Submission by Free TV Australia

Digital Platforms

Government consultation on ACCC's regulatory reform recommendations

February 2023

Table of contents

1. Executive Summary

- Free TV supports the ACCC's recommendation in the fifth report (**Regulatory Reform Report**) from its Digital platform services inquiry 2020-2025 (**5 Year Inquiry**) that reform is required to promote competition in the Digital Platform sector and to address anti-competitive conduct.
- Free TV agrees with the ACCC's findings that existing competition law by itself is not sufficient to promote effective competition, given the speed at which harms have, and will in future, develop and the dynamic nature of digital services, which require a highly flexible regulatory framework.
- The ACCC's proposal for a new power to create mandatory codes of conduct under the *Competition and Consumer Act 2010* (**CCA**) is an administratively straightforward and efficient mechanism to create the new regulatory framework.
- It is now critical that the ACCC's recommendations are implemented quickly. Numerous other jurisdictions are creating new regulatory frameworks to address anti-competitive conduct in digital platform services markets. Reflecting the urgent need for reform, the US Department of Justice has commenced proceedings in the US Federal Court seeking structural remedies to address alleged anti-competitive conduct of Google. While the US proceedings are an important recognition of the need to address anti-competitive conduct, Australia cannot afford to wait until such litigation is resolved before taking action to protect Australian businesses and consumers.
- The ACCC suggests that new service-specific Codes be developed sequentially. Given the range of anti-competitive conduct already found, it is critical that the drafting of a Code for digital advertising technology (**ad tech**) and other digital advertising services be given priority. This should include measures that address:
    - **Self-preferencing** - the preferential treatment given to the dominant platform's own products and services to the detriment of competing services
    - **Bundling and tying** – consumers and businesses being forced to use a platform's own products and services instead of those offered by competitors
    - **Leveraging data collection for an anti-competitive advantage -** using a dominant position in one market to collect vast quantities of data and making these datasets exclusively available through the platform's own products and services in related markets
    - **Imposition of restrictive terms and conditions of service** – the use of a dominant position to impose non-negotiable and anti-competitive terms of service for products
    - **Interoperability restrictions** – dominant platforms designing their products so they are not interoperable with competing products and services or refusing to participate in industry standard processes
    - **Transparency** – both publishers and advertisers have very little pricing transparency when they use digital advertising services.
- In addition to the digital advertising services Code that we consider to be the most urgent for early implementation, it is also important that Codes are implemented very quickly for the following services:
    - social media services, particularly to address the imposition of restrictive terms of monetisation and to ensure that there are robust and immediate processes for the removal of scam advertising
    - app marketplaces services, including those on connected TVs and related devices.
- The ACCC's work from 2018 onwards indicates that Google, Meta and Apple are dominant in numerous digital platform markets. Accordingly, the initial Codes should apply to the relevant services offered by each of these firms in the first instance. The ACCC should be empowered to monitor the growth of services like TikTok to ensure that these designations remain appropriate, with the ACCC given the power to designate additional firms and services as necessary.

2. Introduction

Free TV Australia appreciates the opportunity to respond to The Treasury's consultation paper on the ACCC's digital platform regulatory reform recommendations.

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 (FTA) television makes to Australia's culture and economy. We proudly represent all of Australia's commercial FTA television broadcasters in metropolitan, regional and remote licence areas.

Australia's commercial broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent.

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. Commercial television reaches an audience of 16 million Australians in an average week, with viewers watching around 3 hours per day.

Free TV members are vital to telling Australian stories to Australians, across news, information and entertainment. FTA television broadcasters understand and appreciate the cultural and social dividend that is delivered through the portrayal of the breadth and depth of Australian culture on television, and Australians prefer local stories. Commercial television networks spend more than $1.5 billion on Australian content ever year, dedicating over 85% of their content expenditure to local programming.

Free TV has been closely involved in the ACCC's consultation processes, providing detailed submissions on the competition issues caused by the conduct of large digital platforms who are dominant across related markets. Commercial broadcasters have a complex relationship with these dominant digital platforms, ranging from networks being clients of digital platform service providers through to competing as advertiser funded content service providers. As a result, Free TV members are uniquely placed to comment on the need for updated competition and consumer law provisions for digital platforms services.

2.2 The need for urgent action

The largest digital platforms, Google, Meta and Apple, have achieved such a dominant and far-reaching position in digital marketplaces that they are already unavoidable trading partners for any digital business. These digital platforms, and in particular Google, have become so pervasive that even businesses that seek out alternative service partners can still be impacted by their use of their strategic market position.

Free TV submits that it is therefore critical that the ACCC's recommendations be implemented as soon as is possible. The risk is that without urgent action to address this dominance and the competition

harms that it creates, it will become harder over time to implement the necessary reforms. The competition harms that the ACCC has identified are, today, having a significant negative economic impact on Australia and Australians.

In this submission we highlight our support for the ACCC's recommendations as they relate to the identified competition issues and highlight an implementation plan for Government so that, working consistently with comparable jurisdictions, a regulatory framework can quickly be established. While Australia should seek to act consistently with comparable jurisdictions, we cannot adopt a "wait and see" approach to analyse what international approaches may be most effective. A "wait and see" approach may result in Australian businesses and consumers not receiving the benefits of changes that are made by dominant platforms in other jurisdictions to comply with new regulation. For example, it is well known that Apple is considering EU specific changes to its App Store to respond to the EU's Digital Markets Act, but those changes will not apply in Australia and accordingly will not benefit Australian app developers or consumers.[1]

2.3 Structure of this submission

This submission is separated into the following sections:

- **Section 3** – Discusses the need for a new ex-ante competition framework and why existing competition law will not address the identified harms.
- **Section 4** – Outlines the recommended legislative approach, principles for developing the Codes and discusses the appropriate designation process.
- **Section 5** – Provides examples of the endemic anti-competitive behaviours of the dominant platforms and sets out the competition issues that should be addressed in the initial Codes.
- **Section 6 –** Discusses a number of other matters raised in the Treasury consultation paper.

[1] As discussed, for example, in this Financial Times article published on 17 December 2022: https://www.ft.com/content/0c2d56f7-a402-45ea-8aa6-0e05e6260b68

3. The need for a new ex-ante competition framework for digital platforms

3.1 Existing competition law is not efficient or effective for digital platform regulation

Free TV agrees with the ACCC's findings that existing competition law by itself is not sufficient to promote effective competition in the Digital Platform sector. Notwithstanding the enforcement success that the ACCC has had in some areas, for example, its successful action against Google for misleading and deceptive conduct in its data collection practices, the ACCC has not been able to take enforcement action using its existing powers to comprehensively address the competition (or consumer) harms it has identified across this sector. Further, as digital platform services are continually evolving, new forms of anti-competitive conduct, and harm, can emerge rapidly. For these reasons the ACCC, consistent with the approach that is being implemented in other jurisdictions, has recommended the creation of an ex-ante competition regulatory model for digital platforms.

Free TV has consistently submitted that existing competition law, that relies on the ACCC identifying anti-competitive activities and then taking enforcement action to address those activities on a case by case basis is not an efficient or effective solution. That approach is expensive, slow and is only capable of addressing very narrow categories of conduct. As shown in Figure 1, international experience highlights the lengthy period involved between the start of the alleged anti-competitive conduct, investigation by the regulator and the completion of enforcement action. As a consequence of these problems, enforcement action by the ACCC relying on its existing powers is unlikely to have broad deterrent value in the Digital Platform sector, where there are a small number of dominant providers engaging in a broad range of different types of anti-competitive conduct.

Figure 1: Slow enforcement of existing competition laws

Google shopping case study – 9 years to decision

In June 2017, the European Commission imposed a €2.42 billion fine on Google for abusing its dominance as a search engine by giving illegal advantage to its own comparison-shopping service. In announcing that decision, the Commission stated:

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

Litigation in that case was only finalised in 2021, when the European General Court dismissed an appeal by Google and upheld the decision of the European Commission. That it took 13 years from the commencement of the conduct to the final resolution is illustrative of the issues with ex-post enforcement action.

