# Submission by Free TV Australia

## Exposure draft bill Mandatory news media bargaining Code

August 2020

# Table of contents

## 1. Executive Summary

- Free TV welcomes the opportunity to comment on the exposure draft legislation that will enact the Media and Digital Platforms Mandatory Bargaining Code.
- The draft Code establishes an appropriate framework to redress the significant bargaining imbalance between two of the biggest companies in the world and news media businesses in Australia.
- The reason this legislation is necessary is because neither Google nor Facebook were prepared to genuinely negotiate, within a voluntary code framework, a reasonable payment for their use of Australian news content on key services such as Google Search, Facebook Newsfeed or Instagram.
- By establishing a framework that requires good faith negotiation with a quick and efficient process of final offer arbitration should the parties not be able to enter commercial arrangements, the Government has struck the right balance to redress the inherent imbalance in bargaining power.
- Crucial to the fact that the Government has got the balance right is the requirement for any arbitration decision to consider the benefits to the digital platforms of news content, the costs of news production and ensuring no undue burden on the platforms. We urge the Government to maintain this balance in the final legislation that it introduces to Parliament.
- There are, however, some drafting changes that are required to ensure that the framework functions as intended across all forms of news media businesses.
- We recommend the definition of both core and covered news content be amended to reflect that not all applicable news is “created by a journalist” but is created by people either employed or engaged by a corporation that are subject to editorial controls either by virtue of licensing arrangements or membership of professional standards bodies.
- The requirement that each news source is “predominately” core news, is too narrow and would potentially require the ACMA to undertake an onerous quantitative assessment of each claimed source.
- The non-discrimination provisions are essential to the successful operation of the Code, as we have seen in other countries the potential for platforms to circumvent obligations using their market power. We are concerned the current drafting of the non-discrimination provisions is heavily focussed on potential punitive responses in relation to crawling, indexing and display of news content and should be broadened to ensure that the potential for punitive actions in relation to a broader range of content, and related markets, is also protected against.
- In relation to the arbitration provisions, the process of requesting and receiving information from the platforms is crucial to address the inherent information asymmetries. Further detail could be included in the legislation to ensure that the platforms respond to information requests in a timely fashion and that responses include the full range of benefits captured by the platforms through the use of news content.
- Free TV supports the intent of the provisions of the Bill that are collectively referred to as “the minimum standards”. Public statements by Google have overstated the scope and potential impact of these provisions. Free TV recommends that the intent of these provisions be put beyond on doubt, for example clarifying that there is no obligation to share personally identifying data and that all disclosures must comply with the Privacy Act.
- We look forward to engaging further with the Government on this draft Bill to ensure that it is introduced into Parliament, and becomes law, as soon as is possible.

# 2. Introduction

## 2.1 About Free TV Australia

Free TV Australia 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.

Free TV Australia proudly represents 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 recent 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.

## 2.2 The trusted source of news

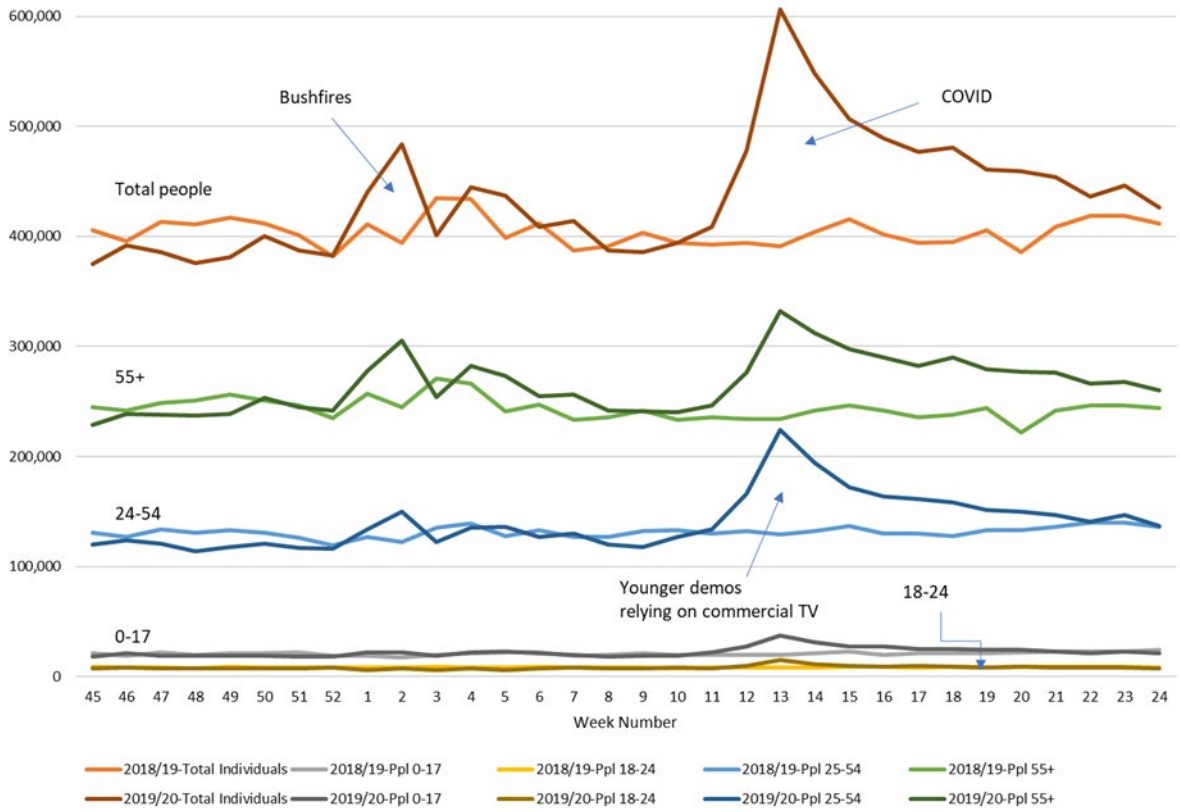
Commercial TV invests significantly in news, and local journalistic content production is a very important part of our businesses. Free TV members broadcast local news services into every State and Territory in Australia and produce news of specific local significance in around 40 separate markets.

These high quality, accurate and impartial news services are watched by 11 million Australians each week.[1] Our members cover events of national significance, provide critical information in times of emergency and bring Australians together to witness moments in history, life changing occasions and times of national success.

[1] Source: OzTAM (Metro), RegionalTAM (Regional). Network National Reach Estimate for Metro + Regional for minimum of 5 consecutive minutes viewed of Sun-Sat news across the day (incl Morning, Afternoon, Sunrise/Today, excl Specials) on Commercial Primary channels (and regional affiliates). Wks 7-23 2017. Data: Consolidated (LIve + As Live + TSV7).

This has never been more true than during times of crisis, as shown by the audience response during the ongoing COVID-19 pandemic and the catastrophic bushfires of late 2019 and early 2020.

