

# SUBMISSION ON DIGITAL PLATFORMS AND DRAFT MEDIA BARGAINING CODE

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This is a short submission in support of the ACCC proposed Draft Media Bargaining Code.

## General principles

The concepts paper addresses bargaining power imbalances. Legal principle underlying the need to remedy these can be found in the unequal market and economic power rationales and provisions of the Australian Competition and Consumer Act and Consumer Law within the remit of the ACCC.

Further, it is submitted that the proposed law can be seen as consistent with traditional legal principle or by relevant analogy with existing legal principle, and the policy underlying same, in a number of ways.

The proposed laws assert rights that align with or analogise from a number of strands of existing and traditional legal principle and the policy underlying same including:

- (a) Prevention of unconscionability in contracting that might otherwise occur through unequal bargaining power;
- (b) Respect for and protection of the creation of intellectual property and content;
- (c) Prevention of free riding;
- (d) The equitable obligation to account for profits made from the actionable use or appropriation of the efforts of others.

The first is grounded in traditional principles from the law of equity of good conscience in bargaining, which may need remediation of unequal bargaining power.

The second is grounded in several arguments, notably the legal public policy argument that justifies some protection of intellectual property (IP) as an incentive to effort and innovation and to produce more high quality intellectual property.<sup>1</sup> In this context, quality Australian news and information content is the public good that is desired. Lack of some IP protection disincentivises this production and will lead to less content being produced leading to reduced overall welfare for Australians (not to mention less employment in Australia).<sup>2</sup> Private individual enforcement of individual intellectual property rights for use of copyright material by digital platforms can be problematic because of the multiplicity of small usages in multiple instances on multiple sources and the resource intensiveness of tracing these, so a general approach is justified.

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<sup>1</sup> Justin Hughes, "The Philosophy Of Intellectual Property, (1988) 77 *Georgetown Law Journal* 287

<sup>2</sup> Another general argument justifying the protection of IP is the natural law argument for protection of and reward for the fruits of individual labour: Adam D Moore, "A Lockean Theory of Intellectual Property Revisited," (2012) 49 *San Diego Law Review* 1069

The third argument is economic and focuses on a form of market failure known as ‘free riding’ where those who benefit from the production of services do not pay for them.<sup>3</sup> It appears that the digital platforms generate substantial profits from the use of Australian media without paying for it. The economic problem of ‘free riding’ has been recognised as a concern, albeit in a different context, by the Australian High Court in the recent case of *Brewster*.<sup>4</sup>

The last argument is somewhat related to the second but focuses on the equitable obligation to account for gains from the use of the efforts of others, if a cause of action lies, whether in contract, tort or intellectual property.<sup>5</sup>

Despite some court decisions treating the digital platforms business models as mere notice boards<sup>6</sup> and the US Congress being somewhat uncritical of, or indulgent towards, Silicon Valley,<sup>7</sup> the hyper profitability of US ‘big tech’ cannot be denied.<sup>8</sup> This is at the same time as Australian jobs in journalism and media are being shed at an unprecedented rate and smaller operators such as Australian regional newspapers particularly, are becoming unviable.

### **Specific comments upon the proposal**

The major purpose for this code is to obtain payment for content and the ability for registered news business to obtain payment for its news content. In particular the to be a new business to be able to take advantage of this it is necessary to meet the revenue test, the content test, Australian audience test, and professional standards test. If this code aimed at giving a voice to those without bargaining power in media and an ability to obtain control and revenue from the use of content they create, it would be appropriate to reduce the revenue test below the current level \$150,000. This is a sum a magazine or a newspaper would achieve, but overlooks the growing area of news media from sole proprietor operators not linked to existing masthead media or magazine, running their own electronic news media. Such a sole proprietor would not achieve this amount particularly if it is from their own electronic transmissions.

The use of an arbitration method is appropriate as a resolution mechanism.

Ultimately the code provides a mechanism to obtain redress for payment for use of content, but the ultimate difficulty will be whether this proves to be successful in obtaining remuneration for Australian content to redress the current copyright licence fees and payments that are transmitted by collecting societies and governments to predominately American operations.

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<sup>3</sup> See e.g. J Sweeney, ‘An experimental investigation of the free rider problem’ (1973) 2 *Social Science Research* 277.

<sup>4</sup> *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 [73] [85] [86] [88] (Keifel CJ Bell and Keane JJ) [131] [132] (Nettle J)[167][168] (Gordon J)

<sup>5</sup> See e.g. James Edelman *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing 2002).

<sup>6</sup> E.g. *Bunt v Tilley* [2007] 1 WLR 1243

<sup>7</sup> Bill Pascrell Jnr 'Why is Congress so dumb? We lawmakers dumped our in-house experts. Now lobbyists do the thinking for us.' <https://www.washingtonpost.com/news/posteverything/wp/2019/01/11/feature/why-is-congress-so-dumb/>

<sup>8</sup> Silicon Valley’s contribution to the US economy might explain indulgence from the US Congress but it does not follow that other nation states should be indulgent given they generally appear to receive fewer benefits and suffer greater costs in the form of job losses.