



28 August 2020

Australian Competition and Consumer Commission
20/175 Pitt Street
Sydney NSW 2000

By email: bargainingcode@accc.gov.au

Dear Chairman,

Thank you for the opportunity to provide a written submission to the Australian Consumer and Competition Commission (**ACCC**) exposure draft Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (**the Code**).

Twitter's purpose is to keep the world informed by serving the public conversation and supporting a free and independent media as a matter of public interest.

We believe that regulation should promote and protect consumer choice and fair competition, whether it's competition amongst digital platforms or established media conglomerates. Maintaining an open internet is the panacea to foster a diverse media ecosystem where consumers have variety and quality in their news choices, as well as the means by which they find and access that information.

Free discourse can only thrive if its underlying architecture is protected. We have a shared responsibility to foster a culture of innovation where the best ideas are allowed to thrive and to mitigate the risk of placing smaller market players at a disadvantage.

Twitter is committed to working with the ACCC, the Department of the Treasury, the Department of Infrastructure, Transport, Regional Development and Communications, as well as industry, academia, and civil society as we continue to build our shared understanding of these issues and find optimal ways to approach them together. We thank you for the opportunity to share this submission with you and to ask further questions.

Kind regards,

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Director of Public Policy
Australia and New Zealand

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Introduction

Twitter shows the world what is happening, democratises access to information, and at its best, provides people with insights into a diversity of perspectives on critical issues in real time.

We work with a commitment towards an open internet and passion to do right by the people who use Twitter, as well as the broader public. Throughout this submission, we endeavour to address various issues identified in the Code in light of a number of overarching considerations, which are relevant to the broader Australian digital economy, and the fairness and objectivity of the Code.

For the purposes of this submission, we will focus on the scope of the Code, the non-discrimination obligations, and future application of the Code as it may extend to additional digital platforms.

We recommend that the ACCC amend the draft Code to include: clear criteria for designation of platforms; requirement for a Treasurer to provide specific justification of the designation; include a mechanism for a digital platform to dispute a designation. Additionally, we suggest that the ACCC eschew requirements for companies to disclose proprietary information, such as the details of algorithmic changes, as well include a statutory review to address any issues and make amendments as appropriate.

Designated digital platforms and services

The objective of the Code is to establish a mandatory code of conduct to address bargaining power imbalances between digital platforms and Australian news businesses. As currently drafted, however, the Code lacks necessary objective criteria for the designation of additional digital platforms in the future, as well as an effective appeal mechanism.

Under section 52C of the draft Code, the Treasurer may make a designation determination via legislative instrument that specifies a corporation that operates or controls a digital platform will be considered a ‘designated digital platform corporation’ or a ‘designated digital platform service’ for the purposes of this Code.¹

Additionally, subsection (2) states that when making the determination, the Treasurer must consider whether there is a significant bargaining imbalance between Australian news providers and the group comprising the corporation and all of its related bodies corporate.² However, subsection (3) goes on to

¹ TREASURY LAWS AMENDMENT (NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE) BILL 2020, section 52C. Retrieved from <https://www.accc.gov.au/system/files/Exposure%20Draft%20Bill%20-%20TREASURY%20LAWS%20AMENDMENT%20%28NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%29%20BILL%202020.pdf>

² Australian Consumer and Competition Commission, Explanatory memorandum. Retrieved from section 1.19, <https://www.accc.gov.au/system/files/Exposure%20Draft%20EM%20-%20NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%20BILL%202020.pdf>



state that the Treasurer's determination is not invalid merely because of a failure to comply with subsection (2). Prima facie, subsection (3) removes the minimal protections afforded in subsection (2) to qualify any decisions made by the Treasurer to include additional digital platforms within the Code's scope.

Additionally, the Explanatory Memorandum states a digital platform must participate in the Code if the Treasurer has made a determination specifying a designated digital platform corporation, leaving little room for challenge or appeal.

Without a clearly defined appeal mechanism, as drafted digital platforms designated by the Treasurer to be captured by the Code do not have a clear process by which to challenge inclusion, nor does a requirement for transparency in the decision making process exist. Therefore, digital platforms lack the ability to understand the facts or criteria that the Treasurer relies upon to decide the application of the Code and would be at a significant disadvantage in protecting their local business and disputing any future designations.

Certainty drives corporate confidence, and without objective criteria or certainty about a digital platform potentially being designated as subject to the Code, it will be difficult for any digitally-enabled business with a news or media element to effectively grow or thrive in the Australian market. Given this unilateral power for the Treasurer to enact binding mandatory legislation without appropriate checks and balances removes all means of balanced due process or abdicates the need to tie any future platform designations to market realities.

