

News Corp Australia

**SUBMISSION TO THE
AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION**

**MANDATORY NEWS MEDIA
BARGAINING CODE**

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PART A: Introduction

News Corp Australia welcomes the Government's direction on 20 April 2020 that the Australian Competition and Consumer Commission (**ACCC**) develop a mandatory code of conduct addressing bargaining power imbalances between digital platforms and news media businesses, the outcome of which is that news media businesses be paid for their content used on Google and Facebook.

In this submission, News Corp Australia responds to the ACCC's '*Mandatory news media bargaining code – Concepts paper*' dated 19 May 2020 (**Concepts Paper**) and sets out its proposal for a code of conduct. While we do not directly answer every question the ACCC has posed, we address the ACCC's general concepts in our submissions. News Corp Australia has previously presented its views on the need for a code of conduct in its submission to The Treasury dated 26 September 2019 responding to the ACCC's Digital Platforms Inquiry Final Report (**DPI Final Report**) and will not repeat those arguments. This submission focuses on News Corp Australia's views on the scope, content and implementation of a mandatory code of conduct.

Regulation of the use of news content by digital platforms demands a bespoke approach by the ACCC that creates proper incentives to support investment in, and the longevity of, news and journalism in Australia. The extent of information asymmetry between digital platforms and news media businesses together with the rapidly changing nature of the products and services offered by digital platforms which extract value from news content, pose novel challenges for regulatory intervention. Accordingly, regulatory approaches used in the past, including in other industries, may not be appropriate. Most importantly, any code must support and reflect the diversity of business models of the various news publishers and contribute to their sustainability and future vibrancy. In News Corp Australia's view, the only model which could support such objectives is where the negotiating framework allows for bilateral negotiations between digital platforms according to minimum standards set by the code of conduct.

In this submission, News Corp Australia outlines its proposed model code which provides a framework for Australian news media businesses to negotiate separate bilateral agreements with each of the digital platforms subject to minimum standards contained in the code. The proposed model could also accommodate an option for publishers who may benefit from and choose to negotiate collectively, particularly smaller publishers who may lack the resources to engage in individual bilateral agreements, to do so. To break any deadlock in bilateral negotiations, News Corp Australia suggests two alternatives:

- 1 a **collective boycott** in which the digital platform is not able to publish the news content of any news media business with a unique audience (**UA**) per month of over 1 million¹ unless they are able to reach agreement with all of them. This ensures that the digital platforms cannot use their substantial bargaining power to play large news publishers off each other and reach agreements between some (who may be willing to accept less compensation) compared to others. This would be layered on top of a framework where there are minimum standards and all news media businesses regardless of size can engage in bilateral negotiations or in collective bargaining; or

¹ The unique audience (**UA**) is "the total number of unique people (de-duplicated) that visited a site at least once during the specified time period. Note this is a people based measure rather than users or registrations": 'Unique Audience (UA)', *IAB Australia* <<https://www.iabaustralia.com.au/component/cobalt/item/2536-unique-audience-ua?Itemid=>>.

2 a final offer arbitration (**FOA**), in which both parties put their best offer to the arbitrator and the arbitrator selects which offer will form the agreement between the parties. This selection is final and binding. The purpose of the FOA is to encourage the parties to negotiate reasonably and bring them closer together. Both dispute resolution literature and practical experience suggests that it can be effective in circumstances where value is difficult to determine and one of the parties occupies a position of market power. It also has the benefit of introducing efficiency to an arbitration that could otherwise be protracted, onerous and potentially resource-intensive.

This submission is structured as follows:

- In **Part B** of this submission we provide an overview of News Corp Australia's proposed model code of conduct, which:
 - sets minimum standards of conduct and parameters for negotiations between digital platforms and news media businesses, such as those relating to data and the consequences of non-compliance with the code; and
 - provides a framework for Australian news media businesses to negotiate bilateral agreements covering the remuneration payable by digital platforms for use of news content, as well as other elements above the minimum standards in the code that may be tailored to the needs of each party. This framework proposes that deadlocked negotiations be resolved by a collective boycott or FOA with the ACCC as the arbitrator.
- In **Part C** we outline the strengths of this model code of conduct over alternatives (such as collective licensing).
- In **Part D** we conclude our submission, outlining why News Corp Australia's proposed code of conduct is the most effective way to ensure Australian news media businesses are fully and reasonably compensated for the value – direct and indirect – that digital platforms obtain from the use of news media content.

The full terms of the proposed code of conduct are provided at **Annexure A** to these submissions. This code of conduct only includes the FOA model, as a draft code of conduct including the collective boycott model was previously provided to the ACCC.

An expert report by Charles River Associates is provided at **Annexure B** to these submissions.

PART B: News Corp Australia's proposed code of conduct

1 Overview

News Corp Australia considers that the most effective way to address the bargaining power imbalance between news media businesses and digital platforms and ensure a sustainable and vibrant Australian news media landscape is through the adoption of a code of conduct consisting of two main parts:

- (a) **Minimum standards:** first, the code establishes minimum standards with which designated digital platforms must comply; and
- (b) **Negotiating framework and deadlock breaking mechanism:** second, the code sets out a framework by which Australian news media businesses can each engage in meaningful bilateral negotiations with those designated digital platforms. This framework includes a deadlock-breaking mechanism in which a collective boycott or FOA with the ACCC as final arbiter is used.

The ability of individual news media businesses to negotiate bilaterally with digital platforms means that those negotiations can reflect and respect the different business models of Australian news media businesses. Indeed, the ACCC considered that the issues it identified in the relationships between the digital platforms and news media businesses would be more appropriately determined through commercial negotiation between the parties, allowing for "*some flexibility for different arrangements*" and to account for "*the fast moving nature of digital markets*".²

Each news media business places different value and importance on different aspects of their interactions with digital platforms. The ability to reach a bilateral negotiated outcome with the digital platform means the outcome can reflect the unique views of each news media business. It would not be possible to determine a common set of appropriate metrics which should be adopted for all news media businesses. Any industry-wide approach would therefore result in unacceptable compromises and potentially create incentives contrary to the very objectives the ACCC is seeking to achieve through the adoption of the code.

By containing minimum standards, however, the code addresses industry-wide concerns while maintaining an approach of bilateral negotiation. These standards should address the data provided to publishers, digital platforms' algorithms and changes to algorithms and control over the 'look and feel' of content displayed on the digital platform's properties.

Details about the proposed code of conduct are set out in detail below. In particular, we explain:

- the digital platforms to which the code of conduct should apply;
- the definitions of news content and news media businesses;
- the value of news content to digital platforms;
- why it is necessary for any code to support and promote bilateral negotiations;

² ACCC, *Digital Platforms Inquiry: Final Report*, June 2019, <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>> (*ACCC DPI Final Report*), 256.

- the framework for bilateral negotiations, together with the deadlock-breaking mechanism;
- why FOA on is an appropriate deadlock-breaking mechanism in these circumstances;
- why the ACCC should be the arbitrator;
- an explanation of the minimum standards and the rationale for these; and
- the inclusion of other aspects, such as penalties.

Ultimately, News Corp Australia proposes a framework that aligns closely with objectives set out by the ACCC in the Concepts Paper and DPI Final Report because it "*require[es] certain digital platforms...to commit to negotiating with media businesses on particular topics and on specific terms.*"³ Our proposed framework also provides the "*flexibility for different arrangements to be reached between each digital platform and media businesses*" while giving scope for the relationship between digital platforms and news media businesses to evolve in accordance with the "*fast moving nature of digital markets*".⁴

2 'Designated digital platforms'

In the Concepts Paper, the ACCC suggests that a mandatory code of conduct will apply to news media businesses and their relationships with, in the first instance, Google and Facebook only.⁵

News Corp Australia agrees that the code of conduct should apply to Google and Facebook, at least at the outset. Both entities have become 'unavoidable trading partners' which has prevented Australian news media businesses engaging in successful commercial negotiations regarding the use of news content and associated data by those platforms.

The code of conduct should therefore specify that Facebook Inc and Google LLC, their related bodies corporate,⁶ and any of their respective successor entities are 'digital platforms' to which the code applies. The code should ensure that **all** products / services (websites, app or otherwise) provided by Google and Facebook are subject to the code, including any subsidiaries such as Google Search, Google News, YouTube, AMP, Google Assistant voice activation services and related services provided through 'Google Home' hardware and home automation devices, Android TV, Facebook News Feed, Facebook Instant Articles, Facebook Watch, Instagram, WhatsApp, Facebook News Tab, Messenger and any other services which present news media. Google and Facebook use news media business' content across these products / services to varying degrees. It is necessary for the code to apply to all products / services provided by Google and Facebook because if the code were to exclude certain kinds of products / services, the digital platforms could change their business model to use news publishers' content in some other way. The code of conduct should also set out a mechanism by which the definition of 'digital platforms' can be extended to other businesses, for example, through a process of

³ ACCC DPI Final Report, 233.

⁴ ACCC DPI Final Report, 256.

⁵ ACCC, *News media bargaining code: Concepts Paper*, May 2020 <<https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/concepts-paper>> (*ACCC Concepts Paper*), 1.

⁶ That is, the code should cover entities like Facebook Ireland Limited, Facebook Australia and New Zealand, Google Australia Pty Ltd, etc. in respect of their interaction with news media businesses in Australia.

consultation and approval by the ACCC, as proposed in our proposed code of conduct in **Annexure A**.

In this submission, we refer to digital platforms to which the code of conduct applies simply as 'digital platforms'.

3 Definition of 'news media business'

In News Corp Australia's view, the code of conduct should define the class of 'news media businesses' that must be given the opportunity to enter into bilateral negotiations with the digital platforms.

News Corp Australia considers that all Australian news media businesses should benefit from the minimum standards set out in the code of conduct, regardless whether or not they decide to enter into bilateral negotiations with a digital platform. Further, the code of conduct should oblige a digital platform to negotiate with any Australian news media business that elects to engage in bilateral negotiations about the use of that news media business' content by the digital platform.

News Corp Australia suggests that 'news media business' should be defined in the code of conduct as 'any business which has as a significant business activity the production and supply of news content, which is more than a mere distribution service' for the purpose of applying the minimum standards discussed **below in section 7**.

News Corp Australia considers that 'news content' should be defined broadly as 'content produced for the purpose of investigating, reporting, or providing commentary on issues of interest to Australians'.

The definition of 'news content' should be agnostic as to form (which may include text, image, audio, visual or combinations of these) and delivery (which may include distribution through third party platforms such as social media platforms or news aggregators or delivery through smart speakers).

The scope of the term 'news content' should not be limited to specific subject matters. Nor should it be limited to public interest journalism or any notion of professional standards.

The minimum standards in the code of conduct must cover all uses of news content by digital platforms, including news content that does not require a copyright licence and, if elected by the publisher, news content that does require a copyright licence.

4 The value of news content to digital platforms

In the Concepts Paper the ACCC raises a question about the value that digital platforms take from dealing with, hosting, or otherwise making available news content from or through their products and/or services. In this section we:

- (a) provide an overview of the likely value – both direct and indirect – that platforms obtain from news content; and
- (b) assess Google's recent claim that it only obtains \$10 million of direct value from dealing in news content.

Any assessment of value must take into account the direct and indirect value from news content, and consider value obtained from all aspects of the platforms' businesses.

4.1 An overview of the direct and indirect value digital platforms take from news content

As the ACCC has recognised in the Concepts Paper, digital platforms obtain both *direct* and *indirect* value from their use of Australian news media businesses' content. The importance of both direct and indirect value of news content to digital platforms, particularly in relation to the digital platforms' collection of data, cannot be underestimated. News Corp Australia agrees with the ACCC that the "*indirect value may greatly outweigh direct value on some of the services of these digital platforms*".⁷

Due to the paucity of data available, and inconsistency or unreliability of data which is made available publicly, it is not possible to accurately estimate the total value – both direct and indirect – of news content to digital platforms. What is indisputable, however, is that digital platforms extract substantial value from news content. The following areas benefit from the presence of news content on digital platforms:

- **Improved targeting capabilities:** Digital platforms like Google experience increased levels of advertising revenue as a result of hosting news content on their platforms – and not just advertising directly associated with news media businesses and news content sites. The data from consumers viewing news content can be used by the digital platforms to provide improved target capabilities in its advertising-facing services. This value of user data is especially pertinent in the case of Google, with its dominant position across the ad tech supply chain. The value of improved targeted digital advertising is considerable: a 2019 trial run by Google itself indicated that UK publishers earned up to 65% less revenue when they could not offer personalised advertising inventory but were competing with other publishers who could.⁸
- **Comprehensive and rich user data:** Both Google and Facebook obtain substantial user data from hosting or otherwise dealing in news content, since users access news content regularly. The data is not limited to name, age and gender, but extends to 'likes', queries, online comments, purchases, clicks, and strikingly, decisions *not* to click.⁹ News content is ideally suited to harvesting data using Google's main tools and sources for gathering data. Both Google's user-facing services (including Google Search) and its analytics technology placed on third party sites and apps (known as tags)¹⁰ can host or be applied to news content and news sites. Facebook's main data-gathering routes – on its services (including Facebook and Instagram, and Instant Articles) and analytics technology placed on third-party sites – can similarly collect data from news content.
- **Portrayal of trustworthiness:** Digital platforms use the brand value of trusted news media business to bolster their own consumer-perceived trustworthiness. The digital

⁷ ACCC Concepts Paper, 11-12.

⁸ Competition and Markets Authority (CMA), *Online platforms and digital advertising: Market study interim report* (2019) (CMA Interim Report), 15 [40].

⁹ Rebecca Lemov, Associate Professor of the History of Science, Harvard University, 'Big data is people!' *AEON* (16 June 2016) <<https://aeon.co/essays/why-big-data-is-actually-small-personal-and-very-human>>.

¹⁰ CMA, Interim Report, 15 [38].

platforms have for some time been struggling with their brand reputations and consumer trust, especially in light of recent controversies. This makes the availability of trusted news content on their services particularly valuable. When a user makes a Google Search query, the results returned will frequently include content from trusted news media businesses, suggesting to users that the digital platform itself is an equally trustworthy source of information. The associated boost in digital trust is of tremendous value to digital platforms, notwithstanding that those platforms have not contributed to the building of consumer trust associated with strong news brands.

- **Improved machine learning / algorithm capabilities / functionality:** It is News Corp Australia's understanding that digital platforms, and particularly Google, use news content to develop their services, particularly their artificial intelligence capabilities. This includes 'deep learning'. Deep learning is a more advanced type of machine learning. It involves building artificial neural networks, which try to mimic the way an organic brain functions. A recent example of deep learning by Google is image enhancement, which is the restoring of images which are missing details or data, based on data that is present and/or based on data the algorithm obtains about similar images. There is significant financial gain for Google in being able to create these types of products.

4.2 An assessment of Google's quantification of value from news content

In a blog post published on 31 May 2020, Google claimed that the benefit it obtains from news content is minimal: that the direct value of revenue from clicks on ads against possible news-related search queries in Australia is approximately \$10 million, and that the indirect value is also "*very small*".¹¹

It is obvious that the figure of \$10 million is incorrect, and in fact, not even likely to be in the right 'ball park' of the total value that Google is likely to obtain from news content. Of course, it is difficult for us to quantify as an external third party in the absence of access to internal information from Google, but this itself underscores the difficulties publishers like News Corp Australia have in negotiating with an entity like Google and why minimum standards of disclosure and transparency are required. However, News Corp Australia sets out below why, based on information that Google has made public, this figure of \$10 million is likely to be very inaccurate.

First, in quantifying this 'value', Google fails to be comprehensive in terms of the scope of its products which benefit from news content. In respect of *direct* value, Google refers solely to revenues from *Google Search*. As the ACCC is itself aware,¹² Google has several other services that host or provide access to news content and also generate substantial revenue, including YouTube, Google News and Google's AMP format (appearing on mobile phones). So let us compare this \$10 million figure with just one other Google product where Google generates revenues from news content: YouTube. Google's parent company, Alphabet, reported that

¹¹ Mel Silva, 'A fact-based discussion about news online', *Google Australia Blog* (31 May 2020) <<https://australia.googleblog.com/2020/05/a-fact-based-discussion-about-news.html>>.

¹² ACCC Concepts Paper, 12.

YouTube generated US\$15 billion globally from advertising revenue in 2019.¹³ News content is widely watched on YouTube. A 2018 study in the United States found that YouTube was the second most popular social media site for news consumption, with 21% of those surveyed accessing it for news content¹⁴ (the most popular platform was Facebook).¹⁵ The number of people using digital platforms to access news content is likely to be greater now in light of the COVID-19 pandemic, which has reportedly sparked a 75% increase in viewership for YouTube news content.¹⁶ Accordingly, it is extremely unlikely that the direct value to Google of news content over all of its services in Australia is merely \$10 million. Indeed, at the 2008 Fortune Brainstorm Tech conference, the then-vice president of Google Marissa Mayer stated that while Google News might not make money on its own, it on its own drove US\$100 million worth of search.¹⁷ That was twelve years ago.

News Corp Australia also understands that AMP has been a significant source of direct revenue for Google, including through the developments of Discover, a tool that uses the AMP articles and for which Google developed Discovery Ads, a new ad format that will likely command higher revenues for Google. The restrictive mobile format, which is hosted on Google's cache, has undermined publishers' ability to generate revenues from their content.

While Google does not currently run ads alongside the results in Google News or in the news tab in Google Search, there is no certainty that this will remain the case in future. In addition, the presence of news content increases potential advertising revenue by ensuring users stay within the Google ecosystem and continue returning to Google. As explained above, the continued use of the platform's products and services improve data harvesting and machine and artificial intelligence capabilities. There is significant scope for financial gain by Google in the artificial intelligence space.

Second, no faith can be placed in Google's calculations or estimates as they are plainly wrong, and border on the absurd, including in relation to the indirect value of news content. In respect of the *indirect* value of news content, Google claims that news-related queries account for "*just over 1 percent of total queries on Google Search in Australia*".¹⁸ News Corp Australia disputes the basis for this claim. On its face, it is an extraordinary figure. It implies that every Australian user of Google Search is undertaking nearly 100 queries every day of the year,¹⁹

¹³ Alphabet, 'Alphabet Announces Fourth Quarter and Fiscal Year 2019 results' (3 February 2020) <https://abc.xyz/investor/static/pdf/2019Q4_alphabet_earnings_release.pdf?cache=05bd9fe>.

¹⁴ Elisa Shearer and Katerina Eva Matsa, 'News Use Across Social Media Platforms 2018', *Pew Research Center: Journalism & Media* (10 September 2018) <<https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/>>.

¹⁵ Which 43% of those surveyed used to consume news content. Elisa Shearer and Katerina Eva Matsa, 'News Use Across Social Media Platforms 2018', *Pew Research Center: Journalism & Media* (10 September 2018) <<https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/>>.

¹⁶ Mark Bergen and Emily Chang, 'YouTube sees 75% Jump in News Views on Thirst for Virus Updates', *Bloomberg* (14 April 2020) <<https://www.bloomberg.com/news/articles/2020-04-13/youtube-sees-75-jump-in-news-views-on-thirst-for-virus-updates>>.

¹⁷ Jon Fortt, 'What's Google News worth? \$100 million', *Fortune* (23 July 2008) <<https://fortune.com/2008/07/22/whats-google-news-worth-100-million/>>.

¹⁸ Mel Silva, 'A fact-based discussion about news online', *Google Australia Blog* (31 May 2020) <<https://australia.googleblog.com/2020/05/a-fact-based-discussion-about-news.html>>.

¹⁹ For the purposes of this calculation, the assumption is made that for every Google query outside Australia which provides a click to an Australian news site, there is a Google query inside Australia which provides a click to a news site outside Australia. The Google blog post tells us that the number of news-related clicks per year to Australian sites is 3,440,000,000. This implies just under **9.5 million news-related clicks per day**. The query:click ratio is not certain, but studies show that around 50% of queries result in a click: see Rand Fishkin, 'Less than half of Google Searches Now Result in a Click', *SparkToro* (13 August 2019) <<https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/>>. Applying this ratio implies just under **19 million news-related searches per day**: i.e. close to one search per Australian monthly unique user of Google Search. (According to Nielson, there are 19,611,000 unique monthly Australian users: Surfing

which is plainly more than is actually being conducted by Australian internet users. Some statistics suggest that on average, users conduct only 3-4 searches each day.²⁰ The effect of Google's claim is to artificially reduce the significance of news related queries.

Even if one were to assume that every single Google Search query equated to a click, which is not the case,²¹ that would still result in the conclusion that every Google Search user is entering nearly 50 queries per day; not three or four.

Moreover, while true that not all clicks result from a Search query, this only acts to further highlight the weakness in the data provided by Google in its recent blog post. There are several ways that Google monetises news content within its ecosystem which are not encompassed in its limited, and misleading, calculations.

News Corp Australia considers these propositions very unlikely and suggests that it is possible news sites appear in search results to millions of queries that Google does not choose to define as 'news-related' in its internal calculations.²² This is further supported by statistics showing that Google Search queries trigger a 'Top Stories' result between 8-14% of the time.²³ The discrepancies evident in these statistics raise concerns both generally and more specifically for implementation of a collecting society model, as discussed in **Part C below**.

Third, as for Google's argument about the value that Google provides to publishers through its 'referral services', News Corp Australia considers that digital platforms have become a default conduit for many consumers who, without them, would otherwise access news content by accessing publishers' sites directly.

Finally, Google's comments about how its own investments allegedly contribute to "*educating and informing Australians [and] strengthening democracy*"²⁴ ignore the consequences of digital platforms' conduct, including atomising news, flattening brands and preventing monetisation by publishers. This conduct has undermined the ability of news media businesses to sustain their business models which require investment in the production of news reporting and journalism. The very reason for this code is because it is recognised that Google's conduct has jeopardised publishers' ability to sustain, let alone grow, their businesses.

5 The need for bilateral negotiations

In this section, we outline:

- why bilateral negotiations are best suited to the news industry; and

Report', *Nielson: Digital Landscape* (December 2019) <<https://digitallandscape.nielsendashboards.com.au/surfing-report>>.) If only 1 percent of total queries are news-related, as Google claims, this implies nearly 100 Google Search queries per user per day.

²⁰ Aleksandra, '63 Fascinating Google Search Statistics', *SEO Tribunal* (26 September 2018) <<https://seotribunal.com/blog/google-stats-and-facts/>>.

²¹ See Rand Fishkin, 'Less than half of Google Searches Now Result in a Click', *SparkToro* (13 August 2019) <<https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/>>.

²² The Deloitte study referred to in the 31 May 2020 blog post was commissioned by Google and "provided exclusively for Google's use under the terms of the Contract. No party other than Google is entitled to rely on the Final Report for any purpose whatsoever..." The data used was also restricted to the period 2015-2017.

²³ ACCC DPI Final Report, 15. See also Mozcast, 'Google SERP Feature Graph', <<https://moz.com/mozcast/features>>, which gives a figure of 10-11%.

²⁴ Mel Silva, 'A fact-based discussion about news online', *Google Australia Blog* (31 May 2020) <<https://australia.googleblog.com/2020/05/a-fact-based-discussion-about-news.html>>.

- how a FOA or collective boycott mechanism could be used as an equitable way to break a negotiation deadlock.

The arguments offered are without prejudice to the possibility that some news media businesses could choose to negotiate collectively, subject to ACCC approval, within the negotiating framework envisaged by our proposed code of conduct.

A critical component of the framework suggested by News Corp Australia is the facilitation of individual bilateral negotiations between Australian news media businesses and each digital platform.

As discussed above, Google and Facebook are 'unavoidable trading partners' for a significant number of news media businesses.²⁵ This bargaining power imbalance results in news media businesses accepting less than favourable terms of service in relation to a number of different issues including the use of content through snippets or otherwise, the restrictive nature of publication formats, the failure to share data collected in relation to news displayed on the digital platform, the failure to recognise original content, and a lack of transparency about how the digital platforms' algorithms distribute news to consumers. To date, Australian news media businesses, including News Corp Australia, have been unable to reach sufficiently reasonable outcomes through bilateral negotiations with the digital platforms for the use of news content and associated data on those digital platforms. The framework proposed in News Corp Australia's proposed code of conduct resolves the existing imbalance in bargaining power by incorporating collective boycott or FOA into the bilateral negotiation process. This incentivises the designated digital platforms, which ordinarily benefit from superior bargaining power by virtue of the significant market power they each possess, to engage more meaningfully in negotiations with the news media businesses.

5.1 Why bilateral negotiations are the most appropriate and effective framework

There are three main reasons why facilitating bilateral negotiations (with a deadlock-breaking mechanism) is the most appropriate way to ensure that news media businesses are compensated for the use by digital platforms of their news content and associated data, and why it should therefore be part of any code adopted by the ACCC.

First, a bargaining framework founded on bilateral negotiations is the only way to address the diverse objectives and preferences of all news media businesses. In the news industry, all news media businesses are different, including that they produce different content across multiple formats, invest in different types and styles of journalism, serve different audiences, and have varying reach.

