

28 August 2020

Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email only to: bargainingcode@accc.gov.au

Dear Commissioner

Australian Competition and Consumer Commission Draft News Media Bargaining Code

The Law Institute of Victoria (**'LIV'**) welcomes the opportunity to provide feedback to the Australian Consumer and Competition Commission's (**'ACCC'**) Draft News Media Bargaining Code (**'the Code'**). The LIV supports the work of the ACCC in its *Digital Platforms Inquiry* (**'the Inquiry'**), however, suggests that the Code does not sufficiently address the key concerns of the Inquiry and may lead to undesirable consequences. The LIV wishes to raise the following issues for consideration:

1. Changing landscape of advertising technology

The LIV queries whether the Code sufficiently accounts for the changing landscape of the advertising technology (**'adtech'**) industry, which indicates a negative trend in news media publishers' advertising revenue. For example, the adtech industry's move to eliminate third-party cookies is projected to impact upon a significant proportion of web publishers' advertising revenue, with an estimated average loss of 52 per cent when third-party cookies are not used.¹ Other examples include Californian and European laws seeking to implement greater privacy protections for consumers through stricter regulation of the use of data that has reduced web publishers' advertising revenue derived from programmatic advertising.²

Legislative intervention should be aware of the need for media companies to adapt, innovate and leverage new forms of digital advertising. As the Interactive Advertising Bureau Europe's (**'IAB Europe'**) *Guide to the Post Third-Party Cookie Era* recommends, rather than a 'work-

¹ Google Ads, 'Effect of Disabling Third-Party Cookies on Publisher Revenue' (27 August 2019) <https://services.google.com/fh/files/misc/disabling_third-party_cookies_publisher_revenue.pdf>.

² See for example *California Consumer Privacy Act of 2018* [1798.100 – 1798.199]; see also ruling of the Court of Justice of the European Union in *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH (C-673/17)* [2019] ECR.

around’— it is critical for publishers to ‘leverage first-party data and diversify their activity beyond the proprietary platforms’.³

2. Requirements for ‘registered news business’⁴

The LIV considers that the Code should embody the purposes of the 2017 amendments to the *Competition and Consumer Act 2010* (‘ACL’).⁵ The inclusion of section 46 sought to address anti-competitive behaviour by actors with a ‘substantial degree of market power’ – preserving desirable vigorous competitive activity with ‘economically inefficient monopolistic practices that harm the competitive process’.⁶

The LIV submits that the current draft Code will lead to unintended consequences by entrenching large news businesses and thereby hampering competition. This is in part due to the overly restrictive requirements for registering news businesses under section 52E of the Code. The revenue test for example,⁷ is prohibitive to regional and start-up media companies as it requires the corporation’s revenue to exceed \$150,000 per annum.⁸ The LIV suggests amendments to these restrictive requirements due to its impact on market entry for new start-ups and smaller media companies.

Recommendation 1: Decrease the \$150,000 threshold under section 52G to reflect the median annual income of news businesses regulated by ACMA.

Moreover, the professional standards test, requires that ‘each news sources it nominates’ has editorial independence and is predominantly ‘core news content’ – created by a journalist and meeting the requirements of recording, investigating or explaining issues contained in s52(b)(i)-(iii). A report from the Centre for Media Transition commissioned by

³ IAB Europe, ‘Guide to Post Third-Party Cookie Era’ (May 2020) 13 <<https://iab europe.eu/knowledge-hub/iab-europe-guide-to-the-post-third-party-cookie-era/>>.

⁴ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, s52D.

⁵ *Competition and Consumer Act 2010*, section 46.

⁶ Explanatory Memorandum, *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* [1.3].

⁷ Explanatory Memorandum, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 5.

⁸ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 52G; See Australian Communications and Media Authority, Local content in regional Australia (Report, May 2017).

the ACCC,⁹ recognises the difficulty of adequately defining ‘news’ and ‘journalism’ for the purposes of journalistic privilege.

Recommendation 2: To assist in the determination of ‘original covered news content’ for the purposes of section 52T(b), the LIV suggests clarification of the definition of ‘journalist’:

- (i) Adopting the ‘factors to be considered’ under section 126J of *Evidence Act 2008* (Vic); and/or
- (ii) Inserting a definition of ‘journalist’ beyond merely those in the occupation of a journalist to capture those engaged in the activities of a journalist. This definition should include persons engaged in the provision of expert commentary and opinions, as well as content creators.

3. Treasurer’s Designation

The LIV queries whether the Treasurer is the appropriate person to make the designation determination under section 52C of the ACL and suggests that due to the inherent complexity of assessing a ‘significant power imbalance’, this should be left either to a consultative body, in response to an ACCC proposal or by an Act of Parliament.

