



Submission by
Free TV Australia

**Digital Platform Services
Report on app
marketplaces issues paper**

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1. Executive Summary

- This is an important inquiry as, for the first time, it can provide valuable insights not only into mobile device app marketplaces but also into the impact that the rapidly developing marketplaces on connected TVs and related devices are having on the sustainability of the broadcast sector.
- The free-to-air television sector plays a crucial role in making Australian content available, thereby supporting the social and cultural policy objectives of the Government to ensure that Australians can freely access quality local content such as entertainment, drama, live sport and trusted news.
- While the majority of video viewing is still delivered via the terrestrial free-to-air broadcast network, the importance of content delivered via broadcaster video-on-demand (BVOD) services, has been quickly increasing in recent years. This is a trend that will inevitably continue.
- Free TV members have innovated and invested heavily to meet the changing demands of the modern audience. However, large TV manufacturers and the TV aggregators, are fast becoming critical gateways to our audience in ways that could, if left unregulated, put at risk both the sustainability of the free-to-air broadcast sector and the discoverability of Australian content.
- This submission highlights the experience of our members in distributing apps through all marketplaces, following the themes set out in the issues paper:
 - **Intensity of competition in relevant markets:** The connected TV market is highly concentrated, with estimates showing the four leading brands covering about 85% of the market. There is no meaningful ability to bypass these marketplaces, and as such a manufacturer with any degree of market share is an unavoidable trading partner for video content app developers.
 - **App marketplace conduct:** Many TV manufacturers and aggregators are requiring a share of revenue earned through our apps in their marketplaces. Further annual payments can be required for apps to be preinstalled on connected TVs and for apps or content to be featured in recommendation tabs, ribbons or rails. This puts pressure on the sustainability of our businesses.
 - **Relationships between app marketplaces and app developers and providers:** In the case of Apple and Google, marketplace terms and conditions are non-negotiable and are subject to change with limited notice. This imposes costs on developers and can also be used to self-preference marketplace providers own services, such as “Sign on with Apple.” The terms commonly tie app developers into payment systems provided by the marketplaces, with fees of up to 30% of revenue.
- It is important that this inquiry process carefully examine the conduct of all app marketplace providers and the impact that this conduct is having on the sustainability of local content. The ACCC should propose appropriate regulatory interventions to the Treasurer.
- The prominence of local content on connected TVs and related devices needs to be recognised and protected as there is little benefit in free-to-air broadcasters being subject to costly regulation to produce and make available Australian content if it is not easily discoverable by Australians.
- Accordingly, consistent with reforms in other jurisdictions, the ACCC should recommend that the Government legislate to protect the prominence of apps that provide material of strategic, social and cultural benefit to Australians. The ACCC should also give consideration to the recommended regulatory responses of the recently released US House Judiciary Committee Majority Staff Report and Recommendations from its Investigation of Competition in Digital Markets, which considered the behaviour of app marketplace providers.

2. Introduction

Free TV Australia appreciates the opportunity to comment on the ACCC’s issues paper published in preparation for the March 2021 digital platform services report that the ACCC will deliver to the Treasurer on the competitiveness, efficiency, transparency and effectiveness of app marketplaces.

2.1 About Free TV Australia

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



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

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

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

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

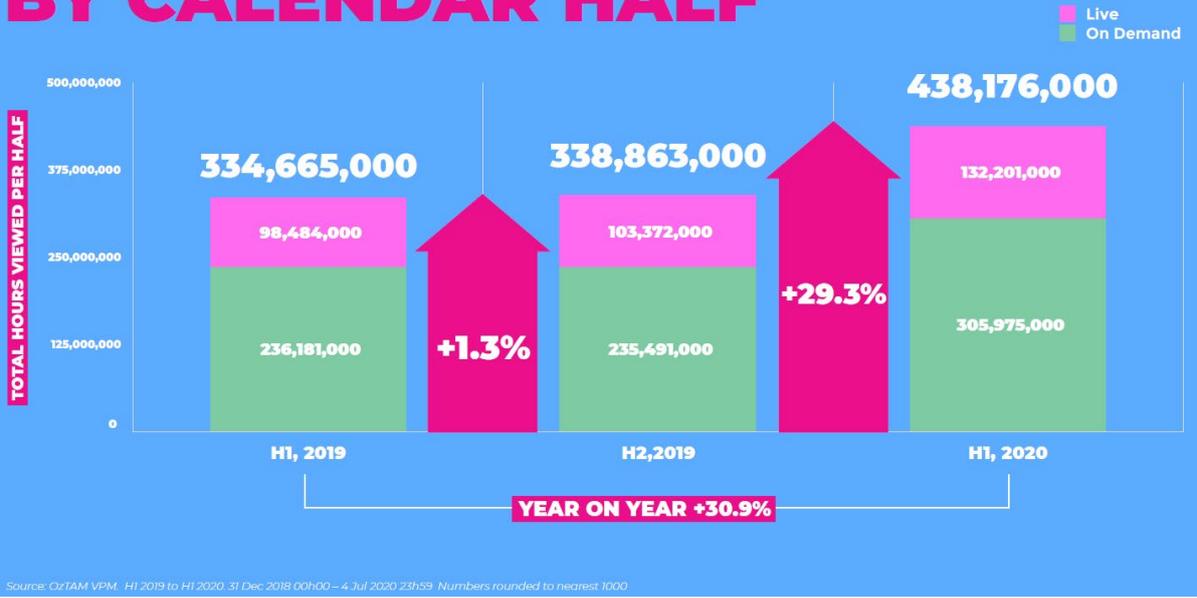
The commercial television industry creates these benefits by delivering content across a wide range of genres, including news and current affairs, sport, entertainment, lifestyle and Australian drama.