Non-discrimination obligations

Within the draft Code, section 52W states that digital platform services must be supplied on a non-discriminatory basis in relation to registered news businesses' news content.

These non-discrimination requirements essentially protect registered news businesses corporations by requiring digital platforms to prevent their services from disadvantaging the news content of an Australian news business that participate in the Code. However, as currently written, these non-discrimination obligations do not conversely apply to protect digital platforms and leave open wider questions regarding possible discriminatory impacts.

As detailed in the Explanatory Memorandum, discrimination in this context will be considered to occur if the news content of a registered news business is disadvantaged in comparison to other news content on the basis of the registered news business' participation in the Code.³

³Australian Consumer and Competition Commission, Explanatory memorandum. Retrieved from section 1.100, <https://www.accc.gov.au/system/files/Exposure%20Draft%20EM%20-%20NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%20BILL%202020.pdf>



If the Code is implemented as intended by the Government, registered news business corporations will negotiate payment terms with Facebook and Google to receive payment for the inclusion of their news content on their designated services. However, as the Code is predicated on registered news business corporations being able to negotiate more favourable terms with designated digital platforms, no protections exist to bar registered news business corporations from subsequently entrenching Google and Facebook as the main channels for content distribution, especially if there are strong and favourable revenue incentives to do so. The current draft Code would potentially incentivise the curation of exclusive content on these designated platforms creating unfair competition and harming smaller platforms through reduced traffic and content.

Therefore, we would recommend that the ACCC ensure non-discrimination obligations not only protect digital platforms, but also achieve a fair balance between the free flow of news and accessibility to information.

Minimum standards for designated digital platforms

The Code establishes ‘minimum standards’ set out in Division 4 with regard to the ‘covered news content’ of the registered news business. Thus, the Code would require designated digital platforms, which operate global platforms in markets around the world, to provide registered news businesses corporations in Australia with advance notification of algorithm changes, information about the collection and availability of user data, and advance notification of changes affecting the display and presentation of news content.⁴

Section 52N focuses on the algorithmic ranking of covered news content, stating that a digital platform must give 28 days notice of algorithm changes that may have a significant effect on the ranking of the registered news business’ covered news content made available by the digital platform service.⁵ However, the draft Code does not clearly define a “significant effect” in either the ranking system or ability to drive user traffic. This requirement does not take into account how algorithm changes occur.

Algorithms that are utilised by digital platforms are generally categorised as commercially sensitive information, or in some cases, proprietary trade secrets, effectively contradicting the protections set out in section 52V in the Code. There are also many such algorithms that apply to all content, not specifically to news content alone. Not only would disclosing the amount of sensitive information as required by the Code bring about vulnerabilities to these algorithms that work to surface relevant, credible content; it would also potentially jeopardise the intended use or algorithms to effectively fight spam, misinformation, malware, and other harmful material.

⁴ Australian Consumer and Competition Commission (20 May 2020), Draft bill. Retrieved from <https://www.accc.gov.au/system/files/Exposure%20Draft%20Bill%20-%20TREASURY%20LAWS%20AMENDENT%20%28NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%29%20BILL%202020.pdf>

⁵ Section 52N



Additionally, there are circumstances where action is required in real time to respond to events where this notice period may not be possible, for example following the Christchurch terrorist attack when a number of media organisations posted content created by the attacker.⁶ The complexity of the hundreds of factors employed in algorithms and the evolving nature of how people use digital services makes it virtually impossible to anticipate how changes might impact future content or news stories that have not yet been written. There is critical research and ongoing work being done in this area. Additionally, the supply of information relating to regular upgrades, updates, and fixes to algorithms and machine learning technology employed across digital platforms would not be the relevant information required by publishers to adequately forecast how their news content would ultimately be featured on digital platforms and would result in an unworkable ‘needle in the haystack’ process.

An obligation to give notice and explain the detail of the change to any algorithms and the potential effect of these changes would in many cases be difficult or impossible to comply with, beyond offering a general overview of the types of results intended or sought through relevant upgrades and changes. In particular, algorithms do not operate in a vacuum, and for a platform like Twitter, the user’s ability to turn on and off the home timeline algorithm is an important part of consumer choice, while the use of signals like whether a user follows an account or not is something that plays a critical role but is ultimately controlled by the person using Twitter, not the company.⁷

The additional provisions covered in Division 4 are equally problematic, including but not limited to sections: 52O covering changes specifically designed to have an effect on the ranking or display of content behind a paywall; 52P covering changes likely to have a significant effect on the display and presentation of news content; 52Q changes are likely to have a significant effect on the display and presentation of advertising directly associated with the registered news business’ covered news content.

