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Senate Standing Committees on Economics

PO Box 6100

Parliament House

Canberra ACT 2600

Via

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia

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

This document is submitted in response to the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020. It has been prepared to attempt to explain some concerns around the Amendment as it currently stands and seek clarity on its intent and also how it intends to sit alongside other legislation and actions surrounding the media industry.

My involvement in this issue is multi-faceted. Personally, I am an avid consumer of the media and a firm believer and supporter of journalism in this country and globally. In my professional capacity, I am also an advisor to many of Australia's largest advertisers and have placed hundreds of millions of dollars of advertising space across almost every single entity impacted by this legislation. Finally, I am an active commentator on the business and future of media across many local publications, and published a book in late 2020 on the business of media and advertising. I am currently the General Manager at a large local advertising agency, and have previously worked for various media agencies, media companies, and consultancies.

Minister Frydenburg stated that "Public interest journalism plays an important role in our society. It is critical to the functioning of our democracy. This role can only be fulfilled by a strong, diverse and sustainable Australian news media sector" and this is not something any reasonable person would contest.

However, the levers proposed to solve this problem seem troublesome and need to be evaluated closely.

Retransmission legislation as the base for the code

In my opinion, based on my experience, the framework of the code is similar to legislation passed by the United States in 1992 under the Cable Television Consumer Protection and Competition Act of 1992 (link - <https://www.congress.gov/bill/102nd-congress/house-bill/4850#:~:text=Cable%20Television%20Consumer%20Protection%20and%20Competition%20Act%20of%201992%20%2D%20Amends%20as%20provided%20under%20the%20Act.>)

This bill was passed with a similar ambition, however it substituted digital platforms for cable television operators, to “promote the availability of diverse views and information, to rely on the marketplace to the maximum extent possible to achieve that availability, to ensure cable operators continue to expand their capacity and program offerings, to ensure cable operators do not have undue market power, and to ensure consumer interests are protected in the receipt of cable service” (source: Wikipedia)

In a nutshell, the bill required cable operators to “must carry” local TV signals and free to air channels in the areas they operated. However, it allowed these local networks to set the price they had to receive for this retransmission to occur.

This created for US based over the air channels the creation of retransmission revenue, with Fox stating in 2022 they believe in the US this retransmission revenue will exceed \$1b USD annually. (source: <https://www.spglobal.com/marketintelligence/en/news-insights/trending/Nmy0P2oc98CkShvfmEwxw2>)

The logic behind these commercial requests is that over the air channels provide a disproportionate level of consumption engagement on cable TV platforms compared to the revenue they receive. It is estimated in the US, cable customers are paying on average \$20 a month to receive free to air channels. (source: <https://www.spglobal.com/marketintelligence/en/news-insights/trending/Nmy0P2oc98CkShvfmEwxw2>)

Australia does not follow this legislation, and Free to Air networks pay cable operators for carriage and retransmission in this country.

In Australia, free to air TV networks face the opposite situation to the US counterparts. Domestic FTA networks are required to pay retransmission fees to the cable operator, including public broadcasters. The ABC and SBS, as reported in 2019, paid \$6m annually to Foxtel for transmission of their signal. In fact, a 2014 efficiency review commission by then Communications Minister Malcolm Turnbull recommended to ABC management to cease this payment in order to save the money. (Source - <https://www.theguardian.com/media/2014/nov/28/abc-sbs-save-6m-pay-foxtel>). For the ABC and SBS, the retransmission fees paid was one of the top 5 cost savings identified by the paper,

In 2014, Free TV Australia funded a report by Dr. Jeffrey Eisenach that expressed the benefits of retransmission payments from cable operators to FTA networks. Free TV Australia is a body of which many supporters of this code are members. This was submitted to parliament in 2014. (source and link to paper -

https://www.pc.gov.au/data/assets/pdf_file/0007/195694/sub129-intellectual-property-attachment.pdf)

Based on the payments being made by FTA networks and the public broadcaster, it appears the government in some ways supports the payment of fees for platforms to carry content. The code however proposed a switch of these roles. Instead of paying the platforms (as the ABC and SBS currently do), the idea is to charge the digital platforms.

The concept of retransmission fees is an analogue principle applied to a digital world

At its heart, retransmission is meant to reflect a fair value for the contribution of engagement to a platform or service. Retransmission fees in the US are based on an assertion that over the air channels provide significant contributions to consumption on cable services.

