Submission by Free TV Australia

Digital Platform Services

Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services

April 2022

Table of contents

1. Executive Summary

- Free TV strongly supports the ACCC's 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 propose industry codes (registered as mandatory codes under a new Part of the *Competition and Consumer Commission Act 2010* (**CCA**)) 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.
- In the first instance, mandatory industry codes would be developed by the ACCC to apply in respect of a broad range of digital products and services markets covering:
    - digital search engine, social media and other digital content aggregation platform services
    - digital display advertising services and digital advertising technology (**ad tech**) services
    - app marketplaces, including those made available on connected TVs and related devices
    - any other digital platform services that the ACCC may designate.
- The new Part of the CCA should initially designate Google, Meta and Apple as being subject to the codes. The ACCC's work from 2018 onwards indicates that each of these entities is dominant in each of the digital platforms services markets in which it operates. There should also be the ability for the ACCC to impose an access regime for some digital platform services.
- It is critical that the anti-competitive outcomes, and therefore the consumer harms, caused by the conduct of digital platform services providers be addressed through an ex-ante framework. This would include:
    - **Restrictions on imposition of unfair contract terms** – Dominant service providers are imposing unfair contract terms on businesses, including in relation to data collection and restrictions on the monetisation of content
    - **Data separation arrangements** – To address the significant advantages that providers obtain from the vast quantities of consumer data they collect in a privacy protective way, data separation arrangements should be implemented
    - **Prohibitions on self-preferencing including management of conflicts of interest** – The ACCC has found strong evidence of Google using its market position to advantage its own products and services in related market segments, with its vertical integration increasing its incentive to self-preference
    - **Addressing interoperability** – Rules are required to address interoperability to ensure businesses and consumers have greater choice
    - **Transparency** – The ACCC has found an absence of transparency impedes competitive outcomes and this should be addressed
    - **Prominence rules and app marketplace protections –** a code is required to ensure free-of-charge prominence for Broadcasting Services Act 1992 (**BSA**) licenced or national broadcasters.
- The longer that gateway firms 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 by the ACCC providing detailed recommendations for legislative changes that the Government may quickly implement this calendar year.

2. Introduction

Free TV Australia appreciates the opportunity to comment on the ACCC's February 2022 discussion paper on updating the competition and consumer law for digital platform services.

2.1 About Free TV

Free TV is the peak industry body for Australia's commercial free-to-air 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 free-to-air 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.

Our members are dedicated to supporting and advancing the important contribution commercial free-to-air television makes to Australia's culture and economy. Australia's commercial free-to-air broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent.

A report by Deloitte Access Economics "*Everybody Gets It: The economic and social benefits of commercial television in Australia*" highlighted that in 2019, the commercial TV industry supported 16,300 full-time equivalent jobs and contributed a total of $2.3 billion into the local economy. Further, advertising on commercial TV provided an additional $4.4 billion worth of economic benefit.

In addition to this economic analysis, Deloitte also undertook a consumer survey that highlighted the ongoing importance of the commercial TV sector to the community, including:

- 86% of people thinking that commercial television supports Australian culture
- 76% think commercial TV is more important than ever
- 95% think losing it would have an impact on society.

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.

Free TV members are uniquely placed to comment on the need for updated competition and consumer law provisions for digital platforms services. We have been actively involved in all stages of the ACCC digital platform inquiry process, providing our point of view from interacting with the digital platforms as users, clients and competitors.

2.2 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.

In a supplementary submission to the ACCC in May 2019, Free TV set out the need 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. This legislation has been successful in achieving its main

objective: to create the conditions for commercial outcomes to be achieved between media companies and the digital platforms. This world leading legislation has become a model for other jurisdictions to follow in balancing the competitive relationship between media companies and digital platforms.

Second, Free TV advocated industry-wide rules for digital programmatic advertising and associated ad-tech.[1] In doing so, Free TV highlighted a range of harms being caused by the market conduct of the dominant ad tech service provider, Google.

Since that time the ACCC has undertaken a full review of the ad tech markets and formed its own view of the need for an ex-ante rule-based framework. Similar reviews in other countries have also recommended new forms of regulation to protect competition and efficient service delivery in the digital platform sector, not limited to the ad tech markets.

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 ACCC recommendations and Government action so that, working consistently with comparable jurisdictions, a regulatory framework can quickly be established.

2.3 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.

The risk is that without urgent action to address this dominance and the competition harms that it creates, it will become harder over time to implement the necessary reforms. The platforms continue to expand, both horizontally and vertically. With that growth comes the potential for a greater impact across a wider range of related markets. What is very clearly at stake here is the ability of governments to maintain their own sovereignty over a critical aspect of modern economies—the digital marketplace.

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.

[1] Free TV, May 2019 Supplementary Submission, ACCC Digital Platforms Inquiry Preliminary Report, pg. 5

2.4 Structure of this submission

Following the broad structure of the Discussion Paper, this submission is separated into the following sections:

- **Section 3** – The proposed new regulatory framework, setting out the guiding principles and objectives, the scope of the codes and the supporting legislative architecture.
- **Section 4** – Outlines the competitive harms that are to be addressed as a matter of urgency by the new framework, such as unfair contract terms, data separation, self-preferencing, interoperability, transparency and prominence.
- **Section 5** – Sets out the proposed code provisions required to address the harms identified in section 4.

3. The new regulatory framework

- The Discussion Paper seeks input regarding the appropriate regulatory tools to implement necessary regulatory reform.
- As recommended in this section, the tools used should be those that are already well known under Australia's competition and consumer regulatory framework and also draw on international experience and proposed reforms, particularly in the UK, US and EU.
- A binding code framework, which incorporates rule making powers, is Free TV's suggested primary regulatory tool. Implementation of such a framework should be facilitated by amendments to the CCA.
- A binding code framework will provide the most flexible regime, which is able to be used quickly, reflecting the urgency of imposing regulation to address significant competition and consumer harms.

3.1 Guiding principles and objectives for code making power

In responding to the ACCC's Discussion Paper we have been guided by a series of principles that we consider should underpin any digital markets regulatory framework. Similarly, the Discussion Paper refers to the potential for the ACCC to be given power to develop and implement rules to achieve overarching objectives or principles that would be set out in the CCA.[2]

Including guiding principles and objectives for the new code making provisions of the CCA would provide focus for both how the codes should be developed and the areas which those codes should address.

In drafting these principles and objectives, we have considered the principles underpinning the approach to these issues that are being adopted internationally. While there may be variations in regulatory nomenclature across jurisdictions, as digital services, including ad tech services, and related services are provided across jurisdictional borders, we consider it is important that regulatory efforts build from a common set of regulatory principles and objectives.

Having regard to the proposed objectives in the UK Government's paper, A new pro-competition regime for digital markets, July 2021 (**UK Paper**),[3] and addressing the anti-competitive conduct and consumer harms that the ACCC has identified through its investigations to date, Free TV considers that the following guiding principles and objectives should be adopted:

- ***Timely and responsive*** – A guiding principle should be that the ACCC uses its code making powers in a timely and responsive manner, reflecting the dynamic nature of the relevant markets. This would mean that codes should be put in place quickly following identification of circumstances that justify use of the new powers and, importantly, the ACCC would move to take enforcement action rapidly when non-compliance was identified.

