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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TREASURY LAWS AMENDMENT (NEWS MEDIA AND DIGITAL PLATFORMS
MANDATORY BARGAINING CODE) BILL 2021

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the
Treasurer, the Hon Josh Frydenberg MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY
THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
Bill	Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020
CCA	<i>Competition and Consumer Act 2010</i>
Code	News Media and Digital Platforms Mandatory Bargaining Code
Digital Platforms Inquiry Final Report	Digital Platforms Inquiry Final Report published on 26 July 2019

General outline and financial impact

News Media and Digital Platforms Mandatory Bargaining Code

This Bill establishes a mandatory code of conduct to help support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses.

Date of effect: The day after this Bill receives the Royal Assent.

Proposal announced: This Bill partially implements the Government's response to the Digital Platforms Inquiry Final Report.

Financial impact: Nil.

Human rights implications: This Bill is compatible with human rights. See *Statement of Compatibility with Human Rights* — Chapter 3.

Compliance cost impact: This measure will result in a medium increase in compliance costs. It is expected that the measure will increase costs for businesses by \$10.5 million to \$13.0 million per year.

Summary of regulation impact statement

Regulation impact on business

Impact: News media businesses and digital platforms will be incentivised to reach agreements for remuneration for news content on digital platform services. There will be a medium increase in compliance costs associated with this measure, largely affecting digital platforms.

Main points:

- The ACCC found in its Digital Platform Inquiry (July 2019) that there is a bargaining power imbalance between digital platforms and news media businesses so that news media businesses are not able to negotiate for a share of the revenue generated by the digital platforms and to which the news content created by the news media businesses contributes. Government intervention is necessary because of the public benefit provided by the production and dissemination of news, and the importance of a strong independent media in a well-functioning democracy.

- The Digital Platforms Inquiry has been certified as an independent review which involved a process and analysis equivalent to a Regulation Impact Statement.
- The Inquiry report can be accessed at this address: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.
- The scope of the certified review covers the scope of the policy proposal with the exception that it does not recommend a mandatory code with arbitration on remuneration as an immediate measure. Rather, the ACCC recommended a code requiring designated digital platforms to develop codes including a commitment to fair negotiation about remuneration.
- In its December 2019 response to the ACCC Digital Platforms Inquiry Final Report, the Government asked the ACCC to work with the digital platforms and news media businesses to develop voluntary codes, and to provide a progress report by May 2020.
- The Government then requested an update on progress towards a voluntary code from the ACCC ahead of May 2020. The ACCC noted that, whilst discussions between the parties had been taking place, progress on a voluntary code had been limited. The ACCC considered it unlikely that any voluntary agreement would be reached with respect to the key issue of remuneration for content.
- Following this report from the ACCC, on 20 April 2020 the Government committed to developing a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Google and Facebook.
- To address the gap in the analysis between the ACCC's inquiry and the Government's consideration of options for a mandatory code, supplementary analysis on the costs, benefits and risks associated with a mandatory code was prepared, consistent with the *Australian Government Guide to Regulatory Impact Analysis*.
- The supplementary Regulation Impact Statement is at Chapter 2.

Chapter 1

News Media and Digital Platforms

Mandatory Bargaining Code

Outline of chapter

1.1 This Bill establishes a mandatory code of conduct to help support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses.

Context of amendments

1.2 In December 2017, the Government directed the ACCC to inquire into the impact of digital platform services on the state of competition in the media and advertising services markets.

1.3 The ACCC's Digital Platforms Inquiry Final Report was released in July 2019. Among the key findings was that the major platforms are unavoidable trading partners for Australian news businesses, and therefore possess substantial bargaining power over these businesses.

1.4 The Government Response to the Digital Platforms Inquiry Final Report, released on 12 December 2019, directed the ACCC to work with major platforms and Australian news businesses to develop and implement a voluntary code of conduct to address bargaining power imbalances between digital platforms and media businesses.

1.5 The ACCC was to provide a progress report to the Government in May 2020, with the code to be finalised no later than November 2020. If an agreement was not forthcoming, the Government would develop alternative options, which could include a mandatory code (joint media release by the Prime Minister, Treasurer, Attorney-General and Minister for Communications, Cyber Safety and the Arts, dated 12 December 2019).

1.6 The Government requested an update on progress towards a voluntary code from the ACCC ahead of May 2020. This update noted that while discussions between the parties had been taking place, progress on a voluntary code had been limited. The ACCC considered it unlikely that any voluntary agreement would be reached with respect to the key issue of remuneration for content.

1.7 On 20 April 2020, the Government directed the ACCC to develop a mandatory code of conduct. This reflected:

- that the Australian media sector was already under significant pressure, which was being exacerbated by a sharp decline in advertising revenue driven by the Coronavirus; and
- the advice of the ACCC that digital platforms and news businesses were unlikely to reach voluntary agreement on the key issue of revenue-sharing (joint media release by the Treasurer and the Minister for Communications, Cyber Safety and the Arts, dated 20 April 2020).

Summary of new law

1.8 The Bill establishes a mandatory code of conduct to address bargaining power imbalances between digital platform services and Australian news businesses.

1.9 It does this by setting out six main elements:

- bargaining – which requires responsible digital platform corporations and registered news business corporations that have indicated an intention to bargain, to do so in good faith;
- compulsory arbitration – where parties cannot come to a negotiated agreement about remuneration relating to the making available of covered news content on designated digital platform services, an arbitral panel will select between two final offers made by the bargaining parties;
- general requirements – which require responsible digital platform corporations to provide registered news business corporations with advance notification of planned changes that are likely to have a significant effect on covered news content;
- non-differentiation requirements – responsible digital platform corporations must not differentiate between the news businesses participating in the Code, or between participants and non-participants, or between non-participants because of matters that arise in relation to their participation or non-participation in the Code;
- contracting out – the Bill recognises that a digital platform corporation may reach a commercial bargain with a news business outside the Code about remuneration or other matters. It provides that parties who notify the ACCC of such

agreements would not need to comply with the general requirements, bargaining and compulsory arbitration rules (as set out in the agreement); and

- standard offers – digital platform corporations may make standard offers to news businesses, which are intended to reduce the time and cost associated with negotiations, particularly for smaller news businesses. If the parties notify the ACCC of an agreed standard offer, those parties do not need to comply with bargaining and compulsory arbitration (as set out in the agreement).

1.10 The Bill provides that the Minister may designate a digital platform corporation and digital services that must comply with the Code. The Minister may only designate a digital platform corporation and services if the Minister has considered whether there is a significant bargaining power imbalance between Australian news businesses and the digital platform corporation’s corporate group. In forming a view, the Minister may consider ACCC reports or advice.

1.11 A responsible digital platform corporation for a digital platform service is required to participate in the Code if the Minister has made a determination that a service is a designated digital platform service of the corporation.

1.12 The responsible digital platform corporation will be either:

- a related body corporate (of the corporation identified in the Ministerial determination) that is incorporated or managed in Australia and operates or controls the designated digital platform service; or
- if that subsidiary does not operate or control the digital platform service by itself or with one or more other entities – the designated digital platform corporation.

1.13 For a news business corporation to participate, it must be registered by the ACMA. The ACMA must register a news business (and the applicant corporation as the registered news business corporation) if the applicant had an annual revenue above \$150,000 in the most recent year or in three of the five most recent years, and the news sources comprising the news business:

- have the primary purpose of creating and publishing core news content;
- are subject to relevant professional journalistic standards; and
- operate predominantly in Australia for the dominant purpose of serving Australian audiences.

1.14 Once a news business corporation is registered by the ACMA, each responsible digital platform corporation that operates or controls a designated digital platform service must comply with the general requirements with respect to each registered news business. However, this is subject to any agreement outside the Code which contracts out of the general requirements.

1.15 Once a news business corporation is registered by the ACMA, it may give notice of an intention to bargain under the Code with a responsible digital platform corporation that operates or controls a designated digital platform service in relation to its covered news content.

1.16 One or more registered news business corporations may form a group for the purpose of bargaining collectively with a responsible digital platform corporation under the Code. The collective may nominate one of the group members or a third party to represent the group during the bargaining process.

1.17 The Bill specifically authorises collective bargaining so that it does not contravene the restrictive trade practices provisions in the CCA. Nothing in the Bill is intended to prevent news business corporations from engaging in discussions with one another about forming a collective. This is because forming a collective is authorised under the Bill.

1.18 If a registered news business corporation or collective has indicated an intention to bargain, a responsible digital platform corporation and a registered news business corporation must negotiate in good faith. Breaches of this requirement are subject to a civil penalty.

1.19 If an agreement is not reached between the parties within three months of the registered news business corporation indicating an intention to bargain, the matter will be subject to compulsory arbitration if the news business elects to begin arbitration.

1.20 If a responsible digital platform corporation and a registered news business corporation are subject to compulsory arbitration, an arbitral panel chosen by the bargaining parties (or by the ACMA if the parties fail to agree on panel members) will select between the final offers made by the parties.

1.21 Both parties must submit a final offer to the arbitral panel stating a remuneration amount. The amount must be expressed as a lump sum and is the amount of remuneration to be paid by the responsible digital platform corporation to the registered news business corporation in relation to making its covered news content available on a designated digital platform service.

1.22 The arbitral panel must accept one of those offers, unless it considers that the final offers are not in the public interest, in which case

the arbitral panel may amend the more reasonable of the two offers. This is expected to happen in very limited circumstances.

1.23 The Bill provides that a review of the Code will begin within one year of the commencement of the new law.

1.24 All legislative references in this Chapter are to the CCA, unless otherwise specified.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A responsible digital platform corporation can make deals outside the Code about designated digital platform services or other services.	No equivalent.
A responsible digital platform corporation can make a standard offer to news business corporations.	No equivalent.
Responsible digital platform corporations must comply with general requirements which require them to provide registered news businesses with advance notification of planned changes to an algorithm that will significantly affect covered news, provide information about the collection and availability of user data and develop a proposal to recognise original news.	No equivalent.
Responsible digital platform corporations must not differentiate between the news businesses participating in the Code, between participants and non-participants or between non-participants, because of matters that arise in relation to their participation or non-participation in the Code.	No equivalent.
Responsible digital platform corporations and registered news business corporations are required to negotiate in good faith, once a registered news business corporation or collective indicates an intention to bargain.	No equivalent.
If a responsible digital platform	No equivalent.

<i>New law</i>	<i>Current law</i>
<p>corporation and a registered news business corporation cannot reach an agreement within three months, then the parties may proceed to arbitration about remuneration.</p>	
<p>If a responsible digital platform corporation and a registered news business corporation proceed to arbitration, the parties must each make a final offer about remuneration and the arbitral panel will decide which of these final offers to select.</p> <p>The binding arbitration will only relate to remuneration to be paid by the responsible digital platform corporation to the registered news business corporation in relation to making its covered news content available on a designated digital platform service.</p>	<p>No equivalent.</p>

Detailed explanation of new law

1.25 This Bill establishes a mandatory code of conduct to help support the sustainability of the Australian news sector by addressing bargaining power imbalances between digital platforms and Australian news businesses.

