Free TV Australia Response to Productivity Commission Inquiry survey: Creating a more dynamic and resilient economy

June 2025

Reducing the impact of regulation on business dynamism

1. **What areas of regulation do you see as *enhancing* business dynamism and resilience? What are the reasons for your answer?**

Regulation in the media and communications sector is complex and, as set out below, there are many opportunities for simplification, or removal of outdated regulation that applies to licensed commercial broadcasters, but not their competitors.

However, there are instances where regulation does enhance business dynamism and resilience, particularly with respect to supporting the sustainability of local media businesses which deliver public goods. In particular:

- regulations, both existing and proposed, the object of which is to correct a power imbalance between global digital platforms and local media companies;
- regulations which both deliver social policy objectives and support the sustainability of the local media sector—such as the anti-siphoning laws that provide for free access to sport on TV, and prominence laws which (from 2026) will ensure local services are easy to find on new connected TVs; and
- regulations relating the efficient management of the scarce public resource that is the radiofrequency spectrum.

Addressing power imbalances

The News Media and Digital Platforms Mandatory Bargaining Code (the **News Bargaining Code**) was a regulation aimed at enhancing business dynamism and resilience. It sought to govern commercial relationships between Australian news businesses and 'designated' digital platforms who benefit from a significant bargaining power imbalance. As noted by the ACCC, addressing the imbalance supports the sustainability of the Australian news media sector, which is essential to a well-functioning democracy.

While there have been significant challenges in its implementation, the policy rationale for the News Bargaining Code remains as relevant today as when the legislation was passed in early 2021. Underpinning the legislation was a comprehensive inquiry undertaken by the ACCC that clearly established the substantial market power enjoyed by Meta (then Facebook) and Google. The key findings from this watershed inquiry remain highly applicable as the relevant market shares and trading conditions have not materially changed, other than that other platforms such as TikTok have also become more dominant.

As described by the ACCC, the combination of monopoly position and unavoidable trading partner status creates a fundamental imbalance in bargaining power between media businesses and Google and Meta. The News Bargaining Code aimed to establish the conditions where Google and Meta entered into genuine commercial negotiations for the fair value of news content on their services. These negotiations resulted in payments being made by digital platforms to some Free TV members.

Google and Meta did not enter into arrangements with regional TV members of Free TV because they do not have dedicated online services (therefore other policy interventions are required to support news sustainability in regional areas).

However, in early-2024, Meta announced it would not renew expiring commercial agreements.

The Government has since announced its intention to explore the implementation of a News Media Bargaining Incentive (the **Incentive**). Free TV supports in-principle the objective of the proposed Incentive, to ensure that large digital platforms contribute to the sustainability of news and journalism in Australia by incentivising digital platforms to renew commercial deals. There is currently insufficient information on the design of the scheme to be able to provide comprehensive comment on this as a regulatory tool.

Each of the above aims to enhance business dynamism and resilience by supporting the sustainability of commercial TV broadcasters and other verified news providers, ensuring Australians continue to be able to access trusted local news from Australian news organisations. They do this by ensuring global digital platforms pay fair value for the Australian journalism from which they derive value.

While yet to be enacted, and while effectiveness will be subject to what is legislated, a further important example is the Government's proposed digital competition regime which would introduce ex ante regulation to address conduct in markets like the advertising technology market, and the app store market, which are dominated by players like Google and Apple. It seeks to address conduct that is anti-competitive, creates a barrier to entry or exploits market power to harm Australian users of digital platform services.

Supporting sustainability and social policy objectives – anti-siphoning and prominence

The anti-siphoning regulatory scheme aims to promote the free availability to audiences throughout Australia of television coverage of sporting events of national importance and cultural significance. In so doing it supports the social policy objective of providing access to free sport on television for all Australians, regardless of income—which drives social cohesion and grass-roots participation in local sport.

However, the anti-siphoning scheme also supports business dynamism and resilience by promoting access to rights to televise sporting events that attract mass audiences. These mass audiences are essential to delivering advertising revenue, which in turn is essential to funding many other public goods provided by commercial television, such as universal access to free news and entertainment that reflects Australian voices and stories.

As with the anti-siphoning scheme, the prominence scheme legislated in 2024, and due to commence in 2026, seeks to support free access to local media for all Australians. It requires prominent placement of local services on new connected TV devices, including those of commercial television broadcasters, without broadcasters being required to pay for that prominence. It seeks to ensure that local TV services can be easily found, so they can continue to contribute to Australia's public and cultural life.

