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Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

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Contents

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Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at February 2021.

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The Bills Digest at a glance

The Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 inserts new Part IVBA into the *Competition and Consumer Act 2010* to establish a mandatory code under which registered Australian news business corporations and designated digital platform corporations must comply with requirements including provision of information and non-differentiation and may bargain about the amount to be paid for making available certain news content on designated platform services.

Key elements

The key elements of the mandatory code are:

- it creates a framework for registered news business corporations and designated digital platform corporations to negotiate in good faith for financial remuneration for the use of, and reproduction of, news content
- where a commercial bargain is negotiated outside of arbitration the parties would not need to comply with the general requirements, bargaining and compulsory arbitration rules
- designated digital platform corporations must provide registered news business corporations with a range of information including advance notification of planned changes to an algorithm that will have a significant effect on referral traffic to, or advertising associated with, covered news content
- where parties cannot come to a negotiated agreement about remuneration an arbitral panel will select between two final offers made by the bargaining parties
- responsible digital platform corporations must not differentiate between the news businesses participating in the Code, or between participants and non-participants, because of matters that arise in relation to their participation or non-participation in the Code
- digital platform corporations may make standard offers to news businesses, which are intended to reduce the time and cost associated with negotiations, particularly for smaller news businesses.

The Bill operates to encourage news business corporations and digital platform corporations to voluntarily work out the price to be paid to the registered news business for the making available of the registered news business' covered news content by the designated digital platform service. Such bargains are likely to be less onerous and less unpredictable than the alternative.

Rationale for the Code

The Bill seeks to address a bargaining power imbalance that exists between digital platforms and Australian news businesses which was identified in the Final Report of the Australian Competition and Consumer Commission's *Digital Platforms Inquiry*.

Senate Committee recommendation

The Bill was referred to the Senate Standing Committee on Economics for inquiry and report. The inquiry received 55 submissions from a wide variety of stakeholders. The views of stakeholder groups are canvassed in detail in this Bills Digest. The Economics Committee recommended that the Bill be passed. Labor Senators and Green Senators, whilst agreeing that the Bill should be passed, made additional comments.

Possible risks

The enactment of the Bill is not without risks—both legal and practical.

The legal risks are twofold. First there is a possibility that the Bill if enacted may be subject to a High Court challenge. This is identified and discussed in this Bills Digest. Second, some

stakeholders have identified the legal risks that might arise if the Bill operates in such a way as to breach Australia's international trade obligations—in particular *Australia-US Free Trade Agreement* (*AUSFTA*).

In practical terms, the key risk is that Google might withhold news services in Australia. This was suggested by the Managing Director and Vice President of Google Australia and New Zealand who stated that 'if this version of the code were to become law it would give us no real choice but to stop making Google search available in Australia'. However, it would appear that other digital platforms would be eager to step into a space that was vacated by Google.

Uncertain outcomes

Whatever the eventual outcome of the bargaining between the parties which is the subject of the Bill, it remains to be seen whether any benefit gained by the registered news businesses is used to support public interest journalism.

Purpose of the Bill

The purpose of the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (the Bill) is to establish a mandatory code under which registered Australian news business corporations and designated digital platform corporations must comply with mandatory requirements including provision of information and non-differentiation, and may bargain about the amount to be paid for making available certain news content on designated platform services.

The Bill seeks to address the bargaining power imbalance that exists between digital platforms and Australian news businesses.[1] The Chair of the Australian Competition and Consumer Commission (ACCC) has put it in this way:

> The central point is that the code's purpose is to address a clear and significant bargaining imbalance that exists between Google and Facebook on the one hand and the news media businesses. This is the essence of the code. It evens out the bargaining positions so that fair commercial deals can be made. Without the code as a backup, that power imbalance will remain. There will be not be commercial deals; instead the platforms will be free to continue to offer terms on a take-it-or-leave-it basis.[2]

Structure of the Bill

The Bill comprises two Parts both of which amend the *Competition and Consumer Act 2010* (*CCA*). Part 1 of the Bill contains the main amendments (which create the Code). Part 2 of the Bill sets out other amendments—in particular, to extend existing provisions relating to penalties to the proposed code of conduct.

Background

While governments around the world have for some time been calculating the economic advantages of national economies that are increasingly digital, they have also been grappling with questions about how to address the disruptions associated with digital technologies, including the entry of digital platforms into almost all aspects of our daily lives.[3]

The importance of the Bill in this context was noted by the Treasurer, Josh Frydenberg, when he stated in December 2020 that the Bill 'represents a major reform—an historic reform—a world first, where the eyes of the world will be on what is occurring here in Australia'.[4] The Treasurer described the Bill as an attempt to 'create a level playing field where market power is not misused and there is appropriate compensation for the production of original news content', and also 'to ensure a sustainable and viable Australian media landscape'.[5]

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1. Explanatory Memorandum, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, p. 7.
2. R Sims (Chair, Australian Competition and Consumer Commission), Evidence to Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 22 January 2021, p. 50.
3. See for example, Treasury, *The digital economy and Australia's corporate tax system*, discussion paper, Treasury, Canberra, October 2018, which noted that the benefits of the digital economy 'rival those of earlier key innovations, like the printing press, electricity, mass production and antibiotics. It has been estimated that GDP per person in Australia is close to $5,000 higher due to the digital economy.' (pp. 2–3). See also Productivity Commission (PC), *Digital Disruption: What do governments need to do?* Research paper, PC, Canberra, June 2016, p. 1. which 'reviews and interprets expert opinion on disruption in order to inform governments about the policy tasks posed by digital technologies.'
4. J Frydenberg (Treasurer), 'Second reading speech: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020', House of Representatives, *Debates*, 9 December 2020, p. 11013.
5. Ibid., pp. 11013–11014.

The Bill can indeed be seen as part of a distinct shift in public conversations about the Internet, and about the disruptions caused by highly digitalised businesses and platform companies around the world.[6] As Terry Flew explains, in an insightful review of the history of digital platforms:

> There is currently a 'policy turn' or a 'regulatory turn' in the field of Internet governance. After two decades where the broad priority was to maximize the potential for speech, commerce, and participation and engagement, there are renewed demands throughout the world for governments to address the perceived power of digital tech giants.[7]

Flew notes that a number of factors are in play, including what he calls a 'populist turn' in politics, whereby various 'mantras' associated with neoliberal globalisation, including the 'sanctity of global commerce and the need to facilitate the growth of markets rather than try and control corporate actors', have been challenged from a variety of angles. He argues the main factor, however, is:

> the realisation that Internet communication is increasingly dependent upon private communications platforms, so that laissez-faire approaches toward speech in the part of governments has produced a public sphere that is increasingly governed by a small number of private corporations.[8]

While the various platforms are an object of international concern, every country has its own story —especially in the context of the news media landscape, with which this Bill is concerned. In Australia, as elsewhere, the impact of Google and Facebook on Australian news media has been considerable. While the digital search and social media tools that the platforms' various applications provide have helped journalists in their daily work of news making,[9] many of whom now work for digital native news outlets, commercial media have, over the last decade or so, suffered a considerable decline in revenue from display and classified advertising.[10] This has directly impacted the publication of high quality news journalism, particularly in regional Australia.[11]

This has occurred in the context of the ongoing deregulation of media ownership in Australia,[12] which has fuelled ongoing concerns about media concentration, and about the extent to which the growth of online news can guarantee choice and diversity in the Australian news market.[13]

Further, Australia has not been immune to the veritable tsunami of misinformation and 'fake news' in recent years, and the actions of populist politicians and political movements has fuelled a

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6. Examples include the impact of rideshare platforms like Uber on the taxi and other delivery industries, of eCommerce platforms like Amazon on the 'bricks and mortar' retail sector, and of 'buy now, pay later' providers like Afterpay on established credit practices of banks and finance companies.
7. T Flew, 'The platformized Internet: issues for internet law and policy', *Journal of Internet Law*, 22(11), May 2019, pp. 3–16. See also P Smith, 'Ground zero in the tech war', *Australian Financial Review*, 5 September 2020, p. 16. Smith points to a number of recent antitrust policy developments in Europe (in Spain, France and Italy), the United States, India, Turkey and Brazil.
8. Ibid., pp. 12–13.
9. Journalists have become increasingly dependent on digital tools, including those afforded by search engines like Google and social media platforms like Facebook. Indeed, the labour of digital and data journalism is now a subset of journalism studies in the academy, with considerable teaching time and research effort devoted to understanding and refining the application of digital tools and skills in news making. See, for example, B Franklin and L Canter, *Digital Journalism Studies: the key concepts*, Taylor and Francis Group, United Kingdom, 2019.
10. Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry: final report*, ACCC, Canberra, July 2019, p. 17. See also A Clark, 'End began a decade ago for Fairfax', *Australian Financial Review*, 27 July 2018.
11. Ibid., p. 18. See also Centre for Media Transition, *Regional news media: state of play*, University of Technology Sydney (UTS), Haymarket, 2019.
12. R Jolly, *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017*, Bills digest, 8, 2017–18, Parliamentary Library, Canberra, 2017.
13. Perhaps the most prominent example here is the decision by the Senate in November 2020 to refer an inquiry into media diversity, independence and reliability in Australia to the Senate Environment and Communications References Committee. See also N Evershed, 'Australia's newspaper ownership is among the most concentrated in the world', *The Guardian*, 14 November 2020. Evershed draws the conclusion that 'while the online news sector is more diverse, it has yet to replace the local reporting done by regional and community newspapers.'

growing chorus of concern about levels of public trust in news media, public and political institutions, and the role of digital platforms in the personal, public and political lives of citizens.[14]

And finally, while critical events in 2020—including the Black Summer bushfires, Black Lives Matter protests, the US presidential elections and the COVID-19 pandemic—all served to heighten the demand for accurate and timely news and information,[15] the economic impact of COVID has helped to accelerate a further rationalisation of news media outlets, particularly in regional Australia.[16]

In this context, the Australian Government asked the Australian Competition and Consumer Commission (ACCC) in April 2020 to come up with a mandatory bargaining code, to address what the Government believes is a 'fundamental imbalance in bargaining power' between Australian news media and the digital platforms.[17] A period of public consultation over subsequent months led to the introduction of the Bill into Parliament in the final sitting week of 2020.[18]

Origins and timeline

The task set for the ACCC's Digital Platforms Inquiry

Before considering the rationale for the development of a mandatory code it is appropriate to acknowledge that the Bill is an outcome of a considerable period—almost three years—of public inquiry and debate about the relationship between news media, audiences, advertising and the platform companies.

On 4 December 2017 the then Treasurer, Scott Morrison, directed the ACCC—perhaps inspired by recent developments in the European Union and the United States[19]—to conduct an inquiry into 'the impact of digital search engines, social media platforms and other digital content aggregation platforms of the state of competition in media and advertising services markets'.[20]

Terms of reference provided to the ACCC indicated the Government's interest in the impact of the activities of platform companies on the availability of news and journalism, by directing the ACCC to consider:

- the extent to which platform service providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers
- the impact of platform service providers on the level of choice and quality of news and journalistic content to consumers
- the impact of platform service providers on media and advertising markets
- the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets; and

14. T Flew, 'Mistrusting the news: what Australians want from news media', *Griffith Review*, 67, 2020.
15. For example, see M Mason and N Gillezeau, 'How newsrooms are adapting to report the COVID-19 crisis', *Australian Financial Review*, 23 March 2020, p. 33.
16. A Meade, 'News Corp to cut "up to a third of workforce" in move towards digital-only publishing', *The Guardian*, 27 May 2020. See also G Dickson, 'Local news sources are closing across Australia. We are tracking the devastation (and some reasons for hope)', *The Conversation*, 9 June 2020, which summarises key elements of the Australian Newsroom Mapping Project.
17. J Frydenberg (Treasurer), *Press Conference: Digital platforms*, transcript, 8 December 2020; J Frydenberg (Treasurer) and P Fletcher (Minister for Communications, Cyber Safety and the Arts), *ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies*, media release, 20 April 2020.
18. The ACCC released two documents for public comment between the announcement in April 2020 and the introduction of the Bill in December 2020: a *Concepts Paper* on 19 May 2020, and an Exposure draft of the Bill on 31 July 2020. See also: ACCC, 'News media bargaining code', ACCC website, n.d.
19. S Blair, 'Europe's Copyright Reform: What Is So Controversial?', *Landslide,* 11(4), 2019; J Rutenberg, 'News Outlets to Seek Bargaining Rights Against Google and Facebook', *New York Times*, 9 July 2017.
20. ACCC, *Digital Platforms Inquiry: issues paper*, ACCC, Canberra, 2018, p. 2.

- the impact of information asymmetry between platform service providers, advertisers and consumers and the effect on competition in media and advertising markets.[21]

The Treasurer's media release noted the decision to hold the Inquiry was an outcome of an agreement reached earlier that year with the Nick Xenophon Team to secure passage of the *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017*, which—among other things—repealed the 75 per cent audience reach rule, and the 'two-out-of-three' cross-media ownership rule, and is seen by many commentators to have opened the door to the merger between Fairfax Media and Nine Entertainment in July 2018.[22]

The ACCC's findings and recommendations

The ACCC provided the Final Report of the Digital Platforms Inquiry (the 'Final Report') to the Government in July 2019.[23] The report teases out the historically developed relations between media businesses and platform companies. It notes the shift of classified advertising from print to online marketplaces and the very particular impacts of digital platforms on the economies of media production in Australia. It indicates, for example, how those platforms have effectively captured the attention of Australian consumers, and the implications this has had for competition between news media and platform companies, which are now:

> ... able to collect and harness greater volumes of user data, which can be used for highly targeted advertising. This significantly differentiates their advertising offering. It also means that the more time consumers spend on digital platforms, the more user data the platforms are able to collect, improving their ability to offer targeted advertising opportunities. This means that to effectively compete with major digital platforms for advertising revenue, media businesses would require greater audience attention and more user data.[24]

The Final Report acknowledges that this is not all one-way traffic. There have been distinct benefits flowing to news media companies from their relationship to the platforms: the former have been able to monetise referred traffic to their websites 'through the sale of advertising inventory, subscriptions, membership fees or donations'.[25] As the ACCC's Final Report explains:

> Links to, and snippets of, news media content enhance the attractiveness of the service Google is able to offer consumers. A significant number of media businesses rely on news referral services from Google to such a degree that it is an unavoidable trading partner. Many news media businesses would be likely to incur a significant loss of revenue, damaging their business, if Google users could no longer click on links to their website in search results. For commercial news media businesses, having links to their websites on Google is a necessity. The ACCC therefore considers that Google has significant bargaining power in its dealings with these media businesses.[26]

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21. S Morrison (Treasurer) and M Fifield (Minister for Communications), *ACCC to review digital platform services*, media release, 4 December 2017.
22. See R Jolly, *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017*, Bills digest, 8, 2017–18, Parliamentary Library, Canberra, 2017. Both the 75 per cent audience reach and the 'two out of three' cross-media ownership rule were designed and legislated in the 1980s, as part of an attempt to limit concentration of media ownership. Supporters for repeal of the rules included Mr Rod Sims, who, according to Jolly, argued 'the reach rule potentially limits competition and efficient investment in the media industry, while the two out of three rule may be preventing the efficient delivery of content over multiple platforms'. (p. 18) Regarding the merger between Fairfax Media and Nine Entertainment, see A Carson, 'Nine-Fairfax merger rings warning bells for investigative journalism - and Australian democracy', *The Conversation*, 1 August 2018.
23. ACCC, *Digital platforms inquiry: final report*, op. cit.
24. Ibid., p. 296. See also Australian Communications and Media Authority (ACMA), *Trends in online behaviour and technology usage: ACMA consumer survey 2020*, ACMA,[Canberra], September 2020, which reports that 86 per cent of Australians used the internet to access news during the first half of 2020, at p. 6.
25. Ibid., p. 100.
26. Ibid., p. 8.

Nevertheless, the ACCC concluded that the considerable loss of advertising revenue 'appears to have reduced the ability of some media businesses to fund Australian news and journalism'.[27]

> Australian commercial media, and in particular traditional print media (now print/online media), first suffered a significant reduction in advertising revenue through the unbundling of classified advertisements from newspapers.
>
> This resulted in a decline from AU$2 billion in classified advertising revenue in 2001 to AU$200 million in 2016 (nominal figure). If these figures are adjusted for inflation, the decline over the same period is from AU$3.7 billion to AU$225 million.[28]

In a media release issued on the day the report was provided to the Government, Mr Rod Sims, Chair of the ACCC, stated that the 'dominance of the leading digital platforms and their impact across Australia's economy, media and society must be addressed with significant, holistic reform', and indicated that the Final Report proposed a series of recommendations 'spanning competition law, consumer protection, media regulation and privacy law, reflecting the intersection of issues arising from the growth of digital platforms'.[29]

Mr Sims' media release included a dot point summary of a shortlist of the 23 recommendations made in the Commission's exhaustive report.[30] First on the list was Recommendation 7, that platform companies develop codes of conduct 'to address the imbalance in the bargaining relationship between these platforms and news media businesses and recognise the need for value sharing and monetisation of content'.[31]

The media release noted other recommendations made in the Report for supporting news journalism:

- a process to implement a harmonised media regulatory framework (Recommendation 6)
- a new grant package of $50 million per year to support local and regional journalism (Recommendation 10) and
- a change in tax settings to encourage philanthropic support for journalism (Recommendation 11).

The Final Report also recommended that 'stable and adequate funding' be provided for Australia's public broadcasters.[32] In other words, the ACCC recommended a variety of measures not only to address the imbalance it described between media businesses and platform companies, but specifically to support news media in the production of public interest journalism.

The Government's response to the ACCC's Final Report

In response, the Government accepted the ACCC's conclusion that there is a need for reform 'to better protect consumers, improve transparency, recognise power imbalances and ensure that substantial market power is not used to lessen competition in media and advertising services markets'.[33]

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27. ACCC, *Digital platforms inquiry: final report*, op. cit., p. 17.
28. Ibid.
29. ACCC, *Holistic, dynamic reforms needed to address dominance of digital platforms*, media release, 26 July 2019.
30. **Appendix A** to this Bills Digest presents a table of all 23 recommendations, showing the corresponding responses by the Government, as published in Australian Government, *Regulating in the digital age: Government response and implementation roadmap for the Digital Platforms Inquiry*, Australian Government, [Canberra], December 2019.
31. ACCC, *Holistic, dynamic reforms needed to address dominance of digital platforms*, op. cit.
32. ACCC, *Digital platforms inquiry: final report*, op. cit., pp. 324–327.
33. J Frydenberg (Treasurer) and P Fletcher (Minister for Communications, Cyber Safety and the Arts), *Release of the ACCC Digital Platforms Report*, media release, 26 July 2019.

In December 2019 the Government directed the ACCC to facilitate the development of voluntary codes, specifying that the ACCC provide a progress report on code negotiations in May 2020, with codes to be finalised no later than November 2020.[34] The Government stated that if agreements were not forthcoming, it would 'develop alternative options to address the concerns raised in the report and this may include the creation of a mandatory code'.[35]

On 20 April 2020, the Government announced it had directed the ACCC to develop a mandatory code of conduct to address what it saw as 'bargaining power imbalances between digital platforms and media companies'.[36] It had come to the conclusion that the original timeframe announced in December 2019 'requires acceleration'.

> The Australian media sector was already under significant pressure; that has now been exacerbated by a sharp decline in advertising revenue driven by coronavirus. At the same time, while discussions between the parties have been taking place, progress on a voluntary code has been limited according to recent advice provided by the ACCC following a request by the Government for an update. The ACCC considers it is unlikely that any voluntary agreement would be reached with respect to the key issue of payment for content.[37]

The ACCC subsequently released a Concepts Paper in May 2020, which reiterated the ACCC's view of a clear 'bargaining power imbalance' between news media businesses and the major platforms, which 'underlies all issues to be addressed by the mandatory bargaining code'.[38] It noted further that the aim of the Code would be to address that imbalance by:

> facilitating commercial negotiations that will allow news media businesses to achieve outcomes consistent with those that would be achieved in the absence of the bargaining power imbalance. For the purpose of the concepts paper, such outcomes are termed 'appropriate remuneration'.[39]

The ACCC then released an exposure draft of the Code on 31 July 2020.[40]

During the weeks of public debate prompted by these publications, the different parties—large news media businesses, and Google and Facebook—made strong claims about what the Code could lead to.

On release of the Concepts Paper, the large media corporations very publicly signalled their views on the value of their published news to the platforms. The Chair of Nine Entertainment, Mr Peter Costello, was reported as arguing the platforms 'should have the technology giants pay around $600 million a year into a fund distributed between Australian media companies',[41] while the Executive Chair of NewsCorp Australasia, Mr Michael Miller, was quoted as saying that figure was not nearly enough: 'Our modelling suggests the figure is much higher than $600 million and former senator Nick Xenophon, whose advocacy sparked the ACCC inquiry into the platforms, has nominated $1 billion'.[42]

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34. Australian Government, *Regulating in the digital age*, op. cit., p. 8.
35. Ibid.
36. J Frydenberg (Treasurer) and P Fletcher (Minister for Communications, Cyber Safety and the Arts), *ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies*, media release, 20 April 2020.
37. Ibid.
38. ACCC, Mandatory news media bargaining code: Concepts paper, ACCC, [Canberra], 19 May 2020, p. 7.
39. Ibid.
40. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020: Exposure Draft.
41. M Mason, 'Nine wants tech giants to pay media $600m', *Australian Financial Review*, 14 May 2020, p. 1.
42. M Mason, 'News says $600m from tech giants not enough', *Australian Financial Review*, 15 May 2020, p. 20.

In early August 2020, Google was reported to have 'refused to rule out axing its Google News product in Australia'.[43] It then commenced a public campaign against the Code which included a series of pop-up ads appearing on its product sites, linking to an open letter stating the proposed code 'would force us to provide you with a dramatically worse Google Search and YouTube, could lead to your data being handed over to big news businesses, and would put the free services you use at risk in Australia'.[44]

Rod Sims refuted Google's claims, responding that the platform's open letter contained misinformation about the proposed Code.

> Google will not be required to charge Australians for the use of its free services such as Google Search and YouTube, unless it chooses to do so.
>
> Google will not be required to share any additional user data with Australian news businesses unless it chooses to do so.[45]

Facebook stayed relatively quiet, eventually issuing a statement claiming the proposed Code 'misunderstands the dynamics of the internet and will do damage to the very news organisations the government is trying to protect'.[46] It stated that if the draft became law it would no longer allow publishers and users in Australia to share local and international news on Facebook and Instagram.

> This is not our first choice—it is our last. But it is the only way to protect against an outcome that defies logic and will hurt, not help, the long-term vibrancy of Australia's news and media sector.[47]

Introduction to Parliament

On the day prior to the introduction of the Bill into Parliament, the Government announced that some important amendments had been made to the draft version.[48]

- the ABC and SBS would now be included in the Code
- the value to news media companies of referral traffic from the platforms would now be included in the assessment of value, and
- the period of notice that platform companies would be required to give to news media companies about changes to their algorithms was reduced from 28 days to 14 days, and the nature of those changes had also been adjusted.

