free tv
AUSTRALIA

Submission by Free TV Australia

Implementing the recommendations of the Digital Platforms Inquiry

September 2019

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1. Executive Summary

The ACCC's world leading Final Report makes plain the unprecedented levels of market dominance of Google and Facebook and the impact that this dominance has on the services provided by media companies. In response, Free TV Australia recommends a plan that would implement the vast majority of the ACCC's recommendations as soon as possible.

Harmonising the regulatory framework

Commercial free-to-air television is the most heavily regulated of all media platforms, directly impacting our ability to meet the social and cultural objectives we are relied upon to deliver. Our implementation plan includes a process for finalising reforms to the Australian content quotas, harmonising content classification and advertising restrictions across platforms over time and better aligning the compliance and enforcement regimes.

Commercial negotiation Code of Conduct

The significant imbalance in the bargaining position between media businesses and the digital platforms precludes the normal commercial negotiations that would ordinarily take place in a competitive market. An enforceable Code of Conduct, administered by the ACCC, is necessary to prevent the platforms from restricting the reasonable and sustainable monetisation of Australian news and media content on their platforms and to enable appropriate data sharing by those who derive audience, data and financial benefit from the consumption of content on their platforms.

Mandatory Standard for the takedown of illegal material

The inadequacy of existing takedown practices by the platforms means that our brands, intellectual property and reputations are at risk. The creation of a mandatory code, supported by meaningful sanctions and penalties, can ensure the effective and timely removal of illegal content.

Proactive support for competition and the prevention of anti-competitive conduct

A new ACCC Digital Platforms Branch should undertake an inquiry into the opaque ad-tech market. The inquiry should report to Government on the appropriate form of regulation to apply to prevent self-preferencing by Google and Facebook that substantially lessens competition.

Broadening the regional and small publishers fund for news and journalistic content

We invest significantly in news and local journalistic content, producing high quality, accurate and impartial news services watched by 11 million Australians each week. We support the ACCC's recommended expansion of the regional and small publishers fund to support the production of regional and local news reporting.

Increasing the accountability of the digital platforms

Measures should be taken to increase the accountability of the digital platforms to address the proliferation of fake news. In addition, we support measures to improve the internal complaints handling mechanisms available and the creation of a role for a digital platforms ombudsman.

Data and Privacy

Ineffective enforcement of privacy laws against digital platforms has resulted in a lack of transparency of their data and privacy practices. This is impacting on consumers' ability to provide informed consent in relation to use of their data. The OAIC should be sufficiently well resourced to enforce existing privacy laws against the digital platforms.

2. Highlights of recommended implementation plan

Australian content

Government to conduct a brief targeted consultation with key stakeholders with a view to announcing a finalised policy before the end of the year that supports a strong and sustainable broadcast industry, alongside a thriving local production industry.

Remove outdated election blackout period for political advertising

Immediate deletion of Clause 3A of Schedule 2 to the *Broadcasting Services Act 1992* (BSA).

Harmonise requirements for political matter advertising

Immediate deletion of political matter licence conditions from the BSA to harmonise all platforms under the more recent provisions of the *Commonwealth Electoral Act* in relation to electoral matter.

Remove double handling of offence provisions

Immediate amendment or deletion of section 7(1)(h) of schedule 2 to the BSA to remove the double handling where the communications regulator acts as a second enforcement body for offence provisions that exist under every Act, or law of a State or Territory.

Consistent approach to content classification

Harmonise classification with the most widely understood and used platform to be used as the basis (free-to-air television).

Advertising restrictions

Government to release a statement of policy intent that any future advertising restrictions will apply consistently across all platforms and not solely commercial free-to-air broadcasting, as part of a process of harmonising existing advertising restrictions across platforms.

Code Registration process

Align the Free TV Code development process with that of the national free-to-air broadcasters and require the ACMA to be notified of any changes to the Code.

Code of conduct between digital platforms and media businesses

ACCC to immediately commence consultation on a proposed industry code to form the basis of a new Code of Conduct governing how digital platforms must negotiate with media businesses.

Mandatory standard for the takedown of illegal material

ACMA to commence consultation on a mandatory standard on the takedown of illegal material by digital platforms.

Creation of digital platforms branch within the ACCC

Government to direct and fund the ACCC to undertake an inquiry into the ad-tech market and provide advice on the most appropriate form of regulation.

3. Introduction

3.1 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.

Free TV Australia proudly represents all of Australia's commercial free-to-air television broadcasters in metropolitan, regional and remote licence areas.

3.2 Value of commercial free-to-air television

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.

Our industry is the largest producer and commissioner of Australian content, responsible for $6 out of every $10 spent on domestic content. The latest financial reports by the ACMA show that local content investment continues to grow and now exceeds 80% ($1.63 billion) of all content spending.[1] We are deeply committed to ensuring Australian audiences continue to see Australian faces, voices and stories on their screens.

This programming includes national and local news and current affairs programs, which play a critical role in providing information to Australians. It also includes extensive live and free coverage of sporting events, entertainment programs that give viewers a glimpse into the lives and personalities of other Australians and iconic, high-quality dramas.

The latest ACMA compliance report reveals that every year in a typical market with three metropolitan commercial TV services, Australians benefit from:

- 14,447 hours of local content on the primary channels from 6am to midnight;
- 11,634 hours of local content across the multi-channels;
- 432 hours of first release Australian dramas; and
- 178 hours of first release Australian documentaries.[2]

In addition, every week commercial free-to-air television networks create over 430 hours of news and current affairs programming. We employ hundreds of journalists and support staff to create this volume of news and current affairs content and play an important role in employing and training journalists throughout Australia.

1 https://www.acma.gov.au/theACMA/Library/Industry-library/Broadcasting/broadcasting-financial-results-report
2 ACMA, Compliance with Australian Content Standard and Children's Television Standards, 2018 (Sydney TV1)

3.3 Funding news content requires sustainable monetisation of all content

Commercial TV invests significantly in news, and local journalistic content production is a very important part of our businesses. Free TV members broadcast local news services into every State and Territory in Australia and produce news of specific local significance in around 40 separate markets.

These services are underpinned by the Commercial Television Industry Code of Practice, enforced by the ACMA. The Code requires that news programs be presented fairly and impartially, that factual information is presented accurately and ensures that viewpoints included in programming are not misrepresented.

These high quality, accurate and impartial news services are watched by 11 million Australians each week.[3] Our members cover events of national significance, provide critical information in times of emergency and bring Australians together to witness moments in history, life changing occasions and times of national success.

Indeed, the ACCC Final Report notes that it considers that:

> *"commercial news media businesses perform a central role in providing journalism and contributing to media plurality."*[4]

These are services that are not available on any other platform. However, we can only continue to provide these vital services by earning revenue from advertising.[5] In turn, it is important to appreciate that our ability to sustainably invest in the production of news and journalistic content is inextricably linked to our ability to monetise all of our content, across all genres.

TV schedules are developed in an integrated fashion with inter-related genres designed to build and hold the highest possible audience throughout the peak evening period. The advertising revenue that we can generate is directly linked to our ability to hold audiences through this period. News and current affairs programming plays an important part as a lead-in for the evening programming. But ultimately it is the entire programming offering in a schedule that generates the audiences and therefore the advertising revenue.

Therefore, while the ACCC has referred to "news media businesses" in its Final Report, the recommendations must not only be read in the context of the impact of the digital platforms on news and journalistic content, but on our ability to fund all Australian content through advertising revenue.

In addition, the local content we broadcast delivers enormous cultural and social value by creating and reinforcing our national identity. Our capacity to continue to deliver Australian stories is crucial whether that is through scripted drama, or in popular entertainment programming formats like *Australia's Got Talent*, *The Block* or *Australian Survivor*.

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3 Source: OzTAM (Metro), RegionalTAM (Regional). Network National Reach Estimate for Metro + Regional for minimum of 5 consecutive minutes viewed of Sun-Sat news across the day (incl Morning, Afternoon, Sunrise/Today, excl Specials) on Commercial Primary channels (and regional affiliates). Wks 7-23 2017. Data: Consolidated (LIve + As Live + TSV7).

4 ACCC, Digital Platforms Inquiry Final Report, pg 1

5 Under the Broadcasting Services Act, commercial television broadcasters are expected to primarily generate their income from advertising. See Section 14, *Broadcasting Services Act 1992*(Cth)

The importance of local content has long been recognised in public policy, with strict requirements on commercial broadcasters to meet minimum Australian content quotas across a range of genres. Consistent with our view that Australian content is central to our offering, we continue to support these requirements and have reiterated that support in the ongoing Australian and Children's Content Review, subject to some reforms to reflect how the modern audience is engaging with television.

For our regional members, their local news services are the main, if not only, content that they produce or commission. The ability of these smaller regional television networks to continue to provide local news services is dependent on their ability to monetise all types of programming from their affiliate partners, together with their own news services.

Accordingly, this submission focuses on how the Government can implement the ACCC's recommendations in a way that promotes the sustainability of all premium Australian content, including news and journalistic content. This includes practical measures that the Government can implement to define the types of content that should be the subject of the reform measures, for example defining premium Australian content as material that qualifies under the existing Australian Content Standard.

