

# DIGITAL PLATFORMS INQUIRY PRELIMINARY REPORT

Submission from Nine



March 2019

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# 1. Introduction and Executive Summary

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- Nine welcomes the ACCC's preliminary report into digital platforms and thanks the ACCC for the opportunity to respond.
- The key findings in the ACCC's preliminary report raise highly complex issues of public policy. Nine thanks the ACCC for its detailed consideration of these issues.
- We particularly welcome the following findings in the ACCC's preliminary report:
  - confirmation that Facebook and Google have substantial market power that is unlikely to erode in the short to medium term.
  - confirmation that Facebook and Google are unavoidable business partners for businesses looking to reach Australian consumers, including advertisers and news media businesses.
  - that digital platforms play an active role in the supply of news media content in Australia and should not be regarded as pure distributors or mere intermediaries in Australian media markets.
  - the production and private consumption of news and journalism provide significant benefits to both individuals and society as a whole.
- This is a specific market assessment which calls for specific regulations to address the commercial position that Australian media find themselves in when having to deal with businesses that control a substantial part of:
  - the advertising supply chain (Google)
  - the social media market (Facebook including Instagram)
  - search (Google)
  - online video markets (Google's YouTube).
- Nine broadly agrees with the structural and competition issues that have been identified by the ACCC in its preliminary report.
- We commend the ACCC for its balanced approach to addressing the issues through a combination of regulatory intervention and industry support. We request the Commission to also strike this balance in the final report.
- The success of this inquiry will be defined by the extent to which the ACCC's final report can act as the catalyst for driving legislative and other reform to address the various structural and competition issues that have been identified by the ACCC.
- Nine considers that the ACCC's preliminary report provides the right starting point for such reforms.
- Nine has identified four priority areas that we consider require greater focus or additional consideration in the ACCC's final report to produce the most effective result for competition in the Australian media and advertising markets.

- These four priority areas are focused on producing effective regulation and market dynamics to address the competitive imbalance in advertising and media markets caused by the digital platforms with substantial market power.
- The priority areas are:
  1. Greater competition (based on preliminary recommendation 4) through the introduction of a new ex ante regulatory regime to be administered by the ACCC to regulate dominant digital platforms. Such measures would include:
    - the development of a new legislative scheme applicable to digital monopolies modelled on Part IIIA and Part XIC of the Competition and Consumer Act, adapted and purpose-built for digital or virtual monopolies
    - new powers for the ACCC to intervene in markets in which the digital platforms hold substantial market power through the issuance of rules to encourage better competitive outcomes
  2. News media oversight (based on preliminary recommendation 5) through the development of a code which addresses the ranking of journalistic content, copyright compliance and advertising regulatory parity.
  3. Industry support (based on further analysis 3): Nine supports the proposals for a tax offset for news, and personal tax deduction for subscriptions, to address the under-production of news and journalistic content in Australia.
  4. Addressing copyright infringement: (based on preliminary recommendation 7). Nine supports the mandatory take-down standard recommendation with additional requirements of proactive action for known breaches.
- Nine also offers comment on other recommendations and findings, which are important to be addressed over time, once the main competition priority areas have been resolved. In particular, Nine broadly supports the ACCC's preliminary recommendations for search engine choices, a digital platform ombudsman and verification of metrics.
- Nine, however, does not see the need for this review to address broader privacy issues, serious invasions of privacy or unfair contract terms. These are secondary matters in the current context and will not, in Nine's view, move the dial in terms of addressing the substantial market power exercised by digital platforms.
- Nine's submission complements the submissions of Free TV Australia, the Australian Press Council and NewsMediaWorks. This submission should be read in conjunction with those submissions and the recommendations that have been made within those industry submissions.

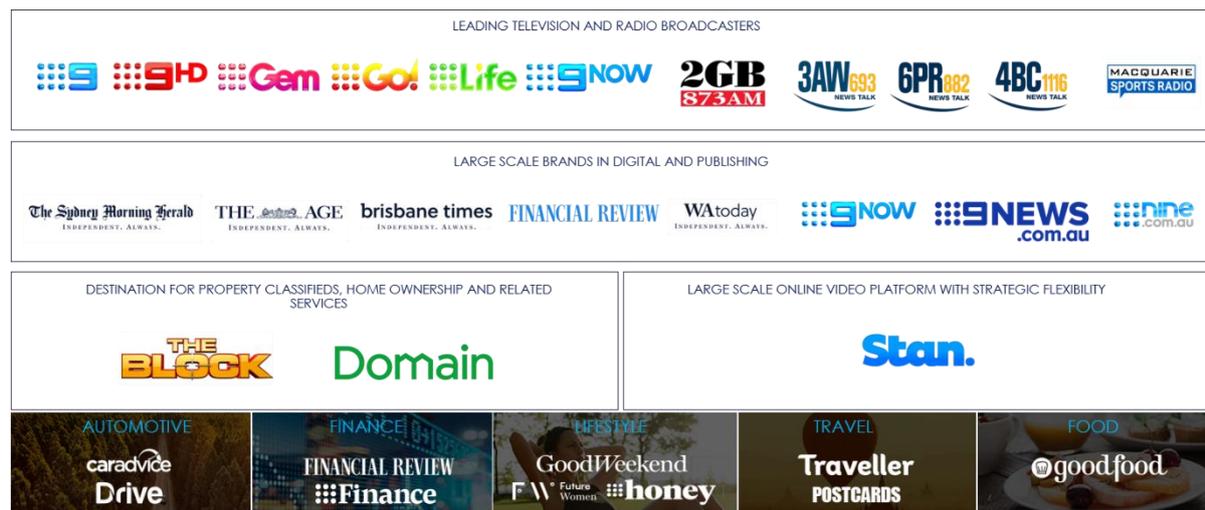
## 2. Nine – A multi-platform media business

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In December 2018, Nine merged with Fairfax Media to create Australia's largest locally owned media company, with investments spanning television, video on demand, print, digital, radio and real estate classifieds. Nine's assets include:

- the Nine Network
- major mastheads, such as The Sydney Morning Herald, The Age and The Australian Financial Review
- digital properties, such as nine.com.au, 9Honey, Pedestrian.TV and CarAdvice
- subscription video platform, Stan
- majority investments in Domain and Macquarie Media

Figure 1.



This response to the ACCC’s Digital Platforms Inquiry, Preliminary Report, reflects the views of the Nine group of companies as a whole.

While Nine has a diversity of interests as a multi-platform media business and these interests are all impacted somewhat differently by the digital platforms, the market structure and competition issues presented by the digital platforms are common to each of our businesses and the contribution of news journalism and Australian content to our culture, democracy and sense of national identity.

### 3. Nine’s relationship with the platforms

Nine’s relationships with the large digital platforms are multi-dimensional, which creates complex issues for Nine and also adds to the complexity of the ACCC’s assessment of competition issues in respect of digital platforms.

Nine is:

- a supplier of content for distribution
- a competitor for the supply of advertising
- a partner for advertising and marketing services
- reliant on traffic referrals to enable the discovery of our content on the internet
- a customer for advertising technology and digital advertising

Nine's traditional business model has depended on proprietary platforms and distribution channels through which it has been able to generate revenue and deliver a sustainable return on our very substantial content investment.

The substantial market power of the platforms has disrupted this model.

In some cases, such as our Metro publishing business's programmatic advertising relationship with Google, we have been able to partner to generate new revenue for both Nine and Google.

In other cases, including our relationships with Facebook and Google's YouTube business, the platform has derived substantial benefits and revenue from Nine's content investment without delivering any material benefit to Nine. In those cases, the platforms' substantial market power provides a significant challenge to the sustainability of investment in professional content.

To provide context to our response, Nine outlines below our relationship with both Google and Facebook.

### Google

Due to Google's vertical integration, product depth and breadth, Nine has numerous touchpoints with Google, which have produced different relationship dynamics depending on the line of business.