Moreover, the LIV submits that the Code place mandatory requirements for the Treasurer to consider and should not provide the Treasurer with unfettered discretion. In making the determination by legislative instrument, the prescribed factors under section 52(C)(2) must be considered and any failure to consider ‘whether there is a significant bargaining power imbalance’, should result in invalidation of the designation.

Recommendation 3: Remove section 52C (3) and mandate consideration of whether there is a significant bargaining imbalance and invalidate decisions that do not comply with section 52(C)(2).

Recommendation 4: Amend section 52C (4) to mandate that the Treasurer must consider reports and advice of the Commission.

The imputed intention of this provision is to capture platforms beyond those listed in the explanatory materials – currently Facebook, Instagram and Google. In such cases, designation determinations should be limited by adopting specific criteria for assessment of the existence of a power imbalance, as well as mandating factors to be considered before making a designation.

⁹ Centre for Media Transition, ‘The Impact of Digital Platforms on News and Journalistic Content’ (Report, 2018) University of Technology Sydney <<https://www.uts.edu.au/sites/default/files/2018-12/CMT%20News%20Report.pdf>>.

Recommendation 5: For the purposes of making a determination under section 52C, the criteria should include similar factors considered when determining whether conduct is unconscionable under section 21 and 22 of the ACL, such as:

- relative strengths of the bargaining positions;¹⁰
- commercial conduct when negotiating the arrangements;¹¹
- requirements to comply with conditions representing an imbalance.¹²

4. Algorithm and search rankings

The LIV submits that the proposed 28-day notice period under section 52N is not a feasible time frame for platforms to provide advanced notification. Given Google makes thousands of often dynamic changes to their algorithms each year and often multiple changes each day,¹³ notification of these rapid changes, as well as the requirements to describe how the registered news business is able to ‘minimise the negative effects of the change to the ranking’, would likely be impracticable within that 28 days period. As one of the rationales of advanced notification is the issue of ‘targeted demotion’, it would be appropriate to address this issue through existing anti-competitive provisions under the ACL.

Recommendation 6: The LIV recommends addressing the issue of anticipated ‘targeted demotion’ under existing provisions of the ACL concerning anti-competitive behaviour. This could be supplemented by amendment to the Code to place a positive obligation on designated platforms to prove they are not specifically disadvantaging certain media companies.

The LIV cautions against overly technical and process-based regulation of digital platforms due to the potential negative impact for small businesses, business innovation and day-to-day operations of global businesses. It recommends more policy and principle-based supervision. It is concerned about unintended consequences such as the risk of Australia being excluded from beneficial developments.¹⁴ Noting the gloss over the case study of Spain in the *Digital Platforms Inquiry* and the commitment of the ACCC to monitor the outcomes of international jurisdictions’ investigations into new digital technologies disruption

¹⁰ *Competition and Consumer Act 2010* (Cth), s22(1)(a).

¹¹ *Ibid*, s22 (1)(f).

¹² *Ibid*, s 22 (b).

¹³ Search Engine Journal, ‘History of Google Algorithm Updates’ (Webpage) <<https://www.searchenginejournal.com/google-algorithm-history/>>.

¹⁴ *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, s 52N.

of traditional business models,¹⁵ the LIV anticipates that these findings will indicate a disproportionate impact on small businesses. Following the withdrawal of Google News as a response to Spain's imposition of an 'aggregator fee, a study commissioned by the Spanish Association of Publishers of Periodicals found publisher's traffic fall on average more than six percent, with smaller publications experiencing a 14 per cent decline.¹⁶ The LIV suggests this is due to smaller news companies being increasingly dependent on these intermediaries for their communications and growth.¹⁷

Thus, the LIV does not consider the ACCC's recent response to adequately address these concerns.¹⁸ The justification that registered news companies are not placed at an unfair advantage because 'no other types of content would be targeted for demotion', does not address the benefit that advanced notification under the Code will provide, irrespective of targeted demotion — placing registered 'news businesses' at an advantage compared to smaller unregistered competitors. This may affect the viability for publishers in the market, prevent market entry for smaller often independent news media companies and lead to a 'lack of choice and higher prices for consumers'.¹⁹

Recommendation 7: The LIV recommends a more policy and principle-based approach to address regulation of digital platforms that protects smaller and independent news media companies and ensure consumers have access to a range of independent news sources.

¹⁵ Australian Competition and Consumer Commission ('**ACCC**'), Digital Platforms Inquiry Final Report (Report, June 2019) 144.

