Law Council
OF AUSTRALIA

Business Law Section

News bargaining incentive

The Treasury

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Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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Submission

Ensuring the regime is flexible and fit-for-purpose

Subject of "social media" and "search services"

1. The proposed news bargaining incentive (**NBI**) framework currently contemplates the introduction of legislation to determine which digital platform entities are within scope of the incentive regime, including relevant definitions of what "social media" and "search" services are.

2. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Competition Committee**) considers that this method of identifying digital platforms that are within scope of the incentive is unnecessarily rigid and does not provide sufficient flexibility to capture future market developments.

3. As acknowledged in the Consultation Paper, digital markets are fast-moving and the interaction of news media with platforms will change over time as markets change. It is important that the proposed framework is flexible in its scope and operation to ensure that it remains fit for purpose in fast-moving and dynamic digital platform markets.

4. This is particularly important in circumstances where Artificial Intelligence (**AI**) is changing how people consume news, and how news organisations produce news content and personalise it for individual consumers. For example, although AI chatbots are not yet a major source of news, there may be a growing acceptance of news mainly produced by AI with some human oversight.[1] In addition, the use of AI chatbots is an emerging source of news, with 6% of Australians using generative AI chatbots such as ChatGPT, Gemini or Perplexity as a source of news.[2]

5. To this end, the Media and Communications Committee (the **Media Committee**) recommends including an automatic sunset after, say, 3 years, to enable the Government of the day to reassess the regime's appropriateness for the changing digital news ecosystem. As an alternative, the Competition and Consumer Committee notes that a mandatory review of the regime could be provided for in the primary legislation.

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1 University of Canberra, Digital News Report: Australia 2025, available at <https://apo.org.au/sites/default/files/resource-files/2025-06/apo-nid330740_0.pdf>.

2 University of Canberra, Digital News Report: Australia 2025, available at <https://apo.org.au/sites/default/files/resource-files/2025-06/apo-nid330740_0.pdf>. See also see *United States of America et al v Google LLC - Case 1:20-cv-03010-APM*, in which Metha J of the District Court found that AI is disrupting digital search services markets such that remedies need to be carefully considered.

6. Given the ongoing evolution of news markets, the Competition Committee considers that:

7. Limiting the scope of the NBI to digital platforms that provide “social media” or “search” services is overly restrictive. In particular, the Committee considers that:

8. the stated NBI policy objective is to encourage commercial deals between “*large digital platforms*” and news businesses; and

    (i) while some Australians use “social media” and “search” services to access news content, both the nature of these services and the way that Australians consume news, are evolving. Accordingly, there is a risk that existing definitions of “social media” and “search” engines will not reflect the main services provided by large digital platforms in the future or the platforms that Australians use to access news.

9. If the Government is minded to limit the scope of the NBI framework to specific digital platform services (i.e. to what “social media” and “search” services are), the Committee nonetheless considers that identifying the relevant digital platforms in definitions inserted into primary legislation may be unnecessarily restrictive. While the Law Council’s general position is that significant matters including key definitions should be in primary legislation, in this instance, the Committee considers that it may be necessary to be flexible because administration of the NBI regime could be better supported through the implementation of a flexible structure that enables the NBI framework to be routinely updated when required to cover new or emerging digital platform services. For example, this could be implemented by including key definitions in subordinate regulations rather than setting them out in primary legislation.

10. Accordingly, the Competition Committee recommends that the identification of digital platforms under the NBI framework be technology-neutral and that large digital platforms not be defined specifically based on definitions of “search” and “social media” services. If—and as—the number of platforms increases, consideration could be given by government, as part of any review of the NBI regime, to whether the contributions of each digital platform (the charge rate) should be adjusted accordingly.

Size and significance of the corporation

11. As set out in above, the Competition Committee considers that the identification of digital platforms under the NBI framework should be:

12. technology-neutral; and

    (a) implemented through a flexible structure.