Deals outside the Code – contracting out

1.26 Nothing in the Bill prevents a responsible digital platform corporation from reaching a commercial agreement outside the Code with a news business corporation about the matters subject to the Code. *[Schedule 1, item 1, sections 52ZZI and 52ZZJ]*

1.27 The Bill provides a pathway for a commercial agreement to be reached outside the Code between a responsible digital platform corporation and a news business corporation about the matters regulated by the Code. The Bill allows agreements to disapply the general requirements, bargaining and arbitration for the parties making the agreement with respect to their obligations to each other. *[Schedule 1, item 1, sections 52ZZI and 52ZZJ]*

1.28 However, an agreement to disapply parts of the Code must be reached before a determination has been made under the arbitration process or before an information request is complied with under the Code. *[Schedule 1, item 1, section 52ZZL(3)]*

1.29 An agreement outside the Code may also relate to one or more non-designated digital platform services, including remuneration for such services. Such an agreement may contain clauses that prevent the news business from utilising the Code for one or more designated digital platform services of that responsible digital platform corporation. *[Schedule 1, item 1, sections 55ZZJ(4)(d) and 52ZZL(1)(f)]*

1.30 Nothing in the Bill restricts the terms on which an agreement outside the Code can be made with news business corporations in general. *[Schedule 1, item 1, section 52ZZM]*

Standard offers

1.31 A responsible digital platform corporation may make a standard offer to a corporation that operates or controls a news business, by itself or together with other corporations. A news business corporation must be registered under the new Part IVBA to accept a standard offer. *[Schedule 1, item 1, section 52ZZJ]*

1.32 Regulations may be made that restrict standard offers to a class of registered news business corporations. If no regulations are made, the responsible digital platform corporation must make the standard offer to every registered news business for the offer to be recognised by the Code. *[Schedule 1, item 1, section 52ZZJ(2)]*

1.33 A standard offer may be made that relates to one or more designated digital platform services of the responsible digital platform corporation in respect of remuneration or other matters. *[Schedule 1, item 1, section 52ZZJ(5)]*

1.34 A registered news business corporation that becomes bound by a standard offer may receive the benefit of the general requirements. However, becoming bound by a standard offer may prevent a registered news business corporation from utilising the bargaining or arbitration Divisions of the Code. *[Schedule 1, item 1, sections 52ZZJ(4) and 52ZZK(4)]*

1.35 A responsible digital platform corporation may also make a standard offer relating to one or more non-designated digital platform services on terms that include that the registered news business corporation would not be able to utilise the Code for one or more designated digital platform services of that digital platform corporation. *[Schedule 1, item 1, section 52ZZJ(4)]*

1.36 A standard offer will not exclude bargaining or arbitration if, before the agreement became binding, a registered news business

corporation has notified the responsible digital platform corporation that it wishes to bargain. *[Schedule 1, item 1, section 52ZZK(3)]*

1.37 Standard offers must have a duration of two years in order to be valid under the relevant provisions of the Code. *[Schedule 1, item 1, section 52ZZJ(4)]*

Process for making a standard offer

1.38 A responsible digital platform corporation may choose if and when it wishes to make a standard offer for a future two year period to registered news business corporations. *[Schedule 1, item 1, sections 52ZZI and 52ZZJ]*

1.39 A standard offer remains open for a period of 60 days unless otherwise prescribed in regulations. If a registered news business corporation wishes to be bound by the standard offer, it must accept the offer during the offer period. *[Schedule 1, item 1, sections 52ZZJ(3) and (8)]*

1.40 At the end of the offer period, the offer becomes binding on the responsible digital platform corporation and all registered news business corporations who accepted the offer. *[Schedule 1, item 1, section 52ZZK]*

1.41 During the offer period, a responsible digital platform corporation may withdraw the standard offer, in which case the offer will not be binding under the Code. A registered news business corporation may revoke any acceptance of the standard offer during the offer period. *[Schedule 1, item 1, section 52ZZJ(3)]*

1.42 The content of the standard offer can be determined by the responsible digital platform corporation. The regulations may prescribe features that must be included in a standard offer in relation to remuneration. *[Schedule 1, item 1, section 52ZZJ(5)]*

1.43 For example, the regulations could set out that remuneration should be based on a percentage of the cost of producing covered news. A responsible digital platform corporation would then need to decide what percentage would be appropriate and include this as a term in any standard offer.

1.44 The standard offer provisions do not prevent the responsible digital platform corporation reaching agreements with registered or unregistered news businesses through other similar processes (for example, offers to certain kinds of news businesses, or offers subject to deadlines for acceptance).

Which digital platforms must participate in the Code?

1.45 A digital platform must participate in the Code if one or more of the services it operates or controls has been designated by the Minister as

a designated digital platform service. The determination will also specify the corporation as the designated digital platform corporation. *[Schedule 1, item 1, section 52E]*

1.46 In making a determination, the Minister must consider whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate. The Minister may consider any reports or advice of the ACCC. *[Schedule 1, item 1, sections 52E(3), (4) and (5)]*

1.47 ‘Digital platform’ is not defined in the Bill and is intended to take its ordinary meaning. It is intended that it will capture platforms that deliver a wide variety of services such as social media services, search engines and other digital content aggregators.

1.48 If a news business corporation wishes to approach a responsible digital platform corporation to negotiate about its non-designated digital platform services then it can do so in the ordinary course of commercial dealings. The Code allows but does not require the responsible digital platform corporation to bargain in relation to those other non-designated digital platform services.

Responsible digital platform corporation

1.49 Under the Code, the party with whom the registered news business corporations must bargain is known as the ‘responsible digital platform corporation’. This is also the party responsible for complying with the general requirements and non-differentiation obligations.

1.50 The responsible digital platform corporation is either:

- an Australian corporation that is related to the corporation identified in the Minister’s designation, that either by itself or together with other corporations operates or controls the digital platform service in supplying services that are used by Australians; or
- if there is no such corporation – the designated digital platform corporation for the designated digital platform service.

[Schedule 1, item 1, definition of ‘responsible digital platform corporation’ in section 52A]

Which news businesses can participate in the Code?

1.51 To participate in the Code, a corporation must apply for their news business to be registered by the ACMA. An ‘applicant corporation’ seeking to register a news business must also apply to be registered by the ACMA as a ‘registered news business corporation’ and demonstrate that

they operate or control that news business, either by themselves or together with other corporations. *[Schedule 1, item 1, sections 52F and 52L]*

1.52 When registering a news business with the ACMA, an applicant corporation must list each ‘news source’ that makes up the news business. It must also provide a point of contact for the corporation. *[Schedule 1, item 1, section 52F(2)]*

1.53 If the ACMA considers that the applicant corporation and any nominated news business satisfies the eligibility criteria, then it must register the applicant corporation as a registered news business corporation and register the news business. The ACMA must also endorse the registered news business corporation as operating or controlling the particular registered news business. *[Schedule 1, item 1, section 52G]*

1.54 The ACMA may endorse a registered news business corporation as controlling multiple news businesses, if the news business corporation operates or controls those news businesses, either by itself, or together with other corporations. *[Schedule 1, item 1, section 52L]*

1.55 The general requirements part of the Code applies separately in relation to each registered news business. *[Schedule 1, item 1, section 52Q]*

1.56 A ‘news business’ means a news source or a combination of news sources. A ‘news source’ includes:

- a newspaper masthead;
- a magazine;
- a television program or channel;
- a radio program or channel;
- a website or part of a website; or
- a program of audio or video content designed to be distributed over the internet.

[Schedule 1, item 1, definitions of ‘news business’ and ‘news source’ in section 52A]

1.57 The definition of ‘news source’ also requires the news source to produce and publish news content online. News content is intended to take its ordinary meaning under the Code. *[Schedule 1, item 1, definition of ‘news source’ in section 52A]*

1.58 In order for a news business to be registered, each news source in a news business must meet the following requirements:

- the content test;
- the Australian audience test; and
- the professional standards test.

[Schedule 1, item 1, section 52G]

1.59 A news source cannot be registered twice. That is, the news sources set out in the news business corporation's application cannot form part of another news business that is already registered. *[Schedule 1, item 1, section 52G(2)(b)]*

1.60 The ACMA must publish the details of the registration on its website, including the registered news business corporation's contact point for the purposes of facilitating communication between the registered news business and the responsible digital platform corporation. *[Schedule 1, item 1, section 52G(3)]*

1.61 A news business corporation is not required to nominate all of its news sources. It may select the news sources that it wishes to nominate, in any combination it chooses. *[Schedule 1, item 1, section 52F(3)]*

1.62 However, all negotiation, bargaining and arbitration facilitated by the Code applies only to the covered news content of those news sources. The Code does not apply to other content produced or published by the registered news business corporation. The Code's general requirements also only apply to covered news content of those registered news sources.

The revenue test

1.63 A news business corporation satisfies the revenue test if either:

- its annual revenue (or the annual revenue of a related body corporate) in the preceding year exceeded \$150,000; or
- its annual revenue (or the annual revenue of a related body corporate) in at least three of the five preceding financial years exceeded \$150,000.

[Schedule 1, item 1, section 52M(1)]

1.64 This test is applied at the corporation level. A news business corporation does not need to show that the revenue was generated by, or relates to, the operations of its news sources.

1.65 The revenue must be set out in the news business corporation's (or the related body corporate's) annual accounts prepared with generally accepted accounting principles. *[Schedule 1, item 1, section 52M(1)]*

1.66 If a news business corporation has acquired a news business over the preceding five years, and the business' previous annual revenue is ascertainable from the annual accounts of its former owner, this annual revenue can be used to support the revenue test of its new owner. This allows the revenue test to be applied to newly acquired news businesses. *[Schedule 1, item 1, sections 52M(2) and (3)]*

The content test

1.67 A news business satisfies the content test if the primary purpose of each news source is to create and publish core news content. *[Schedule 1, item 1, section 52N(1)]*

1.68 Content does not need to be created solely for the purpose of publishing it online, noting the definition of a news source requires the publication of news content online. For example, a television news broadcast may be produced primarily for a television audience but it would satisfy the content test if it is also published online.

1.69 It is intended that a news source can be considered to have created content even if it commissions or otherwise obtains the content externally.

1.70 Core news content is content that reports, investigates or explains:

- issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or
- current issues or events of public significance for Australians at a local, regional or national level.

[Schedule 1, item 1, definition of ‘core news content’ in section 52A]

1.71 Core news content can relate directly to matters of public policy and government decision-making at any level of government. However, it can also include other matters of public significance, such as reporting on law and order, health, education, environmental issues, science, industrial relations and business.

1.72 It also includes coverage of current issues or events where these are of public significance at a local, regional or national level. Reporting on community issues or events is considered core news content if they are of public significance. Matters that are principally private or special interest are not intended to be included.

1.73 Pure opinion or commentary on news content will generally not be considered core news. Applicant corporations seeking to include opinion based or editorial content will need to demonstrate how the content plays a significant role in reporting, investigating or explaining issues that are relevant in engaging Australians in public debate and in informing democratic decision-making.

1.74 There is no requirement that the content be produced by a journalist. For example, news content produced by a team for broadcast television and radio could meet the definition of core news content.

1.75 The level of core news content a news source publishes may fluctuate over the course of a year taking into account holiday periods and peak news periods such as election cycles. The policy intent is that these variations will not cause a news business to fail the content test.