3.4 Impact of digital platforms on media businesses

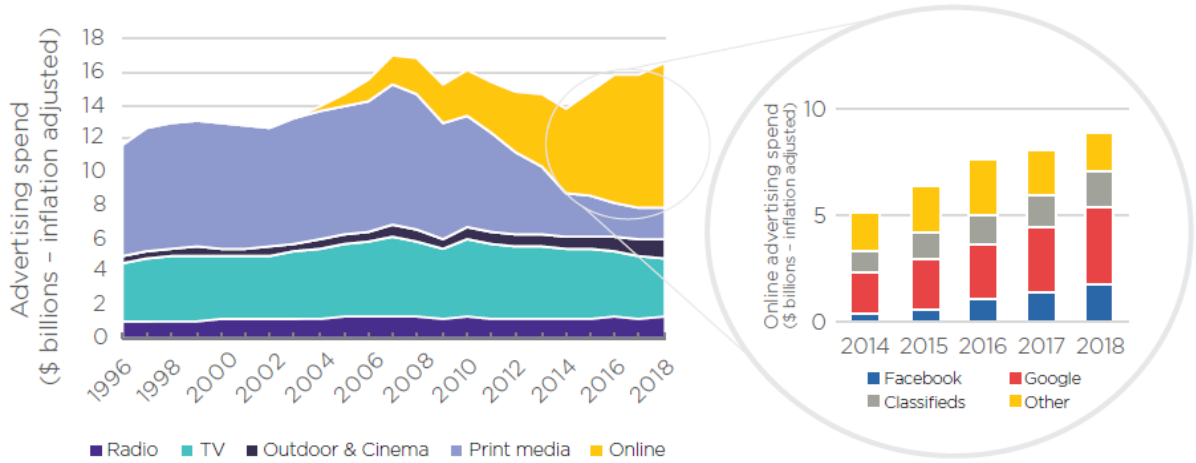
> *"It is important to recognise that the digital platforms have not replaced media businesses as creators or producers of news and journalism. If they had, we may simply treat this as an example of creative destruction: innovation and technological change creating a more effective or efficient product.*
>
> *But Google and Facebook are not creating news stories in Australia. Rather they select, curate, evaluate, rank and arrange news stories produced by third parties, disseminating and greatly benefiting from other parties' content."*
>
> - *Rod Sims, ACCC Chair, Melbourne Press Club 13 August 2019*

Google and Facebook have substantial market power in search and social media and have become seemingly essential to our personal lives and in business. However, as the quote above highlights, the rise of Google and Facebook is not a case of disruption through innovation where new ways of providing existing services are discovered. Rather Google and Facebook have found new ways to deliver and monetise content created by third-parties.

The extent of this problem has been highlighted by the ACCC's analysis of the impact on advertising revenues. In section 3.3 we explained that our investment in premium Australian content relies on our ability to monetise content through advertising revenue. As shown in Figure 1, the revenue available to fund this content has been dramatically impacted by the rise of Google and Facebook.

In real terms, the total expenditure on advertising in Australia has been relatively static over the last decade. However, over this period there has been a significant shift in how much of this advertising revenue accrues to Google and Facebook. Over the last decade, there has been (in real terms) over 400% growth in online advertising revenue.

Figure 1: ACCC Analysis of Revenue Impact



Given that the overall "size of the pie" has not changed, all of this growth has come at the expense of local media companies. In fact, in its Final Report, the ACCC notes that, excluding classifieds, Google and Facebook account for 102 per cent of the growth in the market between 2014 and 2018.[6] The share market expectation is that this growth will continue with the ACCC estimating that as much as 67% of the share price of Google or Facebook is attributable to expected future growth.[7]

This makes implementation of the ACCC's recommendations crucial. Without immediate action to ensure the sustainability of media businesses, the decline in advertising revenue to fund premium Australian content will continue. The result will be fewer services for Australian consumers, including news, and further pressure on the jobs of thousands of Australians employed by our members.

3.4.1 Impact of dominance on commercial bargaining

In its Preliminary Report, the ACCC noted that:

> *"by providing a high quality search service that includes the production of hyperlinks to news content that is accurate, current and relevant to users' search queries (and with those hyperlinks, snippets of relevant news content), Google is able to maintain its standing as a reputable platform for news and other search queries."*[8]

A report by Onlinecircle Digital highlighted that programming provided by commercial TV is some of the most engaging content on Facebook. As shown in Figure 2, in 2017, six of the top 10 most engaging Facebook Pages were related to TV programs. Similarly, the most engaging industries are news and magazines, followed by TV shows. TV channels and networks round out the top 5.

Our content is also driving the most growth, with news and magazines, TV channels and networks and TV shows all featuring in the top 5 industries by fan growth.

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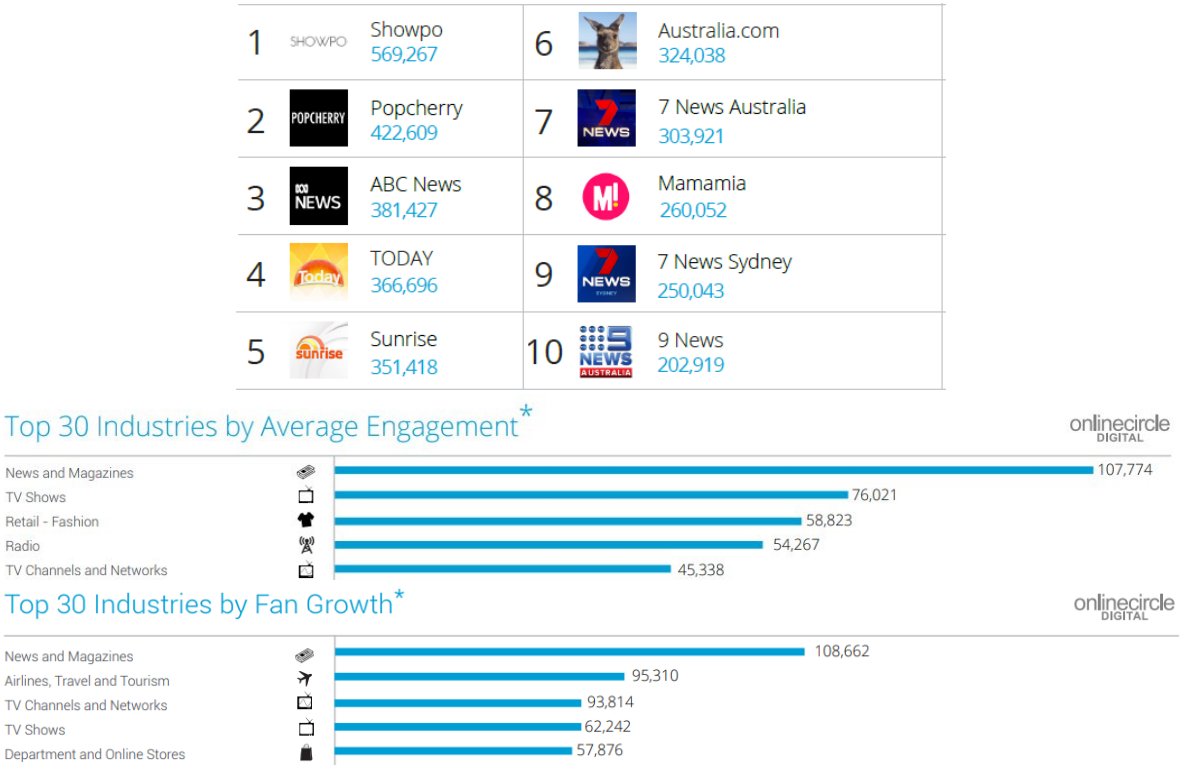
6 ACCC, Digital Platforms Inquiry, Final Report, pg 26
7 Ibid. pg 7
8 ACCC, Digital Platforms Inquiry, Preliminary Report, pg 114.

Figure 2: Value to Facebook of TV content: drives social media engagement



Source: Onlinecircle Digital, Facebook Performance Report, 2017 The Year in Review

These metrics highlight the value of our content both to consumers and the digital platforms. In a workably competitive market, publishers and broadcasters would be able to negotiate with a provider of a digital platform to ensure that the content could be sustainably produced, while allowing both parties to share in the revenue derived from the advertising sold around that content.

However, the market dominance of Google and Facebook means that there is no concept of bilateral negotiation on terms and conditions. The ACCC concluded that Google and Facebook have substantial:

- market power in the supply of general search and social services respectively;
- market power in the supply of search and display advertising respectively; and
- bargaining power in their dealings with news media businesses in Australia.

The ACCC describes Google and Facebook as unavoidable trading partners for a significant number of media businesses and notes:

> *"There is a fundamental bargaining power imbalance between media businesses and Google and Facebook that results in media businesses accepting terms of service that are less favourable."*[9]

Free TV submits that addressing the notion of imbalance, whether in respect of commercial negotiation or the broader regulatory framework, should be the focus of the implementation agenda.

The ACCC Final Report is a world-leading analysis of the impact of the digital platforms. When implemented alongside some minor revisions we suggest in this submission, we are confident that the ACCC's recommendations will make a significant contribution to the sustainability of the media industry to the benefit of the millions of Australians who rely on it every day.

[9] ACCC, Digital Platforms Inquiry, Final Report, pg 206

Implementation plan

The following sections outline our proposed implementation plan for the ACCC's recommendations. This is broken into seven key sections:

- Harmonising the regulatory framework
- Code of Conduct to address market power imbalance
- Mandatory standard on takedown
- Proactive investigation of digital platform competition issues
- Broadening the regional and small publishers fund
- Increased platform accountability and fake news
- Data collection and consumers' privacy.

4. Harmonising the regulatory framework

ACCC Recommendations and key findings

- **What –** That media regulatory frameworks be updated, to ensure comparable functions are effectively and consistently regulated. The framework should, as far as possible, be platform neutral, clear and contain appropriate enforcement mechanisms and meaningful sanctions.
- **Why** – Despite the fact that digital platforms increasingly perform similar functions to media businesses, the current regulatory frameworks have failed to keep pace with changes in technology, consumer preferences and the way in which media businesses now operate.
- **How** – Approached in stages to ensure that regulatory disparities of immediate concern are promptly addressed.

4.1 Importance of removing disparity

Free TV strongly supports the ACCC's recommendation for a staged approach to achieving regulatory harmonisation. In this section we set out our recommended priorities in a staged approach.

Currently, commercial free-to-air television is the most heavily regulated of all media platforms, while digital platforms are virtually free of media regulation. The ACCC Final Report has clearly highlighted the significance consequences of media regulatory disparity, including that it can distort competition by providing digital platforms with a competitive advantage. This is because they operate under fewer regulatory restraints and have lower regulatory compliance costs than other media businesses when performing comparable functions. The ACCC highlight that these costs cover two broad areas:

- compliance costs associated with the time and resources needed to meet the requirements under any additional regulations
- regulatory restrictions that constrain media businesses' commercial decisions and thereby limit their opportunities to generate revenue.[10]

These additional costs and restrictions places commercial free-to-air broadcasters at a disadvantage when compared to competing new entrant businesses, leaving us less able to fund premium Australian content.

