Australian Community Futures Planning

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18 January 2021

SUBMISSION

Senate and Economics Legislation Committee
Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

Australian Community Futures Planning (ACFP) is pleased to make this submission to the Senate and Economics Committee on the above proposed new law.

ACFP was established in March 2020. It is a community-based entity that is organising to involve Australians in planning a better future for themselves and for future generations. At ACFP we are using a new community engagement and planning framework called: **National Integrated Planning & Reporting** to create **Australia's first National Community Futures Plan: *Australia Together*.** Find out more about ***Australia Together*.**

Australian Community Futures Planning has no affiliation with any political party inside or outside Australia. It receives no funding from political parties or other sources. All output from ACFP is supported entirely by voluntarily supplied non-monetary in-kind contributions of research and community involvement.

This submission is made in good faith by the Founder of ACFP, Dr Bronwyn Kelly. Dr Kelly is a highly experienced former senior public servant in state and local government. She is an expert in the field of national integrated planning and the author of ***By 2050: Planning a better future for our children in 21st century democratic Australia***. She is also the creator and presenter of the seven-part videocast series ***The State of Australia in 2020*** and an essayist in issues for Australian governance. Dr Kelly is the author of a major essay on the impact of the potential introduction of the News Media and Digital Platforms Mandatory Bargaining Code. This essay, ***Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code*** was first published on 30 September 2020.

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For detailed information about ACFP, visit our website at **https://www.austcfp.com.au/**

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Introductory Note

The Senate is seeking comment in relation to two very closely related matters at the same time:

1. The Senate Economics Legislation Committee is seeking comment on the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 due by 18 January 2020; and
2. The Senate Environment and Communications References Committee is conducting and Inquiry into Media Diversity in Australia.

Australian Community Futures Planning has made a submission to the Senate Inquiry into Media Diversity in Australia. Links to that submission are:

- ACFP's written submission Senate Environment and Communications References Committee's Inquiry into Media Diversity in Australia.
- An overview by video at this link: ***ACFP's Submission to the Senate Inquiry into Media Diversity in Australia - YouTube***

- Extra supporting detail is provided in the essay by ACFP's Founder, Dr Bronwyn Kelly, ***Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code***, (hyperlink), published on 30 September 2020.

Both the written submission and the video submission on media diversity are also accessible in full on ACFP's website at www.austcfp.com.au/news

For convenience, a full copy of ACFP's written submission to the Senate Inquiry into Media Diversity in Australia is also provided in **Appendix 2** below. That submission provided significant commentary on the Exposure Draft of the News Media and Digital Platforms Mandatory Bargaining Code Bill. It also provided some commentary on the revised draft of the Bill released by the government on 9 December 2020. Comments to the Senate Environment and Communication's Committee of Inquiry on Media Diversity closed on 11 December 2020, leaving only two days for analysis and incorporation of comments on the revised News Media and Digital Platforms Mandatory Bargaining Code Bill. ACFP appreciates the opportunity provided by the Economics Legislation Committee to provide more detailed comment on the revised Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020. Both ACFP's submissions to the two different Senate Committees should be read together.

Executive Summary

Australian Community Futures Planning (ACFP) contends that the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 is structured so that it can only fail in its ostensible objective to:

> help support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses.[1]

The Code is premised on the assumption that there is a bargaining power imbalance between news businesses and Google and Facebook. The government has been encouraged to assume this imbalance exists by the Australian Competition and Consumer Commission (the ACCC) in its Digital Platforms Inquiry Final Report[2], June 2019. ACFP contends that the ACCC has not demonstrated that a bargaining power imbalance exists and that the ACCC's own data indicate there is no demonstrated imbalance. This means that the Code, should it proceed, is likely to expose the Commonwealth to significant risk and loss, the potential for which is quietly acknowledged in Section 2.10 of the Minister's Explanatory Memorandum on the Bill[3]. This loss is likely to pertain because a central tenet of the Bill – the Minister's ability to designate digital platforms as subject to the Code (on the grounds that they hold a bargaining power imbalance) – is fundamentally tenuous, particularly when the ACCC's own data make it doubtful that the imbalance exists and exists to the extent sufficient to impact the ability of news businesses to remain viable.

If there has been market disruption for traditional news media businesses operating on non-digital platforms (print, TV and radio) this cannot be sheeted home to digital search and share companies, especially to just two – Google and Facebook. It is merely a function of the rise of the internet itself. The internet is not the same thing as Google and Facebook and two companies should not be expected to carry an entire news industry through structural change. Despite what some may believe about the depth of the pockets of Google and Facebook, a Code which acts to consume the entire Australian profits of two companies cannot create a sustainable means of support for journalism.

ACFP has a number of concerns with the detail of the Bill. We have provided detail on fifteen of our concerns as follows:

- Concern 1 – It is a fallacy that digital platforms are "unavoidable trading partners".
- Concern 2 – It is a fallacy that there is a "bargaining power imbalance" between news business and digital platforms.
- Concern 3 – There is some efficacy in the proposals for contracting out of the Code and standard offers but these are undermined by the compulsory elements of the Code.
- Concern 4 – The non-differentiation provisions of the Bill will fail to achieve the objectives of the Bill.

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[1] Parliament of the Commonwealth of Australia, Explanatory Memorandum to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, page 7 https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6652_ems_2fe103c0-0f60-480b-b878-1c8e96cf51d2/upload_pdf/JC000725.pdf;fileType=application%2Fpdf

[2] Australian Competition and Consumer Commission, "Digital Platforms Inquiry Final Report", June 2019, page 206: "There is a fundamental bargaining power imbalance between media businesses and Google and Facebook that results in media businesses accepting terms of service that are less favourable." https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

[3] Explanatory Memorandum to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, pages 56-57, Op. Cit.

- Concern 5 – There is an exposure of the Commonwealth to risk of litigation by unfettered exercise of Ministerial power in designations.
- Concern 6 – The prescription of provision of user interaction data by designated digital platforms is unnecessary and potentially harmful to development of quality journalism.
- Concern 7 – The Bill discriminates against quality non-news content in favour of news content.
- Concern 8 – The bill forces subsidisation of content from news businesses that is not public interest journalism vital for a democracy.
- Concern 9 – A reduction in news diversity will arise from forced notification of algorithm changes.
- Concern 10 – The use of the Code to address problems of proliferation of fake news and free speech on the internet is ill-conceived.
- Concern 11 – There is potential for double-dipping by news businesses.
- Concern 12 – There is potential to drive digital platforms out of business in Australia. The Code is highly anti-competitive.
- Concern 13 – The hypothetical that must be used in arbitration for quantifying the monetary impact of an assumed bargaining power imbalance is unworkable.
- Concern 14 – The assumption that the Code will bring down paywalls is wrong.
- Concern 15 – Bigger competition problems for small news businesses will be created under the Code.

There are so many things wrong with this Bill that ACFP's central recommendation is to abandon the Bill entirely. However, we understand the Senate is searching for ideas to sustain the Australian news industry in its transition from the non-digital to the digital age. ACFP believes that if search and share platforms are encouraged to voluntarily bargain with news agencies, then the transition can be achieved that places news businesses onto a sustainable footing and does so without aggravating market concentration problems evident in the non-digital platform sphere (print, TV and radio). For more information on options for the future of a sustainable news industry see the long essay on this topic by ACFP's Founder, Dr Bronwyn Kelly: ***Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code***, (hyperlink), published on 30 September 2020.

There is a way forward to a sustainable quality news industry in Australia in the internet age. To discuss this ACFP is seeking to be a witness at hearings of the Senate Committee on this Bill.

Comments in response to key elements of the Bill

ACFP offers its response to important aspects of the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 in the following tables. These comments:

- respond to elements of concern in the Explanatory Memorandum[4] on the Bill, and
- refer to the actual Bill where necessary.

These comments are in addition to comments already provided by ACFP on the legislation for the Code in its submission to the Senate Inquiry into Media Diversity in Australia. The comments below may not be taken to imply a withdrawal by ACFP of any aspect of its earlier submissions on the Australian Competition and Consumer Commission's (the ACCC's) proposal for a News Media Bargaining Code. Nothing in the revised draft of the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 has addressed ACFP's extensive concerns about the Code.

