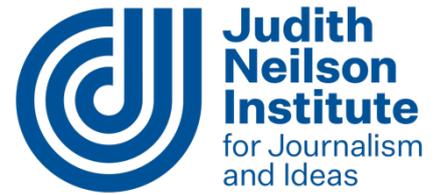


[Public
Interest
Journalism
Initiative]



**PUBLIC INTEREST JOURNALISM INITIATIVE and
THE JUDITH NEILSON INSTITUTE FOR JOURNALISM AND IDEAS
joint submission on the**

**AUSTRALIAN COMPETITION & CONSUMER COMMISSION'S
*Treasury Laws Amendment (News Media and Digital Platforms
Mandatory Bargaining Code) Bill 2020 (Exposure Draft)***

28 August 2020

EXECUTIVE SUMMARY

For public interest journalism to survive and thrive across Australia and its local communities, we need a robust news media sector that boasts a diversity of players of all sizes and types, and that offers deep engagement with necessary trading partners, most notably the digital platforms.

The development of the ACCC's News Media and Digital Platforms Mandatory Bargaining Code (Code) is an important step in acknowledging both the digital transformation of the news industry and the importance of public interest journalism to our community.

Since the previous ACCC Code consultation, the Australian news media landscape has continued to change rapidly. Fluctuations from the first half of this year now amount to an alarming 180 news contractions across the country, including 29 masthead or station closures and 97 end of print editions as at the end of July¹. While the last two months have seen news businesses returning from temporary closures and some market entrants emerging to fill recent regional gaps in areas such as Queensland, the economic uncertainty of COVID-19 pervades.

The Code provides an opportunity for news media businesses and digital platforms to work together in a constructive fashion. For meaningful outcomes, goodwill and pragmatism are required. In recent months, constructive progress has been made between some news businesses and digital platforms: some news content deals have been struck (although are now deferred). The Code also offers an opportunity for commercial agreements to be negotiated but with the addition of mediation and arbitration in the event of disagreement. It also establishes a set of minimum standards on which comment is sought under this consultation period.

Clearly the government and the ACCC are committed to implementing the broad features of the proposed news bargaining code. The focus of the PIJI-JNI joint submission, therefore, is on ways to improve the operation of the proposed code. Some critical issues identified are:

- The lack of value guidance is creating significant market uncertainty – for news businesses and digital platforms alike. It also perpetuates the uneven playing field to the detriment of the news media. Much greater clarity is needed on the value factors intended to help determine payment outcomes. The current, limited criteria present the real possibility of excessively large or small dollar amounts being awarded.

We suggest that the ACCC and the government be more specific on the determination of the value and immediately undertake a body of work so that at the time of the legislation's commencement, all parties have a broad understanding of likely revenue outcomes. Factors for consideration that support the underlying principle of public interest journalism include the cost of journalism, the value the community places on

¹ Gary Dickson, [Australian Newsroom Mapping Project](#), July results' (Public Interest Journalism Initiative, 1 April 2020)

public interest journalism², and forgone revenue such as lost advertising dollars. There is some simplicity in a specific focus being placed on the cost of journalism (ie. editorial costs) rather than on the more difficult to determine exchange value factors. Relevant, audited data can be easily gathered by the ACCC to determine an appropriate percentage of value range (ie. minimum and maximum) on which to calculate a payment outcome. At a minimum, this approach could be adopted for the first round of negotiations and/or arbitration in the absence of other market information.

- Generally, the main purpose of codes under the Australian Competition and Consumer Act is to redress some consequences of unequal vertical bargaining relationships - nearly always aimed at very small players such as franchisees, small suppliers to supermarkets, service stations or small cinema exhibitors. In this case, the Code should improve the balance of market power between major news organisations and the digital platforms and drive real revenue results for those news businesses. However, we are concerned that inequities will persist for small to medium news businesses, resulting in poor outcomes due to a lack of 'clout', a lack of information, difficulties in reaching agreement as part of any collective bargaining group, a relative state of unreadiness (eg. operating priorities during COVID-19 and upcoming bushfire season) and a host of other factors. We believe this potential risk to a core constituent of the industry's diversity and plurality requires further attention from the ACCC.

To assist, the government and the ACCC could consider the introduction of a third option under the bargaining process, in addition to bilateral negotiations and collective bargaining. This option would provide a simple, no bargaining process for participant news businesses. Instead, an independent third party, appointed by ACMA, would lead a simple lump sum negotiation with the digital platforms, and determine the distribution among participants with guidance from the ACCC.

Furthermore, while the Code is an important long term policy setting for the industry, it can only go so far.

- Other short term interventions, such as a continuance of JobKeeper for news organisations beyond the current March 2021 deadline, can complement the timing of the Code by providing the instant relief still needed by small to medium news businesses.
- As highlighted in our previous submission on the Concepts Paper, policy settings beyond a Code are also required to ensure a long-term future for public interest journalism in Australia. Complementary initiatives to the Code could leverage a mix of industry, philanthropic, and governmental levers. For example, a signature response by the Australian Government could see the establishment of a public interest journalism fund

² PIJI research suggests that almost half of Australians are willing to pay higher taxes for increased public interest journalism, valued at \$380 million - \$740 million per annum. See eg [Glenn Withers Community value of public interest journalism](#) (Public Interest Journalism Initiative, November 2019) p. 3; [Centre for International Economics Tax concessions for public interest journalism: examining the case for tax incentive-based funding](#) (Public Interest Journalism Initiative, November 2019) p. 1.

that draws recurrent revenue from contributions arising under the Code as well as other sources. We expand further on this idea later in this submission. We also believe taxation mechanisms to encourage industry reinvestment and other support are worthy of further investigation. PIJI is nearing completion on research into an R&D style rebate for the news industry and is also developing other tax-based investigations that may provide sustainable returns for public interest journalism. For more information, please refer to Annex B.

- Finally, the effective monitoring of compliance with the Code's provisions is no easy task. The information asymmetry that works in favour of the digital media platforms to the detriment of news media businesses is one the ACCC also confronts. It will therefore need to be proactive in its monitoring and enforcement to ensure the successful implementation of the Code. In this regard, the Government's commitment of \$27 million in December last year for the creation of a Digital Platforms Branch of the ACCC is a welcome initiative, although additional funding may be required for the complex task ahead.

Ultimately, an informed Australian community is the underlying obligation for all players.

The Code presents an opportunity to commit collectively to that public interest.

1. INTRODUCTION

The Public Interest Journalism Initiative (PIJI) and Judith Neilson Institute for Journalism and Ideas (JNI) welcome the opportunity to comment on the ACCC's Exposure Draft of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (Exposure Draft), published on 31 July 2020.

Our two organisations have come together again to develop this joint submission as we share a common interest in the health of public interest journalism in Australia.

PIJI and JNI commend the ACCC for the quality of the work completed on the Code thus far and prepared in a remarkably short timeframe. The Exposure Draft reflects many of the recommendations made in the PIJI-JNI submission of 5 June 2020 to the ACCC's Concepts Paper.

Our comments are set against the backdrop of COVID-19's continuing economic shock as outlined in the Executive Summary, and with particular regard to the interests of public interest journalism produced and delivered both in the short and long term.

In this joint submission, we focus on mechanical elements and modifications needed to avoid unintended consequences and to ensure a fully operational Code.

This joint submission by PIJI and JNI is divided into four sections:

- Section 1 comprises this brief introduction.
- Sections 2 and 3, respectively, provide some background information about PIJI and JNI.
- Section 4 sets out our comments on and recommendations for the Exposure Draft.

The joint submission also includes five annexures:

- Annex A: Members of PIJI's Board of Directors and Expert Research Panel
- Annex B: PIJI Research Projects Relevant to the Code
- Annex C: Members of JNI's Board of Directors and International Advisory Council
- Annex D: Preparation of the Joint PIJI-JNI Submission
- Annex E: Members of the PIJI Policy Working Group and Joint Project Team

Further information on our recommendations may be sought, and we would welcome the opportunity for a subsequent briefing with the ACCC.

2. THE PUBLIC INTEREST JOURNALISM INITIATIVE (PIJI)

The Public Interest Journalism Initiative (ACN 630 740 153) was established in late 2018 as a limited-life, non-partisan initiative (3-5 years) to work to ensure that Australia develops a sustainable ecosystem of independent, pluralistic journalism. It conducts research to inform practical policy solutions and public conversation on the importance of an effective, independent news media.