2.2 Meeting the needs of the modern audience



While Australians still watch a significant amount of terrestrially broadcast live free-to-air television, this is increasingly being supplemented by Australians who are choosing to access our BVOD content via our apps. As shown below, there was a 30% year-on-year growth from H1 2019 to H2 2020 of total BVOD minutes watched.

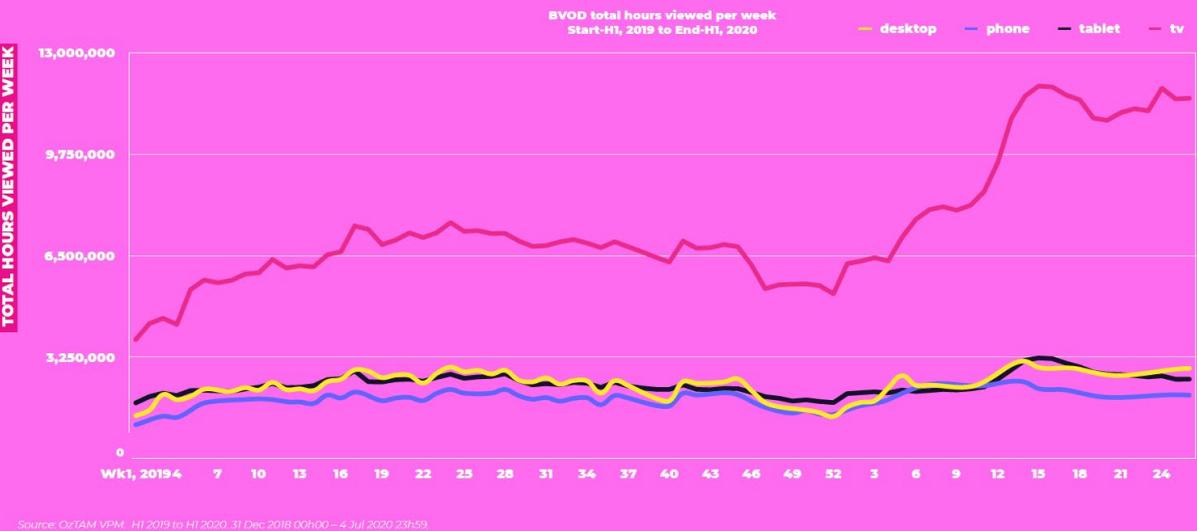
BVOD CONSUMPTION BY CALENDAR HALF



Metropolitan members of Free TV have invested extensively in meeting the needs of the modern audience by developing high quality apps. The apps make available the programming which is broadcast on our member’s channels in a wide variety of genres including entertainment, drama, news and current affairs and live sport. The apps are freely available to all Australians and provide both live channels and catch-up content.

Importantly, almost all of this growth has come from the connected TV sector of the market, as shown in the graph below. OzTAM and Regional TAM establishment survey results reveal that connected TVs made up 48% of the market in June 2020, up from 42% only a year earlier and are therefore becoming an increasingly important gateway for content distribution platforms.

BVOD CONSUMPTION TREND BY DEVICE TYPE



The development of our apps on connected TVs and other platforms and the content they provide is an extension of the advertiser funded model that the commercial free-to-air television sector relies upon. The *Broadcasting Services Act 1992* recognises that commercial television broadcasters will typically primarily generate their income from advertising revenue (Section 14). Therefore, the future sustainability of the sector is directly linked to the efficiency of the advertising market and ensuring content remains freely and widely accessible.

