Submission to Senate Economics Legislation Committee

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

18 JANUARY 2020

FACEBOOK

Executive summary

Facebook welcomes the opportunity to provide this submission to the Senate Economics Legislation Committee in relation to the *Treasury Laws Amendment (News Media and Digital Platforms Bargaining Code) Bill 2020*.

Facebook has been a long-standing supporter of a code of conduct that sets a framework for the relationship between digital platforms and news publishers in Australia. We support a workable framework that encourages innovation, provides certainty for our investment in the Australian news ecosystem, accurately reflects the support we provide publishers, and protects the interests of consumers.

We believe the best way to improve both the sustainability of the Australian news ecosystem and collaboration between digital platforms and news publishers is for any regulatory framework to encourage commercial arrangements between platforms and publishers.

Facebook remains willing to pay Australian news publishers for news content made available on Facebook, as long as it is subject to genuine commercial considerations. We already have existing agreements with Australian news organisations, including licensing their news content. Over the last two years, we have been actively engaged with 30 local media organisations to: enter into commercial deals to pay for premium news content[1]; provide grants for subscription projects and COVID-19 relief funding for regional news organisations[2]; and fund accelerators to help publishers innovate in response to disruption in their industry.[3]

However, by compelling Facebook to pay for news content in a way that is not connected to commercial reality, the prospect of this legislation has already deterred investment and innovation in Australian news. It has had the precise opposite effect to its stated intention.

The proposed legislation has stymied Facebook's ability to bring to Australia our product Facebook News[4], which would have seen a significant increase in investment in the Australian news ecosystem. We had planned for Australia to be the first country outside the US to receive this product in the second half of the 2020; but, since the release of draft legislation, other countries have been prioritised while we assess the impact. We remain in discussions with Australian news publishers but it is very

[1] Facebook for Media, *Facebook partners with Australian news publishers to fund news shows on Facebook Watch* https://www.facebook.com/formedia/blog/facebook-partners-with-australian-news-publishers-to-fund-news-shows-on-facebook-watch

[2] A Kapoor and A Hunter, Australian newsrooms can now apply to the COVID-19 news relief fund, blog post published 18 May 2020, https://www.facebook.com/journalismproject/programs/grants/coronavirus-australian-relief-fund

[3] A Hunter, *Facebook Expands Local News Accelerator To Support Australia & New Zealand Publishers*, blog post published 18 September 2019, https://www.facebook.com/journalismproject/facebook-accelerator-program-australia-new-zealand

[4] Facebook News is a new surface on our platform we have created exclusively for news content, drawing from feedback provided to us by news publishers. Since it launched last year in the US, publishers we partner with have seen the benefit of additional traffic and new audiences.

challenging for us to conclude commercial agreements while it remains uncertain how damaging this law could be for our business in Australia. There also continue to be provisions in the law (such as the non-differentiation clause) which appear to inhibit our ability to bring a product like Facebook News to this country.

In the meantime, Facebook News is being launched in the United Kingdom, after we concluded commercial agreements with leading national and local publishers, and it will be launched in other countries imminently.[5]

There is no other law like this in Australia. No other business is forced by the government into commercial arrangements where the government determines the parties to the agreement and compels payment. The Bill is not, as its name suggests, a bargaining code: it removes the potential for genuine bargaining by forcing Facebook to make payments that are detached from true calculations of commercial value and by incentivising news publishers to make unreasonable ambit claims and bargain in non-commercial ways. It removes any meaningful influence over our own commercial dealings with publishers.

In practice, this means the legislation would impose an uncapped, uncertain and unknowable financial liability on us at the same time that it removes our ability to manage that liability as any business would do. Facebook is effectively compelled to acquire all news content at whatever price is determined. Unlike every other regulated access regime, Facebook does not retain any discretion as to volume, for example, we cannot decide to manage liability by acquiring less content or no content from a publisher. The legislation inherently passes power across to publishers to determine what they want to be paid for, with no room for commercial discretion by Facebook.

These fundamental problems arise because the approach is not based on sound evidence about the actual relationship between Facebook and Australian news publishers. The misconception underpinning this legislation is that Facebook is profiting from news publishers' content in an unauthorised manner and is not entering into commercial deals for that content. The legislation does not reflect these realities about the relationship between Facebook and news publishers:

- If publishers choose for their news content to be shared on our services, they receive distribution, audience development and access to data and other commercial tools on our platform for free.
- We respect the publisher's business model (whether it is paywalled or ad supported), and the publisher has entire control over how the traffic that flows from Facebook is monetised. The referral traffic we have provided to Australian media publishers from January to November 2020 alone (4.7 billion referrals) is estimated to be worth $394 million.
- We also build customised tools and products to help news publishers more effectively monetise their content on our services. For example, from January to November 2020, Australian publishers generated $5.4 million from our revenue share programs, such as In-Stream Video advertising.

[5] J Doub, Stepping up our investment in news in the UK, blog post published 30 November 2020, https://about.fb.com/news/2020/11/launching-facebook-news-in-the-uk/

- We enter into commercial agreements to pay news publishers for quality, premium news content made available on Facebook.

We make these investments, not because we profit from news content, but because we recognise the vital role that news plays in society and democracy. The revenue that we make from news content is virtually zero.

Some news publishers have incorrectly claimed that Australians use Facebook's services with the intention of viewing news, but Facebook is primarily a service used by Australians to connect with their family and friends, to participate in causes that are important to them, and to interact with their community. If Australians want to view news online, the majority go directly to a news publisher's own app or website, or a news aggregator (as acknowledged by the ACCC in its Digital Platforms Inquiry final report[6]).

The flawed premise has been used to design a framework in the legislation that is very challenging to work within. The framework contains six key components:

1. A compulsion to enter into agreements with every eligible Australian news publisher - regardless of whether or not there is any value to Facebook from the news content that the publisher makes available on our services. This requirement amounts to a government sanctioned transfer of revenue from one private company to other private companies (which are typically competitors for ad revenue).
2. An overly-broad definition of who qualifies as a publisher (and is eligible to be paid for content) and full control of that decision sitting with the Australian Communications and Media Authority.
3. Full autonomy for publishers to structure their dealings with Facebook how they would like, for example, by compelling Facebook to negotiate separately with each of their mastheads or digital channels. The Explanatory Memorandum suggests that 100 to 200 publishers could be entitled to demand negotiations with Facebook, but we estimate this could result in more than 1,000 different commercial arrangements for Facebook - depending on how publishers structure their requests.
4. In deciding disputes, arbitrators are instructed to consider a set of factors that are skewed in favour of publishers: they are not compelled to consider the cost to digital platforms of making news content available[7], and the law codifies an ambiguous and contested "imbalance of bargaining power" concept to inherently disadvantage any offer from a digital platform.
5. A highly unusual final offer arbitration mechanism to determine the price for the majority of negotiations between digital platforms and publishers. This would be a new mechanism for Australian regulation and the outcomes are unpredictable. The Explanatory Memorandum estimates that "75 per cent of bargaining processes will ultimately proceed to arbitration".[8] The result is that Facebook's potential liability under the Bill is entirely uncapped, unknown and

[6] ACCC, Digital Platforms Inquiry Final Report, page 101.
[7] While the factors allow consideration of whether there is undue burden on the digital platform, this factor is not connected to the actual commercial value of that particular transaction, but an assessment of the financial state of the company as a whole.
[8] EM [2.13].

unknowable. The approach contained in this Bill is unheard of in any other Australian competition regulation and does not suit a dynamic digital environment. It is clearly commercially unacceptable for a business to operate in an environment where costs are unknowable and uncontrollable.

