



Law Council
OF AUSTRALIA

Draft news media bargaining code

Australian Competition and Consumer Commission

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the Law Society of South Australia and its Legal Technology Committee, as well as the Intellectual Property and Privacy Law Committees of the Law Council's Business Law Section, for their assistance in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (**the ACCC**) regarding the exposure draft of the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (**Draft Code**). The Draft Code was released on 31 July 2020 and provides for a mandatory news media and digital platforms bargaining code.
2. Broadly speaking, the purpose of an industry code is to regulate the operations of an industry to improve access, operability or accountability. While the Draft Code attempts to improve access and accountability to an extent, its coverage of stakeholders and content is limited and may be unlikely to result in a general improvement. Further, the Draft Code fails to address many of the issues relating to access and consumer protection that have been raised by the Law Council and by the ACCC itself in its *Digital Platforms Inquiry – Final Report (Digital Platforms Report)*.
3. Overall, the Draft Code appears to be a special interest response rather than a means of improving the industry for consumers or for participants generally.
4. The Law Council encourages the ACCC to consider the following recommendations as they relate to the operation of the proposed Draft Code:
 - The Draft Code should be amended to improve the position of consumers and their interactions with digital platforms and news services, including with respect to privacy and in a manner consistent with the recommendations from the Digital Platforms Report relating to safeguarding consumers' privacy.
 - Privacy related recommendations from the Digital Platforms Report and recommendations dealing with portability should be the subject of a reference to the Australian Law Reform Commission (**ALRC**) prior to implementation. In the meantime, there should be no erosion of existing protections as afforded under the *Privacy Act 1988* (Cth) (**Privacy Act**). The approach to reform should:
 - reinforce the need for technological neutrality;
 - support harmonisation of various industry specific or state-based regimes;
 - clarify (and align where possible) how the regime in Australia aligns, with the General Data Protection Regulation (**GDPR**); and
 - recognise that privacy is a human right that operates in addition to consumer rights and complements these. It is not supplanted by the addition of consumer rights as proposed.¹
 - The Draft Code should be amended so that it is not restricted in scope to registered news business corporations of a certain size, news content only created by journalists and news content which excludes industry-specific material.
 - The Draft Code should be amended to provide:

¹ See, for example, the Law Council's commentary on relevant recommendations made by the Digital Platforms Inquiry at [16] to [36] of the Law Council of Australia, 'Submission to the Treasury on Digital Platforms Inquiry' (18 September 2019) at <<https://www.lawcouncil.asn.au/docs/4cb7d4fe-d522-ea11-9403-005056be13b5/3686%20-%20Digital%20Platforms%20Inquiry.pdf>> (**Submission on the Report**).

- for the aggregation of information which a digital platform corporation must provide a news business corporation under section 52Y to protect commercial in confidence information; and
 - a definition of 'trade secret' based upon the terms of article 39.2 of the *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)*.
- The Draft Code should be amended to clarify the meaning and operation of the non-discrimination provision at section 52W. This includes:
 - permitting discrimination in the treatment of certain material which is contrary to Australian law, provided this provision is carefully calibrated to avoid compromising the freedom of speech that is vital for engaging in public debate and informing democratic decision-making;
 - clarifying the current language which prohibits discrimination 'in relation to the application of this Part'; and
 - specifying that non-registered businesses may not be discriminated against by the responsible digital platform corporation for a digital platform service for not registering under the Draft Code.
5. Further, the Intellectual Property Committee of the Law Council's Business Law Section (**Intellectual Property Committee**) has made specific suggestions as to how the Draft Code could be improved, namely:
- Amending section 52ZP of the Draft Code so that:
 - the benefit, both direct and indirect, which the registered news business corporation derives from the inclusion of its news source in the digital platform service is included as a matter that must be considered under this section; and
 - whether or not the 'use' of the news in question involves an exercise of copyright is included as a matter that must be considered under this section.
 - The Draft Code should address whether or not, and how, authors of news content should receive some form of remuneration for the presently unremunerated use of their work.