[2] As discussed for example in section 7.3.3, page 77.
[3] Available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf

- ***Targeted*** – Codes should apply to designated entities that have achieved a strategic or gateway status, determined by reference to objective criteria (consistent with international approaches) considered in further detail later in this submission.
- ***Open*** – Each code should provide a foundation for fair and open relationships between consumers or businesses, on the one hand, and any designated entity on the other, facilitating the free choice of a provider, whatever designated products or services are acquired. Contractual arrangements should not contain restrictive terms and conditions and protections should be included in codes against self-preferencing and other forms of anti-competitive behaviour.
- ***Transparent*** – Codes should support information transparency for consumers and businesses being provided with information to enable them to make informed decisions about interacting with designated entities and the products and services those entities offer.

Within these guiding principles and objectives, consistent with the existing Part IVB of the CCA and the recommendations for regulatory powers in the UK Paper, the ACCC should be given a broad discretion to design codes to ensure that the most effective remedies and rules are provided for, that are both proportionate and practicable.[4]

Tasking the ACCC with the role of establishing these codes is recommended in this submission 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 an element of Government scrutiny. We expand on this in section 3.2 below.

Although this submission focusses on the competition issues that the new codes should address, it is submitted that the new mandatory code making power should enable codes to be made to address competition *and* consumer protection issues. Consumer harms in relation to digital platforms services markets, as is the case for competition issues, are typically unique to those markets and therefore should be addressed in a code rather than being incorporated in a form of regulation that is applicable to all businesses to which the Australian Consumer Law applies. In the alternative, Free TV would also be supportive of an approach to consumer protection in relation to scams, malicious apps and fake reviews that is similar to that adopted in the UK in its Online Safety Bill.[5] That Bill, if passed by the UK Parliament, would impose statutory duties on digital platforms to remove illegal content. This would include for example an obligation on designated services to remove fraudulent advertising, which is a particular concern in Australia, as demonstrated by the recent Federal Court proceedings commenced by the ACCC against Meta.

3.2 Structure of proposed new code making power: changes to the CCA

The Discussion Paper puts forward a number of different regulatory tools that could be used to address the competition issues, as well as the consumer harms, that the ACCC has identified in its investigations to date in the digital platforms sector.

[4] As discussed in paragraphs 111 to 114 of the UK Paper, pages 35-36.
[5] The Bill is available here: https://publications.parliament.uk/pa/bills/cbill/58-02/0285/210285.pdf

Although amendments to the CCA are an inevitable element of any regulatory model that is adopted, including the model supported by Free TV, we agree with the conclusion of the ACCC in the Discussion Paper that legislation, of itself, is not sufficiently flexible to respond to competition and consumer protection issues that arise from the rapid changes that are likely to continue to occur in future in business models and technological innovations in the digital platforms sector.

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.[6] 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.[7]

A code regime, similar to that in Part IVB of the CCA, would accordingly be an appropriate tool to regulate the market failures the ACCC has identified to date, and may identify in future, 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.

A key difference between Part IVB and the new code making power would be that the ACCC would be responsible to develop the codes under the new regime, rather than a Government department. 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 would not be necessary for the ACCC to consider the issues that are required to be considered at the commencement of a code making process under Part IVB of the CCA. In other words, in using the code making power, 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.

Free TV's view is that it is unnecessary to distinguish between codes and rules, as the ACCC has proposed in section 7.3 of the Discussion Paper. Matters that the Discussion Paper has suggested should be addressed by rules may equally be addressed in mandatory codes under a new Part of the CCA.

The UK Paper outlines a range of potential regulatory tools to address the conduct of digital platforms. Recognising the differences between the administrative nature of the regime proposed in the UK Paper and the enforcement system we have in Australia, the approach suggested by Free TV is consistent with the regulatory approach proposed in the UK Paper,[8] subject to two qualifications. First, the UK Paper contemplates separate codes being developed for specific firms with "strategic market status", or SMS, and specific activities. Free TV, on the other hand, recommends that proposed codes under the CCA would typically have broader application, applying to multiple entities and all activities undertaken in relation to digital platform services. Free TV's proposal reflects that it would be a significant administrative burden on the ACCC to develop different codes for different designated entities and the supply of different digital platform services, when the same rules should apply across

[6] For example, in describing the Dairy Industry Code: https://www.accc.gov.au/system/files/Dairy-inquiry-fact-sheet.pdf

[7] As discussed by The Treasury, here: https://treasury.gov.au/publication/p2017-t184652

[8] As described in Part 5 of the UK Paper.

all designated entities in providing any digital platform services. Separately monitoring and enforcing separate codes, which may not apply the same rules to different designated entities, would also impose an unnecessary administrative burden on the ACCC. Single entity/activity codes are also not typically implemented under existing provisions of the CCA.[9]

Secondly, the UK Paper proposes that codes would seek to set the "rules of the game" to prevent harms and separate pro-competitive interventions would allow the Digital Markets Unit of the UK's Competition and Markets Authority to address the root causes of a firm's market power. In this submission it is instead proposed that both types of requirements could be included in mandatory codes.[10] The UK Paper gives as one example that a code could restrict self-preferencing but any functional separation remedy to remove the underlying incentive to self-preference would be implemented under a pro-competitive intervention. However, there is no reason why the proposed new code making power under the CCA could not allow the development of codes to address both types of issues, within the scope of guiding principles and objectives. For example, a code could require remedies to address the root cause of market power and include requirements for corrective action until such a remedy was implemented.

3.3 Markets to which code making powers would apply

Mandatory industry codes for the purposes of the proposed new Part of the CCA would be able to be developed by the ACCC to apply in respect of a broad range of digital products and services markets, that should be specified in the CCA, with the ACCC having the power to add additional products and services over time, as markets evolve.

The new code making powers should apply to the markets for the following products and services:

- digital search engine services, social media services and other digital content aggregation platform services, which were considered in the ACCC's Digital Platforms Inquiry;
- digital display advertising services and ad tech services, as each of these terms is defined in the Competition and Consumer (Price Inquiry – Digital Advertising Services) Direction 2020, which were considered in the ACCC's inquiry into markets for the supply of digital advertising technology services and digital advertising agency services (**Ad Tech Inquiry**);
- to the extent not covered by the categories above, digital platform services and digital advertising services provided by digital platform service providers, as each of these terms is defined in the Competition and Consumer (Price Inquiry – Digital Platforms) Direction 2020, which are the services currently being considered in the ACCC's Digital platform services inquiry 2020-2025 (**5 Year Inquiry**);
- as a separate category, although acknowledging the overlap with the categories referred to in the dot point immediately above, app marketplaces services. These services would not be limited to app marketplaces on smart devices but should also include the app marketplaces on connected TVs and aggregation devices, reflecting the importance of the "app marketplace" for content provided by means of those devices and the fact that the choices Australians make regarding their access to content is being increasingly controlled by the decisions of the manufacturers of these devices who act as gatekeepers to Australian consumers; and

[9] .Codes implemented under the existing CCA regime are typically applied to a particular sector. The Discussion Paper refers to the codes that apply in the electricity, dairy, food and groceries and franchising sectors, as described in section 7.3.2, pages 75 to 76.

[10] As described in paragraphs 105 and 106 of the UK Paper.

- finally, to reflect that digital markets are constantly evolving, the ACCC should be provided with a broad discretion to designate other products and services.

All of these products and services are referred to collectively as **digital platforms services** in this submission.

