



Australian Government

The Treasury

OPENING STATEMENT

SENATE ECONOMICS LEGISLATION COMMITTEE

TREASURY LAWS AMENDMENT (NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE) BILL 2020

HEARING, 1 FEBRUARY 2021

Thank you for the opportunity for Treasury to appear before the Committee today.

As set out in the Explanatory Memorandum in the bill before the Committee, the News Media and Digital Platforms Mandatory Bargaining Code is designed to support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australia news businesses.

The Code brings digital platforms and news businesses together to negotiate on terms that would see digital platforms sharing the benefit they obtain from using Australian-sourced news with the news media businesses who create that content.

Jurisdictions around the world are grappling with this policy issue. For example, the United Kingdom has announced it will establish a Digital Markets Unit to enforce a code of conduct for digital platforms. Among other things, this code is intended to support the sustainability of the news publishing industry.

Further, the European Union has enacted a so-called ‘neighbouring rights’ law which extends copyright to certain online news content. France is the first EU country to adopt this law and agreements have recently been reached under which Google will make payments to French news businesses.

Typically Australia uses competition law codes to support more balanced commercial interactions between parties and we already have codes in Australian sectors such as franchising, food and grocery, dairy, sugar and horticulture.

Many of the elements of the Code before the Committee are similar in intent to those found in these other codes. Most but not all are mandatory, some include arbitration options for resolving disputes, including the use of time limits. The codes often require parties to provide information to other parties. The penalties for breaching one of a small number of foundational provisions of

the Code, while substantial, mirror the penalties in competition law. Breaches of other provisions of the Code have commensurately lower penalties. And, finally many of these codes are subject to periodic review.

I would emphasise that the Code is the outcome of an extensive and rigorous policy development process involving extensive stakeholder consultation and policy consideration.

Consideration of these issue more formally commenced in December 2017, with the Government directing the Australian Competition and Consumer Commission (ACCC) to undertake an inquiry. The final report of that inquiry was completed in mid-2019.

The Government, after initially asking the parties to develop voluntary codes, decided in April 2020 that a mandatory bargaining code was needed. The ACCC circulated a concepts paper for stakeholder consultation in May 2020 and a draft Code in July. A further round of targeted consultation was conducted in November 2020. The proposed Code was then subject to usual Cabinet decision-making processes before a Bill was introduced into the Parliament on 9 December 2020.

I would like to provide some brief perspectives on elements of the Bill that have been raised in recent Committee considerations.

Designation of digital platforms

The Code will only apply to those digital platform services that are designated by the Treasurer.

The Code provides that the Treasurer, in deciding whether a digital platform service should be designated, must consider whether there exists a significant bargaining power imbalance. In addition, the Treasurer may consider ACCC reports.

The relevant ACCC report for the initial designation of digital platforms services after the Code commences is the Final Report of its Digital Platforms Inquiry, released in July 2019.

That Report found that significant bargaining power imbalances between Google, Facebook and Australian news businesses arise because they are critical sources of referral traffic for news businesses.

The Report therefore provides strong grounds for the Treasurer to designate these services.

The ACCC will continue to monitor digital platforms until at least 2025 pursuant to a direction from the Treasurer under the *Competition and Consumer Act 2010*.

This will enable the ACCC to undertake further analysis and stakeholder consultation over an extended period on whether other digital platform services should be made subject to the Code.

Were it to find evidence of a significant bargaining power imbalance it will be able to provide this evidence and appropriate recommendations to the Treasurer.

It would then be open for the Treasurer to consider designating any such services.

What will digital platforms be paying news businesses for?

Concerns have been expressed that the Code will undermine the workability of the internet by requiring digital platforms to pay for providing links to news content.

At the outset, I should emphasise that the Code encourages the parties to reach agreements outside the Code, and digital platforms could be expected to negotiate that payments under such agreements would not be on a pay-for-link basis.

Similarly, standard offers by digital platforms to news businesses could be expected to exclude pay-for-link remuneration.

In those cases where the parties end up in arbitration, as the Explanatory Memorandum makes clear (at para 1.211), the Code is not prescriptive about the form of the remuneration to be paid by digital platforms to news businesses.

