



Submission by  
Free TV Australia

**Review of the News  
Media and Digital  
Platforms Mandatory  
Bargaining Code**

The Treasury  
Consultation Paper

May 2022

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## 1. Executive Summary

- Free TV welcomes this review of the News Media Bargaining Code and strongly supports the maintenance of the existing framework with its key pillars of:
  - A designation power for the Treasurer
  - A framework for genuine commercial negotiation to achieve a fair value for the news content made available by the digital platform services of Google and Meta
  - Final Offer Arbitration (FOA) to operate as a deadlock breaking mechanism in the event that the two parties cannot come to a commercial agreement.
- While no designation has yet occurred, the evidence from 12 months of operation of the Code demonstrates that the incentives from these key pillars have broadly been successful in driving commercial negotiations. The ACCC has indicated that the commercial arrangements have led to the payment of over \$200 million by the digital platforms to news media companies.
- The Code has addressed the fundamental bargaining power imbalance that led to the previous refusal of digital platforms to pay a fair price for news content despite the value it creates on their services. It is critical that the legislation be maintained, as without the bargaining Code framework the commercial arrangements that have been struck to-date would not have been possible.
- The ACCC's original findings on the market power held by Google and Meta have been confirmed in recent ACCC analysis (February 2022) that highlighted that these platforms continue to hold a dominant position in the supply of search and social services respectively. As such, the policy analysis that underpinned the creation of the media bargaining Code remains valid.
- This bargaining code framework, including FOA, has become the model for other countries looking to address the fundamental competitive imbalance between digital platforms and news media businesses, for example the recently introduced [C-18 Bill](#) in Canada and the [UK Government's response](#) to the consultation on a new pro-competition regime for digital markets.
- However, Free TV submits that improvements can be made to the framework to ensure that all eligible news media businesses are fairly remunerated for their news media content, including as existing commercial arrangements come up for renewal. Critically, this must include video news content on social video platforms such as YouTube.
- Accordingly, to maintain incentives on digital platforms to seek commercial arrangements, the Government should:
  - issue a statement of expectations on digital platforms that establishes an intention to designate (following the required process in the legislation) Facebook, Google Search and YouTube (and their subservices) if commercial arrangements are not entered and maintained with all relevant news media companies
  - Remove the "significant contribution" test in the designation criteria to reinforce that all eligible news media businesses can seek agreements under the Code if the Treasurer determines to designate a digital platform service
  - Commit to biennial reviews of the operation of the Code to ensure that it continues to foster genuine commercial relationships and to maintain an effective check and balance on the market power of the digital platforms.
- Free TV has also highlighted areas where future reviews should focus, including in relation to the balance of the factors an arbitration panel must consider, the definitions of core and covered news content and the potential for streamlining the ACMA registration process.

## 2. Introduction

Free TV Australia appreciates the opportunity to comment on the Treasury’s Review of the News Media and Digital Platforms Mandatory Bargaining Code Consultation Paper April 2022.

### 2.1 About Free TV

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Free TV is the peak industry body for Australia’s commercial free-to-air broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial free-to-air television makes to Australia’s culture and economy. We proudly represent all of Australia’s commercial free-to-air television broadcasters in metropolitan, regional and remote licence areas.



Our members are dedicated to supporting and advancing the important contribution commercial free-to-air television makes to Australia’s culture and economy. Australia’s commercial free-to-air broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent.

A report by Deloitte Access Economics “*Everybody Gets It: The economic and social benefits of commercial television in Australia*” highlighted that in 2019, the commercial TV industry supported 16,300 full-time equivalent jobs and contributed a total of \$2.3 billion into the local economy. Further, advertising on commercial TV provided an additional \$4.4 billion worth of economic benefit.

In addition to this economic analysis, Deloitte also undertook a consumer survey that highlighted the ongoing importance of the commercial TV sector to the community, including:

- 86% of people thinking that commercial television supports Australian culture
- 76% think commercial TV is more important than ever
- 95% think losing it would have an impact on society.

The commercial television industry creates these benefits by delivering content across a wide range of genres, including news and current affairs, sport, entertainment, lifestyle and Australian drama.

Free TV members are well positioned to comment on the review of the news media bargaining code given our involvement at all stages of the formation of the policy, from the ACCC’s initial Digital Platforms Inquiry, through to the Economics Legislation Committee report that recommended that the Bill be passed.

### 2.2 Commercial arrangements struck by Free TV members

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This submission provides the views of the commercial television industry on the operation of the news media bargaining Code and actions that can be taken to ensure that this success is continued and that all relevant news media companies are able to secure commercial deals with Google and Meta.

To the extent that agreements allow, individual networks may provide additional commercial-in-confidence submissions to Treasury as part of this review. As is appropriate, Free TV does not have visibility of any individual network’s commercial arrangements.