Android and search case – 7 years to decision

Similarly, in July 2018, the European Commission fined Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine. The fine was imposed due to illegal restrictions Google had imposed on Android device manufacturers and mobile network operators since 2011 to cement its dominant position in general internet search.

Again, Google lost its appeal to the European General Court in relation to that fine, with that decision being handed down in September 2021. Ten years elapsed between the start of the conduct and the final decision.

Following completion of the Ad Tech Inquiry, the ACCC stated that enforcement action regarding anti-competitive conduct in the ad tech sector was being considered by the ACCC. No enforcement action has been taken to date. Even if such enforcement action was taken, we agree with previous statements by the ACCC that noted it "does not consider that proceedings under existing legislation will be sufficient alone to address the systemic competition concerns" identified in the Ad Tech Inquiry final report. That same conclusion applies to the systemic competition concerns in the other digital services markets that are proposed to be covered by the Code regime.

In light of the findings of the ACCC and the international experience in relation to repeated anti-competitive conduct, there is a strong case for an ex-ante regulatory framework that ameliorates the potential for such conduct. This will address not only existing conduct, across a broad range of areas in this sector, but will also act as a deterrent to future anti-competitive conduct, given action may quickly be taken by the regulator to address emerging anti-competitive practices.

3.2 Action in US

The anti-competitive conduct that Google has engaged in, and that should be addressed by the new legislative regime in Australia, is also demonstrated by the proceedings the US Department of Justice (**DoJ**) commenced against Google in January 2023.

The anticompetitive conduct the DoJ complaint raises includes that Google uses its dominance across digital advertising markets to force not only publishers but also advertisers to use Google's suite of ad tech products, to the exclusion of those of Google's competitors. The DoJ alleges that Google has been able to take this action because it owns:

- the technology used most major digital publishers to offer advertising inventory
- most of the ad tech tools used by advertisers to buy that inventory
- the largest ad exchange used to match digital advertisers and publishers.

While the DoJ action is welcomed as a direct recognition of the anti-competitive harms that the ACCC has also investigated and that are highlighted in this submission, Australia cannot rely on those proceedings to address the harms that have arisen for Australian businesses and consumers from the actions of Google and the other dominant platforms. Instead, Australia must implement its own regulatory regime to appropriately protect Australian businesses and consumers.

4. Enabling legislation

4.1 Mandatory industry Codes are the appropriate ex-ante mechanism

The ACCC has stated on many occasions that industry codes under Part IVB of the CCA are able to be used to address industry-specific market failures and to set out obligations and standards of commercial conduct for industry participants.[2] Similarly, the Government has acknowledged that industry codes are able to provide regulatory support to guard against misconduct and promote long term changes to business culture to achieve competitiveness and sustainability.[3] The use of such Codes is not novel, but rather a tried and tested approach to addressing competition issues.

Accordingly, Free TV supports the recommendations of the ACCC in its Regulatory Reforms Report that a code regime, similar to that in Part IVB of the CCA is an appropriate tool to regulate the market failures the ACCC has identified to date, and may identify in future, in numerous digital platform services markets. The enabling legislation, including the principles under which the Codes are to be drafted are discussed in the next section.

4.2 New part of the CCA required

Free TV submits that inserting a new part into the CCA that creates a power to draft digital platform service Codes would be an appropriate tool to regulate the market failures the ACCC has identified to date and will act as an effective deterrent to future anti-competitive conduct. In our view, given the expert knowledge of the ACCC, developed over a long period of time, the ACCC should be responsible for developing the mandatory Codes under the new regime, rather than a Government department. Such a regime would be flexible, as the terms of each Code would be tailored to respond to specific competition and consumer protection concerns, as and when these arise.

Further, as the need for mandatory code making powers in this sector has been demonstrated through the ACCC's ground-breaking work from 2017 onwards, the process for establishing the initial Codes can be streamlined compared to the existing process for code drafting under Part IVB of the CCA. Specifically, in establishing the initial Codes, the ACCC should not need to demonstrate there are no existing laws that could be used to address the competition or consumer protection issues, whether industry self-regulation has been attempted or the like, which are typically considered at the commencement of a code making process under Part IVB. Those questions have already been considered in the case of digital services markets and the proposed designated entities and there is a clear overall public benefit in implementing mandatory Codes.

4.3 Principles to guide Code drafting

Free TV agrees with the ACCC recommendation in the Regulatory Reform Report for inclusion of legislated principles to guide the development of Codes. To achieve the objective of promoting competition and innovation, the ACCC proposed three principles for inclusion in legislation:

- competition on the merits

[2] For example, in describing the Dairy Industry Code: https://www.accc.gov.au/system/files/Dairy-inquiry-fact-sheet.pdf

[3] As discussed by The Treasury, here: https://treasury.gov.au/publication/p2017-t184652

- informed and effective consumer choice
- fair trading and transparency for users of digital platforms.

These proposed principles are broadly consistent with those included by Free TV in its submissions to the ACCC's consultation process and are supported.

In addition, Free TV recommends that the principles include guidance for the ACCC, as the body responsible for drafting and enforcing the Codes, through a "timely and responsive" principle. This would assist in ensuring the ACCC used its power in a timely and responsive manner, reflecting the dynamic nature of the relevant markets. This would support an outcome that Codes would be put in place quickly following identification of circumstances that justify use of the new powers, with the ACCC then able to effectively monitor compliance.

4.4 Process for making Codes

The existing Part IVB of the CCA does not mandate the steps that are required to be taken to develop a code, which provides valuable flexibility that allows codes to be developed and implemented quickly. The process for making, for example, the Dairy Industry Code demonstrates the benefits of this flexibility. The Dairy Industry Code was implemented under Part IVB in a nine-month period from the time of the Government's announcement that it proposed to implement a code following the completion of the ACCC's Dairy Inquiry.

If similar processes to those used under Part IVB of the CCA were adopted, developing mandatory digital platform services Codes would typically commence with the preparation of a regulatory impact assessment (**RIS**) and then progress to consultation processes to understand particular issues and develop a cost benefit analysis. However, these steps are not required for the digital platform service Codes that are needed to give effect to the findings of the inquiries that have been undertaken by the ACCC since 2017 and that will be undertaken in future (including the Digital Platforms Inquiry, Ad Tech Inquiry and the investigations under the 5 Year Inquiry).

A public consultation process would be followed by the ACCC for exposure drafts of the Codes, with the Governor General ultimately making regulations for the Codes following a recommendation from the Federal Executive Council. Though it would be the ACCC that determined to develop Codes and undertook the Code development process, the Treasurer would be responsible for overseeing the making of regulations to prescribe each Code (as well as any subsequent amendments to them).