[Schedule 1, item 1, section 52N(1)]

Example 1.1 Application of ‘content test’ to online news business

Maurice Media (MM) is an Australian corporation that produces a news website called A+ Articles, which reports on Australian economic, business and political issues. MM also produces a news podcast called A+ Articles: Audio, which is hosted on the A+ Articles website, and provides a shortened audio version of its online news articles in the form of a daily news briefing.

In addition, MM publishes a separate website called Access: Aussie Rules, which provides match scores, a blog of match highlights, and a footy tipping competition for an Australian Rules football league.

MM seeks to register as a news business corporation under the Code, and nominates A+ Articles (the website) and A+ Articles: Audio (the podcast) as the news sources which make up its news business for the purpose of the bargaining Code.

MM chooses not to nominate the Aussie Rules website as a news source for the purpose of the Code because its primary purpose is not the provision of core news and it would not meet the content test.

MM satisfies the other tests for registration. The ACMA registers MM as a registered news business corporation, registers a news business consisting of A+ Articles and A+ Articles: Audio, and endorses the control relationship between the news business corporation and news business.

Example 1.2 Application of ‘content test’ to online and offline news business

Commercial Broadcast Network (CBN) is a major Australian commercial free-to-air television network. CBN airs a wide variety of programs, including several dedicated news and current affairs programs. CBN also broadcasts a series of lighter ‘infotainment’ programs, such as its daily morning show, which includes a short regular news segment.

CBN offers a live stream of its television broadcast online. It also runs a popular CBN news website consisting of both original news articles and video clips from across its news programs and its morning show.

CBN applies to the ACMA to register a news business under the Code and lists its CBN news website and its designated news and current affairs TV programs as its news sources. CBN decides not to include its daily morning TV show, as it cannot demonstrate that its primary purpose is creating core news content.

The CBN news website and the designated news and current affairs TV programs are considered eligible news sources under the content test.

The Australian audience test

1.76 A news business satisfies the Australian audience test if the news sources comprising its news businesses operate predominantly in Australia for the dominant purpose of serving Australian audiences. *[Schedule 1, item 1, section 520]*

1.77 A foreign news business that only occasionally produces Australian news content, or that has an Australian news segment, may have a dominant purpose of serving Australian audiences, or those interested in Australia, but does not qualify under the Australian audience test unless it is also operating predominantly in Australia. *[Schedule 1, item 1, section 520]*

Example 1.3 Application of ‘Australian audience test’ to international news outlet

Overseas News Network (ONN) is an international news organisation, headquartered in the United Kingdom. The ONN website provides a mix of UK domestic and world news, including an Australian news tab. This Australian tab links to a page containing curated ONN articles and videos covering Australian news (or news of relevance to Australian audiences). ONN applies to the ACMA, seeking to register a news business under the Code based solely on their Australian news page.

While ONN meets the content test by providing core news content to Australians, the news business will be ineligible based on the Australian audience test. This is because ONN is unable to show that its news business (the Australian page on its website) operates predominately in Australia, as it has no operations in Australia, and has no local newsroom or locally-employed staff producing its news content.

The professional standards test

1.78 A news business satisfies the professional standards test if each of the news sources in the relevant application has editorial independence from the subjects of its news coverage and is subject to a professional standard.

1.79 A news source is subject to a professional standard for the purposes of the Code if:

- it is subject to the rules of the Australian Press Council Standards of Practice or the Independent Media Council Code of Conduct;

- it is subject to the rules of the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice;
- it is subject to the rules of the Australian Broadcasting Corporation or Special Broadcasting Service codes of practice;
- it has internal editorial standards that are analogous to the above mentioned rules regarding internal editorial standards relating to the provision of quality journalism;
- it is subject to rules specified in the regulations that replace the above rules; or
- it is subject to other rules specified in the regulations.

[Schedule 1, item 1, section 52P]

1.80 A news source has editorial independence from the subject of its news coverage if it is:

- not owned or controlled by a political or advocacy organisation (such as a political party, lobby group or a union); and
- not owned or controlled by a party that has a commercial interest in the coverage being produced (for example, a publication that covers a sport that is owned or controlled by the sport's governing body).

1.81 The editorial independence requirement is not intended to exclude a news source that otherwise qualifies on all the tests, and occasionally includes reporting about itself or a related business, or about an issue affecting itself or a related business.

1.82 However, an advocacy body that mainly publishes news about its own sector will not meet the professional standards test.

Example 1.4 Application of 'professional standards test' to advocacy organisation

Caterers First is a lobby group in Australia that advocates for catering industry policies and raises money for catering industry events and causes. Caterers First employs a small team of journalists to produce Caterers First News – a news website and daily email newsletter which reports on topical Australian catering news and events. Caterers First News has robust internal editorial guidelines and processes to ensure it operates at arm's length from the lobbying side of the business.

Despite these internal measures, Caterers First News is unlikely to be eligible under the professional standards test. This is because the news source is controlled by an advocacy organisation and reports

exclusively on the subject related to their advocacy work, raising legitimate concerns about its editorial independence.

Loss of eligibility of a registered news business corporation

1.83 The ACMA may revoke the registration of a news business corporation if:

- one or more of the news sources that form part of the registered news business form part of another registered news business; or
- the content, Australian audience or professional standards tests are no longer being met.

[Schedule 1, item 1, sections 52H(1) and (2)]

1.84 A registered news business corporation for a registered news business must notify the ACMA as soon as practicable, in writing, if it is no longer eligible to be registered under the Code. *[Schedule 1, item 1, section 52J]*

1.85 A failure to notify is subject to a maximum civil penalty of 600 penalty units. *[Schedule 1, items 7, 9 and 10, sections 76(1)(a)(iaa), (1A)(bab) and (4A)(a)]*

1.86 If a corporation is the registered news business corporation for multiple registered news businesses, and one of its registered businesses has its registration revoked, the corporation remains the registered news business corporation for its other registered news businesses.

1.87 It is intended that short term changes or fluctuations in the type of content that a registered news business publishes will not result in the registered news business being required to notify the ACMA that they are no longer eligible. For example, if a registered news business usually creates content that is core news content but for one day after registering they cover more celebrity news than core news content, they do not need to notify the ACMA that they are no longer eligible.

Change in ownership of a registered news business

1.88 The Code contains a process for the transfer of ownership of registered news businesses between registered news business corporations. A registered news business corporation must notify the ACMA if they no longer operate or control (by themselves or with other corporations) a registered news business. *[Schedule 1, item 1, sections 52J and 52G]*

1.89 A registered news business corporation can apply to the ACMA to be endorsed in relation to a news business which has already been registered and endorsed to another registered news business corporation. *[Schedule 1, item 1, section 52G]*

1.90 If the ACMA is satisfied that the new applicant news business corporation has purchased the registered news business and is now in control of, or operates the registered news business, the ACMA may reflect the transfer of the ownership of the registered news business by endorsing the new applicant registered news business corporation. The ACMA will also revoke the endorsement of the previous registered news business corporation. *[Schedule 1, item 1, sections 52G and 52H(6) and (7)]*

Adding or removing a news source from a registered news business

1.91 A registered news business corporation can apply to the ACMA to add or remove a news source from one of the registered news businesses for which it has been endorsed. *[Schedule 1, item 1, section 52K]*

1.92 The addition or removal of a news source does not affect any existing agreements a registered news business corporation may have with a responsible digital platform corporation. The registration of a new news source does not trigger a right to bargain in relation to the news source, until the next round of bargaining.

False or misleading information

1.93 The ACMA may revoke the registration of a registered news business or registered news business corporation and the endorsement of a news business corporation for a news business if the ACMA considers that the corporation gave the ACMA information that was false or misleading in a material particular. *[Schedule 1, item 1, section 52I]*

General requirements

The general requirements – overview

1.94 Once a news business corporation is registered by the ACMA, each designated digital platform service must comply with a number of general requirements. This includes general requirements which relate to covered news content of the registered news business. *[Schedule 1, item 1, sections 52Q and 52R]*

1.95 A digital platform service can make available covered news content in a number of ways, and the Code does not exhaustively detail all of these. However, the following are listed in the Code as ways a service makes content available:

- the service allows for covered news content to be reproduced, or otherwise placed on the digital platform service, in whole or in part (including in the form of snippets); or
- the service allows for links to covered news content to be placed on the service.

[Schedule 1, item 1, section 52B]

1.96 The responsible digital platform corporation must ensure the general requirements, including the minimum standards, are met. This reflects its responsibility for compliance, even if another entity in the corporate group carries out the task because, for example, the other entity controls a relevant algorithm or possesses relevant information. *[Schedule 1, item 1, section 52Q]*

1.97 The minimum standards require the responsible digital platform corporation to ensure registered news businesses are:

- provided with clear explanations of the types of data collected by the designated digital platform service in relation to users' interaction with covered news content, where the designated digital platform service has shared this data with one or more other registered news businesses; and
- notified in relation to planned changes to designated digital platform service algorithms that are likely to significantly affect the referral traffic to registered news businesses' covered news content.

[Schedule 1, item 1, sections 52R, 52S, 52V and 52W]

1.98 The minimum standards extend beyond the core news content of the news source of the registered news business to covered news content produced by the registered news business.

1.99 Covered news content is a broader category than core news content and includes:

- core news content; and
- any other content that reports, investigates or explains current issues or events of interest to Australians.

[Schedule 1, item 1, definition of 'covered news content' in section 52A and sections 52R, 52S, 52V and 52W]

1.100 Covered news content is intended to capture content including sports and entertainment news such as interviews with coaches and players, reporting about the entertainment industry, coverage of reality television and certain talk-back radio discussions. However, covered news content is not intended to include:

- broadcasts of sports games or publication of sports results or scores; and
- entertainment content such as drama or reality TV programming.

1.101 Further, covered news content is intended to exclude:

- specialty or industry reporting;

- information published by government, health, charitable or community organisations for the purpose of informing the public;
- product reviews; and
- journals and publications intended primarily for academic, news content.

Example 1.5 Covered news content – weather reporting

Michaels Weather Alerts (MWA) is a website that produces weather forecasts and alerts for weather in rural and regional Australia. MWA does not provide any commentary or analysis on the weather or contain any other content. MWA is not producing covered news content and cannot participate in the Code because the information is information published for the purpose of informing the public.

1.102 The minimum standards apply to the broader category of covered news content, as many news businesses publish a mix of stories of broad interest to cross-subsidise the production of core news content. Content that is neither covered nor core news does not benefit from the minimum standards. The cross-subsidisation business model means that it is important for registered news businesses to receive information relating to, and can bargain over, a broader range of content than just their core news content.

Example 1.6 Core news content versus covered news content

Tom’s News Network (TNN) is a news business that produces several news websites. The websites focus on national and regional political news reporting (considered core news content in the Code), but also feature some sports reporting and entertainment news.

TNN applies to be registered by the ACMA to participate in the Code, nominating all its news websites as news sources. The ACMA finds that each source has the primary purpose of producing core news content and TNN meets all the other criteria. The ACMA registers TNN as a news business corporation.

The general requirements that the responsible digital platform corporation must meet in the Code apply in relation to all of the covered news content TNN produces, not just its political news and court reporting (core news), and may include its sports reporting and entertainment news. This will allow TNN to gain a full picture of the performance of its stories on the digital platform service and to bargain with the responsible digital platform corporation under the Code in relation to this content.

