BCA
Business Council of Australia

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

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1. About this submission

This is the Business Council's submission to the Senate Economics Legislation Committee regarding the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (the Bill). The Treasurer introduced the Bill to establish "a mandatory code to address the bargaining power imbalances that exist between digital platforms and Australian news media businesses".

2. Key recommendations

Our key recommendations include:

1. The arbitration panel's consideration of any value exchange should be fair and balanced in considering the contribution of both parties, and that the arbitration model should be revised to encourage good faith negotiations, including replacing the Final Offer Arbitration model with traditional commercial arbitration.
2. Remove the requirement for the panel to consider the outcomes of hypothetical scenarios based on 'imbalance of bargaining power'.
3. Revise the requirements for platforms to provide 14-day notice of planned changes, including by either removing this requirement or in the least reducing the scope of notifiable updates to ensure the regulatory burden is proportionate to the policy problem.
4. Future designation of additional platforms or services should be undertaken at the 12-month review at earliest.
5. As part of the one-year review of the legislation, include a review of whether the remuneration provided by digital platforms has led to a proportionate increase in spending on high quality news content and reporting for Australians.

3. Overview

The Business Council supports the development of a Code that ensures ongoing investment in high quality, local journalism, addresses real bargaining power imbalances and adheres to best practice regulatory principles. We believe it is possible that this can be achieved through targeted legislation that does not reduce the incentives to invest, set concerning policy precedents or diminish Australia's ability to take advantage of the digital economy.

While we understand the need to regulate the digital economy and support appropriate intervention by government, we believe the approach set out in this legislation is not the answer.

We have previously highlighted several concerns with the draft Code. These included one-sided bargaining arrangements, notification requirements for algorithmic changes, and the Treasurer's ability to designate a digital platform or service without regard to whether a bargaining power imbalance existed, among others.

We welcome many of the changes that have been made to the legislation since it was initially released for consultation by the Australian Competition and Consumer Commission (ACCC) in 2020. However, the Business Council considers the current legislation still presents an unmanageable level of

commercial risk for any business and carries with it significant sovereign risk. Our recommendations are intended to support the implementation of workable legislation.

As the Prime Minister has stated, the Government's ambition is for Australia to be a world leading digital economy by 2030. Digital innovation lifts productivity and living standards, and contributes to a stronger, fairer Australia. All Australians have benefited from the introduction of new digital services and will continue to benefit if we successfully become a leading digital economy. Achieving the Government's ambition will require appropriate legislative and regulatory settings.

It is the view of the Government that the same laws that apply offline should apply online. This is the same for fundamental economic principles – onerous regulation will have a chilling effect on digital investments and threaten the introduction of new services in the digital sphere, just as they always have in other domains. Legislation should not unnecessarily deter foreign technology companies from establishing and growing their presence in Australia. Similarly, it should not discourage local entrepreneurs investing their time, capital, and creative energies.

Foreign investment and domestic innovation require policy frameworks that provide access to the best skills and talent, allows these people to work using the most contemporary tools, work process and methods and encourages the adoption of new technologies and services. Australia's economic success has been built of the back of policy settings that encourage such innovation and provide confidence for businesses to invest.

Excessive regulation creates additional barriers for new and emerging market entrants – both domestic and foreign. As the cost of complying with this and other regulatory requirements mount, it becomes increasingly difficult for new entrants to break into the market or challenge incumbents. While each piece of regulation may be worthy individually, Government should consider the sum of its interventions. The overall consequence may be to create the market power imbalances and monopolies government is seeking to avoid while diverting the investment Australia is trying to attract to other locations.

Moreover, the precedents this legislation will set are troubling for all businesses. It will require businesses to enter into commercial agreements with other businesses, while providing no certainty about the financial exposure these agreements may create and limiting the ability of businesses to manage their own financial exposure. This would be a deeply troubling intervention by the Government in the commercial arrangements for any business.

The approach taken in the current legislation will create substantial sovereign risk for entities that are considering operating or investing in Australia. It will set poor policy precedents for Government intervention and sends a bad message about Australia's position as an open economy that welcomes investment. Australia will not become a leading digital economy if policies are put in place running directly in conflict with this objective.

For example, the requirement for digital platforms to pay for providing a link to another website runs counter to one of the fundamental tenets of the internet: the ability to freely link between content. The ability to freely make these connections has underpinned the creativity and sharing of knowledge enabled by the internet. This legislation undercuts this fundamental principle that has, for decades, enabled the internet to deliver real benefits to all Australians.

The Treasurer has noted this is world leading legislation. Indeed, it is establishing new precedents for how digital platforms are regulated. However, we encourage the Government to carefully consider the precedents this legislation will set for how businesses are regulated more broadly. As with all regulation, it should avoid company specific regulations or placing onerous requirements on businesses that ultimately reduce the welfare of all Australians.

The Business Council supports commercial negotiations as the best way to deliver enduring partnerships between businesses. This is a fundamental premise of a free market economy. The Government has also indicated it encourages commercial agreements to be entered into outside of the Code and recognises this through the framework contained in the Bill, as well as in the Treasurer's second reading speech.

However, as noted in the Regulatory Impact Statement, the Government's conservative estimate is that 75 per cent of all negotiations will ultimately proceed to arbitration. This suggests the framework is not appropriately balanced and, rather than encouraging good faith commercial negotiations, will mean parties are being incentivised to pursue arbitration.

Our recommendations are intended to support a Code that is workable for all parties, addresses bargaining power imbalances and supports a strong and sustainable media landscape and digital economy that benefits all Australians.

