

**COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION
AND THE INTERNATIONAL LAW SECTION ON THE AUSTRALIAN
COMPETITION AND CONSUMER COMMISSION'S PROPOSED NEWS MEDIA
BARGAINING CODE**

August 28, 2020

The views stated in this submission are presented on behalf of the Antitrust Law Section and the International Law Section; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole.

The Antitrust Law Section and the International Law Section of the American Bar Association (the Sections) respectfully submit these comments in response to the Australian Competition and Consumer Commission's (ACCC's) public consultation regarding its draft News Media Bargaining Code ("Draft Code").¹ The Sections are available to provide additional comments or to provide assistance in any other way that the ACCC may deem appropriate.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.²

The International Law Section is the ABA section dedicated to bringing together lawyers from around the globe to focus on international legal issues, promote the rule of law, and provide legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The Section's 56 substantive committees cover competition law worldwide. Throughout its century-plus of existence, the Section has provided input to debates relating to international legal policy.³

¹ Public consultation on draft News Media Bargaining Code, <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation>.

² Past comments can be accessed on the Antitrust Law Section's website at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

³ International Law Section policy is available at https://www.americanbar.org/groups/international_law/policy/about/. With respect to IP and competition law and policy specifically, the Section has provided input for decades to authorities around the world. Past submissions may be accessed at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives.

These comments reflect the Sections’ collective experience and expertise with respect to the application of antitrust law and economics in the United States and other jurisdictions, as well as with international best practices. The Sections offer these comments to share our experience and provide suggestions to evaluate the effectiveness of the Draft Code. As further explained below, the Sections believe that using the Draft Code to regulate the relationship between news media and digital platforms may create unforeseen and potentially competition-stifling consequences including (1) creating an imbalance in favor of a seller’s cartel of news media organizations, (2) chilling platforms’ incentive to invest and innovate by compelling “minimum standards” for sharing proprietary data and algorithm information, and (3) reducing platforms’ incentive to optimize consumer experience and enhance consumer welfare by imposing a mandatory and untested non-discrimination provision without sufficient protections to separate unlawful discrimination from lawful product-enhancing differentiation. For these reasons, the Sections suggest that the ACCC consider flexible guidelines rather than a mandatory regulatory code.⁴ If the ACCC nonetheless decides to pursue mandatory regulation, we urge the ACCC to consider adding the additional protections described below to mitigate potential unintended anticompetitive effects.

I. Executive Summary

Through the information contained in the following discussion, the Antitrust Law Section of the American Bar Association and the Section of International Law respectfully submit that:

- While the ACCC’s Draft Code for the news media and digital platforms reflects serious thought and consideration, it continues to present unresolved ambiguities in implementation, such as how to define “disadvantaging” or “digital platform.” To balance the benefits of the Draft Code and the risk that regulation will result in unintended consequences and anticompetitive effects, the Sections suggest that the Draft Code be recast as flexible guidelines.
- The Draft Code’s collective bargaining provisions create the risk of a sellers’ cartel which, depending on size, can have its own anti-competitive effects. If the ACCC proceeds with the collective bargaining provisions, the Sections suggest that the Draft Code include provisions to mitigate that effect, such as caps on the size of any collective bargaining group.
- The minimum standards provision and the non-discrimination provision of the Draft Code also risk an adverse competitive effect. By requiring the disclosure of the types of data collected and notification of algorithm changes, the minimum standards provision can reduce the incentive of the digital platforms to innovate or improve their product by forcing the disclosure of competitively sensitive data. Similarly, the non-discrimination provision could be difficult to

⁴ The Sections encourage the ACCC to consider whether a mandatory Code is necessary at all. The potential for anti-competitive effect from what is effectively a sellers’ cartel is significant and the benefits limited and uncertain. This is why, under U.S. law, joint selling agreements are considered per se illegal unless there is an integration of members’ resources. *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). The Code and associated materials identify no productive integration of the news media businesses and no procompetitive efficiencies from the bargaining group. As such, the joint bargaining proposed by the Code is the kind of arrangement that would ordinarily be condemned as per se illegal given the high likelihood of anticompetitive effect. If the ACCC nevertheless chooses to move forward with the proposed legislation, the Section offers the following comments as ways to mitigate, although in a partial way, the potential for anticompetitive effect.