Of particular concern is 52S that grants a registered news business corporation flexible content moderation tools that allow the registered news business corporation to remove or filter comments on the registered news business’ covered news content.⁸ Twitter provides tools and controls to every account equally, but does not allow people using Twitter to remove content created by other users, not least as this could be abused to silence criticism and different opinions. We do not believe that news organisations should have the ability to remove content on platforms other than the option to remove their own content if so desired.

⁶ The Drum (August 2019), Christchurch terror attack Australian media facing scrutiny. Retrieved from <https://www.thedrum.com/news/2019/03/19/christchurch-terror-attack-australian-media-facing-scrutiny-showing-video>

⁷ Twitter Help Centre (29 August 2020). Retrieved from <https://help.twitter.com/en/using-twitter/twitter-timeline>

⁸ *Ibid.*



These requirements expand above and beyond any reasonable disclosures placed upon business, and in the long term will prove to be deterrents to further growth and innovation within the Australian digital sector.

Bargaining and arbitration frameworks

Twitter values the freedom to contract and uphold the principles underpinning the free flow of news and information, which is vital to a democratic society.

In conflict with the freedom to contract, however, Division 6 places multiple obligations on digital platforms to comply with information requests and costs/payment data while there is a noticeable absence of these obligations also being placed on registered news business corporations. The scope of the information gathering powers in these relevant sections extend beyond what is customary in commercial bargaining arrangements resulting in a skewed bargaining framework, and may significantly disadvantage smaller services and new market entrants.

News media businesses derive value from the presence of news on digital platforms. People utilise digital platforms to help them find information, which provides a diversity of news and online publications to help people stay up to date on current events or topics that interest them.

Within the Code, there is a lack of recognition of the transfer of value from digital platforms to registered news business corporations. In the current draft, nothing suggests the value registered news business corporations gain from having their content available on digital platforms (e.g. referral links or website traffic). Even the ACCC Concepts Paper acknowledges that one needs to look at both sides of the value equation.⁹ Thus, the current framing of the Code ignores the value exchange that normally exists in this bargaining process.

Additionally, without a requirement to disclose this data in the same way platforms are expected to provide data, digital businesses will have no means to verify the statements being made by news organisations as part of their negotiations.

The Code also provides that only registered news business corporations may initiate arbitration under any justification of their choosing. While there is an obligation to negotiate under good faith, the Code would be better served by the inclusion of clear guidelines and criteria for registered news business corporations to initiate arbitration.

Rather than restoring parity in the commercial relationship, these proposals risk placing one side of the commercial relationship at a significant disadvantage and such enshrined inequity is not the hallmark of good policy.

⁹ Australian Consumer and Competition Commission (20 May 2020), Concepts paper. Retrieved from www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%2019%20May%202020.pdf



Avoiding unintended consequences for small publishers and users

The consumer lies at the heart of competition law. Any solutions to perceived market failures should seek to protect consumer welfare and choice, rather than the interests of particular established market participants.

Through discussions with partners and stakeholders, there are potentially unintended consequences for smaller publishers with the Code since large and small news publishers have different needs, objectives, and business models based on respective sizes and audiences.

It would be mutually beneficial to continue to allow an open and frictionless approach to accessing information; the requirement to pay for content could create undesirable incentives, negative consequences, and lead to further entrenchment of dominant platforms.

For example, Spain's ancillary copyright legislation came into effect on 1 January 2015. Three months later, the Spanish association of periodical publications editors, Asociación Española de Editores de Publicaciones (AEEPP), commissioned a study that confirmed concerns that the new legislation had a negative impact on media diversity and the ability to access news.¹⁰

Based on comScore data for the first three months of 2015, the study found that following the introduction of the law and the closing of Google News and a number of smaller news aggregation services, there was a decline of internet traffic directed at Spanish newspapers.¹¹ Traffic to newspaper sites dropped more than 6% on average and 14% for small publications.¹²

Similar to Spain, the disproportionate effect on smaller publications that fall outside the scope of the Code in Australia will be significant. As stated in the Code, eligible news organizations need to have an annual revenue of at least \$150,000 in the last financial year, or three of the last five. This requirement exhibits the intention that the Code will serve to protect the large incumbent news corporations and publishers, and this revenue threshold along with local content rules will present challenges for new market entrants.

