



Submission by Free TV Australia

*Social Media (Anti-
Trolling) Bill 2022*

**Legal and Constitutional
Affairs Legislation
Committee**

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1. Executive Summary

- Free TV Australia welcomes the opportunity provided by the Legal and Constitutional Affairs Legislation Committee to comment on the *Social Media (Anti-Trolling) Bill 2022* (the **Bill**).
- Free TV welcomes the Bill and strongly encourages the government to pass it as a matter of priority.
- While commercial television now needs to compete with a greater range of services than ever before, our recent experiences with bushfires, floods, and COVID-19 demonstrate that Free TV broadcasters deliver a vital national public service. Australians expect and continue to rely on these services in times of national crisis to make sure they get the facts they need, and to bond with their communities over entertainment viewing.
- News and information is a vital part of the commercial television offering. Commercial television invests significantly in news, and local journalistic content production is a very important part of our businesses. Free-to-air broadcasting services are highly regulated in Australia, which provides a basis for their ongoing role as a valued and trusted source of news and information for Australian audiences.
- The legal risk faced by Free TV members in relation to online content was significantly extended over the last two years, through the Dylan Voller defamation case. In September 2021 the High Court affirmed media companies as the publishers of third party comments on their social media pages. This has placed media companies, including Free TV members, under the significant onus of responsibility for end-user interaction on all of their social media posts (including Facebook, Twitter, YouTube etc.).
- As a result of this, and earlier findings, news media organisations have limited the number and range of articles that they share on social media, and are more often closing the comments section entirely, which prevents any discussion of the news and current affairs they are reporting.
- The passing of this Bill will remove the burden of this liability from Australian news media organisations, placing it instead on social media services as the owners and operators of these platforms, and will provide media companies greater flexibility in sharing news and content, and facilitating user engagement with this content.
- Free TV supports the Bill, and its objectives. There are, however, a number of recommendations to enhance the application of the Bill, to clarify key terms, and to minimise unintended consequences. These include:
 - extending the application of the Bill to other legal risks, such as contempt of court;
 - ensuring that social media services cannot contract-out of liability;
 - defining the purpose and limits the provision for Attorney-General intervention; and
 - clarifying definitions of key terms used in the Bill.
- While this Bill would make a significant impact on the relationship between media companies and social media services, Free TV recommends that the Government take further action.
- The provision of enhanced moderation tools; removing harmful content; and improving complaints-handling and responsiveness; would ensure that social media services act in a responsible manner, and would provide additional protection for audiences from online harms.

2. Introduction

Free TV Australia is the peak industry body for Australia's commercial free-to-air (**FTA**) television broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial FTA television makes to Australia's culture and economy.



Australia's commercial FTA broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent. A 2020 report by Deloitte Access Economics, *Everybody Gets It: The economic and social benefits of commercial television in Australia*, highlighted that in 2019, the commercial TV industry supported 16,300 full-time equivalent jobs and contributed a total of \$2.3 billion into the local economy. Further, advertising on commercial TV provided an additional \$4.4 billion worth of economic benefit.

Free TV members are vital to telling Australian stories to Australians, across news, information and entertainment. Free to air television broadcasters understand and appreciate the cultural and social dividend that is delivered through the portrayal of the breadth and depth of Australian culture on television, and Australians prefer local stories. The 2020 Deloitte Access Economics report found that 95% of people think that losing commercial television would have an impact on society and 89% think commercial television is a valuable service. The report also found that during peak times, half of all television viewers watch together with family or friends.

The commercial television industry creates these benefits by delivering content across a wide range of genres, including news and current affairs, sport, entertainment, lifestyle and Australian drama. At no cost to the public, our members provide a wide array of channels across a range of genres, as well as rich online and mobile offerings. The ubiquity of social media services makes them unavoidable trading partners for media businesses and these services are in a gateway position for access to online audiences.

