

Facebook response to the Australian Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

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FACEBOOK

Executive summary

This is Facebook's response to the draft *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, released by the Australian Competition and Consumer Commission (ACCC) on 31 July 2020.

The draft legislation seeks to force Facebook to pay for news content, beyond our current investment in Australian news (which comprises millions of dollars and innovative products and programs) by determining a price that is not connected to the genuine commercial value of news to Facebook.

We understand the challenges of the Australian media industry, many of which have been exacerbated by the pandemic's impact on business models that are reliant on advertising. Facebook offers services that bring benefit to news publishers, if they voluntarily choose to put news content on Facebook or allow users to share their content. The benefits we bring to publishers comprise: free organic distribution of news (and other content) that grows the audience and revenue for news publishers; customised tools and products to help news publishers monetise their content; initiatives to assist publishers to innovate with online news content; direct investments by commissioning Australian news content that can appear on online services, including Facebook; and the indirect value to publishers such as brand awareness and community-building. Publishers have control over whether their content is available on our platform, and they can choose not to distribute content on Facebook if they believe these benefits are not sufficient.

As part of our support for effective regulatory frameworks for our industry, Facebook has also engaged in good faith with the ACCC to propose sensible regulatory ideas that would encourage innovation in news, bring closer collaboration between publishers and platforms, and set greater scrutiny of how we work with publishers. We have provided direct evidence about both the value that we provide to news publishers and the limited commercial value of news to our business. We have indicated our hope that the legislation would provide a workable framework for us to bring new and innovative news products and tools to Australia, including the launch of Facebook News, and substantially increase our news investment by hundreds of millions of dollars worldwide and in Australia over the coming years.¹

Notwithstanding the good faith, evidence base and desire for investment Facebook has brought to this process, the draft legislation before us is unworkable. The draft law fundamentally misunderstands the economic reality of the value exchange between Facebook and publishers. It is based on the misconceptions that Facebook profits from taking news content with no consent or control by publishers, that we do not pay for news or drive sufficient value for news publishers, and that government intervention is required to correct this situation.

¹ W Easton, 'Facebook's Will Easton on investing in Australia's news ecosystem', *Ad News*, 23 July 2020, <https://www.adnews.com.au/news/facebook-s-will-easton-on-investing-in-australia-s-news-ecosystem>.

Firstly, Facebook does not profit from news. News has a nominal commercial value to our business because people primarily come to Facebook to connect with family and friends. News content generates negligible advertising revenue and it is highly substitutable (meaning, when it's not available on the platform, people continue to use Facebook for other purposes). We have provided evidence to the ACCC that the commercial value we derive from news content in Australia is virtually zero. This has been demonstrated by one notable and very public example: the change we made to our News Feed ranking algorithm in January 2018 to prioritise content from friends and family, in response to feedback from our users.² This change had the effect of reducing audience exposure to public content from all Pages, including news. Notwithstanding this reduction in distribution of news content, the past two years have seen an increase in revenue and people engaging on our services.³

Notwithstanding these commercial realities, we have brought a significant amount of investment, products and tools to the Australian news industry and have been willing to bring much more. These investments would already be well beyond the value we receive from news content. We have invested in the news industry -- not to make a profit -- rather because we believe news is a public good, and it is important for society and democracy.

The draft legislation ignores these facts and instead establishes a highly complex and punitive legislative scheme that is not proportionate even to the findings of the ACCC's final Digital Platforms Inquiry report, and is far more severe than originally recommended. In the ACCC's own Digital Platforms Inquiry report, the ACCC suggested Facebook is responsible for 18 per cent of traffic referrals to news websites, under a narrowly-constructed and artificial market definition that significantly exaggerates the role we play.⁴ Notwithstanding this small proportion of referrals, the legislation contains a negotiate / arbitrate framework that is most commonly used only for terms of access by users of natural monopoly infrastructure, a situation vastly different to the highly dynamic and innovative digital industry.

The details of the negotiate / arbitrate framework are deliberately skewed to force us to pay for news content at a level far beyond its commercial value to us. Facebook has no way to predict or control our possible liability from the legislation: we have no choice over which parties we deal with, how many parties we deal with, what types of content we can agree to pay for, or what costs publishers incur in producing news content.

The legislation then sets incentives for news publishers to disregard genuine commercial negotiations so they can take advantage of a complex arbitration process that is prejudiced in their favour. Instead of Facebook's investments being determined on the basis of a properly assessed two-way value exchange, payment would be determined by an arbitrator using the highly unusual and ill-suited final offer

² Facebook Newsroom *Bringing People Closer Together* (11 January 2018).

³ Facebook, *Q4 2018 Quarterly Earnings Presentation*, https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q4/Q4-2018-Earnings-Presentation.pdf

⁴ We also note that, if the ACCC had applied its own methodology consistently, the 18 per cent would have been even lower again.

arbitration model. We have two serious concerns with the way the model has been designed:

- The choice of a final offer model of arbitration is highly unusual, given it is not used in any other regulatory setting in Australia. International experience would suggest it is not well-suited to markets with characteristics of dynamism, uncertainty and complexity and is generally limited to simple negotiations like wage disputes. It would be an entirely untested experiment, on a topic as important as the sustainability of journalism.
- Arbitrators cannot consider the benefits brought by Facebook: they are only required by the legislation to look at one side of the two-way value exchange.

Combining the unknown scope of commercial deals with binding price arbitration means our potential liability for costs incurred by other businesses is unknowable and uncapped.

The justification for this approach appears to be the ACCC's view that our current and planned investments in journalism are not enough. This view has been reached in the absence of evidence (and in fact, in the face of contrary evidence that we have provided). We do not consider it the appropriate role of a competition regulator to engineer their preferred commercial outcomes based on their own unsubstantial perception of what a good or service should be worth.

Governments are free to decide if they want to increase the subsidies for news, but this should not be done by arbitrarily extracting value from two private companies (Facebook and Google). It is not sustainable nor rational to arbitrarily target and discriminate against two private, US companies⁵, to make them legally and solely responsible for supporting a public good and solving the long-standing challenges of the Australian media industry.⁶ Artificial constructions of value by punitive and skewed regulatory processes will deter - not increase - overall investment in Australian news.