6. A non-differentiation clause which limits digital platforms' ability to offer more appealing commercial terms to certain publishers, and which prevents digital platforms from deciding to no longer carry news content of a publisher if an appropriate arrangement cannot be struck. This clause means that, if one publisher is out, all Australian publishers need to be out. If one publisher behaves so unreasonably that a digital platform cannot reach agreement with them and cannot commercially accept the price set by an arbitration panel, other publishers need to bear the consequences and be subject to any business decisions taken by the digital platform. This clause also prohibits Facebook from testing or deploying innovative news products in Australia like Facebook News, because these are usually rolled out on a test basis with a smaller group of publishers who are best-suited for that product.

Each of these components is challenging from a practical perspective; however, the way that they interact with each other in the legislation make the overall regime complex, unpredictable and unworkable for our business.

These requirements are accompanied by heavy penalties and detailed, micro regulation of all aspects of Facebook's relationship with news publishers. All of these onerous requirements can be applied to any digital business or service without any requirement to undertake due consideration or without providing any avenue for the relevant business to put forward a case or appeal.

All stakeholders engaged in this process agree on the importance of a sustainable news industry. But government policies to support news should not cut across commercial agreements by engineering artificial prices or compelling digital platforms to pay for content that does not have value to them.[9] It is not sustainable nor rational to arbitrarily target and discriminate against two private, US companies, to make them legally and solely responsible for supporting a public good and solving the long-standing challenges of the Australian media industry.[10] The decision to limit the legislation to two US companies is also discriminatory and will inevitably give an unfair advantage to Facebook's competitors in the technology sector, including rivals from countries that propagate different and undesirable visions for the Internet. Questions have arisen in other submissions to the government on the Exposure Draft about whether this legislation is consistent with the Free Trade Agreement between Australia and the United States.

We recognise that the government has made changes since the last version of the legislation in response to feedback from digital platforms, and we hope there is

[9] Bloomberg, 'Australia shouldn't make Facebook and Google pay publishers for news', Bloomberg, 14 August 2020, https://www.bloomberg.com/opinion/articles/2020-08-14/australia-shouldn-t-make-facebook-and-google-pay-publishers-for-news

[10] B Thompson, 'Australia's News Media Bargaining Code, Breaking Down the Code, Australia's Fake News', Stratechery, 20 August 2020, https://stratechery.com/2020/australias-news-media-bargaining-code-breaking-down-the-code-australias-fake-news/

continued willingness to move the legislation towards a more workable framework. Because our concerns arise from the complex interaction between six different and fundamentally flawed components of the law, it is not simple to address our concerns. We believe more concerted work is required to make the legislation a workable scheme that reflects commercial and technical realities.

Given our success in reaching commercial agreements in other jurisdictions without the threat of regulation, we are optimistic that Facebook could reach commercial deals with major Australian publishers. One possible way to allow this to happen would be to institute a grace period where digital platforms are given assurances they will not be designated (or subject to the threat of penalties or damages) if they enter into satisfactory commercial agreements with major news organisations within a reasonable period of time (say, six months). There could also be a requirement to support regional and local news (for example, through a competitive funding pool or grant round). Concepts like a grace period approach have been used in other laws, like the energy sector's "Big Stick" legislation.

We believe digital platforms can play a beneficial role in encouraging the sustainability of Australian journalism, and we support sensible regulation to give publishers confidence about the framework under which digital platforms and news publishers should operate. We welcome the opportunity to discuss with the Committee the right regulatory settings to enable this type of innovation and collaboration.

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Facebook's contribution to this policy process

Much of the law is predicated on the assumptions that, without regulatory intervention, Facebook will not pay Australian news publishers for news content; will not maintain a collaborative approach towards news publishers; and will not behave in good faith. The record of how we have engaged with the Australian Government during this process, and how we have negotiated with news publishers, demonstrate that these assumptions are false. There have also been a number of insights gained throughout this process that are critical for how to shape a code in these final stages of its development.

In an effort to assist the Committee, in this section, we provide an overview of (1) how Facebook has worked in good faith to support the Government's legislative process, and insights gleaned throughout this process; and (2) the reality of our existing investment in Australian news.

Facebook's engagement with the Australian Government

To assist in the development of a workable law, Facebook has been actively and constructively engaged at each stage of the more than three-year process. Here are some of the insights gained:

- **Digital Platforms Inquiry:** during the Digital Platforms Inquiry from November 2017 to July 2019, produced over 1,608 documents (over 14,500 pages), prepared multiple submissions, and provided four expert reports to assist in the ACCC's consideration of the Inquiry's Terms of Reference.

  In the interim report, the ACCC proposed a News Feed Regulator and an Ads Ranking Regulator to address the relationship between digital platforms and news publishers. Neither of these proposals were practicably workable but appeared to be based on a concern about transparency of digital platforms' algorithms. We began to work in response to this concern. There was no mention of any proposals relating to payment or commercial agreements.

- **Final Report Consideration:** during the consideration by the Government of the Digital Platforms Inquiry Final Report from July 2019 to December 2019, we supported 20 of the 29 recommendations in full or in principle (and noted four recommendations that did not relate to us) and provided suggestions for consideration of a suitable oversight framework with respect to our relationship with Australian news media businesses. The conclusion from this process was that a voluntary code development process was preferable.

- **Voluntary code development:** during the voluntary code development process from January 2020 to April 2020, we met with more than 20 publishers to discuss our thinking about what a code could contain and to get their feedback and suggestions.

Publishers told us that they did not want the details of their commercial arrangements with us codified because there is a range of different business models within the media industry. The feedback we were provided was that a principle-based approach to commercial deal making would be preferable. We began preparing a voluntary code on this basis.

Facebook's development of a voluntary code was well-advanced, and we believe it would have been able to address the feedback provided to us from publishers in that consultation. We had made good progress and would have been able to meet the November 2020 deadline set by the Government.

The Government terminated the voluntary process in April and moved to a mandatory code on the basis of ACCC advice that it was unlikely digital platforms could have developed a satisfactory voluntary code. The ACCC did not ask Facebook for an update on our progress before providing their advice to the government, and so it was not based on current information at the time. Had the ACCC undertaken due diligence before offering their opinion, the Government may have been satisfied with the progress that Facebook had made. The underpinning assumption of moving to a mandatory code (because digital platforms were not able to develop a satisfactory voluntary code) is wholly incorrect.

- **Mandatory code development:** during the development of a mandatory code from May 2020 to the release of the first draft of the Bill in July 2020, in response to requests from the ACCC that this was the key issue they wished to resolve on which to base a mandatory code, we provided extensive information to the ACCC about the value exchange between Facebook and news media businesses. We undertook analysis to demonstrate the two sides of the value equation:
    - In terms of the benefits we provide to news organisations, we provided referral traffic data to the ACCC (which we have since updated). Between January and November 2020, Facebook sent 4.7 billion referrals from Facebook's News Feed back to Australian news websites at no charge – additional traffic worth an estimated A$394 million to Australian publishers. Although this may be material for news publishers, it is a small fraction of the overall referral traffic on Facebook.
    - We also provided them with data and evidence about the negligible value that Facebook derives from news content on our services. We provided evidence that, if news is not available on our services, consumer engagement (and revenue) does not decrease.[11] The evidence and data we provided to the ACCC were not reflected in the draft legislation released in July 2020.

[11] This is discussed below, but refers to the 2018 Meaningful Social Interactions change we made to Facebook News Feed.

Facebook's investment in news

Although Facebook is primarily a service used by Australians to connect with their family and friends, to participate in causes that are important to them, and to interact with their community, we recognise that our services can play a role in supporting the news ecosystem. This is because publishers choose to share stories on our services to connect with audiences, and because Australian users choose to share news content with their family and friends. Publishers control whether and how they share news on our services and they also control whether members of the public are able to share stories on Facebook.

