



## **Comments on exposure draft Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020**

### **Joint submission: The Intellectual Property Research Institute of Australia<sup>1</sup> and CREATE<sup>2</sup>**

Prepared by Dr Ula Furgal,<sup>3</sup> A/Professor Rebecca Giblin<sup>4</sup> and A/Professor Julie Clarke.<sup>5</sup>

28 August 2020

---

<sup>1</sup> The Intellectual Property Research Institute of Australia is a University of Melbourne research centre, based in the Melbourne Law School. See <https://law.unimelb.edu.au/centres/ipria>.

<sup>2</sup> The UK Copyright and Creative Economy Centre, University of Glasgow (create.ac.uk).

<sup>3</sup> Postdoctoral researcher, CREATE, University of Glasgow.

<sup>4</sup> ARC Future Fellow and leader of the Authors Interest Project (FT170100011), Melbourne Law School, University of Melbourne.

<sup>5</sup> Melbourne Law School, University of Melbourne.

Thank you for the opportunity to comment on the exposure draft of the News Media and Digital Platforms Mandatory Bargaining Code ('the Code').

We are broadly supportive of the Commission's recommendations. In particular, we support the targeted approach of singling out dominant digital platforms (Google and Facebook at first instance) for special treatment, which has less potential for unanticipated collateral damage than the broader definition of an information society service provider adopted by the EU with its press publishers' right. We also commend the use of final price arbitration which we consider likely to result in faster and more cost-effective outcomes than traditional commercial arbitration. Due to the fast-changing nature of the market, we think the current proposal that the arbitration will only result in agreements for one year is crucial to promoting fair outcomes and should certainly be maintained in the final legislation.

We do however suggest that the Code could benefit from some amendments and clarifications as outlined below.

### **1. Failure to secure remuneration to journalists**

The Code currently contains no requirement for registered news businesses to pass on any share of the new revenue that would be generated under the scheme to their journalists. This is a glaring omission. In the current news environment, the bargaining imbalance between news organisations and journalists is just as severe as the one between news organisations and platforms, and we urge you to give serious consideration to ways of addressing this imbalance by securing some share of this new revenue to journalists directly.

The EU press publishers' right seeks to ensure that journalists get an adequate share of the additional remuneration press publishers will receive from the that regulation via article 15(5), which provides:

Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.<sup>6</sup>

Implementations of this requirement will vary by jurisdiction, but France, for example, requires journalists' share to be determined via collective bargaining (either on an

---

<sup>6</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L 130 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0790>

organisation level, such as in an EBA, or via industry-wide awards).<sup>7</sup> It also mandates transparency obligations and requires that the share not be considered part of a journalist's ordinary salary but an additional payment. There are other models too. We highly recommend that the Commission investigate the various possibilities and make provision for journalists in this law in order to better satisfy the purposes of the legislation.

## **2. Division 3: Registered news businesses**

In the EU, whoever produces 'press publications' (which, as defined, must be under 'editorial initiative, control and responsibility') is eligible to benefit from the press publishers' right. The Code has much stricter criteria for becoming a registered news business.

Limiting the application of the Code to registered organisations provides welcome certainty, but we suggest that the four tests a news business must fulfill in order to be registered would benefit from fine-tuning. We welcome the professional standards test and content test as likely to limit the Code's application to professional quality news information, and find the Australian audience test non-problematic.

However, we have concerns about combining these tests with the revenue test, which may go too far in privileging established organisations over emerging ones. Although the threshold is not particularly high, it will still mean that new entities and smaller news outlets will not be able to benefit from its provisions, making their larger rivals relatively more profitable and threatening the pluralism of news sources. As drafted, there are already costs associated with becoming a registered news business, and especially with negotiating revenue. Combined with the other three tests, it is our view that this will amply separate out genuine news businesses in a way that does not overly discriminate against small and emerging media outlets. This would also future-proof the law in the event that recent changes in the news market result in different ways of doing things (for example, if we see a new wave of micro news businesses staffed by journalists who have lost their jobs in recent purges).

## **3. Division 4(A): Minimum standards etc**

We are generally supportive of the idea of minimum standards to promote a flow of information between news organisations and platforms. This will facilitate development of new news business models. This responds to a criticism of the EU law, that, by providing money but not information, it can only act as a temporary lifeline rather than helping news organisations find a firmer footing in the long term. However,

---

<sup>7</sup> LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038821358&dateTexte=&categorieLien=id>

we think section 52M in particular requires clarification, especially sub-section 2(e), so that there is certainty about what exactly, platforms would be required to do to comply. We would also suggest that an additional allowance be made to permit urgent technical fixes to the platform's service, in addition to the existing allowance for changes relating to matters of urgent public interest.

#### **4. 52ZF(1)(c): Actions covered by the Code**

The Concepts paper refers to 'use of news content' and goes into some detail about the different ways that platforms interact with news content. However, the Code merely refers to the 'making available' of news content without defining what this means. 'Making available' is a term of art in copyright law, and we do not think its meaning in that context adequately captures the legislation's intention. We urge reconsideration of the phrase, or at least additional clarification of the uses it is intended to capture.

#### **5. EM 1.97: 'Opt out' rule**

As the explanatory materials to the Code indicate, the final version will include requirements to provide registered news organisations with an explicit option to 'opt out' of having their content included in any service offered by a digital platform. The explanatory materials do not explain how this requirement would work in case of such services as Facebook News Feed or Instagram, where content is provided by individual users and not scraped by Facebook. It seems that the only possibility would be to introduce preventive monitoring of content shared by the users, which could have far-reaching consequences for users' freedom of expression and free opinion. An 'opt out' rule should not be introduced without a thorough consideration of its effect on users and would need to account for different modes of supply of content to digital platforms' services.

#### **6. Division 5: Non-discrimination**

It is unclear what 'discrimination' means for the purposes of s 52W. It is crucial to clarify this to make the legislation workable, and particularly crucial because the 'must carry' obligation created by this provision appears to be the entire legal basis on which the obligation to bargain relies.

Further, we note a potential risk that digital platform services may attempt to avoid their obligations to pay by filtering out all Australian news content from their services. The Code does not expressly limit the non-discrimination obligation to *Australian* news businesses, but given the presumption that Parliament does not intend to regulate foreign things unless it expressly says so, this interpretation is arguable and should be foreclosed in the final version of the Code.

## **7. EM 1.34: Services covered**

The Code currently does not distinguish between different types of services offered by digital platforms, but simply introduces the same rules for all services. It is indifferent towards services' business models (whether they carry advertising, are supported by subscriptions and similar), source of news content (whether content is scraped by a platform or shared by its users), and whether there are prior agreements regulating stakeholders relationships in place. As it stands, the Code tries to be a one-size-fits-all solution, that may not fully appreciate the realities of the different models that currently exist for sharing content, and those that may emerge in future.

The indifference of the Code towards how the news content makes its way into a service means that the mere fact that a service includes news content ('makes it available') is enough for it to be covered by the Code. This is not the case for the EU press publishers' right, which covers the actions of service providers (platforms), but not the individual users sharing news content. We would recommend consideration be given to adjusting the rules of the Code to account for difference in services, especially the source of service's news content and pre-existing commercial relationships between news businesses and digital platforms.