13. The Competition Committee observes that the proposed process for identifying digital platforms that are within scope of the NBI based on definitions of digital platform

services differs from the process of determining the digital platforms that are required to comply with the Code based on Ministerial designation.[3]

14. The Competition Committee also observes that the proposed process for identifying digital platforms that are within scope of the incentive fundamentally differs from the parallel process of determining the digital platforms that are required to comply with the Code.

15. Given the different approaches to identifying digital platforms, the Competition Committee notes that different digital platforms may be covered by the Code and NBI frameworks. To increase certainty both for digital platforms and news media businesses, further consideration should be given to consistency and harmonisation.

Eligible news businesses and size of the corporation

16. As noted on page 11 of the Consultation Paper, the Treasury is considering how the NBI framework can ensure that the recipient of eligible expenditure under a commercial deal is a professional news business that produces news of importance to Australia.

17. The Consultation Paper indicates that the prospective recipients of eligible expenditure under a commercial deal should include both larger news organisations and small news businesses. In particular, the Consultation Paper states that:

> *It is intended that the incentive would recognise commercial deals agreed between groups of eligible small news businesses and a digital platform.*

18. There are broadly two options under consideration:

19. to rely on the news business registration process under the Code—i.e. provide that the commercial deal must be between a digital platform and any news business registered under the code; or

20. to create a new set of criteria for the incentive.

Operation of the news business registration process under the Code framework

21. In 2022, the Treasury completed a review of the Code,[4] in which it found that the Code registration criteria for news businesses had worked effectively and there was not a sufficiently strong case to amend the news business registration criteria. The Consultation Paper for the NBI states that this finding "*suggests that using the current registration criteria will appropriately allow digital platforms to enter into commercial deals with a broad range of news businesses* …"

22. The Competition Committee respectfully disagrees with this reasoning.

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[3] In summary, the Code applies to digital platforms that are 'designated' under the Code by the Minister, after considering (a) whether there is a significant bargaining power imbalance between the digital platform and Australian news businesses; and (b) whether the platform has made a significant contribution to the sustainability of the Australian news industry through agreements relating to the news content of Australian news businesses, including agreements about remuneration.

[4] https://treasury.gov.au/publication/p2022-343549

23. The Code registration criteria for news businesses do not act as fixed criteria that limit the types of eligible commercial deals that relate to news content or news businesses that are eligible to receive funding from digital platforms under commercial deals. This is fundamentally different to how the news business registration process would operate if it were imported into the NBI framework.

24. Relevantly, under the Code framework:

    (a) There have not been any digital platforms designated under the Code. Accordingly, the act of registration by a news business under the Code does not give registered news businesses any additional legal rights to negotiate commercial deals with digital platforms under the Code.

    (b) In practice, the Code has the effect of incentivising digital platforms to reach commercial deals with news businesses independently of the Code in order to demonstrate to the Minister that the digital platform should not be formally designated under the Code. That is, the Minister should not decide to designate the digital platform on the basis that:

> *… the [digital platform 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 business for their news content.*

25. Accordingly, a relevant factor that may impact whether a news business receives revenue under a commercial deal with a digital platform is if the revenue that the news business receives forms part of the digital platform's "*contribution to the sustainability of the Australian news industry through agreements relating to news content …*"

Importing the news business registration process under the Code to the NBI framework would restrict funding to smaller news businesses

26. The Competition Committee considers that the news business registration process under the Code, and in particular the definitions of "registered news business corporation" and "core news content", would inappropriately limit the coverage of the NBI to news produced by journalists at large, or relatively large, organisations.

27. To be registered under section 52G as the registered news business corporation for a registered news business the applicant corporation must, amongst other things, meet "the revenue test" set out at section 52M. Namely, its annual revenue must exceed $150,000 either for a particular year, or for at least 3 of the 5 most recent years for which it has annual accounts.

28. This requirement appears to deliberately preclude small news organisations, particularly smaller news organisations that are starting a new business.