*Audiences of all ages turn to Free TV news sources as their trusted source of news*




*Source: News Genre 6am-midnight - Primary Channels – National Audiences | OzTAM and Regional TAM | Overnight | Combined Aggregate Markets and 5CM | Typology: News/Current Affairs | S-s 0600-2400 | Audience 000s*

As shown above, at the height of the COVID-19 news-cycle, average audiences in news programming across the primary services within each broadcaster's channels in both metropolitan and regional Australia were up by over 55% on 2019 levels. Most striking in these audience patterns was the response of the audience below 55 years old, underscoring the fact that commercial free-to-air is a vital service across all age groups, including the younger generations.

This again demonstrates why it is so important to address the impact that digital platforms have had on news media businesses by addressing the significant power imbalance and ensuring fair payment for the news content from which they benefit.

## 2.3 Structure of this submission

This submission is structured into two parts. In the first part we set out our support for the proposed negotiation arbitration framework, but provide some specific feedback on the changes necessary to ensure the scheme is workable across all media and that key provisions function as intended.

Appendix A contains a table of further suggested drafting improvements that we have identified in our review of the exposure draft legislation.

# 3. Proposed framework is workable and gets the balance right

## 3.1 What problem are we trying to address?

In the Final Report of the Digital Platforms Inquiry, the ACCC set out in detail the unprecedented nature of the dominance in their respective markets of Google and Facebook.

As Free TV highlighted in its original submission to the ACCC in April 2018, the market capitalisation of Google and Facebook is so large that it is difficult to make meaningful comparisons to the size of even entire sectors of the Australian economy.

*Google and Facebook – unprecedented size and scale*


*Source: Yahoo Finance, 20 August 2020 (Free TV includes CBSViacom, SWM, NEC, PRT and SXL) $1US=$1.4AUD*

It is not simply that these entities are so large that is an issue. As was demonstrated by the Digital Platforms Inquiry, it is the ubiquity of the platforms and digital services owned by Google and Facebook that make them unavoidable trading partners for media businesses.

The problem to be addressed becomes clear when you put together the sheer size and scale of these companies, with their unavoidable trading partner positions. What results is an unprecedented imbalance in bargaining position. This creates a market failure that will not be resolved without regulatory intervention.

The bargaining imbalance between Google and Facebook on the one hand, and Australian media companies on the other, is further exacerbated by the information asymmetries which exist between the parties. Australian media companies have no way of knowing the extent of the benefits that Google and Facebook obtain from using news content – whether these are direct benefits such as advertising revenue and collection of consumer data or indirect benefits which arise from being able to supply this content to Australian users and retain those users on their monopoly platforms. As Australian media companies do not have this information, it further impairs their ability to bargain effectively with the platforms.

The Government's Bargaining Code is an appropriate intervention, which Free TV considers has the potential to address the market failure without unintended consequences. Appropriately, it remains open to each of Google and Facebook to enter arrangements that are commercially negotiated in the first instance, as explained further below.

### 3.1.1 Platforms have not agreed to voluntarily contribute towards the costs of news production

In December 2019, the Government gave Facebook and Google an opportunity to work cooperatively with local news media businesses to ensure fair payment for the content they use. Free TV members, like many news media businesses, entered negotiations with Google and Facebook in good faith on a voluntary Code.

However, it very quickly became clear that neither Google nor Facebook were prepared to agree arrangements for fair payment for the content that Australian media businesses create and that is highly valuable to their platforms. Further, the ongoing public relations campaign by Google again highlights that it will not, voluntarily, enter into agreements to pay for news content in relation to its core service offerings.

We welcome the Government's early recognition that without an external driver to reach agreement or to break a deadlock, the digital platforms were not going to change their approach to making fair payment for news. By moving to the mandatory Code, the Government has acted consistently with the approach it stated it would adopt in its response to the Digital Platform Inquiry Final Report.

## 3.2 Draft Code addresses the significant imbalance in bargaining power

The first principles policy rationale for Government intervention set out above is necessary background to understand why the proposed negotiation and final offer arbitration model sets the right balance.

The final offer arbitration and the matters that must be taken into account have been drafted appropriately, with a clear understanding of the negotiating imbalance that they are designed to address. In particular, the arbitration panel must consider:

- The direct benefits to the platforms of covered news content
- The indirect benefits to the platforms of covered news content
- The costs of production of covered news content
- Whether any proposed amount of remuneration would place an undue burden on the commercial interests of the digital platform service.

These factors strike an entirely appropriate balance in ensuring that the benefits to the platforms are considered, but that in making a contribution to the costs of news production no undue burden is placed on a digital platform service. This is the right balance in the context of a framework that would otherwise be characterised by significant imbalance in bargaining positions between the two parties.

Free TV is aware that some initial feedback on the Bill from Google and those advocating on its behalf is that it fails to require that, in arbitration, the benefits to media companies from Google or Facebook referrals, as applicable, are taken into consideration. However, any attempt to do so would merely be further rewarding the platforms for achieving monopoly positions. As we explained in our submission

to the concepts paper, given their near monopoly positions in their respective markets, news media businesses are reliant on these companies for referral traffic. There are no realistic alternative options that those companies may turn to generate referrals.

If there were a contestable market for the provision of either search, social platform or other digital platform services, news media companies would be able to readily negotiate a fee for making available its news content that includes the value to each platform of being a source of credible and trusted news. However, no such market exists. It is therefore of critical importance that the arbitration panel, when considering which final offer to accept, considers the direct and indirect benefits to the platforms as though the market were contestable, and therefore the platforms would risk losing some users completely to an alternative platform if there were no news on their service, rather than the existing market which is characterised by monopoly/near monopoly gateway businesses.

More information about the "value proposition" posited by the digital platforms is contained in section 4.3 of our submission to the concepts paper.

Free TV urges the Government to maintain its appropriate position in relation to the benefits, costs and "no undue burden" matters in the draft legislation.

# 4. News media registration and news definition

**Key issues**

- In applying for registration to the ACMA, a media company is required to set out each "news source" that it wishes to register and the ACMA must determine that each of those news sources contains content that is predominantly "core news".
- The use of the term "predominantly" creates unnecessary ambiguity and uncertainty in the registration process, particularly for programming that contains a mix of core news and other content, and could potentially lead to the exclusion of some content that most Australians would consider to be relevant and important sources of news.
- The current drafting of the "core news content" and "covered news content" definitions in section 52A(1) of the Bill reflects a "written media" drafting bias which may unintentionally exclude some television news content that is not necessarily "created by a journalist", but rather is researched, produced and broadcast by a range of media professionals.
- The Explanatory Memorandum (EM) correctly recognises the importance of editorial and opinion content and it is recommended that this type of content should be expressly recognised in both the "core news content" and "covered news content" definitions.

## 4.1 ACMA Registration process

The draft legislation intentionally imposes a series of thresholds for the registration of a news business corporation and its associated news business or businesses. Specifically, the legislation sets out four primary tests that the ACMA must determine that an applicant meets:

- Revenue test - generally requires the corporation to have an annual revenue of over $150,000
- Content test - each of the news sources included in the application creates and publishes online content that is predominantly core news (the definition of "core news content", as well as the definition of "covered news content" are considered further in section 4.2)
- Audience test - all of the news sources must operate predominantly in Australia for the dominant purpose of serving Australian audiences
- Professional standards – every news source must be subject to the rules of a professional standards body such as the Press Council or the Commercial Television Industry Code of Practice.