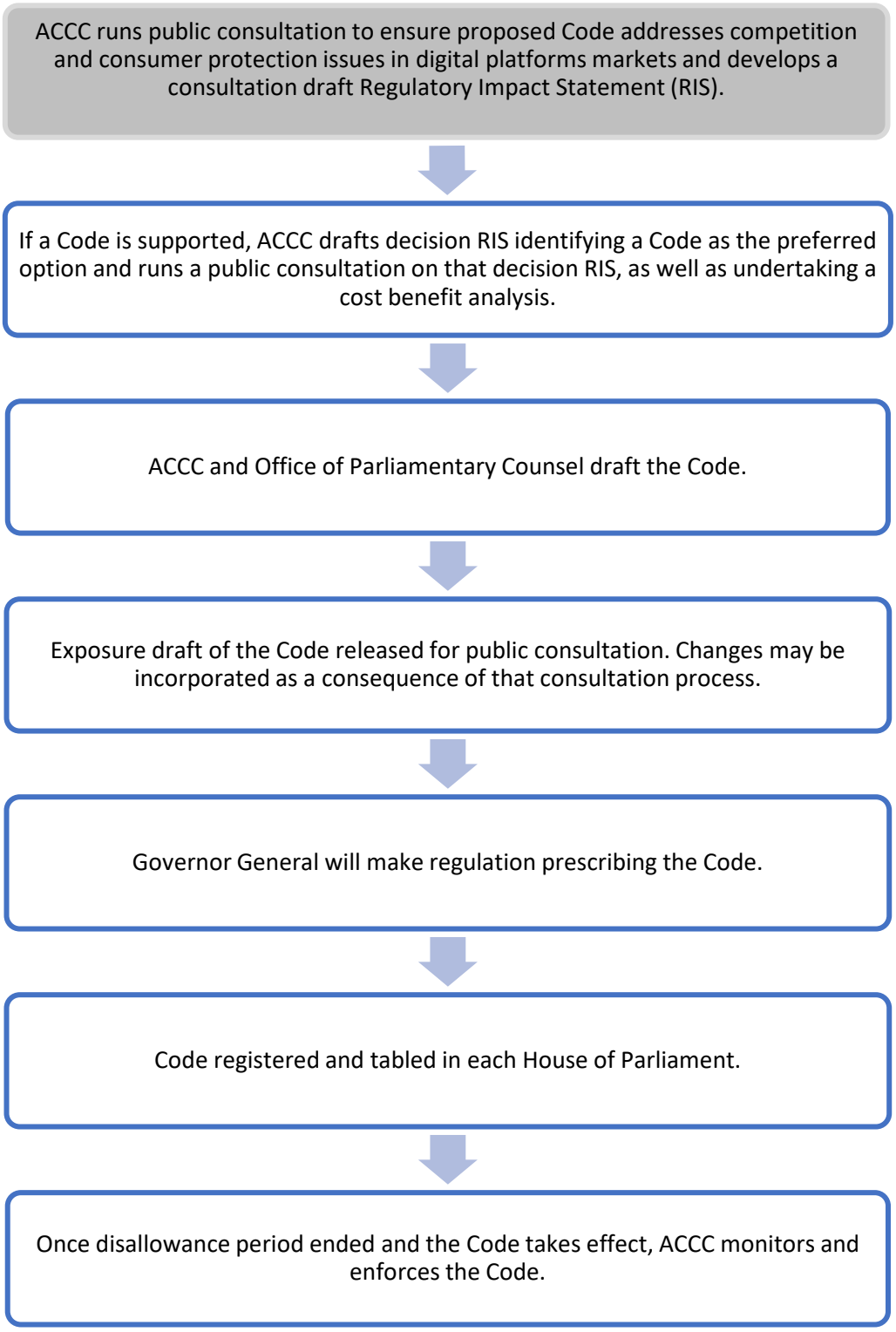
As applies in the case of Part IVB of the CCA, the new Part should not be prescriptive as to the process for development of Codes, other than to provide that each Code must be developed by the ACCC and also to provide that Codes must address the guiding principles and objectives (or one or more of them) specified in the new Part.

As the Codes would be legislative instruments, these would be disallowable instruments under the *Legislation Act 2003*, allowing for appropriate legislative oversight of each Code.

Diagram 1 sets out the proposed Code making process. The same process would apply when amendments to a Code are proposed, though it would be expected that where amendments are made, that process would be able to be undertaken more quickly.

As noted above, the initial step in diagram 1 (shaded grey) would not be required in the case of the initial digital platform service Codes (discussed in the next section), given the work that the ACCC has already undertaken.

Diagram 1: Process for developing a Code



It is important that the new Part of the CCA sets out the maximum time periods that should be taken for each stage for making Codes to meet the requirements of the guiding principles for the code making power. In particular, no consultation process should be allowed to extend from more than one month and each Code making process should be completed within a six-month time frame.

4.5 Services to which code making powers would apply

4.5.1 How services should be defined

The Regulatory Reform Report suggests that the amended CCA could include a list of the types of platform services that could be subject to a Code, citing the 'core platform services' definition used in the EU Digital Markets Act, though acknowledged that there would need to be a process to allow for the definition to be amended over time.

Care needs to be taken in the drafting of any such definition to ensure that it does not inadvertently limit the ability to develop and implement Codes that may be required in future as digital services markets continue to evolve. A key strength of the mandatory industry Code approach is that it is flexible and responsive to changes in a highly dynamic sector. Accordingly, if any such list of services is included it would be appropriate for the list to set out a minimum set of Codes that must be maintained by the ACCC, with the power for additional services to be added by the ACCC, as required, noting that all Codes remain subject to overview of the Government and Parliament, as these cannot be registered without a recommendation from the Federal Executive Council and will be subject to a disallowance process.

4.5.2 Priority Codes

In our view, at a minimum, initial Codes should be developed for the following services:

- digital advertising technology services, including ad tech services
- social media services, particularly to address scam advertising
- app marketplaces services, including the app marketplaces on connected TVs and aggregation devices.

The digital advertising services Code should be the highest priority Code, given the broad range of anti-competitive conduct described in the final report for the ACCC's Ad Tech Inquiry. That conduct continues to occur and therefore is continuing to harm Australian businesses and Australian consumers.

We highlight some of the specific harms that these Codes would address in section 5.

While Codes addressing the services outlined above are the most urgent, these are by no means the only Codes that should be able to be developed and implemented. The ACCC should be tasked with considering which other specific Codes are required as part of its ongoing work under the 5 Year Inquiry.

4.6 Designation of entities

4.6.1 Initial Codes to apply to Google, Meta and Apple

Each Code made under the new Part of the CCA should apply to designated entities, as recommended by the ACCC.

However, for the initial Codes, each of Google, Meta and Apple as well as, in each case, all of the related bodies corporate of these entities, should be designated entities. The work the ACCC has undertaken under the Digital Platforms Inquiry, the Ad Tech Inquiry and the 5 Year Inquiry indicates that each of these entities is dominant in each of the digital platforms services markets in which that

entity operates, though this dominance differs between the different markets and the different corporate groups. Google dominates in consumer facing services, app marketplaces and ad tech services, Meta dominates in social media platform services (and digital advertising services for its own social media platform services) and Apple holds a dominant position as an app marketplace service provider. No further investigation of this issue is required before such designation occurs.

4.6.2 Additional entities to be designated where thresholds are met

The new Part of the CCA should allow the ACCC to designate additional entities that would be subject to the new code making regime. Allowing the ACCC to designate additional entities would be consistent with the UK Furman Report[4] recommendation, which the UK Government has accepted, of allowing designations to be made by the Digital Markets Unit within the UK's Competition & Markets Authority.

The Regulatory Reform Report poses the question of whether quantitative or qualitative criteria or a combination of both, should be used for designation. We recommend a quantitative threshold approach to designation, similar to that included in the antitrust bills introduced to the US Congress in 2021.[5] This would require that an entity is designated if that entity reaches a particular threshold of users in respect of any digital platform service in Australia or, in the case of a digital platform service directed at businesses (such as for example ad tech services), if a specified Australian revenue threshold is met. These criteria are objective and the thresholds would be able to be set at appropriate levels to capture only platforms that hold market power, without adding the uncertainty of introducing an additional qualitative threshold test, such as whether the platform occupies an important intermediary position in providing at least one digital platform service, as suggested by the ACCC in the Regulatory Reform Report.

For transparency purposes, it is recommended that the new Part of the CCA provides that the ACCC should undertake a short consultation with all stakeholders, not simply the impacted entity, prior to a designation being made.

If an entity is designated, that entity should be subject to each service-specific Code that applies to any digital platform services provided by that designated entity.

4.7 Other legislative matters

The other provisions relating to the new code making powers that should be incorporated in the CCA include:

- A complaints mechanism
- Investigative powers
- Appropriate remedies for breach of any Code.

[4] The report of the Digital Competition Expert Panel, which was commissioned by the UK Government, available here:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

[5] This is outlined in section 7.2 of the ACCC's 2022 Discussion Paper, page 73.