As a non-profit company limited by guarantee, PIJI is governed by a board of independent, voluntary directors with expertise in media, law, public policy, research, philanthropy and business. It is philanthropically funded and operates as a Major Research Project of the newDemocracy Foundation.

Over its first 18 months, PIJI has completed five research projects with another four in development (see Annex B: PIJI Research Projects), and has contributed to government and industry inquiries including the Senate Standing Committees on Environment and Communications Press Freedom Inquiry, the ACCC's Digital Platforms Inquiry (DPI) and Treasury's consultation on the DPI Final Report.

PIJI's work is guided and informed by the following six principles:

IN THE PUBLIC INTEREST: news and current affairs media with the primary purpose of recording, investigating and explaining issues of civic significance; that forms an essential service for the citizens and communities of Australia, including their role in national emergency infrastructure

PLURALITY: diversity of voices and types of news media providers

EVIDENCE-BASED: policy design informed by rigorously established, objective evidence

NEUTRALITY: does not unjustifiably favour any particular media outlet, type, platform or organisation

INDEPENDENCE: independent and non-partisan (when formulating and evaluating policy initiatives)

PRACTICAL: the context in which policy recommendations are implemented, including the consideration of factors such as timing (eg. unintended time lag before funding available to recipients) and duration (eg. whether short term remedial relief or long-term industry support is required)

Information about the members of PIJI's Board and its Expert Research Panel is set out in Annex A.

3. THE JUDITH NEILSON INSTITUTE FOR JOURNALISM AND IDEAS (JNI)

The Judith Neilson Institute for Journalism and Ideas encourages quality journalism in Australia and internationally through grants and education and is a forum for civil and evidence-based debate. The Institute collaborates with traditional and emerging news organisations on a wide range of projects. In its first year, it has helped generate more than 500 pieces of original journalism, including news stories, podcasts, videos and magazine articles. Journalists in national, regional and local media reported on subjects as diverse as the coronavirus pandemic, climate change, Asia and the Pacific Islands, First Nations peoples, arts, business, and issues affecting older Australians. This year it will launch Asian Stories, a long-term project to encourage more reporting and analysis on Asia and greater engagement between Australian journalists and their peers across the region.

Information about the membership of JNI's Board and International Advisory Council is set out in Annex C.

4. COMMENTS ON THE EXPOSURE DRAFT

A Division 1 – Basic Concepts

Core News Content and Covered News Content (s 52A Definitions)

PIJI-JNI broadly welcome the ACCC's approach to defining news content, including the creation of two news content categories: 'core news content' and 'covered news content'.

We agree that the provision of 'core news content' should be the fundamental requirement of the content test (s 52G) and are pleased to see the expansion of the definition to include community and local events.

We also agree that the minimum standards set out in Division 4 and the code bargaining and arbitration provisions of the Exposure Draft should be applied to more than 'core news content' and should include the types of content that the definition of 'covered news content' is intending to capture.

However, under s 52A both 'core news content' and 'covered news content' are defined as 'created by a journalist'. PIJI-JNI submit that the Code should recognise content qualified as 'journalism' (ie, content that is produced through common editorial processes and within a framework of recognised professional standards as specified in s 52K) rather than content 'created by a journalist'.

Under this approach, journalism, not the journalist, is the key ingredient. It is journalism, not the journalist, that provides unique value to digital platforms.

In PIJI-JNI's view, the requirement of 'created by a journalist' unnecessarily and arbitrarily narrows eligibility under the Code. It fails to recognise contemporary practice and new models of journalism. We have consistently proposed this definitional approach as seen in [our joint submission to the ACCC's Concepts Paper](#) and with PIJI's submission to the Press Freedom Inquiry conducted by the Senate Standing Committees on Environment and Communications. PIJI stated in its Press Freedom Inquiry submission:

Within the context of significant industry upheaval, including extensive redundancies, casualisation and hybridisation of journalism jobs, it is out of step with the state of the industry to tie [legislated protection] to an expectation of regular professional work [ie, being employed full-time as a journalist].³

Most obviously, the emphasis on the practitioner would exclude serious journalism written by subject matter experts, volunteers, trainees, student and not-for-profit newsmakers who publish under the auspices of a recognised news organisation and its editorial process. For

³ Gary Dickson and Margaret Simons, 'Submission by the Public Interest Journalism Initiative [to the Senate Standing Committees on Environment and Communications Press Freedom Inquiry](#)' (Public Interest Journalism Initiative 30 August 2019) <<https://piji.com.au/wp-content/uploads/2019/09/scec-press-freedom-sub-18-piji.pdf>>

instance, community radio broadcasters often rely on volunteers to produce content, including (to invoke the definition contained in the draft Code) content that records, investigates or explains 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. As outlined in the Community Broadcasting Association of Australia's (CBA) response to the Concepts Paper, it represents 450 community radio stations, many in remote and regional areas, which rely on a total of 22,000 volunteers. Not all volunteers are involved in generating news content, but some are. Similarly, the requirement of 'created by a journalist' also excludes journalism produced by academics and subject matter experts, such as op-ed pieces written for smh.com.au or news.com.au about issues of public significance or articles published in *The Conversation*. In this way, some documentaries such as those broadcast on *Four Corners* may qualify as journalism under the Code but are currently explicitly excluded according to paragraph 1.67 of the Explanatory Materials. The above styles of journalism are produced under strict industry measures with public accountability, and therefore justify inclusion under the Code.

PIJI and JNI therefore suggest that:

- core news content be defined as content that records, investigates or explains 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; and,
- covered news content be defined as 'core news content' *and* content that is relevant in recording, investigating or explaining issues of interest to Australians.

The Code in s 52K already requires content be produced through common editorial processes and within a framework of recognised professional standards.

Furthermore, to assist with the understanding of these definitions and what may qualify as core news content - as discussed below in B - ACMA should, at a minimum, be required under s 52E(2) to publish details of the core news content of each registered news business. ACMA should also be required to publish examples of content it determined did not satisfy the definition of core news content.

Our suggested approach is already broadly reflected in Australian law. For example, at the federal level, the journalist privilege (shield law) protects journalists who refuse to disclose the identity of anonymous sources. It necessarily provides protection to individuals, but the definition of a journalist in the *Evidence Act 1995* (Cth) at s 126J identifies a process for the production of journalism and recognises a journalist as somebody who participates in that process, rather than assessing their employment status. To be clear: the definition of a journalist in the *Evidence Act 1995* (Cth) would not be appropriate for the Code, but it demonstrates as a principle that a focus on process and product has legislative precedent.

Recommendation 1: The references to 'created by a journalist' in the definitions of 'core news content' and 'covered news content' should be omitted. These changes would ensure that some documentaries and some work by subject matter experts, academics, volunteers, trainees, student and not-for-profit newsmakers are covered by the Code.

Recommendation 2: ACMA should at a minimum be required under s 52E(2) to publish:

- details of the core news content of each registered news business; and,
- examples of content it determined did not satisfy the definition of core news content.

B Division 3 - Registered News Businesses

Application for Registration of News Business and News Business Corporation (s 52D)

The registration process in the Exposure Draft requires some further clarification but also offers an opportunity for valuable data gathering by the administering regulator, ACMA.

PIJI and JNI support the formal notification requirements of an application under the Code such as the relevant news business and listing of its news sources, but note that an application must also meet any requirements adopted in regulations (if any). Yet neither the draft Code nor the Exposure Draft Explanatory Materials provide any examples of the types of requirements the regulations may contain. Further explanation is requested to avoid any unintended consequences.

We also believe the Code registration process provides an ideal opportunity for ACMA to gather and aggregate information about news businesses beyond the current, publicly reported data or that collected by organisations such as PIJI.⁴ Requiring news businesses to provide, for example, copies of their last three years' audited financial statements would provide important, reliable data that could be used to analyse the state of the industry and better inform future policy decisions. All data would be held by ACMA on a register, and anonymised and aggregated for any public reporting purpose. Such information could also assist in overcoming some of the existing information asymmetries that regulators confront both under the Code, and more broadly across the sector.

Recommendation 3: The ACCC should provide examples of the types of requirements that may be included in regulations and must be met in the application process.

Recommendation 4: Regulations adopted for the purposes of s 52D should require news businesses to provide information such as audited financial statements and other data necessary to better inform governmental and regulatory policymaking.

Registration of New Business and News Business Corporation (s 52E)

Section 52E(2) requires ACMA to publish 'details' of new business registrations on its website, but PIJI and JNI believe the reference to 'details' is too vague.

