



**FreeTV**  
Australia

## **Submission by Free TV Australia**

Digital Platforms Inquiry

Preliminary Report

*Australian Competition & Consumer Commission*

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## 1 Executive Summary

- We welcome the ACCC's strong findings that Google and Facebook enjoy substantial market power and are insulated from the impacts of dynamic competition.
- Given that these digital platforms have also been found to be unavoidable business partners for many local media companies, the challenge is to now form concrete recommendations that will ensure the future effective competition and viability of investment in Australian content.
- We consider that new regulatory models should be created:
  - firstly, to ensure that Australian content can be fairly monetised on the digital platforms; and
  - secondly, to ensure that original Australian content (including news content) is protected and supported.
- In an attempt to work constructively to a meaningful/workable solution, we propose a new access regime under the *Competition and Consumer Act* to regulate digital monopolies. It would require that any digital platform that meets a market power and prescribed revenue threshold would be subject to potential regulation by the ACCC, using a range of bespoke and fit for purpose regulatory powers.
- Such a model would more directly address the issues identified by the ACCC in the Preliminary Report, utilise well-functioning regulatory models already applying in the Australian economy to firms with enduring market power and mitigate the need for a regulator to stay ahead of the changes in technology.
- To protect ongoing investment in premium Australian news and entertainment content, the access regime should include provisions for Australian media companies to retain control of their own content on digital platforms, including how this content is monetised.
- Instead of the code of practice for the digital platforms proposed by the ACCC being limited to the surfacing and badging of news content, it is suggested that ACMA be empowered to set additional requirements that the codes must meet. For example, a code may not be registered unless it provided for:
  - Fair and impartial search and newsfeed rankings, the disclosure of commercial relationships and non-discrimination against content that attracts a fee for its use; and
  - Appropriate recognition of Australian journalistic sources that meet certain criteria (see section 5.2.1).
- Free TV welcomes the additional financial support measures discussed in the Preliminary Report. In particular, we support tax offsets for expenditure related to the production of journalistic content.
- The impact of regulatory disparity has been recognised in previous reviews. While Free TV would be a willing participant in any future review, there are a number of areas, such as Australian content and election regulations, where reform action is already justified. The ACCC's Final Report should recommend immediate action in those areas.
- Free TV supports the ACCC's recommendation that the ACMA determine a Mandatory Standard regarding digital platforms' take-down procedures for copyright-infringing content to enable effective and timely take-down of copyright-infringing content.
- The importance of requiring genuine third-party measurement and verification on Google and Facebook products remains a critical issue. Further, it is important that the standards that reach claims are measured against must be set independently.
- On privacy, we consider that transparency and control are key to privacy protection and the validity of a consumer's consent to use of their data. Subject to getting these policy settings right, we consider that other policy measures would be unnecessary.

## 2 Recommendations

### ***A new approach to regulation***

- A new access regime, administered by the ACCC, should be created under the *Competition and Consumer Act 2010* to regulate digital platform providers who have a substantial degree of market power in the programmatic advertising market.
- The access regime should require the provision of a transparent platform for the trading of programmatic advertising, with clear pricing ensuring that the platforms do not favour their own businesses in the supply chain.
- The access regime should also give Australian media companies control over how their content is monetised on the digital platforms by ensuring that they set the price of advertising around their content and how that advertising is displayed.
- The ACCC should be given the power to act as the arbitral body if platform owners (including news aggregators) and content creators are unable to agree reasonable commercial terms for the licensing of content, including snippets.
- The access regime should mandate the use of software development kits in advertising products to allow genuine third-party measurement and verification of reach claims.

### ***Principles-based approach to regulating algorithm outputs***

- ACMA should administer a Search and Social Code of Practice that establishes the principles that the digital platforms must abide by in writing their algorithms.
- ACMA would register the Code only when satisfied that it met pre-defined principles including that rankings must be fair and impartial, and not discriminate against content that attracts a payment for its use.
- News from Australian journalistic sources that meet a legislatively determined accreditation process should be clearly identified in search results and newsfeeds.

### ***Support through other financial measures***

- A news production tax offset should be introduced to support the production of Australian news and journalistic content.
- Other financial measures should also be supported such as tax deductibility for personal subscriptions and expanding the Regional and Small Publishers Fund.

### ***Take meaningful action to address regulatory disparity***

- Action should be taken immediately to address the most obvious cases of regulatory disparity, including election blackout periods and outdated children's content quotas.

### ***An efficient and effective process for taking down illegal material***

- Subject to meeting minimum requirements, a Mandatory Standard should be introduced to enable effective and timely take-down of copyright-infringing content, supported by a strong enforcement regime and clearer authorisation infringement provisions.
- The standard should require the proactive identification of illegal material, a quick and effective process for removing content and a process of remuneration for rights holders.

### ***Transparency and control the key to data and privacy***

- The digital platforms should be required to be transparent in their data collection practices to enable consumers to provide their informed consent.
- With an effective informed consent regime, the existing provisions of the Privacy Act are sufficient and additional levels of regulation should not be required.

### 3 Introduction

Free TV Australia thanks the Australian Competition and Consumer Commission (ACCC) for the opportunity to make this submission on the Digital Platforms Inquiry Preliminary Report. We would welcome further opportunities to engage as the ACCC moves towards its Final Report and findings by July 2019.

Free TV represents all of Australia's commercial television networks, covering metropolitan, regional and remote areas. As was the case in the initial round of submissions, some networks will also be making individual submissions to this inquiry. This submission sets out the industry-wide position on the preliminary findings, observations and areas for further consideration set out by the ACCC. Submissions from individual broadcasters will provide their own experiences and more detailed description of the commercial implications of the Preliminary Report.

This submission is broken into 7 key sections:

- section 4 - A new economic regulatory oversight model;
- section 5 - Protecting and surfacing original Australian content on digital platforms;
- section 6 - Other financial support measures;
- section 7 - Removing regulatory disparity;
- section 8 - Ensuring a well-functioning copyright framework;
- section 9 - Genuine third-party measurement and verification; and
- section 10 - Data and privacy.

#### 3.1 What we said in our original submission

Our original submission had 11 recommendations:

- restoring balance to the regulatory framework by considering the extent to which the existing regulations that apply to local media companies are still required in the modern media environment;
- establishing independent digital advertising metrics to establish transparent measurement and verification of web traffic and the inclusion of SDKs across all advertising products;
- increasing transparency of marketing conduct by requiring that the marketing practices of digital advertising platforms be regulated by a Code of Conduct authorised by the ACCC;
- enabling genuine negotiation on terms and conditions, including how a dispute resolution role could be administered by the ACCC, including in relation to regulated pricing or character limits for third party content;
- bringing greater transparency to algorithms by requiring the platforms to publish clear information on how their algorithms function and provide time to consult with affected parties and explain the impact of any changes on related businesses in the supply chain;
- addressing vertical integration competition issues and closely investigating bundling and potential full-line forcing competition issues;
- requiring independence and minimum service levels in setting technical standards where the digital supply chain involves buyers and sellers with common ownership;
- applying the right market definition and collaborating with international regulators to protect new entrant innovators from being acquired by already dominant digital players;
- holding digital media companies to account for piracy by recommending law changes to ensure that the party that facilitates access to pirated material is liable for the loss to the rights holder;

- maintaining the integrity of Australia's copyright system by recommending no change to the current safe harbour framework and no further extension of the scheme to digital media companies; and
- bringing transparency to data collection by Google and Facebook by ensuring consumers are given adequate information on the full extent of the data they are handing over.

Free TV thanks the ACCC for the consideration it has given to these recommendations and the underlying analysis. In the vast majority of cases these issues have been considered in forming preliminary findings or areas for further investigation.

The challenge for all stakeholders now is to work together with the ACCC in determining solutions that will have a lasting positive impact on the long-term viability of local media companies. That is the focus of this submission: taking the Preliminary Report and building constructively on it with models that would underpin the future viability of Australian content.

### **3.2 Why it is important to support commercial television**

This inquiry was instituted following a wave of concern regarding the impact that 'fake news' or public disinformation can have on political discourse and democracy. Indeed, even the outcomes of elections around the world were being considered in terms of the impact that the rise of the influence of the digital platforms was having on our world.

Against this backdrop, it has never been more important to support Australian media companies that invest in the creation of high-quality public interest journalism, to the benefit of all Australians.

Supporting measures that ensure the growth and financial viability of the commercial free-to-air industry is critical not just for the role that broadcasters play in informing the community, but also the role that public interest journalism plays in our democracy.

Indeed, it is fundamental to our democracy.

The free-to-air sector's employment of high calibre, award winning investigative journalists plays a key role in providing important checks and balances on our political and legal processes by facilitating transparency and accountability.

From matters such as challenging non-publication orders, reporting on court cases and investigating instances of alleged corruption, Australians rely on us to be their eyes and ears. In doing so, our public interest journalism plays a crucial role in a healthy functioning democracy.

The Commercial Television Industry Code of Practice enshrines our members' commitment to accuracy and fairness in news and current affairs programming. The Code requires that commercial free-to-air broadcasters present factual information accurately and ensures that viewpoints included in programming are not misrepresented.

Most importantly, our Code of Practice requires that news programs must be presented fairly and impartially. This underlines the commitment of our members to quality news programming that sets their programming apart from the 'fake news' scandals that led, in part, to the formation of this inquiry.

### **3.3 Revenue impact affects all content**

As set out in our original submission, commercial TV networks invests significantly in news, and local journalistic content production is a very important part of our businesses. Our high quality, accurate and impartial news services, which are accessed by millions of Australians each week, provide an important role in our democracy as a counter-balance to the potential proliferation of fake-news that can be shared across search and social platforms.

However, we again note that it is impossible to analyse the impact of the digital platforms on the supply of journalistic content in isolation from our investment in all other forms of Australian content. Our ability to continue to invest in news and journalistic content is dependent on the viability of all parts of our businesses and across all programming categories.

### **3.4 Coverage of digital platforms**

In our original submission we outlined our reasoning for why we considered that the scope of the inquiry should focus on Google and Facebook. We noted that these platforms have a level of ubiquity and scale that provides immense capital and unprecedented ability to collect data and to leverage their market power into additional areas. We also noted their dominance in the advertising market and the fact that there were capturing almost all of the growth in the digital market.