While Google is a valued partner for our Metro publishing business, it remains a major competitor for audiences and advertising spend in other areas of the business, including through YouTube.

Nine's response to the Preliminary Report is focused on Google's activity as a:

- Competitor for advertising revenue
- Supplier of advertising technology services
- Trader of advertising inventory
- Publisher and distributor of third-party content
- Partner in the commercialisation of digital inventory

Since our previous submission our relationship with Google has changed due to the merger of Nine and Fairfax completed in December 2018. As a result of the merger, Nine's commercial relationship with Google has become stronger.

Nine's Metro publishing business (formerly Fairfax Media) entered into an advertising and technology partnership with Google in 2018. This has created an opportunity for Google and Nine's Metro publishing business to work together in a mutually beneficial way. The intent of the partnership is to bring together the premium audiences and environments of Nine's mastheads with Google's technical capability to deliver improved outcomes for advertisers and improve the commercial returns the mastheads are able to generate.

Nine acknowledges and appreciates the cooperative nature of our interactions between Google and our publishing business in the programmatic advertising market and is strongly committed to the relationship. To date, the arrangement has contributed to the improved commercial performance of Nine's Metro publishing business, and therefore the sustainability of its large-scale investment in public-interest journalism.

The strength of this commercial relationship has not mitigated the outstanding issues of fairly commercialising our content on the YouTube platform and Google's dominance in the advertising supply chain, as outlined in Nine's previous submission.

Since our last submission Nine has been working with Google's YouTube as a participant in their partner sales program in the effort to find a commercial model for our short-form video content. However, Google's globalised sales model places restrictions on the level of CPM we can obtain for our content and how it is sold into market. This severely limits our ability to effectively monetise our content, which continues to place pressure on the value of our premium content, leading to the potential for commoditisation of our premium news and Australian programming.

### Facebook

Facebook is also a strong competitor for advertising and operates a pervasive distribution platform for our news and entertainment content.

The business model of Facebook as a closed ecosystem should be a concern to policy makers. Due to its commercial model, which heavily restricts the media's ability to monetise their content, no incentive currently exists for Nine to distribute our news content widely.

This lack of a commercial incentive to participate in Facebook's platforms risks a situation arising where Facebook and Instagram audiences (particularly younger generations) are not exposed to credible, high-quality journalism. While we distribute certain news content to amplify our reach and obtain the necessary referrals, we do not see an adequate commercial return that would allow us to sustainably invest in news distribution that reaches a younger demographic.

While we have conducted trials to explore the viability of engaging with Facebook's commercial models, these are not currently viable commercial models for Nine based on Facebook's existing products and services and approach to the market. Therefore, Nine has no meaningful commercial relationship with Facebook.

### New regulatory rules required

Content commercialisation is at the core of our concerns with the digital platforms. On conservative estimates Google's YouTube and Facebook attract a CPM that is 50%-80% lower than what can be achieved on our owned and operated platform of 9Now.<sup>1</sup>

Google and Facebook are significant advertisers and distributors of Australian news and entertainment content, and given their substantial market power, Nine submits that new regulatory rules are required to address these market imbalances and protect the public good of news media and Australian content.

## 4. The Australian media market

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The media sector is unique.

As noted by the ACCC Chairperson, Rod Sims, in a recent speech:

*'news and journalism perform a critical role in society and therefore we cannot rely solely on market forces to deliver this important service.'*<sup>2</sup>

Further, the ACCC Chair stated in the same speech:

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<sup>1</sup> Based on a combination of reserved (higher CPM) and programmatic rates (lower CPM)

<sup>2</sup> <https://www.accc.gov.au/speech/insights-and-impacts-of-the-accc-digital-platforms-inquiry>

*'The digital platforms have not replaced media businesses as creators or producers of news and journalism. If they had, we may simply treat this as an example of creative destruction.'*

The large digital platforms rely on user content and premium content to drive engagement with their platforms. This content underpins their business model, however, due to their substantial market power, content owners and producers are unable to negotiate fair commercial terms for their content. Put another way, digital platforms act as de facto price setters and do not face sufficient competitive incentives to negotiate commercial terms for access to content despite the fact that such content is a critical input into their own businesses.

Since we are not merely arguing “creative destruction”, we ask the Commission to also consider the unique characteristics of the Australian media market when considering the competition issues that will form the final recommendations. These characteristics are:

- the significant restrictions placed on the TV broadcast commercial model under the Broadcasting Services Act 1992 which requires TV networks to be funded by advertising
- the restrictions to TV advertising, including banning or limiting certain categories of advertisers, including gambling, alcohol and children’s products
- the national broadcasters in TV, radio and online, who compete for advertisers (SBS) and audiences
- the high consumer expectations on the fairness and impartiality of news services
- Australia media and news journalism providing a public good

Given these market dynamics, the ACCC should also consider regulatory solutions which take account of the commercial and regulatory challenges to our business as outlined above.

## 5. Scope of review

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The wide-reaching impact of digital platforms is not isolated to news media. As Nine outlined in its initial submission, the substantial market power of these businesses also affects our ability to fund premium Australian entertainment content.

Australian shows including *The Block*, *Australian Ninja Warrior* and *The Voice* contribute to the fabric of Australian society and our national identity.

As outlined in our initial submission:

*Nine submits that it is crucial to look at the impact of the digital platforms on the entire range of content, because each genre is integral to Nine’s ability to continue to function and provide news and journalistic content. The return on investment on all types of content is adversely impacted by the policies and practices of the digital platforms and this, in turn, affects Nine’s ability to continue to deliver quality news and journalistic content. As the viability of Nine’s news services is ultimately dependent on the entire suite of content offerings that Nine provides across all genres, the issues that arise from Google and Facebook monetising third-party content cannot be viewed in isolation, limited to news and journalistic content. This is*

*a systemic problem applying across the board to all of Nine's content categories (or "content pillars").*<sup>3</sup>

As unavoidable business partners with substantial market power, it is necessary for the ACCC's final report to respond to the structural and competition issues that are preventing the Australian media from fairly monetising entertainment content, along with news and journalistic content, on the major digital platforms.

## 6. Time for action is urgent

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The digital platforms are having a profound effect on the Australian media's ability to adequately fund the ongoing quality production of news and premium content. It is therefore imperative that recommendations made in the final report are actionable and practical, and that steps are taken to implement these recommendations in a speedy timeframe.

The success of this inquiry will be defined by the extent to which the ACCC's final report can act as the catalyst for driving legislative and other reform to address the various structural and competition issues that have been identified by the ACCC, including the extent to which any reforms are able to prioritise and produce the best results for the production of news media and Australian content.

This review comes at a critical juncture, as new-entrant "media disruptors" are also now under challenge to find a commercially viable business model. BuzzFeed Australia announced recently that they were cutting eleven positions<sup>4</sup>. This demonstrates that the right regulatory rules are now more important than ever.

Nine submits that the creation of any new regulatory body would stall the implementation of meaningful solutions arising from this inquiry. In this regard, it is important to distinguish between the need for new regulatory tools which are required to regulate digital platforms and identifying the optimal regulatory body that takes responsibility for the implementation of such tools.

Nine submits that, while new legislation and regulatory tools are needed to address the market power of digital platforms, this does not necessarily mean that new regulators need to be established.

Existing regulatory bodies are already well structured to deal with market power and the associated regulatory issues raised by the report. In particular, Nine submits that the ACCC is the appropriate body to administer many aspects of the new rules that need to apply to digital platforms, including the access regime proposed by Free TV and Nine.

The ACCC has already built up a significant understanding of digital platforms through its current inquiry and has decades of experience in relation to the regulation of various historical monopolies. Furthermore, developing new regulatory solutions within an existing institutional framework will ensure that learning from other sectors can be adapted for application to the digital platforms with speed and efficiency. Nine, therefore, does not support the recommendation to set up a new regulatory body to oversee the competition issues raised in this report. This is a role for the ACCC and it would be appropriate for the ACCC's role to evolve to accommodate digital or virtual monopolies.