## 2.3 Structure of this submission

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This submission is set out as follows:

- Section 3 – The underlying policy rationale for the Code and its continuing relevance
- Section 4 – Establishes the key pillars of the bargaining Code and their criticality in the commercial outcomes that have been achieved
- Section 5 – Proposes a statement of Government policy intent on the future designation of digital platform services
- Section 6 – Highlights some technical issues that could be addressed if the legislation were to be amended in the future
- Section 7 – Proposed next steps including two-yearly reviews.

### 3. Policy rationale for the News Media Bargaining Code

#### 3.1 Monopoly platforms are unavoidable trading partners

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The policy rationale for the Code remains as relevant today as when the legislation was passed in early 2021. Underpinning the legislation was a comprehensive inquiry undertaken by the ACCC that clearly established the substantial market power enjoyed by Meta (then Facebook) and Google. The key findings from this watershed inquiry remain highly applicable as the relevant market shares and trading conditions have not materially changed.

In its 2019 Digital Platforms Inquiry Final Report, the ACCC concluded that Google and Meta had substantial:

- market power in the supply of general search and social services respectively;
- market power in the supply of search and display advertising respectively; and
- bargaining power in their dealings with news media businesses in Australia.

These findings have been reviewed and updated in subsequent ACCC reports. For example, in September 2021, the ACCC found that Google “continues to have substantial market power in the supply of general search engine services and search advertising in Australia, with 94% and 97% market shares respectively.”<sup>1</sup> In February 2022, the ACCC also confirmed its findings that Meta continues to have substantial market power in social media and the overall supply of display advertising.<sup>2</sup>

In order to maximise reach in the modern media environment, news media companies have expanded their traditional distribution channels to include IP delivery, both through owned and operated assets and through making content available on third-party platforms. Given the dominant position in search and social of Google and Meta respectively, they remain unavoidable trading partners for news media companies.

As described by the ACCC, the combination of monopoly position and unavoidable trading partner status creates a fundamental imbalance in bargaining power between media businesses and Google and Meta.<sup>3</sup>

In the absence of the Code, this imbalance in bargaining position would result in the dominant digital platforms continuing to benefit from the availability of news content, while refusing to fairly remunerate news media companies.

The ACCC has also recently confirmed that the gatekeeper status of Google and Meta is likely to endure, at least for the medium term, with ACCC analysis highlighting that “these platforms will continue their growth trajectory, as indicated by the respective share prices of these companies. The ACCC estimated that:

- 15-43% of the current share price for Meta (Facebook) could be attributed to expectations for future growth.
- 46-64% of the current share price for Alphabet was attributable to future growth expectations.<sup>4</sup>

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1 ACCC, Digital platform services inquiry, Interim report No. 3 – Search defaults and choice screens, September 2021, pg. 23

2 ACCC, Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, February 2022, pg. 19 & Digital Platform Services Inquiry, Interim report 2020, pg. B.1

3 ACCC, 2019 Digital Platforms Inquiry, Final Report, pg 206

4 ACCC 2022, op. cit., pg. 25

As such, Free TV submits that the fundamental policy analysis underpinning the creation of the Code remains sound and that there is a strong case for the maintenance of the existing policy settings.

### 3.2 News content is highly valuable to the platforms

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Commercial TV invests significantly in news, and local journalistic content production is a very important part of our businesses. Free TV members broadcast local news services into every State and Territory in Australia and produce news of specific local significance in around 40 separate markets, including being the only providers of local regional television news services.

Much of this content is made available online through owned and operated properties such as [7Plus](#) (Seven West Media including Prime7), [9Now](#) (Nine Entertainment) and [10Play](#) (Paramount ANZ). News content is also made available through YouTube ([7News](#), [9 News](#), [10 News](#), [Nightly News 7 Tasmania](#)) and through Facebook via pages such as [WIN News Illawarra](#) (WIN Corporation), [Spencer Gulf Nightly News](#) and [Nightly News 7 Tasmania](#) (Southern Cross Austereo). There is also an extensive presence on Instagram ([7News](#), [9News](#), [10 News](#)).

Free TV broadcast news services are underpinned by the Commercial Television Industry Code of Practice, enforced by the Australian Communications and Media Authority. The Code requires that news programs be presented fairly and impartially, that factual information is presented accurately and ensures that viewpoints included in programming are not misrepresented.

The result is a high-quality video news product that is valued and relied upon by millions of Australians every day. In fact, a report by Deloitte Access Economics found that commercial television is one of the most trusted sources of news, with three out of every 4 Australians rating commercial TV news as trusted.<sup>5</sup> The same report also found that many Australians (62%) worry about what is real or fake on the internet.

Given the value of their news product, in a workably competitive market, news media businesses would be expected to be able to negotiate with the digital platforms for a share of the value that they create from making available news content on their platforms. This value was accurately described by the ACCC in the context of the value of news to Google search:

*The ACCC considers Google’s ability to attract consumers to its platform relies on the provision of a high quality search service and the inclusion of hyperlinks to news content that is accurate, current and relevant to users’ search queries (as well as snippets of that content) is part of this service. Consumers that use Google Search to access news would likely be inclined to use Google Search for non-news related search queries. (Page 218)*

However, given their monopoly positions, neither Facebook nor Google entered into genuine commercial negotiations that led to fair payment for news content until it was clear that the news media bargaining code would become law.

