
TREASURY LAWS AMENDMENT (NEWS MEDIA AND DIGITAL PLATFORMS
MANDATORY BARGAINING CODE) BILL 2020

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this exposure draft explanatory material.

<i>Abbreviation</i>	<i>Definition</i>
ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
Bill	<i>Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020</i>
CCA	<i>Competition and Consumer Act 2010</i>
SBS	Special Broadcasting Service Corporation

Chapter 1

Mandatory Bargaining Code for News Media and Digital Platforms

Outline of chapter

1.1 This Bill establishes a mandatory code of conduct to address bargaining power imbalances between digital platforms and Australian news businesses.

Context of amendments

1.2 The ACCC's Digital Platforms Inquiry Final Report identified a fundamental bargaining power imbalance between Australian news businesses and each of Google and Facebook. This imbalance is undermining the ability and incentives for Australian news businesses to produce news content.

1.3 Google and Facebook derive a benefit from the ability to make Australian news content available to their users. The size of their online Australian audience makes them unavoidable trading partners for Australian news businesses. Google and Facebook each appear to be more important to Australian news businesses than any one Australian news business is to each of Google and Facebook. This has resulted in Australian news businesses accepting commercial deals with these platforms that are less favourable than they would otherwise agree to.

1.4 The Digital Platforms Inquiry Final Report identified a number of concerns stemming from the inability of Australian news businesses to negotiate more favourable terms with these digital platforms, including the inability of Australian news businesses to successfully bargain to receive payment for the inclusion of their news content on flagship Google and Facebook services.

1.5 While bargaining power imbalances exist in many other contexts, intervention is necessary to address the bargaining power imbalance because of the public benefit provided by the production and dissemination of news and the importance of a strong independent media in a well-functioning democracy.

1.6 Due to these issues, the Digital Platforms Inquiry Final Report recommended that a code of conduct should be developed to regulate

commercial relationships between each of Facebook and Google and Australian news businesses.

1.7 The development of a mandatory code of conduct is part of the Government's response to the Digital Platforms Inquiry Final Report to promote competition, enhance consumer protection and support a sustainable Australian media landscape in the digital age.

1.8 In its response to the Digital Platforms Inquiry Final Report, the Government asked the ACCC to work with Google and Facebook and Australian news businesses to develop and implement a voluntary code of conduct. The ACCC's progress report to the Government in April 2020 indicated that the core issue of payment for content was highly unlikely to be resolved through this voluntary process. On 20 April 2020 the Government announced its intention to implement a mandatory code of conduct.

1.9 The Bill provides that the Treasurer may make an instrument designating that a digital platform is required to comply with the news media and digital platform mandatory bargaining code. In the first instance, the Government has announced that the mandatory code of conduct will apply to Facebook and Google. However, the Treasurer may also make subsequent instruments in the future designating other platforms where fundamental bargaining power imbalances with Australian news businesses emerge.

Summary of new law

1.10 The Bill establishes a mandatory code of conduct to address bargaining power imbalances between digital platform services and Australian news businesses.

1.11 It does this by setting out four main sets of requirements to guide dealings between the responsible digital platform corporation for a digital platform service and registered news business corporations (explained further below).

1.12 The four main sets of requirements are:

- bargaining rules – which require the responsible digital platform corporations and registered news business corporations that have indicated an intention to bargain, to do so in good faith;
- compulsory arbitration rules – where parties cannot come to a negotiated agreement about remuneration relating to the inclusion of covered news content on designated digital

platform services, an arbitral panel will select between two ‘final offers’ made by the parties;

- minimum standards – which require responsible digital platform corporations to provide registered news businesses corporations with advance notification of algorithm changes, information about the collection and availability of user data and advance notification of changes affecting the display and presentation of news content; and
- non-discrimination requirements – which require responsible digital platform corporations to prevent a digital platform service from disadvantaging the news content of an Australian news business.

1.13 The ABC and SBS are able to register with ACMA and participate in the code in all respects and benefit from the minimum standards, however, they will not be able to bargain about remuneration or participate in compulsory arbitration about remuneration.

1.14 This permits the ABC and SBS to benefit from the minimum standards imposed on digital platforms under the code, but excludes them from accessing the bargaining provisions in relation to remuneration under the code. This is appropriate because advertising revenue is not the principal source of funding for public broadcasters.

1.15 A responsible digital platform corporation for a digital platform service is required to participate in the code if the Treasurer has made a determination specifying a corporation that operates or controls the digital platform service.

1.16 The responsible digital platform corporation is either:

- an Australian subsidiary (of the corporation identified in the Treasurer’s designation); or
- if that subsidiary does not operate or control the digital platform service – the designated digital platform corporation itself.

1.17 For a news business corporation to participate, it must be registered by the ACMA. The ACMA must register a news business (and the applicant as the news business corporation) if the applicant had an annual revenue above \$150,000 in the most recent year or in three of the five most recent years, and the news sources comprising the news business:

- relate predominantly to ‘core news content’ (definition discussed below);

- are subject to appropriate professional journalistic standards set out by an Australian professional body for media or an equivalent set of standards; and
- operate predominantly in Australia for the dominant purpose of serving Australian audiences.

1.18 As part of the consultation on this exposure draft, views are sought on the appropriateness of the \$150,000 threshold.

1.19 Once a news business corporation is registered by the ACMA, each responsible digital platform corporation must comply with the minimum standards. Further, commercial negotiations between news business corporations and responsible digital platform corporations must not result in agreements that would require breaching these minimum standards.