implement in practice. If enforcement captures beneficial algorithmic changes, it can reduce the digital platforms' incentives to provide the best product to its end users. The Sections suggest deleting both provisions, or at a minimum, adding additional measures, like mechanisms to identify and exclude from disclosure competitively sensitive information, to mitigate against the risks these provisions create for long-term competitive incentives.

II. Flexible Guidelines Are More Effective and Less Risky than a Mandatory Code

The ACCC's Draft Code for the news media and digital platforms will create a set of requirements and restrictions on ordinary commercial negotiations between digital platforms and the news media. In the Sections' view, such an approach presents the potential for significant challenges in implementation and execution. The ACCC itself has acknowledged some of these challenges.⁵ U.S. experience suggests the Draft Code may have unintended consequences and anticompetitive outcomes, the most significant of which are described in more detail below. To balance the benefits of the Draft Code against such risks, the Sections suggest it be recast as a set of guideposts to assist in negotiations for the inclusion of Australian news on digital platform services, instead of imposing a mandatory system that in effect would amount to compulsory pricing.

The cost and potential inefficiency of regulatory institutions in the United States are well documented by economic research, and these lessons may provide some useful information for determining how the Draft Code should be implemented. Examples include U.S. attempts to regulate railroad and airline industries, the inefficient and anticompetitive outcomes of which are summarized in recent scholarship.⁶ In the railroad industry, the authors describe how the shortfalls of an initial regulation led to "corrective" regulation, which in turn led to yet more regulation, resulting in a chain reaction of costly outcomes, including effectiveness-reducing loopholes, rent-seeking by industry participants, and stifled innovation.⁷ In the airline industry, extensive regulation of routes flown and prices charged resulted in prices for regulated interstate carriers that were much higher than those of unregulated intrastate carriers for the same routes.⁸ These regulatory schemes were eventually repealed or drastically cut back. Deregulation of the U.S. railroad and airline industries led rapidly to falling prices, expanding output, and increased innovation.⁹

These experiences suggest several main conclusions. First, provisions that sound simple, like non-discrimination provisions, may be difficult to implement in practice. Second, to be effective,

⁵ For example, "The code's use of final offer arbitration recognizes the significant challenges involved in setting a price for the inclusion of Australian news on digital platform services." ACCC, Q&As: Draft new media and digital platforms mandatory bargaining code, July 2020, § 4.8 [hereafter Q&As], <https://www.accc.gov.au/system/files/DPB%20-%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code%20Q%26As.pdf>.

⁶ Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. ANTITRUST ENFORC. 10 (2020).

⁷ *Id.* at 15-20.

⁸ *Id.* at 20-25.

⁹ *Id.* at Abstract, 19, 22-25.

regulation requires clear instructions that must be updated as circumstances change. Third, well-intentioned regulations can nonetheless be very costly to consumers.¹⁰ Such lessons are directly applicable to current efforts to regulate digital platforms.¹¹

Moreover, attempts to use regulation to address temporary market imperfections or perceived bargaining imbalances can long outlive their usefulness and any hoped-for competitive benefit. Such regulations can instead entrench practices that inhibit the adoption of long-term pro-competitive changes. State motor vehicle dealer laws in the U.S. prohibiting direct to customer sales, for example, although designed in the first instance to protect dealers from abusive behavior by suppliers, have wound up standing in the way of new and pro-competitive distribution models. The wide-spread regulatory practice was challenged and new models allowed to emerge only through a concerted policy effort by the U.S. Federal Trade Commission on a state-by-state basis.¹²