On the last point, the Minister for Communications explained this would now be restricted 'to conscious changes to algorithms that would have a significant impact on ranking, rather than the continuous machine learning progress of algorithm changes, which happens continuously.'[49]

The Treasurer emphasised that the Code would be a framework that allows commercial deals to be made between platforms and media businesses outside of the Code.

> It is really important to understand that. Paul and I and the Prime Minister, we want deals to be struck between the parties outside of the code. Commercial negotiations that are conducted in good faith, we

43. D Swan, 'Google threatens to dump news', *The Australian*, 3 August 2020, p. 1.
44. M Silva, 'Open letter to Australians', Google Australia, 17 August 2020.
45. R Sims, *Response to Google open letter*, media release, 17 August 2020.
46. W Easton, *An update about changes to Facebook's services in Australia*, media release, 31 August 2020.
47. Ibid.
48. J Frydenberg (Treasurer) and P Fletcher (Minister for Communications), *Press conference: Parliament House, Canberra*, transcript, 8 December 2020.
49. Ibid.

> want those deals to be struck outside of the code. And the word coming back to us is that there are deals that may be struck very soon between the parties.[50]

The Minister for Communications, in the same press conference, commented—in response to a question about whether there will be any scope for discretion in the arbitration process—that 'there are strong incentives for the parties to come to commercial agreement before arbitration and we expect that may very well occur.'[51]

The *Australian Financial Review* reported Rod Sims as making similar comments about the possibility of agreements being made without the parties going to offer and arbitration.

> "The aim of the code is to address the uneven bargaining position between Australian news media businesses and the big digital platforms who have clear market power,'' Mr Sims said. ''It would be good to see commercial agreements between platforms and news media businesses taking place outside the code process. Arbitration is a last resort, and exists to strengthen the media businesses' bargaining position".[52]

Clearly, the option to strike commercial agreements outside the Code was always contemplated. The Explanatory Memorandum introduces this as 'contracting out', explaining that nothing in the Bill 'prevents a responsible digital platform corporation from reaching a commercial agreement outside the Code with a new business corporation about the matters subject to the Code'.[53]

As such, the Code, at its core, seeks to strongly incentivise parties to the negotiating table rather than final offer arbitration.

News and information in a democracy, and a big data economy

Much has been made in the policy process leading to this point, of the need to ensure the sustainable production of public interest journalism, and at the same time to support further development of the digital economy in Australia.

The goal of supporting a sustainable news media industry is made clear in the opening paragraph of the Explanatory Memorandum, published when the Bill was introduced into the Parliament in December 2020.

> This Bill establishes a mandatory code of conduct to help support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news media.'[54]

Just a few months earlier, as the finer touches were being put on the Bill, digital development was clearly on the Government's mind when it announced, in September 2020, that it would invest almost $800 million 'to enable businesses to take advantage of digital technologies to grow their businesses and create jobs as part of our economic recovery plan'.[55]

And in a joint media release issued on the day before the Bill was introduced into Parliament, the Treasurer and the Minister for Communications were careful to acknowledge that the Bill would

50. Ibid.
51. Ibid.
52. M Mason, 'Hope that new media law will not be needed', *Australian Financial Review*, 10 December 2020, p. 6.
53. Explanatory Memorandum, p. 14.
54. Ibid., p. 7.
55. S Morrison (Prime Minister) and J Frydenberg (Treasurer), 'Digital business plan to drive Australia's economic recovery', media release, 29 September 2020.

both ensure 'the Australian economy is able to take full advantage of the benefits of digital technology while protecting a strong and sustainable Australian news media'.[56]

In the current debate about whether and how a sustainable news media can be achieved by regulating a key aspect of platform companies' activities in Australia, a number of dilemmas have been brought into focus, including:

- What is the role of news in a well-functioning democracy?[57]
- Should the Government provide more direct support for regional and local news production?[58]
- What are the different categories of news that either do or do not qualify as being 'of public interest'?[59]
- How do we measure, and improve, trust in news?[60]
- What roles do digital platforms actually have in publishing news?[61]

These matters, and many more, have been thoroughly canvassed. However, given the central concern of the Bill is to intervene in the commercial relationship between news media and platform companies, questions come into focus which are more directly about the economic value of news and information. What do each of the parties produce? How do they derive income? Who uses their services and products, and how? And how do answers to these questions help clarify what are 'unavoidable trading partners', and what is a 'bargaining power imbalance'?

News and journalism

In designing the Code, policy makers have had to consider the fundamental question of what is news content. News and journalism have been the subject of an expansive scholarly literature,

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56. J Frydenberg (Treasurer) and P Fletcher (Minister for Communications, Cyber Safety and the Arts), *News media and digital platforms mandatory bargaining code*, media release, 8 December 2020.
57. In a submission to the Senate Inquiry into the Bill, *The Conversation Australia and New Zealand* argued that: 'Quality information is as important to democracy as clean water is to health. …[and] Public interest journalism is the primary means by which quality information is communicated to the Australian public.' The Conversation Australia and New Zealand, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 42], n.d., p. 1.
58. See K Hess, 'The government's regional media bailout doesn't go far enough—here are reforms we really need', *The Conversation*, 20 August 2020. Hess acknowledges the optimism felt by many at the decision to pursue the Code, and the $50 million Public Interest Newsgathering Fund, but argues 'they miss the mark for many small independent newspapers and new media start-ups.' She offers a list of further options, including reviewing government advertising legislation, practices and policies, and lowering the revenue threshold in the Code from $150,000 to $75,000.
59. In fact, the Bill requires the arbitral panel to make decisions about final offers 'in the public interest'. See **proposed subsections 52ZX(7)** and **(8)** of the *CCA*, at item 1. This will likely be a subject of considerable debate. See J Johnston, 'Whose interests? Why defining the "public interest" is such a challenge', *The Conversation*, 22 September 2017. Johnston notes that the public interest 'is such a complex and tricky concept to navigate because it has intentionally evolved as ambiguous and mutable. It has no overarching definition because it is contextually determined in scope and purpose. This means, in any particular instance, political, legal and regulatory authorities make judgement calls. And what may be deemed in the public interest today may not be in a decade; it changes with social mores and values.' See also R Jolly, Media ownership deregulation in the United States and Australia: in the public interest?, Research paper series, 2007–08, Parliamentary Library, Canberra, 2007. Jolly also notes that defining 'the public interest' is a challenging task. 'This is because the term necessarily alters over time to reflect changes in society and because it involves at least a degree of subjectivity. The public interest can be related to ideas, like common advantage, common good, public good, public benefit or general will. … Another interpretation is that the public interest can also mean more generally what is considered beneficial to the public, that is, that the public interest does not mean what is of interest to the public but what is in the interest of the public.' (pp. 9–10).
60. The development of the Bill has been undertaken at the same time as the Australian Communications and Media Authority (ACMA) has been working on the development of voluntary codes of practice aimed at countering disinformation in online news. But the question of trust has also been asked in relation to the platforms ability to curate users' access to news through the use of algorithms. See for example B Clark, 'The collateral damage in the big tech debate is you, the user', *Crikey*, 22 January 2021. Clark expressed concern—as did many others—about the 'experiment' conducted by Google on the flow of news to Australian users during January, which was aimed at testing the relationship between Google Search and Australian news media businesses. Clark remarks: 'The question Australian internet users must ask themselves, whatever the outcome of the regulatory negotiations, is this: do we trust the same former frat bros who stoked Trump's rise to write the rules that govern such prominent public spaces *in secret*?'
61. See, for example, M Bradley, 'Are Facebook and Twitter publishers? The case was made when they took Trump down', *Crikey*, 1 February 2020.

much of which has been drawn on by policy makers and interested stakeholders as they have considered how a mandatory code should treat 'news' and 'news making'. But precisely **what is news**?

In a report produced by the Centre for Media Transition (CMT), commissioned by the ACCC during its Digital Platforms Inquiry, 'news' and 'journalism' are defined as having six key functions:

- to keep the public up to date with what is going on in the world
- to provide the public with reliable information on which they may base choices as participants in political, economic and social life
- to provide a forum for the exchange of ideas and opinions
- to be a watchdog on those in power
- to help societies understand themselves
- to provide the material upon which members of a society can base a common conversation.[62]

The same report records an expansive definition of journalism, as not only a watchdog on the powerful but also the 'practice of producing news by gathering information and using storytelling techniques', with outputs extending to 'current affairs, comment and analysis'.[63]

News and journalistic content are then defined in the CMT report as:

> A diverse range of informative content about matters of import that can be defined by characteristics such as timeliness. … Deliberately elastic, it extends beyond content produced by journalists.[64]

The ACCC's final report adopted this more elastic definition, describing news as 'information and commentary on contemporary affairs that may or may not be produced and presented by journalists', and journalism as 'the activity of discovering, gathering, assessing, producing, and publicly presenting the reporting, analysis, and commentary on news'.[65]

In a submission to the ACCC during consultation on the Concepts Paper, the Public Interest Journalism Initiative and Judith Neilson Institute for Journalism and Ideas stated that 'journalism involves a process of "curation"'.[66] They agreed with the ACCC, and added that journalism includes not only reporting but also analysis and commentary on the news. 'In this way "news" for the purposes of the Code should take in current affairs, and also encompass comment, analysis and opinion.'[67]

They also argued for a definition of 'public interest journalism', in the Code, which should be sufficiently expansive to include not just informing democratic processes, but also 'connecting community', particularly in regional areas. 'The definition of "news" adopted for the Code must be broad enough to encompass the community-building nature of public interest journalism.'[68]

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62. Civic Impact of Journalism Project, Submission to the Senate Select Committee on the Future of Public Interest Journalism, *Inquiry into the future of public interest journalism*, [Submission no. 14], n.d., p. 2, quoted in D Wilding, P Fray, S Molitorisz and E McKewon, *The impact of digital platforms on news and journalistic content*, UTS, Haymarket, p. 20.
63. Ibid., p. 18.
64. Ibid.
65. ACCC, *Digital platforms inquiry: final report*, op. cit., p. 282.
66. Public Interest Journalism Initiative and Judith Neilson Institute for Journalism and Ideas, Submission to the ACCC, *News media bargaining code: concepts paper* ,5 June 2020, p. 9.
67. Ibid.
68. Ibid., p. 10.

There seems to be broad agreement, then, that a sustainable supply of news is 'in the public interest', that it has a key role in democratic functions of scrutinising and holding to account people who work in public institutions, and also in building connected communities.

These definitions appear to have been incorporated into the Bill, which defines ***core news content*** as content that reports, investigates or explains:

- issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making or
- current issues or events of public significance for Australians at a local, regional or national level.[69]

Democracy and community are indeed important foci of news, but what about the role of news and journalism, and more specifically the news media organisations that produce news, as players in market economies?

Wayne Parsons, in a history of financial presses, argues that market economies have long depended on newspapers.[70] 'News' is never just 'content' (or 'copy' as it has traditionally been termed in the media industry), or the activity of news making (that is, journalism). For Parsons, news also helps facilitate a decentralised price system, in the sense that the daily publication of stories about movements on the stock exchange, commentaries on national and state budgets, classified (and now online display) advertisements, even the shipping lists in colonial newspapers have all—literally—allowed markets to develop beyond 'a vacant plot of primitive higglers' bartering over quality, price and availability, face to face.[71]

News, in other words, is a primary player in the economic life of local, regional and national communities. Parsons' point is that newspapers are not only neutral recorders of fact, but also key sites for the propagation of economic ideas and information. They have considerable political and economic significance for how policy agendas are formed and negotiated. In his view, newspapers not only sell the various forms of information that 'keeps the wheels of the economy turning', but also 'purvey and reinforce' the very values and ideas that underpin the existence of a market economy.

> Newspapers have, almost from their inception, been about selling markets: providing information for the businessman, and opportunities for the business community to advertise its products, services and prices. Newspapers in many senses, therefore, could be said to lie at the very core of the capitalist process and the "free market" idea and consequently have a key role to play in the way in which what Peter Berger describes as "economic culture" is communicated and its myths and discourse sustained and propagated. Newspapers therefore assist in the integration and mediation of economic values, ideas and language.[72]

An appropriate example to point to, in the current context, of the role of news media companies in shaping the limits of public policy debates, is the considerable number of articles published by Australian news media outlets over recent months about the economics of competition in the production and distribution of news. Those articles have indeed presented the 'facts' of the policy process to their audiences, as it has emerged, but they have also commented—sometimes

69. *CCA*, **proposed section 52A**. Note that the Bill does not actually define 'news' but rather **proposed section 52A** defines the terms ***core news content*** and ***covered news content***, as well as ***news business*** and ***news source***.
70. W Parsons, *The Power of the Financial Press: Journalism and Economic Opinion in Britain and America*, London, Edward Elgar, 1990.
71. Ibid., p. 1. Parsons quotes PJD Wiles, *Economic Institutions Compared*, Blackwell, Oxford, 1977.
72. Ibid., p. 2.

stridently—on the merits of the proposed legislation, including the implications for various market players.[73]

As Parsons puts it, news and markets are 'inextricably linked'

> … since economic and financial commentaries and news provide a context or agenda within which political and social events impact upon and communicate themselves to the business community. The press serves as a crucial mediator between the price system and the political system, and enables politicians, business men and men of ideas [sic] to set the parameters of ruling opinion.[74]

In summary, a neutral definition of news emphasises its role in informing citizens about matters affecting them, including in their local communities. News media, in this definition, facilitate conversations about important policy matters such as the value of a national health service in the time of a pandemic, or the cost of labour as it is canvassed during National Wage Case hearings.

However, Parsons' reference to 'ruling opinion' points to another view of news which is sometimes overlooked. News in the form of expert commentaries, opinion pieces by key public figures, and the good old-fashioned editorial not only facilitate discussion but also help shape opinion. This suggests a more persuasive function for news media, that it has a key role in setting agendas for public debate, in forming opinions, in shaping the limits of how important public policy matters can be talked about and decided on.

This is precisely the subject of much consideration in debates about media concentration, in Australia and elsewhere, which has been concerned with relations between public figures (politicians, business leaders, trade unionists, philanthropists, to name just a few), and the proprietors of large news media companies.[75]

Platform companies

And what of the platform companies? How are we to respond to these so-called 'tech giants', which have developed—along with the wider industry of big data and artificial intelligence that they are party to—in such a relatively short period of time?[76] How are we to process the contradictions they pose, as the providers of so many useful—and often free—services, but which are increasingly the subject of concern about their reliance on private personal data?[77]

Terry Flew helpfully explains some of the nuances of how we understand and speak about platforms. The early definition developed in computer science is still used to describe Microsoft Windows and Mac OS operating systems: 'a distinct computing system that provides the combination of hardware and software that leads to the development of software and applications which are unique to it'.[78] However 'platform' is now used to refer to all the digital resources, including services and content, that enable 'value-creating interactions between external producers and consumers.'[79] Platforms can be distinguished from all the computing and

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73. See B Keane, 'Media abandons balance in pursuit of Google's billions', *Crikey*, 5 February 2021.
74. W Parsons, *The Power of the Financial Press*, op. cit., p. 3.
75. See for example Petition EN1938, which called 'for a Royal Commission to ensure a strong, diverse Australian news media'. The petition was tabled in Parliament on 9 November 2020, with over 500,000 signatures. On 11 November 2020, the Senate referred an inquiry into media diversity, independence and reliability in Australia to the Senate Environment and Communications References Committee.
76. 'Tech giants' is just one of a number of terms used to reference the size and scope of platform companies. See for example Editorial, 'Spotlight on tech giants not before time', *The Age*, 11 December 2020, p. 40.
77. A considerable literature has emerged in recent years on this topic. As a starting point, see S Viljoen, 'Data as Property?' Phenomenal World website, 16 October 2020.
78. T Flew, 'The platformized internet', op. cit., p. 4.
79. P Constantinides, O Henfirdsson and G Parker, 'Platforms and Infrastructures in the Digital Age', *Information Systems Research*, 29(2), 2018, p. 381, quoted in T Flew, ibid.

network resources—such as broadband and wireless connectivity, or literally 'digital infrastructure'—that allow content to be served to users, and services coordinated.

> In this definition, the Internet is digital infrastructure, while companies such as Apple, Google, Microsoft, and Facebook are digital platform providers, upon whose platforms sit a layer of services that provide digital content (games, news, entertainment, etc.) to consumers.[80]

Flew then points to the blurring of previous lines between infrastructure and platform, which has occurred with the migration of content from a non-proprietorial World Wide Web, which all content providers could access based on shared protocols, to all the applications of mobile media.

> But as content increasingly migrated to mobile media, and was accessed through platforms such as Apple iOS and Google Android, or from apps acquired through the App Store or Google Play, the latter increasingly constituted the infrastructure of digital media itself, and not just the platforms. In particular, Google and Facebook have engaged in processes whereby 'platforms become infrastructures ... as ... infrastructures are being platformized.'
>
> The result is that what we refer to as platforms can operate across the whole of the computer science value chain. The most significant digital platforms, such as Apple, Google, Facebook, Microsoft, and Amazon, are providers of infrastructure, content and services as well as platforms, and are thus closer to fully fledged ecosystems than narrowly defined platforms. In this respect, the policy distinctions between infrastructure as shared public resources, platforms as intermediaries, and applications, services, and content that sit atop these platforms but are independent of them have become fundamentally blurred.[81]

The language used by the platforms to promote themselves, perhaps not surprisingly, emphasises the various affordances that users have found most appealing, and generally refer back to an older sense of a non-proprietorial Internet. In other words, they tend to define themselves with reference to a social utility function rather than the underlying service they provide, or to the various data practices which they use to derive profit.

For example, Google describes its mission as being 'to organise the world's information and make it universally accessible and useful'.[82] It presents itself, simply, as a terribly good search engine.

> We do search. With one of the world's largest research groups focused exclusively on solving search problems, we know what we do well, and how we could do it better. Through continued iteration on difficult problems, we've been able to solve complex issues and provide continuous improvements to a service that already makes finding information a fast and seamless experience for millions of people.[83]

Facebook speaks about itself in ways that paint a picture of democratic enabling. For example, a Facebook company information page says Facebook:

- is empowering—'Our Mission: Give people the power to build community and bring the world closer together'
- gives its users a voice —'People deserve to be heard and to have a voice—even when that means defending the right of people we disagree with'

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80. T Flew, 'The platformized internet', op. cit., p. 5.
81. Ibid. Interestingly, this blurring has been noticed in another related sense: between different segments of economic life. A report by the Organisation for Economic Cooperation and Development, published in 2015, stated that 'As digital technology is adopted across the economy, segmenting the digital economy is increasingly difficult. In other words, because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy. Attempting to isolate the digital economy as a separate sector would inevitably require arbitrary lines to be drawn between what is digital and what is not. (p. 54)
82. Google, 'About Google', Google website, n.d.
83. Google, 'Ten things we know to be true', Google website, n.d.

- is democratic —'We work to make technology accessible to everyone, and our business model is ads so our services can be free'
- is community-minded —'Our services help people connect, and when they're at their best, they bring people closer together' and
- is a strategic sponsor of economic development —'Our tools level the playing field so businesses grow, create jobs and strengthen the economy'.[84]

Outside the platforms, a political view of these companies has been formulated, as national governments have attempted to come to terms with their social and economic impacts.[85] The European Commission has adopted a relatively neutral definition, describing platforms as 'strong drivers of innovation [which] play an important role in Europe's digital society and economy', and which 'increase consumer choice, improve efficiency and competitiveness of industry and can enhance civil participation in society.'[86] The platforms, they say, 'share key characteristics, such as the use of information and communication technologies to facilitate interactions between users, collection and use of data about such interactions, and network effects'.[87]

The ACCC's Final Report pointed, very helpfully, to the economic activities of the platform companies, and to the competing economic interests of the various actors who use and interact with their content and services.

> Google and Facebook, along with other digital platforms, are multi-sided platforms that interact with a number of groups:
>
> - consumers who utilise services provided by the digital platform
> - advertisers who are purchasing the opportunity to display ads to consumers
> - content creators, including creators of news and journalistic content.[88]

That report explains the business models of the platforms, which is to provide users with applications and services that are free, to derive a range of personal data from the attention of those users (as consumers), and then to sell targeted advertising opportunities.

> Users effectively pay for these services by allowing Google and Facebook to collect and use their data and by viewing advertisements. Because Google and Facebook collect a great depth of information about their users … they are able to offer advertisers very specific targeting opportunities.[89]

The ACCC points to a cycle of continuous improvement operating between the provision of a free service, the constant collection of data, and the use of that data to facilitate more precisely targeted advertising. As digital disruptors, without direct competition being offered by the commercial entities that have been disrupted, the platforms have been able to thrive.

> As Google collects more data on users, it is able to improve the relevance algorithm of its organic search service, which allows it to attract more users. Similarly, if Facebook obtains more data on users, it may

84. Facebook, 'Company Info', Facebook website, n.d.
85. For a brief overview, see J Davidson, 'Finally, the world takes on big tech', *Australian Financial Review*, 23 December 2020.
86. European Commission, 'Online Platforms', European Commission website, n.d.
87. Ibid. This relatively benign formulation understates the objectives of the Digital Services Act, which are summarised as being 'To protect consumers and their fundamental rights online more effectively', and 'To establish a powerful transparency and accountability framework for online platforms'. See also J Espinoza, 'EU tells big tech to police internet', *Australian Financial Review*, 11 December 2020, p. 31.
88. ACCC, *Digital Platforms Inquiry: final report*, op. cit., p. 60.
89. Ibid., p. 61. The ACCC notes here that while some subscription revenue may be received by the platforms, such as the YouTube Premium service, 'this accounts for a small fraction of the revenue.'