3.4 Entities to which the new code making powers would apply

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

Each of Google, Meta and Apple as well as, in each case, all of the related bodies corporate of these entities should be designated entities in the CCA for the purposes of the new Part. The work the ACCC has undertaken under the Digital Platforms Inquiry, the Ad Tech Inquiry and the 5 Year Inquiry indicates that each of these entities is 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 consumer facing services, app marketplaces and ad tech services, Meta dominates in social media platform services (and ad tech services for its own social media platform services) and Apple dominating in app marketplaces. No further investigation of this issue is required before such designation occurs.

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[11] 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.

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, as referred to in the Discussion Paper.[12] 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.

[11] 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

[12] This is outlined in section 7.2 of the Discussion Paper, page 73.

3.5 Process for making codes

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).

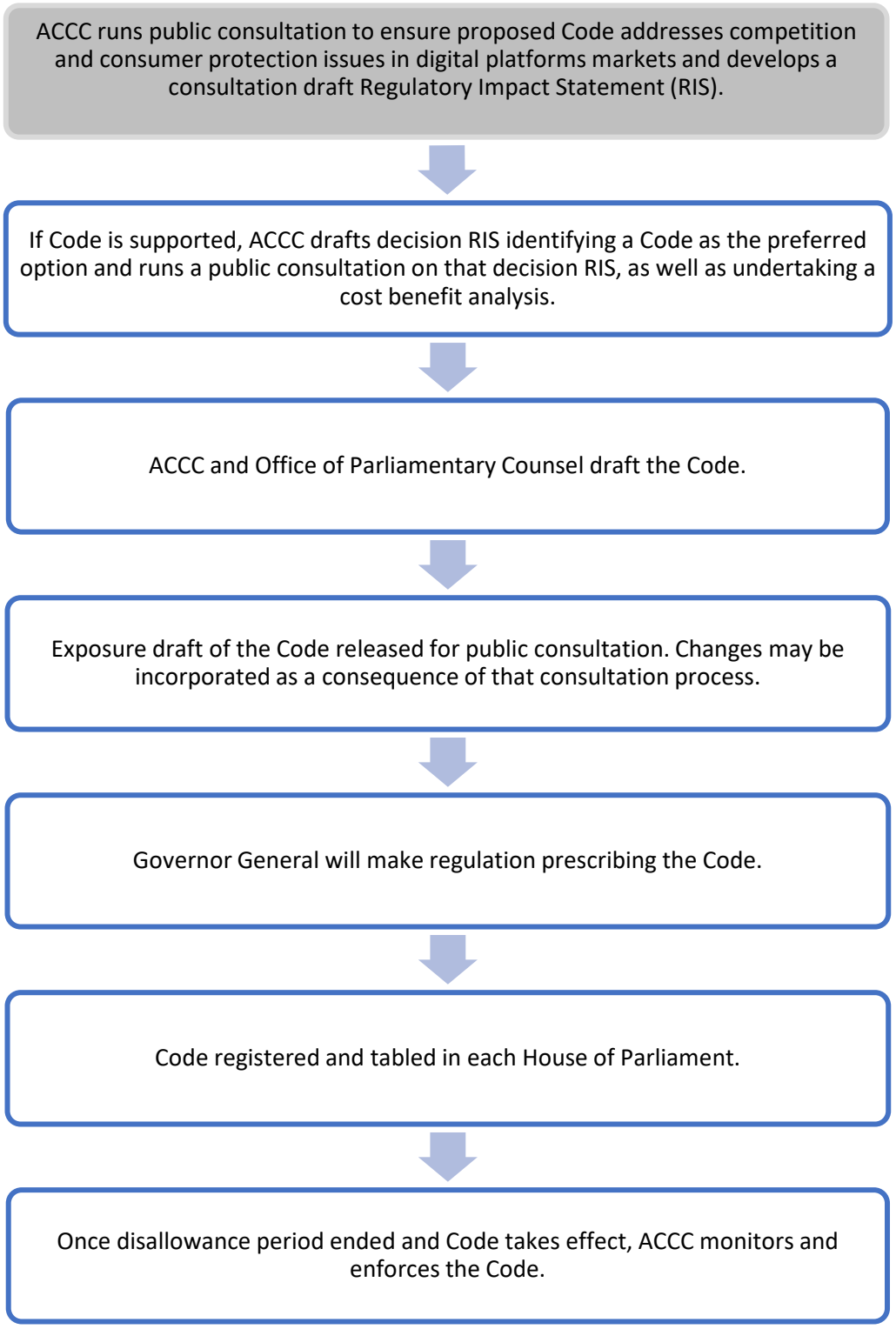
As applies in the case of Part IVB of the CCA, the new Part should not be prescriptive as to process for development of codes, other than to provide that each code must be developed by the ACCC and also to provide that codes must address the guiding principles and objectives (or one or more of them) 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 code discussed in part 5 of this submission, 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.

3.6 Other required changes to the CCA

The other provisions relating to the new code making powers that should be incorporated in the CCA include:

- A complaints mechanism
- Investigative powers
- Appropriate remedies for breach of any code
- Non-binding guidance.

3.6.1 A complaints mechanism

The ACCC has a separate Digital Platforms branch, which focusses on consideration of competition and consumer issues in this sector. However, it could not be expected that this ACCC branch will, without input from stakeholders, be able to identify all issues where intervention through use of the new mandatory code making powers would be appropriate.

Accordingly, it is recommended that industry bodies have the right to bring competition and consumer protection issues of general concern in particular markets to the attention of the ACCC for investigation. This would require that the new Part of the CCA incorporates a complaints process that enables issues to be raised with the ACCC to determine whether the code making power should be used. Under this mechanism:

- Any industry body that represents stakeholders in a digital platform services market, for example, Free TV, should be able to lodge a request with the ACCC for the ACCC to consider an anti-competitive practice, or practice that creates consumer harms, in that digital platform services market and whether the ACCC should use its code making powers to address the issue. The use of the code making power is a potential outcome as new codes would be able to be made from time to time, and existing codes could be amended, to address emerging issues.
- The ACCC would be required to investigate each such request, unless it determined that the request was frivolous, vexatious or similar.
- On completing its investigation, the ACCC would be required to determine whether it should exercise its code making powers (which could include determining to designate one or more new entities and/or digital platforms services as well as making a new code or amending an existing code) or, otherwise, the ACCC would be required to release a public statement explaining the evidence that it has found and the reasons why it made a decision not to exercise its powers. This will assist in transparency.

As in the case of the code making process itself, a time limit should be imposed on the ACCC considering each complaint. The ACCC should be required to undertake each investigation, and make a determination, within a six month period.

This proposed complaints regime would not fetter the ACCC's discretion to consider any issues of concern to it. The ACCC should retain broad powers to investigate matters of concern to it.

3.6.2 Investigative powers

The ACCC has well established investigative powers, including those set out in section 155 of the CCA. Section 155 enables the ACCC to obtain information, documents and evidence. Either section 155

should be extended to apply to the new Part, or an equivalent power should be given to the ACCC in relation to that new Part. This should enable the ACCC to exercise powers:

- To investigate whether particular entities and/or additional digital platform services should be designated under the new Part.
- To investigate particular acts or practices to determine whether there are grounds for the ACCC to exercise its powers to make, or amend, a code to address anti-competitive practices or consumer harms.
- To investigate any acts or practices that constitute, or may constitute, a breach of any existing code.

3.6.3 Enforcement

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.

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).