<input type="checkbox"/> Keyword (by relevance) ↓	Avg. monthly searches	Competition
Keywords you provided		
<input type="checkbox"/> herald sun	10K – 100K	Low
<input type="checkbox"/> the age	10K – 100K	Low
<input type="checkbox"/> smh	100K – 1M	Low
<input type="checkbox"/> afr	10K – 100K	Low
<input type="checkbox"/> nba	1M – 10M	Low
<input type="checkbox"/> afl	10K – 100K	Low
<input type="checkbox"/> near me	100K – 1M	Low
<input type="checkbox"/> facebook	1M – 10M	Low

The search volume of local news organisations on Google appears very low. Estimating between 10-100,000 searches per month. Compare this with sporting leagues such as the NBA, which has 10+ times the volume.

<input type="checkbox"/> Keyword (by relevance) ↓	Avg. monthly searches	Competition
Keywords you provided		
<input type="checkbox"/> apple	1M – 10M	Low
<input type="checkbox"/> samsung	1M – 10M	High
<input type="checkbox"/> uber	1M – 10M	Low
<input type="checkbox"/> coles	10K – 100K	Low
<input type="checkbox"/> woolworths	10K – 100K	Low
<input type="checkbox"/> nintendo	1M – 10M	High
<input type="checkbox"/> xbox	1M – 10M	High
<input type="checkbox"/> ps5	1M – 10M	High
<input type="checkbox"/> qantas	10K – 100K	Low
<input type="checkbox"/> westpac	10K – 100K	Low

The reality based on the data is advertisers and Australian businesses are equally, if not more valuable in terms of their contribution to the use of search. The brands listed above are seeing 10+ times the search volume of local news organisations.

Why are only local media companies compensated for their inclusion on search engines and selected social platforms? Australian businesses are required - rightly - to pay for their inclusion on search and social if they want visibility beyond what is provided organically. They have the choice to allocate these funds, or not to. The idea that selected Australian businesses - those with an existing platform - can request to charge for their inclusion, but other Australian businesses with larger interest cannot does not appear consistent.

Forcing a business to pay for free traffic it sends to a business is incongruent with the modern Internet. No other digital platform provides any business the right to list their product and services and then demand payment for that.

Two of the most valuable media businesses in Australia are Real Estate.com.au and Domain. These are examples of domestic innovation and value creation. As of drafting this letter, REA Group is valued at \$19.5 billion, and Domain is valued at \$2.6 billion.

Classifieds businesses are similar in ways to digital platforms. They aggregate a bunch of content and provide a valuable service to users. It could be argued a significant component of this value these companies have realised is due to both the effort of real estate agents and also vendors who are selling their houses. These agents and vendors provide the majority of the content, and the majority of the reason for users to visit.

These platforms, rightly, do not allow agents and vendors to list their houses for free. They charge considerable amounts - often passed onto vendors at \$2,000 or above. No vendor can demand their property be listed on these platforms despite the contribution each listing makes. No vendor can demand compensation for the page views and advertising inventory sold on their listings.

I am not asserting Real Estate.com.au or Domain should allow this. It's illogical, as any agent or vendor has the choice to list. Yes, vendors and agents provide the content, but the platform provides the volume of users and the infrastructure which allows a property to reach significantly more potential buyers than they would individually.

But why on one hand are certain digital platforms required to pay to carry content, and others are completely removed from any requirement.

It would be an absurdist notion to demand that classifieds businesses subsidise news organisations, even when in some cases they share a common parent. Even when classifieds businesses have been the greatest beneficiary of the decline in news organisation advertising. You cannot place a levy on a successful business in order to subsidise a less successful one.

If the legislation is applied it cannot be so selective.

Under the code as presented, only specific local media companies are provided the right to demand compensation. The same rules do not apply to their platforms.

Sporting organisations cannot demand compensation for news organisations covering their leagues and writing news stories on their product. Musicians can't demand payment for their images being run in news, or live reviews of their concerts, or reviews of their music. Celebrities cannot demand compensation for stories being run on their relationships, actions, activities, social media posts or behaviour.

That is despite their being no payment provided to them for this, and no recourse to stop it being published.

This content generates revenue. It has advertising sold around it. The revenue is entirely retained by the news organisation.

The code as drafted makes a statement that only a handful or large businesses can receive compensation for their claimed contribution, but this is not two way and does not apply to the teams, businesses, individuals and artists that provide them with content every hour.

Businesses cannot be compensated for the value they provide when new products are launched, or movies. For instance, Apple or Samsung may drive 5,000,000 visits to news organisations on the day of a new phone launch. However, they will never receive compensation for this contribution. However, a news organisation will receive contributions if they write an article on a new phone release and this article is indexed on Google or appears on Facebook.

If the code passes, what content qualifies and how do you quantify the contribution of this content to each platform?

First issue to be determined is which content from a news organisation is suitable and applicable to the code. Under the legislation, there are two definitions. There is 'core news' and 'covered news'

Core news content means content that reports, investigates or explains: (a) issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or (b) current issues or events of public significance for Australians at a local, regional or national level. Covered news content means content that is any of the following: (a) core news content; (b) content that reports, investigates or explains current issues or events of interest to Australians.