Only a very small proportion of the content on Facebook is news, and news presents a negligible source of revenue for us.

In addition, news on our services is highly substitutable (i.e., if news is not available to users on our services, they do not reduce their engagement on our services and simply interact with other content). This has been demonstrated by one notable and very public example: the change we made to our News Feed ranking algorithm in January 2018 to prioritise content from friends and family, in response to feedback from our users.[12] This change had the effect of reducing audience exposure to public content from all Pages, including news. Notwithstanding this reduction in distribution of news content, the past two years have seen both an increase in people engaging with our services and in revenue.[13] This confirms that when there is less news on Facebook, people engage with other content and our auction pricing, which is blind to the type of content our ads are shown around, adapts accordingly to changes in content liquidity.

Notwithstanding the nominal value of news to our business, we invest in purpose-built tools to help publishers better monetise their content on our services, enter into commercial deals with publishers and we have a dedicated news partnerships team that serves as a point of contact for publishers. We do so because we believe news is a public good and it plays an important social function.

There are three main ways we work with publishers:

- Firstly, publishers and the public choose to share news content on our services which results in free organic distribution of news. The monetisation preferences of the publisher are respected as part of this organic distribution -- we direct the traffic to the publisher's website, as people need to click through to the publisher's website to access that article -- whether it is paywalled or ad supported, this is all controlled by the publisher. We provided information about the referral traffic we provided to Australian media publishers in 2020 above.[14]

[12] Facebook Newsroom Bringing People Closer Together, 11 January 2018.
[13] Facebook, Q4 2018 Quarterly Earnings Presentation, https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q4/Q4-2018-Earnings-Presentation.pdf
[14] Between January and November 2020, Facebook sent 4.7 billion referrals from Facebook's News Feed back to Australian news websites at no charge – additional traffic worth an estimated A$394 million to Australian publishers.

- Secondly, in response to feedback from publishers, we invested in the development of customised tools and products to help news publishers more effectively monetise their content on our services. These tools drive value to publishers who choose to use them.

- Thirdly, we have directly invested tens of millions of dollars in content and programs, including commissioning Australian news content to appear in new products such as Facebook Watch or as part of the Facebook Accelerator program. We have received feedback that this support helped position many of the participants to not only survive the coronavirus pandemic, but even grow their businesses during a difficult time.

  The benefits of our investments are particularly focused on small and medium publishers (especially regional and local publishers) through the Accelerator program. In the last 18 months, we have paid more than $1.5 million to bring together 11 regional and smaller publishers with industry experts from around the globe to develop strategies for encouraging readers to subscribe and donate.[15] Earlier this year as part of that investment, we provided funding of up to $100,000 to each publisher for reader revenue projects. So far, this has generated more than AU$1 million in customer lifetime value for that group.

During the past two years, Facebook has directly invested cash in -- or paid for premium content from -- 30 Australian news organisations. We have also supported work by the Walkley Foundation and the Alliance for Journalists' Freedom as part of our broader support for the news industry.

Prior to the release of the Exposure Draft, we had been intending to bring a new product to Australia called Facebook News, a feature on our platform exclusively for news content, which would have seen an increase in our investment in the Australian news ecosystem as we enter into deals with publishers for their content to appear in the Facebook News surface. Since it launched last year in the US, publishers we partner with have seen the benefit of additional traffic and new audiences.

Australia would have been the first jurisdiction outside the US to receive this product and its launch here would have brought millions of dollars of investment in the Australian news industry.[16] However, the uncertainty and unworkability of the proposed legislation has meant that Facebook News has been reprioritised for other countries, beginning with the United Kingdom in January 2021 and with other countries to be announced imminently.[17]

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[15] A Hunter, Facebook Expands Local News Accelerator To Support Australia & New Zealand Publishers, blog post published 18 September 2019, https://www.facebook.com/journalismproject/facebook-accelerator-program-australia-new-zealand.
[16] W Easton, 'Facebook's Will Easton on investing in Australia's news ecosystem', Ad News, 23 July 2020, https://www.adnews.com.au/news/facebook-s-will-easton-on-investing-in-australia-s-news-ecosystem
[17] J Doub, Stepping up our investment in news in the UK, blog post published 30 November 2020, https://about.fb.com/news/2020/11/launching-facebook-news-in-the-uk/

Given the importance of news to Australia's democracy and public debate, Facebook recognises the importance of Australian news organisations, the Government and the public having confidence in the role that digital platforms play. This is why we have long supported regulatory frameworks that provide transparency and accountability about our work with respect to news organisations.[18]

[18] N Clegg, 'Smart regulation can deliver a better Internet for all Australians', *Sydney Morning Herald* August 2019 https://www.smh.com.au/business/companies/smart-regulation-can-deliver-a-better-internet-for-all- australians-20190731-p52cm5.html; J Kaplan, 'Australian values can shape the internet of the future', *The Australian*, 26 November 2019, https://www.theaustralian.com.au/business/technology/australian-values-can-shape-the-internet-of-the-future/news-story/0238d15ce068689365809f30c0e37556; M Garlick, *Smart regulation must promote trust, innovation and choice for all Australians*, blog post and submission published 16 September 2019, https://www.facebook.com/notes/facebook-australia-new-zealand-policy/smart-regulation-must-promote- trust-innovation-and-choice-for-all-australians/2417839498543309/; M Garlick, *Transparency and fairness for all publishers is key to success for new code*, blog post published 10 February 2020, https://www.facebook.com/notes/facebook-australia-new-zealand-policy/transparency-and-fairness-for-all- publishers-is-key-to-success-for-new-industry-/2561697627490828/; M Garlick, *A Digital News Distribution Code for the Australian News Ecosystem*, blog post published 18 March 2020, https://www.facebook.com/notes/facebook-australia-new-zealand-policy/a-digital-news-distributor-code-for- the-australian-news-ecosystem/2594059480921309/?__tn__=HH- R.

Overview: The value exchange between Facebook and digital publishers

The Bill is premised on an assumption that Facebook generates revenue from news content, especially in News Feed, that displaces revenue earned by news publishers and requires government intervention to be extracted back. This is perhaps best illustrated by Example 1.7 in the Explanatory Memorandum where it provides an example of how the arbitration panel should determine the remuneration

> *Example 1.7 Panel determination*
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> *The Daily Chronicle (DC) is a registered news business that receives a benefit from referrals to its website from Digiplat, a designated digital platform service that holds a significant bargaining power imbalance in its commercial relationships with Australian news businesses including DC. When assessing both parties' final offers, the panel considers how the benefit that DC receives from Digiplat is affected by this bargaining power imbalance derived from Digiplat's status as an 'unavoidable trading partner' for Australian news businesses.*
>
> *To do this, the arbitrator considers arguments in the final offers about the size of the benefit that would likely be provided by Digiplat to DC when compared to a hypothetical scenario where there is an absence of any bargaining power imbalance.*
>
> *The hypothetical scenario the panel decides is appropriate in this circumstance is one in which audiences may reach DC through other means (such as users directly visiting DC's website or accessing it through other news aggregators) and where DC and other Australian news businesses are not reliant on Digiplat to reach those audiences.*

This seems premised on an assumption that due to Facebook's role in the news ecosystem, which is characterised as us being an "unavoidable trading partner", Facebook receives a benefit that is not properly accounted for in our commercial dealings with publishers to date. It also seems to assume that the hypothetical counterfactual scenario -- determined through the commercial deals that Australian news media businesses have with other digital platforms such as Apple, TikTok, Snap, LinkedIn and Twitter -- involves a fairer calculation of the value exchange as between Facebook and Australian news media businesses.

