The Guardian

18 January 2021

Guardian Australia Submission to the Senate Economics Legislation Committee on the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

About GNM Australia Pty Ltd

Launched in May 2013, Guardian News & Media Australia Pty Ltd (GNMA) is a free premium digital news site in Australia, with a total reach of 6.4m people (Nielsen DRM, December 2020), making us the seventh most read news masthead in the country. We employ 61 FTE journalists and 36 FTE commercial and operations staff through our operations in Sydney, Melbourne and Canberra, as well as numerous freelance contributors.

We are a trusted source of quality news with a particular focus on politics, the environment and social welfare. We are also part of the Guardian's 24-hour global news operation, helping to cover breaking international stories in all parts of the world. GNM Australia operates as an Australian Pty Ltd company with revenue invested back into Australian journalism.

GNMA is owned by Guardian News and Media Holdings (GNMH) which is owned by Guardian Media Group (GMG), which is the publisher of theguardian.com, a leading global English-language newspaper website. The Scott Trust is the sole shareholder in GMG and its profits are reinvested in journalism and do not benefit a proprietor or shareholder.

Introduction

Guardian Australia welcomes the opportunity to make a further submission to the Senate Economics Legislation Committee on the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 "the bill".

Over recent months, we have engaged closely with colleagues at both the ACCC and Treasury on the details of the bill. We support many aspects of the bill, and believe that the Australian government is leading an important effort to rebalance power relations between online platforms and news media publishers.

For many people, dominant online platforms have become the internet, or at the very least the principal gateways to it. According to the University of Canberra's 2020 Digital News Report, 39% of Australians use Facebook for general news, and 49% use Facebook for news about Covid-19[1]. This means that dominant online platforms now play a key role in our information ecosystem. They have also become unavoidable trading partners for news media publishers.

In this short submission, we reflect on areas of the bill where we have welcomed change from the original draft, and also areas where we continue to have concerns, and where we seek clarification from the Committee. We look forward to providing oral evidence to discuss these issues with the Committee later in January.

[1] https://www.canberra.edu.au/research/faculty-research-centres/nmrc/digital-news-report-australia-2020

Bill clause	Guardian Australia notes
52M Revenue test *(1)For the purposes of this Division, the requirement is that the annual revenue of the corporation (or of a related body corporate of the corporation), as set out in the corporation's (or the related body corporate's) annual accounts prepared in accordance with generally accepted accounting principles, exceeds $150,000:* *(a) for the most recent year for which there are such accounts; or* *(b) for at least 3 of the 5 most recent years for which there are such accounts.*	It is vital that this bargaining code ensures that the scope of determining what counts as an eligible publisher is framed to ensure that genuine investors in high quality, original Australian journalism are rewarded. Small, independent news sources that are investing in original Australian public interest journalism should benefit from the introduction of a mandatory bargaining code. In the interests of moderating the burden on the responsible platforms, in addition to the $150,000 threshold, there is a question about whether smaller news publishers should negotiate bilaterally with Google, or form a collective of independent publishers in order to conduct that negotiation. There may be a case for establishing a fund that is accessible to publishers who would otherwise qualify for under section 52G of the final code, but for the fact that their revenue falls below the $150,000 threshold. This would ensure that smaller, startup businesses could also access payment under the code, without placing undue burdens on responsible digital platforms to undertake individual negotiations with all of those publishers. Such a change could ensure that the code enables innovative new businesses to access funding under the Code, as well as existing media businesses.
52N Content test *(1) The requirement in this subsection is met in relation to a news business if the primary purpose of each news source covered by subsection (2) is to create content that is core news content.* *(2) This subsection covers a news source if it comprises, whether by itself or together with other news sources, the news business.* *(3) For the purposes of subsection (1), in*	We support the key objective of using the Code to incentivise investment in high quality core news content for Australians. It is vital that the ability to enter into licensing negotiations with responsible digital platforms, or the measures to provide transparency ahead of significant algorithm changes, do not create a pathway through which this process rewards publishers that steal original public interest journalism, only to pass that journalism off as their own. We welcome the fact that the final code does not envisage content such as celebrity news being covered under the definition of 'core

