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28 August 2020

Australian Competition and Consumer Commission
Level 25, 32 Turbot Street
Brisbane Qld 4000

By Email: bargainingcode@accc.gov.au

Dear Commissioner,

**RE: NEWS MEDIA BARGAINING CODE**

We appreciate this opportunity to make submissions in relation to the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* ("**the Bill**").

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights. EFA is independent of government and commerce and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context.

EFA members and supporters come from all parts of Australia and from diverse backgrounds. Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Please do not hesitate to contact the writer should you wish to discuss these submissions or require any further information.

Yours sincerely,

Angus Murray
Chair of the Policy Committee
Electronic Frontiers Australia

## Submissions

1. EFA appreciates that the Explanatory Memorandum to the Bill seeks to establish "*a mandatory code of conduct to address bargaining power imbalances between digital platforms and Australian news businesses*". However, we believe an examination of the goals and rationale for this proposed legislation has not been sufficiently articulated.

2. At the outset, our recommendation is that the Bill be redrafted to ensure that the following core concerns are expressly addressed:

    a. monetisation of the surveillance of Australian browsing and media consumption data is not legislatively endorsed;

    b. there are sufficient safeguards to ensure that Australians are able to access information without interference;

    c. targeted news (and other) advertising to Australians is prohibited;

    d. freedom of speech and political opinion is sustained; and

    e. any consent provided by an Australian user is fully informed.

3. In this context, there appear to be two broad themes that the code of conduct aims to address:

    a. A market failure that has led to a lack of competition (or ability to compete) within the market for news media, resulting in a power imbalance between digital platforms and Australian news businesses.

    b. The public benefit provided by the production and dissemination of news and the importance of a strong independent media in a well-functioning democracy.

4. EFA believes there has been insufficient examination of the market failure that has led to this situation.

5. Australia already has a variety of regulatory measures aimed at addressing substantial lessening of competition in Australian markets, including the *Competition and Consumer Act 2010*. It is unclear what specific gaps are present in the existing legislation that require additional legislation to fill them, or why the powers already granted are insufficient to address the market failure that has occurred.

6. It could be argued that the competition regulator bears some responsibility for failing to act to prevent a substantial lessening of competition in the market for production and dissemination of news. It is unclear how the Bill would increase competition in this market.

7. Australia is already one of the most highly concentrated media markets in the world.[1]

[1] Dwyer T, *FactCheck: Is Australia's Level of Media Ownership Concentration One of the Highest in the World?* The Conversation, http://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437 viewed 13 January 2020.

The Bill, as drafted, seems to reinforce this level of concentration by excluding (or at least hindering) smaller players and publicly owned entities from financial compensation. It appears to entrench existing structures and cause already existing news businesses to become further reliant on these structures for their continued survival.

**Funding of Public Broadcasters**

8. There is a public benefit provided by the production and dissemination of news and it is unclear why public broadcasters are excluded from accessing the bargaining provisions in relation to remuneration under the code. The Explanatory Memorandum states that this is appropriate because "advertising revenue is not the principal source of funding for public broadcasters" but this presupposes that advertising as a principal source of funding is somehow inherent to the funding model for news organisations.

9. While it is true that many news organisations relied on advertising revenue in the past, it is unclear why this must always be the case. Subscriptions and other payment-for-access models have been common for many years; indeed many news organisations used subscriptions as a source of revenue simultaneously with advertising. Linking advertising revenue to legislation in the manner proposed would seem to preference one particular revenue model to the exclusion of others, distorting the market. Such an intervention should not be entered into lightly, lest the outcome be a further lessening of competition, ironically magnifying the very issue the code of conduct purports to address.

10. More broadly, the issue of how to fund the public benefit provided by the production and dissemination of news has not been properly canvassed in this process. The focus has, rather, been on the quite narrow issue of a power imbalance between specific market participants. EFA believes further consultation is required on this issue before market-wide solutions are settled upon, given the importance of a strong independent media in a well-functioning democracy.

11. A risk to Australia's ability to operate as a well-functioning democracy justifies additional caution and consultation sought in these submissions.

**Media Consumption Surveillance**

12. In s 52M, the Bill provides legislated support for the preferential supply of digital surveillance data to specific businesses.

13. There is substantial and increasing risk to individuals of unfettered data surveillance. We are reminded of the risk of data breaches on a regular basis with the Office of the Australian Information Commissioner's Notifiable Data Breaches Report[2]. The government has recognised this risk in its recent Cyber Security Strategy[3].

14. It is perplexing why the government would encourage increased collection and dissemination of this data when it is simultaneously warning us of the dangers of such collection and the need to invest in cybersecurity. This would seem to be working at

[2] See, e.g.: *Notifiable Data Breaches Report: January–June 2020* OAIC, https://www.oaic.gov.au/privacy/notifiable-data-breaches/notifiable-data-breaches-statistics/notifiable-data-breaches-report-january-june-2020/ viewed 26 August 2020.
[3] *Cyber Security Strategy*, https://www.homeaffairs.gov.au/about-us/our-portfolios/cyber-security/strategy viewed 26 August 2020.

cross-purposes and creating financial incentives to do so.

15. EFA's position is that much of this surveillance data should not be collected in the first place. Where such data is permitted to be collected, the fact of its collection and an explanation of why it is collected should be available to everyone, particularly those about whom the data is being collected. Further, all organisations (digital platforms and news businesses included) should be required to inform individuals prior to data collection commencing and obtain their informed consent. This *fully* informed consent should be ongoing and able to be withdrawn at any time, at which point data collection should cease, and all existing data (insofar as it is possible to do so) should be destroyed.