### 3.3 Bargaining Code addresses the underlying competition issue

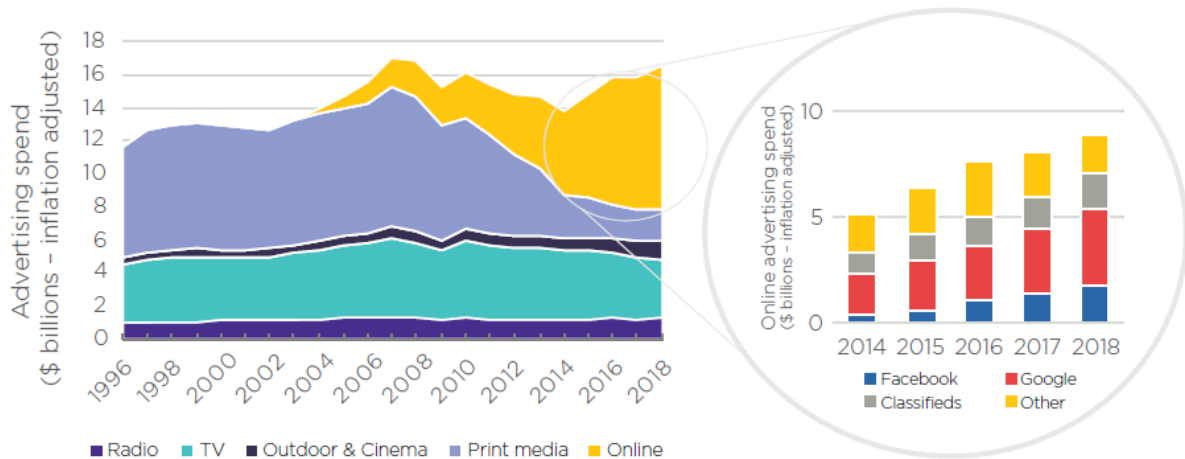
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The ACCC’s DPI Final Report set out how online advertising grew over time to take the largest share of revenue and how the revenues generated from that advertising have largely accrued to Google and

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<sup>5</sup> Deloitte Access Economics, Everybody gets it: The economic and social benefits of commercial television in Australia, 2020, pg. 30

Meta. In fact, the ACCC’s DPI final report noted that, including classifieds, Google and Facebook accounted for 84 per cent of the growth in the market between 2014 and 2018, as shown below.



As set out in the above section, this dominance is expected to endure, with the ACCC’s analysis indicating that up to 64% of the share prices of Google and Meta are attributable to expected future growth.

This redirection of advertising revenue towards Google and Meta resulted in a steady decline of revenue available to news media companies that invest in high quality news content. While Google and Meta continued to benefit from having high quality, credible news content accessible via their platforms, thereby increasing the value of their service offerings and using it to attract users (as well as their data and advertising revenues), there was no meaningful replacement investment in news content.

In a workably competitive market, news media businesses would be able to negotiate with the digital platforms for a share of the value that they create from making available news content on their platforms. However, given their near monopoly positions, neither Facebook nor Meta needed to make a fair payment for news content, prior to the introduction of the bargaining Code.

Under the Broadcasting Services Act, commercial television broadcasters are expected to primarily generate their income from advertising.<sup>6</sup> From this advertising revenue, Free TV members must provide a television service to all Australians, including (amongst other things) meeting minimum Australian and local content requirements, captioning obligations and adhering to stringent restrictions on the volume and type of advertising that can be shown.

The growth of digital search and social media services as a path to market for news (and other forms of) content meant that Google and Meta increasingly intermediated the relationship between news media businesses and their audience. In doing so, the digital platforms gained the benefit of the high-quality sources of news (as set out above) but did not pay a fair price to the news media companies that invested in the creation of the content. This effectively broke the nexus between investment in content creation and advertising revenue.

6 See Section 14, Broadcasting Services Act 1992(Cth)



As explained by former ACCC Chair Rod Sims:

*“It is important to recognise that the digital platforms have not replaced media businesses as creators or producers of news and journalism. If they had, we may simply treat this as an example of creative destruction: innovation and technological change creating a more effective or efficient product.*

*But Google and Facebook are not creating news stories in Australia. Rather they select, curate, evaluate, rank and arrange news stories produced by third parties, disseminating and greatly benefiting from other parties’ content.”<sup>7</sup>*

The news media bargaining Code has been instrumental in correcting the bargaining power imbalance that led to the refusal of Google and Meta to pay a fair price for valuable news content. As such, the Code is meeting its primary objective of correcting a competition issue and encouraging similar commercial outcomes that would be expected if there was a workably competitive market for digital platform services.