The Minister has asserted in circulating the Bill and Explanatory Memorandum that the new Bill addresses concerns in the following table. ACFP rejects suggestions in Chapter 2 of the Explanatory Memorandum that the final code addresses concerns raised by ACFP and others as follows:

Minister's assertion as per 2.9 of the Explanatory Memorandum	**ACFP response**
The final Code addresses concerns about unbalanced arbitration, by ensuring that the code considers the value digital platforms provide to news businesses, as well as the benefits that news businesses bring to digital platforms.	The final Code does not address this concern. The Code now allows the arbitrator to consider the value digital platforms provide to news businesses but discounts that value (perhaps in full and more) in a subsequent clause via a refusal to allow the digital platforms' costs in providing benefit to the news business to be included as part of the calculations for a decision on a final monetary award to the news business. The Code further attempts to discount the value provided by a digital platform to the news businesses by insisting on consideration by the arbitrator of a "hypothetical" in which the news businesses can argue that they would receive more in revenue from referrals by the digital platform than they currently do if the digital platform no longer provided the referrals.[5] This hypothetical, if faithfully applied, obviously cannot work to deliver the desired effect for the news businesses. It certainly cannot work fairly. For a worked example showing why it cannot work – see **Appendix 1**. And for further insight into how the arbitration process and formulas has the potential to drive Google and Facebook out of business in Australia – thereby removing

[4] Parliament of the Commonwealth of Australia, Explanatory Memorandum to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, Op. Cit.

[5] See Explanatory Memorandum, Ibid., Section 1.210: "The hypothetical scenario the panel decides is appropriate in this circumstance is one in which audiences may reach DC through other means (such as users directly visiting DC's website or accessing it through other news aggregators) and where DC and other Australian news businesses are not reliant on Digiplat to reach those audiences."

Minister's assertion as per 2.9 of the Explanatory Memorandum	ACFP response
	the expected stream of income for news producers entirely – see comments below on **Elements of concern 3 and 12.** For an in-depth analysis of market impacts of the News Media Bargaining Code see Dr Bronwyn Kelly's essay on ***Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code***. Regardless of whether the hypothetical is workable (fairly or unfairly), the Code is structured to dictate all arbitrated decisions in the news businesses' favour. The arbitrator is required to speculate and does not have to account for his speculations. And the pre-determined outcome of the arbitration process, according to the Minister responsible for the Bill Treasurer Josh Frydenberg, is that: *The money can only flow one way. The money can only flow from Facebook and Google to the traditional news media businesses under this model. But it is only fair that we also consider in an arbitration process the benefit to the traditional news media businesses of having more eyeballs on their product by having them placed on Google search or Facebook news feed.*[6] Despite Mr Frydenberg's claims that digital platforms will be accorded fair value for the services they provide to news media, this Code cannot function fairly as it is currently designed.
The final Code makes clear that digital platforms will not be required to hand over trade secrets, protecting confidential algorithms. While platforms will be required to give advanced notice to news businesses of some planned changes to algorithm changes, no information about the algorithm itself need be provided.	The original draft of the Code never implied that digital platforms will be required to hand over trade secrets protecting confidential algorithms anyway. So this is no concession at all.
The final Code addresses concerns about being required to share user data, by making it clear that digital platforms are in no way obliged to provide any user data in breach of the Privacy Act.	The original draft of the Code never implied that private data would need to be shared. So this is also no concession at all.
The final Code better targets services that distribute news content where it has been proven that a significant bargaining power	The final Code makes no specific nominations of which services supplied by designated digital corporations are likely to be designated as services caught by the Code. It offers no extra comfort whatsoever that services will not be

[6] Josh Frydenberg, Sky News, 8 December 2020 (254) 'Many nations' will be watching Australia's media bargaining code laws - YouTube

Minister's assertion as per 2.9 of the Explanatory Memorandum	ACFP response
imbalance exists [and] … the minimum standard obligations have been amended to only apply to services the Treasurer designates – not any other services provided by digital platforms.	arbitrarily and unaccountably designated by the Treasurer as having a bargaining power imbalance when in fact the Treasurer has no evidence of such an imbalance. The Code does not require the Treasurer to account for a designation or provide reasons. This is of particular concern because, as ACFP has shown, the ACCC has not proven that Google and Facebook actually hold a bargaining power imbalance over news businesses, big or small. Nor have they proved that Google and Facebook are unavoidable trading partners. The ACCC's own data suggest that the opposite is the case – that there is no such imbalance at all. For more detail on the ACCC's failure to demonstrate that Google and Facebook hold a bargaining power imbalance see **Elements of concern 1 and 2** below. Should the parliament pass this legislation, this fundamental misrepresentation by the ACCC is likely to make the government's position in legal challenges unsafe and cause years of expensive legal battles which the government may well lose.

Element of concern 1 – The fallacy that digital platforms are "unavoidable trading partners"

Extract from Bill Explanatory Memorandum	
1.3	*The ACCC's Digital Platforms Inquiry Final Report was released in July 2019. Among the key findings was that the major platforms are unavoidable trading partners for Australian news businesses, and therefore possess substantial bargaining power over these businesses.*

ACFP Comment

- The ACCC did not demonstrate in its Digital Platforms Inquiry Final Report that Google and Facebook were in fact "unavoidable trading partners" for Australian news businesses. Their own data proved that the opposite is more likely to be true – Google and Facebook are easily avoidable trading partners and in fact are avoided more than they are used.
- In its Digital Platforms Inquiry Final Report the ACCC states as follows:
  - **a)** *The ACCC estimates that, if an adjustment is made to allow for usage of publishers' apps, approximately 26 per cent of referrals to the platforms of print/online and online only news media business are from Google. Google's own estimate is of a similar magnitude.*[7]
  - **b)** It also states that 44% of consumers accessed news websites directly by typing the address of the web into their browser.[8]

[7] Australian Competition and Consumer Commission, "Digital Platforms Inquiry Final Report", June 2019, page 101 https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

[8] Ibid., page 101.

c) *Around 55 per cent of Australians still use print or broadcast formats as their main source of news.* [9]

The ACCC makes several errors here:

- In relation to **(a)** Google's own estimate was not of a similar magnitude; it was only 17.9% or 21% at maximum[10]. And the ACCC does not cite a source for its own data. By contrast, Google cites an independent source for its data (SimilarWeb).
- In relation to **(b) and (c)** it is quite clear that:
  - on the web, around twice as many browsers access news directly as those accessing it via Google, and
  - almost three times as many Australians seek their news off the web (in print, TV and radio) as those who seek it on the web.

- It is therefore entirely indefensible for the ACCC to make an assertion that Google and Facebook are unavoidable trading partners for Australian news businesses and thereby possess substantial bargaining power over these businesses when the ACCC's own data indicate clearly that far more Australians seek their news by means other than Google and Facebook.
- The ACCC's Digital Platforms Inquiry is irresponsible in this regard.
- Furthermore, the obvious incorrect conclusions drawn from its own data make the premise of the Bill false and the determinations of the Treasurer about bargaining power imbalances unsafe. This will expose the Commonwealth to litigation.

ACFP Recommendation

The Senate should consider whether a case has been made by the ACCC for their both their assertions that the digital platforms are unavoidable trading partners for news businesses and that the digital platforms exert substantial bargaining power over these businesses. No evidence provided by the ACCC appears to support such a conclusion.

Element of concern 2 – The fallacy that there is a "bargaining power imbalance" between news business and digital platforms

Extract from Bill Explanatory Memorandum	
1.8	*The Bill establishes a mandatory code of conduct to address bargaining power imbalances between digital platform services and Australian news businesses.*

ACFP Comment

- The Bill proposes an unprecedented market intervention – one that is wholly unfair and anti-competitive.
- ACFP asserts that the particular type and extent of bargaining power imbalance that would justify such a swingeing market intervention has not been proven to exist by the Australian Competition and Consumer Commission (the ACCC) in any of its reports, including its Digital Platforms Inquiry Final Report[11]. See **Element of concern** 1, above.
- The draft Code is built on a fiction that a "bargaining power imbalance" between media businesses and Google and Facebook exists and is:
  - **a)** causing media businesses to be paid less for their news content than they would otherwise be able to command, and
  - **b)** undermining media businesses' advertising market shares.

[9] Ibid., page 290.