Free TV understands these thresholds have been designed to operate cohesively to balance the objective of ensuring that all media businesses whose news content creates a public good for Australians, and which generates material value for the digital platforms, have access to this bargaining framework, while not creating an undue administrative burden on the platforms (or the regulators that will administer the regime, the ACCC and the ACMA).

Free TV accepts that there is a need for such thresholds to apply. However, as currently drafted the content test limb of the framework creates unnecessary uncertainty in the registration process and could lead to anomalous outcomes that are inconsistent with the objectives of the legislation. This is because there are a range of news sources that include a mix of core news content, covered news content and other content. For example, most morning programming includes a material amount of "core news" content and it is our understanding that the intention is that the legislation would enable

such content to be registered. However, it would require a determination from the ACMA that such content met the threshold of "predominantly" before it could be registered.

As such, the content test as currently drafted would arguably require the ACMA to undertake a detailed review of the news source and form a view on the proportions of different content types and determine whether the news source, in its view, amounted to being "predominantly" core news. Free TV's understanding from public statements made by the ACCC that such detailed reviews are not intended.

As much as is possible, the content test should be drafted to minimise the need for the ACMA to undertake a resources intensive process on each news source during the registration process. Free TV submits that such a process is unnecessary to achieve the intended registration threshold when considered alongside the full suite of other criteria, as highlighted above.

Free TV does not accept that there is a relevant distinction between "core news" and other types of news content, such as weather, sport and finance. However, to the extent such a distinction is maintained in the legislation, we propose replacing the threshold of "predominantly core news content" in section 52H(1) with "regularly includes a material amount of core news content". When this amended content test is placed alongside the other tests it becomes an appropriate common sense threshold for access to the mandatory bargaining code, but will remove the opportunity for regulatory disputes and increased uncertainty.

As recognised in the Final Report from the ACCC's Digital Platforms Inquiry, the mandatory bargaining code is required to address the underlying bargaining power imbalance between the digital platforms, Google and Facebook, thereby assisting in ensuring the ongoing provision of quality news content to Australians. Those media organisations that provide news sources that are generally considered by Australians to make news content of significant public interest available on a regular basis should accordingly be able to use the new mandatory bargaining code. This is captured by the suggested "regularly includes a material amount of" wording proposed for section 52H(1).

It is understood that it is also intended that each media business would have flexibility in how to set out its news sources in the application for registration with the ACMA, for example, by listing a block of programs that occur over a particular time period on a daily basis or listing one of the channels of the television network. The arbitration framework would still only apply to covered news content on the channel but this flexibility would provide a more administratively efficient registration process. The current "predominantly" wording would tend to limit the capacity of a television network to exercise this flexibility. Our suggested change to the wording of the content test addresses this concern, while maintaining the integrity of the content test gateway.

#### Proposed solution

- Replace the threshold of "predominantly core news content" in section 52H(1) with "regularly includes a material amount of core news content".

### 4.1.1 Definition of news source

Free TV submits that changes are required to the definition of *news source*, with respect to both the definition of a television program and the reference to "publishes online". These are required to ensure that the scheme is workable for the dynamic nature of television scheduling and to give effect to the intention discussed above to provide flexibility in how news sources can be listed in a registration application.

The commercial television news brands, such as 7News, 9News and 10 News First, apply to a variety of different television programs and content, from the evening news bulletins, through to updates and windows in other programming. In addition, these news brands are often used in breaking or rolling coverage in the event of an immediate change in program scheduling to cover an emerging news story.

Given the dynamic nature of the news cycle and responsive nature of commercial television news to cover events of importance to Australians, we suggest that the definition of "news source" should include not only specific TV programs but any content falling under the banner of the relevant TV program such as bulletins and news updates.

In addition, we suggest broadening the definition to include a television channel, to ensure that there is flexibility should a network wish to seek registration by the ACMA of such a news source.[2] The same analysis applies to radio stations.

Further, two changes are required to recognise that the ways in which content may be made available online will not all be captured by the concept of "publish." This is particularly the case where content is surfaced on a digital platform through crawling and indexing of content, rather than the content being uploaded by the news business. In addition, in the interests of clarity, the definition of website should be expanded to include social media channels.

### Proposed solutions

- Amend the opening words of the definition of news source in section 52A to provide as follows: "***news source*** means any of the following, if it produces content that may be made available or distributed over the internet:"
- Insert two new paragraphs (suggested above paragraph (c)) in the definition of news source as follows: "(c1) a television channel;" and "(c2) a radio station;"
- Amend paragraph (c) of the definition of news source to provide as follows: "a television program which includes any content that is produced under the banner or name of that television program, such as news flashes, rolling coverage, bulletins or special reports or other material"
- Amend paragraph (e) of the definition of news source to provide as follows: "a website or a social media page or channel"

## 4.2 Definition of core and covered news

### 4.2.1 Media neutral definition of core and covered news

The current definitions of both "core news content" and "covered news content" refer to content that is "created by a journalist".

These definitions do not appropriately recognise the manner in which TV news and current affairs programs are produced and presented, which generally involves a team of people working together – including presenters, producers, writers, researchers, cameramen, editors etc – not all of whom would

[2] As a minor drafting point, we note that there is no need to repeat the reference to "publishes online" in 52H (the content test) as this is addressed in the definition of news source.

consider themselves to be "journalists", despite being professionally engaged in the creation of news content.

For example, the host of a current affairs show may not be a trained journalist and guest presenters who are not trained journalists appear on news and current affairs programs on a regular basis. Even though this means that the content of those programs is not produced by a single "journalist", that content is required to meet appropriate editorial standards.

Free TV's view is that this requirement is not necessary, given the professional standards test in section 52K. If this requirement is retained, it is recommended that both definitions should be amended to reflect that content of the type referred to above is capable of being considered to be news content.

We propose two options for resolution. The first would remove the reference to journalist in favour of a media-neutral phrase such as "is created by one or more persons or other entities in the employment of, or engaged by, a corporation that applies rules of the type referred to in section 52K(1)(a)".

Alternatively, the reference to journalist could be retained, and an additional limb could be added to include content that is subject to appropriate editorial standards through being produced (whether under an employment or another type of contractual arrangement) for either an entity that is licensed under the Broadcasting Services Act 1992 (Cth) (BSA), given the strict standards imposed on those licensees under the BSA or an entity that is a member of the Australian Press Council or similar.

### Proposed solutions

**Option 1**

- Replace paragraph (a) of the definition of "core news content" and "is created by a journalist" in paragraph (b) of the definition of "covered news content" with "is created by one or more persons or other entities in the employment of, or engaged by, a corporation that applies rules of the type referred to in section 52K(1)(a)".

**Option 2**

- Replace paragraph (a) of the definition of "core news content" with:

  "(a) is created or produced:

  (i) by a journalist; or

  (ii) by one or more persons or other entities in the employment of, or engaged by:

  (A) a corporation that is the holder of a licence under Part 4 of the Broadcasting Services Act 1992;

  (B) the ABC or SBS; or

  (C) a corporation that is subject to rules regarding internal editorial standards that relate to the provision of quality journalism such as, but not limited to, the rules of the Australian Press Council or the Independent Media Council, the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice;"

- Incorporate an equivalent amendment to the definition of "covered news content,".