4.7.1 A complaints mechanism

The ACCC has a separate Digital Platforms branch, which focusses on consideration of competition and consumer issues in this sector. However, it could not be expected that this ACCC branch will, without input from stakeholders, be able to identify all issues where intervention through use of the new mandatory code making powers would be appropriate.

Accordingly, it is recommended that industry bodies have the right to bring competition and consumer protection issues of general concern in particular markets to the attention of the ACCC for investigation. This would require that the new Part of the CCA incorporates a complaints process that enables issues to be raised with the ACCC to determine whether the code making power should be used. Under this mechanism:

- Any industry body that represents stakeholders in a digital platform services market, for example, Free TV, should be able to lodge a request for the ACCC to consider an anti-competitive practice, or practice that creates consumer harms, in that digital platform services market and whether the ACCC should use its code making powers to address the issue. The use of the code making power is a potential outcome as new Codes would be able to be made from time to time, and existing Codes could be amended, to address emerging issues.
- The ACCC would be required to investigate each such request, unless it determined that the request was frivolous, vexatious or similar.
- On completing its investigation, the ACCC would be required to determine whether it should exercise its code making powers (which could include determining to designate one or more new entities and/or digital platforms services as well as making a new Code or amending an existing Code) or, otherwise, the ACCC would be required to release a public statement explaining the evidence that it has found and the reasons why it made a decision not to exercise its powers. This will assist in transparency.
- As in the case of the code making process itself, a time limit should be imposed on the ACCC considering each complaint. The ACCC should be required to undertake each investigation, and make a determination, within a six-month period.
- This proposed complaints regime would not fetter the ACCC's discretion to consider any issues of concern to it.

4.7.2 Investigative powers

The ACCC has well established investigative powers, including those set out in section 155 of the CCA. Section 155 enables the ACCC to obtain information, documents and evidence. Either section 155 should be extended to apply to the new Part, or an equivalent power should be given to the ACCC in relation to that new Part. This should enable the ACCC to exercise powers:

- To investigate whether particular entities and/or additional digital platform services should be designated under the new Part.
- To investigate particular acts or practices to determine whether there are grounds for the ACCC to exercise its powers to make, or amend, a Code to address anti-competitive practices or consumer harms.
- To investigate any acts or practices that constitute, or may constitute, a breach of any existing Code.

4.7.3 Enforcement

The ACCC should be able to use all of the different types of enforcement tools available to it under the CCA in the event of a breach of any Code. The breach of any provision of the Code should be a civil penalty provision. This would differ from the existing Part IVB regime, which requires that a Code made under that Part IVB specify whether provisions are civil penalty provisions. Specifying in the CCA that all provisions of the Code are civil penalty provisions will emphasise the importance of these Codes and the need for the ACCC to ensure strict compliance.

The ACCC's enforcement tools should include:

- **Infringement notices** - Issuing infringement notices as an alternative to commencing proceedings (equivalent to Division 2A of Part IVB of the CCA).
- **Penalties** - The maximum penalty for a breach of a Code should reflect the penalties for other breaches of the CCA, including the Australian Consumer Law, and therefore be set at the greater of $10 million, three times the value of the benefit or (if the benefit is not known) 10% of the relevant designated entity's annual turnover (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 a Code (equivalent to section 80 of the CCA).
- **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 a Code, 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).

The ACCC should have the ability to accept the equivalent of a section 87B undertaking in relation to breaches of any Code, where it is appropriate in all of the circumstances to settle or avoid proceedings for possible breach.

In addition, any person who has suffered loss or damage as a result of a breach by a designated entity of a Code should be able to seek:

- An order for 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 a Code (equivalent of section 82 of the CCA). It is particularly important that an equivalent of section 83 of the CCA applies to breaches of any Code. This will ensure that if the ACCC (or any other entity) is successful in proceedings for breach of a Code, 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 a Code, 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).

5. Competitive harms to be addressed by the Codes

5.1 Anti-competitive behaviour of platforms that must be addressed

The extent of the market concentration (combined with the strong network effects that are inherent in such markets) for digital platform services is such that the dominant digital platforms have both the incentive and the opportunity to behave anti-competitively to leverage their market power and to insulate themselves from the emergence of competitors. This anti-competitive behaviour includes:

- Creating systems and processes that preference products and services offered by the same company in related markets (self-preferencing)
- Forcing businesses and consumers to use particular products and services by limiting the availability or interoperability of services offered in related markets (bundling and tying)
- Using a dominant position in one market to gain vast quantities of user data and making that data exclusively available through products and services offered by the same company in related markets (data integration)
- Using a dominant market position to force businesses and consumers to accept restrictive terms of service
- Creating opaque supply chains where neither buyer or seller can adequately assess the true cost or value associated with digital platform services
- Failure to take action to address the harms associated with the use of a digital platform service.

The extensive work that the ACCC has undertaken since it first commenced its detailed and thorough investigations of the platforms that are dominant in this sector in Australia demonstrates beyond doubt the anti-competitive activities of those platforms. Our members have been directly negatively impacted by these anti-competitive behaviours. We have provided a number of examples of how this has occurred below.

5.1.1 Self-preferencing, bundling and tying

Self-preferencing refers to the practice of a platform using a dominant or gateway position in one market to provide an advantage to products and services the same company offers in related markets. Examples of this type of conduct have been found by the ACCC in a number of digital platform services including ad tech, app marketplaces, social media and search results.

Self-preferencing also occurs when a digital platform service forces businesses and consumers to use particular products or services of that platform in order to use the platform's products or services in a related market. This bundling and tying of products and services can occur, for example, through digital platform services only being available through one of its own offerings, or the imposition of interoperability restrictions.

During its comprehensive Ad Tech Inquiry, the ACCC carefully consider the evidence of the conduct of Google across the ad tech stack. The ACCC found that Google "has engaged in conduct that has lessened competition and efficiency the ad tech supply chain."[6] The box below highlights the key findings of the ACCC in the Final Report.

[6] ACCC, Digital advertising services inquiry – Final Report, pg 93

ACCC Ad Tech Final Report Findings:

"We are also concerned that Google has been able to leverage its strength in particular ad tech services or in the supply of particular ad inventory, into related ad tech services. There are many examples of Google favouring its own related services at the expense of third-party ad tech services (self-preferencing). In particular, Google has:

- *restricted purchase of YouTube inventory to its DSPs*
- *directed demand from its DSPs (particularly Google Ads) to its own SSP*
- *used its publisher ad server to preference its SSP over time*
- *restricted how its SSP works with third-party ad servers*
- *used its control over auction rules in its publisher ad server to advantage its other services*
- *announced plans which could allow it to use its position in providing the Chrome browser to preference its ad tech services."*[7]

Free TV notes the ACCC has publicly stated that it is continuing to consider the specific allegations that have been made against Google over the course of the Ad Tech Inquiry under the competition provisions of the CCA. Notwithstanding the ongoing investigation being pursued by the ACCC, there has been no change to the market conduct of Google since these matters were brought to light. In fact, Google has continued to strengthen its control of the video advertising market—YouTube is thought to capture two-thirds of the video advertising market in Australia, with ad spending in that segment expected to reach US$3.59 billion in 2023.[8]

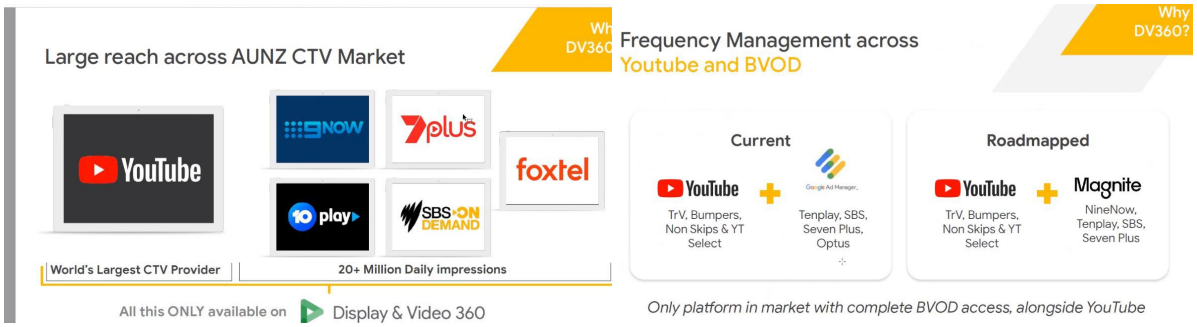
Google continues to bundle exclusive access to Google data—which includes 'click and query data'—and exclusive access to YouTube video inventory with Display and Video 360 (**DV360**). By extending its extensive market power in data and video inventory, Google is consolidating buying power in its DSP, making DV360 a "must use" DSP for advertisers. This means Google controls the allocation of advertisers' budgets across YouTube and third-party inventory supply — giving it both the ability and the incentive to self-preference its own inventory.