> be able to improve the quality of its news feed algorithm, which, in turn, may allow it to attract more users. These effects give rise to positive feedback loops.[90]

The relations between news media and the platforms

The Centre for Media Transition, in the report commissioned by the ACCC noted above, argues that the platforms have become access points for news and information, which historically is key a function—as Parsons suggests above—performed by media companies. The platforms have successfully colonised the position of intermediary between audiences and markets, 'connecting two sets of users, such as advertisers and web users.'[91] In this position, the attractiveness of their offering to advertisers is their ability to offer large datasets on potential customers, which are both population wide and also have depth at the level of the individual.[92]

One of the key impacts of the platforms, for news media, is therefore a certain division, or dissolution, of its old news and information function such that 'the role of news producer is often separated out from the role of news distributor'.[93] As the incomes and reputations of those producers has suffered, this division has enabled the platforms to generate income from news content (and of course many other forms of content) which it does not produce, but which it can be said to distribute. The Centre for Media Transition extends this line of argument, stating that while the platforms do not 'produce' media content, they are more than intermediaries, making judgements about what is and what is not acceptable, particularly in the publication of social media. Their report references the work of Tarleton Gillespie, whose recent review of the content moderation practices of social media platforms notes that

> As soon as Facebook changed from delivering a reverse chronological list of materials that users posted on their walls to curating an algorithmically selected subset of those posts in order to generate a News Feed, it moved from delivering information to producing a media commodity out of it. If that is a profitable move for Facebook, terrific, but its administrators must weigh that against the idea that the shift makes them more accountable, more liable, for the content they assemble—even though it is entirely composed out of the content of others.[94]

The ACCC, in describing the relationship between news media and platform companies as 'the supply of news media referral services', takes on this suggestion that the platforms are more than intermediaries, but also commercially interested players, who derive commercial benefit from the availability of news via their 'free' applications.[95] As the ACCC puts it, snippets and links attract consumers to the platforms. Even those shortened forms of the original content perform the same role that news content has played—at least in a strictly economic sense—of attracting the attention of consumers to advertising content. Many users searching for news on a given topic will expect to find links to reputable media businesses, and if the platforms did not provide links to relevant content, those users/consumers may consider shifting to other platforms. While news content is not necessarily monetised by the platforms (the ACCC notes that Google, for example,

90. Ibid., p. 62.
91. D Wilding et al, *The impact of digital platforms on news and journalistic content*, op. cit., p. 15.
92. Indeed what we have seen with the rise of a platform economy is a shift in how audiences are calculated and mobilised, a shift from a capacity to imagine 'mass' audiences based on numerical aggregates such as media ratings systems, to a more precise view of actual individual persons, now drafted into personalised relationships with providers of goods and services thanks to a continuous collection and analysis of data. See J Cohen, 'Law for the platform economy', *UC Davis Law Review*, 51(1), 2017, pp. 133204.
93. D Wilding et al, *The impact of digital platforms on news and journalistic content*, op. cit., p. 14.
94. G Gillespie, *Custodians of the Internet*, New Haven, Yale University Press, p. 43.
95. ACCC, *Digital Platforms Inquiry: final report*, op. cit., p. 100.

does not place advertisements next to search results for news stories), 'digital platforms benefit from consumers' attraction to the platform (and the brand)'.[96]

Summary

Despite the sense of an essential difference between news media and the platforms, which has been promoted in much of the news coverage of the development of the Bill, news media and the two platform companies which will be designated under this Bill—Google and Facebook—have much in common.

They overlap rhetorically, in the sense that the terms used to describe the functions of news media included in the discussion above—that is, keeping publics updated, providing reliable information on which to base life choices, providing forums for the exchange of ideas, helping societies understand themselves, and helping to generate conversations—are mirrored in the language used by both Google and Facebook to describe how they help users access information.

More importantly, they also operate with overlapping economic logics: media businesses attract the attention of audiences (with news, information, entertainment), and monetise that attention by selling adjacent space to advertisers. Platform companies offer 'free applications' to users, and then monetise their attention by offering personal data (in a variety of different forms) to advertisers. Attempts at clarifying this relationship of similarity often creates confusion. An example of this is an exchange between Senator Rex Patrick and Dr Bronwyn Kelly, who appeared at the second Senate hearing on behalf of Australian Community Futures Planning.

In response to a question about the apparent monopoly status of Google and Facebook in Australia's advertising market, Dr Kelly remarked that she believes it is 'not healthy for journalism to depend entirely on advertising and that it produces conflicts of interest that are not healthy for journalism in itself'.[97] In reply, Senator Patrick suggested Dr Kelly was 'conflating a couple of issues', and that on the basis of the ACCC's research there is 'no question' that Google and Facebook benefit from the news they distribute. Senator Patrick remarked 'Google is not a search company; it's an advertising company'.[98]

The ensuing interaction is indicative of where this conversation often goes: to a conclusion that the end justifies the means.

> Dr Kelly: Newspapers are not news companies; they're advertising companies. It's the same thing.
>
> Senator PATRICK: I respectfully disagree. The product of Google is Australian citizens, and they sell that product to advertisers. The product of news companies is news, which, of course, they try to sell to the Australian public or to advertisers. So the product is different.
>
> Dr Kelly: News businesses use news to generate a readership which they then sell to advertisers. Advertising businesses like Google use news occasionally—they would suggest that they don't, but let's assume that they do—and, according to the ACCC, they're only using it for less than 2.3 per cent of the advertising revenues that they attract.
>
> Senator PATRICK: That's because they tax dodge and funnel their advertising revenue through other countries. It's not exactly transparent, but—

96. Ibid.
97. B Kelly (Founder, Australian Community Futures Planning), Evidence to Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 1 February 2021, p. 15.
98. Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, *Official committee Hansard*, 1 February 2021, p. 15.

> Dr Kelly: I think that that is confusing two things. Yes, I'm sure, like every corporation, including the news businesses, they tax dodge—and it would be great for that to be addressed by the legislatures. That would be a priority thing.

Resolving this debate is difficult, at least partly because there is still much to understand about the development of digital platforms, the means by which they provide services and generate profits, and the role they play in social, political and economic life. It simply is not fully, publicly, transparent.

What is not in doubt is that, despite the fanfare with which much of the world greeted the 'Information Superhighway' at the beginning of the 1990s, the development of 'cookie' technologies from the mid-1990s—and a variety of other contingent economic and technical factors—led to the deployment of 'big data' systems for a continuous identification and re-identification of Internet users, and to what Julie Cohen has called a 'radical democratisation of surveillance capability [which] marks a critical inflection point in the pursuit of user legibility'.[99]

'Legible users'—that is, visible, knowable and biddable users—are all the populations who are now continuously engaged by the 'stickiness' of contemporary digital devices and operating environments, by communications networks which, again according to Cohen,

> have been transformed into sensing networks, organized around always-on mobile devices that collect and transmit highly granular streams of structured information via proprietary interfaces and protocols to powerful, proprietary machine learning systems. Put differently, networked media infrastructures have become pervasively platformized.[100]

News media corporations, also, are rooted in a history of successive attempts to make audiences legible and predictable. In describing the developing relationship, during the twentieth century, between publishers, audience survey agencies, advertisers and producers, Cohen argues that platforms in fact represent continuity.

> The intertwined functions that platforms provide—intermediation that provides would-be counterparties with *access* to one another and techniques for rendering users *legible* to those seeking to market goods and services to them—have important antecedents in twentieth century direct marketing and advertising practices.[101]

However, she does acknowledge the real challenges posed by a set of still relatively new institutions that are now at the core of economic life. While increasingly indispensable, they appear to be at least partially responsible for an increasing polarisation of public life.

> Massively intermediated, platform-based media infrastructures have reshaped the ways that narratives about reality, value, and reputation are crafted, circulated, and contested. Platforms enhance the ability to form groups and share information among members, to harness the wisdom of crowds, and to coalesce in passionate, powerful mobs, but they also magnify the dark side of each of these forms of collective action. The massive intermediation and datafication of networked media infrastructures, meanwhile, shifts the tenor of much networked interaction into the domains of the affective, instinctual, and unreasoning.[102]

Cohen also notes that while the polarisation of public opinion is not new, there is a sense that the publishing practices of key platforms is having a real impact on the extent of that polarisation.

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99. J Cohen, 'Law for the platform economy', op. cit., p. 140.
100. Ibid., p. 143.
101. Ibid., 137.
102. Ibid., p. 148.

> Algorithmic mediation of information flows intended to target controversial material to receptive audiences intensifies such feelings, reinforcing existing biases, inculcating resistance to facts that contradict preferred narratives, and encouraging demonization and abuse. New data harvesting techniques designed to detect users' moods and emotions and messaging techniques that rely on "clickbait" exacerbate these problems; increasingly, today's networked information flows are optimized for subconscious, affective appeal.[103]

The struggle to bring these matters into perspective is real. While it seems reasonable to conclude—as the ACCC and the Government both have—that media companies and digital platforms are in a competitive relationship for user attention and for advertising dollars and services, which is both unavoidable and unbalanced, the challenge is to keep hold of the concept of 'public interest', which is central to the Bill's interest in public interest journalism.

And in doing so, a set of key questions are clear. Whose interests will be most served in the passage of the Bill? What kinds of unintended consequences can be foreseen, and forestalled? And what further action will be necessary to achieve the goals articulated by the Government in July 2019: 'to protect consumers, improve transparency, recognise power imbalances and ensure that substantial market power is not used to lessen competition in media and advertising services markets'?[104]

Committee consideration

Senate Standing Committee on Economics

The Bill was referred to the Senate Standing Committee on Economics (Economics Committee) for inquiry and report by 12 February 2021.[105] The Economics Committee received 55 submissions. The comments of stakeholders are canvassed below.

The final report, published on 12 February 2021 states:

> While the evidence received demonstrated some polarised views on the bill, there is significant support for the bill's aims. Further, while some submitters have questioned the methods and recommended additional refinements, there is a strong view that large multinational technology companies—in this case Google and Facebook—should not remain outside sensible regulations that protect the public interest.[106]

The Economics Committee recommended that the Bill be passed.[107] Both Labor and Greens Senators who were members of the Committee made additional comments. Labor Senators affirmed 'the need to address the bargaining power imbalance between news media businesses and digital platforms' and recommended that Bill be passed subject to the government addressing certain concerns.[108]

The Greens Senators also recommended that the Bill be passed subject to the following:

- the Bill be amended to require news organisations to spend the revenue from the Code on resourcing public interest journalism.

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103. Ibid., p. 150.
104. J Frydenberg (Treasurer) and P Fletcher (Minister for Communications, Cyber Safety and the Arts), *Release of the ACCC Digital Platforms Report*, media release, 26 July 2019.
105. The terms of reference, submissions to the Senate Standing Committee on Economics Legislation and the Committee's final report are available on the inquiry homepage.
106. Senate Standing Committee on Economics Legislation, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 [Provisions]*, Senate, Canberra, February 2021, p. 29.
107. Ibid., p. 31.
108. Ibid., p. 33.

- the Government establish a permanent Public Interest News Gathering Trust and ensure that AAP is supported through public funding and
- the Bill be amended to require the 12-month review of the Code to report on the impact that the Code is having on small, independent and start up publications and the state of journalism in Australia including the number of journalists employed.[109]

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has raised concerns that a number of significant matters are set out in delegated legislation.[110] In particular, the Scrutiny of Bills Committee takes the view:

> … that matters which may be significant to the operation of a legislative scheme should be included in primary legislation unless sound justification for the use of delegated legislation is provided.[111]

The Committee further commented that some of the Bill's provisions:

> … enable delegated legislation to modify the operation of primary legislation and are therefore akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation … such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.[112]

The Scrutiny of Bills Committee did not consider that those matters had been sufficiently addressed in the Explanatory Memorandum and that the use of so many delegated legislation making powers had not been adequately justified. That being the case, the Committee has requested the Treasurer's detailed advice on the use of delegated legislation in the Bill.[113]

Other matters raised by the Scrutiny of Bills Committee are discussed in 'Key issues and provisions', below.

Policy position of non-government parties/independents

Australian Labor Party

When the Bill was introduced into the Parliament on 9 December 2020, the Australian Labor Party (ALP) issued a media release stating that it had, since the announcement of the decision to pursue a mandatory code, offered 'in-principle support for a workable code to help Australian media companies realise fair remuneration for their content from digital platforms such as Google and Facebook'.[114]

However it made clear that the ALP sees the Code as 'just one of a range of mechanisms the ACCC recommended to support the Australian media industry that the Government has failed to deliver.' The media release criticised the Government for 'wasting time', and that 'its response to the inquiry was lacking'.[115]

> The Government has held press conferences but there has been little delivery of substance. As a result, the industry and consumers are missing out.

109. Ibid., pp. 39–40.
110. Senate Standing Committee for the Scrutiny of Bills, *Scrutiny digest*, 1, 2021, 29 January 2021, pp. 48–51.
111. Ibid., p. 50.
112. Ibid.
113. Ibid., p. 51.
114. M Rowland and J Chalmers, *Digital reform drags on*, media release, 9 December 2020.
115. Ibid.

> It remains to be seen whether the Government's Code is workable or how big a difference it will make.
>
> Labor will work through the detail and scrutinise the Bill through the Senate Committee process, in consultation with a range of stakeholders.[116]

As set out above, Labor Senators on the Economics Committee agreed with the Committee's recommendation that the Bill be passed, subject to the Government addressing certain concerns.[117]

Australian Greens

When the Government announced in April 2020 that it had asked the ACCC to develop a mandatory code, the Greens issued a media release supporting the decision.

> Big tech giants have been ripping off Australians by taking content for free and making huge profits. It's beyond time to put the blowtorch on Big Tech and make them pay for content they've been taking for free and pay proper taxes in this country.[118]

In September 2020, the Greens called for the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Services (SBS) to be included in the Code, and for the Government to ensure the Code functioned to support small and independent media players through a collective bargaining arrangement. Senator Hanson-Young stated that 'There is no reason for the ABC and SBS to be excluded from the Code. Public broadcasters deserve a fair return for what they produce and what the tech platforms benefit from.'[119]

She stated further:

> The ACCC's draft Mandatory Code must guarantee simple and cost effective benefits for small and independent media players, through effective collective bargaining arrangements.
>
> If the aim of this code is to ensure the viability of Australia's media, then the Government should ensure ABC is included, that AAP doesn't fail and that small and independent publishers don't miss out.[120]

On 1 February 2021, the Greens announced they will seek to amend the Bill to require:

- news organisations to spend the revenue from the Code on public interest journalism and
- the scope of the 12 month review of the Code to analyse the impact the Code is having on small, independent and start up publications.[121]

At the same time, the Greens announced they were 'calling on the Government to commit to establishing a permanent Public Interest News Gathering Trust, a proposal put forward in the recent Media Reform Green Paper.'[122]

In response to claims made by Google that it may cease offering the Google Search service in Australia if the Bill is passed in its current form, the Greens called on the Government to investigate funding the establishment of an independent search engine.

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116. Ibid.
117. Senate Standing Committee on Economics Legislation, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 [Provisions]*, op. cit., pp. 33–38.
118. Sarah Hanson-Young, *Blowtorch on Big Tech overdue but welcome*, media release, 20 April 2020.
119. S Hanson-Young, *Greens call for ABC and SBS to be included in news Media Code*, media release, 14 September 2020.
120. Ibid.
121. S Hanson-Young, *Greens call for amendments to News Media and Digital Platforms Mandatory Bargaining Code*, media release, 1 February 2021.
122. Ibid.

> Google's threat to leave Australia shows we cannot be reliant on corporations to provide essential services such as access to information online. This is an opportunity for the government to investigate setting up a publicly owned search engine that could be the gateway to the internet for Australians. It would mean Australians can search the internet with the peace of mind that their data is not being sold off to advertisers and corporations.
>
> The internet is an essential service for most Australians. Currently, access to the internet is controlled by a small number of very powerful corporations. We should not seek out another foreign giant to fill the gap of Google, whether it's Microsoft or anyone else, as they will still profit off the data of Australians and be beholden to shareholder interests. A publicly owned and independent search engine would be an important step forward in restoring a free and open internet.[123]

As set out above, Greens Senators on the Economics Committee agreed with the Committee's recommendation that the Bill be passed, subject to:

- amendment of the Bill to require news organisations to spend the revenue from the Code on resourcing public interest journalism
- establishment of a permanent Public Interest News Gathering Trust and support of AAP through public funding and
- amendment of the Bill to require the 12-month review of the Code to report on the impact that the Code is having on small, independent and start up publications and the state of journalism in Australia including the number of journalists employed.[124]

Other minor parties and independents

The Australian has reported that Centre Alliance Senator Stirling Griff has backed the legislation in its current form.[125] That same article reported One Nation leader Pauline Hanson as saying her party has 'no sympathy for either the Australian media or international tech giants in this debate.' The report continued:

> Her spokesman said it was unlikely she or Senate colleague Malcolm Roberts would support the government's bill. "As politicians, we have a need to protect political debate in this nation. I have seen conservative voices like One Nation throttled by conventional media and tech giants like Google who are manipulating search algorithms," Senator Hanson said. "If Google want to take their bat and ball back to the United States, go for it. I don't see them paying their fair share of tax in this country and my push will be to enforce our tax laws upon whoever fills the gap in the Australian market."[126]

Senator Rex Patrick has announced he will introduce amendments to the Bill, including requiring the ACCC to conduct regulator audits of algorithms used by the platforms that have impact on access to Australian news. This was in response to Google's 'experiment' with algorithms governing the appearance of Australian news on its search engine in January 2021, with Senator Patrick stating:

> ACCC audits and reviews would apply to all digital platforms and digital platform corporations designated by the Treasurer under Section 52E of the Government's proposed legislation.
>
> Designated digital platforms would be required to provide the ACCC with full access to information about relevant algorithms and automated decision systems as the Commission may require to assess

123. S Hanson-Young, *Greens call for Government to investigate establishing publicly owned search engine*, media release, 3 February 2021.
124. Senate Standing Committee on Economics Legislation, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 [Provisions]*, op. cit., pp. 39–40.
125. A Ore, 'Writing on the wall for Big Tech', *The Australian*, 25 January 2021.
126. Ibid.

> their impact on access to Australian news media content. Non-cooperation would be the subject of significant financial penalties.[127]

Senator Patrick noted that his proposal was not unique, and had been put forward in the United States.

> US lawmakers have proposed legislation to scrutinise the machine learning-powered systems employed by digital companies. For example, the *Algorithmic Accountability Act* proposed by US Democrat Senators Cory Booker and Ron Wyden would empower the US Federal Trade Commission to create rules for evaluating 'highly sensitive' automated systems. Digital service providers would then be required to assess whether the algorithms powering these tools are biased or discriminatory, as well as whether they pose a privacy or security risk to consumers.[128]

In a speech to the Senate on 2 February 2021, Senator Jacqui Lambie described the Code as 'amusing', and 'not as crash-hot as you think'.[129] She remarked that while Google and Facebook 'haven't got a lot of friends in this place right now', they have plenty of friends 'out there' in the Australian community. She said Google and Facebook 'bring eyeballs to news companies', and it costs 'hundreds of millions of dollars for Google and Facebook to make a product good enough to take over the …market'.[130] Admitting Google has a monopoly status, she said it is only a 'big, bad boy right now' because of the quality of its product.

> That's how it works in big business. It is using its money to improve the standards of its products, and that's a good thing for consumers. We get a better service and we don't have to pay for it. If you don't believe me then spend a day using Yahoo, and good luck to you with that![131]

Senator Lambie expressed concern about the likely outcome of any commercial deal requiring Google to pay for news.

> So Google has a monopoly, and it has three choices: if Google is made to pay more for that monopoly then they're just going to pass on that cost to their consumers, because there's nobody else who can compete with them on that price. They're a monopoly. They don't have any competition. News Corp and Nine don't care about that; they're not the ones who would have to pay the piper. The ones who pay for it are the people who rely on digital ads to promote their businesses. This is what really, really gets me: they're plumbers, they're florists, they're pizza shops, they're hairdressers and they're shoe stores. They aren't making millions, I can tell you. Their advertising budget is tiny—absolutely tiny! It is measured in three or four figures. [132]

Senator Lambie clarified that she is 'no big fan of Google or Facebook', and that she does believe Australia needs 'more good journalism.' Her alternative to the Code is to devise a more effective tax system. 'Don't create a code. Common sense is to tax them—just make them pay some tax!'

> If we want decent journalism, let's pay for it out of the tax. Make it tax-deductible. Expand grants for quality journalism and invest in regional newsgathering. Back public broadcasters and don't keep taking bricks out of the walls, saying that they've got enough left not to notice the difference. Sooner or later, they won't have enough left. Invest in newswire services like AAP which are independent not-for-profits that exist only to deliver news, unbiased and accurate, from anywhere to everyone for no other reason than because news matters.

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127. R Patrick, *Call for tech giants to face regular ACCC algorithm audits*, media release, 22 January 2021.
128. Ibid.
129. J Lambie, 'Adjournment: JobSeeker payment, Google', The Senate, *Debates*, 2 February 2021, pp. 96–97.
130. Ibid.
131. Ibid.
132. Ibid.

> This code deserves a bit more scrutiny than the free run it's getting right now. Not everything that hurts the big, bad company of the day automatically becomes good, not when the ones who end up paying the bill aren't the big, bad companies at all. They're smaller than News Corp and Nine; they're smaller than them. They're the ones in my backyard, trying to survive and keep their doors open and their businesses open. That's why it's so much easier to ignore it when they're being thrown under the bus, and it is just not fair. It is not fair that you pay advertising money for small business— *(Time expired)* .[133]

This view appears to have some support, with Senator Hanson-Young asking Google in the Senate Committee Inquiry hearings:

> You don't really pay that much tax in Australia, given the massive market share you've got, the massive profits you make and the offshoring of profits to places like Singapore. Would Google simply commit to paying more tax?[134]

Senator Hanson-Young also specifically raised this issue with the Treasury:

> Has the department… done any work on a tax for Facebook and Google and tech companies in relation to this type of content, as opposed to a bargaining code? Has a tax on the usage of this content been considered at any point?[135]

Senator Patrick also appeared to flag this issue, making the following statement with respect to Facebook:

> Respectfully, this is a service you charge in Australia and provide to Australians but you avoid completely the paying of tax—you say—on the basis of compliance with international law. I'm not questioning that. I'm saying that, socially, that's not moral. In terms of social licence, there's a failure on the face of Facebook in respect of this particular conduct that, indeed, prevents the Australian government taking the tax from that revenue and perhaps doing something with our regional media outlets. [136]

Position of major interest groups

As noted in the Background section, strong claims have been made about the purpose, content and possible outcomes of the Bill. The policy debate has been very polarising, with strong views expressed for and against the Bill.

For example, representatives of the platforms who gave evidence at Senate hearings in January 2021 reiterated earlier public statements that the Bill presents significant risks for their business models, which may force them to cease providing some services in Australia.[137] A professor of economics at the UNSW Business School went one step further, describing the Code as a 'Stalinist show trial', and claiming the Bill

> …misunderstands the cause of the decline in media revenues, seeks to extract money from unrelated activities of technology companies such as Google and Facebook, has requirements that threaten the core business of those companies, and has a bargaining system that could most politely be described as ''rigged''.[138]

On the other hand, representatives of Australia's mainstream media who attended a hearing of the Senate Inquiry agreed the Bill will provide much needed support for Australian news publishers. Nine Entertainment's representative described the Bill as 'a good first step' in

133. Ibid.
134. Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, *Official committee Hansard*, Canberra, 22 January 2021, p. 10.
135. Ibid.
136. Ibid.
137. Ibid., pp. 2–4, 6–10, 13.
138. R Holden, 'Media code a Stalinist show trial', *Australian Financial Review*, 28 January 2021.

addressing the bargaining imbalance between news publishers and the platform companies.[139] News Corporation's representative stated the corporation is sincere in its belief that 'the new media ecosystem', which it hopes this Bill will help bring about, 'must make journalism viable, whether a publisher is large or small. A changed ecosystem is not about a single publisher; it is about all publishers, all journalists and, indeed, all of society.'[140] The managing director of Guardian Australia called the Bill 'considered', stating his organisation's view that it is 'a pragmatic way to facilitate fair negotiation' between the respective parties, and that it 'will result in us employing more journalists in Australia'.[141]

In the spaces in between, including in submissions to the ACCC and the Senate Economics Legislation Committee, a range of nuanced concerns have been registered, including by small and independent publishers who support the broad principles of the Bill, but are concerned it may have an unintended consequence of increasing media concentration, and also by digital rights groups who for some time have been asking questions about how the privacy of citizens can be protected from the relentless accumulation of user data, which is at the heart of the platform companies' business models.