### 4.2.2 Including editorial or opinion content

Free TV agrees with the position taken in the EM that editorial and opinion pieces should be considered news content (whether or not created by a journalist). Editorial and opinion "pieces", in the context of TV content, will include current affairs programs. Such programs are particularly important in engaging Australians in public debate and informing democratic decision making.

For example, a current affairs program that focusses on providing panel discussions and commentary, with opinions provided by political reporters and commentators, might not be considered to be "recording" or "explaining" political events, because it is providing an opinion or viewpoint on those political events. Such a program may also not be considered to be "investigating" such events. Nonetheless the perspectives that are provided would quite clearly be "relevant in engaging Australians in public debate and in informing democratic decision making", as referred to in the definition of core news content.

It is suggested that the definitions of both "core news" and "covered news content" should be amended to clearly reflect this and to avoid any ambiguity.

#### Proposed solution

- Replace the phrase "that records, investigates or explains issues that" in the definition of "core news content" with: "that records, investigates or explains, or provides an opinion or viewpoint (excluding opinions or general viewpoints from members of the general public) on issues that:"

An equivalent change would then be made to the definition of "covered news content".

# 5. Arbitration process and related issues

## 5.1 Time period for determination

Section 52ZO provides that a determination made in an arbitration will be binding on the parties for only one year. After the expiry of the determination period, the relevant digital platform will have no ongoing obligation to continue to pay for its use of covered news content of the relevant media company. Given that the process leading up to the determination being made would take at least 5 months (that is, a minimum of 3 months for the bargaining process and then 45 business days for the arbitration process), this is a very short period of time. In a practical sense, this one-year determination period means media companies would need to commence preparation for a further bargaining and arbitration process very shortly after the initial process was completed.

To address this issue, we suggest one of 2 options. Under the first option, the bargaining news business corporation, which will be the entity that may trigger commencement of the arbitration process, would be entitled to extend the determination for 2 additional one-year periods. Under the second option, the Treasurer would be provided with the option of extending the one-year period for existing and future determinations by legislative instrument. The Treasurer would be able to take this action either as a result of the review of the mandatory bargaining code that is proposed to occur after 2 years or earlier, if it was determined that the code was working well.

### Proposed solution

**Option 1**

- Section 52ZO(1)(b) would be amended to insert at the beginning "subject to subsection (1a)," and the following would be inserted as a new section 52ZO(1a) immediately after section 52ZO(1):

  "(1a) A bargaining news business corporation may:

  (i) extend the term of a determination applicable to it by one year, by providing written notice to the responsible digital platform corporation to which the determination applies at least three months prior to the date on which the determination would otherwise end; and

  (ii) exercise its rights under this subsection (1a) on two occasions only so that the maximum duration of a determination may not exceed three years."

**Option 2**

- Section 52ZO(1)(b) would be amended by deleting the words "one year" and inserting "the determination period".
- The following definition would be inserted in the correct alphabetical order in section 52A:

  "***determination period*** means one year or such other longer period determined by the Treasurer in accordance with section 52CA."
- Division 2 would be renamed "Designated digital platform corporation, designated digital platform services and determination period" and the following would be inserted as section 52CA:

"52CA **Treasurer may change determination period**

(a) The Treasurer may, by legislative instrument, make a determination to increase the determination period to a period of longer than one year.

(b) In making the determination the Treasurer must consider the operation of this Part IVBA and the determinations that have been made under section 52ZO and may consider any reports or advice of the Commission.

(c) The determination is not invalid merely because of a failure to comply with subsection (2).

(d) The determination will take effect on the date the legislative instrument takes effect and will apply to all determinations under section 52ZO which are then in place and all future determinations made under section 52ZO.

## 5.2 Protection of collective bargaining under the Code

Free TV supports the provisions of the Bill that will enable news media businesses to collectively bargain with the digital platforms (and potentially also collectively arbitrate). Such collective bargaining arrangements could however result in breaches of the restrictive trade practices provisions in Part IV of the Competition and Consumer Act 2010 (Cth) (**CCA**).

In order for the Code to be effective, it would be appropriate to include a mechanism to ensure that activities expressly contemplated by the Code do not give rise to any liability under those restrictive trade practices provisions in Part IV of the CCA. Free TV agrees that the appropriate mechanism to achieve this is the use of the existing specific authorisation power found in subsection 51(1) of the CCA. Under that section, anything specifically authorised by legislation (including another provision of the CCA) will be taken not to breach Part IV of the CCA.

Section 52ZW of the Bill recognises that it is appropriate to use this existing authorisation power, however, what is currently specifically authorised is only "an arrangement between 2 or more registered news business corporations for the purposes of negotiating with a responsible digital platform corporation…".

It is important that the conduct for which authorisation is provided covers all actions that could, quite properly, be taken pursuant to a collective bargaining arrangement. Free TV is concerned that the drafting of section 52ZW is currently overly narrow.

### Proposed solution

Replace section 52ZW with the following:

**Option 1**

For the purposes of subsection 51(1), an agreement entered into between 2 or more registered news business corporations under section 52X for the purposes of bargaining under Division 6 or arbitration under Division 7, and anything done to give effect to any such agreement (including, for the avoidance of doubt, anything done prior to the commencement of the bargaining or arbitration, as applicable), is specified and specifically authorised.

**Option 2**

For the purposes of subsection 51(1), the following things are to be regarded as specified in this section and specifically authorised by this section:

(a) any contracts, arrangements or understandings entered into between 2 or more registered news business corporations for the purposes of exercising rights as bargaining news business corporations under Division 6 or 7; and

(b) all steps or any other action taken to give effect to any provision in any contract, arrangement or understanding referred to in paragraph (a) above, whether before or after the time at which any rights under Division 6 or 7 are exercised.

## 5.3 Clarity regarding information to be considered by arbitration panels

It is important for transparency reasons that the information each arbitration panel may take into consideration in making a determination is clearly identified. Consideration therefore should be given to requiring that:

(a) the panel may only take into consideration the information that is provided to it by either of the bargaining parties and the ACCC; and/or
(b) if the panel requests the ACCC to provide additional information to it (as contemplated in the EM), each of the parties are also provided with the opportunity to make a submission in relation to that additional requested information, in the same time period as the ACCC.

# 6. Designated Digital Platforms

## 6.1 Appropriate entities should be bound

Free TV supports the intent of the Bill, which imposes obligations on "responsible digital platform corporations" which may not be the relevant designated digital platform service itself. This is intended to ensure that a Google or Facebook entity which has a sufficient jurisdictional nexus with Australia is required to comply with the mandatory bargaining code. However, it is important to ensure that each responsible digital platform corporation is both sufficiently creditworthy to comply with its obligations under the mandatory bargaining code (including any determinations made following an arbitration process in which it is involved) and has sufficient day to day operational control in respect of the relevant digital platform services to comply with its obligations, for example, its obligations to notify algorithm changes.