3. Importance of the Australian media sector

3.1 Free to air television as the trusted source of news on online platforms

Commercial television now competes with a greater range of services than ever before, and our recent experiences with bushfires, floods, and COVID-19 demonstrate that Free TV broadcasters deliver a vital national public service. Australians expect and continue to rely on these services in times of national crisis to make sure they get the facts they need, and to bond with their communities over entertainment viewing.

Key to commercial TV content on social media, is news and information. Commercial TV invests significantly in news, and local journalistic content production is a very important part of our businesses. Free TV members broadcast local news services into every State and Territory in Australia and produce news of specific local significance in around 40 separate markets.

The *Media Consumer Survey 2021* found that '[t]elevision is the most frequently used news source, followed by radio and social media'.¹ In separate research, Deloitte also noted that, '[c]ommercial television broadcasters provide 486 hours of news and current affairs every week'².

Deloitte's 2021 survey showed that '...three-quarters of Australians see commercial television as a trusted source of news'.³ Research undertaken by C|T Group in 2021 showed that over a third of voters say that 'maintaining fair and balanced reporting in news and current affairs' is an important issue, as is 'ensuring honesty and transparency on social media platforms'⁴.

High quality, accurate and impartial news services on commercial free-to-air television are watched by 11 million Australians each week.⁵ Our members cover events of national significance, provide critical information in times of emergency and bring Australians together to witness moments in history, life changing occasions and times of national success. This has never been more true than during times of crisis, as shown by the audience response during the ongoing COVID-19 pandemic, with almost half of survey respondents saying that they are watching more commercial TV in the context of COVID-19⁶.

This content is vital for users to find through online platforms. Free TV members engage with millions of Australians through the social media assets. This becomes even more crucial in times of major news impacting audiences. The 2020 bushfires saw over 10 million interactions on members' social media.⁷

¹ Deloitte, *Media Consumer Survey 2021*, page 10

² Deloitte, *Everybody gets it – the economic and social benefits of commercial television in Australia*, 2020, p28-p30.

³ Ibid.

⁴ C|T Group, *Free TV Research*, October 2021

⁵ 1 Source: OzTAM (Metro), RegionalTAM (Regional). Network National Reach Estimate for Metro + Regional for minimum of 5 consecutive minutes viewed of Sun-Sat news across the day (incl Morning, Afternoon, Sunrise/Today, excl Specials) on Commercial Primary channels (and regional affiliates). Wks 7-23 2017. Data: Consolidated (Live + As Live + TSV7).

⁶ Deloitte, *Eyes on TV*, page 11

⁷ Deloitte, *Everybody Gets It*, page 23

This contributes to a strong news media industry in Australia, with a diversity of opinion and perspective. The availability of free-to-air, trusted, news and information is an important mitigation to the prevalence the range of potentially harmful content to which audiences have access through online platforms.

3.2 Regulation of broadcasting services

Free-to-air broadcasting services are highly regulated in Australia, which provides a basis for its ongoing role as a valued and trusted source of news and information for Australian audiences. The media industry develops and administers its own regulatory arrangements, with government providing a legislative backing to enable these arrangements to be enforced.

The *Broadcasting Services Act 1992* (the **Act**) provides for a regulatory environment for the broadcasting and datacasting industry in Australia. The Act also aims to restrict access to certain internet content and to protect children from exposure to unsuitable internet content.

The Free TV Commercial Television Industry Code of Practice (the **Code**), developed under s123 of the Act, applies to all commercial television broadcasting services operated by a Licensee. The Code regulates the broadcast content of commercial free-to-air television according to current community standards, and assists viewers in making informed choices about their television viewing. It also provides a procedure for handling viewer complaints about matters covered by the Code. The Code covers issues including:

- classification and proscribed material;
- news and current affairs;
- disclosure of commercial arrangements;
- advertising limits;
- advertising restrictions; and
- feedback and complaints.