4. Comments and Recommendations

4.1 Arbitration

The 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.

Among the factors the panel is required to consider are the benefits received by both the platform and news media business, the costs for the media business of producing the content, and whether a particular remuneration would place an undue burden on the commercial interests of the digital platform.

The legislation also requires the arbitration panel to consider the bargaining power imbalance between news businesses and digital platform corporations. This is intended to allow the panel to consider the outcome of a hypothetical scenario where commercial negotiations took place in the absence of a bargaining power imbalance.

The Business Council is concerned that the imposition of legislation requiring the use of an arbitration model that has not been used elsewhere in Australia and is not suited to the market will set a poor precedent. Final Offer Arbitration models are typically used in cases where the value of the asset under negotiation is well understood and all parties are relatively close in their positions. However, in this instance the 'value' being negotiated over is still relatively novel and the market this legislation is being applied to is still dynamic and evolving. Final offer arbitration models have previously been criticised in Australia, including by the Productivity Commission in the context of the economic regulation or airports. The use of this model is particularly concerning given there is no recourse or opportunity for parties to appeal the decision taken by the arbitration panel.

The value calculation the panel must undertake is imbalanced. While the cost of producing the content is included, the costs for platforms in providing the service are not among the factors the panel must consider. Government should avoid setting precedents for establishing mandatory codes which consider only the costs worn by one of the parties.

We recommend that any calculation of the value exchange consider contribution made by both sides, that the Committee consider whether a standard commercial arbitration based on comparable deals would be a more appropriate mechanism to achieve good faith bargaining.

Further, the requirement for the panel to consider an 'imbalance of bargaining power' will embed skewed decision-making within legislation. The arbitration panel is required to consider a scenario where negotiations take place in absence of bargaining power imbalances. As the Explanatory Memorandum sets out, this could include the panel considering a hypothetical scenario where audiences reach the media business through other means. As currently drafted, this would allow for the case to be made that the panel not consider any of the value digital platforms provide to media businesses, entirely based on the ill-defined concept of an 'imbalance of bargaining power'.

This approach will set a concerning precedent. Legislation should not compel arbitration on imbalanced terms or create unfair dispute resolution processes.

We recommend the requirement for the panel to consider the outcomes of hypothetical scenarios be removed.

4.2 Notification requirements

The Bill requires digital platforms to provide 14 days advance notice of any planned changes to algorithms or internal practice which are likely to have a significant effect on referral traffic in general or to covered news content behind a paywall, or to the distribution of advertising associated with covered news content. This is intended to capture changes which involve an active decision, but not those that are unplanned or are generated by an automated process (eg. through machine learning).

This will set a precedent for substantial government intervention in how these kinds of products are built. These are complex systems updated by thousands of engineers from across the world. It is unrealistic to expect that all these engineers should be made aware of and trained on this specific regulation. This is not a proportionate response to the problem identified.

Moreover, this requirement will undercut Australia's position as an economy open to investment and innovation and will introduce substantial broader costs if applied more broadly. Introducing a requirement for businesses to provide advance notice to a subset of customers every time a service or algorithm is updated will be a substantial disincentive for businesses to use Australia as a launch pad for new, innovative services. Creating legislative requirements directly opposed to the way agile and innovative businesses operate will mean businesses will not invest or offer services in Australia, particularly if they are placed at a material disadvantage for operating in this market.

Consumer welfare should be the underlying principle driving this legislation. However, the current approach would place the interests of one subset of users (media businesses) over and above the legitimate interests of all other participants in the market, including other businesses and users.

We recommend the Committee consider whether revisions to the notification requirements could result in increased consumer welfare, including by reducing the scope of notifiable updates to ensure the regulatory burden is proportionate to the policy problem.

4.3 Designation of platforms and services

Under this legislation, the Treasurer has the power to designate a digital platform corporation and digital service that must comply with the Code. The Treasurer may only make this designation following consideration of whether there is significant bargaining power imbalance between Australian news businesses and the digital platform corporation's corporate group.

The Government has announced the Code will initially apply to Facebook NewsFeed and Google Search, with other services able to be added if there is sufficient evidence there is a bargaining power imbalance.

Given the ACCC has recently completed an extensive study of the market (through the *Digital Platforms Inquiry*), it would be appropriate to refrain from making additional designations in the short term. This would provide businesses with additional certainty, which will be particularly important given the onerous nature of the requirements imposed on digital platforms by this legislation.

We recommend that any further designations of additional platforms or services only take place at the 12-month review at earliest.

4.4 Reinvestment and sustainable journalism

We support the Government's underlying objective of ensuring a sustainable and viable media landscape. A strong media industry is fundamental to the functioning of Australia's democracy. The transfer required under this legislation should provide Australians with the full benefits of news content and news reporting.

There is no requirement or monitoring set out in the legislation to assess whether the Bill has contributed to greater journalism that benefits the Australian public. The current draft simply involves a transfer payment from the shareholders of two, US-based, commercial entities to the shareholders of one Australian-based and a different US-based commercial entity. There is nothing in the draft legislation that in any way ensures that any component of this wealth transfer will improve local journalism.

We recommend that the one-year review of the legislation include a review of whether the remuneration provided by digital platforms has led to a proportionate increase in spending on high quality news content and reporting for Australians. If there is no evidence of increased spend journalism during the first 12 months then we recommend a 12 month notice be provided, that the legislation will automatically lapse in a further 12 months if it cannot be shown that the majority, if not all, the transfer payment has been applied to an increased investment in local journalism.

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