Consistent with the ACCC findings, we are not advocating for the same regulation to apply across all platforms. We recognise the special place that commercial free-to-air broadcasting occupies in achieving a broader set of social and cultural objectives. However, we are currently operating under an archaic regulatory framework that instead of promoting the achievement of those objectives, is actually undermining them.

In line with this approach we suggest areas for immediate regulatory reform in relation to Australian content, the election blackout period and the tagging of political matter. These steps and recommendations for future reforms are set out in this section.

[10] Ibid pg. 189

4.2 Immediate priorities for urgent reform

4.2.1 Australian Content

Commercial free-to-air television is the proud home of Australian content. Our sector remains committed to local content and our role as the cornerstone of the Australian production industry. However, this relies on supportive policy settings that allow us to sustainably invest in great content that is valued by today's audiences.

The current policy settings have largely been in place since the 1980s and the production incentive schemes have not been significantly updated in the last decade. This is despite numerous Government review processes, starting in 2012 with the Convergence Review. Appendix C of the ACCC's Final Report lists a number of government reviews and reports in relation to various aspects of regulatory disparity.

Reform is well and truly overdue. Accordingly, the Government's response to the ACCC's Final Report should include steps to finalise the Australian and Children's Content Review, commenced in 2017, by the end of the year.

The ongoing delay in achieving the urgently needed reforms is impacting on our ability to invest in Australian content. This is because broadcasters need both the right policy settings and regulatory certainty as developing and commissioning an Australian production can take a number of years.

We have previously proposed that the priority for Australian content reform should be:

- Abolishing the children's quotas as they are no longer serving the original policy intent and are clearly out-of-step with the modern children's audience;
- Amending the adult drama quota to reflect escalating production costs by rewarding investment in higher budget shows with higher production values and appropriately recognising the value of high-volume serials;
- Equalising the producer offset for all qualifying production expenditure (TV and film) at 40% and remove the 65-episode cap; and
- Allowing equal access to Screen Australia funding by all producers, including free-to-air broadcasters.

Further detail on these measures and their justification can be found in our submissions to the ACCC and our submission to the Australian and Children's Content Review. However, we recognise that like many areas of public policy the ultimate solution is likely to be found in a nuanced mix of solutions and will likely include obligations across a range of platforms.

We consider that focusing on sustainable content production on platforms that align with the preferences of the modern audience creates the best opportunity to achieve the social and cultural objectives that at are at the heart of the content framework. Ultimately, these objectives of telling Australian stories with Australian voices can only be achieved if we are delivering the content where Australians want to watch.

The case for change has been made

Free TV has made substantive submissions across a number of different review processes outlining the public policy justification of the need for urgent changes to the current framework. While policy prescriptions in response vary across stakeholders, there is acceptance that the current approach is

failing to achieve its stated objective of sustainably delivering culturally and socially significant content to Australians. Principally this is because the framework lacks flexibility and demands the production of content on commercial free-to-air television, even if it no longer suits the modern audience.

In particular, it is clear that it is not sustainable for commercial free-to-air broadcasters to continue to produce:

- Children's content that in 2018 was watched by an average 0-13 audience of 3,600 (0.11% of the child audience watched a program made especially for them on commercial TV); [11]
- Adult drama under an inflexible quota system that has seen average audiences halve over the last decade, while costs have almost doubled.

A useful comparison of the requirements on commercial free-to-air television in Australia can be drawn with the amount of content being produced by commercial broadcasters in the UK. This is highlighted in Figure 3 below.

Figure 3: UK Content Production Comparison

In Australia, ACMA compliance data for 2018 shows that Free TV networks broadcast 432 hours of first-run Australian drama and 393 hours of first-run children's programs.[12] By comparison, the recently released OfCom Media Nations report for 2019, shows that the commercial public service broadcasters in the UK (ITV, Channel 4, Channel 5) broadcast 589 hours of UK originated drama, including soaps.

That is, in a market that is over two and a half times smaller than the UK, Australian commercial television broadcasters showed more than 73 per cent of the total UK first-run drama.

Children's programming tells an even clearer story. In 2018, UK broadcasters (including the BBC) showed a total of 661 hours of first-run UK-originated children's programming, but 543 of those hours were on BBC channels. Only 118 hours of first run children's programming were shown on UK commercial television. In Australia, Free TV commercial broadcasters showed 393 hours of first run Australian children's programming in 2018, almost five times more than their UK counterparts.

This clearly demonstrates that the amount of content that the current Australian content quota system is requiring the commercial networks to produce is out of step with a highly comparable market like the UK.

		
	2018	
Population (million)	25.5	66.4
Adult drama (hours)	432	589
First run children's programming (hours)	393	118

[11] Source: OzTAM, 5 City Metro, Total people 0-13, Consolidated 28

[12] Excludes first-run P content

We also note children's quotas on commercial TV broadcasters have largely been abolished in other comparable nations. The United Kingdom abolished children's quotas in 2003 and New Zealand removed them in 2011. Canada also removed children's content quotas in 2011, but requires the nation's public broadcaster (CBC) to broadcast 15 hours per week material for children under 12.

Over 70 per cent of all content transmitted by commercial television licensees on their primary channels is Australian.[13] In order to be able to continue to invest in Australian content across all genres it is vital that regulatory obligations around Australian content are set at sustainable levels to ensure ongoing viability of the industry.

It is clear that the obligations and output of local content in Australia far exceed those in similar international territories. This suggests that the expectations of Australian commercial television broadcasters are not set at a sustainable level and that we must seriously consider whether it is reasonable for this industry sector to continue to be regulated in this manner. In our view, there is a strong case for an overall reduction in the regulatory settings for Australian content as they apply to Free TV members.

Practical implementation and next steps

Free TV is committed to working with all stakeholders on a solution to the acknowledged issues with the existing Australian content framework. To that end, we recommend that the Government conduct a brief consultation on specific proposals for adjustments to the content obligations. This consultation should be targeted with key stakeholders including broadcasters, the production sector and other content providers, with a view to announcing a finalised policy before the end of the year.

4.2.2 Multi-channel quota

Related to the Australian content quota framework is the existing requirement for commercial free-to-air networks to broadcast 1,460 hours annually of Australian content across their non-primary channels (referred to as multi-channels). In the vast majority of television markets across Australia this requirement is easily met. In fact, in 2018, the average amount of Australian content shown on non-primary channels was more than two and a half times greater than the minimum quota requirement.[14] This suggests that the quota is no longer necessary, as the market is clearly driving Free TV broadcasters to deliver increasing levels of Australian content.

However, in 2017 an issue emerged for 12 smaller regional or remote licensees in meeting the full multi-channel quota requirement. This situation occurs in a very limited number of cases, where economic or operational issues have impacted the ability of a small number of licensees to syndicate the complete suite of multi-channels provided by their metropolitan affiliate. This issue was anticipated and was raised with the Government during the Australian and Children's Content Review.

There are two possible approaches to addressing this issue. The first and most administratively simple approach is to abolish the multichannel quota entirely. This would be justified by reference to the fact that in the vast majority of cases the quota is being exceeded to such an extent as to render it meaningless. Abolishing the multichannel quota would have no impact on these markets, but would address the small number of regional and remote markets where it is an issue.

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[13] The BSA requires all commercial free-to-air television licensees to broadcast an annual minimum transmission quota of 55 per cent Australian programming between 6am and midnight on their primary channel.

[14] ACMA, Australian Compliance Reports, 2018, https://www.acma.gov.au/Industry/Broadcast/Television/Australian-content/australian-content-compliance-results.

Alternatively, legislation could be enacted that deems regional and remote licensees to have met their multi-channel quota requirements if the amount of Australian content on the channels they do carry is not less than the amount of Australian content on the equivalent metropolitan multi-channels. While administratively more complex, this would address the issue identified, while leaving the quota requirement in place for the remaining markets.

4.2.3 Election blackout

The Government's implementation plan should include an immediate commitment to delete Clause 3A of Schedule 2 to the Broadcasting Services Act. This clause requires that a broadcaster must not broadcast an election advertisement from the end of the Wednesday before polling day until the close of the poll on polling day, where an election is to be held in an area which relates to a broadcast licence area, or an area where a broadcast can normally be received.

The election advertising blackout only applies to broadcasters (radio and TV). In an age where political parties are using multiple platforms to deliver their messages to voters, there is no justification to continue to apply a restriction to television and radio media. This outdated restriction serves to put commercial broadcasters at a disadvantage to all other media and is entirely at odds with modern marketing techniques.

4.2.4 Tagging of political matter

Broadcasters are also subject to an additional requirement under Schedule 2 for advertisements for "political matter" at any time to end with a spoken announcement in the form of words or images that sets out the name and city of the authorising person. Political matter is defined as 'any matter that appears to comment on, encourage participation in or attempt to influence a certain outcome within a political process'. This obligation does not apply to online, print or digital platforms.

This disparate obligation is having a negative financial impact on commercial free-to-air broadcasters. The ACCC Final Report explicitly refers to the example of an advertising campaign proposed by Facebook that was required to be amended for the TV execution given Facebook's desire to run the advertisement without a tag. While the advertisement was broadcast for a limited run, the unamended advertisement was able to run for longer on every other non-broadcast platform.

This is a clear example of an outdated regulation that is adversely impacting commercial broadcasters to our competitive disadvantage. The implementation plan should include provision for removing the political matter licence condition from the Broadcasting Services Act such that broadcasters would operate under the more recently passed provisions of the *Commonwealth Electoral Act* in relation to electoral matter.

The new Electoral Act requirements apply to a communication that:

- is intended or likely to affect voting in a federal election or referendum, or
- contains an express or implicit comment on the election or referendum, a political party or candidates, or an issue that is before electors in connection with an election or referendum.

These laws apply a consistent regime across all platforms political parties and influencers seek to use to communicate political messages to voters. There is no reason for other advertising platforms to be governed by one set of rules and commercial television (and radio) broadcasters by another.

4.2.5 Remove double handling of offence provisions

A further important legislative provision that applies to broadcasters but not to any other platform is Section 8(1)(g) of the BSA that provides:

> *"a licensee will not use the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory."*

In 2015, the High Court held that the ACMA, an administrative body, had correctly exercised its authority in forming an opinion about whether a broadcaster had committed a criminal offence in the absence of any determination by a criminal court. This ruling meant that the ACMA can make such a determination regardless of whether a criminal court subsequently finds that no criminal offence has been committed, or where a police investigation is not pursued because there is insufficient evidence to establish that there is any case to answer.