### Proposed solution

- We suggest that paragraph (a)(iii) of the definition of responsible digital platform corporation in section 52A is deleted and replaced with the following:

  "(iii) has primary responsibility for the operation of, or controls, the digital platform services in supplying services that are used by Australians (irrespective of whether any other corporation also has responsibilities for the operation of that digital platform service); and

  (iv) is sufficiently creditworthy to comply with its obligations under this Part IVBA including under any determinations made under section 52ZO which apply to it; or"

## 6.2 Application to replacement services

It is also necessary to ensure that a designated digital platform corporation may not avoid the operation of the Code simply by making minor changes to a designated digital platform service and rebranding that service.

We therefore suggest a second limb to the designation that automatically designates new digital platform services operated or controlled by the digital platform corporation (either by itself or together with other corporations) that provide substantially similar functionality and characteristics of the existing designated digital platform services.

### Proposed solution

Amend the definition of designated digital platform service in section 52A:

> ***designated digital platform service*** means:
>
> (a) a service that is specified as a designated digital platform service in a determination under section 52C; and
>
> (b) a service (**new service**) that is operated or controlled by the designated digital platform provider (either by itself or together with other corporations) that provides a service referred to in paragraph (a) of this definition (**designated service**) which meets the following criteria:
>
> (i) the new service is first made available to persons located in Australia after the date on which the designated service is specified in a determination under section 52C; and
>
> (ii) the functionality and characteristics of the new service are substantially similar to the functionality and characteristics of the designated service, irrespective of whether or not the new service includes other functionality, characteristics or services.

## 6.3 ACCC review and future designated services

Free TV notes that the Explanatory Memorandum sets out an expectation that the Treasurer will make an instrument that designates Facebook Inc and Google LLC once the Bill is enacted. The designated digital platforms services are expected to be listed as: Facebook News Feed (including Pages and Groups), Facebook News Tab, Instagram, Google Discover, Google News and Google Search.

Further, Free TV understands that it is intended that a review mechanism will be drafted into the final Bill, to require the ACCC to review the provisions of the framework after two years. Free TV supports such a review mechanism.

As part of the statutory review of the framework, the ACCC should be required to provide advice to the Treasurer on whether the designated digital platform corporations or the designated digital platforms services set out in the initial instrument remain appropriate and whether any additional platforms or services should be included in the framework. In particular, the ACCC should review whether services such as Google's YouTube and Facebook Watch should be included in the remuneration provisions of the Code.

# 7. Non-discrimination provisions

**Key issues**

- The current drafting of the non-discrimination provisions is heavily focussed on potential punitive responses in relation to crawling, indexing and display of news content.
- These provisions need to be broadened to ensure that the potential for punitive actions in related markets is also protected against.
- We also recognise that both search engines and social products by their very nature rank content. We would support any clarifications deemed necessary to differentiate between the legitimate operation of algorithms, from those actions deliberately designed to harm a participant as a result of the operation of the mandatory Code.

## 7.1 Ensuring that the non-discrimination provision is robust

The non-discrimination provisions in section 52W are a very significant part of this reform process. In order for these reforms to be successful it is necessary to ensure that neither responsible digital platform corporation is able to take actions that will discriminate against any media business that opts in to the mandatory bargaining code, as has occurred in other jurisdictions – including Germany, France and Spain. It is therefore important to ensure that the non-discrimination provisions are "watertight". In the absence of such protection it would be impossible for media organisations to negotiate with digital platforms and seek fair remuneration if there is a risk that digital platforms will remove, or demote their content, as a result of their participating in the Code, or rejecting a particular offer or obtaining a particular result.

In this regard, greater clarity may be useful as to the types of discriminatory conduct that are restricted under section 52W. Further, the section should recognise that, given the ubiquitous consumer facing and advertising technology services that Google and Facebook provide in Australia, the prohibition on discrimination must extend beyond conduct relating to the use of news content.

We have suggested additional drafting in our proposed section to avoid the possibility that either responsible digital platform corporation may seek to avoid the intent of the non-discrimination obligation.

As the intention of section 52W is to ensure that the digital platforms are not able to take action to avoid the operation of the Part, broad anti-avoidance provisions have also been suggested (based on those in Australian tax legislation) to ensure the intention of the Code is protected.

## 7.2 Non-discrimination must extend to non-news content and other services

Although the discrimination that is sought to be limited by the current drafting of section 52W should be prohibited, it is not an exhaustive list of the conduct that may be engaged in by either Google or Facebook to exercise power to the detriment of Australian media companies.

We consider that an appropriately drafted non-discrimination provision will ensure that the platforms do not:

- Remove all Australian news from their platforms (or remove the content of those that refuse to accept particular terms);

- Remove all non-news content of Australian media businesses from their platforms (or remove the non-news content of those that refuse to accept particular terms);
- Demote the news content or non-news content of those news businesses that seek to exercise their rights under the Code – or those that are awarded higher rates of remuneration under the Code (or alternatively give algorithmic preference (or threaten to preference) news businesses that accept an offer for no remuneration or lower remuneration);
- Punishing news businesses that exercise their rights under the Code or are awarded higher remuneration, in other ways – for example:
    - offering less attractive commercial terms to those businesses in relation to other platforms (for example offering less attractive YouTube revenue share arrangements for non-news content);
    - making it a condition of other commercial deals (such as arrangements to supply video content to Facebook Watch or other news aggregation platforms) to waive rights under the Code (or offering better terms on those deals to businesses that accept lower remuneration under the Code);
    - making it a condition in relation to the supply of other services (such as advertising technology (ad tech) services, including Google ad serving on a news media businesses news websites or other websites) to waive rights under the Code – or offering better terms on those services to businesses that accept lower remuneration under the Code.

TV broadcasters are particularly vulnerable to discriminatory conduct regarding non-news content, as compared to other types of media which are able to register all of their content, rather than just individual programs, or collections of programs, as a news business or businesses.

For a TV broadcaster, even once its particular news businesses are registered, not all content of that TV broadcaster would be considered to be news content. Nothing in section 52W, as it is currently drafted, would prevent Google or Facebook from discriminating against that other non-covered news content in a way that causes significant financial disadvantage to the registered news business corporation – and which would effectively mean that the corporation could not "afford" to exercise its rights under the proposed new Part IVBA.

As the ACCC is aware from its Digital Platforms Inquiry and its current Ad tech Inquiry, the proposed responsible digital platform corporations have a substantial degree of power in the markets for the supply of ad tech services.

Therefore, in the same way that it is important section 52W restricts the ability of those corporations to discriminate against any content of a registered news business corporation, each responsible digital platform corporation should be restricted in its ability to discriminate in relation to other services, including in particular ad tech services. Again, discrimination in relation to other services may impose a substantial cost on Australian media companies which would effectively force them to avoid exercising their rights under the mandatory bargaining code.

## 7.3 Bolstering the compliance and enforcement framework

We are also concerned that a registered news business corporation will not, in a practical sense, be able to determine whether its content is being treated differently to the content of any other media company or whether it is otherwise being discriminated against in breach of section 52W. In order to make a determination whether to ask the ACCC to take action for breach of section 52W, or to take

action itself, registered news businesses will need to be provided with information to enable them to assess whether discrimination has occurred.