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<sup>3</sup> Nine submission to ACCC Digital Platforms Inquiry, April 2018

<sup>4</sup> <https://www.news.com.au/finance/business/media/buzzfeed-gives-entire-news-team-redundancy-letters-international-effort-to-cut-costs/news-story/3e0834f4b7ff027beadcf80eb810bb9f>

We request the ACCC and the Government to develop regulatory solutions within the current institutional framework.

## 7. Journalistic and news media content

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Significant analysis and commentary was provided in the Preliminary Report in relation to what constitutes journalism and news content in Australia. This analysis is key to the eligibility criteria for the proposed industry support measures.

Nine submits that the Commission should avoid a framework which leads to “quality-based” judgements on any eligibility.

### Industry Codes

The Preliminary Report goes into detail to define news and journalistic content and outlines the codes which govern the Australian media in an attempt to create a basis for proposed industry support.

Nine’s business operates under two primary industry codes:

**Commercial Television Code of Practice**, which covers the regulation of content and advertising, including complaints handling, restrictions, and standards such as fair and impartial reporting of news. The full code can be found here [http://www.freetv.com.au/content\\_common/pg-code-of-practice.seo](http://www.freetv.com.au/content_common/pg-code-of-practice.seo)

**Press Council Statement of General Principles**, which forms part of the council’s standards of practice and are binding on all print and online publishers who are members of the council. The standards are applied by the council when considering and adjudicating on complaints about instances of their practice. <https://www.presscouncil.org.au/>

The Standards of Practice comprise guidelines on:

- Accuracy and clarity
- Fairness and balance
- Privacy and avoidance of harm
- Integrity and transparency

While the Press Council is referred to as a self-regulatory body, it is important to note that it is overseen by independent community representatives and senior industry representatives.

The digital platforms’ internal policies are in no way analogous to the level of oversight by the Press Council and should not be characterised as self-regulation, but as mere company policy.

Given the robust oversight of Nine’s publishing business which currently exists, Nine does not support or see the need for any further regulatory oversight of the Press Council. Instead, to gain access to the proposed industry support measures, we support a legislative threshold which could include:

- a test around the production of civic and public-interest journalism with an Australian perspective, or news that reports on events of a local and national significance
- an Australian residence test (being incorporated under Australian law and having central management in Australia)
- an independence test (not affiliated with a political party, union, superannuation fund, financial institution, non-government organisation or policy lobby group)

- having a robust and transparent complaints process, with a component of independent oversight
- having in place editorial guidelines, a code of conduct or similar framework relating to the provision of quality journalism

Placing the test in legislation will effectively set the threshold required to be eligible for industry support and digital platforms badging.

### [A platform-neutral approach to industry support](#)

Nine submits that all industry support measures proposed should be platform-neutral and encompass all forms of news media and journalistic content.

The report provides the following commentary on news and journalism.

**News:** information and commentary on contemporary affairs that are taken to be publicly important.

**Journalism:** the activity of discovering, gathering, assessing, producing, and publicly presenting the reporting, analysis, and commentary on news and other affairs taken to be publicly important. It is a process undertaken by journalists, acting in accordance with their interpretations of professional ethics.

**Journalistic content:** any product of the defining processes of journalism, presented as the work of journalists. These products may also be referred to as journalism.

The report outlines the various roles of the news media including: **influencing the knowledge, opinions, and decisions of individuals; holding others to account; campaigning; being a journal of record; and being a forum of ideas.** (Page 244)

It is important when setting out the eligibility criteria for any initiatives to support news media and journalistic content that it is platform-neutral.

Below, Nine offers commentary and examples of the different types of public-interest journalism we provide across all our platforms.

### [Nine's breadth of news media and journalistic content](#)

Nine proudly creates a variety of news journalism, which ranges from succinct coverage of the day's issues through the 6.00pm news bulletin and in-depth and detailed news journalism including reports by *60 Minutes* to in-depth investigations by reporters at *The Age* and *The Sydney Morning Herald*.

All forms of journalism contribute to a well-functioning and accountable democracy. Nine distributes news media and journalistic content across numerous platforms. Below are details of the way that Nine **influences the knowledge, opinions, and decisions of individuals; holds others to account; campaigns; is a journal of record; and is a forum of ideas.**

## 60 Minutes



Over 40 years, 60 Minutes reputation for exposing wrongdoing and fighting for justice is unchallenged. The most recent examples of this are:

### Examples of Public-Interest Journalism

**Hazing rituals:** Allison Langdon's powerful investigation into degrading "hazing" rituals at Australian universities shocked the country. **D for Disgrace** (and the follow-up story, **F for Fail**, which was broadcast in June 2018) led to a major police investigation, and the board of one university residential college being sacked.

**Daruk Boys Home abuses** (March 2018): For 20 years, nobody had listened to the boys, now men, who lived at the Daruk Boys Home on the outskirts of Sydney in the 1960s, 70s and 80s. Then 60 MINUTES broadcast **Home of Horror**. The stories of abuse they told, at the hands of those who were supposed to be protecting them, were horrific. The report also exposed the identities of the perpetrators, leading to four men being arrested and charged with historic child sex crimes.

## A Current Affair



Hosted by 2009 Walkley Award-winning journalist Tracy Grimshaw, *A Current Affair* (ACA) goes to air each week night at 7.00pm with stories on the people and the issues that really matter to Australians. Along with extensive coverage of the big news stories, ACA regularly uncovers scandal, investigates crime, exposes corporate cheats and reveals failures in government departments. ACA has bureaus in Australia's major capital cities and a

team of reporters, producers and researchers committed to delivering the big stories each night.

### Examples of Public-Interest Journalism

**Home Hacker** (JUNE 2018): Last year, MasterChef Australia star Dani Venn and her husband Chris were left without a home after the proceeds from the sale of their old property were stolen, meaning they could not settle on their new property. Dani's conveyancers were using Property Exchange Australia (PEXA) to settle the purchase when the process was compromised by hackers. The Commonwealth Bank was able to freeze \$138,000 of the stolen funds, but \$110,000 was unrecoverable. PEXA blamed the conveyancers for not correctly carrying out the settlement process, refusing to take responsibility until ACA became involved. Following an emotion-charged interview, PEXA relented, gifting the \$110,000 owed to the couple, and announcing it would now guarantee the safety of its clients' money and provide refunds if hackers strike in the future.

## The Age and Sydney Morning Herald



The Age and the Sydney Morning Herald are the country's most authoritative and independent mastheads. Together and separately the mastheads have contributed significantly to informing the public debate through their game-changing investigative journalism.

# The Sydney Morning Herald

In the era of news being available 24/7, powerful investigative journalism, is what stands the mastheads apart from other print-based media and what brings about real change by exposing wrong-doing, prompting inquiries and achieving policy change.

## Examples of Public-Interest Journalism

### The Age

**Police brutality:** In 2018 Australia's most awarded investigative journalist, Nick McKenzie got hold of first person accounts from victims and video footage providing incontrovertible evidence of abuse by uniformed Victoria Police officers.

For several months, McKenzie worked closely with community law firms combining files and speaking to clients who had been brutalised by police. He revealed cases of police misusing their power at the expense of ordinary people – often poorly resourced or mentally ill. The first of the series, which was also produced for ABC's 7.30 program, ranked as one of The Age's top five most read stories online for the year.

### The Sydney Morning Herald

**Political corruption:** Tireless work by *Sydney Morning Herald* investigative reporter Kate McClymont has prompted several ICAC investigations after she exposed corruption in politics, sport, horse racing and the union movement. All her exposes have been important but possibly the most significant was her work questioning the activities of former NSW Labor Party power broker Eddie Obeid. Obeid was ultimately charged and found guilty in 2016 of misconduct in public office. He is currently serving a five year jail term (non-parole period of three).