Free TV is of the view that the ACMA should not be able to make findings on the balance of probabilities that a broadcaster has committed a criminal offence unless the offence has first been proven in a criminal court, where the burden of proof is on the prosecution and require a test of reasonable doubt.

We therefore consider that the Government should either delete or amend section 7(1)(h) of schedule 2 to the BSA (and its equivalents). An amendment could require that before the ACMA powers under this section are enlivened, the broadcaster would first have to be convicted of the relevant offence under the primary legislation.

Alternatively, the provision could be deleted entirely to remove the double handling that currently exists where the communications regulator acts as a second enforcement body for all offence provisions that exists under every Act, or law of a State or Territory.

The amendment or removal of this provision would not alter the fact that broadcasters would be in breach of the law if they used their broadcasting services in the commission of an offence against a law of a State or Territory. The amendments would simply mean that broadcasters would be subject to the law in the same way as every other platform or individual.

4.2.6 Code registration process

Commercial free-to-air television content is regulated under the Free TV Code, that is developed by Free TV in consultation with the public and must be registered with the ACMA. Before registering the Free TV Code, the ACMA must be satisfied that it provides appropriate community safeguards for the matters it covers; is endorsed by a majority of commercial television stations; and members of the public were given adequate opportunity to comment. Significant penalties apply for non-compliance.

However, despite also offering a free-to-air television broadcasting service, the regulatory model that the ABC and SBS operate under only requires them to notify the ACMA of their Codes of Practice.

Applying disparate regulatory regimes leads to inequitable regulatory outcomes. For example, the SBS Code allows it to broadcast film content that is classified "M" between the hours of 7.30pm and 6am.[15] A similar situation exists for ABC TV that has extended its Code to allow M programming from noon-3pm everyday. However, under subsection 123(3A) of the BSA[16], the Free TV Code must only allow film content classified M to be broadcast between 8.30pm and 5am and noon-3pm on school days. Subclauses 123(3A)(c) and (d) of the BSA should be immediately deleted at a minimum to provide a consistent classification arrangement for all television programs, including films broadcast by commercial and national free-to-air broadcasters.

As part of the harmonisation workstream, the Government should align the Free TV Code development process with the national free-to-air broadcasters and require the ACMA to be notified of any changes to the Code. We note that the ACMA would retain the ability to determine a Mandatory Standard that would act as an effective check and balance on the Free TV Code development process.

4.2.7 Australian content in advertising

Section 122(6) of the BSA requires the ACMA to ensure that there is a Standard in place which has the effect of requiring broadcasters to ensure that at least 80% of their total advertising time between 6am and midnight is taken up with Australian produced advertisements.[17]

This requirement is outdated and precludes the ACMA from exercising any discretion to remake the standard in a way that is appropriate in the context of changing market conditions.

This provision puts broadcasters at a competitive disadvantage to the digital platforms that do not face such requirements and should be removed. Regulation in this area is also unnecessary as broadcasters have consistently exceeded the 80 per cent requirement since it was introduced.

4.3 Medium term reform opportunities

4.3.1 Consistent approach to content classification

Part of the ACCC's harmonisation recommendation focuses on the development of a "nationally-uniform classification scheme to classify or restrict access to content consistently across different delivery formats."[18]

Currently, content on commercial free-to-air television is classified according to the Commercial Television Industry Code of Practice (Free TV Code). In our view, the current television classification system is generally working well, with a high level of consumer awareness and an overall low level of complaint. We would caution against widespread changes to the current classification categories as this would be highly disruptive to viewers and would have a significant cost impact on broadcasters.

[15] SBS Code of Practice 2014, Section 4.6, Pg. 4. Both Codes allow for M broadcast between the hours of noon and 3pm on school days.
[16] Subsection 123(3A) of the Broadcasting Services Act 1992 applies only to industry groups representing commercial television broadcasting licensees and community television broadcasting licensees
[17] Television Program Standard 23 – Australian Content in Advertising (TPS 23).
[18] Op cit. pg. 199

Free-to-air television remains the primary way Australians consume classification information. As a result, it is our audience that will be most affected by any changes to the current classification scheme. The current scheme ensures that the community is informed on the likely content of programming and enables them to make an informed choice of whether it is likely to be suitable for the likely audience. This is based on the well understood G, PG, M or MA15+ classification system set out in the Code.

However, there is a need to address the divergent processes for classifying content across the various platforms. Currently, there are different classification schemes that apply to commercial television, BVOD, SVOD (including a bespoke classification tool operated by Netflix) and cinema content.

Ultimately the resources required to classify all video content means that this role cannot be undertaken by a regulator within government. We consider that a pragmatic solution would be for a regulator to be tasked with reviewing and certifying third-party classification mechanisms to ensure that they meet a prescribed set of principles, harmonised across all platforms.

This would address the current unrealistic process that would, in theory, require that all online content be classified by the Classification Board. Acknowledging that this is unrealistic, we consider that our proposal is a pragmatic solution that would enable all platforms a pathway to have their classification scheme certified, under a harmonised set of principles. To minimise disruption to the most widely understood and accessed platform, as far as is possible these principles should align with those applying to commercial free-to-air television.

4.3.2 Advertising restrictions

The commercial free-to-air platform is the most heavily regulated advertising space in the content eco-system. While this does provide a safe environment for children and families, children are increasingly consuming content through free online platforms like YouTube. As a result, the disparity in regulatory approach between online players and broadcasters is failing to achieve its public policy intention while placing broadcasters at a significant commercial disadvantage.

To address this issue, Free TV recommends that the Government should issue a statement of policy intent that requires that all advertising restrictions going forward must be platform neutral. Further, the statement of policy intent should outline a process for reviewing all existing advertising restrictions on free-to-air television with a view to removing those that are inconsistent or go beyond the restrictions that apply to other platforms.

5. Code of Conduct to address market power imbalance

ACCC Recommendations and key findings

- **What** – Create a set of objective criteria for negotiations between the platform and the media businesses, including in relation to data sharing, algorithm changes, content monetisation and revenue sharing.
- **Why** – Google and Facebook each appear to be more important to the major news media businesses than any one news media business is to Google or Facebook. This provides each of Google and Facebook with substantial bargaining power in relation to many news media businesses.
- **How** – Designated digital platforms to each implement a Code of Conduct to govern their relationships with news media businesses. Each platform's code of conduct should ensure that they treat news media businesses fairly, reasonably and transparently in their dealings with them.

5.1 Achieving competitive outcomes

The dominance held by Google and Facebook has significant implications for the ability of media businesses to negotiate commercial outcomes for the use of our content. As set out in section 3.4.1, our content is some of the most engaging and valuable content on the digital platforms. The fact that premium Australian content has this value on the digital platforms would mean that in a market environment where there was genuine competition between platforms, commercial terms could normally be agreed between media businesses and the digital platforms.

However, given the significant imbalance in the bargaining position, premium Australian content is undervalued by the digital platforms and terms and conditions are presented on a "take it or leave it" basis. The ACCC's recommendation 7 squarely addresses this imbalance.

Free TV has engaged constructively with the ACCC throughout the inquiry process. We consider that the Code of Conduct model that has been proposed is a positive step towards media businesses being able to distribute and sustainably monetise premium Australian content on the digital platforms.

This section sets out our suggestions for the implementation of the ACCC's recommendation for a Code of Conduct, with some minor amendments to maximise the effectiveness of the ACCC's model.

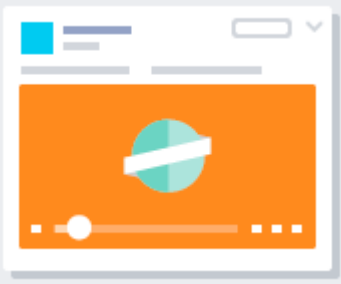
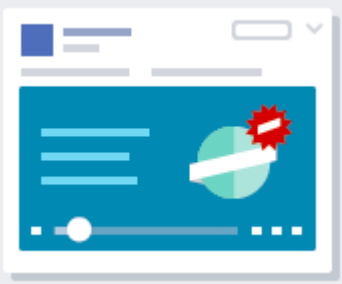
5.2 What problem does the Code address?

The aim of the Code of Conduct is to provide the appropriate incentives for the dominant digital platforms to enter into effective bilateral negotiation with media companies. As noted above, currently the imbalance in negotiating power elicits a "take it or leave it" approach by Google and Facebook.

Under the current framework, when a piece of content is uploaded to a digital platform, the terms of how that content can be monetised are set by the digital platform. That is, rather than the content owner determining how the content is to be monetised, it is the terms and conditions of the platform that dictate the placement and pricing of advertising.

To illustrate, on Facebook Newsfeed there are restrictions on the use of logos, banners and the placement of mid-roll advertisements (see Figure 4).

Figure 4 Facebook restrictions on monetisation

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

Source: https://www.facebook.com/help/publisher/1190980254246452

A further problem with the monetisation of Australian content (including news content) on the digital platforms is the pricing of advertising that is placed around that content. Due to the restrictive nature of the rules stipulated by Facebook and Google, the content owner is given insufficient control over the content that they have created and which they are seeking to monetise. In effect, this means that Australian content is being undervalued and sold at a discount on digital platforms.

Our members also find that the serving of advertising around content is inconsistent and lacks transparency in relation to the factors driving when and to whom advertising is displayed. This inconsistency and lack of transparency means that it is almost impossible to forecast the revenue that can be generated from a piece of content. For businesses that rely on making investments in content based on projected advertising revenue, this lack of clarity will lead to the under-provision of Australian content, including news content.

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

5.3 How a Code of Conduct addresses these issues

We consider that requiring that designated digital platforms submit a commercial negotiation Code of Conduct would address the issues identified above. In our view the purpose of such a Code should be to:

- support the production and distribution of Australian news and culturally significant content;
- have digital platforms and media businesses work collaboratively to monetise Australian news and culturally significant content for their mutual benefit;
- ensure that digital platforms treat media businesses reasonably, fairly and transparently; and
- ensure there is a balance in negotiating position between Digital Platforms and Media Businesses.