### 3.4 Platforms will not pay fair value for news content in absence of mandatory Code

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The history of the mandatory bargaining Code itself highlights that the monopoly platforms will not genuinely negotiate commercial terms voluntarily.

In December 2019, the Government provided Facebook and Google an opportunity to work cooperatively with local news media businesses to ensure fair payment for the news content they make available under a voluntary process. Free TV members, like many news media businesses, entered these negotiations with Google and Facebook in good faith. However, it became apparent shortly after the commencement of these negotiations that neither digital platform would voluntarily enter into agreements to pay a fair value for news content.

Consistent with the experience of our members attempting to negotiate commercial arrangements, the ACCC Chair advised the Government in April 2020 that there was no prospect that agreement would be reached between the platforms and media companies in relation to a voluntary code. The Government accepted this advice and moved to legislate the mandatory bargaining Code.

In contrast, commercial arrangements were very quickly entered into between the platforms and many news media businesses—once the mandatory bargaining Code became law. In the following sections we highlight how the Code is operating to secure these commercial arrangements and how the Government can best ensure that these commercial arrangements continue to be negotiated and renewed for all relevant digital platform services.

### 3.5 Code critical in assisting the future sustainability of the news media sector

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As established in the sections above, the sustainability of the advertiser funded news media business model had been drawn into question by the movement of revenue from content creators to digital platforms.

The news media bargaining Code has been successful in establishing the conditions where Google and Meta will enter genuine commercial negotiations for the fair value of news content on their services.

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7 Rod Sims, ACCC Chair, Melbourne Press Club 13 August 2019

These negotiations have resulted in payments being made by digital platforms to some Free TV members. Google and Meta have not entered arrangements with regional TV members of Free TV.

In a submission to the House Standing Committee on Communications and the Arts' Regional Newspapers Inquiry, the ACCC noted that:

*“Following the passing of the legislation and the introduction of the Code, and because of this, Google and Facebook have reached voluntary commercial deals with a significant number of news media organisations. While the Treasurer has not designated any digital platforms or services to date, the existence of the Code and the threat of designation is having the appropriate impact.*

*There is no obligation on the platforms to provide details of commercial agreements reached. Further, the ACCC does not have any formal role in monitoring outcomes. However, we understand at least 30 agreements have been reached. These agreements span a range of media organisations including local and regional media businesses (and/or businesses with local or regional arms and publications). The ACCC understands that these deals involve substantial remuneration, with public reports suggesting total amounts, per annum, in the several hundreds of millions of dollars. Reports also indicate that this has resulted in a strong hiring environment for journalists.”<sup>8</sup>*

Similarly, a report by Professor Bill Grueskin found that the news media bargaining Code has resulted in payments to Australian news organisations of more than \$200 million in the year since it went into effect.<sup>9</sup>

Receiving fair payment for news content by addressing the bargaining power imbalance has a direct and positive influence on the sustainability of advertiser funded news content. In the absence of the news media bargaining Code, these commercial arrangements between news media businesses and the digital platforms would not have been struck.

It is therefore critical that this review reaffirms the Government's commitment to the central pillars of the news media bargaining Code. We expand on the importance of these pillars in the next section.

However, experience of some other Free TV members highlights that there are gaps in the framework where improvements can be made to ensure consistency of application to all eligible news media businesses. This will also be important when existing commercial arrangements are due for re-negotiation. We set out proposals for a Government statement of expectation in section 5 that will help to ensure that the sustainability benefits of the bargaining Code are enduring.

<sup>8</sup> ACCC, 2022, Submission to the Standing Committee on Communications and the Arts Inquiry into Australia's regional newspapers, pgs 2-3

<sup>9</sup> <https://jinstitute.org/wp-content/uploads/2022/03/Bill-Grueskin-Report-web.pdf>

## 4. Key pillars of the Code must be maintained

### 4.1 Commitment by Government to legislation and designation crucial

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*"But the core of the code can't change. You need an arbitration mechanism. You need a non-discrimination clause. They are the bits of glue that hold the code together that make it workable."*

*- Former ACCC Chair, Rod Sims<sup>10</sup>*

The commercial outcomes discussed above that have been negotiated following the passage of the bargaining Code have only been made possible because of the existence of the legislation, the bipartisan support that it enjoys, and the designation power held by the Treasurer.

For this situation to endure, this review process must lead to three outcomes:

- A clear statement from the Government of its commitment to retaining the core pillars of the bargaining Code in its current form
- A Government policy expectations statement that sets out its very clear intention to exercise the designation power should either outstanding deals or renegotiated deals not be completed in a timely fashion
- A commitment to biennial reviews of the bargaining Code framework to ensure that genuine commercial negotiations are ongoing and to propose to Government any refinements that may be necessary.

As we expand on in the following sections, we submit that these are the minimum necessary outcomes from this review process to retain the conditions for genuine commercial negotiations between the parties.