Example 1.7 Core and covered news content

Ros’ Review is a news business that maintains a website. The site features articles on topical issues and events, written either by academics who are expert in the field or ‘in house’ by journalists who

Ros' Review employs. Ros' Review's journalists also make editorial revisions to the articles written by academics.

Ros' Review applies to be registered by the ACMA to participate in the Code, nominating its website as its sole news source. The ACMA finds that the site's primary purpose is the creation and publication of core news content and Ros' Review meets all the other criteria. The ACMA registers Ros' Review.

Even if a small portion of Ros' Review's content would not be considered core news content, it would all be considered covered news content.

1.103 Information provided to registered news businesses by the responsible digital platform corporation under all the general requirements must be provided in terms that are readily comprehensible. *[Schedule 1, item 1, sections 52R(1)(b) and 52S(2)(c)]*

1.104 None of the general requirements require giving information the disclosure of which would reveal a trade secret, or which is personal information within the meaning of the *Privacy Act 1988*. *[Schedule 1, item 1, sections 52R(5), 52ZA and 52ZB]*

Minimum standards – giving explanations about types of data provided

1.105 Where a responsible digital platform corporation provides data about user interactions with covered news content to one or more registered news businesses, it must inform all other registered news business corporations about the types of data it has provided. *[Schedule 1, item 1, sections 52Q and 52R]*

1.106 This obligation to inform registered news businesses about the provision of data to other registered news businesses is limited to data about user interactions with covered news content made available on a designated digital platform service.

1.107 A user interacts with content made available by a service by commenting, sharing, modifying or otherwise engaging with the content in some way. The concept is intended to be broad and include brief and minimal interactions with content such as pausing, scrolling through, or hovering a cursor over the content, or portions of the content.

1.108 A user who interacts with a link to content made available by a designated digital platform service, interacts with the content, even if the linked material is contained on a website separate to the designated digital platform service. *[Schedule 1, item 1, sections 52C and 52R]*

1.109 This provision is not intended to require the designated digital platform corporation to provide information about data it collects from websites that are not part of a designated digital platform service.

1.110 There is no obligation on a responsible digital platform corporation to share any user information. Nor is there any requirement to make the same data available to all registered news businesses if data is shared with one registered news business. This provision only requires that if a responsible digital platform corporation chooses to share user interaction data with one or more registered news businesses, it must inform all other registered news businesses, at least in general terms, about the types of data it has provided by listing and explaining the shared data. *[Schedule 1, item 1, section 52R]*

1.111 The information about types of data provided must relate specifically to the designated digital platform service that collects the information. *[Schedule 1, item 1, section 52R(1)(c)]*

1.112 The responsible digital platform corporation must ensure the information is provided to registered news business corporations within 28 days of their registration by the ACMA. The responsible digital platform corporation then has an ongoing obligation to update that information every 12 months. *[Schedule 1, item 1, sections 52R(1)(d) and (4)]*

1.113 The intent behind the obligation is to provide a minimum level of transparency so that all registered news businesses are aware of the types of information that are being provided to other news businesses.

1.114 The ACCC may issue an infringement notice of 600 penalty units for a failure to comply. In the alternative, a maximum civil penalty of 6000 penalty units applies. *[Schedule 1, items 1, 7, 9 and 10, sections 52ZZG and 76(1)(a)(iaa), (1A)(baa) and (4A)(c)]*

Minimum standards – referral traffic to covered news content

1.115 A responsible digital platform corporation must give 14 days advance notice to a registered news business corporation of planned changes to its designated digital platform services algorithm, where:

- the dominant purpose of the change is to bring about an identified alteration to the distribution of content on the designated digital platform service; and
- the change is likely to have a significant effect on the referral traffic to covered news content made available by the designated digital platform service.

[Schedule 1, item 1, section 52S]

1.116 The Bill aims to clarify, without limiting, the ways in which a digital platform service can distribute content made available on the service. Broadly, distribution methods include ways to rank, curate, impact prominence or alter the extent to which a user would be likely to interact with the content on the service. *[Schedule 1, item 1, section 52D]*

1.117 The Bill also provides a number of examples of the way a digital platform service can alter the distribution of content. [*Schedule 1, item 1, section 52D(3)*]

1.118 A notification is only required in relation to planned changes to an algorithm. [*Schedule 1, item 1, section 52S(1)(a)*]

1.119 This is intended to capture algorithm changes which involve an active decision to modify how content will be distributed on a designated digital platform service. The provision is not intended to capture:

- changes that are generated by a review process which is almost entirely automated (such as a change designed and implemented almost entirely by machine learning);
- changes which are not planned; and
- routine updates which may be made with high frequency.

Dominant purpose

1.120 The dominant purpose of the planned change must be to bring about an identified alteration to how content is distributed on a designated digital platform service. This means the planned change to an algorithm must be intended by the responsible digital platform corporation to bring about a predetermined identified alteration to the distribution of content. [*Schedule 1, item 1, section 52S(1)*]

1.121 A change will not have the dominant purpose of bringing about an identified alteration to the distribution of content on the designated digital platform service if the planned change is:

- a change made as part of routine maintenance with the dominant purpose of ensuring the ongoing effectiveness of the algorithm; or
- a change made with the dominant purpose of ensuring that the algorithm operates more quickly or efficiently.

[*Schedule 1, item 1, section 52V*]

Significant effect on covered news content on the designated digital platform service

1.122 The Bill sets out a number of matters which should be considered or disregarded when assessing whether a change is likely to significantly affect the referral traffic to covered news content of registered news businesses.

1.123 The matters that should be considered are:

- whether, as a result of the change, there is likely to be a significant variation to the amount of covered news content made available by the designated digital platform service;

- whether, as a result of the change, there is likely to be a significant variation to the proportion of content made available by the designated digital platform service which is covered news content; and
- any other relevant matter.

[Schedule 1, item 1, section 52W(1)]

1.124 The matters that are to be disregarded are:

- whether, as a result of the change, there is likely to be a significant increase or decrease to the proportion of a particular registered news business' covered news content that makes up all the covered news content made available by a designated digital platform service;
- the relative turnover of registered news businesses whose covered news content is made available by the designated digital platform service;
- the relative volume of covered news content created by registered news businesses whose covered news content is made available by the designated digital platform service; and
- the relative financial position of registered news businesses whose covered news content is made available by the designated digital platform service.

[Schedule 1, item 1, section 52W(2)]

1.125 A change may significantly affect the referral traffic to covered news content of registered news businesses even if it does not affect every, or even a majority, of registered news business. If the change affects a small number of news businesses who produce the vast majority of covered news content on the designated digital platform service, then the change may still have a significant effect on covered news content.

1.126 The policy intent is that changes are likely to be considered significant if they are likely to result in an approximately 20% or greater change in referral traffic to registered news businesses as a whole.

1.127 'Referral traffic' from the designated digital platform service is not defined in the Bill and the term will take its ordinary meaning. It is intended to cover the situation where a digital platform service refers a user to an external website, app or news source via a link.

Other requirements

1.128 The notice must describe the change and effect on referral traffic in a way that is readily comprehensible. The notice must relate only to the designated digital platform service to which the planned change relates

and not to any other designated digital platform service of the responsible digital platform corporation. *[Schedule 1, item 1, sections 52S(2)(c) and (d)]*

1.129 If the algorithm change relates to a matter of urgent public interest, no advance notice is required, but the responsible digital platform corporation must ensure that the news business corporation is notified within 48 hours after the change. This exception recognises that urgent algorithm changes such as those that might be required in relation to information about an event such as an earthquake or a terrorist event cannot be notified in advance. *[Schedule 1, item 1, section 52S(2)(b)]*

1.130 The ACCC may issue an infringement notice of 600 penalty units for a failure to comply. In the alternative, a maximum civil penalty of 6000 penalty units applies. *[Schedule 1, items 1, 7, 9 and 10, sections 52ZZG and 76(1)(a)(iaa), (1A)(baa) and (4A)(c)]*

Recognition of original news

1.131 A responsible digital platform corporation must consult with registered news business corporations and publish a proposal to appropriately recognise original covered news content within 6 months of the ACMA registering the first news business corporation on its designated digital services. This is a one-off obligation. *[Schedule 1, item 1, section 52X]*

1.132 The ACCC may issue an infringement notice of 600 penalty units for a failure to comply. In the alternative, a maximum civil penalty of 6000 penalty units applies. *[Schedule 1, items 1, 7, 9 and 10, sections 52ZZG and 76(1)(a)(iaa), (1A)(baa) and (4A)(c)]*

Facilitating open communication

1.133 The responsible digital platform corporation must:

- set up a point of contact in Australia no later than 28 days after the day the Minister makes a determination that a digital platform must participate in the Code;
- ensure the point of contact meets the requirements specified in regulations;
- give details of that point of contact to every registered news business corporation either 10 business days after the point of contact is set up, or 10 business days after the news business is registered, whichever is later;
- acknowledge every communication made to that point of contact from the registered news business corporation; and

- ensure the acknowledgement meets any requirements specified in regulations.

[Schedule 1, item 1, section 52Y]

1.134 Each registered news business corporation must ensure that:

- a point of contact is set up no later than the day on which it is registered by the ACMA;
- the point of contact meets the requirements specified in regulations;
- the point of contact acknowledges every communication from a responsible digital platform corporation that relates to the registered news business' covered news content; and
- the acknowledgement meets any requirements specified in regulations.

[Schedule 1, item 1, section 52Z]

1.135 The ACCC may issue an infringement notice of 600 penalty units for a failure to comply. In the alternative, a maximum civil penalty of 6000 penalty units applies. *[Schedule 1, items 1, 7, 9 and 10, sections 52ZZG and 76(1)(a)(iaa), (1A)(baa) and (4A)(c)]*

1.136 Nothing prevents a responsible digital platform corporation identifying the same point of contact for multiple registered news business corporations, provided it can still fulfil the requirements for availability and responsiveness.

1.137 Regulations can be made that contain requirements for the registered point of contact and acknowledgement of the contact. The regulations will be subject to disallowance by the Parliament and therefore will be subject to Parliamentary scrutiny. *[Schedule 1, item 1, sections 52Y(b) and (e) and 52Z(b) and (d)]*

1.138 The regulations could, for example, provide that the points of contact must be available during Australian business hours and that acknowledgement must occur within two business days.

Non-differentiation requirements

1.139 The non-differentiation provisions apply to any digital service (however described, such as a platform, social media website or mobile phone news app) that is operated or controlled by the responsible digital platform corporation. This includes digital services the responsible digital platform corporation operates or controls together with other corporations. This means that it applies to both digital services which have not been designated, as well as designated digital platform services. *[Schedule 1, item 1, section 52ZC(1)]*

1.140 The obligation under this provision requires a responsible digital platform corporation to ensure that in supplying a digital service, the corporation does not differentiate between registered news businesses or between registered and unregistered news businesses or between unregistered news businesses in relation to crawling, indexing, distributing or making available news businesses' covered news merely because of any of the following:

- a notice of intention to bargain under the Code has been given to a designated digital platform service;
- a notice of intention to arbitrate under the Code has been given to the ACCC;
- a registered news business or news business is receiving remuneration for the making available of the news business' covered news content;
- a registered news business or news business is, or is not, subject to a standard offer with a responsible digital platform corporation;
- a registered news business or news business is, or is not, subject to an agreement contracting out of the Code;
- a corporation is registered, or eligible to be registered as a news business corporation or endorsed as a registered news business corporation for a news business; or
- a corporation has applied to be registered or to be endorsed as a registered news business corporation for a news business.

