



Submission by Free TV Australia

Digital platforms - A new digital competition regime

Proposal paper

Australian Government – The
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1. Executive Summary

- Free TV Australia (**Free TV**) appreciates the opportunity to comment on Treasury’s December 2024 proposal paper ‘*A new digital competition regime*’. Free TV agrees with the findings of the Australian Competition and Consumer Commission (**ACCC**) that existing competition law alone is insufficient to protect and promote effective competition in digital platform services markets,¹ and strongly supports Treasury’s proposal to introduce a new competition regime to address this.
- The proposed new framework is entirely consistent with the objective of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to “enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”.²
- Competition in advertising technology (**ad tech**) services markets is critical to ensuring that Free TV’s members can monetise their advertising activities and make advertising content available to Australian consumers, thereby funding new domestic content.
- Despite previous ACCC findings and recommendations, competition for ad tech services in Australia remains ineffectual and dominated by Alphabet, Inc. (formerly Google) and its related bodies corporate (**Alphabet**), and competition for ad tech services (and in related markets) is severely impeded by anti-competitive conduct such as self-preferencing, bundling and tying, leveraging data collection for anti-competitive advantage, interoperability restrictions, and lack of transparency.
- Free TV’s members, being Australian commercial television broadcasters, are particularly affected by this conduct as they are required by law to be funded by advertising, unlike their digital competitors such as Netflix and other subscription video on demand (**SVOD**) services.
- Importantly, anti-competitive conduct in these markets has had, and continues to have a profoundly harmful effect on Australian consumers. Taking action to address competition concerns in ad tech markets will allow Free TV’s members to better and more fairly capture the value offered by our advertising services to advertisers, which ultimately benefits audiences by strengthening commercial television networks’ ability to fund new screen content which informs, educates and entertains all Australians.
- Free TV strongly supports Treasury’s proposal that the first services to be designated under the new regime include ad tech services. Ad tech services offered by Alphabet must be among the first digital platform services to be designated under the new regime. Free TV submits that inquiries and findings previously made by the ACCC already support immediately designating Alphabet in respect of these services, and that any further regulatory investigation is not required.
- Similarly, Free TV supports the prioritisation of app marketplace services and social media services for designation and submits that existing ACCC findings support the designation of Apple and Alphabet in relation to app marketplace services, and Meta Platforms (formerly Facebook) in relation to social media services, without further regulatory investigation.
- Several other jurisdictions have developed and are implementing (or will imminently implement) new ex-ante regulatory frameworks similar to those proposed by Treasury to address competition concerns in digital platform services markets. It is critical that the new regime is legislated and implemented as quickly as possible to address competition issues endemic to digital platform services markets in Australia, including ad tech services markets. Doing so will also ensure that

¹ See, for example, ACCC, ‘Digital platform services inquiry: Interim report No. 5 – Regulatory reform’ (September 2022): <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>

² *Competition and Consumer Act 2010* (Cth) s 2.

large digital platform services providers with emergent power who may engage in anti-competitive conduct, such as Amazon, can be captured by the new regime.

- There are no major implementation challenges with respect to the new regime. The matters proposed to be addressed by the new regime have been the subject of extensive investigation and consultation by the ACCC and Treasury.
- Free TV supports the use of both broad and service-specific obligations to target anti-competitive conduct under the new regime, established through primary and subordinate legislation and developed in consultation with the ACCC.
- In addition to broad and service-specific obligations, Free TV submits that a “negotiate-arbitrate” mechanism should be included in the regime in respect of terms and conditions of access to designated model services. This would provide a backstop whereby the ACCC could determine reasonable terms and conditions of such access in circumstances where agreement cannot be reached through negotiation.
- Designation criteria under the new regime should include both qualitative and quantitative elements, to be stipulated in legislation, with quantitative thresholds being preeminent. Qualitative thresholds should only apply in circumstances where quantitative thresholds have not been met or are unavailable, and there is an overriding qualitative factor which tends in favour of the digital platform being designated under the new regime.
- The relevant decision maker for designation determinations should be the ACCC, not the relevant Minister. The ACCC has the appropriate knowledge, expertise and resources at its disposal to make quick and informed designation determinations under the new regime, without the delays associated with a further decision-making step.
- Free TV strongly supports the implementation of pro-active monitoring, compliance and multijurisdictional coordination powers and functions for the ACCC to support the development and administration of the new regime. The ACCC should be empowered to monitor the growth of digital platform services and their providers to ensure that the list of entities designated under the new regime remains appropriate.

Recommendations

- The new ex ante digital competition regime should be legislated and implemented as quickly as possible to address significant competition issues in digital platform services markets in Australia.
- The regime should include both broad and service-specific obligations to target anti-competitive conduct—established through primary and subordinate legislation.
- The first services to be designated under the new regime should include ad tech services, app marketplace services and social media services.
- Existing ACCC findings support the designation of certain services without further regulatory investigation:
 - Ad tech services offered by Alphabet;
 - App marketplace services offered by Apple and Alphabet; and
 - Social media services offered by Meta Platforms.
- The ACCC should be the decision maker for designation determinations, and should be given proactive monitoring, compliance and multijurisdictional coordination powers and functions.
- The regime should take a functional approach to designation, whereby services are designated in technologically neutral terms by reference to their function(s).
- Designation by reference to thresholds represents an appropriate method for ensuring that conduct of concern can be dealt with flexibly and rapidly.
- Quantitative thresholds should be preeminent in designation criteria.
- Designation should be for a 5-year designation period, with an automatic renewal for a further 5 years in the absence of a material change in circumstances.
- A “negotiate-arbitrate” mechanism should be included in the regime in respect of terms and conditions of access to designated services.

2. Introduction

Free TV appreciates the opportunity to comment on Treasury's December 2024 proposal paper 'A new digital competition regime' (the **Proposal Paper**). Free TV fully supports Treasury's proposal to introduce a new competition regime to address continuing critical competition issues in digital platform services markets.

This submission is separated into the following sections:

- **Section 1** – Executive summary.
- **Section 2** – Discusses Free TV's critical interests and concerns, particularly in relation to competition in ad tech services markets.
- **Section 3** – Discusses the scope of the new regime and priority services, including the proposal to list regulated digital platform services in the legislation.
- **Section 4** – Addresses the framework for designating entities under the new regime, including Treasury's proposal to impose both qualitative and quantitative designation thresholds and the duration of designation decisions.
- **Section 5** – Considers the range of proposed obligations under the new regime, the form that these obligations should take, and the scope of any exemptions to these obligations.
- **Section 6** – Discusses considerations about how the new regime should be enforced, including whether the ACCC should be responsible for monitoring compliance and enforcing breaches of the regime.
- **Section 7** – Discusses a number of additional matters raised by the Proposal Paper.

2.1 About Free TV

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



A report released in September 2022 by Deloitte Access Economics, 'Everybody Gets It: Revaluing the economic and social benefits of commercial television in Australia', highlighted that in 2021, the commercial TV industry supported over 16,000 full-time equivalent jobs and contributed a total of \$2.5 billion into the local economy. Further, advertising on commercial TV contributed \$161 billion in brand value.

Our members are dedicated to supporting and advancing the important contribution commercial free-to-air television makes to Australia's culture and economy. Free TV members provide vital local services to all Australians. In FY23, commercial television networks spent \$1.67 billion on Australian content, dedicating 87% of their content expenditure to local programming, an increase of 8% on the previous year. Commercial television networks spent more than \$400 million on accountable news and current affairs alone. This is a substantial investment in Australian, trusted and free television content which benefits our culture, democracy and local screen production industry.

Commercial free-to-air broadcasting is inherently a public good because it informs, educates and entertains all Australians no matter where they live or how much they earn. Required by law to be funded by advertising, it provides equitable access to information that supports a thriving democracy and contributes to a sense of Australian identity.

However, a range of public policy processes have, in recent years, collated a substantial evidence-base demonstrating the ways in which major digital platforms' scale, market-power and vertical integration have adversely impacted Australian businesses, including local media businesses.

2.2 The urgent need for a digital competition regime

Australia's existing competition and consumer law regime contains technology-neutral obligations and prohibitions designed to regulate the competitive behaviour of businesses in relation to concerns such as misuse of market power, misleading and deceptive conduct, unconscionable conduct, and unfair contract terms. However, as digital platform services continue to evolve, new forms and iterations of anti-competitive behaviour (and harm) can emerge rapidly.

The ACCC's fifth interim report in its Digital platform services inquiry 2020–2025 (**Fifth Report**) found that existing competition laws are insufficient to promote effective competition in digital platforms markets.³ Free TV agrees with the ACCC's findings. The competition harms that the ACCC identified in the Fifth Report (as well as in its final Digital advertising services inquiry report in August 2021 (**Final DAS Report**)) have had and continue to have a profoundly harmful effect on Australian consumers and businesses. Ensuring effective competition in digital platform services markets is increasingly critical to the maintenance of Australian democracy and the sustainability of Australian broadcast media.

In particular, Free TV commends and supports Treasury's proposal that the first services to be designated under the proposed framework include ad tech services. Taking a "wait and see" approach will have a potentially disastrous impact on Australian media, and therefore consumers, and Australia would fall behind comparable jurisdictions internationally.