determining whether the primary purpose of a news source is to create content that is core news content, take into account the following matters: *(a) the amount of core news content created by the news source;* *(b) the frequency with which the news source creates core news content;* *(c) the degree of prominence given to core news content created by the news source, compared with the degree of prominence given to other content created by the news source;* *(d) any other relevant matter.*	news'. GAUS is aware of instances where large online news publishers have been found to lift original copy that could be categorised as being in the public interest[2] for publication and monetisation on their own digital properties, without putting appropriate licensing and accreditation in place. Such licensing practices are vital, not just from responsible digital platforms and other users of original journalism, but from news publishers themselves. Our wider business has experience of pursuing individual claims with large online news publishers for the misuse of original journalism through the wholesale copying of that content. This process can be time consuming, and often only yields positive results many weeks after an original article is published, by which time the relevance of that article with the audience may have depleted, or the article that replicated wholesale aspects of the original article may have resulted in traffic and attention being taken away from the original article. On other occasions we have pursued large online publications for copyright infringement of Guardian journalism in order to establish proper attribution within the copycat article and licensing fees to the Guardian. GNM has pursued either a takedown of that copied journalism or pursued licensing fees from copycat publications on a case by case basis, but this can be time consuming, may yield low financial returns or may be subject to stalling. Again, this approach to pursuing publications that lift copy from the original investors in journalism is not scalable, and does not challenge the cultural problem of copy lifting or copyright infringement. Given that the policy goal of the mandatory bargaining code is to incentivise investment in original journalism, and yet the business incentive created by the commercial negotiation terms of the mandatory bargaining will be for publishers to publish as much Australian public interest journalism as

2 https://www.newstatesman.com/politics/media/2016/04/what-it-s-fall-victim-mail-online-s-aggregation-machine

	possible in order to satisfy the content test, consideration should be given to putting in place a disincentive to publishers lifting copy or infringing publisher copyright. For example, in considering whether a news source is eligible under the Code, they put in place an ongoing assessment of whether a news publisher has a track record of copy theft. Such an assessment could be made through the development of a complaints process to receive concerns about copy lifting and copyright theft. A complaints process could then establish a pattern of behaviour, which could lead to eligibility to participation under the code being removed.
52O Australian audience test *(1) The requirement in this subsection is met in relation to a news business if every news source covered by subsection (2) operates predominantly in Australia for the dominant purpose of serving Australian audiences.* *(2) This subsection covers a news source if it comprises, whether by itself or together with other news sources, the news business.*	We welcome guidance that journalism that is produced internationally, but which is of direct interest to Australian audiences and consumed on Australian news sources would count in relation to the original content test. GNMA produces and curates a rich mix of journalism that combines deep coverage of Australian issues of public significance with international news issues that are relevant to Australians, curated by an Australian editorial team under the direction of an Australian editor. The respective digital platforms' Australian services benefit from reader engagement with that journalism, whether it is produced by Australian or internationally-based Guardian journalists.

52P Professional standards test *(iii) is subject to the rules of a code of practice mentioned in paragraph 8(1)(e) of the Australian Broadcasting Corporation Act 1983 or paragraph 10(1)(j) of the Special Broadcasting Service Act 1991; or*	We welcome changes to the original draft code to include both the ABC and SBS within the scope of the Code. Including ABC and SBS within the ambit of the code will also ensure a level playing field within the designated digital platform services. If ABC and SBS were excluded from payment, they would become an outlier. While journalism produced by the ABC and SBS would continue to be published by the responsible digital platforms (from which the platforms would benefit), neither the ABC or SBS would be able to negotiate commercial terms from the platforms for doing so. This could provide an incentive for the platforms to promote ABC and SBS journalism over and above the journalism of publishers who are deemed to be news publishers under the code, and who are therefore eligible to seek payment from responsible platforms for doing so.
1.79 A news source is subject to a professional standard for the purposes of the Code if: *• it is subject to the rules of the Australian Press Council Standards of Practice or the Independent Media Council Code of Conduct;* *• it is subject to the rules of the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice;* *• it is subject to the rules of the Australian Broadcasting Corporation or Special Broadcasting Service codes of practice;* *• it has internal editorial standards that are analogous to the above mentioned rules regarding internal editorial standards relating to the provision of quality journalism;* *• it is subject to rules specified in the regulations that replace the above rules; or* *• it is subject to other rules specified in the regulations.*	We welcome clarification at 52P (iv) that a news source that has internal editorial standards that are analogous to those observed by the Australian Press Council Standards of Practice or the Independent Media Council Code of Conduct, are sufficient to qualify under the Code. Guardian Australia's editorial standards are governed by Guardian News and Media's independent global readers editor and their team, based out of our parent company's head office in London. GNMA's approach to self-regulation comprises an editorial code of practice; and both an independent readers' editor and an independent review panel, each of whom report to the Chair of The Scott Trust. Where appropriate, arbitration is offered by GNMA as a way to resolve legal disputes without the need to go through a lengthy and costly court process for both sides. The global readers' editor writes a corrections and clarifications column every day, and a longer weekly column, "open door", which explores some of the more detailed complaints made to the office of the readers' editor. A recent column by the readers' editor prior to the current incumbent, outlined how the