**Sexual harassment:** In 2017, McClymont worked with journalists Tracey Spicer, Lorna Knowles and Alison Branley in revealing sexual misconduct by Australian television personality, Don Burke. The investigation, published in collaboration with the ABC, revealed that Burke had intimidated, sexually harassed and bullied women throughout his career. The expose was the first of several in Australia relating to appalling behaviour by several high profile figures in the entertainment industry.

### Nine News



Nine is Australia's most trusted, dependable and credible source of news and current affairs. For more than 60 years, Australians have turned to Nine News to be reliably informed about matters affecting their lives. Nine is also home to Australia's fastest growing and most informative regional news bulletins. Every night of the week, Nine News broadcasts 25 simultaneous 6.00pm bulletins across our country.

## Examples of Public-Interest Journalism

**Suspension of licences:** Nine Melbourne exposed a loophole in Victorian legislation which

allowed a killer hit-run driver to get behind the wheel while he was going through the court process.

As a result of a petition, and our story, the state government has commenced a formal review of laws relevant to suspension of licences of those charged with serious traffic crimes, including those resulting in death.

<https://www.9news.com.au/national/2018/01/25/18/15/family-furious-alleged-hit-run-driver-still-allowed-to-drive>

**Aged care:** Nine News exposed Australia's worst nursing home, where residents lived in pain and in fear of assault, were unable to easily access drinking water, and had overflowing colostomy bags. The story was among those that led to growing community outrage, which culminated in the Federal Government's announcement of the Royal Commission into Aged Care Quality and Safety.

<https://www.msn.com/en-au/news/australia/australia%E2%80%99s-worst-nursing-home/ar-AAzsWOD>

## 8. Immediate priorities

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To ensure that the findings of the digital platform inquiry act as a catalyst for legislative and regulatory change, Nine submits that the ACCC and the Government focus on recommendations that will address the core structural and competition issues identified by the ACCC.

Nine submits four priority areas of focus:

- **Competition oversight of content commercialisation and the advertising programmatic market:**
  - Access to the platforms on reasonable terms to fairly monetise premium Australian content
  - Sensible oversight for a fair and orderly programmatic advertising market
- **News media oversight:** where creators of content are protected.
- **Industry support:** to incentivise Australians to pay for quality news journalism and provide tax breaks for companies that create original journalist content.
- **Addressing copyright infringement:** Nine supports the mandatory take-down standard recommendation with additional proactive measures.

## (a) Priority: competition oversight of content commercialisation and programmatic advertising market

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### **Preliminary Recommendation 4**

A regulatory authority should be tasked to monitor, investigate and report on whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct (including, but not limited to, conduct which may be anti-competitive) by favouring their own business interests above those of advertisers or potentially competing businesses.

These functions could apply to digital platforms which generate more than AU\$100 million per annum from digital advertising in Australia.

The regulatory authority could consider the digital platform's criteria, commercial arrangements and other circumstances which impact competition between advertisers, suppliers of advertising services and digital platforms. This may include:

- (a) the ranking and display of advertisements and also organic content (when advertisements are displayed alongside the organic content)
- (b) whether the acquisition of any other product or service from the same digital platform (or a related business) affects the display or ranking of advertisements or content
- (c) the impact of any related business of a digital platform (e.g. how referral links appear in the search engine results page or social media news feed)

The relevant digital platforms would need to be obliged to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers.

The regulatory authority could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.

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### [Access Regime](#)

Nine supports the proposal for an ACCC-administered access regime submitted by Free TV.

The key elements of that proposal are summarised below:

### Free TV's proposed access regime (Page 14) Free TV submission:

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

### Interim measure

Given the market power of Facebook and Google and the significant time a new access regime would take to develop, we consider that testing the use of existing ex ante regulatory tools, such as those available under Part IIA, will be critical in the short term. These tools should be tested in conjunction with Part IV actions being considered by the ACCC.

### (i) Content commercialisation: fair compensation for content

As part of the access regime proposed by Free TV, Nine considers that there should be scope to introduce rules that permit Australian media business to retain control of their own content on digital platforms, including how this content is monetised on digital platforms. This will ensure the Australian media retain control over how their content is presented and commercialised on the digital platforms with significant market power, replicating the outcomes that would otherwise exist if such markets were workably competitive.

Nine in its original submission made the following points:

- Digital platforms have had a profound effect on Nine’s business. They have changed the way Nine’s news and content is discovered; how it engages with viewers; and how Nine promotes its programs. While digital platforms offer wider distribution for Nine’s content, stimulate higher engagement and create a conversation beyond traditional media, they have contributed to a marked decrease in audience and revenue from the free-to-air platform. Evidence of this decrease is presented in the Free TV submission.

- Viewer decline has been driven, in part, by viewers sourcing their news and entertainment content from an array of new digital platforms. As advertisers have increasingly diverted their budgets to these platforms, including those which distribute Nine's content, this has contributed to a situation whereby the digital platforms are effectively "free-riding" on the value of the content that Nine has borne all the costs of producing.
- At the same time as advertising revenues are declining, new transaction costs have arisen as a result of necessary participation with digital platforms, including making content discoverable, meeting the content appetite of users on these platforms, and engaging with Nine viewers.
- Due to their dominance in digital distribution, the platforms have unequal bargaining power in their commercial relationships with content creators such as Nine. They are price setters and have relied on this dominance to put in place policies and practices that favour their own digital advertising services to the detriment of Nine and other competitors for digital advertising spend.
- Content creators are essentially forced to participate with digital platforms to ensure the discoverability of their content. The terms of that participation have been largely dictated by the digital platforms, with no real opportunity for bilateral negotiation in most cases. The terms of participation include the handing over of premium content to digital platforms to drive audiences to their websites, where they can be served advertising for the platforms' commercial gain.

Nine has trialled the available commercialisation tools on the platforms and continues to commercially negotiate fair and reasonable terms for our premium content.

However, the terms which are set are based on their global rules and guidelines, and CPMs remain a challenge. These terms, rules and policies around monetising our content present a risk in sustaining quality Australian news media and content. As they stand, they do not provide enough monetisation opportunities at an appropriate CPM to maintain the quality and standard of the content published to these platforms. They are currently cross-subsidised by the profitable "owned and operated" platforms of Nine.

The ability for Nine to fairly monetise content on these platforms is central to the viability of the current quality and standard of Australian news media and local content.

#### Facebook – current situation

Nine does not commercialise its news content on Facebook, but we attempt to commercialise our entertainment content through content integration. This has achieved very limited success due to the very restrictive advertising policies as outlined below.

Facebook Pages and profiles and Instagram accounts must comply with the following rules:

1. don't include pre, mid, or post-roll ads in videos or audio content.
2. don't include banner ads in videos or images.
3. don't include title cards within a video's first three seconds. Interstitial ad cards outside of a video's first three seconds, such as mid cards or end cards, must not persist for longer than three consecutive seconds and must not be included within Facebook Stories or Instagram Stories.
4. Show Pages must not include branded content in showmarks or trailer videos.

5. don't use the branded content tool to tag a Page, brand or business partner without their prior consent.

6. for Facebook Pages and profiles, don't accept anything of value to post content that you did not create or were not involved in the creation of, or that does not feature you.

7. comply with all applicable laws and regulations, including by ensuring that you provide all necessary disclosures to people using Facebook or Instagram, such as any disclosures needed to indicate the commercial nature of content posted by you.

### Importance of news on social media platforms

News content holds a special place in Australian society and the content ecosystem. An informed society and a free press that holds institutions to account is integral to a well-functioning democracy. To protect the quality and impartiality of our news the Free TV code ensures it is fair and impartial and our commercial content is clearly distinguishable. The Press Council standards state the conflicts of interests that are to be avoided or adequately disclosed.