¹⁰ Asociación Española de Editores de Publicaciones (29 August 2020). Retrieved from [https://webgate.ec.europa.eu/fpfis/mwikis/thinktank/index.php/AEEPP_\(es\)](https://webgate.ec.europa.eu/fpfis/mwikis/thinktank/index.php/AEEPP_(es))

¹¹ Asociación Española de Editores de Publicaciones. (29 August 2020). *Research Confirms new Spanish ancillary Copyright is actually good for no one*. Retrieved from <https://www.aepp.com/noticia/2272/actividades/informe-economico-del-impacto-del-nuevo-articulo-32.2-de-la-lpi-nera-para-la-aepp.html>

¹² Asociación Española de Editores de Publicaciones. (29 August 2020). *Research Confirms new Spanish ancillary Copyright is actually good for no one*. Retrieved from <https://www.communia-association.org/2015/09/09/research-confirms-new-spanish-ancillary-copyright-is-actually-good-for-no-one/>



While large publishers will be able to secure remuneration for a broad range of news services, this will enact barriers for smaller or newer publishers despite allowances for collective bargaining arrangements, therefore leading to the entrenchment of dominant players and creating anti-competitive effects both within the digital economy and the media landscape.

By protecting the business models of a few dominant media publishers and businesses, content variety will be limited and market expansion effects will diminish. Consumers will ultimately have less access to information, new products, and services from aggregators, as well as result in a further consolidation of media outlets and news coverage within Australia.

With market expansion effects, if search results prioritise or favour registered news publishers who have signed agreements with designated digital platforms under the Code, smaller publishers who don't sign agreements will miss out on the free distribution and discovery they currently receive from appearing in search results, therefore making it harder for them to compete. This could disproportionately affect independent, regional, and startup publications for whom finding new audiences is especially valuable.

As stated by the European Innovative Media Publishers, if search results are skewed, news aggregators close, or traffic referrals decline, many small and independent news sources will lose their main sources of revenue.¹³ This situation will result in less numerous and less diverse sources online.¹⁴ Typically, smaller pockets of the media ecosystem rely on the internet to reach new audiences. The Code has not been developed with these services in mind. As the large publishers ink these bargaining arrangements and contractual agreements under the Code, lesser known outlets will lose a key channel for being discovered.

Also, as one of the most concentrated media markets in the world, the consumer experience will worsen as the Australian media market further supports dominant players.¹⁵ As outlined in the Reporters Without Borders Press Freedom Index for 2020:

"...pluralism in Australia has been badly eroded by one of the world's highest levels of media ownership concentration. Almost all of the privately-owned media are now owned by two media giants, Rupert Murdoch's News Corp and Nine Entertainment, the heir to a consortium created by the Packer family. This oligarchic media model, in which media outlets focus above all on

¹³ European Innovative Media Publishers. (29 August 2020). *OUR VIEWS*. Retrieved from <http://mediapublishers.eu/our-views/>

¹⁴ *Ibid.*

¹⁵ Dwyer, Tim. (November 8, 2016). *FactCheck: is Australia's level of media ownership concentration one of the highest in the world?*. Retrieved from <https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437#:~:text=The%20Australian%20media%20landscape%20is,the%20large%20majority%20of%20Australians.>



cost-cutting and profits, constitutes an additional curb on public interest investigative journalism.”¹⁶

Thus, the Code could detrimentally affect access to diverse and quality news content, and as drafted, will serve to protect incumbents and large players on both sides of the bargaining table rather than protecting the public interest.

Statutory review of Code

Given the nature of this legislation, we would also recommend a mandated independent review of the Code be codified in the legislation to assess the effectiveness of the Code and determine if it is achieving its intended objectives.

Per standard processes, we would also recommend within two years after the commencement of the Code, the Treasurer must conduct an independent review, evaluate any relevant market impacts, and determine whether the Code or corresponding legislative instruments should be amended. Additionally as consistent with other legislative reviews, it should be required that a prepared report be tabled in each House of the Parliament within a reasonable amount of time after the completion of the independent review.

Digital platform services and the broader implications of the Code

Twitter provides a service focused on serving the public conversation. Twitter does not search or scrape the web for press publications, nor copy content and bring it to the Twitter platform. Twitter’s service is compiled through user-generated content and is dedicated to upholding the free flow of news and information, which is vital to a democratic debate and political communications.

As Twitter is positioned within Australia as a modest participant, the extension of the Code would place us in a competitive disadvantage and hinder our ability to grow within Australia. However, our company and our users have an interest in ensuring that the Code is adopted in as precise and balanced manner as possible, which respects the rights and interests involved to create a predictable regulatory environment for online content-sharing services in the future.

¹⁶ Reporters Without Borders (28 August 2020), *Press Freedom Index for 2020*. Retrieved from <https://rsf.org/en/australia>