Accordingly, we welcome the fact that the ACCC's Preliminary Report also focuses on the impact of Google and Facebook, and the analysis that supports strong conclusions regarding the market power that they enjoy. It flows from there that the regulatory oversight models proposed should be similarly focussed on platforms with market power—namely Google and Facebook.

There is some suggestion in the Preliminary Report that the digital sites of news media are digital aggregation platforms and therefore would be captured by any new regulatory requirements. However, as set out in the sections below, we consider that the new regulatory frameworks need to be focussed on platforms that have a very high degree of market power and are serving third party content.

That said, our recommended policy solutions in relation to third party measurement and verification should apply to news aggregators operating in our jurisdiction (see section 9).

## 4 A new economic regulatory oversight model

### 4.1 Building on the findings in the ACCC Preliminary Report

#### 4.1.1 Market power conclusions supported

Free TV strongly supports the findings of the ACCC in relation to the extent of the market power enjoyed by Google and Facebook and the implications this has for local media companies.

#### Relevant ACCC Findings:

- Google has substantial market power in the supply of online search in Australia with approximately 94 per cent of online searches in Australia currently performed through Google.
- Google has substantial market power in the supply of online search advertising. This flows directly from its substantial market power in the consumer facing market for online search.
- Facebook has substantial market power in display advertising. Facebook and Instagram together obtain approximately 46 per cent of Australian display advertising revenue. No other website or application has a market share of more than five per cent.
- This widespread and frequent use of Google and Facebook means that these platforms occupy a key position for businesses looking to reach Australian consumers, including advertisers and news media businesses.
- Google and Facebook are critical and, in many cases, unavoidable business partners.<sup>1</sup>

In addressing these market power findings, the ACCC's Preliminary Report recommends a regulatory authority be tasked with monitoring, investigating and reporting on the criteria, commercial arrangements or other factors used by digital platforms to impact the ranking and display of advertising, and the ranking and display of news and journalistic content.

The preliminary recommendations from the ACCC are a good start towards addressing the problems that have been identified through the ACCC's comprehensive review. However, in light of the key findings highlighted above, Free TV considers that the ACCC's preliminary recommendations can be strengthened to more directly link to the future viability of investment in Australian content, including news content.

This is particularly the case for the finding that notes that Google and Facebook are unavoidable business partners. In the original Free TV submission, we noted the unsatisfactory dynamic for local media companies that must rely on the platforms for marketing and distribution, but have little or no control over how their content is managed or distributed by those platforms. Nor is there any real ability to negotiate satisfactory terms and conditions bilaterally with Google and Facebook.

In our original submission, Free TV set out an option to create a binding dispute resolution body for the digital media sector. In this capacity, the ACCC would have the power to issue binding arbitration decisions on matters relating to the terms and conditions under which companies like Google and Facebook could access content and other services. Alternatively, we suggested a binding service level agreement could be established that sets out minimum terms and conditions.

The ACCC's Preliminary Report addresses this in two ways. Firstly, through Recommendations 4 and 5 with the suggested creation of a new regulatory authority. In addition, the suggested dispute resolution role is to be considered further in the form of a digital platforms' ombudsman.

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<sup>1</sup> ACCC, Digital Platforms Inquiry – Preliminary Report, pg 2

Free TV also noted the potential for the ACCC to authorise a collective bargaining arrangement by local media companies with the digital platforms. The ACCC also briefly noted these provisions of the CCA.<sup>2</sup> However, after considering the analysis presented by the ACCC on the extent of the dominance of Google and Facebook, we consider that more far reaching regulatory measures are required.

#### 4.1.2 Threat of potential competition is insufficient

Free TV also strongly agrees with the analysis put forward by the ACCC regarding the limited potential for dynamic competition to place a constraint on Google and Facebook:

*The ACCC considers that, like Google, to a large extent, Facebook is insulated from dynamic competition by barriers to entry and expansion, advantages of scope, and its acquisition strategies.<sup>3</sup>*

In our original submission, we made the point that the combination of network and data effects (that the ACCC referred to as same-side and cross-side network effects) and scale effects created virtual monopolies. We posited that the platforms could essentially be defined as “natural digital monopolies.”

In our view, the findings of the ACCC that Facebook and Google enjoy substantial market power and are insulated against dynamic competition, mean that a new bespoke regulatory model, drawing on principles from existing access regimes, should be included in the ACCC’s Final Report. This is discussed further below.

#### ***Valuation of Google and Facebook demonstrates the markets belief in their longevity***

Free TV agrees with the ACCC’s finding in its Preliminary Report, that the substantial market power of Google and Facebook is unlikely to erode in the short to medium term. This is further supported by the stock market valuation of these companies.

Free TV’s original submission highlighted that Google and Facebook were forecast to capture 90% of the growth of US digital advertising in 2018.<sup>4</sup> The ACCC’s Preliminary Report confirms that the ability of Facebook and Google to capture the vast majority of the growth in digital advertising, with Google and Facebook accounting for 86 per cent of the total market increase between 2014 and 2017 (excluding classifieds).<sup>5</sup>

While not included in the Preliminary Report, ACCC Chair Rod Sims has previously noted the link between valuations of Google and Facebook and their ability to continue to capture future growth.

*“Their current share prices reflect a little of their current market position, but they also incorporate a huge margin for projected growth. Our broad calculations indicate that approximately:*

- *65-80 per cent of Facebook’s current share price can be attributed to future growth*
- *In Google’s case, 40-60 per cent of their current share price can be attributed to future growth.*

*That is, if their profits were simply expected to stay at current levels their share prices would plummet. Businesses reliant on such anticipated growth cannot be satisfied with anything other than a continued increase in user engagement and ever growing data gathering and use. The markets valuation of Facebook and Google shows that the market believes they will be even stronger in the years ahead. Their market position is not seen as transitory.*

*Whatever issues we have face today will only grow in importance.”<sup>6</sup>*

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<sup>2</sup> Ibid, pg, 124

<sup>3</sup> Ibid, pg. 51

<sup>4</sup> <https://www.emarketer.com/Article/Google-Facebook-Tighten-Grip-on-US-Digital-Ad-Market/1016494>

<sup>5</sup> Ibid pg 36.

<sup>6</sup> Sims, Rod, Speech to International Institute of Communications - Telecommunications and Media Forum, 3 July 2018

Free TV strongly supports this conclusion. It is consistent with analysis presented in our original submission. This further underlines the importance of forming recommendations in the Final Report that directly relate to long term viability of local media companies.

#### **4.1.3 Solutions proposed can be strengthened**

Given the above context, we support the ACCC's preliminary recommendations regarding the creation of a regulatory authority to monitor:

- whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct by favouring their own business interests above those of advertisers or potentially competing businesses;
- pricing of intermediary services supplied to advertisers or websites for the purpose of digital display advertising; and
- the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.

However, by itself, the creation of this new regulatory role is likely to be insufficient to adequately protect the creation of Australian content, including news and journalistic content. This is because the regulatory oversight model proposed by the ACCC does not directly address the current inability of commercial free-to-air broadcasters to adequately monetise their content that appears on the search and social platforms of Google and Facebook.

In our view, this recommendation should be expanded in the Final Report to support the creation of a new access regime administered by the ACCC. In addition to the functions set out in the Preliminary Report, the ACCC should be tasked with overseeing the terms under which Australian content is monetised on digital platforms. Further, the ACCC should take a more direct role in ensuring a well-functioning advertising market. This model together with the justification for the ACCC performing this role is developed further in the next section.

In addition to this economic regulatory role, we also propose to build on the algorithm and content regulation proposals in the ACCC's Preliminary Report. To this end, section 5.2 proposes a new search and social code of conduct to bring together and build on the findings of the ACCC in relation to algorithm transparency and how Australian content is ranked and surfaced on search and social platforms.

## **4.2 A new approach to dominant platform regulation is needed**

### **Relevant ACCC observations:**

- Facebook and Google are vertically integrated businesses and each is likely to have the ability and incentive to favour their own related businesses or businesses with which they have an existing relationship.
- In terms of advertising services, digital platforms could seek to maximise their own profits, rather than optimise outcomes for advertisers and websites.
- As the process for buying, selling and delivering ads is not transparent, advertisers will be unable to determine whether this occurs.

These ACCC preliminary observations focus on the lack of transparency around the digital advertising supply chain. The preliminary recommendations that follow similarly focus on improving the visibility of pricing and conduct throughout the digital supply chain. These are welcome recommendations which in our view can be strengthened to more directly address the issues identified by the ACCC and not require the regulator to try and dissect the various technologies in the advertising stack that rapidly change and evolve.

#### 4.2.1 Case-by-case regulation is an ineffective solution

Free TV considers that the findings in the ACCC's Preliminary Report require a stronger regulatory response to address the core competition issues the report has surfaced. We recognise that there are many regulatory models available from light-handed price monitoring and reporting, through to access regulation more akin to a Part IIIA national access regime. The model proposed by the ACCC sits at the light-handed end of this spectrum.

It is worth reiterating the overarching findings of the Preliminary Report:

- Google and Facebook have substantial market power that is unlikely to be mitigated by dynamic competition; and
- they are unavoidable business partners for businesses looking to reach Australian consumers, including advertisers and news media businesses.

The model proposed by the ACCC has the potential to be an improvement on the status quo. However, the model still relies on action being taken by the competition regulator in the event that the price monitoring function highlights discriminatory or other conduct that may breach the CCA.



Free TV notes the comments by ACCC Chair Rod Sims at the press conference releasing the Preliminary Report that five separate investigations are now underway relating to either competition or consumer law.<sup>7</sup>

We consider that a process that relies on waiting for issues to arise and addressing them one at a time through the ACCC initiating proceedings against Google and/or Facebook for alleged breaches is not an efficient or effective solution. As shown in Figure 1, international experience highlights the lengthy period involved between the start of the alleged anti-competitive conduct and a final decision by the regulator. This does not take into account the timeframes for any appeals by the platform.

<sup>7</sup> <https://www.accc.gov.au/media/video-audio/digital-platforms-inquiry-media-conference> (21:30 min mark, Accessed 30 January)

Further, we note that there are often likely to be occasions where conduct may be causing consumer detriment, but the ACCC may still not institute proceedings if its prospects of success advice fails to meet the relevant model litigant requirements enforced on Commonwealth regulatory bodies.