This foundational assumption to the arbitration framework does not match with reality. It is based on a fundamentally incorrect assumption that the value exchange favours Facebook, that we do not pay sufficiently for this, and that other digital platforms (who presumably do not, in the ACCC's view, benefit from a significant bargaining power imbalance) do or are likely to pay more. All available evidence suggests that this is not the case.

Australian publishers have made ambit claims that the benefit to Facebook is so large that digital platforms should be taxed at an amount that should be between AU$600 million to AU$1 billion based on a percentage of our presumed local revenues.[19] These assertions are not supported by any independent, economic evidence or empirical analysis. If all factors that contribute to a value exchange assessment are quantified and objectively analysed, the picture is very different.

If a value exchange assessment is to be undertaken with respect to platforms such as Facebook and Australian news media businesses, all parties to this debate need to recognise that the outcome could also show a value-neutral exchange or a value imbalance in favour of the publishers (*i.e.,* news publishers gain more from Facebook than we gain from news content). To date, the arbitration model proposed in the Bill has been deliberately skewed expressly to avoid this likely conclusion.

Notwithstanding the nominal commercial value of news content to Facebook, we are keen to continue our collaboration with publishers and contribute to the news industry (subject to the right regulatory settings). We have also provided a number of proactive suggestions about how to establish a practical code of conduct that would provide transparency and accountability of this collaboration.

We're taking this particular approach for the news industry because of the unique function news plays in society. But we also don't view it as healthy or justifiable for US-based private companies to subsidise and be made accountable for the profitability of news organisations that have a presence in Australia, particularly when there is no guarantee that this will support diverse Australian journalism. To be sustainable, any potential investment by Facebook in the Australian news ecosystem should be grounded on genuine marketplace principles of upholding the primacy of commercial negotiations and focussing on value and investments towards building sustainable products to broadly support Australian journalism. Legislation should reflect the genuine and legitimate commercial interests of all stakeholders.

Ultimately, Facebook provides a voluntary, opt-in platform for our partners, and our focus must—and will continue to be—on protecting and enhancing the controls and experiences we provide to our community. News is not a primary part of the experience on Facebook, but it is beneficial for people, for society and for communities. And that's why we've innovated and provided tools for news publishers to monetise their content and why we share data and insights with publishers to help support their businesses.

[19] M Mason and J Kehoe, 'Tech giants should pay media $600m', Australian Financial Review, 14 May 2020, https://www.afr.com/companies/media-and-marketing/tech-giants-should-pay-media-600m-costello-20200513-p54sgs; L Shanahan, 'Content bill for Facebook, Google might top $1bn', The Australian, 14 May 2020, https://www.theaustralian.com.au/business/media/content-bill-for-facebook-google-might-top-1bn-says-news-corp-australasia-boss-michael-miller/news-story/f5eae6dc272c0e132f13da3ef1569d92

Specific comments on the Bill

To assist the Committee in its consideration of the Bill, we explain below: (1) the fundamental misconceptions that the Bill is based on; (2) the six key components of the Bill that together generate an uncapped, uncertain and unknowable financial liability on Facebook and remove any meaningful influence over our own commercial dealings or ability to minimise that liability. The consequence of these provisions will be to deter commercial agreements and investments in Australian news; and (3) we briefly cover some of the additional concerns we have with the Bill outside of the bargaining and arbitration framework.

Fundamental misconceptions

There are four fundamental misconceptions that form the foundation for the Bill:

1) **The Bill is based on the view that there is a significant imbalance in bargaining power between Facebook and news publishers.** The Explanatory Memorandum cites a supposed significant "imbalance of bargaining power" between Facebook and news publishers to justify this legislation. This claim is solely based on ACCC's Final Report in the Digital Platforms Inquiry.

   However, the ACCC's opinion of Facebook's bargaining power is not grounded in evidence:

   - It does not acknowledge that Facebook only accounts for a small portion of the referral traffic to news publishers. The expert report provided by Professor Catherine Tucker during the Digital Platforms Inquiry on referral traffic shows that Facebook accounts for less than 10% of traffic for 70% of the sites reviewed.[20]

     Australian media organisations have publicly stated in late 2020 that "the traffic that we get clicked through from Facebook to our sites is a small part of our overall consumption".[21]

     Even by the ACCC's own calculation (which was based on a narrow and artificial construction of a market, designed to exaggerate Facebook's role in the news ecosystem), Facebook only accounts for 18 per cent of the "news referral market" defined by the ACCC.[22]

   - It does not account for changes in the market since the Digital Platforms Inquiry was concluded over eighteen months ago. Digital

[20] C Tucker, Submission to the ACCC's Digital Platforms Inquiry - News Referrals, https://www.accc.gov.au/system/files/Facebook%20Australia%20Submission%203%20%28April%2020 20 19%29.pdf
[21] P Smith, 'Tech sector backs Facebook over "terrible" government overreach', Australian Financial Review, 2 September 2020, https://www.afr.com/technology/tech-sector-backs-facebook-over-terrible-government-overreach-20200902-p55rm6
[22] ACCC, Digital Platforms Inquiry Final Report, page 101.

markets are highly innovative and dynamic. Since the Digital Platforms Inquiry was released, Apple has released a news aggregator service (Apple News) and TikTok has rapidly risen in popularity in Australia, now with millions of users.

While Facebook aims to be a partner of choice for news publishers, the reality is that publishers are not dependent on Facebook. They have a multitude of services on which they can choose to share their content to grow their audience or, indeed, they can rely on consumers who directly engage with their content via their own website, apps, email newsletters or other channels. News publishers have a large number of options in how they reach consumers and monetise their news.

- The Explanatory Memorandum to the Bill claims that, if this supposed imbalance of bargaining power did not exist, then news publishers would have more appealing commercial terms for their agreements with Facebook. This is a hypothetical situation. If it were true, then news publishers would have commercial agreements with other digital platforms (such as Twitter, Apple, Snap, LinkedIn) that are more favourable than the arrangements they have with Facebook or Google. All available evidence would suggest this is not the case.

- Even if a substantial imbalance of bargaining power exists (which we do not believe to be the case), it does not necessarily require government intervention as disproportionate as that proposed in the Bill. Not every business in the Australian economy has the same level of bargaining power, and it is not realistic to assume that will ever be the case. Instead of regulatory intervention to attempt to even out the bargaining power of every business (or even to compel transfer of revenue from one company to another simply because the ACCC considers that there is an inequality of bargaining power), we rely on competition laws that target businesses when they misuse any market power they accrue. Australia has comprehensive and robust competition laws that are more than able to target any business behaviour that the ACCC and courts believe is a threat to fair competition.

2) **The Bill assumes that the value exchange between digital platforms and news businesses will always be in Facebook's favour.** The Bill justifies the extraction of revenue from Facebook by assuming that, in the two-way value exchange between digital platforms and news businesses, Facebook is profiting. The Bill extracts this supposed profit by developing an artificial process for calculating the amount that will always be in the favour of news publishers: remuneration by an arbitration panel needs to assume, by law, there is an imbalance of bargaining power that benefits Facebook. This skews the decisions that third party arbitrators are able to reach.

   All data points indicate that the commercial value we derive from news content in Australia is virtually zero (discussed earlier).

By compelling Facebook to enter into commercial arrangements with a large number of news publishers in Australia, it is based on the assumption that the net benefit of the interaction between news publishers and Facebook is always accrued by Facebook. The legislation does not contemplate or even allow for a scenario (that we believe is most likely) where a vast majority of publishers overwhelmingly benefit from the free distribution, customised products, innovation initiatives, provision of data and insights, and direct investments that Facebook already makes available - and that these benefits far outweigh any possible value that Facebook might gain from that specific publisher's news content.

