Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

Submission on the Exposure Draft

1. Introduction

Nine welcomes the opportunity to comment on the Exposure Draft of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (**Bill**) and related materials. The release of the Bill is a positive step in recognising the significant value which Australian news content provides to digital platforms and ensuring a framework for fair remuneration for the use of that content by the digital platforms. Nine also appreciates the inclusion of proposed minimum standards, which will apply across a broader suite of products and services of the digital platforms, as a means of addressing, in part, the imbalance of power between news media and digital platforms and ensuring that news media is not disadvantaged because of the remuneration model which is proposed.

Nine is a member of FreeTV Australia and Commercial Radio Australia. We have reviewed the submissions made by each of those bodies, and endorse the key principles raised by them.

In addition to supporting those submissions, Nine has identified further areas for improvement of the Bill, which are:

- The requirement to nominate television and radio programs, websites, mastheads and magazines, each of which, individually, must publish content that is "predominantly core news content". It would be better for registered news business corporations such as Nine to be able to nominate television channels, radio channels or publications (including all supplements and both online and printed versions), which considered as a whole, regularly distribute a material amount of core news content, and then all of the core news content or covered news content created by that channel (which will change regularly as events dictate changes in the content and scheduling of programs) or publication will be within the regime set out in the Bill.
- The requirement that both core news content and covered news content must be created by a journalist:
    - does not take account of the reality that news content, particularly in television and radio, will typically be created by a team of professionals, some of whom will be professional journalists, and some of whom will not be; and
    - creates an artificial distinction, which does not reflect the way in which that content is valued by consumers or regulated by the ACMA or the Press Council, as such regulation applies regardless of whether the content was created by a journalist, an occasional contributor (such as a relevant expert writing an opinion piece), a cartoonist, or a person from another professional background who conducts interviews on air.
- There is a lack of clarity around the permitted uses of news content by the digital platforms which forms the basis on which remuneration should be determined. The term "the making available of the registered news business' covered news content" does not reflect the current uses of that content by the platforms and the value which accrues to the platforms from that or other usage. This needs to be determined so that the offers made to the arbitrator will be on a like for like basis.
- The scope of indirect benefits to the digital platform of the news business' content should be further defined so that it is clear that benefits flowing from the opportunity for digital platforms to act as intermediaries between suppliers and consumers of news content are fully captured and information necessary to assess those benefits is made available to the news media business in a timely way.
- The arbitration process needs further clarity:

    - so any scope for the arbitrator to gather information from outside the written submissions provided (which could be through questioning the parties, expert evidence from the parties or commissioned by the arbitrator, or otherwise) is certain.
    - about the information which will be available to news businesses in relation to the outcome or reasoning of arbitration decisions, given the platforms may participate in multiple arbitrations so will know the likely outcomes of that process, but the news businesses will only have one opportunity.
- While we recognise that the proposed regime is a world first, and how it will operate in practice is unknown so review points are necessary, having the arbitrated agreement terminate after 12 months could disadvantage the news businesses it is designed to protect, if there is no new agreement in place at the end of that term. Nine suggests the agreements should simply roll over until either the parties agree to recommence the negotiation/arbitration process or the Commission determines otherwise.

2. What news businesses and news content are within the Code?

In order for the Australian media to survive and prosper, it is important for resources to be used efficiently. To that end, there is a trend towards convergence, and towards resource sharing within and between media organisations to minimise the cost of producing quality original news content. As the explanatory materials recognise (para 1.68), the production of core news may be subsidised by other news content, so it is appropriate that the Code should apply to all of the news content of a registered news media business corporation, provided the news sources:

- contain a material amount of core news content so producing marginal amounts of core news, in conjunction with a majority of other news or non-news content, cannot bring a publication, website, program or channel into the Code; and
- have been produced to appropriate editorial standards (either internal or external) relevant to the medium for which it was first produced (television, radio, newspapers/magazines or online only).