The Code enshrines our members' commitment to accuracy and fairness in news and current affairs programming. The Code requires that commercial free-to-air broadcasters present factual information accurately and ensures that viewpoints included in programming are not misrepresented.

Most importantly, our Code of Practice requires that news programs must be presented fairly and impartially. This underlines the commitment of our members to quality news programming that sets their programming apart.

The Australian Communications and Media Authority (**ACMA**) regulates communications and media services in Australia. The ACMA sets and manages rules about communications and media services and markets; licences people, organisations and products to operate in Australia; looks into complaints and problems; and plans and manages the airwaves.

3.3 Complaints-handling processes

Free TV members have rigorous complaints-handling processes. Complaints can be made under the *Commercial Television Industry Code of Practice*, about any matter covered by the Code, and relating to a broadcast by a Free TV member (television licensee).



Complaints must be received within 30 days of the relevant broadcast. The licensee must send a written response within 30 days of receiving the complaint, or will use their best efforts to refer complaints to Ad Standards, where it is better placed to respond.

Should the complainant not be satisfied with the response received from the licensee, they may refer the complaint to the ACMA. Free TV reports annually to the ACMA about complaints received by licensees.

The co-regulatory complaints-handling process ensures that audiences have a clear and direct pathway to contact television licensees about content broadcast on television.

4. Legal liability for defamatory material

The Explanatory Memorandum affirms that,

*Australians can be the subject of defamatory material posted on social media. The challenges presented by defamation over social media are particularly acute, given the speed at which such material can spread and the limited scope to contain the spread of a defamatory post once it has been published on a social media network.*⁸

Free TV supports this statement, noting also the range of other harms to which Australians are exposed online. As outlined in Free TV's submission to the Select Committee on Social Media and Online Safety⁹, these harms also include misinformation and disinformation on social media platforms; misuse of brand and personal identity; and personal data privacy. Free TV has made a number of recommendations to mitigate or lower these risks.

4.1 Responsibility of page owners

Free TV strongly supports section 14 of the Bill detailing that page owners are not the publishers of material on that page by end users, and section 15 that the provider of the social media service is taken to be a publisher of the material.

The legal risk faced by Free TV members in relation to online content was significantly extended over the last two years, through the Dylan Voller defamation case. In September 2021 the High Court affirmed that media companies the publishers of third party comments on their social media pages.¹⁰ This has created an unmanageable and unacceptable liability for media companies, including Free TV members, for the interaction of end-users on social media platforms, including Facebook, Twitter, YouTube etc.

4.1.1 Impact of the Voller decision

News media organisations have limited the number and range of articles that they share on social media, and are more often closing the comments section entirely, which prevents any discussion of the news and current affairs they are reporting. Some publicly reported examples include:

- In an article published in the New York Times in September 2021, the ABC's then-Director of News, Gaven Morris, said 'We do choose not to publish some stories on Facebook and social platforms because we can't ourselves control the comment streams that follow it...[t]he load on our end in having to be vigilant across all of the comments is increasing all of the time...[w]e've talked long and hard particularly to Facebook about this and say there's got to be a better way... to moderate comments as they're going up.' Dave Earley, audience editor at Guardian Australia said '...we won't post stories about politicians, Indigenous issues, court decisions, anything that we feel could get a problematic reaction from readers.'¹¹

⁸https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6831_ems_d8a044e1-2ac3-4f15-b90a-7cf5d57b4b2e/upload_pdf/JC004985.pdf;fileType=application%2Fpdf

⁹<https://www.freetv.com.au/wp-content/uploads/2022/01/Free-TV-Submission-Social-Media-and-Online-Safety-Submission-Jan-2022.pdf>

¹⁰ *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCA 27

¹¹ <https://www.nytimes.com/2021/09/24/technology/facebook-australia-comments.html>