Practical example of enforcement of a code

- Once a code is made, the ACCC would monitor compliance through its Digital Platforms section. This would be done by assessing reported complaints of breach of that code and also by independently conducting compliance checks.
- The ACCC would be able to use its investigative powers, equivalent to those set out in section 155 of the CCA, to obtain the information necessary to undertake this monitoring activity.
- If the ACCC believed a breach of the code had occurred, there would be a range of different enforcement tools it could use. Primary remedies would include:
    - the ability to seek pecuniary penalties;
    - in addition to seeking pecuniary penalties, the ACCC would be able to seek an injunction under section 80 of the CCA or an equivalent provision. This enforcement tool would be particularly important if there were findings of ongoing breach of the code. There is ample precedent that would support the ACCC being able to obtain an injunction to require a designated entity to take identified positive steps to ensure it was acting in compliance with the code; and
    - the ACCC, as an alternative to litigation, could seek the equivalent of a section 87B undertaking, under which the relevant designated entity would provide commitments to resolve the breach, where it is appropriate in all of the circumstances.
- Also important is that, under this proposed regime, any third party such as a publisher or advertiser who suffers loss as a result of the conduct of a designated entity that is found by a court to breach a code should be able to rely on the findings of fact by the relevant court in its own proceedings against the designated entity. This provides an important and necessary protection. Many Australian companies do not have the resources to seek redress through the Courts against digital platforms that are several orders of magnitude larger, but should be able to take action to recover their losses arising from breach of a code where a court has determined that such a breach has occurred.

3.6.4 Non-binding guidance

The ACCC already has the function under section 28(1)(a) of the CCA to make available guidance with respect to the carrying out if its functions and the exercise of its powers. This existing power would be able to be used to issue non-binding guidance regarding the steps that designated entities should take to comply with any applicable code. Alternatively, an express provision could be included in the proposed new Part that specifically conferred that function on the ACCC.

3.7 Access regime

As part of the new regulatory toolkit, Free TV considers that the ACCC should also have the ability to create an access regime for digital platforms services that it considers necessary to address the asymmetric bargaining power of the parties, given the detrimental impact on competition which arises

from that asymmetry. This type of power would be in support of the code making power that is the primary regulatory tool proposed by Free TV.

Free TV supports an access regime modelled on that used for the telecommunications sector and contained in Part XIC of the CCA. Where used, such a mechanism would encourage commercial negotiations but provides for an enforceable right of access if commercial negotiations fail. This would have parallels with the provisions of the EU's proposed Digital Markets Act. That Act for example would ensure that a designated entity would be required to provide access to, and interoperability with, its operating systems, hardware and software features that the designated entity itself uses for the provision of certain services. In this way an access regime may have the potential to extend beyond data, such as click-and-query data, that is considered for a potential access regime in the Discussion Paper.

Free TV also supports the ACCC's suggestion that any access regime would support the code making regime, in the same way that Part XIC of the CCA is complemented by Part XIB of the CCA (which regulates anti-competitive conduct in the telecommunications sector).[13]

3.8 Ombudsman model

The Discussion Paper notes that the ACCC continues to strongly support its 2019 recommendation from the Digital Platforms Inquiry Final Report that an independent ombudsman scheme should be established to resolve complaints and disputes between consumers and digital platforms as well as between businesses and digital platforms.[14]

Outgoing ACCC Chair, Rod Sims, in a recent speech, discussed the importance of ombudsman schemes to help small businesses and consumers resolve disputes with digital platforms.[15] While Free TV understands the importance of an ombudsman scheme for consumers and small businesses, such a scheme is not able to address disputes between large businesses, such as the commercial free-to-air television broadcasters and designated entities.

[13] As discussed in paragraph 7.3.5 of the Discussion Paper, page 78.
[14] As discussed in paragraph 8.4.2 of the Discussion Paper, page 100.
[15] The Ruby Hutchinson Memorial Lecture 2022, available from the ACCC's website: https://www.accc.gov.au/speech/continuing-the-acl-journey

4. Competitive harms to be addressed

4.1 Ad tech market conduct

The Ad Tech Inquiry final report clearly establishes the urgent need for a new regulatory framework to govern the burgeoning ad tech market. As set out in the final report, Google is the dominant supplier of ad tech services across the supply chain and no other provider has the scale or reach across the ad tech supply chain that Google does.[16]

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%.

Free TV recognises that being a dominant firm is not in and of itself a justification for the imposition of regulation. However, as we have consistently submitted to the ACCC throughout its extensive inquiry process, it is the use of that dominant position to harm advertisers, publishers and consumers that justifies immediate regulatory intervention.

We strongly agree with the statement of the ACCC that while enforcement action is currently being considered in relation to some of the harms identified, the ACCC "does not consider that proceedings under existing legislation will be sufficient alone to address the systemic competition concerns" identified in its ad tech report.

As such, there is a need for ex-ante regulation to cover:

- Leveraging of market position to impose unfair contract terms
- Insurmountable barriers to entry to markets created by the vast quantities of consumer data held by Google
- Self-preferencing, including through the bundling and tying of services, which are exacerbated by conflicts of interest
- Constraints on interoperability
- The lack of transparency hampering efficient competition in the market.

4.1.1 Unfair contract terms and unilateral amendments

Free TV is aware of instances where Google has sought to impose strict contract terms 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.

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

Free TV submits that this tying is anticompetitive because there is no reason to link data collection and the delivery of targeting advertising, other than to provide such a financial disincentive for the publisher to opt out, that they continue to share the data with Google 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 other purposes. This means that user data from 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.

This is a more recent example 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.

4.1.2 Insurmountable barriers to entry created by vast data holdings

As the ACCC acknowledged in the final report from the Ad Tech Inquiry, user related data is crucial in digital advertising and in the provision and use of ad tech services. 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.

4.1.3 Self-preferencing, including through bundling and tying of related services

Throughout the ACCC's Ad Tech Inquiry, evidence was received of anti-competitive bundling and tying of services by Google. Consistent with Free TV submissions, the ACCC Final Report provides examples of Google "unreasonably restricting the purchase of exclusive inventory to their ad tech services, or making use of one of their ad tech services contingent on integration with their other tech services":

- restricted purchase of YouTube inventory to its own demand side platforms (**DSPs**)
- directed demand from its DSPs (particularly Google Ads) to its own supply side platform (**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.[17]

[17] Ibid, page 87

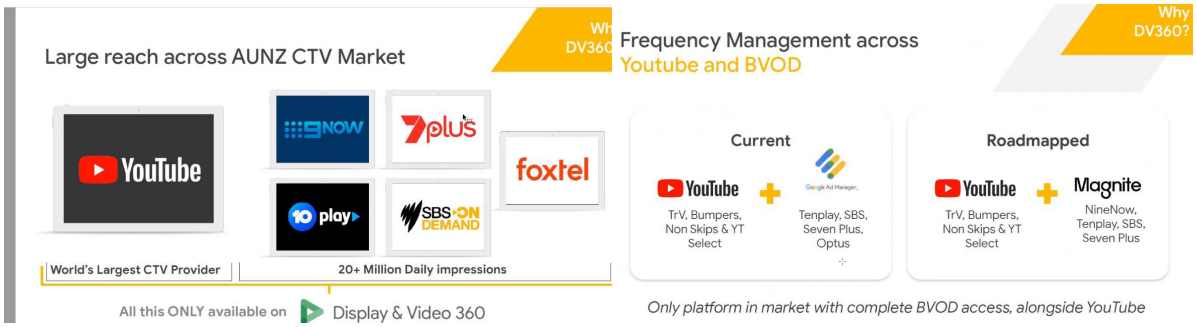
Free TV notes that the ACCC is continuing to consider the specific allegations that have been made against Google over the course of the inquiry under the competition provisions of the CCA.