In view of these considerations, it would be better for the Bill to include broader definitions of "news source", "core news content" and "covered news content", to recognise that news content is produced by teams of people, who may work across platforms and some of whom will not be journalists. Further, nominating individual programs does not allow for changes in the way in which the nature and content of programming across television and radio channels changes in response to market circumstances and the news cycle. For example, during 2020, Nine has changed its television news programming significantly, in response to local and international events such as the bushfires and the pandemic.

Nine considers that some drafting changes should be made to ensure that businesses which produce relevant content are not inadvertently excluded from the Bill by reason of the structure of particular news sources. Importantly, we propose that the "predominantly core news" requirement in the content test in section 52H should be replaced with "regularly includes a material amount of core news".

Our understanding of the Bill is that:

- Nine will need to nominate individual television programs, radio programs, newspapers, magazines and websites as "news sources";
- each of those sources will each only be part of the Code if:
    - it creates and publishes online content which is "predominantly core news content" (section 52H); and
    - it is subject to the rules of the Press Council or Independent Media Council, the Commercial Television Industry Code of Practice, Commercial radio Code of Practice or substantially similar rules relating to internal editorial standards that relate to the provision of quality journalism (section 52K); and
- to be "core news content" or "covered news content", the content must be created by a journalist.

While we understand the intention is that the news services of an organisation such as Nine should be covered by the Code, there are a number of ways in which these tests could prevent suitable Nine content from falling within the Code. [CONTENT REDACTED FOR CONFIDENTIALITY]

[CONTENT REDACTED FOR CONFIDENTIALITY] there is a significant risk that the Bill, as drafted, will unintentionally exclude a substantial amount of professionally produced news content which is subject to either external regulation or internal standards which ensure high quality news content is produced. Further, where a news source is not producing "predominantly core news content", all of the news content of that news source will fall outside the ambit of the Bill, which could significantly reduce the benefits of the Code for news businesses so it is imperative that "news source" is defined sufficiently broadly to capture the different ways in which news is produced across different media (such as television programs within a channel or magazines within a newspaper masthead).

From this, we suggest that the primary challenges with the Bill in its current form are the requirements that:

- each news source must be considered individually (against the test of producing predominantly core news) rather than looking at the output of a broader channel, website or publication as a whole;
- "predominantly core news" is too high a bar for some programs or channels which are clearly quality news content; and
- only content produced by journalists can be within the Code.

Nine suggests these issues be addressed by:

- as outlined above, allowing the registered news business corporation to include in its registration channels, publications and programs which regularly produce material amounts of core news content, and providing for it to recover compensation to reflect the value to digital platforms of that content; and
- changing the requirement for content to be produced by a journalist so that all relevant content produced by teams under the supervision of a registered news business corporation and thus subject to appropriate standards, is included.

3. Use of content and relationship to value

a. Meaning of "making available"

The Bill requires the arbitrator to determine a "remuneration amount" which is the remuneration for "the registered news business for the making available of the registered news business' covered news content by the digital platform service" (section 52ZO(1)(b)).

Nine is concerned to ensure that the language of this provision reflects the economics of the situation being addressed, in which the digital platforms are able to exploit covered news content including by developing customer relationships with consumers of that content, obtaining their data, serving advertising and (through customer relationships) selling other products to those customers. This is done by way of the digital platform providing links to and snippets of such content, as well as more extensive uses of that content. The language of "making available" by the platform does not convey in any way that the digital platforms are gaining significant benefits from being able, for example, to provide snippets of text, headlines and thumbnails in response to search queries and in social media feeds (thus enhancing the quality of response which it provides to its users and the value of its services), without requiring the consent or participation of the news media business in that process.