Potential impact on existing and ongoing deals

29. Importing the news business registration process from the Code directly into the NBI framework may also adversely impact existing and ongoing deals between news businesses and digital platforms, if it makes revenue from those deals ineligible to be counted as eligible funding under the NBI framework.

30. For example, the Competition Committee considers that this may impact some news businesses that have previously been authorised to collectively bargain with digital platforms for payment for news content. Relevantly, on 5 August 2021, the ACCC decided to grant authorisation to enable Country Press Australia (**CPA**) and its current and future members to collectively bargain with each of Facebook and Google concerning payment for content produced by those members and featuring on those platforms.[5]

31. There is no reference in the ACCC's decision to the news business registration process under the Code, or the revenue received by CPA members in the ACCC's determination. Rather, as set out the ACCC's determination:

> *CPA is an industry body that represents the interests of independent regional and local newspapers throughout Australia. CPA currently represents 81 members and 160 regional newspapers. The members of CPA are predominantly small businesses and they provide news services in regional and local communities published in print and online.*

32. While the Competition Committee does not have access to revenue information for CPA members, we anticipate that some current or future CPA members may be ineligible under the NBI if members are required to establish the revenue threshold under the Code.

33. The Competition Committee considers that this may have a significant impact on existing or ongoing deals between news businesses and digital platforms that have been negotiated under the Code framework, which would be ineligible to be classified as eligible funding, under the NBI.

34. Accordingly, the Competition Committee does not consider that the news business registration process under the Code is appropriate to comprehensively identify which news businesses are potential candidates for commercial deals with news businesses under the NBI framework.

35. Instead, the Competition Committee recommends that news businesses are defined broadly under the NBI framework, and that any relevant definitions are not limited to journalists at large, or relatively large, organisations.

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[5] https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/country-press-australia-cpa

Distribution of commercial deals among news businesses

36. The Competition Committee notes that the calculation of both the incentive and deduction rates as currently propose may create a 'maximum' amount or 'cap' for the value of deals that designated platforms have to enter with news businesses. The effect of such a cap on expenditure with any single news business may have the unintended consequence of effectively setting a further cap on the amount that can be negotiated by a news business, thereby risking undermining commercial negotiations rather than driving them, as intended.

37. The Competition Committee considers that it is important for the NBI to include a mechanism to encourage the distribution of eligible expenditure among news businesses through multiple deals—rather than supporting a single large deal with a single news business corporate group.

38. In particular, the Competition Committee considers that that this is an important mechanism as legislation that encourages a single large deal between digital platforms and any single news business corporate group could distort competition within the news industry and disincentivise entry or expansion. In contrast, distributing eligible expenditure among news businesses is consistent with supporting competition within the news sector in Australia.

39. The Competition Committee also notes the Treasury's policy objective of the NBI about driving commercial negotiations that support news businesses, and the Government's complementary News MAP framework and associated funding to provide support for public interest journalism and media literacy. The Competition Committee considers that a mechanism to encourage the distribution of eligible expenditure among news businesses through multiple deals is also consistent with this policy objective.

Commencement of the news bargaining incentive

40. The NBI framework is intended to incentivise large digital platforms to enter into commercial deals with news businesses, by introducing a requirement that large digital platforms that do not enter into or renew commercial agreements with news businesses pay an incentive charge to support the Australian news industry instead.

41. Given this objective, the Committees consider that it is important to provide commercial parties with sufficient time to understand the scope of the final legislation and to negotiate eligible commercial deals. The Committee considers that it would be reasonable to provide the parties with a 12-month period prior to financial reporting (and levying of any incentive charge) to enter into and report on eligible commercial deals.

42. The Committees anticipate that it may be efficient for reporting on commercial deals (and the payment of any incentive charge) to occur in accordance with the timeframes for annual financial reporting and reconciliation to the Australian Taxation Office (**ATO**). If this process is adopted, the Committees consider that the first financial reporting period for eligible agreements would be 30 June 2027.