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 $2.9bn video advertising market in Australia.[18]

Google continues to bundle exclusive access to Google data and exclusive access to YouTube video inventory with Display and Video 360 (**DV360**). By extending its 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.

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



In the following section, Free TV highlights the harms associated with the inherent conflict of interest caused by Google being the dominant participant on both the buy and sell sides of the market. This is evident as well in relation 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:

- 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."[19]
- "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 that it sees fit. This places Google at a significant competitive advantage to other publishers—a

[18] https://www.mi-3.com.au/02-03-2022/youtube-eyes-2bn-australian-ad-revenues-its-adloads-surge#:~:text=YouTube%20is%20marching%20towards%20a,on%20%242%20billion%20in%20revenues

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

situation only made possible because of its exclusive control of YouTube inventory through its DV360 product.

Other product tying arrangements

Other product tying arrangements include Google's bundling of Search data with DV360. As has been raised previously by Free TV, Google bundles web browsing and search data with DV360 by making this data available as Affinity Audiences and In Market Audiences in the DSP for advertisers to use to target their campaigns for free. This is powerful data, particularly the search data which is the strongest signal of user intent, and highly valuable to advertisers.

Free TV has also previously raised concerns with Google's collection of data from publisher websites and apps that implement its monetisation products such as Ad Manager, Ad Exchange or Google Analytics. This data collection is tied to the use of the monetisation products and there is no ability for publishers to refuse to allow this data collection. In addition, where broadcasters use Google's Ad Exchange, Google automatically captures data signals from broadcaster inventory and passes those signals to DV360 to enable DV360 to manage frequency and allocate client spend across YouTube and 3rd party video inventory supply.

Similar issues in relation to Meta

Although Meta was not the primary focus of the ACCC's Ad Tech Inquiry, a similar data collection issue arises in relation to Meta. Meta collects user data from publisher websites that have implemented social 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.

4.1.4 Conflict of interest

Google is the only ad tech market participant that provides services across the entire supply chain, while also providing inventory across its YouTube, Gmail and Google Search properties. As the ACCC final report found, this conflict of interest has resulted in self-preferencing that has further contributed to poor outcomes for advertisers or publishers.

> *"Google's vertical integration means that, in a single transaction, Google can act on behalf of both sides of the transaction (the buyer/advertiser and the seller/publisher) and operate the ad exchange (SSP) connecting these two parties. It can also be a seller of its own inventory. Google's conflicts of interest have resulted in competition issues in ad tech markets, or otherwise led to poor outcomes for advertisers or publishers. We do not consider that the level of competition and transparency in the supply of ad tech services is sufficient to prevent Google acting contrary to the interests of its customers."*[20]

This conflict extends beyond the programmatic execution of trades between supply side platforms and demand side platforms and includes the provision by Google of media buying and planning advisory services. Google has a certification program that will pay agency staff to become "accredited" on the use of DV360 and related services.

[20] Ibid. pg. 87

There is a clear conflict between the provision of this service and Google's role of the provider of inventory, with the likely result being an over-indexation of advertising on Google properties, to the detriment of advertisers in terms of effectiveness and competing publishers.

4.1.5 Interoperability restrictions

Google also imposes restrictions on how its products integrate with other services, for example header bidding. These restrictions have the effect of preferencing Google products and services, to the detriment of competitive outcomes.

Consistent with earlier submissions from Free TV, the ACCC found that Google's refusal to participate in industry-developed header bidding in 2015 preferences its own SSP product. As set out in the final report, 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, Open Bidding, itself is characterised by self-preferencing with non-Google SSPs subject to an extra fee if they win the auction process.

Free TV has also previously raised the example of Google's self-preferencing of its Google Ad Manager product through its limitation of programmatic guaranteed only being 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 customers who may wish to transact via Programmatic Guaranteed with publishers on third party ad servers, Google use interoperability as a mechanism to lock publishers into using their ad tech products.

4.1.6 Lack of transparency, particularly in relation to pricing

The Ad Tech Final Report reiterates the opacity that prevails in the pricing of services throughout the ad tech stack. This 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.[21]

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."[22]

Given the economy wide inefficiencies that are created as a result, it is essential that a comprehensive code should directly address this issue.

4.2 Other unfair contract terms: restrictions on how we can monetise content on platforms

Restrictive terms and conditions also exist in relation to how content can be monetised on the digital platforms. 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. Free TV has previously highlighted the restriction on Facebook Newsfeed (now just known

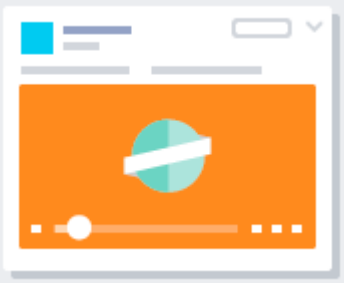
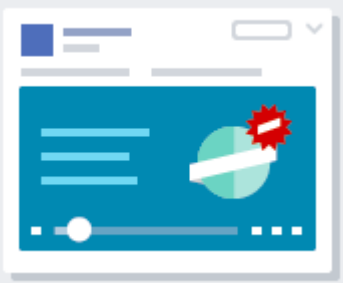
[21] See for example, Chapter 6 of the ACCC's Ad Tech Inquiry Interim Report.
[22] Op cit. page 50

as the “Feed”) for example, where the use of logos, banners and the placement of a mid-roll advertisements is set by non-negotiable terms and conditions of service.

A further problem with the monetisation of Australian content on the digital platforms is that it does not attract any advertising premium, and due to the restrictive nature of the rules stipulated by Meta and Google, gives the content owner insufficient control over the content that it has created and which it is seeking to monetise. In effect, this means that Australian content is commoditised and sold at a discount on digital platforms. As the digital platforms rely on the investment by others in content, their focus is on achieving sales volume, despite undervaluing the investment that was made by local media companies.

Our members also find that the serving of advertising around content is inconsistent and lacks transparency in relation to the factors driving when and to whom advertising is displayed. This inconsistency and lack of transparency means that it is almost impossible to forecast the revenue that can be generated from a piece of content.

Facebook restrictions on monetisation

Banner ads	**Interstitial Cards**	**Roll Ads**
Published video and image content must not contain banner ads. We define a banner ad as a branded column (often horizontal or vertical) that is overlaid onto and visually separated from the original image or video content (often by a differing background color). We prohibit banner ads that span more than one-third of your video or image content.	A title or interstitial card is a card that features the business partner and interrupts your video content. Interstitial cards are prohibited in the first three seconds of video content, and for longer than three consecutive seconds anywhere in the video. Interstitial cards must not be included at the beginning, middle or end of an individual story within the Facebook Stories product.	Video and audio content must not include roll ads that play before, during, or after your content, including pre-rolls mid-rolls and post-rolls.
		

Source: https://www.facebook.com/business/help/1190980254246452 *[accessed 17 March 2022]*

4.3 App marketplace conduct

4.3.1 App approval and other app marketplace issues

In respect of Apple App Store and Google Play, the terms and conditions of access to app marketplaces are generally 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.

Free TV has previously cited the example of the change to the terms and conditions implemented by Apple to the App Store that required that apps that required a sign-on, must 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 obtain by performing this intermediation role.