#### **FIGURE 1 – A LONG TIME COMING: EXPERIENCE WITH EX-POST REGULATION**

##### ***Google shopping case study – 9 years to decision***

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

In announcing that decision, the Commission stated:

*“From 2008, Google began to implement in European markets a fundamental change in strategy to push its comparison shopping service. This strategy relied on Google's dominance in general internet search, instead of competition on the merits in comparison shopping markets”<sup>8</sup>*

That it took 9 years from the commencement of the conduct to the imposition of the fine is illustrative of the issues with ex-post enforcement action.

##### ***Android and search case – 7 years to decision***

Similarly, in July 2018, the European Commission fined Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine.<sup>9</sup>

The fine was imposed due to illegal restrictions Google had imposed on Android device manufacturers and mobile network operators since 2011 to cement its dominant position in general internet search. Again, seven years elapsed between the start of the conduct and the final decision.

In light of the findings of the ACCC and the international experience of repeated anti-competitive conduct, there is a strong case for an ex-ante regulatory framework that ameliorates the potential for such conduct, before it arises.

#### **4.2.2 What are we trying to achieve?**

Before setting out our suggested model to address the issues identified by the ACCC, it is worthwhile outlining the general principles we have sought to achieve in considering different regulatory approaches.

In simple terms, the aim is to facilitate a competitive, efficient and economically rational market for the buying and selling of digital advertising on platforms provided by vertically integrated dominant providers with significant market power.

We consider that consumer welfare is maximised where digital advertising platforms demonstrably meet the following principles, which align with how digital platforms would conduct themselves in a reasonably competitive market:

- fairness, impartiality and non-discriminatory;
  - be free from bias;
  - have a level playing field where participants in like circumstances are treated in a like manner and no undue advantage is afforded to any participant; and
  - free from manipulation and other forms of deceptive behaviour or misconduct.
- orderly;

<sup>8</sup> [http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm)

<sup>9</sup> [http://europa.eu/rapid/press-release\\_IP-18-4581\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4581_en.htm)

- conform to applicable rules; and
- display reliable market operations.
- transparent;
  - have clear processes governing how & when buy and sell orders will be matched; and
  - open disclosure of pricing & intermediary fees.
- economically rational;
  - consistent with best practice auction design.

The challenge for governments and regulators is to achieve these principles in an environment where the digital platforms already have both “the incentive and the opportunity to favour their own businesses.”<sup>10</sup> As set in earlier sections, our view is that increased transparency and an ex-post approach to regulation is insufficient to deliver this outcome. Accordingly, we propose a new regulatory approach for dominant digital platforms.

#### 4.2.3 Access regulation 2.0: updated for the digital age

In our view, the ACCC should recommend that digital platform providers who have a substantial degree of market power in the programmatic advertising market, should be subject to a separate access regime regulated by the ACCC. We consider this approach is necessary to ensure an orderly and well-functioning advertising market that is free from discriminatory conduct and which applies regulation in a focused and proportionate way.

Free TV submits that a bespoke access regime for digital platforms is needed over the longer term to ensure that the regulatory toolkit available to the ACCC is fit-for-purpose and capable of achieving economically efficient outcomes in the context of fast-paced and highly complex online platforms. This is best achieved, in our view, through the development of a new part of the CCA to deal with digital platforms.

Free TV is not convinced that existing access regimes in the CCA are completely fit for purpose or necessarily capable of accommodating digital platforms in an efficient and effective manner. However, we also consider that there is scope to test whether an existing access regime, such as Part IIIA, could be used as an interim measure for regulating digital platforms until a more bespoke regime is developed and legislation is passed. Indeed, while Part IIIA has historically been used for access to physical infrastructure, it is intended to have a wide scope of operation that could potentially accommodate digital platforms and there does not appear to be anything within Part IIIA that would prevent this.<sup>11</sup>

Further, given the existing market power of Facebook and Google and the potential for delay in the introduction of a new access regime, the scope of the existing competition law provisions of the CCA, including Part IV, should fully be tested by the ACCC.

Free TV considers that there are a range of existing concepts and elements from Part IIIA and Part XIC of the CCA that could readily serve as the basis for the development of a new bespoke access regime for digital platforms.

In terms of how a bespoke access regime for digital platforms could be structured, we propose the following high-level principles for consideration:

- digital platforms and associated services could be subject to “declaration” if they satisfy certain market power thresholds and particular revenue thresholds (as would already been

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<sup>10</sup> <https://www.accc.gov.au/media/video-audio/digital-platforms-inquiry-media-conference> (18:00 min mark, Accessed 30 January)

<sup>11</sup> National Competition Council, Declaration of Services: A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth), Version 6, April 2018, pages 25-26. See, [http://ncc.gov.au/images/uploads/NCC\\_Declaration\\_Guide\\_-\\_Version\\_6\\_-\\_April\\_2018.pdf](http://ncc.gov.au/images/uploads/NCC_Declaration_Guide_-_Version_6_-_April_2018.pdf)

the case in respect of Facebook and Google) – this would ensure that regulation is applied asymmetrically and focused on the true bottlenecks in the digital platform space;

- all declared services (a “platform service”) could be subject to a mandatory undertaking requiring the service provider to deal with users on transparent and on non-discriminatory terms, with full disclosure in relation to the terms and conditions of access to their platforms;
- the declaration can be subject to periodic “market reviews” to determine whether the scope of regulation needs to be expanded or refined;
- the declaration of a platform service would then result in a range of powers being available to the ACCC, including:
  - the ability for the ACCC to issue specific information, transparency and/or price monitoring requested in respect of the platform service in lieu of direct regulation or more interventionist measures;
  - the ability for the ACCC to issue rules or requirements that would need to be observed by the regulated digital platform provider (e.g. if the ACCC considered that the platform provider’s compliance with its broad form regulatory obligations was deficient) – this is analogous to the access determination option that’s available to the ACCC currently under Part XIC; and
  - the ability for the regulated digital platform provider to lodge its own access undertaking to govern access to its platform and associated services as a means of allowing that provider to have commercial flexibility and regulatory certainty in how it meets its obligations in respect of a declared platform service.

The types of matters that could potentially be covered by such an access regime include:

- how the proposed auction process used by a regulated digital platform is to be implemented to achieve transparency and non-discrimination (e.g. by providing a fair and impartial of matching buyers and sellers);
- how intermediary fees are to be disclosed and made accessible to buyers and sellers; and
- any other applicable rules as determined by the ACCC.

In addition, we propose the inclusion of a “negotiate-arbitrate” regime to complement legislative provisions, modelled on recent changes to the EU Copyright Directive, that permit content owners to be able to obtain a fair and proportionate remuneration for the digital use of their content. Under the negotiate-arbitrate model, the ACCC could serve as the arbitral body in the event that platform owners (including news aggregators) and content creators are unable to agree reasonable commercial terms for the licensing of such content. This is expanded upon in the next section.

Generally, we would expect that implementation of the access regime for digital platforms to occur in an open and consultative process, as per the ACCC’s existing practices in regulated sectors.

The ability for the ACCC to exercise the powers that we have proposed above is not unusual. For example, while nominally set by the Minister, the ACCC provided detailed advice on the development of water market rules, which it now also enforces. Similarly, the ACCC/AER have previously considered the conduct of excess gas pipeline capacity auctions as part of access undertakings for gas transmission network operators.

Our proposal seeks to ensure that the economic regulation of monopolies remains relevant and continues to adapt by applying mature and well-functioning regulatory principles to a new form of monopoly in the economy.

### **4.3 Local media businesses must retain control of their content**

Free TV recommends that any access regime proposed in the previous section should also include powers for the ACCC to establish rules (e.g. in an access determination) that ensures

that the creators and owners of Australian content are able to retain control of how that content is monetised on the digital platforms.

Much has been said and written during this inquiry regarding the status of the digital platforms and whether they fulfil the definition of “publishers”. For their part, Google and Facebook have consistently suggested that they are merely platforms for the aggregation and surfacing of content. For this proposition to hold, it stands to reason that the local media companies who do invest in the creation of local content, retain control of that content and how it is monetised on the digital platforms.

Addressing this issue would directly positively impact the ability of local media companies to fairly monetise their content on the digital platforms. In turn this would assist Australian media businesses in continuing to produce quality Australian content including news and current affairs. Other than the tax and financial incentives discussed in Preliminary Report in pages 298-300, there is an insufficient focus on how Australian content can be fairly monetised on digital platforms. This includes how Australian journalistic content is funded.

#### **4.3.1 What’s the problem with control of content now?**

In simple terms, when a piece of content is uploaded to a digital platform, the terms of how that content can be monetised are set by the digital platform. 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 of the pricing) of advertising. On Facebook Newsfeed for example, there are restrictions on the use of logos, banners and the placement of a mid-roll advertisements.

A further problem with the monetisation of Australian content (including news 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 Facebook and Google, gives the content owner insufficient control over the content that they have created and which they are seeking to monetise. In effect, this means that Australian content is being undervalued 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. For businesses that rely on making investments in content based on projected advertising revenue, this lack of clarity will lead to the under-provision of Australian content, including news content.

These issues underline the difference in the focus of local media companies that must continually match the ability to monetise content with the initial investment in its creation. As the digital platforms rely on the investment by others in content, they tend to be merely interested in achieving volume of ad sales or, in the case of news aggregation sites, extracting greater insight into users to better target ads, regardless of the provenance or public benefit value to the Australian society that the content may provide.

#### **4.3.2 How would the access regime deal with this?**

We propose a model where the access regime administered by the ACCC includes rules that can be imposed on digital platform operators to give owners of local content, including news media outlets, greater flexibility in how they can monetise their content on the digital platforms. These rules would effectively seek to replicate the outcomes that would eventuate if there was reasonable competition between platforms for the digital content.

These rules would allow content owners to have a greater say in how their content can be presented on digital platforms and greater accuracy, reliability and transparency in respect of how users are interacting with that content.