Included as a confidential appendix to this submission is a proposed guideline on the minimum requirements that would need to be included in a Code to achieve this purpose. This includes provisions that cover how:

- flexibility is to be achieved to allow media businesses to display and monetise content on the digital platform;
- remuneration arrangements will be agreed between digital platforms and relevant media businesses;
- information will be shared between the parties, including in relation to minimum notice requirements for changes that impact the ranking or monetisation of content; and
- disputes will be arbitrated and settled under the Code, with the provision for a regulator to issue a binding resolution.

These are broadly consistent with the minimum commitments set out by the ACCC in its Final Report.[19]

A Code of Conduct would establish the basis of negotiation between media companies and the digital service providers. In our view, if agreement cannot be reached under a Code, the ACCC should arbitrate the dispute and issue a binding determination.

The inclusion of an arbitral role for the regulator to resolve disputes under a Code is essential. The ultimate aim of a Code of Conduct is to mimic outcomes that could be achieved in a competitive market place. For this to be achieved, the ability of an independent umpire to resolve disputes is crucial for the incentives on the participants throughout the first instance negotiation.

5.4 ACCC is the appropriate body for this role

The ACCC Final Report recommended that the ACMA be tasked with administering the Code of Conduct. Free TV has great respect for the work that the ACMA does as a subject matter expert in content regulation and infrastructure planning. However, to date economic regulation has not formed part of the core work of the ACMA.

[19] Ibid, pg 256

We note that the general approach to economic regulation in Australia is to have sectoral specific teams within the one decision making body. For example, the ACCC has staff dedicated to, amongst other areas, telecommunications, water, rail, electricity and gas.[20]

We consider that administering the Code of Conduct is first and foremost an economic regulatory function, with secondary implications for content regulation. As a result, the Code of Conduct envisaged by the ACCC has more synergies with the existing skillset of the ACCC in terms of using economic regulatory techniques to address market power concerns.

In our view, placing this role with the ACCC would give it the ability to draw on a unique skillset across the one agency in tackling the complex matters described in the Final Report. In addition, we consider that this function would sit well alongside the new functions envisaged for the digital platforms branch.

5.5 Code must cover all businesses making premium Australian content

As set out in section 3.3, while news and current affairs programming is a very important part of our programming, it is not possible to address its sustainability in isolation from the remainder of our content.

Accordingly, we recommend that the Code should set the basis of negotiation between:

- Digital platforms designated by the ACCC;
- Media Businesses – defined as businesses whose primary business is publishing or broadcasting culturally significant Australian news and video content to which appropriate standards apply, including:
    - broadcasters as defined under the Broadcasting Services Act 1992
    - news publishers who are members of the Press Council of Australia or an equivalent body.

We consider that the Code should cover dealings between Designated Digital Platforms and Media Businesses in relation to news content and Australian programs as defined under the *Broadcasting Services (Australian Content) Standard 2016*.

5.6 Recent content deals executed with Facebook

We note that some local content that commercial free-to-air broadcasters create has recently been recognised and valued by Facebook. Under recently announced commercial arrangements, some content will be made by commercial free-to-air networks for the Facebook platform.

However, it must be recognised that the recent limited content deals with Facebook do not address the long-term sustainable monetisation of premium Australian content on their platform.

As a result, these recent announcements should be viewed as a welcome accompaniment (but not a replacement for) the need for a new commercial relationship between media companies and the platforms.

[20] Electricity and gas decisions are made by an independent board on the advice of staff who are administratively part of the ACCC.

6. Mandatory standard on takedown

ACCC Recommendations and key findings

- **What** – The ACCC has recommended a mandatory industry code be implemented to govern the take-down processes of digital platforms operating in Australia.
- **Why** – A mandatory code is intended to enable rights holders to ensure the effective and timely removal of copyright-protected content from digital platforms.
- **How** – The Code is to be developed by the ACMA in consultation with industry including rights holders and digital platforms.

6.1 Mandatory Copyright Takedown Code

Free TV supports the ACCC's recommendation that a mandatory code be implemented to ensure the effective and timely removal of copyright-protected content from digital platforms, to be enforced by the ACMA. A well drafted mandatory Code supported by meaningful sanctions and penalties for breach and subject to effective enforcement will incentivise the digital platforms to work with rights holders to address online piracy.

The implementation plan should therefore include a direction to the ACMA to begin consultation on a mandatory code. The inadequacy of existing takedown practices by the platforms means that our members' intellectual property, brands and reputations will continue to be at risk until an effective and functioning mandatory code is in place.

In supporting the ACCC's proposal for a mandatory code in its Preliminary Report, we highlighted that its effectiveness would depend entirely on its terms. A 'weak' industry standard without clear obligations would risk further undermining rather than clarifying authorisation liability, allowing rights holders to avoid liability.

Free TV is pleased that the ACCC has recognised this risk in its Final Report, making the following critical point:

> "the code must set out clear rules that address the current challenges in enforcing copyright on digital platforms for its flow-on impact on a court's assessment of authorisation liability to be of value to rightsholders".[21]

The ACCC goes on to recommend that the mandatory code should include the following matters:

- A framework for cooperation between rights holders and digital platforms that enables proactive identification and prevention of copyright infringing content online;
- Measures to improve communications between rights holders and digital platforms, including requirements for digital platforms to make people available in Australia during business hours and during periods where key Australian live events are broadcast;
- Reasonable time-frames for the removal of time-sensitive content such as live broadcasts;
- Mechanisms for rightsholders to make bulk notifications to address repeat infringers/infringements and to sanction users who commit multiple or regular infringements;

[21] ACCC, Digital Platforms Inquiry Final Report, pg, 277.

- Measures to develop or improve content matching/unauthorised content identification procedures; and
- Measures to streamline the process for rightsholders to prove copyright ownership (eg in cases where there is joint authorship).

We agree with these findings but also note that in addition to the matters set out by the ACCC, in order to be effective, the Code should contain clear obligations on digital platforms to:

- optimise technologies to detect infringing content, for example automated detection by technologies such as Content ID, upload filters or other techniques;
- ensure that content is prevented from reappearing once it has been removed (including content which is effectively duplicate infringing content with only minor variations);
- respond to inquiries, including requests for access to rights management tools, within clear timeframes;
- remove infringing live content immediately;
- terminate user accounts (as well as block / blacklist the opening of new accounts by the same individuals) if they have been warned twice to remove infringing material and they persist in the infringing activity;
- automatically remunerate rights holders for any advertising served by the platform against infringing content upon detection of that content.

The administration of the code should form part of the ACMA's operating framework.

6.2 Authorisation infringement under the Copyright Act

The ACCC has noted in the Final Report that it did not consider it appropriate to propose broad amendments altering the operation of the Copyright Act as part of its inquiry.[22]

In Free TV's view, amending the authorisation infringement provisions so that they operate effectively in the online environment is an important part of the solution to the problem of online piracy and the Government should move to ensure that the authorisation provisions under the Copyright Act are clear and operating effectively in tandem with developing a mandatory code.

As Free TV noted in its submissions to the ACCC inquiry, the decision in *Roadshow Films v iiNet* shows that the current authorisation infringement provisions are not working in the online environment as they were intended to.[23] The Court in that decision found that iiNet had no direct technical power to prevent its customers from using the BitTorrent system and that it could not be inferred from iiNet's inactivity after receiving AFACT notices that iiNet had authorised copyright infringements by its subscribers. This was despite the fact that iiNet had the technical power to prevent infringing activities by suspending or terminating user accounts, as well as a contractual relationship with users whereby they agreed not to use iiNet's service to infringe copyright. This decision severely limits the circumstances in which an ISP can be found liable for authorising copyright infringement.

While the ACCC states that its view is that the impact of this decision on digital platforms is not clear,[24] that uncertainty is a problem which needs to be addressed. In Free TV's view, it is clear that digital

[22] Ibid, pg, 262.
[23] Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16.
[24] Ibid, pg, 261.

platforms are different to ISPs in that they actively participate in making infringing content available by:

- providing or selecting infringing content for a use;
- recommending infringing content based on an algorithm; and/or
- commercially gaining from making infringing content available.

However, as the ACCC has alluded to, whether or not this would make it more likely that the authorisation provisions would work more effectively in relation to digital platforms remains very unclear.

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

> *"Extending authorisation liability is essential to ensuring the existence of an effective legal framework that encourages industry cooperation and functions as originally intended, and is consistent with Australia's international obligations."* [25]

Therefore, while a mandatory code as recommended by the ACCC will assist to provide the practical steps and processes required to remove infringing material, we recommend that the authorisation provisions of the Act also be clarified to provide an effective legal framework that provides the incentive for digital platforms to remove pirated material expeditiously.

6.3 Expansion of take-down notice scheme to cover other content

The ACCC's Final Report acknowledges the problem of fake advertisements that use the intellectual property, identity or branding of an individual or company but does not propose an adequate solution to this problem.

In our view, these false and misleading advertisements should be managed in the same way as copyright infringing material and should be subject to the same mandatory code on takedown. Fake advertisements that are permitted to remain online for extended periods because of inadequate take-down processes not only devalue broadcasters' intellectual property but also significantly damage our business reputations and brands and those of the affected individuals.

The ACCC proposes that complaints of this nature be dealt with by an independent ombudsman. While Free TV is supportive of the establishment of an independent ombudsman (see section 9), we do not think that this sufficiently addresses issues such as the misuse of celebrity identity on the digital platforms. Ombudsman processes such as the one proposed by the ACCC can take weeks or in some cases months to resolve. Fake advertisements that misuse the identity of third-parties should be expeditiously removed in the same way as copyright infringing material.

As such, the Government's implementation plan should include a direction to the ACMA to begin consultation on a mandatory standard for takedown, including in relation to the removal of fake advertising described above.

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[25] Commonwealth Attorney-General's Department, Online Copyright Infringement, Discussion Paper, July 2014.

7. Proactive investigation of digital platform competition issues

ACCC Recommendations and key findings

- **What** – Proactively monitoring and investigating instances of potentially anti-competitive conduct and conduct causing consumer harm by digital platforms, which impact consumers, advertisers or other business users.
- **Why** – Given the substantial market power of each of Google and Facebook, their presence in a significant number of related markets and the opacity of their key algorithms, there is significant potential for self-preferencing by Google and Facebook to substantially lessen competition.
- **How** – Establish a specialist digital platforms branch within the ACCC to build on and develop expertise in digital markets and the use of algorithms.