### 4.2 Final Offer Arbitration remains the heart of the policy

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The Final Offer Arbitration (FOA) model adopted in the bargaining Code legislation has been crucial to the success of the framework. While to date no digital platform service has been designated by the Treasurer, the existence of the right of parties to seek FOA following unsuccessful negotiations, should designation occur, places a strong incentive on all parties to negotiate in good faith.

The FOA model is clear and straightforward and would limit the incentives for either bargaining party to make ambit claims and will enable disputes to be resolved quickly. As this model requires the arbitration panel to select one offer or the other (subject to a very limited exception), if an ambit claim was made by one party, the arbitration panel would accept the offer of the other party. This acts as a strong disincentive to make an ambit claim.

This arbitration process was selected as it can achieve a reasonable and balanced outcome in a short period of time. Some stakeholders have suggested that standard arbitration should be used in place of FOA. However, there are no other existing models in the Competition and Consumer Act that could be used to achieve the same outcome. For example, the arbitration model under Part IIIA of the CCA could not be used. Disputes under Part IIIA have often dragged on for more than a decade and cost participants many millions of dollars in legal fees (examples include the dispute for access to rail lines

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<sup>10</sup> <https://www.smh.com.au/politics/federal/accc-won-t-change-core-of-code-to-regulate-tech-giants-20200917-p55wl5.html>

in the Pilbara over the early part of this century and the dispute over access to the Port of Newcastle which commenced in May 2015 and was finally determined by the High Court in December 2021).

#### 4.2.1 Model used as a base for implementation overseas

The news media bargaining Code has become the model upon which international action is being based. For example, on 5 April 2022, the Canadian Government introduced the Online News Act (Bill C-18) with the stated aim of ensuring that:

*major digital platforms fairly compensate news publishers for their content and enhance fairness in the Canadian digital news marketplace, including the sustainability of independent local news businesses.*<sup>11</sup>

In the UK, the Government has recently [announced](#) its response to the consultation on a new pro-competition regime for digital markets. In its response, the UK Government set out its intention to legislate a new regulatory framework for digital platforms with ‘Strategic Market Status’. In doing so, the UK Government noted that:

*“These interventions will help rebalance the relationship between firms with Strategic Market Status and those who rely on them - such as news publishers. But they may not be enough to ensure fair compensation within a suitable timeframe. Therefore the government agrees with the report’s recommendation that the DMU must be able to intervene, to address unfair and unreasonable terms that stem from the market power of firms with Strategic Market Status, where these can not be suitably addressed through other routes. We are minded to pursue a mechanism, as proposed by the CMA and Ofcom, based on binding final offer arbitration to address pricing-related disputes, for use in the event that other interventions are unlikely to change the fundamentals.”*<sup>12</sup>

It has also been reported that the EU<sup>13</sup> and Indonesia<sup>14</sup> are considering similar laws, while a Bill has been introduced in the US Senate that would allow collective bargaining of news media companies with the digital platforms.<sup>15</sup>

### 4.3 Non-differentiation essential protection for news media businesses

The non-differentiation provision is the second critical element of the Code and must be maintained. It is intended to operate to ensure that designated digital platforms do not differentiate between news media businesses as a result of their participation in the processes provided for in the Code.

Indeed, while we are not proposing any changes at this time, we urge the Government to ensure that these provisions are monitored closely to ensure that they are broad enough to protect against punitive responses by the digital platforms to news media companies exercising their rights under the bargaining framework.

Currently the non-differentiation provisions only provide protection in respect of crawling, indexing, making available and distributing *covered news content*. This limitation may leave TV broadcasters vulnerable to discriminatory conduct. This is because, unlike news businesses such as news mastheads, which primarily produce content that would be considered to be covered news content, Free TV’s members produce a wide range of content, including high-quality drama, sporting event

<sup>11</sup> <https://www.canada.ca/en/canadian-heritage/news/2022/04/backgrounder--government-introduces-legislation-to-ensure-fair-compensation-for-news-media-and-the-sustainability-of-local-news.html>

<sup>12</sup> UK Government response to the consultation on a new pro-competition regime for digital markets, May 2022, Pg 22

<sup>13</sup> <https://www.businessinsider.com/eu-australia-google-facebook-technology-2021-2>

<sup>14</sup> <https://www.reuters.com/technology/indonesia-mulls-media-bill-seeking-fairer-share-big-tech-2021-11-23/>

<sup>15</sup> <https://www.congress.gov/bill/117th-congress/senate-bill/673/text>

coverage and unscripted entertainment programs. While that other content is not covered by the bargaining Code, it is also made available on digital platform services and so is open to being discriminated against, as much as the news content of Free TV members.

The digital platforms are also able to discriminate against media businesses in ways that are not directly linked to the display of news content. This is particularly relevant in relation to ad tech services. In September 2021, the ACCC completed an inquiry into these services and found that Google, in particular, has a dominant position throughout the ad tech chain. As a result, it could use its market power to discriminate against media companies in relation to the provision of those services.

It will be important for future reviews to continue to monitor these provisions and if necessary seek to broaden them to include the entire relationship between registered news businesses and the digital platform corporation.