The sustainability of the free-to-air broadcast sector is vital for the achievement of many of the Government's social and cultural policy objectives, including accessibility of accurate and impartial news, key sporting events and other content of cultural significance. Following the recent review of the Australian content obligations, the Government has announced that it will retain the obligation on commercial television networks to broadcast at least 55 per cent local content between 6am and midnight on their primary channels. In addition, there remains stringent obligations on broadcasters to meet a minimum total amount of Australian drama, children's and documentary programming. These are on top of the other local content obligations on the multi-channels and news of local significance requirements that were not impacted by the Government's recent review.

For the ultimate goal of these content obligations to be achieved, which is that Australians view Australian content, the content that Free TV members invest in creating must be accessible and easily discoverable by Australians. However, the prominence of our content and our capacity to continue to invest in creating the great programming that Australians rely on is being drawn into question by the gateway position of some app marketplace providers, not simply the providers of mobile device marketplaces, as we expand on in the following sections.

Accordingly, Free TV urges the ACCC to consider, in the March 2021 report to the Treasurer, not only traditional mobile device app marketplaces but also app marketplaces that will become of increasing importance in the short term, that is, those offered by TV set and TV aggregation device manufacturers.

3. Intensity of competition in the relevant markets

3.1 TV manufacturers and TV aggregation marketplaces must be included

While the focus of the ACCC's issues paper is on the Google Play Store and Apple App Store, the ACCC has asked whether there are other significant suppliers of app marketplaces in Australia.

As acknowledged in the ACCC's issues paper, Google and Apple provide the two dominant operating systems on mobile devices, which has led to the dominance of Google Play Store and the Apple App Store. However, the ACCC's inquiry must recognise the ongoing evolution in the way in which Australians are using apps to access content, with more and more Australians accessing content through apps made available on connected TVs or through aggregation devices. Therefore, the ACCC should also consider the significant marketplaces offered on connected TVs, set-top boxes and other TV aggregation devices. This includes marketplaces offered on the following:

- Connected TVs such as Samsung smart TVs, featuring the Samsung Smart Hub, LG smart TVs, featuring the LG Content Store and Sony smart TVs, using Android TV ribbons
- Set-top boxes and similar devices such as the Telstra TV, Fetch, Apple TV, Foxtel iQ and Amazon Fire.

The remainder of this section 3 sets out the market structure of these marketplaces and why there are currently no meaningful constraints on the conduct of marketplace providers. Sections 4 and 5 then set out the experience of Free TV members in offering apps across these marketplaces, across different types of devices, and the conduct that is contributing to the threats to the sustainability of Australian commercial free-to-air broadcasters.

3.2 Market structure of the relevant marketplaces

For almost all relevant devices, the choice of app marketplace is determined by the equipment manufacturer. The ACCC has recognised this in its issues paper in the context of mobile devices. But it also applies in the case of connected TVs, set-top boxes and other TV aggregation devices. For example, a Samsung smart TV is inextricably linked to the Samsung Smart Hub app store through its Tizen operating system. As such, to the extent that a manufacturer has a significant market share in the hardware market (or the operating system market, in the case of Google and Roku), it will necessarily have a degree of market power over app developers and providers looking to gain access to the app marketplaces available through the relevant hardware.

It is simply not possible to avoid app marketplaces on connected TVs and TV aggregation devices. The reasons why sideloading and other potential "workarounds" are not a meaningful constraint to this relationship are discussed in section 3.3.

This relationship between the hardware and operating system and the app marketplace means that once a consumer has made a purchase decision, the choice of app marketplace is already fixed, and unable to be changed. In the case of connected TVs and TV aggregation devices, there is no capacity for the consumer who has purchased the relevant equipment to use an alternative marketplace to the one offered by the original manufacturer. Accordingly, if app developers and providers are to reach that consumer, there is no alternative than to incur the significant costs of development to make an app available on each marketplace used by the manufacturers with the larger market shares.

This issue is particularly acute for app providers relying on an advertiser funded business model, such as BVOD app providers, where reach is positively correlated to advertising revenue. In effect, it makes connected TV and TV aggregation device providers with any significant market share unavoidable business partners for Free TV members.

Recent media reports have indicated that the connected TV market is indeed highly concentrated. While it would be useful for the ACCC to seek to better understand more recent market share information, data from 2018 showed Samsung as a clear market leader with a market share of 28.1% overall and 32.5% of the ultra-high definition market.¹ If we assume that the ultra-high definition market can be taken to represent the connected TV market (as almost all ultra-high definition sets are “smart”), 85% of the market is covered by the leading brands of Samsung, LG, Sony and Hisense.

In practice, this has led to a degree of price leadership being evident, with Samsung setting terms and conditions for app providers and developers that are frequently followed by other connected TV manufacturers and aggregation platform in the market.