In the interests of transparency and public accountability, the Exposure Draft should be amended to require ACMA to publish annually the following (as a minimum):

- the name of each news business;
- its news sources; and
- details of its core news content.

⁴ See, eg, Gary Dickson 'Australian Newsroom Mapping Project' (Public Interest Journalism Initiative, 1 April 2020) <<https://piji.com.au/research-and-inquiries/our-research/australian-newsroom-mapping-project/>>

ACMA should also be required to publish the names of news businesses that have applied for registration but were unsuccessful, their news sources and brief reasons as to why their registration was not approved.

As mentioned in A above, ACMA should publish examples of content that it determined did not satisfy the definition of core news content as well.

Recommendation 5: ACMA should be required to publish the following information about registered news businesses:

- the name of the news business;
- the news sources of each news business; and,
- details of the core news content published by each registered news business.

An obligation requiring ACMA to publish similar information for news businesses that applied for registration but were unsuccessful should also be imposed.

Revenue Test (s 52G)

PIJI and JNI recognise the need to impose a revenue threshold as a criterion of registration. The Code can never hope to be all things to all people, and nor should it.

The Code is intended to create a fairer value exchange for news businesses whose content appears on digital platforms. However, for some news businesses - including newcomers and very small, legitimate public interest news players who do not have a significant digital presence or generate much value for the digital platforms - alternative policy mechanisms are needed.

PIJI-JNI submit the \$150,000 threshold is appropriate, particularly given the possible costs associated with negotiation, mediation and arbitration. However, this test is accompanied by two caveats:

- that the threshold is reviewed every two years; and,
- that supplementary policy mechanisms and measures are investigated and, where appropriate, implemented to benefit hyperlocals, new entrants, freelancers and other genuine news contributors likely to be excluded from the Code due to this criterion.

Recommendation 6: The Revenue Test threshold should be reviewed every two years, and the Code must be supplemented by further policy mechanisms and measures to benefit hyperlocals, new entrants, freelancers and other core news producers.

Content Test (s 52H)

As suggested above (see *Core News Content and Covered News Content (s 52A Definitions)*), the definition of core news content and covered news content used for the purposes of the

Content Test should be broadened from content ‘created by a journalist’ to reflect the practice of ‘journalism’. This would enable the inclusion of content generated by subject matter experts, volunteers, academics and, potentially, new technologies including artificial intelligence that are all subject to strict editorial and professional standards within a legitimate, registered news business.

See Recommendation 1.

Professional Standards Test (s 52K)

One of the ways in which the professional standards test may be met is if the news source is subject to internal editorial standards ‘substantially equivalent’ to those of the Australian Press Council or the Independent Media Council or is subject to the rules set out in three specified codes of practice registered under the *Broadcasting Services Act 1992* (Cth) (s 52K(1)(a)(iii)): the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Codes of Practice.

PIJI-JNI believe that requirements of transparency through the use of a recognised industry complaints process serve as an important public accountability mechanism for journalism and must be met for any internal editorial standard to be recognised by ACMA as being ‘substantially equivalent’.

Consistent with this position, PIJI-JNI note the Code’s provision seems intended to capture the ABC and SBS’s published codes of conduct which details a complaints process made in the first instance, to the relevant public broadcaster, and in the event of an unsatisfactory outcome, one that can be escalated by the complainant to ACMA. Given the importance of these two organisations, direct reference in the Code to their codes of conduct may be prudent.

PIJI-JNI also contend that the Community Radio Broadcasting Codes of Practice (CRBCP), drafted by the CBAA, be included under s 52K(1)(a)(iii). This code of conduct is already registered by ACMA under Part 9 of the *Broadcasting Services Act 1992* (Cth) — the same framework used to register the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice, and the Subscription Broadcast Codes of Practice. The reason for this omission is unclear and may simply be a drafting oversight given the contemplation of any core and covered news content by a community broadcaster under the Code, would already be governed by the CRBCP.

As drafted, s 52K(1)(a)(iii) may also capture editorial standards that are not in the public domain and/or do not incorporate the use of a recognised external complaints service.

Failure to meet these minimum professional standards should be explicitly rejected under the Code.

Recommendation 7:

The Code should specifically record all of the Community Radio Broadcasting Codes of Practice and the ABC and SBS’s published codes of conduct as meeting acceptable standards.

It should also cover news businesses bound by professional standards that are: (1) published in the public domain;;and (2) overseen by a complaints resolution system that is recognised and administered externally.

C Division 4 – Minimum Standards etc

Subdivision A – The minimum standards

Notification of significant algorithmic changes (s 52N)

The digital platforms Google and Facebook have expressed concerns about the obligation to provide advance notification of algorithmic changes to registered news businesses. By contrast, among media stakeholders, there is general agreement on the benefit in some advance notification of algorithmic changes by digital platforms where there is significant effect to news media businesses. Naturally, there is a range of views as to specifics, and as to the precise nature of this obligation, but they support a notification requirement of some sort. On this point, as on several others, PIJI and JNI want to highlight the existing information asymmetry in the marketplace. There is very little information in the public domain about the extensive data the digital platforms have on their users or the way in which digital platforms adjust their algorithms to suit their commercial interests. Indeed, digital platform algorithms are sometimes known as ‘black boxes’ for their opacity.⁵

PIJI and JNI therefore believe it is incumbent upon Google and Facebook to clearly identify their concerns about the proposed requirement and inform the ACCC accordingly. The digital platforms then need to engage in constructive conversations with the ACCC and attempt to develop workable solutions that are fair to both the digital platforms and registered news businesses.

We note also that s 52N of the Exposure Draft does not currently contain any provision to give effect to the statement in the Exposure Draft Explanatory Material (para 1.79) that deems algorithmic changes significant if they are likely to:

- result in 15% or greater change in referral traffic for at least 25% of registered news businesses; and/or
- significantly affect the performance of the covered news content of a registered news business.

Detail as to the Code’s intent should be specified to ensure full clarity among participant parties.

Recommendation 8: Rules for the notification of algorithmic changes must be drafted with as much clarity and precision as possible to provide clear guidance for both news businesses and digital platforms.

⁵ See, eg, Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information*, (Harvard University Press, 2015).

Giving explanations of information etc (s 52M)

Concerns about information asymmetry as described above also apply to the issue of data sharing.

Data flows through the Internet are frequently hidden and opaque. Consumers (and others) are often unaware of the ways in which their usage information is used, shared and sold. This is a key point, relating to the value of data for digital platforms, but also for news businesses. The use of data (as well as digital disruption in general) has transformed journalism, and journalism's business model. As the ACCC detailed in the final report of its DPI, the relationship between news businesses and digital platforms cannot be understood without reference to data. Until recently, much of journalism was funded by advertising with the news producers. Now most of that advertising has migrated to digital platforms, which also carry the journalism as the underlying data enables digital platforms to connect advertisers and consumers more efficiently. For their part, some large news businesses, such as the *New York Times*, have made significant strides towards harnessing user data to improve their advertising and subscription revenues outside of the digital platform's services.⁶ However, most news organisations do not enjoy or seek the scale of the *NYT*'s operations.

As submissions responding to the ACCC's Concepts Paper highlight, the issue of data sharing attracts a wide range of views. Some news businesses sought ownership of the user data collected with its content, regardless of where the content is housed. Others do not want any access to data or believe this issue will be resolved by the ACCC's Ad Tech Inquiry. Many submissions landed somewhere in between, proposing that some data sharing is warranted.

It is worth noting that the Office of the Australian Information Commissioner recommended a cautious approach to setting data sharing requirements so as not to pre-empt privacy reform.

In principle, PIJI and JNI support a degree of data sharing between digital platforms and news businesses but recognise that this is a contested and difficult issue. Furthermore, the roadmap for legislative reform already announced by the [Treasury](#) needs to be accommodated in these provisions, which must be clear and precise in their meaning and intent.

Recommendation 9: Rules for data sharing need to be drafted as clearly and precisely as possible to provide clear guidance for both news businesses and digital platforms, and with a view to accommodating potential privacy law reform.

Ranking and display of paywalled content (s 52O)

⁶ Ken Doctor, 'Newsonomics: The New York Times' new CEO, Meredith Levien, on building a world-class digital media business — and a tech company', *Nieman Lab* (online, 30 July 2020) <<https://www.niemanlab.org/2020/07/newsonomics-the-new-york-times-new-ceo-meredith-levien-on-building-a-world-class-digital-media-business-and-a-tech-company/>>.