The change to section 52ZO(1) to address this issue could be:

"The panel is to make a determination about the terms for resolving the remuneration issue that:

(a) is in accordance with subsections (5) and (6) (final offer arbitration); and

*(b) sets out an amount (the **remuneration amount**) to reflect the value to the platform of acting as an intermediary between the registered news business and consumers in relation to covered news content including by making available covered news content";*

Given the centrality of the concept of "making available" content to the arbitration, it would be helpful to define "making available" for the purposes of the arbitrator's decision, to reflect current usage by the platforms (to the extent that can occur without the registered news business' consent). This should not limit the parties negotiating in relation to use of their content on a wider or narrower basis for use of content. Our proposed definition is:

52[XX] Meaning of making available news content

*In this Part, the **making available** of news content means:*

a) displaying news content (including headlines, text, images, audio or video, or any combination of them);
b) making a snippet of news content (which may be text, images, audio or video, or a combination of that material);
c) showing search results for news content;
d) creating and publishing a short summary of news content;
e) displaying thumbnails of images from news content; or
f) if regulations made for the purposes of this paragraph specify any other acts, any of those acts.

b. Basis for determining value

Consideration should be given to incorporating a concept of "value" which reflects both the benefits to digital platforms and the costs to registered news businesses (as set out in section 52ZP) as part of the arbitrator's function. This could simply be achieved by including a reference to "value" in the drafting of section 52ZP, such as:

In considering value in accordance with section 52ZO(1)…

The value should be determined by reference to the position that the digital platform would be in if it did not have any access to any covered news content (not just the news content of the other party to the arbitration) and its competitors did. In that respect, Nine agrees with the submission made in the economist's report attached to News Corporation's 5 June 2020 submission on the Mandatory News Media Bargaining Code (see paragraph 73 of that submission). To that end, there should be a new section 52ZP(4) to the effect of:

(4) In considering value in accordance with section 52ZO(1), the panel must take into account the position that the digital platform would be in, in a competitive market if it did not have access to any Australian news content and its competitors did.

That is, the panel should be required to consider the position a digital platform would be in if it lacked Australian news content and had an otherwise comparable competitor which had such content. This would enable the panel to assess the true value of Australian news content without it being distorted by the current lack of actual competition.

4. Who is a "responsible digital platform corporation"?

Given the complex corporate structures of the digital platforms, some oversight of the nomination of a responsible digital platform corporation by the digital platform would provide comfort that the nominated entity will be a corporation that has the practical capacity to comply with the financial and non-financial obligations that will be imposed on it.

Otherwise, it will be too easy for the corporation to simply say that, while it may, in part, operate the digital platform service in supplying services used by Australians, it does so in conjunction with other entities in the corporate group, and it cannot ensure that those other entities will take the necessary steps to allow compliance with the Code or will provide information required to allow compliance with section 52ZC. The requirement in section 52R that there be a point of contact in Australia does not ensure that the point of contact will be anything more than a post box for communications that need to be dealt with by a part of the platform's corporate structure which is outside Australia. Our experience in dealing with the platforms has been that local representatives have limited ability to effect change or respond to feedback substantively.

Further, if the proposed designated digital platform corporations (Facebook Inc and Google LLC, para 1.30 of the Explanatory Materials) also become the responsible digital platform corporations, the news businesses will then have the challenge of seeking to enforce rights against an overseas company, which may not submit to the jurisdiction of the Australian courts.

Section 52M and section 52ZC each need to be amended to make it clear that the responsible digital platform corporation must obtain information from its related bodies corporate where it does not itself hold that information, and that consequences will flow if it does not do so. Timeframes for the production of information should also be included in section 52ZC to ensure that complex corporate structures and division of roles amongst related bodies corporate do not result in delay or the provision of incomplete information during the negotiation period, given that will impact on the news media business' ability to make an informed submission to the arbitration panel.