#### 4.4 Factors the panel must take into account

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The Bill provides for five factors to be considered by an arbitration panel in determining which final offer to accept:

- the benefit (whether monetary or otherwise) of the registered news business' covered news content to the designated digital platform service;
- the benefit (whether monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content;
- the reasonable cost to the registered news business of producing covered news content;
- the reasonable cost to the designated digital platform service of making available covered news content in Australia;
- whether a particular remuneration amount would place an undue burden on the commercial interests of the designated digital platform service.

Free TV has previously expressed concerns that these factors account for both the costs and benefits accruing to digital platforms and combine this with an additional “undue burden” factor. It is understood that these factors were amended shortly prior to the Bill being introduced into the Parliament by the Government to address the concerns of some stakeholders regarding the balance of the factors contained in earlier exposure draft legislation.

We are concerned that “undue burden” could potentially be interpreted very broadly and allow the digital platforms to argue that a wide range of factors should be considered that are extraneous to determining an appropriate price to be paid for the use of covered news content. We note that the Canadian Bill C-18 (discussed above) includes the first four factors, but omits the “undue burden” limb.<sup>16</sup>

While at this stage Free TV is not proposing amendments to these factors, they should be carefully monitored by the Government and the future reviews of the operation of the Code to ensure that the balance of the framework is maintained.

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<sup>16</sup> See section 38, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/first-reading>

## 5. Designation of digital platform services

### 5.1 Government statement on the use of designation power

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The success of the bargaining Code discussed in the above sections relates directly to the power that the Treasurer holds to designate digital platform services. The designation of a digital platform service would enliven the negotiate-arbitrate provisions of the Code, together with other minimum standards that are established in legislation covering matters such as information exchange between the parties.

Subject to the amendment to the designation criteria proposed in the following section, Free TV strongly supports the retention of the existing power of designation for the Treasurer.

This designation power and the negotiate-arbitrate provisions (including FOA) have created sufficient incentives for digital platforms to genuinely negotiate with many news media businesses. However, for the incentive properties of this framework to be maintained over time, the Government must demonstrate a willingness to exercise the designation power.

This designation power is crucial for those news media businesses that have not yet entered commercial arrangements or as the existing commercial arrangements near their expiry and are due for re-negotiation.

Free TV submits that the Government should publish a statement of expectations on the digital platforms setting out the circumstances under which it would exercise its designation power. This statement would, working together with the changes to the designation criteria we propose below, establish clear incentives for all parties to continue to genuinely negotiate to reach commercial terms.

Such a statement of expectations should set out that the Government's intention to commence consultation on the designation of digital platform services, as required by Section 52E(5) of the CCA, if commercial agreements are not entered and maintained with relevant news media businesses.

For example, the statement should set out the Government's expectations that commercial agreements should be entered into and maintained with respect to all commercial and national television broadcasters. This would address the concerns held by some Free TV members that they have not been able to secure deals with both Google and Meta. It would also address publicly expressed concerns in relation to Meta's refusal to enter an agreement with SBS. Similar provisions would be drafted with respect to other media platforms such as print, online and radio.

### 5.2 Designation intention must include social video platforms like YouTube

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The statement of expectations should highlight the Government's intention to commence consultation on a designation determination with respect to the following digital platform services if commercial arrangements are not entered and maintained with news media businesses:

- Google Search – including Google News and Showcase
- YouTube
- Facebook News.

Future reviews of the Code (as we discuss in section 7) should consider whether additional services provided by TikTok, Twitter and Apple meet the designation criteria for inclusion within the statement of expectations, particularly given their growing popularity and use for access to news content by younger demographics.

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## 5.3 Justification for the inclusion of these digital platform services

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### 5.3.1 Imbalance in bargaining power extends across all digital platforms

In a media release announcing the Government's intention to introduce the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*, the Treasurer and Minister for Communications said:

*"The Code will initially apply to Facebook NewsFeed and Google Search. Other digital platform services can be added to the Code in future if there is sufficient evidence to establish that they give rise to a bargaining power imbalance."<sup>17</sup>*

Such a clear statement of intent was a critical factor in the ultimate success of the bargaining Code framework, notwithstanding that a designation determination is yet to be made. However, given the fact that the bargaining power imbalance experienced by news media businesses extends beyond Facebook and Google Search, it is appropriate that the statement of expectations proposed in this submission be expanded to include a broader range of digital platform services.

As established earlier in this submission, the ACCC analysis that underpinned the establishment of the bargaining Code found that Google and Meta are unavoidable trading partners for news media businesses and concluded:

*"There is a fundamental bargaining power imbalance between media businesses and Google and Facebook that results in media businesses accepting terms of service that are less favourable."<sup>18</sup>*

This analysis was undertaken at the corporate level, ie. it included all the services provided by the platform corporation. As a result of the bargaining power imbalance, monetisation terms across all digital platform services are very restrictive, with terms and conditions such as the use of branding, logos and the placement of advertising all determined by the relevant service provider.