Google has continued to openly market this exclusivity in its trade material. In launching a new frequency capping product, Google notes that it is "only available" on DV360 and the "only platform in market with complete BVOD access, alongside YouTube" the new product offers to cap advertising frequency across YouTube and other connected TV apps, including BVOD.

The Google frequency capping product does not allow publishers to 'opt-out' of having their inventory subject to a frequency cap. Approaches made to Google to request this opt-out feature, have so far not been successful, despite the fact that the option to turn off capping for some publishers exists on the buy side of the market.

[7] ACCC, Digital advertising services inquiry – Final Report, pg 87
[8] https://www.statista.com/outlook/dmo/digital-advertising/video-advertising/australia

Google: building new products that rely on the exclusivity of YouTube inventory access



Conflicts of interest

There is an inherent conflict of interest caused by Google being the dominant participant on both the buy and sell sides of the market. This is evident in relation Google's DV360 product automatically allocating an advertiser's spend across the inventory of different publishers as it sees fit.

As noted in the Google blog post on the product: [9]

- Google uses its proprietary data sources "(t)o determine the number of times a CTV ad is shown, Display & Video 360 uses Google data on YouTube and the IAB standard Identifier for Advertising on other CTV inventory."
- "Once we've modelled that duplication of viewers across YouTube and other CTV apps, we can determine the appropriate budget placement to control average ad frequency."

That is, Google's own DSP, DV360, automatically allocates the client's spend across inventory sources as it sees fit. Not only does this place Google's inventory (in this example YouTube) at a significant competitive advantage to other publishers, but it demonstrates the conflict of interest Google has in acting for both buy-side clients and as a seller of inventory.

5.1.2 Leveraging dominant position to collect data and create anti-competitive advantages

Anonymised user related data is crucial in digital advertising and in the provision and use of ad tech services and there is no more valuable dataset in the world than the 'click and query' dataset collected by Google through its search product. Google bundles exclusive use of this data within its own products in related markets, to leverage this dominant data holding across the digital advertising supply chain. As a result, Google's user related data advantage has significantly contributed to its dominance in the market for ad tech services.

Google has imposed significant restrictions on the sharing of any of the user related data that it collects (including on an anonymised basis). Google's user related data holdings create an insurmountable barrier to entry (and expansion) in the market for the provision of ad tech services. It is not practically feasible, in the short to medium term, for any other ad tech services providers to collect such broad ranging and unique data sets in relation to users to compete effectively with Google.

Given this, a stark choice exists, either regulatory intervention occurs or Google will continue to dominate the ad tech services market in Australia.

[9] https://blog.google/products/marketingplatform/360/dv360-frequency-ctv/#footnote-1

5.1.3 Restrictive terms and conditions of service

In markets where digital platforms hold market power for any of their products or services, the terms and conditions of service offered for those products are generally issued on a 'take it or leave it' basis with little or no ability for negotiation.

For example, Free TV is aware of instances where Google has sought to impose strict terms of service on clients as part of its ad server product. In these contracts, clients are required to allow Google to assume ownership of all data collected as part of providing ad server services. It is understood that Google provides publishers with the ability to opt out of Google using their data, but Google ties this opt-out provision with ceasing to deliver any Google data targeted ads across that publisher's inventory. This would significantly affect that publisher's revenue. In other words, if a publisher opts out of Google using the publisher's data, Google automatically disables eligibility of that publisher's inventory from accepting any Google data targeted campaigns.

A similar data collection issue arises in relation to Meta. Meta collects user data from publisher websites that have implemented social media sharing tools. With Meta being a significant source of traffic for many publishers, publishers must implement sharing tools on their pages to allow their articles to be shared by users on Meta's social media platforms (such as Facebook and Instagram). Those publishers therefore have no option other than to accept that Meta may collect such user data.

Free TV submits that imposing these terms of service is anti-competitive because there is no reason to link data collection with services offered in other markets, other than to provide such a financial disincentive for the publisher to opt out, that they continue to share the data with Google or Meta, as applicable, so as to not suffer revenue loss.

Similarly, Free TV is aware that the Google Ad Manager product for connected TVs is collecting user data and passing that data through into the ad tech stack for use in relation to other services. This means that a viewer using a BVOD application that employs Google Ad Manager is having their data shared with Google for use in other market segments. Free TV understands that when requests have been made by BVOD app developers to stop this data collection practice, Google stated that this feature is "part of their roadmap" and is not able to be switched off locally. In addition, Google has approached Free TV members requesting that they either use Google's SSP (AdX) and/or install a Google Software Development Kit (SDK) in their BVOD apps that would send data to Google to be used as part of the DV360 product. While Google has not been transparent about the precise nature of this data, it is understood that these signals would be used to enable the frequency capping product discussed above.

Finally, to demonstrate the dynamic nature of the digital platform service industry and the need for a flexible regulatory regime that can address new harms as they emerge, Free TV highlights Google's conduct in relation to Server Side Ad Insertion (SSAI). SSAI is a technology that creates a complete stream of content, including advertising content in a single stream, rather than having to switch content streams between programming and advertising. To use AdX programmatic deal types (except Programmatic Guaranteed) on any SSAI product, it is a requirement of the terms of service that the publisher either use Google Ad Manager's DAI (Google's own SSAI product) or use a third-party SSAI provider and install Google's SDK that would pass data back to Google. As the screenshot below demonstrates, it is not possible to use a third-party ad server without implementing Google's SDK

(Programmatic Access Libraries) that "that provide discrete access to targeting signals for Google Ad Manager programmatic ads."[10]

Google requiring SDK implementation as a condition of accessing Google's AdX

Configure the third-party ad server's request for Ad Manager.

Note: If you use multiple third-party solutions—for example, a third-party SSAI server calling another third-party ad server, you need to make sure the PAL SDK's encrypted nonce is forwarded to each third party.

These are more recent examples of Google using the market dominant position of its products to enforce contract terms that are non-negotiable and operate to the detriment of competing publishers. This type of behaviour is ongoing, and indeed expanding, in the Australian market notwithstanding that the ACCC has highlighted through its various digital platforms reports that this is anti-competitive.

5.1.4 Constraints on interoperability

Dominant digital platforms also put restrictions on how their products and services interoperate with those offered by competing companies. For example, Google imposes restrictions on how its products integrate with ad tech services such as header bidding (an ad tech service that enables a number of SSPs to bid against each other in real time). These restrictions have the effect of preferencing Google products and services, to the detriment of competitive outcomes.