3.3 No meaningful ability to bypass marketplaces of equipment manufacturers

3.3.1 Sideloaded voids warranties and introduces security risks

Sideloaded is the process of installing an app onto a device without using the official marketplace. This process is not supported by the manufacturers of any equipment, including connected TVs, and Free TV understands that in some cases sideloading will void the manufacturer’s warranty on the device.

While sideloading is technically possible on Android based devices, including recent Sony TVs, most other connected TVs and mobile devices do not have a method of sideloading that could be reasonably followed by the typical consumer. In these cases, a “jailbreak” would first need to be performed on the device, a process that is highly technical and risks rendering the device unusable.

In addition, the process of sideloading introduces security risks as installation files need to be downloaded from unknown sources, increasing the risk of malware. Further, once an application has been sideloaded, there is no official process to maintain and update the app, for example, should a security issue be identified that require amendments to the app coding. Normally, these routine updates would be pushed to devices through the official marketplace.

In summary, sideloading is an unsupported and potentially risky activity that cannot be relied upon to be a meaningful competitive constraint on app marketplaces, whatever the type of equipment is considered.

3.3.2 Web interfaces present a significantly poorer consumer experience

The ACCC has asked whether web-versions of apps are able to be used to bypass app marketplaces. In the connected TV ecosystem, the performance of web-based applications is heavily constrained by the performance capabilities of the television chipset. In many cases, the processing power required means that web-applications fail to load or provide a very poor consumer experience.

¹ <https://www.channelnews.com.au/tv-market-share-revealed-samsung-dominates/>

In the mobile ecosystem, the processing power is less of a constraint. However, studies have shown that consumers have higher levels of engagement with dedicated mobile apps. This is borne out by related studies that demonstrate that mobile users spend 86% of their time on mobile apps, and only 14% inside the browser.²

In summary, web-based applications are not considered a meaningful constraint on the power of the marketplace providers, whatever type of equipment is considered.

² <https://www.mobilesmith.com/html5-vs-native-debate-is-over/>

4. App marketplace conduct

4.1 Revenue sharing demands threaten sustainability of Australian content

In previous submissions to the ACCC Digital Platforms Inquiry, Free TV has set out the considerable loss of revenue to Facebook and Google experienced by our members and the threat that places to the sustainability of our industry. This has not been for lack of innovation and significant investment to ensure that our businesses are meeting the needs of the modern audience.

Our investment in high-quality BVOD offerings has enabled our members to retain total audience share in a highly competitive video content market, once terrestrial and BVOD are considered together. However, in absolute dollar terms, the growth in audience has not yet been matched by a growth in revenue. From FY2016 to FY2020, metro broadcaster free-to-air revenues fell by \$566million, compared to a \$134million increase in BVOD revenues.

It is therefore very important for the sustainability of the free-to-air industry that our investment in ever more popular BVOD services is not undermined by revenue share demands of app marketplace providers. Unfortunately, the experience of Free TV members is that the dominant app marketplace providers are often demanding a share of advertising revenues in order to be included in the marketplaces offered on connected TV and set-top-box devices. We have referred later in this submission to the fees that Google and Apple charge developers for in-app purchases. Although we do not agree that such fees are justified, both Google and Apple seek to argue that the fees are necessary because of the need to invest in and maintain the services, including security in relation to payments and protection of privacy, that are provided through their app stores. No justification is provided by manufacturers of connected TVs and set-top boxes for seeking a share of advertising revenues – in such cases, these fees are imposed simply because app developers and providers have no alternative options but to pay the fees to offer their apps to the users of the relevant devices. We encourage the ACCC to consider whether the imposition of these fees constitutes a breach of any of the provisions of Part IV of the *Competition and Consumer Act 2010*, for example, section 46.

Global experience and recent discussions held by some members with TV manufacturers have indicated that, as their own product offerings continue to expand, the demand for advertising revenue is likely to extend into demands for a share of advertising inventory. For example, for inclusion in the [Samsung TV Plus](#) aggregation product, which is not yet available in Australia but is likely to be launched here, Australian media companies could be required to share 50% of their inventory with Samsung. To illustrate, if there are 6 ad spots in a piece of video content, rather than an already onerous demand for a share of advertising revenue, Samsung would require the rights to directly sell advertising in three of those spots. Such demands completely undermine the nexus between advertising revenue and content investment for free to air TV broadcasters.

In the US, Roku, Samsung and Amazon all operate their own ad-platforms using the data they gain from the users of their platforms, which means that to most effectively target ads requires use of their own ad servers and demand side platforms.

Free TV submits that the ACCC inquiry process must closely examine this type of conduct and consider the impact that this is having on competition in the local market and the ability of local app developers to continue to innovate and invest in content that Australians rely on. An appropriate regulatory response is also considered in this section 4.