Secondly, news publishers have much greater control over their content on Facebook than the legislation recognises. Facebook operates a voluntary service. News content appears on Facebook either because publishers post it directly themselves or because they allow people to share it. Publishers exert control over what news they make available on Facebook, and how they choose to monetise that content when Facebook directs traffic back to their website or via the monetisation products that we have built into our services for publishers. They receive these benefits from Facebook for free.

Again, the legislation has disregarded the evidence provided. It grants publishers a material level of control over how we operate many of Facebook's products and features, above what is available to every other content creator or business. The

⁵ B Thompson, 'Australia's News Media Bargaining Code, Breaking Down the Code, Australia's Fake News', *Stratechery*, 20 August 2020, <https://stratechery.com/2020/australias-news-media-bargaining-code-breaking-down-the-code-australias-fake-news/>

⁶ Bloomberg, 'Australia shouldn't make Facebook and Google pay publishers for news', *Bloomberg*, 14 August 2020, <https://www.bloomberg.com/opinion/articles/2020-08-14/australia-shouldn-t-make-facebook-and-google-pay-publishers-for-news>

consequence would be that the legislation would override our ability to build products that best serve the legitimate interests of our users and our business. Any market failure that the ACCC considers to exist here would not merit this level of prescription and an excessive level of control for publishers over how our services are designed and operated. It is highly unconventional for one business' products to be dictated by other companies in this way. It's extraordinary to contemplate that Facebook could be fined tens of millions of dollars for not responding to an email in the specific format dictated by regulations.

Thirdly, there are other concerns with the way the legislation has been designed and the additional obligations around "minimum standards":

- The law cements detailed and complex requirements (including relating to dynamic and innovative products that change regularly) into legislation, which can only be amended by a lengthy Parliamentary process. This sets a deeply concerning precedent for regulating the technology industry. The rationale for moving from a "code" or similar regulatory instrument to a rigid legislation seems to have been punitive.
- The legislation captures products (like Instagram or Facebook News [not launched in Australia]) and product features (including comment moderation) that have never been considered by the ACCC before and have been included without evidence or rationale. Indeed, the legislation requires us to build certain product features solely at the behest of news publishers, at potentially high costs to our business. Instagram in particular is a separate app and service, which is visual-first and is not designed for the distribution of news. By our initial estimates, news accounts are a very small fraction of active accounts on Instagram in Australia and Instagram has a negligible relationship with the distribution of news in Australia. There is no evidentiary basis for its inclusion in the legislation.

Whether by intention or accident, the ACCC has subjected a much broader set of Facebook's products than explained by the legislation. By applying minimum standards to "related bodies corporate", the obligations could be seen to apply to *any* services operated by Facebook, well beyond the scope considered in the Digital Platforms Inquiry or those mentioned in the Explanatory Memorandum.

- The legislation would allow publishers to seek information about the user data we collect. This requirement is unjustified, given the significant data and insights we already make available to them and the low level of awareness among Australian publishers about the data and analytics already available to them. It also grants publishers an extraordinary ability to seek commercially sensitive information. The legislation establishes an unbounded discovery power that could allow publishers to make expansive and detailed requests for information including commercially confidential material, largely unfettered.
- The definition and scope of news as set by this legislation is so broad that it will trigger payment and assign a material role in controlling our services to

businesses that have nothing to do with the underlying public policy objective of promoting Australian journalism.

- The regime gives publishers multiple bites of the same cherry. By subjecting multiple different features of Facebook's products to the arbitration regime (News Feed, Pages, Groups, Instagram and Facebook News [not released in Australia]) allows multiple arbitrations by multiple publishers for the same content. There is nothing in the legislation to prevent publishers from commencing re-negotiation of a commercial agreement settled before the legislation passes.

The entirety of the legislation attracts excessive penalties that are exponentially larger in quantum and broader in application than the penalties under any other competition code in Australia. The penalties are not applied to any specific provision, meaning the ACCC could apply them as liberally and frequently as it decides, no matter how minor the infraction.

Not only is the legislation unworkable for Facebook, but it will not be effective in solving the public policy challenge of the sustainability of Australian news. We believe greater collaboration between digital platforms like Facebook and news publishers is key to solving the challenges facing the Australian news industry, which is why we have proposed a cooperative and representative Australian Digital News Council to air and mediate complaints and concerns from publishers. Instead, the proposed law does not promote greater collaboration but instead seeks to dictate all aspects of our relationships with publishers, incentivises publishers to make unreasonable demands and then pursue an arbitration process that is purposefully skewed in their favour by law, and discourages platforms from bringing new investment to Australia.

This legislative framework also risks media diversity and plurality within Australia, because it favours those publishers who can afford to participate in a complex arbitration process over small to medium publishers or news start-ups that are building innovative business models focused on the future sustainability of journalism. There are also no constraints on the collective bargaining process to protect the interests of small publishers.

Overall, the legislation does not properly account for the reality of the markets in which digital platforms operate. The technology sector is highly dynamic and innovative, with new entrants able to enter the market easily and quickly take market share. For example, when the Digital Platforms Inquiry concluded just over 12 months ago, TikTok barely registered on the ACCC's radar. Now, it is one of the fastest apps of all time to reach 2 billion downloads globally and has an expanding user base in Australia approaching an estimated 2 million people. The growth and expansion of technology companies has been even more pronounced during the current pandemic, when services like Zoom went from a niche and relatively unknown company to becoming a household name.

In our last submission and in every interaction with government, Facebook has aimed to put forward a workable solution that would allow for greater scrutiny and accountability of digital platforms' engagement with publishers, would reflect a

genuine understanding of the value exchange at play, and would unlock substantially greater investment in the Australian ecosystem. Unfortunately, the ACCC has adopted an alternate approach that is not connected to commercial reality, is unbalanced and disproportionate, and wholesale disregards the evidence and regulatory proposals put forward by Facebook.