1.20 Once a news business corporation is registered by the ACMA, it may indicate an intention to bargain in relation to its covered news content (definition discussed below) with a responsible digital platform corporation.

1.21 A registered news business corporation is also able to form a group with one or more other registered news business corporations for the purpose of collectively bargaining with a responsible digital platform corporation under the code. The Bill specifically authorises this collective bargaining so that it does not contravene the CCA's restrictive trade practices provisions.

1.22 If a registered news business corporation has indicated an intention to bargain, a responsible digital platform corporation and a registered news business corporation must negotiate in good faith. Breaches of this requirement are subject to a civil penalty.

1.23 If an agreement is not reached between the parties within three months of the registered news business corporation indicating an intention to bargain, the matter will be subject to compulsory arbitration.

1.24 If a responsible digital platform corporation and a registered news business corporation are subject to compulsory arbitration, an arbitral panel chosen by the bargaining parties (or by the ACMA if the parties fail to agree on panel members) will select between two final offers made by the parties.

1.25 Both parties must submit a final offer to the arbitral panel stating a remuneration amount. The remuneration amount must be in relation to the benefit derived by the responsible digital platform corporation from the inclusion of covered news content on its digital platform services. The final offers must be submitted within 10 business days of compulsory arbitration being triggered.

1.26 The arbitral panel must accept one of those offers, unless it considers that each final offer is not in the public interest, in which case the arbitral panel may amend the more reasonable of the two offers. This is expected to happen in very limited circumstances – for example where both offers put forward by parties would be highly likely to result in serious detriment to the provision of covered news content in Australia, or to Australian consumers.

1.27 All legislative references are to the CCA, unless otherwise specified.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Responsible digital platform corporations must comply with minimum standards which require them to provide registered news businesses with advance notification of algorithm changes, 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 display and presentation of news content.	No equivalent obligation exists.
Responsible digital platform corporations may not discriminate between the news businesses participating in the code, or between participants and non-participants, because of their participation in the code.	No equivalent obligation exists.
Responsible digital platform corporations and registered news business corporations are required to negotiate in good faith, once a registered news business corporation indicates an intention to bargain.	No equivalent obligation exists.
If a responsible digital platform corporation and a registered news business corporation cannot reach an agreement within three months, then the parties will be subject to compulsory arbitration about remuneration.	No equivalent obligation exists.

<p>If a responsible digital platform corporation and a registered news business corporation are subject to compulsory arbitration, the parties must each make a ‘final offer’ on remuneration and the arbitral panel will decide which of these final offers to select.</p> <p>The binding arbitration will only relate to remuneration to be provided by the responsible digital platform corporation to the registered news business corporation in relation to the benefit of making covered news content of registered news business corporations available on designated digital platform services.</p>	<p>No equivalent obligation exists.</p>
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Detailed explanation of new law

1.28 This Bill establishes a mandatory code of conduct to address bargaining power imbalances between digital platforms and Australian news businesses.

Which digital platforms must participate in the code?

1.29 A digital platform must participate in the code if the Treasurer has made a determination specifying a designated digital platform corporation. The Treasurer may also specify one or more designated digital platform services. *[Schedule 1, item 1, section 52C]*

1.30 The Government has announced that the code will apply to Facebook and Google. Accordingly, the Treasurer is expected to make an instrument specifying Facebook Inc. and Google LLC as designated digital platform corporations.

1.31 ‘Digital platform’ is not defined in the Bill, but is intended to capture platforms that deliver a wide variety of services such as social media services, search engines and other digital content aggregators.

1.32 A ‘digital platform service’ is a service that is provided by the designated digital platform corporation, either by itself or together with one or more related corporations. A given digital platform will normally provide multiple digital services, such as messaging, search, content curation and other content sharing services. *[Schedule 1, item 1, section 52B]*

1.33 The requirements for compulsory arbitration about remuneration apply to designated digital platform services (see the section on

compulsory arbitration below). These will generally be a subset of the services provided on a digital platform, including the services which are most important for the distribution of news on the digital platform.

1.34 The Treasurer's instrument is expected to specify the following as designated digital platform services:

- Facebook News Feed (including Facebook Groups and Facebook Pages);
- Facebook News Tab (if and when released in Australia);
- Instagram;
- Google Discover;
- Google News; and
- Google Search.

1.35 The minimum standards and non-discrimination obligations apply to the responsible digital platform corporation. It is also the party with which registered news business corporations must bargain.

1.36 The responsible digital platform corporation is either:

- an Australian corporation that is related to the corporation identified in the Treasurer's designation, that either by itself or together with other corporations operates or controls the digital platform service in supplying services that are used by Australians; or
- if there is no such Australian corporation – the designated digital platform corporation for the digital platform service.

[Schedule 1, item 1, definition of 'responsible digital platform corporation' in section 52A]

Which news businesses can participate in the code?

1.37 For a news business corporation to participate in the code, it must first be registered by the ACMA.

1.38 When registering with the ACMA, a news business corporation must nominate:

- a 'news business'; and
- each 'news source' that makes up the news business.

[Schedule 1, item 1, section 52D]

1.39 Multiple news businesses can register under the same news business corporation, if the news business corporation operates or controls all the news businesses, either by itself or together with other corporations. *[Schedule 1, item 1, section 52F]*

1.40 The minimum standards will apply separately in relation to each news business. This will mean for example, that each news business will get separate notifications of relevant algorithmic changes which relate to their covered news content.