4.3.2 Restrictive conditions for in-app payments and subscriptions

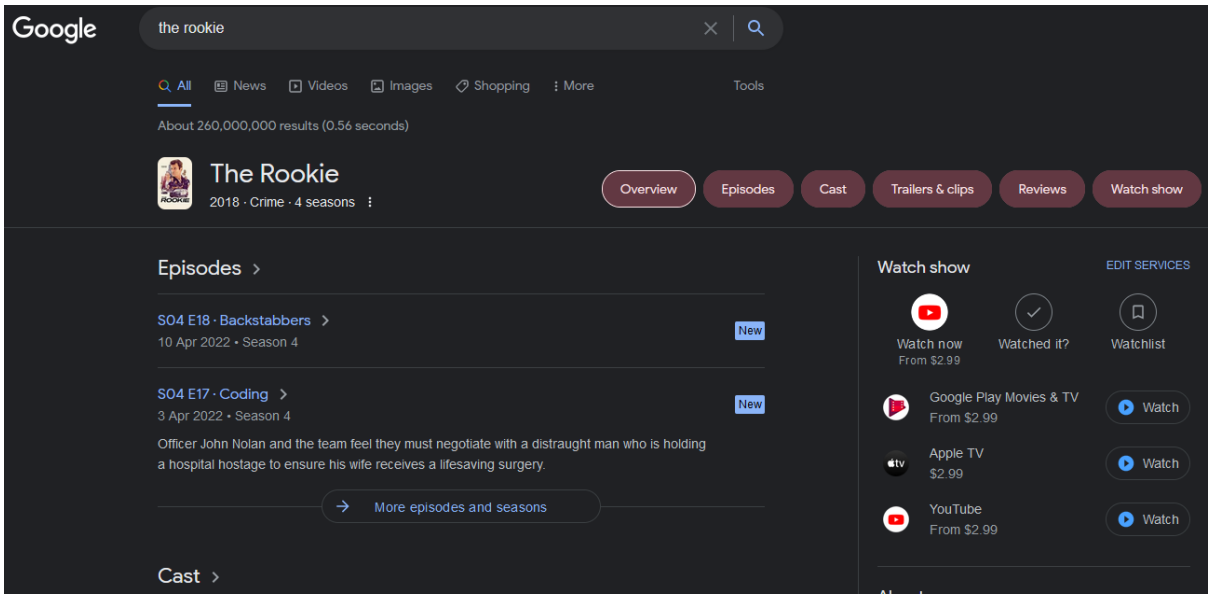
Both the Google Play Store and Apple App Store require that any in-app purchased subscriptions are required to share 30% of the subscription revenue in the first year and 15% in the second and subsequent years. This can lead to substantially different revenue outcomes for app developers/providers who 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.

4.3.3 Self-preferencing

In the context of the app marketplaces, self-preferencing occurs through the pre-installation of content aggregation apps, such as Apple TV+ on Apple devices and YouTube and Google Play Movies on Android. In addition, manufacturers and marketplace providers can set the default app to execute any requested action, or to integrate with any available voice activation. For example, a simple Siri voice command to play a TV program or a song will default to the Apple TV+ app or the Apple Music app unless the user specifies a different app by name.

In contrast, the apps developed by Free TV members must be located in marketplaces and installed by the consumer, although some members have been able to negotiate to be preinstalled with some TV manufacturers for a fee or as part of a broader arrangement.

Self-preferencing extends beyond the app marketplace and can include search and discoverability tools. For example, the screenshot below shows a Google search for a TV series “The Rookie” that is freely available on the 7Plus platform. The Google search result directs users to the paid version of the content available on YouTube (with Apple TV included as a secondary option). This sort of self-preferencing denies Australians the option of discovering free locally available content. The issue of prominence of free local services is discussed in more detail in the next section.



4.4 Connected TV marketplaces

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. The artificial nature of the distinction drawn between the mobile app marketplace and the large screen app marketplace is highlighted when considering the Apple TV and Google Play Store, both of which provide materially the same marketplace with the same user experience across either screen format.

Accordingly, the issues identified by the ACCC in relation to the conduct of mobile app marketplace providers—Apple and Google—apply equally to app marketplaces on connected TVs. As such, our proposed framework includes provisions for the regulation of app marketplaces on connected TVs to address the harms set out in the following sections.

4.4.1 Connected TV gateway demand for payment

The achievement of the objectives of the *Broadcasting Services Act 1992*[23] relies on two interrelated factors, namely that:

- consumers can readily find free-to-air services on widely available consumer equipment
- commercial TV networks are able to raise and retain sufficient advertising revenue to fund the required investment in local content, including news, live sport, entertainment and scripted drama.

However, many TV manufacturers and aggregators are requiring a share of revenue earned through our apps in their marketplaces in order for our content and apps to remain prominent and discoverable within their user interfaces. 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.

For almost all relevant devices, the user interface and app marketplace is determined by the equipment manufacturer. For example, a Samsung smart TV is inextricably linked to the Samsung Smart Hub app store through its Tizen operating system. As such, to the extent that a manufacturer has a significant market share in the hardware market (or the operating system market, in the case of Google), it will necessarily have a degree of market power over app developers and providers looking to gain access to the app marketplaces available through the relevant hardware.

The tying of the hardware device to the app marketplace / user interface means that in order for the Broadcast Services Act objectives of providing content to audiences throughout Australia to be met, free-to-air networks have no alternative other than to enter into arrangements with all marketplace providers in return for varying degrees of prominence and discoverability. In effect, this makes connected TV and TV aggregation device providers with any significant market share unavoidable business partners for Free TV members.

[23] Broadcasting Services Act 1992, see 3(1)(a), 3(1)(e), 3(1)(ea)

When compared to the global subscription-driven streaming service providers, local broadcasters are in a weak bargaining position to negotiate deals with global manufacturing or app marketplace providers. It is self-evident that free-to-air broadcasters do not have the resources to compete with the increasing number of multinational content service providers (such as Netflix, Amazon, Disney) for the prominent positions. More fundamentally, we note that *any* amount paid by free-to-air networks for availability on consumer equipment is unjustified. This is because the demands for revenue shares and other payments only relate to the market power of the manufacturers and ignores the substantial investment in local content creation made by free-to-air networks.

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.

This is analogous to the issues considered in relation to the Food and Grocery Code of Conduct and specifically the "gateway" supermarket chains exerting their market power in relation to positioning of goods on supermarket shelves. Rule 16 of the Food and Grocery Code was included to restrict gateway suppliers from requiring a payment to secure prominent placement on shelving. Similar concepts would be relevant here, though in the context of a mandatory, not a voluntary, code.

To address these issues in relation to television content, 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.

4.4.2 Consistency with Treasurer's February 2020 digital services direction

For the avoidance of any doubt, Free TV reiterates that the matters associated with the app marketplaces as they appear on connected TVs and other devices, fall well within the ambit of the Treasurer's digital services inquiry direction.

The Treasurer's February 2020 direction to the ACCC defined "digital platform services" to include:

a. services, including websites, internet portals, gateways, stores or marketplaces, that facilitate the supply of goods or services between suppliers and consumers and are delivered by means of electronic communication (**electronic marketplace services**);

b. services provided by a digital content aggregation platform, being an online system that collects information from disparate sources and presents it to consumers as a collated, curated product in which users may be able to customise or filter their aggregation, or to use a search function (**digital content aggregation platform services**); and

c. media referral services provided in the course of providing digital content aggregation platform services.