Australian commercial television must be offered free to the general public, offer programs intended to appeal to the general public, and must be funded by advertising revenue.⁴ Australian commercial television broadcasters must also comply with a range of special requirements with respect to matters such as Australian content, local news and contributing to the provision of certain services in the geographical areas they are licensed to serve,⁵ and are subject to strict restrictions on the control of commercial television broadcasting licenses.⁶

While these requirements are crucial to the lasting appeal of Australian television (whether it is delivered terrestrially or online via broadcast video on demand (**BVOD**) services), as well as the ongoing policy importance of strong and diverse local electronic media, Australian commercial broadcasters are increasingly competing with large, well-resourced multinational participants in digital platforms advertising markets. These participants are not subject to the same content and

³ ACCC, 'Digital platforms services inquiry: Interim report No. 5 – Regulatory reform' (September 2022), page 8: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>.

⁴ *Broadcasting Services Act 1992* (Cth) s 14.

⁵ See, for example, *Broadcasting Services (Australian Content and Children's Television) Standards 2020* and *Broadcasting Services Local Programming Determination 2018*.

⁶ *Broadcasting Services Act 1992* (Cth) s 53.

control constraints, and as a consequence are able to achieve greater scale than Australian commercial television broadcasters.

At the same time, conventional advertising sales channels in broadcast television markets are being increasingly supplanted by programmatic advertising, and video advertising (including online video advertising) is becoming a progressively material source of digital advertising revenue for broadcasters. A report released by PwC in July 2024, *'Global Telecom and Entertainment & Media Outlook 2024–2028'*, found that internet advertising grew 10.1% in 2023, and predicted that after rising at a 9.5% compound annual growth rate through 2028, internet advertising will account for 77.1% of total ad spending.⁷ In 2024, global programmatic advertising spending reached an estimated USD \$595 billion,⁸ and Australia has been identified as one of the largest programmatic ad markets in the Asia-Pacific region.⁹

2.3 The state of competition for ad tech services

Fair and reasonable access to ad tech services is essential to ensuring that Australian commercial TV broadcasters can make advertising content (including for Australian products) available to Australian consumers, monetise advertising activities and fund new domestic content. In the Final DAS Report, the ACCC found that competition for ad tech services in Australia was ineffectual and dominated by Google (now Alphabet), which was found to have an 80% to 90% share of impressions for advertiser ad server services in Australia in 2020.¹⁰

Similarly, video advertising is increasingly important to advertisers. This was evident to the ACCC in 2021, when it found that advertiser expenditure on video advertising made up 54% of the total amount spent on display advertising.¹¹ Since then, video advertising expenditure has continued to grow, with more recent statistics suggesting that this percentage has now increased to 67%.¹²

The ACCC also found that display advertising (including BVOD advertising) comprised 39% of programmatic advertising expenditure in 2020.¹³ Programmatic advertising in the context of ad tech services involves automated buying, selling and delivery of digital advertising. While the ACCC has previously stated that regulatory enforcement action concerning anticompetitive conduct in ad tech

⁷ See PwC, 'Perspectives from the Global Entertainment & Media Outlook 2024-2028 – Seizing growth opportunities in a dynamic ecosystem' (16 July 2024): <https://www.pwc.com/gx/en/issues/business-model-reinvention/outlook/insights-and-perspectives.html>.

⁸ Statista, 'Programmatic advertising worldwide – statistics & facts' (29 October 2024): <https://www.statista.com/topics/2498/programmatic-advertising/#topicOverview>.

⁹ Statista, 'Programmatic advertising spending in the Asia-Pacific region from 2017 to 2028' (29 October 2024): <https://www.statista.com/statistics/1316184/programmatic-advertising-spending-apac/#:~:text=Programmatic%20ad%20spend%20in%20APAC%202017%2D2028&text=In%202022%2C%20programmatic%20advertising%20spending,ad%20markets%20in%20the%20region>.

¹⁰ ACCC, 'Digital advertising services inquiry – final report' (August 2021), page 5: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

¹¹ ACCC, 'Digital advertising services inquiry – final report' (August 2021), page 46: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

¹² See IAB Australia, 'video advertising: state of the nation' (July 2024), page 7: <file:///C:/Users/HWL/Downloads/IAB%20Australia%20Video%20State%20of%20the%20Nation%202024.pdf>.

¹³ ACCC, 'Digital advertising services inquiry – final report' (August 2021), page 42: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

markets was being considered,¹⁴ no such action has been taken in Australia to date. Free TV understands that a class action was filed against several Alphabet entities in December 2024, seeking compensation for financial loss arising from Alphabet's alleged misuse of market power in the ad tech services market from December 2018.¹⁵ Free TV welcomes this development but notes the ACCC's previous findings about the limitations of Australia's existing competition laws in addressing this type of conduct.¹⁶ These findings are reflected in the Position Paper, which states that:

*The characteristics and dynamic nature of digital platform markets mean that enforcement of existing economy-wide provisions of the Competition and Consumer Act 2010 (Cth) (CCA) may not on its own be sufficient to protect and promote competition, or well-suited to addressing the range and scale of competition harms identified in digital platform markets. Further, the fast-moving nature of digital platform markets may mean that significant, and sometimes irreversible, damage to Australian businesses or consumers can occur, even where a successful outcome is achieved through litigation.*¹⁷

Since the publication of the Final DAS Report, the prevalence of display advertising (including BVOD advertising) in Australia continues to grow. Alphabet has continued to strengthen its position in ad tech services markets and remains the largest supplier and dominant participant in the ad tech supply chain, a position entrenched by Alphabet's vertical integration in that supply chain. Amazon is an emerging player in ad tech markets and, as suggested elsewhere in this submission, should be the subject of a formal ACCC market inquiry. As of 2021, Facebook Audience Network (now Meta Audience Network) only enabled advertisements on its closed Facebook and Instagram platforms, and advertising inventory on third-party publishers' mobile apps.¹⁸ Meta continues to operate a closed channel to facilitate the sale of ads on Facebook and Instagram, now called Meta Ads Manager.¹⁹

¹⁴ See ACCC, 'Google's dominance in ad tech supply chain harms businesses and consumers' (28 September 2021): <https://www.accc.gov.au/media-release/googles-dominance-in-ad-tech-supply-chain-harms-businesses-and-consumers>.

¹⁵ See Piper Alderman, 'Google AdTech Class Action', 17 December 2024: <https://piperalderman.com.au/google-adtech-class-action/>. Free TV also understands that another similar class action is expected to be filed shortly: see Maurice Blackburn, 'Rural publisher Riverine Grazier to launch David vs Goliath class action against tech giant Google over advert rip offs', 31 January 2025: <https://www.mauriceblackburn.com.au/media-centre/media-statements/2025/rural-publisher-to-launch-class-action-against-tech-giant-google-over-advert-rip-offs/>

¹⁶ See, for example, ACCC, 'Digital platforms services inquiry: Interim report No. 5 – Regulatory reform' (September 2022), pages 8-9: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>; ACCC, 'Digital advertising services inquiry – final report' (August 2021), pages 10-11: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

¹⁷ ACCC, 'Digital advertising services inquiry – final report' (August 2021), page 4: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>

¹⁸ See ACCC, 'Digital advertising services inquiry – final report' (August 2021), pages 3, 27, 62: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

¹⁹ Meta, 'Ads Manager': <https://www.facebook.com/business/tools/ads-manager>

Alphabet continues not to participate in header bidding, despite the ACCC's findings that refusal to do so preferences Google Ad Exchange (**AdX**), its own supply side platform (**SSP**) product.²⁰ The ACCC concluded in the Final DAS Report that the effect of Alphabet (then Google) not participating in header bidding is that, if a publisher wishes to receive bids from Alphabet's SSP, Google Ad Manager (**GAM**), in an efficient way and have it compete directly against other SSPs, then they must use Alphabet's publisher ad server. Open Bidding is a feature of GAM and is Alphabet's alternative to header bidding auctions, allowing third-party ad exchanges to bid on ad impressions sold through GAM. Publishers are effectively locked into using Open Bidding if they want GAM to compete directly with other SSPs.²¹ A further disadvantage of using Open Bidding is that third-party SSPs participating in Open Bidding are charged a fee, while GAM is not.²² At the same time, Alphabet charge publishers a fee of 5% to 10% of the value of the winning bids when a non-Google SSP wins an auction through Open Bidding.²³

More generally, Alphabet's ad tech services continue to lack transparency, particularly with respect to fees charged. For instance, the ACCC noted in 2021 that the inability of parties other than Alphabet to observe Google Ads' take rate for advertisers' bids means that Alphabet can retain hidden fees, and advertisers are unable to compare Google Ads' take rates with those of other ad tech providers.²⁴

In 2019, an email published in the course of Alphabet's ongoing legal proceedings with the US Department of Justice²⁵ sent by former Alphabet sell-side advertising executive Chris LaSala states that "[t]here is a continued call from buyers and publishers for transparency. It is reasonable and should not be dismissed".²⁶ Despite this, in Free TV members' experience there continues to be a lack of transparency in relation to Alphabet's ad tech stack.