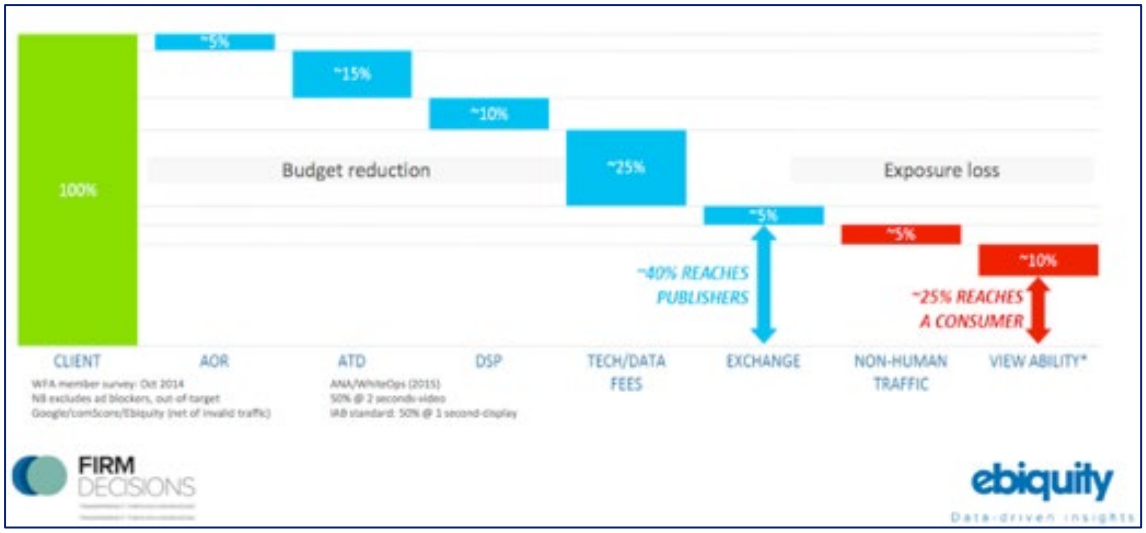
The ACCC has found that Google's refusal to participate in industry-developed header bidding preferences its own SSP product. While there are workarounds available to include Google's SSP at the final stage of a heading bidding process, this process is sub-optimal and still places the Google SSP at a structural competitive advantage to those SSPs limited to inclusion in the initial header bid auction. Google's proprietary service, Exchange Bidding, itself is characterised by self-preferencing with non-Google SSPs subject to an extra fee if they win the auction process.

Free TV also notes the example of Google's restriction on programmatic guaranteed (that is, arrangements where an advertiser buys inventory directly from a publisher) arising from the fact that its Google Ad Manager product is only interoperable with DV360. It is not possible to use a third-party ad server and access programmatic guaranteed inventory through DV360. While this conduct is to the detriment of Google's advertiser customers who may wish to transact via programmatic guaranteed with publishers on third party ad servers, Google uses interoperability restrictions as a mechanism to lock publishers into using their ad tech products.

5.1.5 Lack of pricing transparency in supply chains

The lack of pricing transparency, principally in relation to ad tech services, is a further key matter of concern for Free TV members. For example, when one of our members sells an impression into an SSP, there is no visibility of what the advertiser client actually pays at the end of the complex ad tech waterfall (see diagram below). Visibility of pricing is limited to knowing the fees that were paid on the sell side and the amount received by our members for the impression.

[10] https://developers.google.com/ad-manager/pal



Source: Ebiquity

The ACCC's final ad tech report estimated that between 20 and 75 per cent of the amount paid by an advertiser is taken up on ad tech related costs, with only the remainder filtering through to the publisher. Clearly, for the advertiser-funded business models of Free TV's members, the efficiency of the ad tech stack is directly related to the revenue that is available to reinvest in local services and content.

The current lack of transparency prevents advertisers and publishers from making decisions about how to most efficiently buy or sell ad inventory and also makes it difficult to monitor whether vertically integrated providers are engaging in self-preferencing conduct or charging hidden fees.[11]

Free TV supports the finding of the ACCC that "these fee levels are higher than they would be if the supply of ad tech services was more competitive, and likely reflect the market power that Google is able to exercise in its dealings with both advertisers and publishers."[12]

However, the harm caused by the lack of transparency in the ad tech stack goes beyond lost allocative efficiency and is also used as a tool to leverage a competitive advantage. For example, Google routinely refuses to pay a material percentage of the cost of inventory purchased by their DSP from third-party SSPs. The only information provided by Google for this refusal to pay for inventory is "Invalid Traffic". Google does not provide further information regarding how it has made the assessment regarding invalid traffic. However, Google has made the point that if its own SSP (AdX) was to be used, this would eliminate the invalid traffic issues. This is an example of the lack of transparency being used to create an advantage for the dominant platform.

5.1.6 App approval and other app marketplace issues

In respect of the app marketplaces offered by Apple (the App Store) and Google (Play Store), the terms and conditions of access to app marketplaces are also offered on a "take it or leave it" basis with no genuine opportunity to negotiate these terms. The terms are also subject to change with limited notice to app developers. This again reflects the unfair contract terms that are prevalent throughout the digital platform services markets.

[11] See for example, Chapter 6 of the ACCC's Ad Tech Inquiry Interim Report.
[12] ACCC, Digital advertising services inquiry – Final Report, pg 50

Free TV notes the example of the change to the terms and conditions implemented by Apple to the App Store for apps that required a sign-on, those apps must now offer "Sign in with Apple" as an option. This change was made with no ability to negotiate with Apple for alternative arrangements. The announcement was made on 12 September 2019. Any apps that were in development at that time had to immediately comply with the new terms and conditions. Existing apps had until April 2020 to comply. While the development costs associated with this change were significant, more fundamentally, this changed the nature of the relationship between the consumer and the app developer/provider. Rather than a more direct communication between local content providers and their users, Apple now controls that interaction through a hashed e-mail address that routes all communication via their servers. There is no transparency as to how Apple itself uses the information that it is able to obtain by performing this intermediation role.

In addition, both the Google Play Store and Apple App Store require that any in-app purchased subscriptions share 30% of the subscription revenue in the first year and 15% in the second and subsequent years. This can lead to substantially different revenue outcomes for app developers/providers who offer premium subscription services through their apps, depending on whether the consumer subscribes through the marketplace or via a web-portal. Both Apple and Google are understood to have restrictive terms of service that bans app developers from offering users the option of visiting a web-portal to process subscription payments.

5.1.7 Failure to prevent harms on digital platform services

Free TV also wishes to raise the concerns of its members regarding scam advertising and the significant consumer harm caused by fake or scam advertisements and the inadequate takedown processes implemented by platforms, including Meta, to address this problem.

Free TV notes the ACCC's proceedings against Meta in relation to scam ads that feature prominent Australians without their consent, which was commenced in early 2022. Despite this action, it remains the case that the takedown processes for scam advertisements implemented by Meta (and other platforms) are inadequate. Fake ads continue to quickly reappear after they are taken down. These inadequate takedown processes damage the business reputations of broadcasters and also the personal reputations of the celebrities and media personalities that are misrepresented.

Recent examples of such scam advertising include:

- Fake endorsements that appear on Facebook suggesting that Georgie Gardner, a news reader and reporter for Channel 9, endorses the "Mayan Diamonds" app.
- A fake account purporting to belong to former Today show presenter Allison Langdon, encouraging individuals to enter a fake competition to win money. When an individual seeks to register for the competition, the link takes them to a page that promotes Mega March Monday and requests their bank account details.
- Images of Today Show presenter Karl Stefanovic used without his consent by advertiser Jimmy Napes on Instagram to give a misleading and deceptive endorsement of cryptocurrency.
- A Facebook page used sponsored posts with 9News branding and intellectual property without permission, suggesting that Channel 9 endorses the relevant company (QLD Rebate Finder) when this is not the case. The page also appears to be seeking to obtain personal information under false pretences.
- Unverified social media profiles impersonated Seven's Sydney Weekender Facebook page and targeted typically vulnerable audiences by falsely claiming that the user has won a prize in the comments section of Seven's Facebook posts.

- Seven's Sunrise host, David Koch, was used by fraudsters to scam social media users to invest in cryptocurrencies. His image was used as one of many fake celebrity endorsements that baited and lured users into scam Bitcoin investments.

Notwithstanding the significant consumer harm from these scams, in addition to the reputational harm to Free TV members, the digital platforms are persistently slow in responding to takedown requests.

