



## ITI Response to Draft News Media Bargaining Code

January 15, 2021

We thank the Australia Senate Standing Committees on Economics for the opportunity to comment on the Inquiry regarding *The News Media and Digital Platforms Mandatory Bargaining Draft Code*.

### About ITI

The Information Technology Industry Council (ITI) is the premier voice for the global information and communications technology (ICT) industry. Our over 70 member companies include the world's leading innovators around the world across the ICT spectrum. We advocate on behalf of our members for policy and regulatory environments that foster innovation and maximize all the benefits that ICT companies provide, including economic growth, job creation, and the tools to solve the world's most pressing social, economic, and environmental challenges. We work closely with our partners in government, international organizations, the business community, and civil society to achieve these objectives.

### Overview

In our previous letter to the Australia Competition and Consumer Commission (ACCC) dated August 28, 2020, we emphasized the tech sector's appreciation for the need for quality journalism. Digital platforms have a vital and foundational role in ensuring Australians are able to have free and open access to journalism through a mutually beneficial ecosystem of publishers and platforms.

However, we believe the current draft of the Code undermines the ability of internet-based platforms to make an important and broad range of information and opinions available and accessible to the Australian people. Furthermore, the revised draft does not address the issues raised in our letter to the ACCC, including:

- **Concerns about unfair treatment and targeting of specific digital platforms to be designated without clear evidence or criteria, regulatory overreach in forcing payment from private companies to benefit one domestic sector in the business community, and unintended consequences that may inhibit the growth of digital services in Australia.**
- **Incentivizing news media businesses to prioritize content creation for only designated digital platforms as a means of gaining remuneration. This may have the unintended consequence of conversely shifting a large amount of traffic only to those designated platforms and hurt smaller platforms that may not have the means to pay for exclusive content.**

We also wish to re-emphasize our concerns related to the Code's discriminatory impacts and inconsistencies with Australia's trade obligations. The explicit and exclusive targeting of two U.S. companies – without regard to or demonstration of criteria for this approach – contravenes

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Australia's commitment to national treatment and most-favored nation rules under the Australia-U.S. Free Trade Agreement (AUSFTA) and the World Trade Organization (WTO) General Agreement on Trade in Services (GATS). The imposition of U.S. company-specific performance requirements to access the Australian market, such as the requirement to purchase and carry Australian content, also raises concern with Australia's investment commitments under the AUSFTA, including minimum standards of treatment for investors and procedural transparency. Such actions are at odds with Australia's desire to play a leadership role in advancing international digital trade rules for an open, global digital economy.

The Code presently benefits a narrow business sector and has negative consequences for the remainder of Australian consumers who depend on digital platforms for access to journalism, while discriminating against U.S. companies.

Therefore, we recommend that the Australian Parliament reject the current draft of the Code and ensure that a new version of the code fully addresses these concerns.

Below, we expand on the comments from our August 28 letter and provide additional information on the negative impact the Code would have on the ongoing development of innovative approaches to delivering news.

### [Forced payment for links and snippets would undermine how search engines and the internet work](#)

Imposing a uniform obligation on digital platforms to pay Australian news publishers for having their links and snippets of news content appear in search results or a feed is an unprecedented intervention that does not account for how consumers, news organizations, and platforms interact, and undermines some of the key benefits of the internet for both readers and news outlets. Search engines, websites, and other platforms often use links and snippets to make it easy for people to discover content and to drive traffic to websites, including news sites.

The premise of these and other internet services is that no payment is necessarily required by users, publishers, or platforms for creating, displaying, viewing, and sharing links. Requiring payment from the platform for surfacing links and snippets could undercut the benefits to both consumers and news organizations that come from the ability for intermediaries to link websites. The Code would require certain platforms to pay for links to Australian news websites, undermining the integrity of search and news platforms and limiting results for consumers. Instead of displaying and ranking links based on factors such as relevance, the existence of a commercial arrangement with publishers could become a key factor in determining placement in search results and feeds. This could also reduce competition and emergent players in the space that may design news consumption platforms that rely on differentiated ranking factors.

### [Biased, untested, and non-commercial arbitration scheme designed to transfer revenue to Australian news publishers](#)

The Code requires payments to news publishers through an unprecedented arbitration model. This model does not require the arbitrator to consider comparable market arrangements in order to

determine a fair market-comparable price based on evidence, and does not seek to provide a balanced assessment of the value exchange between platforms and publishers. The factors in the arbitration scheme are heavily tilted towards making large payments to publishers for links and snippets and assumes that the only reason for the prevailing zero-price model for links is that there is a “bargaining power imbalance” between digital platforms and news publishers.

The Code seeks to rectify this perceived market imbalance by skewing the factors the arbitrator must consider in favor of news publishers and against digital platforms. For example, the Code requires the panel to consider the costs to news businesses of producing news content, but not the costs to the digital platform of providing its services. And while the Code does refer to the possibility of two-way value exchange, it requires arbitrators to “consider the bargaining power imbalance” as a key factor in their calculation, which is an unjustified *per se* assumption that could lead to distortions in calculating the benefits and value that digital platforms bring to news publishers.

Finally, the Code requires the arbitrator to choose between two “final offers” – an extreme arbitration model that denies the fundamental principles of fairness and good faith that should apply in any commercial negotiation. The Code authorizes the ACCC to make submissions to arbitration panels, which can be expected to support the positions of news businesses that the ACCC drafted the Code to protect. And if news publishers disagree with the choice of arbitrators, then the Australian Communications and Media Authority is vested with the power to appoint members of the panel. Such arbitration decisions are not appealable to any Australian court or other administrative body.

These features of the arbitration model under the Code appear designed to guarantee that an arbitrator will always determine that significant revenue should be transferred from platforms to publishers. If this arbitration model should become law, there would be no downside risk for publishers to force negotiations to arbitration where they would be emboldened to make uncommercial demands for payment.

ITI and our members thank the Senate Standing Committee for considering our comments. We would be happy to discuss additional details on any of the aforementioned points.