At a minimum such a regime would require:

- increased functionality to enable content to be uploaded and manipulated by the content owner;
- control over the sale of inventory, including pricing;
- greater control to content owners in respect of the technical aspects of how Australian content is monetised (for example, allowing banner ads on news video clips and cue points for mid-rolls);
- greater control to content owners to determine the length and usage of snippets and how the content owner is to be remunerated for this use of its content (see section 5.2.1); and
- the availability of genuine third-party verification tools to enable more accurate, reliable and transparent reporting to clients on the effectiveness of campaigns (see section 9 for further information on this).

In addition, as suggested in section 4.2.1 above, Free TV also supports the inclusion of a legislative right, modelled on Article 11 of the EU Copyright Directive, that gives content owners a right to obtain fair and proportionate remuneration for the digital use of their content and which seeks to ensure that all views of Australian content can be monetised. To ensure that this legislative right can operate effectively, we propose that any such right also be complemented by a “negotiate-arbitrate” model to be administered by the ACCC under the framework of an access regime. We consider that this will create greater incentives on digital platforms to negotiate commercial terms with content owners relative to the status quo, with the ACCC playing a regulatory backstop role.

The proposed model above would help to improve the financial viability of premium Australian content. It would allow for better monetisation options for content creators by ensuring that the investing publisher retains control of how its content is monetised.

#### **4.4 ACCC is the right body, rather than creating new regulatory body**

The ACCC’s Preliminary Report suggests that a new regulatory authority could be established to undertake the roles included in the preliminary recommendations, without specifying where these roles are best placed to reside within the machinery of Government.

In our view, there are strong synergies with the new regulatory roles and the ACCC’s set of existing responsibilities across competition law, consumer protection and infrastructure regulation. This would give the ACCC the ability to draw on a unique skillset across the one agency in tackling the complex matters described in the Preliminary Report. Accordingly, we would suggest that on these matters the ACCC is the appropriate body to be funded to undertake these new roles.

In the following section, we note a range of content regulatory responsibility that we consider would best reside with the ACMA.

In addition, we note that the ACCC is further considering the potential role for a digital platforms’ ombudsman. Free TV considers that there is merit in this proposal as it would allow small publishers, other small businesses and consumers to have disputes with the digital platforms settled across a range of issues. Most ombudsman schemes operating in Australia limit access to small businesses (20 employees or less and/or \$3 million in annual turnover). Accordingly, while such a scheme will have value for consumers and small businesses, larger business-to-business disputes will need to be addressed through other regulatory measures, such as those proposed in the section above.

## 5 Surfacing and promoting Australian Content on digital platforms

The ACCC's Preliminary Report covers a range of related matters on how the algorithms govern how content is displayed to users. Given the ACCC's interpretation of the terms of reference for this inquiry, there is a heavy focus on the surfacing of news and journalistic content. However, we again highlight the intrinsic link between the long-term viability of commercial broadcasters and our ability to invest in Australian content, including news content. That is, an unduly narrow focus on the surfacing of Australian journalistic coverage still risks its under-provision as it fails to recognise the interdependent nature of commercial network content monetisation and investment decisions.

Accordingly, while this section covers the ACCC's preliminary findings in relation to the impact of the digital platforms on journalistic coverage in Australia, it also covers how broader Australian content could be better protected and promoted on the digital platforms.

Free TV submits that this could be achieved by the ACMA administering an integrated search and social Mandatory Standard (under an amended Telecommunications Act) covering content, algorithm and copyright takedown requirements. Alternatively, a new code of practice requirement could be introduced for the digital platforms to regulate how Australian content is displayed on the digital platforms, alongside a separate Mandatory Standard on copyright takedown.

### 5.1 Regulating the algorithms

#### Key ACCC findings

- There is a lack of transparency in the operation of Google and Facebook's key algorithms, and the other factors influencing the display of results on Google's search engine results page, and the surfacing of content on Facebook's News feed.
- Given the opaque nature of algorithms determining news feeds and search results, it is unclear whether or how algorithms may have contributed to filter bubbles in recent years.

The ACCC's Preliminary Report envisages a role for the ACMA in administering codes submitted by the digital platforms. These would cover how the platforms must inform consumers about the processes put in place to ensure accountability and to better educate consumers about how their news and journalistic content is curated and displayed to them.

Free TV considers that these recommendations are a good start in addressing the identified problems with the lack of transparency around how the algorithms surface Australian content. This section suggests how this model could be strengthened to more directly address the identified issues and put in place an adequate enforcement regime to ensure compliance by the digital platforms.

#### 5.1.1 ACMA oversight model

Free TV welcomes the preliminary findings of the ACCC that there is a lack of transparency in the operation of the algorithms of Google and Facebook. We also note the comments of the ACCC regarding the importance of preventing the potential for 'gaming' of the algorithms by virtue of addressing this lack of transparency.

While we accept that there is the potential for 'gaming' to occur, we agree with the ACCC that a regulatory model such as proposed in the Preliminary Report would help address some of these concerns.

However, we consider that the best way to protect against this sort of gaming is to create an output-based regulatory model that sets out the principles that the digital platforms must abide by in writing their algorithms. We consider that these principles should be contained in search and social code that would be required to be submitted by digital platforms with substantial

market power. The code could only be registered by the ACMA if it was satisfied that it met pre-defined principles.

Consistent with the preliminary position of the ACCC, we also consider that the ACMA is the appropriate regulatory body to undertake this role, albeit that this role is expanded under our proposed model.

Under our proposed model, the digital platforms would have to submit a code of conduct to the ACMA that sets out how:

- the platforms intend to meet the output principles as set out by the ACMA for the ranking and identification of news and journalistic content;
- commercial arrangements are to be disclosed that impact the ranking of Australian content, including news content;
- advertising is classified and how it ensures care in placement such that inappropriate advertisements are not served to underage users; and
- complaints will be handled and the interaction with the ombudsman that has also been proposed by the ACCC.

### **5.1.2 Setting out the principles of algorithm outputs**

To address the issues identified by the ACCC, Free TV suggests that the output principles would include requirements:

- that rankings must be fair and impartial, and any impact of commercial arrangements must be clearly disclosed;
- that the availability and ranking of snippets or other forms of rich results must not be impacted by any requirement to remunerate the source content owner for the use of the content;
- to clearly identify news from Australian journalistic sources that meet a legislatively determined accreditation process (see section 5.2.1); and
- to ensure that any material or related material that has previously been taken-down according to the Mandatory Take-down Standard (see section 8) is not be ranked.

The following section provides more detail on the shortcomings identified by the ACCC and how this model would support continued investment in Australian content.

## **5.2 Promoting Australian news content**

### **Key ACCC findings and observations**

- There is a risk that digital platforms may potentially reduce incentives to invest in original content as a result of key algorithms failing to rank original content higher than re-purposed or effectively duplicated content.
- There may also be detriments for news businesses if a snippet satisfies a consumer's need and does not lead to a visit to its website.
- It is not clear to the ACCC whether the status as "originator" or source of a story is a variable that promotes a higher ranking.
- The rapid digitisation of news and the growth of the digital platforms have led to the atomisation of news and, for some consumers, a disconnect between news content and its source.
- Importantly, unlike the case when a consumer deliberately chooses one particular news source, a digital platform user may not fully understand how the sources displayed in their news feed, or in response to their search query, are curated.

### **5.2.1 Accrediting news and journalistic sources**

In two distinct areas of the Preliminary Report, the ACCC suggests that there should be some form of accreditation for journalistic sources to:

- be awarded a “badge” in news and search rankings; and
- qualify for financial incentives (see section 6).

To this end the ACCC is exploring whether the existing sectoral specific regulatory instruments (like the Free TV Code) or industry-regulatory standards of accountability (for example membership of the Australian Press Council) could be subject to ACMA accreditation.

Free TV considers that there is merit in this proposal. We consider that this mechanism should be enshrined in legislation and should allow automatic accreditation for members of recognised industry bodies. This is preferred to other models that would require a separate accreditation process through the ACMA.

We recognise that an additional process may be required to allow news publishers who are not members of a recognised industry body to be accredited. In these instances, the decision for accreditation should be based on meeting pre-defined criteria, with ACMA required to confirm accreditation subject to meeting those criteria. Importantly, it should not be left to the digital platforms themselves to determine accreditation.

### **5.2.2 Helping Australians better understand news on digital platforms**

The ACCC has identified some further initiatives that it plans to examine further in the lead up to the Final Report, namely badging of news content to support informed consumer choice and a news literacy campaign.

Free TV supports the badging of content produced by automatically accredited news and journalistic sources, as set out above. We would also welcome a public information campaign to be run by the ACMA to increase the news literacy of Australians. As a major source of content that is used by the digital platforms we would also welcome the opportunity to be involved in the framing of this campaign.

### **5.2.3 Snippets and the atomisation of news content**

The impact of snippets on the provision of Australian content is an area that the ACCC needs to develop further. As it stands the analysis and observations do not appear to support the preliminary finding of a lack of evidence of an issue. Indeed, there are some internal inconsistencies in the observations that suggest a re-examination of this issue is required.

The ACCC correctly recognises the risk to the ability of Australian news media outlets to monetise content if the provision of snippets reduces the number of click-throughs on original content. Despite noting this, the ACCC finds that it does not consider that there is sufficient evidence that snippets have the effect of reducing referral traffic.

In our original submission we noted a study that found that the click through rate for the first organic search result fell from 26% without a snippet to 9.6% with a snippet.<sup>12</sup> There does not appear to be any recognition of this research nor any attempt to replicate this study with reference to Australian data that the ACCC now has access to via its compulsory information gathering powers.

The ACCC suggests that while longer snippets “may have some effect on click-through rates” a number of factors are likely to impact on click-through rates. The fact that there are a number of factors impacting on click-through rates is inarguable. That the provision and length of snippets is not the sole contributor to the level of referral traffic is not justification for finding that there is insufficient evidence of a problem.

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<sup>12</sup> <https://searchengineland.com/another-featured-snippet-study-shows-steal-significant-traffic-first-organic-result-275967>

### ***Snippets exacerbate the atomisation problem***

The ACCC suggests that the curation process of digital platforms inherently involves the 'atomisation' of journalistic content. Free TV agrees that the way that search displays results means that the atomisation of journalistic content is unavoidable within the ecosystems provided by the digital platforms.

Indeed, this is a key problem with long snippets and products such as instant articles as it encourages users to stay within the highly atomised environment owned by the digital platforms.