Free TV considers that the Government's implementation plan must include additional resources for the ACCC to establish and maintain a digital platforms branch. Consistent with the ACCC's recommendation 5, this branch should be tasked with undertaking an inquiry into competition for the supply of ad-tech services. Free TV outlined a range of potential existing competition issues with the current conduct of the digital platforms in submissions to the ACCC.

As we set out in this section, this inquiry should both examine the existing competition issues and determine market rules for the future conduct of the digital platforms.

7.1 The challenge for competition regulators

The ACCC Final Report clearly sets out the significant degree of market power enjoyed by Google and Facebook in their respective markets, while correctly pointing out that competition law is only breached when this market power is used for an anti-competitive purpose.

The Final Report of the ACCC notes two recent examples where the European Commission has found evidence of anti-competitive conduct:

- the decision in March 2019 that Google had abused its dominant position by imposing unfair restrictions on owners of publisher websites which prevented them from partnering with rival suppliers of advertising services
- the decision in July 2018 that requirements imposed by Google on mobile manufacturers to pre-install certain apps as defaults in order to licence other proprietary apps amounted to an abuse of Google's dominance in licensable smart mobile operating systems.

The challenge for competition regulators is to detect anti-competitive conduct in a timely manner and seek court enforcement action and penalties. The experience to-date is that such ex-post enforcement action has been slow and ineffective in preventing future anti-competitive conduct.

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

In announcing that decision, the Commission stated:

> *"From 2008, Google began to implement in European markets a fundamental change in strategy to push its comparison shopping service. This strategy relied on Google's dominance in general internet search, instead of competition on the merits in comparison shopping markets."* [26]

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

In respect of Australia, the ACCC Final Report notes issues with a lack of transparency in the ad-tech market. The ACCC found that it is unclear how Google and Facebook rank and display advertisements and the extent to which each platform self-preferences their own platforms or businesses in which they have interests. In the ACCC's view, this gives rise to the risk of anti-competitive conduct:

> *"Given the substantial market power of each of Google and Facebook, their presence in a significant number of related markets and the opacity of their key algorithms, there is significant potential for self-preferencing by Google and Facebook to substantially lessen competition."*[27]

Accordingly, we welcome the ACCC's recommendation to establish a bespoke digital platform branch to undertake an in-depth inquiry into these competition issues. In our view the direction to begin the inquiry should also include a requirement for the ACCC to provide advice to Government on the most appropriate form of regulation to apply on an on-going basis, taking into account the issues the ACCC identified in the conduct of the inquiry. In our view (and as we elaborate on in the next section) the best solution to these competition issues is for the digital platform branch to administer a set of up-front digital market rules designed to prevent the abuse of market power.

7.2 Formal up-front market rules are the first best solution

The dominant digital platforms, in this instance primarily Google, offer a range of services across the ad-tech supply chain. Some of these services can also be sourced from third-party vendors, which then rely on interoperability with other parts of the supply chain supplied by the dominant platform.

The Final Report of the ACCC has found that there is both the incentive and the opportunity for the digital platforms to favour their related businesses in this supply chain. However, as also highlighted in the Final Report, there is very little transparency around the operation of this market.

We strongly consider that an ex-ante regulatory framework is the solution that will most effectively prevent welfare harming competition issues to arise. As noted in the earlier section, merely relying on traditional competition law approaches has been shown internationally to be a slow and largely ineffective method of dealing with these issues.

These issues could be avoided if there were a set of ex-ante market rules established by the ACCC that included a set of minimum criteria, such as:

- Strong and effective protections that ensure interoperability with third party vendors and mechanisms to ensure that the platform cannot unduly incentivise or lock participants into using the platform's products or services as opposed to acting in the best interests of the participant's customers

[26] http://europa.eu/rapid/press-release_IP-17-1784_en.htm
[27] Op cit, pg 12

- Effective mechanisms to ensure that no company can use its substantial market power in one market to extend or leverage that power into other markets to the detriment of competitors
- Industry participants being precluded from favouring their own advertising services or inventory by
    - Excluding rivals, or
    - Providing an undue advantage to their own services through rankings, access or other technical or commercial means
- In respect of auction processes, clear rules that require that where a dominant platform acts as a market maker, it has an obligation to provide an unbiased auction platform with transparent processes that clearly establish how and when buy and sell orders will be matched
- A process of price notification to the market and/or the regulator to enable a price monitoring function to be implemented.

Free TV considers that there is already ample evidence of the digital platforms enforcing terms and conditions of service that limit interoperability with third party vendors and the bundling of services to exclude rivals. However, the ACCC has found during its review process that competitors in the supply chain have been unwilling to come forward to share information with the ACCC. This is to be expected given the market dominance of the digital platforms.

We would expect that a focused inquiry on the ad-tech stack, complete with information gathering powers, would enable the ACCC sufficient scope to collect the required information. This should then form the basis of advice to Government on the most appropriate form of regulation to apply to the market.

8. Broadening the regional and small publishers fund

ACCC Recommendations and key findings

- **What** – Provide targeted Government assistance to support forms of public interest journalism that are at risk of under-provision.
- **Why** – There is a risk of under-provision of public interest journalism in national, regional and local communities. That risk has increased with the growth of digital platforms and the financial stress this has placed on advertising-funded media organisations.
- **How** – Replace the Regional and Small Publishers Jobs and Innovation Package with a $50 million per annum targeted grants program that supports the production of original local and regional journalism.

Free TV's members employ hundreds of journalists throughout Australia, producing hundreds of hours of news and current affairs programming every week. Consumer research has consistently shown that Australians value, rely on, and trust commercial free-to-air news services. The ACCC highlighted ACMA research that found that regional Australians exhibit distinct preferences in their consumption of local news, favouring traditional media formats. This study found that the most trusted source of local news in regional areas was commercial television.[28]

The free-to-air sector's employment of high calibre, award winning investigative journalists plays a key role in providing important checks and balances on our political and legal processes by facilitating transparency and accountability. From matters such as challenging non-publication orders, reporting on court cases and investigating instances of alleged corruption, Australians rely on us to be their eyes and ears. In doing so, our journalism plays a crucial role in a healthy functioning democracy.

This importance and reliance that Australians place on commercial TV news is important context in considering the policy prescriptions for the urgently needed financial support of news content.

8.1 Targeting specific types of journalism and regional news coverage

Free TV supports the expansion of the Regional and Small Publishers Jobs and Innovation Package that encourages the production of local and regional journalism. As set out by the ACCC, the problem that this solution is designed to address is twofold:

- Declines in public interest journalism in areas such as local government and courts, health and science reporting
- A sustained decline in local and regional news coverage more broadly.

These are vital services that are not being replaced by alternative news sources as the advertising revenue available to fund them is diverted to the digital platforms. Further, the ACCC made clear the issues with relying on news obtained online:

> *"Consumers accessing news through digital platforms potentially risk exposure to unreliable news through 'filter bubbles' and the spread of disinformation, malinformation and misinformation ('fake news') online."*[29]

[28] ACCC, Digital Platforms Inquiry Final Report, pg 291
[29] Ibid, pg. 280

Free TV therefore agrees with the ACCC that there is a role for direct Government support for the continued production of news and journalistic content in these categories. We therefore support the replacement of the Regional and Small Publishers fund with a targeted grants program with a significantly expanded budget.

However, in doing so, the implementation plan must also address the flaws in the previous model. We consider that the program should be expanded and explicitly support the product of local television news services. Such an expansion should include removing the existing turnover threshold. In our view, it is important that the criteria for funding from the amended grants program focus on the services being provided by the media business, rather than its earnings.

Free TV notes, however, that the definition used by the ACCC as to what constitutes "local" journalism was not very specific. This will need to be subject to further consultation in the drafting of the funding guidelines for the fund. As a starting point, we consider that this definition needs to include regional and rural locations as well as smaller city populations within the regions where television news is more cost prohibitive.

We would support the creation of a new body for the purposes of administering this grants process, via an independent panel supported by a secretariat drawn from the Department of Communications and the Arts. Given that the ACMA has ongoing compliance and enforcement responsibilities for the sector, we question whether it would be appropriate for the same regulator to be administering a grants process.

Free TV and some of its members have also suggested alternative solutions, such as utilising the tax system, to incentivise and support television news services which we believe remain worthy of deeper consideration by government.

9. Increased platform accountability and fake news

ACCC Recommendations and key findings

- **What** – Ensure consumers and small businesses have appropriate avenues for complaint and dispute resolution processes that conform to a regulated set of minimum standards and address the risk of risk of consumers being exposed to deliberately misleading and harmful news when using digital platforms.
- **Why** – There is an absence of effective dispute resolution to address the growing concerns on the use of social media to make false representations and propagate scams. Similarly, there is a need for consistency of treatment of serious incidents of disinformation, which is an increasing concern in Australia and internationally.
- **How** – Establish either a new ombudsman or create a new function of the existing TIO to resolve complaints and disputes with digital platform providers, improve news literacy in the community and ensure digital platforms have an enforceable Code of Conduct on how they counter fake news.

A central plank of the ACCC's Final Report relates to increasing the accountability of the digital platforms for the harms caused by the misuse of their platforms. Importantly, this includes taking steps to genuinely address the use of their platforms for scams and the proliferation of fake news.

9.1 Complaints resolution and ombudsman

The ACCC Final Report highlights that in 2018 alone, Australian consumers reported losses of $15.7 million from scams that occurred on online platforms and AU$16.5 million from scams that occurred on the internet. Similarly, victims of social media-based dating and investment scams reported losses of AU$9.3 and AU$3.3 million in this year respectively.[30]

Free TV members and their employees have had firsthand experience in seeing how these scams operate on the digital platforms. For example, the identities of various celebrities in our industry have been abused on the digital platforms to mislead consumers into purchasing goods and services including unwanted subscriptions to cosmetics, crypto-currency investment decisions and erectile dysfunction medication.

