



AUSTRALIA

# Submission by Free TV Australia

**Exposure Draft of the  
*Treasury Laws Amendment  
(Competition and Consumer  
Reforms No. 1) Bill 2022***

**The Treasury**

August 2022

## 1. Summary

- Free TV Australia appreciates the opportunity to comment on the Exposure Draft of the *Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022* (Penalties Bill).
- Our industry indicates its support for the increases in Penalties proposed under the Exposure Draft Legislation.
- However, Free TV submits that the scope of the Penalties Bill should be expanded to allow for the increased penalties to apply, in appropriate circumstances, to breaches of mandatory codes implemented under Part IVB of the Competition and Consumer Act 2010 (CCA).
- There are a number of policy processes currently underway across Government that may ultimately lead to a reliance on mandatory codes under Part IVB of the CCA.
- In circumstances where these codes capture large digital platforms like Google, Meta or Apple or device manufacturers like Samsung or LG, it is appropriate that policy makers have the option of applying the increased Penalties to these Codes, commensurate with the scale of the businesses to which they may apply.

## 2. About Free TV Australia

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



## 3. Policy rationale for the Penalties Bill

In his media release announcing the consultation on the Penalties Bill, the Hon Dr Andrew Leigh MP, Assistant Minister for Competition, Charities and Treasury stated the penalties for corporations engaged in anticompetitive behaviour need to increase to ensure that these are high enough to deter unfair activity and also to ensure better corporate behaviour.

The Exposure Draft Explanatory Materials states at paragraph 1.17:

*The amendments primarily increase penalties for anti-competitive conduct and breach of consumer law, so the maximum penalties for contraventions which relate to, for example, the Consumer Data Right or industry codes will not change. Similarly, penalties for secondary boycott provisions will remain at their current maximum level, except for secondary boycotts that cause substantial lessening of competition.*

The comments of the Assistant Minister, and the Exposure Draft Explanatory Materials, suggest that industry codes, which are implemented under Part IVB of the CCA, do not address anti-competitive conduct or provide consumer protections. However, as we set out below, this is not necessarily the case.

#### 4. Codes under Part IVB may regulate anti-competitive behaviour and provide important consumer protections

There are currently 8 mandatory codes, and one voluntary code, in place under Part IVB of the CCA. However, there is significant scope for additional mandatory codes to be put in place under Part IVB in future. For example:

- **Digital platform services regulation:** The Australian Competition and Consumer Commission (ACCC) is currently consulting on the need for a new regulatory framework for digital platforms, as part of its Digital Platform Services Inquiry 2020-2025. This framework is required to address the anticompetitive behaviour and consumer harms that have been identified by the ACCC through the market inquiries it has undertaken since 2017. Chapter 7 of the discussion paper for that consultation considers codes of practice as a potential regulatory tool. In its submission to that consultation, Free TV supported the use of codes. Ultimately, the Government could determine to use the existing code making powers in Part IVB of the CCA to address at least some anticompetitive conduct and consumer harms in digital platform services markets.
- **Prominence:** The Australian Government has announced it will implement a prominence regime to ensure that local TV services are available and easy to find on connected TV platforms, such as smart TVs. This prominence regime is required to address the anticompetitive conduct of the small number of manufacturers that produce these devices for the Australian market. The prominence regime will also provide necessary consumer protections, supporting the accessibility of Australian content for consumers. One of the means by which this prominence regime could be implemented would be via a Part IVB mandatory code.

If one or more mandatory codes were implemented to address the anticompetitive conduct and consumer harms highlighted above, then the same policy reasons underlying the introduction of higher penalties for breaches of Parts IV and IVB of the CCA and the Australian Consumer Law would apply to in relation to those codes.

It is particularly important that higher penalties apply to mandatory codes that address competition and consumer protection concerns in digital platforms services markets, and the market for connected devices, because these markets are dominated by global companies, with the largest market capitalisations in the world.

Unless the penalties that may be imposed for breach of such codes are set at the higher levels proposed in the Penalties Bill, the codes are unlikely to promote the responsible behaviour that the Government is seeking. If penalties for breaches of such codes stay at the current levels, regulated entities will likely see those penalties as simply part of the cost of doing business.

##### 4.1 Proposed further amendment to Penalties Bill

In light of the above, Free TV's submission is that the Penalties Bill should be amended to incorporate an ability for the higher penalties set out in the Penalties Bill to apply to mandatory codes, where that is specified in the particular mandatory code. This would then provide flexibility to the Government to determine if the particular mandatory code in fact addresses anticompetitive conduct and consumer harms. Where a code does so, the Government could prescribe that the higher levels of penalties would apply to breach of that code. A decision to impose higher penalties would be subject to the important protection of Parliamentary scrutiny, given that mandatory codes, as legislative instruments, are subject to disallowance under the Legislation Act 2003.