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CENTRE FOR MEDIA TRANSITION

News Media Bargaining Code

Exposure Draft of the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

Submission to Australian Competition and Consumer Commission

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About the Centre for Media Transition

The Centre for Media Transition is an interdisciplinary research centre established jointly by the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

We investigate key areas of media evolution and transition, including: journalism and industry best practice; new business models; and regulatory adaptation. We work with industry, public and private institutions to explore the ongoing movements and pressures wrought by disruption. Emphasising the impact and promise of new technologies, we aim to understand how digital transition can be harnessed to develop local media and to enhance the role of journalism in democratic, civil society.

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Introduction

Thank you for the opportunity to comment on the exposure draft.

We recognise that considerable work by the ACCC, news media businesses and digital platforms has gone into this draft scheme and that the ACCC does not wish to depart from the chosen commercial bargaining approach. However, as one of the few contributors to this policy process with no commercial interest, we believe it is important to continue to advance ideas about digital platform regulation that are grounded in a public interest perspective.

In section A we explain why we take a different approach to the ACCC on the regulation of digital platforms. However, recognising the advanced stage of this policy process, in section B we offer specific comments on the proposed scheme, hoping that some of these comments may help to improve the scheme's public interest outcomes. Some aspects we wish to highlight are as follows:

- there is potential under s 52D for a secondary use of the registration data to support a register of media plurality
- the proposal under 52E and 52K to permit internal standards schemes fails to serve the public interest and should be replaced by membership of an independent industry or statutory scheme with a complaints handling facility
- the unfettered decision by the Treasurer to designate a digital platform should be tightened
- the monitoring role of the ACMA under 52E should be enhanced
- the revenue threshold under 52G should be adjusted to admit smaller news providers in some circumstances
- the ABC and SBS should be included in the scheme.

A. General comments

The bargaining framework

In our submission on the Concepts Paper, we said our preference would be for digital platforms to contribute to a scheme based on recognising the value of news as a public good, not on the improvement of the bargaining position of individual participants. The scheme set out in the exposure draft is based on rectifying the power imbalance between news businesses and digital platforms. In the Q&As (p.3), the ACCC says:

> This imbalance has resulted in news media businesses accepting less favourable terms for the inclusion of news on digital platform services than they would otherwise agree to.

The code therefore aims to have news media businesses remunerated for supplying content to digital platforms.

As we see it, the scheme does not address the underlying problem with the business model of news; instead, it assumes the business model will work if the power imbalance is corrected. We can't see how this will address the problem that advertisers often prefer digital platforms to mass media as a means of reaching customers. This approach might work if there is a settled method for valuing the benefit derived by platforms from news, along with the benefit derived from platforms by news organisations, and the application of this method shows platforms should pay news organisations. This scheme does not provide such a method of calculating benefit, and even if it did, the payments may be too small to make much difference to some news services that, as a community, we want preserved. Government subsidy may then be the only remaining option.

The public policy task here is to consider how platforms might contribute to the public interest in the supply of journalism. A variety of approaches may be valid. The platforms would point to their recent initiatives in striking deals with some publishers; the ACCC and some large media organisations would support the improvement of bargaining positions; smaller publishers may seek a collective fee arrangement.

For our part, CMT prefers an approach that recognises the fragility of the news business model and allocates funding according to the value of news. That involves the difficult task of finding a way to calculate this value, with no consensus on how to go about this. Once that is done, we think it is reasonable that digital platforms – as a new category of service provider within the Australian regulatory framework – contribute to the costs of maintaining a diverse local media environment.

Schemes requiring service providers to contribute to social objectives exist already. Participating telecommunications carriers contribute to the costs of universal service set out in Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (imposed via the *Telecommunications (Industry Levy) Act 2012*), while consumer research grants are funded under s 593 of the *Telecommunications Act 1997* (imposed via the *Telecommunications (Carrier Licence Charges) Act 1997*). An alternative approach to funding social objectives is seen in the New Eligible Drama Expenditure Scheme set out in Division 2A of Part 7 of the *Broadcasting Services Act 1992*, whereby subscription television broadcasting licensees ensure, among other things, that channel providers spend at least 10% of their total outlay on Australian drama programs.

As we know this approach is not favoured by the ACCC, below we offer specific comments on the scheme set out in the exposure draft. However, we also note the comments of our colleague Dr David Brennan in a submission on the Concepts Paper and a further submission on the exposure draft, about the complications presented in the intersection of the bargaining scheme with local and international copyright law.

The choice of 'code'

We query the continuing use of the 'code' framework. This scheme is black letter law. A new Part IVBA is to be inserted into the *Competition and Consumer Act 2010*. The scheme comprises a set of specific obligations, a duty to bargain in good faith, and an arbitration mechanism. It does not have the features generally associated with a code of practice, even though a code would probably be more appropriate for some of the matters dealt with here (see, for example, the comments below on the recognition of original news content).

