



18 January 2021

Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Committee,

Thank you for the opportunity to provide a written submission to the Australian Senate Standing Committees on Economics regarding the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (**the Bill**).

Twitter's purpose is to serve the public conversation, and we believe that regulation should promote and protect consumer choice and fair competition. Maintaining an open internet fosters a diverse media ecosystem where consumers have variety and quality in their news choices, as well the means to choose how they find and access that information.

Free discourse can only thrive if its underlying architecture is protected. We have a shared responsibility to promote a culture of innovation and mitigate the risk of placing smaller players or new market entrants at a disadvantage.

Twitter is committed to working with the Australian Government, as well as industry, academia, and civil society as we continue to build our shared understanding of these issues and find optimal ways to approach them together.

Kind regards,



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## Overview

Twitter welcomes many changes that have been made to the draft legislation since its initial release. For the purposes of this submission, we will focus on areas that we believe still need to be addressed, namely the future application of the Code as it may extend to additional digital platforms.

## Designated digital platforms and services

The objective of the Code is to establish a mandatory code of conduct to address bargaining power imbalances between digital platforms and Australian news businesses.

Section 52E(3) states that when designating a digital platform for inclusion in the Code, “the Minister must consider whether there is a significant bargaining power imbalance between Australian news businesses and the group [comprising] the corporation and all of its related bodies corporate.”<sup>1</sup> However, the section does not go further to include transparent criteria regarding how significant bargaining power imbalances would be determined for the designation of additional digital platforms in the future.

Additionally, the Explanatory Memorandum states a digital platform must participate in the Code if one or more of the services it operates or controls has been designated by the Minister as a designated digital platform service, thus eschewing any requirement for transparency in the decision-making process. Additionally, potential platforms could be designated to be within the scope of the Code without any clear appeal process or mechanisms to challenge the decision reached by the Minister.<sup>2</sup>

Certainty drives corporate confidence, and currently the Code lacks objective criteria to indicate when a digital platform may be designated as subject to the Code. This unilateral power for the Minister to enact binding mandatory legislation on a company without appropriate checks and balances removes basic due process, and it renders it difficult for any digitally-enabled business with user-generated content to effectively operate, grow or thrive in the Australian market with any degree of business certainty.

## Avoiding unintended consequences for small platforms, publishers, and consumers

The consumer lies at the heart of competition law. Any solutions to perceived market failures should seek to protect consumer welfare and choice. The Code, as currently drafted, is likely to do the

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<sup>1</sup>*Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, section 52E(3).

<sup>2</sup>*Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Explanatory memorandum. Retrieved from section 1.45 on 12 January 2021  
<<https://www.accc.gov.au/system/files/Exposure%20Draft%20EM%20-%20NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%20BILL%202020.pdf>>.



opposite. Because of potentially unintended consequences, the Code is likely to entrench dominant players at the expense of smaller digital platforms, publishers, and consumers.

#### *Smaller digital platforms and new market entrants*

If the Code is implemented as written, registered news business corporations will negotiate payment terms with designated digital platforms to receive payment for the inclusion of their news content on the platform's designated services. However, currently no protections exist to bar registered news business corporations from subsequently entrenching the two designated digital platforms as the main channels for their online news content distribution, especially if there are strong and favourable revenue incentives to do so.

To the contrary, the current draft Code would potentially incentivise the curation of exclusive news content on the designated digital platforms creating unfair competition and harming smaller platforms through reduced traffic and the loss of potential exclusive or breaking news content. As this is a negotiation process mandated by the Government, the Code does not include protections that would prevent designated digital platforms from entering into exclusivity agreements with news publishers that could impact their future dealings with other smaller platforms or new market entrants in the future. Given the market power of the two designated digital platforms at this time, there may be little incentive, or the requisite bargaining power, to resist such an arrangement.

Additionally, this regulation has the potential to create additional barriers for new and emerging market entrants. As the cost of complying with this Code and other regulatory requirements continue to accrue, it becomes increasingly difficult for new entrants to break into the market or challenge incumbents. The overall consequence may have the unintended effect of creating the very market power imbalances and monopolies the Australian Government is seeking to prevent.

#### *Smaller news publishers and consumers*

As written, the Code risks disadvantaging smaller publishers who don't sign agreements and will miss out on current distribution and discovery channels. This will disproportionately affect independent, regional, and startup publications for whom finding new audiences is especially valuable, and will result in less numerous and less diverse sources online.<sup>3</sup>

Conversely, the media ecosystem has traditionally utilised the open internet to reach new audiences, especially across a multitude of digital platforms that have different audiences or niche markets. The Code has not been developed with these services in mind. As the large news publishers ink these bargaining arrangements under the Code, they will have less incentive to publish their content across a multitude of digital platforms other than the designated digital platforms that hold signed

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<sup>3</sup>*Ibid.*



agreements with guaranteed revenue. Thus, smaller digital platforms will lose out on the opportunity to also have this content also shared on their platforms too.

Additionally, the range of prohibitive civil enforcement sanctions that can apply poses a strong disincentive for new potential players to enter the market if they were designated as having to participate in the mandatory news media bargaining code, which could dissuade them from entering the Australian market or serving Australian audiences altogether.

As one of the most concentrated media markets in the world, the consumer experience will worsen as the Australian media market further supports dominant players.<sup>4</sup> Long term impacts of the Code could serve to protect dominant firms on both sides of the bargaining table rather than protecting the public interest and detrimentally affect access to diverse and quality news content for Australian consumers.

### **Digital platform services and the broader implications of the Code**

Twitter provides a service focused on serving the public conversation. Twitter does not search or scrape the web for press publications, nor copy content and bring it to the Twitter platform. Twitter's service is compiled through user-generated content and is dedicated to upholding the free flow of news and information, which is vital to a public debate and political communications.

As Twitter is positioned within Australia as a modest participant, any extension of the Code would place us in a competitive disadvantage and hinder our ability to grow within Australia. In regards to local legislative precedents, we have an interest in the Code being adopted in as precise and balanced manner as possible, which respects the rights and interests involved to create a predictable regulatory environment for online content-sharing services in the future.

We would urge the Government to consider the long-term ramifications of codifying the creation of arbitrated content agreements between dominant digital platforms and established news media businesses. We would also ask the Government to reconsider if this process achieves the stated legislative objective to address bargaining power imbalances or if it serves to further reinforce the position of dominant players on both sides of the bargaining table.

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<sup>4</sup>Dwyer, Tim. (November 8, 2016). *FactCheck: is Australia's level of media ownership concentration one of the highest in the world?*. Retrieved from <https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437#:~:text=The%20Australian%20media%20landscape%20is,the%20large%20majority%20of%20Australians.>