Importantly, what we also discovered from these examples is how difficult it can be to report these scams to the digital platforms and have meaningful action taken to remove the offending content from their platforms.

In our example, we consider that as the material related to the use of our brands, content and talent identity, achieving quick and effective take-down of the offending material would be most appropriately managed through the scheme discussed in section 6. However, for other matters we consider that requiring the digital platforms to put in place a meaningful and local dispute resolution process is critical to allow consumers and small businesses to have other scams adequately addressed.

An ombudsman scheme that operates with the same funding model with incentives for complaints to be addressed quickly and by the digital platforms in the first instance (as applies in

[30] Ibid, pg 504

telecommunications) should form part of the Government's implementation plan. As recommended by the ACCC, the internal disputes resolution processes of the digital platforms should be regulated, with ACMA to determine minimum standards.

9.2 Address the proliferation of fake news

The ACCC's Final Report takes a multi-faceted approach to addressing the proliferation of fake news. First, it suggests requiring that the digital platforms implement a Code of Conduct to improve their processes for dealing with fake news on their platforms. Second, it recommends that the ACMA be tasked with assessing the performance of the digital platforms' initiatives to signal the credibility of news presented on their platforms. Third, on the consumer side, the ACCC recommends strategies to increase digital news literacy. Free TV supports these practical measures that we consider will assist in addressing this issue.

9.2.1 Code of Conduct a welcome step

We consider that the Government's implementation plan should include the creation of a new role for the ACMA to administer a Digital Platforms Code of Conduct to manage disinformation. We note and agree with the ACCC's findings that "addressing these issues is too important to be left at the sole discretion of digital platforms alone."[31] This should include the necessary legislative changes to ensure that the regulator has the information gathering powers required to undertake this function.

An important threshold question for the implementation of this recommendation is the definition of the harm that is the focus of the Code. The ACCC has recommended that this threshold be set at content that is likely to cause "serious public detriment". In its view, this threshold would be likely to capture information such as:

- doctored and dubbed video footage misrepresenting a political figure's position on issues
- incorrect information about time and location for voting in elections
- information incorrectly alleging that a public individual is involved with illegal activity.[32]

Free TV considers that this threshold may be too high and further consideration should be given to the EU Code threshold that captures content that "may cause public harm." The ACCC notes that this may be more appropriate in the EU context given that they have "already experienced" harms including social media interference.[33]

However, in our view, Australia is unlikely to be immune from the problems that have been experienced in other jurisdictions. We therefore consider that applying emerging international best practice in this area is the appropriate response.

9.2.2 Voluntary mechanisms to signal credible news sources

While Free TV supports the measures discussed in this section to mitigate the spread of fake news and to improve the ability of citizens to detect fake news, the primary defence mechanism that we have as a society against disinformation is to have a strong and vibrant news media sector. News from our sector comes from journalists operating under a strong Code of Practice that requires fairness and

[31] Ibid, pg 369
[32] Ibid, pg 370
[33] Ibid, pg 371

impartiality in reporting. The Code is enforceable by an independent regulator, with significant penalties available for non-compliance. As a result, Australians continually respond positively both in terms of ratings, but also in terms of research results that note that commercial TV news continues to be highly valued and trusted.

When accessing news from digital platforms it is essential that consumers are able to determine the source of that information. This is what links the professional journalistic standards imbued in the content created by our members, and Australians accessing information via digital platforms.

The ACCC recommendations include new information and evidence gathering powers to allow the ACMA to report back to Government on the effectiveness of digital platforms' voluntary credibility-signalling mechanisms, as well as the necessity of more direct regulation in the future.

Free TV recommends that the Government's implementation plan include provision for the ACMA to undertake this role. Further, a 12-month deadline should be set for the ACMA to report to Government on whether further action is required to ensure that Australians can readily identify reliable and trustworthy sources of news featured on digital platforms.

9.2.3 The role of news literacy

Free TV agrees that increasing the news and digital literacy of the community has a part to play in countering the fake news that is available on the digital platforms. We agree with the ACCC's recommendations and suggest that the implementation plan include the:

- provision of digital media literacy resources and training via a program similar to the Online Safety Grants Program currently administered by the Office of the eSafety Commissioner; and
- inclusion of digital media literacy in the Australian school curriculum review scheduled for 2020.

In addition to these measures, we consider that the ACMA should be tasked with creating a public information campaign to work in concert with the other initiatives to assist consumers identify credible news sources and to improve news literacy in the community more generally. As a major source of news content that is used by the digital platforms, we would also welcome the opportunity to be involved in the framing of this campaign.

10. Data collection and consumers' privacy

ACCC Recommendations and key findings

- **What** – Reform and strengthen laws **protecting consumers' private information in light of the increasing volume and scope of data collection in the digital economy.**
- **Why – To address the bargaining imbalance between consumers and digital platforms and give consumers greater control over their data and personal information.**
- **How – Make wide ranging reforms including in the** Privacy Act, in the Competition and Consumer Act, by way of an enforceable code of practice regulating digital platforms' privacy practices and by introducing a statutory tort for serious invasions of privacy.

10.1 Collection of data and consent to data processing

10.1.1 Transparency and control for consumers paramount

The ACCC's Final Report found that while digital platforms provide a wide range of valuable services to consumers in exchange for consumers' attention and their data, consumers are not necessarily making informed choices that align with their privacy and data collection preferences.[34]

Free TV agrees with the ACCC's findings that transparency and control are key to privacy protection and the validity of a consumer's consent to use of their personal information, and that the nature of digital platforms' consent processes could be improved.

Transparency and control are essential to enabling consumers to make informed choices in selecting services that process personal information in a way that meets their individual privacy preferences. The ACCC's Consumer Survey, referred to in the Final Report, confirms that 'most Australians using digital platforms consider that there should be transparency and choice in how digital platforms should collect, use and disclose certain types of user data.'[35]

As noted by the ACCC, it is concerning that there has been significant information asymmetry between consumers and digital platforms in relation to the terms on which they collect, use and disclose personal information of their users. In Free TV's view, ineffective enforcement processes have been a significant issue.

10.1.2 Achieving effective enforcement

Free TV is not convinced that substantial changes to Australia's privacy laws are required. Privacy laws and the Australian Privacy Principles were most recently reviewed with the new principles having come into effect in 2014 following a lengthy consultation period. In our view they are up-to-date and generally working well. In particular (and as detailed further below), they already:

- provide a broad, internationally recognised definition of what constitutes 'personal information';
- contain obligations to deal with personal information in an open and transparent way;

[34] Ibid, pg 374.
[35] Ibid, pg 382.

- require APP entities to obtain consent to use personal information for purposes other than those for which the information was disclosed in the first place (with only limited exceptions).

As identified in various sections of the ACCC's report, the key issue with regulation of the digital platforms is effective enforcement of the laws that are already applicable to those platforms. As such, given the significant and unprecedented amount of data collected by Google and Facebook, the Government should ensure the OAIC is appropriately resourced to ensure that the platforms are incentivised to comply with existing laws. For example, the OAIC could conduct regular audit processes in respect of the platforms to facilitate enforcement of existing laws. This would encourage the platforms to take proactive steps to comply with existing laws, rather than addressing issues once large-scale privacy breaches have occurred.

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

If further economy-wide changes to existing privacy laws are considered, there should be further consultation regarding the proposed changes with all affected stakeholders first. Many privacy stakeholders may not have focused on or engaged with the digital platforms inquiry and the implications of the ACCC's proposals on their business operations are likely to be significant.

The ACCC's recommendations could result in Australia having an even more onerous privacy regime than Europe. For example, in Free TV's view, the ACCC's interpretation of "personal data" and proposed effective adoption of GDPR-like laws but without the GDPR's "legitimate interests" basis for processing would not be in the interests of Australian consumers nor the Australian economy, and the impact of these two recommendations alone would likely have significant unintended consequences.

While the ACCC's report has focussed on privacy developments in the EU, Free TV's view is that any future privacy consultation process should also consider developments in the US and other jurisdictions. In particular, Free TV notes that Business Roundtable members in the US have recently developed and submitted to Congress, a uniform national consumer data privacy framework to give consumers greater control of their personal data and how it is collected, used, shared and protected.[36] Free TV understands this proposal has the endorsement of CEOs from 51 major US-based companies.

Any changes to Australian laws should consider this proposal alongside the GDPR and any other international developments and come up with an approach that is best suited for Australian consumers, in consultation with affected Australian privacy stakeholders.

We address the ACCC's specific proposals further below.

10.1.3 Retain a consistent and clear definition of personal information

The Final Report recommends that the definition of 'personal information' should be updated in the Privacy Act to clarify that it captures technical data such as IP addresses, device identifiers, location data, and any other online identifiers that may be used to identify an individual.

[36] https://www.businessroundtable.org/policy-perspectives/technology/privacy-2

The Final Report cites the problem to be solved as the fact that there is no consistency in how 'personal information' is defined and used by the digital platforms.

Free TV has a number of concerns with this recommendation. Firstly, regardless of the definition provided on platforms' websites, the relevant definition of 'personal information' is the one set out in the Privacy Act. It provides:

> *"personal information" means information or an opinion about an identified individual or an individual who is reasonably identifiable:*
>
> *(a) whether the information or opinion is true or not; and*
>
> *(b) whether the information or opinion is recorded in a material form or not.*

This should be the definition applied to digital platforms in Australia regardless of whether they seek to apply an alternative definition on their website. The OAIC should work with digital platforms to ensure that they are complying with the existing definition at law. Where online identifiers identify an individual (or where a person is reasonably identifiable), then information about the individual associated with the identifier will fall within the definition of personal information. However, where that is not the case, online identifiers should not be deemed to be personal information under the law.

Free TV notes that the Final Report refers to the EU's treatment of 'personal data' under the General Data Protection Regulation (GDPR) as a basis for this recommendation.

Free TV does not think that Australia should introduce a new definition of personal information that is inconsistent with our existing approach to defining personal information. We recommend maintaining our existing approach where identifiers such as IP addresses, cookies, device IDs etc will be 'personal information' where they are combined with other data which relates to an identified or identifiable person.

The OAIC has provided guidance in Australia on this point already, namely that where data on its own does not identify an individual, it is not personal information, but where such data is put together with information that identifies an individual, it should also be treated as personal information. In our view, the OAIC should provide more detailed guidance on the circumstances where identifiers, and information associated with identifiers (such as browsing information), will become 'personal information'.