News media businesses have different business models and monetisation strategies. While one may monetise its content through advertising, another may adopt a subscription-based model. Consistent with this, in dealing with the digital platforms, while one may most prominently value access to data, another may consider that its worth is best demonstrated through another mechanism. There will be no agreement amongst news media businesses about which metric or set of metrics should be used to measure value: no common model will be acceptable, as it will

²⁵ ACCC DPI Final Report, 253.

inevitably fail to reflect what each news media business values. The flexibility permitted in bilateral negotiations will allow each party to, in light of their particular business model and particular relationship with each digital platform, come to the best possible arrangement for their business and their users.

Second, as this submission articulates in relation to collective models of regulation in **Part C below**, prescribing a common pricing system would alter the incentives of news media businesses and be open to manipulation. It would incentivise news media businesses to create and present content with the aim of satisfying quantitative metrics, undermining the news creation process and driving investment in non-original content and superficial user engagement, as opposed to quality journalism. For example, metrics like the number of clicks an article receives or the impressions it attracts will encourage the proliferation of short, attention-grabbing articles, like clickbait. Clickbait is notoriously low quality, sometimes misleading and comparable to 'fake news'.²⁶ Indeed, if superficial quantification mechanisms are adopted, they are likely to reward fake news content by hoax publishers; even more than they currently do and have done in the past, such as during the 2016 presidential elections in the United States.²⁷ A direct corollary of this is that a common metric or set of metrics will incentivise gaming of the system, as news media businesses target the metrics in order to receive more remuneration. This is the very outcome the ACCC and the Government wish to avoid, as it undermines the incentives to invest in the creation of original content, and instead encourages poor quality and often copycat 'journalism'.

Third, if uniform pricing were applied to news content, it would not reflect the value obtained by digital platforms from news media, much of which is indirect. That is, much of that value stems from the collection and use of user data and news content for other purposes, such as the improvement of advertiser-facing services²⁸ and digital platforms' machine learning tools.²⁹ Much of this indirect value is inherently difficult to quantify. There is also considerable differentiation between the content produced by news media businesses such that it simply is not suitable to fix a common price or value across the industry. Moreover, it would be impossible to divide between news media businesses the 'pool' of value transferred by digital platforms to the collective. The use of bilateral negotiations avoids both (a) artificially standardising the pricing of news content by imposing uniform pricing, and (b) having the regulator attempt the formidable task of fairly and accurately reflecting the offering of respective news media businesses in dividing between them the 'pool' obtained by the collective.

Finally, the bilateral negotiation process proposed by News Corp Australia reduces the regulatory burden imposed on the arbitrator (the ACCC), compared with any form of collective licensing or mandatory collective bargaining regime. To ascertain a single price for 'news

²⁶ See e.g. Yimin Chen, Nadia Conroy and Victoria Rubin, 'Misleading Online Content: Recognizing Clickbait as "False News"' (Paper presented at the 2015 Association for Computing Machinery Workshop on Multimodal Deception Detection, Seattle, Washington USA, November 2015).

²⁷ See e.g. Abby Ohlheiser, 'This is how Facebook's fake-news writers make money', *The Washington Post* (19 November 2016) <<https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/>>.

²⁸ ACCC, Concepts Paper, 11-12.

²⁹ It is News Corp Australia's understanding that Google uses web content, including news content, to train its machine learning tools. An example is RankBrain, the machine learning tool responsible for presenting Google Search results. These sorts of tools are self-learning algorithms, but in order to 'learn' they need access to repeated and substantial amounts of information.

content' would involve significant regulatory involvement, without necessarily reaching the 'right' outcome. Indeed, one of the most substantial burdens on the regulatory body in telecommunications access regimes and some collective models is the setting of a uniform price or setting of common factors by which price is determined. The risk of determining an 'inappropriate price' was acknowledged by the ACCC in the DPI Final Report in its consideration of the appropriateness of creating a new bespoke access regime.³⁰ The weight of this burden is amplified in the context of news content given the issues outlined above. Further, the rapidly evolving nature of these markets means that a common price or metric could quickly become inappropriate, deter innovation and ossify the market. In contrast, a regulatory scheme that supports bilateral negotiations will offer the flexibility that is required: it will enable digital platforms to adapt to the evolving digital space; allow news media businesses to independently engage in separate bilateral negotiations with each digital platform in a manner reflecting the distinctiveness of their news content; and avoid the imposition of time- and cost-intensive regulatory burdens on the ACCC.

The collective licensing or collecting society models, and the reasons why they are not suitable for the news context, are outlined in **Part C below**.

5.2 Options for resolving a deadlock in bilateral negotiations

(a) 'All in/none in'

One of the ways to incentivise digital platforms to engage in good faith negotiations with Australian news media businesses is through the adoption of an 'all in/none in' or collective boycott approach flagged in the Concepts Paper. News Corp Australia suggests that this could be in the form of a prohibition on digital platforms using news media businesses' content or data unless they conclude agreements with Australian news media businesses which have a monthly UA of over 1 million. News Corp Australia considers there to be a number of benefits to this 'all in/none in' approach since it creates strong incentives for digital platforms to negotiate expeditiously and offer reasonable terms because the opportunity cost of delaying or refusing to negotiate is significant. Failing to conclude a negotiation with even one of these larger news publishers would result in that digital platform losing a substantial amount of user traffic and the associated revenue flows (e.g. through advertising). The incentive to respond quickly arises from the fact that, the longer the negotiation period, the longer the digital platform would be precluded from collecting and using content and data from Australian news media businesses.

This 'all in/none in' option would effectively prevent the digital platforms, which have significant bargaining power, from playing news publishers off against one another and agreeing to pay one news publisher less and then declining to use the content of another news publisher.

In its Concepts Paper, the ACCC raised a number of concerns with a collective boycott approach. However, as the digital platforms are the gateways to the internet and also 'unavoidable trading partners', each of the major news publishers will want to remain on the digital platforms' product / service so long as the terms are reasonable, therefore a major news publisher will not strategically hold out from negotiations or delay agreements for its competitors, as suggested by

³⁰ ACCC DPI Final Report, 253.

the ACCC in its Concepts Paper. The 'all in/none in' approach would force both major news publishers and digital platforms to behave rationally as failure to reach an agreement would result in significant ramifications for both parties. The discipline of the 'all in/none in' approach would balance out the significant bargaining power held by digital platforms.

(b) **Final offer arbitration**

While the 'all in/none in' approach is one method to break a deadlock in negotiations, News Corp Australia has included in its proposed code of conduct an alternative deadlock-breaking mechanism in the form of FOA.

There are a number of advantages to FOA that make it an appropriate solution to address the power imbalance between news media businesses and digital platforms. For a detailed explanation of how FOA might operate and support the efficient and effective negotiation of agreements between news media businesses and digital platforms, please see the independent expert report drafted by economic experts, Charles River Associates, at **Annexure B**. This also includes an overview of the economic literature which supports this view. In summary:

- The model provides a strong incentive for the parties to negotiate the terms of their commercial agreements in good faith and make genuine and realistic offers, compared to conventional arbitration.
- Conventional arbitration often discourages good-faith bargaining in negotiations, as arbitrators have the power to impose their own award, leading parties to enter negotiations with an expectation of a likelihood that the arbitrator will 'split the difference' (i.e. find a middle ground) between the parties. This can lead to 'positional negotiation', where parties adopt extreme positions in the hope of skewing the arbitrator's award in their favour and are disincentivised from making compromises toward the 'middle'. Whether an arbitration in a particular conventional arbitration would actually 'split the difference' is immaterial, as the potential for the arbitrator to do so will shape the parties' negotiating incentives and positions. This can lead to a lack of convergence between the parties in negotiations and the maintenance of extreme positions, more frequent resort to arbitration, and, in general, protracted disputes.
- FOA, by contrast, is designed to incentivise convergence of the parties' positions at the negotiation and arbitration stages. The FOA model is therefore more likely to encourage the parties to settle their dispute **before arbitration** as compared to conventional arbitration. Parties are less likely to maintain extreme positions and are more likely to find common ground prior to arbitration.
- By encouraging parties to present offers that better reflect their genuine perceptions of each party's market value, FOA is particularly suited to the news media industry, where the value that digital platforms derive from news content, especially via indirect means, is difficult to quantify.
- Even if parties do not reach a negotiated outcome and arbitration takes place, FOA provides the parties with incentives to bring reasonable 'middle ground' positions to the arbitration, in the knowledge that the arbitrator is more likely to choose a reasonable

offer over an extreme offer. Each party faces a trade-off in devising its final offer: if they submit an extreme offer they have a chance of a windfall gain, but if the other party submits a more reasonable offer there is a much higher chance that the extreme offer will not be accepted. The narrowing of the range of the positions of the parties can both reduce the number of issues in dispute by the time of the arbitration and reduce uncertainty for the arbitrator regarding issues that remain in dispute. FOA is therefore more likely to result in arbitrated outcomes that reflect both parties' true perceptions of market value and a genuine compromise.

- Critically, when engaging in FOA the digital platform and the news media business (no matter the size) are placed on equal footing. Further, since FOA penalises unreasonable offers, neither party is disadvantaged by this redistribution of power in the negotiation process.

5.3 Reasons for appointing the ACCC as arbitrator in a final offer arbitration process

In News Corp Australia's view, the ACCC is best positioned to perform the role of arbitrator in the FOA process in our proposed code of conduct for the following reasons:

- As an independent Commonwealth statutory authority, the ACCC is an impartial, fair and trusted decision-making body.
- The ACCC has deep knowledge and understanding of the news media and digital platform industries. It has accumulated knowledge through the Digital Platforms Inquiry and maintains that knowledge within the Digital Platforms Branch which was subsequently established. The time and cost needed to develop the requisite knowledge to be the final offer arbitrator could therefore be avoided. This therefore underpins why FOA can be such an efficient mechanism, particularly with the ACCC as arbitrator.
- Under this proposal, the ACCC is not required to interfere with the commercial judgment of digital platforms and news media businesses by formulating the terms (including a 'price' or amount of compensation) of any agreement between the parties. Rather, it is simply choosing one offer lodged to it that it considers to be the most fair and reasonable.
- The Canadian Radio-television and Telecommunications Commission is one example of a regulatory authority that has appointed its own commissioners as arbitrators for FOA processes. For bilateral disputes that relate to the regulation and supervision of the Canadian broadcasting or telecommunications system, the commissioners in their capacity as arbitrators must choose one party's offer in accordance with stipulated 'fair market value factors'.
- News Corp Australia's proposed framework would similarly only require the ACCC to make a selection among alternatives, rather than devise a calculation, or express any considered views or preferences over the terms of the agreements between digital platforms and news media businesses.

- The confidential nature of the ACCC's determination of the chosen proposal removes the potential for any disclosure of its decision that could provide an unfair advantage to parties in future negotiations.

6 Proposed steps in code of conduct

The code of conduct establishes a framework by which Australian news media businesses that choose to do so can negotiate bilaterally with any digital platform. News Corp Australia proposes that the code should mandate the following key steps:

- (a) **request for negotiation and pre-negotiation disclosure** – an Australian news media business should notify a digital platform of its intention to engage in a process of bilateral negotiation with that entity and its request for pre-negotiation disclosure.

If the news media business elects to receive pre-negotiation disclosure, after being notified by a news media business, the digital platform should be required to disclose the direct and indirect value the digital platform receives from its use of any news content produced by that news media business.
- (b) **good faith bilateral negotiations** – the digital platform must negotiate in good faith with the relevant news media business. Such negotiations will involve negotiation about the use of news content that does not require a copyright licence and, to the extent elected by the news media business, news content that does require a copyright licence. The minimum standards and principles in the code of conduct will be a starting point, but parties can negotiate obligations over and above those minimum standards. The negotiations may, at the election of the news media business, include discussions over remuneration for the use of content, provision of data, algorithm transparency, or other matters deemed relevant by the parties.
- (c) **deadlock-breaking mechanism** – if the negotiation does not result in a commercial agreement, either:
 - (i) **'all in/none in'** – the parties enter negotiations with a requirement that the digital platforms reach an agreement with all major news media businesses, otherwise they will be unable to use any news content of those news media businesses on their platforms; or
 - (ii) **FOA** – the parties must enter into a 'final offer arbitration', in which the arbitrator (the ACCC) must select, without modification, one of the parties' offers for each topic for which bilateral negotiated agreement was not reached (but only if that topic is elected by the news media business in its request for FOA). The decision of the arbitrator is final and binding and the arbitrator is not required to give reasons. If there is dispute about whether the negotiations should cover copyrighted news content produced by the news publisher, the news publisher should be entitled to refer that question for determination as an interlocutory matter to the arbitrator.

These stages are discussed in further detail below. A suggested timeline for each stage of the negotiation is provided in the proposed code of conduct in **Annexure A**.

6.1 Use of copyright material

While the Concepts Paper clearly contemplates payment by digital platforms for use of material that does not require a copyright licence, the code of conduct should include provisions to also enable news media businesses to retain control over content and material for which any use requires a copyright licence. This material is the proprietary material of the news media business. As part of the bilateral negotiations framework, the code of conduct should include provisions that give news media businesses the ability to define the scope of any use of their content that requires a copyright licence. This could include, for example, the number of copyright articles the digital platform can use, requirements as to paywalled content and when it may be bypassed, and use of copyright in other products. If the parties fail to reach agreement about such uses of copyrighted material by the digital platform, refer this for an interlocutory determination by the ACCC on whether the use proposed by the news media business is reasonable. If the ACCC determines it is not, it may provide reasons and the news media business has the ability to propose another use for negotiation and determination by the ACCC. Until the ACCC determines in the news media business's favour on the proposed use, it is not required to supply the content. If the ACCC's accepts the use proposed by the news media business as reasonable, then the parties negotiate and if necessary go to FOA over the compensation for that use only.

Australian copyright laws provide important safeguards for publishers and is crucial for protecting news media businesses' brand and investments in the creation of original content. In essence, such laws prevent unauthorised use, reproduction or dissemination of material by someone who is not authorised to do so. While Australian copyright laws do not usually extend to news headlines and short snippets,³¹ they typically protect news articles and the expression of that original content in different formats. These laws recognise the significant human capital that is expended upfront in the creation of original content, and therefore provide important economic incentives for creators to keep producing original content.

Special treatment of copyright material is crucial to address the current imbalance in bargaining power between digital platforms and news media businesses, which is reflected in the terms of existing copyright licensing arrangements between those parties. The enactment of a code of conduct without special treatment of copyright material could potentially give rise to a counterintuitive outcome, in which:

- non-copyright material produced by news media businesses is protected by minimum standards prescribed under the code of conduct; but
- news media businesses cannot control the terms of use and remuneration for copyright content, the production of which requires a greater investment than for non-copyright material.

The copyright material belongs to these businesses and nothing in the code of conduct, or negotiations facilitated by the code, should undermine or weaken these important protections.

³¹ *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984.

News Corp Australia's proposal also protects the businesses of the digital platforms by ensuring that the ACCC can determine whether the use proposed by the news media publisher is a reasonable one in the event that there is a debate.

6.2 The right to opt out of the negotiation process

In order to rebalance the significant bargaining power imbalance between the digital platforms and news media businesses, it is critical that the news media businesses are able to opt out of the negotiation process until the point at which the arbitrator has made their final decision.

Conversely, digital platforms should not be able to "opt out" of the negotiation process outlined in the code of conduct. In France, in response to a law that required Google to share some of the value it obtained from news content with news media businesses, Google provided news media businesses with a choice: zero remuneration or no longer being displayed on Google services. This is equivalent to having a digital platform leave the negotiations, and is an outcome that should be avoided.³² The same issue does not apply to news media businesses, which lack the market power to force the digital platforms to accept an uncompetitive bargain by disengaging from the negotiation process.

6.3 Proposed code of conduct framework

The code of conduct establishes a framework by which Australian news media businesses that choose to do so can negotiate bilaterally with any digital platform. To the extent that the code of conduct adopts FOA (instead of a collective boycott) for the deadlock-breaking mechanism, News Corp Australia proposes that the code should mandate the steps and principles set out below. More detail of how these steps (or alternatively, the collective boycott approach) could be incorporated in a code of conduct is set out in **Annexure A**.

(a) Key rights and obligations

1. At the news media business' election, a digital platform must negotiate with a news media publisher on the use of news content that does not require a copyright licence and/or use of news content that does require a copyright licence. Such negotiations may, at the news media businesses' election and without limitation, include remuneration for the use of the content, the provision of data, and algorithm transparency.
2. The news media business may at any point withdraw from the negotiations up until a FOA decision is made as set out in step 16 below.

(b) Stage 1: Pre-negotiation disclosure and request for negotiation

3. At the news media business's election, the digital platform must provide, on a confidential basis and in written form, information to that news media business about the products and services that use (or may use) the news content produced by that news media business and the direct and indirect value the digital platform derives from use of that news content. The value

³² The French Competition Authority has since, having determined that Google likely engaged in an abuse of dominant market position, ordered Google to engage in negotiations with news media businesses.

provided should not deduct any purported benefits the news media business obtains from the digital platform's services, but may set these out separately. Disclosure of this information by the digital platform does not preclude the news media business from referring to this information in the negotiation and in the FOA.

4. The news media business must indicate in written form whether the negotiations will include news content that does or does not require a copyright licence and:
 - i. in the former case, the volume of copyright material (e.g. minimum and/or maximum amounts of articles per day) and precise uses of the copyright material within the products and services of the digital platform; and
 - ii. in the latter case, the negotiations cover all uses that do not require a copyright licence,
(request for negotiation).

(c) Stage 2: Negotiation

5. The digital platform and the news media business will engage in good faith bilateral negotiations with a view to achieving an outcome on each of the elements set out in the request for negotiation.
6. There will be no third party mediator or arbitrator present in these negotiations. External legal counsel for either side may attend the negotiations.
7. The negotiations must be consistent with the purpose and principles set out in the code, which is to avoid undermining the ability and incentives of news media businesses to invest in the production of news content and properly distribute and monetise their content. The digital platform must not offer to provide anything less favourable to the news media business than what is prescribed in the minimum standards in the code of conduct.
8. So as not to interfere with potential innovation, any agreement reached must be for a maximum of one year, although after the expiry of one year, the news media business should have the ability to extend for a maximum period of up to two years.

(d) Stage 3: FOA

9. If, three months after the request for negotiation, final agreement has not been reached between the parties on all or any of the elements set out in that request for negotiation, the news media business may elect that any elements that remain undecided will proceed to FOA to be determined by the ACCC **(request for FOA)**.
10. If the news media business elects any elements to go to FOA , the digital platform may:
 - i. not object to arbitration over the volume and uses of the copyright material as proposed by the news media business and proceed to step 15 below; or
 - ii. alternatively, object to arbitration over such uses.
11. If the digital platform does object to such volume and uses, it must set out its reasons in a written submission of no more than 5 pages per element. The objection and submission must be

made within 5 business days of the news media business electing to go to FOA. This written submission is to be provided to both the ACCC and the news media business. The news media business may, within 5 business days of the objection being made, comment on the digital platform's objection by way of written submission, again of no more than 5 pages per element. The ACCC, in its capacity as arbitrator, will, within 10 business days of the objection being made, determine whether the digital platform should:

- i.* be bound to accept the content of the news media business subject to the volume and uses proposed by the news media business; or
- ii.* not be so bound,

(interlocutory decision).

For the avoidance of doubt, if the ACCC accepts certain uses of copyright content proposed by the news media business, all other uses of copyright content are prohibited.

12. If no objection is made within time the digital platform is taken to have agreed to the uses defined in the request for negotiation by the news media business.
13. If the ACCC determines that the digital platform should not be bound to accept the content of the news media business subject to the uses proposed by the news media business, the arbitrator may give feedback to the news media business on what aspects of the proposed use were not reasonable. It is open for the news media business to put forward a revised proposal regarding use of its copyright material. In that event, the process in steps 9 and 10 above is repeated. The news media business may revise the proposal for use of its copyright material an unlimited number of times.
14. If either:
 - i.* the ACCC determines that the digital platform should be bound to accept the content of the news media business subject to the uses as proposed by the news media business; or
 - ii.* step 11 applies,either party may request for the FOA process to continue to step 15 below (**request for continuation of FOA**).
15. Following either the request for FOA or the request for continuation of FOA (as applicable), the news media business and digital platform may each lodge a final offer on those elements the news media business elected go to FOA in step 9. For the avoidance of doubt, an offer can be for \$0. The offer does not need to be the same as the final offer in the negotiation and will be disclosed to each party. The offers must be lodged within 5 business days of the date of the request for FOA (if a party did not seek an interlocutory decision), or the date of the request for continuation of FOA (if a party sought an interlocutory decision).
16. In order to prevent delay, the ACCC must determine the outcome "on the papers" and there must be no hearings. Final offers can be accompanied by written submissions of no more than 4 pages per element. The decision must be made within 25 business days of the time for lodging

of offers, and within no more than 30 business days from the date of the request for FOA or the request for continuation of FOA.

17. The remuneration proposed by each final offer must be limited to a lump sum.
18. The possible outcomes for each disputed element are as follows:
 - **Outcome A:** If no parties lodge an offer, then the minimum standard set out in the code of conduct will apply;
 - **Outcome B:** If only one party lodges an offer, then that offer will prevail; or
 - **Outcome C:** If both parties lodge an offer then the ACCC shall decide which offer shall prevail, without any modification by the ACCC. This decision shall be made within no more than 30 business days from the date of the request for FOA (if a party did not seek an interlocutory decision) , or the date of the request for continuation of FOA (if a party sought an interlocutory decision).
19. For the avoidance of doubt, the clock cannot be "stopped" at any stage of the process by the parties or the ACCC.
20. The decision of the ACCC is final and binding on the digital platform and the news media business. There will be no appeal process. The ACCC will not have the power to amend the offers lodged by the parties. The ACCC is not required to give reasons for its selection and the parties cannot request or compel the ACCC to provide reasons.
21. The result of the negotiations (whether the parties proceed to final arbitration or not) will be confidential between the parties and the ACCC.

7 Minimum standards

As discussed above, the code of conduct should include a set of minimum standards that should apply to the digital platforms. This aligns with the ACCC's suggestion in the DPI Final Report that digital platforms should adopt codes of conduct containing minimum commitments, including in relation to data sharing, notification of changes to ranking or display of news that would affect referral traffic, and to fairly negotiate with news media businesses about how the revenue should be shared or how news media businesses should be compensated.³³

As discussed in **section 6 above**, News Corp Australia suggests that in its framework, in the course of FOA, offers lodged with the ACCC cannot be less than what is set out as minimum standards in the code.

The minimum standards set out in the code should relate to the following issues:

- general principles for negotiation and dealing with news media businesses;
- provision of data;
- algorithm transparency;
- advertising;

³³ ACCC DPI Final Report, 256.

- prominence for original content; and
- content provenance.

News Corp Australia sets out in more detail below suggestions for minimum standards on each of the above issues.

The minimum standards are obligations with which compliance should be observable and provide actual tangible benefits to news media businesses. In contrast, it would not be sufficient for the code to address these areas, such as data sharing, by merely putting in place principle-based requirements of, for example, 'good faith' negotiations between news media businesses and the digital platforms. While concepts such as fairness and transparency should underpin any code of conduct, these principles on their own are not sufficient to address the bargaining imbalance enjoyed by the digital platforms.

An approach which is based only on broad principles would be inadequate for several reasons. **Firstly**, concepts like 'fairness' and 'transparency' are highly ambiguous and subjective. It is likely that the digital platforms will not provide the level of transparency necessary to address the significant asymmetry of information and bargaining power that persists. **Secondly**, and most crucially, as the Government has identified, the bargaining power imbalances between digital platforms and news media companies require a timely response that will have a clear impact. It is implausible that a series of 'etiquette' statements or promises by the digital platforms will be sufficient to respond to this urgency. Without clear minimum standards and enforcement mechanisms, there will be no incentive under the code of conduct for digital platforms to alter their behaviour in any way – let alone the substantial way required.

7.1 General principles for dealings with news media businesses

Box 1 – General principles for dealings with News Media Businesses

In relation to all dealings between News Media Businesses and Digital Platforms and all use by Digital Platforms of the news content and related data of News Media Businesses, the Digital Platform must:

- adhere to overarching standards of fairness, good competitive practice and full transparency;
- operate in good faith;
- pursue the objective of supporting the ability and incentives of news media businesses to properly distribute and monetise their content; and
- act in the best interests of the News Media Businesses when using their news content.

Digital Platforms must not retaliate against, discriminate against, treat differently, or otherwise cause negative impact to News Media Businesses as compared with any entities not subject to the code (including any located in jurisdictions outside of Australia).

Digital Platforms must not agree with a News Media Business to give preferential treatment to a News Media Business' content. The only exception to this arises where News Media Businesses pay the Digital Platform for a sponsored post, advertisement or similar, separate to and distinct from the agreement reached under the requirements of the code.

Digital Platforms must not discriminate against, treat differently, or otherwise cause negative impact to a News Media Business' content on the basis that the News Media Business' agreement with the Digital

Platform is less favourable to or more costly for the Digital Platform than other agreements the Digital Platform has entered into with other News Media Businesses.

While principles alone will not be sufficient to regulate the digital platforms, News Corp Australia considers that it is important to set minimum standards for future dealings between news media businesses and digital platforms.

In addition, it is important that the code protect against discrimination or retaliation, and preferential treatment, by digital platforms which could occur as a result of bilateral negotiations under the code.