So a report on a local court case is clearly news, so would be a report on an issue concerning economic matters. Reporting of parliament and legislation would be covered. Crimes is also another inclusion.

It's less clear around opinion and columnists providing their subjective opinion around news events. It's also less clear when journalists who may cover news, also cover areas that are on the fringes of news. It's also not that clear what a 'journalist' is.

Another challenge is how you delineate between news and non-news content and calculate the contribution of each (or remove the non-news component).

For example, for the Sydney Morning Herald there may be 120,000 pieces of content indexed by Google, and another 45,000 that have been shared on Facebook over the past 5-10 years. What is the process for categorising each piece. If I share a SMH piece on a movie review, how can this be backed out of any quantification of contribution to a platform.

What if a news organisation has actively shared content themselves? Does this contribute? If a news organisation is pushing 40 pieces of content to Facebook every day, does Facebook now have to pay them for each piece?

You can see the challenge here? How do you index and categorise thousands of articles to determine which ones pass the test? It's an important thing to get right - as you need to categorise in order to objectively quantify and measure the contribution to platforms and the two way contribution back to the news organisation.

And how far in terms of time will the valuation go? Is it inclusive of every article ever published? Is there a time frame on it? This has direct ramifications for the value assigned as well.

And what incurred costs by the local media organisation are considered?

This is vital as the premise of the code is to not prop up incumbent media businesses financially, but to support and fund journalism. However, the inputs that fund journalism are many and varied and this will need to be determined. On one hand you have journalist related costs only. Which would be

Salary costs

Direct operational costs (IT, rent, equipment to perform role)

So, you could categorise a group of news journalists, disclose salary and all operational costs, and then try and work out a value or reconciliation based on this somehow factoring in that most of these journalists are also working across print products and likely other ones (podcasts, TV even). Without disclosure of salaries and costs it's difficult to ascertain how you could work out a contribution, as the point of the code is not to be a revenue stream to news organisations but a way of recovering costs they feel they incur unfairly. Doing this would be relatively simple. Create a list of news journalists, disclose their salaries and any bonuses they incur, disclose their direct operational costs, and seek to claw back some of these.

For most news organisations, these costs are not even the majority. Not even close. There are all kinds of costs that are incurred in the operation of these businesses:

- Journalism costs
- Marketing and traffic acquisition costs

- Technology and Development
- Management and administration
- Travel
- Centralised corporate costs
- Rent
- Internal or intra company charges
- Related entity charges
- Capital costs
- Servers, equipment, hosting, ad technology
- Hosting

A news organisation will argue that all or at least many of these costs are vital to produce the end journalism product. And if this argument is successful, how are these costs allocated?

Is the expectation from a news organisation that they can offset managerial costs? Marketing expenses? Advertising? Rent. Capital investment? How do you allocate an accurate operational cost base to the direct journalism related costs? As you can see this is incredibly complex and there will be massive amounts of costs that aren't directly contributing to the product of words on a screen.

And for Google and Facebook what costs are they able to offset against perceived revenue received? So far there hasn't been much discussion of the costs they sustain in research and development, product, operations, hosting etc.

What is the onus on both sides to demonstrate the true costs they incur in doing business?

And what happens in instances where a news organisation is actively using a platform for traffic referral, i.e. dedicated staff used for social media organic traffic, search engine optimisation, linking and other SEO based behaviour; actively posting on social media platforms, using paid social media advertising to drive traffic, encouraging or incentivising readers to share content on social media, requesting reactions from readers in the forms of likes or upvotes? These are instances where a news organisation is actively using a platform for the gain of traffic. Will this be considered when trying to decide the cost/benefit equation?

How do you calculate the cost/benefit to both parties and what inputs are included and how are these quantified?

If it's not already incredibly complex, this makes it definitely a complex area. When determining cost/benefit to both parties what are the contributing factors? For Google, the contributing factors of value can be determined via:

Traffic sent to news organisation

Extraction rate from advertising based on that page (based on CPM, ad load)

A value based on additional content consumed during that specific visit. For instance, let's say for Journalist X across a year, Google has sent 258,000 visits to that journalist's content on the news organisations website.

The journalist works within finance and business, the average ad load is 6 ads per page, and the average net CPM realised is \$18. So, the revenue generated from that visit is $6 \text{ (ads)} \times \$18 \text{ (CPM)} \times 258 \text{ (visits / 1000)} = \$27,864$

Google could argue - "we pointed this user to you, you realised \$27,864 of that, we feel we contributed 30% of that value in a referral fee ... so our value to you was \$9,287 in the instance of that journalist."

A platform could argue that there are indirect benefits - if a reader subscribes to a paid product, or if a reader views multiple articles. What if a reader is new to the site.