Support for the Bill

News Corporation

News Corporation's submission to the Senate chose not to reiterate the detail of earlier submissions it had made to the ACCC, and instead made a brief statement about what it sees as the purpose of the Bill:

> The Code is designed to address the imbalance in bargaining power between the digital platforms and news media businesses. The result of which is for news media businesses to be paid for their content as a result of commercial deals or the use of the arbitration function of the Code. This was recently articulated by ACCC Chair Rod Sims in the following way: "So this should lead to commercial deals outside the code. The code is a backstop, it evens up the bargaining power, which is all it was ever meant to do. So let's hope we get some commercial deals being done, and the sooner the better."[142]

In its submission to the ACCC on the content of the exposure draft, News Corporation had argued that the final offer arbitration provisions should apply to all platform companies, and not just those designated by the Minister.

> This change is essential to ensure the purpose of the Code is met, to address the significant imbalance in bargaining power between digital platforms and news media. If this change is not made, we are concerned that the purpose and outcome of the Code will be significantly undermined.[143]

On the model of arbitration proposed in the Bill, News Corporation's head of corporate affairs, Mr Campbell Reid, has put the view that the model has been misrepresented, and the 'lived

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139. C Janz (Chief Digital and Publishing Officer, Nine Entertainment Company), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 22 January 2021, p. 26.
140. C Reid (Group Executive Corporate Affairs, Policy and Government Relations, News Corporation), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 22 January 2021, p. 27.
141. D Stinton (Managing Director, Guardian Australia), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 22 January 2021, p. 28.
142. News Corporation, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 52], 18 January 2021, p. 1 (quoting D Swan, 'Pandemic, policy agenda to ensure exciting year', *The Australian*, 5 January 2021.)
143. News Corporation, Submission to the ACCC on content of Exposure Draft, 28 August 2020, p. 2.

impact' will be that it can make parties behave 'reasonably', in the knowledge that if their offer is unreasonable, the arbitrator will likely choose the more reasonable offer.

> We would contend that the reason Google in particular are saying they want commercial or standard arbitration is that it allows them to delay the process and, even in Australia, commercial or conventional arbitration can take years and years and years and cost millions and millions of dollars. So the final offer arbitration, sure, is high stakes. We would all prefer to negotiate openly and not reserve—by the time you get to an arbitrator, of whatever form, you're asking the referee to solve your problem for you. Final offer arbitration, we think, allows a small publisher to negotiate on a level playing field—fast, fair, affordable and final—with one of the biggest companies in the world.[144]

Mr Reid was asked about critics of the Bill who see it as principally a 'war' between News Corporation and Google. Senator Hanson-Young put to Mr Reid that

> We talk about Google's monopoly of 81 per cent of the market share, but, of course, News and Murdoch hold a big market share of journalism in Australia, too. So what's your response to the criticism that this is just a war between one big company on this side, Google, and another big company on that side, Murdoch?[145]

In reply, Mr Reid stated that 'comparing News Corporation with Google is like comparing a company with a country', and that any comparison is 'almost inconceivable', and then spoke to concerns about the apparent monopoly status of News Corp news media in Australia.

> The notion of the Murdoch news monopoly in Australia is being prosecuted by people who are living in the past, for their own purposes. The notion of the all-powerful Murdoch newspapers dictating to Australians how to think and how to act is a fantasy. Australians are leading a media life and a news consumption life in a more rich and diverse exchange of views than they ever have before. As we now know from recent experiences, people who want to challenge News Corporation can do so and self-publish and be very, very effective. So I would contend that the exchange of news, views and attitudes is richer in Australia now than it has ever been before. To portray News Corporation as an all-powerful news media monopoly is a self-serving fantasy of disaffected people looking for someone to blame.[146]

Nine Entertainment

While supportive of the Bill, Nine Entertainment has identified six aspects of the Bill which it argues need to be tightened.

> The key elements which require amendment in the Bill include:
>
> - The facilitation of timely and meaningful access to information during the negotiation process so that news media businesses may make informed decisions during negotiations and when making final offers during the arbitration process;
> - The designation of all relevant services, including Google Search, Facebook Newsfeed and Instagram (which is currently not included in the Code);
> - The matters to be considered in arbitration should require arbitrators to take account (as in the Exposure Draft of the Bill) of the indirect benefit to the platforms of all news content, but not the benefits to the registered news business;
> - There must be an effective non-discrimination provision, to prevent the platforms from using their near monopoly power to dissuade news businesses from exercising their rights under the Bill and preventing Australian users from accessing current news content;

144. C Reid, Evidence, op. cit., 22 January 2021, p. 38.
145. Ibid., p. 36.
146. Ibid.

- Digital Platforms must provide moderation tools to news media companies to enable the removal or filtering of user comments;
- The Code should not exclude, or negatively differentiate between, news created by a broadcaster as opposed to news created by a newspaper masthead.

By failing to incorporate these key elements within the Code, the Code risks not achieving the objectives it was meant to address.[147]

Free TV

Free TV, which is also supportive of the Bill, has recommended six key changes to the Bill.

- Instagram must be covered alongside Facebook News Feed (including Groups, Pages and Stories of both services), Facebook News Tab (when launched in Australia), Google search, Google Discover and Google News. With the services of Facebook's Instagram and News feed so closely linked, applying different remuneration models (or not having a remuneration model at all, as is currently the case) would create perverse avoidance incentives for the platforms.
- The content test must be amended to ensure equivalence of treatment between traditional print mastheads and TV broadcasters. The "primary purpose test" should be replaced with a requirement that a news source "regularly includes a material amount of core news content". Further, rather than requiring that every single news source of a news business be registered, all "covered news content" that is created by a registered news business should be included regardless of whether it was listed in the original application.
- Non-differentiation provisions must be expanded to protect all content produced by registered news media businesses. Free TV members' relationships with the platforms includes non-news content distribution through services such as Facebook Watch and Google's YouTube, and as a client for services such as advertising technology (adtech). These relationships can be used to penalise participation in the news Code process.
- Platforms must disclose the types of data they collect from users of news content. The Bill currently contains perverse incentives to withhold all information from registered news media businesses as the requirement to transparently disclose information only operates if this information is already provided to one registered news media business.
- Information exchange must occur as part of the bargaining process not just in arbitration. Currently the information required to enable estimates of the value of news content to the platforms can only be requested once the arbitration process has been initiated, meaning that this data will not be available for the commercial negotiation process, limiting the value of that process.
- Final offer arbitration (FOA) must be retained but the arbitration panel should also explicitly take into account the public benefit of news content. While FOA provides a clear and straightforward deadlock breaking mechanism, the arbitration panel should be given additional guidance in how to take into account the "public good" and the indirect benefit to the platforms of news content.[148]

Free TV has argued that in a well-functioning democracy 'there is a responsibility that falls on the businesses that become gateways between the community and information'. This responsibility has been borne by commercial TV broadcasters for some time.

> For decades, as an influential media platform, we have operated under a regulatory compact that requires us to pay broadcast licence fees, pay spectrum fees and meet stringent content obligations.[149]

147. Nine Entertainment, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 34], nd., pp. 3–4.
148. Free TV, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 29], January 2021, p. 3.
149. G Hywood (Chair, Free TV Australia), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 22 January 2021, p. 39.

This responsibility should now be shared, suggests Free TV, by companies with the size and influence of Google and Facebook.

> This legislation puts forward the entirely reasonable proposition that, as gateway businesses that are collecting data and monetising news content, Facebook and Google must pay a fair price for the quality of news content that they use and that the price should be agreed by the parties through a genuine commercial negotiation under a framework that addresses the unprecedented imbalance in bargaining power enjoyed by the platforms.[150]

Public service broadcasters

Australia's public service broadcasters—the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS)—were not included in the remuneration aspect of the Code in the exposure draft of the Bill, released at the end of July 2020. The Minister for Communications, Paul Fletcher, was quoted at the time as saying that the ABC and SBS would not be included because they do not rely on advertising.[151] As noted in the Background section, the inclusion of both the ABC and SBS in the current Bill was announced just prior to its introduction into the Parliament.[152]

The ABC has welcomed this, stating it would commit any additional revenue 'to fund new investment in public interest journalism at the local and regional level'.[153]

In evidence before the Senate, the SBS stated three desired changes, concerning the inclusion of a provision for moderation tools, a longer notification period for changes to algorithms, and clauses regarding non-differentiation.

> While SBS supports the introduction and passage of the bill, there are a number of important issues which should be considered or amended prior to its passing. These include the introduction of a provision for the digital platforms to provide enhanced moderation tools for managing user comments on their services, which is critical for legal, resourcing and audience reasons; the notification period for changes to algorithms and, importantly, related policies should be increased from 14 days to provide news media businesses with sufficient time to build and adapt accordingly; and the strengthening of clauses regarding non-differentiation to mitigate potential unintended consequences and ensure an expansive application. Each of those amendments will support SBS's interaction with the digital platforms and how our content is shared with audiences. [154]

Australian Press Council

The Australian Press Council (APC) has endorsed the Bill's recognition of the Australian Press Council Standards of Practice as an appropriate measure of professional practice for news media businesses. However, it has expressed concerns about the proposed sub-paragraph 52P(1)(a)(iv) of the Bill, which would allow a news business to meet the Professional Standards Test if it is subject to internal editorial standards that are analogous to the Press Council's Standards of Practice, to the extent that they relate to the provision of quality journalism.

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150. Ibid.
151. K Gair and G Chambers, 'ABC, SBS will not share in Google, Facebook media revenue, says Paul Fletcher', *The Australian*, 31 July 2020.
152. J Frydenberg (Treasurer) and P Fletcher (Minister for Communications), *Press conference: Parliament House, Canberra*, transcript, 8 December 2020. (See footnote 48.)
153. Australian Broadcasting Corporation, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 49], January 2021, p. 2.
154. C O'Neil, Director, Corporate Affairs, Special Broadcasting Service, Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 22 January 2021, p. 45.

> As the Press Council has previously submitted, it believes that high standards of media practice and transparent complaints processes require that the standards set and the complaints handling involved be under the auspices of a body entirely independent of a news business.
>
> It is not clear that high standards of practice will always result in cases where rules are only applied via an internal process, or via a body whose complaints-handling process is not entirely independent and where standards and principles by which decisions are made are not developed through robust processes and are publicly available.[155]

The APC recommends amending the professional standards test in proposed subsection 52P(1) of the Bill, which it believes could allow the Government to make regulations which would replace the Press Council Standards.

> The Press Council considers that such a provision might allow a government to intervene to set standards which might constrain freedom of the press and freedom of speech beyond reasonable professional standards. … Ideally there should be a uniform set of standards that are developed outside Government and with a complaints-handling system that is independent of both Government and publishers. Media convergence is already leading to overlapping standards and complaints-handling processes with the risk of inconsistency and loss of public awareness and confidence. The Bill as currently drafted would allow further fragmentation when moves in the other direction are needed.[156]

On this matter of professional standards, the Centre for Media Transition has submitted that the version in the Bill 'has been diluted from the version included in the Exposure Draft [and] is deficient but could be easily improved by removing the accommodation of 'internal' editorial standards and by adding a requirement for consumer access to an independent complaints scheme.'[157] It then recommended the following:

> An internal set of guidelines, with no external accountability, may be sufficient for a purely self-governing environment but not for businesses that are benefiting from the intervention of Federal Parliament and two government regulators.
>
> We suggest the following amendments:
>
> 1. change the reference to 'rules' in 52P(1)(a)(i) to (iii) and (v) to 'schemes' so that it will include the complaints-handling component;
>
> 2. delete s 52P(1)(a)(iv); and
>
> 3. amend s 52P(1)(a)(vi) to allow for the Regulations to specify other schemes that are independent of specific news businesses and that include a complaints-handling function.[158]

Opposition to the Bill

Google

Melanie Silva, Managing Director and Vice President of Google Australia and New Zealand, gave evidence to the Senate Committee that Google is committed to achieving a 'workable news media bargaining code', but believes the Code in its current form is unworkable, and that if passed into

155. Australian Press Council, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 28], January 2021, p. 3.
156. Ibid., pp. 3–5.
157. Centre for Media Transition, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 41], 18 January 2021, p. 3.
158. Ibid., p. 5.

legislation it 'would hurt small publishers, small businesses and the millions of Australians that use our services every day.'[159]

She stated further that Google sees the Bill as posing an 'untenable risk' in terms of the impacts it may have on Google products, operations, and finances.[160]

Ms Silva indicated the company's most critical concern about the Bill is what she called 'the requirement to pay for links and snippets in search.'[161] She said this provision would set an 'untenable precedent' for Google, and for the digital economy more broadly.

> It's not compatible with how search engines work or how the internet works. … The principle of unrestricted linking between websites is fundamental to search, and coupled with the unmanageable financial and operational risk, if this version of the code were to become law it would give us no real choice but to stop making Google search available in Australia.[162]

She also expressed concern about the final offer arbitration model which she said includes 'biased criteria', and which presents 'unmanageable financial and operational risks' for the company. She stated:

> If this were replaced with standard commercial arbitration based on comparable deals, this would both incentivise good-faith negotiations and ensure that we are held accountable by a robust dispute resolution process.[163]

In response to a question from Senator McAllister about how a withdrawal of its search engine service from Australia would work, Ms Silva confirmed that, in this 'worst-case scenario', users landing on a Google search page would be presented with a screen telling them 'we're unable to offer the service in Australia.'[164]

Facebook

Mr Simon Milner, Vice President, Public Policy, Facebook Asia-Pacific, stated in evidence to the Senate Committee that Facebook is 'keen to strike commercial deals' with Australian news publishers, which he believes will 'substantially increase investment in the news ecosystem and in journalism …[and] help drive innovation'.[165] However, he described the Bill in its current form as 'highly prescriptive micro regulation' which will prevent Facebook from reaching viable agreements with publishers.

> The law would compel us to enter into agreements with all news publishers in Australia without any regard for the true commercial value for our business. It gives publishers near complete control of these negotiations and will encourage unreasonable behaviour like ambit claims and bargaining in non-commercial ways. The likely outcomes for us are entirely uncapped and unknowable.[166]

Mr Milner stated that the Bill, in its current form, still does not acknowledge the commercial and technical realities of how publishers use Facebook, and the value it provides to them.

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159. M Silva, (Managing Director and Vice President, Google Australia and New Zealand), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 22 January 2021, p. 1.
160. Ibid, p. 3.
161. Ibid., p. 1.
162. Ibid.
163. Ibid., p. 2.
164. Ibid., p. 11.
165. S Milner, (Vice President, Public Policy, Asia-Pacific, Facebook), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 22 January 2021, p. 13.
166. Ibid.

> Facebook operates an open platform where publishers voluntarily choose to post their content if they want to. They then receive enormous benefits from putting their contents on Facebook, including referral traffic, customised products and access to audiences. We estimate the economic value of referral traffic alone for Australian publishers from January to November last year was $394 million. And Facebook doesn't generate any meaningful revenue from news content, so the deterrent effect of this law and investment in the Australian news industry should concern the committee.[167]

Mr Milner denied that Facebook had 'threatened' to remove news from its platform in Australia, but that it had instead 'explained … a potential worst-case consequence of the law as is it stands'.[168] He reassured the Committee that

> this does not mean that Facebook would no longer be available for the millions of people in Australia who love Facebook and for the many small businesses, including in regional Australia, that make use of Facebook. The great majority of people who are using Facebook would continue to be able to do so, but we would no longer be able to provide news as part of the Facebook product.[169]

Other opposing voices

Twitter has expressed concern about what it sees as a lack of transparency in the decision making process established by the proposed section 52E of the *CCA*, under which platforms will be designated by the Minister. Specifically, it is concerned that 'potential platforms could be designated to be within the scope of the Code without any clear appeal process or mechanisms to challenge the decision reached by the Minister.'[170]

Vuly Play, an ecommerce business based in Brisbane, expressed concern about news businesses getting paid by platform companies for linking to them, instead of paying to appear like other 'well-run' companies. The submission suggested this was not only unfair but would damage Australia's reputation as a space for digital innovation.

> The draft bargaining codes would create an environment that would slow down innovation of digital platforms dramatically as notice would need to be provided for algorithm changes. This, as well as the financial payments required by digital platforms obviously affect the desirability of the Australian market to attract up and coming digital platforms.[171]

Software development company **Atlassian** has also argued the Bill presents the potential for damage to Australia's reputation and ability to attract foreign investment.

> Given its targeted nature and drastic form, the Code may read on the global stage like protectionism for established Australian media at best and open hostility to the tech sector at worst. Businesses considering Australia for further investment may not only note the heavy-handed nature of this law, but fear the uncertainty of future regulations yet to come. If the current regulatory trend continues, it will have a powerful, negative impact on Australia's business-friendly reputation and, given the importance of the digital economy to Australia's future over the long term, on Australian jobs and economic prosperity.[172]

Atlassian also expressed concern about the 14-day notification period, during which the platforms must provide news media businesses with information about changes to their algorithms, calling

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167. Ibid.
168. Ibid., p. 14.
169. Ibid.
170. Twitter, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 44] 18 January 2021, p. 2.
171. Vuly Play, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 55], 17 January 2021, p. 1.
172. Atlassian, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 48], 18 January 2021, p. 5.

this 'impractical and overly burdensome'.[173] It argues that software and product development proceeds in the technology sector proceeds at a fast pace, and that it is usual practice for codes and algorithms to be updated daily.

> In that operational hum, it would be extremely disruptive, if not impractical, for a technology company to pause its global product development for 14-days to satisfy the regulatory needs of a single market, or even to make the detailed, case-by-case assessment as to whether or not those regulatory needs are enlivened in the circumstances.[174]

The **Business Council of Australia** (BCA) supports the development of a code 'that ensures ongoing investment in high quality, local journalism, addresses real bargaining power imbalances and adheres to best practice regulatory principles', but that 'we believe the approach set out in this legislation is not the answer.'[175] It argues the Bill presents an 'unmanageable level of commercial risk', and that it carries with it 'significant sovereign risk.'

> It is the view of the Government that the same laws that apply offline should apply online. This is the same for fundamental economic principles—onerous regulation will have a chilling effect on digital investments and threaten the introduction of new services in the digital sphere, just as they always have in other domains. Legislation should not unnecessarily deter foreign technology companies from establishing and growing their presence in Australia. Similarly, it should not discourage local entrepreneurs investing their time, capital, and creative energies.[176]

The **Internet Association** claims the Code is 'fundamentally discriminatory towards US companies, sets a harmful global precedent, and undercuts critical principles of an open internet'.[177] It has stated that 'the forced payment for links and snippets', the 'biased arbitration framework', and the 'unfeasible requirements' to report and disclose algorithm changes should all be revised.[178] Furthermore, it claims the Code will violate Australia's trade obligations and discriminate against US companies.

> While the Code only applies to two companies, it sets a concerning precedent. The Code requires U.S. digital companies to disclose proprietary information related to private user data and algorithms, as well as raises significant national treatment concerns. These requirements violate obligations in trade agreements, including National Treatment and Most-Favored Nation (MFN), performance requirements, and the minimum standard of treatment. They pose a fundamental threat to digital companies' ability to thrive in foreign markets.[179]

Several individuals and groups have submitted that the Bill, if legislated, will impact on the integrity of the Internet. **Vint Cerf**, who describes himself as 'one of the original co-designers of the TCP/IP protocols and the architecture of the Internet', and who now works for Google as a

173. Ibid., p. 2.
174. Ibid.
175. Business Council of Australia, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 37], 18 January 2021, p. 2.
176. Ibid., p. 3.
177. Internet Association, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 14], 15 January 2021, p. 1.
178. Ibid.
179. Ibid. Similar claims are made in submissions by the Office of the US Trade Representative [Submission no. 17], the US Chamber of Commerce [Submission no. 13], and the Software and Information Industry Association [Submission no. 15].

'Chief Internet Evangelist', has claimed that the Bill is 'deeply flawed' and will 'undermine the basic framework upon which the Internet was built, and on which the modern economy thrives'.[180]

> Internet companies do not owe news publishers compensation for the emergence of an Internet-based economy, especially when some of the news publishers have themselves diversified into the digital classified businesses that have cannibalised their own earlier advertising revenue. Undermining the foundations of a democratic Internet is not a sustainable solution to one industry's economic challenges.[181]

Similar concerns have been raised by **S4 Capital**, which claims the Bill will 'fundamentally change how the open internet is used, resulting in negative impacts that will ripple across the digital ecosystem (including but not limited to the businesses and employees of those digital platforms included in the inquiry).'[182] S4's submission to the Senate stated that requiring platforms to pay for providing snippets, which provide link to news stories, is a practice which 'limits the free and open nature of the internet'.[183] It describes the Bill as providing 'an immediate solution for an intimate group of benefactors', which will allow them to 'utilise stronger bargaining powers with digital platforms', while at the same time 'diminishing this power for independent news publishers.'[184]

S4's submission recommended an alternative approach:

> To address bargaining power imbalances, a carte blanche approach needs to be replaced with an appropriate industry holistic long term solution, solving for the concerns of all news publications across a number of facets where digital platforms may play a role.
>
> A sustainable future proof solution may include:
>
> - the use of article licensing in curated marketplaces on digital platforms; or
> - education programs that focus on automation, technology upgrades or robust content planning processes that allow for stronger article production and recirculation; in turn growing customer retention and encouraging new audiences - both resulting in increased revenue.[185]

Concerns about media concentration

Several individuals and organisations have, throughout the development of the Bill, pointed to the potential for further concentration in Australia's news media landscape. A submission to the ACCC's Concept Paper, drafted collectively by eighty-eight regional, state and national news publishers, neatly encapsulated this concern, arguing that while the establishment of a mandatory bargaining code 'is likely to be one of the most important media policy decisions affecting Australian democracy for decades', it could also 'permanently and irrevocably increase the concentration of ownership of Australia's news ecosystem' delivering greater control into the

180. V Cerf, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 1], 10 January 2021, pp. 1–2. See also the submission by Sir Tim Berners-Lee, [Submission no. 46] often described as 'the inventor of the world wide web', which claims the Code would 'undermine the fundamental principle of the ability to link freely on the web', and could ultimately 'make the web unworkable around the world.'
181. Ibid., p. 2.
182. S4 Capital, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 25], n.d., p. 1. Note that S4 describes itself as a 'rapidly growing marketing services firm based in London'.
183. Ibid., p. 2.
184. Ibid.
185. Ibid.

hands of two or three large companies, and thereby limiting competition and employment in the market for news.[186]

Twitter expressed concern that the Bill may not only assist large media corporations at the expense of smaller companies, but also entrench the currently dominant platforms as a monopoly channel for news distribution. It submitted that there is no mechanism proposed in the Bill which would stop registered media corporations from effectively helping to entrench particular platforms 'as the main channels for their online news content distribution, especially if there are strong and favourable revenue incentives to do so.'[187]

Bundaberg Regional Council has stated that the Bill 'provides excessive powers to interfere in a free market and risks stifling innovation'. That Council established an online community news service—Bundaberg Now[188]—in February 2019, in response to what it saw as an ongoing decline in the capacity of mainstream news media to cover local issues and events.