7.2 Data

Box 2 – Data to be provided to News Media Businesses

The Digital Platform must:

- acknowledge that all data that the Digital Platform collects about user's engagement with News Media Business' news content (including but not limited to data collected in relation to views on media formats controlled by that Digital platform (such as AMP and Facebook's Instant Articles), and data collected through browsers and operating systems) (**engagement data**) belongs to that News Media Business;
- give that News Media Business full and unconditional access to and use of such engagement data in a form that allows the News Media Business to combine and match such engagement data with data that the News Media Business collects and holds, consistent with privacy law consents that the News Media Business holds; and
- only use such engagement data on behalf of and as instructed by the News Media Business, and only to facilitate viewing of the News Media Business' news content on that Digital Platform, and shall not make any secondary independent use of such engagement data, including profile building or re-sharing of such engagement data and/or identities amongst its properties and services.

The Digital Platform must also provide information to a News Media Business relating to its news content, including reporting on:

- the ranking of the news media business's news content;
- the types of user data the digital platform collects on audiences which view news content;
- engagement with the news media business' news content; and
- any data collected from the digital platform's pages used to navigate to the news content of the news media business.

The sharing of user data currently

News Corp Australia welcomes the Concept Paper's recognition of the importance of user data to news media businesses and that lack of access to at least some of this data "*hinders [news media's] ability to precisely target content and advertising to news audiences.*"³⁴

Clearly, Google and Facebook obtain real value from user data collected through the consumption of news content. The ACCC has characterised the benefit obtained as part of the

³⁴ ACCC Concepts Paper, 16.

'indirect value' the digital platforms gain from the availability of news content on their platforms.³⁵ Similarly, the UK Competition and Markets Authority (**CMA**), in its Interim Report on online platforms and digital advertising, recognised that by observing user interaction with news media businesses, Google and Facebook enhance their ability to track users across the web and reinforce their existing advantages in the ad tech space.³⁶ (While separately subject to the Digital Advertising Services Inquiry and hence not emphasised in this submission, there is a considerable connection between the ad tech side of the digital economy and any access to and sharing of user data.)

Contrary to Google's submission in response to the UK Competition and Markets Authority's (**CMA**) Interim Report, news media businesses do not have access to the information collected by digital platforms on their sites. Google submitted that the CMA "fundamentally" misunderstood the interaction with news sites, and that Google does not prevent the collection of information by news media businesses themselves.³⁷ That is not the data of concern here. Rather, it is the data collected and generated from news media businesses' own content by digital platforms. Both Google and Facebook collect substantial data through news media businesses' sites and content, about the users accessing those sites and content, including through referral traffic and media plugins embedded on those webpages.

The sharing of user data under the code of conduct

The complete and open sharing of data collected by Google and Facebook about users visiting, sharing and navigating to news media businesses' pages best realises the value obtained by the digital platforms through this data.

The code can facilitate this by imposing minimum data sharing obligations on digital platforms: see **Box 2 above**.

These minimum requirements would apply to all services provided by Google and Facebook, including those listed in the Concepts Paper and any other services which interact with news media. The code should not provide an exclusive list of specific services to which this requirement applies. Due to the constantly evolving nature of the digital platforms' products and services, this would risk underreach as existing services are modified and new services introduced.

It would be open to the parties to come to more detailed agreement as to data sharing, specific to the particular relationship between a specific digital platform and news media business, in the course of bilateral negotiations.

Finally, News Corp Australia agrees with the ACCC that consumers would not expect a news media business to have access to the broader browsing histories, search queries, etc. that are collected by Google and Facebook. This is why News Corp Australia's proposal focuses on the data gathered about users in respect of their access to and consumption of a news media business' news content. News Corp Australia would also expect that all user data provided by the digital platforms is anonymised so as to protect the privacy of users.

³⁵ ACCC Concepts Paper, 11-12.

³⁶ CMA Interim Report, 224 [5.277].

³⁷ Google, Online Platforms and Digital Advertising: Comments on the Market Study Interim Report,

<https://assets.publishing.service.gov.uk/media/5e8c8290d3bf7f1fb7b91c2c/200212_Google_response_to_interim_report.pdf>, 14 [57].

7.3 Notification of algorithm changes

Box 3 – Algorithm transparency

In relation to practices and conditions affecting News Media Businesses, the Digital Platform must:

- operate in a way which is transparent, fair and equitable;
- provide a user-friendly mechanism by which news media businesses can easily register for advance notice of new practices and conditions or changes to existing practices or conditions;
- provide reasonable warning regarding the imposition of new practices or conditions (including algorithms), or changes to existing practices or conditions, by giving at least 28 calendar days' notice to registered News Media Businesses;
- provide an explanation of the reasons for and intended impact of new practices or conditions, or changes to existing practices or conditions to News Media Businesses, by giving written notice at least 28 calendar days prior to the changes;
- provide a reasonable opportunity for registered News Media Businesses to raise concerns about the imposition of new practices or conditions or changes to existing practices and conditions and the Digital Platform must consider any such concerns in good faith; and
- not preference their own businesses or those of their related bodies corporate.

A conditional exception applies where urgent implementation of new practices or conditions (including to algorithms), or changes to existing practices or conditions, is required in the public interest.

News Corp Australia welcomes the ACCC's view that the substantial impacts of algorithmic changes by Google and Facebook can be mitigated by a requirement in the mandatory code that notice be given to news media businesses of any such changes.

In order to both best serve their readership and effectively monetise their content, news media businesses need to understand how their news content is being presented to users and whether there will be any changes which may affect referral traffic. This is especially so in light of the significant and increasing number of users navigating to news media business websites via digital platforms.

Historically, Google and Facebook have given news media businesses limited to no notice of relevant algorithm changes. News media businesses are often forced to rely on the digital platforms' public announcements. While true that Google and Facebook have recently taken steps to provide greater transparency in respect of algorithm changes, there is still too little information, too little notice, and too much uncertainty. Since March 2019, Google has provided information about significant search algorithm changes ('core updates'). Google determines what constitutes a 'significant' change and still provides only a few days' notice to news media businesses.³⁸ In the process of negotiating a voluntary code of conduct with news media businesses, Facebook expressed willingness to be more transparent with news media businesses, but did not specify the extent of this transparency nor what period of notice it

³⁸ ee e.g. Sarah Berry, 'What Is a Google Core Update? (And How to Recover From the Latest One)', *WebFX: Blog* (20 November 2019) <<https://www.webfx.com/blog/marketing/what-is-a-google-core-update/>>.

would offer.³⁹ Even if the digital platforms elected voluntarily to provide a reasonable period of notice of 28 calendar days, they could change this at any point.

As such, News Corp Australia proposes that the code of conduct impose an obligation on digital platforms to provide news media businesses who register with the digital platform with advance notice of changes to existing practices and conditions (including algorithms), or the introduction of new practices and conditions, that affect the display and ranking of news content (see **Box 3 above**).

- **Who should receive the notification?** All news media businesses in Australia, as defined by the code, who have registered with the digital platform for such updates.
- **What should the notification period be?** A minimum of 28 calendar days. This notice period would not limit digital platforms' abilities to implement algorithmic changes for the benefit of users.

News Corp Australia agrees that some more flexibility is appropriate where there is a public policy interest in implementing urgent changes to algorithms, such as with recent changes made in respect of information provided about COVID-19. News Corp Australia's proposed code of conduct provides that if Google or Facebook want to make algorithm changes with a shorter notice period, they must notify the ACCC. The ACCC can then determine whether the change fell within the exemption on the basis of urgency in the public interest, and if not, impose the relevant penalty on the digital platform for failing to provide advance notice: see section 9.2 of the proposed code of conduct at **Annexure A**.

- **What should the notification include?** The notification to news media businesses should include at least the following:
 - The date on which the change is coming into effect.
 - The elements that will be changing. For example, which specific factors are being adjusted, added, removed, or weighted differently.
 - The expected impact of the change. For example, if the change will prioritise news stories from news media businesses which the user has previously accessed.
 - A reasonable opportunity for news media businesses to raise concerns about the change.
- **What threshold of change should be required for the notification obligation to arise?** The obligation should arise whenever Google or Facebook impose new algorithms or change existing algorithms which relate to and change the moderation and ranking of news content.

³⁹ Mia Garlick, 'A Digital News Distributor Code for the Australian News Ecosystem', *Facebook* (18 March 2020) <<https://www.facebook.com/notes/facebook-australia-new-zealand-policy/a-digital-news-distributor-code-for-theaustralian-news-ecosystem/2594059480921309/>>.

7.4 Prominence of original news content and content provenance

Box 4 – Prominence of original news content and content provenance

The Digital Platform must:

- give prominence to original news content of News Media Businesses in its search results or platform display. This includes giving prominence to the most linked articles and/or expertise, authority and trust (EAT) on any news related query without regard to other parameters, such as non-content based parameters like speed or page experience;
- clearly explain to News Media Businesses the format in which their news content is displayed on the Digital Platform's properties;
- ensure that the origin of News Media Businesses' news content is clearly presented; and
- clearly present the News Media Business' branding when using its news content.

The Digital Platform must provide to News Media Businesses an explanation of how it ranks news content and provide advance notice of at least 28 calendar days of any changes that may significantly affect the way News Media Businesses' news content is ranked or displayed.

The Digital Platform must consult with News Media Businesses in relation to the development of new services or formats which will present their news content.

If a News Media Business publishes original news content that creates a new search query on the Digital Platform, and:

- if there is a Code Agreement between the News Media Business and Digital Platform, the original news content must be listed as the top search result on the Digital Platform for 48 hours after the original news content is first released online by the News Media Business; or
- if there is no Code Agreement between the News Media Business and Digital Platform, the Digital Platform must not publish any content relating to that search query on the Digital Platform.

News Corp Australia prides itself on its provision not only of general news content to consumers, but also of time- and resource-intensive breaking news content and investigative journalism. Breaking news and investigative journalism is necessarily in the public interest and is indispensable to the proper functioning of a democracy. Yet, as the Concepts Paper rightly remarks, it is difficult for consumers to identify the original source of news stories on digital platforms. If digital platforms continue to allow original news content to be sidelined in favour of copycat articles, particularly when the original content is behind a paywall,⁴⁰ the incentive for news media businesses to invest in this type of news product will likely be reduced.

[REDACTED]

⁴⁰ See e.g. News Corp Australia, Submission in response to the Digital Platforms Inquiry Preliminary Report, March 2019, 34; ACCC Future of Journalism Roundtable, 15 March 2019, 7..

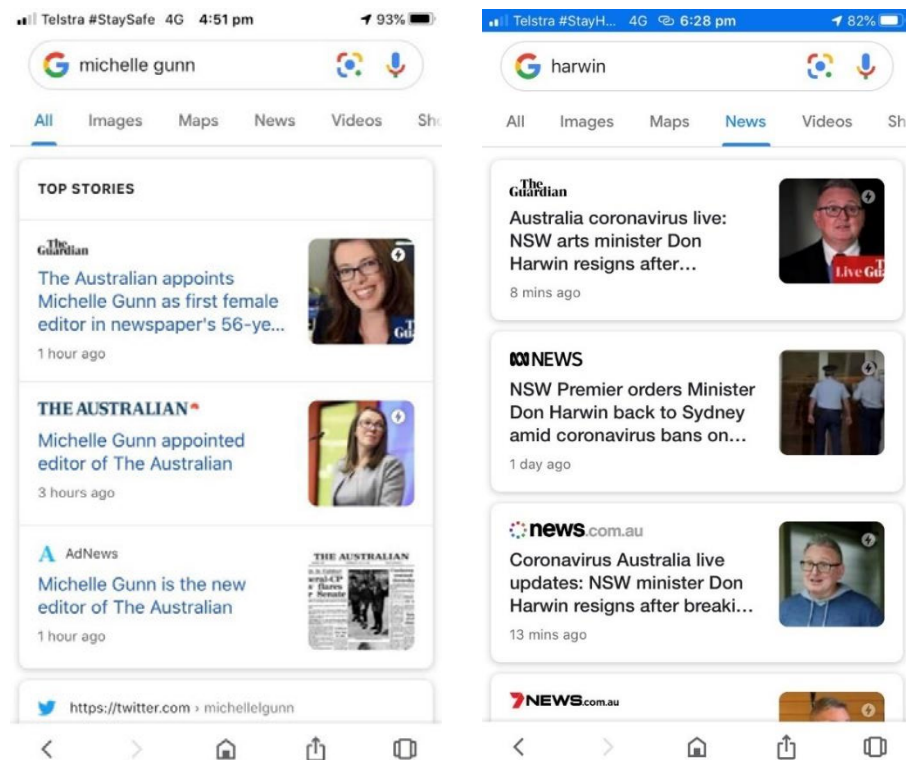
[REDACTED]

[REDACTED] This diverted economic value away from the original news publisher who made the investment necessary for the story to exist, while maintaining and enhancing the value gained by Google (free of charge).

To remedy this, greater weighting should be given in algorithms to original content in search results. Digital platforms must work with news publishers to deliver quality distribution services that serve end-users, including by preferencing original journalism in their rankings.

On 12 September 2019, Google ostensibly changed its search algorithm to "*better recognise original reporting, surface it more prominently in Search and ensure it stays there longer*".⁴¹ However, News Corp Australia has not observed any resulting change to the ranking and prominence of its original news content. We have continued to see examples of stories News Corp Australia's publications have broken but have not been listed first in the search rankings. Two examples are very recent ones. These both include instances where a News Corp Australia publication broke the story. The first was the announcement of the new editor for *The Australian*, which was reported first by *The Australian*, but as the screenshot of the mobile display of the Google SERP shows below, other publications appeared ahead of *The Australian* on the Google SERP. The second was the story of NSW State Member of Parliament, Don Harwin, breaching the NSW Government's lockdown rules. This story was broken by *The Daily Telegraph*, but as the screenshot of the mobile display of the Google SERP shows below, *The Daily Telegraph* story is not even listed as a top story. These are just two examples of what is a regular practice within the Google ecosystem of failing to give prominence to original content.

⁴¹ Richard Gingras, 'Elevating original reporting in Search', *Google: The Keyword* (12 September 2019) <<https://www.blog.google/products/search/original-reporting/>>.



Even if the change had positively impacted creators of news content, News Corp Australia further emphasises that it is only incorporation into the mandatory code that can provide news media businesses and the ACCC any certainty as to the maintenance and enhancement of practices giving prominence to original news content.

Google and Facebook have made much of the supposed 'initiatives' they have introduced to help journalism since investigations were launched by competition law agencies around the world into the impacts of their activities on news media businesses, including the Google News Initiative, and also *"implementing news initiatives and offering partnerships that focus on helping these businesses build revenue, including through the innovative use of subscription-based business models"* (see page 23 of the Concepts Paper). In News Corp Australia's view, these have been little more than expensive, elaborate and aggressive public relations initiatives defined more by their buzz words than the force of their content or purpose. Meanwhile, the platforms have continued to refuse to provide or respond to our requests for the things we have asked for repeatedly: payment, product improvements and data. Google and Facebook's 'initiatives' do more to serve their own objectives to carry regulatory influence, by 'picking off' smaller or government-funded publishers not as adversely impacted by their behaviour, than actually address the core of the problems which hit home to major Australian publishers such as News Corp Australia, which, relevantly, account for the vast majority of news content creation and investment in Australia.

7.5 Treatment of paywalled news content

Box 5 – No discrimination based on monetisation or data / attention

The Digital Platform must not:

- discriminate between the news content of a News Media Business and other news content based on the means of monetisation used by the News Media Business for its content;
- discriminate between the news content of a News Media Business and other news content based on the amount of data or attention generated by the Digital Platform; or
- discourage click-through to source.

News Corp Australia understands that Google's current algorithm still discriminates against paywalled material in its Google Search results through its treatment of 'time on site', 'pages per session', and 'bounce rates': three of the four most important ranking factors.⁴² When a user clicks on a link to a publisher with a subscription or paywall, they are likely to 'bounce' back to Google. This means they spend less time on the site and click fewer pages per session. Yet, demoting paywalled news content by way of these factors is neither an accurate nor fair reflection of the attractiveness of paywalled content,⁴³ for the following reasons:

- The fact that a user directs away from paywalled content does not mean they are not interested in the content behind the paywall, or that the paywalled content is not relevant to the user's search. It is of concern to users, news media businesses, and society as a whole if the relevance of news content is not a prominent factor in presenting search results to users. Especially in the context of increasing consumption of fake news, it is vital that quality pieces of journalism that are most relevant to a user's query are shown to users in a manner reflecting this relevance.
- The three ranking factors listed above have considerable shortcomings in being able to accurately comprehend user engagement with news content.
 - **Time on site:** Generally, the more time users spend on a site, the higher a page rank is (Google Analytics calls this 'Average Session Duration') but there are some idiosyncrasies in calculation which do not actually reflect the time a user spends on site.⁴⁴
 - **Pages per session:** measures how many of a news publisher's pages a user will visit in one session. On average, a user navigates through 3-3.5 pages per website, per visit.⁴⁵ In results that are higher ranked in Google SERP, there are more pages per session for every domain.⁴⁶

⁴² SEMrush, *Ranking Factors: SEMrush Study 2.0* <<https://www.semrush.com/ranking-factors/>>.

⁴³ Contra ACCC Concepts Paper, 22.

⁴⁴ A session is defined as a visit to a website, starting when they first view a page on the website and ending when they either leave the website or have 30 minutes of inactivity. An important caveat with Google Analytics' measurement of 'time on site' is to do with how it measures a session. When a user clicks on an article from SERP, the session timer starts. It continues when the user clicks to a second page on that same publisher's website. However, if the user does not then interact further on the second page, then the time spent reading that second page is not counted as part of the session duration. The session duration would only consist of the time between when the first page loaded and when the user clicked the link to the second page.

⁴⁵ SEMrush, *Ranking Factors: SEMrush Study 2.0* <<https://www.semrush.com/ranking-factors/>>, 47.

⁴⁶ SEMrush, *Ranking Factors: SEMrush Study 2.0* <<https://www.semrush.com/ranking-factors/>>, 47.

- **Bounce rates:** This metric indicates how long users stay on the site. It is not an accurate representation of the attractiveness of a site, even without paywall considerations. For instance, a user may click on a SERP result, spend a few minutes reading the content on the landing page, then exit the site. The user has interacted with the content, and may well have satisfied their query. Google Analytics will still consider this a 'bounce'.
- There is no fixed definition of these (or any) algorithmic factors. It is in the hands of the digital platforms as to what information they feed the algorithm and how the algorithm interprets this information. Over time, Google and Facebook can change, and indeed have changed, how they define these algorithmic factors. It would be exceedingly difficult for either a regulator or a news media business to monitor the impact of these changes or verify that they have occurred. Absent a prohibition of discrimination based on how a news media business monetises their content, these factors are open to being gamed.
- A key element of online marketing is repetition: where a user's most relevant search results are paywalled, users are incentivised to invest in quality journalism. Prioritisation of free content (including rewrites) has a direct impact on the feasibility of investigative journalism. It detracts from advertising revenue, and reduces incentives for users to subscribe to access premium investigative journalism. This is something many publishers have experienced.⁴⁷

Accordingly, News Corp Australia proposes that the code include a provision prohibiting digital platforms from discriminating between news content based on whether or not it is paywalled, and the differential in attention and clicks hence generated by that news content.

The inclusion of such a prohibition would not unreasonably limit consumers' access to free news. It would merely ensure that the most relevant is shown to users, regardless of the monetisation model adopted by the creator of that content. Even if this meant that the first search results were behind a paywall, a user could easily scroll down the results page to access free content.

8 Other aspects of the code of conduct

News Corp Australia's proposed code of conduct also contains the following features:

- **Dispute resolution and complaint mechanisms:**
 - Each digital platform should be responsible for establishing and running a complaints handling procedure.
 - For complaints relating to digital platforms' compliance with the code (including adherence to minimum standards) and/or alleged breaches of individual agreements concluded with news media businesses, there should be recourse to each of the following procedures: (a) complaint to a dedicated Code Compliance Officer at the digital platform; (b) complaint directly to senior management of

⁴⁷ See e.g. Vineet Kumar, Bharat Anand, Sunil Gupta and Felix Oberholzer-Gee, "The New York Times Paywall" (Harvard Business School Case Study 9-512-077, 2 April 2012), later published in the *Harvard Business Review*.

the digital platform; and/or (c) mediation or arbitration. Each of these dispute resolution paths would be external to the ACCC. The ACCC would not be responsible for supervising or reviewing these processes.

For the avoidance of doubt, the above dispute resolution mechanisms should be available to all news media businesses regardless of whether or not they have concluded agreements with the news media business. The arbitration engaged in under this section is separate from that engaged in when parties are negotiating under the bilateral negotiation / FOA framework proposed above.

- **Reporting obligations:** which require digital platforms to report to the ACCC and each news media business each year on various matters, including compliance with the code and agreements made under the code. These reports will help the ACCC understand how the code is working in practice and inform the ACCC's reviews of the code in the 5th and 9th years after commencement.

News Corp Australia's proposed code of conduct does not specify the penalties attached to contravention of various provisions. Failure to comply with the obligations outlined in the mandatory code of conduct should attract a significant penalty in order to reflect the seriousness of the conduct being regulated. The ACCC should consider this as part of preparing a draft mandatory code of conduct.

It is expected that the parties would include an audit mechanism in relation in any agreements reached.

PART C: Other proposed models

There have been a number of other models proposed to address the significant imbalance in bargaining power between Australian news media businesses and the digital platforms, Google and Facebook. For example, as discussed **above in section 7**, in News Corp Australia's view, a broad principles-based approach would be an utterly inadequate solution to the problem which requires a clearly defined and timely response.

9 Collective licensing model

Another model that has been proposed, including in the ACCC's Concepts Paper,⁴⁸ is a collective licensing regime similar to what is used in the music and creative arts industries. As discussed above, it is fundamental that the mandatory code enable *bilateral* negotiations to reflect the uniqueness of news media publishers' different business models, and their likely different attitudes to value.

In the DPI Final Report, the ACCC considered the merits of introducing a mandatory licensing regime for the use of snippets by digital platforms. It ultimately concluded that this approach failed to address the "*wider set of issues regarding [the] imbalance in bargaining power between the digital platforms and news media businesses*". Instead, the ACCC stated that:

*"it would be more appropriate for digital platforms and news media businesses to negotiate payments between themselves. This would provide flexibility to the payment model, which can be adjusted to the requirements of digital platforms and news media businesses."*⁴⁹

This is why News Corp Australia has suggested the approach based on bilateral negotiations set out **above in section 5**.

A licensing regime similar to that used in the music industry should not be used for news content because the industries differ in the following key respects:

- Common pricing is not appropriate in the context of news content.
- For a collective regime to work, there must be a set of metrics or bases by reference to which the revenue is distributed. The imposition of a set of metrics would not work in the news context.
- A collective regime would require significant and unnecessary regulatory oversight and cost, which can be avoided through a model consisting of bilateral negotiation and a "deadlock-breaking mechanism" (in FOA), as discussed above.
- The economic justifications for collective licensing in industries like music and broadcast rights are not present in the news industry.

Before addressing each of these issues, it is useful to briefly outline the collective licensing model.

⁴⁸ ACCC Concepts Paper, 11.

⁴⁹ ACCC DPI Final Report, 233.

9.1 Brief overview of collective licensing schemes

The most widely known use of a collective licensing scheme is in the music industry, and therefore that is the focus of this overview. Other examples of collective licensing regimes include for the retransmission of free-to-air TV and for the use of literature (i.e. illustrations and images accompanying text). However, given the familiarity of the general public with music collection societies, we refer to those more in this section than others. Irrespective of the type of media, there are commonalities which make some media more or less suitable to a collective licensing regime than others. We set out in this section why news content is largely unsuited to a collective licensing regime.

Collecting societies are licensing organisations. They issue collective licences, collect royalties from users of copyrighted material, and distribute those royalties to their members. In Australia, the collective administration of copyright can take place under a voluntary licence scheme (dictated by contract) or under compulsory licence schemes (dictated by statute). In the music industry, royalties tend to be divided between the writer's share and publisher's share, and come in two forms: mechanical (broadcasting) royalties, and performance royalties. Creators of music (or their representatives) assign the broadcasting and/or performing rights in their music to the collecting society.

While each collecting society tends to hold a natural monopoly position, the economic rationale for allowing or mandating collective regimes is that any anti-competitive detriment is outweighed by the public benefit gained from the reduction in transaction costs and balancing out of uneven bargaining power.⁵⁰ These economic justifications, and the reasons why they do not translate to the news context, are discussed further in **section 9.6 below**.

The role of collecting societies often extends beyond purely distributing royalties, to functions funded by part of the fees collected by the societies, such as representing copyright owner members, somewhat like a trade union, creating international affiliations with overseas collecting societies, and identifying unauthorised use and pursuing infringers.