Reporting requirements under the news bargaining incentive

Eligible expenditure and commercial deals

43. The Committees understand that the ATO will need to collect relevant information as part of the taxation lodgement process to administer the NBI. There are also existing mechanisms under Australian taxation laws that require businesses to provide complete and accurate information to the ATO, with penalties already in place for failure to report information under taxation laws.

44. The Committees do not consider that it is necessary to introduce broader reporting obligations for digital platforms or news businesses in relation to commercial deals, noting that:

    - it is common for commercial deals to confidentiality clauses limiting the disclosure of details; and
    - the disclosure of information could affect the negotiation of other deals.

Government reporting in relation to distribution of the incentive to news businesses

45. As set out in the Consultation Paper, the incentive is not intended to raise revenue that is to remain in the hands of the Commonwealth. Accordingly, the Government will consider options to distribute assistance if it becomes clear that a platform will pay the charge rather than enter into commercial deals.

46. In the event that a platform will pay a charge (rather than entering into commercial deals), the Committees consider that the distribution of this revenue by the Government to news businesses will be similar in principle to a Government grants regime. Accordingly, the Committees consider that the distribution of payments by the Government should be administered in accordance with the Australian Government Grants Framework. This will ensure that revenue from the charge is distributed and used effectively by news businesses to support a competitive news industry, and the stated policy objectives of supporting news business, public interest journalism and media literacy.

47. The Australian Government grants framework consists of the *Public Governance, Performance and Accountability Act 2013* (*PGPA Act*) and Public Governance, Performance and Accountability Rule 2014 (*PGPA Rule*), the *Commonwealth Grants Rules and Principles 2024* (**CGRPs**) and other government policies related to grants administration as well as whole of government guidance, tools and templates.

48. The Australian Government Grants Framework includes detailed obligations and guidance that promotes transparency, accountability and flexibility in grants administration to achieve government policy outcomes and ensure equitable access of grants to and for the benefit of the Australian public.

49. Relevantly, the CGRPs provide in relation to public reporting (section 5.1) that:

> *Effective disclosure and reporting arrangements for grants administration are essential for reasons of transparency, integrity and public accountability. Reliable and timely information on grants awarded is a precondition for public and parliamentary confidence in the quality and integrity of grants administration.*

50. The CGRPs also provide, the following public reporting and performance framework requirements (inter alia):

51. **Public reporting**—this includes a requirement that the relevant Minister or Government entity:

52. develop grant opportunity guidelines which are made publicly available; and

53. record information about the grant/s awarded and the grant decision/s[6]

54. **Performance framework**—this includes developing performance reporting and information requirements for grant opportunities and grantees, such as the collection of performance information to show the extent to which grant activities contribute to government outcomes. It also contemplates proportional and ongoing due diligence of grant recipients throughout the lifecycle of the grant.[7]

[6] For example, see Commonwealth Grants Rules and Principles 2024 (Section 5, Public Reporting) available at <https://www.legislation.gov.au/F2024L00854/latest/text>.

[7] For example, see Commonwealth Grants Rules and Principles 2024 (Section 10, An Outcomes Orientation) available at <https://www.legislation.gov.au/F2024L00854/latest/text>.

About the Business Law Section

The Business Law Section of the Law Council of Australia provides a forum through which lawyers and others interested in all matters pertaining to business law can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Section:

- prepares more than half of the Law Council's submissions each year, putting the views of the business community and the legal profession directly to the Federal Government and its agencies, and Federal Parliamentary Committees;
- provides a forum for debate of current issues, and assists lawyers to develop and maintain their professional skills and knowledge, through a schedule of regular conferences, workshops and seminars;
- represents the Law Council on a number of bodies—for example, the National Taxation Liaison Group and its sub-committees, the Customs and Border Protection National Consultative Committee and its sub-committees and the ASX Corporate Governance Council; and
- gives its members the opportunity to develop a network of professional contacts in their fields of practice.

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