4.2 Demanding payment for prominence and punitive demoting

The ACCC asks how important it is to rank highly in an app marketplace’s search and to be featured in any highlights or spotlight tabs or ribbons displayed by the marketplace. As we expand on in this section, being prominently featured is extremely important to the sustainability of our industry.

As set out in the introduction to this submission, the achievement of the Government’s relevant social and cultural policy objectives relies not only on Australian content being produced and made available but also on Australian content being *discoverable* by Australians. For this to occur our apps must be prominent in the app marketplaces and content recommendation and discoverability features offered on connected TVs and TV aggregation devices.

4.2.1 First instance installation

The largest global streaming platforms, such as Netflix, Amazon Prime and Google Play Movies, have been given an extremely high degree of prominence through preinstallation on many connected TVs and other arrangements such as brand and logo integration on television remotes. These arrangements are likely driven through global arrangements between the manufacturers and the global streaming companies. There is no transparency in relation to these arrangements and this would be an appropriate area for the ACCC to investigate further.

The ACCC asks about self-preferencing of the apps developed by the marketplace providers themselves. In this context, self-preferencing occurs through the pre-installation of content aggregation apps, such as Apple TV+ on Apple devices, Google Play Movies on Android and Amazon Prime on Fire TV Sticks.

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

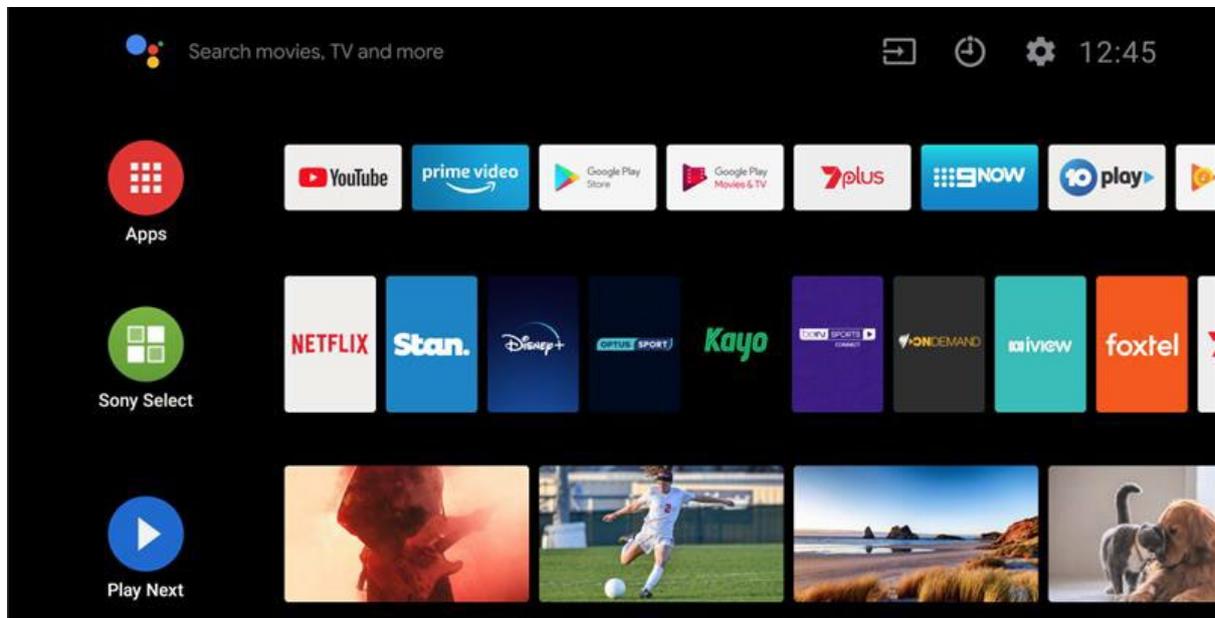
The prominence of an app in the relevant marketplace is important in the first instance installation process. For example, the new Amazon Fire Stick Lite guides users through an installation process that includes a video of how to access the app marketplace and examples of apps that are available. Free TV members were required to quickly negotiate with Amazon for inclusion in this out-of-box experience. Similar installation processes are included for most recent models of connected TVs and set-top-box devices.



Source: Amazon Fire Stick Out of Box Experience

Inclusion in ‘home-page’ and ‘launcher’ features can be charged by providers such as Samsung and Sony at up to AUD 150,000 per annum. An example is included below of the “Sony Select” ribbon within its Android TV implementation. However, manufacturers do not provide any data that would

enable app developers to determine the effectiveness of such inclusions, for example, conversions or number of daily active users. Again, the imposition of such charges, and the lack of data made available to app developers and providers, are conditions that are able to be imposed by manufacturers because they are unavoidable partners in reaching audiences.