The prominence scheme addressed via regulation changed market conditions in which a small number of global device manufacturers sold prime placement on TV home screens to global

streamers, making it more difficult for audiences to find local services. Local media businesses need audiences to be able to find them to be sustainable, so this scheme also supports local business dynamism through regulation aimed at supporting sector sustainability.

Free TV would be pleased to provide further detail on how each of these schemes should be extended to ensure they remain fit for purpose; however, their underlying objectives remain sound.

Managing scarce public resources

The radiofrequency spectrum is the portion of the electromagnetic spectrum used for radio transmission, relevantly including television broadcasting and outside television production. It is a finite national resource and national administrations manage access to spectrum for reasons including management of interference, harmonisation with international technical standards and the delivery of public policy goals. Radiofrequency spectrum licensing arrangements often enhance business dynamism and resilience, by striking the proper balance between accommodating changes in the optimal use-cases for spectrum bands and the need for regulatory predictability for existing use-cases.

However, business dynamism and resilience should not be pursued in isolation—optimal regulatory arrangements for radiofrequency spectrum access should also take careful account of, and give weight to, the positive externalities/public interest benefits derived from spectrum use, such as (in the case of broadcasting) digital connectivity, social inclusion and real-time coverage of breaking news.

2. How has your regulatory burden changed over time?

Regulation applied differently according to delivery platform

A key way in which regulatory burden has changed over the last 30 years or so, since the enactment of the *Broadcasting Services Act 1992* (the **BSA**), is that regulation to deal with potential harms has been implemented differently according to the platform on which a service is delivered. This is because there is not one cohesive regulatory framework for all media delivery platforms.

This increases overall regulatory burden because even if the potential harm is the same, and the regulatory response is broadly consistent, businesses that operate across platforms must apply resources to build systems and processes for each stream of regulation, and deal with different enforcement pathways. This is inefficient and adversely affects business dynamism.

In the context of commercial television broadcasting, the BSA provides for a co-regulatory scheme for the development of codes of practice governing the content of commercial broadcasting services delivered terrestrially. Under this model, industry develops safeguards in a code of practice, and the regulator registers and enforces the code—with complaints also dealt with first by industry, then escalated to the regulator if unresolved. However, a different and direct regulatory scheme applies to the provision of the same content on broadcasters' free online streaming services.

For example, in relation to the existing regulation of gambling promotional content, a broadcaster will be subject to rules in the co-regulatory code for its terrestrially delivered broadcast service, and a set of similar but slightly different rules set out in the BSA for the same content delivered online. Complaint and enforcement pathways differ between the two.

This distinction has been maintained for more than 20 years by a Ministerial determination known most recently as the *Broadcasting Services ("Broadcasting Service" Definition—Exclusion) Determination 2022* and referred to previously as the 'Alston Determination' (named after the Minister who first made the determination). It excludes certain types of online live-streaming services from the definition of 'broadcasting service' under the BSA. This generally includes online television simulcasts meaning that they cannot be regulated under the co-regulatory arrangements referred to above.

Increasing regulatory imbalance between competing sectors

Another notable feature of the regulatory burden experienced by licensed commercial broadcasters is that it is now significantly imbalanced when compared with the lighter regulatory burden applied to online-only competitors.

The comparative regulatory burden between licensed commercial broadcasters and their competitors has also changed over time, as television is regulated far more heavily than its big tech competitors. For example, as set out below there are a range of regulations relating to ownership and control, Australian and local content, taxation and advertising rules that apply only to broadcasters.

This supports a decrease in regulation where possible, combined with regulation to increase competition by moderating the power wielded by major digital platforms.

3. What regulations do you find time-consuming, overly complex or otherwise constraining business dynamism and resilience? What are the reasons for your answer?

Many broadcasting regulations are complex and time-consuming to administer and often apply only to licensed commercial television broadcasters and not their online-only competitors. Or the regulations apply differently and in a more prescriptive manner to commercial television broadcasters than broadcasters in other sectors. Examples are set out below.

Regulations that constrain business operations

Commercial broadcasters are required to do a significant amount of the heavy lifting in supporting Australia's media policy objectives through detailed rules that were developed in the 1990s.

The original broadcasting regulations were created at a time when their focus was on governing access to limited spectrum resources, with broadcasters accepting content quotas and advertising restrictions in exchange for the ability to use this resource to provide services to Australian audiences.

However, the rise of internet streaming and social media has created largely unregulated global competitors that face none of these obligations, leaving traditional broadcasters at a severe disadvantage while large tech platforms dominate advertising markets and content distribution without corresponding regulatory burdens.