> In the Bundaberg Region over the past three years, two newspapers have closed (Guardian and NewsMail), the WIN TV local news service has ceased and the remaining TV news services (Seven and Nine) have shed half their staff. Neither of the two local commercial radio stations have journalists based in the Bundaberg Region.[189]

The Council argues that the Bill does not guarantee local news content will increase in regional markets and in fact could reduce it. It argues that the Bill is based on a false premise, that there is no bargaining power imbalance between platforms and news businesses, and that in fact news businesses need the platforms to be successful.

> The reality is that news businesses need digital platforms to succeed and flourish. It's a mutually beneficial relationship between the news publisher and the digital platforms. Instead of mandatory bargaining, the Bill should provide a voluntary code overseen by an independent panel.[190]

The Council also argues that the withdrawal of traditional media companies from regional areas has opened up spaces for start-up ventures, which are succeeding in both print and online formats, and which often use social media and Google to promote their publications to local audiences.

> In many places, the plug was pulled suddenly at the height of the COVID-19 lockdown, leaving communities disconnected at a critical time. As subsequently seen, many start-up ventures have succeeded in print and online, often utilising social media and Google to promote their operations and build an audience.
>
> The Bill now seeks to subsidise failed business models (large traditional media companies) by requiring successful businesses (digital platforms) to pay for access to content they don't necessarily need.[191]

Science Alert, an independent Canberra-based science news site employing eight journalists, acknowledged that the Bill has been formulated with the purpose of giving publishers some power

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186. 88 regional, state and national news publishers, Submission to the ACCC, *News media bargaining code: concepts paper*, n.d. p. 1.
187. Twitter, Submission, op. cit., p. 3.
188. The Bundaberg Now website describes this as 'a free community website delivering good news online'.
189. Bundaberg Regional Council, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 11], 15 January 2021, p. 1.
190. Ibid.
191. Ibid., p. 2. This view—about local start-up news outlets—chimes with recent news reports concerning new mastheads. See, for example: T Elliott, 'I said: "so you want to start a newspaper in the middle of a pandemic in a town with one cave, a cattle-killing centre and about 5000 people?" He said: "yep."', *Sydney Morning Herald*, 6 February 2021, p. 8; K Napier-Raman, 'Filling the void: the new wave fighting to keep regional media alive', *Crikey*, 20 May 2020.

to negotiate payment deals with Google and Facebook. However, it noted the possibility that this will likely give large media companies a 'greater competitive edge' over small news companies:

> Hundreds of small, independent publishing news outlets such as ScienceAlert are already thriving in the new media landscape, and the Code completely ignores this fact. More than 70% of our traffic and revenue come from distribution on Google and Facebook's platforms. Thanks to this, we are a profitable media company. We employ local staff, pay them fairly, and expect to continue to grow. In response to the Code, both Google and Facebook have threatened to stop sharing news in Australia. If that happens, it will have a disastrous impact on the revenue of independent publishers like us. In Spain and Germany, similar legislation led to steep drops in local news traffic and caused outsized harm on smaller publishers.[192]

In a submission to the ACCC on the exposure draft of the Bill, the **Media Entertainment and Arts Alliance** (MEAA) welcomed the development of the Code, describing it as 'a sound starting point for commercial negotiations about the value and scope of news media carried by Google and Facebook.'[193] However the MEAA's submission to the Senate Inquiry described a number of major concerns, contending that the Bill does not include a provision to ensure money derived from a commercial agreement is not used for non-journalistic purposes.[194]

In evidence before a hearing of the Senate Committee, the MEAA stated:

> …it is critical that the code mandates that any revenue received by media organisations be spent on the production of journalistic content. In the absence of that requirement, there is evident risk that companies could use the funds for other purposes. Having gone through the effort to get here, the beneficiaries of the code must be journalism and the citizens who rely on it, not shareholders and senior executives. Put simply, any money from this code or other mechanisms needs to go to the newsroom, not the boardroom.[195]

Otherwise, the MEAA argues:

- the Bill does not appear to deal with 'the parlous economic and employment situation at regional media organisations'
- the $150,000 per annum revenue test for eligible news organisations is too high and
- the incorporation of a two-way value exchange principle is 'an unreasonable concession by the Government' which will diminish the effectiveness of the Code.[196]

On this last point, the MEAA claims that lack of a clear mechanism for calculating the value of referral traffic to news company websites is 'an overly-elastic concept' which will serve to frustrate bargaining processes, and it should be dispensed with now, or at least evaluated during the first annual review of the Code.[197]

On the matter of support for regional news organisations, the MEAA has put forward the view that the revenue test will likely prevent regional businesses 'enjoying the fruits of this code'.

> Part of what we see this code as providing and promoting is a diverse media ecosystem. In recent times, there's been a whole bunch of small startup publications, places in the Northern Rivers, at Yass, regional

192. Science Alert, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 12], n.d., p. 1.
193. Media Entertainment and Arts Alliance(MEAA), Submission to the ACCC, ACCC Mandatory Code Comment, 28 August 2020.
194. MEAA, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 30], 18 January 2020, p. 1.
195. A Portelli (Director, Media, Media, Entertainment and Arts Alliance), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 1 February 2021, p. 1.
196. MEAA, Submission, op. cit., pp. 1–2.
197. Ibid.

> South Australia and Victoria. They've all sprung up, often, to fill the gap left by that large number of News Corp and Australian Community Media masthead closures during 2020. These publications are usually quite small but they're, no less, integral parts of their communities. Currently, they would fall outside the code. The current annual revenue requirements would prevent these small businesses from participating in the code. The reality is that for most or many of those publications the scope to compensation by the code, at least initially, may be limited, but that could certainly change very easily depending on how that publication matures.[198]

The **Australian Associated Press** (AAP) supports the Bill in its current form, but points out that while it seeks to assist what it calls 'retail media customers' (that is, media companies who produce news through employing journalists) it does not assist wholesale providers of news.

> If all the Australian government does is pass the bill then it will not have achieved its goal of protecting media diversity in Australia. In order to truly achieve the objective of the bill, namely to help support the sustainability of the Australian news media sector, the government must urgently consider additional measures to assist the wholesale news industry such as the provision of an appropriate form of recurrent government support for AAP.[199]

The **Country Press Association** (CPA), which represents more than 160 independent regional and local newspapers across Australia, has stated that the Bill 'is weighted to large media organisations and does not take into account the ongoing need for a diversified media across Australia'.[200]

In evidence to the Senate hearing, the President of the CPA, Mr Bruce Ellen, argued that consultation during the development of the Bill has been 'skewed heavily towards the large media businesses'.[201] Mr Ellen stated that much of the reportage about the development of the Code has been generated by the large media and entertainment businesses, in a way that has framed a 'Goliath versus Goliath' battle as a 'David and Goliath' battle, and he added that for his members 'it truly is a David and Goliath battle'.[202] He went on to explain the importance of advertising revenue in supporting the production of public interest journalism in local and regional areas.[203]

> Our primary source of revenue to sustain our funding for public interest journalism is advertising placed by local, state and national businesses and organisations who want to reach the unique local audience that our newspapers service. We are proudly commercial businesses whose survival depends on the advertising markets now dominated by the digital platforms.
>
> …
>
> Regional and local newspapers publish content that is specifically relevant to their local communities and regions. It is written and produced by local journalists employed by those newspapers that are part of the communities they write about. Content is hyper-local and not syndicated.
>
> …
>
> Whilst the bill generally works well, the key issue that must be considered by the Senate committee is how each media is compensated by the value exchange. Sadly, the current digital platforms legislation

198. A Portelli, Evidence, op. cit., pp. 2–3.
199. E Cowdroy (Chief Executive Officer, Australian Associated Press), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 22 January 2021, p. 28.
200. Country Press Association, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 45], 18 January 2021, p. 1.
201. B Ellen, Evidence to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 1 February 2021, p. 19.
202. Ibid.
203. Ibid.

> rewards the large companies and their digital-only syndicated-content models at the expense of smaller media businesses with true local news that is expensive to produce. This can only lead to reduced diversity of media in Australia.[204]

Mr Ellen also noted that the decision to include the ABC and SBS in the Bill may lead to a reduction in media diversity.

> These taxpayer-funded media organisations compete for audience with commercial media operations whose viability and survival depends on advertising revenues now decimated by the digital platforms. … To include the ABC and SBS provides them a further unfair advantage and also has the potential for commercial news media businesses whose revenues have been severely impacted to receive a smaller share of whatever pie may be available.
>
> The result could be that communities lose their main source of local news. The ABC and SBS are not substitutes for the volume and the detail of local journalism produced by local commercial newspapers. In the ABC's submission to the Senate inquiry on media diversity it stated that the ABC can't fill the gap left by closed local newsrooms. It's not its job to deliver hyperlocal news; that's our job. While it provides a foundation for public interest journalism, the ABC does not have resources to tell all the nations' stories.[205]

In evidence to the Senate, Mr Eric Beecher—currently chair of both **Private Media** and **Solstice Media**—expressed his concerns about the form of media concentration he sees in Australia, which, as an independent publisher (of *Crikey*, *The Mandarin* and the *New Daily*, among others), he competes with.

> Ten days ago, I watched as the representatives of three very large multibillion-dollar media organisations sat here before your committee insisting that this legislation is essential to their survival. Two of those companies, News Corporation and The Guardian, are foreign controlled with deep pockets. The other is an entertainment business whose serious journalism is a small and almost financially irrelevant part of its overall media portfolio. I've watched and listened to those companies tell the government, the opposition, this committee and the public that Google and Facebook have destroyed their business models by stealing both their content and their advertising revenue and, therefore, they need legislation to force those two global behemoths to compensate them, to the tune of a billion dollars a year, in the estimation of the executive chairman of News Corp Australia.
>
> The truth is that there is no content stealing, there's no breach of copyright. Those media companies actively provide snippets or their full journalism to the platform for one blindingly obvious reason: they gain huge benefit from the exposure and clicks their content attracts on Google and Facebook. 'If they didn't, they wouldn't allow it to be stolen.' The other truth is that the advertising wasn't stolen either. The ad revenue that used to support Australian journalism pre Google and Facebook came primarily from newspaper classifieds, and has actually ended up in the pockets of realestate.com, owned by News Corp, Domain, owned by Nine, and other classified advertising websites like seek and carsales.[206]

Mr Beecher explained that he was 'not here to defend Google and Facebook. They're almost certainly too powerful'.[207] He stated their market dominance, and the data they collect about users online is 'scary', and there should be laws 'to make sure that they pay full Australian corporate tax on all their Australian profits that stem from all their Australian revenue.'[208] For those reasons, he said, he believes the platforms should pay for 'a social licence to support the

204. Ibid., pp. 19–20.
205. Ibid., p. 20.
206. E Beecher (Chairman, Private Media and Solstice Media), Evidence to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 1 February 2021, p. 32.
207. Ibid.
208. Ibid.

public interest journalism that has been severely affected by the invention of the commercial internet, which Google and Facebook dominate. They should pay for the collateral damage inflicted on quality journalism, and that's exactly what Google and Facebook are prepared to do and, in many countries, are doing'.[209]

Mr Beecher did, however, express concern that without modifications the large corporate publishers will be advantaged at the expense of smaller companies.

> That will perpetuate and consolidate the concentration of ownership that we have. They'll get more money to make more money, basically, and we might get some crumbs. Will we survive with crumbs? Probably we'll survive; we've survived without those crumbs.[210]

He summarised, very precisely, his views about how the Bill could be improved. It should, he stated, be 'nuanced' to address two crucial aspects.

> One, it should explicitly protect and enhance diversity of media ownership. The legislation should create meaningful financial support for Australia's 100 or so small to medium regional and urban news publishers so that the vast proportion of funding does not end up in the pockets of News Corp and Nine. Therefore I think there should be a specific mechanism or formula in the legislation to guarantee that smaller news publishers, like the members of Country Press Australia who you saw before and Private Media, Solstice Media and Schwartz Media as well as potential new entrants, share fairly and transparently in the funding from the platforms—a mechanism to protect media diversity.
>
> Two, it should address Google and Facebook seminal concerns to ensure they participate in the code. It's become clear that the platforms have one or two red-line issues that they're warning could force them from participating in the code. In Google's case, that relates to the way they provide funding to news publishers. If it is by paying publishers to display snippets, that creates a global precedent for Google that could, if replicated in other countries, unwind their entire search business model. But if they pay publishers through other means, such as licensing content for products like their new Showcase, they've made it clear they will proceed to support the Australian news industry. Because this is a payment mechanism issue, it should be nuanced to ensure Google participates. In Facebook's case, the primary concern, which also applies to Google, is the absence of any kind of parameters or guidance or definition of value to place a limit or cap on their financial liability if they participate in the code. This uncertainty is enhanced by the final offer arbitration system, so some kind of liability guidance would remove that objection.[211]

Data rights

Reset Australia, which describes itself as 'an independent, non-partisan policy and advocacy organisation committed to fighting the digital threats to democracy', supports the Bill, but believes it should go further.[212] It argues that a power to ensure compliance with rules about the bargaining and data-sharing provisions of the Bill should be 'held by elected governments that are accountable to public interest', and that governments should seek to be more than an impartial referee between platforms and publishers. Reset Australia has proposed, specifically, an empowered audit authority which 'should be capable of assessing how well ad revenue redistribution and algorithmic curation of news are serving the public.'[213] It also supports stronger protections and guidelines for how data is shared, 'to protect consumers from harm and to give

209. Ibid.
210. Ibid., p. 34.
211. Ibid., pp. 32–33.
212. M Nguyen (Policy Lead, Reset Australia), Evidence to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 1 February 2021, p. 5.
213. Ibid.

them control over who has the data and why. This should work under a broader framework of data and privacy, which will hopefully be captured in the review of the Privacy Act.'[214]

Digital Rights Watch has also made an argument for greater scrutiny of, and control over, the data collection practices of the platform companies. While it has welcomed the purpose of the Bill—in promoting competition, enhancing consumer protection and supporting a sustainable media landscape—it has also expressed concern that the Bill does not address data privacy issues.

> We are particularly concerned by the focus on Google and Facebook in the draft code and the lack of an objective way to nominate platforms in the future. Any legislation that targets a specific service risks inflicting damage on the competitiveness of the sector. By giving this sort of privileged access to digital platforms to news corporations, the draft code actually perpetuates the collection and abuse of user data by locking in the business model and making more parties fiscally reliant upon it. It is this act—the generation of extraordinary revenue through targeting of advertising based on data accumulated from users of 'free' services—that should be regulated, regardless of the organisation undertaking it. It also inadvertently privileges Google and Facebook in setting them up as the dominant players in this space—under the draft code news corporations will have a steady financial incentive not to diversify their online presence across smaller platforms and providers, or move away from these advertising services and practices.[215]

Electronic Frontiers Australia (EFA) agrees with this view, describing the Bill as 'legislated support for the preferential supply of digital surveillance data to specific businesses.'[216] EFA's submission to the Senate noted that on the one hand Australians are regularly reminded of the risk of data breaches (including by the Office of the Australian Information Commissioner, and the Government's Cyber Security Strategy), but on the other hand,

> It is perplexing why the government would encourage increased collection and dissemination of this data when it is simultaneously warning us of the dangers of such collection and the need to invest in cybersecurity. This would seem to be working at cross-purposes and creating financial incentives to do so. … It is our position that the Bill attempts to legitimise, and place into the hands of mainstream media, the ability to commercial gain from Australians' interactions within the digital environment.[217]

Financial implications

According to the Explanatory Memorandum, the Bill will have no financial impact for the Government.[218]

However, there will be compliance costs for business, estimated to be '$10.5 million to $13.0 million per year'.[219]

Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill's compatibility with the human rights and freedoms recognised

214. Ibid.
215. Digital Rights Watch, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 47], 18 January 2021, p. 3.
216. Electronic Frontiers Australia, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 24], 18 January 2021, p. 3.
217. Ibid., pp. 3–4.
218. Explanatory Memorandum, p. 7.
219. Ibid.

or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.[220]

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights had no comment on the Bill.[221]

Key issues and provisions

Quick guide to the bargaining code

The media bargaining Code operates as follows:

- a news business corporation must apply to the ACMA for registration—this can only occur if all of the specified tests are satisfied
- the Minister may, by legislative instrument, determine that one or more services are ***designated digital platform services*** of a corporation and that the relevant corporation is a ***designated digital platform corporation***
- if the designated digital platform service makes available ***covered news content*** of a registered news business, the responsible digital platform corporation must meet certain minimum standards in relation to the provision of information about user interactions, referral traffic, and advance notice of significant changes to algorithms and internal practices
- a framework for bargaining between a registered news business and a digital platform corporation on issues including remuneration is provided by the Code
- should the parties fail to agree on a bargaining outcome, the matter may proceed to final offer arbitration, which is strictly time-and information-limited
- in the alternative, a designated digital platform corporation may enter into standard offer agreements for the payment of remuneration for the making available of the registered news business' covered news content—although the Bill requires such agreements to include specified content
- nothing in the Bill prevents parties from making an agreement outside the Code.

Establishing the code

Item 1 of the Bill inserts **proposed Part IVBA—News media and digital platforms mandatory bargaining code** into the *CCA.*

The mandatory bargaining code (the Code) is directed toward the following entities:

- a ***designated digital platform corporation*** for a ***designated digital platform service*** and
- a ***registered news business corporation*** for a ***registered news business***.

These terms are defined in the Bill, as set out below.

Designating a digital platform service

The Bill applies to the **services** of a corporation where the corporation (either by itself or with related body corporates) operates or controls the service; or a related body corporate of the corporation (either by itself or with related bodies corporate) operates or controls the service.[222]

220. The Statement of Compatibility with Human Rights can be found at pages 59–61 of the Explanatory Memorandum to the Bill.
221. Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report* , 1, 2021, Canberra, 3 February 2021, p. 47.
222. *Competition and Consumer Act 2010* (CCA), **proposed subsection 52E(2)**.

In that case, the Minister[223] is empowered to make a determination, by legislative instrument, specifying:

- one or more services as ***designated digital platform services*** of a corporation and
- the relevant corporation as a ***designated digital platform corporation***.[224]

In making the determination, the Minister **must** consider whether there is a significant bargaining power imbalance between Australian news businesses and the designated corporation and its related bodies corporate.[225] In addition, the Minister **may** consider any reports or advice by the Australian Competition and Consumer Commission (ACCC).[226] At the outset it is likely that consideration will be given to the final report of the Digital Platforms Inquiry which states:

> Digital platforms increasingly perform similar functions to media businesses, such as selecting and curating content, evaluating content, and ranking and arranging content online.
>
> Despite this, virtually no media regulation applies to digital platforms. This creates regulatory disparity between some digital platforms and some more heavily-regulated media businesses that perform comparable functions.[227]

The government has indicated that the Code will initially apply to Facebook Newsfeed and Google Search (but not YouTube) with other digital platform services added in future if required.[228]

Key issue—perceived lack of objective criteria

The Chamber of Commerce of the United States of America (US Chamber of Commerce) has raised concerns that the Bill 'does not establish objective criteria for determining who is subject to the Code' and that it explicitly discriminates against US companies.[229] These concerns were echoed by the Office of the United States Trade Representative who also noted that the Bill 'explicitly and exclusively targets two US companies … without first having established a violation of existing Australian law or a market failure'.[230]

The Scrutiny of Bills Committee also questioned the power of the Minister to make a determination that specifies services as ***designated digital platform services*** and specifies a corporation as a ***designated digital platform corporation***.