9.2 Common pricing and the differences between news and music content

The assumption that all musical content has the same value, song by song, is implicit in the distribution practices of music collecting societies. Indeed, the Australian Competition Tribunal in the 1999 case *Re Applications by Australasian Performing Right Assn Ltd* commented that "*[i]t is certainly hard to postulate another basis for royalty distribution that could be adopted by a collecting society.*"⁵¹

The Tribunal's analysis of the logic behind this 'administrative simplification' adopted by all collecting societies is useful in demonstrating why such common pricing is not appropriate in the news context. The logic is that the value of a song is calculated by the size of the user audience and the attention it garners from that audience: that is, the number of times the song is ultimately bought, streamed, broadcast, or performed, and in some cases the size of the audience.

⁵⁰ See e.g. *Re Applications by Australasian Performing Right Assn Ltd* (1999) 45 IPR 53; 151 FLR 1.

⁵¹ *Re Applications by Australasian Performing Right Assn Ltd* (1999) 45 IPR 53 at 100-101 [165].

News and music content, and the manner in which each is consumed by users, are vastly different, for a number of reasons.

First, music content is generally consumed numerous times by each user. Especially in the context of music streaming, the number of times each user listens to an artist's song directly correlates to the revenue the artist obtains from that song. Due to the nature of the industry, the number of times a song is heard becomes a sufficient proxy for its popularity, the revenue owing to the artist or owner of the original rights. This is not the case with news content.

News content is generally consumed once. A user does not usually read an article several times because they enjoyed that article. Once the news content is read and digested, it ordinarily need not be visited again. Therefore, providing revenue to news publishers proportionate to the number of clicks (representing the number of times the article is read) is not an accurate or fair proxy for the significance and utility or appreciation of, a news article. As a result, if the code of conduct were to implement a process whereby the same amount of money is paid per article notwithstanding the wordcount there would simply be no incentive to create premium content, including but not limited to breaking news, research-based content, long-form journalism or investigative journalism.

Second, news publishing can involve not only the presentation of news content, but its curation. News curation refers to the process of finding, distilling, adding value to, and sharing the most relevant news content on a specific issue for a specific audience. It is a time-consuming and resource-intensive activity. Importantly, not every news publisher engages in news curation. In contrast, this curation element is not present in the music context.

Third, news content also experiences a level of internal differentiation not present in the music context. Not all news content has equal value, nor should it be assumed to have equal value. A distinction can be made, for example, between general news and investigative journalism. There is also a distinction between original news content and rewritten content. While musical works can also vary in terms of the investment made to produce a work, what makes news such a unique space is that this increased investment in the news content tends to correlate with increased public value. Hence the need to protect the ability of news media businesses to continue and enhance engagement with users of news issues.

Given these inherent differences between news content and content that is subject to collective licensing regimes (like music and film), it is inappropriate to impose a common pricing system for all news content. The imposition of common pricing under a collective regime raises the same competition concerns, especially where there is such a difference between the large news media businesses, and smaller (and sometimes less reputable) news media businesses.

9.3 Unintended consequences and scope for manipulation

For a collective regime to work, there must be some common metric by which the revenue can be divided between publishers. Yet, any such common set of metrics will prove unsuccessful when applied across the news industry.

Imposing a common metric would impact the incentives of news media businesses, **creating unintended negative consequences**. A key unintended consequence relates to the quality of journalism published.

- If the metric chosen is the **number of clicks** an article receives, it will encourage the creation of clickbait, as that is what the model will reward.⁵² Clickbait is notoriously low quality, and often even misleading. To encourage clickbait is to disincentivise and undercompensate quality journalism. Further, it will not adequately reflect the value generated for digital platforms.
- If the metric chosen is **impressions** (the number of articles organically displayed on Google Search, boxes, carousels, etc.), it will similarly encourage short, attention-grabbing articles. Impressions are directly linked to the algorithms employed by the digital platforms. For example, if Google SERP favours the recency of an article as opposed to its originality, such that the newest articles appear at the top of search results, rewrites of an original article will be financially rewarded instead of the original article's publisher. An impression-based compensation regime would also overcompensate news publishers investing in search engine optimisation as opposed to quality journalism.⁵³
- If the metric is the amount of **direct advertising revenue** received by the news publisher, it will again encourage articles that get lots of clicks, as opposed to those with quality content. It will also penalise publishers with subscription-based models.

Whichever common basis of measurement is chosen, it will interfere with and undermine the news creation process and drive the industry towards more superficial interaction with users, rather than investment in journalism.

Another unintended consequence of the use of common metrics is the increase in 'brand flattening'. Brand flattening refers to when differentiation among brands is reduced, because all brands become equivalent in the consumer's eyes. (This is apparent in the way collecting societies treat musical works, as discussed above.)

While a consumer does not assess the quality of a musical work based on the 'brand' (i.e. the record company), the 'brand' which publishes news content (i.e. the news publisher) is an important reference point for consumers as an indicator of quality and often reliability of the news content. This is already an issue in light of rewriting and copycat articles.⁵⁴ When publisher X publishes a rewrite of publisher Y's story, the news brand associated with the original story becomes diluted, and potentially entirely forgotten. This disincentivises news publishers from investing time and resources into innovative or quality content.

Furthermore, any set of common metrics will be capable of being gamed by either (or both) digital platforms or news media businesses. This is highlighted, for example, by the discrepancy

⁵² On the rising use of clickbait, see Ben Frampton, 'Clickbait: The changing face of online journalism', *BBC News: Wales* (14 September 2015) <<https://www.bbc.com/news/uk-wales-34213693>>.

⁵³ Search engine optimisation is the process of optimising a website and its content so that it appears in a prominent position in a search engine's results.

⁵⁴ These concerns are not new (see e.g. Roy Greenslade, 'The dangers of 'hit parade' journalism', *The Guardian* (26 September 2008) <<https://www.theguardian.com/media/greenslade/2008/sep/26/2>>) but are becoming ever more pertinent with the increasingly central role of digital platforms.

in facts and figures given by Google in its blog post published on 31 May 2020 (see **section 4 above**). The post seems internally inconsistent with respect to the number of Google Search queries made and those that were news-related, and externally inconsistent with other figures, including some relied on in the ACCC Digital Platforms Inquiry Final Report. If there was a 'pool' of revenue to be distributed to news media businesses under a collective model, and the size of this pool was to be established with reference to data provided by the digital platforms, it could not be relied upon as being accurate. As evidenced by the inconsistency of Google's public figures on revenue from 'news-related queries', the digital platforms have the ability (and incentive) to firstly, define relevant metrics in a way so as to benefit themselves and minimise the size of the pool; secondly, later change or redefine these metrics; and thirdly, adapt their internal processes so as to work around those metrics. An example of the third point is the development of AMP, where content is on Google's cache and so users do not pass into the news media publisher's domain. This would prevent 'clicks' from being an adequate metric for news consumption. Common metrics present a fruitless exercise, with no certainty that Google or Facebook will actually pass on the benefit they obtain from the availability of news content on digital platforms.

Manipulation of metrics has already occurred in the context of media monitoring. [REDACTED]

[REDACTED]

9.4 Significant regulatory oversight is required in a collective regime

A collective licensing model would require significant regulatory oversight to apply and enforce it.

The ACCC Concepts Paper raises 59 questions about what the mandatory code should cover and how it will function. Many of these can be resolved with adoption of News Corp Australia's proposed model discussed in **Part B above**. This is because, most, if not all, of these questions can be resolved by leaving them to the bilateral negotiation process. The code needs to only dictate the mandatory minimum requirements and standards, and the bargaining process which the digital platforms would need to participate in. This would reduce the need for regulatory oversight (with reduced associated costs and time).

A related issue is the inadequacy of common metrics, as discussed in the **section 9.3 above**. While simplifying the process, they are inadequate to reflect the news industry and its public

contributions, would be highly subjective and complex to implement. An independent authority would be needed to monitor allocation of the 'pool' of revenue, and it would not be possible to prevent or even monitor all gaming of the system. For example, such 'gaming' could happen by creating 'fake' links and clickbait, or 'click farms', or by labelling non-journalist staff as journalists or hiring more journalists as part-time or casual staff so as to give the appearance of a greater number of journalists within the staff. The supervision of this process would be costly, inefficient, and likely ineffective.

One of the most significant regulatory burdens imposed by a collective regime is price setting. It is News Corp Australia's view that a bilateral bargaining framework is most suited and appropriate for the news context. However, if the ACCC were to decide a collective approach is required, that would presumably mean the ACCC had determined that direct licensing (bilateral negotiations between copyright owner (the news media business) and licensee (the digital platform)) was not an adequate option.

Past examples of suboptimal price setting processes are set out in **section 9.5 below**.

9.5 Price setting for collective licensing models

Price setting for any collective licensing model through the Copyright Tribunal of Australia (whether a statutory licence or a licence scheme under the Copyright Act) is often a protracted process, at significant cost to the parties and placing a sizeable burden on public resources. Consider the following examples:

Media monitoring:

- Media monitoring company Isentia Pty Limited (*Isentia*) sought a variation of the 'per-clip' rate payable to Copyright Agency Limited (*CAL*) for the licensing of newspaper and magazine articles, so that its interim licence would match the interim licence granted by the Copyright Tribunal to rival company Meltwater Australia Pty Ltd.⁵⁵ In addition to the applications brought by Isentia and Meltwater, a third media monitoring organisation, Stream Limited, has also brought an application in the Copyright Tribunal for a determination of the rate payable to CAL for its licence.
- Relevant factors in the determination of the per-clip rate included Isentia's competitiveness compared to others paying lower rates to CAL and loss of customers to those competitors; reduction in content covered by the licence; reduction in cost flow to CAL and 'undervaluing' of CAL content; and the impact on rightsholders (i.e. media companies). Considerable evidence was filed.
- The matter of the interim licence has now been resolved, following a hearing in August 2018 and a subsequent 2 day hearing in February 2020, with decisions and reasons published by the Tribunal on 16 November 2018 and 22 April 2020. However, the substantive applications by Isentia, Meltwater and Stream for a final determination of the terms of their licences from CAL are still pending, despite having been filed in November 2017 (Meltwater), May 2018 (Stream) and June 2018 (Isentia).

⁵⁵ Application by Isentia Pty Limited [2020] ACopyT 1.

Retransmission of free-to-air channels by pay TV providers:

- Audio-Visual Copyright Society Limited trading as Screenrights sought a determination of the amount of equitable remuneration payable to it for the retransmission of free-to-air (**FTA**) broadcasts by various pay TV providers, including Foxtel Management Pty Limited (**Foxtel**). The Tribunal made its initial determination on 3 May 2006 (**2006 Decision**) after 15 hearing days between October 2004 and June 2005.⁵⁶
- The parties adduced extensive evidence, including voluminous expert and survey evidence.⁵⁷ There were 5 'survey witnesses' alone, dealing with the reliability of a survey relied on by Screenrights. The evidence covered issues including the benefits of FTA retransmission by pay TV providers, the costs of retransmission, approaches in other jurisdictions and social gain theory. Despite the voluminous evidence, the Tribunal concluded:⁵⁸

"There is no firm evidence guiding us to a particular figure in any way remotely resembling a mathematical calculation. Taking into account all the evidence and recognising that a substantial degree of estimation is involved, and basing ourselves on our own appreciation of the likely value that subscribers, taken as a whole, would see in the benefits of better reception and the single remote control, we have reached the conclusion that the amount of equitable remuneration payable by the Retransmitters in respect of the retransmission of all five FTA channels (including the multichannels) is 22.5 cents [per subscriber per month]."

- Disagreement as to the scope of the 2006 Decision saw Screenrights return to the Tribunal for a determination of the equitable remuneration payable by Foxtel for retransmission of new FTA 'multichannels', Seven HD, One HD, One SD, ABC HD, SBS HD, Seven 2, Nine HD, Go! and ABC 3. After a further 9 hearing days between January and May 2012, on 1 June 2012 (the application having been commenced in February 2010), the Tribunal determined that 10 cents per subscriber per month was appropriate for retransmissions of the new multichannels.⁵⁹ The Tribunal expressed concerns about recognising that additional multichannels may be added in future and the risk of a 'piecemeal approach' of separate determinations on separate groups of multichannels.⁶⁰

Experience strongly indicates that the determination of an appropriate collective licensing model for news content will be an extremely protracted, expensive and complicated process.

9.6 The economic justifications for a collective regime do not translate to the news industry

Collecting societies are permitted to operate (despite essentially fixing prices between members) because it is considered that the public benefit outweighs the potential anti-competitive detriments. The core public benefit of collecting societies is their role in reducing the costs of trading music content for money and simplifying the process of doing so (**transaction cost efficiencies**).

⁵⁶ *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4)* (2006) 68 IPR 367; [2006] ACopyT 2 (**2006 Decision**).

⁵⁷ 2006 Decision at [14], [203] and [290].

⁵⁸ 2006 Decision at [519].

⁵⁹ *Audio-Visual Copyright Society Limited v Foxtel Management Pty Limited* [2012] ACopyT 1 at [192].

⁶⁰ *Audio-Visual Copyright Society Limited v Foxtel Management Pty Limited* [2012] ACopyT 1 at [193].

No significant transaction cost efficiencies are to be gained from imposing a collecting society regime on digital platforms and news media businesses.

For example, in the music industry, the high costs stem from a number of factors:

- In the music industry, there are many parties and distribution channels between the creator(s) of a musical work and the final distributor(s) of that musical work.
- The collecting society's job includes the collection and processing of information about potential contracting partners, advertising, monitoring of performance and broadcast use of musical works, enforcement of payment,⁶¹ and detection of illegal use of musical works.
- In monitoring use of musical works, a collecting society needs to track what musical works are performed under licence (the collection and analysis of which information is "a formidable task"⁶²), and ascertain the copyright owners of the works.
- Music revenue flows from a multiplicity of sources: radios, film studios, the streaming of songs, etc. Indeed, even different streaming platforms are treated differently under revenue collection.⁶³
- Further, due to the many parties involved, the revenue from the use of a musical work will often not flow to merely one party or entity.⁶⁴

This is not the case for digital news content.

- There are two parties to this transaction: the news media business and the digital platform. Accordingly, questions like remuneration and provision of content are better dealt with through a simple bilateral negotiation framework, as proposed in this submission and our proposed code of conduct. For smaller news media businesses, they may elect to form a group (or groups) and negotiate bilaterally with each of the digital platforms.
- There are two main sources of digital news content: a news media business' website or a digital platform (Google, Facebook, etc.).
- The dissemination of news content on digital platforms does not necessitate the involvement of an intermediary to simplify a complex process. Rather, Google (as the platform disseminating news content through its services such as SERP) and Facebook (which disseminates news content through its social media platforms) are already directly involved in the process of disseminating news content and recording data about this dissemination.

⁶¹ *Re Applications by Australasian Performing Right Assn Ltd* (1999) 45 IPR 53 at 128 [294].

⁶² *Re Applications by Australasian Performing Right Assn Ltd* (1999) 45 IPR 53 at 97-98 [153].

⁶³ E.g. take a comparison of Spotify and Pandora. The use of Spotify attracts both performance and mechanical royalties. A user of Spotify plays a song. The user does not own this song, so this qualifies as a performance of the piece (bringing with it the associate performance royalty). Yet the streaming service provided by Spotify requires Spotify to reproduce the underlying composition in order to play the track to the user. This brings with it mechanical royalties. In contrast, Pandora, which operates more like a personalised radio, only attracts performance royalties. They are technically broadcasting the composition, as a radio would, rather than reproducing it, as Spotify does.

⁶⁴ There is the creator of the audio (e.g. Celine Dion); the recording studio (e.g. Universal Music Group); the publisher (e.g. Universal Music Publishing); the platforms on which music is shared (e.g. Spotify); and the collecting society (e.g. APRA AMCOS).

PART D: Conclusion

The ACCC and the Government has made it clear that a mandatory code of conduct is required to address the bargaining power imbalances between Australian news media businesses and digital platforms. The ACCC's task in producing a code is not an easy one. However it is because of the diversity of news media businesses and the need to ensure that their objectives continue to be supported that the ACCC should adopt a model which provides a framework in which bilateral negotiations between news media businesses and digital platforms can take place. Without this, the ACCC will be forced to define obscure terms, metrics and values which will potentially risk the very objective that the ACCC is seeking to protect: the sustainability of news media business' investment in creating original content and informing Australians. If the ACCC adopts a model on which compensation is based on one particular metric, or even a combination of metrics, it risks creating perverse incentives to game that system (both by the digital platforms and the news media businesses) and undermining incentives to invest in original content.

A bilateral negotiation model avoids this entirely. However, it is clear that some form of deadlock-breaking mechanism is required, which is why either an 'all in/none in' collective boycott or FOA mechanism would be necessary. Either choice is simple, efficient and fast, ensuring that the bilateral negotiations draw to a close quickly and are not lost to lengthy and expensive arbitration or mediation processes. Importantly, the model we propose provides the flexibility necessary to adapt to the industries as they grow and change: while providing a strong framework which will result in one-on-one agreements being struck, it allows fresh arrangements to be struck to reflect changing circumstances. The model we propose is also flexible enough for smaller news publishers to avail themselves of the process, including possibly by some form of collective negotiation, as approved by the ACCC. It also, importantly, goes some way to balancing the enormous bargaining power that continues to rest with the digital platforms.

News Corp Australia

Proposed Mandatory Code of Conduct

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Division 1 – Purpose and application

1 Recitals

- 1.1** News and journalism generate important benefits for society through the production and dissemination of knowledge, the exposure of corruption, protection against disinformation and holding governments and other decision makers to account. News content and media plurality are crucial to the healthy functioning of a democracy.
- 1.2** The Australian Consumer and Competition Commission (**ACCC**) found in its Digital Platforms Inquiry Final Report that News Media Businesses are heavily reliant on Digital Platforms to distribute their online news content to consumers and that Digital Platforms have substantial bargaining power in relation to News Media Businesses.
- 1.3** News Media Businesses, particularly traditional print (now print/online) publishers, have experienced a significant fall in revenue due to the increase in online consumption of news and corresponding shift in spend by advertisers. Digital Platforms generally extract online advertising revenue attributable to news content and associated data without compensating the News Media Businesses that authored the content, adequately sharing relevant data with them or fully disclosing how the Digital Platform uses the news content. This imbalance threatens the viability and sustainability of the production of news content by News Media Businesses.
- 1.4** A Code of Conduct to govern the relationship between Digital Platforms and News Media Businesses is necessary to protect the viability and sustainability of news content and journalism produced by News Media Businesses, for the wider public benefit.

2 Purpose of Code

- 2.1** The purpose of this Code is to:
- (a) rebalance the bargaining power between Digital Platforms and News Media Businesses;
 - (b) advance the incentives for News Media Businesses to invest in the production of news content and to properly distribute and monetise their content;
 - (c) support and protect news content and media plurality, which are recognised as important public benefits and crucial to the healthy functioning of democracy;
 - (d) promote and support good faith commercial dealings between Digital Platforms and News Media Businesses;
 - (e) ensure Australian news content is distributed and monetised for the benefit of News Media Businesses; and
 - (f) establish minimum standards, principles and a framework against which Digital Platforms and News Media Businesses can negotiate in relation to:
 - (i) the amount of compensation to be paid to News Media Businesses by Digital Platforms to compensate for the direct and indirect benefit Digital Platforms derive from the use of news content;

- (ii) the data collected by Digital Platforms to which News Media Businesses should be given access;
- (iii) other matters including algorithm transparency, content and advertising;
- (g) provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between Digital Platforms and News Media Businesses.

3 Application of the Code

3.1 The Code applies to Digital Platforms in relation to their dealings with News Media Businesses .

3.2 For the purposes of this Code:

- (a) **Digital Platforms** means Facebook Inc and Google LLC and their related bodies corporate (or the businesses held by those entities as at the commencement of this Code if they are subsequently reorganised). This Code will apply to any successor entities which subsequently hold the businesses of Facebook Inc and Google LLC if reorganised.
- (b) **News Media Business** means any business in Australia which has as a significant business activity the production and supply of news content, which is more than a mere distribution service.
- (c) **News content** means content produced for the purpose of investigating, reporting, or providing commentary on issues of interest to Australians.
- (d) **Content** includes text, video, audio, images and infographics.
- (e) **Code Agreement** means an agreement between a Digital Platform and News Media Business formed as a result of engaging in the framework set out in clause 5 of this Code.

3.3 A News Media Business may apply to the ACCC for the definition of 'Digital Platforms' to be extended to include an additional digital platform or digital platforms. The ACCC will determine if the Code should be applied to the additional digital platform by issuing a decision on its website to that effect. Prior to issuing that decision, the ACCC will provide an opportunity for third parties to make submissions on the extension of the definition of Digital Platforms to the nominated digital platform.

4 Term and review of the Code

4.1 This Code applies from the date on which the enabling legislation receives Royal Assent for a term of 10 years from that date.

4.2 The ACCC will conduct a review of the Code, with reports to be published on the 5th and 9th anniversaries of the date on which the enabling legislation receives Royal Assent.

Division 2 – Framework for negotiations

5 Framework for negotiations

5.1 This section provides the framework for negotiations between Digital Platforms and News Media Businesses.

5.2 Request for negotiation

- (a) A News Media Business shall notify a Digital Platform of its intention to engage in bilateral negotiations (*request for negotiation*).
- (b) The News Media Business must indicate in its request for negotiation whether the bilateral negotiations will include deliberation about content that requires a copyright licence:
 - (i) if the News Media Business decides to include use of material for which a copyright licence is required, the News Media Business must indicate the volume of copyright material (e.g. minimum and/or maximum amounts of articles per day) and precise uses of the copyright material within the products and services of the Digital Platform; and
 - (ii) if the News Media Business indicates that the negotiations will only cover use of content that does not require a copyright licence, then negotiations will not include use of material which requires a copyright licence.
- (c) Upon receiving the request for negotiation, the Digital Platform must continue to use the content of the News Media Business in the same way it has been until the process outlined in this clause 5 concludes.

5.3 Pre-negotiation disclosures

- (a) Prior to commencing bilateral negotiations, at the request of a News Media Business, each Digital Platform shall disclose to each News Media Business on a confidential basis in a written report to a nominated representative of the News Media Business:
 - (i) information about its products and services that use news content (or are able to do so); and
 - (ii) the direct and indirect value the Digital Platform receives from the use of the Digital Platform of any content belonging to, produced by or originating from the News Media Business; and
 - (A) The value should reflect any value obtained in any part of the Digital Platform's business.
 - (B) The value should be accompanied by a statement of methodology and calculations.
 - (C) The value should not deduct any purported benefits the News Media Business obtains from the Digital Platform, including providing news referral services to the News Media Business, but this information can be outlined in the report separately.

- (b) The disclosure made in clause 5.3(a) shall be kept confidential by the News Media Business recipient except that the News Media Business may refer to it in negotiations with the Digital Platform or in the subsequent final offer arbitration referred to in clause 5.5.

5.4 Bilateral negotiations

- (a) Following pre-negotiation disclosure, the Digital Platform and News Media Business will engage in bilateral negotiations with one another with the view to reaching agreement on the following elements (the **Elements**):
 - (i) Remuneration, i.e. payment by the Digital Platform to the News Media Business to compensate for the direct and indirect benefits obtained by Digital Platforms from the use of news content produced by the News Media Business;
 - (ii) Provision of data;
 - (iii) Algorithm transparency; and
 - (iv) Advertising.

This list is non-exhaustive. For the avoidance of doubt, the Digital Platform and News Media Business may negotiate in relation to other elements of their choosing.

- (b) The agreement reached shall be kept confidential as between the relevant counterparties.
- (c) The bilateral negotiations must be consistent with the purpose and principles set out in this Code of Conduct.
- (d) The Digital Platform may not make any offer to any News Media Business which is less favourable than the terms prescribed in the minimum standards set out in Division 3.

5.5 Final offer arbitration

- (a) If three months after the request for negotiation no final agreement has been reached between the parties on all or any of the Elements, in order to commence the final offer arbitration process in this clause 5.5, the News Media Business may submit to the Digital Platform a request for final offer arbitration setting out the Elements and proposed uses of its content to be decided by the ACCC through the final offer arbitration process (**request for FOA**). A copy of the request for FOA shall be simultaneously lodged with the ACCC by the News Media Business.
- (b) If a News Media Business makes a request for FOA, the Digital Platform must participate in the final offer arbitration process outlined in this clause 5.5, subject to the provisions of clause 5.5(c) below.
- (c) A News Media Business or a Digital Platform may call upon the ACCC to make an interlocutory decision about the volume of copyright material and the scope over which uses of copyright material will form part of the final offer arbitration process as follows:
 - (i) If a Digital Platform objects to the uses proposed by a News Media Business in the News Media Business' request for FOA, the Digital Platform must raise its

objection and set out its reasons for objecting in a written submission of no more than 5 pages per Element to be provided to the ACCC and the News Media Business. The Digital Platform will provide its reasons within 5 business days of the News Media Business providing the request for FOA.

- (ii) If the Digital Platform does not make an objection in accordance with clause 5.5(c)(i), the Digital Platform is taken to have agreed to the uses defined in the request for negotiation by the News Media Business.
- (iii) The News Media Business may provide a reply to the Digital Platform's submission by way of a written reply submission of no more than 5 pages per Element, with a copy also to be provided to the ACCC, within 5 business days of the Digital Platform's objection being made.
- (iv) The ACCC, within 10 business days of the objection under clause 5.5(c)(i) being made, will determine whether the Digital Platform must:
 - (A) accept the uses of copyright content proposed by the News Media Business; or
 - (B) not accept the uses of copyright content proposed by the News Media Business

(the *interlocutory decision*). For the avoidance of doubt, if the ACCC accepts certain uses of copyright content proposed by the News Media Business, all other uses of copyright content are prohibited.