1.41 A ‘news business’ means a news source or a combination of news sources. A ‘news source’ includes:

- a newspaper masthead;
- a magazine;
- a television program;
- a radio program;
- a website; or
- a program of audio or video content designed to be distributed over the internet.

[Schedule 1, item 1, definitions of ‘news business’ and ‘news source’ in section 52A]

1.42 The ACMA must register a news business that applies to it in writing if the ACMA considers that the applicant meets the following requirements:

- the revenue test;
- the content test;
- the Australian audience test; and
- the professional standards test.

[Schedule 1, item 1, section 52E]

1.43 It is intended that the ACMA will have the necessary powers to administer the functions conferred on it in the code. This will include information gathering powers to obtain information relevant to determining whether a news media business satisfies these tests. Provisions to this effect will be included in the final code.

1.44 In a registration application to the ACMA, a news business corporation must nominate every one of its individual news sources that it wishes to comprise the registered news business for the purpose of the code. The ACMA must publish the details of the registration on its website. *[Schedule 1, item 1, sections 52D and 52E]*

1.45 A news source cannot be included twice. That is, the news sources set out in the news business corporation’s application cannot form part of another news business already registered. *[Schedule 1, item 1, section 52E]*

1.46 A news business corporation is not required to nominate all of its news businesses or news sources. It may select which of these it wishes to nominate, in any combination it chooses. *[Schedule 1, item 1, section 52D]*

1.47 However, all negotiation, mediation and arbitration facilitated by the code will apply only to covered news content of those news sources and will not apply to other content produced or published by the news business corporation. The code's minimum standards will also only apply to covered news content of those news sources (discussed further below).

Example 1 – Making an application to the ACMA to register as a news business

Amy's Articles (AA) is a corporation that produces an online newspaper called 'A+ Articles', which reports on Australian economic, business and political issues. AA also produces a podcast called 'A+ Articles: Audio', which provides a shortened audio version of online newspaper articles in the form of a news briefing.

In addition, AA publishes another website called 'Access: AFLW', which covers footy tipping for the AFLW competition each year.

AA nominates 'A+ Articles' as a 'news business', and nominates the online newspaper and the podcast as 'news sources'.

AA chooses not to nominate the AFLW footy tipping blog as a news source for the purpose of the code, as it does not satisfy the 'predominantly core news content' test (discussed below).

AA satisfies the other tests for registration. The ACMA registers AA as a registered news business corporation, which comprises the news business 'A+ Articles' (sources: the online newspaper and podcast).

The revenue test

1.48 A news business corporation satisfies the revenue test if either:

- its annual revenue in the preceding financial year exceeded \$150,000; or
- its annual revenue in at least three of the five preceding financial years exceeded \$150,000.

[Schedule 1, item 1, section 52G]

The content test

1.49 A news business corporation satisfies the content test if each news source it nominates when applying to the ACMA is predominantly 'core news content'. *[Schedule 1, item 1, section 52H]*

1.50 Core news content is content produced by a journalist that records, investigates or explains:

- issues of public significance to Australians;

- issues relevant to engaging Australians in public debate and in informing democratic decision making; or
- content which relates to community and local events.

[Schedule 1, item 1, definition of ‘core news content’ in section 52A]

1.51 Core news content can relate directly to matters of public policy and government decision making at any level of government. However, it can also include other matters of public importance such as the activities of private sector entities.

1.52 Political, court and crime reporting are examples of content intended to be captured by this test.

1.53 Core news content can include editorial and opinion pieces, if those pieces are written by journalists.

The Australian audience test

1.54 A news business corporation satisfies the Australian audience test if the news sources it nominates when applying to the ACMA operate predominantly in Australia for the dominant purpose of serving Australian audiences. *[Schedule 1, item 1, section 52J]*

1.55 A local business of a foreign news business may satisfy the Australian audience test if the local business operates predominantly in Australia for the dominant purpose of serving Australian audiences. However, a global news business that only occasionally produces Australian news content will not satisfy the test.

The professional standards test

1.56 A news business corporation satisfies the professional standards test if each of the news sources it nominates when applying to the ACMA has editorial independence from the subjects of its news coverage and is subject to a professional standard or code.

1.57 A news source will be subject to a professional standard or code if it:

- is subject to the rules of the Australian Press Council or the Independent Media Council;
- is subject to the rules of the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice; or
- is subject to substantially equivalent internal editorial standards relating to the provision of quality journalism.

[Schedule 1, item 1, section 52K]

1.58 A news source will have editorial independence from the subject of its news coverage if it is:

- not owned or controlled by a political 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).

1.59 The ACMA can revoke the registration of an Australian news media business at any time, and will regularly review the registration of each news business corporation. *[Schedule 1, item 1, section 52E]*

Example 2 – Registration of Australian news businesses

Nelson's News Network (NNN) is an Australian news business with several news sources that are all magazines. The popular magazines mostly review local restaurants, but occasionally the magazines feature editorial pieces about local politics. NNN had revenue of \$500,000 in its most recent year for which there are accounts. NNN applies to the ACMA, nominating all its news sources and a news business corporation. Nelson is a journalist, having worked for major publications before starting NNN. NNN is registered with the Australian Press Council. However the content of NNN's nominated news sources are not predominantly core news content, and therefore the ACMA will not register NNN to participate in the code.

