC can be rightly proud of its analysis to date that sets out the clear justification for action. But with jurisdictions like the EU pressing ahead with reforms such as the new Digital Markets Act, Australia is at risk of falling off the pace, despite having previously led the world with the ACCC's Digital Platforms Inquiry.

5. Issues specific to connected TVs and related devices

5.1 Addressing app marketplace conduct on connected TVs

There are significant issues associated with the conduct of TV and device manufacturers in digital marketplaces. These are putting at risk the delivery of free-to-air television—a service that is a central plank of Australia's social, inclusion and cultural policy.

With the growing penetration of connected TVs and related devices in our homes, these devices are increasingly becoming the gatekeepers for access to free television channels and broadcaster apps. It is very important that connected TVs and related devices are recognised as just another app marketplace. Accordingly, the issues identified above and confirmed by the ACCC in relation to the conduct of mobile app marketplace providers—Apple and Google—apply equally to app marketplaces on connected TVs. The same anti-competitive conduct is observed on connected TVs, including in relation to self-preferencing. As such, the app marketplace code discussed in section 4.5.2 should also apply to connected TV marketplaces.

5.2 Ensuring local TV services can be found on modern TVs

5.2.1 Connected TV gateway demand for payment for prominence

Televisions and related devices have become very sophisticated, capable of delivering content to consumers across a vast array of applications. Today these devices provide access to a range of video content, streaming, video games, and internet services, as well as traditional terrestrial broadcast services. However, as TV manufacturers exert control over which options are displayed to consumers, directing viewers to those services that pay the highest price for preferred placement on the screen, Australians are finding it increasingly difficult to find local TV services.

Manufacturers are designing their user interfaces to position them as critical gateways to the audience. Other mechanisms to divert traffic come through pre-installing apps and placing streaming-specific buttons on remote controls. In order for free local TV services to remain prominent and discoverable within these user interfaces, many manufacturers and OS providers require a share of revenue earned through the apps of Free TV members, or even demand a share of advertising inventory. Further, annual payments can be required for apps to be preinstalled on connected TVs and for apps or content to be featured in recommendation tabs, ribbons or rails.

In addition, in some cases local TV services compete for prominence against the services offered by manufacturers and OS developers themselves, such Samsung which offers an international streamed linear product, TVPlus or Google's YouTube. These factors have meant that locally relevant, licenced and regulated local TV services are becoming difficult for Australians to find.

Free TV is aware of punitive responses by TV manufacturers in situations where free-to-air broadcasters have refused to meet manufacturer demands, with apps being demoted to the end of the guided installation process or app ribbon/carousel.

5.2.2 Government's commitment to legislated a prominence framework is welcomed and should be supported

Free TV has warmly welcomed the Australian Government's commitment on 7 May 2022 to legislate a free prominence regime to ensure Australian TV services can easily be found on connected TV platforms and the subsequent release of a Proposals Paper to address the issues identified above.

We submit that a recommendation of this Committee inquiry process should be that the Government's commitment to a legislated prominence framework be supported and implemented as soon as possible.

To implement this commitment, Free TV proposes that manufacturers of connected TVs and related devices be bound by a mandatory industry code that would set out the minimum requirements for providing free-of-charge prominence for services provided by Broadcast Services Act licenced (or national) broadcasters, including in relation to live TV functionality, placement of BVOD apps and access to search and discoverability tools.

This framework would ensure free-of-charge priority placement for FTA services, built on three key principles:

1. Free and local terrestrial TV and BVOD services provided by licenced commercial and national broadcasters (Local TV Services) must be prominent and universally available for all Australians across all of their devices
2. Australians must be informed of the Local TV Services that are available to them on devices when making a purchase decision
3. As new technologies and search and discovery tools emerge on devices, free, prominent and universal access to Local TV Services for all Australians must be maintained through the inclusion of these services in all search, discovery and aggregation tools.

A full description of our proposed prominence framework has been submitted in response to the Government's Proposals Paper. A copy of our submission is available here.

A. Process for making new Codes under the CCA

Part IVB of the CCA does not mandate the steps that are required to be taken to develop a code, which provides valuable flexibility. The process for making, for example, the Dairy Industry Code demonstrates the benefits of this flexibility, as it allows codes to be developed and implemented quickly. The Dairy Industry Code was implemented under Part IVB in a nine month period from the time of the Government's announcement that it proposed to implement a code following the completion of the ACCC's Dairy Inquiry.

If similar processes to those used under Part IVB of the CCA were adopted, developing a mandatory digital platforms code would typically commence with the preparation of a regulatory impact assessment (**RIS**) and then progress to consultation processes to understand particular issues and develop a cost benefit analysis. These steps would not be required in the case of codes that are implemented to give effect to the findings of the inquiries that have been undertaken by the ACCC to date and will be undertaken in future (including the Digital Platforms Inquiry, Ad Tech Inquiry and the investigations under the 5 Year Inquiry) but could be implemented for other codes in future. A public consultation process would then be followed by the ACCC for an exposure draft of the code, with the Governor General ultimately making the regulation for the code following a recommendation from the Federal Executive Council. Though it would be the ACCC that determined to develop a code and undertook the code development process, the Treasurer would be responsible for overseeing the making of regulations to prescribe each code (as well as any subsequent amendments to them).