While some of the ACCC's proposals, such as badging, may have the potential to assist in addressing this issue at the margins, we consider that further action is required to adequately remunerate news producers for the sampling and use of content by the digital platforms. This is particularly the case given the demonstrable benefit to the digital platforms from making this content available, as discussed below.

### ***Platforms benefit from but do not pay for this content***

The ACCC notes that "Google may be able to benefit from news publishers' content by way of snippets, while news publishers face declining referral traffic." Free TV considers that this is the key issue at the heart of the issue of snippets. Further, the ACCC acknowledges the benefit of snippets to Google (and users) and notes that by using snippets "Google is able to maintain its standing as a reputable platform for news and other search queries."<sup>13</sup>

The ACCC concludes the section dealing with snippets with a strong statement on the benefit to Google of snippets with news content:

*"Based on information before the ACCC, we understand that approximately 8 per cent to 14 per cent of Google Search queries from devices in Australia led to the appearance of Top Stories on the Google Search results page. This is a relatively significant proportion of search queries and may indicate the value to Google of being able to refer to news content."<sup>14</sup>*

However, the ACCC has drawn inconsistent conclusions from the use of snippets elsewhere in the Preliminary Report. In a later section the ACCC suggests that an "ideal" solution would involve the design of snippets, "rather than penalising their usage."<sup>15</sup> We consider that this an incorrect way of interpreting platforms paying for content that they did not create but (as the ACCC recognises) benefit from. Paying for content created by others is not a penalty and it is disappointing that the ACCC has chosen to portray it as such.

The ACCC also noted the international experience in Germany and Spain that introduced levies on the use of snippets. In Germany, Google responded by only displaying snippets where the fee was waived. In Spain, Google closed Google News. That is, rather than paying content owners for the use of their content, Google chose to use its market power and deny consumers access to these services. Free TV submits that such poor market conduct in one jurisdiction should not be used as a reason to provide a reward to the digital platforms in another.

### ***News producers and publishers should be paid for this content***

In the previous section we outlined how an access regime may operate regulate digital platforms with market power in Australia. We consider that there is clear evidence of benefit to the digital platforms from the use of content produced by Australian media outlets in the form of snippets. As such, the access regime and associated undertaking should also include provision for how these snippets are remunerated.

Importantly, given the examples of previous conduct by Google, the search and social code that is proposed in this section must include a principle that algorithms must not discriminate

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<sup>13</sup> Op cit pg 114

<sup>14</sup> Ibid pg 114

<sup>15</sup> Ibid pg 279

against content that attracts a fee payable to the content owner. This should apply both to the ranking of that content in search results and the availability of snippets of that content.

Such a model would still allow the benefit of the provision of snippets to accrue to the digital platforms. However, appropriately, the content owner who invested in the creation of that content, would be able to share in this benefit and support the creation of future Australian content.

#### **5.2.4 Statutory licence option**

A further option worthy of consideration is the creation of a statutory licence fee, funded by a levy on the digital advertising revenues of Google and Facebook.

The proceeds of this levy could be distributed to content owners via a collecting society to news media organisations and other professional Australian content creators based on the frequency of the appearance of that content in search results and newsfeeds.

Such collection and distribution models are common throughout the creative industries. For example, the Copyright Agency has been appointed by the Minister for Communications and the Arts to manage the statutory licences for education and government, and the artists' resale royalty scheme. In addition, licence fees are also collected and distributed by APRA AMCOS on behalf of performing artists and mechanical copyright owners.

This option would need to work hand-in-hand with the requirement that the algorithms governing the search and social newsfeeds do not discriminate against content that attracts a fee for its use. This issue is expanded upon in the following section.

## 6 Supporting local media through other financial measures

### Relevant ACCC further analysis and assessment areas:

- The ACCC is continuing to consider approaches to improve the ability of news media businesses to fund the production of quality news and journalism.
  - Tax offsets for the costs incurred by news media organisations
  - Tax deductibility for personal subscriptions to publications by accredited media businesses.
  - A review of the impacts of the measures comprising the Regional and Small Publishers' Jobs and Innovation Package in 2018–19

As we outline in section 3.2, ensuring that the commercial free-to-air broadcast industry can continue to invest in premium Australian content, is critical for the role that public interest journalism plays in our democracy.

The ACCC's Preliminary Report tends to be too heavily focussed on supporting print journalism. In our view, the Final Report should focus on supporting all forms of journalism in a platform agnostic manner. For example, as set out below, there are some incorrect assumptions made about the price of spectrum that should be removed from the Final Report.

Free TV's members employ hundreds of journalists throughout Australia, producing hundreds of hours of news and current affairs related programming every week.

Our commitment to high quality journalism is rewarded by the Australian public every night. News and current affairs services produced by our members are consistently among the highest rating shows across all television programming. Over 11 million Australians tune in to at least one of the commercial free-to-air broadcasters' news programs each week.

Beyond the ratings, consumer research has consistently shown that Australians value, rely on, and trust commercial free-to-air news services. Research undertaken for Free TV Australia revealed that an overwhelming 70 per cent of respondents agreed with the statement that commercial free-to-air TV is "what I turn on first when major news events happen". A further 66 per cent of respondents agreed that commercial free-to-air television is "my most trusted source of news and current affairs."<sup>16</sup> Further, a recent ACMA survey in regional Australia also found that commercial free-to-air TV was the most preferred source for local news and the most trusted.<sup>17</sup>

Subject to ensuring a focus on platform neutrality, Free TV welcomes the indication by the ACCC that it will further investigate options to fund the production of quality news and journalism. All of the three options noted for further consideration by the ACCC are worthy of support.

In this section we set out our principles for how options for support should be assessed, together with some further detail on how various options may operate.

### 6.1 Principles for assessing options

All measures that assist local media companies to produce local content are welcomed. As such, these principles are offered as a means of assessing and ranking options, rather than a method of ruling options either in or out.

Free TV suggests that options be ranked according to:

- their ability to support or establish long-term sustainable business models;
- how targeted the mechanism is to support Australian content; and

<sup>16</sup> Research conducted by independent researchers Crosby|Textor on behalf of Free TV Australia amongst n=1,000 randomly selected Australian adults nation-wide in February 2015.

<sup>17</sup> ACMA, Local content in regional Australia 2017 report, May 2017, pg 9

- whether the measure is sector neutral across all forms of media.

In earlier sections we have described an access regime model that would ensure that local media companies retain control of their content on the digital platform and are able to monetise it appropriately. Free TV considers that this model should be the primary focus of the ACCC Final Report with regard ensuring the future viability of local media companies.

However, in this section we assess the models for further budgetary measures that would support the continued investment in local content.

## 6.2 Qualification for financial support

Free TV considers that the qualification for financial support should be linked to the same accreditation process as set out in section 5.2.1. Given that it is the same type of content that as a society we are seeking to protect and promote, it would be appropriate to apply the same accreditation process for the purposes of identification on a digital platform and for qualification for financial incentives.

## 6.3 Tax offsets

Free TV supports the proposal for the use of tax offsets to incentivise the production of news content.

Tax offsets are already used to encourage the production of socially and culturally important content across the film and television industry, for example the producer offset. This offset provides a 40 per cent rebate on the qualifying Australian production expenditure for feature films, and 20 per cent for other eligible projects (e.g. television drama series). In fact, documentary production is already eligible for the producer offset.

Free TV considers that the Final Report should recommend a news production offset to support the production of Australian news and journalistic content. A news and journalism production offset, for example set at 25 per cent of qualifying expenditure, would be justified in terms of the importance of supporting a strong and vibrant media sector in Australia, that was capable of playing its part in a robust democracy.

### FIGURE 2: INTERNATIONAL EXAMPLE—CANADIAN JOURNALISM TAX OFFSETS

In its 2018 Fall Economic Statement, the Canadian Government announced a A\$630 million package of measures to support journalism. As part of this package, a new refundable tax credit will be introduced for qualifying news organisations that produce a wide variety of news and information of interest to Canadians. The refundable credit will support labour costs associated with producing original news content and will generally be available to both non-profit and for-profit news organizations.

*“A strong and independent news media is crucial to a well-functioning democracy. It empowers citizens by providing them with the information they need to make informed decisions on important issues, and also serves to hold powerful institutions—including governments—to account by bringing to light information that might not otherwise be made available to the public. In short, strong and independent journalism serves the public good—for Canada, and for Canadians. Canadians have a right to a wide range of independent news sources that they can trust, and government has a responsibility to ensure that Canadians have access to these kinds of news sources.”*

– Canadian Fall 2018 Economic Statement

## 6.4 Deductibility for personal subscriptions

Free TV would support measures that made personal subscriptions to local news media businesses tax deductible.

While such a model would not be sector neutral as advertiser funded business models would not receive any direct benefit, we still see there is merit examining this option as it would provide meaningful support to the production of local journalistic content.

## 6.5 Extending the Regional and Small Publishers Fund

The commercial television sector employs hundreds of regional Australians as journalists and production staff and plays a crucial role in delivering news services across regional, rural and remote Australia. A summary of these services was included in our original submission.

In recognition of the existing investment in regional and rural programming, a 2017 ACMA survey in regional Australia found that commercial free-to-air TV was the preferred source for local news. In addition, commercial free-to-air TV was found to be the most trusted media news source for regional Australians across all platforms.<sup>18</sup>

Free TV supports the ACCC's examination of the operation of the regional and small publishers fund, together with the cadetship program to make recommendations to Government on how it could be improved in further rounds. In our view, the program should be extended and expanded and explicitly support the product of local television news services. Such an expansion should include removing the turnover threshold that applies to metropolitan publishers who also provide regional services.

## 6.6 Spectrum pricing

Free TV notes the comments of the ACCC in the Preliminary Report that commercial television and radio broadcasters "receive a level of public support via access to spectrum at below-market rates." Free TV disagrees with this statement and notes that no evidence was provided to support this conclusion.