B. Specific comments on the exposure draft

Definitions of 'core news content' and 'covered news content'	52A	We understand it is difficult to devise appropriate definitions and we broadly support these provisions. There are some aspects where we suggest amendment. (i) The concept of 'journalism' could be used in placed of 'journalist', or there could be some recognition that content can be created in an environment where it is editorially supervised or approved by a journalist. This would allow for interns and other arrangements in the way, for example, that a medical or legal professional with a practising certificate oversees the work of junior doctors or clerks. (ii) The EM at 1.53 makes it clear that the expression 'explaining issues' is intended to extend to opinion, not just analysis. We think this should recognise analysis as both 'core news' and 'covered news' but should not recognise opinion alone as 'core news' (instead, it should just be counted as 'covered news'). This would probably need an explicit provision that distinguishes analysis from opinion.
Definition of 'news source'	52A	We think this should be expanded from newspapers, websites etc to include 'other digital services' (or similar) so that the provision includes, for example, email subscription services (such as daily news emails, like those from *The New Daily*, the ABC or *Crikey*) and apps. Content may well be created by journalists specifically for these sources, either now or in the near future.
Decisions by the Treasurer: 'designated digital platform corporation'	52C	(i) This provision appears to give the Treasurer an unfettered discretion to make a designation determination. The designation of a digital platform is not invalid, even if the Treasurer fails to take into account, as required by the section, a 'significant bargaining imbalance' between the platform and Australian news providers. We think it would be preferable for the Treasurer to be satisfied that a designation is 'in the public interest', taking account of established criteria which include a significant bargaining imbalance. (ii) The Treasurer should be required to take account of any relevant reports from the ACCC (so 'must' not 'may'). (iii) We note the ACCC has not attempted to define 'digital platform service' other than to refer to designation. We understand it is a difficult category of service to define, but we note that other legislative contexts (eg, online safety) show there is a growing need to define either the category as a whole, or its component parts.

		(iv) Related to this, we understand there is some confusion over the scope of the term 'digital platform service'. The EM at 1.33 indicates that the arbitration provisions would apply only to some components of a digital platform business (ie, the *designated* services, such as Facebook News Feed and Google Search), but the minimum standards are said (at 1.35) to apply to the 'digital platform corporation' and the obligations in Division 4 of the Bill apply to a 'digital platform service', not a *designated* service, suggesting they have wider application. We assume this will be clarified, given the ACCC has extensive experience is specifying, for an integrated business, the specific services to which a determination applies.
Application for registration of news media business corporation	52D	We think there is an opportunity for a secondary use of the information collected under this scheme in order to develop a register or database on media plurality. We explained the need for such information in our report, *The Impact of Digital Platforms on News and Journalistic Content*, for the ACCC's Preliminary Report in the Digital Platforms Inquiry. This is an opportunity to lay the foundations for a contemporary approach to measuring media plurality which goes beyond the arrangements in the Broadcasting Service Act that relate only to commercial television, commercial radio and associated newspapers. In the first instance, the information required to apply for registration as a new media business could be made available for a media plurality database kept by the ACMA. To the extent that additional ownership and control information is required to be consistent with existing reporting obligations under Part 5 of the BSA, this should be included in the current Bill, as the incremental additional cost of reporting would be justified by the significant benefit in the new register and in the secondary use of the registration data. Businesses already providing this information under the BSA should not be required to duplicate their current reporting obligations. In the longer term, the ACMA could be tasked with monitoring the media environment for existence of news providers that are not registered news media businesses.
Registration and revocation of the registration by ACMA	52E	Our comments on this section and on s 52K below relate to the obligations that apply to news media businesses and how the obligations are overseen by the ACMA. While we support the attempt to provide a better foundation for news media in the digital environment, we think the scheme places insufficient emphasis on the public interest in the supply of news. A commitment to the longer-term public interest in a diverse and competitive media environment is a reasonable expectation of a scheme that involves legislative