- (v) If the ACCC determines that the Digital Platform should not be bound to accept the content of the News Media Business subject to the uses proposed by the News Media Business, the ACCC may give feedback to the News Media Business on what aspects of the proposed use were not reasonable. It is open for the News Media Business to put forward a revised proposal regarding use of its copyright material. In that event, the process in steps 5.5(c) above is repeated. The News Media Business may revise the proposal for use of its copyright material an unlimited number of times.
- (vi) If either:
 - (A) the ACCC determines that the Digital Platform should be bound to accept the content of the News Media Business subject to the uses proposed by the News Media Business; or
 - (B) clause 5.5(ii) applies,the News Media Business or Digital Platform may request for the FOA process to continue to the next stage of determining the terms of each Element set out in the News Media Business' request for FOA in 5.5(a) (*request for continuation of FOA*).

- (d) Following either:

- (i) the request for FOA, if an interlocutory decision was not sought under clause 5.5(c) above; or
- (ii) the request for continuation of FOA, if an interlocutory decision was sought under clause 5.5(c) above,

the News Media Business and the Digital Platform may both lodge with the ACCC a final offer on each Element set out in the News Media Business' request for FOA in 5.5(a). A copy of each offer must also be disclosed to the other party.

- (e) The offers made under clause 5.5(d) must be lodged within 5 business days of the date of:
 - (i) the request for FOA, if an interlocutory decision was sought under clause 5.5(c) above; or
 - (ii) the request for continuation of FOA, if the News Media Business sought an interlocutory decision was not sought under clause 5.5(c) above,
- (f) Where there is a dispute about more than one Element separate final offers must be lodged for each of the Elements.
- (g) The Digital Platform and News Media Business are not required to lodge a final offer for every Element.
- (h) An offer can be lodged for \$0.
- (i) The final offer may differ to any offer provided as part of bilateral negotiations.
- (j) The News Media Business may at any point until the ACCC makes its final decision withdraw from the final offer arbitration process outlined in this clause 5.5.
- (k) Any final offer lodged by the Digital Platform or News Media Business for final offer arbitration must at least reflect the minimum standards for each Element as set out in clause 8 (**Data**), clause 9 (**Algorithm transparency**), clause 10 (**Display of content**) and clause 11 (**Advertising**).
- (l) If one party lodges an offer and the other does not, then the ACCC shall select the offer put forward.
- (m) If no agreement has been reached in bilateral negotiations and no offer is lodged by either the Digital Platform or the News Media Business, the minimum standards shall apply.
- (n) If both parties lodge a final offer for an Element then the ACCC shall select one of those two offers for each Element in their entirety and without amendment. The ACCC is not permitted to amend the offers lodged by the parties. For each Element, the ACCC can select an offer of its choice, subject to the requirements of this Code, lodged by either party. The ACCC is not required to select offers lodged by the same party.
- (o) Any final offer in relation to remuneration must be limited to a lump sum.
- (p) The ACCC shall select the final offer for compensation payable by the Digital Platform.

- (q) Any written submissions accompanying the final offers lodged with the ACCC should not exceed 4 A4 pages per Element.
- (r) The ACCC must make a decision within 25 business days of the time for lodging of offers, and within no more than 30 business days from the date of:
 - (i) the request for FOA, if an interlocutory decision was not sought under clause 5.5(c) above; or
 - (ii) the request for continuation of FOA, if an interlocutory decision was sought under clause 5.5(c) above.
- (s) The ACCC's decision will be final and binding on the parties and will not be subject to any appeal.
- (t) The ACCC is not required to provide reasons for its selection and the parties are not permitted to request or compel the ACCC to provide reasons.
- (u) The result of the negotiations (whether the parties proceed to final arbitration or not) will be confidential between the parties and the ACCC.
- (v) The clock cannot be 'stopped' at any stage of the arbitration process by the parties or the ACCC.

5.6 Term

- (a) Each agreement negotiated between the parties or determined by the arbitrator shall apply for a term of one year although after the expiry of one year, the News Media Business can extend the agreement for a maximum period of up to two years.
- (b) At the expiry of an agreement, the parties shall engage in negotiations for a new agreement as set out in this Code.

5.7 Review

- (a) A News Media Business may request a review of a prevailing agreement when the Digital Platform introduces a new use case for the News Media Business' news content or makes other material changes to its use of the news content.
- (b) Following a request from a News Media Business, the ACCC shall determine in 20 business days that renegotiations of a prevailing agreement or Element of a prevailing agreement shall take place. In those circumstances, the framework for negotiations above in sections 5.1 to 5.6 shall apply.

5.8 Conduct during negotiations and arbitration

- (a) Digital Platforms and News Media Businesses must negotiate in good faith and with the goal of avoiding undermining the ability and incentives of News Media Businesses to invest in the production of news content and properly distribute and monetise their content.
- (b) Digital Platforms must not withhold information which would be relevant to a News Media Business' decision to accept an offer made during bilateral negotiations.
- (c) A Digital Platform must not:

- (i) refuse to make the disclosures in clause 5.3;
- (ii) knowingly or recklessly give information or data during the course of negotiations or the arbitration which are false or misleading.

Division 3 – Industry-wide minimum standards

6 Purpose of this division

- 6.1** This division sets out the practices and conduct Digital Platforms must adhere to in their dealings with News Media Businesses.
- 6.2** To the extent that the clause 8 (**Data**), clause 9 (**Algorithm transparency**), clause 10 (**Display of content**) and clause 11 (**Advertising**) form part of negotiations between Digital Platforms and News Media Businesses or subject to final offer arbitration, the provisions in those sections form minimum standards for those negotiations or selection by the arbitrator.

7 General principles for dealings with News Media Businesses

- 7.1** In relation to all dealings between News Media Businesses and Digital Platforms and all use by Digital Platforms of the news content and related data of News Media Businesses, the Digital Platform must:
- (a) adhere to overarching standards of fairness, good competitive practice and full transparency;
 - (b) operate in good faith;
 - (c) pursue the objective of supporting the ability and incentives of news media businesses to properly distribute and monetise their content; and
 - (d) act in the best interests of the News Media Businesses when using their news content.
- 7.2** The Digital Platform must not require exclusivity from News Media Businesses.
- 7.3** The Digital Platform must not oblige, directly or through the threat of demotion, a News Media Business to use another of its products or services.
- 7.4** Digital Platforms must not retaliate against, discriminate against, treat differently, or otherwise cause negative impact to News Media Businesses, including through the display of or the ability to view or navigate to a News Media Business' content (including content protected by a pay wall) in or via any of the Digital Platform's products or services, as compared with any entities not subject to this Code (including any located in jurisdictions outside of Australia).
- 7.5** Digital Platforms must not agree with a News Media Business to give preferential treatment to a News Media Business' content in or via any of the Digital Platform's products or services. The only exception to this arises where News Media Businesses pay the Digital Platform for a sponsored post, advertisement or similar, separate to and distinct from the agreement reached under the requirements of this Code.
- 7.6** Digital Platforms must not discriminate against, treat differently, or otherwise cause negative impact to a News Media Business' content in or via any of the Digital Platform's products or services on the basis that the News Media Business' agreement with the Digital Platform is less favourable to or more costly for the Digital Platform than other agreements the Digital Platform has entered into with other News Media Businesses.

8 Data

- 8.1** The Digital Platform must ensure its systems have interoperability with systems used by News Media Businesses and that data is supplied in a format usable by News Media Businesses.
- 8.2** The Digital Platform must:
- (a) acknowledge that all data that the Digital Platform collects about user's engagement with News Media Business' news content (including but not limited to data collected in relation to views on media formats controlled by that Digital platform (such as AMP and Facebook's Instant Articles), and data collected through browsers and operating systems) (**engagement data**) belongs to that News Media Business;
 - (b) give that News Media Business full and unconditional access to and use of such engagement data in a form that allows the News Media Business to combine and match such engagement data with data that the News Media Business collects and holds, consistent with privacy law consents that the News Media Business holds; and
 - (c) only use such engagement data on behalf of and as instructed by the News Media Business, and only to facilitate viewing of the News Media Business' news content on that Digital Platform, and shall not make any secondary independent use of such engagement data, including profile building or re-sharing of such engagement data and/or identities amongst its properties and services.
- 8.3** The Digital Platform must provide information to a News Media Business relating to its news content, including reporting on:
- (a) the ranking of the news content of the News Media Business in search results and in news feeds;
 - (b) the types of user data they collect on audiences which view news content;
 - (c) engagement with the News Media Business' news content (eg, likes, shares, views, reviews etc); and
 - (d) any data collected from the Digital Platform's pages used to navigate to the news content of the News Media Business.

9 Algorithm transparency

- 9.1** In relation to practices and conditions affecting News Media Businesses, the Digital Platform must:
- (a) operate in a way which is transparent, fair and equitable;
 - (b) provide News Media Businesses with a user-friendly method of registering for advance notice of new practices and conditions (including changes in algorithms), or changes to existing practices or conditions as under clauses 9.1(c)-9.1(e) below;
 - (c) provide reasonable warning regarding the imposition of new practices or conditions (including algorithms), or changes to existing practices or conditions, by giving at least 28 calendar days' notice to registered News Media Businesses;

- (d) provide an explanation of the reasons for and intended impact of new practices or conditions, or changes to existing practices or conditions to News Media Businesses, by giving written notice at least 28 calendar days prior to the changes;
- (e) provide a reasonable opportunity for registered News Media Businesses to raise concerns about the imposition of new practices or conditions or changes to existing practices and conditions and the Digital Platform must consider any such concerns in good faith; and
- (f) not preference their own businesses or those of their related bodies corporate.

9.2 A conditional exception to clause 9.1 applies where urgent implementation of new practices or conditions (including to algorithms), or changes to existing practices or conditions, is required in the public interest. The Digital Platform must inform the ACCC and News Media Businesses of the news practices or conditions, or changes to existing practices or conditions, and provide the information required under clause 9.1(d) as soon as possible and at the latest within three calendar days of implementing the change.

10 Display of content

10.1 The Digital Platform must:

- (a) give prominence to original news content of News Media Businesses in its search results or platform display. This includes giving prominence to the most linked articles and/or expertise, authority and trust (EAT) on any news related query without regard to other parameters, such as non-content based parameters like speed or page experience;
- (b) clearly explain to News Media Businesses the format in which their news content is displayed on the Digital Platform's properties;
- (c) ensure that the origin of News Media Businesses' news content is clearly presented; and
- (d) clearly present the News Media Business' branding when using its news content.

10.2 The Digital Platform must not:

- (a) discriminate between the news content of a News Media Business and other news content based on the means of monetisation used by the News Media Business for its content;
- (b) discriminate between the news content of a News Media Business and other news content based on the amount of data or attention generated by the Digital Platform; or
- (c) discourage click-through to source.

10.3 The Digital Platform must provide to News Media Businesses an explanation of how it ranks news content and provide advance notice of at least 28 calendar days of any changes that may significantly affect the way News Media Businesses' news content is ranked or displayed.

10.4 The Digital Platform must consult with News Media Businesses in relation to the development of new services or formats which will present their news content.

10.5 If a News Media Business publishes original news content that creates a new search query on the Digital Platform, and:

- (a) if there is a Code Agreement between the News Media Business and Digital Platform, the original news content must be listed as the top search result on the Digital Platform for 48 hours after the original news content is first released online by the News Media Business; or
- (b) if there is no Code Agreement between the News Media Business and Digital Platform, the Digital Platform must not publish any content relating to that search query on the Digital Platform.

11 Advertising

11.1 For online advertising auctions which the Digital Platform controls:

- (a) Digital Platforms must provide information to News Media Businesses regarding:
 - (i) the organisation of online advertising auctions, including the rules governing the auction;
 - (ii) revenue shares and fees at each stage of the ad tech supply chain (ie, programmatic receipting) starting from the amount paid by the brands;
 - (iii) the volume of advertising associated with the News Media Business' content (ie, fill rates);
 - (iv) how News Media Businesses' inventory is displayed to prospective purchasers;
 - (v) the content, format, length and placement of advertising associated with content on News Media Businesses' sites;
- (b) Digital Platforms must use open source banner bidding;
- (c) Digital Platforms must not impose rules that preference the Digital Platform or a related body corporate; and
- (d) Digital Platforms must not bid for impressions on their own exchanges.

11.2 The Digital Platform must:

- (a) acknowledge that all data relating to the sale and purchase of advertising inventory on a News Media Business' properties (including bidding data; audience data; inventory forecasting data; delivery reporting data (including all campaign reporting metrics the Digital Platform makes available to advertisers when it sells advertising on a News Media Business property)) (**ad data**), belongs to that News Media Business;
- (b) give that News Media Business full and unconditional access to and use of such ad data in a form that allows the News Media Business to combine and match such ad data with data that the News Media Business collects and holds, consistent with privacy law consents that the News Media Business holds;

- (c) only use such ad data on behalf of and as instructed by the News Media Business and shall not make any secondary independent use of such ad data without the consent of the News Media Business.

11.3 Subject to any data protection or privacy limitations, Digital Platforms must provide the following information to each News Media Business on a weekly basis:

- (a) audience data;
- (b) inventory forecasting data;
- (c) delivery reporting data (including all campaign reporting metrics the Digital Platform makes available to advertisers when it sells advertising on its platform); and
- (d) third party verification data.

Division 4 – Compliance and arbitration

12 Compliance and reporting

- 12.1** The Digital Platform must nominate a representative in its business with appropriate authority to act as the '**Code Compliance Officer**' to monitor compliance with the Code and Code Agreements.
- 12.2** The Code Compliance Officer must be independent of the team directly dealing with the commercial relationship between the Digital Platform and News Media Business regarding use of news content and related data.
- 12.3** The Digital Platform must have a written complaints handling procedure for complaints regarding compliance with the Code and Code Agreements. A copy of such procedure should be provided to the ACCC and each News Media Business with which the Digital Platform has a Code Agreement in place.
- 12.4** The Digital Platform must self-report instances of non-compliance with the Code to the ACCC, within 10 business days of knowledge of the breach.
- 12.5** The Code Compliance Officer must prepare a written report every 6 months to document complaints received, investigations conducted and instances of non-compliance with the Code and Code Agreements. The report must be provided to the ACCC within 20 business days of the end of the applicable 6 month period.
- 12.6** The Digital Platform must provide a report to the ACCC every year (to be provided within 20 business days after the anniversary of this Code commencing) on the progress of commercial negotiations arising from the Code, including the total number of negotiations that took place and the proportion which were finalised by way of final offer arbitration.
- 12.7** The Digital Platform must provide a report to the ACCC and to each News Media Business with which the Digital Platform has a Code Agreement in Place every year (to be provided within 20 business days after the anniversary of this Code commencing) which will include a report on the Digital Platform's compliance with the Code of Conduct and the relevant Code Agreement with each News Media Business including measures put in place to address any shortcomings.

13 Complaints and dispute resolution

- 13.1** Where a News Media Business wishes to make a complaint relating to non-compliance with the Code or a Code Agreement by a Digital Platform, it can:
- (a) raise the complaint with the Digital Platform's Code Compliance Officer;
 - (b) request the immediate elevation of the complaint to the Digital Platform's senior management; and/or
 - (c) refer the complaint directly to mediation or arbitration.
- 13.2** Where a News Media Business raises a complaint with the Digital Platform under 13.1(a) or 13.1(b), the Digital Platform must take all reasonable steps to investigate the complaint and

attempt to resolve the complaint / breach in good faith, through commercial negotiations with the complainant, within 20 business days.

14 Mediation and arbitration

- 14.1** This clause applies once a Code Agreement is in place between a Digital Platform and News Media Business to settle disputes arising under compliance with the Code Agreement or other aspects of this Code, except the negotiation of a Code Agreement in clause 5.
- 14.2** here the News Media Business requests mediation or arbitration of a dispute relating to compliance with the Code or a Code Agreement, the parties may agree on an independent mediator or arbitrator.
- 14.3** If agreement on a mediator or arbitrator cannot be reached by the parties within 10 business days of a News Media Business requesting mediation or arbitration, the mediator or arbitrator must be appointed by the Institute of Arbitrators and Mediators Australia in accordance with the rules of the Institute.
- 14.4** Mediation or arbitration for the purposes of this Code must be conducted in accordance with the rules of the Institute of Arbitrators and Mediators Australia.
- 14.5** The Digital Platform:
- (a) must take part in the mediation or arbitration in good faith; but
 - (b) is not required by this code to take part in both mediation and arbitration in relation to the same complaint or dispute at the same time.
- 14.6** For the purposes of this clause, the Digital Platform:
- (a) is taken to take part in the mediation or arbitration if the Digital Platform is represented at the mediation or arbitration by a person who has authority to enter into an agreement to settle the dispute on behalf of the Digital Platform; and
 - (b) is taken to be trying to resolve the dispute in good faith if the Digital Platform approaches the resolution of the dispute in a reconciliatory manner, including by doing any of the following:
 - (i) attending and participating at meetings that are arranged at reasonable times;
 - (ii) at the beginning of the mediation or arbitration process, making it clear what the Digital Platform is trying to achieve through the mediation or arbitration;
 - (iii) observing any obligation relating to confidentiality that applies during or after the mediation or arbitration process; and/or
 - (iv) not taking or refusing to take action during the dispute, including refusing to accept goods or to make payments, that has the purpose or effect of applying pressure to resolve the dispute.
 - (c) All costs of any mediation or arbitration are to be determined under the rules of the Institute of Arbitrators and Mediators Australia.

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Response to the ACCC Concepts Paper on the
Mandatory News Media Bargaining Code

Prepared for

Jacqueline Downes (Allens)
Level 28 Deutsche Bank Place
126 Philip Street
Sydney NSW 2000

Prepared by

Dr Geoff Edwards and Jennifer Fish
Suite 2201, Level 22, Tower 2
101 Grafton Street
Bondi Junction NSW 2022
Date: 5 June 2020

CRA Charles River
Associates

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1. INTRODUCTION AND OVERVIEW

1. We have been engaged by the law firm Allens to respond to the ACCC's "Concepts Paper" released on 19 May 2020 in the context of the ACCC's consultation on the forthcoming mandatory news media bargaining code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms. In particular, Allens has asked us to consider the following two issues:
 - a. Whether bargaining between digital platforms and news media businesses should be bilateral or collective; and
 - b. If the code were to mandate arbitration in the event that bargaining impasses arise, what are the advantages and disadvantages of alternative arbitration frameworks.
2. This report is structured as follows.
 - a. In Section 2 we provide a brief background to the ACCC's Concepts Paper and a summary of parts of the Concepts Paper that are relevant context for this report. Regarding effective bargaining frameworks, the Concepts Paper contemplates, among others, bilateral bargaining, voluntary collective bargaining and collective licensing, which we understand to be a form of mandatory collective bargaining. For each of these alternative bargaining frameworks, the Concepts Paper contemplates the possibility of recourse to mediation and arbitration. This report focuses on the bilateral bargaining and mandatory collective bargaining alternatives.
 - b. In Section 3 we consider the relative merits of bilateral and mandatory collective bargaining between digital platforms and news media businesses. While mandatory collective bargaining offers an advantage of savings in external transaction costs between the digital platforms and news media businesses, the extent of heterogeneity in the business models, nature of content and incentives of news media businesses will result in significant internal coordination costs and significant costs of compromise, for both news media businesses and the public generally, including an adverse impact on original and quality journalism. While these internal coordination and compromise costs will depend on the extent to which matters in dispute between the digital platforms and news media businesses are directly codified in the mandatory code of conduct, we consider that bilateral bargaining is likely to be more efficient and socially preferable to mandatory collective bargaining, in relation to both monetary payment and other matters.
 - c. In Section 4 we consider two alternative forms of arbitration: conventional arbitration (CA) and final offer arbitration (FOA). Both have merit as means of addressing bargaining power imbalances. FOA, while novel in Australia, has a number of attractive properties that warrants its consideration for inclusion in the mandatory code of conduct if the ACCC decides to include an arbitration framework.

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2. BACKGROUND AND SUMMARY OF THE ACCC'S CONCEPTS PAPER

2.1. Background to the Concepts Paper

3. In July 2019 the ACCC published its Digital Platforms Inquiry Final Report (DPI Report). Our report takes as assumptions the following findings of the ACCC presented in Chapter 5 and the Executive Summary of the DPI Report.
 - a. Significant proportions of Australians access news through social media and search for news brands and particular news stories using search engines;
 - b. Google is a “critical source of internet traffic (and therefore audiences) for news media businesses”;
 - c. A news media business “risks losing a significant source of revenue if it prevents Google from providing links to its websites in search results”;
 - d. Facebook contributes a significantly lower proportion of traffic to new media businesses, but “remains a vital distribution channel for a number of media businesses, particularly those seeking to target a particular demographic group”;
 - e. The content produced by news media businesses is important to digital platforms with 8-14% of Google search results triggering a “Top Stories” result, which typically includes reports from news media websites including niche publications or blogs;
 - f. While Google and Facebook each “clearly value the news media content that they are able to display to their users” they “each appear to be more important to the major news media businesses than any one news media business is to [them]”. This provides each of Google and Facebook with substantial bargaining power in relation to many news media businesses;
 - g. News media businesses, consumers and digital platforms all benefit from the reproduction of news content in snippets:
 - i. Media businesses benefit because “a snippet provides context and an indication to the user of the value of that content, increasing the likelihood of consumers clicking through than if no snippet were provided (although this may depend on the length of the snippet)”;
 - ii. Consumers benefit because the context provided by the snippet “enables them to make an informed choice of which article to click on”;
 - iii. Google benefits because “the inclusion of news stories and snippets in search results increases the attractiveness of the google search engine” which “in turn increases the likelihood that consumers will use the search engine for other queries, which can be directly monetised”; and
 - iv. Facebook benefits because “news stories appearing on a user’s news feed retain the user’s attention, enabling more advertisements to be displayed”;
 - h. However, “the inability of news media businesses to individually negotiate terms over the use of their content by digital platforms is likely indicative of the imbalance of bargaining power”: individual news media businesses require Google and Facebook referrals more than each platform requires an individual news media business’s content.

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4. The DPI Report included a recommendation (Recommendation 7), based on the factual findings summarised above, that designated digital platforms should each separately provide a voluntary code of conduct to the Australian Communications and Media Authority (ACMA) to govern their commercial relationships with news media businesses, and that the code should be informed by a consultation process with news media businesses and contain a strong enforcement mechanism. The DPI Report also recommended that if a digital platform were unable to submit an acceptable code to the ACMA within nine months of designation, the ACMA should create a mandatory standard to apply to the designated digital platform. The DPI Report also recommended that each code of conduct “should ensure that [designated digital platforms] treat news media businesses fairly, reasonably and transparently in their dealings with them and contain at least the following commitments:
 - a. The sharing of data with news media businesses;
 - b. The early notification of changes to the ranking or display of news content;
 - c. That the digital platform’s actions will not impede news media businesses’ opportunities to monetise their content appropriately on the digital platform’s sites or apps, or on the media businesses’ own sites or apps; and
 - d. Where the digital platform obtains value, directly or indirectly, from content produced by news media businesses, that the digital platform will fairly negotiate with news media businesses as to how that revenue should be shared, or how the news media business should be compensated.
5. The DPI Report also stated that “determining such issues by commercial negotiation, *taking into account the unique nature of each commercial relationship*, is more appropriate than having a regulator determine aspects of the relationship such as an appropriate price or snippet length” (emphasis added).
6. In December 2019, the Federal Government published its response to the DPI Report and its “Implementation Roadmap”, and asked the ACCC to work with Google, Facebook and news media businesses to develop and implement a voluntary code of conduct, flagging that if an agreement were not forthcoming the Government would develop alternative options that may include the creation of a mandatory code.
7. In April 2020, the Federal Government announced that it was directing the ACCC to develop a mandatory code of conduct “to address bargaining power imbalances between digital platforms and media companies”.¹ In that announcement, the Government stated that “the development of a code of conduct is part of the Government’s response to the ACCC’s Digital Platforms Inquiry final report to promote competition, enhance consumer protection and support a sustainable Australian media landscape in the digital age”.²

¹ Joint media release by the Hon. Josh Frydenberg MP (Commonwealth Treasurer) and the Hon. Paul Fletcher MP (Minister for Communications, Cyber Safety and the Arts), *ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies*, 20 April 2020.

² Above note 1.