Alphabet's control of the video advertising market has also grown since the publication of the Final DAS Report. Most notably, YouTube's global advertising revenues in Q3 2024 were USD\$8.9 billion.²⁷ In Australia, YouTube makes between \$1.5 and \$2 billion in advertising revenue.²⁸ As discussed in more detail in section 2.4.1 below, YouTube video inventory must be programmatically purchased by

²⁰ ACCC, 'Digital advertising services inquiry – final report' (August 2021), page 114, 118: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

²¹ ACCC, 'Digital advertising services inquiry – final report' (August 2021), pages 117-118: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

²² ACCC, 'Digital advertising services inquiry – final report' (August 2021), page 118: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

²³ See ACCC, 'Digital advertising services inquiry – final report' (August 2021), page 120: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

²⁴ See ACCC, 'Digital advertising services inquiry – final report' (August 2021), pages 154-155: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

²⁵ *United States of America and Plaintiff States v. Google LLC* [2023] Case No. 1:23-cv-00108.

²⁶ See U.S. Department of Justice – Antitrust Division, 'U.S. and Plaintiff States v. Google LLC [2023] - Trial Exhibits': <https://www.justice.gov/atr/media/1367921/dl>.

²⁷ Statista, 'Worldwide advertising revenues of YouTube as of 3rd quarter 2024' (21 January 2025): <https://www.statista.com/statistics/289657/youtube-global-quarterly-advertising-revenues/#:~:text=YouTube%3A%20global%20advertising%20revenues%20as%20of%20Q3%202024&text=YouTube's%20worldwide%20advertising%20revenues%20amounted,the%20second%20quarter%20of%202024.>

²⁸ See Calum Jaspan, 'YouTube draws industry ire on wasted advertising spending', *Sydney Morning Herald* (8 September 2023): <https://www.smh.com.au/business/companies/youtube-draws-industry-ire-on-wasted-advertising-spending-20230907-p5e2rz.html>.

advertisers (including Free TV members) through one of Alphabet’s ad tech products, further entrenching Alphabet’s dominance in the ad tech supply chain.

The conduct outlined above and detailed in section 2.4 below, while not exhaustive, illustrates how Alphabet acts in a way that is unconstrained by the actions of any legitimate competitors in ad tech services markets, and can (and does) adversely impact other participants in the ad tech supply chain.

Free TV has also observed that other global market participants have begun to replicate Alphabet’s conduct in ad tech services markets. Most notably, Amazon is also now repeating Google’s conduct in advertising spaces controlled by Amazon. The fact that anti-competitive conduct is becoming increasingly widespread in the ad tech services industry reinforces the need for the new regime to be legislated without delay. Free TV also submits that an ACCC investigation into whether Amazon ought to be designated in respect of ad tech services should be prioritised under the new regime.

2.4 Alphabet’s conduct in ad tech services markets

In the Final DAS Report, the ACCC found that Alphabet had “engaged in conduct that has lessened competition and efficiency in the ad tech supply chain.”²⁹ Since then, Alphabet’s growing dominance has exacerbated anti-competitive conduct in the ad tech services market and adversely impacted other markets in the ad tech supply chain, including but not limited to:

- **Self-preferencing** – Preferring Alphabet’s own products and services over those of third parties, to the detriment of those third parties, consumers and businesses.
- **Bundling and tying** – Forcing businesses and individual users to use Alphabet’s own products and services over competing products and services offered by third parties.
- **Leveraging data collection** – Using Alphabet’s web of interconnected products and services to collect large volumes of user data, which is then exclusively held behind those products to increase Alphabet’s dominance in one or more markets.
- **Imposition of restrictive terms and conditions** – Imposing anti-competitive terms and conditions of use in respect of Alphabet’s products and services.
- **Interoperability** – Alphabet designing their products and services to restrict or remove their interoperability with competing products and services.
- **Transparency** – Limiting or removing pricing and other product-level transparency to businesses and individual users who use Alphabet’s products or services.

These issues are compounded by a lack of adequate complaint resolution processes. Free TV’s members regularly experience inadequate complaints resolution processes with Alphabet (and other digital platform service providers), including extensive delays to receive responses to and resolve

²⁹ ACCC, ‘Digital advertising services inquiry – final report’, page 87:
<https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

complaints and disputes.³⁰ This experience is also consistent with the ACCC's findings in the Fifth Report which identified a range of deficiencies with existing complaint resolution processes with digital platform and concluded that setting minimum standards for internal resolution processes (with resource to an ombuds scheme) was essential to improving outcomes for consumers and business users of digital platforms.³¹

2.4.1 Self-preferencing; bundling and tying; conflicts of interest

In the Final DAS Report, the ACCC found that "There are many examples of Google favouring its own related services at the expense of third-party ad tech services (self-preferencing)."³² Despite this finding, Free TV has not observed any changes to Alphabet's conduct in ad tech services markets since the publication of the Final DAS Report. In fact, Free TV has observed that anti-competitive self-preferencing in ad tech services markets has become worse.

Free TV is particularly concerned with Alphabet's conduct in respect of advertising on YouTube. Advertisers use demand side platforms (**DSPs**) to purchase ad inventory. Ad publishers use SSPs to sell ad inventory. Access to YouTube video inventory requires advertisers to programmatically purchase advertising opportunities through one of Alphabet's DSPs, being Google Ads or Display and Video 360 (**DV360**). This is despite concerns being raised by the ACCC in the Final DAS Report that, in doing so, Alphabet was providing its DSPs with a competitive advantage.³³ Accordingly, in order to obtain the benefit of advertising on YouTube, advertisers (including Free TV members) are forced to work through Alphabet.

Alphabet's dominance on both the buy and sell sides also extends to digital display advertising outside YouTube, through being both a supplier of ad tech services (through Google Ads and DV360) and a publisher of ads (through, for example, YouTube, Gmail and Google Search, as well as its publisher ad server known as 'DoubleClick for Publishers'). Alphabet also operates AdX. Alphabet therefore dominates the ad tech supply chain because it is vertically integrated on both the supply and demand sides of ad tech transactions, providing and controlling an ad server, two DSPs, an SSP, two ad networks and a publisher ad server.

As noted above, this has adverse flow on effects for consumers—in this case audience members of free-to-air broadcasters. This is because when Australian broadcasters face anti-competitive conditions in a market like the supply of ad tech services, it impairs their ability to maximise returns from their advertising activities (for example, they pay more to place their advertisements than they otherwise would if the market was more competitive; or, must deal with an ad tech supplier who is

³⁰ For example, Google will buy and use impressions from a Free TV member, then after the fact uses its own methodology and technology to decide retrospectively which impressions it deems as invalid traffic (**IVT**), then will not pay the Free TV member for those impressions. A Free TV member has limited recourse to query those impressions deemed as IVT, even though they might have data to prove they were genuinely served to a genuine user on their platform. Google will also not reveal their methodology for determining what impressions were IVT in their opinion.

³¹ ACCC, 'Digital platforms services inquiry: Interim report No. 5 – Regulatory reform' (September 2022), page 10-11, 16, 88-104: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>.

³² ACCC, 'Digital advertising services inquiry – final report', page 87: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

³³ ACCC, 'Digital advertising services inquiry – final report', page 95: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>

also selling advertising in competition with them). When they make less money from their digital advertising activity in these circumstances than they would if the market was more competitive, they have fewer resources to fund new screen content for the benefit of audiences.

Free TV's observations of Alphabet's anticompetitive self-preferencing in ad tech services markets is shared by several competition regulators. For example, in September 2024, the United Kingdom's Competition and Markets Authority (CMA) provisionally found after an extensive investigation that Alphabet (and certain related bodies corporate) "has abused its dominant positions through the operation of both its buying tools and publisher ad server in order to strengthen AdX's market position and to protect AdX from competition from other exchanges" and "has also prevented rival publisher ad servers from being able to compete effectively with DoubleClick for Publishers, harming competition in this market."³⁴

Alphabet also continues to impinge on competition through its GAM product. GAM presently requires users to buy and sell digital advertising space through AdX. The ACCC in the Final DAS Report estimates that Alphabet's share of impressions of publisher ad server services is 90% to 100%.³⁵ Free TV considers that this tying-and-bundling of Alphabet's publisher-facing and supply-side ad tech platforms continues to impede competition, and Alphabet's vertical integration along the entire ad tech supply chain gives rise to inherent conflicts of interest.

Free TV's position is consistent with allegations made by Canada's Competition Bureau against a number of Alphabet entities in its ongoing proceedings in Canada's Competition Tribunal, where it is alleged that Alphabet maintains "near-total control of the ad tech stack" and has made "must-have advertiser demand [...] available only to its own ad exchange, and in turn, compelled publishers to use its publisher ad server in order to access that demand by means of real time bids from its ad exchange".³⁶

In Free TV's members' experience, Alphabet does not adequately manage conflicts of interest in ad tech services markets in circumstances where it operates DSPs such as Google Ads and DV360 (where advertiser customers want the DSP to buy ad inventory for the lowest possible price) and an SSP in the form of AdX (where publisher companies want the SSP to sell its ad inventory at the highest possible price).

2.4.2 Using collected data to create anti-competitive advantages; restrictive terms and conditions

Free TV has also observed that the anti-competitive effects of Alphabet's self-preferencing and bundling and tying conduct are worsened by its collection of extensive amounts of user data, particularly 'click and query' data obtained through its search engine 'Google', which it bundles exclusively within its ad tech services products.

³⁴ Competition and Markets Authority, 'CMA objects to Google's ad tech practices in bid to help UK advertisers and publishers' (6 September 2024): <https://www.gov.uk/government/news/cma-objects-to-googles-ad-tech-practices-in-bid-to-help-uk-advertisers-and-publishers>.