Background to consultation

6. In June 2019, the ACCC released the Digital Platforms Report which, at the Australian Government's request, looked at the impact of digital platforms on consumers, businesses using platforms to advertise to and reach customers, and news media businesses that also use the platforms to disseminate their content. It also focussed particularly on the impact of digital platforms on the choice and quality of news and journalism.²
7. On 18 September 2019, the Law Council made a [submission](#) to the Treasury's stakeholder consultation on the findings and recommendations of the Report (**Submission on the Report**). The Law Council recognised that many digital platforms have achieved an extraordinary level of integration into the daily lives of Australian

² See, ACCC, 'Digital Platforms Inquiry' (Final report, June 2019) (*'DPI Report'*).

citizens, importing the responsibility to operate them in a way that protects a person's privacy (unless the right to privacy is actively waived).³

8. The Law Council understands that in December 2019, and as part of its response to the Digital Platforms Report, the Australian Government directed the ACCC to assist it to develop voluntary codes for the purpose of addressing bargaining power imbalances between digital platforms (specifically, Facebook and Google) and media companies.⁴ It had advised that if this could not be achieved in the requisite time, it may consider the creation of a mandatory code.⁵
9. Noting that the coronavirus has exacerbated existing pressures on the Australian media sector by causing a sharp decline in advertising revenue, the Government announced on 20 April 2020 that it had directed the ACCC to develop a mandatory code of conduct of the kind described above, namely, a bargaining code.⁶
10. On 19 May 2020 the ACCC released the [Concepts Paper](#). The Concepts Paper stated that the ACCC was drafting the bargaining code in close consultation with the Departments of Treasury and of Infrastructure, Transport, Regional Development and Communications.⁷
11. Incorporating feedback on the Concepts Paper, the Draft Code (which has been published alongside a [Q&A](#) resource and [relevant explanatory materials](#)) proposes amendments to the *Competition and Consumer Act 2010* (Cth) which would allow the Treasurer to make a determination by legislative instrument specifying that:
 - a corporation which operates or controls a digital platform is a 'designated digital platform corporation'; or
 - a digital platform service of such a corporation is a 'designated digital platform service'.⁸
12. The Draft Code provides that in making the above determination, the Treasurer must consider 'whether there is a significant bargaining imbalance between Australian news providers and the group comprised of the corporation and all of its related bodies corporate'.⁹ The Government has advised that the Draft Code will only initially apply to Facebook and Google.¹⁰
13. The effect of being the subject of a determination is significant because the Draft Code imposes obligations on digital platform services and/or corporations, in respect of a relevant registered news business.¹¹ Amongst others, obligations include:
 - giving explanations of certain information to the news business (e.g. a list and explanation of the data that the digital platform service collects about the registered news business' users);¹²

³ *Submission on the Report* (n 1) 5.

⁴ The Hon Josh Frydenberg MP and the Hon Paul Fletcher MP, *ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies* (20 April 2020) ('*ACCC mandatory code*').

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Australian Competition and Consumer Commission, *Mandatory news media bargaining code: Concepts paper* (19 May 2020) 1 ('*Concepts Paper*').

⁸ [Treasury Laws Amendment \(News Media and Digital Platforms Mandatory Bargaining Code\) Bill 2020](#) ('*Draft Code*') s 52C(1).

⁹ *Draft Code* (n 8) at s 52C(2).

¹⁰ ACCC, '[Q&As](#): Draft news media and digital platforms mandatory bargaining code' (July 2020) 3.

¹¹ *Draft Code* (n 8) at s 52L.

¹² *Ibid* s 52M(2)(a).

- notifying the news business of changes planned to be made to an algorithm of the digital platform service;¹³ and
 - developing a proposal to recognise original news covered content.¹⁴
14. The Draft Code also imposes obligations on registered news business corporations, including to set up a point of contact for a responsible digital platform corporation.¹⁵
15. The bargaining provisions in the Draft Code allow a news business corporation to bargain with a digital platform corporation about the coverage of the news business corporation's content by the digital platform service, including with respect to payment.¹⁶ The Draft Code sets out various 'bargaining obligations' held by the various parties, for example, in relation to the provision of data for assessing the costs incurred by a registered news business in creating covered news content.¹⁷ The Draft Code also provides for the arbitration of issues relating to remuneration for a registered news business for its content being made available by a digital platform service.¹⁸