This approach will also more easily allow the law to account for changes in data practices and technologies, as clarification via guidance provided by the OAIC can be more readily updated and adjusted as required. Legislative changes on the other hand, will codify the issues of the day and not be able to keep up with evolving practices and resulting public policy problems.

Similarly, Free TV would be concerned that adopting "inferred information" as another category of 'personal information' appears to be unnecessary on the face of the existing law.

10.1.4 Consent

The ACCC has recommended that the consent requirements and pro-consumer defaults under the Privacy Act be strengthened. Specifically, it has recommended that opt in consent should be obtained whenever a consumer's personal information is collected, used or disclosed by an APP entity, unless the collection, use or disclosure of personal information is necessary for the performance of a contract

to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason.

The ACCC further recommended a requirement that any settings for data practice relying on consent must be pre-selected to 'off' (which we will call "Mandatory Opt in Approach") and that different purposes of data collection, use or disclosure must not be bundled.

When the impact of this recommendation along with the impact of the recommendation of the broadening of the definition of personal information and not adopting a "legitimate interests" basis for processing are considered together, it becomes immediately apparent that what consumers currently accept as standard and accepted practices when they use websites would no longer be acceptable. This would result in a very clunky and slow online experience for consumers and in Free TV's view, a more pragmatic approach needs to be considered.

In Free TV's view, increased transparency is the key to strengthening consumer consents. Existing privacy law already provides a clear and appropriate framework in relation to when consumers' consents should be obtained and when they will be valid. Notably, the Privacy Act provides that consent means 'express or implied consent' and the OAIC's Australian Privacy Principles Guidelines provide that consent requires that:

- **the individual is adequately informed before giving consent**
- the individual gives consent voluntarily
- consent is current and specific;
- the individual has the capacity to understand and communicate their consent; and
- that consumers have a means of withdrawing their consent at any time.

Free TV therefore does not agree that existing laws need to be strengthened. However, Free TV acknowledges that there is a problem with the digital platforms not obtaining adequate consent from consumers and that the Government should address this.

In Free TV's view it is important to draw a distinction between:

A) Practices which are not transparent to the consumer and where the consumer would not have a reasonable expectation that their personal information would be used or disclosed in a particular way; and

B) Practices which are transparent or where such a reasonable expectation does exist.

This distinction already applies under our existing principles-based privacy law. Under APP 6, an entity can generally only use or disclose information for a purpose for which it was collected (the 'primary purpose'), however exceptions to this general rule apply where either the individual has consented to a secondary use or disclosure or where an individual would **reasonably expect** the APP entity to use or disclose their personal information for the secondary purpose, and that purpose is related to the primary purpose of collection.[37]

If there is to be any move to a Mandatory Opt in Approach, Free TV believes it should be only with respect to practices in A above. This might include provision of the personal information to a third party for the third party's own use, or targeted advertising on platforms outside the platforms of the

[37] APP 6

first party collecting the personal information. It should not be required with respect to practices in B above, which might include targeting on the sites of the first party collecting the data, traffic measurement and analytics. Customers reasonably expect when they visit a site that the site operator would be measuring traffic to the site and customer use of the site. They would also reasonably expect to be served targeted advertising on the sites of the party collecting the data based on their use of that party's site(s) (but not "off network").

In Free TV's view, a principles-based approach to law making ensures that the law can accommodate changes to reflect community understanding and attitudes over time. For example, the ACCC's report has found that there is 'widespread consumer discomfort' with online tracking practices, despite it being a common practice. This suggests that, these practices are occurring despite the fact that at least in some cases they are not within the reasonable expectation of consumers, contrary to the current law under APP 6.

By way of example, in Free TV's view, essential processing and measurement analytics such as Google Analytics which enables the measurement of traffic to websites is likely already within consumers' reasonable expectations and should not require an 'opt-in' consent. By contrast, there is greater consumer concern in relation to online tracking and collection of personal information via Google's location tracking and Facebook's Onavo Protect VPN.[38]

Free TV notes that the GDPR similarly allows the processing of personal information where it is within the reasonable expectations of the user. It provides that the processing of personal data, where it is necessary for a company's legitimate interests or the legitimate interests of a third party, will be lawful unless there is a good reason to protect the individual's personal data which overrides those legitimate interests.[39]

While Free TV favours a principles-based approach to law-making and does not think that the law itself requires strengthening in this area, the ACCC report does suggest that the current law is not being effectively enforced. In addition, the OAIC could play a role to increase consumer understanding about the collection of data in exchange for the provision of free online content services. These practices in many instances have the potential to be of great benefit to consumers, and to provide a more relevant and targeted online experience. However, in order for consumers to consent to these services, they need to understand how their data is collected, for what purposes and how it will be used.

10.1.5 De-identification of data

The ACCC has recommended that consideration be given to whether there should be protections or standards for de-identification, anonymisation and pseudonymisation of personal information to address the growing risks of re-identification as datasets are combined and data analytics technologies become more advanced.

Free TV notes that under existing privacy law provisions:

- APP entities are required to give individuals the option of not identifying themselves, or of using a pseudonym (APP 2); and

[38] Op cit, pg 414
[39] GDPR, Principle 1

- APP entities are required to de-identify or destroy personal information if it no longer needs the information for any purpose for which it may be used or disclosed under the APPs (APP 11).

The Privacy Act also gives specific guidance on when personal information is 'de-identified'; it provides that personal information is de-identified 'if the information is no longer about an identifiable individual or an individual who is reasonably identifiable'.[40] The OAIC provides guidance on the risk of re-identification, stating that organisations should consider destroying personal information if the risk of re-identification cannot be appropriately minimised.[41]

For this reason, Free TV's view is that the law in this area is clear, however the OAIC should consider whether any updated guidance is required on the risk of re-identification. The ACCC appears to have taken a dim view on de-identification, however it should be recognised that de-identification is good privacy practice, and that data in de-identified form is secure and poses no risk of harm to the individual from whose personal information it was originally derived. De-identification has significant security benefits and should also be seen as a legitimate alternative to deletion of personal information, where applicable.

10.1.6 Direct rights of action

The ACCC has recommended that the Privacy Act should be amended to give individuals a direct right to bring actions and class actions against APP entities in court to seek compensation for an interference with their privacy.

Free TV does not support this recommendation. Actions such as these are generally not effective in addressing consumer concerns and are in practice available only to those with the resources to bring Court action.

A better approach would be to ensure the OAIC is appropriately resourced to enforce privacy laws as outlined above.

10.1.7 OAIC privacy code for digital platforms

The ACCC has recommended an enforceable code of practice developed by the OAIC to enable proactive and targeted regulation of digital platforms' data practices (DP Privacy Code). This would apply to all digital platforms supplying online search, social media, and content aggregation services to Australian consumers and that meet an objective threshold regarding the collection of Australian consumers' personal information.

Free TV recognises that particular issues have arisen from data practices of the digital platforms, or 'big data' companies such as Facebook and Google. The privacy issues arising from the practices of these companies are unique and a direct result of the unprecedented scale of the data they collect and store which has led to their market dominance. The more users they have, the more data they collect, the greater uses that can be made of that data and the greater the commercial advantage that accrues. The result is the market dominance of virtual monopolists.

The critical mass of data achieved by digital platforms such as Facebook and Google serve as a major barrier to entry for new entrants and increases competitive pressure on existing market participants. The dominant position of Facebook and Google removes any impact that natural forces of competition

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[40] Privacy Act, s 6(1).

[41] https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines/chapter-11-app-11-security-of-personal-information/

would have in driving compliance with privacy laws and engaging in good information management practices.

The dominant position that these companies hold with respect to data collection and management has resulted in large-scale privacy breaches in a number of instances. This is a direct result of the scale at which companies like Facebook and Google can access data on users as a consequence of their near monopoly position in their respective markets, and the nature of the data they have access to. They are not sufficiently incentivised to comply with the law and instead take a 'risk-based approach' to privacy which is harming consumers.

In Free TV's view however, many of the issues that have arisen are a direct result of the fact that existing privacy laws have not been effectively enforced against the platforms. In Free TV's view, achieving effective enforcement of existing laws, as outlined above, should be the starting point for regulating digital platforms' data practices.

10.2 No statutory cause of action

Free TV does not support a statutory cause of action for serious invasions of privacy. The current framework of legislative, common law and regulatory protections is extensive and generally working well. This framework includes: Commonwealth, State and Territory legislation in a range of areas which impact on reporting (including in areas such as family law, evidence, children and young people, adoption, surveillance devices and many others); common law actions including breach of confidence, trespass, nuisance, defamation, malicious falsehood and contempt; and industry codes of practice. A statutory cause of action is therefore unnecessary.

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

In addition, many of these concerns have been addressed by recent changes to the law to introduce a mandatory data breach notification scheme in Australia. The changes require government agencies and businesses covered by the Privacy Act to notify any individuals affected by a data breach that is likely to result in serious harm and are intended to improve transparency in the way that organisations respond to serious data breaches and to allow those affected to take practical steps to mitigate any harm caused.

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

It would place undue weight on an individual's right to privacy at the expense of freedom of communication. Free TV recognises that individual privacy rights are an important public interest.

However, they must be balanced against other competing public interests including freedom of speech, which benefit society as a whole. This is particularly the case given that Australia doesn't have a clear process for balancing these rights in the form of a statutory human rights framework or express constitutional protection for freedom of speech (in contrast to other jurisdictions such as the UK and the US).

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

10.3 Prohibition on unfair contract terms

The ACCC recommends that the Competition and Consumer Act be amended so that unfair contract terms are prohibited, rather than just voidable.

Free TV does not support this recommendation. As noted in the Final Report, this would mean that civil pecuniary penalties apply to the use of unfair contract terms in any standard form consumer or small business contract.

This is a heavy-handed approach and doesn't acknowledge the fact that, whether or not terms are unfair is not always clear at the outset of contract negotiations and may depend on the relative bargaining power of the parties. In other words, which terms are unfair and in which circumstances would be very difficult to define in the absence of a more detailed consideration of the individual circumstances of the transaction.