³⁵ ACCC, 'Digital advertising services inquiry – final report', page 56: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

³⁶ See *Commissioner of Competition v Google Canada Corporation and Google LLC* R.S.C. 1985, c. C-34, Notice of Application filed November 28, 2024: <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/521324/1/document.do>.

As of 2024, the Google search engine retained 93.95% of the market share for search engines, followed by Bing with 4.48%.³⁷ Free TV is similarly aware that GAM for connected TVs is also collecting user data. Google's website states that "When you allow data collection and interest-based ads, Google demand (Google Ads, Display & Video 360) can collect user activities on your sites through ad requests, clicks, and conversions [and] build user profiles and then serve interest-based ads."³⁸ In other words, many consumers who use a BVOD application (including those operated by Free TV members) which employs GAM are having their data shared with Alphabet. Free TV understands that Alphabet subsequently passes this data into its ad tech services stack, further entrenching its dominant position in ad tech services. Critically, user data collected by Alphabet includes Free TV members' data.

Free TV is also aware of instances where Alphabet has sought to impose strict terms of service on clients as part of its ad server products. In these contracts, clients are required to allow Alphabet (or a related body corporate) to assume ownership of all data collected as part of providing ad server services.

While Free TV members may choose not to enter these contracts, doing so would significantly affect those members' revenue because they would lose the benefit of Alphabet's ad tech stack which, as noted earlier in this submission, is increasingly critical for Australian commercial broadcasters to be able to effectively advertise digitally.

Free TV notes that the use of restrictive terms and conditions is not limited to Alphabet. In markets for social media services, Free TV is aware of large market participants using their market power to accumulate large volumes of consumer data and then restricting the availability of that data to their own products and services. The terms and conditions of use of these products and services are often restrictive and anti-competitive. In particular (and in the context of the business of Free TV's members), Free TV is aware that Meta Platforms collects user data from publisher websites that have implemented social media sharing tools. Since Meta's social media platforms (most notably Facebook and Instagram) are a vital source of consumer traffic for these publishers, they have little choice but to accept the collection of user data by Meta Platforms to operate their businesses.

In markets for app marketplace services, Free TV is similarly aware that the terms and conditions of access to the app marketplaces offered by Apple (the App Store) and Alphabet (Google Play Store) are offered on a "take it or leave it" basis with no genuine opportunity to negotiate these terms.

2.4.3 Interoperability constraints; lack of transparency

Despite recommendations to address these issues in the Final DAS Report,³⁹ lack of transparency and interoperability continue to impinge on competition and adversely impact participants in advertising markets. This is exacerbated by the absence of meaningful competitive pressure on Alphabet. This is particularly so with respect to the operation and outcomes of publisher ad server auctions, and average fees and take rates for ad tech services.

For instance, Free TV's members are unable to determine what price their advertiser clients pay when selling an impression into AdX. Free TV members should be able to verify prices paid through SSP

³⁷ RedSearch, 'Search Engine Usage Statistics Australia (2024)':
<https://www.redsearch.com.au/resources/search-engine-usage-statistics/>.

³⁸ Google, 'Set data collection and interest-based ads control for Google demand':
<https://support.google.com/admanager/answer/13681844?hl=en>.

³⁹ ACCC, 'Digital advertising services inquiry – final report' (August 2021), page 144:
<https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

services, and compare bids received by publishers. This is particularly important where it is unclear how much of the total price paid for an impression flows through to Alphabet for its ad tech related costs, and where the price efficiency of ad tech stacks directly bear on the revenue available to Free TV members to reinvest into Australian news and other local content.

Further, allegations of “invalid traffic” are an increasing problem for Free TV members. Alphabet defines invalid traffic as “clicks and impressions on ads that are not a result of genuine user interest, including intentionally fraudulent traffic and accidental or duplicate clicks”.⁴⁰ Alphabet’s website states that it can detect invalid traffic through its “sophisticated monitoring system” and that “advertisers won’t be charged for invalid clicks or impressions as they provide little or no value”.⁴¹

Free TV members are increasingly receiving notifications of “invalid traffic” from Alphabet, with Alphabet unilaterally reducing payments for advertising said to be the subject of invalid traffic. There is little or no transparency about how invalid traffic is identified by Alphabet, or how any consequent reduction in advertising payments is calculated. Free TV members are concerned that the amount of invalid traffic is overstated by Alphabet, and there is no adequate mechanism for Free TV members to verify or challenge a report of invalid traffic or the amount of the reduced payment.

Free TV is also concerned that notifications to advertisers about claimed invalid traffic may be incorrect or misleading, damaging Free TV members’ commercial relationships with advertisers.

2.5 Free TV members’ participation in other digital platform services markets

Free TV welcomes Treasury’s identification of app marketplace services and social media services (in addition to ad tech services) as ‘priority services’ for designation under the new regime.

As noted earlier in this submission, Free TV members offer products (including BVOD apps) through app marketplaces operated by Apple and Alphabet. Terms and conditions of access to the app marketplaces offered via the App Store and the Google Play Store are unable to be negotiated.⁴² The terms and conditions of use of these products and services are often restrictive and anti-competitive and can include (among other things) conditions about how data is collected by Apple and Alphabet. Free TV is also concerned about the lack of transparency around how apps are discovered and displayed on the App Store and the Google Play Store.

Free TV is similarly aware that Meta Platforms collects user data from publisher websites (including the websites of Free TV members). As noted earlier in this submission, Facebook and Instagram are a vital source of consumer traffic for these publishers. In 2023, the ACCC found that Meta Platforms owns and operates the most widely used social media platforms in Australia (Facebook and Instagram), and has significant market power not only in the market for the provision of social media services, but also in the market for the provision of display advertising services on closed channels on

⁴⁰ Google Ads Help, ‘Managing invalid traffic’: <https://support.google.com/google-ads/answer/11182074?hl=en-AU>.

⁴¹ Google Ads Help, ‘Managing invalid traffic’: <https://support.google.com/google-ads/answer/11182074?hl=en-AU>.

⁴² See, for example, ACCC, ‘Digital platforms services inquiry – March 2021 interim report on app marketplaces’, page 45: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>. This is also consistent with Free TV members’ experiences.

those services.⁴³ Free TV is concerned that its members are required to accept the collection of user data in order to continue reach audiences through critical social media platforms.

2.6 Next steps

Free TV submits that, despite the ACCC's recommendations in the Final DAS Report, the state of competition in ad tech services markets has deteriorated and has now reached a critical stage. A higher proportion of revenue from advertising sources is being directed away from Australian commercial TV broadcasters (who are legislatively required to derive their revenue through advertising and who deliver important public policy benefits to Australian viewers) to dominant global digital platforms like Alphabet, who take a cut at every stage of the ad tech stack. This significantly limits the resources available to Australian commercial TV broadcasters, which would otherwise be used to develop and promote local news and other Australian content, including live and free sport, and entertainment content that reflects Australian culture. This reduces the benefit that would otherwise flow to audiences, Australian culture and Australian democracy from the production of this additional content.

Free TV considers the objectives of the digital competition regime should be consistent with and complementary to the general provisions of the CCA, including to prevent the unique harms to competition that can arise in digital platforms services markets and to promote the long-term interests of Australian businesses and consumers.

It is essential that the new digital competition regime is legislated and implemented as quickly as possible in order to address the competition issues endemic to the digital platforms space, and in particular ad tech services markets. Passage of the new regime should be prioritised in 2025, given that subordinate instruments will also need to be developed and passed to introduce service-specific rules under the new regime (as presently proposed).

In this submission, we highlight our support for the proposed new digital competition regime and provide further submissions with respect to the scope and implementation of the regime, including recommendations on key issues raised in the Proposal Paper concerning the need to regulate particular digital platform services, as well as the designation framework, obligations, and enforcement and compliance.

⁴³ See ACCC, 'Digital platform services inquiry – Interim report 6: Report on social media services' (March 2023), pages 8, 11, 13, 89: https://www.accc.gov.au/system/files/Digital%20platforms%20services%20inquiry%20-%20Interim%20report%206%20-%20Report%20on%20social%20media%20services_0.pdf.

3. Scope of the proposed framework and priority services

3.1 Implementing the new regime

Free TV strongly believes that there are no major implementation challenges with respect to the new regime to regulate digital platform services. This is primarily because the matters dealt with under the new regime have been the subject of extensive and thorough investigation and consultation by the ACCC and Treasury over the past six years, including the ACCC's Digital advertising services inquiry, Digital platforms inquiry, and the ongoing Digital platform services inquiry 2020–2025.

Ex ante regulations similar to those proposed under the new regime are used (or will imminently be used) to regulate digital platform services in other jurisdictions, including in the European Union, United Kingdom, Germany and Japan. Free TV supports the establishment of an overarching framework through primary legislation and the use of subordinate legislation to house service-level details, to be developed in consultation with the ACCC (see section 4 of this submission). Free TV also agrees that the new regime should be administered by the ACCC through pro-active monitoring and compliance arrangements.

Having regard to the matters discussed in section 2 of this submission, it is essential that the Government prioritises the passage of the new regime, particularly since subordinate legislation will likely need to be developed to address service-specific regulations as well as list specified digital platform services. As submitted earlier in this submission, passage of the new regime should be prioritised in 2025.