Proposed amendments to Draft Code

Final offer arbitration and determination of remuneration

16. The Intellectual Property Committee commends the adoption of the 'final offer arbitration' process to be implemented by proposed section 52ZO of the Draft Code. This appears to the Law Council to be a useful method to avoid the drawn out, expensive and delayed processes with which the Copyright Tribunal of Australia has become entangled.
17. However, the Intellectual Property Committee considers proposed section 52ZP of the Draft Code to be deficient. This section specifies the matters that the arbitral panel must consider when deciding the remuneration payable to the registered news business corporation for the use of covered news content by the digital platform service. An omission from the factors to be considered is the benefit, both direct and indirect, which the registered news business corporation derives from the inclusion of its news source in the digital platform service.
18. The Intellectual Property Committee notes that the registered news business corporation will derive benefit, otherwise it would use existing tools (such as robot.txt) to prevent its news source from being included in the digital platform service. Indeed, the proposed scheme is premised on the basis that the news business requires access to ensure end-users can find its news items.
19. Therefore, the Intellectual Property Committee notes that the failure to include the benefit derived by the registered news business corporation in the remuneration calculation will mean that any remuneration will not properly or fairly reflect the value exchange in the transaction.
20. In addition, the matters listed under section 52ZP do not take into account whether or not the 'use' of the news in question involves an exercise of copyright. As noted at paragraph 25 below, this is a significant difference to the press publisher's right introduced in the

¹³ Ibid s 52N.

¹⁴ Ibid s 52T.

¹⁵ Ibid s 52U.

¹⁶ Ibid s 52Y.

¹⁷ Ibid s 52ZC.

¹⁸ Ibid s 52ZF.

European Union (EU) by the Directive on Copyright in the Digital Single Market, Directive (EU) 2019/790 (DSM Directive).

21. This failure may also have ramifications under the *Commonwealth of Australia Constitution Act 1900 (the Constitution)*, and reference should be made to the 5 June 2020 submission by the Law Council's Business Law Section on this point.¹⁹ As stated in that Submission, to the extent that a digital platform's use of the news content in question is not an infringement of copyright, an obligation to make a payment for that use which is imposed by regulation may constitute a tax and be potentially invalid under the principles established in the *Blank Tapes* case.²⁰
22. The Intellectual Property Committee notes that in *Blank Tapes*, a majority of the High Court held that an obligation to pay to a collecting society a 'royalty' on sales of blank tapes was not in truth a 'royalty' as the payment was not made for use of copyright. The obligation to pay was, therefore, a tax. The legislation imposing it was invalid under section 55 of the Constitution because it did not deal with the imposition of the tax only. It also contravened section 81 of the Constitution as the money was not paid into the Consolidated Revenue Fund, as required under that section. The majority also noted that, if the law did not impose a tax, it would have been invalid as an acquisition of property on other than just terms.
23. On this basis, the Intellectual Property Committee has reiterated the necessity for any price to be imposed on Google and Facebook to, if not a tax, be carefully calibrated to avoid contravening this prohibition.
24. As a separate point, the 'price' payable could well be different depending on whether the 'use' is of the snippet typically found in an organic search or, rather, the reproduction of a whole article or report.
25. Finally, the Intellectual Property Committee notes that the Draft Code has obvious antecedents, at least conceptually, in article 15 of the DSM Directive and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. Unlike the scheme proposed in the Draft Code, however, the DSM Directive:
 - is carefully targeted at uses of copyright, including in the following ways:
 - the press publisher's rights do not extend to hyperlinking; and
 - the press publisher's rights do not extend to the use of individual words or very short extracts of a press publication;²¹
 - does not apply to material published before 6 June 2019 (that is, before the DSM Directive came into force) and applies to particular news items only for two years following publication; and
 - requires the author(s) of the applicable news item to receive 'an appropriate share of the revenues' paid by way of remuneration.
26. Noting the EU's requirement that authors of the news content receive an 'appropriate share' of the remuneration, the Intellectual Property Committee is unaware of any consideration being given in the Draft Code as to whether or not, and how, authors should

¹⁹ See, Law Council of Australia Business Law Section, 'Submission on ACCC mandatory news media bargaining code concepts paper' (5 June 2020), <www.lawcouncil.asn.au/resources/submissions/accc-mandatory-news-media-bargaining-code-concepts-paper>.

²⁰ Ibid, at [4]-[10]. See, also, *Australian Tape Manufacturers Association Ltd v The Commonwealth* [1993] HCA 10; 176 CLR 480.

