Business Council of Australia

SUBMISSION

Submission to the Australian Competition and Consumer Commission on the draft news media bargaining code

August 2020

Business Council of Australia ABN 75 008 483 216

CONTENTS

ABOUT THIS SUBMISSION

This is the Business Council's submission to the Australian Competition and Consumer Commission (ACCC) on the draft version of the news media bargaining code.

In December 2019, the ACCC was directed by the Government to facilitate the development of voluntary codes between digital platforms and news media businesses. The Government indicated at the time that if an agreement was not forthcoming, the Government would develop alternative options, which may include the creation of a mandatory code.

In April 2020, the Treasurer asked the ACCC to develop a mandatory code of conduct. This was in response to declining advertising revenue driven by COVID-19, and advice from the ACCC that progress on a voluntary code had been limited.

KEY RECOMMENDATIONS

1. The scope of any negotiations should be clearly articulated in the Code so the policy intent and compliance requirements are clear for all parties.
2. Similarly, the requirements in the Minimum Standards for sharing of information about data and access to that data should be redrafted to make clear the policy intent and expected additionality.
3. The requirement for 28 days' notification of changes to algorithms should be reconsidered.
4. Arbitration arrangements should also take into consideration the existing value news media businesses receive from digital platforms.
5. In determining which digital platforms should be required to participate in the Code, the Treasurer should undertake appropriate consultation and be required to consider whether inclusion of additional parties will address bargaining power imbalances.
6. The Code should be subject to review to assess whether the changes have led to improved consumer welfare.

GENERAL COMMENT

The Government has directed the ACCC to develop a mandatory code to address commercial arrangements between digital platforms and news media businesses. The draft Code is being implemented through amendments to the *Competition and Consumer Act 2010*. It covers data sharing, ranking and display of news content and the monetisation and sharing of revenue generated from news.

The Business Council supports the Government's goal of making Australia a leading digital economy by the year 2030. Digital innovation lifts productivity and living standards, and contributes to a stronger, fairer Australia. It provides significant benefits to Australian consumers. It also requires appropriate legislative and regulatory structures that promote the upsides of innovation while managing the risks.

Our submission is intended to support Government in setting regulations which do not have unintended consequences across the economy and in its ambition to become a leading digital economy by 2030.

To achieve this ambition, Australia needs policy frameworks that provide access to the best resources available globally, the right skills and talent, and support the adoption of new technologies. The broad frameworks should encourage innovation and provide confidence for businesses to invest, and not protect incumbents or industries that have failed to innovate. This will enable operations to increase in scale, boosting productivity and creating jobs.

In the context of managing the ongoing economic and health crises, as well as the recovery from the recent bushfires, many businesses, particularly small businesses, have already taken advantage of digitisation and the digital economy where traditional business models have been disrupted. Legislation and regulation should back these moves. Legislation should avoid unnecessarily deterring foreign technology companies from establishing and growing their presence in Australia or discouraging local entrepreneurs from taking the leap and investing their time, capital, and creative energies in challenging incumbent business models. Onerous regulatory settings may encourage foreign governments to create barriers to Australian technology exports via tit-for-tat responses.

The Business Council has consistently argued against the setting of excessive regulation that imposes unnecessary costs on the economy. The unintended consequences and costs of creating highly regulated markets are felt by all Australians through reduced services, higher prices, and less choice.

As we have previously argued, to support job creation and economic growth and recovery Australia's business environment should be competitive, low cost, open, and efficiently regulated.

This remains true for the digital economy. Well intentioned efforts to support one sector may have unforeseen negative consequences for another, and onerous regulations have a chilling effect on all investment.

As noted in the Final Report of the Digital Platforms Inquiry, the Code is intended to address bargaining power imbalances between digital platforms and news media businesses. It was expected to establish a framework for digital platforms to fairly negotiate with news media businesses over the value derived from content produced by news media businesses.

The Government has been clear it intends to act. However, as with all regulation, we must avoid company specific regulations, or regulations that create onerous requirements. On this basis, our recommendations support the development of a Code that addresses the core concerns it was intended to address when it was originally proposed in the Digital Platforms Inquiry Final Report, adheres to best practice regulatory principles and does not set precedents that if applied more broadly would lead to reduced overall economic welfare.

The ACCC has been working closely with the Treasury and the Department of Infrastructure, Transport, Regional Development and Communications to consult with stakeholders and develop the draft Code. In practice this means the ACCC is developing a Code that it will then be responsible for enforcing. This Code will be carving new regulatory ground in Australia. It will be particularly important that in the process of designing and enforcing this regulation the principles of the Government's Regulator Performance Framework are observed, including that any actions taken are proportionate to the risks being managed.

SPECIFIC ISSUES

Bargaining arrangements

The draft laws allow a registered news business to bargain with a digital platform corporation on 'one or more specified issues' relating to the 'covered news content made available on the digital platform service'. No additional scope is set out.

The largely undefined scope of potential issues for negotiation this creates goes beyond a proportionate and effective response to any bargaining power imbalance. The scope should be clearly articulated so the policy intent and compliance requirements are clear for all parties. These could reflect the key areas identified by the ACCC in the Digital Platforms Inquiry, such as control over 'snippets' or recognition of original content.

The issues within scope of any negotiations should be required to not reduce overall consumer welfare. This could include through reduced access to news content, access to search, social media or communication services, or low-cost advertising services.

Minimum standards and information sharing

The draft Code includes a set of minimum standards digital platforms must comply with. These include a requirement for, among other things, sharing a list of and explanation about the types of data collected and information about how news businesses can access any of this data. As currently drafted, the Code would require digital platforms to share a substantial amount of data with news media businesses or face substantial penalties.