Determining a "market rate" for spectrum allocated to broadcasting is a highly complex exercise. It involves consideration of the rights and responsibilities that are attached to the use of that spectrum—all of which impact on the value of that spectrum—and valuing the positive externalities associated with the use of that spectrum for broadcasting services. For example, Ofcom in the UK has recognised that the availability and consumption of free-to-air broadcasting generates broader social value including in terms of:<sup>19</sup>

- access and inclusion – for example value derived from universal access and facilitating access to public services;
- quality of life – for example value derived from providing access to services which promote quality of life, perhaps by helping to support or promote work-life balance or family life;
- belonging to a community – for example value derived from allowing people with similar interests to communicate or from participating in your local community;
- cultural understanding – for example value derived from services which reflect and strengthen cultural identities or promote diversity and understanding of other cultures; and
- informed democracy – for example value from the news and current affairs programming provided by our members that facilitates democratic debate.

However, these positive externalities cannot be captured by the broadcasters. This is because commercial free-to-air television is a two-sided market, in which broadcasters act as intermediaries between viewers and advertisers. The business model involves providing a platform of channels which on one-side is attractive to viewers because of the content the channels contain, and on the other-side is attractive to advertisers because of the viewers watching the channels. Commercial broadcasters compete with each other for both viewers and the advertising dollars those viewers attract.

In the free-to-air model, broadcasters can only capture the value of providing the platform to advertisers. They cannot capture the value of the broadcast to viewers (as they, by definition, receive the content free of charge). This contrasts with subscription television or pay-per-view which can capture some of the value to viewers (as well as to advertisers). As individual viewers are not able to be excluded from receiving a free-to-air broadcast, there is no incentive

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<sup>18</sup> ACMA, Local content in regional Australia 2017 report, May 2017, pg 9

<sup>19</sup> Ofcom (2006), "Digital Dividend Review Annexes," Annex 7, Capturing consumer and citizen interests, page 12.

for them to pay for the cost of free-to-air broadcasting even where they value the service by more than its cost. In the absence of government intervention, this risks too little free-to-air broadcasting being produced.

Accordingly, determining an opportunity cost or “market rate” for broadcasting spectrum is highly complex as there is no straightforward way to price the loss of these positive externalities to society. However, the fact that the governments and regulators around the world take into account the existence of these positive externalities should not be confused with allocating spectrum at “below market rates.” Particularly in the context of sections of the Preliminary Report dealing with the need for appropriate financial support for the provision of journalistic content, such unsupported commentary has the potential to mislead stakeholders.

Free TV considers that such references should be removed in the Final Report.

## 7 Updating the regulatory framework

### Key ACCC findings:

- Despite digital platforms increasingly performing similar functions to media businesses, virtually no media regulation applies to digital platforms in comparison with some other media businesses.
- The regulation of media sectors supplying news and journalistic content varies by sector and different regulatory models and obligations apply for TV, radio, print and online publishers.

Free TV welcomes the analysis of the regulatory disparity across the media sectors in Australia. As the report sets out, commercial free-to-air television is the most heavily regulated of all media platforms. This puts us at a competitive disadvantage to competing new entrant businesses.

As noted in the Preliminary Report, the current approach to regulation:

*... “results in regulatory disparity that provides digital platforms with an unfair advantage because they operate under fewer regulatory restraints and have lower regulatory compliance costs than other media businesses when performing comparable functions.”<sup>20</sup>*

The ACCC has recommended an independent review to design a regulatory framework to consistently regulate the conduct of all entities which perform comparable functions in the production and delivery of content in Australia. While Free TV would be an active and willing participant in any such review process, it should be recognised that there have already been a number of recent reviews of the media landscape.

In our view, there are clear actions that the Government can take immediately to address the disparity recognised by the ACCC. First amongst these is the long-awaited Government response to the 2017 Australian and Children’s Content Review, as set out below.

Free TV recognises that the regulatory models set out in sections 4 and 5 above would also have the effect of removing some of the regulatory disparity discussed in the Preliminary Report.

### 7.1 Report should recommend action on Australian content

The Government announced the terms of reference for the Australian and Children’s Content Review in May 2017 as part and parcel of a comprehensive package of measures, including a Government commitment to reform the current outdated Australian content standards.

The Final Report from this review was handed to Government in December 2017. The ongoing delay in announcing the Government’s response to the Australia content review is impacting on our ability to invest in Australian content and needs to be resolved as a matter of urgency.

For example, commercial free-to-air broadcasters are still required to screen a collective total of at least 1,170 hours of programming annually for children aged up to 14, to meet C and P quota obligations imposed by the government. This is despite:

- In 2016, the average child audience in C and P programming was 6,800. In 2017, this had fallen to just 4,700. That is a 30% fall in 12 months.
- In 2017, of all children in the 0-13 age bracket, a mere 0.16% of them watched a program made especially for them on commercial TV.
- Over 80% of programs made specifically for children are now broadcast to an average 0-13 metro audience of less than 10,000.

We also note children’s quotas on commercial TV broadcasters have largely disappeared in other comparable nations. The United Kingdom abolished children’s quotas in 2003 and New

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<sup>20</sup> Ibid, pg 91

Zealand removed them in 2011. Canada also removed children's content quotas in 2011, but requires the nation's public broadcaster (CBC) to broadcast 15 hours per week material for children under 12.

Similarly, the current adult drama quota system, which sets mandatory requirements for commercial free-to-air broadcasters, dates back to the 1960s and was last substantially updated in 2005. This system has become outdated due to the radical changes in technology and audience behaviours seen in recent years.

Free TV considers that a further review is not required in relation to Australian content and the case for immediate change has already been made. In our view, the ACCC Final Report should include a recommendation to reform the Australian content quota system as a matter of urgency.

## 7.2 Election blackout period

Clause 3A of Schedule 2 to the Broadcasting Services Act requires that a broadcaster must not broadcast an election advertisement from the end of the Wednesday before polling day until the close of the poll on polling day, where an election is to be held in an area which relates to a broadcast licence area, or an area where a broadcast can normally be received.

The election advertising blackout applies to broadcasters, including:

- commercial television broadcasting licensees;
- commercial radio broadcasting licensees;
- community broadcasting licensees;
- subscription television broadcasting licensees; and
- providers of broadcasting services under class licences.

The election advertising blackout only applies to broadcasters. It does not include online services and print media.<sup>21</sup>

In an age where political parties are using multiple platforms to reach out to voters, there is no justification to continue to apply a restriction to television and radio media. This outdated restriction serves to put commercial broadcasters at a disadvantage to all other media and is entirely at odds with modern marketing techniques.

This issue was highlighted as the "best example" of regulatory disparity by the ACCC Chair in his press conference of 10 December.<sup>22</sup> Free TV strongly agrees with this statement and suggests that a review is not required for the ACCC to recommend an immediate change in the Final Report.

## 7.3 Tagging of election material

Similarly, broadcasters are responsible for compliance with the requirement for advertisements for "political matter" to end with a spoken announcement in the form of words or images that set out:

- if the broadcast was authorised by an entity that is a disclosure entity and not a natural person:
  - the name of the entity (as included in the most recent return given in relation to the entity under Part XX of the Commonwealth Electoral Act 1918, if a return has been given in relation to the entity under that Part);
  - the relevant town or city of the entity; and
  - the name of the natural person responsible for giving effect to the authorisation.

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<sup>21</sup> <https://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/political-matter-tv-content-regulation-i-acma>

<sup>22</sup> Rod Sims Press Conference 10 December 2018, 16:30 min

- if the broadcast was authorised by an entity that is not a disclosure entity and not a natural person:
  - the name of the entity;
  - the relevant town or city of the entity; and
- if the broadcasting was authorised by a natural person (regardless of whether that person is, or is not, a disclosure entity):
  - the name of the person who authorised the broadcasting of the political matter; and
  - the town or city in which the person lives.

Political matter is defined as 'any matter that appears to comment on, encourage participation in or attempt to influence a certain outcome within a political process'.

These requirements place the broadcast platform at a disadvantage to other platforms that do not face such regulations. Over the last 12 months there have been (confidential) examples of advertising campaigns that have either not run or have been delayed on the television platform as they could not run in the form that they could on other platforms

There is no public policy justification for this disparity. Accordingly, we consider that the ACCC Final Report should recommend that a consistent treatment of political matter disclosure be applied across all platforms.

## 8 Take Down Notice Scheme

### 8.1 Mandatory take-down standard for copyright infringements

Free TV supports the ACCC's recommendation that the ACMA determine a Mandatory Standard regarding digital platforms' take-down procedures for copyright infringing content to enable effective and timely take-down of copyright-infringing content.

Free TV agrees that a Mandatory Standard, supported by meaningful sanctions and subject to effective enforcement, would incentivise the digital platforms to comply with its contents. As highlighted in the Preliminary Report, contravention of a Mandatory Standard registered under Part 6 of the Telecommunications Act would give rise to the ACMA's power to issue formal warnings and impose civil penalties up to \$250,000 per contravention.<sup>23</sup>

Free TV also agrees with the Preliminary Report's findings that, 'Clear industry standards regarding reasonable take-down procedures would also increase the clarity of how authorisation liability operates under the Copyright Act,' although we note that an Industry Standard would be only one factor that a court would take into consideration in determining whether the platform had in fact authorised copyright infringement.<sup>24</sup> However, whether or not the standard would increase the utility of the authorisation provisions to rights holders, as the Report suggests,<sup>25</sup> would depend entirely on (a) its terms and (b) the understood scope of authorisation infringement under the Copyright Act more broadly.

A 'weak' industry standard without clear obligations which sufficiently address rights holders' concerns would risk further undermining authorisation liability. A standard with vague or minimal obligations which facilitate inadequate practices would simply clarify that the existing authorisation infringement provisions are ineffective. It would enable the platforms to avoid liability for authorisation infringement while doing very little to ensure that piracy is addressed. The effectiveness of any standard, including in clarifying authorisation liability, therefore depends on its terms and an effective enforcement regime.

In addition, the scope of the authorisation infringement provisions under the Copyright Act should be clarified to incentivise service providers to comply with the standard.

In Free TV's view, in order to be effective, the take-down standard would need to:

- sufficiently detail the processes (including time-frames) for identifying and removing copyright infringing material;
- set out proactive steps that should be taken to avoid infringing material being distributed;
- provide a framework for cooperation between rights holders and digital platforms to reduce piracy online; and
- be supported by a strong legislative framework with clear copyright authorisation liability provisions.

We expand on these issues below.