This legislation is being pursued at a time when countries are fiercely competing for investment and innovation from the technology sector, and putting forward competing visions for the future of the internet. It sets a dangerous precedent for how Australia will approach the challenging public policy issues associated with the digital economy. It stymies Facebook's ability to bring additional investment to Australia and undermines the very objectives it is trying to achieve.

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Facebook's role in the news ecosystem

The draft legislation is based on a fundamentally incorrect argument that Facebook benefits more from the presence of news content on our services than news publishers do. Australian publishers have made ambit claims that the benefit to Facebook is so large that digital platforms should pay publishers an amount between AU\$600 million to AU\$1 billion based on a percentage of our presumed local revenues.⁷ These assertions are not supported by any independent, economic evidence or empirical analysis.

If all factors that contribute to a value exchange assessment are quantified and objectively analysed, the picture is likely to be very different.

News content is highly substitutable for the people using our services (i.e., if there is less news, they will engage with other content) and news does not drive significant commercial value for our business. We have provided evidence to the ACCC that the commercial value we derive from news content in Australia is virtually zero.

The limited commercial value of news to us is not just supported by the evidence we provided to the ACCC; it is evident from the changes we have made to our business over a period of time. In January 2018, we made updates to the News Feed ranking to prioritise posts that spark conversations and meaningful interactions between people.⁸ Because the amount of content that people want to see in News Feed is limited, showing more posts from friends and family meant less public content was viewed, including videos and other posts from publishers or businesses.

If Facebook derived long-term commercial value from news content, then this change should have resulted in reduced user engagement and revenues. This has not happened over the two and a half years since the change was implemented. People do not principally come to Facebook for news and, when they do not see news on the platform, they simply engage with other content.

The design of the arbitration model specifically prevents arbitrators from considering the full picture of the two-way value exchange in making their decisions. It excludes the value Facebook provides to selectively bolster the value exchange factors which run in favour of publishers and, in doing so, goes far beyond what is necessary to facilitate economically efficient outcomes.

Facebook is a voluntary service and publishers choose to make their content available because they derive significant value from our services. News content appears on Facebook either because publishers post it directly themselves or because publishers allow people to share it. Publishers derive considerable commercial value from

⁷ M Mason and J Kehoe, 'Tech giants should pay media \$600m', Australian Financial Review, 14 May 2020, <https://www.afr.com/companies/media-and-marketing/tech-giants-should-pay-media-600m-costello-20200513-p54sgs>; L Shanahan, 'Content bill for Facebook, Google might top \$1bn', The Australian, 14 May 2020, <https://www.theaustralian.com.au/business/media/content-bill-for-facebook-google-might-top-1bn-says-news-corp-australasia-boss-michael-miller/newsstory/f5eae6dc272c0e132f13da3ef1569d92>

⁸ Facebook Newsroom Bringing People Closer Together (11 January 2018).

Facebook driving traffic to their owned and operated websites, and from the monetisation opportunities we provide for the content they choose to share. This includes, free publication and opportunities for potential distribution, customised commercialisation and innovation products, new commercial deals for premium content, and a variety of non-monetary data insights and other programs, like our support for Accelerator programs.⁹

We provided the ACCC with tangible evidence about the benefits we provide:

- While referral traffic totals from Facebook to news publishers vary with the news cycle, Facebook’s News Feed generated approximately 2.3 billion organic referrals to Australian news publisher domains from January through May 2020. Publishers are free to monetise this traffic however they wish. This referral traffic is provided at no cost to news publishers.
- We estimate the value of these organic referrals from January through May to be approximately \$135 million USD (AU\$195.8 million) on the basis of average cost-per-click auction pricing for Australia news publishers’ link clicks on our platform.
- For many years, we have heard from publishers that free distribution is not sufficient to offset the significant impact of technological disruption on their business models. To assist publishers, we launched the Facebook Journalism project in 2017, and have continued to steadily increase our investment and products in the news sector since then. Through these efforts, we have incorporated publisher feedback into the development processes for:
 - Subscriptions: 100% of revenue goes to news publishers
 - In-Stream Ads: From January to May 2020, these publishers earned approximately \$1.5 million USD (AU\$2.1 million) through this program.
 - Instant Articles: Publishers can distribute articles on the Facebook platform via our “Instant Articles” product, which allows various types of ads to be included in the articles.
 - Branded content: Publishers can partner with advertisers to create and post branded content on their Facebook pages and Instagram accounts. Advertisers directly pay publishers for such content and publishers retain 100% of revenue generated.
 - Commercial deals: Facebook has previously entered into concluded commercial deals for new premium content with many Australian publishers.

This value is in addition to the data and insights we provide publishers about the performance of their news content. We provide more than a dozen different tools which can be used by news publishers to gather data and insights on the performance of their posts and advertising campaigns -- and support their operations. We do not currently charge for providing this data.

⁹ Our Accelerator program brings together journalists, product managers, data analysts, and marketers from 11 regional and smaller publishers and industry experts from around the globe to develop strategies for encouraging readers to subscribe and donate. Earlier in 2020 as part of that investment, we provided funding of \$100,000 to Australian publishers for reader revenue projects. So far, this has generated more than AU\$1 million in customer lifetime value for those participants.

Facebook also does not currently charge for any of the costs of providing the infrastructure for the free distribution, nor the data or research and development that we invest to innovate and identify new product solutions for publishers.

The issue of indirect value of news content to Facebook is especially complex and contestable. From all of the data points available, any value that we receive from publishers is outweighed by the significant costs and investment that we make in news relative to this direct and indirect value.

We provide support and invest in the news industry -- not to make a profit -- rather because we believe news is a public good and it is important for society and democracy.

Concerns with the draft legislation

Bargaining framework and arbitration

The draft legislation ignores commercial realities and instead establishes a highly complex and punitive legislative scheme that forces Facebook to pay for news content, beyond our current investment in Australian news by dictating a payment mechanism that is not connected to the genuine commercial value of news to Facebook.