Some Free TV members have found that failure to pay the amount demanded by TV manufacturers has led to their apps being demoted in carousels behind niche video content providers such as Red Bull TV.

4.2.2 Getting featured on “Today” tabs and other promotional rails

Most marketplaces include a “featured” or “recommended” section that highlights either particular apps or in the case of TV aggregators, particular content within video apps. Free TV members consider that having access to these features is critical for the discoverability of our content and therefore the sustainability of our content investment.

The ACCC has asked how transparent the process is for being featured in a marketplace. The decisions on which apps are included in these featured tabs or rails is usually driven by editorial teams, based on the content strategy or theme of the month. Media companies pitch to have their apps featured in Samsung, Apple and Sony app stores for connected TVs and aggregation providers.

Free TV members have found, however, that these editorial decisions are impacted by revenue share and other agreements. For example, it is generally harder to get featured without a revenue sharing arrangement in place or if any annual revenue cap has been met.

There is the ability for TV manufacturers and other app marketplace providers to preference their own aggregation apps through featuring them prominently in promotional tabs. This is in addition to the self-preferencing that is available through pre-installation. Further, some marketplaces make it a condition of being featured that an app must be available across all their devices, for example Apple will not feature an app in their Today tab unless it is universally available across iPad and iPhone.

4.2.3 Inquiry should consider regulation of prominence as a matter of public policy importance

Free TV submits that this inquiry should examine the case for regulation of prominence for apps where the provider has a legislative obligation to make Australian content available, such as those that deliver video content that is regulated under a free-to-air TV broadcasting licence issued under the *Broadcasting Services Act 1992*, as well as in the case of the apps made available by the two national broadcasters, the ABC and SBS.

Free-to-air television is required under the *Broadcasting Services Act 1992* to provide a range of social and cultural benefits through our programming. As the Minister for Communications, Cyber Safety and the Arts recently noted:³

We need Australian stories on our screens. It's important to Australia's cultural identity ... That is why, for decades, there have been rules requiring commercial television networks to show specified amounts of Australian drama, documentaries and children's content.

Free TV's members agree that there are social and cultural benefits from ensuring that Australian content is available to Australians. That is why our members have no objection to the recent announcement by the Government of the ongoing imposition of a regulatory requirement that 55 per cent Australian content is broadcast between 6am and midnight on the primary free-to-air TV channels. However, given the evolution in the way Australians access content, not only is it important that our members make Australian content available, but it must also be easily discoverable. In the past, when Australians accessed content by accessing traditional linear broadcasts directly through their televisions, no issues of discoverability arose. But that is no longer the case.

There is a real risk that without action to mandate a given level of prominence free of charge for regulated free-to-air broadcasting services, a winner-takes all approach to prominence could lead to deals between equipment manufacturers and other global video platform providers that have far greater capacity to enter into preferential deals, at the expense of local content providers. The end result will be that the Government's policies for ensuring that Australian content is produced and made available will not be achieved – as that content will not be discovered and viewed by Australians.

There is precedent for adopting a legislative approach to address difficulties in discoverability in at least 3 other comparable jurisdictions.

United Kingdom

In a recent review,⁴ Ofcom recommended to the UK Government that regulatory steps are taken to ensure that public service broadcasting remains easy for TV viewers to find and watch on connected services and devices. The reasons given by Ofcom closely reflect those set out in this submission. Importantly, the UK Government has provided support for public service broadcasting primarily to ensure that UK viewers have access to a wide range of high-quality, original programs that “reflect the UK back to itself”.⁵ Equally, Ofcom recognised that as viewing habits are changing in the UK, it has become more difficult to find public service broadcasting on connected devices, including smart TVs.

³ Available here: <https://minister.infrastructure.gov.au/fletcher/opinion-piece/safeguarding-australian-content-world-changing-viewership>

⁴ Available here: https://www.ofcom.org.uk/_data/assets/pdf_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf

⁵ At page 2.

In responding to Ofcom’s recommendations, the UK House of Lords endorsed the introduction of new legislation to implement a prominence framework in line with Ofcom’s recommendations, noting it is important that public service broadcasting should be more, not less, easy to find in a fragmented media environment. The House of Lords also recommended that the new legislation should be principles based so that it can adapt as technology changes.⁶

Canada

In early 2020, a Broadcasting and Telecommunications Legislative Review Panel, tasked by the Canadian Government to review the legislation governing Canada’s communications sector and make recommendations for its modernisation, issued its report.⁷ The Panel considered many issues that are relevant in the context of the ACCC’s Digital platform services Inquiry, including the current app marketplaces inquiry. The Panel determined that it was an appropriate policy outcome not only that Canadian content is produced and made available but also that it is discoverable by Canadians.