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8. Before deciding to direct the ACCC to develop a mandatory code of conduct, the Government took advice from the ACCC that it was unlikely that any voluntary agreement would be reached with respect to the key issue of payment for content.³
9. The Government stated that the mandatory code of conduct is to govern commercial arrangements between digital platforms and news media businesses and “include the sharing of data, ranking and display of news content and the monetisation and the sharing of revenue generated from news” and that it should “establish appropriate enforcement, penalty and binding dispute resolution mechanisms”.⁴
10. The Government also emphasised that it is “delivering a regulatory framework that is fit for purpose and better protects and informs Australian consumers, addresses bargaining power imbalances between digital platforms and media companies, and ensures privacy settings remain appropriate in the digital age.”⁵

2.2. The Concepts Paper

11. The ACCC’s Concepts Paper is intended to guide the ACCC’s consultation process towards a mandatory code of conduct to address bargaining power imbalances between digital platforms and news media businesses.⁶
12. For the purposes of our report, the section of the Concepts Paper titled “Establishing an effective bargaining framework” is most relevant.⁷ This section falls within a broader section on “Monetisation and sharing of revenue from the use of news”⁸ that includes consideration of both monetary remuneration for the use of news, and sharing of user data, which the ACCC recognises has monetary value for digital platforms and news media businesses.⁹
13. The Concepts Paper describes the “aim” of the mandatory code of conduct in the context of monetisation and sharing of revenue from the use of news as to “address the bargaining power imbalance by facilitating commercial negotiations that will allow news media businesses to achieve outcomes consistent with those that would be achieved in the absence of the bargaining power imbalance”.¹⁰ We consider the emphasis on seeking to facilitate *commercial negotiations* (free of bargaining power imbalance) in relation to monetisation and sharing of revenue is sensible, and preferable to a regulatory route.¹¹
14. The first two commercial negotiation frameworks that the Concepts Paper considers – bilateral bargaining and (voluntary) collective bargaining – differ in just one respect: whether

3 Above note 1.

4 Above note 1.

5 Above note 1.

6 Concepts Paper, page 1.

7 Concepts Paper, pages 7-11.

8 Concepts Paper, pages 7-18.

9 Concepts Paper, page 16.

10 Concepts Paper, page 7.

11 Regulation is likely to encounter similar issues to those discussed in relation to mandatory collective bargaining in Section 3 below, including “one size fits all” compromises and inflexibility in a dynamic environment.

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the news media businesses are allowed to bargain collectively.¹² The Concepts Paper also considers, as an alternative, a collective licensing arrangement. We assume that when discussing the collective licensing alternative the Concepts Paper is contemplating the possibility of imposing a *mandatory* collective bargaining regime, in which the news media businesses are *required* to negotiate with the digital platforms as a collective, and may not bargain bilaterally or in voluntary collectives.

15. This report focuses on the relative merits of bilateral bargaining and *mandatory* collective bargaining. We treat *voluntary* collective bargaining as a special case of bilateral bargaining, since it is at the option of the news media businesses, rather than forced upon them.¹³ The mechanism that will bring the digital platforms “to the table” and address the bargaining power imbalance is essentially the same for each of these forms of bargaining. That mechanism is not the negotiation stage, but the threat of compulsory arbitration should negotiations fail. As we will discuss in Section 4, the design of the arbitration stage may be critical and there is much to consider there.

3. BILATERAL V MANDATORY COLLECTIVE BARGAINING BETWEEN DIGITAL PLATFORMS AND NEWS MEDIA BUSINESSES

16. In this section we consider the advantages and disadvantages of a bilateral bargaining framework compared to a mandatory collective bargaining framework in the context of bargaining between digital platforms and news media businesses.
17. The main advantages of a bilateral bargaining framework are the avoidance of coordination and compromise costs that are likely to be significant in a mandatory collective bargaining framework due to the significant heterogeneity among news media businesses in their business models and incentives. To explore the advantages, the first two sub-sections consider, separately, a situation in which bargaining takes place only in relation to the single issue of monetary payments (this might occur if the mandatory code were to fully specify all other terms and conditions for the commercial relationships between digital platforms and news media businesses, including the extent of access to data, among other things) and a situation in which bargaining takes place over multiple issues (e.g. also including the issue of access to data).
18. In the third sub-section, we consider the (external) transaction cost disadvantages of a bilateral bargaining framework, which must be balanced against the avoidance of coordination and compromise costs that we identify in the first two sub-sections, and in the final sub-section we draw our conclusion.

¹² This distinction seems minor compared to the distinction between: (i) a framework in which news media businesses may elect to bargain bilaterally or collectively; and (ii) a framework in which news media businesses are required to bargain as a collective (mandatory collective bargaining).

¹³ We assume that voluntary collective bargaining is likely to occur when the news media businesses within the collective view their business models and incentives as sufficiently aligned for the benefits to them of collective bargaining to outweigh the costs. This collective would then negotiate “bilaterally” with the digital platforms, separately from other news media businesses. For more on the benefits and costs of bargaining as a collective, see Section 3 below.

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19. Before we begin, an important observation that applies to all frameworks (including the bilateral and mandatory collective bargaining frameworks that are the focus of this report, and a regulatory framework in which the ACCC or another third party determines terms and conditions) is that variable payments (e.g. payments that depend on the number of impressions of content on the platforms, or the number of clicks to news media business sites) would risk distorting the platforms' incentives regarding ranking of news content (either in general or in favour or against particular news media businesses).¹⁴
20. We therefore consider it important that the mandatory code specify that monetary payments between digital platforms and news media businesses (individually or collectively) must not depend in any direct way on the volume of news content (in general or in relation to any one news media business) on the platforms.¹⁵
21. An alternative, perhaps, would be a provision in the mandatory code that the digital platforms must not rank or favour or dis-favour content on the basis of payments between themselves and news media businesses. However, this would require constant monitoring of the platforms' algorithms and may not be effective. The simpler and more cost-effective, non-regulatory, solution is to ban variable payments. In a mandatory collective bargaining framework, this would not preclude the allocation of a fixed "pot" among the members of the collective according to variable measures. Once the fixed "pot" has been agreed with a platform, how it is allocated among the collective members would not affect the platform's ranking incentives.
22. More generally, the ACCC should consider a provision in the mandatory code that no agreement between a digital platform and a news media business may require or give a platform an incentive to alter its algorithms or ranking of news content.

3.1. Advantages of a bilateral bargaining framework in the context of negotiations over the single issue of monetary payments

23. In principle, if there were only the single issue of monetary payments to be negotiated (e.g. if the mandatory code of conduct fully specified all of the other terms and conditions for commercial relationships between the digital platforms and news media businesses), and if the views and preferences of the various news media businesses were largely homogenous regarding valuing news content and methods of allocation, a mandatory collective bargaining framework (with compulsory arbitration – see Section 4 below) would be an attractive solution for addressing the bargaining power imbalance identified by the ACCC.
24. A mandatory collective bargaining framework under these (strict) conditions might involve a single advocate for the entire news media sector bargaining with the digital platforms,

¹⁴ In a mandatory collective bargaining context, variable payments from the platforms to the collective of news media businesses would risk the platforms favouring non-news content (which would not attract any variable cost) over news media content. In a bilateral bargaining context, variable payments from the platforms to one news media business would risk the platforms favouring other news media business that may have reached fixed payment terms with the platforms. It is also conceivable that some news media businesses may seek bilateral agreements with the platforms for variable payments in the other direction, to incentivise the platforms to rank their content higher.

¹⁵ The Concepts Paper (at page 11) contemplates payment of fixed fees for the use of news content by digital platforms when considering collective licensing arrangements. We consider there is a more general need for any fees to be fixed, regardless of the bargaining framework that is adopted.

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with instructions to extract the largest possible “pot” of money each year (e.g. a fixed amount or a percentage of the platforms’ revenues directly and indirectly associated with news content).¹⁶ That pot could then be allocated among all news media businesses using objective allocation drivers that all news media businesses would find satisfactory, as there would be little disagreement among them regarding the appropriate drivers.

25. If these (strict) conditions held, the mandatory collective bargaining framework just outlined would offer a single solution via a single negotiation that would adequately remunerate the entire news media sector based on objective measures. Importantly, it would realise efficiencies from economies of scale in transactions costs, significantly reducing these costs compared to bilateral bargaining, and increasing the overall “pie” available to news media businesses.¹⁷
26. These conditions are essentially the conditions that exist in relation to blanket licenses for music royalties administered by music royalty collection societies, where licensees pay fixed amounts that are then allocated to musicians on the basis of objective metrics that essentially allocate more to musicians the more their recordings are listened to.
27. News content, however, differs from music in significant respects that mean that the condition of largely homogenous preferences of news media businesses is unlikely to hold. In particular, news media businesses are diverse in business models, incentives and the content they produce. Some news media businesses engage in relatively more original journalism than others. Some produce relatively more in-depth or investigative journalism. Some focus more on local or national news. Some may focus more on images or video. Some produce more regular updates. And there exist a variety of monetisation models, with some news media businesses relying largely on advertising while others charge monthly subscription fees to users.
28. Under mandatory collective bargaining, this diversity is likely to preclude efficient resolution of the question of how to allocate a collective pot. In particular, the greater the degree of heterogeneity within a collective, the greater the internal costs of coordination and the greater the (internal and external) costs of compromise by the collective.¹⁸
 - a. **Coordination costs.** The internal costs of coordination are the internal transaction costs associated with negotiations among the collective parties towards a common position to present to the counterparty. If heterogeneity among the collective is sufficient, these internal transaction costs may, by themselves, outweigh savings in external transaction costs (i.e. the additional costs of negotiating bilaterally with the counterparty).
 - b. **Compromise costs.** In addition to internal coordination costs, there are costs of the compromises that must be made by the collective to reach a single agreement with the counterparty. These compromise costs will also increase with the degree of heterogeneity of the members of the collective and may fall on both members of the collective and society more generally. In particular, a collective is likely to adopt a

16 In each case the amount of the “pot” should not vary with the amount of news content actually used by the platform form year to year: see paragraphs 19-20.

17 See Stephen P. King (2013), “Collective Bargaining by Business: Economic and Legal Implications,” 36(1) *UNSW Law Journal* 107-138 at 113.

18 See King, above note 17, for an introduction to these concepts.

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compromise negotiating position and achieve an outcome from bargaining with the counterparty that fails to reflect the heterogeneity in the business models of the members of the collective and incentivises conformity among them. Not only will the collective members have incentives to converge on business models that are most rewarded by the compromise outcome, but innovative business models will be discouraged. This will harm both the collective members that are unable to differentiate themselves as they would like to do, and society more generally.

29. These dynamics can be further illustrated by considering the matters of originality and quality.

3.1.1. Originality

30. In the music industry, originality is easily identifiable and valued highly by both licensees (e.g. radio stations) and listeners. Original recordings are far more likely to be played and listened to than covers, and consequently attract greater royalties. Even where a “cover” of an original recording is played, or a recording that “samples” from an original, the original can usually be identified and will still attract a royalty payment reflecting its contribution. This system incentivises originality.
31. Originality in news content, by contrast, is often more difficult to establish and appropriate. One news media business might break a story, but another might quickly report on it using their own words and perhaps an alternative or additional angle. This second news item might then attract more attention (impressions and/or clicks) on a digital platform than the first. The second news media business might even claim their work to be original, and this may be difficult to dispute. News media business models might even be constructed around attracting user “attention” on digital platforms (impressions and clicks) without much original reporting, focusing instead on search engine optimisation (SEO) and other strategies to achieve high rankings on the platforms (e.g. publishing frequent “updates” without much additional content, if a platform’s algorithm prioritises recency).
32. Free riding effects therefore preclude news media businesses from appropriating all of the interest in an original story that they break, and in a mandatory collective bargaining framework these effects will create divergence of preferences among news media businesses regarding allocation methods. This is different to the music royalty situation where originality can more easily be identified and free riding more easily precluded. In the example given above, under mandatory collective bargaining the second news media business would prefer an allocation method based on user attention on the digital platform (similar to the allocation methods used for music royalties), whereas the first would argue that this would disincentivise the production of original content, and prefer alternative allocation methods that seek to identify and reward originality. Coordination within the collective is likely to be difficult to achieve with these diverging preferences. At the same time, a compromise by the collective (e.g. to allocate based on attention metrics) would disincentivise originality and incentivise efforts to attract attention.
33. Bilateral bargaining, by contrast, would allow diverse news media businesses to negotiate with digital platforms freely on the basis of their values and preferences, without the need to compromise on allocation methods with other news media businesses that may operate different business models.

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3.1.2. Quality

34. Another difference between news content and music is that attention-based metrics measuring the amount of listening to music recordings provide a reasonably good proxy for quality and value to society, and can be used as an allocation mechanism to reward quality, whereas the same is not the case for news content.
35. While one person might regard the recordings of Sting to represent high musical quality, another person might feel the same about the recordings of Mortal Sin (a thrash metal band of the same vintage). Ultimately, however, the amount that each artist's recordings are listened to is a reasonably good barometer of quality and value to society, unless one considers there to be a public interest concern with the broadcasting of a particular music genre (or artist).¹⁹ For this reason, it has not been too difficult for the music industry to settle on measures of listening as drivers for allocating blanket license fees to musicians.
36. By contrast, attention-based metrics, such as the number of impressions or clicks on digital platforms, may not reflect well the quality and value to society of news content. This is for at least two reasons.
- a. First, whereas high quality music will be listened to over and over again (generating more and more royalties for a high-quality artist) news content only need be read once to inform and fulfil a reader. This means that rewarding news content on the basis of impressions or clicks will under-reward high quality content (including in-depth and investigative journalism) and over-reward other content.
 - b. Second, the incentives of digital platforms when ranking news content may bear little relation to the quality of the content. Platforms have incentives to prioritise content that users want to see, to gain their attention. This may not be high quality or in-depth or investigative journalism. While "market" signals may be working here, this outcome may not be in the public interest, and an allocation method based on impressions or clicks may again under-reward high quality content. Platforms may also have incentives to prioritise content that is more likely to be clicked through to sites where the platforms will earn advertising revenues. Again, this may not be the highest quality content.
37. Since news media businesses differ in the quality of their content and the extent to which they invest in in-depth and investigative public interest journalism, and (unlike in the case of music) attention-based metrics do not provide good signals of quality, there is again likely to be disagreement among news media businesses in a mandatory collective bargaining framework regarding how to allocate a collective "pot". Some are again likely to favour attention-based metrics such as impressions or clicks, while others are likely to favour allocation methods that better reflect quality or the production of in-depth or investigative public interest journalism. Moreover, should an allocation method such as impressions or clicks ultimately be settled on for the collective, this would be likely to disincentivise high quality and public interest journalism.

¹⁹ Obviously, we don't mean Mortal Sin.

3.2. Advantages of a bilateral bargaining framework in the context of negotiations over multiple issues

38. Our review of the DPI Report and the Concepts Paper suggests a number of matters *in addition to monetary payments* that may be the subject of negotiation between news media businesses and digital platforms, including the matters set out below.
- a. **Access to data.** The Concepts Paper contemplates negotiations over sharing of data potentially taking place together with negotiation over monetary payments, given the monetary value that can be ascribed to data.²⁰ The Concepts Paper also observes that different news media businesses may value data sharing differently.²¹
 - b. **Branding.** Another matter that may be the subject of negotiations is how news media business brands are presented and promoted on the platform. Different news media businesses may have different preferences regarding this.
 - c. **Transparency.** Transparency of algorithms and of the nature of data on users collected by the platforms may be another matter that may be the subject of negotiations.
39. The advantages of bilateral bargaining over mandatory collective bargaining (i.e. avoiding coordination and compromise costs) increase if negotiations need to take place with digital platforms over multiple issues, as multiple issues will mean that the number of dimensions for disagreement within a mandatory collective of news media businesses will increase.

3.3. Disadvantages of a bilateral bargaining framework

40. The main disadvantage that we see of a bilateral bargaining framework is the additional transaction costs associated with a potentially large number of negotiations and potential arbitrations, given the fragmentation of the news media sector. Bilateral bargaining sacrifices the benefit of economies of scale in negotiations offered by mandatory collective bargaining: the negotiation costs borne by each news media business will be greater if negotiations are not pooled and the costs are not shared, and there will also be greater costs for the platforms.²² Higher transaction costs may also result in more incomplete contracting (i.e. failure to agree on terms and conditions that would be mutually beneficial).²³ These disadvantages must be balanced against the benefits of bilateral bargaining discussed above.
41. The disadvantages of bilateral bargaining may be mitigated to some extent. One possibility would be for the mandatory code to provide that only publishers above a certain size have a right to bargain bilaterally with the platforms, and that small publishers must bargain collectively. Such a provision may not even be necessary: at some point economies of scale are likely to incentivise smaller news media businesses to voluntarily form collectives to negotiate with the digital platforms, rather than attempt bilateral negotiations.
42. If a size cut-off for bilateral bargaining were included in the code, it should reflect the different news media business models and not favour one business model over another.

20 Concepts Paper, page 16.

21 Concepts Paper, page 17.

22 See King, above note 17, at 113.

23 See King, above note 17, at 114.

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For example, the size cut-off might allow a news media business to engage in bilateral bargaining with the digital platforms if it is considered sufficiently large based on at least one of a number of measures: e.g. proportion of impressions on the digital platform; unique audience; and/or number of subscribers.

43. Such a system would not need to be static and could evolve with the news media sector. For example, if a news media business declined in size over time, it may not be entitled to bilateral bargaining when its existing agreement expires and would have to move into the mandatory collective. Conversely, a news media business that grew over time may be permitted to enter into bilateral bargaining with the platforms once it has maintained a size above the threshold for a non-trivial period of time.
44. We appreciate that, regardless of how news media businesses are classified, a size cut-off may be contentious. However, if preference heterogeneity among news media businesses tends to diminish with size, mandatory collective bargaining for smaller news media businesses may be viewed as an acceptable expediency. If heterogeneity remains a concern, a possibility might be to allow news media businesses that do not qualify for bilateral bargaining to nominate one or the other of two or more collectives. For example, if remaining differences in preferences among smaller news media businesses were driven by differences in valuation of data, one mandatory collective might represent small news media businesses with strong preferences for access to data and another might represent the rest.

3.4. Conclusion on bilateral v mandatory collective bargaining

45. While mandatory collective bargaining offers an advantage of savings in external transaction costs between the digital platforms and news media businesses, the extent of heterogeneity in the business models, nature of content and incentives of news media businesses will result in significant internal coordination costs and significant costs of compromise, for both news media businesses and the public generally, including an adverse impact on original and quality journalism. While these internal coordination and compromise costs will depend on the extent to which matters in dispute between the digital platforms and news media businesses are directly codified in the mandatory code of conduct, we consider that bilateral bargaining is likely to be more efficient and socially preferable to mandatory collective bargaining, in relation to both monetary payment and other matters.

4. ALTERNATIVE ARBITRATION FRAMEWORKS

46. In this section we consider two alternative arbitration frameworks that the ACCC might consider when developing the mandatory code of conduct, should the ACCC prefer a negotiate/arbitrate framework for addressing the bargaining power imbalance. These alternative frameworks are conventional arbitration (CA) and final offer arbitration (FOA). The observations in this section apply equally whether the mandatory code of conduct specifies bilateral or mandatory collective bargaining, unless otherwise stated. This section first provides a brief overview of the alternative arbitration frameworks and the arguments for and against FOA. The rest of the section introduces a number of design choices that would need to be considered if the mandatory code of conduct were to prescribe FOA.

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4.1. Conventional arbitration and final offer arbitration

47. Both CA and FOA, as compulsory arbitration schemes, have the attractive property of bringing the digital platforms to the bargaining table and promising a resolution of matters in dispute between the digital platforms and news media businesses, including monetary payments for news content.
48. Under CA, arbitrators have the power to impose their own outcome, which may be the same as the best offer of one of the parties or different from the best offers of each of the parties. Under FOA, by contrast, the arbitrator is unable to impose their own outcome and must choose one of the “final offers” presented by the parties.
49. CA has been criticised for having a “chilling effect” on commercial negotiations and increasing the length and costs of disputes.²⁴ The concern with CA is that parties enter negotiations with an expectation of a likelihood that if the matter reaches arbitration the arbitrator will “split the difference” (i.e. find a middle ground) between the parties’ positions. This is said to lead to “positional” negotiations: during negotiations parties have incentives to establish extreme positions in the hope of skewing the arbitrator’s award in their favour, and corresponding disincentives to make compromises toward the “middle”. CA is therefore seen as an obstacle to good-faith bargaining in negotiations. Note that it does not matter whether the arbitrator actually “splits the difference”. The potential for the arbitrator to do so is what impacts the parties negotiating incentives and positions.
50. The primary purpose of FOA is to remove incentives for positional negotiation to counteract the chilling effect, instead incentivising the parties to come closer together in the negotiation stage and reach negotiated settlements more frequently. The theory is that by precluding a “split the difference” arbitration outcome, parties are less likely to maintain extreme positions and are more likely to find common ground and settle the dispute before arbitration:²⁵ each party has incentives to prepare offers that are reasonable, bringing both to a “middle ground”. As Abrams has explained: “[w]inning means being more reasonable, which is the key that unlocks the door to settlement”.²⁶ The primary purpose of FOA is therefore to more often achieve negotiated outcomes and avoid arbitration altogether. Efficiency in dispute resolution is therefore the primary purpose of FOA.²⁷
51. The theoretical benefits of FOA over CA extend beyond reducing the chilling effect and increasing rates of negotiated settlements. Even if parties do not reach a negotiated settlement and arbitration takes place, FOA provides the parties with incentives to bring reasonable “middle ground” positions to the arbitration, in the knowledge that the arbitrator is more likely to choose a reasonable offer over an extreme offer. Each party faces a trade-off in devising its final offer: if they submit an extreme offer they have a chance of a windfall gain, but if the other party submits a more reasonable offer there is a much higher chance

24 See P. Feuille (1975), “Final Offer Arbitration and the Chilling Effect,” 14(3) *Industrial Relations*, October 1975, pp. 302-310.

25 Carl M. Stevens (1966), “Is Compulsory Arbitration Compatible with Bargaining?”, 5(2) *Journal of Industrial Relations* pp. 38-52 at 46.

26 Roger Abrams (2000), *The Money Pitch: Baseball Free Agency and Salary Arbitration*, Temple University Press, p. 153.

27 Benjamin A. Tulis (2010), “Final Offer ‘Baseball’ Arbitration: Contexts, Mechanics & Applications,” 20(1) *Seton Hall Journal of Sports and Entertainment Law* pp. 85-130 at 89.

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that the extreme offer will not be accepted. As noted by Stevens, "[E]ach party may assume that the arbitrator will reject an 'exaggerated' position in favor of an opponent's more moderate claim."²⁸

52. FOA also offers the prospect of quicker and more efficient resolution of disputes compared to CA.²⁹ There are three aspects to this. First, protracted negotiation periods under CA – with each party maintaining extreme positions and preparing arguments for arbitration – can be avoided, as the parties are incentivised to exchange reasonable offers and are more likely to reach settlements ahead of arbitration. Second, the arbitration stage itself can be much shorter as the arbitrator only needs to make a decision between two offers and does not need to prepare a lengthy reasoned statement justifying their own outcome. Third, since the arbitrator has limited discretion, there is no basis for any appeals process: the FOA arbitrator's decision is final.
53. While some have disputed the theoretical basis for the benefits of FOA over CA described above,³⁰ FOA has been employed in a number of countries since it was first proposed in the 1960s (including the US, Canada, the UK and New Zealand) and in a range of contexts, from collective bargaining over public sector employment terms and conditions to tax disputes, disputes in the transport and telecommunications sectors and disputes over terms and conditions for the supply of TV channels to distributors. A number of studies of real-world implementations of FOA compared to CA, and anecdotal reports, suggest that FOA increases rates of negotiated settlements and narrows the "gaps" between the positions of the bargaining parties.³¹ The fact that FOA has been continuously operating in a number of contexts in the US for decades (in particular, for baseball salary negotiations and in the context of public sector collective bargaining regimes in many US states) suggests that FOA has generally been successful in these settings.
54. One concern that has been raised with FOA is the risk that the arbitrator will be forced to choose between two unreasonable proposals. However, this concern may not be a realistic one,³² and in any event seems to be specific to "package" FOA – a particular form of FOA to deal with multiple issues in dispute – and may be addressed by an alternative form of FOA called "issue by issue" FOA. Research also suggests that transparency of the offers may help avoid instances of duelling unreasonable offers.³³ At the end of the day, the FOA scheme can only offer improved incentives for the parties to negotiate and submit

28 Carl M. Stevens (1966), "Is Compulsory Arbitration Compatible with Bargaining?", 5(2) *Journal of Industrial Relations* pp. 38-52 at 46.

29 See Tulis, above note 27, p. 107

30 See, for example, S.J. Brams and S. Merrill III (1983), "Equilibrium Strategies for Final-Offer Arbitration: There is no Median Convergence," 29 *Management Science* 927-941.

31 A number of studies of the effectiveness of FOA relative to CA in the context of employment disputes are identified and discussed in the Annex to this Report. Although based on limited data, these studies, together with anecdotal evidence from other contexts, suggest that FOA has been more effective than CA in achieving negotiated settlements and narrowing the range of offers made at arbitration.

32 See Powers, B. (2019), "An Analysis of Dual-Issue Final-Offer Arbitration", 48 *International Journal of Game Theory* pp. 81–108 at pp. 82 - 83.

33 See Carell, M. and Bales, R. (2013), "Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining", 28(1) *Ohio State Journal on Dispute Resolution* pp. 1-36 at 31-32 and Justin Kelly (2009), "Study of Final-Offer Arbitration," 63(4) *Dispute Resolution Journal* 8-9.

reasonable proposals in arbitration: it cannot completely govern their behaviour. However, we have not come across any evidence in the literature that two unreasonable proposals is a frequent occurrence in FOA contexts.