The system then sets incentives for news publishers to disregard genuine commercial negotiations so they can take advantage of a complex arbitration process that is inherently biased in their favour. Instead of Facebook's investments being determined on the basis of a properly assessed two-way value exchange, payment would be determined by an arbitrator using the highly unusual and ill-suited final offer arbitration model. We have two serious concerns with the way the model has been designed:

- The choice of a final offer model of arbitration is highly unusual, given it is not used in any other regulatory setting in Australia. International experience would suggest it is not well-suited to markets with characteristics of dynamism, uncertainty and complexity and generally limited to simple negotiations like wage disputes. It would be an entirely untested experiment, on a topic as important as the sustainability of journalism.
- Arbitrators cannot consider the benefits brought by Facebook: they are only required by the legislation to look at one side of the two-way value exchange.

Our primary concerns with the bargaining framework and arbitration are that:

- The legislation does not encourage genuine commercial discussions before arbitration is triggered.
- Final offer arbitration is an ineffective model to pick for arbitration relating to disputes between digital platforms and publishers.
- The factors to determine an arbitrated outcome are partial and do not allow the arbitrator to assess the full picture of the value exchange between platforms and publishers.

This legislation does not encourage genuine commercial discussions before arbitration is triggered

The legislation has been characterised by the Government as allowing for commercial discussions, and setting a “backstop” that helps resolve an impasse if negotiations fail.

Unfortunately, the detail of the legislation does not reflect this objective: the law applies heavy-handed prescription to *every* stage of a commercial negotiation. From the first contact from a publisher to a platform (which occurs in the form of a notice regulated by the ACCC), through to every single communication between the parties (which must be acknowledged and can be prescribed by underpinning regulations, as well as being subject to potential record-keeping rules), through to a short timeframe

set for negotiation. The legislation's penalties apply to each stage of the discussions. It's extraordinary to contemplate that Facebook could be fined tens of millions of dollars for not responding to an email in the specific format dictated by regulations.

The justification for such prescription is based on an inaccurate characterisation of Facebook's role and position in the news ecosystem. In the ACCC's own Digital Platforms Inquiry report, the ACCC suggested Facebook is responsible for 18 per cent of traffic referrals to news websites, under a narrowly-constructed and artificial market definition that significantly exaggerates the role we play.¹⁰ Notwithstanding this small proportion of referrals, the legislation contains a negotiate / arbitrate framework that is most commonly used only in the case of terms of access by users of natural monopoly infrastructure, a situation vastly different to the highly dynamic and innovative digital industry. It is plainly inappropriate to use the same regulatory models for both essential infrastructure services (such as, ports, railways and airports that by definition involve a natural monopoly and are marked by high infrastructure costs, high barriers to entry and far less dynamic competition) and digital platform services (which have a large numbers of participants and are characterised by low barriers to entry and highly dynamic competition). But even the regulation that applies to monopoly infrastructure assets assumes that the user of the service pays for it, not the other way around as is the case under the currently proposed legislation.

In short, the level of prescription contained in the law is not proportionate even to the ACCC's own findings in the Digital Platforms Inquiry. It would make the regulatory burden involved in engaging in any commercial negotiations between platforms and publishers prohibitively high.

The legislation also discourages genuine commercial discussions. It incentivises publishers to make unreasonable demands and then pursue an arbitration process that is purposefully skewed in their favour by law. As discussed further below, the factors used in deciding arbitration outcomes are substantially biased in favour of news publishers. This creates a strong incentive for news publishers to dismiss or subvert commercial negotiations (such as by putting forward unreasonable demands), in order to activate a process that is more in their favour.

Given the inherent inequity in the design of the bargaining process, the requirement to participate in "good faith" is unlikely to constrain inefficient bargaining tactics by news publishers. Publishers are able to make unreasonable demands entirely legitimately within the process that has been determined.

We believe greater collaboration between digital platforms like Facebook and news publishers will be key to solving the challenges facing the Australian news industry. The features of the bargaining framework are unlikely to encourage collaboration or closer partnership; they are more likely to encourage gamesmanship, ambit claims, and worsening relationships between platforms and publishers.

¹⁰ We also note that, if the ACCC had applied its own methodology consistently, the 18 per cent would have been even lower again.

Final offer arbitration is a highly unusual and ineffective model to pick for arbitration

We are very concerned that the ACCC is uncritically accepting publishers' recommendation of a final offer arbitration model, without providing any justification or evidence for selecting this model based on its merits.

Final offer arbitration is a novel and highly unusual arbitration model for this legislation, especially without any analysis of the potential costs and risks. We are not aware of any regulatory setting in Australia where final offer arbitration is used, and we understand that it is rarely used elsewhere in the world (and, even then, primarily for wage disputes or other straightforward assessments). Facebook would face a unique and untested regulatory regime for arbitration for a novel area of commercial deal-making.

A number of Australian reviews have considered, and dismissed final offer arbitration.

- In 2017, the Gas Market Reform Group considered this approach for disputes about access to gas pipeline infrastructure.¹¹ The Gas Market Reform Group concluded that there are a number of disadvantages to this arbitration, including the high potential of parties gaming the system. Ultimately, the Gas Market Reform Group did not recommend this model.
- In 2019, the Productivity Commission considered final offer arbitration in its review of the economic regulation of airports. The Commission indicated the model would lead to economically inefficient outcomes, and strongly criticised final offer arbitration by saying:

“An individual airline has little incentive to take into account the needs of other airport users in its negotiations with an airport, or in its submissions to an arbitrator. In fact, to the extent that they are competitors, each airline has incentives to make life difficult for the others. For arbitration to be compatible with efficient airport operations, the arbitrator would need to give some consideration to airport users that are not part of the arbitration.