This presents challenges on Facebook because as soon as content is declared to carry advertising material (Sponsored Content) the whole piece of content is treated as an advertisement regardless of whether it is a news piece carrying an advertisement. We are concerned with news being categorised as an advertisement will adversely affect the engagement of this piece of news content.

Furthermore, allowing pre and mid-roll advertisement through a news story would make the commercial content distinguishable as required by our code and is good practice, yet this is banned on Facebook's Newsfeed. Further, the policy of no title card in the first three seconds of a video post restricts Nine from commercialising the most valuable part of the story. If we were able to insert a title card in a news story we would be able to monetise that content while also clearly distinguishing the content from the commercial partner.

Another commercial challenge with the current Facebook rules is with our choice of news sponsors. For example, on Nine's broadcast news service, our commercial partners would purchase a clearly distinguishable sponsored playout to commercial break and the first run ad in the break. This is a valuable content partnership. We carefully select our partners and how we present their sponsorship. However, we are unable to translate this onto our Facebook/social platforms because we do not get to select the advertiser or how we position them against our content. Controlling selection of our commercial partners is key to our TV business and would assist in monetising our news content on the digital platforms.

Nine's social media news and current affairs team edit and produce news stories for consumption on social media platforms, predominantly Facebook, Facebook's Instagram, and Twitter. If the business model of Facebook does not change, or there is no regulated outcome, news on these platforms will continue to come under pressure as we continue to produce news at a loss to attract the required referrals from digital platforms.

The restrictions in using Facebook described above are a function of the significant market power it holds. We consider it unlikely that Facebook would insist on such rules and force Nine to buy placements using standardised and non-negotiable terms if such a market was workably competitive.

### Entertainment content on Facebook and Instagram

In Nine's first submission we outlined the challenges of the production of entertainment content for social platforms.

This season's social content for Married at First sight reached millions of Australians each day through Facebook and Facebook's Instagram. Furthermore, the daily interactions of likes, views, comments and shares are in the tens of thousands.

Being present on these platforms is important for reach and engagement. However, there is a great deal of production and monitoring required by Nine to have a responsible presence on Facebook and Instagram, yet like news it cannot be adequately monetised.

#### Google's YouTube – current situation

Nine continues to work with Google to resolve some outstanding issues around achieving a commercially viable content partnership. Pleasingly, Google have made key concessions over the last 12 months and are now more open to finding a commercial solution through their premium partner sales for YouTube content. But challenges remain.

While we remain hopeful of progressing to a commercial partnership which benefits both parties, a negotiate/arbitrate model included in the access regime would address the existing bargaining imbalance.

Nine submits that only a regulated response can address these structural issues in the market and that a new access regime for digital monopolies provides the main vehicle for addressing the current imbalance.

#### Access regime requirements for content commercialisation

In relation to regulating content, Nine agrees with Free TV that at a minimum the proposed access regime would require:

- increased functionality, to enable content be uploaded and manipulated by the content owner
- control over the sale of inventory, including pricing
- greater control for 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)
- 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 of Free TV report)

In addition to the Free TV suggestions, Nine would also seek to ensure that any access regime that may be developed can support (or be capable of supporting) the following outcomes:

- the flexibility to choose when advertisements are inserted with options for pre-rolls and cue points
- access to deeper analytics associated with that sponsored content
- greater control and visibility over the intended target of the content, i.e. a more accurate audience number

We acknowledge that the inclusion of these additional elements within a regulated access regime may be perceived as a heavy approach. However, Nine submits that these are the types of behaviours that one would expect to be permitted (or at least negotiable) within the context of a workably competitive market. We acknowledge that how such measures would be structured from a regulatory design perspective will require significant work, but note that these are matters that should be considered further by the ACCC in its inquiry and subject to further industry consultation.

## (ii) Oversight of a well-functioning programmatic advertising market

Nine acknowledges the ACCC proposal to tighten regulation in the advertising market through increasing powers to monitor and investigate. These recommendations, as they stand, do not go far enough to protect and enhance a competitive dynamic in the programmatic advertising market. The Free TV proposal of a new access regime should oversee the digital platforms' conduct in the programmatic auction market. The access regime should be based on the principles of a fair and orderly programmatic auction market.

As stated in our previous submission, Google owns and operates a multitude of businesses at different levels of the digital advertising supply chain and has put in place policies and practices reflecting this level of vertical integration. This allows it to take advantage of its position as a consumer access point and its integration across various levels of the digital advertising marketplace.

This has also created a closed or self-reinforcing system. As the dominant intermediary in the publisher-advertiser exchange, it could be argued Google has been able to capture a disproportionate share of benefits of the value transaction. It is important to note, however, that certain publishers including Nine's Metro publishing business (formerly Fairfax Media) have established commercial arrangements with Google that have enabled them to generate improved returns on their content investment.

Free TV has proposed a set of overarching principles that can be enshrined in an access regime to influence how the advertising market should operate, along with specific examples of the rules that would potentially be available to the ACCC when regulating a digital platform with substantial market power.

Nine is supportive of these proposals about the approach, scoping and operation of any access regime for application to digital monopolies.

These principles are:

- 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.
  - Free from manipulation and other forms of deceptive behaviour or misconduct.
- Orderly
  - Conform to applicable rules.
  - Display reliable market operations.
- Transparent
  - Have clear processes governing how and when buy and sell orders will be matched.
  - Open disclosure of pricing and intermediary fees.
- Economically rational
  - Consistent with best practice auction design.

## (b) Priority: news, digital platform regulatory oversight

### **Preliminary Recommendation 5 – news and digital platform regulatory oversight (page 125)**

The ACCC considers that the regulatory authority proposed in Preliminary Recommendation 4 could also monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.

These functions could apply to digital platforms which generate more than AU\$100 million per annum in revenue in Australia and which also disseminate news and journalistic content, including by providing hyperlinks to news and journalistic content or snippets of such content.

In performing its functions, the regulatory authority could consider the digital platform's criteria, commercial arrangements and other factors that affect competition in media markets or the production of news and journalistic content in Australia. This may include:

- (a) the rankings of news and journalistic content presented to consumers
- (b) the referrals of consumers to media businesses

The relevant digital platforms would need to be obliged to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers. The regulatory authority could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.

Nine supports the Free TV proposal to empower a regulator to oversee the digital platforms including their criteria and commercial arrangements.

The proposal for the digital platforms to submit a code of conduct that covers ranking, disclosure of commercial relationship, advertising classification and complaints handling will help in levelling the playing field and address some of the competition issues arising from the report.

Free TV's recommendation of a principles-based approach to regulating algorithm outputs is a sensible one which does not require the ACCC to be ahead of technology changes.

Free TV advocates for the digital platforms 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 the platforms will ensure care in placement such that inappropriate advertisements are not served to underage users
- complaints will be handled, and the interaction with the ombudsman that has also been proposed by the ACCC

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

- 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
- to ensure that any material or related material that has previously been taken down according to the mandatory take-down standard (see section 8 Free TV submission) is not be ranked.

Nine is supportive of these proposals.

## (c) Priority: improving the ability of news media business to fund the production of news journalists

Nine supports the proposal to provide incentives for Australians to subscribe to news media publications and the proposed offset for the production of news media and journalism.

As outlined in the Fairfax Submission:<sup>5</sup>

*“estimates suggest that digital platforms (particularly Google and Facebook) captured three-quarters of total Australian online advertising expenditure in 2016.*

*“Recent market developments have further broken apart the historic link between advertising expenditure and content investment that was weakened by the internet.”*

Since this link between news and advertising will not return to the levels of the past, and advertising is the legislated source of revenue for Nine’s television business, Nine supports the ACCC proposals for industry support through a proposed tax offset for the production of journalistic content and making personal subscriptions tax deductible.