		intervention, the involvement of two federal regulators, and the redirection of revenue from one sector to another. (i) The EM at 1.59 states that ACMA 'will regularly review the registration of each news business corporation' but there is no such requirement in the Bill. There should be a requirement that ACMA monitor compliance with the requirements in 52E(1) (eg, the qualifying criteria set out in the revenue test, the content test, the Australian audience test, the professional standards test). Further, s 52E(3) should say the ACMA 'must' (not 'may') revoke registration if it is satisfied the corporation no longer complies. (This is not a matter of ACMA being an effective regulator. This is a substantial regulatory intervention by Parliament to assist news media; it is reasonable that those receiving the assistance meet certain requirements.) (ii) In relation to this matter and more generally, we note the statement in the EM at 1.43 that 'It is intended that the ACMA will have the necessary powers to administer the functions conferred on it in the code. This will include information gathering powers to obtain information relevant to determining whether a news media business satisfies these tests. Provisions to this effect will be included in the final code.' ACMA will be acting to protect the public interest in maintaining a well-functioning news environment. This is a welcome development, taking ACMA beyond its traditional remit. We assume it will involve amendment to the ACMA Act as well as the Competition and Consumer Act, and would support additional functions being specified, rather than relying on the broad provision in s 11(1)(d)(ii) of the ACMA Act.
Revenue test	52G	The annual revenue threshold of $150,000 per annum would appear to cover costs comprising, perhaps, two salaries and some overheads. It may be reasonable to exclude smaller businesses on the assumption that separate support programs could be developed for start-ups that would move into this scheme as they expand and establish themselves in the market, but such support is not guaranteed and in any event, size is not necessarily a proxy for social utility. While we accept that news media businesses would need to be of a sufficient size for digital platforms to gain some benefit from their presence, we think it would help promote a more diverse media environment if (a) the threshold were lowered, and/or (b) the ACMA were given a discretion to waive the revenue requirement in situations where the business can demonstrate significant public benefit and where certain other conditions are met (such as membership of a professional standards scheme). This would likely assist a news provider in a regional area, where revenue is likely to

		be much more restricted. In any event, we think the operation of this section should be reviewed annually for the first three years in order to determine its effect on smaller news businesses.
Content test	52H	The requirement is that 'each news source … creates, and publishes online, content that is predominantly core news content'. While we agree that 'core news' should be the focus, we suggest 'principally' would be more appropriate than 'predominantly'.
Audience test	52J	The requirement is that news sources '… operate predominantly in Australia for the dominant purpose of serving an Australian audience'. We agree that Australian audiences should be the focus but we suggest that while 'predominantly in Australia' remain, 'dominant purpose' could be replaced with 'principal purpose'.
Professional standards test	52K	We object to the proposed arrangements and see several problems. We think it is reasonable to expect more of news media organisations that receive a benefit from this scheme as a result of regulatory intervention. (i) The scheme needs to recognise the importance of a complaints scheme to support rules about accuracy, fairness etc. A code of ethics alone is insufficient. (ii) The professional standards scheme needs to be independent of the news organisation, at least insofar as complaints can be made to an independent entity. An internal set of guidelines, with no external accountability, may be sufficient for a purely self-governing environment but not for businesses that are benefiting from the intervention of Federal Parliament and two government regulators. (iii) Apart from the fact that the proposal in the Bill would allow Australia's largest and most influential commercial publishers to operate exclusively under their own internal codes, it is worth considering potential industry changes. A recent news report suggested the Australian Press Council is facing its own financial difficulties as a result of the economic pressures experienced by its members. While we are not suggesting there is an imminent problem with the APC, in principle the scheme could collapse – as the Advertising Standards Council collapsed in the mid 1990s, before being replaced by the Advertising Standards Bureau (now Ad Standards) – and Australians would be left with the largest print and online publishers running their own standards schemes. The ACCC's draft of Part IVBA would not only permit this; it would provide regulatory support.

		(iv) In our submission on the Concepts Paper and in other work we have suggested this could be an opportunity to develop a single industry-based standards scheme that operates across media platforms, with certain minimum standards and opt-in arrangements for higher standards. We note that in its own submission on the Concepts Paper, Facebook proposed an Australian Digital News Council. While this is not the same as the standards body we have proposed, it is encouraging that Facebook has said it will consider financially supporting a council, as it is unlikely that Australian news providers alone would have the capacity to fund an enhanced and expanded industry scheme. (v) Even disregarding the potential for a cross-platform scheme, the suggestion that internal editorial standards can be equivalent to the broadcasting and print and online schemes is misplaced because those schemes themselves are not comparable. While it is reasonable to expect the national broadcasters would have more extensive requirements, the current commercial broadcasting codes provide lesser obligations, although they are of course backed by ACMA enforcement. (vi) The concept of 'quality journalism' appears in this provision but is not explained. It is not necessary to include that concept if the ACCC replaces the right to adopt internal standards with the obligation to be a part of an independent industry or statutory scheme. (vii) The requirement of 'editorial independence' ('from the subject of its news coverage') is explained in the EM to refer to AFL Media etc. While this is understandable, the concept is unclear in the Bill as it appears to be wider in application.
Providing information to news businesses	52M, 52N to 52Q	These provisions require the digital platform to give the news media business information at the outset and annually on the type of user data it collects etc, and to provide 28 days notice of changes that might affect ranking and display of news content, display of advertising, and arrangements for paywalled content. We support the objective of providing additional information and advance notice, having made the following observation in our report for the ACCC in 2018 (*The Impact of Digital Platforms on News and Journalistic Content*, p. 150): > The public benefit which distinguishes news media from other businesses establishes a strong case for requiring platforms to give advance warning of changes which significantly affect news media business operations and revenues. In more general terms, it is reasonable to regard digital platforms as