PIJI-JNI welcome the idea (envisaged in para 1.82 of the Exposure Draft Explanatory Materials) of a requirement that a notice of a change to the ranking or display of paywalled content must include a description of how a news business may minimise the negative effects of any such change in the final draft of the Code.

Display of covered news content (s 52P)

PIJI-JNI welcome the proposed inclusion (described in para 1.85 of the Exposure Draft Explanatory Materials) of requirements about genuinely considering reasonable proposals from news businesses about matters such as clear branding of mastheads.

However, we would encourage the ACCC to consider additional obligations that require the digital platforms to acknowledge the receipt and contemplation of proposals and to reply in writing to the substance of a proposal within a reasonable period of time, if a proposal cannot be accommodated. Without such obligations, it is difficult to assess participation in good faith.

Recommendation 10: The ACCC should give consideration to requiring the digital platforms to acknowledge the receipt and contemplation of proposals and to reply in writing to the substance of a proposal within a reasonable period of time, if a proposal cannot be accommodated.

Subdivision C - Obligations on Registered News Business Corporations

Subject to reviewing the relevant wording, the proposed right for news businesses to ‘opt out’ of any individual service provided by the digital platform (mentioned in para 1.97 of the Exposure Draft Explanatory Materials) is appropriate.

Subdivision D - Trade Secrets (s 52V)

Section 52V of the Code stipulates, ‘Nothing in this Division requires the giving of information the publication of which would reveal a trade secret.’ The spirit of the provision is laudable, but PIJI and JNI are concerned that it might be used to stonewall and stymie by a participant party. For instance, either news businesses or digital platforms might not be forthcoming regarding aspects of their operations or about their use of algorithms and data. The term ‘trade secret’ could be used as a blanket defence, even against reasonable requests for details that are not trade secrets.

PIJI and JNI would like to see clarification of the provision to recognise the above point.

Specifically, PIJI and JNI would like to see a dispute resolution mechanism worked into the Code on this issue. For instance, if during the course of bargaining one party refuses to share certain information on the basis of s 52V, then the other party ought to be able to challenge that refusal, and vice versa. Furthermore, inappropriate use of s 52V that is flagrant and deliberate ought to attract penalties. Incorporated into the Code, a straightforward dispute resolution mechanism would reduce the likelihood that s 52V is used unfairly and inappropriately. Such a

mechanism would also assist in overcoming significant information asymmetries between the digital platforms and news businesses.

Recommendation 11: To prevent the inappropriate use of s 52V:

- the definition of 'trade secrets' ought to be clarified, and
- provision ought to be made for a dispute resolution mechanism where one party to a negotiation wishes to challenge the invocation of s 52V
- flagrant and deliberate misuse of s 52V ought to attract penalties.

D Division 5 – Non-discrimination

PIJI-JNI welcome the ACCC's decision to require digital platforms to ensure that they will not discriminate, in relation to crawling, indexing, ranking, displaying or presenting *all* news content of registered news businesses, between registered news businesses; or registered news businesses and non-registered news businesses. Indeed, such a provision is essential to prevent market distortion. For example, if the digital platforms are not required to remunerate the ABC and SBS for use of their content, the digital platforms may have strong financial incentives to preference ABC and SBS news content over content provided by commercial news producers.

We note, however, that the utility of the non-discrimination obligation rests on the adequacy of the ACCC's capacity to monitor whether digital platforms comply with the provision. Despite the proposal to impose information-keeping obligations on the digital platforms, the ACCC's information-gathering powers found elsewhere in the *Competition and Consumer Act 2010* (Cth), and its ability to observe certain aspects of the digital platforms' conduct (eg, display of news content, changes in traffic patterns), there are also significant information asymmetries between the digital platforms and the ACCC. These asymmetries will render identification of specific breaches of the Code difficult and therefore hinder the ACCC's capacity to adequately enforce its provisions.

To avoid any ambiguity about the scope of the non-discrimination obligation, we suggest replacing the term 'news content' in s 52W with 'covered news content'.

Recommendation 12: The reference to 'news content' in s 52W should be replaced with 'covered news content'.

E Division 6 – Bargaining

Bargaining News Business Corporation for a Registered News Business (s 52X)

The Code provides that news business corporations may engage in collective bargaining with a responsible digital platform for a digital platform service. However, the news business corporations must first enter into a written agreement with one another and designate a lead company to undertake code bargaining on their behalf.

PIJI and JNI believe s 52Z (as drafted) is too restrictive. It is important that the Code gives registered news business corporations the flexibility to nominate entities not registered as a news business corporation as their bargaining representatives. For example, registered news business corporations may prefer to nominate a peak industry body or other third party, such as a law firm or other professional advisory firm, to act as their agent during the bargaining process. Such representation is especially important for smaller publishers. Peak industry bodies and third-party agents may have knowledge and expertise that can contribute to the success of the bargaining process. The Code should be amended accordingly.

As a side note, it appears likely that parts of the news industry will need to build capacity, before they can work as effective bargaining collectives and take advantage of the above function. Experience in other sectors suggests that it takes time for direct competitors to trust each other sufficiently to delegate decisions with significant financial impact to an industry peak or other third party. Plus, some news organisations have highlighted the absence of a relevant peak industry organisation suitably qualified to represent their interests for collective bargaining purposes. There are significant opportunities for a coalition of media interests to enter into a meaningful agreement with the digital platforms, but this will require financial investment, goodwill, hard work and most notably, time.

Recommendation 13: The Code should be amended to allow for peak bodies or other third parties to act as nominated agents on behalf of news businesses or groups of news businesses.

Notification of Bargaining (s 52Y(5)) – Non-variation

This provision prevents the bargaining news business corporation from varying the registered news businesses specified in the notification provided in accordance with s 52Y(1).

PIJI-JNI believe that amendments to the notification should be permitted in the event that a registered news business is acquired by another registered news business corporation before negotiations commence.

Recommendation 14: The Code should be amended to allow for variations in registered news businesses specified in the notification provided in accordance with s 52Y(1).

Notification of Bargaining (s 52Y(6)) – Exclusion of ABC and SBS from the Bargaining Process

The ACCC's draft Code stipulates that the ABC and the SBS be eligible for the protections of the minimum standards set under the Code, which include data sharing, notification of algorithmic changes and the surfacing of original content, but be excluded for the purposes of negotiating and receiving revenue.

The ACCC's Digital Platforms Inquiry Final Report explicitly expressed concern on the identified commercial market imbalance, and which was reflected in the recommendation for, and subsequent development of, a bargaining code.⁷ According to the *Q&As: Draft News Media and Digital Platforms Mandatory Bargaining Code* (July 2020), 'The code seeks to address the fundamental bargaining power imbalance between Australian news businesses and major digital platforms.' Elsewhere, the Code is described as seeking a fair value exchange.⁸ There is something of a tension between these two aims. The former suggests that public broadcasters should *not* receive revenue for the use of their content, given that questions of market imbalance are irrelevant for a public broadcaster. However, the latter suggests that public broadcaster content *should* be included in any content calculation. Clearly, digital platforms derive direct and indirect value from the volume of news content generated by public broadcasters, particularly as the ABC and SBS are the most trusted news sources in Australia.⁹ Their news stories appear prominently on digital services, including in Google search results and Facebook's Newsfeed. Therefore, if Google and Facebook pay for content from News Corp and Nine, but not from the public broadcasters, then in effect the Australian taxpayers are arguably subsidising the digital platforms.

A further point is that the ABC and SBS are distinct. The ABC does not carry advertising. It is funded by the taxpayer.¹⁰ By contrast, SBS derives a material operating revenue from sponsorship and advertising. A 2015 government report found SBS generated approximately one quarter of its revenue through advertising. This revenue split remains relatively stable: in 2018/2019, advertising and sponsorship activities generated \$109.5 million of \$435.2 million in combined revenue (or 25.2%).¹¹ On this basis, SBS should be able to negotiate and receive payment under the Code for a commensurate share of generated content.

PIJI-JNI support the inclusion of core and covered news content from the public broadcasters in an assessment of fair value exchange under the Code. However, arising revenue - aside from 25% of the revenue of SBS - need not flow back to the public broadcasters. Instead the revenue could be allocated to a dedicated public interest journalism fund.

⁷ ACCC, *Digital Platforms Inquiry Final Report* (June 2019) pp. 12-13, 119, 174.