According to the Scrutiny of Bills Committee, 'significant matters, such as which digital platforms must participate in the Code, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided'.[231] Of concern to the Committee was that the Explanatory Memorandum to the Bill 'contains no justification regarding why it is necessary to

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223. Section 19 of the *Acts Interpretation Act 1901* states that if a provision of an Act refers to a Minister by using the expression 'the Minister' without specifying which Minister is referred to, the reference is a reference to the Minister who administers the provision in respect of the relevant matter. For the purposes of the Bill the relevant Minister is the Treasurer. See: Administrative Arrangements Order—1/2/2020.
224. *CCA*, **proposed subsection 52E(1)**.
225. *CCA*, **proposed subsection 52E(3)**.
226. *CCA*, **proposed subsection 52E(4)**.
227. ACCC, *Digital platforms inquiry: final report*, op. cit., p. 15.
228. J Frydenberg and P Fletcher, *News media and digital platforms mandatory bargaining code*, op. cit.
229. Chamber of Commerce of the USA, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 13], 17 January 2021, p. 1.
230. US Government, Office of the US Trade Representative, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 17], 15 January 2021, p. 1. See also Information Technology Industry Council, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 16], 15 January 2021.
231. Senate Standing Committee for the Scrutiny of Bills, *Scrutiny digest*, 1, 2021, op. cit., p. 49.

allow such significant matters to be set out in delegated legislation' and that these concerns were 'heightened' due to the use of certain terms which are undefined by the Bill—specifically, the term 'digital platform'.[232]

Accordingly, the Committee has sought further advice from the Treasurer 'as to why it is considered necessary and appropriate to leave the determination of which digital platforms must participate in the News Media and Digital Platforms Mandatory Bargaining Code to delegated legislation'.[233]

Registering a news business

Application for registration

The Bill provides that a corporation (called the ***applicant corporation***) may apply to the Australian Communications and Media Authority (ACMA) in the specified manner and form[234] to:

- register a news business
- register the applicant corporation as a registered news business corporation and
- endorse that corporation as the registered news business corporation for that news business.[235]

Relevantly the Bill defines a ***news business*** as a news source or a combination of news sources.[236] A ***news source*** is defined as any of the following, if it produces, and publishes online, news content:

- a newspaper masthead
- a magazine
- a television program or channel
- a radio program or channel
- a website or part of a website
- a program of audio or video content designed to be distributed over the internet.[237]

'News content' is not defined. The Explanatory Memorandum states that it is intended to take its ordinary meaning.[238]

The application may relate to some, or all, of the news sources that the applicant corporation (either by itself or with other corporations) operates or controls.[239]

There are a number of conditions (set out below) which **must** be met before the ACMA registers a news business or news business corporation. If the conditions are satisfied, the ACMA must register the news business, register the applicant corporation and endorse the applicant

232. Ibid., p. 48.
233. Ibid., p. 49.
234. *CCA*, **proposed subsection 52F(2)**.
235. *CCA*, **proposed subsection 52F(1)**.
236. *CCA*, **proposed section 52A**.
237. *CCA*, **proposed section 52A**.
238. Explanatory Memorandum, p. 18.
239. *CCA*, **proposed subsection 52F(3)**.

corporation as the registered news business corporation for the news business.[240] Details of each registration and endorsement are to be published on the ACMA's website.[241]

Conditions of registration for news businesses and news corporations

Connection test

There must be a connection between the applicant corporation and news business. The requirement is that the applicant corporation, either by itself, or together with other corporations, operates or controls the news business.[242]

Revenue test

The revenue test requires that the annual revenue of the corporation (or a related body corporate) as set out in the corporation's accounts prepared in accordance with generally accepted accounting principles, exceeds $150,000 for the most recent year or for at least three of the five most recent years for which there are accounts.[243]

Content test

A news business satisfies the content test if the ***primary purpose*** of each news source is to create content that is ***core news content*** being content that reports, investigates or explains:

- issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making or
- current issues or events of public significance for Australians at a local, regional or national level.[244]

In determining the ***primary purpose*** of a news source, the following must be taken into account:

- the amount of core news content created by the news source
- the frequency with which the news source creates core news content
- the degree of prominence given to core news content created by the news source, compared with the degree of prominence given to other content created by the news source and
- any other relevant matter.[245]

According to the Explanatory Memorandum to the Bill core news is intended to be construed broadly:

> [core news] includes coverage of current issues or events where these are of public significance at a local, regional or national level. Reporting on community issues or events is considered core news content if they are of public significance. Matters that are principally private or special interest are not intended to be included.[246]

Australian audience test

The Australian audience test is met in relation to a news business if every news source comprising the news business ***operates predominantly*** in Australia for the dominant purpose of serving

240. *CCA*, **proposed subsection 52G(1)**.
241. *CCA*, **proposed subsection 52G(3)**.
242. *CCA*, **proposed section 52L, proposed paragraph 52G(2)(e)**.
243. *CCA*, **proposed section 52M, proposed paragraph 52G(2)(d)**.
244. *CCA*, **proposed section 52A**.
245. *CCA*, **proposed section 52N, proposed subparagraph 52G(2)(c)(i)**.
246. Explanatory Memorandum, p. 20.

Australian audiences.[247] This means that a foreign news business that only occasionally produces Australian news content, or that has an Australian news segment as part of a broader news broadcast, will not qualify under the Australian audience test unless it is also operating predominantly in Australia.[248]

Professional standards test

A news business satisfies the professional standards test if every news source has editorial independence from the subjects of its news coverage and is subject to a professional standard—such as the Australian Press Council Standards of Practice or the Commercial Television Industry Code of Practice.[249]

Although editorial independence is not defined in the Bill, the Explanatory Memorandum states:

> A news source has editorial independence from the subject of its news coverage if it is:
>
> - not owned or controlled by a political or advocacy organisation (such as a political party, lobby group or a union); and
> - not owned or controlled by a party that has a commercial interest in the coverage being produced (for example, a publication that covers a sport that is owned or controlled by the sport's governing body).
>
> The editorial independence requirement is not intended to exclude a news source that otherwise qualifies on all the tests, and occasionally includes reporting about itself or a related business, or about an issue affecting itself or a related business.
>
> However, an advocacy body that mainly publishes news about its own sector will not meet the professional standards test.[250]

Changes to conditions

The Bill requires a registered news business corporation to notify the ACMA in writing as soon as practicable if any of the conditions of registration are no longer met.[251] A failure to notify is subject to a maximum civil penalty of 600 penalty units (being equivalent to $133,200).[252]

247. *CCA*, **proposed section 52O, proposed subparagraph 52G(2)(c)(ii)**.
248. Explanatory Memorandum, p. 22.
249. *CCA*, **proposed section 52P** (which contains a detailed list of the relevant standards)**, proposed subparagraph 52G(2)(c)(iii)**.
250. Explanatory Memorandum, p. 23.
251. *CCA*, **proposed section 52J.**
252. *CCA*, **proposed subparagraph 76(1A)(a)(iaa)**, and **proposed paragraphs 71(1A)(bab)** and **76(4A)(a)** inserted by **Items 7, 9 and 10** respectively. The value of a penalty unit is currently $222: section 4AA of the *Crimes Act 1914* and Notice of Indexation of the Penalty Unit Amount.

Civil penalties under the Bill

Subsection 76(1) of the *CCA* provides that pecuniary penalties are payable by a person who has contravened (or has attempted to contravene) specified provisions of the Act and extends to, amongst other things, a person who has aided, abetted, counselled or procured a person to contravene such a provision. **Items 7** and **10** in Part 2 of the Bill operate so that a person who contravenes specified sections in Part IVBA will also be liable to pay a civil penalty.

Subsection 76(1A) of the *CCA* sets out the maximum penalties that arise for a body corporate in the most egregious of cases for specified provisions, that is:

(i) $10,000,000

(ii) if the court can determine the total value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—three times that benefit

(iii) if the court cannot determine the total value of that benefit—10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the act or omission occurred.

Item 8 in Part 2 of the Bill amends subsection 76(1A) to include specified sections of new Part IVBA as liable to this maximum penalty.[253]

In the alternative, subsection 76(1A) of the *CCA* may operate so that an act or omission gives rise to a pecuniary penalty of a specified amount. **Item 9** in Part 2 of the Bill inserts **proposed paragraphs 76(1A)(baa)** and **(bab)** so that specified conduct is subject to a pecuniary penalty of 6,000 penalty units (equivalent to $1,332,000) or 600 penalty units (equivalent to $133,200) respectively.[254]

The relevant penalties are set out in the body of this Bills Digest.

The ACMA may revoke the registration of a news business if it is satisfied that the requirements of the content test, the Australian audience test or the professional standards test are no longer met.[255] In addition, the ACMA may revoke the registration of a registered news business or a registered news business corporation and the endorsement of a news business corporation for a news business if the ACMA considers that, in making the application for registration, the corporation gave the ACMA information or documents that were false or misleading in a material particular.[256]

The ACMA may also revoke the registration of a registered news corporation if the ACMA considers that the corporation no longer satisfies the revenue test [257] or the connection test, [258] or is no longer endorsed for at least one registered news business.[259]

General requirements for digital platform services

If a designated digital platform service makes available ***covered news content*** of a registered news business, the responsible digital platform corporation must meet certain minimum standards in relation to the provision of information about types of data relating to user interactions, referral traffic, and advance notice of significant changes to algorithms and internal practices.[260] For the purposes of these requirements, the term ***covered news content*** means content that is ***core news***

253. Specifically, sections 52ZC (not to differentiate), 52ZH (negotiate in good faith), 52ZS (obligation to participate in arbitration in good faith) and 52ZZE (comply with the arbitral determination)
254. These are discussed in the body of the Digest.
255. *CCA*, **proposed subsection 52H(2)**.
256. *CCA*, **proposed section 52I**.
257. *CCA*, **proposed subsection 52H(4)**.
258. *CCA*, **proposed subsection 52H(6)**.
259. *CCA*, **proposed subsection 52H(5)**.
260. *CCA,* **proposed Part IVBA, Division 4, Subdivision B**.

content or content that reports, investigates or explains current issues or events of interest to Australians.[261]

According to the Explanatory Memorandum to the Bill:

> The minimum standards apply to the broader category of covered news content, as many news businesses publish a mix of stories of broad interest to cross-subsidise the production of core news content. Content that is neither covered nor core news does not benefit from the minimum standards. The cross-subsidisation business model means that it is important for registered news businesses to receive information relating to, and can bargain over, a broader range of content than just their core news content.[262]

Further, the Explanatory Memorandum expresses the intention that covered news content will exclude:

- broadcasts of sports games or publication of sports results or scores
- entertainment content such as drama or reality TV programming
- specialty or industry reporting
- product reviews and
- journals and publications intended primarily for academic, rather than general, audiences.[263]

Content that is neither covered nor core news does not benefit from the minimum standards.[264]

Minimum Standards

The minimum standards relate to the provision of information. Their purpose 'is to provide a minimum level of transparency so that all news businesses are aware of the types of information that are being provided to other news businesses'.[265]

These minimum standards are discussed in more detail below.

Giving information about data

The Bill imposes an obligation on a designated digital platform service which ***makes available*** covered news content to give certain information to registered news business corporations.[266] For the purposes of the minimum standards, the service 'makes content available' if the content is reproduced on the service, or is otherwise placed on the service, or if a link to the content or an extract of the content is provided on the service.[267] **Proposed subsection 52B(2)** makes it clear that 'makes content available' is to be interpreted broadly.

The required information comprises lists and explanations about data:

- that relates to the ***interactions*** of users of the digital platform service with the covered news content that is made available by the service[268] and
- that the designated digital platform service provides to one or more registered news businesses.[269]

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261. *CCA*, **proposed section 52A**.
262. Explanatory Memorandum, p. 27.
263. Ibid.
264. *CCA*, **proposed section 52A** and *CCA*, **proposed section 52R**.
265. Explanatory Memorandum, p. 29.
266. *CCA*, **proposed section 52R**.
267. *CCA*, **proposed section 52B**.
268. *CCA*, **proposed subsection 52C(2)** makes it clear that interaction is to be interpreted broadly.
269. *CCA*, **proposed subsections 52R(2) and (3)**.

> A user [of a service] ***interacts*** with content made available by a service by commenting, sharing, modifying or otherwise engaging with the content in some way. The concept is intended to be broad and include brief and minimal interactions with content such as pausing, scrolling through, or hovering a cursor over the content, or portions of the content. [270]

The information must be given to the registered news business corporation no later than 28 days after the day on which the registered news business was registered.[271] The ACCC may issue an infringement notice of 600 penalty units for a failure to comply. In the alternative, a maximum civil penalty of 6,000 penalty units applies.[272]

Updated information is to be given annually to the registered news business corporation no later than 12 months after the later of the day on which information was first given to the registered news business corporation and the most recent day on which updated information was given to the registered news business corporation.[273]

It has been contended by some stakeholders that this requirement will address the current information asymmetry that exists and that this will be crucial for registered news businesses to be able to negotiate fair and just outcomes under the Code. On this point, Free TV Australia contends:

> … accurate and current information about what consumer data is collected by the platforms is required to enable media businesses to obtain a clear understanding of the commercial benefit that platforms receive from the use of their news content. If media companies have access to this information, it will assist in addressing the bargaining power imbalance between the parties because it will ensure that media businesses bring an informed position to negotiations with each designated platform.[274]

Notice of change to algorithms

The remaining minimum standards compel a responsible digital platform to provide a registered news business with notice of planned changes to an algorithm or internal practice of the designated digital platform service in circumstances where:

- the ***dominant purpose*** of the change is to bring about an identified alteration to the ways in which the designated digital platform service distributes content that is made available by the service[275] and
  - the change is likely to have a ***significant effect*** on the referral traffic from the designated digital platform service to the covered news content (including to paywalled content) of registered news businesses (considered as a whole) that the service makes available[276] or
  - the change is likely to have a ***significant effect*** on the distribution of advertising directly associated with the registered news business' covered news content which is made available by the designated digital platform service.[277]

The responsible digital platform corporation **must** give notice of the planned change to the registered news business corporation for each registered news business at least 14 days before

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270. Explanatory Memorandum, p. 28; *CCA*, **proposed section 52C**.
271. *CCA*, **proposed paragraph 52R(1)(d)**.
272. *CCA*, **proposed section 52ZZG; proposed subparagraphs 76(1)(a)(iaa)** and **76(1A)(baa); proposed paragraph 76(4A)(c)** inserted by **items 7, 9 and 10** respectively.
273. *CCA*, **proposed subsection 52R(4)**.
274. Free TV, Submission op. cit., p. 17.
275. *CCA*, **proposed paragraphs 52S(1)(a) and (b); 52T(1)(a) and (b); 52U(1)(a) and (b)** – this includes referral traffic (including paywalled and non-paywalled content) and distribution of advertising.
276. *CCA*, **proposed paragraphs 52S(1)(c) and 52T(1)(c)**.
277. *CCA*, **proposed paragraph 52U(1)(c)**.

the change is made unless the change relates to a matter of urgent public interest, in which case notice must be given no later than 48 hours after the change is made.[278]

The ACCC may issue an infringement notice of 600 penalty units for a failure to comply. In the alternative, a maximum civil penalty of 6,000 penalty units applies.[279]

For each of the requirements which comprise the minimum standards the relevant information or notice must be given in terms that are readily comprehensible and if there are other designated digital platform services of the responsible digital platform corporation—the information must not be in aggregate.[280]

When a change is not for a dominant purpose

The Bill deems that the purpose of a change to an algorithm will **not be** the dominant purpose if it was made as part of routine maintenance to ensure the ongoing effectiveness of the algorithm or to ensure that the algorithm operates more quickly or more efficiently.[281]

Significant effect test

The Bill sets out the matters to be considered in determining whether a change to an algorithm affecting referral traffic to covered news content as a whole (**proposed section 52S**) or a change to an algorithm affecting referral traffic to paywalled content (**proposed section 52T**) is likely to have the ***significant effect***.

The matters to be considered are:

- whether as a result of the change there is likely to be a significant variation to the **amount** of covered news content made available by the designated digital platform service and
- whether as a result of the change there is likely to be a significant variation to the **proportion** of content made available by the designated digital platform service represented by covered news content and
- any other relevant matter.[282]

In addition, the Bill provides that certain specified matters must be disregarded—for instance, the relative **turnover** and the relative **financial position** of registered news businesses whose covered news content is made available by the designated digital platform service.[283]

Key issue—providing data and information

The provision of data and, in particular the requirement to notify if there is to be a change in an algorithm, is contentious. According to SBS:

> … notification of changes to algorithms is important, as is the provision of detail on the nature of the algorithm change, both of which will facilitate SBS's response to change, in turn ensuring that audiences are still able to received the same news services from SBS.[284]

278. *CCA*, **proposed subsections 52S(2), 52T(2) and 52U(2)**.
279. *CCA*, **proposed section 55ZZG; subparagraphs 76(1)(a)(iaa)** and **76(1A)(baa); proposed paragraph 76(4A)(c)** inserted by **items 7, 9 and 10** respectively.
280. *CCA*, **proposed paragraphs 52R(1)(b) and (c); 52R(4)(b); 52S(2)(c) and (d); 52T(2)(c) and (d); 52U(2)(c) and (d)**.
281. *CCA*, **proposed section 52V**.
282. *CCA*, **proposed subsection 52W(1)**.
283. *CCA*, **proposed subsection 52W(2)**.
284. Special Broadcasting Service Corporation (SBS), Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 26], nd., p. 1.

Evidence by representatives of both Google and Facebook to the Economics Committee was, essentially, that they support an algorithm notification component—but not in the form set out in the Bill.[285] Indeed, as noted above Google has stated that the Code in its current form is unworkable, and that if passed into legislation it 'would hurt small publishers, small businesses and the millions of Australians that use our services every day'.[286]

Further, Google has stated that it sees the Bill as posing an 'untenable risk' in terms of the impacts it may have on Google products, operations, and finances.[287]

The Bill contains safeguards against any requirement to provide information that would reveal a trade secret.[288] Similarly, the Bill does not require or authorise the giving of information that is personal information within the meaning of the *Privacy Act 1988*.[289]

Other obligations

There are two administrative obligations.

First, the Bill requires a responsible digital platform corporation to develop a proposal which enables a designated digital platform service to recognise original ***covered news content*** when it makes available and distributes that content. That proposal is to be published not later than six months after the first registration of a news business. In addition, a responsible digital platform corporation must consult with registered news business corporations in the development of the proposal.[290]

Second, in order to facilitate open communications between the parties to the Code, the Bill requires certain action to be taken by both a responsible digital platform corporation for a designated digital platform service and a registered news business corporation for a registered news business. The actions include but are not limited to:

- setting up a point of contact in Australia[291]
- complying with any regulations relating to specific requirements for the point of contact[292]
- acknowledging every communication to that point of contact[293] and
- complying with any regulations relating to the specific requirements for the acknowledgement.[294]

Non-differentiation

Proposed section 52ZC of the *CCA* operates so that a responsible digital platform corporation must ensure that in supplying a digital service, the corporation does not differentiate between registered news businesses or between registered and unregistered news businesses, in relation to crawling, indexing, making available and distributing the covered news content of a news business in the circumstances specified in the Bill. The Bill provides examples of the ways in which

285. S Milner, Evidence op. cit., 22 January 2021, p. 25; M Silva, Evidence, op. cit., 22 January 2021, p. 2.
286. M Silva, Evidence, op. cit., p. 1.
287. Ibid, p. 3.
288. *CCA*, **proposed section 52ZA, proposed subsection 52ZV(1)**. The term 'trade secret' is not defined in the Bill.
289. 'Personal information' is defined at subsection 6(1) of the *Privacy Act 1988* as information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether or not the information or opinion is recorded in a material form or not. *CCA*, **proposed section 52ZB, proposed subsection 52ZV(2)**.
290. *CCA*, **proposed section 52X**.
291. *CCA*, **proposed subsections 52Y(a) and 52Z(a)**.
292. *CCA*, **proposed subsections 52Y(b) and 52Z(b)**.
293. *CCA*, **proposed subsections 52Y(d) and 52Z(c)**.
294. *CCA*, **proposed subsections 52Y(e) and 52Z(d)**.

a service ***distributes content*** such as ranking and curating content, making content more or less prominent and making a user more or less likely to interact with the content.[295] According to the Explanatory Memorandum to the Bill:

> The non-differentiations provisions apply to any digital services (however described, such as a platform, social media website or mobile phone news app) that is operated or controlled by the responsible platform corporation. This includes digital services the responsible digital platform corporation operates or controls together with other corporations. This means that it applies to both digital services which have not been designated, as well as designated digital platform services. [296]

A failure to comply with the non-differentiation requirements is subject to a maximum civil penalty of the greatest of:

- $10 million
- if the court can determine the value of the benefit obtained and that is reasonably attributable to the act or omission—three times the value of that benefit and
- if the court cannot determine the value of that benefit—10 per cent of annual turnover during the period of 12 months ending at the end of the month in which the act or omission occurred.[297]

Key issue—threat to curb or withdraw services

According to the Office of the United States Trade Representative:

> Although not explicit, the apparent intent of this provision is to prevent designated digital platforms from declining to carry Australian news businesses content if negotiations over remuneration for that content fails. This results in a Hobson's choice for designated platforms—they can withhold all news content from Australia, or submit to prescriptive rules and mandatory remuneration for content Australian news businesses choose to distribute through their platforms.[298]

Google has clearly considered that it might withhold services. In evidence to the Economics Committee, Melanie Silva, Managing Director and Vice President of Google Australia and New Zealand stated that 'if this version of the code were to become law it would give us no real choice but to stop making Google search available in Australia'.[299]

The power of Google to curb or remove its service from Australia was confirmed by Chris Janz of Nine Entertainment Company who told the Economics Committee:

> Just last week Google decided to remove local news from the search results it presented to some Australians. It did so without giving any notice to the people affected. The impact of its decision was instant. It was disturbing. Instead of receiving critical updates from the ABC, Nine News, *The Age*, *The Sydney Morning Herald*, *The Guardian* or *The Australian*, some people searching for 'coronavirus New South Wales' received just a single news story at the top of their results—a three-week-old update from Al Jazeera. Searches for 'Sydney news' deprioritised crucial, accurate information about the public

295. *CCA*, **proposed subsection 52D(1)**. See also *CCA*, **proposed subsection 52D(2),** which broadly provides that subsection 52D(1) does not limit the meaning of distributes content.
296. Explanatory Memorandum, p. 35.
297. *CCA*, **proposed subparagraphs 76(1)(a)(iaa)** and **76(1A)(b); proposed paragraph 76(4A)(d)** inserted by **items 7, 8 and 10** respectively.
298. US Government, Office of the US Trade Representative, Submission, op. cit., p. 5.
299. M Silva, Evidence, op. cit., p. 1.

> health emergency. Instead, the most prominent story Google served up was about exciting things to do.[300]

In 2014, Spain passed a law requiring Google to pay for a license to use news content and images. Google shut down its Google News service in Spain as a reaction.[301]

However, it has been foreshadowed that should Google curtail its news services in Australia:

> … audiences will no doubt find ways to switch their behaviours and access news directly.
>
> Many major publishers have developed substantive online presences, with main websites, apps, and distribution across third party online platforms. Other aggregators like Flipboard, Reddit and RSS feeds also remain available. A September 2020 Essential poll found that the majority of Australians (75%) would go directly to publishers or use alternative platforms (53%) if Google stopped showing news. Google has since announced that it will pay $1 billion over 3 years for news content, and that it had signed agreements with almost 200 publications in Germany, Brazil, Argentina, Canada and the UK. This latest announcement demonstrates that Google is willing to pay for news content, but only in their own terms, and want to avoid regulation at all costs.[302]

If Google was to leave Australia it is unclear what impact this would have[303]—although Microsoft has indicated it fully supports the Code and would be willing to facilitate a transition from Google to Microsoft for affected businesses.[304] It is also unclear what impact such a move would have on android based mobile devices and available services for Australian users.

Bargaining

The Bill provides for bargaining between a registered news business and a digital platform corporation.

Notification of bargaining

Generally speaking, the registered news business corporation for a registered news business is the ***bargaining news business representative*** for the registered news business.[305] (For brevity this Bills Digest will refer to the bargaining representative.) Alternatively, a registered news business corporation may engage a third party to act as the ***bargaining representative***.[306] In either case, a person can be the ***bargaining representative*** for two or more registered news businesses.[307]

The bargaining representative may notify a responsible digital platform corporation that it wishes to bargain over one or more specified issues relating to the registered news business' ***covered news content*** made available by the designated digital platform service.[308] In that case the notification must be in the manner and form set out in the Bill. In particular, the notification must specify the issues which will be subject to bargaining.[309]

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300. C Janz (Chief Digital and Publishing Officer, Nine Entertainment Company, Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 22 January 2021, p. 26.
301. J Guiao, *Tech-xit: can Australia survive without Google and Facebook?*, Issues paper, Australia Institute, Canberra, October 2020, p. 5; D Rushe, 'Google News Spain to close in response to story links 'tax'' *The Guardian*, 11 December 2014.
302. J Guiao, *Tech-xit*, op. cit., p. 11.
303. Note that in Germany efforts to force Google to pay licence fees for search result snippets failed. See 'German publishers cave, grant Google free permission to use snippets in search results', *The Digital Reader*, 22 October 2014.
304. M Ward, 'Microsoft boss ready to fill Google void', *Australian Financial Review*, 4 February 2021, p. 1.
305. *CCA*, **proposed subsection 52ZD(1)**.
306. *CCA*, **proposed subsections 52ZD(2) and (3)**.
307. *CCA*, **proposed subsection 52ZD(4)**.
308. *CCA*, **proposed subsection 52ZE(1)**.
309. *CCA*, **proposed subsection 52ZE(4)**.