[10] Google Australia, Digital Platforms Inquiry Submission in Response to the ACCC's Preliminary Report, 18 February 2019, page 32 https://www.accc.gov.au/system/files/Google%20%28February%202019%29.PDF

[11] Australian Competition and Consumer Commission, "Digital Platforms Inquiry Final Report", June 2019 https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

Neither of these assertions holds water for the following reasons:

- **In the case of (a):** News content originators are indeed paid (handsomely and repeatedly some would say) by the digital platforms to license their content for access by others on their platforms. They are paid in the form of connections provided to the news business free of charge by (but not without cost to) the digital platforms. It is a conceit to imply that the digital platforms "take" journalists' content for "free" and "use" it without giving anything in return. If anything, the news content producers are the ones getting something for free. They are getting free publicity and for this they are not even being required to transfer ownership of their content to the platforms.
- The Senate should note that the Code therefore introduces a concept that a commercial trader should have to pay (and indeed pay way beyond market value) for an item it does not even then get to acquire. No precedent exists for this outside taxation. Furthermore, the Code introduces the concept that some digital platform traders will have to pay for an item but not others. This is a completely inequitable market interference. It is fully anti-competitive.
- The final Code does at least acknowledge in part that digital platforms do provide a "benefit (monetary or otherwise)" to the news businesses. However, there is still an insistence in the Code that the monetary benefit provided by the digital platforms to the news businesses is less than the monetary benefit derived by the digital platforms from their provision of links to news. Figures supplied show that it is the other way around. The value provided by the digital platforms to the news businesses is far bigger than the value derived by the digital platforms from providing links to the news businesses' content. For instance, Google claims that it earns $10 million gross[12] from providing links to Australia news but in 2018 drove $218 million in value to Australian news publishers by sending readers to their websites.[13]
- There is a fundamental misconception underpinning the Bill that the digital platforms are "making available" the news business' content and deriving money from something they have not paid for. The reality is that it is the news businesses that are making their content available, not the digital platforms at all. And the news businesses are expecting to be paid by the digital platforms for the privilege of providing the news businesses with links to readers seeking their content. As far as the Code embeds this sort of perversity, it is fundamentally unfair.
- **In the case of (b):** Because of the cost structures of digital and non-digital platforms, the digital platforms are cruelling the non-digital news media in provision of advertising. This disadvantage for non-digital news platforms has not arisen from any so called "bargaining power imbalance" between the news businesses and Google and Facebook and pertained well before Google and Facebook grew to their current market shares. Instead, the disadvantage for non-digital news is simply a function of the high cost, inefficiency and general unattractiveness of non-digital platforms such as newspapers to advertisers. It is the big news media businesses that are cutting themselves off from advertising income opportunities by putting up paywalls. That – and not a fictitious bargaining power imbalance – is another key cause of their losses in advertising revenue.
- The reality is that the demise of advertising revenues for non-digital news platforms has nothing to do with ***any*** of the search and share platforms on the internet, including Google, Facebook, Bing, Twitter and the like. It is the rise of the internet that

[12] Mel Silva, CEO Google Australia, "A fact-based discussion about news online", Google Australia Blog, 31 March 2020. https://australia.googleblog.com/2020/05/a-fact-based-discussion-about-news.html

[13] Mel Silva, CEO Google Australia, "The News Media Bargaining Code remains unworkable—but there is a path forward", Google Australia Blog, 17 December 2020,
The News Media Bargaining Code remains unworkable—but there is a path forward (blog.google)

	has disrupted the advertising-dependent business models for news businesses. Google and Facebook are being mis-identified as though they are the internet when in fact they are providing the means not of stealing news income but of helping news businesses maximise advertising income in the internet realm. If Google and Facebook (and particularly Google) weren't there, there would be less advertising income for news businesses for items on their websites, not more. This is why the whole notion of the use of the "hypothetical" for determining monetary transfers from digital platforms to news businesses for their content is misplaced and will fail as a mechanism for boosting money for news businesses. See how at **Appendix 1** below.

ACFP Recommendation

The Senate should consider what problem it is trying to solve here and whether a massive market distortion is necessary or proportional to the extent of any genuinely demonstrated bargaining imbalance. ACFP contends that there is no imbalance and as such the Bill is based on a false premise. If a firmer premise cannot be established, the Bill should be withdrawn in its entirety.

Element of concern 3 – The efficacy of contracting out and standard offers

Extract from Bill Explanatory Memorandum

1.9 *It* [the Bill] *does this* [establishes a mandatory code] *by setting out six main elements: […]*

- *contracting out – the Bill recognises that a digital platform corporation may reach a commercial bargain with a news business outside the Code about remuneration or other matters. It provides that parties who notify the ACCC of such agreements would not need to comply with the general requirements, bargaining and compulsory arbitration rules (as set out in the agreement); and*
- *standard offers – digital platform corporations may make standard offers to news businesses, which are intended to reduce the time and cost associated with negotiations, particularly for smaller news businesses. If the parties notify the ACCC of an agreed standard offer, those parties do not need to comply with bargaining and compulsory arbitration (as set out in the agreement).*

ACFP Comment

- These two elements, which seem to approximate an attempt to reintroduce some measure of voluntary operation within the Code, were not part of the Exposure Draft of the Code.
- They may streamline bargaining for smaller news businesses but the overall incentives within the Bill are still set to encourage big news media businesses to by-pass genuine competitive commercial trading and go straight for arbitration under a system which has been designed to strongly favour the big news businesses.
- This in itself creates two classes of media businesses and widens rather than reduces the market power imbalance which currently exists between big news businesses in Australia (Murdoch and Nine) and everyone else in the news industry. It widens the market power imbalance in favour of Murdoch and Nine over their competitors in news. See **Element of concern 4** below for some other ways in which the Bill makes this inequity in trading opportunities worse for small news players.
- The real market power imbalance affecting news media business viability and diversity of news content in the digital age is not with the digital platforms at all: it is the overweening dominance of the Murdoch media that is actively crushing competition by smaller entrants, even to the point of buying up small players and then shutting them down.
- The Bill as designed will make the market concentration in Australia's news media worse, not better.
- The Bill also has enough power in its arbitration mechanism to make it impossible for Google and Facebook to remain viable in Australia. This is because the arbitration mechanisms are

capable of transferring the entirety of Google and Facebook's profits to the news businesses and perhaps require subsidies from the digital platforms to the news businesses that equate to multiples of their profits. This is another reason the Bill should be withdrawn. It is set up to gouge two digital platforms so hard (either by forced subsidisation of other commercial companies or fines that are impossible to avoid) that Google and Facebook may have to withdraw from Australia. If the Code consumes all their profits and more, then the lifeline expected to be provided by the Code to news businesses will instantly disappear. In this way the Bill defeats its own objective and does so almost from day one.

- Should the Code operate in that self-defeating way, the Commonwealth will be faced with the ridiculous option of having to find another unfortunate digital platform, such as Bing, to designate as one obliged to bargain under the Code. The prospects for that are not good. In the meantime, the government will suffer the ire of consumers who rely on Google and Facebook. Some of this may be avoided by consumers through the use of VPNs. In that event, the government will have succeeded in driving Google and/or Facebook out of operation in Australia and out of the purview of the Code and will at the same time have failed to provide support to a healthy independent quality news sector – support which, if it is so concerned, should be provided by restoration of funds to the ABC. This would mean taxpayer money would go to taxpayer owned free and valued news services, not commercial services who grab tax revenues and then still refuse access to taxpayers by retaining their paywalls.

ACFP Recommendation

All the problems associated with this Code started when the government insisted on making it mandatory. The Senate may consider the option of removing all compulsion from the Code – which is to say withdraw the legislation entirely. It is draconian. But as a minimum, remove the arbitration process entirely on the grounds that it is unfair and disproportionally anti-competitive. Arbitration in this context – the context of a false premise about a market imbalance – is contrary to the interests of news consumers who, within a healthy democracy, should be able to rely on access to a variety of news sources. The arbitration proposal is more likely to increase media concentration in Australia and is therefore contrary to the public interest.

Element of concern 4 – The inevitable failure of non-differentiation provisions to achieve the objectives of the Bill

Extract from Bill Explanatory Memorandum

1.9 *It* [the Bill] *does this* [establishes a mandatory code] *by setting out six main elements: […]*

- *non-differentiation requirements – responsible digital platform corporations must not differentiate between the news businesses participating in the Code, or between participants and non-participants, because of matters that arise in relation to their participation or non-participation in the Code.*

and

1.154

- *Furthermore the non-differentiation provision does not prohibit the making of deals and agreements, the substance of which may include terms about remuneration for the making available of covered news content or the way in which covered news content is distributed. Differentiation on the basis of the terms of an agreement, such as providing covered news content on a specific topic or presented in a specific way that meets the digital platform's business needs, will not be a breach of the provision.*

ACFP Comment

- This section in the original Exposure Draft was ostensibly included "to prevent a digital platform service from disadvantaging the news content of an Australian news business."[14]
- In the revised Bill, the provision seems to have morphed into a measure protecting the capacity of news businesses with lots of legal resources to command better fees for their content than those who do not have as much bargaining power. For the first time, in the digital news market at least, it introduces the possibility of some content being more highly valued than others. Differential value for content is something that applied when the market was run by the non-digital platforms but in those markets there was full buyer discretion about what they were prepared to pay for and there was sufficient competition to keep news prices affordable. The digital market, however, has never yet been affected by differential pricing and has operated in a neutral way for entrants. It has always been free to buy and sell in the digital market. It should stay that way.
- In effect, the revised Code embeds differential reward for entry to the digital news market. This is bound to make those with inordinate market power – Murdoch and Nine, but particularly Murdoch – more capable of reducing the viability of their competitors.
- At present there is perfect non-discrimination in the digital news market because everyone pays the same price to partake of services provided by the digital platforms, i.e., they all pay zero to display and sell their content and accept (or reject) links to it.
- The new Code will introduce discrimination where none currently exists. It introduces a differential for entry and business viability. Some news businesses will be more privileged than others and that differential will have been determined by the greater market power granted to powerful news businesses by this Code.