⁸ ACCC, *Mandatory News Media Bargaining Code Concepts Paper* (19 May 2020), pp. 8-9, 12-14.

⁹ Sora Park, Caroline Fisher, Jee Young Lee, Kieran McGuinness, Yoonmo Sang, Mathieu O'Neil, Michael Jensen, Kerry McCallum and Glen Fuller, *Digital News Report: Australia 2020* (online, June 2020) <https://apo.org.au/sites/default/files/resource-files/2020-06/apo-nid305057_0.pdf> p. 76.

¹⁰ The ABC is largely, but not entirely, publicly funded. Its public funding is supplemented by merchandising and licensing deals, such as for the video news bulletins embedded in *The New Daily* email newsletter.

¹¹ Special Broadcasting Service, *Annual Report 2019: A World of Difference* (online, August 2019) <http://media.sbs.com.au/aboutus/upload_media/site_367_rand_108318840_sbs_2019_annual_report_digital.pdf> pp 81, 108.

The establishment of such a fund would ensure ongoing program support for Australian public interest journalism, open to news providers of all sizes, without putting strain on the public purse. The fund could also be structured to enable co-contributions and other revenue streams over time. Plus, the fund could be shaped to meet industry needs that the Code cannot and does not address – for example, the funding of: innovation and business transformation; start-up capital or loans; original public interest content; collaborative, investigative journalism; hyper local content or community-led co-operative models where local news may not be commercially viable.

Recommendation 15: ABC and SBS content should be captured under the Code, including for the purposes of fair value exchange and remuneration, but any funds collected from digital platforms should flow to a public interest journalism fund, established independently of the Code.

Information Requests (s 52ZC)

Section 52ZC(3) and (5) require a bargaining party to reply to a request for information made by another bargaining party, but no time limit is specified.

The Code should specify a time limit to remove any tactical delays to the bargaining process by either party.

Alternatively, the issue of time limits could be addressed in regulations adopted by the Governor-General.

Recommendation 16: To remove any tactical delays to the bargaining process by either party, either the Code or regulations adopted by the Governor-General should specify a time limit within which a party must respond to an information request.

F Division 7 – Arbitration about Remuneration Issue

Register of Bargaining Code Arbitrators (s 52ZE)

Given the importance that arbitrators potentially play in the bargaining process, PIJI and JNI believe further guidance is needed on the selection criteria and process for arbitrators listed on ACMA's register. For example, will there be a public call for applications to be added to the register? What selection criteria will be used to assess applicants? Will successful applicants be required to have experience in Australia and/or be familiar with the Australian markets for news businesses and/or digital platform services? Section 52ZE states only that 'each such person must be a person experienced in legal matters, economic matters or industry matters.' Do they need to meet a 'responsible persons' test? What is the length of appointment for an arbitrator on ACMA's register?

PIJI and JNI's preference would be for these issues to be addressed in the Code, although ACMA could also address them in regulations made for the purposes of the Code.

Recommendation 17: Further details regarding the selection and appointment of arbitrators should be provided and published. The list of arbitrators should also be made public.

Notification of Arbitration (s 52ZF)/Chair to Notify Start of Arbitration (s 52ZH)/Final Offer Arbitration (s 52ZO)/Submission of Parties (s 52ZR)/Role of Commission (s 52ZS) - Timescales

PIJI and JNI note that s 52ZF(2) empowers the bargaining parties to seek final offer arbitration if they have attended at least one day of mediation and they have agreed to arbitration no earlier than 10 business days after bargaining starts. Moreover, arbitration must begin no later than 5 business days after notice is given by the chair (s 52ZH) and the bargaining parties must make their final offers no later than 10 business days after arbitration begins (s 52ZO). The bargaining parties have 5 business days to comment on the final offer of the other bargaining party (s 52ZR). If the ACCC makes a submission to the arbitral panel about both final offers, the bargaining parties have 5 business days to comment on the ACCC's submission.

PIJI and JNI agree that resolving remuneration matters quickly is important and that the parties should not have an ability to 'game' the system by causing unnecessary delay. However, PIJI and JNI feel that these tight timescales and the potential for mounting costs may cause significant problems for smaller news businesses. Smaller news businesses may be reliant on legal, business, and/or economic advice that is provided on a pro-bono basis, which is often accompanied by a limit on the capacity to provide advice on short notice.

Consequently, PIJI and JNI recommend that smaller registered news businesses (ie, those with an annual turnover of less than \$20m as demonstrated in their registration application) should be entitled to seek extensions of time to:

- the start of arbitration;
- the submission of final offers;
- comments on final offers;

- and comments on any submission made by the ACCC, upon the demonstration of need or good cause to the chair of the arbitral panel.

Recommendation 18: Smaller registered news businesses (ie, those with an annual turnover of less than \$20m) should be entitled to seek extensions to specified arbitral deadlines upon the demonstration of need or good cause to the chair of the arbitral panel.

Notification of Arbitration (s 52ZF)

Section 52ZF(2)(a) requires the bargaining parties to have attended at least one day of mediation before either party may notify the ACCC it wishes to arbitrate.

While we agree that mediation may help the parties to reach a commercial agreement, we do not believe that mediation should be compulsory for smaller organisations where advisory costs can become a determining factor to their participation. Larger organisations may be able to easily bear these costs, but smaller media organisations will find them a significant burden. Plus, mediation may not be appropriate in all circumstances.

Recommendation 19: Mediation before arbitration should be voluntary, not compulsory.

Formation of Arbitral Panel (s 52ZG)

Paragraph 1.128 of the Exposure Draft Explanatory Materials states, ‘Bargaining parties will bear equally shared responsibility for the arbitration costs. This will include where the panel is appointed by the ACMA.’ However, s 52ZG does not contain any provisions that impose such responsibilities.

PIJI and JNI agree that arbitration costs should be equally shared between the parties with additional subsections giving effect to the ACCC’s intention required in the Exposure Draft.

PIJI notes that page 8 of the Q&As suggests that the daily remuneration for one or more arbitrators appointed by AMCA will be paid in accordance with a fee schedule to be set out in a determination. We presume the fee determination will be made by ACMA, although this is not clear in either the Q&As or the Exposure Draft Explanatory Materials. The Q&As further list fees of between \$800 and \$2,000 per day, as well as a fee of \$1,103 per day, as an indicator of the likely costs that might be incurred by the parties.

While PIJI believes it is important that arbitration fees are set at an amount that even smaller news businesses can afford, it has concerns that the amounts suggested by the ACCC in the Q&As are too low to attract arbitrators of the calibre and with the skills needed to understand, assess, and resolve the complex issues relating to remuneration, including those matters specified in s 52ZP(2).

Recommendation 20: Further consideration should be given to ensure equitable access to arbitration for registered news businesses of any scale.

Final Offer Arbitration (s 52ZO)/Other Requirements for Arbitration Determination (s 52ZQ)

Subject to the inclusion of a requirement that the Code be reviewed within two years of the Bill receiving Royal Assent and/or an appeals mechanism (see *Code review*), PIJI and JNI agree that determinations of the arbitral panel should apply for one year.

To ensure procedural fairness, PIJI-JNI believe that s 52ZO or s 52ZQ should be amended to require the arbitral panel to provide a confidential copy of any determination made (along with an explanation of the reasons for its determination) to the bargaining parties. This is especially important when the arbitral panel decides not to accept one of the final offers made by the bargaining parties. A limit on the length of the explanation required could be set to avoid any delays in decision-making (ie, decision-making taking in excess of the 45 business days from the start of arbitration).

Recommendation 21: The Code should be amended to ensure bargaining parties are provided with confidential copies of determinations made by arbitrators.

Effect and Enforcement of Determination by Panel (s 52ZT)

The Code should include provisions mandating that:

- the arbitral panel provides a copy of a determination made under s 52ZO to the ACCC; and,
- the bargaining parties provide the ACCC with a copy of the written agreement (if any) that gives effect to a determination of the arbitral panel.

It is essential that the ACCC is notified of this information so it can monitor any anti-competitive behaviour across deals, ensure the parties' compliance with a determination and the Code, and take enforcement action where appropriate.

Other – Confidentiality of the Arbitral Process

Subject to our observation above (see *Final Offer Arbitration (s 52ZO)/Other Requirements for Arbitration Determination (s 52ZQ)*) that the ACCC be provided with a copy of determinations made by the arbitral panel and our comments below relating to Transparency and Other Public Accountability Mechanisms, a provision specifying that the arbitral process is confidential is needed, given that there are numerous sensitivities surrounding remuneration. The Exposure Draft does not make this clear.