²¹ See also, recital 57.

receive some share of the remuneration for the presently unremunerated use of their work.

Recommendations (as suggested by the Intellectual Property Committee):

- **Section 52ZP of the Draft Code should be amended so that:**
 - **the benefit, both direct and indirect, which the registered news business corporation derives from the inclusion of its news source in the digital platform service is included as a matter that must be considered under this section; and**
 - **whether or not the ‘use’ of the news in question involves an exercise of copyright is included as a matter that must be considered under this section.**
- **The Draft Code should address whether or not, and how, authors of news content should receive some form of remuneration for the presently unremunerated use of their work.**

Consumer rights and privacy issues

27. The Draft Code does not appear to implement measures to respond to the consumer rights and privacy issues which the Law Council raised in its earlier Submission on the Report.²² Rather, as foreshadowed in the Concepts Paper, the Draft Code is limited to addressing bargaining power imbalances between Australian news media businesses and digital platforms.²³ It focuses on access to user data, notification of changes and the prospect of remuneration in some form, for a small subset of news businesses.
28. The Law Council acknowledges the recognition by the ACCC in the Concepts Paper that ‘bargaining power imbalances exist in other contexts, including in other commercial relationships involving digital platforms’.²⁴ The ACCC explains the Draft Code’s focus on the imbalances between Australian news media businesses and digital platforms by the fact that the production and dissemination of news provides broad benefits to society beyond those individuals who consume it.²⁵
29. However, the Concepts Paper noted that any data-sharing mechanisms in the Draft Code should ‘appropriately address issues of consumer consent’ and highlighted ‘the importance of protecting the privacy of individuals’ as a ‘primary issue to consider’ in developing a code in relation to the sharing between commercial entities of data.²⁶
30. This aligns with the Law Council’s position, as set out in its Submission on the Report, that the approach to reform should align with the fact that privacy is a human right that operates in addition to (and complements) consumer rights.²⁷
31. The Explanatory Memorandum to the Draft Code notes that any disclosure of data under draft section 52M must comply with the Privacy Act. Section 52M provides a ‘minimum standard’ for a digital platform service to adhere to in giving the relevant registered news

²² See, Law Council of Australia, ‘Submission to the Digital Platforms Inquiry’ at 6-8.

²³ See, *Concepts Paper* (n 7) at 1.

²⁴ *Ibid.*

²⁵ See, *Concepts Paper* (n 7) at 1.

²⁶ *Ibid* 17.

²⁷ At [17].

business certain information about the data that the service collects about the business' users, through users' engagement with the service's covered news content.²⁸

32. The Law Council objects not to this note, which is supported in principle, but rather to the failure to codify it in the Draft Code itself. The Draft Code makes no explicit reference to consumers' privacy rights in the context of data or information-sharing here. Users of a registered news business may have a legitimate interest in the data collected about them when they use service platforms, and what data (or information relating to that data) is supplied back to news services. However, this is not captured in the Draft Code.
33. In the Law Council's view, the Draft Code does not include new measures to improve the position of consumers and their interactions with the platforms and news services. If privacy concerns are not to be addressed in the Draft Code, it is important that other recommendations from the Digital Platforms Inquiry in respect to safeguarding consumers' privacy are appropriately considered in the near term.

Data portability

34. There is no mention in the Draft Code or Explanatory Memorandum of any requirement for data portability. As raised in the Submission on the Report, the Law Council considers that there is potential to achieve a greater impact in encouraging competition by mandating interoperability standards, and it is submitted that further review is needed to determine how this would best be achieved. As an example of similar provisions in another industry, the Consumer Data Right which is currently being implemented in relation to the financial sector will, it is hoped, significantly improve customers' ability to move between product offerings.²⁹
35. The ACCC deferred considering related provisions in the Digital Platforms Report on the basis that platforms such as Google and Facebook already provide a mechanism for users to export their data and the rate of utilisation of this functionality is low (including because users do not wish to migrate to other platforms that do not have the same reach).
36. However, the Law Council submits that mandatory standardisation of data transfer for social media platforms, assuming a suitable model can be developed, could increase the speed at which alternative platforms can be developed and gain sufficient reach to be viable alternatives for consumers. To this end, the Law Council repeats its support of the ACCC's undertaking in the Digital Platforms Report to reconsider this issue in the future.³⁰

Recommendations:

- **The Draft Code should be amended to improve the position of consumers and their interactions with digital platforms and news services, including in respect to privacy and in a manner consistent with the recommendations from the Digital Platforms Report relating to safeguarding consumers' privacy.**
- **Privacy related recommendations from the Digital Platforms Report and recommendations dealing with portability should be the subject of a reference to the Australian Law Reform Commission prior to implementation. In the meantime, there should be no erosion to existing**

²⁸ At [1.76].