The potential for corporate structures to undermine the intent of the Bill is demonstrated by the fact that Google has relied upon distinctions between companies in its group in defamation proceedings in Australia. These cases suggest that the local Google entity is not practically involved with the relevant platform products, therefore constraining the ability of the local entity to exert any control over the platform or obtain data in respect of the platform's operation. For example, in *Trkulja v Google LLC* [2018] HCA 25, the complainant in a defamation claim had initially written to Google LLC (a US-based entity), as well as Google Australia Pty Ltd identifying allegedly defamatory matter and requesting that those entities take action in respect of that material. Google responded to the effect that the search products to which the complainant's inquiry related were owned by Google LLC and that Google Australia was "unable to further assist" the complainant. This distinction was also addressed in *Defteros v Google Inc & Anor* [2017] VSC 158. The Victorian Supreme Court found that a complainant's defamation proceeding against Google Australia Pty Ltd had no prospect of success, because the evidence showed that Google Australia Pty Ltd has no ownership of, role in, or control of the Google search engine function or the domains at which they reside, no direct role in the generation of search results or associated URLs, nor any direct ability to correct or remove anything from the material published by Google Inc.

Further, Nine has previously been advised by Facebook Australia Pty Ltd that it does not control or host the Facebook service used by Australians, which is owned by Facebook Inc. This would suggest there may not be a local entity which will have the ability to comply with the Code requirements, making enforceability of the Code more challenging for the news media businesses.

5. Access to information

Nine recognises that the Bill goes some way towards addressing the information asymmetry between the news businesses and the digital platforms, through sections 52M and 52ZC. However, there is more that could be done to address that issue.

a. Trade secrets exception

The exclusion in section 52V of the Bill for giving information that would reveal a trade secret gives the platforms much scope to avoid providing information which is otherwise required to be disclosed, cementing the existing information asymmetry. It would be preferable to impose confidentiality obligations on the recipients of that information, to limit the purposes for which information can be used and protect the position of the digital platforms.

b. Information about arbitrations

Over time, the platforms will presumably participate in a number of arbitration processes, so will have knowledge about the offers submitted by both parties and the outcome of the arbitrations. This will give them knowledge about how to frame their offer to maximise the prospect of success, what other information the arbitrator sought from parties (if any) and the value which has been attributed to Australian news content in previous panel decisions. The news business will not have the opportunity to build up that knowledge (as it will presumably arbitrate, at most, once against each platform each time the contract is up for renewal) so will be at a disadvantage. While respecting the commercial sensitivities of the outcome, it would be valuable to the news businesses to have insights from the arbitrations made available on a regular basis, to try to address that inequality.

One of the key challenges the news media businesses will face is extensive information asymmetries and the risk for this to distort outcomes of the bargaining process and any resultant arbitrations. Aside from being economically inefficient, this has the potential to lead to winners and losers in this process based on criteria other than merit.

One possible solution to this is to provide for some form of publication of outcomes of arbitrations. While Nine recognises that it and other news media businesses are competitors, and with attendant risks of signalling costs inputs, there is no obvious reason why a panel decision as to the total value of covered news content to a particular platform should not be disclosed in some form (assuming the arbitrator makes such an assessment as part of deciding between the final offers).

Presumably, these sorts of economic efficiency considerations were behind the parliament's decision to permit the ACCC to publish determinations in arbitrations under the former Part XIC of the *Competition and Consumer Act 2005* (Cth) (the Telecommunications Access Regime) and to allow it to so under the current Part IIIA (the National Access Regime). In addition, Part XIC currently makes provision for publication of certain information about variations to NBN Co's standard form agreements for similar reasons. Importantly these are all examples of regulatory frameworks where the access seekers are also competitors.

If decisions are not published, then consideration should be given to whether some limited and confidential access to decisions or information relating to decisions should be provided to registered news business corporations or their advisers to address or at least mitigate the information imbalance which would otherwise place digital platforms at an advantage. This advantage includes deciding whether to proceed to an arbitration, or agree to a negotiated outcome, if the platforms have knowledge of prior arbitration outcomes.

c. Information sharing with advisers

Section 52ZD provides that information disclosed pursuant to section 52ZC may not be used for a purpose other than a purpose in relation to bargaining or arbitration. For the avoidance of doubt, section 52ZC should be amended to allow for information disclosed by either a bargaining news business corporation or a responsible digital platform, pursuant to section 52ZC, to be shared with external advisors (including legal advisors and professional consultants and experts), subject to strict confidentiality undertakings

and to the extent necessary for the purpose of bargaining under Division 6 or arbitration under Division 7.