Given the importance of news made available across all digital platform services, including social video platforms that are critical for TV news services, (as explored further below), Free TV submits that there is a bargaining power imbalance that needs to be addressed via the Code.

### 5.3.2 Video news sources are critical for Australians on digital platforms

Australians continue to rely on and trust commercial television for their local, national and international news. In the modern media environment, the news stories reported on by commercial TV networks are consumed across a range of different platforms, from broadcast television, BVOD apps and through digital search and social.

As has previously been referred to by the ACCC,<sup>19</sup> the annual Digital News Report produced by the University of Canberra provides useful information on the usage of digital platforms by Australians to access news content.

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<sup>17</sup> <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/news-media-and-digital-platforms-mandatory-bargaining>

<sup>18</sup> ACCC, Digital Platforms Inquiry, Final Report, pg 206

<sup>19</sup> <https://www.accc.gov.au/media-release/statement-on-facebook>

The 2021 Digital News Report demonstrates that social media continues to be widely used by Australians to access news content. While the number of Australians using Facebook to access news fell in 2021, it is still used by 1 in 3 Australians for news content. Importantly, while there have been modest declines in the use of Facebook for news, Instagram has continued to grow with 10% of Australians now using that platform for news content. Underscoring the importance of YouTube as a news platform, the report found that 20% of Australians now use YouTube for news content.<sup>20</sup>



The report also found that video news content consumption was generally increasing across the population, particularly for the younger demographics:

*“With cheaper data and improvements in mobile internet speeds Australians are now commonly consuming video news through news websites, apps and social media platforms. In 2021, 53% of Australians say they have accessed a news related video in the past week.” (Page 67)*

*“News videos are more commonly consumed by younger people. Among Gen Z news consumers, 41% say they accessed a news video on YouTube and 23% on other platforms such as Snapchat, WhatsApp or Twitter. For Gen Y, Facebook (31%) is still more popular than YouTube (24%) for news video consumption. Older generations are less likely to have consumed a news video in the last week.”*

Importantly, when consuming news on these platforms, Australians are turning to traditional sources of news such as commercial TV. The Digital News report found on each of Facebook, Instagram and YouTube “consumers say they are paying attention to mainstream news outlets and journalists the most.”<sup>21</sup>

As such, online video platforms are a critical path to market for television news services. Given the dominance of the YouTube platform<sup>22</sup> and its importance for consumers as a video news platform, YouTube is an unavoidable trading partner for television news services. Further, video news is very expensive to produce, requiring a considerable and ongoing investment in journalists, crew and studio and outside broadcast equipment. It is therefore crucial that highly profitable platforms like YouTube enter fair commercial arrangements with news businesses for the high-quality content they produce that adds significant value to the YouTube platform.

### 5.3.3 Designation would promote competition in the media sector

Free TV notes that the Treasury’s consultation paper asks a question regarding the impact that the bargaining Code is having on competition between local media businesses.

<sup>20</sup> University of Canberra, 2021, Digital News Report, pg 64

<sup>21</sup> Ibid page 65

<sup>22</sup> Datanyze estimates YouTube enjoys a 76% market share, with the next closest competitor, Vimeo, having a 18.7% share



All things being equal, when the bargaining Code framework is operating as intended and all relevant news media businesses are able to negotiate commercial arrangements with the digital platforms, the Code should not impact on the competition between local media companies. However, for this to hold all relevant media companies need to be receiving fair payment for the content that they create.

There is the potential for media market competition to be impacted if individual media companies are not remunerated or are inadequately remunerated compared to their competitors. In our view, the potential for uneven outcomes and the consequent impact on media sector competition provides further justification for the approach we have set out in this submission for the Government to issue a statement of expectations on digital platforms to have entered and maintained commercial arrangements with all relevant news media businesses.

#### 5.4 The designation criteria can be made more objective

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While the designation power has not yet been used by the Government, the existence of this power and the designation criteria for its use have formed the basis of commercial arrangements struck under this Code. However, the bargaining framework has been weakened by late amendments to the legislation that included an unnecessary second designation criterion requiring the Treasurer to consider whether a ‘significant contribution’ has been made to the sustainability of the news industry.

Under the bargaining Code legislation finally passed by Parliament, in making a designation determination, the Minister must consider:

- (a) whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate; and
- (b) whether that group has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).

Free TV submits that what qualifies as a ‘significant contribution’ is subjective and contestable and it is inappropriate to be used as a designation criterion. More importantly, it does not relate to the fundamental competition issue that the bargaining code framework addresses: the imbalance in power between media companies and digital platforms. In fact, the inclusion of this criterion has the potential to worsen the bargaining position of a news media company relative to the digital platforms for any firms who either do not have a deal or would otherwise like to expand the terms of their existing commercial arrangements.

Adding to the subjectivity of the criterion is the lack of detail on the timeframe over which a ‘significant contribution’ must have been made. As a result, it is unclear how this criterion would be considered in the context of the re-negotiation of existing deals that are nearing expiry.