[Schedule 1, item 1, section 52ZC(2)]

1.141 For the avoidance of doubt, this requirement is not intended to interfere with the ordinary operation of the proprietary algorithms of a digital platform.

1.142 Furthermore, the non-differentiation provision does not prohibit the making of deals and agreements, the substance of which may include terms about remuneration for the making available of covered news content or the way in which covered news content is distributed. Differentiation on the basis of the terms of an agreement, such as providing covered news content on a specific topic or presented in a specific way that meets the digital platform's business needs, will not be a breach of the provision.

1.143 However, if differentiation occurred only because a responsible digital platform corporation paid remuneration to a registered news

business for the making available of covered news content, then this will likely breach the provision.

1.144 A failure to comply with the non-differentiation requirements is subject to a maximum civil penalty of the greatest of:

- \$10 million;
- if the court can determine the value of the benefit obtained and that is reasonably attributable to the act or omission – three times the value of that benefit; and
- if the court cannot determine the value of that benefit – 10% of annual turnover during the period of 12 months ending at the end of the month in which the act or omission occurred.

[Schedule 1, items 7, 8 and 10, sections 76(1)(a)(iaa), (1A)(b) and (4A)(d)]

Bargaining

Topics that may be bargained about

1.145 Once an Australian news business is registered by the ACMA, the registered news business corporation can notify a responsible digital platform corporation of its intention to bargain under the Code in relation to one or more ‘specified issues’. *[Schedule 1, item 1, section 52ZE]*

1.146 The issues can be about remuneration or another topic but, in order for the Code to apply, they must relate to the registered news businesses’ covered news content which is made available on (or via) a designated digital platform service. *[Schedule 1, item 1, sections 52ZE(1) and (4)(e)]*

1.147 Separately to those topics specified in the notice, the parties can agree in writing to bargain under the Code about issues relating to covered news content made available by designated or non-designated digital platform services. *[Schedule 1, item 1, section 52ZG(2)]*

1.148 As explained above in relation to the general requirements, a digital platform service makes available covered news content if it:

- allows for covered news content to be reproduced, or otherwise placed on the digital platform service, in whole or in part (including in the form of snippets); or
- allows for links to covered news content to be placed on the service.

[Schedule 1, item 1, section 52B]

1.149 As explained above in relation to the general requirements, covered news content is a broader category than core news content and includes:

- core news content; and
- any other content that reports, investigates or explains current issues or events of interest to Australians.

[Schedule 1, item 1, definition of ‘covered news content’ in section 52A]

1.150 Nothing prevents the bargaining parties seeking to conduct commercial negotiations on their own initiative on any other matter. However, this is considered to occur outside the Code, which means the responsible digital platform corporation cannot be penalised under the Code for failing to participate in good faith because the good faith requirement only applies to the core bargaining issues. *[Schedule 1, item 1, sections 52ZG(3), 52ZH and 52ZJ]*

News business corporations can bargain individually or collectively

1.151 Under the bargaining and arbitration Divisions of the Code, a registered news business corporation for a registered news business is known as the bargaining news business representative. *[Schedule 1, item 1, section 52ZD]*

1.152 However, a registered news business corporation may appoint a third party to be its bargaining news business representative. *[Schedule 1, item 1, section 52ZD]*

1.153 A registered news business representative can bargain with a responsible digital platform corporation. Under the bargaining and arbitration Divisions of the Code, these are the bargaining parties. *[Schedule 1, item 1, section 52ZG]*

1.154 Two or more registered news business corporations can agree to collectively bargain with a designated digital platform. *[Schedule 1, item 1, section 52ZZP]*

1.155 The collective can select one of its members to be the bargaining news business representative or appoint a third party to perform that role. The third party could be a peak body, industry association, legal representative or other appointed agent. Each member of the collective must agree in writing who will be the bargaining news business representative. *[Schedule 1, item 1, section 52ZD]*

1.156 If two or more news business corporations join together to negotiate with a responsible digital platform corporation, that collective bargaining is specifically authorised for the purposes of subsection 51(1). *[Schedule 1, item 1, section 52ZZP]*

Indicating an intention to bargain

1.157 The notification must be made by the bargaining news business representative and set out the matters detailed in the Bill. *[Schedule 1, item 1, section 52ZE(4)]*

1.158 Each registered news business to which the notification relates is a represented registered news business. A notification cannot be varied to include additional registered news businesses at a later time. *[Schedule 1, item 1, sections 52ZE(5) and 52ZG(4)]*

1.159 A registered news business is not required to give notice to bargain under the Code. If a registered news business chooses not to bargain, the general requirements will still apply in respect of that news business' covered news content. *[Schedule 1, item 1, sections 52ZE, 52ZR, 52S and 52X]*

Bargaining in good faith

1.160 Once a bargaining news business representative indicates an intention to bargain in relation to its covered news content, the bargaining news business representative and the responsible digital platform corporation must act towards each other in good faith. *[Schedule 1, item 1, sections 52ZF and 52ZH]*

1.161 A failure to bargain in good faith is subject to a maximum civil penalty of the greatest of:

- \$10 million;
- if the court can determine the value of the benefit obtained and that is reasonably attributable to the act or omission – three times the value of that benefit; and
- if the court cannot determine the value of that benefit – 10% of annual turnover during the period of 12 months ending at the end of the month in which the act or omission occurred.

[Schedule 1, items 7, 8 and 10, sections 76(1)(a)(iaa), (1A)(b) and (4A)(e)]

1.162 Whether or not a party has acted in good faith will depend on the facts and circumstances of each case.

1.163 Some examples of conduct which would likely breach the good faith obligation include avoiding or refusing to engage in discussions with the other party, making clearly unreasonable offers or failing to consider or accept reasonable offers made by the other party.

1.164 A party will not breach the good faith obligation for putting its own commercial interests ahead of the other party's or rejecting unreasonable offers or demands from the other party.

1.165 This good faith bargaining obligation only applies to the core bargaining issues, which are the specified issues set out in the bargaining notification. Parties may agree in writing to bargain about other 'specified issues'. These may be about the designated digital platform service or other services. These specified issues will also be core bargaining issues.

As such the good faith obligation will apply to these specified issues also. *[Schedule 1, item 1, sections 52ZG(3) and 52ZH]*

1.166 The parties are able to engage in ordinary commercial bargaining over any other issue at any time but the Code's protections and obligations will not cover any of these additional issues. *[Schedule 1, item 1, sections 52ZG(3) and 52ZH]*

Notifying the ACCC of agreements reached

1.167 Both parties must ensure that the ACCC is notified as soon as practicable if they successfully reach an agreement during the bargaining phase. *[Schedule 1, item 1, section 52ZI]*

1.168 A failure to notify is subject to a maximum civil penalty of 600 penalty units. *[Schedule 1, items 7, 9 and 10, sections 76(1)(a)(iaa), (1A)(bab) and (4A)(b)]*

Arbitration about the remuneration issue

1.169 Where parties cannot come to a negotiated agreement about remuneration relating to the making available of covered news content on designated digital platform services, the Code sets out a process for an arbitral panel to select between two final offers made by the parties.

Starting arbitration

1.170 If a bargaining news business representative indicates an intention to bargain with a responsible digital platform corporation and an agreement about remuneration in relation to a designated digital platform service is not reached within a three month period, the matter can proceed to compulsory arbitration. *[Schedule 1, item 1, sections 52ZL(1) and (2)(a)]*

1.171 The matter can proceed to arbitration earlier if both parties agree to this. This cannot occur until at least 10 business days after the bargaining news business representative indicates an intention to bargain. *[Schedule 1, item 1, section 52ZL(2)(b)]*

1.172 In order to commence arbitration, the bargaining news business representative must give a written notice to the ACCC. Only the bargaining news business representative can initiate the arbitration, and only after three months have elapsed since bargaining began. Nothing in the Bill requires a bargaining news business representative to proceed to arbitration. *[Schedule 1, item 1, section 52ZL]*

1.173 As soon as practicable after receiving the notice, the ACCC must give the ACMA and the bargaining parties a notice stating that an arbitral panel is to be formed. *[Schedule 1, item 1, section 52ZL(5)]*

1.174 The Chair of the arbitral panel will notify the bargaining parties that arbitration will start on a specified day. That day must be within five

business days (unless another period of time is prescribed in regulations) of the arbitral panel Chair's appointment. *[Schedule 1, item 1, section 52ZP]*

1.175 A bargaining news business representative cannot trigger arbitration more than once within a two year period, in relation to each registered news business and designated digital platform service. *[Schedule 1, item 1, section 52ZL(4)]*

Register of bargaining Code arbitrators

1.176 A register of bargaining code arbitrators will be appointed and managed by the ACMA. *[Schedule 1, item 1, section 52ZK]*

1.177 Each person on the register must be a person experienced in at least one of legal, economic or industry matters (relevant to digital platforms and news media) or considered by the ACMA to have appropriate experience to be a member of the arbitral panel. The ACMA must consider relevant regulations in appointing individuals to the register. *[Schedule 1, item 1, section 52ZK]*

The arbitral panel

1.178 When compulsory arbitration begins, an arbitral panel is to be formed by agreement of the bargaining parties. The panel will include a Chair of the panel and, unless the bargaining parties agree that the Chair should be the sole member of the panel, two other members. *[Schedule 1, item 1, section 52ZM]*

1.179 Appointed panel members need not be on the ACMA register if they were appointed by agreement of the bargaining parties. The panel must comply with the arbitral process set out in the Code. *[Schedule 1, item 1, section 52ZM]*

1.180 The bargaining parties have 10 business days (unless otherwise prescribed by regulations) to agree on the membership of the panel and inform the ACCC and the ACMA of the appointments. *[Schedule 1, item 1, sections 52ZM(6) and (7)]*

1.181 If the bargaining parties do not notify the ACMA of the membership of the panel within that period, the ACMA will appoint any remaining panel members from the register as necessary. *[Schedule 1, item 1, section 52ZM(8) and (9)]*

1.182 Before the ACMA appoints a person to be a member of an arbitral panel, the person must declare any conflicts of interest. *[Schedule 1, item 1, sections 52ZN(1),(2) and (6)]*

1.183 The ACMA may also remove and replace an ACMA-appointed panel member if it has reason to consider that the person has an actual or potential conflict of interest, whether or not the person previously declared it. *[Schedule 1, item 1, sections 52ZN(3) to (6)]*

1.184 Bargaining parties will share equal responsibility for the arbitration costs. Each member of a panel is to determine that member's costs, worked out as daily costs. This will include where the members are appointed by the ACMA. *[Schedule 1, item 1, section 52ZO]*

The arbitration process

Topic of arbitration

1.185 If the arbitration process is triggered, the only mandatory topic for arbitration is the remuneration issue (the remuneration to be paid to a registered news business for the making available of the registered news business' covered news content by the designated digital platform service). *[Schedule 1, item 1, section 52ZL(1)(b)]*

1.186 However, the bargaining parties can agree to arbitrate about remuneration for the digital platform corporation making available the news media businesses' covered news content on another digital platform service and if they notify the Chair of the panel. Accordingly, the panel can make a determination that includes remuneration for both the designated and non-designated services. *[Schedule 1, item 1, sections 52ZQ and 52ZX]*

Good faith requirement

1.187 The bargaining parties must participate in the arbitration in good faith. *[Schedule 1, item 1, section 52ZS]*

1.188 A failure to participate in arbitration in good faith is subject to a maximum civil penalty of the greatest of:

- \$10 million;
- if the court can determine the value of the benefit obtained and that is reasonably attributable to the act or omission – three times the value of that benefit; and
- if the court cannot determine the value of that benefit – 10% of annual turnover during the period of 12 months ending at the end of the month in which the act or omission occurred.