We consider that the issues identified above in relation to the connected TV and associated device marketplaces could fall within the ambit of any of the three limbs of the digital platform services inquiry.

The ACCC has accepted that the Apple App Store and Google Play provide electronic marketplace services within the meaning of the Direction. The ACCC's Interim Report No. 2 – App Marketplaces considers the competition and consumer issues associated with these two mobile device app

marketplaces. The Issues Paper that was released at the commencement of the ACCC's investigation of these mobile device app marketplaces expressly stated that app marketplaces fall within the definition of electronic marketplaces:[24]

> *… the second report, which will follow this Issues Paper, will be given to the Treasurer by 31 March 2021 and will focus on app marketplaces, a form of electronic marketplaces.*

The marketplaces offered by connected TVs and related devices operate in precisely the same manner as the mobile app stores, enabling users to download a wide range of different apps. The central function of a marketplace on these devices is to allow consumers to download content apps directly to their connected TV and devices. Different types of apps may be downloaded – not only for video content but also for music, live sports and games. For example:

(a) the Connected TV Marketplace on Samsung smart TVs is referred to as "Smart Hub". Samsung describes the products and services available to consumers via the Smart Hub on the following terms:[25]

> *Check out the content that other people are enjoying, and even get recommendations from your Samsung Smart TV which can access all of the most popular content apps on Samsung TVs.*

(b) LG, another major manufacturer of connected TVs, advertises its TVs in a similar manner. For example, its advertising states:[26]

> *LG Smart TVs come with our latest webOS to allow you to easily navigate changing channels, accessing your external devices or navigating all of the Smart TV apps available in your new LG TV.*

The operating systems offered by other TV manufacturers, such as the Android TV based Sony sets, or the aggregation devices such as Apple TV or Amazon Firestick, include marketplaces with essentially identical functionality to the mobile app stores. In the case of Apple TV and the Play Store, the app marketplaces are the same as those analysed by the ACCC in its April interim report.

Beyond the availability of app stores, these connected TVs and devices act as content aggregation platforms for video content, within the meaning of the second limb of the Direction definition.

In fact, the only material difference between a mobile device app marketplace such as the Apple App Store or Google Play and a connected TV or device marketplace, is the type of device on which the relevant marketplace is available. As such, we consider that the issues associated with these marketplaces should be regulated by a new mandatory code under the CCA, as we expand on below.

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[24] Page 8 of that Issues Paper, which is available here: https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20report%20-%20Issues%20Paper.pdf

[25] See: https://www.samsung.com/au/tvs/smart-tv/apps-on-smart-tv/

[26] See: https://www.lg.com/au/lgtvselector/smart-tvs

5. The first Codes

- It is critical that the ACCC moves quickly to put in place the first code as soon as the amendments to the CCA are made. The competition harms that the ACCC has identified in the relevant markets, particularly as a result of its findings from the Digital Platforms Inquiry, the Ad Tech Inquiry and the investigations to date under the 5 Year Inquiry, must be urgently addressed.
- The ACCC must also move quickly to consider other issues that should be addressed by use of the code making power. This is particularly important in the case of the issue of connected TVs and prominence. A prominence code should also be put in place as a matter of urgency.
- Addressing these issues in codes would be consistent with the approaches being taken internationally.

5.1 Initial code: urgency is required

It is critical that the first code is put in place as soon as possible after the necessary amendments to the CCA are enacted. To ensure that this is able to be achieved, Free TV recommends that this code is developed, and consulted on, at the same time that consultation on the proposed amendments to the CCA occurs. There is precedent in many different areas for the Australian Government to consult on both proposed legislation and subsidiary regulation at the same time.[27]

5.2 The first code should apply to all digital platform services provided by Google, Meta and Apple

Consistent with the analysis of critical competition issues identified in this submission it is proposed that the first code should apply to all categories of digital platform services provided by the initial designated entities (Google, Meta and Apple). The ACCC's investigations indicate that these designated entities dominate the markets for all of the digital platform services they supply and therefore the first code should have a broad application.

The ACCC has raised in the Discussion Paper that new codes would be developed in a way that minimises the risk of duplication or inconsistency in application with existing codes, for example, the News Media and Digital Platforms Mandatory Bargaining Code. Although the first proposed code would apply to all digital platform services provided by each of Google, Meta and Apple, there would be no overlap with those existing codes, given the focus on addressing the anti-competitive activities of these designated entities.

[27] As occurred, for example, in relation to the consultation by the Department of Home Affairs regarding both the Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 Exposure Draft and the Risk management program rules that would be made under proposed new provisions of the Security of Critical Infrastructure Act 2018 which would be introduced by that Bill.

5.3 Unfair contract terms to be addressed for all digital platform services

The ACCC has proposed in the Discussion Paper that consideration is given to mandating fair-trading obligations for digital platforms, including for example rules that would prohibit contractual provisions that unreasonably restrict the access of businesses to consumers.[28]

Free TV would support the initial code including a general requirement for designated entities to comply with fair-trading obligations, supported by specific fair-trading obligations that:

- Restrict the ability of designated entities to charge inflated prices.
- Limit the ability of designated entities to unfairly restrict competition, including by requiring the bundling of services.
- Impose positive obligations to provide fair and non-discriminatory terms of access to key services and platforms.[29] This could be supported by an audit obligation.
- Address unfair data collection practices. To take one example, a designated entity that provides ad tech services should not have the ability to collect or use for its own purposes a business' data (including data collected by that business from consumers) as a consequence of the business using the ad tech services of that designated entity.[30]
- Address the restrictions on how publishers can seek to monetise their content, by prohibiting the platforms from imposing restrictive terms of service including relating to the placement and pricing of advertising.

5.4 Provisions of the first code specific to ad tech services

Although the first code would apply to all of the initial designated entities regarding the digital platform services they provide, the provisions of the code addressing the ad tech services markets would primarily apply to Google and Meta.

5.4.1 Data separation

Dealing with data advantages in respect of ad tech services in the code will be challenging as it will be necessary to address both competition and privacy concerns. The only effective way to achieve this 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 advantage would far outweigh the decreases in efficiency for designated entities caused by the implementation of these measures.

Free TV recommends that the ACCC incorporates in the code a requirement for each designated entity to put in place separation arrangements that provide the entity must ensure that data collected from

[28] This is discussed in section 8.4.1, page 99 of the Discussion Paper.
[29] Discussed by the ACCC in section 8.1.1 of the Discussion Paper, pages 85-86.
[30] This would be consistent with the EU's Digital Markets Act, which would restrict designated gatekeepers from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users (see page 40, https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf).

its own consumer facing services is kept separate from, and not aggregated with, data collected from any other services. For example, in the context of Google and its ad tech services, this would require that Google could not aggregate the consumer data that it collects from its own consumer facing services, such as Google search, with consumer data that it collects from businesses that use its ad tech services. In fact, the consumer data that it collects from its business customers should only be able to be used for the delivery of the relevant ad tech service.

The detail of the data separation arrangements could not be included in the code, given the complexity of the arrangements and also because each designated entity would be required to put in place arrangements that reflected its own operational structures. Therefore a structure similar to section 87B (undertakings) of the CCA is recommended. That is, the code would direct each entity to provide to the ACCC for approval a draft plan to implement the separation arrangement. When a plan was approved by the ACCC, the relevant designated entity would be required to comply with it.