3) **The Bill assumes that Facebook controls the news content that is made available on our services.** The Bill codifies into law an assumption that Facebook "makes available" news content and suggests it is appropriate for us to pay for news because we "use" news content. Both suggestions are entirely incorrect: we make available an open platform for users to connect with each other and share content; *news publishers* are the parties responsible for making news content available on Facebook (either by publishing it themselves, or by providing easy ways for their readers to share the publisher's news content on our services).

   Codifying these incorrect assumptions into law would run contrary to the entire foundation of an open and free internet. If this law sets the precedent of requiring intermediaries to pay for links that other users share on their services, it would make it uneconomic to operate most of the platforms and forums that comprise the internet. Putting this assumption into law would overturn decades of international internet law. It would redefine the action of intermediaries such as Facebook and lead to a concept that we have a liability and responsibility for news that is written, controlled, and shared on our platform by others. The definition of "making available" (introduced since the last public version of the Bill) states that:

   "For the purposes of this Part, a service makes content available if:
   (a) the content is reproduced on the service, or is otherwise placed on the service; or
   (b) a link to the content is provided on the service; or
   (c) an extract of the content is provided on the service."

   By making a digital platform such as Facebook responsible for news content being made available on our services by news publishers and members of the public, the Bill inverts the technical reality of how our services operate. Content is placed on our services by publishers or their readers. Publishers can control this -- they can use metatags to block the sharing of their content on our services. They also control the monetisation of this content on our services: if a publisher or reader shares a paywalled article on Facebook, the person who sees that content must subscribe to access it; if the publisher or reader shares an ad-supported article, the person who sees that content is directed to the publishers' website to read it, consistent with the monetisation choices of the

publisher. Where content is shared in original form on Facebook (such as through Instant Articles or video), we have developed monetisation tools that revenue share ads associated with that content.

4) **The Bill assumes that Facebook is not capable of reaching satisfactory commercial arrangements with publishers on our own.**

The Bill removes all meaningful influence over our own commercial dealings with news publishers and contains prescriptive micro-regulation of how we work with publishers. This level of prescription may be necessary if it was evident that a company will act in bad faith or with bad intent. However, Facebook has a record over many years of operating in good faith in our commercial deals with Australian publishers. We have been steadily increasing our investment in the Australian news ecosystem, culminating in a public statement from us in July 2020 that we would like to make a very significant multi-million-dollar investment in Australian news (subject to the right regulatory settings).[23] We are not aware of any suggestion we have behaved in any way other than fairly in all of these dealings with news publishers.

While we are aware news publishers have made unreasonable claims about the value of their news content, there has been no economic analysis done by the ACCC (or anybody else) to suggest the terms of our commercial arrangements are unreasonable.

The types of arrangements we have struck with news publishers has been seen as more than satisfactory in other jurisdictions around the world: we have been able to enter into commercial arrangements for our News Tab in the United States, United Kingdom and other countries (to be announced imminently). These include arrangements with the international parent companies of many Australian news publishers.

We have also operated in good faith in considering regulatory frameworks that give publishers (as well as policymakers and the broader community) confidence that we will act appropriately in our dealings with publishers. We have proposed regulatory solutions ever since the Digital Platforms Inquiry (including first a Digital News Distributor code and then the establishment of a Digital News Council), and we were well advanced in developing a voluntary code in early 2020, as accordance with the Government's request.

However, the level of prescription in the legislation assumes bad faith on our part. It does not even trust us to respond to emails promptly. It contains onerous regulation of minute interactions with news publishers (see sections 52L, 52M, 52N, 52O, 52P, 52Q, 52R, 52S and 52T). In contrast, the obligations for registered news businesses are wholly contained in section 52U – which

[23] W Easton, 'Facebook's Will Easton on investing in Australia's news ecosystem', Ad News, 23 July 2020, https://www.adnews.com.au/news/facebook-s-will-easton-on-investing-in-australia-s-news-ecosystem

relate only to setting up points of contact and acknowledgement of communications.

Regulation should only be introduced to rectify an identified market failure. Given Facebook's keen willingness to invest more in Australia (under the right regulatory settings) and our track record of reaching satisfactory commercial arrangements in other jurisdictions, the assumed bad faith underpinning the prescription in this legislation is unjustified.

Key components of the Bill

We believe the best way to improve both the sustainability of the Australian news ecosystem and collaboration between digital platforms and news publishers is for any regulatory framework to encourage commercial arrangements between platforms and publishers.

Facebook is very willing to pay Australian news publishers for news content made available on Facebook, as long as it is subject to genuine commercial considerations. The very nature of this extraordinary law means that, as long as this law is on the table, the nature of negotiations between digital platforms and news publishers will not be genuinely commercial. There are six key elements of the legislation that interact in a way that forces Facebook to make payments that are detached from calculations of commercial value and incentivises news publishers to make unreasonable ambit claims and bargain in non-commercial ways.

Although we have many concerns about how elements of the legislation will operate, our chief concern is that their combined effect is that our financial exposure under the law is uncapped, uncertain and unknowable - and the legislation removes any meaningful influence over our own commercial dealings in Australia to minimise this exposure. Businesses are only able to invest in Australia if the regulatory settings are conducive to commercial outcomes that are genuinely beneficial and sustainable. By forcing price outcomes for news content that are artificial and not connected to the real commercial value of news on our services, this legislation will make it much harder for a company like Facebook to justify bringing investment to Australia.

It is challenging to suggest practical amendments to the legislation because these outcomes are a result of the cumulative interaction between six key elements of the legislation. We step through each of these below.

1. A compulsion to enter into agreements to pay every single publisher

The legislation contains a requirement for Facebook to enter into agreements where we pay a large number of news publishers - regardless of whether or not there is any value to Facebook from the news content that the publisher makes available on our services.

As discussed above, the support that Facebook provides to Australian news publishers is extensive. We also receive very little commercial value from news content on our services because it is not the primary reason people come to Facebook, it is not connected to advertising (our business model) and it is easily substitutable for other content on our platform. If the value exchanged between digital platforms and news publishers was properly quantified, we believe that the overwhelming net benefit of the relationship would flow to Australian publishers.

By requiring payment for every single eligible news publisher, the legislation is structured to assume that the value exchange currently will always favour Facebook and then will always justify a payment to be extracted.

2. Overly broad but unknowable scope of publishers

The legislation contains an overly broad definition of who may be (and full decision-making control by the Australian Communications and Media Authority to determine who qualifies as) a publisher.

The scope of publishers who could be covered by this definition is unknown. There is no obvious or clearly defined list from which digital platforms (or regulators) can estimate which publishers are in or out. Even the Treasury's attempt to estimate the number of publishers in the Explanatory Memorandum is very broad: between 100 and 200 possible publishers (we estimate this could be much higher).

Facebook has currently been engaged in commercial arrangements or discussions with up to 30 publishers, and we believe this constitutes almost all major news publishers in Australia. Although the law's scope is unknown, it appears to be a dramatic expansion in the number of news publishers who we would be required to enter into commercial deals. By establishing such a large number of very small publishers who Facebook is compelled to negotiate with, the law dramatically increases the regulatory burden on our company.

While Facebook is a strong supporter of regional and local news - and in supporting media diversity and smaller publishers - we do not believe a law should compel us to enter into commercial agreements with a large number of small publishers. For many of these publishers, they gain significantly greater commercial value from being able to reach larger audiences via Facebook, than we would ever receive from their content; however, we would still be compelled to pay for that content.

These concerns are not abated by the "standard offer" option that the Government has developed in the legislation, which allows a digital platform to issue the same offer for a large number of news publishers. We understand the standard offer

process has been designed to facilitate genuine commercial deal making – with the possibility that the law could then operate as a 'backstop'. However, the law does not operate in this way – in fact, as set out above, we believe the law continues to operate to encourage arbitration and the potential for ambit claims for payment by publishers for the following reasons.