The ACCC's Draft Code appears to have a variety of unresolved ambiguities regarding its implementation, creating the potential for costly unforeseen consequences. Here are some examples:

- The bill includes non-discrimination requirements under which it will “require responsible digital platform corporations to prevent a digital platform service from disadvantaging the news content of an Australian news business.”¹³ The definition of “disadvantaging” will need to be clearly defined, including consideration of whether and how this is measured relative to competition or other factors.? Discrimination should not be limited to placing more reliance on international than Australian news content, as suggested in the Q&As.¹⁴
- The bill includes criteria for registering as a news business under the law.¹⁵ However, none of these criteria would appear to prevent the competitors of Facebook or Google from developing a “news business” and registering themselves.
- The bill explicitly chooses not to define a “digital platform.”¹⁶ The Code should include a clear definition to provide more certainty for firms on whether they may be designated as a digital platform subject to the law, even if that definition introduces elements of flexibility.
- To register under the law, a news business must pass a “core news content” test in which it must show that its news covers “issues of public significance to Australians; issues relevant to engaging Australians in public debate and in informing democratic decision

¹⁰ *Id.* at 14, 26-27.

¹¹ *Id.* at 14.

¹² *See, e.g.*, Comment from FTC Staff to Michigan State Senator Darwin L. Boohar (May 7.2015), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-exception-current/150511michiganautocycle.pdf.

¹³ *Id.*

¹⁴ Q&As, *supra* note 3 § 6.1.

¹⁵ Explanatory Materials, *supra* note 10 ¶ 1.17.

¹⁶ *Id.* ¶ 1.31.

making; or content which relates to community and local events.” These criteria should be defined consistently, clearly, and objectively.

- The ACCC expects “final offer arbitration” to be “used rarely’ but does not provide evidence to support the expectation.¹⁷ If, in fact, such arbitration becomes commonplace, the Code risks transforming the platform-news media relationship from a market-based one into a fully regulated one with little oversight or safeguard. The ACCC should therefore include a mechanism to address issues like this should the practical impact not match the ACCC’s expectations.

The Draft Code reflects serious thought and consideration. However, given unresolved and perhaps unresolvable ambiguities in implementation, these topics would be better for those involved and would present less anticompetitive risk if they were guideposts for the inclusion of Australian news on digital platform services, rather than mandates. The Draft Code includes several provisions, such as the delineation of an appropriate time frame for negotiation, the definition of information considered core news, and the description of methods for resolving disputes through arbitration, that could be useful guidance for facilitating agreement between platforms and news media businesses. As U.S. experience indicates, however, forcing parties to comply with a complex set of requirements likely will result in undesirable and inefficient outcomes.

II. Mandated Collective Bargaining Can Result in Anticompetitive Sellers’ Cartels

One risk of the ACCC’s Draft Code is that it fails to take into account the long-term competitive effects of its provisions. Most significant in this respect are the collective bargaining provisions of the Draft Code, which allow “news media businesses to bargain individually or collectively with Google and Facebook over payment for the inclusion of news on their services.”¹⁸

While collective bargaining provisions may be intended to correct a perceived imbalance where buyers are deemed to have undue bargaining power, such provisions can at the same time create a selling group, or a seller cartel, of news media. If the seller cartel controls a large share of the news content in Australia, it can create its own imbalance of bargaining power favoring the news media over the individual digital platforms. As a result, it may drive up prices for advertisers or decrease the quality of services provided by digital platforms. Due to such risks, the U.S. antitrust agencies have consistently opposed antitrust exemptions allowing collective bargaining to counter buyer power.¹⁹ Alternatively, potential concerns about a perceived imbalance in bargain position may be addressed through other means. For example, competition enforcement may target any conduct that would be deemed improper coordination or abuse of market power held by the platforms to increase individual or collective bargaining positions.

¹⁷ Q&As, *supra* note 3 § 4.6.

¹⁸ Q&As, *supra* note 3 § 1.1.