This will allow the parties to formulate how remuneration would be paid in the final offers they put to arbitrators. The expectation is that parties will propose lump sum or periodic payments over the two years that determinations will be in force. The Explanatory Memorandum states that, if a party submits an offer that provides for non-lump sum payments, the offer should include an estimate of the equivalent lump sum figure.

Non-differentiation

The non-differentiation provisions of the Bill have been subject to revision through the policy development process. The provisions are designed to prohibit digital platforms from taking retaliatory action against news businesses which exercise their rights under the Code.

They have been developed to prevent actions we have seen occur in foreign markets when issues of copyright or royalty payments have been raised in those jurisdictions.

Specifically, the Bill prohibits digital platforms from differentiating between registered news businesses, and between registered and unregistered news businesses, in specified ways – for example, by changing the ranking of news content.

It is important to note that the provision applies where a digital platform treats a news business's content differently in response to that business doing one of a specific list of things under the Code.

For example, the provision will prohibit a digital platform from disadvantaging a news business because it commences negotiations or triggers arbitration under the Code.

As the Explanatory Memorandum makes clear at paragraph 1.154, the non-differentiation provision is not intended to interrupt normal commercial dealings.

As such, it is not intended to prohibit a digital platform reaching different agreements with news businesses where these agreements reflect standard commercial considerations.

Put another way, it does not require a digital platform to offer all news businesses the same deal.

Similarly, the provision is not intended to prevent a digital platform from testing a new product with a target group of news businesses where this is standard business practice.

The Code is not intended to prevent a digital platform from ranking its content based on interest or relevance to its users, in line with their standard business practices.

The ACCC will be charged with enforcing this part of the Code and could provide further information on their intended approach to enforcing the non-differentiation provision.

Arbitration factors

In the event that commercial deals are not struck either outside the Code, through a standard offer process, or inside the Code then the Code sets out an arbitration process to ensure that the issue of payment for use of news content is resolved within an appropriate timeframe. This provides certainty for all parties.

Under the Code arbitrators are required to take account of certain factors when considering which 'final offer' to choose.

They must consider the benefits that both parties obtain from having Australian news content available on digital platforms.

Consistent with the fundamental purpose of the Code, these benefits must be considered taking account of the bargaining power imbalance between digital platforms and news businesses.

Arbitrators must also consider the costs of producing news content.

While arbitrators are not expressly required to consider digital platform costs, balance in the arbitrators' considerations is maintained as they are required to consider whether their decision would impose an undue burden on the commercial interests of digital platforms.

Number of negotiations

The Government has been conscious in developing the Code to ensure the negotiation and arbitration process is manageable for all parties.

The Code ensures a range of news media businesses are eligible to participate, with design elements that mean that small and regional news businesses are able to benefit along-side larger media organisations.

However, there are also specific design features in the Code, that when combined with commercial factors, are expected to keep the compliance costs of the Code manageable.

The Code encourages parties to reach commercial agreements outside the Code by allowing these agreements to switch off elements of the Code such as arbitration.

Under the Code, digital platforms and individual news business will be required to negotiate in good faith.

Further, we expect it will be unlikely that media organisation that owned several newspapers to register each paper, or groups of papers, as separate news businesses, given the costs this would impose on the news company itself.

Rather, we think news companies will have a strong incentive to consolidate negotiations for different parts of their operations so as to reduce their costs.

Smaller and regional news businesses, in particular, are likely to be attracted to bargaining collectively so as to reduce their costs. This is explicitly allowed for in the Code, as it is elsewhere in our competition framework.

Digital platforms would also be able to make standard offers to news businesses and thereby avoid individual negotiations. For the same reason, standard offers are also likely to be attractive to small and regional news businesses.

Conclusion

The Australian Government, like governments around the world, is concerned to ensure that digital platforms fairly remunerate local news businesses for the content they create, and from which the platforms generate financial returns.

The Code introduced into the Parliament is designed to be legislatively and operationally workable and to support a sustainable Australian news media sector while ensuring that Australian businesses and consumers continue to benefit from the services provided by digital platforms.

Finally, the Government has directed the Treasury to undertake a review of the Code to commence within one year of the Code coming into effect. This will provide an opportunity for news businesses and digital platforms to share their experience with how the Code works in practice, and for the Government to consider whether any refinements to the Code are warranted.