There is a detailed set of rules in the BSA applying only to commercial broadcasters, and not online-only platforms such as YouTube, and social media platforms such as Instagram and TikTok. They include:

- **Media ownership and control rules**, which limit the number of licences one company can control in a licence area and regulate the number of media 'voices' in a licence area
- **Australian content rules**, which require 55% Australian content on primary broadcast channels (6.00 am–midnight), a minimum of 1,460 hours of Australian content per year on non-primary channels, and that at least 80% of advertisements must be Australian (6.00 am–midnight)
- **Local content requirements in certain regional television markets**, such that there are standing obligations in some markets, and events that 'trigger' additional local content obligations

Sector-specific restrictions on the control and other regulation of commercial broadcasting services have created an imbalanced playing field. These rules limit licensed commercial television broadcasters from operating more efficiently and realising economies of scale that their online-only competitors can achieve. For example, the ownership of online-only platforms is only regulated like any other company under the *Competition and Consumer Act 2010* and the *Foreign Acquisitions and Takeovers Act 1975*.

Sector-specific taxation

Commercial broadcasters are also subject to a bespoke taxation arrangement, the Commercial Broadcasting Tax (**CBT**), that does not apply to competitors. The CBT, which amounts to nearly $50 million per year, is a disguised super profits tax being applied to a sector that is not earning super profits and is under increased advertising competition from online-only platforms.

This is important because advertising is by far the principal source of revenue licensed commercial broadcasters may access (the BSA provides that commercial broadcasting services are 'usually funded by advertising revenue'). The sector is also under other significant cost pressures, including high transmission costs to ensure free services continue to be available to all Australians no matter where they live, or how much they earn.

The CBT, which is levied on transmitter licences associated with commercial broadcasting licences, was introduced in 2017 as part of regulatory reforms aimed at improving the financial health of Australia's free TV broadcasters. It replaced a licence fee based on a proportion of gross revenue. While the CBT was positioned as an 'interim' measure for up to five years, its continued existence has created an undue financial burden on the sector.

Free TV appreciated the Government's recognition of the burden of the CBT when it announced in December's Mid-Year Economic and Fiscal Outlook 2024–25 that it would suspend the CBT for one year from 9 June 2025. As noted by the Government, this was an important step to support media sector sustainability and contribute to the provision of news for all Australians.

Free TV has urged the Government to recognise the vital role that free local TV plays in our media landscape and to permanently remove this tax to support sector sustainability and increase business dynamism and resilience in the sector.

Election Blackout applied selectively to broadcast media

Currently, there is a law which prevents the broadcast of election advertisements on TV or radio during election blackout periods (as well as referendum advertisements during referendum blackout periods). The blackout period runs from the end of the Wednesday before the relevant polling day

until the close of the poll on polling day. It only applies to broadcasters, not online services or print media.

Election blackout laws applying only to linear broadcasting are not relevant or effective and unfairly disadvantage commercial broadcasters. This regulatory imbalance has a commercial and competitive impact on commercial broadcasters (impacting dynamism), and creates confusion for audiences, who do not always distinguish between media platforms, and are not aware of the disparate rules.

Free TV recommends the immediate repeal of the blackout laws to provide regulatory consistency across platforms and media services.

The alternative suggestion of introducing election blackout regulation to digital services would not significantly contribute to meeting the objectives of the election blackout period. It would be most appropriate for any proposals for advertising regulation on digital services to be considered as part of a holistic review of regulation of the media industry, through a review of the BSA. This will ensure consistency and transparency for audiences, broadcasters, and digital services.

Process improvements – prescriptive Code of Practice registration requirements

As noted above, co-regulatory rules apply to commercial broadcasters terrestrially delivered services. There are opportunities to make the process for introducing these rules more streamlined.

Section 123 of the BSA requires Free TV to make a Code of Practice on behalf of the commercial broadcasting sector. As noted above, this Code must be registered by the Australian Communications and Media Authority (**ACMA**). Free TV is currently engaged with the ACMA in this process—one which began in July 2022. This three-year process has been resource-intensive for Free TV, commercial broadcasters, and the regulator. It has required a public consultation process, as well as frequent engagement with the ACMA. Additionally, the ACMA received a Freedom of Information request relating to documents developed during the process, further expending the resources and time of Free TV and the regulator.

This is in contrast to the codes of practice of the public broadcasters which are developed and notified to the ACMA under the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991*. Public broadcasters are not required to complete a public consultation process in the development of these codes, nor are they required to seek registration (ie. approval) for the codes from the ACMA.

Free TV recommends that the code process for commercial television be amended to replicate that of the public broadcasters, noting that the ACMA would retain the ability to set standards for the industry should there be areas where it felt further regulation was required.