¹⁹ *See, e.g.*, FTC Staff Comment to New York State Senator John J. Bonacic (October 20, 2011), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-john-j.bonacic-concerning-new-york-s.b.3186-allow-health-care-providers-negotiate-collectively-health-plans/111024nyhealthcare.pdf

If the ACCC nevertheless decides to proceed with the collective bargaining provisions, the Sections recommend at a minimum that the ACCC adopt certain measures to mitigate the potential competitive concerns including limiting the size of the seller cartel created by the collective bargaining provision and requiring the seller cartel to conduct its collective bargaining through an independent agent. The provisions must also be flexible to address changes over time.

A. The relationship between digital platforms and news media

As acknowledged by the ACCC in its Final Report on “Digital Platforms Inquiry,” the current business dealings between digital platforms and news media related to news referral services typically do not involve an exchange of a money for a service. Instead, they involve a mutually beneficial exchange of services, which either party could cease to supply.²⁰ More specifically, by displaying links and snippets of news media content in digital platforms’ search results, news feed, and news aggregator websites such as Google News, digital platforms help direct significant amounts of internet traffic to news media’s own websites.²¹ The increased internet traffic to news media’s websites can increase advertising revenue for news media. At the same time, digital platforms can collect more user data when a user clicks on links to the news media’s websites, which enables digital platforms to improve the quality of targeted ad placements (which in turn increases revenues to the digital platforms). Moreover, the display of links and snippets of news media content on digital platforms’ websites also enhances the attractiveness of the services that digital platforms are able to offer consumers.²²

B. Potential anticompetitive effects from seller cartels created by collective bargaining

The display of links and snippets of news media content can be viewed as an input to the production of ad placements by digital platforms. Currently, digital platforms compensate news media by directing internet traffic to news media’s websites. Under the Draft Code, digital platforms are required to make additional compensation to news media by sharing ad revenue when digital platforms obtain value, directly or indirectly, from content produced by news media businesses.²³ Therefore, in effect, the collective bargaining provision in the Draft Code will create a selling group, or a seller cartel, for an input used in the sale of targeted advertising and other services provided by digital platforms.

Anticompetitive effects of cartels are well recognized in economics and in antitrust law because cartels will generally lead to prices above competitive levels and to lower output. There is extensive economic literature on the factors that inhibit and facilitate the functioning of a cartel.²⁴ One important factor in predicting cartel success is the size of the cartel share of the relevant

²⁰ ACCC, DIGITAL PLATFORMS INQUIRY: FINAL REPORT 103 (June 2019) [hereinafter FINAL REPORT], <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

²¹ *Id.* at 8,101.

²² *Id.* at 8.

²³ Q&As, *supra* note 3 § 1.1; FINAL REPORT, *supra* note 17, at 32; Anne Davies, *World watches as Australian regulator rules on Facebook and Google*, THE GUARDIAN, December 2, 2018, available at <https://www.theguardian.com/media/2018/dec/03/world-watches-australian-regulator-facebook-google>.

²⁴ See, e.g., MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 142-159 (2004); Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43 (2006); Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343 (2011).

market.²⁵ If a cartel possesses high market share, customers will have limited options to substitute products or services produced by non-cartel members for products or services provided by the cartel. Consequently, the cartel will have a greater ability to elevate prices above the competitive level without the fear of losing significant sales.

Economic teachings on the impact of cartels suggest that if a seller cartel created by collective bargaining controls a large share of the news content in Australia, the seller cartel could possess significant market power and create potential anticompetitive effects in several aspects.²⁶ First, a seller cartel with substantial market share could lead to significant increases in the input costs for digital platforms to produce digital advertisements, which can in turn result in higher prices for the advertisers if digital platforms pass the cost increases to their customers. Alternatively, digital platforms may choose not to display snippets of news content in their search results, news feed, and news aggregator websites or even choose to withdraw news aggregation services from Australia, as Google did in Spain,²⁷ to reduce compensation costs to news media. In either case, the quality of services provided by digital platforms to their users would decrease.