ACFP Recommendation

If the Senate removes all compulsion from the Code by deleting the arbitration mechanisms, the increase in the bargaining power imbalance that is likely to by enjoyed by Murdoch and Nine may be mitigated. It would be preferable, however, to dispense with the entire Code because it is fundamentally anti-competitive.

Element of concern 5 – Exposure of the Commonwealth to risk of litigation by unfettered exercise of Ministerial power in designations

Extract from Bill Explanatory Memorandum	
1.11	*A responsible digital platform corporation for a digital platform service is required to participate in the Code if the Minister has made a determination that a service is a designated digital platform service of the corporation.*
	and
Bill clause 55E(3)	*In making the determination, the Minister must consider whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate.*

ACFP Comment

- A significant problem with this is that there is nothing limiting the Minister (the Treasurer) in his/her determination:
    - The Minister is not required to demonstrate that the bargaining power imbalance actually exists.

[14] ACCC's Draft News Media Bargaining Code: Commonwealth Government, "Treasury Amendment Laws (News Media and Digital Platforms Mandatory Bargaining Code) 2020" Draft Exposure Bill. Clause 1.12. https://www.accc.gov.au/system/files/Exposure%20Draft%20EM%20-%20NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%20BILL%202020.pdf

    - There is no specific information about what makes a determination valid or invalid.
    - The Minister is unfettered in making an invalid determination.
    - There is no right of appeal and no independent arbiter (although in Section 2.10 of the Explanatory Memorandum it does state that: *The Code has been constructed to minimise the potential for successful legal challenge under the Australian law. Nevertheless, it is possible that, for example, decisions by the Treasurer to designate digital platforms could be subject to legal challenge*. As such, the Code's designers do recognise that they are on risky ground.)
- In the case of this particular legislation this power of designation by the Minister is perhaps the most important matter to resolve because:
    - the legislation will give unprecedented power to a government to unaccountably designate a commercial business as an abuser of market or bargaining power, but
    - the ACCC has not proven that a bargaining power imbalance exists.
- As shown above, the ACCC's own data do not support its conclusion that a bargaining power imbalance exists between news business and those entities the ACCC asserts exert a bargaining power imbalance – Google and Facebook. Nor has the ACCC demonstrated proof of its contention that the supposed "fundamental bargaining power imbalance between media businesses and Google and Facebook … results in media businesses accepting terms of service that are less favourable." **The ACCC's contention is false** if only because the service being traded is not the news content, since Google and Facebook do not seek to acquire that property and news businesses are not seeking to sell it to the digital platforms. The only service being traded between the news businesses and Google or Facebook is the service being offered by Google and/or Facebook – which is the service of making links to content available between those who own the content and those who seek it. That service is being offered by these digital platforms to the news businesses (and to any other participant in the web of sites held on the internet) for free. It is difficult to impossible to see how news businesses could get a better deal than that (although obviously the designers of the Code are trying their best to get the big news businesses an even better deal – to the detriment of everyone else, including small news businesses and news consumers).
- News businesses will argue that if Google and Facebook didn't "make their content available" they would then be able to charge for it.[15] But it is *because* Google makes links to their content available to Australian searchers they can charge (and do) for the content or access to the content (if they agree to sell it at all).
- News businesses will also argue that Google and Facebook are using their content to take advertising income that is rightly the property of the news business – although no advertising income is rightly the property of any business, news or otherwise. But even if it were the property of the news business, the news businesses are still making more in advertising opportunities than Google is taking from them by making links to their news available. As stated above, Google makes about $10 million gross a year in Australia associated with news related searches but directs at least $218 million in value to Australian news businesses by sending Australian users to their sites through the offer of a link.
- All Google is doing is optimising the ability to find news and every other piece of information a web user may be searching for. They are acting as a research librarian in what is now a vast library that would otherwise be unnavigable, and they are trying to be as neutral as possible in that function by constantly attuning the algorithms so that people can actually find what they are really looking for. Algorithm changes are reader driven, not Google driven. If Google, Facebook and every other search engine or share platform weren't there, it is very likely that

[15] **Note:** It is the *link* to the content that Google and Facebook make available, not the content. The content isn't revealed (even if Google publishes a disjointed snippet in the search results) unless the publisher wants it to be revealed.

readers and news sites would become more estranged from each other and the advertising opportunities for news businesses would drop.

- What needs to be clarified here – again – is that there is a difference between Google and Facebook and the internet. It is the rise of the internet that has affected non-digital news platforms (print, TV and radio), not Google and Facebook. On the contrary, Google and Facebook (and others such as Bing and Twitter) but particularly Google have made it possible for more connections between news producers and readers. We need them when the Library is now so vast.
- News businesses have lost advertising but not because of Google and Facebook. They've lost it simply because the internet makes it cheaper to advertise in digital form than non-digital forms of print and TV and advertisers have an ability to create their own websites about their products whereon they can by-pass ***both*** non-digital news businesses and Google and Facebook.
- In these circumstances there is no justification for making one or two players in the now vast information market responsible for supporting the entire news industry. If there was a genuine market imbalance it may be an option – although normally that would be resolved by taxation or nationalisation of any all-too powerful (monopoly) corporations. Google and Facebook might be big, but they are not monopolies in their respective fields and even if they were they would still not be demonstrating in the information market a bargaining power imbalance that prevents the news businesses from obtaining the best possible deal on the only service being traded – the linkage service.
- For this and several other reasons, determinations that a corporation or any of its services be designated as a digital platform under the Code, should be made by an authority with much more accountability than the Treasurer under this legislation. They should be made independently by a court and appealable.
- The fact is that the legislation is unsafe to the extent that it exposes the Commonwealth to extensive risk of legal cost that is otherwise avoidable and which, if the legislation proceeds, will mire the Commonwealth in protracted legal difficulties for years without having resolved any of the real issues affecting safe use of the internet by information providers and websites.

ACFP Recommendation

The Senate may consider the option of removing the right of designating a digital platform as responsible under the Code and transfer it to an independent authority, and specify an appeal right and process regardless of who is permitted to make the designations. The senate should also prescribe amendments to oblige the designator to provide minimum proofs that a bargaining power imbalance exists and specify an appeal process for decisions on the fact of bargaining power imbalances.

Element of concern 6 – The unnecessary prescription of provision of user interaction data by designated digital platforms

Extract from Bill Explanatory Memorandum	
1.97	*The minimum standards require the responsible digital platform corporation to ensure registered news businesses are:* • *provided with clear explanations of the types of data collected by the designated digital platform service in relation to users' interaction with covered news content, where the designated digital platform service has shared this data with one or more other registered news businesses.* [16]

[16] Compare this with the scope of the provision in the Exposure Draft – Clause 1.72: "A responsible digital platform corporation must provide readily comprehensible information to the registered news business

ACFP Comment
• The reasoning behind the provisions requiring user interaction data to be shared is presumably to advantage news businesses that may have the capacity to analyse and interpret vast data sets about content preferences of news consumers. Presumably those big news businesses expect that this will give them information about the content that is the best click bait. This will of course narrow diversity of content available on the net. As such it threatens Australia's democracy. • Oddly, the revised Code seems to have modified this in some sort of attempt to prevent discrimination in provision of data about users' interaction with covered news content. The new emphasis seems to be to ensure that all news businesses have access to the same types of information, whether they have the capacity to analyse it or not. However, this has been crafted in a way that may encourage the digital platforms to comply with the provision simply by sharing user data with no-one at all. This is unlikely to be to the preference of Murdoch and Nine. • The provision also imposes a differential burden on designated digital platforms, embroiling them in extensive unavoidable costs which their competitors do not have to bear.
ACFP Recommendation
If the Code is adopted at all, this provision ironically will stand as one of the few non-discriminatory items within it (except insofar as it is discriminatory to designated digital platforms). This, however, does not ameliorate the propensity of the clause to reduce news content diversity. It is recommended that the Senate recognise the propensity of the Code to reduce news media business and content diversity and discard the whole Code. If this is the best and least discriminatory provision in the Code, it will not function as an effective means of transitioning traditional news production from the non-digital to the digital age.