- In June 2019, News Corp Australia issued a statement saying ‘This ruling shows how far out of step Australia’s defamation laws are with other English-speaking democracies and highlights the urgent need for change. It defies belief that media organisations are held responsible for comments made by other people on social media pages. It is ridiculous that the media company is held responsible while Facebook which gives us no ability to turn off comments on its platform bears no responsibility at all.’¹²
- In December 2019, media industry publication Mumbrella decided to stop sharing news stories on Facebook altogether, telling readers the risk outweighed the reward. Mumbrella founder Tim Burrowes said that for a small publisher, the impact of even a single defamation claim can be very time consuming and expensive to defend. ‘It can have a chilling effect on whether they share perfectly legitimate news,’¹³ Burrowes said.
- In September 2021 and in response to the High Court's decision in the Voller case, major international media company Cable News Network (CNN) disabled its Facebook pages in Australia. CNN issued a media statement saying it had approached Facebook to see whether the platform would disable the comment functionality on its Australian pages but Facebook chose not to. ‘We are disappointed that Facebook, once again, has failed to ensure its platform is a place for credible journalism and productive dialogue around current events among its users,’ the statement said¹⁴.

This decision did not only affect media companies:

- Premier of Tasmania, Peter Gutwein MP, said he would turn off comments on some posts on his Facebook page due to the Voller ruling. The Premier of Victoria, and then-Premier of New South Wales were also reported to be considering how to manage these risks.¹⁵
- Community legal service Justice Connect issued a warning to the non-profit sector that ‘...essentially, if your not-for-profit organisation operates a social media page, it is responsible under defamation law for everything that everyone posts on that page. It doesn’t matter if your not-for-profit organisation disagrees with a defamatory comment or is even unaware that someone has posted a comment. Every not-for-profit organisation that operates a social media page should put measures in place to ensure that posts or comments made by others are not defamatory.’¹⁶
- The Arts Law Centre of Australia also warned artists and art organisations that they will be affected, as they use social media to drive engagement and publicise events.¹⁷
- It was reported in The Guardian in October 2021 that an individual whose name was listed as an administrator on a Facebook community group with only 200 members, received a law firm's letter threatening defamation proceedings on behalf of the mayor of his local council.¹⁸

The passing of this Bill would appropriately place the liability for defamation on the providers of social media platforms as the parties best equipped to manage the content on their platforms. In doing so,

¹²<https://mumbrella.com.au/media-outlets-found-liaable-for-readers-facebook-comments-in-first-round-of-landmark-dylan-voller-defamation-case-585567>

¹³<https://www.smh.com.au/politics/federal/a-chilling-effect-media-companies-forced-to-keep-stories-off-facebook-20191204-p53gx5.html>

¹⁴<https://www.smh.com.au/business/companies/cnn-disables-facebook-pages-in-australia-after-voller-decision-20210929-p58vq2.html>

¹⁵ Ibid

¹⁶ <https://nfplaw.org.au/new-high-court-decision-affects-all-not-profit-organisations-use-social-media>

¹⁷ <https://www.artslaw.com.au/defamation-and-the-voller-case/>

¹⁸ <https://www.theguardian.com/law/2021/oct/29/lawyers-use-voller-defamation-case-to-demand-facebook-group-admins-remove-posts>

this will remove the unmanageable liability from Australian news media organisations, as well as other page owners, and will allow media companies the flexibility to promote and provide opportunities for users to engage with and discuss their content.

5. Further recommendations for social media services

5.1 Need for enhanced moderation tools on social media platforms

To ensure that audiences can have a positive experience while interacting with commercial television content on online platforms, Free TV members must be able to manage their content on digital platforms, and to meet their own statutory compliance obligations. Free TV members are committed to freedom of speech and freedom of communication, while needing to efficiently and effectively take actions to protect audiences, where possible, from trolling. Free TV has previously requested enhanced moderation tools from the social media platforms. These remain vital even if the Bill is passed, removing legal risk for comments on posts, it is still necessary for Free TV members to have some level of control over how their content is presented on these platforms.