[Schedule 1, items 7, 8 and 10, sections 76(1)(a)(iaa), (1A)(b) and (4A)(f)]

Early termination of arbitration by agreement

1.189 If the parties are able to resolve the remuneration issue before the panel makes its remuneration determination, they can agree to terminate arbitration if neither party has yet made an information request. The parties must notify the Chair of the agreement as soon as practicable for the termination to take effect. If they fail to notify the Chair in time

and the panel proceeds to make its remuneration determination, the remuneration determination prevails. [*Schedule 1, item 1, section 52ZW*]

Final offers

1.190 Each of the bargaining parties must submit to the panel a final offer on the remuneration amount to be paid by the responsible digital platform corporation to the registered news business corporation for making available the registered news business corporation's covered news content. The remuneration amount must be expressed as a lump sum. [*Schedule 1, item 1, section 52ZX*]

1.191 Final offers are due within the time specified in the Code, unless the panel grants an extension for exceptional circumstances (or if the regulations set another period). Each party must give a copy of its offer to the ACCC, who will then give a copy to the other party. [*Schedule 1, item 1, sections 52ZX(2) to (4)*]

1.192 If a bargaining party submits to the panel a final offer during arbitration, it must, on the same day that it submits the final offer to the panel, give the panel information that is relevant to the arbitration and relates to all contracts that are in force between the parties (including related bodies corporate of the bargaining parties). The parties are not obliged to provide the actual contracts. Nor are they required to provide all of the contracts between the parties. Rather, they are required to provide information which is relevant to the arbitration relating to contracts between the parties. In doing this, the parties should consider all contracts between them and, having done that, determine whether the information to be submitted about those contracts is relevant to the arbitration. If the information is not relevant, then it should not be provided. They are not required to disclose information which is protected from disclosure by a duty of confidence, which might exist as a matter of law or under a contract. If such a duty of confidence exists between the parties, then they can agree, for the purposes of the arbitration process, for that information to be provided to the panel. [*Schedule 1, item 1, section 52ZXA*]

1.193 The bargaining parties may give a response submission to the panel about the other party's final offer. The response submission may only deal with issues that are dealt with in the material accompanying the respective final offers. As with final offers, parties are to give a copy of their response submission to the ACCC, who will then give a copy to the other party. [*Schedule 1, item 1, sections 52ZX and 52ZZB*]

1.194 The ACCC may also provide a submission to the panel. The submission must be impartial and only include factual statements or information about relevant economic principles. The bargaining parties may submit a response submission to the ACCC's submission. [*Schedule 1, item 1, section 52ZZC*]

1.195 The panel must accept one of the final offers, unless the panel considers that each final offer is not in the public interest because it is highly likely to result in serious detriment to the provision of covered news content in Australia or to Australian consumers. [*Schedule 1, item 1, section 52ZX(7)*]

Arbitration is time-limited

1.196 The panel must make the written final determination for remuneration no later than 35 business days (unless another deadline is prescribed in regulations) after the latest of the deadline for final offers, the deadline for response submissions, the deadline for an ACCC submission or the deadline for bargaining party responses to an ACCC submission. This accounts for the fact that parties or the ACCC may opt not to make response submissions. [*Schedule 1, item 1, section 52ZZA*]

What must the panel consider in making its determination?

1.197 In making a determination on the remuneration issue, the panel must consider the benefit (monetary or otherwise) of the registered news business' covered news content to the designated digital platform service and the benefit (monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content. [*Schedule 1, item 1, section 52ZZ*]

1.198 The panel must also consider the reasonable costs to the registered news business of producing covered news content. Similarly, the panel must also consider the reasonable costs to the designated digital platform service of making available covered news content in Australia. [*Schedule 1, item 1, section 52ZZ*]

1.199 The panel must also consider whether a particular amount of remuneration would place an undue burden on the commercial interests of the designated digital platform service. It is intended that the panel will consider whether a particular amount of remuneration would place an undue burden on the revenue of a service's Australian operations as opposed to the global operations. [*Schedule 1, item 1, section 52ZZ*]

1.200 When considering all the matters above, the panel must consider the bargaining power imbalance between Australian news businesses and the designated digital platform corporation. This allows the panel, in making their determination, to consider the outcome of a hypothetical scenario where commercial negotiations take place in the absence of the bargaining power imbalance. [*Schedule 1, item 1, section 52ZZ*]

Example 1.8 Panel determination

The Daily Chronicle is a registered news business that is a party to an arbitration process with a designated platform service named Digiplat.

When assessing both parties' final offers, the panel considers a range of factors. This includes the benefit that Digiplat provides to the Daily Chronicle. For example, the Daily Chronicle receives a significant number of referrals to its website from Digiplat. These referrals provide considerable benefits to the Daily Chronicle by increasing its online audience and therefore its potential advertising and subscription revenue.

The panel also considers the benefits that the Daily Chronicle provides to Digiplat. In this example, there is meaningful value that is derived from the Daily Chronicle's content appearing on Digiplat.

The panel also considers the reasonable costs that the Daily Chronicle incurs in producing relevant content, and the reasonable domestic costs that Digiplat incurs in making relevant news content available on its platform.

In addition, the panel considers the extent to which there is a significant bargaining power imbalance between Australian news businesses and the designated digital platform corporation. To do this, the arbitrator may consider arguments in the final offers about the size of the benefits to both Digiplat and the Daily Chronicle that may have occurred in the absence of any bargaining power imbalance.

1.201 The Bill specifies that the remuneration determination must set out a lump sum amount. The determination must also be consistent with rights and obligations of the parties under contracts that are in force between the relevant parties. *[Schedule 1, item 1, section 52ZX]*

1.202 If the panel does not accept one of the final offers made by the parties, it must adjust the most reasonable of those offers in a manner that takes into account the above factors, and results in that offer being in the public interest. *[Schedule 1, item 1, section 52ZX(8)]*

1.203 If one of the parties fails to make a final offer, the panel must accept the final offer submitted by the other party, or adjust that offer in accordance with the above factors. *[Schedule 1, item 1, section 52ZX(9)]*

1.204 If neither party makes a final offer within the mandatory timeframe set out under the Code, the arbitration terminates on the next day, and the parties cannot utilise the arbitration process under the Code for a period of two years. *[Schedule 1, item 1, sections 52ZL(4) and 52ZY]*

Decision-making by the panel

1.205 The Bill provides that panel members must endeavour to make unanimous decisions. Where a unanimous decision is not possible, the panel must make the determination by majority decision of the members of the panel. *[Schedule 1, item 1, section 52ZZA(2)]*

Effect of arbitral determination

1.206 The bargaining parties must comply with the arbitral panel's determination. *[Schedule 1, item 1, section 52ZZE]*

1.207 A failure to comply is subject to a maximum civil penalty of the greatest of:

- \$10 million;
- if the court can determine the value of the benefit obtained and that is reasonably attributable to the act or omission – three times the value of that benefit; and
- if the court cannot determine the value of that benefit – 10% of annual turnover during the period of 12 months ending at the end of the month in which the act or omission occurred.

[Schedule 1, items 7, 8 and 10, sections 76(1)(a)(iaa), (1A)(b) and (4A)(h)]

1.208 The obligation to pay the remuneration amount consistent with the arbitral determination is also enforceable by private action. As with any breach of the Code, the standard provisions in the CCA for injunctions and damages apply, which would, for example, enable the registered news business corporation or the ACCC to seek a court order for payment. *[Schedule 1, items 11 and 12, sections 80(1)(a)(iaa) and 82(1)(a)]*

Duration of arbitral determination

1.209 The amount determined by the arbitral panel is for remunerating the registered news business for making its covered news content available by the designated digital platform service for two years. *[Schedule 1, item 1, section 52ZX(1)(b)]*

1.210 Nothing prevents the parties agreeing to continue the arrangement into subsequent years.

Information requests

1.211 During arbitration, either of the bargaining parties may make one request that the other bargaining party provide it with information if the request is reasonable for the purposes of the arbitration. The requesting party must also give the panel a copy of the request. *[Schedule 1, item 1, sections 52ZT(1) and (4)]*

1.212 This request may relate to information held by the responsible digital platform corporation and any related bodies corporate or information held by the registered news business corporation for the registered news business and any related bodies corporate. That is, the bargaining parties are responsible for ensuring information in the control

of their respective corporate groups is provided, regardless of whether it is in their direct possession. *[Schedule 1, item 1, section 52ZT(2)]*

1.213 The request must be made in writing, set out reasons why it is reasonable for the information to be provided and comply with any regulations. *[Schedule 1, item 1, section 52ZT(3)]*

1.214 The other bargaining party must ensure that the request is complied with no later than 10 business days after it was made or ruled reasonable by the panel (unless another deadline is prescribed in regulations) and that the information is given in terms that are readily comprehensible, compliant with any regulations, and specific to the service in question. *[Schedule 1, item 1, section 52ZT(5)]*

1.215 Alternatively, the other bargaining party may apply to the panel, in writing, for a ruling that it was not reasonable for the other bargaining party to make the request for the purposes of the arbitration, in relation to all or parts of the information requested. This application must be made within 10 business days of receiving the request (unless another deadline is prescribed in regulations). *[Schedule 1, item 1, sections 52ZU(1), (2) and (4)]*

1.216 The panel may find that such a request is not reasonable, in which case the bargaining party who received the request need not comply. Otherwise, the receiving party must comply within 10 business days (unless another deadline is prescribed in regulations) from the panel's decision. *[Schedule 1, item 1, sections 52ZT(5) and 52ZU(6)]*

1.217 The panel must make its finding within 10 business days (unless another deadline is prescribed in regulations). In making its finding, it must consider the factors set out for making the remuneration determination during final offer arbitration. *[Schedule 1, item 1, sections 52ZU(3) and (5)]*

1.218 The parties are not required to give information which, if disclosed, would reveal a trade secret or give information that is personal information within the meaning of the *Privacy Act 1988*. *[Schedule 1, item 1, sections 52ZV(1) and (2)]*

1.219 If the responsible digital platform corporation gives information or data to the bargaining news business representative, the bargaining news business representative must ensure that the information is not used for any purpose other than the arbitration. *[Schedule 1, item 1, section 52ZV(3)]*

1.220 A failure to comply with a reasonable information request is subject to a maximum civil penalty of 600 penalty units. The same applies if a recipient of information uses the information for a purpose other than the arbitration. *[Schedule 1, items 7, 9 and 10, sections 76(1)(a)(iaa), (1A)(bab) and (4A)(g)]*

The role of the ACCC

1.221 The ACCC may make written submissions to the arbitral panel. *[Schedule 1, item 1, section 52ZZC]*

1.222 As stated above, the ACCC will receive copies of final offers and any response submissions by parties. Any submission made by the ACCC on its own initiative must be provided to the arbitral panel and a copy provided to the bargaining parties within 10 business days of receiving each bargaining party's final offer. Any responses the bargaining parties may wish to make to the ACCC submission must be provided to the panel within five business days, with a copy to the ACCC (who will then give a copy to the other party). *[Schedule 1, item 1, section 52ZZC(1)]*

1.223 Any submissions made by the ACCC do not bind the arbitrators to any particular course of action and must be impartial. It is intended that the submissions will be in relation to the arbitration generally and will not analyse or comment on the remuneration amount specified in the parties' final offers. Submissions should include relevant information about economic principles. *[Schedule 1, item 1, section 52ZZC(1A)]*

1.224 The ACCC may also make guidelines relating to the conduct of arbitration under the Code. The arbitral panel may take them into account in conducting the arbitration. The validity of the arbitration will not be impacted if the panel chooses not to take the guidelines into account. *[Schedule 1, item 1, section 52ZZD]*

1.225 However, the ACCC cannot include matters related to the following in its guidelines without the approval of the Minister:

- how a panel makes a ruling on information requests;
- the content of bargaining parties' final offers;
- the content of bargaining parties' response submissions; and
- how a panel makes the remuneration determination.