Therefore, we recommend that each of the responsible digital platform corporations should be required to report 6-monthly to the ACCC as to whether they are complying with the non-discrimination obligation. These reports should be publicly released so that both the ACCC and media companies are able to determine whether they wish to take action in relation to any non-compliance.

### Proposed solution

Replace section 52W with the following:

(1) The responsible digital platform corporation for a digital platform service must ensure that the supply of the digital platform service does not discriminate (including but not limited to in relation to the crawling, indexing, ranking, displaying or presenting of news and non-news content), and must ensure that neither the responsible digital platform corporation nor any of its related bodies corporate discriminates in the provision of any other goods or services (including in the provision of services relating to advertising on the digital platform service):

(a) between registered news business corporations including any related bodies corporate of those registered news business corporations;

(b) between registered news businesses corporations including any related bodies corporate of those registered news business corporations (or any one or more of them) and any news business corporations that are not registered under this Part, including, for the avoidance of doubt, any news business corporation that does not operate predominantly in Australia for the dominant purpose of serving Australian audiences; or

(c) by preferencing its own services (or services in which it has a commercial interest or relationship).

(2) Sub-section (1) does not apply if the responsible digital platform corporation or any of its related bodies corporate engages in discrimination that is necessary for the efficient provision of any goods or services and which is unrelated to this Part or any determination made under section 52ZO(1) and the onus of proving that any conduct is necessary for the efficient provision of any goods or services and is unrelated to this Part or any determination made under section 52ZO(1) is borne by the responsible digital platform corporation.

(3) For the purposes of sub-section (2) the following conduct is not necessary for the efficient provision of any goods or services:

(a) demoting, removing, preferencing or de-preferencing the content (whether news or non-news) of any registered news business corporation or any related body corporate of any registered news business corporation by reason of:

(i) the exercise by any registered news business corporation of any rights under Division 6 or 7;

(ii) the terms agreed between a registered news business corporation or any related body corporate of any registered news business corporation and a digital platform service corporation including the terms of any agreement

entered into as a result of any bargaining process occurring under Division 6 or any agreement entered into under section 52ZJ;

(iii) the terms of any arbitral determination under section 52ZO(1);

(b) imposing as a condition of any supply of goods or services by the responsible digital platform corporation or any of its related bodies corporate to any registered news business corporation or any related body corporate of any registered news business corporation a requirement to waive or not to exercise any rights under this Part or accept a particular agreement in respect of a remuneration issue.

(4) The responsible digital platform corporation for a digital platform service must ensure that neither it nor any of its related bodies corporate takes, or proposes to take, any action:

(a) which has the purpose, effect or likely effect of discouraging any corporation from seeking registration of any news business or any news business corporation under Division 3 or the exercise by any registered news business corporation of any rights under this Part;

(b) that would enable the avoidance of the operation of this Part (including, for the avoidance of doubt, a determination made in accordance with section 52ZO(1)); or

(c) where it would be concluded that the action was taken, or proposed to be taken, for the principal purpose of the avoidance of the operation of this Part (including, for the avoidance of doubt, a determination made in accordance with section 52ZO(1)).

# 8. Information requests

## 8.1 Information under Minimum Standards and bargaining provisions

Key issues

- The process of requesting and receiving information from the platforms is crucial to address the inherent information asymmetries and Free TV is very supportive of the provisions that require the platforms to provide information to registered news business corporations. These are set out in Division 4, which set out the Minimum Standards that the platforms must comply with, and Division 6, which describes the bargaining processes.
- Further detail needs to be included in the legislation to ensure that the platforms respond to information requests under Division 6 (bargaining provisions) in a timely fashion and that responses include the full range of benefits captured by the platforms through the use of news content.

A significant issue that media companies face and, as mentioned previously, which adds to the significant bargaining imbalances with the platforms is the very limited transparency provided regarding the benefits the platforms receive from accessing and using news content. Platforms also do not provide information as to how news content is treated, what data is being collected, and the range of ways that data is being used. Without such information being provided, media companies may not be able to determine appropriate negotiating positions.

Therefore, we support the minimum standards in relation to the provision of information to registered news business corporations and also the information related provisions in Division 6, which contains the bargaining provisions. The information that is required to be provided by the platforms under Division 6 directly relates to the key issue that will be negotiated between the parties, the question of remuneration.

It is accordingly critical that the information provision requirements of the Bill are retained and our only comment would be to suggest that time limits are included for the provision of information to be provided under Division 6 to ensure that it is able to be appropriately used during the bargaining and, if applicable, arbitration processes. We have suggested in our proposed drafting a period of 20 business days. This appropriately balances the requirement that the platforms have sufficient time to collate the requested information with the need to ensure that the information is provided in sufficient time to be useful in the bargaining and, potentially, arbitration processes.

Google has made suggestions publicly that the information that would be required to be disclosed to registered news business corporations under section 52M would include personal information about users. This is clearly incorrect. Section 52M quite appropriately, requires the platforms to disclose the *types* of data that the platforms collect through *engagement by users with covered news content*. In other words, the information required is the categories of data collected about users of the content provided by the relevant registered news business corporation, that is, information related to their own customers. It is necessary for transparency that platforms should tell registered news business corporations the types of data those platforms collect about the customers of those media companies, including the types of data about those news business' customers that those platforms retain and do not pass on.

Division 4 contains a number of sections which will require the provision of notices to registered news business corporations in respect of upcoming algorithm changes. In all bar one case changes are only required to be notified if these will have a relevant "significant effect" (in the other case, notification is required only if the changes are designed to have a particular effect). This is an appropriate threshold – it is set at a level to ensure that not all changes are required to be notified, only those that meet a materiality threshold. These notifications will provide an important level of information, and therefore transparency, to registered news business corporations and are supported by Free TV.

The EM refers to particular enhancements that will be made to the requirements to notify of algorithm changes. For example, the EM states that section 52O will be further amended to require any notice of changes to algorithms which are specifically designed to affect the ranking of paywalled content must also describe how the registered news business is able to minimise and mitigate the negative impacts of such changes. These additional enhancements are supported by Free TV.

### Proposed solution

Amend section 52ZC(3) as follows:

(3) The responsible digital platform corporation must comply with a request under subsection (1) [or (2)] not later than 20 business days after the receipt of that request.

## 8.2 Trade secrets

### Key issues

- While Free TV understands that digital platforms should not be required to provide details of the workings of algorithms to minimise the opportunities for third parties to "game the system", as recognised in the Final Report of the Digital Platforms Inquiry, Free TV is concerned that the Bill provides the platforms with a broad ability to refuse to provide information that a platform considers are "trade secrets".
- To minimise the potential for the misuse of these provisions, we suggest relevant information that is the subject of an information request that may be reasonably considered to be a trade secret should still be provided, but that additional restrictions on its use, storage and destruction be included.

Both the Minimum Standards and Bargaining provisions include a section that enables a digital platform to refuse to provide information if it would reveal a "trade secret". This term is typically interpreted broadly by the courts and we have a concern that both digital platforms will rely on these provisions to significantly restrict the information that is provided to media companies.