3.2 Scope of the new regime

Free TV supports Treasury's proposal that the legislation stipulate a list of digital platform services that are regulated under the regime. For the reasons discussed in section 2 of this submission, Free TV welcomes and strongly supports the designation of ad tech services as one of Treasury's "priority services" under the new regime.

It is also critical that the Government ensures that the legislation is drafted in a way that is flexible enough to ensure designation keeps pace with rapid changes to technology and market dynamics. As discussed further below, Free TV submits that the best way to achieve this is through a functional approach to designation, whereby services are designated in technologically neutral terms by reference to their function(s), in order to limit any opportunity for entities to exploit or circumvent the designation process.

3.3 Stakeholder questions

3.3.1 Are there any major implementation challenges associated with the proposed framework?

No. See section 3.1 above.

3.3.2 Is the proposed scope of digital platform services targeted appropriately? Are there any digital platform services that should be added or removed?

Yes. Ad tech should be prioritised as Treasury has proposed, as well as app marketplace services and social media services. See sections 2 and 3.2 above.

3.3.3 Do you agree with the proposal that app marketplaces, ad tech services and social media services should be prioritised as the first services to be investigated for designation under the framework?

Yes. See sections 2 and 3.2 above.

4. Designation

4.1 Designation thresholds

Free TV supports Treasury's proposal that designation decisions under the new regime apply to digital platform entities in respect of specific digital platform services that they provide and agrees that designation considerations under the new regime should include both qualitative and quantitative elements, to be stipulated in legislation. Specifically, and as discussed later in this submission, Free TV submits that the new Australian regime should adopt a functional approach to designation, whereby services are designated in technologically neutral terms by reference to their function(s), in order to limit any opportunity for entities to exploit the designation process.

We consider that designation by reference to thresholds represents an appropriate method for ensuring that conduct of concern can be dealt with flexibly and rapidly. In comparable international jurisdictions, the designation thresholds for digital platform services providers primarily comprise a combination of quantitative and qualitative criteria.⁴⁴ There is merit in this combined approach insofar as it represents a flexible method for ensuring conduct of concern can be dealt with efficiently as digital platform services providers emerge and evolve over time. This combined approach is also a useful method for ensuring business-to-business as well as consumer services are captured under the new regime.

However, Free TV submits that quantitative thresholds under the new regime should be preeminent and unable to be overturned by qualitative thresholds. This is because qualitative thresholds (for instance, market position) are often contentious. Designation by reference to qualitative thresholds is a useful method for ensuring that digital platform services are captured by the new regime in circumstances where quantitative thresholds may not be an appropriate or complete reflection of the market power of a digital platform service provider, or their ability to substantially affect competition in markets.

For instance, Free TV supports the designation of Alphabet's ad tech services products by virtue of Alphabet's vertical integration and dominant market position in the supply of ad tech services, as detailed in section 2 of this submission.

Qualitative thresholds should only be used in circumstances where quantitative thresholds have not been met or are unavailable, and there is an overriding qualitative factor which tends in favour of the digital platform being designated under the regime.

Free TV agrees with Treasury's proposal to draw on quantitative thresholds used by international regimes, adjusted to reflect the size of the Australian economy and population (where necessary). Quantitative thresholds under the new regime should be clearly and carefully set, with revenue or other quantitative financial metrics being calculated by reference to revenue or turnover generated or sourced either worldwide, or in Australia or by operations occurring in Australian markets (as opposed to where revenue or turnover is ultimately accounted for, such as in the United States or Ireland).

Free TV also submits that consideration should be given to whether there should also be a threshold for revenue generated from the relevant specific service in order to ensure designation is appropriately targeted.

⁴⁴ See, for example, Chapter 2, Article 3 of *Regulation (EU) 2022/1925* and Chapter 2 of the *Digital Markets, Competition and Consumers Act 2024* (UK).

Free TV submits that designation by reference to number of users is not appropriate in the ad tech services context, given the significantly different manner in which these services are used compared to social media and app marketplace services.

When determining whether an entity meets one or more qualitative thresholds, Free TV submits that the relevant decision maker should undertake a forward-looking assessment over a five-year period. This period is the same length as the duration of designations proposed by Treasury (see in section 4.2.3 below). This forward-looking assessment should require the relevant decision maker to consider both the dynamics of, and the relevant entity's position in, the relevant market(s) at the time of the designation investigation, before examining the potential or likely dynamics of competition in those markets over the next five years. This examination should have regard to expected or foreseeable developments that may affect the relevant entity's conduct in the relevant market(s) if they were not designated, including but not limited to the prospective growth of the relevant entity in the absence of designation and the likelihood of emergent (or the growth of existing) barriers to entry in those markets.

Free TV notes that the use of forward (and backwards-looking) assessments for the purpose of determining whether an entity should be subject to a legislative regime has precedent in other regimes. Notably, in the United Kingdom the CMA is empowered to undertake a very similar forward-looking assessment when undertaking a determination investigation under the digital markets competition regime contained in the *Digital Markets, Competition and Consumers Act 2024* (UK).⁴⁵

Free TV submits that the inclusion of a forward-looking assessment process in the designation determination process under the new regime will ensure that designation determinations are made having regard to both the likely long-term evolution of digital platform services markets, and the prospective increase in the market power of potentially designated entities.

4.2 Designation investigations and decisions

4.2.1 Relevant decision maker

Free TV strongly supports Treasury's proposal that the ACCC be responsible for conducting designation investigations under the new regime. It is important that the ACCC is able to conduct self-initiated designation investigations. As the expert regulator with both inquiry and investigations experience relating to digital platforms, it is appropriate that the ACCC be able to initiate these investigations at any time, in addition to when it is directed to conduct such investigations by the relevant Minister. Such an approach finds precedent in the *Broadcasting Services Act 1992* (Cth), which gives the Australian Communications and Media Authority a broad discretion to conduct investigations,⁴⁶ and imposes an obligation on the Australian Communications and Media Authority to conduct investigations when directed by the Minister.⁴⁷

⁴⁵ See Competition & Markets Authority, 'Digital markets competition regime guidance (CMA194): Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024' (19 December 2024): https://assets.publishing.service.gov.uk/media/6762f4f6cdb5e64b69e307de/Digital_Markets_Competition_Regime_Guidance.pdf

⁴⁶ See *Broadcasting Services Act 1992* (Cth) s 170.

⁴⁷ See *Broadcasting Services Act 1992* (Cth) s 171.

Free TV also strongly supports the proposition that the appropriate decision maker for designation determinations is the ACCC, not the relevant Minister. In the Fifth Report, the ACCC contemplated that either the ACCC or the Minister could be the relevant decision maker.⁴⁸ Free TV submits that the ACCC, not the relevant Minister, has the appropriate expertise and resources at its disposal to make informed and rigorous designation determinations.

Moreover, the ACCC is already vested with decision-making powers under Australia's existing competition laws. For example, under Part XIC of the *Competition and Consumer Act 2010* (Cth) (CCA), the ACCC is empowered to make written determinations with respect to the telecommunications access regime,⁴⁹ and will be the primary decision maker under the new merger review regime. Such an approach would also be consistent with the approach taken in the United Kingdom, where the CMA is empowered to designate an undertaking as having 'strategic market status'.⁵⁰

4.2.2 Designated digital platform services

Having regard to the matters detailed in section 2 of this submission, Free TV submits that Treasury should ensure that ad tech services offered by Alphabet, as well as the social media services provided by Meta Platforms and the app marketplace services provided by Alphabet and Apple, are among the first digital platform services to be designated under the new regime. Free TV submits that further extensive investigations are not required in respect of these proposed designations, and that designation should occur as soon as possible after the passage of the legislation.

There is a significant body of investigative work that has already been undertaken by the ACCC with respect to competition issues in ad tech services markets, most notably the Digital advertising services inquiry and the Digital platform services inquiry 2020–2025, all of which conclude that Alphabet is dominant in ad tech services markets. Similarly, the ACCC has previously concluded that Apple and Alphabet own and operate the "most significant" app marketplaces in Australia,⁵¹ and that Meta maintains significant market power in the market for social media services.⁵² There is a strong case for these providers to be designated in respect of these services offered under the new regime without further regulatory investigation. As noted above, Free TV also submits that an investigation into whether Amazon ought to be designated in respect of ad tech services should be prioritised. Free TV notes that Amazon, Alphabet, Meta Platforms and Apple have already been designated under the European Union's Digital Markets Act (DMA), and Germany's Competition Act.

No further work needs to be done to designate the relevant services of these entities in the three priority areas identified in the Proposal Paper. Free TV supports designation of these services as soon as possible using transitional provisions in the legislation. These provisions could require the ACCC to designate these services within (for instance) 60 days of the commencement of the legislation. There is strong and good precedent for this approach. For example, when the new declaration system was

⁴⁸ ACCC, 'Digital platform services inquiry – Interim report No. 5 – Regulatory reform' (September 2022), page 120: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>.

⁴⁹ *Competition and Consumer Act 2010* (Cth) s 152BC.

⁵⁰ *Digital Markets, Competition and Consumers Act 2024* (UK) s 2.

⁵¹ ACCC, 'Digital platform services inquiry – Interim report No. 2 – App marketplaces' (March 2021), page 24: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>.