However, there is an expanded set of requirements that these tools should satisfy, which are within the current capacities of the platforms to provide. This would include:

- Turn off comments at the time of scheduling a post
- Remove or filter comments
- Filter a word from comments on a single post – when a comment is submitted for a specific post and the comment includes the filtered word or phrase, the comment is automatically stopped from being published
- Hide a comment from all users, including the commenter's friends
- Disable the making of comments on geo-blocked posts
- Prevent sharing of content by end users
- Prevent individuals from being tagged in comments
- Option to switch off comments after a set period of time

These options should be clearly and easily accessible to users and page owners, generally as a 'yes/no' option to provide clarity. One of the most significant challenges that Free TV members face in relation to moderation of comments is on historical posts. Recently introduced moderation tools do not appear to apply retrospectively (eg. it is not possible to turn off comments on old posts), and there is no functionality to remove old comments but to preserve the data, which may be necessary for litigation obligations. Where comments are deleted manually, caching restrictions mean that the comments do not disappear from all users' views. The resources required to moderate the large archives of material posted by media companies are significant, and tools should be provided to assist media companies to manage this content.

The provision of these tools will allow Free TV members to assist their audiences in keeping safe online. These tools should be prominently displayed and promoted to users and page owners.

These tools are required to assist media companies manage their legal liability that arises through user interaction with our content. One key benefit of ensuring social medial services are made legally liable for the content of comments on their platforms, is the rational incentive it would produce for the platforms to provide these tools to page owners to assist in efficiently and effectively managing harmful content.

This Bill places the defamation liability on social media services for user comments and provides a defence to this liability subject to a complaints-handling process. The Explanatory Memorandum states that ‘...the Bill incentivises providers to have [a complaints] scheme, by making it a condition of accessing the defence.’¹⁹ Similarly, we recommend that the Committee should give consideration to placing the legal liability from user comments on platforms for other matters, such as contempt of court, and provide a defence for social media platforms contingent on the provision of the moderation tools discussed in this section, as this will also provide incentives to introduce moderation tools that will mitigate the risk for issues such as contempt of court.

5.2 Removal of content

Broadcasters have reported misuse of their brands and the identity of individuals on social media services²⁰. This severely undermines the value and trust placed in these brands by Australian audiences. The Australian Securities and Investment Commission has also reported on ‘[t]he fraudulent use of celebrities, prominent businesses, news sites and government agencies in the marketing of financial products and services’²¹.

While noting the challenges in introducing mandatory take-downs, social media services (digital platforms) must have the authority to remove this content or these accounts, when they are identified by either the platforms themselves, or by Free TV members.

Free TV recommends that identified pages or account holders should be provided 72 hours to show authority to use the brand or personality. If they are unable to demonstrate this authority, then social media services should remove the content/account.

5.3 Complaints handling and responsiveness

The *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (the **Code**) provides for the facilitation of open communication between digital platforms and news media businesses. Until such a time as a digital platform is designated under this Code, however, these provisions are not activated. However, we suggest that it is vital for digital platforms to provide this to news media businesses, including Free TV members, to ensure communication and engagement. This would include:

- Digital platforms to set up a point of contact in Australia, and provide details of this point of contact to Free TV members
- Acknowledge every communication to that point of contact from Free TV members, in relation to their content being made available on the digital platform service.

Equally, Free TV members/news media businesses would also commit to setting up a point of contact and acknowledging communication received from digital platforms.

¹⁹ Explanatory Memorandum, page 17

²⁰ <https://www.freetv.com.au/wp-content/uploads/2022/01/Free-TV-Submission-Social-Media-and-Online-Safety-Submission-Jan-2022.pdf>

²¹ <https://asic.gov.au/about-asic/news-centre/news-items/that-celebrity-endorsed-bitcoin-ad-is-probably-a-scam/>

This process would enable requests for content removal; complaints; reports of misuse of identity (business or personal) to be acted on quickly, to minimise damage to audiences, businesses and individuals.

