SUBMISSION TO THE SENATE ECONOMICS LEGISLATION COMMITTEE ON THE TREASURY LAWS AMENDMENT (NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE) BILL 2020

Introduction

1. This submission to the Committee follows two submissions that I have made to the ACCC consultation process. The first dated 3 June 2020 was confined to question 18 of the ACCC 19 May 2020 Concepts Paper: "How might the bargaining code define 'use' for the purpose of any mechanisms facilitating negotiation on payment for the use of news content?" The second submission dated 26 August 2020 was made on that aspect of the Exposure Draft of the Bill which related to defining such use. Consistent with those prior two submissions, this submission contends that without connecting use under the Bargaining Code to copyright reform – and therefore to make the remuneration amount a payment by the digital platforms for copyright property use – the public policy ends being sought may not be perfected. This is because without such a copyright connection the proposed legislative regime may be vulnerable to internal (constitutional) and external (international trade law) legal attacks. More fundamentally, absent property rights, the reform is open to being characterised as having a patronage-basis rather than any bargain-basis.

2. My doctoral research (published as *Retransmission and US Compliance with TRIPS*, 2003, Kluwer Law International) considered in part the existence and valuation of copyright rights related to retransmission (the rebroadcasting of a primary broadcast by a third party) within the TRIPS framework and that work informs this submission.

3. In the context of the Bill as introduced to Parliament, central to the potential legal vulnerability of the Bargaining Code regime is the issue of how the payment mandated by clauses 52X(1) and 52ZZE should be properly characterised. In particular: what is the remuneration being paid for? It is described in clause 52X(1)(b) as "the making available of the registered news business' covered news content by the designated digital platform service for 2 years". Contrary to what this drafting might suggest, it is not a payment for the exploitation of by the platform of any copyright property owned by the news business for the reasons that are explained below.

The Absence of Copyright

4. "Content" in clause 52X(1), while not defined *per se*, appears intended to mean any matter published online that reports, investigates or explains current Australian issues and Australian events: cl 52A ("covered news content" and "core news content" definitions). The breadth of the subject matter categories that comprise Part III (works) and Part IV (subject matter other than works) in the *Copyright Act 1968* means that the online "content" contemplated by the regime is likely to largely but not entirely fall within copyright subject matter categories. Thus an unscripted live web stream will generally fall outside of those copyright subject matter categories. More fundamentally, while a news business may have a lawful right to utilise such content, that right is not coextensive with copyright ownership of the content in the business. For example, it might be third-party content it has a contractual licence to use or it might be third-party content being availed of under an exception such as a reporting of news fair dealing: *Copyright Act 1968*, ss 42, 103B. Note also that performers' rights under Part XIA of the *Copyright Act 1968* (which are non-

proprietary, actionable only by the relevant human performers and not by their employers – such as news businesses) exclude "a reading, recital or delivery of any item of news and information" from the scope of a protected "performance": *Copyright Act 1968*, s 248A(2)(b).

5. "Making available" for the purposes of the Bill's proposed regime is defined by clause 52B(1) to include "if: (a) the content is reproduced on the service, or is otherwise placed on the service; or (b) a link to the content is provided on the service; or (c) an extract of the content is provided on the service". The copyright exclusive right of "to communicate to the public" should generally be owned by a relevant news business in its online content to the extent that content comprises a relevant category of Part III or Part IV copyright subject matter that it owns. An aspect of the exclusive right is "make available online": *Copyright Act 1968*, s 10(1) (definition of 'communicate'). However the Bill's conception of making content available extends beyond the *Copyright Act 1968* in at least two ways.

6. The clause 52B(1) provision sets out that making available for the proposed regime includes: (b) the provision of a link to content on a designated digital platform service and (c) the provision of extracts of content on a designated digital platform service.

7. On the clause 52B(1)(b) aspect – the provision of a link – it is clear enough that in Australian copyright law linking to content by a platform service is quite unlikely to be either an exercise of the communication to the public right by the service or any authorisation by the service of an exercise of copyright: *Cooper v Universal Music* (2006) 156 FCR 380; *Copyright Act 1968*, ss 22(6A), 43A, 111A. In other words, in copyright law such linking does not obviously implicate any proprietary right. However, under the Bargaining Code regime the provision of such a link to content is a central remunerable use of content by a platform service.

8. On the clause 52B(1)(c) aspect – the provision of extracts – the making available online of an extract of a Part III work or Part IV other subject matter will only amount to a exercise of copyright if it amounts to a substantial part of the target subject matter: *Copyright Act 1968*, s 14(1)(a). Under the proposed Bargaining Code regime making available any "extract", including one that is not a substantial part of the target content, appears to be a remunerable use of that content by the service.