### Tax-deductible subscriptions

#### Current tax arrangements

Currently, subscriptions to news media and other electronic published material, such as e-books and e-journals, are only tax-deductible where the subscription directly relates to the production of the taxpayer's assessable income. Where the item is only partially used to produce assessable income, the deduction is strictly only available to the extent that it is used for work-related purposes.

Generally, if a subscription costs less than \$300, the taxpayer can claim an immediate deduction where the subscription is used predominantly for earning of assessable income that is not income from carrying on a business.

Examples of taxpayers who currently may claim a deduction for news media subscriptions include:

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<sup>5</sup> Fairfax Submission, Page 5.

- those working in professional services (e.g. lawyers, accountants, investment bankers) who keep abreast of news which may affect their clients, or to obtain new clients
- commodity or share traders conducting research
- journalists researching and investigating topics
- politicians

Conversely, a property investor who purchases a news subscription to keep track of local matters in the location of an investment property cannot claim a tax deduction for that subscription as it does not directly relate to the running and maintenance of the property for earning of rental income.

### Personal tax deductibility of subscriptions

In a challenging advertising environment for publishers, it is likely that consumer subscriptions will play a bigger role in funding large-scale newsrooms and offsetting the progressive decline of advertising revenue.

Over time this is likely to be good for public-interest journalism, due to the alignment that subscriptions provide between the business outcome and newsroom objectives. This makes scaling subscription revenue as quickly as possible both a priority for Nine's publishing assets (i.e. The SMH, The Age, The AFR) and something that would be in the public interest.

Pleasingly, there are signs in Australia (e.g. Nine's mastheads) and overseas that consumers are increasingly willing to pay for distinctive journalism. Nonetheless, there are challenges in rapidly achieving the scale required to maintain the quality and depth of our journalistic offerings.

These include:

- the continued free availability of commoditised news online, including via digital platforms.
- the requirement to change habits of Australians' who have become accustomed to receiving news for free online, including due to Google's first-click-free policy (which has now been overturned).
- the appropriation of original content by other media outlets.
- competition for a share of consumers' online spending with other subscription media, e.g. streaming music, SVOD, overseas publications.

It is also clear that many consumers are price-sensitive when considering whether to take up a news subscription.

In this context, tax deductibility could make a material difference to the ability of publishers with distinctive journalism to scale up their subscription revenue and fund public-interest journalism.

### Tax offsets to produce journalism

As outlined on page 298 of the report, the tax incentive model has worked well in other areas of Australian content. In the screen industries they are used to promote Australian subject matter, employ Australian workers, and support Australian businesses in other parts of the economy.

### Producer offset

The producer offset is available to Australian films and programs, creating cultural benefits for the Australian community as well as economic benefits. To be eligible, a project must

have significant Australian content or be an official co-production. The offset is paid through the production company's tax return after a project is completed and Screen Australia has issued the producer with a final certificate. The value of the rebate is calculated as a percentage of the project's Qualifying Australian Production Expenditure (QAPE). The rebate is 40% of QAPE for feature films and 20% of QAPE for other formats (for example, documentaries, series, telemovies or short-form animation). Broadly speaking, QAPE is expenditure incurred on goods and services provided in Australia for making the production.<sup>6</sup>

Without the producer offset a number of Australian productions would not be viable and therefore not commissioned, or alternatively, the production value and quality would not be as high.

Through a tax offset, Nine is confident of being in a position to invest in more public-interest journalism, particularly in the resource-intensive area of investigative journalism.

Nine submits that this area of further analysis becomes a concrete recommendation in the final report.

### Creating a legislative threshold

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
- qualify for financial incentives

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 (like membership of the Australian Press Council) could be subject to ACMA accreditation.

Nine agrees with Free TV that, by tying accreditation to existing structures, this risks creating a fragmented approach that would leave some local media outlets without an obvious accreditation path. More importantly, it may create an inappropriate nexus between government regulation and some media sectors that are not (and should not) be subject to government oversight on journalistic standards.

Accordingly, Nine recommends the creation of a legislatively determined test for the badging process and financial incentives to hinge on. This threshold was outlined in (section 7).

## (d) Priority: mandatory take-down standard

The ACCC proposes to recommend 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. This may take the form of legislative amendments to the Telecommunications Act so that the ACMA has the power to set a mandatory industry standard applicable to digital platforms under Part 6 of the Telecommunications Act.

Nine has a range of content businesses which require copyright protection to ensure the optimal monetisation of its intellectual property rights.

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<sup>6</sup> <https://www.screenaustralia.gov.au/funding-and-support/producer-offset>

Protection of the rights of the owners and licensees' of premium content is central to the sustainability of the creative industries. We commend the government for recent measures to tighten legislation in this area, but we can go further.

Nine supports the ACCC's recommendation for a mandatory standard regarding digital platforms' take-down procedures, if the timeframes are expedient and the right sanctions and enforcement are in place.

Nine supports Free TV's position, outlined in section 8 of its submission, that the standard would need to:

- include sufficiently detailed 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

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 with only minor variations)
- a process for engaging and cooperating with rights holders, including setting out timeframes within which platforms are required to respond to inquiries and requests for access to rights management tools, etcetara.<sup>7</sup>

#### [Fake advertisements should also be included](#)

Nine submits that this standard also addresses the widespread appearances of fake ads, which are damaging to Nine's brand and the reputation of its talent.

Nine and many of its talent have made public statements on the deceptive nature of false advertisements appearing throughout the Google Display Network and Facebook Newsfeed, making unauthorised use of the images of a number of Nine's on-air talent, including Today co-host Georgie Gardner, The Block's Shelley Craft, Nine News Sydney presenter Deborah Knight, and Eddie McGuire.

These advertisements are presented as news items, with news-like headlines that click through to editorial-style articles, persuading readers to purchase cosmetic products such as skin creams. We understand that many of the individuals who have purchased these cosmetic products as a result of the false advertisements have been misled into providing their credit card details, which locks them into subscription-based contracts for products they believed they were purchasing as a one-off, because they believed they were endorsed by the celebrity.

These false advertisements are being communicated without the express prior permission of Nine or its employees. Nine's rights in relation to its content have not been assigned or licensed for the purposes of the advertisements, nor is there any relevant copyright

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<sup>7</sup> Free TV Submission, February 2019, page 31

exemption available to permit the reproduction and communication of Nine's broadcast, to our knowledge.

The same applies in respect of Nine's presenters where their images have been taken directly from Nine's broadcast signal or other Nine-owned material. We understand from discussions with our presenters and employees that they have not otherwise authorised the use of their image for the purpose of any sponsorship or affiliation with the products featured in false advertisements.

Nine submits that in addition to a new mandatory standard the authorisation liability provisions of the Copyright Act 1968 be amended to clarify the responsibility of the platforms in relation to copyright infringement on their platforms.

Together, a mandatory take-down standard and clarity of the authorisation liability position of digital platforms will provide the necessary framework to ensure platforms take more responsibility for advertisements they are receiving payment for.

## Conclusion on priority areas

Nine submits that prioritising the key recommendations as outlined above will result in better competition outcomes for the Australian media and mitigate the risk of the underproduction of news media and Australian content.

In the following section Nine offers comment on the other recommendations and Area for Further Analysis.

## 9. Merger law – Recommendation 1

The ACCC considers that section 50(3) of the *Competition and Consumer Act 2010*, which identifies the factors to be taken into account in assessing the likely competitive effects of a merger or acquisition, could be amended to make it clearer that the following are relevant factors:

- (a) the likelihood that an acquisition would result in the removal of a *potential* competitor, and
- (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.

### Response

Nine considers that the current terms of section 50(3) of the Competition and Consumer Act 2010 are sufficiently broad to encompass the factors referred to in the proposed amendment.

The current section 50(3) factors are expressed to be mandatory but non-exhaustive and it is not clear what practical consequences would flow from these amendments. Nine submits that the additional factors identified by the ACCC can already be taken into account in any merger analysis undertaken by the ACCC.