Second, a seller cartel created by collective bargaining may facilitate price fixing or other forms of collusion among its members in economic activities related to products or services news media sell to other buyers. For example, members of a seller cartel may find collusion on sales of ad space on news media's websites to advertisers easier to coordinate.²⁸ Third, members of a seller cartel may also have reduced incentive to compete on the quality of journalism if the additional compensation from digital platforms is not tied to the quality of news content.

C. Mitigating Measures

To address the potential anticompetitive effects created by the collective bargaining code, the Sections recommend two mitigating measures. First, the ACCC should limit the size of seller cartels created by the collective bargaining code so no single seller cartel will possess a substantial share of news content in Australia. In its Merger Guidelines, the ACCC views mergers that increase HHI by more than 100 with a post-merger HHI greater than 2000 as creating horizontal competitive concerns.²⁹ The ACCC can consider using a similar HHI threshold when evaluating whether a seller cartel created by the collective bargaining code may pose such concerns.

Second, the ACCC should require seller cartels created by the collective bargaining code to conduct collective bargaining with digital platforms through an independent agent who is not an

²⁵ Motta, *supra* note 21, at 142-143.

²⁶ Even though the ACCC has found that Google has substantial market power in the supply of search advertising in Australia and Facebook has substantial market power in the supply of display advertising in Australia, the ACCC did not come to a conclusion whether Google and Facebook have substantial market power in the supply of news referral services. In fact, according to the ACCC's study, Google and Facebook account for only 32 percent and 18 percent respectively of total referrals to news websites. Final Report, *supra* note 17, at 89, 97, 101, 103.

²⁷ Eric Auchard, *Google to shut down news site in Spain over copyright fees*, REUTERS, Dec. 11, 2014, available at <https://www.reuters.com/article/us-google-spain-news/google-to-shut-down-news-site-in-spain-over-copyright-fees-idUSKBN0JP0QM20141211>.

²⁸ For a discussion on how a buying group can facilitate collusion, see Michael A. Lindsay, *Antitrust and Group Purchasing*, 23 ANTITRUST 67 (2009). The same concern applies to a selling group as well.

²⁹ ACCC, *Merger Guidelines* § 7.14 (2008, amended 2017), available at <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>.

employee of the members of the seller cartel and will keep all competitively sensitive information confidential.³⁰

When implementing the mitigation measures, the ACCC can request seller cartels of news media to propose self-mitigation measures subject to the ACCC approval, similar to how the U.S. Department of Justice has evaluated competitive concerns raised by group purchasing.³¹

III. Mandated Minimum Standards of Data and Algorithm Information Disclosure May Inhibit a Platform’s Incentives to Invest in Procompetitive Innovation

The Sections also respectfully suggest that the ACCC consider the potential adverse competitive impact of the Draft Code’s mandated minimum standards on the information digital platforms must disclose to news media businesses. These minimum standards include requirements that digital platforms provide news media businesses with information about the consumer data they collect, as well as notify publishers about certain changes to their algorithms and content displays.³²

The algorithms employed by digital platforms are constantly updated; for example, Google has been reported to change its general search algorithm thousands of times per year,³³ and as a machine-learning tool, the further changes applied automatically to Google’s algorithm are in the thousands and potentially millions or billions. Facebook’s, Amazon’s, and other platforms’ algorithms operate in a similar way, such that it is impossible to inform a third party of the changes without disclosing the algorithm itself. The Draft Code requires disclosure of changes expected to have certain effects, but those effects are vague; for example, “changes ... likely to have a significant effect on the ranking of ... covered news,” which invites disputes over what is “significant” and what constitutes a “ranking.” The Draft Code also requires that changes be disclosed 28 days before they take effect, which, if possible at all, would greatly slow the pace of updates, improvement, and innovation in digital platforms. The Sections submit that these disclosure requirements are not administrable, and are likely either to result in make-work disclosures that are largely ignored—increasing inefficiency and costs—or to mire the enforcement authority in endless disputes.