5.2 Digital advertising conduct to be addressed in first Code

While the harms discussed above have been observed across a number of digital platform services, the most prevalent harms relate to those found in the ad tech and broader digital advertising services sector. The ACCC's comprehensive Ad Tech Inquiry final report clearly establishes the urgent need for a new regulatory framework to govern this burgeoning market.

Google is the dominant supplier of ad tech services across the supply chain and no other provider has the scale or reach that Google does.[13] For example, the ACCC found that:

- 90% of digital ad impressions passed through at least one Google service in the ad tech stack
- Google's share of impressions for each of the four main ad tech services was between 70 and 100%, with revenue shares of up to 70%.

While recognising that being a dominant firm is not in and of itself a justification for the imposition of regulation, in this case, it is the use of that dominant position to harm advertisers, publishers and consumers that justifies immediate regulatory intervention.

As such, although the first Codes would apply to all of the initial designated entities regarding the digital platform services they provide, the provisions of the Code addressing the digital advertising services markets would primarily apply to Google.

The ACCC has previously stated that it was considering enforcement action regarding anti-competitive conduct in the ad tech sector. However, no enforcement action has been taken to date. Even if such enforcement action was taken, we agree with previous statements by the ACCC that the ACCC "does not consider that proceedings under existing legislation will be sufficient alone to address the systemic competition concerns" identified in the Ad Tech Inquiry final report.

The digital advertising services Code should address:

- self-preferencing, including through the bundling and tying of services, which exacerbate conflicts of interest,
- limits on interoperability,
- the leveraging of anti-competitive advantage through data collection in one dominant market for exclusive use in other markets,
- restrictive terms and conditions, and
- lack of pricing transparency.

Further detail on each of these areas, and how these should be addressed in the digital advertising services Code, is included in the following sections.

[13] See, for example, ACCC, Digital advertising services inquiry, Final Report, pg. 5

A number of the competitive harms identified in this section are common across digital platform services. This has been demonstrated through the reports that have already been issued by the ACCC under the 5 Year Inquiry. Therefore while the focus of this section 5 is on the proposed digital advertising services Code, the Code terms discussed in this section will have application across each Code for different services.

5.2.1 Restrictions on self-preferencing behaviour in digital advertising services markets

A general prohibition on a designated entity favouring its own digital inventory or third-party inventory sold through its digital services by excluding rivals or providing an undue advantage to its own inventory or third-party inventory sold through its digital services whether through bundling, tying of services, access to inputs or any other technical or commercial means should be adopted in the initial Code. This prohibition should be targeted.[14] Nonetheless, to future proof the Code, it should not be limited to restricting only specific instances of self-preferencing. If only specific instances were restricted, the Code would require constant updating, as designated entities change their practices over time.

Restrictions in the Code on self-preferencing could include a general "best execution" requirement similar to that applicable in financial markets, requiring designated entities to seek to achieve the best outcome for the relevant client. This is not simply a question of achieving the lowest price for an advertiser, given the different quality of inventory and the intention of advertisers to target particular consumers. Such a requirement would protect both advertisers and publishers by ensuring designated entities do not place their own interests before those of their clients in any digital advertising services trading process. For advertiser clients, in the context of Google's ad tech services, this would mean implementing inventory purchases of the requested type at the lowest net price after ad tech services costs and, for publisher clients, this would mean implementing inventory sales at the highest net price after ad tech services costs.

The Code should specifically restrict the ability of any designated entity to use its substantial market power in any digital advertising services market to extend or leverage that power into other markets to the detriment of competitors. To take just one example, this would mean that, where a designated entity is also a publisher of one or more popular sites that is considered a "must have" by advertisers, it should not be allowed to restrict the access of other digital advertising services providers to those sites or inventory as this locks advertisers into particular digital advertising products, notwithstanding that it is not a direct restriction on interoperability. This is particularly problematic with respect to Google's DV360, which is a demand or advertiser-side platform for purchasing inventory, but the Code should not be limited in its application to these services.

In addition, to address this type of anti-competitive practice, each designated entity must be legally prevented from combining, in relation to its ad tech buying services, that designated entity's own inventory with the inventory of other publishers. To take a practical example of how this would operate in the context of Google, DV360 would still be able to buy Google owned inventory and competing publisher inventory, however this inventory could not be purchased as a single "line item". Instead, the buyer would need to manually allocate spending in DV360 between Google owned inventory and third-party inventory. This would prevent Google from determining how advertiser budgets are allocated across Google owned inventory and competing inventory and therefore restrict

[14] The ACCC has acknowledged this in section 6.1.5 of the Regulatory Reforms Report.

Google's ability to leverage its power in the ad tech services markets into the publisher inventory market to the disadvantage of its competitors in that other market.

5.2.2 Interoperability

Building on the restrictions on self-preferencing, strong and effective protections should be included in the Code that ensure interoperability of the digital advertising services of designated entities with those of third-party vendors. This is to ensure that designated entities cannot use claimed technical limitations to entrench and extend their market power to unduly incentivise or lock other participants into using the designated entity's products or services.

Interoperability measures would in part be addressed by including in the Code requirements for designated entities to apply the same rules, provide access to key inputs on fair and non-discriminatory grounds and give the same information to all other digital advertising services providers.

The Code should also extend to imposing restrictions on the ability of designated entities to exclude other providers, such as by requiring that technologies used by other digital advertising services providers (for example, header bidding) integrate with supply–side (or publisher-side) platforms used by designated entities. This is particularly key for Google Ad Manager which, in relation to programmatic guaranteed services, is currently only interoperable with Google's DV360, as discussed earlier in this submission.

5.2.3 Data collection practices and the requirement for separation

Dealing with data advantages in respect of digital advertising services in a Code need not be challenging, even though it will be necessary to address both competition and privacy concerns. While noting the ACCC view that data access and data portability regimes may assist in addressing the insurmountable barriers to entry to markets created by the vast quantities of consumer data held by the dominant digital platforms, Free TV submits that given the legitimate privacy concerns raised by these approaches, the only effective way to remedy the identified competition harms at the current time would be to limit data use by designated entities. This would be privacy enhancing, in that it would limit the use of data about individuals as compared to data portability or interoperability arrangements, which would *increase* the use of such data. The pro-competitive effects of limiting the ability of designated entities to leverage their data advantages would far outweigh the decreases in efficiency for designated entities caused by the implementation of these measures.

Free TV recommends that the ACCC incorporates in the digital advertising services Code a requirement for each designated entity to put in place separation arrangements to ensure that audience data collected from its own consumer services is kept separate from its ad tech services that advertisers might use to target their campaigns. For example, this would prevent data collected from Google search, Google Maps, Google's Chrome browser or other consumer services from being used as targeting segments in DV360 for advertisers to be able to use to target campaigns across publisher inventory. This would prevent Google from extending its data advantage derived from consumer services into ad tech markets to consolidate buying power in its DSP, where it can control the allocation of advertiser budgets across both its own inventory and third party publisher inventory. However, it would not prevent Google from using data collected from its consumer services to sell advertising inventory on its consumer services. It is expected that the latter would continue to be acceptable practice under a data separation arrangement.

5.2.4 Prohibit restrictive terms of service

The Code should include a requirement for designated entities to offer fair terms and conditions of service that:

- restrict the ability of designated entities to charge inflated prices;
- impose positive obligations to provide fair and non-discriminatory terms of access to key services and platforms, supported by an audit obligation;[15]
- prohibit terms of service that require acceptance of data collection by the platforms in the provision of services (such as Google's ad serving, or Meta's social sharing tools);
- address the restrictions on how publishers can seek to monetise their content, including by prohibiting restrictive terms relating to the placement and pricing of advertising and the sharing of their data with the digital platform (this also relates to social media services as discussed below).

5.2.5 Conflicts of interest in exchange operation and pricing transparency

Free TV supports the ACCC's view that increased transparency, including but not limited to pricing, is necessary for effective competition in relation to digital platform services. For example, transparency is necessary for both publishers and advertisers in digital advertising services markets, given it is not possible to make optimal investment and purchasing decisions without information on prices, terms of service and key functions.[16]

To address conflicts of interest, the Code should include ad exchange provisions that govern how auction processes, and any other ad tech services trading processes, are to be conducted by designated entities. This will ensure that exchange processes are both transparent and that conflicts of interest are adequately addressed.