²⁹ The Treasury, 'Consumer Data Right' (2019) <<https://treasury.gov.au/consumer-data-right>>. Note, although customers have always been able to download bank statements and export 'csv' files, mandatory standardisation of the way financial data can be transferred is expected to significantly increase the ease with which customers can change banks.

³⁰ See, *DPI Report* (n 2) at 116; *Submission on the Report* (n 1) at [9].

protections as afforded under the *Privacy Act 1988* (Cth). The approach to reform should:

- **reinforce the need for technological neutrality;**
- **support harmonisation of various industry specific or state-based regimes;**
- **clarify (and align where possible) how the regime in Australia aligns, with the General Data Protection Regulation; and**
- **recognise that that privacy is a human right that operates in addition to consumer rights and complements these. It is not supplanted by the addition of consumer rights as proposed.**

Scope of the Draft Code

Subject of news content and size of corporation

37. The Law Council considers that the definitions of ‘registered news business corporation’ and ‘core news content’ inappropriately limit the coverage of the Draft Code to news produced by journalists at large, or relatively large, organisations.
38. To be registered under section 52E as the registered news business corporation for a registered news business (a prerequisite to coverage under the Draft Code) the applicant corporation must, amongst other things, meet ‘the revenue test’ set out at section 52G. Namely, its annual revenue must exceed \$150,000 either for a particular year, or for at least 3 of the 5 most recent years for which it has annual accounts.
39. This requirement appears to deliberately preclude small news organisations from a right to obtain user data, a power which may be particularly valuable to a news organisation when starting out.
40. Another prerequisite to registration is that the news source creates and publishes content that is ‘predominantly core news content’.³¹ Amongst other things, core news content must be created by a journalist, a term which is not defined. It must also record, investigate, or explain issues that are ‘of public significance for Australians,’ are relevant in engaging Australians in public debate and in informing democratic decision-making, or relate to community and local events.
41. Articles produced by academics are excluded (as specified at clause 1.67 of the Explanatory Memorandum to the Draft Code), as is industry-specific material. Only opinions and editorials produced by journalists are included. This may have the effect of limiting (and even actively inhibiting) opportunities to promote competition with large, established organisations. It is not clear why the sources of news content should be so limited, and the Law Council considers this restrictive application may not be appropriate for an industry code.

Sharing of commercial in confidence information and trade secrets

42. Under section 52Y of the Draft Code, a news business corporation may notify a responsible digital platform corporation that it wishes to bargain over one or more issues in relation to the covered news content that the digital platform corporation makes available. Where such notification is made, the news business corporation may request

³¹ See, *Draft Code* (n 8) at s 52H.

the responsible digital platform corporation to give it information relevant to assessing the benefit which the platform obtains from all Australian news services.³²

43. The Intellectual Property Committee considers that such information should be aggregated in such a way that the benefit derived from specific organisations cannot be identified. If traced to a specific organisation, this information may amount to commercial-in-confidence information that would provide an unfair benefit to the requesting organisation. It is considered that subsection 52ZC(7), which states that information need not be given if its publication would reveal a trade secret, does not adequately guard against this risk.
44. Indeed, it is appropriate and important to make protections for valuable confidential information, as Australia is obliged to do under article 39 of the TRIPS Agreement. However, the Intellectual Property Committee is concerned that it may not be effective for the protections under section 52V and subsection 52ZC(7) to adopt the term 'trade secret' in an attempt to delineate information which a digital platform may refuse to disclose from other confidential information which would ordinarily be protectable.
45. First, the term 'trade secret' is not a recognised and defined term under Australian law. Australian courts have repeatedly stated that the term is ambiguous and imprecise, and does not adequately capture all the species of confidential information of sufficiently high importance to require protection.³³ The adoption of the term will, therefore, lead to considerable uncertainty and potentially significant harm (as well as expense) through unwarranted disclosure of properly protectable information.
46. Secondly, the term 'trade secret' is a term used under United States law. For example, it has been defined in the Defend Trade Secrets Act 2016 (US), 18 US Code §1839(3) as follows:

...(3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information...