There also is a risk that such mandated notice will adversely affect a platform’s incentives to develop new data assets or improve its algorithm. As the U.S. Supreme Court has observed, mandated sharing of platform access to address competitive concerns could lead to even worse

³⁰ To eliminate antitrust agencies’ concern for potential collusion, buying groups in the United States often conduct group purchasing through an independent agent. *See, e.g.*, U.S. Dep’t of Justice, Response to NSM Purchasing Association’s Request for Business Review Letter, Jan. 13, 1999, *available at* <http://www.usdoj.gov/atr/public/busreview/2175.htm>; U.S. Dep’t of Justice, Response to the AOA and the AOAEExcel GPO’s Request for a Business Review Letter, Jan. 15, 2020, *available at* <https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-american-optometric-association-its-proposed>.

³¹ *Id.*

³² Treasury Laws Amendment (News Media And Digital Platforms *Mandatory* Bargaining Code) Bill 2020, Sections 52L-52N..

³³ Google Algorithm Update History: A History of Major Google Algorithm Updates from 2000–Present, MOZ, <https://moz.com/google-algorithm-change>.

competitive outcomes, whether due to a chilling effect on incentives to innovate or due to the increased risk of collusion that information sharing presents. It is for these reasons U.S. law generally does not impose a unilateral duty to share assets with competitors, even where such assets may give rise to monopoly power based on the procompetitive advantages they provide to their owners.³⁴ Although the Explanatory Materials emphasize that the minimum standards provision is not intended to require “the disclosure of trade secrets or intellectual property” or compel a platform to “share any particular user data,” there is no provision for platforms to exempt any information sharing even if it may be competitively sensitive or may compromise proprietary information.³⁵ The information sharing mandated by the minimum standards, therefore, still poses the threat that it will decrease incentives to develop new data and algorithm improvements.

Moreover, the ACCC has presented little evidence that there is a data sharing problem at all, and even less that there is a data sharing problem that requires an additional regulatory intervention beyond the proposed collective bargaining provision. News media businesses should be able to obtain competitive compensation for their content through bargaining, including access to the kind of data and algorithmic disclosures contemplated by the minimum standards provision. In fact, the disclosures that come out of a negotiated agreement are far more likely to be pertinent to the news media than any set of mandated disclosures. As a result, the minimum standards are unlikely to add any significant benefit for news media businesses.

The Sections suggest that the ACCC consider whether the minimum standards provision is on balance more likely to harm procompetitive innovation than help news media businesses. To the extent that the ACCC retains a minimum standards provision in the final code, the Sections recommend that the ACCC include a mechanism for platforms to exempt from the minimum standards disclosure information that platforms identify as competitively sensitive or likely to compromise proprietary information.

IV. Mandated Non-Discrimination May Inhibit a Platform’s Procompetitive Incentives to Innovate and Improve Its Offering

As drafted, the non-discrimination provision of the ACCC’s Draft Code could be applied in a manner that reduces rather than enhances competition.³⁶ If enforced without regard to competitive effect, this provision could stifle the ability of digital platforms to continue to pursue innovation and product improvements focused on their end-users. The Sections recommend that if the ACCC chooses to proceed with a mandatory non-discrimination requirement, it build in protections to mitigate such anticompetitive risk.

³⁴ See *Verizon Communications, Inc., v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) 407; see also *Morris Commc’ns v. PGA Tour*, 364 F.3d 1288, 1295-96 (11th Cir. 2004); see also, Barry Nigro, U.S. Dep’t of Justice, Antitrust Div., “Big Data” and Competition for the Market, Address Before the Fourth Annual Tech, Media & Telecom Competition Conference 4 (Dec. 13, 2017), available at <https://www.justice.gov/opa/speech/file/1017701/download>.

³⁵ Explanatory Materials, *supra* note 10 ¶ 1.76.