### 8.2 Minimum criteria for the ACMA Copyright Mandatory Standard

#### Relevant ACCC observations:

Whilst the specifics of the take-down notice procedure should be settled after consultation with relevant industry stakeholders, the standard should provide guidance on the following key issues of concern raised by rights holders in this Inquiry:

- improving ease of communication between rights holders and digital platforms

<sup>23</sup> Preliminary Report, page 163.

<sup>24</sup> Copyright Act, ss36(1A)(c), 101(1A)(c)

<sup>25</sup> Preliminary Report, 160.

- mechanisms to address particularly time-sensitive content such as live streamed sporting events
- mechanisms for rights holders to make bulk notifications to address repeated infringements of the same content
- measures to develop or update content-matching or unauthorised content identification software
- procedures for removing users who commit multiple or regular infringements

Free TV agrees with these broad observations. However, we consider below several essential matters that must be included in a Mandatory Standard in order for it to effectively deal with the issues identified by the ACCC. These matters should be included in the ACCC's recommendations in its Final Report, as they are essential to the effective operation of the proposed standard, as discussed below.

### **8.2.1 Objectives and scope of Mandatory Standard**

While the Standard should include a copyright take-down notice procedure, Free TV's view is that the broader objective of the Standard should be to reduce the incidence of online copyright infringement by the platforms.

To do this, the standard should set out a framework for better cooperation between the platforms and content owners/rights holders more broadly. It should incorporate obligations for the platforms to proactively identify infringing content. Consideration should also be given to incorporating techniques to dissuade internet users from engaging in infringement, such as education about piracy.

Ultimately, if the Standard is too narrow in its approach, it will risk becoming ineffective. A Standard which is targeted towards addressing the problem of piracy will be more effective.

### **8.2.2 Proactive identification of infringing content**

The Preliminary Report provides that, 'a mandatory code or standard could also outline reasonable or effective steps for a digital platform to prevent distribution of copyright-infringing content or otherwise seek to fairly divide the burden of enforcement between the content hosts and rights holders.'<sup>26</sup>

Free TV strongly agrees that effective steps to prevent distribution of copyright-infringing content should be included in the proposed Mandatory Standard. However, it is unclear what the ACCC means by 'or otherwise fairly divide the burden of enforcement between content hosts and rights holders'. In Free TV's view, in order for the proposed Mandatory Standard to incentivise content hosts to remove infringing material from their platforms in accordance with their copyright law obligations, it must set out a process for proactive detection and removal of infringing content. This would be more efficient and effective for all parties; content hosts, rights holders and the ACMA. It would minimise the volume of infringement notices required and would act as a deterrent to those seeking to distribute pirated material.

Specifically, the Standard should set out:

- minimum requirements for swift and proactive detection and removal or disablement of illegal content, including a requirement to optimise technologies to detect infringing content, for example automated detection by technologies such as Content ID, upload filters or other techniques;
- an obligation to ensure that infringing content is prevented from reappearing once it has been removed (including content which is effectively duplicate infringing content with only minor variations); and

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<sup>26</sup> Preliminary Report, p 160.

- a process for engaging and cooperating with rights holders, including setting out time-frames within which platforms are required to respond to inquiries, requests for access to rights management tools etc.

The administration of the Mandatory Standard and any associated costs should be borne by Government. Ensuring compliance with the law including the Mandatory Standard should be the content host's responsibility.

### **8.2.3 Time-sensitive content**

The Standard should include a requirement that infringing material is removed 'expeditiously'. In relation to live content, the Standard should make clear that for removal to be 'expeditious', it must be immediate.

### **8.2.4 Three-strikes**

If a user has been warned twice to remove infringing material and they persist in the infringing activity, the Mandatory Standard must include a requirement to terminate access of the user's account.

### **8.2.5 Remuneration of rights-holders**

The Standard should require the digital platforms to automatically remunerate rights holders for any advertising served by the platform against infringing content upon detection of that content.

## **8.3 Expansion of take-down notice scheme to cover all illegal content**

In Free TV's view, the proposed mandatory take-down standard should also cover take-down of other illegal content including fake, damaging, misleading and defamatory material. The Preliminary Report briefly acknowledges the issue of fake advertisements but does not propose an adequate solution to this problem. Inadequate take-down processes not only devalue broadcasters' intellectual property but also significantly damage our business reputations and brands.

The Preliminary Report notes that the ACCC is considering the introduction of a digital platforms' ombudsman to address enforcement issues in relation to a range of issues including scam content and misleading advertising disputes.<sup>27</sup> Free TV has discussed the merits of an industry ombudsman above at section 4.4.

While we are not opposed to a digital platforms' ombudsman, our view is that the digital platforms should be subject to an equivalent regulatory framework as traditional media companies. Traditional media companies are subject to a range of industry codes and standards in addition to laws such as defamation, contempt of court and misleading and deceptive conduct. Such codes form part of the 'co-regulatory approach' to communications regulation in Australia. They provide a mechanism to increase respect for community standards and for communications companies to respond more quickly and efficiently to customer concerns.

In Free TV's view, the proposed Mandatory Standard should be broadened to regulate the content on the digital platforms in accordance with current community standards more broadly. While the laws of defamation and misleading and deceptive conduct provide recourse through the courts, codes of practice provide a uniform, fast and effective way for dealing with complaints, as well as guidance on community expectations. A Mandatory Standard or code would address the enforcement difficulties noted by the ACCC.<sup>28</sup>

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<sup>27</sup>Ibid, 163.

<sup>28</sup> For example, section 4.7.8

## 8.4 Authorisation liability

In Free TV's view, clear and effective authorisation provisions are fundamental to the operation of any takedown notice process, including under a Mandatory Standard as the ACCC has recommended. As outlined in Free TV's supplementary submission to this review,<sup>29</sup> for the platforms to remove pirated material expeditiously and to terminate the accounts of repeat infringers, the copyright framework must effectively incentivise this. At the moment, it does not.

The Government has previously recognised this issue in its discussion paper, '*Online Copyright Infringement*',<sup>30</sup> which proposed to amend the authorisation liability provisions of the Act so that it is clear that they are intended to function the same way in the online environment as they did in the analogue environment.

In Free TV's view, clear authorisation liability provisions under the Copyright Act would create the necessary legal obligation to remove infringing material online. A Mandatory Standard as outlined above, would set out the practical steps and processes required to remove infringing material. Together, clear authorisation liability provisions and a Mandatory Standard would provide the necessary incentive for digital platforms to work with rights holders to tackle piracy on their platforms.

## 8.5 "Fair use" Terminology

Free TV notes that the Preliminary Report refers to 'fair use' under Australian copyright law.<sup>31</sup> Our view is that the correct term for the exceptions under Australian copyright law is 'fair dealing'. 'Fair use' has a very specific meaning and generally refers to US-style copyright exceptions such as 17 U.S.C. S.107 of the Digital Millennium Copyright Act which is open-ended and allows new uses of copyright material to be considered 'fair' by the judiciary.

By contrast, the Australian 'fair dealing' exceptions are limited, prescriptive and purpose-based. Australian courts cannot find new exceptions to be 'fair dealing' if they are not specifically set out in the Australian Copyright Act. For clarity, Free TV suggests amending the references in the Final Report to reflect the Australian terminology. Australian media companies have argued against the introduction of 'fair use' in Australia and for the retention of the existing fair dealing exceptions.

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<sup>29</sup> Free TV Australia, Supplementary submission to ACCC Digital Platforms Inquiry, 13.

<sup>30</sup> Attorney-General's Department, *Online Infringement Discussion Paper*, July 2014.

<sup>31</sup> Preliminary Report, Chapter 6.

## 9 Measurement and verification

### Key ACCC findings and observations:

- Advertisers are unable to verify for themselves whether advertisements on Google and Facebook are delivered to their intended audience. The ACCC has not yet reached a view about the extent to which third party auditing overcomes this issue but expects to in its Final Report.
- The ACCC considers the inability for advertisers to verify the delivery and performance of their ads on Google and Facebook has the potential to lessen competition in the supply of advertising services. This is because it has the potential to mislead advertisers into thinking their ads perform better than they actually do.
- Google and Facebook do not have strong incentives to address these issues because they may profit from them. The opaque nature of the advertising systems offered by the digital platforms makes it difficult to assess the extent of this problem.

Free TV strongly supports the ACCC investigating the opaque nature of the advertising systems offered by the digital platforms in greater detail. This section builds on our original and supplementary submissions on this issue.

It also reiterates the importance of not only allowing for genuine third-party verification of digital platform advertising reach claims, but also independently setting the standard that those claims are measured against. In short, even with the best verification system in the world, if the standard that it is being verified against is still set by the digital platforms, then the risks of distortions in the advertising market remain.

### 9.1 Measurement: the standard that all other news outlets apply

Free TV again notes that third party measurement and verification via independent reporting of elemental data through a software development kit (SDK) is standard across all major news outlets in Australia, and indeed the world.

An SDK is a small piece of Java Script that sits within a publisher's products that records anonymous usage data and reports that back to a third party for measurement and verification purposes.

Throughout this inquiry process to date, the digital platforms have attempted to confuse the issue by suggesting that in some way their own measurement of their own usage statistics and the provision of this data to a third party is the same as genuine third-party measurement and verification. This is not the case.

Free TV agrees with the ACCC's finding that advertisers are unable to verify for themselves whether advertisements on Google and Facebook are delivered to their intended audience. This is unlike advertising served on any other major publisher's website or on television. We do not consider that a right to audit can overcome this fundamental issue.

As set out in our supplementary submission, an audit right has two key problems:

- the data is still collected, collated and disseminated by the digital platforms. The usage data provided to Nielsen into the 'double-blind' process is a black box. There is no genuine independent verification of this data—including the extent to which the numbers are inflated by non-human activity (like bots).
- for the right to audit to have any power, it requires a third-party to exercise that right. Even if the audit right is triggered, the auditing process would be a bilateral process between the third-party and the provider of the data—predominantly Google or Facebook. It is not an open and transparent process in which all stakeholders who rely on the accuracy of reach claims would have visibility.

Free TV therefore maintains that all digital publishing businesses of scale operating in our territory should be legislatively required to natively deploy accredited third-party SDKs for genuine independent measurement and verification.

## **9.2 Measuring against an independently set standard**

One issue that did not appear to be addressed in the Preliminary Report was the need for independence in setting the standard for when an “impression” or a “view” should be counted.