Minimum standards

1.60 Once a news business corporation is registered by the ACMA, each digital platform service must comply with the minimum standards with regard to the 'covered news content' of the registered news business. *[Schedule 1, item 1, section 52L]*

1.61 The responsible digital platform corporation must ensure the requirements set out in the minimum standards are met. This reflects the entity's responsibility for compliance, even if another entity in the corporate group carries out the task because, for example, the other entity controls a relevant algorithm or possesses relevant data. *[Schedule 1, item 1, section 52L]*

1.62 The minimum standards include requirements that the responsible digital platform corporation:

- give explanations of the types of data collected by the digital platform service;
- notify news businesses in relation to changes of their algorithms likely to affect their news business;

- notify news businesses in relation to changes of their algorithms designed to effect the ranking and display of paywalled content;
- notify news businesses in relation to changes to their display of news content;
- notify news businesses in relation to changes to their display of advertising which relates to covered news content;
- provide news businesses tools to moderate user comments on their covered news content; and
- develop a proposal to recognise original news.

1.63 The minimum standards also include reciprocal obligations to facilitate open communication between the responsible digital platform corporation and the news business corporation. *[Schedule 1, item 1, sections 52R and 52U]*

1.64 The minimum standards extend beyond the ‘core news content’ of the news source of the registered news business to ‘covered news content’ produced by the registered news business.

1.65 ‘Covered news content’ is a broader category than ‘core news content’ and includes:

- core news content (this definition is discussed above); and
- any other content that is created by a journalist which is relevant to recording, investigating or explaining issues of interest to Australians.

[Schedule 1, item 1, definition of ‘covered news content’ in section 52A]

1.66 ‘Covered news content’ is intended to capture content including sports and entertainment related news such as interviews with coaches and players, reporting about the entertainment industry and coverage of reality television, but is intended to exclude:

- broadcasts of sports games or publication of sports results or scores; and
- entertainment content such as drama or reality TV programming.

1.67 ‘Covered news content’ is also intended to exclude specialty or industry reporting, product reviews, talk-back radio discussions, content produced by academics and documentaries.

1.68 The minimum standards apply to the broader category of covered news content, as many news businesses use other news content to cross-subsidise the production of core news content. This means it is

important that registered news businesses receive information relating to, and can bargain over, a broader range of content than just their core news content.

Example 3 – Core news content versus covered news content

Tom’s News Network (TNN) is a news business that produces several news websites. The websites focus on political news reporting (considered ‘core’ news in the code), but also feature some sports reporting and entertainment news.

TNN applies to be registered by the ACMA to participate in the code, nominating all its news sources and a news business corporation. The ACMA finds that each source is predominantly ‘core news’ and TNN meets all the other criteria. The ACMA registers TNN.

The minimum standards that the responsible digital platform corporation must meet in the code apply in relation to all of the covered news content TNN produces, not just its political news and court reporting (core news), and may include its sports reporting and entertainment news. This will allow TNN to gain a full picture of the performance of its stories on the digital platform service and to bargain with the responsible digital platform corporation under the code in relation to this content.

1.69 Information provided to registered news businesses by the responsible digital platform corporation under all the minimum standards must be provided in terms that are readily comprehensible.

1.70 Where there is a requirement on the responsible digital platform corporation to provide information or notice to the registered news business corporation, records of the associated internal decision making process relating to that information or notice must be kept. These records should be kept within Australia and the ACCC’s information gathering powers will extend to these records.

1.71 None of the minimum standards require the giving of information the publication of which would reveal a trade secret.
[Schedule 1, item 1, 52V]

Giving explanations about information and types of data collected

1.72 A responsible digital platform corporation must provide readily comprehensible information to the registered news business corporation that explains the types of data which it collects in relation to its users’ interactions with the registered news business’ covered news content.
[Schedule 1, item 1, section 52M]

1.73 The responsible digital platform corporation must ensure the information is provided to the registered news business corporation within 28 days of its registration by the ACMA. The responsible digital platform corporation then has an ongoing obligation to update that information every 12 months. *[Schedule 1, item 1, section 52M]*

1.74 The information a responsible digital platform corporation must provide to comply with this minimum requirement is the following:

- a list and explanation of all types of data the digital platform service collects about the registered news business' users through their engagement with covered news content made available on the digital platform's services;
- a list and explanation of the products and services supplied by the digital platform service that collects the data;
- a list and explanation of the data that the digital platform service currently makes available to be shared with the registered news business;
- an explanation of how the form in which the data is shared with the news businesses differs from the user data collected by the digital platform; and
- information about how news businesses can access any of this data.

[Schedule 1, item 1, section 52M]

1.75 The Governor-General can make regulations specifying other requirements which the responsible digital platform corporation must comply with. This regulation making power is required to keep the regulatory regime flexible and in line with changing industry practices. The regulations will be subject to disallowance by the Parliament and therefore will be subject to Parliamentary scrutiny.

1.76 The obligations imposed by this minimum standard are not intended to require digital platforms to disclose trade secrets or other intellectual property to news businesses, or to share any particular user data. Any disclosure of data must comply with the *Privacy Act 1988*.