First, digital platforms such as Facebook are at the mercy of whether or not publishers accept any standard offer that the digital platform makes. If one or more publishers do not accept a standard offer – and do not agree to any other commercial terms offered by Facebook – they can trigger the final offer arbitration process.

The ability for digital platforms to make standard offers or to offer commercial agreements therefore does nothing to reduce the practical risk that a large number of publishers may seek arbitration. It does not reduce or give more certainty in relation to the potentially unlimited exposure inherent in the final offer arbitration process.

Secondly, the ability for digital platforms to make standard offers and enter into commercial agreements are still fundamentally predicated on a requirement that digital platforms must enter into contracts involving payment to every single registered news business in Australia. This is the case regardless of whether or not there is any value to Facebook from the news content that the publisher makes available on our services, and regardless of whether the government-imposed price makes any commercial sense for Facebook. This is not an incentive for genuine and sustainable commercial agreements and is likely to have precisely the opposite effect to that intended by Government. It is tantamount to a deliberate distortion of the market.

In this way, the standard offer process will not materially reduce the number of negotiations or arbitrations that a digital platform may face.

Thirdly, even those publishers who do not wish to pursue arbitration (due to the cost of the arbitration process) will be incentivised to not strike deals, at least initially. They do not lose anything by waiting to see if other publishers are able to secure prices through the arbitration process that are significantly higher than the standard offers. In effect, any arbitral outcome that is higher than the standard offer will become the floor for the next standard offer. This will result in ever-escalating costs for digital platforms, without any change in the actual underlying value of the news content.

3. Full autonomy for publishers in structuring dealings

The law grants publishers full autonomy to structure their dealings with Facebook how they would like.

If a publisher owns multiple mastheads or digital channels that are eligible under the law, they are able to register each of those separately, and require that Facebook negotiate with each of them separately. For example, Nine could separately register Nine News (national), Nine Adelaide and 60 Minutes as a negotiating tactic against Facebook, as we would have no choice under the law but to deal with each of them

separately. This would dramatically increase the cost Facebook would bear in negotiating under each agreement, and we have no option but to comply.

Even though the Explanatory Memorandum suggests that 100 to 200 publishers could be entitled to demand negotiations with Facebook, we estimate that the structure of the registration, bargaining and arbitration regimes could result in more than 1,000 different commercial arrangements for Facebook - depending on how publishers structure their requests.

Overall, the Explanatory Memorandum states that the Code is intended to have a "medium impact" on digital platforms, based on the anticipated behaviour of news businesses who are eligible to register under the Code. On the basis of a potentially dramatically larger number of commercial agreements, the Explanatory Memorandum's estimates of the costs and regulatory impact of the legislation is a significant underestimate.

Because the law affords publishers absolute autonomy in how negotiations are structured and does not permit Facebook to object, it again distorts normal commercial bargaining behaviour in favour of permitting unreasonable negotiation tactics and gamesmanship by news publishers.

4. The factors considered in dispute resolution remain skewed towards publishers

In making a determination to resolve a dispute between digital platforms and news publishers, the Arbitration Panel is required to consider a number of factors. Since the last public version of the legislation, the Government has amended these factors to include: the costs borne by the news publishers, the benefits enjoyed by the news publishers, the benefits enjoyed by the digital platforms, and any undue burden on the digital platforms. We strongly commend them on taking a step to recognise the benefits digital platforms provide to news publishers. Unless arbitrators are required to consider both sides, the decisions they reach will clearly be skewed and artificial.

However, the factors still do not include reference to the costs incurred by the digital platforms in providing the infrastructure on which news publishers are able to share their news content. While the factors allow consideration of whether there is undue burden on the digital platform, this factor is not connected to the actual commercial value of that particular transaction, but an assessment of the financial state of the company as a whole.

Additionally, the Government has since included a new requirement that the Arbitration Panel must consider the "imbalance of bargaining power" between the parties. This codifies the ACCC's contested, subjective and unsound conclusion about an imbalance of bargaining power into law. And it ensures that the facts presented by a digital platform can be questioned or undermined so the arbitrator is always able to find in favour of news publishers. Combined with granting publishers full discretion over whether to trigger arbitration, the process remains significantly and disproportionately skewed in favour of news publishers.

5. Highly unusual final offer arbitration

The legislation contains an unprecedented and unacceptable final offer arbitration mechanism to determine the price for the majority of negotiations between digital platforms and publishers.

Final offer arbitration is a novel and highly unusual arbitration model for this legislation, especially without any analysis of the potential costs and detriments. We are not aware of any regulatory setting in Australia where final offer arbitration is used, and we understand that it is rarely used elsewhere in the world (and, even then, primarily for wage disputes or other straightforward assessments). Facebook would face a unique and untested regulatory regime for arbitration which does not sit at all easily with the Government's stated views about their preference for relationships between digital platforms and publishers to be primarily determined through commercial deals.

A number of Australian reviews have considered, and dismissed final offer arbitration.

- In 2017, the Gas Market Reform Group considered this approach for disputes about access to gas pipeline infrastructure.[24] The Gas Market Reform Group concluded that there are a number of disadvantages to this arbitration, including the high potential of parties gaming the system. Ultimately, the Gas Market Reform Group did not recommend this model.

- In 2019, the Productivity Commission considered final offer arbitration in its review of the economic regulation of airports. The Commission indicated the model would lead to economically inefficient outcomes, and strongly criticised final offer arbitration by saying this:

  "An individual airline has little incentive to take into account the needs of other airport users in its negotiations with an airport, or in its submissions to an arbitrator. In fact, to the extent that they are competitors, each airline has incentives to make life difficult for the others. For arbitration to be compatible with efficient airport operations, the arbitrator would need to give some consideration to airport users that are not part of the arbitration.

  The proposal for FOA [final offer arbitration] collapses at this hurdle. Airlines do not have the information or incentives that would be required to make an offer that is consistent with efficient airport operations. The interests of an individual airline might align with efficient airport operations, but this would be entirely coincidental and could not be relied upon as a feature of FOA."[25]

In the context of digital platforms and news, the final offer arbitration model has the same fatal shortfalls. As with airlines, an individual news publisher does not have the information or incentive to make an offer that is consistent with the efficient and

[24] Gas Market Reform Group, Gas Pipeline Information Disclosure and Arbitration Framework - Implementation Options Paper, March 2017, pages 48 to 123.
[25] Productivity Commission, Draft Report into Economic Regulation of Airports, February 2019, page 313.

effective functioning of the platform, either in its dealings with other media companies or in general. In fact, they are incentivised to try and game the system, rather than engage in good-faith negotiation, to try and maximise their stake on the overall amount of investment Facebook would make in news.

More specific concerns about final offer arbitration include:

- The use of this model will likely lead to random and inconsistent outcomes across different arbitrations, for a number of reasons:
    - There is very limited (or no) real-time information available to assist the parties in determining a "reasonable" price.
    - Final offer arbitration is unsuited to situations where the central argument seems to be different perceptions of value. There is no information on this and, as is already clear, there are very widely diverging views on the issue. Final offer arbitration is unlikely to assist in bridging the gap on such a complex and contestable concept.

  The arbitrator is prohibited from independently deciding what price is appropriate. Instead, they are required to pick between two potentially wildly diverging offers that are likely to adopt materially different assumptions, evidence and methodologies. This further limits the "precedential value" of any determination (i.e., the most that can be said after an arbitral outcome is that the arbitrator decided one final offer was closer than the other to whatever "mark" the arbitrator had in mind – not what was the correct approach or correct methodology).

  Given these uncertainties, and the self-evident lack of clarity in the legislation, we expect final offer arbitration would be likely to lead to variable and potentially inequitable outcomes across publishers.