Once a notification is made, the following rules apply:

- the bargaining representative that made the notification and the responsible digital platform corporation to which the notification relates are the ***bargaining parties***[310]
- the bargaining parties may agree, in writing, to bargain over one or more additional specific issues relating to the registered news business' covered news content[311]
- the ***core bargaining issues*** are the issues specified in the original notification and the additional issues specified in an agreement (if any) between the bargaining parties[312]
- each bargaining party must negotiate in good faith over each core bargaining issue[313] and
- if the bargaining parties reach agreement over a core bargaining issue, they must, as soon as practicable notify the ACCC of that agreement in writing.[314]

Failure to reach an agreement

Where the parties are unable to reach a negotiated agreement, the Bill contains a framework for a form of arbitration between the parties which is known as final offer arbitration.

What is final offer arbitration?[315]

Final offer arbitration is a novel form of arbitration that originally came to prominence in player salary disputes in professional sports in the United States, from which context it derives its colloquial name 'baseball arbitration'.

Final offer arbitration can generally be described as a process in which the arbitral tribunal is required to choose one party's offer, rather than making an independent determination of the 'correct' resolution. Thus, the role played by an arbitrator in a final offer arbitration process is quite different to that of an arbitrator in a normal commercial arbitration.

The principal attraction of final offer arbitration is that it creates an incentive for the parties to act reasonably, because the design of the system is such that the most reasonable party prevails.

Notice that arbitration should start

The issue to be determined by the arbitration will be the amount of remuneration to be paid to a registered news business by the digital platform corporation for making the registered news business' covered news content available on a designated digital platform service (called the ***remuneration issue***).[316]

Where a bargaining representative has notified a responsible digital platform corporation that it wishes to bargain and **either**:

- the bargaining parties have not reached an agreement about terms for resolving the **remuneration issue** within three months after the notification was made **or**
- the bargaining parties have agreed to arbitration about terms for resolving the **remuneration issue** no earlier than 10 business days after that notification was made

310. *CCA*, **proposed subsection 52ZG(1)**.
311. *CCA*, **proposed subsection 52ZG(2)**.
312. *CCA*, **proposed subsection 52ZG(3)**.
313. *CCA*, **proposed section 52ZH**.
314. *CCA*, **proposed section 52ZI**.
315. This information about final arbitration is sourced from S Luttrell and D Poddar, 'Batter up: ACCC proposes compulsory "final offer arbitration" for disputes between media businesses and digital platforms in Australia', *Australian Journal of Competition and Consumer Law*, 28, 4, 2020, pp. 255–261.
316. *CCA*, **proposed subsection 52ZL(1)**.

then the bargaining representative may give a notice, in writing, to the ACCC that arbitration should start.[317] The notice cannot be given to the ACCC if an equivalent notice was given within the preceding 24 months.[318]

As soon as practicable after the ACCC has been so notified, it must give the ACMA and the bargaining parties a notice stating that an arbitral panel is to be formed.[319]

Forming the arbitral panel

The Bill requires that the ACMA establish and keep a register of bargaining code arbitrators being persons who are experienced in legal matters, economic matters or industry matters or persons who are considered by the ACMA to have appropriate experience to be a member of an arbitral panel.[320]

Proposed section 52ZM of the *CCA* provides for the formation of the arbitral panel not later than **10 business days** after the notice that arbitration should start was given. The relevant features of the panel are:

- the panel is to be formed to arbitrate about the remuneration issue
- the panel comprises of the Chair and two other members—unless the bargaining parties agree to a panel of a single member
- bargaining parties may agree to appoint a person who is not listed on the ACMA's register of bargaining code arbitrators
- once agreement is reached about the appointment of the panel members, each of the bargaining parties must give the ACCC and the ACMA a notice in writing identifying the appointees and the date of the agreement.[321]

Importantly, where the bargaining parties cannot agree on the appointment of panel members within that period, the ACMA must appoint a person who is listed on the register of bargaining code arbitrators.[322] In that case, the ACMA must, before the appointment is made, give the person a reasonable opportunity to declare actual or potential conflicts of interest in relation to the arbitration.[323] A person **will** have a conflict of interest if the person has any interest, pecuniary or otherwise, that could conflict with the proper performance of the person's functions in relation to the arbitration.[324]

Accordingly, 'the ACMA will need to think carefully about the people it names on its register of arbitrators, as these individuals are likely to play a prominent role in the operation of the Code'.[325]

The bargaining parties must each pay half of the costs of each member of the panel, worked out as daily costs or in accordance with any relevant Regulations.[326]

317. *CCA*, **proposed subsection 52ZL(2)**.
318. *CCA*, **proposed subsection 52ZL(4)**.
319. *CCA*, **proposed subsection 52ZL(5)**.
320. *CCA*, **proposed subsections 52ZK(1) and (2)**.
321. *CCA*, **proposed subsections 52ZM(2)** to **(7)**.
322. *CCA*, **proposed subsections 52ZM(8) and (9)**.
323. *CCA*, **proposed subsection 52ZN(1)**.
324. *CCA*, **proposed subsection 52ZN(6)**.
325. S Luttrell and D Poddar, 'Batter up', op. cit., p. 258.
326. *CCA*, **proposed section 52ZO**.

The Chair must notify the bargaining parties in writing that the arbitration will start on a specified day that is no later than **five business days** after his, or her, appointment, unless specified otherwise by any relevant Regulations.[327]

Arbitration commences

The Bill sets out strict timelines which operate for the duration of the arbitration.

Each bargaining party may request the other bargaining party, in writing, to give it specified information if, amongst other things, the request is reasonable. The request must be made no later than **five business days** after the start of arbitration. Only one such request may be made.[328] The request must include the reasons why it is **reasonable** for the bargaining party to make the request.[329] A copy of the request must be given to the panel on the same day that it is given to the other bargaining party.[330]

A bargaining party must comply with a request for information no later than **10 business days** after it was given by the other bargaining party or at a time specified by the panel.[331]

A bargaining party who has received a request for information may challenge that request by applying to the panel, in writing, for a ruling that it is ***not* reasonable** for the other bargaining party to make the request.[332] That application must be made no later than **10 business days** after the other bargaining party gives the request. The relevant ruling must be made no later than **10 business days** after the challenge is made.[333]

In making the ruling, the panel must consider the following matters:

- the benefit (whether monetary or otherwise) of the registered news business' covered news content to the designated digital platform service
- the benefit (whether monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content
- the cost to the registered news business of producing covered news content and
- whether a particular remuneration amount would place an undue burden on the commercial interests of the designated digital platform service.[334]

The arbitration may terminate early **only if** all of the following are satisfied:

- the bargaining parties agree to that effect
- the panel did not make a determination about the terms for resolving the remuneration issue and
- no information was given by one bargaining party to the other bargaining party in compliance with a request for information before the agreement was made.[335]

In that case, the bargaining parties must notify the Chair of the agreement as soon as practicable after the day on which the agreement is made.[336]

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327. *CCA*, **proposed section 52ZP**.
328. *CCA*, **proposed subsection 52ZT(1)**.
329. *CCA*, **proposed subsection 52ZT(3)**.
330. *CCA*, **proposed subsection 52ZT(4)**.
331. *CCA*, **proposed paragraph 52ZT(5)(a)**.
332. *CCA*, **proposed subsection 52ZU(1)**.
333. *CCA*, **proposed subsection 52ZU(3).**
334. *CCA*, **proposed subsection 52ZU(5) and 52ZZ(1)**.
335. *CCA*, **proposed subsection 52ZW(1)**.
336. *CCA*, **proposed subsection 52ZW(2)**.

Final offer by the bargaining parties

The Bill requires each of the bargaining parties to submit a final offer for what the remuneration amount should be to the panel and, on the same day, to give a copy of the offer to the ACCC. It is for the ACCC to forward, as soon as practicable, a copy of the offer to the other bargaining party.[337]

Generally speaking, a final offer cannot be submitted later than the end of the period of **10 business days** after the day on which the arbitration starts.[338] However, that time is extended if:

- a bargaining party makes an information request – in this situation the period will be extended to 10 days after the latest day on which the other party must comply with the request
- a bargaining party challenges an information request – in this situation the period will be extended to 10 days after the day on which the panel makes a ruling
- the Regulations specify a different period or
- the panel considers that exceptional circumstances justify a different period.[339]

A final offer cannot be more than 30 pages in length.[340] A final offer, once submitted, cannot be withdrawn or amended.[341]

Other submissions

The Bill provides for the making and exchange of submissions in relation to the final offers within the following strict time frames:

- each bargaining party may give the panel a submission about the final offer of the other bargaining party—no later than **five business days** after the panel has received both final offers. The length and content of the submission is subject to specified limitations[342]
- on the **same day** each bargaining party must give a copy of the submission to the ACCC[343]
- as **soon as practicable** the ACCC must give a copy of the submission to the other bargaining party[344]
- no later than **10 business days** after receiving the final offers the ACCC may give the panel a submission about the final offers[345]
- on the **same day** the ACCC must give a copy of that submission to the bargaining parties[346]
- no later than **five business days** after each bargaining party has received the ACCC's submission they may give the panel a further submission—not more than 20 pages in length—addressing the contents of ACCC's submission[347]
- on the **same day**, the bargaining party must give a copy of the submission to the ACCC[348] and
- as **soon as practicable**, the ACCC must give a copy to the other bargaining party.[349]

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337. *CCA*, **proposed subsections 52ZX(2) and (3)**.
338. *CCA*, **proposed subparagraph 52ZX(4)(a)(i)**.
339. *CCA*, **proposed subparagraphs 52ZX(4)(a)(ii)–(v)**.
340. *CCA*, **proposed paragraph 52ZX(4)(b)**.
341. *CCA*, **proposed subsection 52ZX(6)**.
342. *CCA*, **proposed subsections 52ZZB(1)–(3)**.
343. *CCA*, **proposed paragraph 52ZZB(4)(a)**.
344. *CCA*, **proposed paragraph 52ZZB(4)(b)**.
345. *CCA*, **proposed subsection 52ZZC(1)**.
346. *CCA*, **proposed subsections 52ZZC(2)**.
347. *CCA*, **proposed subsections 52ZZC(3) and (4)**.
348. *CCA*, **proposed paragraph 52ZZC(5)(a)**.
349. *CCA*, **proposed paragraph 52ZZC(5)(b)**.

Key issue—nature of the arbitration

There has been some criticism of the arbitration model contained in the Bill. For instance, the Asia Internet Coalition describes it as 'an extreme and untested arbitration model … that denies the fundamental principles of fairness and good faith that should apply in any commercial negotiation'.[350]

Chair of the ACCC, Rod Sims, explained the value of final offer arbitration as follows:

> Firstly, it **stops ambit claims**, because if you had normal arbitration Google and Facebook would say, 'Zero', or, 'You pay us'; the media companies would come up with something very large … Secondly, you can arbitrate over individual deals, and so it's not a bespoke commercial arbitration; it allows final offers that suit each party, and so they're more attuned. Thirdly, you don't need as much information through final offer arbitration. If you're doing what may be termed standard offer arbitration where both parties are providing stuff to the arbitrator, it's the one who's got the most information who wins; you can flood the arbitrator with massive amounts of information. There is going to be, inevitably, an information difference between the two sides. Google and Facebook are always going to have massively more information. That's why they like standard arbitration, so they can leverage that. With final offer arbitration, there's still a disadvantage but it's not as large.[351] [emphasis added]

According to Associate Professor Rob Nicholls of the UNSW Business School:

> Final Offer Arbitration is an appropriate mechanism to resolve negotiation disputes between platforms and Australian news media businesses. This view is supported by the academic literature. The role of arbitrator may seem, on the surface, to be little more than checking if each offer is consistent with the public interest … and then drawing lots. However, the arbitration process before the final offers are submitted has the potential to bring the parties closer together by the arbitral panel expressing preferences. On this basis, the arbitrators would be best served by having broad dispute resolution experience.[352]

Role of the arbitral panel

It is for the panel to make a determination about the terms for resolving the remuneration issue. That determination sets out an amount (the ***remuneration amount***) for remunerating the registered news business for the making available of the registered news business' covered news content by the designated digital platform service for **two years**.[353]

The panel must do one of the following once the final offers and subsequent submissions are received:

- unless the panel considers that each of the final offers is not in the public interest because it is highly likely to result in serious detriment to the provision of covered news content in Australia or to Australian consumers—accept one of the final offers
- where neither of the final offers was accepted by the panel—ascertain the remuneration amount by adjusting the most reasonable offer so that the offer is in the public interest or
- where one bargaining party fails to submit an offer—the panel must accept the final offer of the other bargaining party (provided that it is not likely to result in serious detriment to the

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350. Asia Internet Coalition, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 43], 18 January 2021, p. 2.
351. R Sims, Evidence op. cit., 22 January 2021, p. 54.
352. R Nicholls, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 31], 18 January 2021, p. 5. For an example of academic writing on the topic of FOA, see also J Pauwelyn, 'Baseball arbitration to resolve internal law disputes: hit or miss?', *Florida Tax Review*, 22(1),2018, pp. 40–76, Hein online; at p. 40 which argues that 'FOA preserves a crucial role for neutral, third-party adjudication but puts more responsibility on [the parties] to work out positive solutions themselves. When carefully calibrated, FOA can … enhance both efficiency (speed, reduced cost, and complexity) and accuracy (reasonable party offers versus tribunals splitting the difference between extreme demands)'.
353. *CCA*, **proposed subsection 52ZX(1)**.

provision of covered news content in Australia or to Australian consumers) or ascertain the remuneration amount by adjusting the final offer so that the offer is in the public interest.[354]

Where neither of the bargaining parties submits a final offer, the arbitration terminates on the day after the last day on which such a final offer could have been submitted.[355] This effectively prevents the bargaining parties from entering into the statutory bargaining process for a period of two years.[356]

The matters for consideration by the panel are in equivalent terms to those applied in determining whether a request for information is reasonable, that is:

- the benefit (whether monetary or otherwise) of the registered news business' covered news content to the designated digital platform service
- the benefit (whether monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content
- the cost to the registered news business of producing covered news content and
- whether a particular remuneration amount would place an undue burden on the commercial interests of the designated digital platform service.[357]

In addition, the panel must take into account the bargaining power imbalance between Australian news businesses and the designated digital platform corporation.[358]

Final determination of the remuneration amount

The panel must endeavour to make the determination by unanimous decision of its members. If that is not possible, the panel must make the determination by majority decision of the members of the panel. Once the determination has been made the panel must give written reasons for its decision to the bargaining parties and to the ACCC.[359]

The bargaining parties must comply with the determination of the panel.[360] A failure to do so is subject to a maximum civil penalty of the greatest of:

- $10 million
- if the court can determine the value of the benefit obtained and that is reasonably attributable to the act or omission—three times the value of that benefit and
- if the court cannot determine the value of that benefit—10% of annual turnover during the period of 12 months ending at the end of the month in which the act or omission occurred.[361]

The obligation to pay the remuneration amount consistent with the arbitral determination is also enforceable by private action. As with any breach of the Code, the standard provisions in the *CCA* for injunctions and damages apply, which would, for example, enable the registered news business corporation or the ACCC to seek a court order for payment.[362]

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354. *CCA*, **proposed subsections 52ZX(7)–(9)**. Note that a failure to submit a final offer may be a breach of the obligation to participate in the arbitration in good faith as required by **proposed section 52ZS**.
355. *CCA*, **proposed section 52ZY**.
356. *CCA*, **proposed subsection 52ZL(4)**.
357. *CCA*, **proposed subsection 52ZZ(1)**.
358. *CCA*, **proposed subsection 52ZZ(2)**.
359. *CCA*, **proposed subsections 52ZZA(2) and (3)**.
360. *CCA*, **proposed section 52ZZE**.
361. CCA, **proposed subparagraph 76(1)(a)(iaa)** and **proposed paragraphs 76(1A)(b) and 76(4A)(h)** inserted by **items 7, 8 and 10**.
362. CCA, **proposed subparagraph 80(1)(a)(iiaa)** and **proposed paragraph 82(1)(a)** inserted by **items 11 and 12**.

Key issue—what is the payment for?

Copyright matters

In Australia, the *Copyright Act 1968* protects the expression of an idea rather than the idea itself and therefore requires an element of originality.[363] Copyright can be denied on the basis that works are insufficiently original or that there is an insufficient amount of input contributed by a human. For example, Australian courts have expressly found that specific headlines of newspaper articles were not original literary works in which copyright subsists.[364] However, this has not been uniform. In other cases, the courts have determined that a compilation was sufficiently original not to infringe copyright.[365]

If copyright exists in material, the *Copyright Act* grants the copyright holder exclusive rights to copy, reproduce, publish and communicate the copyrighted work to the public.[366] Copyrighted content may be used by third parties on the grant of a licence by the rights holder or in exchange for royalty payments.

> Digital platforms' common use of article headlines and snippets of the content in the news articles **may not infringe copyright protections** in Australia. This is because many headlines are concise statements of facts and therefore headlines alone are unlikely to be copyright-protected. Digital platforms **reproducing a snippet** of a copyright-protected news article **does not infringe copyright** protections if the snippet does not reproduce a substantial part of the article. Only courts may determine whether a snippet reproduces enough of a copyrighted work to constitute copyright infringement, which means copyright holders must engage in expensive litigation to determine whether infringement has occurred.[367]

One submitter to the Economics Committee suggested that reform of copyright laws may be less legally vulnerable than the proposed Code because the relevant payment is 'not a payment for the exploitation by the platform of any copyright property owned by the news business'.[368] This has been the preferred course of action in the European Union which has enacted the Directive on Copyright in the Digital Single Market.[369]

Constitutional considerations

The possible legal vulnerabilities arise from the interpretation of sections 55 and 51(xxxi) of the *Constitution*. They relate to:

- whether the payment is appropriately characterised as a tax and if not
- whether the payment is an acquisition which is not on just terms.

Section 55 of the Constitution provides:

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363. *Copyright Act*, section 32.
364. *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109 [2010] FCA 984, [28–50].
365. This is called the 'sweat of the brow' or 'industrious collection approach'. See *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [2009] HCA 14 [47]; *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* (2002) 119 FCR 491, [2002] FCAFC 112 [191].
366. *Copyright Act*, section 31.
367. ACCC, *Digital platforms inquiry: preliminary report*, ACCC, Canberra, December 2018, p. 142.
368. D Brennan, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 7], 13 January 2021, p. 1.
369. Directive (EU) 2019/790 (the Digital Single Market directive). The DSM directive grants new rights to EU-based press publishers for the digital use of their press publications, although these rights only apply to uses by online service providers and not to private or non-commercial uses by individual users. Acts of hyperlinking and very short extracts from press publications are not subject to these new rights. It should be noted that in 2016 the European Commission considered the idea of taxing snippets but rejected that approach—preferring to update copyright laws. See, G Moody, ''Google tax' on snippets under serious consideration by European Commission', *ARS Technica*, 25 March 2016.

> Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

As noted by Blackshield and Williams, infringement or potential infringements of the first paragraph of section 55 have been extremely rare, due mainly to the 'tried and venerated procedure for escaping the hitherto ineffectual menaces of s. 55'[370] of splitting the Bill into two parts—one to deal the imposition and one to deal with the machinery of assessment.[371]

The seminal statement on what constitutes a tax was outlined by Latham CJ in *Matthews v Chicory Marketing Board (Vic)*, where it was held that a tax is a compulsory exaction of money by a public authority for a public purpose.[372] This definition has been refined over time by a large body of case law to recognise, amongst other things, that:[373]

- a payment will not be considered a tax where it is a penalty or arbitrary (that is, based on other than ascertainable criteria)[374]
- it is not essential to the concept of a tax that the exaction of a payment should be by a public authority[375]
- the payment will not be a tax where it constitutes a fee for service[376]
- a public purpose is not synonymous with a government purpose[377] and
- payment into Consolidated Revenue may indicate a public purpose, but this alone is not sufficient to characterise a payment as being a tax.[378]

In its submission to the ACCC mandatory news media bargaining code concepts paper, the Law Council of Australia noted that in the *Blank Tapes case*:[379]

> ... a majority of the High Court held that an obligation to pay to a collecting society a 'royalty' on sales of blank tapes was not in truth a 'royalty' as the payment was not made for use of copyright. The obligation to pay, therefore, was a tax. The legislation imposing it was invalid under section 55 of the *Constitution* because it did not deal with the imposition of the tax only. [380]

In addition, the majority in the *Blank Tapes case* noted that, if the law was not a tax, it would have been invalid under section 51(xxxi) as an acquisition of property on other than just terms. The Law Council of Australia recommended that the price to be imposed on Google and Facebook (if it is not a tax) should be 'carefully calibrated to avoid contravening this prohibition'.[381]

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370. *Moore v Commonwealth* (1951) 82 CLR 547, [1951] HCA 10; Dixon J [569].
371. G Williams, S Brennan and A Lynch, and A Blackshield, *Blackshield and Williams Australian Constitutional Law and Theory: commentary and materials*, 7th edn., The Federation Press, Annandale NSW, 2018, p. 1088 [24.5].
372. *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, [1938] HCA 38, 276.
373. For a detailed discussion, see, G Williams et al., *Australian Constitutional Law and Theory*, op. cit., pp. 1088–1105 and V Morabiti and S Barkozy, 'What is a tax? The erosion of the 'Latham definition', *Revenue Law Journal*, 1996, pp. 43–63.
374. See for example, *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 [1984] HCA 20.
375. See for example, *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 [1988] HCA 61, *Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, [1993] HCA 10.
376. See for example, *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 [1984] HCA 20.
377. See for example, *Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 [1993] HCA 10.
378. Ibid.
379. *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 [1993] HCA 10.
380. Law Council of Australia (Business Law section), Submission to the ACCC, *News media bargaining code: concepts paper*, 5 June 2020, p. 2.
381. Ibid.