The only recourse in such a case would be for a news business corporation to commence legal proceedings to seek to obtain an order for Facebook or Google to provide the information not disclosed in reliance on these sections. This brings with it inherent difficulties, including that a media company would essentially need to take action on the basis of a suspicion that information is being withheld and without knowing whether there would be an ability for a platform to legitimately claim that the information was a "trade secret".

An alternative would be to remove the trade secret sections and include more robust provisions as to restrictions imposed on use of the data and confidentiality of the data. The alternative provision suggested expressly recognises that neither digital platform should be required to disclose its proprietary algorithms.

## Proposed solution

- It is recommended that sections 52V is deleted and section 52ZC(7) is limited in its operation to bargaining news business corporations.
- The following new section 52ZX is proposed:

  52ZX **Restrictions regarding trade secrets**

  (1) Subject to subparagraph (4), a responsible digital platform corporation may not refuse to give information to a registered news business corporation under this Part on the basis that the publication of the information would reveal a trade secret.

  (2) If a responsible digital platform corporation is required to provide information to a registered news business corporation under this Part which, if published, would reveal a trade secret of the responsible digital platform corporation, it must notify the registered news business corporation of this at the same time the information is disclosed and subsection (3) will apply to that information.

  (3) In respect of any trade secret referred to in subsection (2) received by it in accordance with this Part, a registered news business corporation must keep that trade secret confidential, take all reasonable steps to protect the trade secret from improper use or disclosure and not disclose that trade secret to any person (including any of its employees, officers, agents or contractors) unless:

  (a) disclosure is made to the ACCC;

  (b) where a trade secret has been disclosed as required under Division 6, this is required for a purpose in relation to bargaining under Division 6 or arbitration under Division 7 or, where a trade secret has been disclosed as required under Division 4, this is required for the business operations of the registered news business corporation; and

  (c) the person to whom the disclosure is made under subparagraph (b) is under a legally binding obligation to keep the trade secret confidential, to not use it other than for a purpose specified in subparagraph (b).

  (4) Nothing in this Part requires any responsible digital platform corporation to disclose any trade secret which is a proprietary algorithm of a digital platform service.

# 9. Comments on additional draft Code provisions

## 9.1 Clarifying intent of minimum standards

### 9.1.1 Early warning on algorithm changes

Free TV has been consistent throughout the Digital Platforms Inquiry consultation stages and the Government processes that followed that we do not consider it is the public interest to require that algorithms are revealed.

However, significant algorithm changes have the ability to materially impact the reach of news content. This issue was brought into sharp focus when Facebook announced on 11 January 2018 with no forewarning that it was going to start systematically de-ranking some news content, in favour of alternative content. To achieve the same reach, news media businesses would now be required to pay Facebook to boost posts.

Accordingly, we have sought to ensure that similar situations do not occur again and that notice of fundamental shifts in approach to algorithm scripting is provided to impacted news media businesses.

While we consider that the draft Bill achieves this aim, for the avoidance of doubt, there is scope to include a provision that expressly states that nothing in the minimum standards would require a digital platform to reveal their algorithms.

## 9.2 Recognition of original news

The recognition of original covered news content provisions (section 52T) of the Bill raise an important issue that Free TV agrees that the digital platforms and news media businesses should work together to address. In principle, we consider that where possible original news sources should be identified.

However, as set out in earlier consultation processes, Free TV members recognise the challenges involved in identifying the original source and the need to ensure that legitimate story developments, counterpoints and reporting on new information are not inadvertently disadvantaged.

As such, it is appropriate that the Bill establish a requirement to consult with news business corporations to develop a proposal to recognise original content. However, no proposal should be adopted until it has the support of a majority of registered news businesses and the digital platforms.

Any proposal under section 52T should also recognise that registered news business corporations include, under agreed arrangements with other news businesses, content provided by those other news businesses in particular circumstances, for example, content from Reuters. Those legitimate arrangements should not be restricted by any proposal developed by a responsible digital platform corporation.

## 9.3 Support user comment tools

Free TV strongly supports the regime for the provision of content moderation tools in section 52S. Content moderation tools are an important tool in enabling media companies to meet their own statutory compliance obligations and the use of these tools may help limit risks in relation to defamation claims.

However, there is an expanded set of requirements that these tools should satisfy, which are within the current capacities of the platforms to provide. We have suggested in our alternative drafting appropriate enhancements of the tools.

Given Australia's current laws, it is likely that each registered news business will seek the content moderation tools that are referred to in section 52S. In addition, the same content moderation tools should be able to be used for any content on the relevant digital service. Therefore, there seems to be no reason why a specific request should need to be made to access such tools (noting also that section 52S does not impose any time limits as to when a platform should respond to such a request).

Finally, the section is currently silent as to whether a responsible digital platform corporation could charge for the provision of these tools. It is recommended that the section clearly state that no charge is able to be imposed.

### Proposed solution

Replace section 52S with the following:

(1) The responsible digital platform corporation for a digital platform service must make available content moderation tools that allows the registered news business corporation to, if it determines that it wishes to do so:

  (a) remove or filter comments on the registered news business' covered news content that:

    (i) are made using the digital platform service; and

    (ii) are made on a part of the digital platform service that is set up and able to be edited by the registered news business;

  (b) disable the making of such comments;

  (c) block the making of such comments:

    (iii) by all persons or by particular classes of persons; and/or

    (iv) in particular circumstances;

  (d) prevent sharing of the registered news business' covered news content by users of the digital platform service; and

  (e) prevent individuals from being tagged in comments made regarding the registered news business' covered news content.

(2) The tools made available under subsection (1) must also enable the registered news business to receive notification when a user reports a comment on the registered news business' covered news content.

(3) The responsible digital platform corporation for a digital platform service must comply with subsection (1) no later than 28 days after the day on which the registered news business was registered under section 52E.

(4) The responsible digital platform corporation for a digital platform service must not impose any fees or charges on the registered news business or the registered news business corporation for the provision of the content moderation tool under subsection (1).

## 9.4 Terminology of news content being "made available"

There are a number of places in which the draft Bill refers to covered news content being "made available" (or similar terminology) by a digital platform service. These include sections 52M(2)(a), 52M(2)(b), 52M(2)(c), 52N(1)(b), 52N(2)(d), 52P(1)(b), 52Q(1)(b), 52R(d), 52U(d), 52Y(1), 52ZF(1)(c) and 52ZO(1)(b).

Free TV is concerned that the use of this terminology implies that news media businesses are making the content freely available for use by the digital platforms. The ambiguity in this term does not adequately describe how the content is used now and risks an implied permission for expanded future use of news content by the platforms. We believe that the Code needs to be very clear that it does not override any existing legal requirements which must be satisfied before a platform utilises content. For example, to the extent any usage requires a consent under copyright then it remains at the election of the news media business whether or not to grant that consent. We suggest this can be easily addressed by the inclusion of a new section in Division 9, which deals with miscellaneous provisions.

We also consider that the "made available" terminology throughout the Bill should be amended to include content that is "made available or otherwise utilised in any way" (and equivalent expressions). Further, the existing use of news content by the platforms should be set out in the Explanatory Memorandum and could be described as including the following (to the extent they fall within a designated digital platform service's existing practices):

- crawling and indexing news content;
- collecting and using any data associated with user engagement with news content;
- displaying news content, [including link, headlines, snippets, text, images, audio or video];
- making a snippet of news content;
- showing search results for news content; or
- creating and publishing a short summary of news content.