Element of concern 7 – Forced discrimination against non-news business content in favour of news content

Extract from Bill Explanatory Memorandum	
1.101	*Further, covered news content is intended to exclude:* • *specialty or industry reporting;* • *product reviews; and* • *journals and publications intended primarily for academic, rather than general, audiences.*
ACFP Comment	
• There are dozens of serious problems with this legislation, most of which have been illustrated in ACFP's submission to the Senate Inquiry into Media Diversity. But this clause has been singled out by ACFP for criticism because it crystallises the whole problem of forcing digital platforms to pay for one type of content and no other content. • The clause is working (very tenuously) on the premise that journalism is worth more to democracy than other types of factual information, even when the factual information being excluded from coverage is peer-reviewed high quality content. The fact is that journalistic content on non-digital and digital platforms is often fake news and as such is not worth paying for any more than any other type of content. It is often a good deal less worth paying for. • Under this clause Choice Magazine – which is designed to protect consumers – would be excluded but poor quality magazines pretending to pump "news" into their offerings would not.	

corporation that explains the types of data which it collects in relation to its users' interactions with the registered news business' covered news content. [Schedule 1, item 1, section 52M]" Ibid.

• The ACCC itself has concluded that Australians spend less than 2.3% of their time online browsing the content of Australia's main news content providers – Murdoch, Nine, Seven, Ten and the ABC.[17] Clearly Australians do not assign a higher level of importance to news over the other types of information excluded from coverage under this legislation.
ACFP Recommendation
The Senate should recognise that while quality journalism is vital to democracy, democracy itself is not advantaged by promotion of journalistic content over other content, particularly if this guarantees no greater compliance with standards for quality and ethics in journalism than Australian news businesses are currently subject to or held to. If the Bill proceeds, core content should not be expanded to include "covered content" that has nothing to do with public interest journalism (eg., articles about sport). Better still though, dispense with the Bill in its entirety and thereby dispense with the artificial and discriminatory support for one type of content over all others.

Element of concern 8 – Forced subsidisation of content from news businesses that is not public interest journalism vital for a democracy

Extract from Bill Explanatory Memorandum	
1.102	*The minimum standards apply to the broader category of covered news content, as many news businesses publish a mix of stories of broad interest to cross-subsidise the production of core news content. … The cross-subsidisation business model means that it is important for registered news businesses to receive information relating to, and can bargain over, a broader range of content than just their core news content.*
ACFP Comment	
• This is another assertion by the ACCC for which it provides no reasonable basis. If a commercial business chooses to cross-subsidise its public interest news content production by earning income from news about sport and other matters that can have nothing to do with supporting the public interest or sustaining the health of an Australian democracy, this provides no argument whatsoever in support of the idea of including sport and other extraneous material covered in the definition of covered content. Indeed it can be argued that the ability of a news business to cross-subsidise public interest journalism should be measured and then used to discount any claim it may be able to make in a bargain with any other entity that finds itself in the unfortunate position of being forced to subsidise the news business.	
ACFP Recommendation	
The senate should exclude everything other than public interest journalism from the definition of covered news content. The current definition simply allows for gouging to cover the cost of content that has no value for a healthy democracy.	

Element of concern 9 – The reduction in news diversity that will arise from forced notification of algorithm changes

Extract from Bill Explanatory Memorandum	
1.115	*A responsible digital platform corporation must give 14 days' advance notice to a registered news business corporation of planned changes to an algorithm or internal practice of its designated digital platform services, where:* • *the dominant purpose of the change is to bring about an identified alteration to the distribution of content on the designated digital platform service; and*

[17] Australian Competition and Consumer Commission, "Digital Platforms Inquiry Final Report", June 2019, page 6. https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

	• *the change is likely to have a significant effect on the referral traffic to covered news content made available by the designated digital platform service. [Schedule 1, item 1, section 52S]*

ACFP Comment

- There are too many problems with this to elaborate. Google has problems with the physical workability of the procedure.
- But there are problems in both social and commercial equity.
- Effectively the provision is forcing Google and Facebook to foreshadow to a news business where the clicks are going to be coming from in 14 days' time. This will make news businesses stop writing news about whatever they think will get less clicks and start determining newsworthiness on the basis of click bait. This of course already happens and has happened through the ages – newspapers produce what sells, which is usually sensationalism rather than facts. This is one more reason why the whole Bill should be scrapped. It will make it more likely that the quality of news will decline even further than it has as the news business market has become more and more concentrated (due to legislators allowing cross-media takeovers by Murdoch and Nine that should never have been allowed).
- Google and Facebook (and Twitter for that matter) have been saying they don't want to be mixed up in determining what's on the news agenda and what the priorities should be for news subjects and content; and Google in particular has tried to keep its algorithms as neutral as possible for this purpose. But this system of forcing them to supply user interaction data and notification of algorithm changes puts them in that position. It will saddle us only with news likely to get clicks – this will not be quality news; it will be muck raking and civil unrest news (see comment on 1.120 below).
- The Code started – ridiculously – as a measure to make one or two commercial providers prop others. That was bad enough but it has now morphed into a measure trying to control content decisions.

ACFP Recommendation

The Bill's provisions for notification of algorithm changes will degrade news quality and diversity. These notification requirements should be removed.

Element of concern 10 – Ill-conceived use of the Code to address problems of proliferation of fake news and free speech on the internet

Extract from Bill Explanatory Memorandum	
1.120	*An internal practice may include a policy or procedure of a designated digital platform service which is implemented by individuals, as opposed to an automated algorithmic process. Examples could include the policies and procedures around appeals against the removal of inappropriate content, suspending of user accounts and rules around permitted types of advertising content. [Schedule 1, item 1, sections 52S(1)(a), 52T(1)(a) and 52U(1)(a)]*

ACFP Comment

- The inclusion of the phrase "internal practice" is new to this provision. ACFP wishes Google and Facebook good luck in interpreting that, although Treasury and ACCC seem to have made some attempt to explain what is meant by internal practice. It would appear that in adding reference to a change in "internal practice" the ACCC is attempting to design some features into the Code which deal with the real problems of the internet (as opposed to the problems of Murdoch) – namely the problems of inappropriate content from news outlets.
- However, some of the examples given about the type of content from news providers that can be removed only after 14 days' notice are ill-conceived to the point of being alarming. For instance, the digital platform must give 14 days' notice before it can make the following alterations to content rankings or display:

- *Example 4: An alteration that decreases the prevalence or prominence of content made available by the* [news] *service if the content is from an account of a celebrity or other prominent individual.*
- *Example 1: An alteration that prevents inappropriate content being made available by the service to children.*

In other words, this clause insists that 14 days' notice must be given by a responsible digital platform of intention to demote or remove news content containing, say, an incendiary tweet or incitement to violence or civil insurrection by a prominent person such as the President of the United States. Or it must give 14 days' notice of intention to demote items from news businesses which are inappropriate for children.

- In the case of the obligation to allow a news business 14 days' notice of, say, an incendiary tweet by Donald Trump, the stupidity of this regulation is that it would allow the responsible digital platform to take the post down on it's the platforms under its control but have no influence over whether it is taken down by a news business or, for that matter another digital platform.
- Clearly the ACCC has not thought this through and these are gauche attempts to add some brush-strokes to the first draft of the Code that might make it look as if it is an attempt to control purported excesses by digital platforms in determining what content should and shouldn't be made available.
- This Bill/Act is not the place for this sort of attempted regulation of the settings in algorithms that may dictate content decisions. The whole Code, as structured, is singularly ill-suited for such a purpose.
- There is also no utility in the attempt because other digital platforms not obliged to comply with the Code (because they have been fortunate enough not to have been – arbitrarily and without accountability through reasonable criteria – "designated" by Australia's Treasurer as a responsible digital platform caught by the Code) will still be unconstrained in their decisions about what may and may not be demoted or removed ("crawled, indexed, distributed or made available") in the search ranking of news businesses' covered news.

ACFP Recommendation

This legislation is not the place for introducing policies to foster responsible behaviour on the internet. That is a problem at the heart of society itself, not in search engines and not even in share platforms. Restricting one or two search and share platforms will fail. Delete the whole clause.

Element of concern 11 – The potential for double-dipping by news businesses

Extract from Bill Explanatory Memorandum	
1.163 to 1.168 *1.31*	*News business corporations can bargain collectively or individually.* and *A responsible digital platform corporation may make a standard offer to a corporation that operates or controls a news business, by itself or together with other corporations. A news business corporation must be registered under the new Part IVBA to accept a standard offer. [Schedule 1, item 1, section 52ZZJ]*

ACFP Comment

- These provisions are apparently intended to help small news businesses band together to negotiate.
- But the Code makes no provision for designated digital platform corporations to band together to negotiate (except perhaps to the extent that Clause 1.31 is ambiguous).
- As such, news businesses can get paid in full – with all their costs covered (and more) – by one digital platform corporation and then turn around and get all the same costs covered all over again by another designated digital platform.

• And then of course, other ***un***designated digital platforms get off scot-free. This is entirely anti-competitive. It completely unlevels the playing field for digital platforms.
ACFP Recommendation
If the Senate is unable to establish a more orderly approach to prevent double-dipping by news businesses, then designated digital platforms should be able to band together to make one deal with registered news platforms as a single group. This would work better if more than two corporations were designated as responsible digital platforms. Bing and Twitter and every other digital company should be included. The simplest and cheapest way then to make this work might be to hypothecate the tax paid by these businesses in the normal course of their operations (yes they do pay tax in Australia – Google paid $59 million on a pre-tax profit of $134 million in 2019[18]) to the ABC. That would reassure Australians that independent news was being protected in Australia. Tax should not be hypothecated to commercial companies. The whole concept of taxpayers subsidising commercial businesses is highly questionable.