The proposal for FOA collapses at this hurdle. Airlines do not have the information or incentives that would be required to make an offer that is consistent with efficient airport operations. The interests of an individual airline might align with efficient airport operations, but this would be entirely coincidental and could not be relied upon as a feature of FOA.”¹²

In the context of digital platforms and news, the final offer arbitration model has the same fatal shortfalls. As with airlines, an individual news publisher does not have the information or incentive to make an offer that is consistent with the efficient and

¹¹ Gas Market Reform Group, [*Gas Pipeline Information Disclosure and Arbitration Framework - Implementation Options Paper*](#), March 2017, pages 48 to 123.

¹² Productivity Commission, [*Draft Report into Economic Regulation of Airports*](#), February 2019, page 313.

effective functioning of the digital platform, either in its dealings with other media companies or in general. In fact, they are incentivised to try and game the system, rather than engage in good-faith negotiation, to try and maximise their stake on the overall amount of investment Facebook would make in news.

More specific concerns about final offer arbitration include:

- The use of this model will likely lead to random and inconsistent outcomes across different arbitrations, for a number of reasons:
 - As we outlined in our last submission¹³, the “indirect value” that Facebook receives from news content is highly contestable.
 - There is very limited (or no) real-time information available to assist the parties in determining a “reasonable” price.
 - Final offer arbitration is unsuited to situations where the central argument seems to be indirect value. As is already clear, there are very widely diverging views on the issue. Final offer arbitration is unlikely to assist in bridging the gap on such a complex and contestable concept.

The arbitrator is prohibited from independently deciding what price is appropriate. Instead, they are required to pick between two potentially wildly-diverging offers that are likely to adopt materially different assumptions, evidence and methodologies. This further limits the “precedential value” of any determination (i.e. the most that can be said after an arbitral outcome is that the arbitrator decided one final offer was closer than the other to whatever “mark” the arbitrator had in mind – not what was the correct approach or correct methodology).

Given these uncertainties, and the self-evident lack of clarity in the legislation, we expect final offer arbitration would be likely to lead to variable and potentially inequitable outcomes across publishers.

- Final offer arbitration does not encourage parties to work together to reach a shared understanding of value; this model encourages combat and high-stakes gamesmanship to try and succeed in a winner-takes-all decision by the arbitrator. Academic research has suggested final offer arbitration actually leads to **higher** dispute rates than under more conventional forms of arbitration.¹⁴ Research suggests that final offers are especially likely to diverge from one another where there is increased uncertainty about the arbitrator’s

¹³ Facebook, *Response to the Australian mandatory news media bargaining code concepts paper*, 5 June 2020, https://fbnewsroomus.files.wordpress.com/2020/06/submission-facebook-response-to-accs-concepts-paper-on-mandatory-news-code.pdf?fbclid=IwAR1eJfnwdzTkIBKuSWxR_W18R7KTSPio_3H57HXrNTUG8CvHVVaDSrvoi7W4

¹⁴ Orley Ashenfelter, Janet Currie, Henry S. Farber and Matthew Spiegel, ‘An Experimental Comparison of Dispute Rates in Alternative Arbitration Systems’, *Econometrica*, vol. 60, no. 6 (1992), page 1430. This is also supported by David Dickinson, ‘A Comparison of Conventional, Final-Offer, and “Combined” Arbitration for Dispute Resolution’, *ILR Review*, vol. 57, no. 2 (2004), page 299.

assessment - the exact situation we would expect for commercial agreements relating to news content.¹⁵

- Final offer arbitration is particularly ill-suited, when the deal-making is especially complex and where the public interest may be at stake. Although the model proposed in the draft legislation would allow an arbitrator to consider the public interest, there is no mechanism by which the public interest is represented in the consideration process.

The factors to be considered in arbitration are partial

The legislation sets four criteria that must be considered by arbitrators in determining a final outcome:

1. The direct benefit of news content to digital platforms
2. The indirect benefit of news content to digital platforms
3. The cost to news publishers of producing news
4. Whether a particular remuneration would place an undue burden on the commercial interests of the digital platform.

The arbitration model prevents arbitrators from considering the full picture of the two-way value exchange between platforms and publishers in making their decisions. The legislation bolsters the elements of the value exchange which run in favour of publishers and excludes factors that run in favour of platforms.

Firstly, it does not require the panel to consider the value to publishers from their content being on our services as a counterweight to the benefit to platforms. This is an inexplicable omission, especially given we provided quantified data about this to the ACCC.

Secondly, it requires the panel to only consider the publishers' cost and not the cost to Facebook associated with the infrastructure for the free distribution, or the data or research and development that we invest to innovate and identify new product solutions for publishers. It is entirely unclear the basis on which we should be responsible for the costs incurred by publishers in making content that has no particular commercial value for us and which the publisher chooses to place on our platform because of the benefits they obtain.

¹⁵ Steven Brams and Samuel Merrill, 'Equilibrium Strategies for Final-Offer Arbitration: There Is No Median Convergence', *Management Science*, vol. 29, no. 8, pages 927 to 941.

Thirdly, the legislation compels the arbitrator to consider factors that are entirely unrelated to the two-way value exchange. As we indicated in our last submission¹⁶, legislation should not compel an arbitrator to consider a nebulous, complex and highly contestable concept like “indirect value”. The ACCC has drafted a novel and curious calculation for indirect value, by articulating two aspects they consider to be “indirect value”:

- Increased usage of a digital platform’s service
- Public perception benefits arising from the inclusion of Australian news. Any attempt to attribute a price to “public perception benefits” would be unmeasurable and highly subjective.

The legislation does not enable the arbitrator to take into account many other factors that are clearly relevant – in particular, the significant value provided to news publishers by Facebook and the significant cost to Facebook of providing free distribution and the investment in innovative products to assist Australian news businesses to monetise their content on our services.

In only assessing the benefits to digital platforms and costs to news media businesses, final arbitration model cannot be expected to result in outcomes that reflect the true value exchange between Facebook and publishers. Put simply, this one-sided approach means that prices set under the final arbitration offer model will be much higher than the genuine value of the news content.

Scope of products captured

The way the draft legislation is designed and applied to specific Facebook products and features lacks an evidentiary basis, especially in relation to Instagram.