## A. Other drafting matters

| Issue | Suggested resolution |
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| **A.1 ACMA registration decision timeframes and revocation**<br>• Registration is the "trigger" for a news corporation to be able to commence negotiations with a digital platform. Therefore there should be a fixed time period by which the ACMA must complete its review of an application and either make a registration or notify the applicant that it will not do so (and should provide reasons if it does not register the relevant news business or businesses).<br>• ACMA has the power to revoke a registration, which has the potential to create uncertainty. This also risks significant resources being thrown away by all parties on undertaking arbitration for payment for covered news content if ACMA subsequently cancels the registration of the news business. Any such decisions should be subject to a mandatory consultation period to ensure due process in making a decision to revoke registration. | • Insert as section 52D(4):<br>(4) The ACMA must, within 30 days of receipt of an application under paragraph (1), either:<br>(a) register the news business (and the applicant corporation as the registered news business corporation for the news business) in accordance with section 52E; or<br>(b) notify the applicant that it will not make that registration, including reasons why it will not make that registration.<br>• Replace section 52E(3) with the following:<br>(a) The ACMA must, if it considers that any of the requirements mentioned in paragraph (1)(c), (d) and (e) are no longer met in relation to a registered news business:<br>(i) notify the registered news business corporation for that news business in writing, providing details of why the ACMA considers that any of the requirements mentioned in paragraph (1)(c), (d) and (e) are no longer met; and<br>(ii) consult with that registered news business corporation for a period of not less than 45 days in relation to whether the requirements mentioned in paragraph (1)(c), (d) and (e) are no longer met for the registered news business.<br>(b) Following the expiry of a consultation period referred to in paragraph (3)(a)(ii) the ACMA may, if it determines that the |

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| | relevant registered news business does not meet any of the requirements mentioned in paragraph (1)(c), (d) and (e) revoke the registration of that registered news business (and of the registered news business corporation for the registered news business, unless that registered news business corporation is required to remain registered in relation to any other registered news business), provided that the ACMA must publish a notice of the revocation which must state why the registration has been revoked.<br>(c) The ACMA may not revoke the registration of a registered news business (or of any registered news business corporation) except in accordance with this paragraph (3). |
| **A.2 Arbitration process**<br>• Free TV's members fully support the arbitration process provided for in the Bill. Free TV has made a number of comments for refinement to that process earlier in this submission. The additional points below are suggested for further consideration to refine the application of the arbitration model.<br>• While Free TV is fully supportive of the overall timeframe provided in the arbitration model (ie, 45 business days), some further consideration could be given to adjustments to those time periods to ensure practical implementation is possible. For example, the regime currently provides that the arbitration will commence 5 business days after a notice is issued under 52ZF(2). In that time period the panel must be constituted, which may include a requirement for the ACMA to make appointments if agreement cannot be reached directly between the bargaining parties. That is a very short time period and no guidance on when the ACMA should intervene to appoint the panel is given.<br>• Section 52ZF(2) provides there are 2 preconditions that must be satisfied before a bargaining party may give a notice commencing the arbitration. The first is that the bargaining parties have attended at least one day of mediation in relation to the remuneration issue. However, there is no obligation under the Bill for either bargaining party to agree to a mediation during the | Suggested drafting for third dot point only.<br>• **Option 1:** Replace section 52ZF(2)(a) with the following:<br>(a) either the bargaining parties have attended at least one day of mediation in relation to the remuneration issue or one of the bargaining parties has requested the other bargaining party to attend such mediation and that other bargaining party has not agreed to do so;<br>• **Option 2:** Add a new section 52ZB(2) and provide for the existing paragraph in that section to be paragraph (1):<br>(2) Either bargaining party may request the other bargaining party at any time to attend mediation about the remuneration to be provided for a registered news business' covered news content to be made available or otherwise utilised by the relevant digital platform service or services at any time after the bargaining commences. The other bargaining party must comply with that request. |

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| bargaining phase. Therefore this requirement could be used to avoid arbitration, that is, by one of the bargaining parties refusing to engage in mediation. There are 2 suggested options to address this issue, either to enable a bargaining party to issue a notice for arbitration if the other party has not agreed to attend a mediation or alternatively to include in Division 6 a provision requiring bargaining parties to undertake that mediation.<br>• Although it is acknowledged that the final offer arbitration decisions will not necessarily have precedent value given the need to choose between 2 competing final offers and the differing nature of media businesses in Australia, consistency and accountability are likely to be increased if there is a requirement for reasons to be published and the ACMA to maintain a register of decisions. Of course, any publication arrangement would need to provide for confidential information to be redacted. As each arbitration will turn on its particular facts, publication of the specific outcomes of an arbitration should not be an issue if decisions are published (noting that given many Australian media organisations are publicly listed, the details of the amounts paid will become public in a large number of cases).<br>• It is recommended that Division 7 should require that arbitrations are conducted "on the papers". Further, the ability of the arbitration panel to seek its own advice needs to be clarified. If such a right is included, an appropriate timeframe for response to that information needs to be provided for the bargaining parties. | |
| **A.3 Minimum Standards – process and compliance**<br>• While Free TV supports the proposed minimum standards as set out in Division 4 of the Bill, we have a concern that there are no independent compliance mechanisms to assess whether the responsible digital platform corporations are providing all of the information that is required to be provided under Division 4 or that the information provided is complete and accurate.<br>• It is suggested that there are additional powers provided to the ACCC to enable it to implement a compliance checking mechanism in respect to information provided by the digital platforms which will assist in addressing this issue. | |

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| **A.4 Minimum standards – provision of information**<br><br>• Information should be provided on how the data collected from engagement with covered news content is combined with other data collected by the relevant digital platform service.<br><br>• There are no time periods specified in relation to subparagraphs (2) and (3) and this should be rectified otherwise there is a risk that the information provided will only need to be given as at specific point in time, which may not provide an accurate understanding of the general data collection practices of the digital platforms. | • A suggested amendment to section 52M(1)(a) is as follows:<br><br>(a) information covered by subsection (2) is given to the registered news business corporation for the registered news business in respect of the 12 month period immediately preceding the date on which the information is provided; and<br><br>• A suggested new section 52M(1)(d) is as follows (with the existing subparagraph (d) to be renumbered accordingly):<br><br>(d) the updated information covered by subsection (2) which is required to be provided annually in accordance with subsection (3) must relate to the full 12 month period commencing on the later of the following days:<br><br>(i) the day on which information was given to the registered news business corporation in accordance with subsection (1); or<br><br>(ii) the most recent day on which on which updated information was previously given to the registered news business corporation in accordance with subsection (3).<br><br>• If the above 2 changes are adopted, the word “currently” should be deleted from section 52M(2)(c).<br><br>• A suggested new section 52M(2)(b) is as follows (with the remaining subparagraphs to be renumbered accordingly):<br><br>(b) in respect of each digital platform service, information and data on how data of the type referred to in subparagraph (a) is used with other user data collected by that digital platform service; |