Social media services should publicly provide details on their complaints review process, and should publish statistics of complaints received and content removed in response to complaints.

5.4 Extend focus beyond defamation

The Bill overlooks injurious falsehood, and misleading and deceptive conduct. Any plaintiff that wishes to pursue a claim against the page owner, can simply pursue one of those alternative causes of action instead (if available on the facts).

Similarly, we recommend that the Committee should give consideration to placing the legal liability from user comments on platforms for other matters, such as contempt of court and provide a defence for social media platforms contingent on the provision of the moderation tools, as discussed in section 5.1.

6. Drafting recommendations

6.1 Contracts with social media services

During 2021, media companies entered into a range of contractual agreements with social media services. While the News Media Bargaining Code has facilitated these agreements, there remains a bargaining power imbalance between media companies and social media services. This Bill must include a provision to prohibit social media services from contracting-out of legal liability for defamation, in these agreements.

6.2 Attorney-General intervention

The Explanatory Memorandum states that ‘...the Attorney-General may intervene in defamation proceedings relating to material posted on a page of a social media service where the provider of the social media service is a party to the proceeding...’. Additionally, ‘...the Attorney-General may intervene in a proceeding before an Australian court in a matter arising under the Bill. This provision makes clear that the Attorney-General may intervene in proceeding that are not defamation proceedings, providing they arise under the Bill.’²²

The intent and limitations of this wide-ranging power of intervention should be further clarified, to reduce unintended consequences, and to avoid a precedent of intervention.

6.3 Definitions

Section 6 of the Bill provides definitions of key terms. Three of these require further clarification.

²² Explanatory Memorandum, page 25

6.3.1 Account

The Bill defines the term ‘account’ as:

account includes:

- (a) a free account; and*
- (b) a pre-paid account; and*
- (c) anything that may reasonably be regarded as the equivalent of an account.*

While this definition replicates that which is provided in the *Online Safety Act 2021*, this definition is unclear and circular, as it uses the term ‘account’ within the definition, and notes only that it may be ‘free’ or ‘pre-paid’. A definition of ‘account’ itself should be provided. This should be aligned with an existing legislative definition of ‘account’, however, should this not be available, drafting may consider terminology such as ‘a registration or profile created within a social media platform’.

6.3.2 Social media service

The Bill defines the term ‘social media service’ as:

social media service means:

- (a) an electronic service that is a social media service (within the meaning of the Online Safety Act 2021); or*
 - (b) an electronic service specified in the legislative rules;*
- but does not include an exempt service.*

Free TV supports use of the definition of ‘social media service’ contained in s13 of the *Online Safety Act 2021*. Appropriately, broadcasters’ own websites and apps are not covered by this definition, as the sole or primary purpose of those sites and apps is not to ‘enable social interaction’. These sites and apps therefore fall outside the definition of ‘social media service’ for the purposes of the *Social Media (Anti-Trolling) Bill 2021*.

This ensures that Free TV members’ own websites and apps are not considered to be ‘social media services’ for the purposes of this Bill. Further clarification, however, should be given on the types of electronic services that are envisaged to fall under the definition in the legislative rules.

6.3.3 ‘Page’ of a social media service

The Bill defines the term ‘page’ as:

page of a social media service means:

- (a) a page (however described) of the service; or*
- (b) any other distinct part of the service.*

The term ‘page’ is inherently referring to a page of a website. This is not applicable to apps such as those used by Facebook, Twitter, Instagram and TikTok. While the phrase ‘any other distinct part of the service’ may be intended to cover how this material appears on apps, this should be clarified.

6.3.4 End user

The term ‘end-user’ appears throughout the Bill, however no definition is provided. The term is used within the description for a ‘page owner’ and also for a ‘commenter’. Arguably a page owner is not an



end-user and is more like an intermediary. The difference between 'page owner', 'end user' and 'commenter' should be clarified.