Recommendation 22: Subject to some exceptions, the arbitral process should be confidential.

G Division 9 – Miscellaneous

As drafted, the exception to Part IV of the *Competition and Consumer Act 2010* (Cth) set out in s52ZW applies only to an arrangement between two or more registered news business corporations who have, in accordance with s 52Y, notified a responsible digital platform corporation for a digital platform service that they wish to bargain collectively.

However, PIJI and JNI believe the scope of the exception to Part IV should be wider: registered news businesses with a turnover of less than \$20 million should be permitted to confer with each other before registering with ACMA and notifying the digital platforms of their intention to bargain collectively or bilaterally. They should be allowed to have discussions and share information with each in order to determine their approach to negotiation.

Permitting information-sharing about Code-related matters between smaller news business corporations before they register with ACMA and/or notify a responsible digital platform corporation of their intention to bargain is a significant way to reduce the information asymmetry and bargaining imbalance identified by the ACCC, and to facilitate monitoring and enforcement of the Code's provisions.

PIJI and JNI note that smaller news businesses may seek an authorisation to engage in pre-bargaining discussions and information-sharing from the ACCC under Division 1 of Part VII of the *Competition and Consumer Act 2010* (Cth). We note too that they may qualify for the benefit of the notification process under Division 2 of the Act, provided each member of the group reasonably expects to have less than \$3 million a year in total transactions with either Google or Facebook. But these processes take up valuable time and news businesses will incur application costs of up to \$7,500 — time and money that many news businesses can ill afford in the current financial climate. The \$3 million threshold is also too low. News businesses with larger annual turnovers need to be allowed to engage in pre-bargaining discussions and information-sharing if the bargaining imbalance with the digital platforms is to be adequately addressed.

We therefore suggest that the Code is amended to allow news businesses with an annual turnover of up to \$20 million to engage in discussions and information-sharing prior to registration with ACMA and to give notification of an intent to bargain. Alternatively, the ACCC could grant a class exemption under Division 3 of Part VII of the Act to news businesses whose annual turnover is \$20 million or less. If the ACCC is not willing to consider granting a class exemption, we suggest that the fees for filing an authorisation or notification application are waived.

Recommendation 23: News businesses with an annual turnover of up to \$20 million should be expressly authorised under the Code to engage in discussions and information-sharing prior to registering with ACMA and to notify the digital platforms of their intention to bargain. Alternatively, the ACCC should grant a class exemption under Division 3 of Part VII of the *Competition and Consumer Act 2010* (Cth) to news businesses whose annual turnover is \$20 million or less. If the ACCC is not willing to consider granting a class exemption, the fees for filing an authorisation or notification application should be waived.

H Other

Information-Gathering Powers

Paras 1.150-152 of the Exposure Draft Explanatory Materials envisage the ACCC will have information-gathering powers, in addition to s 155 of the *Competition and Consumer Act 2010* (Cth), to compel the digital platforms to provide information relating to:

- records of documents provided to registered news business corporations through the Code process; and
- records of internal decisions that relate to the minimum standards. These powers are in addition to its powers under s 155 of the *Competition and Consumer Act 2010* (Cth).

Relevant clauses giving effect to paras 1.150-152 do not appear in the Exposure Draft, so PIJI and JNI have been unable to review them.

Recommendation 24: Clauses giving effect to paras 1.150-152 of the Exposure Draft Explanatory Material should be included in the Code.

Appeals Process

PIJI-JNI note a decision of the arbitral panel appears to be final. A bargaining party is likely to struggle to establish a court has jurisdiction to review a decision of the arbitral panel under the *Administrative Decisions Judicial Review Act 1977* (Cth) or the *Judiciary Act 1903* (Cth); and the Exposure Draft does not provide a specific review mechanism.

While PIJI-JNI share the ACCC's desire for commercial certainty on an arbitrated outcome, it is important that a decision of the arbitral panel is lawful. PIJI-JNI therefore suggest that the Exposure Draft be amended to include an appeals process. The bargaining parties should have a right to appeal to the Federal Court on any question of law arising out of the arbitral panel's decision, as is common in commercial arbitration legislation (see, eg, *Commercial Arbitration Act 2011* (Vic)). Such an approach would strike the correct balance between the need for fairness with the commercial imperative of speed.

Recommendation 25: The Code should allow for a right of appeal on a question of law arising out of the arbitral panel's decision to the Federal Court.

Transparency and Other Public Accountability Mechanisms

The Exposure Draft contains no public transparency and accountability mechanisms.

While PIJI and JNI recognise that the arbitration process should be confidential because remuneration matters are highly sensitive, there need to be mechanisms that enable market participants and members of the public to know if the bargaining parties have sought

arbitration and if the arbitral panel has made any determinations. It is also important that the total number of commenced arbitrations and arbitral determinations are aggregated and reported annually. Such accountability is vital for fairness and transparency, and to promote some measures of outcomes and decisions.

PIJI-JNI therefore suggest that:

- ACMA should be required to establish a register that specifies, at a minimum, the dates on which it has appointed one or more bargaining code arbitrators from its register; the names of those arbitrators; the date on which arbitration commenced; the date of the arbitral panel's determination; and the names of the parties subject to the determination.
- The ACCC should also consider requiring the ACMA to publish in the register the amount of remuneration accepted or ascertained by the arbitral panel.
- In addition to the register, ACMA should be required to aggregate the above information and include it in its annual reports.

Recommendation 26: Under the Code, the ACMA should be required to establish a register that specifies, inter alia: the names of appointed arbitrators; the parties to arbitration; the names and dates of arbitral determinations; and perhaps the amount of remuneration accepted or ascertained by the arbitral panel.

Code Review

Contrary to the recommendation made in the joint PIJI-JNI submission dated 5 June 2020, there is no provision in the Exposure Draft which mandates review of the Code after a specified time period.

PIJI and JNI believe that the ACCC should review the operation of the Code two years after the Code is enacted. The digital platforms and the practice of journalism conditions are changing rapidly as are market conditions. New technologies including artificial intelligence continue to emerge. It is essential the Code remains fit-for-purpose.

Recommendation 27: The Code should be reviewed every two years.

Copyright

We note that some submissions to the ACCC's Concepts Paper suggest that in the absence of copyright, patent and/or trademark law reform that expressly creates rights for certain activities, including hyperlinks and allowing the users of digital platforms to 'share', 'like', comment on and discuss individual pieces of news content, there is a risk that the Code, and any decision made by the arbitral panel in accordance with it, could be characterised as an acquisition of property not on just terms, and hence unlawful under the Constitution.

To avoid any ambiguity, PIJI and JNI suggest that the ACCC includes a provision that states expressly that nothing in the Code affects Australian intellectual property law, including copyright, trademark and patent law.

Recommendation 28: The Code should be explicit that no clause affects Australian intellectual property law.

ANNEX A:

MEMBERS OF PIJI'S BOARD OF DIRECTORS AND EXPERT RESEARCH PANEL

Board of Directors

Declared industry interests

Professor Allan Fels AO, Chair

Professor Allan Fels AO is a Professor of Law and of Economics at Melbourne and Monash Universities. Professor Fels was Chair of the Australian Competition and Consumer Commission and its predecessor bodies, the Trade Practices Commission and the Prices Surveillance Authority, from 1989 until 2003.

Eric Beecher

Eric Beecher is Chair of two influential media groups – Private Media, which publishes Crikey, The Mandarin and Smart Company, and Solstice Media, which publishes The New Daily and InDaily. In 1990, Eric became a founder, CEO and major shareholder in The Text Media Group, a public company that produced newspapers, magazines and books. Text Media was acquired by Fairfax Media in 2003 and Eric formed Private Media Partners, which acquired crikey.com.au in 2005. Since then he has been a founding shareholder and chairman of Eureka Report and Business Spectator.

- Chair, Private Media
- Chair, Solstice Media

Professor Glyn Davis AC

Glyn Davis is the Chief Executive Officer of the Ramsay Foundation, the Distinguished Professor of Political Science at the Australian National University, a Visiting Fellow at the Blavatnik School of Government and a Visiting Fellow at Exeter College, Oxford. He recently completed nearly 14 years as Vice-Chancellor of the University of Melbourne. He is a Director of the Menzies Foundation.

