

Ai GROUP SUBMISSION

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

**NEWS MEDIA AND DIGITAL PLATFORMS
MANDATORY BARGAINING CODE**

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Ai
GROUP

About Australian Industry Group

Ai Group is a peak national employer association representing and connecting thousands of businesses in a variety of industries and sectors across Australia. Our membership and affiliates include private sector employers large and small from more than 60,000 businesses employing over 1 million staff. Ai Group promotes industry development, jobs growth and stronger Australian communities. Our members have a common interest in creating more competitive businesses and a stronger economic environment. We provide advice, services, networks and advocacy to help members and industries thrive, and the community to prosper.

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Ai Group Submission on the News Media and Digital Platforms Mandatory Bargaining Code

This Submission is made on behalf of Ai Group to express our deep concerns with the draft News Media and Digital Platforms Bargaining Code.

Ai Group is a national employer association with a broad membership of employers drawn from a wide cross-section of industries and comprised of large, medium and small businesses.

Our concerns relate to the code itself which we see as an extreme instance of regulatory overreach, full of potential unintended consequences that sets a dangerous precedent that will detract from competition and consumer welfare. We have further concerns about the hasty action to shut down the process initiated in December 2019 under which the relevant parties were asked to develop a voluntary code and the substitution of the current ACCC-led process to develop a mandatory code.

At the outset we acknowledge both the short-term and longer-term structural stresses that traditional providers of news and advertising services are experiencing. These stresses include those stemming from disruption to the established business models that cross-subsidised news services with revenue from advertising. They also include the erosion by the innovative development of digital technologies of the natural protections associated with physical delivery of newspapers to readers' letterboxes.

We also understand the importance of news services for the proper functioning of an open and well-informed, democratic society. In this connection we see considerable value in the services provided by digital platforms in making accessible to very wide audiences an unprecedented range of information, including, though not limited to, information and other content provided by news providers.

Finally, we support the principle that providers of news services should be able to bargain fairly with digital platform providers about payment for content.

Flawed draft legislation

The Exposure Draft of the Treasury Laws Amendment (New Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 if adopted would amount to an unprecedented intervention in arrangements between private businesses. It is an intervention that appears one-sided. It certainly has the potential to substantially add to business compliance costs and could well undermine the quality of services provided by the leading digital platforms to the detriment of users of these services.

Bargaining power imbalance

The Explanatory Memorandum (p.3) explains that the Bill "establishes a mandatory code of conduct to address bargaining power imbalances between digital platforms and Australian news businesses."

There does not appear to be a definition of what is covered by "bargaining power imbalances".

Section 52C of the Exposure Draft Bill (p.6) states that:

....

(2) In making the determination, the Treasurer must consider whether there is a significant bargaining imbalance between Australia's new providers and ... [the designated digital platform].

(3) The determination is not invalid merely because of a failure by the Treasurer to comply with subsection (2).

This would seem to imply that the Treasurer could make a determination regardless of whether there is a bargaining imbalance and it certainly implies that there are no evidentiary requirements related to whether there is a bargaining imbalance.

Minimum standards

The minimum standards are inherently anticompetitive. Most noticeably, the requirement for the platform provider to give 28 days' advance notice of changes to algorithms likely to have a significant effect on how registered news organisations' content is ranked will provide an information advantage to a selection of organisations and cannot be expected to give rise to outcomes that are fair to other providers of relevant material or to consumers.

The 28 days' notice requirement could delay important adjustments to how digital platforms operate and adapt to the use, and misuse, of digital platforms.

Imposing this requirement only on one set of digital platform providers will reduce their agility and the quality of their service and will also reduce their ability to compete with other platform providers.

If algorithms were to be gamed to the advantage of a particular news provider, adjusting the algorithms to address such gaming will be delayed by the requirement to give the 28 days advance notice.

Non-discrimination

The framing of non-discrimination by the digital platform provider has the potential to embroil platform providers in ongoing allegations if news providers perceive, or allege to perceive, that their news content is not given the prominence they would prefer.

Open bargaining rights

News providers are given rights to bargain with platform providers on any issue. This imposes a very high potential compliance burden on digital platform providers.

Arbitration

The arbitration process appears to encourage ambit claims rather than negotiation. It also appears that the range of factors that arbitrators must consider is very much weighted towards the interests of news organisations.

The one-sided nature of obligations

The obligations imposed by the draft code on digital platform providers are detailed in Sections 52L (page 9 in the Exposure Draft of the Bill); 52M (pages 10-11); 52N (pages 11-12); 52O (page 12); 52P (pages 12-13); 52Q (page 13); 52R (page 14); 52S (pages 14-15); and 52T (pages 15-16).

In contrast, the obligations imposed on registered news businesses are wholly contained in Section 52U (page 15) and they relate to setting up points of contact and acknowledgement by the contact of communications from the digital platform provider.

The obligations on digital service providers are both onerous and extensive. There is no sense of mutual obligation.

Changing the process mid-stream

We are deeply concerned with the way that the process to develop a voluntary code was abandoned and replaced with an approach that, if adopted, would impose high regulatory burdens on some of the businesses involved. This is contrary to the Government's objective of reducing regulatory burdens and is despite the ACCC's own acknowledgement that, in general, voluntary codes can deliver "reduced regulatory burdens for business"¹

On 12 December 2019 the Prime Minister, the Treasurer, the Attorney General and the Minister for Communications, in announcing the Government's Response to the Digital Platforms Inquiry, set in train a process couched in the following terms:

Addressing 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 the code negotiations in May 2020, with the code to be finalised no later than November 2020. If an agreement is not forthcoming, the Government will develop alternative options which may include the creation of a mandatory code.

In hindsight, what may have appeared to be a sound process had a fundamental flaw. In holding out the prospect of the imposition of a mandatory code, the Government provided an incentive for some parties involved in the development of a voluntary code to approach the discussions on a voluntary code in a way that would result in the adoption of the alternative approach.

Nevertheless, the voluntary process went ahead, and progress was made towards making agreements under which at least one major digital platform provider would pay several Australian news organisations to license their content. This progress is in line with agreements that have been reached in other parts of the world between digital platform providers and news organisations.

However, on 20 April 2020 the Treasurer and the Minister for Communications announced the Government's decision to "accelerate the process" noting that the pressures on Australia's media sector had been "exacerbated by a sharp decline in advertising revenue driven by coronavirus." In addition, the Government was informed by the ACCC that limited progress had been made and that it was unlikely that a voluntary agreement would be reached on the payment for content issue.

This announcement was not informed by discussion with the full range of parties to the development of the voluntary code. Nor did it consider whether the nature of the Government's response to the Digital Platforms Inquiry in December was flawed as discussed above and contributed to the unfavourable report from the ACCC.

The Government did not, as it originally announced it would, wait until May 2020 to make the assessment that an alternative approach would be taken. Instead it acted pre-emptively to fundamentally change the process by adopting the alternative path.

We are concerned that this intervention creates a dangerous precedent, relegates the objective of reducing regulatory burdens to the sidelines and erodes confidence in Australia's approach to regulation.

We urge you to reconsider the approach of legislating a mandatory code of conduct and instead recommend to the Government that the parties should resume discussions over to develop a less burdensome and less heavy-handed intervention.

¹ See <https://www.accc.gov.au/business/industry-codes/voluntary-codes#benefits-of-a-voluntary-code>



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