55. Another concern that sometimes appears in the literature is that one party might be undercompensated or overcompensated for the good or service it provides. Concerns of this nature need to be evaluated carefully. There is a high likelihood that any arbitration (CA or FOA) will result in an outcome in which at least one party considers that it is undercompensated or paying too much for the good or service in dispute. Some claims of over or under compensation may derive from concerns that compulsory arbitration forces a party that would have leverage over another party in the absence of arbitration to make concessions that it would not otherwise have had to make. If the goal of an arbitration framework is to address that bargaining leverage, it is that goal that creates the issue, not the form of arbitration per se.

4.2. Design choices for FOA

56. If the mandatory code of conduct were to incorporate FOA, a number of design details should be considered and potentially also codified.

4.2.1. “Package” or “issue by issue” offers

57. Commercial negotiations between digital platforms and news media businesses may include many matters in addition to monetary payments. Some of these other matters are listed in paragraph 38 above. FOA is capable of resolving multi-issue disputes and it is commonly used in multi-issue contexts, for example in public sector collective bargaining contexts. A design choice to make here is whether the parties should submit “package” final offers that address all of the disputed issues, with the arbitrator choosing one of those packages in its entirety, or “issue by issue” final offers, with the arbitrator choosing the most reasonable final offer of each party in respect of each issue.
58. A concern that has been raised with the package approach is that it may provide an incentive for one or both parties to take extreme positions in respect of just some of the issues that are the subject of debate. If extreme positions on a subset of issues are taken by both sides, the arbitrator may find it impossible to choose a reasonable offer. Alternatively, the arbitrator may find it difficult to weigh up the two different offers, particularly if one is reasonable except for a few elements and the other is generally less reasonable, but more consistent.
59. A possible mechanism to mitigate (though not eliminate) these issues would be for the parties in a multi-issue arbitration to be allowed to submit multiple offers (e.g. two offers each). We discuss this further below. We also note that while this concern has been expressed, it may be more a theoretical concern than a practical one. As mentioned earlier, we have not come across any evidence in the literature that two unreasonable proposals is a frequent occurrence in FOA contexts, and Powers (2019) finds that both players’ optimal strategy in a multiple-issue FOA setting is to make all final-offers reasonable, irrespective of whether the “package” or “issue-by-issue” approach is applied.³⁴

³⁴ Powers, B. (2019), “An Analysis of Dual-Issue Final-Offer Arbitration”, 48 *International Journal of Game Theory* pp. 81–108 at 82.

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60. Under the “issue-by-issue” approach, the parties cannot try to “railroad” an arbitrator into an extreme position on one issue by packaging it with a set of reasonable positions on the other issues. Another potential advantage of the “issue by issue” approach is that it gives an opportunity for the parties to consider reasonable offers in relation to each issue and may increase the likelihood of reaching pre-arbitration settlements on some issues, thereby reducing the number of issues remaining in dispute for arbitration. Conversely, Powers (2019) argues that the additional variance in the awards and higher risk for each party under the “package” approach acts as a greater motivator for the parties to reach agreement during negotiations.³⁵
61. An obvious disadvantage of the “issue by issue” approach is that it limits the scope for the parties to trade their preferred positions on the various issues to arrive at a settlement pre-arbitration and, more generally, to bargain over holistically conceived integrated packages of inter-related issues. For example, an employee union would be unable to “trade” vacation time for pension benefits or vice-versa. Related to this, the “issue by issue” approach precludes the arbitrator from being given holistic solutions and choosing between these.
62. It has also been argued that the “issue-by-issue” approach may reintroduce the chilling effect on negotiations that FOA is designed to avoid, because with multiple issues to be decided the arbitrator can effectively adopt a “split the difference” approach by choosing the offers of one party with respect to half the issues and the offers of the other party with respect to the other issues. The concern is that this may discourage the parties from reaching a negotiated settlement, defeating the primary purpose of FOA. This concern is not well founded. Even though an arbitrator could “split the difference” across multiple issues, the parties have no way of knowing pre-arbitration which issues the arbitrator will choose to find in their favour, and therefore retain the desirable incentives of FOA to make reasonable offers on each and every issue.³⁶
63. Whether “package” or “issue by issue” FOA is preferable remains an open question. In the context of public employment collective bargaining in the US, state governments that have adopted FOA have typically codified one or other of these methods, with roughly half choosing “package” FOA and the other half choosing “issue by issue” FOA.³⁷ The fact that after a number of decades they have not converged on one approach suggests that both methods can operate effectively.
64. It is also possible to combine the approaches, and this has been done in some public sector collective bargaining disputes in the US and also tax treaties. For example, issues that

35 Powers, B. (2019), “An Analysis of Dual-Issue Final-Offer Arbitration”, 48 *International Journal of Game Theory* pp. 81–108 at 82-83.

36 See Tulis, above note 27, at 104.

37 According to Carell and Bales, of the 12 States that have codified FOA and the form of FOA, five have codified “issue by issue” FOA, six have codified “package” FOA and one (New Jersey) allows for a range of methods including a “package” method (for non-economic issues) and an “issue by issue” method (for economic issues); see Carell, M. and Bales, R. (2013), “Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining”, 28(1) *Ohio State Journal on Dispute Resolution* pp. 1-36, Table 2 at 24-25.

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both parties agree are inter-related might be dealt with using “package” FOA, while all other issues might be dealt with using “issue by issue” FOA.³⁸

4.2.2. Multiple final offers

65. In principle, FOA might take the form of each party submitting two (or more) final offers. In a multi-issue context under “package” FOA, this would, for example, allow the parties to submit a final offer that is restricted to one issue only (with the status quo to prevail on the other issues) and an alternative final offer that makes some claim or concession in regard to a second issue. A more sophisticated form of multiple final offers has been contemplated in the theoretical literature, called “double offer” arbitration (DOA).³⁹ While DOA is claimed to improve negotiating incentives and convergence pre-arbitration, we are not aware of any real-world implementation of DOA.

4.2.3. Timing of offers

66. It is obviously important that the procedural rules for FOA allow adequate time for negotiations between the parties, as settlement of the dispute prior to arbitration is the main goal of FOA. The parties should be encouraged to make a number of offers during negotiation prior to their final offers, to create an environment in which the parties can battle over the reasonableness of their offers.⁴⁰ It is also desirable that the final offers be submitted and exchanged (simultaneously) well in advance of the arbitration hearing and disclosed to each party, to allow further negotiation and opportunity for settlement prior to the hearing.

4.2.4. Nature of the arbitrator

67. The arbitrator should ideally have the following three characteristics: independence, considerable experience as an arbitrator and digital platform industry knowledge. Since it may be difficult to identify a single person with all of these attributes, a panel of three independent arbitrators might be considered (e.g. one with considerable legal and arbitration experience, another with economic expertise and a third with digital platform industry expertise). Use of a fact-finder might also be considered if an arbitrator or arbitration panel with the required industry knowledge cannot be identified (see below).

38 According to Petruzzi et al, the “issue by issue” approach is the approach set out in the Memorandum of Understanding associated with the US-Canada international tax treaty, except for where issues are inter-related, in which case the US and Canada may agree to present “package” offers: R. Petruzzi, P. Koch and L. Turcan, *Baseball Arbitration in Comparison to Other Types of Arbitration*, Chapter 6 of M. Lang and J. Owers, *International Arbitration in Tax Matters*, International Bureau of Fiscal Documentation, Amsterdam, 2nd Ed. 2015, pp. 139 – 158 at 143..

39 See Dao-Zhi Zeng, Shinya Nakamura and Toshihide Ibaraki (1996), “Double-Offer Arbitration,” 31(3) *Mathematical Social Sciences* 147-170.

40 As Abramsom has put it: “[i]nstead of participants posturing about who will win in court (or arbitration), they posture about who will resent the more reasonable final offer. Instead of settlement offers consisting of painful compromises of positions ... they consist of proposals that harmonize with the final offers that will be submitted to the arbitrator”: Harold I. Abramsom (2013), *Mediation Representation: Advocating as Problem Solver*, 3rd Ed., p. 448.

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4.2.5. Use of fact-finders

68. Some FOA schemes allow for the use of a “fact-finder”: an independent third party that provides assistance to the arbitrator. This may be worth consideration given the complex issues involved in disputes between digital platforms and news media businesses, particularly if the arbitrator does not have the required industry knowledge. In Canada, arbitrators of transport disputes are able to request assistance from the regulator.⁴¹ If fact-finders of this kind were allowed, the parties should be allowed to see and comment on any report of the fact-finder.
69. Fact-finders may also improve the information sets of the parties, assisting them to come closer together in their positions and potentially reducing the number of issues that the parties ultimately submit to the arbitrator. They may therefore have added value in a FOA context even if the arbitrator has their own industry expertise.
70. In some FOA schemes, fact-finders are allowed to make a third “offer” to the arbitrator that the arbitrator may choose. This is referred to as “tri-offer” arbitration. We do not recommend “tri-offer” arbitration. The existence of a third offer has the potential to alter the incentives of the parties and recreate the “chilling effect” on negotiations that FOA is designed to overcome.⁴²

4.2.6. Criteria that the arbitrator may or may not take into account

71. It is common for FOA schemes to include specification of criteria that the arbitrator may or may not take into account when choosing between the final offers. According to Tulis (2010), the ideal list is short, but detailed, to limit arbitrator discretion.⁴³
72. The Concepts Paper sets out several criteria that may be relevant for an arbitrator to consider when choosing between offers:
 - a. The value of news content to digital platforms;
 - b. The value news media businesses derive from the presence of news on digital platforms;
 - c. The value of the availability of news content to digital platform users;
 - d. The cost of producing news content (although the ACCC observes that the cost of producing news may have no direct or indirect link with its value to the digital platforms); and
 - e. Market benchmarks, if any can be found.
73. Given the aim of the mandatory code of conduct to address the bargaining power imbalance between digital platforms and news media businesses, it will be important for the criteria to clarify that the value of news content to the digital platforms should not be measured by reference to the *marginal* value to the digital platform of a particular news media businesses content assuming all other news content would remain available to the digital platform.

41 Canada Transportation Act, Part IV, 159 and 169.

42 If each party believes that the fact-finder will take the “middle-ground” and submit an offer that sits somewhere in-between their own, they each have an incentive to make their final offers more extreme than they would in the absence of the third-party offer. See Tulis, above note 27, at 99.

43 Tulis, above note 27, pp. 128-129.

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Adoption of such a measure as a criterion for assessment of the final offers would perpetuate the bargaining power imbalance that the mandatory code of conduct is supposed to address.⁴⁴

74. A further criterion that might be specified is the extent to which the offers promote original content and quality journalism in Australia. According to a PaRR news report dated 19 May 2020, in a conference call soon after the release of the Concepts Paper, ACCC Chairman Rod Sims noted the potential for news media businesses to quickly “create a whole lot of news items which aren’t very well put together” and posed the following question: “[h]ow do we actually get a bias to the sort of journalism that adds to democracy and our society?”⁴⁵ Limiting the criteria to the value of the content of the news media business to the digital platform (even with the adjustments suggested above) and the value the news media business derives from the presence of its content on the platform, or attempting to measure value using attention measures such as impressions or clicks on a platform, may fail adequately to reward the public interest value of certain news content.

44 A further observation regarding the value of news content to the digital platforms is that the total value of *original* content (including the original output of investigative journalism) cannot be measured by reference to impressions or clicks directly in relation to that content, because without that original content, many of the impressions and clicks directly in relation to follow-on content published by other news media businesses would not have occurred. Moreover, to the extent that the availability of the follow-on content on a platform enhances users’ perceptions of the quality of the platform overall and allows the platform to earn indirect (“spill-over”) revenues, some of this should, in principle, be attributable to the original content.

45 Sam McKeith, “ACCC chief labels revenue sharing ‘key issue’ in code between tech giants and media outlets”, PaRR, 19 May 2020.

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ANNEX: PRACTICAL APPLICATIONS OF FINAL OFFER ARBITRATION

75. This Annex reviews practical applications of final offer arbitration (FOA) around the world for the resolution of various types of disputes.
76. FOA has been used extensively in the United States (US), Canada and New Zealand for the resolution of salary and other employment disputes, including in Major League Baseball (hence the term “baseball arbitration” that is often given to FOA) and public sector employment disputes (e.g. for the determination of police and firefighter terms and conditions under collective bargaining). It has also been used in the United Kingdom for the resolution of employment disputes in the private sector.
77. FOA has also been used in a range of other contexts, including disputes in the transport, telecommunications and broadcasting sectors, domestic and international tax disputes and medical insurance disputes.⁴⁶ A notable application of FOA has been its incorporation into conditions for vertical merger clearance in Comcast/NBCU to assist the resolution of audio-visual content carriage disputes between Comcast/NBCU and cable and online distributors.
78. In Australia, consideration has been given to the introduction of FOA in the context of negotiate/arbitrate frameworks for access to essential infrastructure. In particular, in 2017 the Gas Market Reform Group (GMRG) considered whether to adopt FOA as the arbitration mechanism in its proposed negotiate/arbitrate framework for disputes between shippers and gas pipelines.⁴⁷ And in 2018, in the context of the Productivity Commission’s review of the economic regulation of airports, Airlines for Australia and New Zealand (A4ANZ) – an aviation industry group – proposed that FOA be introduced as part of a negotiate/arbitrate framework for access to airside services provided by Australian airports.⁴⁸ Although some consideration was given to these proposals, they were not adopted.

A.1 Salary and Other Employment Disputes

A.1.1 United States

79. In the US, FOA has been in use for close to 50 years in salary and other employment disputes, including Major League of Baseball (MLB) salary disputes between contracted players and their teams, and to resolve public sector employment-related disputes in many US states.

⁴⁶ FOA is believed to have been used as early as in Ancient Greece, during the trial of Socrates: see Ashenfelter, O., J. Currie, H.S. Farber and M. Spiegel, “An Experimental Comparison of Dispute Rates in Alternative Arbitration Systems,” 60 *Econometrica* 1407-1433 at 1408.

⁴⁷ Gas Market Reform Group, Gas Pipeline Information Disclosure and Arbitration Framework: Implementation Options Paper March 2017 at and Gas Market Reform Group, Gas Pipeline Information Disclosure and Arbitration Framework: Final Design Recommendation, June 2017 at <http://gmrq.coagenergycouncil.gov.au/publications/gas-pipeline-information-disclosure-and-arbitration-framework-implementation-options> and <http://gmrq.coagenergycouncil.gov.au/publications/gas-pipeline-information-disclosure-and-arbitration-framework-final-design>

⁴⁸ See: https://www.pc.gov.au/data/assets/pdf_file/0007/231379/sub044-airports.pdf

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Major League Baseball Salary Disputes

80. The use of FOA for the determination of MLB player salaries was introduced in 1974 at a time when MLB teams had the right to retain players for their entire career.⁴⁹ FOA afforded players with some protection from being locked-in to a team for an indefinite period by allowing them to test their market value based on their performance. Although the rules have since changed, teams still have the right to retain players for their first six years of service in the MLB.⁵⁰ Due to this lock-in, players with three to six years of service are entitled to file for FOA when they cannot reach agreement with their team over their salary for the upcoming season.⁵¹
81. Players can file for FOA in early January, with salary offers exchanged shortly thereafter. If the player and the team are unable to come to an agreement, the matter will be heard by a panel of arbitrators by mid-to-late February.⁵² The arbitration panel, which is comprised of three arbitrators, is required to make a decision within 24 hours of the hearing.⁵³ One reason why FOA is so quick in this context is that the only issue in dispute is the player's salary, not any other terms and conditions of employment.⁵⁴
82. Although a significant number of MLB players invoke arbitration, the vast majority come to a negotiated settlement before the arbitration hearing. According to Vishwanathan (2019), over the period from 2011 to 2017 inclusive, players and teams exchanged final offers 269 times, with the parties proceeding to an arbitration hearing on only 45 occasions (i.e. less than 17% of the time).⁵⁵ This understates the settlement rates of FOA in MLB, as many disputes are settled before final offers are filed. For example, according to Tulis (2010), in the 2009 season 111 players filed for arbitration, 46 exchanged numbers with their respective teams and only three continued to a hearing (implying a settlement rate of 2.7%).⁵⁶ Similarly, Monhait (2013) reports that out of 119 players that filed for salary arbitration in 2011, only three (2.5%) went to hearings, and for the 2012 season out of 142

49 Tulis B.A., (2010), "Final Offer "Baseball" Arbitration: Contexts, Mechanics & Applications", *Seton Hall Journal of Sports and Entertainment Law*, Vol. 20, No. 1, pp. 85-130 at 91.

50 After six years a player becomes what is known as a free agent and is able to negotiate with other teams. With alternative options, it is rare for free agents to seek arbitration with their existing team.

51 FOA is also available to a special class of players called "Super 2s". A Super 2 is a player who has between two and three years of service time, has at least 86 days of service time during the second year and ranks in the top 22 percent of players who fall into that classification. See: <https://www.sportingnews.com/us/mlb/news/mlb-salary-arbitration-process-breakdown-spring-training-2016/4jkawqkcz8i17cb4rhqjxseh>.

52 Sievert, J., Breaking down the MLB salary arbitration process at: <https://www.sportingnews.com/us/mlb/news/mlb-salary-arbitration-process-breakdown-spring-training-2016/4jkawqkcz8i17cb4rhqjxseh>.

53 Abrams, Roger, 'Inside baseball's salary attribution process'. The University of Chicago Law School Roundtable, vol. 6, no. 1, 1999, p. 55 at: <https://chicagounbound.uchicago.edu/roundtable/vol6/iss1/6/>

54 Carell, M. and Bales, R., "Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining", *The Ohio State Journal on Dispute Resolution*, Volume 28, No. 1, 2013, pp. 1-36 at 19.

55 Vishwanathan, N.S., (2019), "File and Trial: Examining Valuation and Hearings in MLB Arbitration," Spring 2019 *Baseball Research Journal* at: <https://sabr.org/research/file-and-trial-examining-valuation-and-hearings-mlb-arbitration>.

56 Tulis B.A., (2010), "Final Offer "Baseball" Arbitration: Contexts, Mechanics & Applications", *Seton Hall Journal of Sports and Entertainment Law*, Vol. 20, No. 1, pp. 85-130 at 90.

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players that filed, only seven (5%) went to hearings.⁵⁷ This suggests that FOA works much as intended in the MLB context, by promoting the parties reaching negotiated settlements and avoiding arbitration.

83. Vishwanathan studies what happens between the moment that final offers are filed and the hearing. Vishwanathan finds that players and their teams are less likely to proceed to hearings the larger the difference in their final offers: in the aggregate sample of players, an increase of \$100,000 in the bid difference reduced the likelihood of a hearing by 2.7 percent.⁵⁸ This suggests that when players and the teams for which they play are widely apart in their views of the player's value, fear of losing at arbitration provides them with strong incentives to reach negotiated settlements, and that when arbitration hearings do occur it is likely to be when any remaining differences between the parties' positions by the time of their final offers are small.

Public Sector Employment Disputes

84. Since the early 1960s various US state governments have allowed public sector employees to collectively bargain but have not allow them to strike. Absent the ability to strike, employees require an alternative form of dispute resolution such as mediation or arbitration to resolve bargaining impasses. FOA was introduced as one form of arbitration of public sector employment disputes in the early 1970's in Oregon, Michigan and Wisconsin⁵⁹ and by 2013 FOA had been codified in legislation in at least 14 US states.⁶⁰
85. In some states FOA is limited to disputes over salaries, wages, or other entitlements (referred to as "economic" issues). In others, "non-economic" issues may also be considered, such as whether police officers are permitted to carry guns while off-duty.⁶¹
86. Disputes that involve a wider range of issues than salary and benefits alone can be determined on a "package" basis or an "issue-by-issue" basis. Some states such as Michigan, Iowa and Ohio adopt an issue-by-issue approach, whereas others such as Washington, Oregon, Illinois, and Indiana adopt the package approach.⁶² At least one state, New Jersey, takes a hybrid approach: where the parties do not agree on an available method of arbitration, the arbitrator can accept package offers in relation to economic elements and issue-specific offers in relation to non-economic elements.⁶³

57 Jeff Monhait (2013), "Baseball Arbitration: An ADR Success," 4 *Harvard Journal of Sports & Entertainment Law* 105-143 at 138-139.

58 Ibid.

59 FOA was utilised in disputes involving the Eugene (Oregon) city government as early as 1972 and was also used by labour groups in Michigan and Wisconsin from 1973. See Feuille, P., (1975), "Final Offer Arbitration and the Chilling Effect," *Industrial Relations*, Vol. 13, No. 3, October 1975, pp. 302-310.

60 Carell, M. and Bales, R., "Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining", *The Ohio State Journal on Dispute Resolution*, Volume 28, No. 1, 2013, pp.1-36 at 23.

61 Ibid, pp. 24 – 25.

62 Ibid, pp. 24 – 25.

63 Ibid, pp. 24 – 25.

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87. Early studies of FOA in the context of US public sector employment disputes suggest that FOA has been effective in achieving a higher rate of negotiated settlements after arbitration had been invoked.
- a. Feuille (1975) reports, based on studies by others, that over the period 1973 to 1974, following the implementation of FOA in Michigan and Wisconsin, the proportion of all negotiations involving public safety workers that were determined in arbitration was only around 10-12%, compared to 19% in Michigan in 1969-1971 under CA.⁶⁴
 - b. Stern (1975) found that in Michigan the proportion of negotiations that settled before arbitration rose from 39% to 64% following the switch from CA to FOA.⁶⁵
 - c. In a study of arbitration experience in New York City, Pennsylvania, Michigan, Minnesota, Wisconsin, Massachusetts, New York, Iowa, and New Jersey, Lester (1984) reportedly found that arbitration usage rates were significantly lower in states with FOA than they were in states with CA.⁶⁶
88. Another study suggests that FOA was more successful than CA in achieving convergence of final offers. In 1997, in response to dissatisfaction with what were viewed as overly generous awards being made in favour of police officers and firefighters, New Jersey switched from the use of FOA to CA. Stokes (1999) found that following this switch, the average spread between the final positions of the parties increased from 29% in 1995 and 1996 to 44% in 1997 and 55% in 1998.⁶⁷

A.1.2 United Kingdom

89. In the United Kingdom, FOA was voluntarily implemented at a small number of privately owned plants in the 1980's, often in combination with strike-avoidance or no-strike clauses in bargaining agreements with unions (although such clauses were not legally enforceable).⁶⁸ The form of FOA differed between plants with some requiring the parties to go to mediation before arbitration in the event that they could not reach agreement and some allowing for arbitration only at the request of both parties (i.e. one party could not force an arbitrated outcome on the other; both parties had to agree to the arbitration for it to proceed). In a 1992 study of 72 plants that recognised unions for bargaining, Metcalf and Milner found that 44 had some form of arbitration mechanism in place, of which 27

64 Feuille, P., (1975), "Final Offer Arbitration and the Chilling Effect," *Industrial Relations*, Vol. 13, No. 3, October 1975, pp. 302-310.

65 As summarised in Stevens, C. (1976), "Final Offer Arbitration", *The Journal of Business*, Vol. 49, pp. 574 - 575, at p.575.

66 Lester, R.A, (1984). *Labor Arbitration in State and Local Government: An Examination of Experiences in Eight States and New York City* (Princeton, NJ: Princeton University, 1984) as reported in Lipsky, D., and Katz. H., (2006). "Alternative Approaches to Interest Arbitration: Lessons from New York City", *Public Personnel Management*, Vol 35, No. 4, p. 10.

67 Stokes, G. (1999), "Solomon's Wisdom: An Early Analysis of the Effects of the Police and Fire Interest Arbitration Reform Act in New Jersey," *Journal of Collective Negotiations*, Vol. 28, pp. 219 – 231 at 228.