9. Thus, the activities which go to an assessment of the value of the use of content by making it available for the purposes of the proposed regime are detached from the exploitation of property rights owned by a news business under the *Copyright Act 1968*. As such it is not feasible to characterise those payments as a payment for any copyright use and as a type of copyright licence fee. This conclusion is unsurprising in view of the fundaments for the reform disclosed in the ACCC 19 May 2020 Concepts Paper: "The Australian Government has asked the ACCC to develop a mandatory bargaining code, which would **not** involve changes to Australian copyright law" (page 11, emphasis in original).

Characterisation Beyond Copyright

10. Not being a copyright payment means that a series of other options exist to characterise what the payments made under the regime are, and these other options which create problematic vulnerabilities for the regime. There are at least four ways to try to characterise the payment mandated by clauses 52X(1) and 52ZZE: (i) as taxation; (ii) as a compulsory acquisition of property; (iii) as a fee for a non-copyright service being the licensing of conduct that would otherwise be unfair competition; (iv) as a type of regulatory police power exercise. It is useful to bundle the discussion of these four into two pairs.

Taxation and Compulsory Acquisition

11. Taxation. The Law Council of Australia flagged in its submissions to the ACCC dated 5 June 2020 and 28 August 2020 "to the extent that a digital platform's use of the news content in question is not an infringement of copyright, an obligation to make a payment for that use which is imposed by regulation may constitute a tax and be potentially invalid under the principles established in the *Blank Tapes* case" (being a reference to *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480). Invalidity arose in that case because of the operation of section 55 of the *Constitution* which would apply equally here if the payment under the regime was indeed properly characterised as taxation. The 1993 decision dispensed with the requirement that a payment had to be exacted by a public authority for it to be characterised as taxation: the "collector" was a government-declared copyright collecting society being a private company limited by guarantee. Under the proposed regime, and similar to *Australian Tape Manufacturers,* the payments are not entirely being exacted by public authorities. There is some doubt about whether the *Australian Tape Manufacturers* holding remains good law insofar as it relates to the non-necessity of a public collecting authority. This doubt arises from a statement by 6-members of the High Court in *Roy Morgan Research v Federal Commissioner of Taxation* (2011) 244 CLR 97, 110: "the majority in *Tape Manufacturers* (1993) 176 CLR 480 at 501 suggested that it is not essential to the concept of a tax that the exaction should be by a public authority. That suggestion would constitute a large and controversial step beyond what was said in [*Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263]." A complication is the Bargaining Code regime as proposed in the Bill (with the omission of a provision equivalent to clause 52Y(6) of the Exposure Draft) which permits public bodies (i.e. the ABC and the SBS) to exact payments, and that possibly muddies the water on this point as it applies to the regime.

12. Compulsory acquisition. If not taxation the payment could be characterised as an acquisition of property not on just terms, as recognised by section 51(xxxi) of the *Constitution*. Given the payment is no obvious *quid pro quo* for any licence to exploit copyright property, unless some other fee for service basis could be ascertained, or police power exercise identified, there seems some likelihood that the payment mandated by clauses 52X(1) and 52ZZE could be characterised as an acquisition of property not on just terms. Based on the view in *Trade Practices Commission v Tooth* (1979) 142 CLR 397, 452 the fact the payment is not mandated to be paid to the government does not preclude this outcome: "It would be a serious gap in the constitutional safeguard which is the manifest policy of s 51(xxxi) if the Parliament could legislate for compulsory acquisition of property without just terms by … persons or bodies having no connexion with the government. Neither the

words of s 51(xxxi) nor the context require the adoption of so anomalous a view." It should also be noted that in *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 the majority there stated that had it concluded the payment liability there was not taxation, it would have been invalid as an acquisition of property on other than just terms.

Fee For Service (Licensing Unfair Competition) and Police Power

13. Fee for a service – licensing unfair competition. The third alternative is that the payment is a fee for a service other than copyright. It is notable that the Government is not explicitly proposing the creation of a new type of private right to be owned or controlled by registered news businesses for the purposes of this proposed regime. As such the Bill can be distinguished from the right (limited to two-years duration) in publishers of press publications that are 'established in' an EU Member State, for the online reproduction and making available of their press publications by online service providers: Directive (EU) 2019/790, art 15. Notably that right excludes both "acts of hyperlinking" and "very short extracts" from its scope.