## 10. Prior notice of acquisitions – Recommendation 2

The ACCC is also intending to ask large digital platforms (such as Facebook and Google) to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition.

If such a commitment were not forthcoming from the major digital platforms other options could be considered to address this issue.

### Response

The current Australian merger laws and practices and those in other relevant jurisdictions already provide for mandatory or voluntary pre-merger notification. We see a number of practical issues arising from a transactional perspective if additional advance notice needs to be given to competition regulators.

Businesses already face the risk of injunctions, divestiture orders, fines or other significant remedies and penalties for completing transactions without adequate notice being given to competition regulators.

There are also international information-sharing arrangements that subsist between competition law agencies, which can be used to monitor global transactions that impact on multiple or international markets. Moreover, this measure will not address the core concerns of maintaining the viable creation and distribution of local news media and content.

## 11. Choice of browser and search engine – Recommendation 3

The ACCC is considering recommending that:

- (a) suppliers of operating systems for mobile devices, computers and tablets be required to provide consumers with options for internet browsers (rather than providing a default browser), and
- (b) suppliers of internet browsers be required to provide consumers with options for search engines (rather than providing a default search engine).

The ACCC considers that where options for internet browsers and search engines are presented, no option should be pre-selected.

### Response

We support this recommendation but expect that the practical impact of such a measure will be limited. In any case, we also do not regard it as critical to the issues facing media companies and publishers. Whilst diversity of options for internet browsers may over the medium to longer term partly assist in mitigating the market power of Google and provide opportunities to introduce competitive tension into some relevant markets, it will not serve to

address the issues facing media companies seeking to deal with the market power of the two major platforms.

## 12. Review of media regulatory frameworks – Recommendation 6

The ACCC proposes to recommend the Government conduct a separate, independent review to design a regulatory framework that is able to effectively and consistently regulate the conduct of all entities which perform comparable functions in the production and delivery of content in Australia, including news and journalistic content, whether they are publishers, broadcasters, other media businesses, or digital platforms

### Response

Nine agrees with the comments made by the ACCC in the report in relation to the regulatory imbalance. Nine submits that the focus should not be on further review but on reform based on the evidence and analysis, which is captured in the many reviews already undertaken, including this one.

There are several priorities, which if addressed now will contribute to the health of the media industry. These immediate priorities are well known and have already been heavily reviewed, including:

- Abolishing children's quota obligations and providing more flexibility to adult drama quotas on Australian commercial free to air business.
- Removing the disparity of election advertising where there remains a blackout period on broadcast TV which does not exist online.
- Harmonising the classification systems between commercial broadcasters and national broadcasters by allowing the same flexibility afforded to national broadcasters to be provided to commercial broadcasters to set rating timeslots.
- Addressing defamation laws which have failed to keep pace with the way technology has changed how the media and individuals communicate. Defamation litigation in Australia is overly expensive and complex. Key areas for reform include strengthening the availability of defences to protect public-interest journalism, bringing limitation periods for online publications in line with off-line publications, introducing more cost-efficient means of resolving disputes, and ensuring that court resources focus on serious matters only and are not tied up in dealing with trivial matters.

## 13. Use and collection of personal information – Recommendation 8

Recommends to strengthen Privacy law to: (a) Strengthen notification requirements: (b) Introduce an independent third-party certification scheme: (c) Strengthen consent requirements: (d) Enable the erasure of personal information: (e) Increase the penalties for breach: (f) Introduce direct rights of action for individuals: (g) Expand resourcing for the OAIC to support further enforcement activities

## Response

Nine is a strong advocate for an effective privacy regime.

However, Nine also submits that the key findings of the ACCC's preliminary report are overwhelming matters that pertain to structural and competition issues arising in respect of digital platforms. While there is an unavoidable degree of overlap or interaction between privacy-related issues impacting digital platforms and the identified competition concerns, Nine considers that the privacy-related recommendations made by the ACCC are less critical matters.

Nine does not have any particular objection to the following recommendations:

- strengthening terms and conditions to be concise, transparent, intelligible and easily accessible, written in clear and plain language (particularly if addressed to a child), and provided free of charge
- expanding OAIC's resourcing to support further enforcement actions.

These recommendations are prudent and would not present unreasonable burdens on responsible businesses that take privacy seriously.

However, Nine considers that some of the other proposals put forward by the ACCC are excessive and may have inadvertent consequences that negatively impact consumer welfare. This includes the ACCC's proposals on the following:

- the strengthening of consent requirements so that settings for data collection are set to "off" by default
- enabling consumers to require the erasure of their personal information where they withdraw their consent
- direct rights of actions for individuals for breach of privacy

It is important to stress that the collection and use of personal information is critical to the business models of a range of business in Australia (beyond the digital platforms) and that this is also an area of increased focus for Nine. For example, for Nine's advertising business to continue to act as a reasonable competitive constraint on those offered by the digital platforms, it will be necessary for Nine to be able to collect and use personal information without any unreasonable constraints.

A default to "off" requirement could have the effect of preventing Nine from delivering more valuable services to Australians and impact its ability to competitively constraint the digital platforms which will have more touch points with consumers. In the era of machine learning and recommendation engines, the use of personal information provides a valuable input for enhancing the end user experience, including more relevant advertising. This should not be unreasonably constrained.

Nine submits that the proposal for more informed consent will provide for a more informed consumer. If the consumer is aware and consenting to the use of their information, for the purposes stipulated, then the issues around the use of personal information raised in the report are substantially mitigated. It would also mean that the separate recommendation for the strengthening of consent requirements would become less essential.

Similarly, Nine considers that the right for consumers to request the erasure of their personal information is probably excessive. It is possible for consumers to opt-out of receiving marketing communications and this would be enough for most. For example, consumers

may want the flexibility of reactivating a subscription or restarting the receipt of marketing communications without going through the whole process of re-registering.

Finally, Nine does not support an expansion of the right for consumers to take legal action for breach of privacy. While the privacy of individuals is important, the existing requirements on businesses to protect the privacy of consumers are extensive and includes significant penalties. Our preference in this regard is to increase the level of those penalties and to provide additional resources for OIAC to take action, rather than establishing a new cause of action for consumers who suffer a breach of privacy.

In this regard, Nine observes that the right of privacy, while obviously important, is not an absolute right and needs to be balanced against a series of other legal and policy considerations. This includes the right of free speech and the right to know.

Consequently, as a news media organisation, it is difficult for Nine to support a situation where affected individuals are able to action for privacy breaches to challenge negative reporting in the news media. Sufficient protections exist outside of privacy law to protect individuals, such as journalistic standards, codes of conduct, the role of the Australian Press Council and laws of defamation (amongst others).

Nine is happy to work with the privacy commissioner to have a more informed review on these matters.

## 14. OAIC Code of Practice for digital platforms – Recommendation 9

The ACCC proposes to recommend that the OAIC engage with key digital platforms operating in Australia to develop an enforceable code of practice under Part IIIB of the Privacy Act to provide Australians with greater transparency and control over how their personal information is collected, used and disclosed by digital platforms. A code would allow for proactive and targeted regulation of digital platforms' data collection practices under the existing provisions of the Privacy Act

### Response

Nine supports this recommendation if the code is only placed on Google and Facebook, given the significant role played by these digital platforms in Australia.

## 15. Serious invasions of privacy – Recommendation 10

The ACCC proposes to recommend that the Government adopt the Australian Law Reform Commission's recommendation to introduce a statutory cause of action for serious invasions of privacy to increase the accountability of businesses for their data practices and give consumers greater control over their personal information.

### Response

Whilst Nine supports efforts to protect business and consumers from serious invasions of privacy, the introduction of a statutory cause of action is unlikely to prove a practically useful

remedy in most circumstances, given the likely high cost and degree of difficulty in bringing such an action.