In relation to acquisition of property:

- acquisition and property are to be construed liberally[382]
- the property need not actually be acquired by the Commonwealth and [383]
- unless a law can be fairly characterised for the purposes of section 51(xxxi) of the Constitution as a law with respect to the acquisition of property, section 51(xxxi) cannot indirectly operate to exclude its enactment from the prima facie scope of a grant of legislative power.[384]

Whether the code will breach International trade obligations

Australia is a party to the *Australia-US Free Trade Agreement* (*AUSFTA*).[385] In its submission to the Economics Committee, the Internet Association expressed its concern that the proposed Code violates Australia's trade obligations and unfairly discriminates against US companies alleging 'the Code targets two US digital companies to assist a class of domestic players in a way that runs counter to Australia's international trade commitments'.[386] Submissions from both the US Chamber of Commerce and the Office of the US Trade Representative echoed concerns that aspects of the Code may breach Australia's international obligations.[387]

The argument that the proposed Code breaches Australia's trade obligations is based on statements by the Government indicating that Facebook and Google (both US corporations) would be the first digital platforms subject to the Code.[388] However, the market power of Google and Facebook and the corresponding imbalance in bargaining power between these corporations and Australian news businesses is evidence-based.[389] Also, the proposed law contemplates the addition of other digital platforms and digital services and it does not seem to be the case that the intent is to make their designation arbitrary or based on their country of origin.[390] Rather, the Explanatory Memorandum to the Bill states:

> … the Minister may only designate a digital platform corporation and services if the Minister has considered whether there is a significant bargaining power imbalance between Australian news businesses and the digital platform corporation's corporate group.[391]

The Treasurer is able to consider ACCC reports or advice in making the designation decision.[392]

It has been reported:

> Senior Morrison government ministers are confident that proposed laws that force Facebook and Google to pay publishers for their journalism do not breach the Australia-US Free Trade Agreement, as

382. *Georgiadis v Australian and Overseas Telecommunication Corporation* (1994) 179 CLR 297, [1994] HCA 6; Mason CJ, Deane and Gaudron JJ [8].
383. *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, [1949] HCA 66; Latham CJ [12].
384. See, *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, [1994] HCA 9; Deane and Gaudron JJ [187–188] who cited as an example a penalty for a corrupt breach of a statutory duty.
385. *Australia-US Free Trade Agreement*, done in Washington 18 May 2004, [2005] ATS 1, (entered into force 1 January 2005); Department of Foreign Affairs and Trade (DFAT), 'Australia-United States FTA', DFAT website, 1 May 2019.
386. Internet Association, Submission to the Senate Standing Committee on Economics, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, [Submission no. 14], 15 January 2021, p. 2.
387. Chamber of Commerce of the USA, Submission, op. cit.; US Government, Office of the US Trade Representative, Submission, op. cit.
388. J Frydenberg (Treasurer) and P Fletcher (Minister for Communications, Cyber Safety and the Arts), *Draft mandatory code of conduct governing digital platforms and media businesses released for public consultation*, media release, 31 July 2020; Explanatory Memorandum, pp. 8, 53
389. See for example, M Stucke, '*Antitrust spring*', *Institute for New Economic Thinking*, 18 December 2020.
390. *CCA*, **proposed section 52E**.
391. Explanatory Memorandum, pp. 8, 53.
392. *CCA*, **proposed subsection 52E(4)**.

> claimed by the US government and US business. The federal government has received legal and international trade advice on the matter.[393]

Nevertheless, questions were raised by members of the Economics Committee during public hearings as to whether the operation of the Bill would give rise to investor-state dispute settlement (ISDS) procedures.[394] According to the Department of Foreign Affairs and Trade

> A foreign investor in Australia, or an Australian investing overseas, can use ISDS to seek compensation for certain breaches of a country's investment obligations. For example:
>
> - obligations setting parameters on expropriation of a foreign investor's property
> - non-discrimination and minimum standards of treatment (such as protection against denial of justice)
> - a commitment to ensure foreign investors will be able to move capital relating to their investments freely, subject to appropriate safeguards.
>
> An ISDS tribunal cannot overturn domestic laws and regulations. The tribunal is limited to determining breaches of certain investment obligations. ISDS does not give foreign investors the right to enforce other provisions of the FTA, including, for example, the intellectual property chapter.[395]

Senator Gallacher specifically asked a representative of the Department of the Treasury whether, if the proposed code becomes law, there could be a legal challenge under *AUSFTA.* The response from Treasury was:

> It's possible. Much of the legislation that Australia does have is subject to various dispute processes. So this act could potentially be at play in legal cases, as could other acts that Australia has.[396]

In response to a question from Senator Patrick about whether the Code is likely to enliven ISDS provisions in Australia's free trade agreements the same representative stated:

> All the legal implications have been explored in the government's deliberations. I've been advised that there are legal privilege issues around talking about specific legal advice and legal issues that have been raised. I can just assure you that many of the issues that have been raised before this committee about legal issues have been before the government as they have been making the decision and drafting the legislation to make sure it's as workable as is available through the legal system.[397]

Questions have also been raised as to whether the Code will comply with Australia's obligations under the WTO General Agreement on Trade in Services (GATS).[398]

Contracting out of the Code

The Bill provides a mechanism by which responsible digital platform corporations and news business corporations may contract out of the Code by making commercial agreements.[399]

In oral evidence to the Senate Economics Committee a representative of Facebook stated:

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393. J Kehoe and M Ward, 'Facebook, Google code 'won't breach trade pact'', *Australian Financial Review*, 22 January 2021, p. 4.
394. Department of Foreign Affairs and Trade (DFAT), 'About foreign investment: investor-state dispute settlement', DFAT website, n.d.
395. Ibid.
396. M Quinn (Deputy Secretary, Department of the Treasury), Evidence to the Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Canberra, 1 February, p. 53.
397. Ibid., p. 62.
398. Internet Association, Submission, op. cit., p. 3 and Chamber of Commerce of the USA, Submission, op. cit., p. 1.
399. *CCA*, **proposed Part IVBA, Division 9**.

> I want to begin by making Facebook's position on the news industry very clear. As elsewhere in the world, **we are keen to strike commercial deals** with many Australian news publishers which will substantially increase investment in the news ecosystem and in journalism. Our experience and contention is that **commercial agreements are the best way to improve collaboration between platforms and publishers**. They can help drive innovation that improves the sustainability of the Australian news industry. However, the draft news bargaining law as it stands prevents us from being able to reach viable agreements; therefore, rather than increasing investment in news in journalism, it will have the opposite effect.[400] [emphasis added]

Form of a standard offer

A standard offer by a responsible digital platform corporation for a designated digital platform corporation **must** contain certain elements.

First, the offer is made by the responsible digital platform corporation to a registered news business corporation (called a ***covered RNBC***).[401]

Second, the offer provides the procedure for its acceptance. This will include:

- when to accept the offer within a specified ***offer period***[402]
- that the covered RNBC may revoke its acceptance before the end of the offer period
- that the responsible digital platform corporation may revoke its offer before the end of the offer period and
- at the end of the offer period acceptance becomes final, and the agreement between the parties is binding.[403]

Third, the standard offer must set out the following formal matters:

- it covers specified corporations (the ***covered corporations***)
- each covered corporation is the responsible digital platform corporation, a related body corporate of the responsible digital platform corporation, the registered news business corporation or a related body corporate of the registered news business corporation
- it is in force for a two year period (the ***covered period***)
- it specifies one or more designated digital platform services or other services (the ***covered services***) of the designated digital platform corporation and
- it expressly states that certain provisions of the Code relating to bargaining or arbitration do not apply.[404]

Fourth, the standard offer must specify that the responsible digital platform corporation will ensure the payment of remuneration to the covered RNBC for making available the registered news business' covered news content by one or more of the covered services, in respect of the covered period.[405]

Once the standard offer has been accepted and the agreement has become binding the parties to the agreement must notify the ACCC in writing.[406]

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400. S Milner, Evidence op. cit., 22 January 2021, p. 13.
401. *CCA*, **proposed subsection 52ZZJ(1)**.
402. *CCA*, **proposed subsection 52ZZJ(8)** provides that the ***offer period*** starts when the responsible digital platform corporation gives a copy of the offer to a covered RNBC and ends 60 days after the period starts or some other day specified in the Regulations.
403. *CCA*, **proposed subsection 52ZZJ(3)**.
404. *CCA*, **proposed subsection 52ZZJ(4)**.
405. *CCA*, **proposed subsection 52ZZJ(5)**.
406. *CCA*, **proposed paragraph 52ZZK(1)(e)**.

Extraterritorial operation

The *CCA* has been framed on the assumption that when conduct is made a contravention of the Act, it is conduct in Australia that is dealt with unless the conditions set out in section 5 apply to extend its operation to extraterritorial conduct.[407] Subsection 5(1) confers limited extraterritorial operation by applying the *CCA* to conduct outside Australia—only if the party engaging in the conduct is an Australian citizen, a person ordinarily resident in Australia, an Australian incorporated entity or a ***body corporate carrying on a business*** in Australia.

Inclusion of bodies corporate carrying on business in Australia significantly broadens the scope of the provisions. Any overseas corporation which carries on business in Australia, at least through a branch, is covered.[408]

The term ***carrying on a business*** has different meanings in different contexts. For example, in *Australian Competition and Consumer Commission v European City Guide SL*[409] it was sufficient that an overseas company that had conducted overseas almost all of the activity needed to mislead or deceive its victims sent its misleading forms to businesses in Australia.

In *Australian Competition and Consumer Commission v Valve Corporation (No 3)*[410] Edelman J found that a US internet gaming company that was not registered in Australia, had no subsidiaries here, but supplied online internet games from servers in the USA was nevertheless carrying on business in Australia because:

- it had many customers in Australia and earned significant revenue from Australian customers[411]
- it had servers located in Australia and its game content was deposited on three servers in Australia when requested by a subscriber[412]
- it incurred substantial expenses in Australia[413]
- it relied on relationships with third party members of content delivery providers in Australia[414] and
- it had entered into contracts with third party services providers who provide content around the world, including in Australia.[415]

Items 3 and 4 in Part 2 of the Bill amend subsection 5(1) of the *CCA* so that Part IVBA will operate extraterritorially.

Requirement for review

Proposed section 52ZZS of the *CCA* requires that a review of the operation of new Part IVBA is undertaken within 12 months after its commencement. The review must be completed no later than 12 months after its commencement and a written report of the review is to be given to the Minister and the Communications Minister. The Minister must ensure that copies of the report are available for public inspection as soon as practicable after the period of 28 days of the date that the report is given to him, or her.

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407. *Bray v F Hoffman-La Roc*he (2002) 118 FCR 1, [2002] FCA 243.
408. R V Miller, *Miller's Australian Competition and Consumer Law Annotated*, 42nd ed., Thomson Reuters Australia, Pyrmont, 2020, p. 130.
409. *Australian Competition and Consumer Commission v European City Guide SL* [2011] FCA 804.
410. *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, [2016] FCA 196.
411. Ibid., [199].
412. Ibid., [200].
413. Ibid., [202].
414. Ibid., [203].
415. Ibid., [204].

The Scrutiny of Bills Committee expressed concern that the Bill does not require the review report to be tabled in Parliament because 'the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only available for public inspection'.[416] That being the case, the Scrutiny of Bills Committee has requested the Treasurer's advice as to whether the Bill can be amended to provide that the Minister must arrange for a copy of the review report to be tabled in each House of the Parliament within 15 sitting days of the House after the report is given to the Minister.[417]

Concluding comments

The Bill has attracted considerable attention in Australian mainstream presses, as would be expected given there is much at stake with the passage of the legislation.

There is also much at stake for the two platforms which the Government has stated will be designated as ***designated digital platform corporations***—that is, Google and Facebook. In response, Google has stated:

> The principle of unrestricted linking between websites is fundamental to search, and coupled with the unmanageable financial and operational risk, if this version of the code were to become law it would give us no real choice but to stop making Google search available in Australia.[418]

The Bill requires as a first step that a news business corporation must apply to the ACMA, in order to be registered. An applicant news business corporation will only be eligible for registration if it satisfies all of the specified tests related to revenue, news content, Australian audience and professional standards.

Once these prerequisite steps are completed the Bill imposes minimum standards on the designated digital platform corporation to provide registered news businesses with advance notification of planned changes to an algorithm or internal practices that will significantly affect covered news, provide information about the collection and availability of user data, develop a proposal to recognise original news and give advance notification of changes affecting the distribution of advertising.

The registered news business corporations will then be able to formulate an appropriate view of their value to the platforms, and use that as a starting point for commercial negotiations. However, if those negotiations are unsuccessful (including an unwillingness by the designated digital platform corporation to enter into negotiations at all), the Bill provides for arbitration under a 'final offer' arbitration model which is strictly time limited and allows no room for 'gaming' by the bargaining parties.

In summary, the Bill requires the parties to enter into bargaining in good faith in the context of the following:

- first, a requirement for a designated digital platform corporation to provide specified data to a registered news business which is designed to 'level the playing field' between the bargaining parties, providing a realistic starting point for calculating relative value and
- second, while it does this in order to create a more open space for negotiation between the parties, it also builds in the possibility that parties are forced into a rigid arbitration model.

Clearly, the Government would prefer the parties to work out the price to be paid to the registered news business for the making available of the registered news business' covered news content by the designated digital platform service. The underlying purpose of the Bill is to send a

416. Senate Standing Committee for the Scrutiny of Bills, *Scrutiny digest*, 1, 2021, op. cit., p. 51.
417. Ibid.
418. M Silva, Evidence, op. cit., p.1.

strong message that voluntary bargains are less onerous and less unpredictable than the alternative.

There are risks involved in this process—including that Google, in particular, may withdraw its news and/or search services from Australia. That possibility is creating some uncertainty for Australian businesses and consumers, which was apparent in evidence by Treasury officials to the Senate Committee inquiry into the Bill.[419]

Whatever the eventual outcome of the bargaining between the parties which is the subject of the Bill it remains to be seen whether any benefit gained by the registered news businesses is used to benefit the publication of public interest news which is, after all, such an important component of a healthy democracy.

419. Senate Standing Committee on Economics Legislation, *Inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Official committee Hansard, 1 February 2021, pp. 48–65.

Appendix 1

Recommendations of the ACCC's Digital Platforms Inquiry and Government response

	Recommendation	Government response
1	Changes to merger law	**Note.** Undertake further public consultation on ACCC proposal.
2	Advance notice of acquisitions	**Support.** Large digital platforms to work with the ACCC to develop a voluntary notification protocol.
3	Changes to search engine and internet browser defaults	**Note.** ACCC to monitor and report back on Google's rollout of options in Europe to allow consumers to choose their default internet browser and search engine before making a commitment to rollout in Australia.
4	Proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate	**Support.** The Government is committing $27 million over the next four years for the creation of a new Digital Platforms Branch to undertake specific inquiries.
5	Inquiry into ad tech services and advertising agencies	**Support.** The Digital Platforms Branch will be tasked to undertake an inquiry into the supply of ad tech services and advertising agencies.
6	Process to implement harmonised media regulatory framework	**Support.** The Government will commence a staged process to reform media regulation towards an end state of a platform-neutral regulatory framework covering both online and offline delivery of media content to Australian consumers.
7	Designated digital platforms to provide codes of conduct governing relationships between digital platforms and media businesses to the ACMA	**Support in principle**. The Government will address bargaining power imbalances between digital platforms and news media businesses by asking the ACCC to work with the relevant parties to develop and implement voluntary codes to address these concerns. The ACCC will provide a progress report to Government on code negotiations in May 2020, with codes to be finalised no later than November 2020. Any code will be considered binding on the parties who elect to sign up to it. If an agreement is not forthcoming, the Government will develop alternative options to address the concerns raised in the report and this may include the creation of a mandatory code.

	Recommendation	Government response
8	Mandatory ACMA take-down code to assist copyright enforcement on digital platforms	**Do not support.** The Government notes the concerns of both major copyright owners and users of the potential unintended effects of a code. There are diverse views among a broad range of copyright stakeholders as to what are the best options to deal with the issues raised by the ACCC report. More data and further consultation with a broader range of copyright stakeholders, digital platforms and consumer groups is needed to determine appropriate options for reducing the availability of infringing material on digital platforms, especially given the Government's 2018 copyright enforcement reforms. The Government has committed to reviewing these reforms at the end of 2020 and considers this will be an opportune time to better evaluate the opportunities for facilitating online copyright enforcement.
9	Stable and adequate funding for the public broadcasters	**Support.** The Government is committed to maintaining the health and vibrancy of the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). The provision of nearly $3.2 billion and $887 million respectively, over the next three years, represents a substantial investment of public funds in our national broadcasters and will assist the ABC and SBS in the provision of television, radio and digital media services in line with their Charters.
10	Grants for local journalism	**Support in principle**. The Government will enhance the Regional and Small Publishers Jobs and Innovation Package to better support the production of high quality news, particularly in regional and remote areas of Australia, with a particular focus on the production of public interest journalism that is at greatest risk of being under-provided.
11	Tax settings to encourage philanthropic support for journalism	**Do not support.** In December 2017, the Government announced reforms to the administration of the deductible gift recipient (DGR) framework to simplify administrative processes and increase transparency. The Government's current focus is implementing previously announced DGR reforms before considering further changes, including changes to eligibility.
12	Improving digital media literacy in the community	**Support in principle.** The Government will explore models to establish a network of experts and organisations to develop media literacy materials around a common framework prioritising students, older adults and other vulnerable people. Key components to support the network will be examined, including stakeholders, programs and research. The combination of new and established resources and

	Recommendation	Government response
		delivery modes will play an important role to target the different literacy needs in the community. The Government will aim to have a preferred approach in place in 2020.
13	Digital media literacy in schools	**Support in principle.** The Government will seek to have news and media literacy included within the scheduled review of the Australian curriculum, noting that the Australian curriculum is one of the few international curriculum policies that include media literacy as a goal.
14 &15	Monitoring efforts of digital platforms to implement credibility signalling (Recommendation 14) and Digital Platforms Code to counter disinformation (Recommendation 15)	**Support in principle.** The Government will ask the major digital platforms to develop a voluntary code (or codes) of conduct for disinformation and news quality. The Australian Communications and Media Authority (ACMA) will oversee the development of the code (or codes) and will report to the Government on the adequacy of the platforms' measures and the broader impacts of disinformation with the first such report due no later than June 2021. Should the actions and responses of the platforms be found to not sufficiently respond to the concerns identified by the ACCC, the Government will consider the need for further measures.
16	Strengthen protections in the *Privacy Act*	
16(a)	Update 'personal information definition'	**Support in principle, subject to consultation and design of specific measures.** The Government will consult further on this recommendation to ensure that the definition of 'personal information' captures technical data and other online identifiers that raises privacy concerns and that any amendments to the definition do not impose an unreasonable regulatory burden on industry.
16(b)	Strengthen notification requirements	**Support in principle, subject to consultation and design of specific measures.** The Government will consult further on this recommendation to identify the appropriate measures that can be taken to improve notification to individuals without imposing significant regulatory burden and ensuring individuals do not suffer from 'notification fatigue'. Reforms to the *Privacy Act* the Government announced in March 2019 will require social media platforms and other online platforms that trade in personal information to meet best practice standards when notifying individuals of the

	Recommendation	Government response
		collection of personal information, and to be more transparent about how they share data with third parties. Further consultation will provide the opportunity to consider how similar measures could be adopted economy-wide.
16(c)	Strengthen consent requirements and pro-consumer defaults	**Support in principle, subject to consultation and design of specific measures**. The Government will consult further on this recommendation to identify the appropriate measures that can be taken to improve consent requirements and pro-consumer defaults, without imposing significant regulatory burden and ensuring individuals do not suffer from 'consent fatigue'. Reforms to the Privacy Act the Government announced in March 2019 will require social media platforms and other online platforms that trade in personal information to meet best practice standards when seeking consent for the collection, use or disclosure of personal information, and to be more transparent about how they share data with third parties. Further consultation will provide the opportunity to consider how similar measures could be adopted economy-wide.
16(d)	Enable the erasure of personal information	**Note.** This recommendation will be considered through the review of the *Privacy Act* at recommendation 17. The review will need to consider the potential freedom of speech concerns, challenges during law enforcement and national security investigations (if personal information was erased before investigating agencies could access the information), and practical difficulties for industry that could flow from a legal obligation to erase personal information. The Government notes that it is pursuing a similar reform through the reforms to the Privacy Act announced in March 2019. These reforms will require social media platforms and other online platforms that trade in personal information to cease using or disclosing an individual's personal information upon request.
16(e)	Introduce direct rights of action for individuals	**Support in principle, subject to consultation and design of specific measures.** The Government will consult further on this recommendation to identify the appropriate measures that can be taken to ensure individuals have adequate remedies for an interference with their privacy under the *Privacy Act*.

	Recommendation	Government response
16(f)	Higher penalties for breach of the *Privacy Act*	**Support.** The Government announced in March 2019 that it would consult on draft legislation to amend the *Privacy Act*, including to increase maximum civil penalties to match penalties under the Australian Consumer Law. The draft legislation will be introduced to Parliament in 2020.
17	Broader reform of Australian privacy law	**Support.** The Government will conduct a review of the *Privacy Act* and related laws to consider whether broader reform of the Australian privacy law framework is necessary in the medium- to long-term to empower consumers, protect their data and best serve the Australian economy. The review will complement the amendments to the *Privacy Act* announced in March 2019 to increase penalties, strengthen enforcement and introduce a binding online privacy code. The review will also consider the matters in recommendations 16(d) above and recommendation 19 below.
18	OAIC privacy code for digital platforms	**Support in principle.** The Government announced in March 2019 that it would consult on draft legislation to amend the *Privacy Act*, including to introduce a binding privacy code that would apply to social media platforms and other online platforms that trade in personal information. The legislation will be introduced in Parliament in 2020. The code would require these entities to be more transparent about data sharing; to meet best practice consent requirements when collecting, using and disclosing personal information; to stop using or disclosing personal information upon request; and include specific rules to protect personal information of children and vulnerable groups. The Government expects the review of the *Privacy Act* at recommendation 17 will also provide an opportunity to consider whether this approach is sufficient to safeguard online consumer privacy or whether further action is needed.
19	Statutory tort for serious invasions of privacy	**Note.** This recommendation would need to be considered through the review of the *Privacy Act* at recommendation 17.
20	Prohibition against unfair contract terms	**Note.** Consultation on a range of policy options to strengthen unfair contract term protections for small businesses will commence from late 2019.

	Recommendation	Government response
21	Prohibition on certain unfair trading practices	**Note.** Work is underway through Consumer Affairs Australia and New Zealand on exploring how an unfair trading prohibition could be adopted in Australia to address potentially unfair business practices.
22 & 23	Digital platforms to comply with internal dispute resolution requirements (Recommendation 22) and establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers (Recommendation 23)	**Support in principle.** The Government will develop a pilot external dispute resolution scheme in consultation with major digital platforms, consumer groups and relevant government agencies. The Government will assess the development and rollout of the pilot scheme over the course of 2020, along with any parallel improvements in associated internal dispute resolution processes. The outcomes of the pilot scheme will inform consideration of whether to establish a Digital Platforms Ombudsman to resolve complaints and disputes between digital platforms and the individual consumers and small businesses using their services.

Australian Government, *Regulating in the digital age: Government response and implementation roadmap for the Digital Platforms Inquiry*, 2019, pp. 15–19.

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