⁵² ACCC, 'Digital platform services inquiry – Interim report No. 6 – Report on social media services' (March 2023), page 13: https://www.accc.gov.au/system/files/Digital%20platforms%20services%20inquiry%20-%20Interim%20report%206%20-%20Report%20on%20social%20media%20services_0.pdf.

introduced in telecommunications in 1997, Part XIC, section 39 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* (Cth) specified that the ACCC was required to prepare a statement, in consultation with the then-AUSTEL, specifying certain services to be deemed as declared services with effect on 1 July 1997. This deeming provision was intended to provide a smooth introduction of the new declaration system.⁵³

When designating digital platform services providers as ‘gatekeepers’ under the DMA, the European Commission has taken the approach of listing the specific ‘core platform services’ in respect of which this gatekeeper status applies. For example, in the context of ad tech services, Alphabet has been designated gatekeeper status with respect to Google Ads, DV360, Search Ads 360, Campaign Manager 360, Waze Ads, GAM, AdSense for display and video ads and AdMob. The benefit of this approach is that it provides transparency and clarity to stakeholders about which of Alphabet’s products fall within the scope of its designation. However, Free TV considers that this approach may also provide scope for designated entities to make changes to elements such as product names or product ownership structures in order to circumvent prescriptive designations.

In contrast, under Part XIC of the CCA, declared services are described by reference to their function,⁵⁴ the effect of which is that any product falling within the scope of the function description also falls within the scope of the relevant designation. As the ACCC has noted:

*“The ACCC’s preference is to describe the service in functional terms using a technology neutral basis as far as possible. This provides the access provider with the flexibility to determine the most efficient way of supplying the service. **It also ensures that with technological or innovative developments the bottleneck service continues to be declared.** In deciding whether to use a technology neutral service description, the ACCC will consider whether such an approach would reduce innovation and distort investment. Technical terms may, however, be included where a functional description would provide scope for ambiguity which could be exploited by the access provider in a manner that hinders access.”⁵⁵ (Emphasis added)*

A similar approach is also adopted for declaration of services under Part IIIA of the CCA.⁵⁶ In the United Kingdom, the CMA may describe a digital activity by reference to the nature of the activity or brand names (or both). Where it decides to designate an entity under the *Digital Markets, Competition and Consumers Act 2024* (UK), the CMA’s designation notice must include (among other things) a description of the digital activity with respect to which the designation applies.⁵⁷

⁵³ ACCC, ‘ACCC releases draft statement of deemed telecommunications services’ (4 June 1997):

<https://www.accc.gov.au/media-release/accc-releases-draft-statement-of-deemed-telecommunications-services>.

⁵⁴ ACCC, ‘A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010’ (August 2016): <https://www.accc.gov.au/system/files/MEA-Final%20-%20Part%20XIC%20Declaration%20Guidelines%20August%202016%20-%20Published.pdf>.

⁵⁵ ACCC, ‘A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010’ (August 2016), page 25: <https://www.accc.gov.au/system/files/MEA-Final%20-%20Part%20XIC%20Declaration%20Guidelines%20August%202016%20-%20Published.pdf>.

⁵⁶ For example, the most recent declaration of a service under Part IIIA (since revoked) was the shipping channel service at the Port of Newcastle, which was described in functional terms rather than by reference to the specific means of access (see *Application by Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7).

⁵⁷ See Competition & Markets Authority, ‘Digital markets competition regime guidance (CMA194): Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024’ (19 December 2024), paragraph 2.106: https://assets.publishing.service.gov.uk/media/6762f4f6cdb5e64b69e307de/Digital_Markets_Competition_Regime_Guidance.pdf.

Free TV submits that the new Australian regime should adopt this functional approach to designation in order to limit any opportunity for entities to exploit the designation process. This approach will provide greater certainty to relevant stakeholders and reduce the need for designations to be updated in the course of the designation period. Free TV suggests that this approach could also provide scope for the designation decision to non-exhaustively list the digital platform products captured by the designation. We also consider that related bodies corporate of designated entities should also be automatically designated.

Free TV submits further that the ACCC should be required to publish non-confidential summaries of designation decisions and agrees that this would promote transparency and provide a greater understanding of the designation process to stakeholders. The ACCC is subject to similar publication requirements under existing laws (see, for example, section 153ZET of the CCA).

Free TV submits that the new regime should provide for a short consultation period open to all stakeholders (as opposed to only the entity providing the relevant service) in respect of a potential designation (or renewal of a designation). A similar requirement presently exists with respect to the telecommunications access regime under the CCA, which provides that the ACCC cannot make an access determination unless a public inquiry about a proposal to make the determination has been held (see section 152BCH of the CCA). However, for the avoidance of doubt, Free TV does not submit that a full public inquiry should be undertaken in respect of every potential designation or renewal determination under the new regime.

Having regard to the recommendations set out in the Australian Government's guidance note on best practice for consultation,⁵⁸ Free TV submits that the consultation period under the new regime should be 30 days. A consultation period of this length would strike the balance between providing adequate opportunity for stakeholders to provide their feedback on a proposed designation determination or renewal, and the execution of expeditious designation decisions under the new regime.

4.2.3 Duration of designations

Free TV submits that a 5-year designation period, with an automatic renewal for a further 5 years in the absence of a material change in circumstances, is appropriate. Noting that comparable regimes in other jurisdictions impose designation periods of up to 5 years with very limited extension periods,⁵⁹ Free TV considers that the proposed designation period and automatic renewal should be sufficient to provide long term certainty, including in respect of investment in businesses which are reliant on access to digital platforms, while also recognising the dynamic nature of digital platform markets.

In Australia, under the telecommunications access regime, a declaration period of between 3 and 5 years (unless the ACCC considers that a shorter or longer period is warranted) is provided for under Part XIC of the CCA,⁶⁰ with most declarations being for 5 years. Longer declaration periods (10 years or more) are more common under the national access regime in Part IIIA of the CCA.⁶¹

⁵⁸ See Australian Government (Department of the Prime Minister and Cabinet, Office of Impact Analysis), 'Guidance Note: Best Practice Consultation' (July 2023), page 7, which states that "Depending on the significance of the proposal, between 30 to 60 days is usually appropriate for effective consultation, with 30 days considered the minimum. Longer consultation periods may be necessary when they fall around holiday periods": <https://oia.pmc.gov.au/sites/default/files/2021-09/best-practice-consult.pdf>.

⁵⁹ See, for example, *Digital Markets, Competition and Consumers Act 2024* (UK) ss 18, 104.

⁶⁰ *Competition and Consumer Act 2010* (Cth) s 152ALA(2).

⁶¹ For example, the most recent declaration period (in respect of the Port of Newcastle) was 15 years.

Designations should automatically rollover at the conclusion of the 5-year period, unless the ACCC is satisfied that there has been a material change in circumstances at the end of the initial 5-year term, in which case it could investigate whether the designation ought to continue for the renewal period. This process would reduce the administrative and investigative burden on the ACCC, compared to a shorter designation period where more frequent designation investigations and decisions are likely to be required.

4.3 Stakeholder questions

4.3.1 What are the benefits and risks of the various designation approaches taken or proposed internationally?

See section 4.1 above.

4.3.2 Would the proposed quantitative thresholds and qualitative factors appropriately target entities that are significant to Australian consumers, businesses and the economy? What other quantitative thresholds or qualitative factors should be considered to ensure they are adaptable to a variety of circumstances? How could any risks of over and under capture be mitigated?

Yes. See section 4.1 above.

4.3.3 For quantitative thresholds, the proposed regime would draw on the threshold levels used by international regimes, adjusted to reflect the size of the Australian economy and population. Is this approach appropriate?

Yes. Quantitative thresholds should be adjusted to reflect the size of the Australian economy. See section 4.1 above.

4.3.4 Are there any circumstances where quantitative thresholds may be sufficient by themselves to inform a designation decision and if so, what circumstances would they be?

Yes. Quantitative thresholds should be preeminent. See section 4.1 above.

4.3.5 The proposed framework provides the relevant minister the ability to direct the ACCC to conduct designation investigations and the ACCC to also self-initiate designation investigations. On what basis should the ACCC be able to self-initiate investigations?

The ACCC should be empowered to self-initiate investigations and should be the relevant decision maker for the purpose of designation determinations. See section 4.2 above.

4.3.6 Should the ACCC be required to publish a non-confidential summary of its designation investigation findings?

Yes. See section 4.2 above.

4.3.7 The digital competition regime proposes designation to last for up to 5 years. Is this time period appropriate?

Yes, subject to the potential for automatic rollover of designation determinations. See section 4.2 above.

5. Obligations under the proposed new regime and a “negotiate-arbitrate” model for setting terms and conditions of access

Free TV supports the proposed approach in section 4.1 of the Proposal Paper to include both broad and service-specific obligations to target anti-competitive conduct under the new regime, established through primary and subordinate legislation, and the inclusion of obligations of the type described in the Proposal Paper.

Additionally, Free TV submits that the new regime should also include:

- A “negotiate-arbitrate” process whereby the ACCC would have power to set reasonable terms and conditions of access to designated services through arbitration if such terms cannot be agreed through negotiation, similar to existing negotiate-arbitrate models for setting terms and conditions of access to services such as that contained in Part IIIA of the CCA (and was formerly the case under Part XIC of the CCA);⁶²
- An additional service-specific obligation addressing data segregation; and
- An additional broad obligation requiring providers of designated services to have an adequate complaint resolution process, including responding to complaints concerning designated services within prescribed time frames.