Algorithmic ranking of news

1.77 A responsible digital platform corporation must give 28 days' advance notice in a readily comprehensible form to a registered news business corporation, of changes to algorithms used by each of its digital platform services to rank and display news, where the changes are likely to significantly affect referral traffic to a registered news business corporation's covered news content. *[Schedule 1, item 1, section 52N]*

1.78 The notice must describe the change and effect on referral traffic in a way that is readily comprehensible and must describe how a registered news business can minimise the effects of the change on the ranking of its news content. *[Schedule 1, item 1, section 52N]*

1.79 Changes are likely to significantly affect the referrals to a registered news business corporation's covered news content if they:

- are likely to result in a 15% or greater change in referral traffic for at least 25% of registered news businesses; or
- are otherwise likely to significantly affect the performance of a registered news business' covered news content on a digital platform service.

1.80 If the algorithm change relates to a matter of urgent public interest, no advance notice is required, but the responsible digital platform corporation must ensure that the news business corporation is notified within 48 hours after the change. This exception recognises urgent algorithm changes such as those that might be required in relation to information about a public health crisis. *[Schedule 1, item 1, section 52N]*

Ranking and display of paywalled content

1.81 A responsible digital platform corporation must give 28 days' advance notice to a registered news business corporation of changes to algorithms used by each digital platform service to rank and display news, where the changes are specifically designed to affect the ranking of paywalled content, along with a readily comprehensible explanation of such changes. *[Schedule 1, item 1, section 52O]*

1.82 It is expected that the final code will require the notice to describe how the registered news business is able to minimise the negative effects of the change to the ranking of its covered news content.

Display of news content

1.83 A responsible digital platform corporation must give 28 days advance notice to a registered news business corporation of changes to its digital platform services, where the changes are likely to significantly affect the display and presentation of their covered news content on the digital platform services, along with a readily comprehensible explanation of such changes. This includes, for example, major changes to visual interfaces. *[Schedule 1, item 1, section 52P]*

1.84 If the change relates to a matter of urgent public interest, no advance notice is required, but the responsible digital platform corporation must ensure the news business corporation is notified within 48 hours. *[Schedule 1, item 1, section 52P]*

1.85 The final code will also include requirements about genuinely considering reasonable proposals from registered news business corporations to ensure that the display and presentation of news on platforms' services provides appropriate prominence to their content (for example, displaying clear branding of mastheads).

Display of advertising

1.86 A responsible digital platform corporation must give 28 days' advance notice to a registered news business corporation of changes to digital platform services, where the changes are likely to have a significant effect on the display and presentation of advertising directly associated with news on the digital platform, along with a readily comprehensible explanation of such changes. *[Schedule 1, item 1, section 52Q]*

1.87 Again, if the change relates to a matter of urgent public interest, no advance notice is required, but the responsible digital platform corporation must ensure the news business corporation is notified within 48 hours. *[Schedule 1, item 1, section 52Q]*

User comments

1.88 Upon receiving written requests from a registered news business corporation, a responsible digital platform corporation must ensure the registered news business corporation can do the following in relation to the covered news content the news business has posted on part of a digital platform service:

- remove or filter user comments;
- disable entirely the making of user comments; and
- block user comments by particular users and accounts, in particular circumstances.

[Schedule 1, item 1, section 52S]

1.89 In the case of a social media service such as Facebook, this rule deals with the situation where the news business has posted its covered news content on the news business' own social media page. Comments on the news business' articles posted by somebody else on another Facebook page are not covered by this law.

1.90 The Governor-General can make regulations which contain additional requirements before a responsible digital platform corporation is required to comply with requests from a registered news business to provide them with the above tools. This regulation making power is required to keep the regulatory regime flexible and in line with changing industry practices. The regulations will be subject to disallowance by the Parliament and therefore will be subject to Parliamentary scrutiny.

Example 4 – Flexible moderation tools for content created by a registered news business corporation on a digital platform service

Archie's Informative Chronicle (AIC) creates its own Facebook page to promote its breaking stories to a wider readership. AIC wishes to disable all comments on its stories posted to this page in order to most

efficiently meet its compliance obligations with other laws and to reduce its operating costs. Facebook provides AIC with flexible content moderation tools so that it can do so.

AIC requests to the contact that the responsible digital platform corporation for Facebook has provided under this Part to be provided with the same flexible content moderation tools with respect to its stories when they appear in the news feed of any Facebook user.

Facebook refuses this request as this is not required under this Part.

Recognition of original news

1.91 A responsible digital platform corporation must consult with registered news business corporations and publish a proposal to appropriately recognise original covered news content published by the registered news business corporations within six months of the ACMA registering the first news business corporation. *[Schedule 1, item 1, section 52T]*

1.92 The responsible digital platform corporation then has an ongoing obligation to update its proposal every 12 months and consult all registered news businesses on the updated proposal. *[Schedule 1, item 1, section 52T]*

Facilitating open communication

1.93 Each responsible digital platform corporation and registered news business corporation must provide each other a point of contact and acknowledge each communication from the other party. *[Schedule 1, item 1, sections 52R and 52U]*

1.94 Nothing prevents a responsible digital platform corporation identifying the same point of contact for multiple registered news business corporations, provided it can still fulfil the requirements for availability and responsiveness.

1.95 The Governor-General can make regulations which contain requirements for the registered point of contact and acknowledgement of the contact. This regulation making power is required to keep the regulatory regime flexible and in line with changing industry practices. The regulations will be subject to disallowance by the Parliament and therefore will be subject to Parliamentary scrutiny.

1.96 These regulations will include that the points of contact must be available during Australian business hours and that the acknowledgment must occur within two business days.