Leslie Falkiner-Rose

Leslie is an experienced print, radio and television journalist who now focuses on strategic communications and collaborative educational, social and cultural change initiatives. Leslie, who holds a Masters in Philanthropy and Social Investment, is a Trustee of the Ruffin Falkiner Foundation; on the Advisory Board of the Master of Social Impact at Swinburne University; Chair of bookclubshub.com and a Director of Creative Clunes, which hosts the annual Booktown Festival.

- Digital Content Creator; Falkiner Media Services

Adam Ferrier

Adam Ferrier is a multi-award-winning advertising creative strategist and founder of the agency, Thinkerbell. He is also a leading Australian consumer psychologist and author of *The Advertising Effect: How to change behaviour* (Oxford University Press, 2014), and *Stop Listening to The Customer* (Wiley, 2020). Adam is a regular media commentator who has a weekly segment, #mastersofspin, on Sunrise (Seven Network). He is a frequent guest on the ABC's *Gruen* series and appears on shows like *The Project* (Ten Network) and Sky News.

- Co-founder; s p a c e and DOA.
- Board member; TRIBE
- Thinkerbell clients include StreamMotion; Amazon Prime.
-

Karen Mahlab AM

Karen Mahlab is Founder and CEO of Pro Bono Australia. In 1999, Karen launched Pro Bono Australia as one of Australia's first social purpose business ventures. It is now a major gateway and media organisation for the Australian not-for-profit sector. Prior to establishing Pro Bono Australia, Karen was CEO of the Mahlab publishing Group (1989-2012).

- Founder and CEO; Pro Bono Australia

Dr Sophie Oh

Sophie Oh, with her husband Grant Rule, is co-founder of the Susan McKinnon Foundation. The Susan McKinnon Foundation is a non-partisan organisation passionate about building Australia's long-term capacity to meet social and economic challenges. Support is provided to activities that ensure the effectiveness of government, including scrutiny from independent media. Sophie holds a Doctorate of Health Psychology and has spent over a decade working in a range of health prevention areas, including TAC, VicRoads and QUIT. She has a passionate belief in the importance of the implementation of evidence-based public policy.

Dr Margaret Simons

Margaret is an award-winning freelance journalist, author and journalism academic, and honorary principal fellow of the Centre for Advancing Journalism at the University of Melbourne. She is well known as a writer and thinker on the future of journalism. From 2012-2017 Margaret was director of the Centre for Advancing Journalism and the coordinator of the innovative Master of Journalism degree at the University of Melbourne. From 2017-2019 she was an Associate Professor of Journalism at Monash University. Margaret has won one Walkley Award, two Quill awards and has published 13 books.

- Board member; Public Interest Journalism Foundation
- Honorary Principal Fellow, Centre for Advancing Journalism, University of Melbourne
- Under retainer contract to the Guardian Australia

- Under retainer contract to Schwartz Media, funded by the Judith Neilson Institute.

Professor Marilyn Warren AC QC

Professor Marilyn Warren is a Vice-Chancellor's Fellow of Monash University and an Adjunct Professor at the Law Schools of Monash and Victoria Universities. Marilyn is the former Chief Justice of Victoria (2003-2017) and Lieutenant Governor of Victoria (2006-2017) and previously was a Judge of the Supreme Court of Victoria (1998-2003). In 2018 she was a member of the Monash University Vice-Chancellor's Global Leaders' Summit and in 2020 Marilyn will be the Judge in Residence at the University of Melbourne Law School.

Expert Research Panel members

[Dr Margaret Simons](#) (Chair), Honorary Principal Fellow, Centre for Advancing Journalism, University of Melbourne

[Associate Professor Jason Bosland](#) Melbourne Law School, University of Melbourne

[Professor Axel Bruns](#) Digital Media Research Centre, Queensland University of Technology

[Associate Professor Andrea Carson](#) Department of Politics, Media and Philosophy, La Trobe University

[Associate Professor Andrew Dodd](#) Centre for Advancing Journalism, University of Melbourne

[Professor Sora Park](#) News and Media Research Centre, University of Canberra

[Professor Julian Thomas](#) Technology, Communications and Policy Lab, RMIT University

[Professor Glenn Withers AO](#) Australian National University

Chair Declaration:

As PIJI Chair, I have received and approved the declaration of all interests by individual PIJI directors and policy working group members and am satisfied that there is nothing further to be disclosed outside the itemised interests listed above.

Signed:



Professor Allan Fels

Date: 28/08/20

ANNEX B:

PIJI RESEARCH PROJECTS RELEVANT TO THE CODE

The Australian Newsroom Mapping Project

Project Leader: Gary Dickson, PIJI

This research project gathers and presents data, reflecting different types of change in news production and availability across Australia. This project is now in next stage development to visualise additional categories of data that also act as indicators of change in news availability. Public data releases occur at the end of each month.

Community value of public interest journalism

Project Leader: Prof Glenn Withers, Applied Economics and Australian National University

This 12-month project is part of PIJI's ongoing work to understand how the community values public interest journalism. It includes [six-monthly omnibus surveys](#) by Essential Media, which commenced in November 2019. A final survey will be conducted in October of 2020, accompanied by a deeper analysis of trends in public sentiment across demographics and comparisons by Applied Economics.

Expected release (final survey and analysis): November 2020.

Guidance to implement and claim a Public Interest Journalism Tax Incentive

Project Leaders: Dr Margaret Simons; David Pearce, Centre for International Economics; Eddie Ahn and Gabrielle Hedge, DLA Piper

This next stage of PIJI's investigations into tax reform for public interest journalism builds on the analysis conducted by the Centre for International Economics in late 2019, which examined the applicability of a research and development (R&D) style rebate to support public interest journalism. This project includes legislative drafting for such a measure and an implementation guide, detailing issues for consideration in determining eligible activities.

Expected release: September 2020

Tax mechanisms to incentivise private investment in public interest journalism

This project will assess the suitability of tax mechanisms to incentivise private investment in public interest journalism. It is a complementary project to PIJI's research into a R&D tax rebate for organisational investment.

Expected release: November 2020

ANNEX C:

MEMBERS OF THE JUDITH NEILSON INSTITUTE FOR JOURNALISM AND IDEAS BOARD OF DIRECTORS AND INTERNATIONAL ADVISORY COUNCIL

Board of Directors

The Hon. Jim Spigelman, AC QC, Chairman - former Chief Justice of New South Wales and former chairman of the Australian Broadcasting Corporation

Mark Ryan – Executive Director, JNI

Bridget Fair* - Chief Executive Officer of Free TV Australia.

Edward Jewell-Tait - member of the Investment Committee of the Judith Neilson Family Office.

Paul Kelly* - Editor-at-Large at The Australian.

Jonathan Teperson - Chairman of the Judith Neilson Family Office and Chairman of the JNFO Investment Committee.

Kate Torney* - CEO of the State Library of Victoria and former Director of ABC News and Head of Asia Pacific News.

**Directors with a declared interest in, or direct involvement with, a media organisation. They were not involved in the preparation or approval of this submission.*

International Advisory Council

Desi Anwar – Indonesia – veteran journalist and currently host of CNN’s Insight program.

Yuen-Ying Chan – China/United States – former US-based journalist and foreign correspondent. Co-founder of the Journalism and Media Studies Centre at Hong Kong University.

Steve Coll - United States - Dean of the Columbia University Graduate School of Journalism, a staff writer at The New Yorker, the author of eight books of nonfiction, and a two-time winner of the Pulitzer Prize.

John Lloyd - United Kingdom - Contributing Editor for the Financial Times and co-founder of the Reuters Institute for the Study of Journalism at the University of Oxford.

Kyle Pope - United States – Editor-in-Chief of the Columbia Journalism Review, former editor and foreign correspondent.

Bruce Shapiro - United States - Executive Director of the Dart Center for Journalism and Trauma, a project encouraging innovative reporting on violence, conflict and tragedy worldwide.

Siddharth Varadarajan – India – co-founder of online news outlet The Wire and former editor of The Hindu.

Haiyan Wang - China - Associate Professor at the School of Communication and Design at Sun Yat-sen University.

ANNEX D: PREPARATION OF THIS JOINT PIJI-JNI SUBMISSION

PIJI-JNI Submission Development Processes

The joint PIJI-JNI was developed by PIJI's Policy Working Group and the joint project team.

The PIJI Policy Working Group consists of three members of PIJI's Board—Professors Glyn Davis AC, Allan Fels AO and Marilyn Warren AC, QC — and external member, Professor Simon Wilkie, Dean of Monash University's Business School and its external Chair, Richard Eccles.