14. There is no equivalent in Australia of any quasi-copyright, unfair competition or (so-called) "hot news doctrine" which might provide a substratum of private rights to support characterisation of the payment by the digital platforms as being in exchange for their engaging in conduct that would otherwise give rise to a tort in the affected news businesses. Indeed, the judicial creation of such a tortious liability has been vigorously resisted in Australia. The classic explanation for that resistance comes from Dixon J in *Victoria Park Racing v Taylor* (1937) 58 CLR 479, 509: "But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization." This statement in *Victoria Park Racing v Taylor* has been endorsed by the High Court in *Campomar v Nike* (2000) 202 CLR 45, 55 on the basis that it "should be regarded as an authoritative statement of contemporary Australian law". In the current setting the digital platforms are in a similar position to the opportunistic broadcasting defendant in *Victoria Park Racing v Taylor*, whereas news businesses are in a similar position to the racing industry plaintiff. However, as noted in paragraphs 15 and 16 that follow, one consequence of the proposed regime is indeed a reversal of the *Victoria Park Racing v Taylor* principle by the proposed regime creating a limited right to action unfair competition in a defined class of plaintiffs.

15. Police power. A necessary precursor to any digital platform service being liable to the payment mandated by clauses 52X(1) and 52ZZE is it first being "designated" which occurs after the Minister considers whether there is a "significant bargaining power imbalance between Australian news businesses" and the companies that own the service: clauses 52A, 52E. Thus, the liability to pay can be seen as a part of an competition regime to suppress noxious abuses of dominant position. This might permit characterisation of the liability as being tantamount to a type of regulatory police power: *Trade Practices Commission v Tooth* (1979) 142 CLR 397, 416. This, in turn, might lead to characterising the payment in a way which took it outside the scope of either taxation recognised

by section 55 of the *Constitution* or an acquisition of property recognised by section 51(xxxi) of the *Constitution*. However, such characterisation of the payment as a type of police power might also imply the *de facto* creation of a limited new right against unfair competition in registered news businesses exercisable against designated digital platform services, for the reason explained next.

16. The dual characterisation of the regime as comprising both a type of regulatory police power and the creation of an attenuated private right against unfair competition can be seen in the reforms to the enforcement machinery of Part VI of the *Competition and Consumer Act 2010* that are proposed in the Bill. Those reforms contemplate that a failure by a digital platform service to comply with an arbitral determination can be met by both public enforcement and with private action. Public law enforcement may result in punitive orders with the maximum civil penalty being the greater of – $10 million; three times the value of the benefit attributable to the breach; or if that benefit is not ascertainable, 10% of turnover: proposed reforms to section 76 of the *Competition and Consumer Act 2010*. Private action by a news business is also contemplated by injunction, damages or both: proposed reforms to section 80 and 82 of the *Competition and Consumer Act 2010*. An obvious basis on which to assess damages would be the quantum of any unmet arbitral award. It is unclear the extent of possible injunctive relief and whether a news business could obtain an injunction to (say) restrain the provision of links to its content on a designated digital platform service that is in default of an arbitral determination. However the enactment in stereo of public penalties and private remedies can be well understood as underscoring the law's dual nature as involving both the exercise of police power and the creation of (an albeit limited) private statutory tort.

Legal Vulnerabilities in Constitutional Law And International Law

17. Constitutional law. Sections 55 and 51(xxxi) of the *Constitution* each present vulnerabilities to the validity of the payment mandated by clauses 52X(1) and 52ZZE of the Bill. Following the logic of *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, to the extent the payment liability has no *quid pro quo* with private rights the payment could be characterised as taxation, and obligations to pay the ABC or the SBS are particularly vulnerable to that characterisation. If it is not taxation, the payment liability could be characterised as an acquisition not on just terms. The latter characterisation could be answered by a regulatory police power characterisation under the logic of *Trade Practices Commission v Tooth* (1979) 142 CLR 397, and which in view of the proposed public penalties and private remedies for default of an arbitral award implies the *de facto* simultaneous creation of a limited statutory tort of unfair competition within the regime.