## 16. Unfair contract terms – Recommendation 11

The ACCC proposes to recommend that unfair contract terms should be illegal (not just voidable) under the Australian Consumer Law, and that civil pecuniary penalties should apply to their use, to more effectively deter digital platforms, as well as other businesses, from leveraging their bargaining power over consumers by using unfair contract terms in their terms of use or privacy policies.

### Response

Recommendation 11 proposes a variation to the Australian Consumer Law (ACL) to make unfair contract terms illegal rather than voidable and to introduce civil penalty provisions for use of unfair contract terms. The report also notes that the ACCC is continuing to review whether a general prohibition on unfair conduct should be written into the ACL. The ACCC has had considerable success in bringing about changes in contract terms across a range of industries where it has considered terms to be unfair, without the additional penalties which are now proposed.

Both of those proposed changes would apply to all businesses which fall within the operation of the ACL. This would create a high level of uncertainty for all businesses, given the lack of precision about what may be considered “unfair” at any point in the future. This level of uncertainty could increase the cost of doing business (as businesses may need to change the way they carry on business and will need to factor in increased risks), ultimately to the detriment of consumers. There is no evidence provided that, across the economy, businesses are taking advantage of the absence of penalties to include unfair contract terms. It would be preferable to allow businesses to distinguish themselves in a positive way (by having easy-to-read and even-handed consumer terms and providing a superior service experience to consumers and small businesses), rather than establishing a regime which will lead to uncertainty and could increase costs of doing business.

We understand the ACCC’s concerns stem from the behaviour of some digital platforms, particularly in relation to privacy and consent terms. It may be appropriate to consider solutions which address those specific issues, including consumer education and a greater focus by the relevant privacy regulators, rather than seeking to impose uncertainty on all businesses, to address specific activities by a small number of participants in the economy.

## 17. Improve news literacy online

The ACCC is considering measures aimed at increasing news literacy and is considering recommending that the ACMA work with the leading digital platforms to develop a broad campaign targeted at all Australians, to improve their understanding of how news and journalism is curated and displayed on social media and other digital platforms.

## Response

Nine supports the position of Free TV and News Media Works that a news literacy program is a positive initiative for consumers and the media.

## 18. A digital platform ombudsman

The ACCC considers that one effect of Google's and Facebook's substantial market power in the markets for search and display advertising respectively is that some advertisers, particularly small businesses, are unable to negotiate the terms on which they do business with Google and Facebook.

This can be evident in the difficulties businesses may encounter when attempting to seek effective dispute resolution.

The ACCC is considering whether an ombudsman could be established to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of digital platforms. For example, an ombudsman may have the power to resolve some or all of the following:

- a) disputes from businesses that consider digital platforms' representations as to the performance or
- b) likely performance of purchased advertising to be inaccurate or unsubstantiated
- c) disputes from consumers relating to scams and the removal of such content
- d) disputes from media companies relating to the surfacing and ranking of news content
- e) disputes from businesses relating to false or misleading advertising.

## Response

Nine sees merit in this proposal for small businesses as a complaint-handling process. Nine argues, however, that the take-down of fake advertisements should be wrapped up into the mandatory standard proposed in section 8 (d), and should have requirements for digital platforms to be proactive on known and proven issues.

## 19. Monitoring of intermediary pricing

The ACCC considers that a regulatory authority could have the power to monitor the pricing of intermediary services supplied to advertisers or websites for the purpose of digital display advertising. To achieve this, businesses offering these services earning revenue exceeding a certain threshold (e.g. revenue in Australia greater than AUD 5 million) could be required to provide a regulatory authority with details on:

- (a) the median price charged for each product offered
- (b) an explanation of how that price is determined
- (c) the revenue received for supplying each product or service
- (d) any discounts, rebates or other incentives offered to customers

This information should be provided at least once a year, or as required by the regulatory authority.

The regulatory authority could be required to report publicly on this information.

### Response

Nine supports measures to address the disclosure and transparency of intermediary pricing. Nine proposes the most effective way to address this issue is through disclosure in the access regime proposed in section 8.

## 20. Third-party measurement

The ACCC is considering whether there is an ability for advertisers to verify whether advertisements on digital platforms, including Google and Facebook, are delivered to their intended audience and whether there may be instances where the performance of digital advertising is overstated; or advertisers are misled into thinking more consumers viewed their advertisements than actually did.

### Response

Verification is key for marketers to measure the effectiveness of their campaigns. Nine supports the position taken by Free TV in relation to independent auditing of digital platforms' measurement.

## 21. Deletion of user data

The ACCC is considering whether there should be an explicit obligation to delete all user data associated with an Australian consumer once that user ceases to use the digital platforms' services, or whether user data should automatically be required to be deleted after a set period of time.

## Response

Please see Nine's comments in relation to the ACCC's preliminary recommendation 8(d) in relation to the erasure of personal information. This recommendation seems to go further than preliminary recommendation 8(d) by requiring the deletion of all data in respect of an Australian consumer.

Nine considers that such a proposal would be excessive for the same reasons as set out in its response in relation to preliminary recommendation 8(d).

## 22. Opt-in targeted Advertising

The ACCC is considering whether, in addition to proposed preliminary recommendation 8(c), consumer consents in relation to targeted advertising should be further strengthened by prohibiting entities from collecting, using, or disclosing personal information of Australians for targeted advertising purposes, unless consumers have provided express, opt-in consent.

## Response

Please see Nine's comments in relation to the ACCC's preliminary recommendation 8(c) in relation to the strengthening of consent requirements. This recommendation appears to build upon preliminary recommendation 8(c).

Nine considers that such a proposal would be excessive for the same reasons as set out in its response in relation to preliminary recommendation 8(d). Nine also notes that the impact of such a restriction is likely to have an adverse impact on consumer welfare. Other than cutting across the business models of a range of businesses that look to match advertisers with the interests of consumers, this recommendation would result in consumers being served less targeted and focused advertising. It is not clear that this would necessarily present a better outcome either for consumers or advertising businesses.

## 23. Prohibition against unfair practice

The ACCC is considering whether its exposure to issues through this inquiry considerably increases the need for a general prohibition against the use of unfair practices under Australian Consumer Law. Such a prohibition could deter digital platforms and other businesses from engaging in conduct that falls short of societal norms, but which are not currently captured under Australian Consumer Law.

## Response

Nine considers that the practical impact of such a measure will be limited and is unlikely to provide a significantly robust legal mechanism for addressing the substantial market power of digital platforms. These are structural issues associated with markets and competition levels. The augmentation of laws relating to unfair practices appears to be a secondary priority from Nine's perspective.

## 24. Conclusion

Central to this inquiry is the ongoing production of premium news journalism and Australian content. It has been well documented that the digital platforms, particularly Google and Facebook, have disrupted this model through attracting audiences and advertisers to new digital services.

Nine submits that due to the market power of these digital platforms little commercial incentive currently exists for them to address the potential underproduction of this important content.

The Commission has made a good start in its recommendations in the Preliminary report. However, to truly address the central competition issues in the Australian media market caused by the digital platforms, the ACCC needs to fully leverage all the tools at their disposal, including recommending legislative change.

Nine also asks the ACCC to focus the final report on those recommendations which address the fundamental competition issues of: content commercialisation; a fair and orderly programmatic advertising market; tax incentives for the production of news journalism; and appropriately dealing with the infringement of others' copyright.

Given the lack of competition in the market and the substantial market power of the digital platforms, little incentive exists to ensure the level and quality of the Australian news media and local content is maintained.

The Australian Government and the ACCC have a genuine opportunity to do something to ensure:

- the right incentives are in place to encourage Australians to subscribe to news services
- the linking of the right advertising model to premium content to avoid commoditisation of news media and Australian content
- that news is ranked and recognised fairly
- that the platforms take responsibility for the copyright infringements they are enabling.

Nine looks forward to assisting the ACCC and the Government in implementing the outcomes from the final report.

-Ends-