For a news organisation with other media, what is the benefit of a news related referral who then discovers a TV show, or a radio host, and then become regular viewers or listeners? What about a platform referral that generates a large performance advertising outcome via a lead or sale to an advertiser? Is this considered?

For Facebook the equation would be the same.

On the other side, the news organisation would need to demonstrate value heading the other direction. However, at the quantifiable level (ie. based on specific content or journalists) it's very difficult to do.

How do you place a value on a search engine indexing an article? Clearly there is a value - otherwise news organisations wouldn't pay staff to try and obtain top results, and they wouldn't hire entire social media teams to post content multiple times a day.

You can't simply use a ratio of incurred costs by a news organisation as this would be hugely inaccurate and lack any level of transparency. And you can't do the other way either - and tax Facebook and Google revenues and then hand that money to a news organisation.

If you do this at an article level, journalist level, or even the newsbrand aggregate level, the exercise is extremely difficult when on one hand the platforms can quantify their value, but for a news organisation it's not as easy. A news organisation cannot claim a platform is taking traffic away from them, not when they've spent the last decade talking about their record traffic. They can't claim platforms steal their engagement, not when they tell advertisers they are premium and have highly engaged users. They can't claim a platform takes their content or indexes without permission, when none use any sort of indexing blocker and many are investing millions of dollars on being prominent on these platforms.

I am not saying platforms don't derive benefit from news organisations. Not at all. It's just in my

view it is a two-way exchange and the code is insufficient at creating a standardised and operational procedure around quantifying this value. **Even if this legislation passes it is completely unworkable.**

To provide a framework for the future of media the Parliament needs to spend more time to understand the future of media and consult with a wider group of stakeholders.

In seeking to provide higher funds to news organisations, this legislation opens up a debate around the dynamics of the internet and the role all content plays.

On one hand for a broadcast medium like cable TV the government are happy for content providers (even public broadcasters) to pay for their inclusion, and on the other hand when it's selected digital platforms the reverse is true. For domestic classifieds businesses, worth billions or even tens of billions of dollars, they retain the flexibility to only include content on their platforms that is paid for.

If ANY business didn't feel their inclusion on search results and social channels wasn't a fair value exchange, they would deny these platforms the potential to index their sites and content. They would stop advertising. They would not employ expensive professionals with the sole task of increasing search engine and social platform visibility. They wouldn't invest in search engine optimisation tools and social engagement platforms. They would stop promoting platforms such as Twitter, YouTube, Facebook and Instagram on broadcasts and in their content every day.

A refresh of legislation governing the media industry and landscape is vital. One that considers how Australian's consume media in 2021, not how they consumed it in 1991. One that acknowledges and understands how modern advertisers evaluate their advertising spend and the follow on effects of this on media company revenue.

If the government is seeking to ensure more money is invested into the creation of local news content, it could subsidise journalism roles in local media organisations. It could subsidise and help fund organisations like AAP, which was created for that very purpose, but has been abandoned by its two largest stakeholders and is now battling to survive. It could invest more funds into public broadcaster resources. It could reduce broadcasting fees for FTA networks. It could provide tax benefits on journalism related roles at news organisations. It could mandate retransmission fees for cable operators. It could provide TV networks with an equal footing with streaming services such as Netflix and Amazon around local content requirements and costs to broadcast their signal.

The government could help fund news organisations by mandating government departments allocate a ratio of their advertising spend to local news organisations. The federal government is one of the largest advertisers in Australia, and when combined with state governments, they would be the largest advertiser in Australia. An allocation of 70-80% of this to local new organisations would be a more sustainable act than demanding a third party fund these. The federal government and state government are some of the largest advertisers on

digital platforms and have been for the last decade. If the federal government invests \$1b in advertising over the next decade, a 30% increase in ad placement into local news organisations would create \$300m of additional revenue for these businesses.

And if the government is seeking a greater contribution of funds from international platforms, it could revise tax legislation that governs the transfer of revenue obtained domestically, internationally.

Consumers are not thinking about media and content based on the conduit from which they receive it - and legislation that governs media cannot treat companies differently depending on their country of origin, their incumbent business model, or the way they are delivered.

The code as drafted will not increase competition whatsoever. It will create even larger barriers for local media organisations to form. It will make funding for new media startups almost impossible. If Google and Facebook stop indexing news, it will devastate almost every local publisher bar those with strong incumbent network effects.

Local news needs to be nurtured and supported. Journalism is vital and yes, the commercial model that has supported it in the past is no longer suited to its future. News organisations need the support of the government, but this support must evolve and be suited to media consumption and the media business in 2021. The code is simply a rebadging of legislation that is almost 30 years old, and is not suited to serve any of the parties involved - the media companies, the platforms, and most importantly the people of Australia.

Thank you,