[Schedule 1, item 1, section 52ZZD(2)]

1.226 The Bill clarifies that the ACCC guidelines are not a legislative instrument. This clarification is merely declaratory of the law as the guidelines would not be a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*, and is included merely to assist readers of the legislation. *[Schedule 1, item 1, section 52ZZD(7)]*

1.227 General information made available by the ACCC in accordance with subsection 28(1) of the CCA must not relate to the conduct of arbitration under the Code. *[Schedule 1, item 1, section 52ZZD(6)]*

Record keeping and information-gathering powers

1.228 Regulations may specify requirements for responsible digital platform corporations to generate and keep records relating to the operation of the Code. [*Schedule 1, item 1, sections 52ZZF(1) and (2)*]

1.229 A failure to comply is subject to a maximum civil penalty of 600 penalty units. [*Schedule 1, items 7, 9 and 10, sections 76(1)(a)(iaa), (1A)(bab) and (4A)(i)*]

1.230 The ACCC may give the responsible digital platform corporation a notice requiring it to produce those records. The existing investigation power framework for industry codes under the CCA is applied for this purpose. [*Schedule 1, item 1, section 52ZZF(3)*]

1.231 Whether or not regulations prescribe record-keeping requirements as explained above, the ACCC's standard information-gathering powers under section 155 of the CCA also apply. Notices issued under that section are used by the ACCC to gather information, documents and evidence about potential contraventions of the law or that are relevant to specific ACCC functions and powers. [*Schedule 1, items 1, 19 and 20, sections 52ZZF(4) and 155(2)(b)(ib) and (9AB)*]

1.232 The ACMA's information-gathering powers in Part 13 and power to seek civil penalties in Part 14B of the *Broadcasting Services Act 1992* are also applied to the operation of the Code. In particular, these powers enable the ACMA to address non-compliance with the Code's eligibility requirements. The maximum civil penalty for obstruction of a hearing or non-compliance with a requirement to give evidence is set at 600 penalty units. [*Schedule 1, item 1, section 52ZZN*]

1.233 No Ministerial directions may be made to the ACMA in relation to the exercise of these information-gathering powers, or in relation to any other power or function the Code confers on the ACMA. [*Schedule 1, item 1, section 52ZZO*]

Consequences of contravention

Civil penalties

1.234 Civil penalties apply for many (but not all) contraventions of the new Part IVBA.

1.235 The Code also contains a number of procedural requirements, a breach of which attracts a procedural consequence but not a liability for any pecuniary penalty.

1.236 In the case of non-differentiation, good faith obligations and compliance with an arbitral determination, the maximum civil penalty for an act or omission, is the greatest of:

- \$10 million;
- if the court can determine the value of the benefit obtained and that is reasonably attributable to the act or omission – three times the value of that benefit; and
- if the court cannot determine the value of that benefit – 10% of annual turnover during the period of 12 months ending at the end of the month in which the act or omission occurred.

[Schedule 1, items 7, 8 and 10, sections 76(1)(a)(iaa), (1A)(b) and (4A)]

1.237 This is consistent with the maximum penalties applicable under section 76 for a number of contraventions of the CCA.

1.238 Compliance by responsible digital platform corporations and registered news business corporations with all of their respective obligations under the Code is critical to the integrity of the scheme and the achievement of its objectives. The maximum civil penalty reflects the seriousness of the most egregious instances of non-compliance with the Code. Flexibility in the penalty amount is provided to enable the ACCC to seek penalties proportionate to the conduct. Minor breaches are not expected to attract significant penalties under the Code.

1.239 For the purposes of calculating annual turnover under the third limb of the maximum civil penalty, the turnover of related bodies corporate is included. However, only turnover connected with the supply of goods and services in Australia is relevant.

1.240 If a responsible digital platform corporation has contravened the Code and it is not the designated digital platform corporation (that is, it is an Australian entity), both the responsible digital platform corporation and the designated digital platform corporation are jointly and severally liable for the civil penalty. *[Schedule 1, item 1, section 52ZZH]*

Infringement notices

1.241 The ACCC may issue an infringement notice for a contravention of the general requirements. The infringement notice penalty amount is 600 penalty units. This is consistent with the infringement notice penalty amount applicable to certain contraventions of the Australian Consumer Law by listed corporations. *[Schedule 1, item 1, section 52ZZG]*

Other enforcement and redress mechanisms

1.242 On application from the ACCC, a registered news business corporation, a responsible digital platform corporation or another person, the court may grant an injunction in relation to a breach or proposed breach of any provision of the Code. *[Schedule 1, item 11, section 80(1)(a)(iaa)]*

1.243 The ACCC may accept a court enforceable undertaking under section 87B in relation to matters arising under the Code.

1.244 A registered news business corporation can bring an action seeking damages for loss or damage by conduct of a responsible digital platform corporation in contravention of the Code. [*Schedule 1, item 12, section 82(1)(a)*]

1.245 Non-punitive orders and other compensatory orders available under the CCA also apply to contraventions of the Code. [*Schedule 1, items 15 to 18, sections 86C(4) and 87*]

1.246 In the case of damages and other compensatory orders, the court may make an order against a person involved in the contravention, including, among other things, a person aiding, procuring and being knowingly concerned in the contravention. [*Schedule 1, item 6, section 75B(1)*]

Review of the Code

1.247 A review of the Code will begin within one year of the new law commencing and must be completed within a period of 1 year. A written report of the review must be made publicly available by the Minister as soon as practicable after the period of 28 days from when the Minister is given the report. [*Schedule 1, item 1, section 52ZZS*]

Electronic transactions

1.248 Under the *Electronic Transactions Act 1999*, parties are required to seek consent for providing written information or producing documents to each other by electronic communication. However, the Code ensures that the parties do not need to seek this consent before doing so. [*Schedule 1, item 1, section 52ZZR*]

1.249 Nothing in the Part affects how the *Electronic Transactions Act 1999* applies to the *Broadcasting Services Act 1992* including Part 13 of the *Broadcasting Services Act 1992*, as that Part applies in relation to this Part.

Other amendments

1.250 The new Part IVBA will bind the Crown. [*Schedule 1, item 2, section 2B(1)(aaa)*]

1.251 The new Part IVBA operates concurrently with State and Territory laws. [*Schedule 1, item 1, section 52ZZQ*]

1.252 The new Part IVBA will extend to engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia. [*Schedule 1, items 3 and 4, sections 5(1)(aa) and (f)*]

1.253 The Minister cannot use the general directions power under the CCA to direct the ACCC with regard to the new Part IVBA. [*Schedule 1, item 5, section 29(1A)(a)*]

1.254 Other amendments are also made to certain provisions about findings and admissions of fact in prior proceedings, and conduct by directors, employees or agents. [*Schedule 1, items 13 and 14, sections 83(1)(b)(i) and 84(1)(b) and (3)(b)*]

1.255 The new Part IVBA is also added to the definition of ‘core statutory provision’ in subsection 155AAA(21) to ensure that the information protection provisions (about the use of information by the ACCC) in the CCA also apply to the Code. [*Schedule 1, item 21, section 155AAA(21)(a)*]

Application and transitional provisions

1.256 The Bill commences on the day after it receives the Royal Assent. [*Schedule 1, clause 2*]

Chapter 2

Digital Platforms Inquiry: Supplementary Analysis on options for a Mandatory Code

Background

2.1 On 4 December 2017, the then Treasurer, the Hon Scott Morrison MP, directed the ACCC to conduct an inquiry into the impact of digital platform services on the state of competition in media and advertising markets, in particular in relation to the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.

2.2 On 26 July 2019, the ACCC published the Final Report of its Digital Platforms Inquiry. This report identified that Facebook and Google had each become unavoidable trading partners for Australian news media businesses in reaching audiences online, resulting in an imbalance in bargaining power. The ACCC recommended that designated digital platforms be required to provide codes of conduct governing their commercial relationships with Australian news media businesses to the ACMA.

2.3 In December 2019, as part of its response to the Digital Platforms Inquiry, the Government directed the ACCC to facilitate the development of voluntary codes to address bargaining power imbalances between digital platforms and news media businesses. The Government indicated that if an agreement was not forthcoming, the Government would develop alternative options to address concerns raised, which may include the creation of a mandatory code.

2.4 On 20 April 2020 the Government asked the ACCC to develop a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Google and Facebook, to help support a sustainable Australian media landscape in the digital age. In making this decision, the Government was concerned that the Australian media sector was already under significant pressure which was being exacerbated by a sharp decline in advertising revenue driven by the COVID-19 pandemic. Further, while discussions between the parties about voluntary codes had been taking place, advice provided to the Government by the ACCC suggested limited progress had been made. Crucially, the ACCC considered it unlikely that any voluntary agreement would be reached with respect to the key issue of payment for content.

2.5 This analysis is intended to supplement the analysis in the Digital Platforms Inquiry Final Report for the purpose of consistency with the *Australian Government Guide to Regulatory Impact Analysis*. It considers the impacts of two possible designs of a mandatory code.

Impact analysis

2.6 A qualitative cost-benefit analysis of each option is below.

Option 1

2.7 A mandatory code of conduct between digital platforms and news media businesses, with minimum standards of information sharing for digital platforms, bargaining requirements and arbitration to resolve disputes about remuneration.