18. International law. Assuming the payment mandated by clauses 52X(1) and 52ZZE of the Bill is valid under the *Constitution* being characterised as neither taxation nor an acquisition on unjust terms, and as an exercise of a type of regulatory police power with a shadowing statutory tort of unfair competition, this leads on to two other International law concerns. Both relate to the discriminatory nature of the benefits and burdens of the regime. As to its benefits, as noted at paragraphs 13 and 14 above, if constitutionally valid the regime appears to implicitly create an attenuated right of unfair competition in registered news businesses. However article 10*bis* of the Paris Convention (which is inscribed into the WTO framework by TRIPS article 2(1)) obliges Australia

to extend national treatment in relation to protection against unfair competition. Under this obligation the implicit unfair competition protection created by the proposed regime should not be confined to the protection of local news media, but available to nationals of all WTO members. As to its burdens, article 10.2 ("Each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to its own service suppliers") of the Australia-US FTA may be particularly relevant insofar as the regime as its intended focus liability in only two American firms: Google and Facebook. The US Government's submission to the ACCC dated 27 August 2020 on the Exposure Draft version of the Bill flagged that national treatment as "the most significant" likely trade agreement violation.

Copyright-Based Reform

19. Many of the constitutional law and international law vulnerabilities set out above can be traced to a fundament upon which the bargaining code was constructed: no changes to Australian copyright law. It is submitted that if this fundament is revisited, many of the legal vulnerabilities drop away and the policy goals of the reform can be more clearly and certainly achieved.

20. In this a central feature of the proposed regime is that it involves payment for linking to content, where linking is not as a general matter under Australian law an exercise of any private rights in copyright. Another feature of the proposed regime is that it also involves payment for making available extracts in circumstances not subject to the substantial part test in Australian copyright law. However in relation to the latter it is likely that many of the 'news feed' type extracts taken by digital platform services from news reports works are likely to comprise a substantial part of the report. (For example extracting the first paragraph from a news report that comprises a literary work, where that first paragraph serves the role as a summary of the whole report, is likely to be a substantial part in many instances.)

21. In 2013 the Association Littéraire et Artistique Internationale (ALAI) concluded that under article 8 of the WIPO Copyright Treaty (WCT): (i) the making available right covers links that enable members of the public to access specific protected material; (ii) the making available right does not cover links that merely refer to a source from which a work may subsequently be accessed: [2014] *European Intellectual Property Review* 149. It remains possible to reform Australian copyright law, consistent with WCT article 8, to include within the scope of the communication to the public right the act of providing a link. National treatment principles in international law would mean that copyright owners would need to be afforded this expanded right under the *Copyright Act 1968* without discrimination. However this could be done in a way directed to the end objective of addressing the bargaining power imbalances and abuses the regime is directed to, by providing a clear private rights basis to justify payment for use, while not unduly burdening society at large. Moreover, this more general copyright approach addresses US Government trade concerns about Australian discriminatory trade measures being targeted at US service providers.

22. Thus, copyright reform could be undertaken to perfect the policy ends being sought in the Bill by:

    - Expansion of the communication to the public right to include the provision of a link where the link provides access to specific works or other subject matter.

- Creation of a free exception for non-commercial exercises of the communication to the public right by provision of a link.
- Creation of a remunerated exception for commercial exercises of the communication to the public right by provision of a link, so that that aspect of the right can only be exercised through a mandated bargaining code process such as the one proposed, or for other exercises that occur outside the scope of such a bargaining code, then under a general statutory licence created in copyright law.
- Within the bargaining code mechanism that remunerated copyright exception could be extended to include allied exploitations of copyright subject matter (e.g. reproduction and copying) in whole or in substantial part.
- Within the bargaining code mechanism an obligation created in eligible news businesses to account to any relevant third-party copyright owners.
- Clarification that allowing a digital platform service's users to 'share', 'like', comment on and discuss individual pieces of news content', insofar as these activities include the provision of a link, involves a joint exercise of the right of the communication to the public right by the user and by the service such that for the one act the former may avail himself or herself of a free exception for any non-commercial exercise whereas the latter will be subject to a remunerated exception for any commercial exercise.

Conclusion

23. Copyright law exists to protect news media against the very types of appropriations made by digital platforms. Competition law alone is not readily fit for purpose because any "bargain" requires as a logical matter a clear framework of private rights. For any bargaining system a primary requirement is that those rights can be clearly established and ascertained. By tailoring copyright protections to the new digital environment, not only can such rights be created but they can be crafted so as to give rise to none of the constitutional or international law concerns flagged above, and to work within an integrated competition law framework. Many of the vulnerabilities present in the proposed regime which might impede it being able to deliver its intended outcomes can be overcome by considering afresh the core issue payment for use through a copyright law perspective.

24. Moreover, as it stands, the payment aspect of the bargaining code absent a substratum of property rights in the news businesses evokes a patronage relationship between the Commonwealth government (which is using its power to enforce payment from the digital platforms) and the recipient news businesses. Such government patronage is the antithesis of the competitive and expressive freedoms that copyright exists to serve.

David Brennan, 13 January 2021
Visiting Fellow, UTS Law