³⁶ Treasury Laws Amendment (News Media And Digital Platforms Mandatory Bargaining Code) Bill 2020, section 52W.

First, a risk arises from a gap between the enforcement goals expressed in the Explanatory Materials and the actual text of the Draft Code.³⁷ The Explanatory Materials note that the prohibition would operate narrowly to prevent the digital platform from retaliating for the manner in which a particular news business participates in the commercial negotiations under the code, and that such retaliatory conduct would involve the digital platform discriminating in how it provides the content of that news business.

The Explanatory Materials also clarify that the non-discrimination provision is not designed to impair the platform's use of algorithms to optimize the provision of new content to individual users.³⁸ In other words, it purports not to interfere with what the platform may—legitimately—argue are consumer-focused improvements to its product. This clarification is welcome; however, it is not included in the Draft Code, which raises potential problems of application in practice.

This is particularly the case given that the Explanatory Materials also note that the unlawful retaliatory discrimination would likely take the form of disadvantaging the news business in comparison to other news content in terms of “crawling, indexing, ranking, display, presentation or other process”.³⁹ It is not clear how the ACCC would effectively police the non-discrimination provision, and distinguish between discriminatory conduct and the digital platform's unfettered discretion to use its algorithm to optimize the surfacing of news content to end-users. An unlawful retaliation against the news business' bargaining position could look quite similar to a lawful adjustment to its algorithm.

The ambiguity embedded in the non-discrimination provision could diminish the incentive for digital platforms to continue to optimize the end-user experience of news content. Digital platforms may be wary of such actions being interpreted (honestly or otherwise) by news businesses as a retaliatory response to commercial negotiations under the bargaining code. As a result of these concerns, the overall impact of the non-discrimination provision could dampen innovation in the delivery of news content via digital platform businesses.

Accordingly, the Sections encourage the ACCC to build into the final code an obligation for the non-discrimination analysis to take into account the potential for tension between benign (indeed, arguably procompetitive) improvements to the end-user experience and genuine attempts by digital platforms to punish news businesses for participating in the bargaining code. Further, the Sections encourage the ACCC in practice to interpret and enforce the non-discrimination provisions in the final code narrowly.

Second, the Draft Code is not clear about how the ACCC will identify, or enforce against, potential infractions of the non-discrimination provision. There is a risk, therefore, that enforcers will not have enough information to distinguish unlawful discrimination from lawful behavior. The ACCC's specific information-gathering powers under the Draft Code are limited to requiring production of copies of documents that must be kept pursuant to the bargaining code (specifically, records of documents provided to registered news business corporations through the code process; and records of internal decisions that relate to the minimum standards).⁴⁰ Without a clear ability in the final code for an enforcer to obtain additional information or for platforms to provide

³⁷ Explanatory Materials, *supra* note 10 ¶ 1.100.

³⁸ *Id.* ¶ 1.101.

³⁹ *Id.* ¶ 1.100.

⁴⁰ *Id.* ¶ 1.150-1.152.

evidence to the contrary, there is no obvious process to enable a thorough evaluation of an allegation of discrimination. As a result, the effectiveness of this section of the proposed regulatory scheme may be compromised.

Given its potentially adverse consumer welfare consequences, the Sections respectfully urge the ACCC to consider deleting this aspect of the Draft Code. As a matter of regulatory policy, it is laudable to encourage news businesses to participate in the bargaining code without fear of retaliation from the digital platforms on which they allegedly rely to generate digital traffic. The Sections encourage the ACCC, however, to consider the potential impact of an open-ended and difficult-to-enforce non-discrimination provision on the incentives of the digital platforms to enhance end user experience. If the ACCC does include the non-discrimination provision in the final code, the Sections recommend that it also consider including provisions such as an obligation to take into account the effect on platforms' incentives and provisions that enable the ACCC to consider a broader range of evidence relevant to whether the alleged discrimination is competitively harmful on balance.

The Sections appreciate the opportunity to provide these comments and are available to consult further if desired.