- Final offer arbitration does not encourage parties to work together to reach a shared understanding of value; this model encourages combat and high-stakes gamesmanship to try and succeed in a winner-takes-all decision by the arbitrator. Academic research has suggested final offer arbitration actually leads to **higher** dispute rates than under more conventional forms of arbitration.[26] This seems to be supported by the Government's own estimate that "75 per cent of bargaining processes will ultimately proceed to arbitration".[27] Research also suggests that final offers are especially likely to diverge from one another where there is increased uncertainty about the arbitrator's assessment - the exact situation we would expect for commercial agreements relating to news content.[28]

[26] Orley Ashenfelter, Janet Currie, Henry S. Farber and Matthew Spiegel, 'An Experimental Comparison of Dispute Rates in Alternative Arbitration Systems', Econometrica, vol. 60, no. 6 (1992), page 1430. This is also supported by David Dickinson, 'A Comparison of Conventional, Final-Offer, and "Combined" Arbitration for Dispute Resolution', ILR Review, vol. 57, no. 2 (2004), page 299.
[27] EM [2.13].
[28] Steven Brams and Samuel Merrill, 'Equilibrium Strategies for Final-Offer Arbitration: There Is No Median Convergence', Management Science, vol. 29, no. 8, pages 927 to 941.

- Final offer arbitration is particularly ill-suited, when the deal-making is especially complex and where the public interest may be at stake. It is clear that there are wide differences of opinion in the value of news to digital platforms (with some news publishers claiming it is worth $1 billion and contrary to evidence we have provided), and final offer arbitration does not allow for sufficiently precise consideration to bridge this gap.

The collective consequences of all of these design features of final offer arbitration will be that the scheme will incentivise brinkmanship and "game playing" by news publishers, rather than genuine negotiation. In this way, the process will be used excessively by publishers who do not engage in good faith and would rather try their luck via arbitration. As set out above, the Explanatory Memorandum acknowledges that a vast majority of commercial arrangements will be determined via arbitration: it estimates that "75 per cent of bargaining processes will ultimately proceed to arbitration".[29]

Because of how the arbitration process works, it will undermine the Government's intention of encouraging commercial negotiation and instead result in a scheme where a government-appointed third party is setting prices for news content in Australia. These prices would be set on the basis of the contested, subjective and unsound conclusion by the ACCC that there is an imbalance of bargaining power with news publishers that favours Facebook.

6. Non-differentiation clause which makes publishers "all-in"

One of the key features of the legislation is a non-differentiation clause. We understand it is the government's intention for this clause to benefit publishers by preventing digital platforms from treating news businesses differently on the basis of their participation in a legislated bargaining regime. It applies to all agreements automatically; it does not rely on a publisher to trigger this clause.

However, the practical effect is that this clause will enforce homogeneity in the terms on which digital platforms enter agreements with news publishers. In this way, it limits digital platforms' ability to offer more appealing commercial terms to certain publishers, and prevents digital platforms from deciding to no longer carry news content of a publisher if an appropriate arrangement cannot be reached.

By design, this clause is "all-in": if one publisher is out, all Australian publishers need to be out. It removes the possibility of a digital platform not carrying news content from a particular publisher, even if the publisher behaves unreasonably and inhibits the ability to reach agreement.

If an arbitrator reaches an uncommercial decision, this clause is intended to limit the ways in which a digital platform can respond. The platform is only able to take one of two causes of action: accept the uncommercial decision and pay the amount of revenue determined by the arbitrator; or to no longer carry news content for *any* Australian news publisher. This means that other publishers (who may be perfectly

[29] EM [2.13].

content with the commercial arrangements they have struck with a digital platform) are potentially affected by the commercial arrangements sought by another publisher. The entire news industry would bear the consequences of the unreasonable behaviour of a single publisher.

It is highly unusual for an Australian regulation to remove the ability for a business to walk away from a negotiation where the other party is behaving unreasonably. This ability to walk away is an important constraint on the other party's behaviour and encourages them to behave in a way that is more likely to reach agreement. By forcing Facebook to do business with every publisher no matter what (and removing the ability to walk away even in the worst possible circumstances), the legislation provides an incentive for publishers to behave in ways that do not reflect normal commercial negotiations.

The clause also contains provisions that are of vague and uncertain effect - but is attached to very significant penalties. This generates significant uncertainty for businesses and makes participation in the provision of news at all unduly risky for digital platforms.

Finally, this clause also prohibits Facebook from testing or deploying innovative news products in Australia, like Facebook News. These products are usually rolled out on a test basis with a smaller group of publishers who may be best suited for that product. This clause attaches severe penalties for Facebook in working with some publishers and not others. The practical effect is that it will make it impossible for Facebook to test and trial new products in Australia; it is only possible to release news products that are immediately available to every possible registered news business. If the legislation had been in effect at that time, Facebook would not have been able to launch subscriptions in our product Instant Articles, which was only trialled initially with publishers who had a strong reliance on reader revenues.

Additional concerns

In addition to our concerns with the bargaining and arbitration provisions of the legislation, there are many other requirements that are impractical.

Specifically, these are:

- **Lack of due process in the designation of a digital platform's service:** The sum of this legislation represents an enormous new regulatory burden and financial impost on any business. The expansion of the scheme to other digital services must be carefully weighed up to ensure the potential benefits of inclusion would outweigh any detrimental impacts to innovation, distortion of markets, or inhibiting competition.

  However, any future digital service can be included at a moment's notice at the full discretion of the Treasurer. There is no requirement for the Treasurer to undertake consultation or to provide any opportunity for a digital platform that could be subjected to the law to make their case to remain out.

  Although the Treasurer can choose to seek advice from the ACCC, there is no requirement on the ACCC to provide updated or current advice (i.e., the ACCC can continue to rely on the Digital Platforms Inquiry report, notwithstanding the significant shifts in digital markets already since then).

  There is no opportunity for appeal.

  This should chill any digital platform that currently has or may achieve such popularity with Australian users that they share news articles (regardless of whether that is a core purpose of the digital service or not).

  All of these onerous requirements can be applied to any digital business or service without any requirement to undertake due consideration or without providing any avenue for the relevant business to put forward a case or appeal.

- **News content definitions:** The definitions of "core news content", and therefore "covered news content", are so broad and vague that they will inevitably result in differences in interpretation and result in large, overreaching ambit claims from news publishers. For example, the definition includes content that reports, investigates or explains events of public significance at a local level. This could conceivably cover a local newsletter that advertises or notifies of upcoming functions or events, even if this is far removed from any accepted concept of what constitutes news. Given the wide diversity within the Australian population, it is also extremely unclear what matters would or would not be "of interest to Australians". This is a very broad and undefined concept. The risk is therefore high that the definition will result in expansion of the legislation beyond its intended application (to support diversity and sustainability of quality journalism).

- **Notice of algorithm changes:** Facebook supports in-principle a reasonable requirement to notify publishers when it makes changes to the News Feed algorithms with a significant impact on news content. It is important that such a requirement be limited to truly "significant" changes, given the sheer number and frequency of ranking improvements Facebook makes to enhance our users' experience on the platform, most of which have relatively minimal impact on news publishers.

  Facebook already provides public notice of significant ranking changes at the time a change is set to go into effect. It is often not possible to entirely accurately predict exactly how an algorithm change may impact a particular publisher (like a news organisation).

  We recognise the notification requirement in the legislation is vastly improved from the requirement in the last public version of the legislation. However, 14 days is still a very significant length of time prior to the commencement of an algorithm change.

- **Notice of internal practices and advertising changes:** This legislation contains a new requirement for digital platforms to provide advance notice to all registered news organisations relating to any changes to their internal practices that makes a change to the way content is treated. This is accompanied by a similar requirement to notify news organisations about changes to our advertising practices and policies.