68 Metcalf, D. and Milner, S. (1992), "Final Offer Arbitration in Great Britain: Style and Impact", *National Institute Economic Review*, No. 142, pp. 75-87. Metcalf and Milner note (at p. 75) that plants that introduced FOA were predominantly greenfield plants owned by foreign, often Japanese, hi-tech companies. In many cases the Electrical, Electronic, Telecommunications and Plumbing Union (EETPU) was a co-signatory to the agreement. They also note that some FOA arrangements existed in the Victorian and Edwardian era.

relied on FOA and 17 relied on CA. In assessing the relative effectiveness of FOA and CA the authors found that FOA did not deter disputes more effectively than non-FOA procedures, but did out-perform CA in deterring disputes when it was coupled with conciliation and/or mediation. The authors concluded that an unaccompanied mediation/conciliation procedure will be made more effective by the addition of FOA rather than CA.⁶⁹

A.1.3 New Zealand

90. In New Zealand FOA was available over the four years between 1988 and 1991 as a means of resolving bargaining disputes involving government employees (provided that both parties to the dispute elected to forgo strike action or lockouts).⁷⁰ Over those four years FOA was used infrequently, with the option removed for most of the public sector in 1991. The police force is currently the only occupation for which compulsory arbitration of wage disputes still occurs.⁷¹
91. The FOA system has evolved over time with major changes made in 1995 with the establishment of the *Police Negotiations Framework* (PNF). These changes were designed to address perceived problems with the then existing framework, which were thought to have contributed to a confrontational nature of the 1993–1994 negotiations.⁷²
92. One of the main changes made over this period related to the involvement of the arbitrator in the mediation process (at that time there was only one arbitrator). In the 1997 negotiations both the mediator and arbitrator sat through all the bargaining sessions at the mediation stage. At this point in the process the matter had not yet been referred to arbitration: the arbitrator was simply an observer. When the matter was referred to arbitration the arbitrator was required to issue an interim decision,⁷³ with reasons, setting out which party's position he would accept based on the information acquired over the course of negotiations. Following the interim decision the parties engaged in further negotiations, with the arbitrator again sitting in as an observer. The matter proceeded to FOA with the arbitrator ultimately deciding in favour of the Commissioner of Police.
93. In a later review of the negotiation framework, stakeholders generally endorsed the presence of the arbitrator throughout negotiations at the mediation stage as this was thought to have influenced the behaviour of the negotiators and enhanced the arbitrator's understanding of the issues prior to making his decision. Concerns were raised over the requirement of the arbitrator to issue an interim decision. This requirement was thought to have a chilling effect on negotiations, with neither party willing to compromise until the issue of the interim decision. However, both parties were of the view that some form of feedback from the arbitrator was important to the success of the process. Following that round of negotiations, the PNF was amended so that, at any stage during the mediation phase,

69 Ibid, p. 82.

70 McAndrew, I., (2003), "Final-Offer Arbitration: A New Zealand Variation", *Industrial Relations*, Vol. 42, No. 4, pp. 736 – 744, at p. 737. McAndrew notes that prior to 1988 New Zealand had a stable compulsory conciliation and arbitration system for private-sector interest disputes. See p. 737.

71 This is the case for sworn officers of the police, being those with law enforcement powers, not support staff, with the current system provided for in the Police Act. Ibid, p. 737.

72 Ibid, p. 739.

73 At the time this was required under the PNF.

either or both parties could request feedback from the arbitrator on their present positions with the arbitrator required to provide a reasonable level of feedback in order to guide the parties toward settlement.⁷⁴

94. Under the current system, disputes are heard by more than one arbitrator selected by the Commissioner of Police and the service organisations that are party to the dispute.⁷⁵ The parties have the freedom to devise their own procedures for the arbitration, although at the conclusion of proceedings the arbitrator must choose one or the other final offer in its entirety (i.e. package arbitration applies).

A.2 Transport Disputes

A.2.1 Canada

95. In Canada, FOA was introduced in 1987 as one of a number of options available to shippers to resolve disputes with carriers.⁷⁶ Under the *Canada Transportation Act 1996* (the Transportation Act), subject to a few exclusions, FOA can be used to resolve disputes concerning the carriage of goods by air, rail or water.⁷⁷
96. The key elements of the FOA framework, as set out in Part IV of the Transportation Act, are as follows:⁷⁸
- a. A shipper that is dissatisfied with the rates charged or proposed to be charged by a carrier, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Canadian Transportation Agency (the Agency) for FOA.
 - b. The shipper can request that the FOA be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators. The arbitrator or arbitrators are independent of the Agency, but the Agency is tasked with the job of maintaining a roster of persons who agree to act as arbitrators in FOAs.⁷⁹
 - c. The submission needs to include:
 - i. the final offer of the shipper to the carrier in the matter, excluding any dollar amounts;
 - ii. the period requested by the shipper for which the decision of the arbitrator is to apply (this must not exceed two years);
 - iii. an undertaking by the shipper to ship the goods to which the arbitration relates in accordance with the decision of the arbitrator;

74 Ibid, p. 741.

75 Schedule 2 of the Policing Act 2008.

76 FOA was introduced under the *National Transportation Act 1987*, now the *Canada Transportation Act 1996*.

77 Transport Act, Part IV, 159 and 160. See: <https://laws-lois.justice.gc.ca/eng/acts/C-10.4/FullText.html#h-56733> and <https://otc-cta.gc.ca/eng/publication/final-offer-arbitration-a-resource-tool>.

78 Part IV, 161 – 169.

79 For a list of arbitrators and their qualifications see: <https://otc-cta.gc.ca/eng/list-arbitrators-sections-362-1691-and-16942-canada-transportation-act>

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- iv. an undertaking by the shipper to the Agency whereby the shipper agrees to pay to the arbitrator's fee; and
 - v. the name of the arbitrator, if any, that the shipper and the carrier agree should conduct the arbitration or, if they agree that the arbitration should be conducted by a panel of three arbitrators, the name of an arbitrator chosen by the shipper and the name of an arbitrator chosen by the carrier.
- d. Within 10 days after a submission is served, the shipper and the carrier submit to the Agency their final offers, including dollar amounts. The shipper and the carrier will receive each other's final offers without delay.
 - e. Within five days after final offers are received, the Agency will refer the matter for arbitration. The procedure for the arbitration may be agreed between the arbitrator and the parties and if no agreement is made, the arbitration shall be governed by the rules of procedure made by the Agency.⁸⁰
 - f. Within fifteen days after the Agency refers a matter for arbitration, the parties are required to exchange the information that they intend to submit to the arbitrator in support of their final offers, with timeframes set for the interrogation of that information by each party. The arbitrator may also request information from the parties and take that into account in making its decision.
 - g. If they agree, the parties may refer a matter that is the subject of the arbitration to a mediator, which may be the Agency. If requested by the arbitrator the Agency may also provide administrative, technical and legal assistance to the arbitrator.
 - h. Within 60 days the arbitrator will select the final offer of either the shipper or the carrier (30 days for disputes involving freight charges of less than \$2,000,000). The arbitrator's decision will be in writing but no reasons will be set out in that decision. The parties can, however, request written reasons, which are to be provided by the arbitrator within 30 days of its decision.
 - i. The decision of the arbitrator is final, binding and enforceable as if it were an order of the Agency. It is applicable to the parties as of the date on which the submission for the arbitration was received by the Agency from the shipper.
97. In relation to rail disputes, FOA has primarily been used to determine rates rather than service conditions. Over the course of its 2010/11 Rail Freight Service Review, Transport Canada received feedback from shippers that introducing service conditions significantly complicated the process, with shippers reluctant to lose the rate issue based on a service complication.⁸¹ The Panel believed that the requirement for the shipper to submit its final offer in advance of the railway's final offer was also a disincentive to use the FOA provision for disputes that are limited to or focussed on service.⁸²
98. More recently, in its final report on the Canada Transportation Act Review, Transport Canada noted that many stakeholders had been critical of the dispute resolution

80 See: <https://otc-cta.gc.ca/eng/procedures-conduct-final-offer-arbitration-pursuant-part-iv-canada-transportation-act-0>

81 Transport Canada, Rail Freight Service Review – Final Report, 2011, p. 8. See: <https://www.yumpu.com/en/document/read/12359310/final-report-transport-canada>

82 Ibid.

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mechanisms within the Transport Act, calling them ineffective, costly,⁸³ time-consuming, and inaccessible, with the potential to create acrimony in a shipper-railway relationship.⁸⁴ Some parties have also raised concerns that railways are not required to provide costing information as part of the FOA process, which puts shippers at a disadvantage.⁸⁵ However, FOA is seen by some stakeholders as the only effective limit to excessive rates charged by railways to captive shippers. As noted by the Commissioner of Competition, even where a shipper does not ultimately resort to FOA, the threat of initiating the process serves as an important bargaining tool for shippers in their negotiations and serves to limit the rates proposed by the railways.⁸⁶

99. In considering how the dispute resolution mechanisms in the Transport Act could become speedier, more efficient, more effective and more accessible to all shippers, Transport Canada considered that one option may be to introduce mandatory mediation between shippers and railways before they embark on a formal dispute resolution procedure.⁸⁷ It also considered that the dispute resolution process should be streamlined so that it is quicker, commercially grounded, more accessible for smaller shippers, and provides for timely payment of penalties and reimbursement of harmed parties.⁸⁸

A.2.2 United States

100. Based on the experience in Canada, the Surface Transportation Board (STB) in the US has recently proposed to establish a similar final offer procedure to determine rate reasonableness for smaller cases, with the intention of providing faster, less costly review of claims of unreasonable railroad rates.⁸⁹

A.3 Telecommunications and Broadcasting Disputes

A.3.1 United States

101. In the US, FOA was imposed by the Federal Communications Commission (FCC) as a vertical merger clearance condition in the broadcasting sector.

83 The Commissioner of Competition noted that the costs incurred by a shipper in relation to a single FOA application are estimated to be in the range of \$500,000 to \$1,000,000. See Commissioner of Competition, Submission to the Canada Transportation Act Review Panel, February 2015, See: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04040.html>

84 Transport Canada, Pathways: Connecting Canada's Transportation System to the World, Volume 1, p. 137.

85 See, for example: <https://business.financialpost.com/opinion/ottawa-just-tied-canadian-miners-to-the-tracks-of-a-railway-duopoly> and <https://business.financialpost.com/transportation/rail/complete-and-utter-disrepair-business-groups-slams-ottawas-changes-to-transportation-bill>

86 Commissioner of Competition, Submission to the Canada Transportation Act Review Panel, February 2015, See: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04040.html>

87 Transport Canada, Pathways: Connecting Canada's Transportation System to the World, Volume 1, p. 137.

88 It also considered that the then \$750,000 freight charge limit on the less-expensive summary FOA might be increased to \$2 million to make that mechanism more accessible.

89 Surface Transportation Board, Notice of proposed rulemaking; request for comments, 17 September 2019. See: <https://www.federalregister.gov/documents/2019/09/17/2019-20093/final-offer-rate-review-expanding-access-to-rate-relief>.

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102. In 2011, the FCC approved a joint venture between Comcast Corporation and NBC Universal with conditions to protect cable TV distributors in their bargaining with Comcast/NBCU over carriage of Comcast/NBCU channels. One of these conditions was that if a dispute arises about prices, terms and conditions of the retransmission of Comcast/NBCU programming, distributors may invoke an FOA process.⁹⁰
103. Under the arbitration procedures imposed as a condition of FCC clearance, no more than five days after the expiration of a carriage agreement or an agreement for online display of video programming, or no more than 90 days after a first time request for carriage or online distribution, a TV distributor may notify Comcast/NBCU of an intention to request arbitration to determine the terms and conditions of a new agreement.⁹¹ A “small” TV distributor, with 1.5 million or fewer subscribers, may appoint an independent bargaining agent to bargain collectively on its behalf.
104. The notification must describe with specificity the video programming to be covered by the request for arbitration. The TV distributor may demand a standalone offer for broadcast programming, regional sports network programming, a bundle of all cable programming or any bundle of programming that Comcast/NBCU has made available to similar TV distributors. Following notification of intent, a “cooling off” period commences, during which negotiations shall continue.
105. The TV distributor must formally file its complaint with the American Arbitration Association (AAA) between 10 and 15 days following its notification of intent. This must include its final offer, which shall remain confidential. If it files a complaint in time, Comcast/NBCU must participate in the arbitration proceeding. Within two days of the being notified of the TV distributors’ complaint, Comcast/NBCU is required to file its own final offer to the AAA.
106. The final offers must be in the form of a contract for carriage for three years of the video programming identified in the TV distributor’s notice of intent. A final offer may not include any provision to carry any other video programming.
107. Once filed, the parties are required to provide a copy of their final offers to the FCC and to each other. Following the exchange of offers the parties may negotiate or enter into mediation. At the conclusion of mediation, the parties can, if they both agree, revise their final offers.
108. If the matter proceeds to arbitration it will be heard by a single arbitrator. The arbitrator must have at least seven years of experience, including prior experience in mediating or arbitrating disputes concerning media programming contracts, and have negotiated or have knowledge of the terms of retransmission contracts.⁹²
109. If the arbitration relates to online conditions and there is a dispute regarding (i) whether the online video distributor is qualified, (ii) what comparable programming a qualified online distributor is entitled to, or (iii) whether there is a defence to the claim (such as an argument by Comcast/NBCU that it is reasonable to deny programming because it would otherwise

90 See FCC (2011), Memorandum Opinion and Order, 18 January 2011, section VII: Commercial arbitration remedy, pp. 127 – 132 at: <https://www.fcc.gov/proceedings-actions/mergers-transactions/comcast-corporation-and-nbc-universal-mb-docket-10-56>.

91 Comcast/NBCU is required to continue to supply programming under an expired agreement until the dispute is resolved: *Ibid*, p. 128.

92 *Ibid*, section VIII. Modifications to AAA Rules for Arbitration, p. 133.

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be in breach of contract with another party), the arbitration will be heard in two phases: in the first phase the arbitrator will determine the validity issue, and in the second, the arbitrator will determine which of the two offers will stand.⁹³

110. The arbitrator must make their decision within 90 days of their appointment. The arbitrator must choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.⁹⁴ To determine “fair market value” the arbitrator may consider any relevant evidence and may require the parties to submit such evidence. The arbitrator may not compel production of evidence by third parties. The arbitrator also may not consider offers made by the parties prior to the arbitration. This includes any final offer made prior to mediation if the final offer was subsequently revised following mediation.
111. Both parties are bound by the arbitrator’s decision, although either party may have the arbitrator’s award reviewed by the FCC or a court with jurisdiction over the matter. The FCC or court must examine the same evidence that was presented to the arbitrator and choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.

A.3.2 Canada

112. FOA was formally introduced into the Canadian Radio and Telecommunications Commission’s (CRTC) framework for dispute resolution in 2000.⁹⁵ At that time the CRTC noted that given the increasing demands that were being placed upon it, processes that allow for the speedy resolution of disputes under the Telecommunications Act and the Broadcasting Act were essential to minimize the strain on the CRTC’s resources and, more importantly, achieve its objective of fair and sustainable competition. The framework adopted by the CRTC was built upon informal practices that it had adapted over the years and provides for a variety of procedures to ensure the fair, effective and timely resolution of disputes.
113. The practices and procedures that apply in respect of FOA are set out in Broadcasting and Telecom Information Bulletin CRTC 2013-637.⁹⁶ In line with the CRTC’s view that FOA is not suitable for disputes that involve a large number of issues,⁹⁷ FOA is only available to parties in relation to disputes that are exclusively monetary, involve two parties only and where the parties involved have failed to resolve the dispute through staff-assisted mediation.
114. The key elements of the FOA framework applied by the CRTC are similar to that applied in relation to transport disputes. Under the CRTC’s framework:

93 Ibid, section VII: Commercial arbitration remedy, subsection C, pp. 130 – 131.

94 The arbitrator may not consider offers prior to the arbitration made by the Claimant and the C-NBCU Programmer or Programmers for the programming at issue in determining the fair market value.

95 Public Notice CRTC 2000-65, 12 May 2000 at: <https://crtc.gc.ca/eng/archive/2000/pb2000-65.htm>.

96 Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013, See: <https://crtc.gc.ca/eng/archive/2013/2013-637.htm>

97 See: Broadcasting and Telecom Information Bulletin CRTC 2019-184, May 2019 at <https://crtc.gc.ca/eng/archive/2019/2019-184.htm>

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- a. Either party may request FOA by filing a written application with the CRTC and serving it on the other party. The application must set out the matter(s) for which a determination by the CRTC is requested, include a concise statement of the facts and issues, and explain why the application meets the criteria for FOA.
 - b. The respondent must advise the CRTC whether it supports the application for FOA. If both parties support the FOA, they will be expected to agree not to apply for a review and variance of the decision resulting from the FOA (for Telecommunications disputes only). The CRTC considers that removing the prospect of review will help to ensure that parties have the requisite incentive to submit reasonable final offers.
 - c. Following consultation with the parties, the CRTC will advise them within 15 days of receiving the application whether it is prepared to accept the request for FOA.
 - d. The FOA will be conducted by a panel of CRTC Commissioners.⁹⁸ The panel will set out in an advice letter the specific dates upon which the final offer process is to be conducted and the matter(s) upon which it will make a determination. The CRTC's establishment of the disputed matters is designed to ensure that the parties submit comparable offers.
 - e. Within 15 days of being notified of the final offer process, each party must submit its final offer to the CRTC. These submissions must refer to the disputed matters upon which the CRTC will make a determination. They must also include concise arguments in support of the party's position. These submissions must be no longer than ten pages (although the parties may file, as an attachment, a copy of any written material upon which they rely).
 - f. Within five days of receiving the final offer submissions of the parties, and upon confirmation that both offers respond to the identified disputed matters, the CRTC will forward to each of the parties a copy of the other party's offer. Each party will be given an opportunity to comment on the other party's offer but will not be able to change its original offer. These commenting documents must be submitted by each party to the CRTC within five days of each party having received the offer of the other party and may be no longer than ten pages.
 - g. In regard to broadcasting disputes, the CRTC may, at some point in the process, require parties to participate in a mediation before a person appointed by the CRTC. If mediation fails, the FOA continues.
 - h. The CRTC arbitration panel will select one or the other offer in its entirety. The CRTC will then issue its decision, generally within 55 days of having accepted a request for FOA (in those cases where parties have met their filing obligations). The CRTC's decision is binding.
 - i. Where neither party's final offer is, in the opinion of the CRTC, in the public interest, both final offers will be rejected by the CRTC and the parties involved will be so advised. In this event, which occurs only on a very exceptional basis, the CRTC may refer the matter to an expedited hearing.
115. The CRTC consulted with stakeholders on the effectiveness of the FOA mechanism in 2013 as part of its "Let's Talk TV" review of Canada's television system. The CRTC notes that

98

See: <https://crtc.gc.ca/eng/industr/rddr/arbitra.htm>

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some parties raised concerns that the existing dispute resolution mechanisms were too slow, too costly and too risky.⁹⁹ Similar to concerns raised in the transport sector, broadcasting distributors and independent programmers raised concerns about the impact that filing a complaint would have on their long-term relationship with those parties on whom they rely for programming or distribution. Some independent programmers argued that the disparity of bargaining power renders dispute resolution ineffective, particularly for those programmers without carriage rights, since broadcasting distributors decide whether or not to carry them.

116. Bell proposed that the existing dispute resolution mechanisms no longer apply to large broadcasting distributors, defined as those with more than 500,000 subscribers.¹⁰⁰ Others disagreed, arguing that FOA, while imperfect, was better than no recourse at all. The CTRC rejected Bell's suggestion noting that dispute resolution has been a helpful recourse for parties when negotiations have broken down.¹⁰¹

A.4 Tax Disputes

117. FOA was utilised in 1993 in the context of a tax dispute between Apple Company Inc (Apple) and the Internal Revenue Service (IRS).¹⁰² In early 1992, the IRS audited Apple for its 1984-1986 tax years and filed a transfer pricing adjustment of USD 114.6 million, claiming that Apple had inflated the costs it incurred in connection with its dealings with its Singaporean subsidiary. Apple challenged the decision. Instead of embarking on a lengthy court process, Apple and the IRS agreed to resolve the dispute through voluntary FOA.
118. The parties agreed on a panel of three arbitrators to hear the matter: a retired federal judge, an economist, and an industry expert.¹⁰³ Each party presented a settlement offer for every tax year that was the subject of the dispute, with the arbitration panel determining the matter on an issue-by-issue basis (i.e. choosing one or the other of the parties' settlement amounts for each of the three years). The procedure took approximately two months (not including the design of the procedure itself and the selection of arbitrators), with the panel of arbitrators issuing their decision within two weeks of the hearing, without a written opinion.
119. Although the arbitration panel selected the value proposed by the IRS for each of the three years in dispute, by the time the parties reached arbitration they had narrowed their differences such that Apple paid much less than the IRS' initial demand. William E. Bonano, International Special Trial Attorney at the IRS was quoted as saying that although

99 CTRV, Broadcasting Regulatory Policy CRTC 2015-96, Let's Talk TV, para 93 at:
https://www.ctvnews.ca/polopoly_fs/1.2288258!/httpFile/file.pdf

100 Ibid, para 95.

101 Ibid, para 102.

102 Since 1990, US Tax Court Rule 124 permits any factual issue to be resolved via voluntary binding arbitration rather than litigation. Although most of the 20 cases where voluntary binding arbitration has been used have involved CA, FOA is an option available to parties. Sansing, R. (1997), "Voluntary binding arbitration as an alternative to tax court litigation," 50(2) *National Tax Journal* pp. 279 – 296.

103 "After Successful Use of Baseball Arbitration, Apple, IRS Both Declare Themselves Winners", *Alternatives*, Vol. 11, No.12, 1993, pp. 163 – 164.

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the need to come up with a realistic number under FOA did not in itself achieve settlement, it “brought the parties closer together”.¹⁰⁴

120. The United States has since pioneered the inclusion of FOA in international tax treaties to resolve disputes under those treaties.¹⁰⁵ Under the US-Canada double tax treaty, FOA is available for disputes involving particular provisions of the treaty.¹⁰⁶ Where a matter goes to arbitration, it is heard by a panel of three arbitrators: each treaty partner appoints one arbitrator and those two arbitrators jointly appoint a third member as Chair of the panel. The arbitrators are required to be impartial and to have significant international tax experience. Within 60 days of the appointment of the Chair, each treaty partner is allowed to submit a proposed Resolution Paper of no more than ten pages, along with a supporting Position Paper of no more than 30 pages. Each treaty partner may reply to the Resolution Paper and Position Paper of the other within 120 days by way of a Reply Submission of no more than ten pages.
121. Although the Memorandum of Understanding between the two countries specifies various rules for dealing with information disclosure and other issues, the arbitration panel is free to adopt procedures that it considers necessary to conduct the arbitration.¹⁰⁷ Where the matter concerns multiple issues (e.g. multiple discrete proposed adjustments arising from an audit) the authorities are required to consider these separately, with the arbitrators taking an issue-by-issue approach in reaching their decision (although there is some scope for packages of interrelated issues to be considered). There is no time requirement for the arbitrators’ decision, which is provided in writing without any rationale or analysis.
122. While the panel’s decision is binding on both authorities, it must be accepted by a “Concerned Person” (being a taxpayer whose tax liability may be directly affected by a mutual agreement) within 30 days, otherwise it will be considered rejected.¹⁰⁸ A Concerned Person may also terminate an arbitration proceeding by withdrawing its request for assistance at any time. In either case, the matter will be closed and the Concerned Person will not be allowed access to the mutual agreement procedures for the same matter and same years. It will, however, be free to seek judicial remedies.

104 “After Successful Use of Baseball Arbitration, Apple, IRS Both Declare Themselves Winners”, *Alternatives*, Vol. 11, No.12, 1993, pp. 163 – 164 at 163.

105 Grlica, I, Baseball Arbitration: Comparison of the Rules under the U.S.-Canada Tax Treaty with the Rules under the Multilateral Instrument, Chapter 14 of OECD Arbitration in Tax Treaty Law: Schriftenreihe IStR Band 111, 2018, pp. 317 – 336 at: https://books.google.com.au/books?id=Xf5tDwAAQBAJ&pg=PA319&lpg=PA319&dq=United+States+and+international+arbitration+and+tax+and+final+offer+arbitration&source=bl&ots=gb_REhvAHk&sig=ACfU3U1kYV5pKF_WANnNAaYh6FvL4uxHjw&hl=en&sa=X&ved=2ahUKEwiDnJHto9PpAhXyxDqGHVQIAZUQ6AEwC3oECAwQAQ#v=onepage&q=United%20States%20and%20international%20arbitration%20and%20tax%20and%20final%20offer%20arbitration&f=false

106 US Canada Double Taxation Convention, Memorandum of Understanding Between The Competent Authorities of Canada and The United States of America at: https://www.irs.gov/pub/irs-utl/2010_arbitration_mou_nov_8-10_-_final.pdf. Even in respect of these disputes, the treaty parties may agree that any particular case is not suitable for arbitration. See Grlica, p. 323.

107 Grlica, p. 325.

108 Grlica, p. 325.

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123. Largely based on the US-Canadian tax treaty, FOA has recently been adopted by the Organisation for Economic Co-operation and Development (OECD) as the default arbitration option under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).¹⁰⁹

A.5 Medical Insurance Disputes

124. In 2015, the State of New York passed a bill that introduced FOA as a means of settling payment disputes between insurance companies and physicians in circumstances where a patient is treated by a physician outside the patient's insurance network.¹¹⁰ Under this law, patients are only required to pay the co-payment that would be payable had the physician been within the patient's insurance network. If the insurer and out-of-network provider(s) are unable to agree on a payment amount for the balance, an arbitrator must decide whether the final payment should be the insurer's initial allowed amount or the provider's charges.
125. Although the arbitrator is required to choose one or the other value, the State has provided guidance that that the arbitrator consider the 80th percentile of billed charges when determining the final amount (i.e. the amount charged by 80% of physicians for a particular billing code as published by FAIR Health, an independent insurance claims database). A recent study found that arbitration decisions have averaged 8% higher than the 80th percentile of charges, suggesting that arbitrators focus on this value when making their determination.¹¹¹

109 See Article 23 of the MLI at: <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>

110 Adler, L, Experience with New York's arbitration process for surprise out-of-network bills, at: <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2019/10/24/experience-with-new-yorks-arbitration-process-for-surprise-out-of-network-bills/>

111 Ibid.