	readers' editor's office responds to the many interactions that we have with readers in Australia and across the globe. Rulings of the review panel are hosted within the corrections and clarifications section of The Guardian website. The review panel ensures that where complainants do not feel their issues have been adequately resolved through the internal complaints procedures, they have the opportunity to have their complaint further considered by an independent panel. GNMA's primary focus is on resolving complaints in a rapid and effective manner, and promoting the highest quality standards of independent journalism.
1.17 The Bill specifically authorises collective bargaining so that it does not contravene the restrictive trade practices provisions in the CCA. Nothing in the Bill is intended to prevent news business corporations from engaging in discussions with one another about forming a collective. This is because forming a collective is authorised under the Bill.	We would welcome clarification that news media businesses are able to discuss a collective position, but can also then retain the ability to negotiate bilaterally with the digital platforms if they determine that is the best option. In approaching negotiations under the code provisions, Google and Facebook will continue to start from a position of knowing more than any individual publisher could know about its bargaining position. Both companies will continue to benefit from information asymmetry which could be used to place downward pressure on terms negotiated with publishers. News publishers need, therefore, to be able to share information, understanding and best practice within clear parameters that do not fall foul of competition law. This information sharing may lead to publishers deciding to enter collective bargaining, or it may mean that publishers decide instead to pursue bilateral deals with responsible digital platforms. Ultimately, publishers need confidence from the regulator that they are able to come together to develop a consistent bargaining framework that contains the principles that publishers could use to collectively negotiate, even if publishers determine, in the end, that bilateral negotiations are preferable.

	By way of example, news publishers may agree to negotiate on the basis that a consistent percentage of the cost of our journalism should be paid by the platforms as one key consideration in the fees the platforms should pay, and/or agree to apply a consistent methodology to determine the indirect benefit the platforms receive from publisher content, while pursuing different outcomes on consumer data depending on the importance of targeted advertising to the respective news businesses. If negotiations end up being resolved by final arbitration, publishers will be in a better position to determine best practice in their respective final submissions to the ACMA, mitigating the information asymmetry with the digital platforms.
1.108 A user who interacts with a link to content made available by a designated digital platform service, interacts with the content, even if the linked material is contained on a website separate to the designated digital platform service.	We would welcome clarification that "commenting, sharing, modifying or otherwise engaging with the content in some way" includes the user reading a snippet within the covered service.
1.109 This provision is not intended to require the designated digital platform corporation to provide information about data it collects from websites that are not part of a designated digital platform service.	We believe that the ability to understand the data collected by digital platforms through products that sit outside of the covered services is essential to enable news businesses to understand the total value that their content provides to the digital platforms. The value that news media businesses provide to Google as a result of inclusion in Google search, can only be properly understood when combined with an understanding of how data generated through those transactions is utilised by other Google products such as Google Ad Manager or Google Analytics.

1.110 There is no obligation on a responsible digital platform corporation to share any user information. Nor is there any requirement to make the same data available to all registered news businesses if data is shared with one registered news business. This provision only requires that if a responsible digital platform corporation chooses to share user interaction data with one or more registered news businesses, it must inform all other registered news businesses, at least in general terms, about the types of data it has provided by listing and explaining the shared data. [Schedule 1, item 1, section 52R]	We recognise that this is an attempt to create a level playing field, but the impact of this could be to actually increase reticence of platforms within scope to share any engagement information with any publisher. Similarly, if a news business requested data for a particular commercial purpose, the provision of that data point to other publishers could undermine innovative services being developed by the original requestor.
***sections 52S-52W** – in relation to where the minimum standards provide for advance notice of changes algorithm changes etc.*	We believe this is a reasonable tightening of the wording with regards to notification based on a 14 day timeline. Though nothing in the final code should prevent the platforms making information about changes to services known more than 14 days in advance.