There is no evidence to justify extending this regime to Instagram

Despite the lengthy Digital Platforms Inquiry (which began in 2017) in which Facebook consistently engaged with the ACCC and provided requested information, the ACCC’s concept paper (released in June 2020) was the first ever suggestion that Instagram should be subject to a regime that regulates interactions with news publishers. Instagram is a separate service from Facebook: it is a separate app and separate website, with different functions and uses. It has not been part of the ACCC’s inquiry, nor has the ACCC made any findings about Instagram as a result.

¹⁶ Facebook, *Response to the Australian mandatory news media bargaining code concepts paper*, 5 June 2020, https://fbnewsroomus.files.wordpress.com/2020/06/submission-facebook-response-to-acc-concepts-paper-on-mandatory-news-code.pdf?fbclid=IwAR1eJfnwdzTkIBKuSWxR_W18R7KTSPio_3H57HXrNTUG8CvHVaDSrvoi7W4

We strongly contest the suggestion that Instagram should be included within the ambit of the code. While we do not believe the application of the regime to the Facebook app is justified on the available evidence, the proposed legislative scheme is lacking even further in terms of an evidence base when considering Instagram, for the following reasons:

- Instagram’s very limited role as a participant in the Australian news ecosystem was not covered in the ACCC’s Digital Platforms Inquiry, and the ACCC made no recommendations or findings relating to Instagram and news.

Instagram has been included at this late stage based on a single report released by the University of Canberra in April 2020.¹⁷ The ACCC indicated that they felt Instagram’s inclusion was justified given that, in a self-reported survey within the report, 14% of Australians indicated they received some news about COVID from Instagram in March / April 2020 (an increase versus 9% of Australians who earlier indicated they received general news from Instagram in January / February 2020).

A single survey is not a reasonable basis on which to entirely base public policy decisions about including commercial services in scope of this legislation. On the survey specifically, we note that it only examined which “social media” services people were using for news, and did not examine, for example, the proportion of Australians who may have received news from other digital platforms, like Apple News or email newsletters. The survey also only relates to behaviour since the onset of COVID-19 in Australia six months ago, and cannot be extrapolated to suggest Instagram is or will be a critical service for news publishers beyond the pandemic. It appears instead that news consumption has increased across every digital platform (including beyond those owned by Facebook or Google) and other media during the COVID-19 pandemic. Additionally, it is possible that Instagram’s first efforts to boost authoritative information during a public health crisis (including by inserting prompts that linked to official sources from Australian Government health authorities about COVID-19)¹⁸ may have resulted in the respondents’ perception of Instagram as a source of COVID-19 information, rather than any clear evidence of Instagram as a distributor of news from Australian news businesses.

By our initial estimates, news accounts are a very small fraction of active accounts on Instagram in Australia and Instagram has a negligible relationship with the distribution of news in Australia.

¹⁷ S Park, C Fisher, JY Lee, K McGuinness, Y Sang, M O’Neil, M Jensen, K McCallum, G Fuller, *Digital News Report: Australia 2020*, University of Canberra, 16 June 2020, <https://www.canberra.edu.au/research/faculty-research-centres/nmrc/digital-news-report-australia-2020>

¹⁸ Facebook, *Update on Facebook’s efforts to support the COVID-19 response in Australia and New Zealand*, 23 March 2020, <https://www.facebook.com/notes/facebook-australia-new-zealand-policy/update-on-facebooks-efforts-to-support-the-covid-19-response-in-australia-and-ne/2598576887136235/>

- Even if the ACCC wishes to rely on this single survey as the basis for bringing a new digital service within the proposed legislative framework, we note that the report cites Instagram’s use for general news at 9% of respondents -- lower than Twitter (10%) and significantly less than YouTube (21%). There has been no suggestion by the ACCC, which relies on this report, that Twitter should be subject to the legislation at all, or YouTube should be subject to the arbitration provisions in this legislation.
- Including Instagram in this legislation would also fundamentally misconstrue Instagram’s role as a service. Instagram is a visual-first space where people connect and share using photos and videos. Any “news content” on Instagram is primarily in the form of visual content (photos, videos, graphics) rather than traditional news articles written by journalists. If news publishers choose to have a presence on Instagram, their efforts are typically less focused on news and more focused on marketing to new audiences and establishing brand identity. This is no different to any other businesses that choose to use Instagram.

More importantly, Instagram is not designed for the distribution of news content. As the Head of Instagram, Adam Mosseri, said in *Wired* on November 2019: “We’re going to put a 15-year-old kid’s interests before a public speaker’s interest,” and “When we look at the world of public content, we’re going to put people in that world before organisations and corporations.”¹⁹ For example, Instagram doesn’t allow users to share clickable links in Feed posts on Instagram which drive referral traffic to off-platform websites, such as a publisher’s website. In Instagram Stories, only a small percentage of public figures or notable people can currently share links through a Swipe Up feature.

The ability for people to re-share content on Instagram (such as visuals posted by news publishers) is also significantly limited compared with other digital platforms. While Feed posts can be re-shared as an ephemeral Story which expires after 24 hours, there is currently no ability within Instagram for anyone to re-share another’s Feed post to their own feed, and subsequently to their followers. This means that news, and indeed any third party content, cannot be re-shared or circulated amongst people on Instagram in any permanent way. This emphasises that Instagram is a place for individuals to share their own original photos and videos, rather than a place for “referrals” or sharing of content at scale.

Given the above, we strongly believe there is no basis for including Instagram in any part of the proposed legislative framework.

If the ACCC is going to include new products at this late stage in the legislative process, it should be based on a full and fair re-assessment of all digital platforms who distribute news, including services provided by our competitors in the technology industry (some of whom are far larger globally and more prevalent than Facebook in Australia).

¹⁹ A So, ‘Instagram Will Test Hiding “Likes” in the US Starting Next Week’, *Wired*, 11 August 2019, <https://www.wired.com/story/instagram-hiding-likes-adam-mosseri-tracee-ellis-ross-wired25/>

All services provided by Facebook

In defining a digital platform to be captured, the draft legislation covers “related bodies corporate of the corporation” (s52B(b)). The consequence of this drafting is that, once Facebook Inc is designated by the Treasurer, the entire family of apps owned by Facebook could be considered to be covered by the legislation. This would include applications and services that have no relationship with news content and have never been considered by the ACCC in this context, including our virtual reality business Oculus or upcoming digital wallet app Novi.