‘Opt out’ rule

1.97 The final code will also include requirements about providing registered news business corporations the explicit option to ‘opt out’ of

having their news content featured on any individual service operated by the digital platforms.

Non-discrimination requirements

1.98 A responsible digital platform corporation must ensure that a digital platform service does not discriminate in relation to the application of the code between:

- registered news businesses; or
- registered news businesses and non-registered news businesses.

[Schedule 1, item 1, section 52W]

1.99 This means discrimination in relation to the registered news business proposing to or having relied on any rights or entitlements under the code is unlawful. Discrimination solely in relation to any agreement entered into under the code is similarly unlawful. *[Schedule 1, item 1, section 52W]*

1.100 Discrimination in this context will be considered to occur if the news content of a registered news business is disadvantaged in comparison to other news content in terms of the crawling, indexing, ranking, display, presentation or other process undertaken by the digital platform on any service provided by the digital platform, on the basis of the registered news business' participation in the code.

1.101 For the avoidance of doubt, this requirement is not intended to interfere with the operation of the proprietary algorithms of a digital platform.

1.102 The non-discrimination requirements apply in relation to all news content instead of only core news content or covered news content. This is to ensure the integrity of the non-discrimination requirements and that other forms of news (such as foreign news or citizen journalism content) are not used as replacement content.

Bargaining

1.103 Once an Australian news business is registered by the ACMA, the registered news business corporation can notify a responsible digital platform corporation that it wishes to bargain in relation to one or more specified issues. The issues must relate to the registered news businesses' covered news content made available on a digital platform service. *[Schedule 1, item 1, section 52Y]*

1.104 A registered news business corporation may bargain with a responsible digital platform corporation on an individual basis or

collectively with a group of one or more registered news business corporations. *[Schedule 1, item 1, section 52Y]*

Indicating an intention to bargain

1.105 The notification must be made by a news business corporation, unless the news business corporation has agreed in writing that another news business corporation can undertake the bargaining on its behalf. Under the new law, the corporation that agrees to undertake bargaining on behalf of the other is referred to as the bargaining news business corporation. *[Schedule 1, item 1, section 52X]*

1.106 The notification must set out:

- the bargaining news business corporation;
- each registered news business to which the notification relates;
- the digital platform service;
- the responsible digital platform corporation for the digital platform service;
- the specified issues to which bargaining will relate;
- if regulations made for the purposes of this paragraph specify other matters – those matters.

[Schedule 1, item 1, section 52Y]

1.107 A notification cannot be varied to include additional registered news businesses at a later time. *[Schedule 1, item 1, section 52Y]*

1.108 A registered news business is not required to indicate an intention to bargain. If a registered news business chooses not to bargain, the minimum standards will still apply in respect of that news business' covered news content.

1.109 If two or more news business corporations join together to negotiate with a responsible digital platform corporation, that collective bargaining will be specifically authorised for the purposes of subsection 51(1) of the CCA. *[Schedule 1, item 1, section 52ZW]*

Bargaining in good faith

1.110 Once a bargaining news business corporation indicates an intention to bargain in relation to its covered news content, the bargaining news business corporation and the responsible digital platform corporation must act towards the other party in good faith. *[Schedule 1, item 1, section 52ZB]*

1.111 There may be a range of conduct that would indicate that parties have not negotiated in good faith.

Information requests

1.112 The bargaining news business corporation may request the responsible digital platform corporation to give it information and data that is necessary to assess:

- the benefit that the digital platform service receives from covered news content of each represented registered news business;
- the benefit that the digital platform service receives from news content of every Australian news business; and
- whether a payment in respect of the digital platform service by the responsible digital platform corporation would place an undue burden on the commercial interests of the digital platform service.

[Schedule 1, item 1, section 52ZC]

1.113 The responsible digital platform corporation may request the bargaining news business corporation to give it information and data that is necessary to assess the costs incurred by each represented registered news business corporation in providing covered news content. *[Schedule 1, item 1, section 52ZC]*

1.114 Both parties must comply with the requests. *[Schedule 1, item 1, section 52ZC]*

1.115 The requests must be in writing and meet any requirements that may be specified in regulations. *[Schedule 1, item 1, section 52ZC]*

1.116 Nothing in this section requires the giving of information the publication of which would reveal a trade secret. *[Schedule 1, item 1, section 52ZC]*

1.117 A recipient news business corporation or responsible digital platform corporation must ensure that any information or data are not used for a purpose other than bargaining under this code. The recipient must treat the material confidentially and not disclose it to any officer or third party unless it is for the purpose of bargaining under the code. *[Schedule 1, item 1, section 52ZD]*

1.118 The SBS and ABC may bargain in relation to any issues they specify, including about the minimum standards. However, they may not bargain about remuneration for making available their covered news content on a digital platform service. *[Schedule 1, item 1, subsection 52Y(6)]*

Compulsory arbitration about remuneration

Starting arbitration

1.119 If a registered news business corporation other than the ABC or SBS indicates an intention to bargain with a responsible digital platform corporation and an agreement about remuneration in relation to designated digital platform services is not reached within a three month period, the matter will be subject to compulsory arbitration. Arbitration will only take place if the bargaining parties have attended at least one day of mediation. *[Schedule 1, item 1, section 52ZF]*

1.120 If those preconditions are met, either of the bargaining parties may give a written notice to the ACCC that arbitration should start. The Chair of the arbitral panel will then notify the bargaining parties that arbitration will start on a specified day. That day must be within five business days of the notice being given to the ACCC. *[Schedule 1, item 1, sections 52ZF, 52ZH and 52ZK]*

1.121 The final code will mandate mediation within the three month bargaining period, if an agreement has not been reached. Bargaining parties will be free to attend private mediation at any time.