These proposals are discussed further in section 5.2 below.

5.1 Broad and service-specific obligations

Free TV submits that a legislative framework structured such that high-level anti-competitive behaviours are regulated through primary legislation, supplemented by service-specific obligations (insofar as they concern specific digital platform services industries, markets and conduct) through subordinate legislation will provide an uplift in conduct across the entire digital platform services industry. These would apply upon designation, which would be of the major digital platforms identified above and others who investigations reveal have the ability to engage in anti-competitive conduct and have a critical position in one or more digital services markets.

It will mean that the benefits of more competitive markets will flow through to consumers and businesses far quicker than through sector-specific rules, which may take more time to develop and implement. Additionally, the consistent regulation of broad obligations through primary legislation will limit instances of disadvantage between designated platforms.

5.2 Types of anti-competitive conduct to be addressed

Section 2.4 of this submission details the types of anti-competitive conduct that Free TV considers must be addressed under the new regime. Free TV agrees that it is appropriate that the main purpose of service-specific obligations would be to inform the content and application of the broad obligations, and that each service-specific obligation would be linked to one of the broad obligations. Free TV considers that the broad obligations regulated through primary legislation should deal with the specific types of anti-competitive behaviours listed in section 2.4 of this submission, for the reasons set out in that section.

⁶² There is also a “negotiate-arbitrate” process in the *News Media and Digital Platforms Mandatory Bargaining Code* (see *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Cth)).

For ad tech services, the extent of market concentration in Alphabet and its resulting market power means it can and does behave anti-competitively, including significantly impacting competition in dependent markets while insulated from the threat of competing ad tech service providers. This anti-competitive behaviour includes self-preferencing, bundling and tying of ad tech services, leveraging its dominant market position to collect and use data to create anti-competitive advantages, and restricting interoperability and transparency, particularly with respect to the composition of supply chains and the price associated with using ad tech services. The extensive investigative work undertaken by the ACCC demonstrates the prevalence and impact of this anti-competitive conduct in ad tech services and related markets.

Free TV proposes a “negotiate-arbitrate” model for setting reasonable terms and conditions of access to designated services, in addition to broad and service-specific obligations. The negotiate-arbitrate process would apply to setting the reasonableness of the terms and conditions themselves. This would provide an important backstop to the broad and service-specific obligations to ensure there is a process to ensure reasonable terms and conditions of access to designated services. For the avoidance of doubt, this is a different recommendation to the complaint resolution process discussed below, which relates to complaints arising under the terms of a digital platform provider’s service.

Free TV also agrees that the examples in Table 1 of the Proposal Paper should be addressed in the regime. As noted above, Free TV also proposes a broad obligation to have an adequate complaint resolution process with prescribed time frames for responding to and resolving complaints. This is consistent with the ACCC’s findings in its Fifth Report that improved resolution processes are required to reduce the risk and magnitude of harm, and its proposal that minimum standards be set for internal complaint resolution processes (with the ability to escalate to an independent ombuds scheme).⁶³ While this could be dealt with as a separate statutory requirement, Free TV submits it is appropriate for it to be included as a broad obligation in the new regime.

Free TV also submits that a service-specific obligations (applicable across social media, app marketplace and ad tech services) should be included addressing data segregation. Restrictions on digital platforms’ ability to use data collected from one service in other services is appropriate to address the concerns identified in section 2.4 of this submission.

5.3 Exemptions

There should be very limited scope for exemptions, and the application of the regime should primarily be dealt with through sufficiently targeted service definitions and thresholds, rather than exemptions. In particular, Free TV does not support a broad “countervailing benefits” exemption such as that which is presently provided for in section 29 of the *Digital Markets, Competition and Consumers Act 2024* (UK). Such an approach may lead to broad ranging disputes about benefits and detriments of the regulations, which are likely to lead to uncertainty and delays and risk undermining the purpose of the regime.

However, Free TV considers there may be circumstances in which an exemption is justified. Free TV submits that a high threshold for exemptions, such as exceptional circumstances giving rise to substantial public benefits that significantly outweigh any public detriments, is appropriate and agrees

⁶³ ACCC, ‘Digital platforms services inquiry: Interim report No. 5 – Regulatory reform’ (September 2022), pages 10-11, 16, 88-104: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>.

that the threshold should be higher than the “net public benefits authorisation” test in section 90 of the CCA.

In the event that a “countervailing benefits” exemption is introduced under the regime, Free TV submits that any determination as to whether this exemption should be granted should occur at the designation stage, rather than as a separate process occurring after a designation determination has been made. Free TV submits that doing so will maximise the speed and efficiency of determination decisions, as well as provide greater clarity to market participants as to the designation status of specific entities or services.

5.4 Stakeholder questions

5.4.1 What are the costs, benefits and risks of the proposed framework comprising both broad and service-specific obligations? How can any costs or risks be mitigated? How should broad and service-specific obligations interact?

See section 5.1 above.

5.4.2 Are there any additional types of anti-competitive conduct common across different digital platform services the government should consider when drafting broad obligations?

Yes. See sections 2 and 5.2 above.

5.4.3 For app marketplaces, ad tech services and social media services, are there any additional types of anti-competitive conduct in the supplies of these services the government should consider when drafting service-specific obligations?

Yes. See sections 2 and 5.2 above.

5.4.4 Are there particular obligations or design features in similar regimes in international jurisdictions the government should consider including or not including in a regime in Australia?

Yes. See sections 5.1 and 5.2 above.

5.4.5 What are the benefits and risks of various international approaches to exemptions (such as the EU’s Digital Markets Act and the UK’s Digital Markets, Competition and Consumers Act)?

See section 5.3 above.

5.4.6 For the grounds for exemption, would a broad ‘countervailing benefits’ exemptions mechanism with a high threshold be appropriate? What measures should there be to reduce the risk of vexatious applications?

No. See section 5.3 above.

5.4.7 Are there any potential obligations for which exemptions should not be available?

Yes. See section 5.3 above.

6. Enforcement and compliance

6.1 Monitoring and compliance functions

Free TV strongly supports the implementation of pro-active monitoring, compliance and multijurisdictional coordination functions to support the development and administration of the new regime. The ACCC should work closely with industry stakeholders to ensure that obligations under the new regime are clearly understood, and to ensure that anti-competitive harms arising from new or developing digital platform services are addressed quickly and efficiently.

Under section 28 of the CCA, one of the functions of the ACCC is to “make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission” under the CCA, and “to make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers”.

The publication by the ACCC of regulatory guidance associated with the enforcement and compliance with the new regime, and any other aspects which require the exercise of regulator discretion, is appropriate. The ACCC should be empowered with the discretion to publish such guidance as required, rather than be compelled to do so. It is envisioned that this guidance could take the form of regulatory guidance documents such as those presently published by the ACCC,⁶⁴ as well as more extensive reports or other publications.⁶⁵

6.2 Information gathering

Free TV agrees that the ACCC should be vested with information-gathering powers equivalent to those presently available to it under section 155 of the CCA to enforce the new regime. This should enable the ACCC to investigate any acts or practices that constitute, or may constitute, a breach of the new regime, and whether particular entities and/or additional digital platform services should be designated under the new regime.

Given the global nature of many digital platform services, it is critical that the ACCC is empowered to compel information and evidence from individuals and businesses carrying on business in Australia, but who are not located in Australia.

In order to further bolster the ACCC’s ability to quickly and accurately identify instances in which intervention under the new regime is required, a complaints mechanism should be available for stakeholders to directly raise issues of concern in digital platforms markets with the ACCC. This complaints mechanism should be incorporated in the primary legislation discussed in section 4 of the Proposal Paper, under which:

- Representative bodies in digital platform services markets (such as Free TV), among others, should be able to submit requests to the ACCC to consider anti-competitive practices, or practices that they consider create consumer harms, in one or more digital platform services markets.

⁶⁴ See ACCC, ‘Regulatory guidance documents’: <https://www.accc.gov.au/by-industry/regulated-infrastructure/regulatory-resources/regulatory-guidance-documents>.

⁶⁵ See ACCC, ‘Publications’: <https://www.accc.gov.au/about-us/publications>.

- The ACCC should be required to investigate each such request, unless it determines that the request is frivolous, vexatious or similar.
- On completing its investigation, the ACCC should be required to determine whether any steps should be taken with respect to the issues raised in the request (which could include determining to designate one or more entities and/or digital platform services). The ACCC would be required to release a public statement explaining the evidence that it has found and the reasons for its decision. This will assist in transparency.
- The ACCC should be required to undertake each investigation, and make a determination, within a six-month period.

Importantly, this complaints system must not fetter the ACCC's discretion to consider any issues of concern to it beyond those raised in each request.

6.3 Record keeping

Free TV supports the inclusion of record keeping and reporting requirements under the new regime, and the publication of such information (subject to appropriate confidentiality protections). The retention, reporting and publication of this information would support robust regulatory decisions and transparency, including for businesses reliant on access to digital platforms.

It is appropriate that the new regime include comprehensive record keeping rules on both designated and non-designated digital platform services providers. These rules would ensure consistent data is available to the ACCC so that analysis against designation thresholds and other investigations can be properly undertaken. In this sense, the record keeping powers would be complemented by the information gathering powers (discussed in section 6.2 of this submission) with sufficient enforcement consequences to deter non-compliance with the new regime.