From the concepts paper and explanatory memorandum to the legislation, it does not appear to be the ACCC’s intention to capture these services. To avoid unintended overcapture, the draft legislation should be amended to only apply to services that are explicitly specified by the Treasurer.

Features of the Facebook app

The legislation applies to a number of different products and features within the Facebook app, including:

- **News Feed.** News Feed aggregates content that is posted by Pages, posted in Groups or made available through Facebook Watch, as well as updates from family and friends. By separating out News Feed as a separate product to Pages, Groups or Watch, the legislation is either (1) allowing publishers to have multiple bites of the cherry by allowing multiple arbitrations by multiple publishers for the same content; or (2) suggesting that payment should be made for third-party links that are posted by Facebook users. We have provided evidence to the ACCC that the value of news is low to Facebook, and much more likely brings greater benefits to publishers than Facebook. The inclusion of News Feed, combined with the selective factors favouring publishers in the arbitration, demonstrates the economic and logical fallacy at the heart of the legislation.
- **Pages and Groups.** There has been no specific analysis of Facebook Pages or Groups that contribute to the ACCC’s finding of bargaining power imbalance. This is the first time Facebook Groups have been mentioned in the ACCC’s inquiry. It is not clear and no evidence has been provided by the ACCC for their inclusion. Pages can be created by news organisations, as well as the multitude of businesses, NGOs, governments, politicians, and other organisations that use Facebook. News organisations have full control about the content that they put on their Page, and including Pages in the legislation could allow publishers to “write their own cheques” by having full control over the content that is posted and then demanding payment for it. By including Pages and Groups, whose content is already included in News Feed, the draft legislation allows multiple arbitrations by multiple publishers for the same content.

- **Facebook News**, which has not yet launched in Australia. Under the right regulatory settings we had signalled our intent to bring Facebook News to Australia. However, we do not expect it will be possible under this regulatory framework. Facebook News is a new, innovative product that Facebook has developed and the legislation proposes establishing onerous regulation to cover it before it has even launched in the country. It is a product where we surface the news content publishers put on Facebook voluntarily, and Facebook pays news publishers for incremental content to create a more compelling experience for consumers. There has been no analysis as to why and how any market power or bargaining imbalance issues relate to Facebook News.

Definition of news businesses and news content

The definition and scope of news as set by this legislation is so broad that it will trigger payment and assign a material role in controlling our services to businesses that are unrelated to the underlying public policy objectives of the law. We have already seen organisations publicly proposing they should be eligible under the law, without any connection to public interest journalism or the original intent of the Government.

The definition of core news content is so broad and vague it is almost impossible to ensure compliance and will inevitably result in large, overreaching ambit claims from news publishers. For example, the definition includes content that relates to “community and local events”. Strictly speaking, this could cover a newsletter that advertises upcoming functions (events), so long as it was created by a journalist. The risk is high that the definition will result in unintended expansion of the legislation beyond its intended application.

Instead, “news business” should be defined in a way that is knowable and predictable from the outset of the legislation. Our previous submission proposed a tighter definition that could more clearly cover the businesses covered by the legislation: any organisation that is a member of the Press Council, a regulated broadcaster under the ACMA’s codes of practice or an Australian organisation registered in news publisher lists maintained by the digital platforms (for example, Facebook’s News Publisher Index) or an Australian organisation that is recognised as a news publisher by a highly reputable third party source (such as Nielsen).

Penalties

While we understand that the Government desires strong penalties associated with breaches of the law, the penalties contained in this legislation are excessive. They are exponentially larger in quantum and broader in application than the penalties under any other competition code in Australia.

The penalties also attach to every one of the obligations in the legislation, even those obligations that are unclear, highly subjective, or are minor procedural requirements. This could include examples as minor as:

- Not responding to an email from a news publisher in the correct format (s52R)
- A description about a very technical algorithm change is not judged to be “readily comprehensible” (s52N(2)(b))
- Not acknowledging a communication made by a registered news business point of contact (s52R(d))
- Not publishing an annual proposal relating to promoting original news content [the penalty would apply even if the platform does not publish a new proposal because a satisfactory outcome has been reached with publishers years early] (s52T(2))

Our concern is exacerbated further by specifying that breaches will be considered as separate as against each publisher and, potentially, in respect of separate issues

notified for bargaining and separate arbitrations in respect of different digital platform services.

This creates enormous uncertainty and financial risk for any digital platform covered under the legislation. It is possible to use penalties as a strong incentive for companies to comply without this very high level of uncertainty. The heavy-handed nature of the penalties in this draft legislation disincentivises investment in Australia.

Prescription about how our products operate

The legislation grants publishers a material level of control over how we operate many of Facebook's products and features. This level of control would exceed what is available to every other content creator or business, and would override our ability to build products that best serve the legitimate interests of our users and our business.

Some of the ways that the interests of publishers would be elevated above every other user of our services (and our own business) include:

- **User data.** Facebook already makes a large amount of aggregated user data available to news media businesses to assist them in monetising their content and services. Our conversations with publishers throughout this process have revealed there is generally low awareness or usage of the data we already make available. There is no need for a regulatory intervention to require a list of all data collected by Facebook, given that we will not provide most of that data in order to protect users' privacy, and that news publishers are not using the aggregated, anonymised data already available to them.
- **Ranking of original news content.** Given that Facebook has already announced we will be ranking original news content higher²⁰, it is difficult to see why this change is necessary. We also do not believe it is the role of regulators or governments to interfere with the content that people choose to see in their News Feed. It sets a highly concerning precedent if regulators felt they could dictate certain types of content to appear more often or regularly than others. This concern is particularly acute in relation to government intervention in what news content people should and should not see more of. Even beyond interfering with content, it sets a concerning precedent for a government to mandate that a platform develop and implement certain ranking changes at their behest, which would force Facebook to deviate from its normal process of only developing ranking changes after careful study of user value, technical feasibility, and other issues.
- **Ranking of paywalled content.** This provision of the legislation demonstrates a fundamental misunderstanding about how Facebook operates. We use thousands of signals to determine the ranking of content in News Feed - whether or not a piece of news content is paywalled is not one of them. We do not envisage this requirement relates at any point to Facebook.

