

Ai GROUP SUBMISSION

**Senate Standing Committee on
Economics: Legislation Committee**

**Treasury Laws Amendment (News Media
and Digital Platforms Mandatory
Bargaining Code) Bill 2020**

JANUARY 2021

**Ai
GROUP**

About Australian Industry Group

Ai Group is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for nearly 150 years.

Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, the defence industry, civil airlines and ICT.

Our vision is for *thriving industries and a prosperous community*.

Australian Industry Group contact for this submission

Peter Burn, Chief Policy Advisor

Telephone: 02 9466 5503

Email: peter.burn@aigroup.com.au

Ai Group appreciates the opportunity to provide input to the Committee on the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (the Bill).

Introduction

Ai Group acknowledges both the short-term and longer-term structural stresses being experienced by traditional providers of news and advertising services. We also appreciate the importance to a well-functioning society of access to a diversity of sources of news, information and opinion. Further, we support the principle that providers of news services should be able to bargain fairly, including with providers of digital platforms, about payment for content.

While the Bill has been modified to address several of the problems with the approach set out in the exposure draft materials, there are remaining concerns with the approach set out in the Bill and associated explanatory material. These are set out below under four headings:

- Risk of reduced availability of digital services for consumers and businesses
- Favoured treatment of registered news media organisations
- Are links and snippets media organisations' content?
- Bargaining and arbitration.

Ai Group suggests that the risk of reduced availability of digital services could be significantly reduced and that the objective of ensuring media organisations are fairly compensated for the use of their content by digital platforms could be improved by addressing the concerns raised below.

Risk of reduced availability of digital services for consumers and businesses

Ai Group is concerned that Australian consumers and businesses will face a reduced availability of digital services if the mandatory code is legislated in its present form. These services are highly valued by businesses and are now embedded in their business models.

While the approach to the Code set out in the Bill and the explanatory material has addressed some of the elements in the approach put forward in the exposure draft material, we remain wary that Australian consumers will have less access to digital services and that Australian businesses will bear higher search and marketing costs than competitors in other jurisdictions.

Favoured treatment of registered news media organisations

Ai Group is concerned that business organisations that are not registered news media organisations will be disadvantaged by the requirements in the code that entitle registered news media organisations to privileged access to information about certain algorithms and internal practices of digital platform providers.

It would appear likely that news media organisations will use this information to gain more prominence for links to their own material. This would be to the disadvantage of other businesses, and individuals who necessarily would be less favourably positioned.

These requirements could be removed from the Bill.

Are links and snippets media organisations' content?

The bill asserts that media organisations have property rights over links to and snippets from their material made available by providers of digital platform services.

While there may be circumstances where links and snippets were rightfully regarded in this way, the assertion is a departure from what would generally be regarded as material that belonged to the creators of content.

Rather than assert that links and snippets must be regarded as the property of the media company, Ai Group suggests that this question should be the subject of commercial negotiations and, if necessary, included in the matters that could be considered in the course of arbitration.

Bargaining and arbitration

Ai Group supports the use of commercial negotiations between the digital platform providers and news media organisations as a means of determining revenue flows between the parties. The parties themselves have the best information about the matters under consideration and they will generally and at lower cost find an agreed outcome where gains are available to both parties.

We supported the ACCC's original proposal to develop a voluntary bargaining code as a means of structuring such negotiations and were disappointed the Government cut short this process prematurely and instead set in train the establishment of a mandatory bargaining code.

Nevertheless, there are positive features of the approach proposed in the Bill and explanatory material. In particular, the room retained for agreement making between the parties outside of the code holds out the possibility for the parties to arrive at agreements that are more creative and less costly than the approach prescribed in the Bill. In addition, the requirement that parties approach bargaining under the code in good faith should also assist agreement making. For example, parties would need to avoid making clearly unreasonable offers and they would need to consider or accept clearly reasonable offers made by the other party.

We are, however, concerned that the approach taken in the Bill will deter the making of commercial agreements between the parties and will instead result in excessive recourse to arbitration.

A key reason for this is the asymmetry of treatment of parties' costs. In a commercial bargain the benefits and costs of both parties will be relevant to the outcome. However, under the arbitration clauses in the approach put forward in the Bill, while the benefits to both parties must be considered, only the costs to the news media organisations in producing covered news content must be considered. The costs of the digital platform provider are not required to be considered. The arbitration process is only required to avoid imposing an undue burden on the digital platform business. This asymmetry is in addition to the requirement that arbitration must consider the bargaining power imbalance.

The weighting of arbitration in favour of the news media organisations is likely to reduce the changes of successful commercial bargaining and give rise to an over-use of arbitration. This conclusion is supported by the assumption in the explanatory memorandum (page 57) that 75 per cent of bargaining processes will proceed to arbitration.

Final offer arbitration

The weighting of the considerations that are required of arbitration also call into question whether the final offer arbitration approach in the Bill is appropriate.

One claimed benefit of final offer arbitration, under which the arbitrator is required to opt for one of the claims put to it, is that each party will tend to avoid making extreme claims in order to reduce the likelihood that the position they put would be disregarded in favour of the more moderate claim of the other party.

However, because the rules governing arbitration build-in an asymmetrical treatment of the parties, they would appear to encourage ambit claims by the news media organisation in the hope that its claim is the one that better accommodates the requirements of arbitration.

In these circumstances, a standard model of arbitration under which the arbitrator can determine an outcome that lies between the claims of the parties would seem to be a better approach.

Under a standard arbitration approach, the arbitrator could still be required to consider the relative bargaining power of the parties.



AUSTRALIAN INDUSTRY GROUP METROPOLITAN OFFICES

SYDNEY 51 Walker Street, North Sydney NSW 2060, PO Box 289, North Sydney NSW 2059 Tel 02 9466 5566 Fax 02 9466 5599

CANBERRA 44 Sydney Avenue, Forrest ACT 2603, PO Box 4986, Kingston ACT 2604 Tel 02 6233 0700 Fax 02 6233 0799

MELBOURNE Level 2, 441 St Kilda Road, Melbourne VIC 3004, PO Box 7622, Melbourne VIC 8004 Tel 03 9867 0111 Fax 03 9867 0199

BRISBANE 202 Boundary Street, Spring Hill QLD 4004, PO Box 128, Spring Hill QLD 4004 Tel 07 3244 1777 Fax 07 3244 1799

ADELAIDE 45 Greenhill Road, Wayville SA 5034 Tel 08 08 8394 0000 Fax 08 08 8394 0099

REGIONAL OFFICES

ALBURY/WODONGA 560 David Street Albury NSW 2640 Tel 02 6041 0600 Fax 02 6021 5117

BALLARAT Suite 8, 106-110 Lydiard St South, Ballarat VIC 3350, PO Box 640, Ballarat VIC 3350 Tel 03 5331 7688 Fax 03 5332 3858

BENDIGO 87 Wills Street, Bendigo VIC 3550 Tel 03 5440 3900 Fax 03 5444 5940

NEWCASTLE Suite 1 "Nautilus", 265 Wharf Road, Newcastle 2300, PO Box 811, Newcastle NSW 2300 Tel: 02 4925 8300 Fax: 02 4929 3429

WOLLONGONG Level 1, 166 Keira Street, Wollongong NSW 2500, PO Box 891, Wollongong East NSW 2520 Tel 02 4254 2500 Fax 02 4228 1898

AFFILIATE: PERTH Chamber of Commerce & Industry Western Australia

180 Hay Street, East Perth WA 6004, PO Box 6209, East Perth WA 6892 Tel 08 9365 7555 Fax 08 9365 7550

www.aigroup.com.au