16. This is in accordance with the intent of the Australian Privacy Principles, and with legislation in other jurisdictions such as the EU's General Data Protection Regulation[4] and the California Consumer Privacy Act[5].

17. It is our position that the Bill attempts to legitimise, and place into the hands of mainstream media, the ability to commercially gain from Australians' interactions within the digital environment.

18. In this context, we consider that there is a legitimate problem of commercial entities such as Google and Facebook holding excessive marker power in the digital and media space. Where the market fails to protect the public commons (including the digital commons) and the vulnerable and disadvantaged then Governments should arguably intervene. Whilst this Bill seeks to remedy this issue, EFA holds concerns about the Bill in the current form.

19. Democracy and the public interest is best served by a healthy functional and independent media and this is at risk in Australia currently. In 2020, News Corp closed over 100 regional newspapers serving regional communities closed down.[6] The monopoly of power amongst media organisations is evident both in the digital space and also amongst forms of traditional media including print and broadcast journalism.

20. In this submission, we raise concern with both the concept of "designated digital platform corporations" and "news businesses" and this submission ought to be understood in the context of EFA's longstanding position that the Government ought to introduce an enforceable federal human rights framework and a tort for serious invasions of privacy.

*Designated Digital Platform Corporations*

21. We appreciate that the Explanatory Memorandum appears to focus on the bargaining power and market share held by Facebook and Google and note the intention that:

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[4] *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA Relevance) 2016* (OJ L).

[5] *California Consumer Privacy Act (CCPA)* (15 October 2018) State of California - Department of Justice - Office of the Attorney General, https://www.oag.ca.gov/privacy/ccpa viewed 26 August 2020.

[6] The Guardian, "News Corp announces end of more than 100 Australian print newspapers in huge shift to digital" (28 May 2020) https://www.theguardian.com/media/2020/may/28/news-corp-announces-end-of-nearly-100-australian-print-newspapers-in-huge-shift-to-digital

*"the Treasurer's instrument is expected to specify the following as designated digital platform services:*

- *Facebook News Feed (including Facebook Groups and Facebook Pages);*
- *Facebook News Tab (if and when released in Australia);*
- *Instagram;*
- *Google Discover;*
- *Google News; and*
- *Google Search*".

22. While we agree that those corporations hold significant power in the Australian digital media industry, it is our position that the Bill insufficiently addresses emerging media and effectively places the existing major providers in a situation where they become data trawls for mainstream media. The two primary issues this creates are as follows:

    a. First, s. 52C of the Bill provides that the Treasurer may make, by legislative instrument (which does not require the level of scrutiny necessary to ensure that Australians' access to information and free speech is being impinged) a determination that any operation or control of a digital platform or any service of a digital platform fall within the reach of this legislation. We are concerned that the only criterion upon which that determination is made is an imbalance between the digital platform or service and a news corporation and that, in any event, s. 52C(2) provides that the Treasurer's determination is not invalided by failing to comply with that criterion. In our submission, s. 52C ought to be amended to require an express and mandatory obligation that Australians' best interests (and human rights insofar as they exist in international law) be a mandatory consideration when making such a determination and that a determination without full and complete regard to Australians' rights is invalid.

    b. Secondly, we do not accept that the unrestrained scope of digital platforms or services ought to be required to provide the information expressed in s. 52ZC(1) and (2) of the Bill. In our submission, the consequence of s. 52ZC(3) is that digital platforms and/or services become the tool of news businesses to tailor their content provision towards Australians. In the current digital environment, we are concerned that large media outlets (which includes Google and Facebook as providers and, for example, Fairfax Media as distributors) hold a significant amount of power over democratic processes in Australia and freedom of easily accessible information. Specifically, we are concerned that the effect of s. 52ZC(3) is that digital platform and/or service providers become a more efficient means to target advertising which, using the Cambridge Analytica revelations as an example, has the real potential of causing covertly influenced voting and non-transparently sourced information being propagated.

*News Businesses*

23. On one view, the intended scope of a "news business" as the definition at s. 52A appears to include any person who offers the broad ambit of a "news source" and turns over more than $150,000.00. Although the Bill seems to target corporations, a combined reading of the definition at s. 52A (for example, a news business is a news source which includes any program of audio or video content designed to be distributed over the

internet) and meets the tests at ss. 52G - 52K could result in any content provider that turnover more than $150,000.00 being subjected to the obligations at s. 52ZC and s. 52S[7]. In the above context, we are also and significantly concerned that the effect of s. 52S is that the, potentially broad, ambit of digital platforms and/or services become a vehicle for news business censorship of content.

24. On another view, the Bill could be construed as a means for mainstream news outlets to obtain a taxpayer funded handout from Google (and to a lesser extent Facebook) and access to the same data surveillance they have, but without calling it a 'levy' and without adding any protection for consumers. If this is the case, these costs will be invariably passed onto Australian consumers which would be an unacceptable market consequence.

25. In summary, we consider that the Bill in its current form is unacceptable and that the Bill requires revision to ensure that (in no particular order):

    a. monetisation of the surveillance of Australian browsing and media consumption data is not legislatively endorsed;

    b. there are sufficient safeguards to ensure that Australians are able to access information without interference;

    c. targeted news (and other) advertising to Australians is prohibited;

    d. freedom of speech and political opinion is sustained; and

    e. any consent provided by an Australian user is fully informed.

26. Please do not hesitate to contact Mr Angus Murray, Chair of Electronic Frontiers Australia's Policy Committee should you wish to discuss this submission.

[7] Although we acknowledge that this provision would, if passed, require balancing with the role of Google and Facebook as publishers for the purpose of defamation law, see: *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 10; *Google Inc v Duffy* [2017] SASCFC 130; *Trkulja v Google LLC* [2018] HCA 25.