Element of concern 12 – The potential to drive digital platforms out of business in Australia

Extract from Bill Explanatory Memorandum	
1.208	*In making a determination on the remuneration issue, the panel must consider the benefit (monetary or otherwise) of the registered news business' covered news content to the designated digital platform service and the benefit (monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content. [Schedule 1, item 1, section 52ZZ]*
	and
1.209	*The panel must also consider the cost to the registered news business of producing covered news content and whether a particular amount of remuneration would place an undue burden on the commercial interests of the designated digital platform service. [Schedule 1, item 1, section 52ZZ]*
ACFP Comment	

• ACFP has provided clear commentary on the unfairness and inadvisability of these provisions in its submission to the Senate Inquiry into Media Diversity in Australia.
• The whole compulsory arbitration process is completely unfair and entirely unworkable. In summary:
  • The Code is structured such that Google and Facebook (assuming they are still the only corporations to be designated under the Code) will be permitted neither discretion nor lawful means to withdraw their services to news content providers unless they withdraw services for everyone – i.e., unless they withdraw entirely from the market. It is akin to indenturing Google and/or Facebook to slavery and more than that, making them pay for the privilege of being a slave.
  • The exorbitant costs accrue to Google and Facebook (and any other indentured slave), and only to them, because under these clauses the arbitrator is neither bound to nor authorised to take the digital platforms' costs into account in determining what they shall pay over to each news media business. The Code in no way acknowledges that the digital platforms incur costs in sending advertising income opportunities to the news businesses and does not compensate the platforms for their costs. Instead it forces them to keep on incurring these costs, by threatening them with huge fines for withdrawing service to Australian content originators. And on top of all that, the Code	

[18] Mel Silva, CEO Google Australia, 17 December 2020, Op. Cit., The News Media Bargaining Code remains unworkable—but there is a path forward (blog.google)

forces the designated digital platforms to pay up to the full costs of the registered news businesses in their production of covered news content. In summary, it forces Google and Facebook to:

i. pay the news businesses for the privilege of advertising the news businesses' content, regardless of its quality; ***AND***
ii. pay for the news businesses' cost of production of the news content itself (plus content that is not public interest journalism at all); ***AND***
iii. continue to direct all custom to the news businesses without discrimination regardless of the quality of the content; ***AND AT THE SAME TIME***
iv. it refuses payment to Google and Facebook for their costs in services they are forced to provide to the news originators.

- This impact on any unfortunate designated digital platform is limited only by whether the costs will be deemed by the arbitrator to impose an undue burden on the designated digital platform. In short, the arbitrator is only obliged to stop the gouging of the digital platforms at the point just before the digital platform goes into loss. In effect the arbitrator is authorised (or at least not prohibited) from transferring the entire profit of a digital platform to a news business and doing it for each and every negotiation between that platform and every news business.

- In earlier drafts of the Code, the arbitrator was not permitted to consider the value provided by the digital platform to the news business. Under the new Bill the arbitrator is now obliged to consider that. However, the means by which the arbitrator is authorised to consider that value will not protect the digital platforms from unfairness. It simply introduces the possibility for the arbitrator to speculate within a permitted type of hypothetical. This permitted hypothetical is invalid because from the beginning, it is based on a false premise – namely that a designated digital platform corporation will have been proven independently to hold a bargaining power imbalance and monopoly powers as an "unavoidable trading partner" over the news business. As shown by the ACCC's own data in the comments on 1.3 above, there is no bargaining power imbalance between news businesses and the digital platforms that the ACCC has deemed to be the biggest corporations for this purpose – Google and Facebook. The hypothetical also fails because of its structure. See **Element of concern 13** below.
- The Code is anti-competitive in the extreme to the extent of being able to drive at least Google, if not Facebook too, out of business in Australia. It has the architecture of a facilitated raid particularly on Google, one that opens the way (if Google is forced out of Australia) for Murdoch to acquire a search engine. In that event Australia would have created the conditions for a news (near) monopoly to vertically integrate production and distribution in the digital market. Imagine that – Murdoch owning not just most of the news we read but the means of how we search for news online as well. Let's take a guess as to how search results would pan out for Murdoch if he slipped into the search engine market. This wholly unfair bargaining process, dictating that Google and Facebook's costs must be disregarded in bargaining is not likely to achieve any of the objectives of the Bill. Journalism will suffer under this arrangement and become less diverse.
- For full information on how diversity in the journalism industry will narrow under the News Media Bargaining Code see the section on "Will the Code result in a healthy fair market for journalism?" in **Dr Bronwyn Kelly: *Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code*.[19] (hyperlink)**

ACFP Recommendation

At the risk of being repetitive – delete the compulsory arbitration aspects of the Code, as a minimum.

[19] Dr Bronwyn Kelly: "Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code", Australian Community Futures Planning, 30 September 2020.

Element of concern 13 – The unworkability of the hypothetical for quantifying the monetary impact of an assumed bargaining power imbalance

Extract from Bill Explanatory Memorandum	
1.210	*When considering all the matters above, the panel must consider the bargaining power imbalance between Australian news businesses and the designated digital platform corporation. This allows the panel, in making their determination, to consider the outcome of a hypothetical scenario where commercial negotiations take place in the absence of the bargaining power imbalance. [Schedule 1, item 1, section 52ZZ(2)]*

ACFP Comment

- As stated in the previous comment, the permitted hypothetical is based on a false premise of a bargaining power imbalance between news businesses and Google and Facebook. ACCC has not proved that this imbalance exists. Their data prove that it doesn't.
- But the hypothetical is also unworkable in application, as anyone can see if they run a few figures. For illustration purposes I have provided an example of how such a hypothetical could be constructed by the arbitrator. See **Appendix 1.**
- This illustrative example shows that the hypothetical is not practicable for purposes of achieving the objects of this act or the intention of the Code.
- The worked example of the hypothetical in **Appendix 1** is between Google and Nine/Murdoch. In effect, based on estimates of potential costs and benefits for each of the parties for a given year, the result is that if the formula is applied, more than $1 billion would be owed by Google to Nine/Murdoch in a year. This is similar to the amounts that Nine and Murdoch have publicly speculated would be due to them as compensation for the income they are losing because Google has (supposedly) stepped in between them and their markets and traditional income sources (subscriptions and advertising).
- As the hypothetical is structured within the Code, it is assumed that Google and Facebook are responsible for the entirety of the business downturn for news businesses in the digital age. It is assumed to be nothing to do with the news businesses' own ineptitude, inefficient cost structures or other market forces (such as the rise of more competitive ways of distributing news on the internet). The Code hypothetical assumes the news industry woes are entirely the fault of two businesses and two businesses only – Google and Facebook, even though it is the internet, not search and share platforms that have caused the disruption in the news market structure.
- Google and Facebook are not the internet. They are just the ones helping news businesses make money on the internet. This does not mean they have the capacity to help news businesses make up losses for operating outside the internet (in print, TV and radio). News businesses that wish to stay in the non-digital platform environment for access to income must do so on their own recognisance. In the meantime, Google and Facebook can and are helping them all make money in the digital environment. And in that arrangement Google is asserting that it is delivering $218 million worth of value, 20 times more than it is picking up itself from making links to Australian news available.
- Speculation that all the money would magically come direct to news businesses if Google were not there to be relied on for that income is just that – wild speculation. And the arbitration formula is nothing more than an attempt to pump up the amount that can be sucked from Google and Facebook to prop up an industry that is no longer sustainable in the non-digital environment.
- The example shows how preposterous it is to assume, as the Bill does, that two commercial entities should be able to fund an entire industry of commercial news media businesses. The Bill cannot function as a means of sustaining floundering news businesses in non-digital platforms. Google and Facebook cannot cover the costs non-digital news businesses incur in print, TV and radio – costs that are in excess of the income they can command in their digital

and non-digital offerings. No business – no matter how big and capable we might assume Google and Facebook to be – can feasibly cover the losses of a whole news industry, especially one operating in a market where the structure is changing irretrievably. • Google and Facebook are, however, providing substantial assistance to help diverse journalism flourish in the digital age. They are not adversely affecting it, they are making it possible for diverse news content producers to flourish and are particularly helpful for small news market entrants. Nine and Murdoch prefer to keep these entrants out.
ACFP Recommendation
The Senate may be inclined to ask: If the Code won't work to save diverse quality journalism in Australia, what will? The answer is to encourage all search and share platforms to continue to support the transition of public interest journalism industry from the non-digital to the digital age. In other words, take up offers from platforms like Google such as their News Showcase and INKL that pay journalists direct for content and let their new audiences grow in the only place they will be able to afford to in future – the internet. The Code is an attempt to stop growth in competition to Nine and Murdoch from new entrants in quality journalism businesses who can and are trading very effectively online with no paywalls. These new entrants (such as Guardian Australia) are proving that news in the digital age can be sustainable. They're succeeding. The answer therefore is to shut down the legislation on the Code which will achieve the opposite of a sustainable news industry.