  This requirement is so broad as to potentially capture a whole range of Facebook's legitimate practices. For example, we regularly update our Community Standards which determine which content is permitted on our services. In some cases, this may impact news organisations because they may inadvertently post content that violates our Community Standards (for example, an Australian news organisation posting a piece of content that violates our policy on harmful COVID-19 misinformation).

  We take great efforts to be transparent and public about changes such as these. We do not believe it is at all reasonable or practical to establish a requirement that Australian news organisations be given preferential treatment over every one of Facebook's stakeholders in the world to hear about these changes first.

- **Original news content:** the legislation requires us to make a proposal relating to rewarding original news content within six months of the law passing. In 2020, we already made a significant and permanent change to the way the News Feed algorithm operates in order to reward original news content. This has been welcomed by many stakeholders, including Australian media organisations.

  Given we have already implemented a proposal that satisfies Australian media organisations in this regard, we consider this clause to be obsolete. Even

though it was recommended in the Digital Platforms Inquiry, it is no longer required.

Other digital services

We offer some final comments on the potential applicability of the legislation to Instagram, which some news publishers have called for. We commend the Government for removing Instagram from the scope of the legislation following the Exposure Draft, and strongly reject any suggestion that it is appropriate for Instagram to be re-included within the scope of this scheme.

The Digital Platforms Inquiry (which began in 2017) never suggested that Instagram should be subject to a regime that regulates interactions with news publishers. Instagram is a separate service from Facebook: it is a separate app and separate website, with different functions and uses.

While we do not believe the application of the regime to the Facebook app is justified on the available evidence, the proposed legislative scheme is lacking even further in terms of an evidence base when considering Instagram, for the following reasons:

- Instagram's very limited role as a participant in the Australian news ecosystem was not covered in the ACCC's Digital Platforms Inquiry, and the ACCC made no recommendations or findings relating to Instagram and news.

  Some have claimed Instagram should be included based on a single report released by the University of Canberra in April 2020.[30] In a self-reported survey within the report, 14% of Australians indicated they received some news about COVID-19 from Instagram in March / April 2020 (an increase versus 9% of Australians who earlier indicated they received general news from Instagram in January / February 2020).

  A single survey is not a reasonable basis on which to entirely base public policy decisions about including commercial services in scope of this legislation. On the survey specifically, we note that it only examined which "social media" services people were using for news, and did not examine, for example, the proportion of Australians who may have received news from other digital platforms, like Apple News or email newsletters. The survey also only relates to behaviour since the onset of COVID-19 in Australia at the beginning of 2020, and cannot be extrapolated to suggest Instagram is or will be a critical service for news publishers beyond the pandemic. It appears instead that news consumption increased across every digital platform (including beyond those owned by Facebook or Google) and other media during the COVID-19 pandemic. Additionally, it is possible that Instagram's first efforts to boost authoritative information during a public health crisis (including by inserting

[30] S Park, C Fisher, JY Lee, K McGuinness, Y Sang, M O'Neil, M Jensen, K McCallum, G Fuller, Digital News Report: Australia 2020, University of Canberra, 16 June 2020, https://www.canberra.edu.au/research/faculty-research-centres/nmrc/digital-news-report-australia-2020

prompts that linked to official sources from Australian Government health authorities about COVID-19)[31] may have resulted in the respondents' perception of Instagram as a source of COVID-19 information, rather than any clear evidence of Instagram as a distributor of news from Australian news businesses.

By our initial estimates, news accounts are a very small fraction of active accounts on Instagram in Australia and Instagram has a negligible relationship with the distribution of news in Australia.

- Even if the ACCC wishes to rely on this single survey as the basis for bringing a new digital service within the proposed legislative framework, we note that the report cites Instagram's use for general news at 9% of respondents -- lower than Twitter (10%) and significantly less than YouTube (21%).

- Including Instagram in this legislation would also fundamentally misconstrue Instagram's role as a service. Instagram is a visual-first space where people connect and share using photos and videos. Any "news content" on Instagram is primarily in the form of visual content (photos, videos, graphics) rather than traditional news articles written by journalists. If news publishers choose to have a presence on Instagram, their efforts are typically less focused on news and more focused on marketing to new audiences and establishing brand identity. This is no different to any other businesses that choose to use Instagram.

More importantly, Instagram is not designed for the distribution of news content. As the Head of Instagram, Adam Mosseri, said in Wired in November 2019: "We're going to put a 15-year-old kid's interests before a public speaker's interest," and "When we look at the world of public content, we're going to put people in that world before organisations and corporations."[32] For example, Instagram doesn't allow users to share clickable links in Feed posts on Instagram which drive referral traffic to off-platform websites, such as a publisher's website.

The ability for people to re-share content on Instagram (such as visuals posted by news publishers) is also significantly limited compared with other digital platforms. A user cannot re-share another user's Feed post directly to their own Feed. This means that news, and indeed any third-party content, cannot be re-shared or circulated amongst people on Instagram unlike other social media services. This emphasises that Instagram is a place for individuals to share their own original photos and videos, rather than a place for "referrals" or sharing of content at scale.

Given the above, we strongly believe there is no basis for including Instagram in any part of the proposed legislative framework.

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[31] Facebook, Update on Facebook's efforts to support the COVID-19 response in Australia and New Zealand, 23 March 2020, https://www.facebook.com/notes/facebook-australia-new-zealand-policy/update-on-facebooks-efforts-to-support-the-covid-19-response-in-australia-and-ne/2598576887136235/

[32] A So, 'Instagram Will Test Hiding "Likes" in the US Starting Next Week', Wired, 11 August 2019, https://www.wired.com/story/instagram-hiding-likes-adam-mosseri-tracee-ellis-ross-wired25/

Recommendations

Because our concerns arise from the complex interaction between six different and fundamentally flawed components of the law, it is not simple to address our concerns with the legislation.

We believe significantly more concerted work is required to make the legislation a workable scheme that reflects commercial realities.

In fact, if the Government were able to give Facebook a period of time to strike commercial deals on our own (without the overhanging threat of dire new regulation), we believe we would be able to strike agreements with news publishers that would demonstrate policymakers' concerns could be resolved without such strident regulatory intervention.

If the Australian Government does wish to attract significantly greater investment in the Australian news industry by digital platforms, one option could be to consider the institution of a "grace period" where digital platforms are given assurances they will not be designated (or subject to the threat of penalties or damages) if they enter into satisfactory commercial agreements with news organisations within a reasonable period of time -- say, six months.

We would welcome the opportunity to provide more detailed suggestions for amending the legislation, with the intention of providing sufficient certainty and commercial return for digital platforms to unlock additional investment in Australian news.

There are some specific recommendations we could already make, such as: amending the arbitration factors in the draft legislation to a genuine two-way value exchange (i.e., the cost and benefit of each party will be taken into account) and that the highly unusual final offer arbitration will be replaced with an alternate dispute resolution mechanism to incentivise all parties to enter into agreements during this grace period.

It is highly problematic to couple a compulsion to negotiate deals with all news publishers with a very low eligibility threshold. This dramatically increases the regulatory burden on digital platforms, and includes a broad swathe of publishers who will primarily be the overwhelming beneficiaries of their relationships with digital platforms. Facebook is a strong supporter of media diversity (especially local, regional and small or medium publishers). However, we believe a better structure for these investments would be via a competitive pool or grant round, rather than a legislative requirement to enter into negotiations with every publisher, with potentially uncapped and unknown exposure for Facebook.

Finally, given that the law has prescriptive regulation of minute interactions between digital platforms and news publishers, it would be reasonable to remove these provisions from attracting penalties under the law and only attaching penalties to the most critical and significant obligations under the legislation.