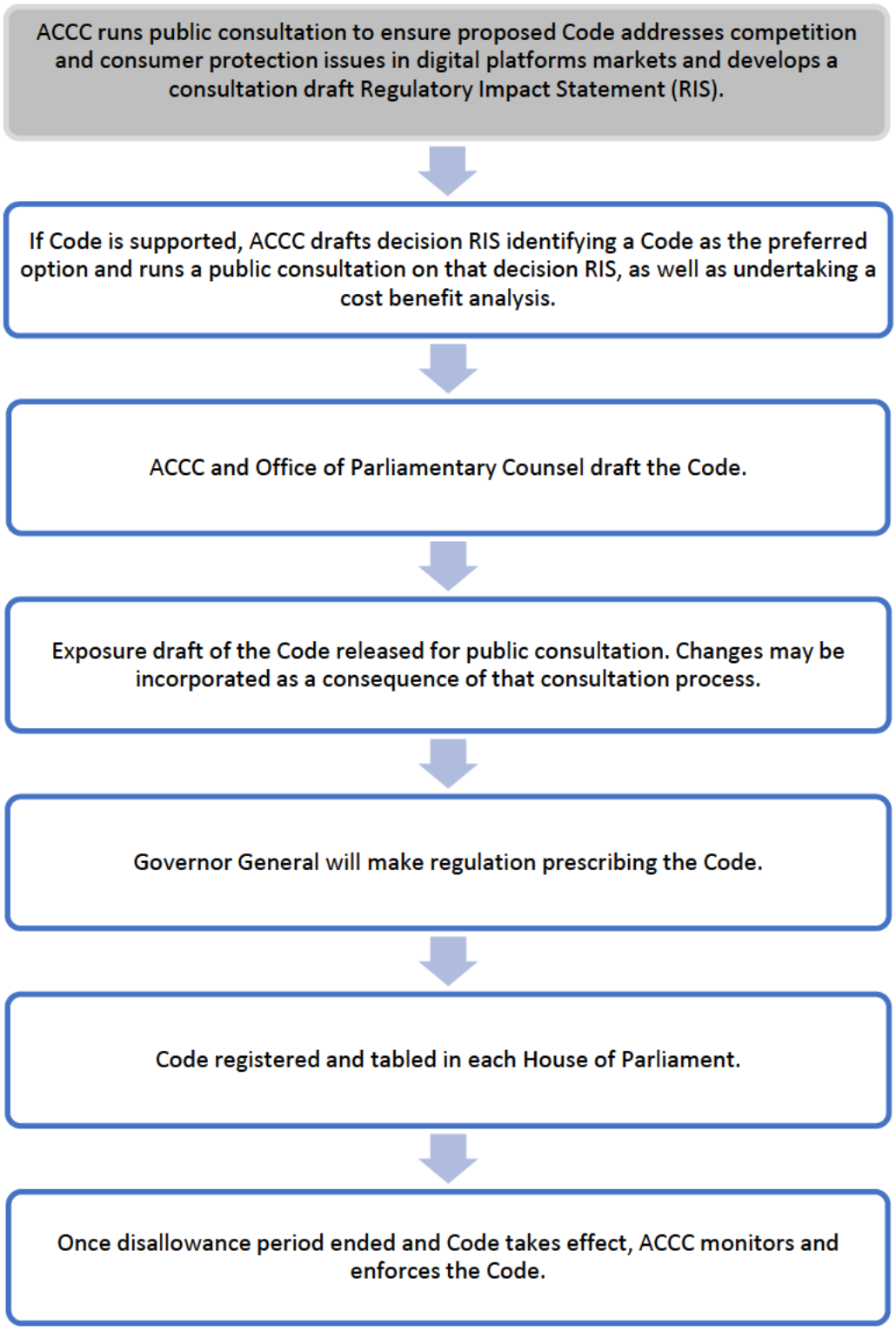
As applies in the case of Part IVB of the CCA, the new Part should not be prescriptive as to process for development of codes, other than to provide that each code must be developed by the ACCC and also to provide that codes must address the guiding principles and objectives (or one or more of them) specified in the new Part.

As the codes would be legislative instruments, these would be disallowable instruments under the *Legislation Act 2003*, allowing for appropriate legislative oversight of each code.

Diagram 1 sets out the proposed code making process. The same process would apply when amendments to a code are proposed, though it would be expected that where amendments are made, that process would be able to be undertaken more quickly.

The initial step in diagram 1 (shaded grey) would not be required in the case of the initial codes, given the work that the ACCC has already undertaken.

Diagram 1: Process for developing a Code



It is important that the new Part of the CCA sets out the maximum time periods that should be taken for each stage for making a code to meet the requirements of the guiding principles for the code making power. In particular, no consultation process should be allowed to extend from more than one month and each code making process should be completed within a six month time frame.