Element of concern 14 – The fallacy that the Code will bring down paywalls

Extract from Bill Explanatory Memorandum	
2.7 Impact Analysis	*Consumers may also benefit from news media companies no longer being as reliant on paywalls to pay for journalism, as a result of remuneration for covered news content. This would improve access to news media content and reduce consumer prices.*
ACFP Comment	
• The above statement is listed as a "benefit" in the cost/benefit analysis of the mandatory code of conduct. • However, the Code as designed in the Bill will not require paywalls to be pulled down and there is no extra incentive provided by the Code to make news businesses pull down their paywalls. Some may actually put paywalls **up** where they never have before. Why wouldn't they if they have no more cost worries and do not need to drop paywalls to be competitive in supply of news?	
ACFP Recommendation	
Include provisions requiring news businesses receiving subsidies under the Code to pull down all paywalls permanently in order to receive a subsidy. Otherwise news businesses are just double-dipping.	

Element of concern 15 – The creation of bigger competition problems for small news businesses under the Code

Extract from Bill Explanatory Memorandum	
2.12 Impact Analysis	*Under both options, it is assumed that between 100 and 200 news media businesses will be part of the code. This is based on available public information of news media businesses which, based on a desktop assessment, meet the eligibility criteria to register for the code. Public information includes the ACMA's media ownership and control registers and the membership of the Press Council. Further assumptions include:*

	• *20 news media businesses would have the financial resources to pursue individual negotiations and arbitrations. This reflects the relative concentration of the Australian media market;* • *The remainder would form collectives for the purpose of bargaining, comprising on average 10 per cent of the remaining news media businesses; and* • *75 per cent of bargaining processes will ultimately proceed to arbitration. This is a conservative estimate, given the difficulties estimating the variables associated with approaches parties take to commercial bargaining which influence the possibility of a deal being reached before arbitration.*

ACFP Comment

- Through the late inclusion of provisions allowing standard offers and contracting outside the Code, the government has made an attempt to make it easier for smaller news businesses to participate in and benefit financially from the Code.
- However, this still entrenches two classes of participants under the Code: those who can afford to bargain long and hard those that the ACCC openly acknowledges do not have "the financial resources to pursue individual negotiations and arbitrations".
- In this arrangement those with more funds will scrape the cash register clean well before those with less funds can even get a seat at the table. Those with less funds will then go out of business leading to even greater concentration by the big rich news businesses.
- The only way to avoid this inequity and reduction in competition is to encourage the making of standard offers similar to the offers already being made (and freely agreed to) by Google in its Google News Showcase.
- A very real problem with the whole structure of arbitration and stratification of news businesses that will arise here (meaning an increase in anti-competitive behaviour by Murdoch and Nine) is that it assumes Google and Facebook are bottomless pits of money and will be able to fund all news businesses in full and still make a profit themselves. Anyone can see (if they bother to look) that pre-tax profits of Google Australia will be entirely wiped out several times over by the claims being made possible by the Code. As such the bill fails before it even starts in terms of:
    - the objective of sustaining a diverse and viable news industry and democracy;
    - equity among news content producers and between news content producers and digital search and share platforms;
    - ensuring fairness in competition under the Australian Competition and Consumer Act 2010; and
    - plain common sense.

ACFP Recommendation

The Senate may consider removing all compulsory arbitration components from the Code and revert to a voluntary mechanism.

Appendix 1 - Sample consideration of permitted hypothetical under Clause 52ZZ

As per sections 1.208 to 1.210 and under clauses 52ZZ and 52ZZ(2) of the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, it is envisaged that in compulsory arbitration under the Code, an arbitrator will be obliged to assume a particular hypothetical in order to make a final determination on the amount of money that must be paid by a designated digital platform corporation to a registered news business. The hypothetical assumes there is a bargaining power imbalance held by the digital platform and the hypothetical is intended to quantify the monetary impact of the imbalance and pay it over to the news business.

> The Daily Chronicle (DC) is a registered news business that receives a benefit from referrals to its website from Digiplat, a designated digital platform service that holds a significant bargaining power imbalance in its commercial relationships with Australian news businesses including DC. When assessing both parties' final offers, the panel considers how the benefit that DC receives from Digiplat is affected by this bargaining power imbalance derived from Digiplat's status as an 'unavoidable trading partner' for Australian news businesses.
>
> To do this, the arbitrator considers arguments in the final offers about the size of the benefit that would likely be provided by Digiplat to DC when compared to a hypothetical scenario where there is an absence of any bargaining power imbalance.
>
> The hypothetical scenario the panel decides is appropriate in this circumstance is one in which audiences may reach DC through other means (such as users directly visiting DC's website or accessing it through other news aggregators) *and where DC and other Australian news businesses are not reliant on Digiplat to reach those audiences*.[20] [my emphasis]

In this arrangement, the arbitrator's job is to speculate how much more money a news business would make if there were no bargaining power imbalance. The amount of compensation for the imbalance is meant to be one of the amounts that one of each of the parties to the bargain can argue will be equal to what the news businesses would be able to command in the open market for their content if the designated digital platform did not exist – i.e., the digital platform is not available to be relied on "to reach Australian audiences". Both parties are able to submit a figure for this. The arbitrator must pick one.

The amount of the imbalance that will be payable in compensation to the news businesses is in addition to amounts covering their costs of news production, as deemed by the arbitrator, and can only be netted off or capped in two ways:

- one by the amount of the exchange of value between the news businesses and the digital platform[21]; and
- another by what the arbitrator may deem to be "an undue burden on the commercial interests of the designated digital platform service".[22]

Other than Google, no interested party seems to have put forward anything relevant to quantification of the value exchange between participants. Google has asserted that in 2018:

[20] Parliament of the Commonwealth of Australia, Explanatory Memorandum to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, Op. Cit., Section 1.210.
[21] Ibid., Section 1.208.
[22] Ibid., Section 1.209.

- the monetary value it delivered to news businesses as a whole in Australia was $218 million, and
- the monetary value it derived from clicks on ads against possible news-related queries in Australia was $10 million gross (not profit)[23]. (This figure is consistent with other independent views of the amount Google makes from news queries.[24])

Nine and Murdoch have broadcast figures for the amounts they expect to garner annually in these arbitrations as $600 million and $1 billion respectively.[25]

The following example works through how claims might play out in a bargain between Google and Nine/Murdoch (who together probably cover the vast majority of news in Australia – they are effectively a duopoly) based on a mixture of estimates available in public (but not verified) and estimates derived by me for scenario purposes from annual financial statements of Nine and NewsCorp (Murdoch). The purpose of the exercise is purely illustrative of the incapacity of the Code to solve the problems of sustaining news businesses in Australia.

Table 1 - Breakdown of extrapolations used in Table 2 (below) for costs of news production for Nine and NewsCorp		
Nine Broadcasting expenses	$984,904,000	Nine Annual Report 2019, page 69
Nine publishing expenses	$347,576,000	Nine Annual Report 2019, page 69
NewsCorp operating expenses worldwide	$5,622,000,000	NewsCorp Annual Report 2019, page 48
NewsCorp revenues worldwide	$10,075,000,000	NewsCorp Annual Report 2019, page 48
NewsCorp revenues Australia	$1,197,000,000	NewsCorp Annual Report 2019, page 52
NewsCorp expenses Australia:	$674,640,000	Assuming the if NewsCorp Australia revenues are 12% of worldwide NewsCorp revenues then expenses in Australia might be reasonably assumed to be 12% of worldwide expenses – for illustrative purposes.

[23] Mel Silva, CEO Google Australia, "A fact-based discussion about news online", Google Australia Blog, 31 March 2020, Op. Cit: "We don't run ads on Google News or the news results tab on Google Search. And looking at our overall business, Google last year generated approximately AU$10 million in revenue—not profit—from clicks on ads against possible news-related queries in Australia. The bulk of our revenue comes not from news queries, but from queries with commercial intent, as when someone searches for 'running shoes' and then clicks on an ad."