As noted in our original submission, recent debates within the Media Rating Council (MRC) and the Interactive Advertising Bureau (IAB) have seen a change to their guidelines. Under the recent changes, for a view to be counted the image or video would have to be 100 per cent rendered on screen for 1 second for an image or two seconds for a video.

This standard is, however, disregarded by some digital platforms in favour of their own bespoke measurement. Page 23 of our original submission includes a table with some of the measurement standards used by various platforms.

Free TV recommends the establishment of a truly independent process for determining when a video or an image can be counted as a view. In our original submission we suggested that Standards Australia could be the appropriate body to undertake this role. However, given the development of alternative regulatory models above, these standards could equally be written into the access undertaking to be authorised by the ACCC.

A further issue is in the usage of measurement in marketing and promotional material presented by the digital platforms at events like trade fairs. At these events, the digital platforms will market themselves to potential advertisers on the basis of their incremental reach to television. However, it is often not clear what metrics are used in the calculation of these claims. To address this issue, it should also be a requirement that any marketing and promotional material be based on the independently set standard.

## **9.3 Include SDK requirement in access regime**

In section 4.2, we outlined how a new access regime could operate to more effectively address the issues identified in the ACCC’s Preliminary Report.

Free TV considers that the most efficient and effective method for requiring genuine third-party measurement and verification is to make SDK implementation a condition of ACCC authorisation of such an access regime. This approach would ensure that the dominant providers of digital advertising platform services were subject to independent verification on their reach claims.

This would provide a level playing field with every other major publisher and broadcaster operating in Australia who are already subject to genuine third-party measurement and verification.

## 10 Data and privacy

### Key ACCC findings and observations:

- Consumers have different privacy preferences and levels of privacy awareness. All consumers will be better off when they are sufficiently informed and have sufficient control over their user data such that they can make informed choices that align with their privacy and data collection preferences.
- Currently, several features of consumers' relationship with digital platforms may prevent consumers from making informed choices, including the bargaining power held by the digital platform vis-à-vis the consumer; information asymmetries that exist between digital platforms and consumers; and inherent difficulties in accurately assessing the current and future costs of providing their user data.
- Many digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents.
- These features of digital platforms' consent processes leverage digital platforms' bargaining power and deepen information asymmetries, preventing consumers from providing meaningful consents to digital platforms' collection, use and disclosure of their user data.
- Many digital platforms' privacy policies are long, complex, vague, and difficult to navigate. They also use different descriptions for fundamental concepts such as 'personal information', which is likely to cause significant confusion for consumers.

### 10.1 Transparency and control for consumers paramount

The Preliminary Report notes that 'the ACCC consumer survey found that most Australians using digital platforms consider that there should be transparency and choice in how digital platforms should collect, use and disclose certain types of user data.'<sup>32</sup>

Free TV agrees with the Report's findings that transparency and control are key to privacy protection and the validity of a consumer's consent to use of their data, and that the nature of digital platforms' consent processes are inadequate.<sup>33</sup> Free TV also agrees that transparency and control are essential to enabling consumers to make informed choices in selecting services that process user data in a way that meets their individual privacy preferences.<sup>34</sup>

As noted in the Report, it is concerning that consumer consents are generally not well-informed or freely given, because of the significant information asymmetry between consumers and digital platforms in relation to the terms on which they collect, use and disclose user data. Free TV agrees that this reflects the bargaining power imbalance between consumers and digital platforms more broadly.<sup>35</sup> In Free TV's view, this is also a result of ineffective enforcement processes in respect of the digital platforms.

The ACCC has indicated that this market failure that could be addressed by:

- amending the Privacy Act to require digital platforms to obtain informed consents from consumers;
- establishing a Privacy Code of Conduct;
- Introducing a statutory tort of serious invasions of privacy; and
- Imposing sanctions on the use of unfair contract terms to increase deterrence.<sup>36</sup>

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<sup>32</sup> Preliminary Report, 172.

<sup>33</sup> Ibid, 173.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, 175.

<sup>36</sup> Ibid, 223.

## 10.2 Achieving effective enforcement of existing privacy laws

Free TV does not agree with the ACCC's proposed solution as we are not convinced that there are current failings with existing information privacy laws that apply in Australia. Privacy laws and the Australian Privacy Principles were most recently reviewed with the new principles having come into effect in 2014 following a lengthy consultation period. In our view they are up-to-date and generally working well. In particular, they already contain obligations to deal with personal information in an open and transparent way.<sup>37</sup>

However, as identified in various sections of the ACCC's report, the key issue with regulation of the digital platforms is effective enforcement of the laws that are already in place, on those platforms. As such, given the significant and unprecedented amount of data collected by Google and Facebook, consideration should instead be given to how to ensure that the platforms comply with existing laws. Further, how the platforms can achieve sufficient transparency in relation to their practices to provide consumers with sufficient control of their data, in the context of the unique relationships that exist between the platforms and consumers. For example, consideration could be given to the introduction of a regular audit process in respect of the platforms to facilitate enforcement of existing laws. This would encourage the platforms to take proactive steps to comply with existing laws, rather than addressing issues once large-scale privacy breaches have occurred.

Given the comprehensive nature of the information privacy laws and obligations that already exist on companies under the existing regulatory framework, and the recent review of this framework, Free TV's view is that further economy wide privacy obligations are not a targeted solution to the problem that the ACCC has identified and are therefore not warranted. Any further obligations should be specifically directed to the problems identified in the ACCC's report to address the issue of transparency of the data practices on the digital platforms and the resultant power imbalance between the digital platforms and consumers.

## 10.3 Opt-in vs Opt-out

The ACCC has also expressed concerns that some digital platforms may not provide consumers with easy or effective ways of opting out of data collection, particularly in relation to issues of concern to consumers such as the collection of user data for targeted advertising purposes.<sup>38</sup> It has suggested that consumer consents in relation to targeted advertising should be further strengthened by prohibiting entities from collecting, using or disclosing personal information for targeted advertising purposes unless consumers have provided express, opt-in consent.<sup>39</sup>

Free TV does not agree with this proposal. In our view, transparency and control are paramount. If the requirement of informed consent is satisfied (that is, the data practices of the digital platforms are sufficiently transparent, consumers are adequately informed of and sufficiently able to control them), there is no need to specifically mandate *how* that requirement (informed consent) should be met.

Digital platforms (and other businesses) should be responsible for ensuring that they are transparent and that their consumers are informed. In addition, there should be adequate complaints options for consumers backed up by effective regulatory enforcement. Matters such as how privacy obligations can or should be met are more appropriately dealt with in Privacy Guidelines which are more flexible and can be more easily changed over time with changing community standards and updated technologies and industry practices.

## 10.4 Statutory cause of action

Free TV does not support a statutory cause of action for serious invasions of privacy. The current framework of legislative, common law and regulatory protections is extensive and generally working well. This framework includes: Commonwealth, State and Territory

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<sup>37</sup> APP 1.

<sup>38</sup> Ibid, 206.

<sup>39</sup> Ibid, 17.

legislation in a range of areas which impact on reporting (including in areas such as family law, evidence, children and young people, adoption, surveillance devices and many others); common law actions including breach of confidence, trespass, nuisance, defamation, malicious falsehood and contempt; and industry codes of practice.<sup>40</sup> A statutory cause of action is therefore unnecessary.

Fundamentally, a statutory cause of action would fail to address the issues identified in relation to transparency of data practices and control for consumers that are unique to the relationships between consumers and the digital platforms that have been identified in the Preliminary Report. A statutory cause of action would only provide a small number of individuals with sufficiently deep pockets the opportunity to pursue litigation after a privacy breach has occurred. For most people this would be meaningless. For the same reason, it would also be unlikely to incentivise platforms to improve their practices.

In addition, many of these concerns have been addressed by recent changes to the law to introduce a mandatory data breach notification scheme in Australia.<sup>41</sup> The changes will require government agencies and businesses covered by the *Privacy Act* to notify any individuals affected by a data breach that is likely to result in serious harm and are intended to improve transparency in the way that organisations respond to serious data breaches.

A statutory cause of action would not only fail to address the issues identified by the ACCC, it would also risk an unjustified adverse effect on the freedom of the media to seek out and disseminate information of public concern. The ability to express opinions freely and access information about matters of public concern is a fundamental part of a free and open democracy and the media plays an important role in facilitating this information flow. A statutory cause of action would act as a deterrent to media companies reporting public interest stories due to the added complexity it would introduce to the privacy law framework and the increased risk of costly litigation.

It would place undue weight on an individual's right to privacy at the expense of freedom of communication. Free TV recognises that individual privacy rights are an important public interest. However, they must be balanced against other competing public interests including the right to freedom of speech, which benefit society as a whole. This is particularly the case given that Australia doesn't have a clear process for balancing these rights in the form of a statutory human rights framework or express constitutional protection for freedom of speech (in contrast to other jurisdictions such as the UK and the US).

As such, Free TV's view is that there are no identifiable benefits to be achieved from introducing a statutory cause of action.

## 10.5 Mandatory deletion of data

As outlined above, the paramount data and privacy reform that the ACCC should focus on is ensuring that consumers are made aware in clear and concise language the terms and conditions of using a service provided by a digital platform. We consider that beyond this additional regulation is unnecessary and may lead to consumer detriment.

Accordingly, as long as a consumer is made clearly aware of the handling of their data once they cease using a service and they have the right to request its deletion at any stage, a further obligation to delete data is not required. In fact, such an obligation may not be in-line with consumer expectations should they resume using a service in the future. We do not consider that consumers would expect that all of their user history would have been automatically deleted, even if they had not requested this to occur.

There is a consumer benefit from being able to readily join, exit and re-join services, without the loss of data. The key public policy principle remains, that as long as the consumer is aware of how their data will be treated and that they have the right to request its deletion, further measures are unnecessary.

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<sup>40</sup> See [https://www.alrc.gov.au/sites/default/files/subs/55\\_org\\_free\\_tv.pdf](https://www.alrc.gov.au/sites/default/files/subs/55_org_free_tv.pdf)

<sup>41</sup> See <https://www.oaic.gov.au/media-and-speeches/statements/mandatory-data-breach-notification>