The criterion essentially allows the digital platforms to determine where to “draw the line” in seeking commercial deals, which is again inappropriate in the context of a piece of legislation that was designed to address fundamental bargaining power imbalances.

Free TV recommends that the Government use the next legislative opportunity to remove this unnecessary criterion. Its removal would improve the objective functioning of the bargaining Code framework, which will be particularly important as the existing deals are re-negotiated as they near expiry.

## 6. Definition of news and registration process

### 6.1 Primary purpose test can be improved

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A media company may only use the provisions of the Code if that company has registered with the ACMA as a news business corporation and has also registered one or more news businesses. A news business is either a single “news source” or a combination of news sources. News sources include for example newspaper mastheads and television programs and channels. This registration process is discussed further in section 6.2 below.

For registration to occur, several tests must be met, including the “content test”. The content test as specified in the Act is that the primary purpose of each news source that is to be registered is to create core news content. This definition has the potential to create ambiguity for TV networks that broadcast content that would meet the definition of “covered news”, during programming that also includes non-news content. In this scenario it is not clear whether the regulator would assess that the ‘primary purpose’ of such programming is to create core news content.

Should future amendments be planned to the Code provisions, this ambiguity can be easily addressed by amending the primary purpose test to require that a news source “regularly include a material amount of core news content.”

### 6.2 Administrative issues with registration

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The ACMA has provided, in advance of the designation of services, a registration process for news media businesses. This was accompanied by the ACMA’s *News media bargaining code guidelines* (the **Guidelines**). At the time of writing, one Free TV member, Southern Cross Austereo, had registered.

Free TV outlines below some recommendations to streamline the registration process. This primarily focusses on recognition of the multiplatform nature of news services, and new distribution platforms not considered by the *News media bargaining code guidelines* and registration process.

In registering a news source, the ACMA Guidelines state that,

*A news source as defined in the code means any of the following, if it produces and publishes news content online:*

- a) *a newspaper masthead*
- b) *a magazine*
- c) *a television program or channel*
- d) *a radio program or channel*
- e) *a website or part of a website*
- f) *a program of audio or video content designed to be distributed over the internet.*<sup>23</sup>

Free TV recommends that news businesses be able to register a multi-platform news business. In the current process, news businesses must choose between ‘website’, ‘radio’, ‘television’ etc which publishes content online. As a single news source can appear across platforms, it may be difficult to distinguish a news source based on its distribution channel.

In order to ensure that all iterations of the same news service are captured under the Code, Free TV recommends the registration process include the ability to choose multiple platforms under which to

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<sup>23</sup> Guidelines, page 6

register a service. In future, should a news service expand to a new platform, this could be amended in the system. The inclusion of an 'other' option would also allow for the Code to consider new technologies and distribution platforms such as smart speakers.

In registering these news sources, the ACMA registration process also requires a link to the material. In some cases, news is provided in a live stream, and an evergreen link is not able to be provided. This should be considered in the registration process.

In relation to the Connection Requirement, the ACMA guidelines state that,

*'Applicants must provide a statutory declaration from the company secretary or equivalent certifying that the applicant corporation operates or controls each of the news sources making up the proposed news business. Where a news source is jointly operated or controlled, the statutory declaration must specify each of the corporations that operate or control the source.'*<sup>24</sup>

As Free TV members provide Annual Reports which set out the operation and control status of their news sources, provision of the Annual Report should be sufficient to support registration under this section. No further statutory declaration should need to be provided.

## 7. Other issues and future considerations

### 7.1 Future reviews of the Code

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As has been covered throughout this submission, to the extent that the bargaining Code framework has been successful to date, it has been because of its ability to create the right incentives for both digital platforms and news media businesses to genuinely negotiate. A key part of those incentives is this review process, which assesses whether the Code is achieving its stated public policy objectives.

Free TV submits that it is important for the incentive properties of the framework for there to be regular reviews by Government of the bargaining Code. In our view, the appropriate time period for these reviews is two years, given the pace of change of both the news media sector and the product offerings from the digital platform services.

Regular reviews will ensure that incentives are maintained for ongoing positive commercial relationships to be fostered between digital platforms and news media businesses.

### 7.2 Other support provided by digital platforms

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Free TV is aware of reports that Facebook now refers media companies that seek to enter commercial arrangements for news content to their application process for their [Facebook Australian News Fund initiatives](#).

While these arrangements and the terms and conditions that they are offered on may be acceptable to some media companies, they are funds positioned as “social good initiatives” where the eligibility criteria and terms and conditions are dictated by the digital platforms. As such, it is important that these public relations arrangements not become the default alternative to genuine commercial negotiation for a product that provides value.

Where media companies do not consider that the terms and conditions of initiatives like the Facebook Australian News Fund appropriately remunerate their content, genuine commercial negotiations should still be available and supported by the news media bargaining code legislation. This would be assisted by the consideration of the changes to designation criteria suggested in section 5.