Process improvements – registration under the News Bargaining Code

While the objective of the News Bargaining Code, and proposed Incentive, is strongly supported for the reasons set out above, some regulatory improvements could be considered to streamline the registration process.

A media company may only use the provisions of the News Bargaining Code if that company has registered with the ACMA as a news business corporation and has also registered one or more news businesses. Free TV recommends that news businesses be able to register a multi-platform news

business. In order to ensure that all iterations of the same news service are captured under the Code, Free TV recommends the registration process include the ability to choose multiple platforms under which to register a service.

In relation to the Connection Requirement, applicants must provide a statutory declaration from the company secretary or equivalent certifying that the applicant corporation operates or controls each of the news sources making up the proposed news business. As Free TV members provide Annual Reports which set out the operation and control status of their news sources, provision of the Annual Report should be sufficient to support registration under this section. No further statutory declaration should need to be provided.

Process improvement – Foreign Owners of Media Assets (FOMA) register

The regulator, the ACMA, maintains a Register of Foreign Owners of Media Assets. This includes information about foreign stakeholders and their interests in media assets.

As a general principle, Free TV members accept and agree with the public policy rationale for the transparent disclosure of information regarding material foreign ownership of media assets.

However, as previously submitted to the ACMA, any disclosure regime should avoid duplication with other transparency measures, be targeted to foreign owners who have a sustained material ability to control media assets and that ensures the information disclosed is valued by the public.

Free TV would be pleased to provide additional detail on this issue, including in relation to the various legislative provisions that apply.

Captioning

Commercial television broadcasters, as well as national broadcasters and subscription television broadcasters—but not online-only service providers—are subject to legislative rules requiring that certain amounts of closed captions be provided in programs, and that the quality of those captions meets certain standards.

The captioning rules in the BSA are overseen by the ACMA. The current system of compliance measurement, which involves subjective investigations by the ACMA, is not fit-for-purpose. Free TV recommends the ACMA recommence its exploration of the NER, a quantitative standard, which is a promising option to improve compliance measurement.

Additionally, given the unique nature of live captioning, and the particular technical challenges in providing captioning of live content, the ACMA should ensure that it complies with its obligation to disregard failures 'attributable to significant difficulties of a technical or engineering nature', by disregarding instances where licensees have failed to achieve the currently required standard due to the significant technical difficulties associated with live captioning. It would be appropriate for the ACMA to make representations to the Minister to amend the legislation to enable the ACMA to impose technically workable standards for live captioning. A renewed focus on the NER will assist the ACMA in developing appropriate standards for live captioning.

5. Can you share any specific examples of where you think a regulator has done a good or bad job of understanding and reducing regulatory burden on businesses and why?

ACMA discretion not to investigate

It is important that regulatory schemes give regulators who enforce them discretion to apply their resources to enforcement activity as they consider it is appropriate to do so, and not only where they consider complaints to be frivolous, vexatious, or made in bad faith (which is a high bar for declining to investigate).

The BSA gives the ACMA a broad discretion to conduct broadcasting content investigations (as well as imposing an obligation on the ACMA to conduct investigations, when directed by the Minister). It is important to note that having been granted the discretion to investigate relevant broadcasting complaints only where it thinks that it is desirable to do so, the ACMA has taken the opportunity to decline to investigate in certain circumstances.

In exercising its discretion relevant considerations may appropriately be the specifics and/or merits of the matter, the nature and seriousness of the issue raised, the matter's potential to affect the community at large and its priority in relation to other matters.

This represents good regulatory practice which has reduced regulatory burden for industry, while still delivering appropriate safeguards and enforcement outcomes for audience members.

Implementation of Consistent Gambling Messages

By contrast, an example of regulatory practice which could have been improved related to the implementation of Consistent Gambling Messages on gambling advertising, in late 2022.

This was a regulatory process whereby commercial television was not initially considered to be a stakeholder. Free TV and its members were only informally advised of existence of an Implementation Plan for Consistent Gambling Messages through colleagues from another sector.

Free TV wrote to the Minister for Social Services to request reasonable opportunity to comment and identify any issues or unintended consequences, noting concerns about revenue implications (and therefore our ability to invest in local production, news, sport and other services) as well as operational implications for commercial television and other media businesses.

Following this communication, Free TV was invited to join stakeholder consultation on the Consistent Gambling Messages, and we worked collaboratively with the Department of Social Services to develop an implementation plan which met the goals of the Department while minimising the impact on our members. Free TV recommends that due consideration of commercial television be given when considering any amendments to advertising regulation.