1.122 It is expected that the final code will also allow a news business corporation to elect to not proceed to arbitration.

1.123 Arbitration may also start earlier than three months after the bargaining news business corporation indicated an intention to bargain, if both parties agree to proceed to arbitration earlier. This can occur no earlier than 10 business days after the bargaining news business corporation indicated an intention to bargain. *[Schedule 1, item 1, section 52ZF]*

The arbitral panel

1.124 The bargaining parties may agree on individuals to form the arbitral panel. *[Schedule 1, item 1, section 52ZE]*

1.125 A register of bargaining code arbitrators will be appointed and managed by the ACMA. The ACMA must ensure that at least 10 individuals are on the register at all times, and that each person on the register is a person experienced in at least one of legal, economic or industry matters. The parties may agree to appoint individuals from the register to serve on the arbitral panel, but may also choose other individuals. *[Schedule 1, item 1, section 52ZE]*

1.126 When compulsory arbitration begins, an arbitral panel will be formed. The panel will include a Chair of the panel and unless the bargaining parties agree that the Chair should be the sole member of the panel, two other members. *[Schedule 1, item 1, section 52ZG]*

1.127 Appointed panel members need not be on the ACMA register. The panel must comply with the arbitration process set out in the code. *[Schedule 1, item 1, section 52ZG]*

1.128 If the bargaining parties cannot agree on the formation of the panel, the ACMA will appoint any remaining panel members from the register as necessary. Bargaining parties will bear equally shared responsibility for the arbitration costs. This will include where the panel is appointed by the ACMA. *[Schedule 1, item 1, section 52ZG]*

The arbitration process

1.129 Arbitration is only about remuneration in relation to a designated digital platform service specified in a determination instrument made by the Treasurer. However, the bargaining parties can agree to arbitration about an expanded set of services. *[Schedule 1, item 1, section 52ZJ]*

1.130 The bargaining parties must participate in the arbitration in good faith. *[Schedule 1, item 1, section 52ZL]*

1.131 The panel must make the written final determination for remuneration no later than 45 business days after the start of arbitration. *[Schedule 1, item 1, section 52ZQ]*

1.132 The Chair of the panel may direct the bargaining parties to attend mediation about the remuneration at any time after the arbitration starts. The parties must comply with the direction. *[Schedule 1, item 1, section 52ZM]*

1.133 If the parties are able to resolve the dispute, they can agree to terminate arbitration. *[Schedule 1, item 1, section 52ZN]*

1.134 Each of the bargaining parties must submit to the panel a final offer on the remuneration amount to be paid by the responsible digital platform corporation to the registered news business corporation for making available the registered news business corporation's covered news content, within 10 days of compulsory arbitration being triggered. *[Schedule 1, item 1, section 52ZO]*

1.135 Each of the offers must be shared with the other bargaining party and the ACCC. The bargaining parties may submit a response submission about the other party's final offer. The response submission may only deal with issues that are dealt with in the material accompanying the respective final offers. *[Schedule 1, item 1, sections 52ZO and 52ZR]*

1.136 The ACCC may also provide a submission to the panel in relation to the final offers of the bargaining parties. The bargaining parties will be able to respond to the ACCC's submission. *[Schedule 1, item 1, section 52ZS]*

1.137 It is expected that the final code will detail:

- allowance for parties to continue to negotiate in parallel to the arbitration, and to reach a negotiated agreement that will cease the arbitration at any point until the final decision is made by the arbitral panel; and
- that arbitration will only result in agreements for one year.

1.138 The panel must accept one of the final offers, unless the panel considers that each final offer 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
- Australian consumers.

[Schedule 1, item 1, section 52ZO]

1.139 In deciding which offer to accept on the remuneration to paid by the responsible digital platform corporation to the registered news business corporation for making available the registered news businesses corporation's covered news content, the panel must consider:

- the direct benefit (whether monetary or otherwise) of the registered news business' covered news content to the digital platform service;
- the indirect benefit (whether monetary or otherwise) of the registered news business' covered news content to the digital platform service;
- 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 digital platform service.

[Schedule 1, item 1, section 52ZP]

1.140 When considering the indirect benefit, the panel must:

- consider the total indirect benefit of Australian news to the digital platform service (including increased usage of that service and public perception benefits arising from the inclusion of Australian news); and
- consider the extent to which that total indirect benefit is attributable to the registered news business' covered news content.

[Schedule 1, item 1, section 52ZP]

1.141 Indirect benefit is intended to encompass public perception benefits arising from the inclusion of Australian news. This is because the making available of news sources on their digital platform services

increases user trust and reliance on these services. Indirect benefits also flow due to increased use of digital platform services because of the presence of covered news content generally.

1.142 The Bill does not specify what form the remuneration will take, which will allow the registered Australian news business and responsible digital platform corporation to determine their own flexible approach to the remuneration (e.g. lump sum, regular payments calculated with respect to volumes or amounts of news content, or other measures of user engagement). However, if a party submits offers for non-lump sum payments, these offers must include estimates amounting to a single year's payment.