The Panel concluded that:⁸

The discovery of Canadian content is also becoming a greater challenge as Canadians shift to new forms of content, from user-generated to short video and gaming, as well as subscription services with huge volumes of entertainment content provided by foreign platform providers. Foreign companies have been present in Canada for many years. However, their ability to collect and use consumer data through the application of artificial intelligence and algorithmic processes, to customize their offerings and be responsive to changing consumer demands creates a competitive challenge for existing Canadian companies.

To address this issue, the Panel recommended:

- The objects of the Canadian Broadcasting Act should be amended to include that Canadians should be able to find and access a wide range of media content choices, including Canadian choices, that are affordable and reflect a diversity of voices.
- That all audiovisual entertainment “media content undertakings” are subject to obligations to both make Canadian content available and make it discoverable, including by the imposition of catalogue or exhibition requirements, prominence obligations and an obligation to offer Canadian media content choices.

Germany

Germany is in the process of adopting a regime similar to the regimes recommended in the UK and Canada. Amendments to its Interstate Treaty on Broadcasting that will take effect later in 2020 will impose a “findability” obligation on user interfaces provided by media platforms. Media platforms is broadly defined to mean online services that offer users a pre-selected combination of one or more of broadcast media, online media similar to broadcast media and online media that includes journalistically edited news or political information. This will include smart TVs and set-top boxes. Under the new requirement, linear TV broadcasting must be directly accessible, that is, without downloading an app or taking any other intermediary step, on the first page of the user interface and “easy to find”.

⁶ See the report of the UK House of Lord’s Available here:

https://publications.parliament.uk/pa/ld201919/ldselect/ldcomuni/16/1607.htm#_idTextAnchor079 at paragraphs 230 to 240.

⁷ The Report is available here: [https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/\\$file/BTLR_Eng-V3.pdf](https://www.ic.gc.ca/eic/site/110.nsf/vwapj/BTLR_Eng-V3.pdf/$file/BTLR_Eng-V3.pdf)

⁸ At page 116 of the Report.

Conclusion

Although Australia's regulatory regime for free-to-air TV broadcasters differs from the other international regimes considered above, the rationale for legislation to regulate prominence applies equally in Australia as in these other jurisdictions. Free-to-air TV broadcasters (both commercial broadcasters and the national broadcasters) are required to make Australian content available to viewers. However, the policy objective of ensuring that Australians are able to access to this content is only partially achieved by this regulation. The content also needs to be easily discoverable to audiences. Therefore the ACCC should recommend the adoption of an appropriate prominence regime in its report on app marketplaces to ensure that viewers can continue to find and access free-to-air TV linear and on-demand services, across a range of connected devices (including smart TVs, set-top boxes and streaming sticks).

4.2.4 Apple App Store and Google Play Store

The issue of discoverability is not as significant a concern in the context of the Apple App Store and Google Play Store, given the increasing prevalence of Australians accessing our members' content using connected TVs, set-top boxes and streaming sticks, rather than smaller mobile devices. Nonetheless, we wanted to respond briefly on the questions the ACCC had raised in relation to the display of apps in those 2 app stores (questions 23 through 27 in the ACCC's issues paper). We agree with the view that, given both of those marketplaces offer millions of apps, where those apps are displayed and how discoverable (including through use of the search function) they are does have an impact on their success. The operation of search ranking for both of these app stores is not transparent and there is quite clearly extensive self-preferencing, for example, a search in the Apple App Store for "TV" will inevitably result in Apple TV showing at a higher ranking than the apps for any of our members.

Accordingly, it would be appropriate that the recommended legislation for prominence outlined above extend also to app marketplaces available for mobile devices.

5. Relationship between marketplaces and app developers

5.1 Non-negotiable marketplace terms and conditions

In respect of Apple App Store and Google Play, the terms and conditions of access to app marketplaces are generally offered on a “take it or leave it” basis with no genuine opportunity to negotiate these terms. The terms are also subject to change with limited notice to app developers.

This applies not only in the case of connected TVs, but also in the traditional mobile device app marketplaces that are referred to in the ACCC’s issues paper. For example, Apple implemented a change to the terms and conditions of the App Store that required that apps that required a sign-on, must offer “Sign in with Apple” as an option. This example is illustrative of a number of discrete issues with the relationship between marketplaces and app developers. Although Apple stated that this was a change required for protect the privacy of users, it had a significant negative impact on app developers and providers, as described below. Appropriate privacy protections could have been implemented in an alternative manner, without those negative impacts.