²⁰ C Brown, *Prioritizing Original News Reporting on Facebook*, 30 June 2020, <https://about.fb.com/news/2020/06/prioritizing-original-news-reporting-on-facebook/>

- **Display of advertising.** This provision is highly vague and it is unclear what the issue or concern is that it seeks to address. This potentially implicates all aspects of our business without any clear evidence base, over the course of the ACCC's Digital Platforms Inquiry, as to why this aspect of our business needs to be regulated.

Algorithm notification

Facebook supports in-principle a reasonable requirement to notify publishers when it makes changes to the News Feed algorithms with a significant impact on news content. As the Concepts Paper acknowledged, though, it is important that such a requirement be limited to truly "significant" changes, given the sheer number and frequency of ranking improvements Facebook makes to enhance our users' experience on the platform, most of which have relatively minimal impact on news publishers.

We have already advised the ACCC that we are amenable to providing notice of ranking changes that have a "significant" impact on users' actual engagement with news content. Given the frequency and complexity of algorithm changes, it is not practicable to provide this notice for every ranking change, nor is it practicable to provide advance notice of these changes. As previously explained, Facebook already provides public notice of significant ranking changes at the time a change is set to go into effect. Also, it may not be possible to advise news businesses how to minimise the effects of ranking changes, because this could result in the gaming of the system.

In Facebook's view, a change should only be deemed to likely result in a significant impact when, using best efforts, Facebook reasonably predicts, based on data analysis of experimentation, that the ranking change will result in a change to overall "engagement with News Content" from the News Publishers by more than +/- (plus or minus) twenty (20) percent over a seven-day (7) period (the "Relevant Period") relative to the seven-day (7) period directly preceding the Relevant Period. Engagement with News Content could be measured by either clicks on links on Facebook that bring a user to the website of a News Publisher or watch time of videos posted onto Facebook by the News Publisher. A predicted 20% change in *either* metric would be considered "significant."

Before Facebook launches a ranking change, it can only predict likely impact. We may use small experiments to extrapolate what the impact might be for a given change. Because Facebook cannot know the actual impact of any given ranking change before implementing it, the code should only require platforms to make best efforts in predicting which changes will cross the threshold and to provide notice in good faith based on those efforts.

Additional areas of significant concern

Information requests from publishers

The legislation contains extraordinary provisions that compel Facebook to provide news publishers any “information and data relating to the digital platform service that is relevant to assessing the benefit that digital platforms receive from covered news content” of Australian news publishers.

The commercial data sharing provisions also assume that Facebook users belong to news publishers and require us to share data that we have already told the ACCC we do not keep in the regular course of our businesses. Even if we did create the data, it would be unduly onerous on us to produce and difficult to see how this would not amount to the transfer of commercially sensitive information or trade secrets to our competitors for advertising revenue.

These are extremely wide information sharing requirements with very limited, inadequate and unclear confidentiality protections – news businesses can ask Facebook to provide information about the “value of news to our platform”. There are no bounds or clarity around the scope of this request. It goes far beyond conventional standards of information provision between commercial entities (for example, in discovery in litigation). With compliance backed by very large penalties, it’s effectively a power for private parties to issue a mandatory information request free of meaningful and clear confidentiality carve-outs.

Publishers could make expansive, detailed and largely unfettered requests for information including commercially confidential material, with the information and data Facebook must provide as to benefits it receives from news content, or whether a payment would create an undue burden. There appears to be no dispute resolution mechanism available to parties, for example, where a request is overbroad, oppressive or unreasonable, and no time limits for compliance.

Public comment moderation

This is the first time this issue has been raised by the ACCC in the three years since the Digital Platforms Inquiry and is not related to competition or consumer protection law. It intends to prescribe a specific product design feature in Australian legislation, without any consultation on the work Facebook already has undertaken in relation to this functionality both with Australian news publishers and with policy makers in relation to defamation reform. Any business should be concerned about this level of micro product design being contained with legislation, especially in relation to a feature that is likely to be subject to innovation and change in future.

This level of detailed prescription (accompanied by the ambiguity about how a regulator may interpret whether a product solution is sufficiently “flexible”) imposes an undue and onerous burden on companies to develop customised products and features specifically for Australian news businesses. This would be a deterrent and barrier to investment, and may stifle innovation or the deployment of state of the art

features. For example: Facebook may develop a better way to address the concern of publishers relating to potential defamatory content on their Pages, but the requirement may block innovation in this sense and result in a worse experience for all.

Collective bargaining

The legislation allows any publisher to join with other publishers for collective bargaining. Facebook has concerns with any suggestion that coordination between competing publishers is necessary to facilitate commercial arrangements, especially if collective bargaining was to involve sophisticated global media companies.

A collective bargaining framework does not create the purportedly intended incentives to reach agreements that benefit the news media industry as a whole, because the interests and needs of the industry vary so widely that a one-size-fits-all approach subjects the preferences of the many to the demands of the few. There is a risk that collective bargaining arrangements would disadvantage small to medium sized publishers and effectively lead to greater concentration within the news industry. Finally, there is a serious risk that collective bargaining would likely result in severe detriment to the public, if this avenue is available to large news publishers. Coordination involving competing players is frowned upon in competition law for a reason: they likely harm competition overall, drive up prices, shelter companies from competition, and the ultimate harm falls directly on consumers.

If the final legislation proceeds with collective bargaining, it should only be introduced after thorough analysis, and be reserved for the only instance where this model might bring some economic efficiency: small or very small publishers who fall under clearly defined and reasonable size thresholds.