1.143 If the panel does not accept one of the final offers made by the parties, it must adjust one of those offers in a manner that takes into account the benefit that the digital platform service receives in relation to the news media content and results in that offer being in the public interest. *[Schedule 1, item 1, section 52ZO]*

Effect of arbitral determination

1.144 The bargaining parties must comply with the arbitral panel's determination about the terms for resolving the remuneration issue. Within 30 business days of the determination, the bargaining parties must make a written agreement that the responsible digital platform corporation will ensure the remuneration amount set out in the determination is paid. *[Schedule 1, item 1, section 52ZT]*

1.145 A failure to make the written agreement will attract a civil penalty. The obligation to pay the remuneration amount according to the agreement will be enforceable by private action.

The role of the ACCC

1.146 The ACCC will be permitted to make written submissions to the arbitral panel on its own initiative for the purpose of providing additional sources of information to assist the panel to fulfil its obligations in considering the submissions of both parties. *[Schedule 1, item 1, section 52ZS]*

1.147 The arbitral panel will be able to request that the ACCC provide information or assistance in respect of any matters arising under the code, including matters of public interest. If such a request for assistance is made, the ACCC will provide a response to the request within 5 business days.

1.148 As stated above, the ACCC will receive copies of offers and submissions that are provided to the arbitral panel. Any submission made by the ACCC on its own initiative must be provided to the arbitral panel and copied to the parties within 10 business days of receiving each bargaining party's final offer. Any responses the bargaining parties may

wish to make to the ACCC submission must be provided to the arbitral panel and copied to the ACCC within five business days of receiving the ACCC submission. *[Schedule 1, item 1, section 52ZS]*

1.149 Any submissions made by the ACCC will not bind the arbitrators to any particular course of action. The arbitral panel will also be able to seek input from any other party.

Information-gathering powers

1.150 Consistent with existing arrangements for Part IVB industry codes, the ACCC will have the power to compel information or documents to be provided to it. The powers will only relate to information or documents that the code requires the responsible digital platform corporation to keep, generate or publish.

1.151 A responsible digital platform corporation will be required to keep the following records of certain matters which the ACCC could compel:

- records of documents provided to registered news business corporations through the code process; and
- records of internal decisions that relate to the minimum standards.

1.152 The ACCC's information gathering powers under section 155 will also be available.

Consequences of contravention

Civil penalties

1.153 Civil penalties apply for contraventions of the new Part IVBA. The maximum civil penalty, for an act or omission, is the greater of:

- \$10 million;
- if the court can determine the total value of the benefits that have been obtained and that are reasonably attributable to the act or omission – three times that total value;
- if the court cannot determine the total value of those benefits – 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.

[Schedule 1, items 6 and 7, section 76]

1.154 This is consistent with the maximum penalties applicable under section 76 of the CCA for a number of contraventions of that Act.

1.155 Compliance by responsible digital platform corporations and registered news business corporations with all of their respective obligations under the code is critical for the integrity of the scheme and the achievement of its objectives. The maximum civil penalty reflects the seriousness of the most egregious instances of non-compliance with the code. The flexibility in penalty amount is provided to enable the ACCC to seek penalties proportionate to the conduct. Minor breaches are not expected to attract the maximum penalty under the code.

1.156 For the purposes of calculating annual turnover under the third limb of the maximum civil penalty, only the responsible digital platform corporation's turnover connected with the supply of goods and services in Australia will be relevant.

1.157 If a responsible digital platform corporation has contravened the new Part IVBA and it is not the designated digital platform corporation (that is, it is an Australian entity), both the responsible digital platform corporation and the designated digital platform corporation are jointly and severally liable for the civil penalty. *[Schedule 1, item 1, section 52ZV]*

1.158 The final code will specify which provisions contravene the code and when civil penalties will apply.

Infringement notices

1.159 The ACCC may issue an infringement notice for a contravention of the new Part IVBA. The infringement notice penalty amount is 600 penalty units. This is consistent with the infringement notice penalty amount applicable to certain contraventions of the Australian Consumer Law by listed corporations. *[Schedule 1, item 1, section 52ZU]*

Other enforcement and redress mechanisms

1.160 The ACCC may accept a court enforceable undertaking under section 87B of the CCA in relation to matters arising under the code. These enforceable commitments may allow for individual solutions to compliance issues that arise in relation to the code.

1.161 Non-punitive orders and other compensatory orders will also apply to contraventions of Part IVBA.

1.162 The new Part IVBA will also enable a news business to take action seeking damages for loss or damage by conduct of a digital platform in contravention of Part IVBA.

Consequential Amendments

1.163 The new Part IVBA will bind the Crown in right of the states and territories. *[Schedule 1, item 2, section 2B]*

1.164 The new Part IVBA will extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia. *[Schedule 1, items 3 and 4, section 5]*

1.165 The Minister cannot use the general directions power under the CCA to direct the ACCC with regard to the new Part IVBA. *[Schedule 1, item 5, section 29]*

1.166 The court may grant an injunction in relation to a breach or proposed breach of the new Part IVBA. *[Schedule 1, item 8, section 80]*

1.167 The new Part IVBA is also added to the definition of ‘core statutory provision’ in subsection 155AAA(21) to ensure the protection of certain information also includes the code. *[Schedule 1, item 9, section 155AAA]*

Application and transitional provisions

1.168 The Bill commences on the day after it receives the Royal Assent. *[Schedule 1, item 2]*