47. The Intellectual Property Committee notes that a similar definition has been adopted in the EU under Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, at art. 2(1):

...'trade secret' means information which meets all of the following requirements:

³² Ibid at ss 52Z, 52ZC.

³³ See, for example, the extensive discussion by Campbell JA in *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172; 73 IPR 32 at [128] – [141]; and *GlaxoSmithKline v Ritchie* (2008) 77 IPR 306 at [49]–[50].

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret...

48. The EU definition is in effect the definition of what is required to be protected under TRIPS Agreement at article 39. It is also largely consistent with the concept of protected confidential information applied by the courts in Australia.³⁴
49. The Intellectual Property Committee notes that Australian courts have identified a range of factors which may require consideration in determining whether any particular claimed information warrants legal protection. Hodgson JA referred to one such illustrative list in the case of *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172; 73 IPR 32.³⁵ As Campbell JA pointed out in that case, however, while such lists are aids to decision-making, they are neither exhaustive nor necessarily applicable in any particular situation.³⁶
50. Taking into account the US and EU definitions of 'trade secret', the Intellectual Property Committee considers that article 39.2 of the TRIPS Agreement provides an appropriate definition of that term for inclusion in the Draft Code which is also consistent also with the approach of Australian courts.

Non-discrimination provision

51. The Intellectual Property Committee notes that the non-discrimination provision at section 52W provides that the responsible digital platform corporation must not discriminate against a registered news business 'in relation to the application of this Part [the Draft Code]', and must not discriminate between registered and non-registered news businesses 'in relation to the application of this Part [the Draft Code]'
52. The Intellectual Property Committee further notes that 'discriminate' is an ambiguous and uncertain term. Further, it is wholly unclear what discrimination 'in relation to the application of this Part' might mean given the nature of the legislative provisions contained within the Draft Code. These provisions do not appear to impose any obligations on responsible digital platform corporations specifically with respect to the indexing, display or presentation of news content itself.
53. The Intellectual Property Committee is also concerned by the uncertain scope of the obligation imposed by section 52W. For example, it is possible that circumstances may arise where an unregistered news business could be making available material contrary to Australian law. An example could be footage of the March 2019 Christchurch terrorist attack. Discrimination in the treatment of such material, where it is contrary to Australian law, should be permissible, but it is unclear from the Draft Code whether such discrimination would be prohibited under section 52W. Clarification of the Draft Code to permit discrimination in certain circumstances is, therefore, required – recognising, however, that it should be very carefully calibrated, given the risk of compromising the

³⁴ See, for example, the comments of Finn J in *Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Ltd* [2009] FCA 1220 at [632]-[634].

³⁵ At [40].

³⁶ At [138].

freedom of speech that is vital for engaging in public debate and informing democratic decision-making.

54. Similarly, given the exclusion of some businesses from the Draft Code, there is a need for clarification within the non-discrimination provision to include a more explicit statement that non-registered businesses may not be discriminated against (for example, via the operations of the relevant search algorithms) for not registering.

Recommendations:

- **The Draft Code should be amended so that it is not restricted in scope to registered news business corporations of a certain size, news content only created by journalists and news content which excludes industry-specific material.**
- **The Draft Code should be amended to provide:**
 - **for the aggregation of information which a digital platform corporation must provide a news business corporation under section 52Y to protect commercial in confidence information; and**
 - **a definition of ‘trade secret’ based upon the terms of article 39.2 of the *Agreement on Trade Related Aspects of Intellectual Property Rights*.**
- **The Draft Code should be amended to clarify the meaning and operation of the non-discrimination provision at section 52W. This includes:**
 - **permitting discrimination in the treatment of certain material which is contrary to Australian law, provided this provision is carefully calibrated to avoid compromising the freedom of speech that is vital for engaging in public debate and informing democratic decision-making;**
 - **clarifying the current language which prohibits discrimination ‘in relation to the application of this Part’; and**
 - **specifying that non-registered businesses may not be discriminated against by the responsible digital platform corporation for a digital platform service for not registering under the Draft Code.**