When operating exchange services, Designated entities should be obliged to clearly disclose how and when buy and sell orders will be matched (including the mechanics of the sales process and other aspects). Further, Designated entities that provide both DSP and SSP services must ensure that the auction, DSP bidding and SSP selection decisions for any transaction must be determined by an independent third-party.[17]

In relation to pricing, different models could be adopted in the Code to achieve transparency for discrete services. For example, in relation to ad tech services, a real time dashboard of ad tech service provider costs for a campaign could be prescribed which would allow advertisers to consider the costs versus the potential benefits of going directly to publishers to engage in a direct deal.

A requirement for full, independent verification of digital advertising services provided by designated entities, not limited to demand side platform services, should also be included in the Code. This would require that verification services are able to access the data required for the effective provision of their services. The same approach should be mandated in the Code for attribution services so that advertisers are able to truly measure the value of their advertising spend.

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[15] Discussed by the ACCC in section 6.8 of the Regulatory Reform Report.
[16] As referenced in section 6.7 of the Regulatory Reform Paper.
[17] As set out in section 3.2, the DoJ is currently seeking structural separation of Google to address this conflict of interest.

The ACCC noted in its Ad Tech Inquiry final report that a voluntary industry-led standards process could require ad tech providers to publish average fees and take rates for ad tech services. Free TV cautions that there is no certainty that such a voluntary code would achieve the required transparency as the ACCC would not be able to determine the content of that code, designated entities may not agree to sign up to such a code and the ACCC could neither monitor compliance or take enforcement action in relation to the voluntary code. The last point is particularly important as neither Australian publishers nor Australian advertisers would have sufficient resources (or the necessary regulatory powers) to determine if designated entities were complying with a voluntary code and would be unable to take any meaningful enforcement action.

In addition, mandatory obligations would be consistent with the approach that the EU has adopted in the Digital Markets Act. This will impose an obligation on gatekeeper digital platforms to provide advertisers and publishers information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper.[18] The Digital Markets Act will also impose a mandatory requirement on those designated gatekeepers to provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory.[19]

The ACCC has proposed the imposition of other transparency measures in relation to ad tech services, such as a requirement that Google amend its public material to clearly describe how it uses first party data to provide ad tech services. Free TV would support the inclusion of such transparency measures in the digital advertising services Code.

5.3 Other sector specific Codes

While the examples given above on anti-competitive conduct in the provision of digital advertising services, the Code terms discussed in this section will have application across all of the different services identified in section 4.5.2. This is because the full range of anti-competitive conduct engaged in by the dominant platforms in digital advertising services markets is engaged in across the markets for those other digital platform services, as has been demonstrated through the reports that have already been issued by the ACCC from its inquiries into digital services markets, including in connection with the 5 Year Inquiry, as well as through the engagement by Free TV's members with the dominant digital platforms.

5.3.1 Social media services

Free TV submits that a Code for social media services should be implemented, including provisions that address the competitive harms discussed above. In addition, the social media services Code should target anti-competitive behaviour that has been observed on those services offered by the dominant digital platforms.

[18] As discussed page 39: https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf

[19] As discussed on page 40: https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf

First, restrictive terms and conditions are imposed by dominant platforms in relation to how content can be monetised on social media and social video. That is, rather than the content owner determining how the content is to be monetised, it is the terms and conditions of the platform that dictate the placement (and often the pricing) of advertising.

For example, on Facebook's Newsfeed (now just known as the "Feed"), the use of logos, banners and the placement of a mid-roll advertisements is set by non-negotiable terms and conditions of service. This means that the terms and conditions of the monetisation of content created by Free TV members is controlled by Meta (or Google in the case of YouTube content), giving the content owner insufficient control over the content that it has created and which it is seeking to monetise.

Secondly, Free TV members have extensive experience of the use of network branding and identities in scam advertising on the platforms and the resulting harms to Australian businesses and individuals. It remains the case that the takedown processes for scam advertisements implemented by Meta (and other platforms) are inadequate. Fake ads continue to quickly reappear after they are taken down. These inadequate takedown processes damage the business reputations of broadcasters and also the personal reputations of the celebrities and media personalities that are misrepresented.

In submissions to the Digital Platforms Inquiry and the inquiry in relation to social media services the ACCC is currently undertaking under the 5 Year Inquiry, Free TV Australia has highlighted the problems caused by fake or scam advertisements and the inadequate takedown processes implemented by platforms, including Meta, to address this problem.

In early 2022, the ACCC commenced proceedings against Meta in the Federal Court in relation to scam advertising appearing on its platforms. At the time, the then ACCC Chair stated that Meta should be doing more to detect and then remove false or misleading ads on Facebook. We support the ACCC's actions in these proceedings and look forward to the ACCC being successful in that case. However, to address the underlying problem of ensuring that Meta (Facebook) and other platforms, including Google and TikTok, take actions to address this significant problem, further steps are required.

To address the problem with scam ads, social media platforms and other similar types of digital platforms, should be required to ensure that material which they have the ability to control (and accordingly which they have the ability to remove from their sites) is not fake, damaging, misleading or defamatory. We acknowledge that the Government is currently considering the possibility of a code to address scam advertising. However, Free TV submits that, given the role of social media platforms in relation to scam ads, the resolution for this significant issue may most easily be achieved by implementing a social media services specific Code under the new regulatory regime.

5.3.2 Addressing anti-competitive behaviour in app marketplaces

A Code for app marketplaces should include requirements for designated entities to treat competitors fairly and in a non-discriminatory manner.[20] This would require app store operators to provide third-party apps with fair terms and conditions of access to app stores and prohibit the self-preferencing of first-party apps.

Free TV's members are particularly concerned to ensure that designated entities are not able to provide preferential treatment to any apps in terms of discoverability. The Code should mandate that

[20] As discussed in section 6.8 of the Regulatory Reform Report.

information be provided regarding the use of algorithms to determine the ranking and discoverability of apps in app stores and the disclosure of rankings that are driven by commercial arrangements.

In addition, the app marketplace Code should include:

- prohibitions on terms of service for app marketplaces that require that app developers use payment systems and sign on processes provided by the app marketplace provider.
- Transparency requirements for the approval process for developer apps to be accepted by the app marketplace provider.

6. Other matters

6.1 Consumer protection recommendations

This submission focusses predominantly on the competition issues that the new Codes should address. In relation to the consumer measures recommended by the ACCC, Free TV submits that the new mandatory code making power should enable Codes to be made to address competition *and* consumer protection issues. Consumer harms in relation to digital platforms services markets (including those considered in this submission), as is the case for competition issues, are typically unique to those markets and therefore should be addressed in a Code rather than being incorporated in a form of regulation that is applicable to all businesses to which the Australian Consumer Law applies.

6.2 Alternative approach to dealing with scam ads

In the alternative to addressing scams in a social media services Code under the new regulatory regime, Free TV would also be supportive of an approach to consumer protection in relation to scams, malicious apps and fake reviews that is similar to that adopted in the UK in its Online Safety Bill.[21] That Bill, if passed by the UK Parliament, would impose statutory duties on digital platforms regarding unsafe content. This would include for example an obligation on designated services to put in place proportionate systems and processes to prevent fraudulent advertising on their services. That approach would be effective in Australia.

6.3 Ombuds model

While Free TV understands the importance of an ombuds scheme for consumers and small businesses, such a scheme is not able to address disputes between larger Australian businesses, such as the commercial free-to-air television broadcasters and designated entities. The creation of a digital platform ombuds scheme should not be seen as an alternative remedy for the competition harms found by the ACCC and highlighted in this submission.

[21] The Bill is accessible from here: https://bills.parliament.uk/bills/3137/publications