6.4 Penalties and other enforcement tools

Free TV strongly supports Treasury's view that the maximum penalty amounts following the passage of the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) should apply to contraventions of the new regime. It is appropriate that designated entities also be required to comply with all relevant obligations while reviews or applications under the new regime are being conducted.

Additionally, the ACCC should be able to use all presently existing enforcement tools available to it under the CCA in the event of a breach of the new regime. The breach of any provision of the new regime should be a civil penalty provision, without the need to specify each provision as a civil penalty provision. This will emphasise the importance of strict compliance with the new regime to participants in digital platform services markets.

The ACCC's enforcement tools must include:

- **Infringement notices** – Issuing infringement notices as an alternative to commencing proceedings (equivalent to Division 2A of Part IVB of the CCA).
- **Pecuniary penalties** – The maximum penalty for a breach of the new regime should reflect the penalties for breaches of Part IV the CCA, and serious contraventions of the Australian Consumer Law, and therefore be set at the greater of \$50 million, three times the value of the benefit

obtained from the conduct or (if the value of the benefit cannot be determined) 30% of the relevant designated entity's adjusted turnover during the breach period (equivalent to section 76 of the CCA).

- **Injunctions** – The ACCC should be able to seek an order for an injunction, including a positive injunction to require compliance with the new regime (equivalent to section 80 of the CCA). Given many digital platforms service providers are located outside Australia, it is critical that the Government ensure non-pecuniary penalties, such as injunctions, are effective and enforceable.
- **Court orders** – The ACCC, on behalf of third parties, should also be able to seek such orders as a court determines are appropriate in relation to a contravention of the new regime, if it considers that this will compensate a person who has suffered loss or damage or will prevent or reduce such loss or damage (equivalent of section 87 of the CCA).
- **Undertakings** – The ACCC should have the ability to accept the equivalent of a section 87B undertaking in relation to breaches of the new regime, where it is appropriate in all of the circumstances to settle or avoid proceedings for possible breach.

While not contemplated by Treasury in the Proposal Paper, as noted above, Free TV submits there should be a “negotiate-arbitrate” process available to determine reasonable terms and conditions of access to a designated service. Empowering the ACCC in this way would help to avoid the need for detailed service specific obligations regarding terms of access and use and allow the ACCC to determine these matters on a case-by-case basis if required. An arbitration process to this effect already exists in access regimes under the CCA (for example, under Part IIIA, Division 3, Subdivision C of the CCA).

Additionally, Free TV submits that any person who has suffered loss or damage as a result of a breach by a designated entity of the new regime should be able to seek:

- An injunction, on the same terms which the ACCC would be able to obtain (equivalent to section 80 of the CCA).
- Damages against the relevant designated entity for breach of the new regime (equivalent of section 82 of the CCA). It is particularly important that an equivalent of section 83 of the CCA applies to breaches of the new regime. This will ensure that if the ACCC (or any other entity) is successful in proceedings for any such breach, any third party that has suffered loss as a result of that breach may, in claiming for damages, rely on the findings of fact from the successful proceedings.
- Such other orders as a court determines is appropriate in relation to a contravention of the new regime, if it considers that this will compensate that person or reduce the loss or damage suffered by that person (equivalent of section 87 of the CCA). This could include orders declaring that a standard term or condition of use of a digital platform service is void insofar as it contravenes the new regime, or orders requiring the parties to the dispute to arbitrate.

Free TV supports the implementation of structural remedies, such as separating different product or functional divisions (e.g. search, advertising) into independent entities,⁶⁶ in circumstances where

⁶⁶ See, for example, *Digital Markets, Competition and Consumers Act 2024* (UK) Part 1, Chapter 4. See also *Regulation (EU) 2022/1925* Article 18, and *Act on Promotion of Competition for Specified Smartphone Software 2024* (Japan) Article 18.

similar structural remedies have been implemented with respect to the same platform under an equivalent international regime. Free TV also supports Treasury's proposal in section 5.3 of the Proposal Paper to implement mechanisms to recognise compliance overseas as compliance in Australia, subject to the ACCC being able to negotiate the terms of the proposal as necessary to suit the Australian context. It is also critical that the ACCC be empowered to vary or rescind its acceptance of compliance proposals, having regard to the dynamic and fast-moving nature of digital platform services markets.

6.5 Stakeholder questions

6.5.1 The proposed framework could include record keeping requirements for designated digital platforms to record and keep certain information in a standardised format. How could these requirements be scoped to limit regulatory burden? Would there be any public benefit of publishing some of these records?

See section 6.3 above.

6.5.2 The regime could include limited record keeping obligations for entities that meet specified global revenue thresholds but are not yet designated. How could this requirement be scoped to limit regulatory burden and impacted entities? Are there any risks of this approach and how could these be mitigated?

See section 6.3 above.

6.5.3 What guidance or resources would be needed by stakeholders to clarify and assist compliance with the obligations?

See section 6.1 above.

6.5.4 Are increased monetary penalties and/or new specific non-monetary penalties required in the new digital competition regime? If so, why?

Yes. See section 6.4 above.

6.5.5 Should the new digital competition regime provide for structural remedies similar to those available in overseas regimes? Alternatively, should the regime include a mechanism for the ACCC to require that, where a platform has implemented a structural remedy overseas under an equivalent international regime, the platform roll out that same remedy in Australia?

Yes. See section 6.4 above.

6.5.6 Is the proposed compliance proposals regime an efficient and workable way of recognising platforms' compliance with similar international regimes as compliance in Australia?

Yes, subject to the ACCC being able to arbitrate the terms of the proposal as necessary to suit the Australian context. See section 6.4 above.

7. Other implementation considerations

7.1 Review of decisions

While the ability to seek reviews of administrative decisions is necessary to promote the integrity of the new regime, Free TV considers that the regime should include no merits review, consistent with the approach in the telecommunications access regime in Part XIC of the CCA. Merits review can lead to significant delay, uncertainty and use of public resources and associated costs. Merits review in the competition law and *ex ante* regulatory context has historically given rise to significant uncertainty as to the application of particular regulations and regulatory decisions, as well as increased costs for consumers and businesses and delays to the administration of justice, particularly in circumstances where entities may use a merits review function as a means to delay designation or compliance with related obligations. Free TV considers that merits review in the context of the new regime is likely to result in similar inefficiencies.

If merits review is included in the regime, Free TV supports limiting the scope of that review, including limiting the review to information before the original decision maker (plus reasonable updating information, such as updated data since the original decision was made), as well as a leave process similar to that which will apply in the new merger regime under section 100C(3)–(4) of the CCA. Free TV also considers that a designation decision and associated obligations should continue in-force and not be stayed pending the outcome of any review. Free TV supports the availability of judicial review under the new regime to ensure the legality of designation decisions is preserved.

7.2 Cost recovery

Free TV does not consider it appropriate for the Government to recover the costs of administering the regime generally from industry.

The ACCC is already funded to enforce the CCA and other legislation promoting competition and fair trading, and regulate national infrastructure, for the benefit of all Australians. The new *ex ante* competition regime for digital services should be no different. Enforcement of the scheme should be undertaken using base funding to the ACCC, and not a cost recovery charge.

This approach is consistent, for example, with the declaration stage of the telecommunications access regime (Part XIC of the CCA) and the national access regime (Part IIIA of the CCA). However, Free TV does support costs recovery in respect of any arbitrations, disputes, enforcement proceedings or reviews under the new regime.

7.3 Flexibility, fitness-for-purpose and review of legislation

In the context of historically dynamic and fast-moving digital platform services markets, it is necessary for the Government to ensure that all powers under the new regime are exercised in a manner consistent with the following principles, which Free TV submits should be legislated under the new regime:

- competition on the merits;
- informed and effective consumer choice; and
- fair trading and transparency for users of digital platforms.

Free TV further recommends that the new regime include a “timely and responsive” principle to assist in ensuring the ACCC use its powers in a timely and responsive manner, reflecting the dynamic nature of the digital platform services markets. This would support the ACCC acting quickly following identification of circumstances that justify use of its powers under the new regime.

Free TV agrees that the new regime should be subject to a review after an appropriate period to ensure that it is flexible, fit-for-purpose and achieving its intended outcomes.

7.4 International alignment and reform

In the context of a “customised approach” to the regulation of digital platform services by incorporating successful overseas approaches, Free TV strongly supports Australia positioning itself as a “fast follower” of similar international regimes. However, while Australia should seek to act consistently with other jurisdictions where appropriate having regard to the relevant features and requirements of the Australian context (such as discussed in section 6.4 above), it cannot take a “wait and see” approach to the regulation of digital platform services markets. Stakeholder questions

7.4.1 Should merits review be available for certain administrative decisions under this regime (such as exemption decisions)? What would be the associated risks, and can these risks be mitigated?

No. See section 7.1 above.

7.4.2 Would it be appropriate for government to recover the costs of administering the regime from industry?

No. See section 7.2 above.

7.4.3 Are any additional measures required to ensure that the framework remains fit-for-purpose to address harms in fast moving and dynamic digital platform markets?

Yes. See section 7.3 above.

7.4.4 Noting the benefits of Australia adopting the approach taken in international jurisdictions, where might a customised approach for Australia be warranted and why?

See section 7.4 above.

7.4.5 Is the proposed approach for Australia to be a ‘fast follower’ of international regimes appropriate?

Yes. See section 7.4 above.