¹⁶ Nera Economic Consulting, 'Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual: Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP) (9 July 2015) <<https://www.aepp.com/pdf/InformeNera.pdf>>; ZDNet, 'The Google News effect: Spain Reveals the Winners and Losers From a 'link tax' (14 August 2015) <<https://www.zdnet.com/article/the-google-news-effect-spain-reveals-the-winners-and-losers-from-a-link-tax/>>.

¹⁷ Rasmus Kleis Nielsen, Sarah Anne Ganter, 'Dealing with digital intermediaries: A Case Study of the Relations Between Publishers and Platforms' (2018) 20(4) *New Media & Society* 1602; Deloitte Access Economics, 'Platforms, Small Business and the Agile Economy' (2017) 2; Parliament of Australia, Internet Competition Inquiry: Inquiry into impacts on local businesses in Australia from global internet-based competition (Report, March 2018) [5.11].

¹⁸ ACCC, 'Response to Google Open Letter' (Media Release, 17 August 2020) <<https://www.accc.gov.au/media-release/response-to-google-open-letter>>.

¹⁹ UK Competition and Markets Authority, 'Online Targeting: Final Report and Recommendations' (4 February 2020) <<https://www.gov.uk/government/publications/cdei-review-of-online-targeting/online-targeting-final-report-and-recommendations>>.

5. Arbitration

The LIV suggests that the Code provide specific guidance as to the calculation of the actual value derived by the digital platform and the metrics used by arbitrators to calculate the value for decisions regarding remuneration. This would assist in the bargaining process, given the anticipated disjunction between the bargaining parties before an arbitrator/ arbitrator panel is appointed. While the Code prescribes factors that must be considered, the relative weight of these factors and how they contribute to the determination of value is unclear.

Acknowledging the ACCC's rationale for including 'final offer arbitration' rather than conventional commercial arbitration due to the challenges involved in setting a price for advertising revenue,²⁰ the arbitrator's decision ought to carry a right of appeal.

Recommendation 8: Where the value is disputed and an agreement cannot be reached, the LIV recommends imposing an industry assessment of value. This basis for assessment of value should include:

- Whether the news is displayed across the internet or in the form of a summary
- Whether loss of revenue is a product of web scraping
- Whether news is promoted through verified news companies
- Whether the platform directs news content to pages where advertising revenue can be made.
- whether the news appears as trending on the digital platforms or top news items
- a distinction between direct value gained through advertisement from indirect benefits referred to by the ACCC.²¹

Recommendation 9: Include and/or clarify the availability of a right of appeal against the arbitration determination.

6. Confidential information

The LIV seeks clarification as to what 'information' and data is to be provided under the Code. Whilst the Draft Explanatory Memorandum states that the minimum standards are not intended to require digital platforms to disclose 'trade secrets or other intellectual property', it is not clear as to what information and the extent that digital platforms will be required to provide. Sections 52M, 52N and 52ZC require the provision of information, but do not

²⁰ ACCC, 'Q&As: Draft News Media and Digital Platforms Mandatory Bargaining Code' (July 2020) [4.8].

²¹ Ibid 9.

discuss whether this overrides or is overridden by contractual requirements, including privacy policies of the specific parties.

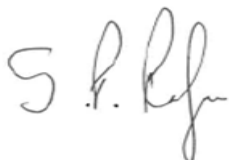
Without a defined scope of information, the LIV is concerned that the Code does not sufficiently safeguard consumer data. Moreover, for information requested under s52ZC, the use of information does not carry a statutory right of action for the digital platform if the data is misused.²² The LIV anticipates that without clarification, the draft legislation will lead to disagreements and prolong any negotiations between digital platforms and media companies.

Recommendation 10: The LIV recommends clarifying the scope of information and data that is required to be shared, including ensuring that an individual's data is not shared and data that is shared is de-identified. This would reduce the possibility of abuse of these provisions.

The LIV welcomes the opportunity to discuss the above and any further issues contemplated by the ACCC for the purposes of the Code. While agreeing with the purposes of the Code, the LIV is concerned that the issues raised with the requirements may entrench larger media companies to the detriment of consumers' access to a variety of independent media coverage and may only address imbalances in the short-term. Further, the role of government intervention should be principle based rather than process based, with support for independently competitive business environments and innovation.²³

Should you wish to discuss this further, please the LIV Technology and Innovation Section Policy Lawyer Maurice Stuckey on (03) 9607 9382 or email mstuckey@liv.asn.au.

Yours sincerely,



Sam Pandya
President

²² *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, s 52ZD.

²³ Parliament of Australia, 'Inquiry into Impacts on Local Businesses in Australia from Global Internet-based Competition' (Report, March 2018) [5.2]; Department of Industry, Innovation and Science, Submission No. 7 to the Standing Committee on Industry, Innovation, Science and Resources' *Internet Competition Inquiry* (December 2017) 6.