<i>Option 1: Mandatory code of conduct</i>	
<i>Benefits</i>	<i>Costs</i>
<p>Remuneration for news content through negotiation or arbitration could contribute to sustainable employment of journalists and production of news content.</p> <p>Remuneration for covered news content could sustain the current availability of news media for consumers.</p> <p>Consumers may also benefit from news media companies no longer being as reliant on paywalls to pay for journalism, as a result of remuneration for covered news content. This would improve access to news media content and reduce consumer prices.</p> <p>News media businesses would benefit from greater awareness of changes to digital platform services through the code’s minimum standards, improving their ability to monetise content.</p>	<p>Parties to the code would face compliance costs to register under the code.</p> <p>Digital platforms would have compliance costs associated their obligations under the minimum standards.</p> <p>Parties to the code would incur costs as part of the bargaining and arbitration processes. In the case of arbitration, both parties would share equally the arbitrator’s fee. These costs could be reduced for news media businesses by engaging in collective bargaining.</p> <p>Digital platforms designated under the code would face uncertainty regarding the number of arbitrations and possible outcomes of those arbitrations.</p> <p>Digital platforms could restrict or withdraw services in Australia to minimise financial liabilities under the code. This would result in a reduction in available digital services for consumers.</p> <p>The Government would incur costs to administer and enforce the code through the ACMA and the ACCC.</p>

Option 2

2.8 A mandatory code of conduct with the same features as option 1, but with the additional of frameworks to encourage deals outside the code, in the form of a “standard offer” that digital platforms would be able to make available to news media businesses. This option would allow news media businesses to receive remuneration without having to go through protracted negotiations or arbitration. If a news media business elected to take up one of these standard offers, the negotiation and arbitration provisions of the code would be unavailable to them.

<i>Option 2: Mandatory code of conduct with a framework to encourage deals outside the code</i>	
<i>Benefits</i>	<i>Costs</i>
<p>Remuneration for news content through negotiation or arbitration could contribute to sustainable employment of journalists and production of journalism on topics of public interest. Remuneration for covered news content could sustain the current availability and variety of news media for consumers.</p> <p>Consumers may also benefit through news media companies no longer being as reliant on paywalls to pay for journalism, as a result of remuneration for covered news content. This would improve access to news media content and reduce consumer prices.</p> <p>News media businesses would benefit from greater awareness of changes to digital platform services through the code’s minimum standards, improving their ability to monetise content. These minimum standards would apply to news businesses that did negotiate with platforms within the framework of the code, and it would also be open to news businesses negotiating outside the code to incorporate elements of the minimum standards into these negotiations.</p>	<p>Parties to the code would face compliance costs to register under the code. However, these would be lower than option 1, given fewer registrations could be expected owing to the out-of-code bargaining framework.</p> <p>Digital platforms would have compliance costs associated with their obligations under the code’s minimum standards.</p> <p>Parties to the code would incur costs as part of the bargaining and arbitration processes. In the case of arbitration, both parties would share equally the arbitrator’s fee. However, these costs would be lower in aggregate than option 1, given the out-of-code bargaining framework would incentivise deals that do not draw on the negotiation and arbitration provisions of the code. The standard offer process similarly provides a mechanism to avoid these costs, and may be attractive for smaller news media businesses, including those in regional Australia.</p> <p>Digital platforms designated under the code would face some uncertainty regarding the number of arbitrations and the outcomes of arbitration. However, the standard offer provision would allow them to target offers to news media businesses and in doing so</p>

<i>Option 2: Mandatory code of conduct with a framework to encourage deals outside the code</i>	
<i>Benefits</i>	<i>Costs</i>
	this would reduce the uncertainty. The Government would incur costs to administer and enforce the code through the ACMA and the ACCC.

Identified risks from proposed options

Risk – Reduced availability of digital services for consumers

2.9 In response to an early exposure draft Code released in July 2020 by the ACCC, Google publicly stated that it would affect its provision of relevant search and other services due to a number of concerns about how the code would operate in practice. Facebook publicly stated that it would stop users sharing news on Facebook NewsFeed. The final code:

- addresses concerns about unbalanced arbitration, by ensuring that the code considers the value digital platforms provide to news businesses, as well as the benefits that news businesses bring to digital platforms;
- makes clear that digital platforms will not be required to hand over trade secrets, protecting confidential algorithms. While platforms will be required to give advanced notice to news businesses of some planned changes to algorithm changes, no information about the algorithm itself need be provided;
- addresses concerns about being required to share user data, by making it clear that digital platforms are in no way obliged to provide any user data in breach of the Privacy Act;
- addresses concerns that digital platforms would be required to provide tools to news businesses that would allow them to moderate user comments; and
- better targets services that distribute news content where it has been proven that a significant bargaining power imbalance exists. Similarly, the minimum standard obligations have been amended to only apply to services the Treasurer designates– not any other services provided by digital platforms.

Risk – Court proceedings following introduction of legislation

2.10 The Code has been constructed to minimise the potential for successful legal challenge under the Australian law. Nevertheless, it is

possible that, for example, decisions by the Treasurer to designate digital platforms could be subject to legal challenge.

Regulatory burden estimate (RBE) table

2.11 In estimating regulatory burden costs, it is assumed that under both options two digital platforms will be designated under the code initially, based on the findings of the Digital Platforms Inquiry that two digital platforms have a bargaining power imbalance with news media businesses.

2.12 Under both options, it is assumed that between 100 and 200 news media businesses will be part of the code. This is based on available public information of news media businesses which, based on a desktop assessment, meet the eligibility criteria to register for the code. Public information includes the ACMA's media ownership and control registers and the membership of the Press Council. Further assumptions include:

- 20 news media businesses would have the financial resources to pursue individual negotiations and arbitrations. This reflects the relative concentration of the Australian media market;
- The remainder would form collectives for the purpose of bargaining, comprising on average 10 per cent of the remaining news media businesses; and
- 75 per cent of bargaining processes will ultimately proceed to arbitration. This is a conservative estimate, given the difficulties estimating the variables associated with approaches parties take to commercial bargaining which influence the possibility of a deal being reached before arbitration.

2.13 The differing assumptions under option 2 are as follows:

- 20 news media businesses would have the financial resources to pursue individual negotiations and arbitrations. This reflects the relative concentration of the Australian media market;
- 80 per cent of the remainder would use the standard offers to agree remuneration with the digital platforms;
- The remainder would form collectives for the purpose of bargaining, comprising on average 25 per cent of the remaining news media businesses; and

- 75 per cent of bargaining processes will ultimately proceed to arbitration. This is a conservative estimate, for reasons discussed above.

2.14 The costs of options 1 and 2 largely reflect the costs of registration under the code, the compliance obligations created by the minimum standards, and the costs incurred through negotiation and arbitration. The lower cost of option 2 reflects the reduced number of negotiations and arbitrations taking place, owing to news media businesses which take up a standard offer.

2.15 The substantive compliance costs which contribute the most to the overall regulatory costs are:

- the requirement to provide information in an arbitration if the arbitrator determines a request is reasonable, given the expense parties will incur in gathering financially sensitive information and determining what they are legally required to provide;
- the costs of engaging the arbitrator or arbitral panel, which reflects the conservative estimate of the number of arbitrations likely under the code; and
- the requirements for the digital platforms to provide registered news businesses corporations with advance notification of algorithm changes.

2.16 Note that the regulatory costs below do not include estimates of any payments from digital platforms to news media businesses, as these are considered a direct financial cost and are therefore excluded from a regulatory cost assessment. Under both options, there are no impacts on community organisations or individuals, as only businesses can be parties to the code.

<i>Average annual regulatory costs (from business as usual)</i>				
<i>Change in costs</i>	<i>Business</i>	<i>Community organisations</i>	<i>Individuals</i>	<i>Total change in cost</i>
Option 1	\$11,783,675.93 - \$16,379,917.45	Nil	Nil	\$11,783,675.93 - \$16,379,917.45
Option 2	\$10,464,256.58 - \$12,986,507.23	Nil	Nil	\$10,464,256.58 - \$12,986,507.23

Chapter 3

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

3.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

3.2 The Bill establishes a mandatory code of conduct to address bargaining power imbalances between digital platform services and Australian news businesses.

3.3 The Bill achieves this by creating a set of rules and obligations that news media businesses and digital platform corporations must abide by when bargaining about the news media business' covered news content which is made available by the digital platform service. These rules and obligations include:

- that news media businesses and digital platform corporations must bargain in good faith;
- where the parties cannot come to an agreement during the bargaining, that the news media business can commence arbitration over the issues by notifying the ACCC;
- that digital platform corporations must provide registered news business corporations with advance notification of planned changes to an algorithm that will have a significant effect on covered news content;
- a prohibition on responsible digital platform corporations treating the news media content of news media businesses participating in the code differently to the news media content from news media businesses who are not participating in the Code;

- that a news media business cannot commence bargaining with a digital platform corporation if they have already reached a commercial agreement outside the Code; and
- that a digital platform corporation can make a standard offer to news media businesses which disapply the bargaining and arbitration rules under the Code if news media businesses accept the offer.

3.4 The Bill provides that the Code will apply to digital platform corporations and digital services which have been designated by the Minister. The Minister may only designate a digital platform corporation and digital services if the Minister has considered whether there is a power imbalance between the news media business and the digital platform corporation.

Human rights implications

Right to a fair trial

3.5 The Bill engages the right to a fair trial in Article 14 of the ICCPR by making many contraventions of the new Part IVBA subject to the imposition of a civil penalty.

3.6 The civil penalty provisions contained in the new Part IVBA are not ‘criminal’ for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary as they aim to encourage compliance with the obligations under the Code.

3.7 The provisions are intended to target relevant corporations. Furthermore, they do not apply to the general public, but to a class (news media businesses and digital platform corporations) who should reasonably be aware of their obligations under the CCA.

3.8 Imposing these civil penalties will enable an effective response to non-compliance. The maximum civil penalty amounts that can be imposed under the new Part IVBA are intentionally significant and are in line with the penalties for other provisions in the CCA.

3.9 The judiciary continues to have discretion to consider the seriousness of the contravention and impose a penalty that is appropriate in the circumstances. The civil courts are experienced in making civil penalty orders at appropriate levels having regard to the maximum civil penalty amount, taking into account a range of factors including the nature of the contravening conduct and the size of the organisation involved.

3.10 Therefore, a relevant consideration in setting a civil penalty amount is the maximum penalty that should apply in the most egregious instances of non-compliance with the new Part IVBA.

3.11 Finally, the civil penalties carry no sanction of imprisonment for non-payment of the penalty. Based on the above factors, the nature and severity of the civil penalties in the new Part IVBA are not ‘criminal’ for the purposes of human rights law.

Protection from arbitrary or unlawful interference with privacy

3.12 The Bill does not engage the right to protection from arbitrary or unlawful interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

3.13 The Bill provides that a digital platform corporation must provide, to a registered news media business, a list and explanation of data that relates to user interactions with the news media business’ covered news content to that news media business. The list and information must be updated annually. *[Schedule 1, item 1, section 52R]*

3.14 Under the Code, parties may also bargain to receive data that may include personal information, under the existing operation of the *Privacy Act 1988*, by specifying this as a ‘specified issue’ for bargaining about. *[Schedule 1, item 1, section 52ZG]*

3.15 Under the arbitration framework in the Bill, parties may ask each other for information, including personal information, but only as permitted by the existing *Privacy Act 1988*. *[Schedule 1, item 1, section 52ZT]*

3.16 These obligations and abilities do not interfere with Article 17 of the ICCPR because they do not require or authorise any additional use or disclosure of information than what is already regulated under the *Privacy Act 1988*, so the Bill does nothing to change the privacy protections for personal information already in place under Australian law. *[Schedule 1, item 1, sections 52ZB and 52ZV]*

Conclusion

3.17 Accordingly, to the extent that Schedule 1 to the Bill engages with the rights under Articles 14 and 17 of the ICCPR, it is compatible with human rights as any limitations are reasonable, necessary and proportionate.