First, the change was made with no ability to negotiate with Apple for alternative arrangements. The announcement was made on 12 September 2019. Any apps that were in development at that time had to immediately comply with the new terms and conditions. Existing apps had until April 2020 to comply.⁹

Second, changes in terms and conditions can lead to significant cost implications for app developers. Free TV understands that the implementation of the sign-on change required on average over 100 hours of development in respect of each app of our members. This is a significant cost.

Third, this change fundamentally changed the nature of the relationship between the consumer and the app developer/provider. Rather than a more direct communication between local content providers and their users, Apple now controls that interaction through a hashed e-mail address that routes all communication via their servers. There is no transparency as to how Apple itself uses the information that it is able to obtain by performing this intermediation role.

5.2 App approval process

Free TV members have found the app approval processes on both the Apple App Store and Google Play Store to have both inconsistent timeframes for approval and outcomes. The factors that cause these inconsistencies are not transparent.

Our members have reported submitting minor updates to their apps, only to have these rejected with no clear reasoning for this decision being forthcoming. This requires app developers to then contact a general call-centre in a different time zone to lodge an inquiry about the decision. This is a resource intensive and time-consuming process for app developers.

5.3 Restrictive conditions for in-app payments and subscriptions

The ACCC asks what terms in the Google Play Store and Apple App Store are app providers required to comply with in relation to payments.

⁹ <https://developer.apple.com/news/?id=09122019b>

Both of these marketplaces require that any in-app purchased subscriptions are required to share 30% of the subscription revenue in the first year and 15% in the second and subsequent years. This can lead to substantially different revenue outcomes for app developers/providers who offer premium subscription services through their apps, depending on whether the consumer subscribes through the marketplace or via a web-portal.

Apple and Google may suggest that this is primarily required to meet the costs for the investment and maintenance of a secure payment system. However, Free TV notes that alternative payment systems that are regulated by the Reserve Bank, limit surcharges to the amount it costs a merchant to accept a type of payment for a given transaction.

Free TV submits that this inquiry should carefully examine the rates charged by marketplace operators for handling in-app payments and consider the need for such payment systems to be brought within the purview of the Reserve Bank or another regulatory body.

Relatedly, Free TV understands that apps that attempt to direct users to a web-portal to process subscription payments are banned under the terms and conditions of Google and Apple. The ACCC inquiry should examine whether such terms and conditions are consistent with the Competition and Consumer Act.

5.4 Self-preferencing

In the previous section of this submission, we highlighted the ability of manufacturers and other marketplace providers to self-preference their own apps through pre-installation and inclusion in featured apps tabs. For example, in other markets there is a clear conflict of interest where the hardware and/or operating system vendors have their own content channels competing with third-party apps, such as the Roku Channel and Amazon's IMDB channel.

In addition, manufacturers and marketplace providers can set the default app to execute any requested action, or to integrate with any available voice activation. For example, a simple Siri voice command to play a TV program or a song will default to the Apple TV+ app or the Apple Music app unless the user specifies a different app by name.

5.5 Approach of the US House Judiciary Committee

When considered holistically, the behaviour of app marketplace providers highlighted in this section 5 causes significant consumer detriment. Where a consumer must pay to use an app, or to make in app purchases, the charges are higher than they would otherwise be and there is a chilling impact on innovation. This is because app developers/providers are required to comply with rules that are not always clear and that on occasion (as demonstrated in section 5.1 for example) impose significant costs.

Therefore, the ACCC as part of its inquiry into app marketplaces could consider making recommendations to the Australian Treasurer to address these issues. In this regard we draw attention to the recently released US House Judiciary Committee Majority Staff Report and Recommendations¹⁰ from its Investigation of Competition in Digital Markets which proposed a number of different recommendations which would be appropriate in the Australian context.

¹⁰ Available here: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

In relation to the promotion of fair competition in digital markets, the following suggestions were put forward for consideration:¹¹

- Establishing non-discrimination rules to ensure fair competition and to promote innovation online. In the context of app marketplaces, these rules would require dominant providers to offer equal terms and would apply to price and other relevant terms, including to limit self-preferencing.
- Purchasers of equipment are locked into the use of one app marketplace. The US report suggests that these types of issues could be addressed by interoperability. Although app marketplaces were not specifically mentioned in this context, it is clear that if equipment users were able to access multiple marketplaces, and were not limited to the marketplace of the equipment manufacturer, this would allow other marketplace providers to enter the relevant markets, increasing competition.
- To counter the excessive bargaining power that relevant entities have because third parties depend on those entities to access users and markets, the US report recommended that consideration be given to prohibiting the abuse of superior bargaining power, including through potentially targeting anticompetitive contracts and introducing due process protections for businesses. Although the *Competition and Consumer Act 2010* addresses such issues to a certain extent, the relevant law could be strengthened.

¹¹ As set out from pages 383 to 392.