		having a duty not to harm the public benefit provided by news and journalistic content. In relation to the terms of these sections in the exposure draft, we make two points. First, we think it's reasonable that news businesses only get access under 52M to data relevant to the operations of the registered news business. It is possible that platforms will collect a range of data about users who access news content. Registered news businesses should only access the datasets that will help inform ongoing business operations. Giving registered businesses carte blanche to access user data through 52M(e) will not lead to beneficial outcomes for Australian consumers, as it will help to normalise the sharing of large sets of consumer data without stopping to consider the applicability and relevance of each data category. It may well be that agreements about data sharing are dealt with through something akin to the bargaining process, where negotiations can occur with appropriate oversight. Second, in relation to notice of algorithm changes, we accept the point advanced by digital platforms that the concept of 'actionable' changes may be a useful way of limiting the number of times a platform needs to inform a news business of changes. Actionable changes are those for which a news business needs to take some action to preserve its position. This may be at least as useful as the concept of 'a significant effect on the ranking of … covered news content' and has the advantage of being grounded in current practice.
User comments	52S	As this provision was unexpected and not the subject of previous consultations, we just note here that, in principle, it is a welcome addition. News organisations will be in a better position to advise on the precise terms of the provision.
Recognition of original news	52T	The requirement is to work with news organisations to develop 'a proposal' to 'recognise original covered news content when ranking and displaying news content on the digital platform service'. The EM provides no explanation, but the provision appears to anticipate labelling or other identification, without involving changes to ranking (with both aspects having been the subject of discussion in the Digital Platforms Inquiry, and ranking being dealt with to some extent in the separate work on a disinformation code and, apparently, in the reference to 'prominence' in 1.85 of the EM.) We think this provision needs to be tighter in that it should refer specifically to labelling or other forms of visual identification and it should explain what is meant by 'original' content.

		(Note: this is the kind of provision that may be dealt with better by a code of practice, rather than in legislation.)
Exclusion of ABC and SBS	52Y(6)	We object to the exclusion of the ABC and SBS. Although mainly publicly funded, they are news providers operating independently of government, and their content is subject to the same distribution environment involving digital platforms. Their exclusion undermines the rationale for the scheme and raises questions about the authenticity of Parliament's intervention in this area. It is a separate question as to how any revenue arising out of the participation by the ABC and SBS in the scheme might be used. Though opinions will differ on this, in our view it should help address the problem that has prompted this action – the erosion of news in a digital environment. Revenue raised from the scheme could be ringfenced to support new initiatives in public interest journalism by the national broadcasters.
Matters to be considered in arbitration	52ZP(2)	These include (in summary) the direct and indirect benefits to the platform along with the news business' cost of production and whether there would be an undue burden on the platform. As noted in our general comments in section A above, the revenue aspect of the bargaining scheme does not provide any specific guidance on how to value the benefit derived by digital platforms, and it does not take account of any benefit derived by news organisations. Valuing these benefits is of course is very difficult, but in not offering guidance and in having multiple agreements between news organisations and the one platform, it is possible there will be vastly different methodologies for valuing the benefits of news as well as for valuing costs of production. In our introductory comments we suggested these difficulties could be a reason for adopting a different approach overall, but the ACCC, in maintaining the bargaining framework, could still provide guidance that allows for aspects of the social value exchange, not just the commercial value exchange, to be considered.
Prominence of news content		The EM at 1.85 states that 'The final code will also include requirements about genuinely considering reasonable proposals from registered news business corporations to ensure that the display and presentation of news on platforms' services provides appropriate prominence to their content (for example, displaying clear branding of mastheads).' This is an important aspect, and presumably it is something Google was referring to in its 'Open Letter'. We think the ACCC should publish the proposed provision and seek comment.

Other – transparency and support for smaller news businesses		There is a lack of transparency on the outcomes of the scheme. Given that legislation is being used to redirect revenue from platforms to publishers, it is reasonable to expect that at least the value of the payments made by platforms to news organisations be made public, perhaps as part of the register kept by the ACMA. Additional transparency would be helpful to smaller organisations, whether or not they participate with their competitors in collective bargaining. Additional support might also be considered for smaller news businesses or their collectives, given the collectives would need to be of a considerable size before they had access to adequate resources. Smaller players who can put less time, money and expertise into developing their bid and have no insight into the methods of the larger players, are likely to be less successful than better resourced news organisations.