As the Final Report of the Digital Platforms Inquiry noted, digital platforms already share data with news media businesses. It is not clear from the current draft Code what expected additional data would need to be shared, or the benefit the public could expect to gain from this requirement.

The draft Code should clearly articulate the policy intent and expected additionality, if any, of these new requirements, to ensure compliance requirements are clear.

How these proposed changes would interact with privacy requirements will need also to be carefully considered, as well as the reasonable expectations of the community about the sharing of data relevant to them.

Notification of changes to algorithms

Under the draft Code, digital platforms are required to provide 28 days' advance notice to news businesses of changes to algorithms used to rank and display news, where these changes are likely to significantly affect referral traffic.

This approach is a substantial intervention in the internal operation of businesses and sets a precedent for Government intervention in *how* these kinds of products are built. Digital platforms of the scale of Google and Facebook are likely to be updated thousands of times a month, by tens of thousands of software developers located all around the world. It is unrealistic to expect that all these team members be made aware and trained on the specific nature of this regulation. In combination with the very high potential penalty of an inadvertent change that triggers this provision will make Australia a particularly unattractive market for

digital platforms to offer their services or grow the skills required to develop new and existing products.

Similarly, this would run at cross purposes to existing legislated requirements, including on preventing the spread of violent abhorrent material. Machine learning has been deployed to comply with these existing requirements. These same systems are likely to make it impossible to provide 28 days notification of changes to algorithms. This would put designated companies in the impossible situation of being required to comply with conflicting legislation, on an incredibly important matter.

Further, if this model – requiring substantial notification of changes to algorithms – was applied more broadly, it would create a major disincentive to investment across a range of sectors that use similar systems to rank or display content.

The Business Council supports regulations that can be realistically implemented. As currently drafted, the requirement to provide 28 days' advance notice of changes to algorithms ignores the iterative way these types of products are developed or delivered. It would be a handbrake on innovation and improvements to the consumer experience, and it would cut cross existing legislated requirements.

Arbitration

The draft Bill proposes the use of a 'Final Offer Arbitration' model for cases where, if agreement about remuneration is not reached within a three-month period, and parties have attended at least one day of mediation, the matter will be subject to compulsory arbitration. Both parties would provide their 'final offer' to an arbitration panel. The panel must accept one of the final offers unless each final offer is not in the public interest.

The current draft laws require the arbitration panel to consider the direct and indirect benefits of a news business' content to the digital platform service, the cost of producing this content, and whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform service. The proposed considerations reflect only one side of the value exchange. A precedent should not be set for mandatory codes which require compulsory payments without fair recognition of the value exchanged by both parties. In this context, the panel should consider the value news media businesses already receive from digital platforms (such as from referral traffic).

Final Offer Arbitration models are intended to promote commercial negotiations between the parties. The Business Council supports the principle of commercial negotiations as the best way to deliver enduring partnerships. However, the combination of 'Final Offer Arbitration' and a mandatory code which only considers one side of the value exchange will act in concert to discourage parties from commercial negotiation and rather proceed directly to arbitration.

This creates a dangerous precedent and risks global organisations not opening their digital platforms up to Australian consumers and businesses, which will place Australian SMEs at a significant disadvantage to their global competitors. It will also disincentivise domestic innovation and reduce the likelihood that new market entrants will emerge across all sectors, by creating the perception that innovation and success are punished.

Affected parties

Digital platforms are required to participate in the Code if the Treasurer makes a determination specifying a digital platform corporation. The Treasurer may also specify one or more designated digital platform services. The definition of a 'digital platform' is not specified.

The Treasurer must consider whether there is a significant bargaining power imbalance between the digital platform and news media businesses. The determination is deemed valid even if the Treasurer fails to consider whether there is a significant bargaining power imbalance.

In the first instance, the Government has announced the Code will apply to Google and Facebook. It is not clear which services of those two companies will be within scope. Additional companies can be added without a requirement for consultation or regard as to whether bargaining power imbalances exist. There is no published criteria on which the Treasurer will make this determination.

The Treasurer's determination should require appropriate consultation and consideration of whether inclusion of additional parties will address bargaining power imbalances. When considering the scope of services to be captured in a designation, the consideration should be evidence-based, proportionate, and have regard to both the costs and benefits of designating that service. The basis on which the Treasurer makes these determinations should also be open and transparent to the community at large.

Without appropriate guidelines, consultation and consideration, the Government will be establishing a precedent for creating powers to arbitrarily impose substantial obligations on individual companies with no procedural fairness or options for recourse.

Review of the operation of the Code

The negotiate-arbitrate approach set out in the draft Code has proven to work well where the asset under negotiation is well defined (a commonly referred example is for baseball players, where individual performance is clear and value is readily comparable).

This model is likely to be more difficult to apply where the asset's value is less clear, and where parties have substantially differing views. The draft Code is intended to operate where the 'asset' under negotiation is still relatively novel. It is likely the proposed approach will have unintended consequences.

This is a major policy reform that will be taken as an example both domestically and internationally. It is being imposed on a relatively new and dynamic sector, and many aspects of the Code are either unproven or require greater clarification in their intent.

The BCA supports the Government including a provision requiring a review of the Code in two years to assess whether the changes have led to improved consumer welfare. The review should be independent and not conducted by the regulator of the legislation. This will provide sufficient evidence to assess whether the Code is working as intended or if changes are required.

BUSINESS COUNCIL OF AUSTRALIA
42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 www.bca.com.au