The joint project team comprises Anna Draffin (PIJI's Chief Executive Officer), Gary Dickson (PIJI's Research and Projects Manager), Mark Ryan (JNI's Executive Director) and Anthony Bubalo (JNI's Chief Operating Officer) and two consultants from the University of Technology Sydney (UTS)— Drs Karen Lee (Senior Lecturer, Faculty of Law) and Sacha Molitorisz (post-doctoral research fellow at the Centre for Media Transition).

Information about the members of PIJI's Policy Working Group and the joint project team can be found in Annex E.

Given the possibility of perceived and/or actual conflicts of interests for some PIJI directors who are industry practitioners, the PIJI board delegated its authority to approve ACCC's submissions to the PIJI Policy Working Group at its board meeting on 29 May 2020. This delegation was reaffirmed at a board meeting on 24 August 2020. Within JNI, the joint PIJI-JNI submission was reviewed and approved by Jim Spigelman (chairman of JNI) and Jonathan Teperson (chairman of the Finance Committee of the board of JNI).

Please refer to Annexes A and C for the list of PIJI and JNI directors' interests.

The joint PIJI-JNI submission was approved by the PIJI Policy Working Group and joint project team on 28 August 2020.

External Consultation

Members of the PIJI Policy Working Group and joint project team met with representatives from the following organisations and other industry contributors to discuss the issues raised by the Exposure Draft:

Alliance for Journalists' Freedom
Australian Associated Press
Australian Broadcasting Corporation
Australian Community Media
Commercial Radio Australia
Community Broadcasting Association of Australia
Conversation Media Group
Copyright Agency
Country Press Australia
Facebook

Free TV
Google
Guardian Australia
J-Project
McPherson Media Group
Media, Entertainment and Arts Alliance
Network Ten
News Corp
Nine Entertainment
Private Media
Pro Bono Australia
Schwartz Media
Seven West Media
Solstice Media
Special Broadcasting Service
Star News Group
Walkley Foundation

These discussions have informed the thinking of the authors of this joint PIJI-JNI submission.

We are grateful to the representatives who met with us and wish to thank them publicly for sharing their time and thoughts with us.

ANNEX E:

MEMBERS OF THE PIJI POLICY WORKING GROUP AND JOINT PROJECT TEAM

PIJI Policy Working Group

Richard Eccles, (Chair, external member)

Richard Eccles enjoyed a successful career as a senior public service leader having held Deputy Secretary positions since May 2010, across several portfolios, including the Department of the Prime Minister and Cabinet; Health and Aged Care; Regional Affairs, Local Government, Arts and Sport; and Communications and the Arts. This is underpinned by a total of over 30 years' experience in the public and non-profit sectors.

Career highlights include world leading reforms in cyber safety; driving reforms in the Australian media landscape; leading the Australian Government's World Cup Bid Taskforce and involvement in major sporting events; leading major reforms in copyright to protect Australian creators and industries; and social and economic policy reforms in Indigenous Affairs.

Richard left the Australian Public Service in March 2020. He is currently Chair of the Policy Working Group of PIJI; a Board member of Epilepsy ACT; and a member of the Match Committee of Federal Golf Club.

Professor Simon Wilkie (external member)

Professor Simon Wilkie's career spans a remarkable array of roles that extend beyond the higher education sphere and include appointments as Chief Economic Policy Strategist at Microsoft Corporation and Chief Economist with the US Federal Communications Commission.

In 2019, Professor Wilkie joined Monash Business School from the University of Southern California (USC), where he was Professor of Economics in the Department of Economics and Professor of Economics, Communication and Law, in the USC Gould School of Law.

He was previously head of USC's Department of Economics and the USC Center for Communication Law and Policy. Prof Wilkie has a PhD and MA in Economics from the University of Rochester, and a BComm (Hons) with first-class honours in Economics from the University of New South Wales.

His research has particularly focused on game theory, its application to business strategy, economic and regulatory policy design, and the economics of the communications industries.

He is a member of the editorial board of the International Journal of Communication and a former member of the editorial board of the Journal of Public Economic Theory.

Participating PIJI directors:

Professor Glyn Davis AC

Professor Allan Fels AO

Professor Marilyn Warren AC QC

Please refer to Annex A for information about PIJI's board of directors.

Joint Project Team

Anna Draffin, Chief Executive Officer, PIJI

Anna Draffin was appointed the Chief Executive Officer of PIJI in April 2020, having served as Interim Executive Director since August 2019. She is a strategically focused senior executive with over 20 years' experience in shared value strategy and stakeholder engagement across the corporate, government, philanthropic and non-profit sectors. The former Deputy CEO of Philanthropy Australia and Chair of YWCA National Housing, Anna is currently a director of ShareGift Australia, a fund that works with ASX-listed companies, and sits on the Victorian Government's Metropolitan Partnerships - Inner Metro, advising on jobs, services and infrastructure.

Mark Ryan, Executive Director, JNI

Mark Ryan undertook the initial study that resulted in the establishment of the Judith Neilson Institute and led its early development. He is a former journalist and was senior political adviser to Australian Prime Minister Paul Keating. For 25 years he was a senior executive at Westfield Corporation, an adviser to the Lowy family and a number of major public companies and institutions. He is a director of the Lowy Institute and an Ambassador of the Victor Chang Cardiac Research Institute. He consults to the Judith Neilson Family Office, the Lowy Family Group and major public companies.

Anthony Bubalo, Chief Operating Officer, JNI

Anthony has worked as a diplomat, intelligence analyst, speechwriter, researcher and management consultant. As a Principal with Nous Group he helped to design the operating model for the Judith Neilson Institute. He was previously the Deputy Director and Research Director at the Lowy Institute. As one of the Institute's founding researchers, he established its Middle East program and was a regular commentator on Middle Eastern politics in the Australian and international media. Before joining the Lowy Institute, Anthony was an officer of the Department of Foreign Affairs and Trade from 1991 to 2003. He served in Australian diplomatic missions in Saudi Arabia and Israel and was Middle East Analyst with the Office of National Assessments from 1996 to 1998.

Dr Karen Lee, Project Consultant

Karen is a senior lecturer in the Faculty of Law at the University of Technology Sydney (UTS). She is a specialist in communications regulation. Her PhD, for which she received the UNSW Faculty of Law's PhD Research Excellence Award, involved an in-depth study of the

development of three telecommunications consumer codes by working committees of the Communications Alliance – the peak self-regulatory body in the Australian telecommunications sector. Her book *The Legitimacy and Responsiveness of Industry Rule-making*, which was based on her thesis, was published by Hart Publishing in September 2018. She has also published in the *Federal Law Review*, the *Media and Arts Law Review* and the *Australian Journal of Competition and Consumer Law*; and is a contributor to *Australian Telecommunications Regulation*, edited by Alasdair Grant and David Howarth, and *Telecommunications Law and Regulation*, edited by Professor Ian Walden.

Dr Sacha Molitorisz, Project Consultant

Sacha is a postdoctoral research fellow at the Centre for Media Transition, in the Faculty of Law at UTS. He has an interest in privacy, trust and news media, and his expertise spans media, law and ethics. After studying law and English literature at UNSW, Sacha accepted a cadetship at *The Sydney Morning Herald*, where for 19 years he had a front row seat for digital disruption while working as a writer, editor, reviewer and blogger. In 2012 he began teaching media and ethics courses at UNSW and NYU Sydney, and in 2017 he completed his PhD, which applied Kantian ethics to internet privacy. His book *Net Privacy: How We Can Be Free in an Age of Surveillance* was published in April 2020.

Submission disclosure: Dr Molitorisz has had occasional contact with his supervisor and colleague Professor Derek Wilding at the Centre for Media Transition (CMT) at the University of Technology Sydney during the preparation of this submission. However, the development of this submission has been independent of Professor Wilding's preparation of a CMT submission in response to the ACCC's Exposure Draft.

Gary Dickson, Research and Projects Manager, PIJI

Gary was appointed the Research and Project Manager in February 2020, having held the position of Operations Administrator since August 2019. Prior to PIJI, he worked at the Melbourne Social Equity Institute and the Centre for Advancing Journalism, University of Melbourne. He teaches journalism law and ethics at Monash University. As a freelance writer and researcher, he has developed a curriculum for teaching journalism students about family violence for *Our Watch* and contributed to magazines *Index on Censorship*, *Nieman Reports* and *Right Now*. He holds a Master of Journalism from the University of Melbourne.