Adopting a data separation approach would be consistent with the EU's recently finalised Digital Markets Act, which includes restrictions on combining data from different sources where fully informed consent has not been obtained from users.[31] Consent should not be a criteria under the Australian law. Given both the competition and consumer harms arising from the combination of these different data sets, it is submitted that there should be no exceptions to the prohibition on the combination of such data types.

5.4.2 Restrictions on self-preferencing behaviour in ad tech services markets

A general prohibition on a designated entity favouring its own ad tech services, or inventory, by excluding rivals or providing an undue advantage to its own 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 general prohibition may need to include some exclusions whether there are legitimate pro-competitive reasons for this to occur, though such exclusions would need to be narrow and very targeted.[32] 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 ad tech trading process. For advertiser clients, this would mean implementing inventory purchases of the requested type at both the lowest price and ad tech services cost and for publisher clients, this would mean implementing inventory sales at the highest price minus ad tech services costs.

The code should specifically restrict the ability of any designated entity to use its substantial market power in any ad tech services market to extend or leverage that power into other markets to the detriment of competitors. To take just one example from those set out in section 4 of this submission, this would mean that, where a designated entity is also a publisher of one or more popular sites that

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

[32] The ACCC has acknowledged this in section 8.1.1 of the Discussion Paper, pages 85-86.

is considered a "must have" by advertisers, it should not be allowed to restrict the access of other ad tech services providers to those sites or inventory as this locks advertisers into particular ad tech products, notwithstanding that it is not a direct restriction on interoperability. This is particularly problematic with respect to YouTube and DV360, but the code should not be limited in its application to these services.

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 owned 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.

5.4.3 Interoperability

Building on the restrictions on self-preferencing, to foster competitive markets for ad tech services, strong and effective protections should be included in the code that ensure interoperability of the ad tech services of designated entities with third party vendors and mechanisms to ensure that designated entities cannot unduly incentivise or lock other participants into using the designated entity's products or services as opposed to acting in the best interests of the other participant's customers.

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 ad tech 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 ad tech services providers (for example, header bidding) integrate with SSPs used by designated entities. This is also particularly key for Google Ad Manager which, in relation to programmatic guaranteed services, is only interoperable with DV360.

5.4.4 Transparency, including for pricing

Free TV supports the ACCC's suggestion that increased transparency, including but not limited to pricing, is necessary for effective competition in relation to digital platform services.[33]

The code should address ad exchange provisions that govern how auction processes, and any other ad tech services trading processes, are to be conducted by designated entities to ensure that these are both transparent and unbiased, with designated entities to be obliged to clearly disclose how and when buy and sell orders will be matched (including the mechanics of the sales process and other aspects). This general transparency requirement would also limit the potential for self-preferencing.

[33] As referenced in section 8.5 of the Discussion Paper.

As the code would impose obligations only on designated entities, there are different models that could be adopted in that code to achieve pricing transparency. For example, a real time dashboard of ad tech service 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 ad tech services provided by designated entities, not limited to DSP services, should 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 has referred in both the final report from the Ad Tech Inquiry and the Discussion Paper to the possibility of voluntary, industry-led standards being established to require ad tech providers to publish average fees and take rates for ad tech services.[34] This is not supported by Free TV given the significant harm to competition that has already been caused by the lack of transparency in relation to pricing in Australia's digital advertising and ad tech services sector. There are many disadvantages to a voluntary code. There is no certainty that such a 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. This issue should be addressed in a mandatory code.

In addition, mandatory obligations would be consistent with the approach that the EU has adopted in the recently finalised Digital Markets Act, which will impose an obligation on gatekeeper digital platforms to provide advertisers and publishers to which it supplies advertising services, upon their request, with 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.[35] 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.[36]

The ACCC has referred to 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.[37] Free TV would support the inclusion of such transparency measures in the code.

[34] See paragraph 8.5.1 of the Discussion Paper.
[35] As discussed page 39: https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf
[36] As discussed on page 40: https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf
[37] As discussed in paragraph 8.5.2 of the Discussion Paper.

5.5 Provisions of the first code specific to app marketplaces

Free TV recommends that the initial code includes equivalent provision in relation to app marketplaces that would apply to ad tech services.

In particular, we support the ACCC's proposals:

- that obligations should be imposed on designated entities to treat competitors fairly or in a non-discriminatory manner in relation to app marketplaces.[38] This would include requiring app store operators to provide third-party apps with fair terms and conditions of access to app stores. 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.
- for non-pricing transparency, including that information is provided regarding the use of algorithms to determine the discoverability of apps in app stores and similar. Transparency should also apply to the terms for app approval processes.

5.6 A separate code for connected TV marketplaces

The Government's recently released Media Policy Statement[39] provides for the establishment of a working group which would consider, amongst other issues, prominence. With TV sets increasingly becoming more like large computers, free-to-air television content is becoming harder to find amongst the many other choices in the connected TV environment. These choices are not presented to consumers in a fair and impartial manner. Instead, TV manufacturers and operating system developers exert control over which options are displayed to consumers, directing viewers to those services that can pay the highest price for preferred placement on the home screen, as explained in section 4.4.1.

This gateway control imposed by TV manufacturers and operating system providers creates a competition issue that should be addressed by a new mandatory code under the CCA. A new mandatory code should provide for prominence principles and be binding on connected TV manufacturers and operating system providers. This is necessary to safeguard the future of access to free terrestrial television and broadcaster video on demand (**BVOD**) services.

The prominence principles proposed for inclusion in this separate code are:

- ***Australians must have free, easy and universal access to terrestrial services and BVOD apps:*** This encompasses:
    - To ensure free-to-air services are easy to find and consistently presented the code should require that, for example, access to the live TV function is prominently displayed on any ribbon or menu system.
    - The code must require that BVOD services are pre-installed and prominent. For example, BVOD apps should be visible on the to-level user interface when a compatible connected TV or set-top box is first turned on.

[38] As discussed on page 86 in section 8.1 of the Discussion Paper.
[39] Available here: https://www.infrastructure.gov.au/media-communications-arts/media-laws-regulation/2022-media-policy-statement

- Content search and discoverability tools should be regulated in the prominence code, for example, by requiring BVOD apps to be included in aggregated universal search and content aggregation products.

- ***Australians must be made aware of the availability of free-to-air services.*** Again, this would apply to both terrestrial services and BVOD services, at the time when Australians make a purchase decision regarding a connected TV or set-top box.
  - The ability of a connected TV or set-top box to receive and display free-to-air terrestrial services must be clearly displayed on device packaging and associated marketing collateral, including online manuals.
  - The availability of BVOD apps should be set out on device packaging and associated marketing collateral.

- ***Free, easy and universal access must be maintained as new technologies emerge:*** The code must ensure that, as technology evolves, Australians' access to free-to-air services also evolves.
  - Free-to-air services must automatically be granted, at no cost, equal opportunity to be included in search, discoverability or other prominence features that may be developed in the future for any streaming application.

Prominence should be provided to broadcasters licensed under the BSA, as well as the two national broadcasters, under the code at no cost. Action is already being taken in other jurisdictions, including in the UK, to address this issue. Australia should follow the lead of these other jurisdictions.

The code should also address the types of self-preferencing that is behaviour that are identified in section 4.3 of this submission.

The final requirement in relation to this issue would be that all connected TVs and other devices imported into Australia must be compliant with the requirements of the new mandatory code.