6. The Arbitration Process and Outcome

a. Process

The Bill should be amended to make it clear whether and to what extent the arbitrator can obtain evidence and information beyond the submissions provided for in the Bill. Nine does not consider that the arbitrator should be able to go outside the submissions made by the parties and the ACCC. However, if the intention is that the arbitrator can acquire information from other sources, it should also provide for parties to be given a reasonable opportunity to consider and respond to any material obtained by the arbitrator from any third party, including an opportunity to provide further submissions (including any evidence) up to a length to be specified by the arbitrator (perhaps with a particular maximum).

This is required because it is unclear from the Bill as currently drafted and the discussions we have participated in on the Bill whether the expectation is that the arbitrator will make a decision solely on the basis of the written submissions provided by the parties and the ACCC or whether the arbitrator will be permitted to:

- get oral submissions from the parties to support the final offers;
- ask questions of the parties;
- allow cross-examination of the parties;
- engage an expert (and if so, on what terms and at whose cost);
- have experts engaged by the parties provide evidence or engage in a debate facilitated by the arbitrator (noting that, if a final offer is limited to 30 pages, there is unlikely to be a detailed expert's report provided with the final offer); or
- seek advice from any third party.

If the arbitrator does any of those things to gather further information, natural justice would require that the parties know about the information which the arbitrator has obtained and have an opportunity to make further submissions on that information.

It would be more consistent with the intention of the final offer arbitration being a short and efficient process to provide that the arbitrator solely relies on the submissions from the parties and the ACCC.

b. The Arbitrator's Decision

The arbitrator's decision is on the remuneration payable to the news business for the platform making available its content. As we have noted above, the "making available" language does not capture the way in which the platforms benefit from the content of the news business.

The benefits (both direct and indirect) need to be assessed by reference to a situation where the digital platform service has no access to Australian news media content but its competitors do. This should be stipulated in section 52ZP.

Consideration should also be given to broadening the scope of section 52ZC. In particular, section 52ZC does not currently require provision of information about downstream uses of, and monetisation of, data by digital platforms, which is a key component of the benefits received by the digital platforms from making available news content.

c. Term of an Arbitrated Decision

The Bill provides that the arbitrator's decision is for remuneration for 1 year (section 52ZO(1)(b)). Nine appreciates that this is an unprecedented model and it will need review after a short period of time to test whether the regime is meeting the legislative and policy intentions. However, if the news business wishes to continue to be paid for the use of its content by the digital platform at the end of that 1 year term, it will need to recommence the negotiation/arbitration process after approximately 6 months to be assured of having a new agreement in place before expiry of the first one.

To give both parties greater certainty about their business and revenue/costs for a period of time, it would be preferable to have the agreement continue on the same terms (to a maximum of say 3 years) unless the news business chooses to recommence the negotiation/arbitration process or there is a triggering event such as a variation to the legislation which creates the scheme.

7. Anti-avoidance Mechanisms

Nine welcomes the inclusion of a non-discrimination obligation in respect of the digital platforms treatment of registered news businesses' content. It appropriately reflects the ability and incentive of digital platforms, as the 'gatekeepers' of content, to discriminate between providers of that content in a way which is profitable for the platform but contrary to the interests of users with an interest in obtaining access to a variety of high quality news content.

Accordingly Nine considers that the obligations in draft section 52W should extend to a prohibition on the responsible digital platform discriminating between itself and registered news businesses in respect of news content, as well as between registered news businesses in respect of their news content. There are ample precedents for an obligation of this kind in both Parts IIIA and XIC of the *Competition and Consumer Act*. For example s152ARA contains a prohibition on a carrier or carriage service provider discriminating in favour of itself in relation to the supply of a service.