[24] See Kamil Franek, "How Google News Makes Money: Business Model Explained", 17 December 2019. https://www.kamilfranek.com/how-google-news-makes-money/

[25] See Max Mason and John Kehoe, "Tech giants should pay media $600m – Costello", Financial Review, 14 May 2020, https://www.afr.com/companies/media-and-marketing/tech-giants-should-pay-media-600m-costello-20200513-p54sgs and "Forget $600m! News Corp boss wants tech giants to pay $1 billion a year for news", B&T Magazine, 15 May 2020, https://www.bandt.com.au/forget-600m-news-corp-boss-wants-tech-giants-to-pay-1b-a-year-for-news/

Table 2 - Hypothetical example of Arbitrator's possible calculation of remuneration to be paid by Google to NewsCorp and Nine in a compulsory arbitration under Clause 52ZZ of the News Media and Digital Platforms Mandatory Bargaining Code Bill 2020.		
1. Monetary benefit that must be taken into account by arbitrator under section 52ZZ (as per Treasurer's Explanatory Memorandum: 1.208):		
Monetary benefit provided by news businesses to Google	$10,000,000	Google estimate[26]
Monetary benefit provided by Google to news businesses	$218,000,000	Google estimate[27]
Net benefit transferred between parties - from Google to Nine/NewsCorp	**$208,000,000**	This assumes the arbitrator would allow the concept that the full $218 million of value provided by Google to all news would come to them if Google didn't exist. That is probably reasonable because if Google didn't exist, the smaller news businesses would get very little if any of the supposed referrals. For ease of illustration we will assume that the arbitrator will assume that he will reduce the costs allowable in Item 2 below by $208,000,000.
2. News business cost that must be taken into account by arbitrator under section 52ZZ (as per Treasurer's Explanatory Memorandum 1.209):		
Assume a cost of covered news content - Nine = half their broadcasting expenses plus all publishing expenses (SMH)	$840,028,000	Assuming half of Nine's declared broadcasting expenses plus all publishing expenses (SMH)[28] See **Table 1 – Breakdown of Extrapolations Table** above.
Assume a cost of covered news content - NewsCorp	$674,640,000	For reasoning behind this estimate see **Table 1 – Breakdown of Extrapolations Table** above.[29]
Total costs likely to be submitted by Nine and NewsCorp	**$1,514,668,000**	Note that this estimate is not too inconsistent with amounts Nine and Murdoch have asserted might be claimed by them, and them alone, under compulsory arbitration. Should the arbitrator allow full costs of this magnitude, there will be little if anything left for any other news business because NewsCorp's and Nine's costs on their own would exceed the pre-tax profit made in Australia by Google by a factor of eleven (11). Note: Google's pre-tax profit in 2019 was $134 million on which they paid $59 million in tax.
3. Calculation of value of bargaining power imbalance		
Costs claimed by Nine and NewsCorp	$1,514,668,000	
Less net benefit already provided by Google	-$208,000,000	
Total maximum subsidy theoretically required from Google to Nine and NewsCorp	**$1,306,668,000**	**If this is the size of the bargaining imbalance that must be included in the remuneration calculation then intention of the Code is defeated because Google will need to depart Australia to avoid this loss.**

The figure in Item 3 above of **$1,306,668,000** is probably what Nine and Murdoch would attempt to argue they are losing because Google has (supposedly) stepped in between them and their markets and traditional income sources (subscriptions and advertising). As the hypothetical is structured within the Code, it is assumed that Google and Facebook are responsible for the entirety of business downturn for news businesses in the digital age. It is assumed to be nothing to do with the news businesses' own ineptitude, inefficient cost structures or other market forces. The Code hypothetical assumes the news industry woes are entirely the fault of two businesses and two businesses only – Google and Facebook, even though it is the internet, not search and share platforms, that have caused the disruption in the news market structure. Google and Facebook are not the internet. They are just the ones helping news businesses make money on the internet. This does not mean they have the capacity to help news businesses make up losses for operating outside the internet (in

[26] Mel Silva, CEO Google Australia, "A fact-based discussion about news online", Google Australia Blog, 31 March 2020, Op. Cit.
[27] Mel Silva, Ibid.
[28] Extrapolated from "Nine Annual Report 2019", 1251884 (nineforbrands.com.au)
[29] Extrapolated from "NewsCorp Annual Report 2019", NASDAQ_NWS_2019.pdf (annualreports.com). Note that NewsCorp does not report separately on operating expenses in Australia, hence the need for extrapolations as per the **Breakdown of Extrapolations Table**.

print, TV and radio). News businesses that wish to stay in the non-digital platform environment for access to income must do so on their own recognisance. In the meantime, Google and Facebook can and is helping them all make money in the digital environment. And in that arrangement Google is asserting that it is delivering $218 million worth of value, 20 times more than it is picking up itself from making links to Australian news available.

Speculation that all the money would magically come direct to news businesses if Google were not there to be relied on for that income is just that – wild speculation. And the arbitration formula is nothing more than an attempt to pump up the amount that can be sucked from Google and Facebook to prop up an industry that is no longer sustainable in the non-digital environment.

The example shows how preposterous it is to assume, as the Bill does, that two commercial entities should be able to fund an entire industry of commercial news media businesses. The Bill cannot function as a means of sustaining floundering news businesses in non-digital platforms. Google and Facebook cannot cover the costs non-digital news businesses incur in print, TV and radio – costs that are in excess of the income they can command in their digital and non-digital offerings. No business – no matter how big and capable we might assume Google and Facebook to be – can feasibly cover the losses of a whole news industry, especially one operating in a market where the structure is changing irretrievably.

Google and Facebook are, however, providing substantial assistance to help diverse journalism flourish in the digital age. They are not adversely affecting it, they are making it possible for diverse news content producers to flourish and are particularly helpful for small news market entrants. Nine and Murdoch prefer to keep these entrants out.

Appendix 2 – Australian Community Futures Planning's Submission to the Media Diversity in Australia

The Senate is seeking comment in relation to two very closely related matters at the same time:

1. The Senate Economics Legislation Committee is seeking comment on the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 due by 18 January 2020; and
2. The Senate Environment and Communications References Committee is conducting and Inquiry into Media Diversity in Australia.

Australian Community Futures Planning has made a submission to the Senate Inquiry into Media Diversity in Australia.

For convenience, ACFP's submission to the Senate Inquiry into Media Diversity in Australia is attached here in full.

acfp
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Response to the Terms of Reference of the Senate Inquiry into Media Diversity in Australia

Executive Summary

Australia has one of the highest concentrations of news media business ownership in the world.[30] This is not in dispute. But this does not mean that there is a crisis for production of and access to a wide diversity of Australian news content.

Diversity of news content has narrowed on *non-digital* platforms of print, TV and radio, dominated by Murdoch.

But *digital* platforms have created a space for wide diversity in journalism.

Diversity in public interest journalism has declined markedly in those ***non-digital*** media platforms of print, TV and radio dominated by Murdoch and Nine in Australia. But diversity in news content has not declined in news delivered online via ***digital*** platforms. On the contrary, there has been an explosion of diversity in news and other content that is now freely accessible, courtesy of the rise of the internet and the 21st century free information market structure which efficiently (and without charge to buyers or sellers) connects readers with news in a way that allows journalists to then monetise their content and to do so at significantly reduced costs. This is providing the journalism industry as a whole with sustainable new business model options and these options are working well for both individual journalists and medium-size news businesses.

Digital platforms have provided the journalism industry with sustainable new business model options.

Digital platforms are enhancing the prospects for independence in journalism, by uncoupling it from dependence on advertising income.

The rise of these new business models is also increasing the proportion of journalism in Australia that is more truly independent. News businesses reliant on advertising are not independent at all and never have been. That advertising-dependent business model for journalism should be phased out as much as possible if Australia is to recover a healthy democracy.

Democracy is not under threat from digital platforms.

But there is need for regulation of both digital and non-digital platforms.

Australia's democracy is under threat. But this is not because of the digital platforms, although our democracy certainly will be adversely affected if governments continue to shirk responsibility for creating sound regulatory frameworks for search and share platforms alongside news content producers. If our current regulatory vacuum in the information market is permitted for too much longer, we will find ourselves exposed to an unethical,

[30] Tim Dwyer and Dennis Muller, "**FactCheck: is Australia's level of media ownership concentration one of the highest in the world?**" The Conversation, 12 December 2016. https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437

Threats to Australia's democracy will arise if we do not develop a sound regulatory framework for a 21st century information market.

But in Australia in 2020 *governments* are the main threat to a well-functioning democracy, through their irresponsible relaxation of cross-media ownership laws in favour of Murdoch.

The ACCC's News Media Bargaining Code will further damage Australia's democracy and open information market.

The News Media Bargaining Code addresses none of the regulatory failures in Australia's news and information market. It makes everything worse.

The News Media Bargaining Code *cannot* result in improved diversity in news content or sustainable business models for public interest journalism.

It is an anti-competitive disproportionate market intervention in Murdoch's favour.

The quality and diversity of news content can only be improved by establishing an ethically and fairly regulated free and open information market.

We need to establish what that market should look like.

restricted information market which will be a serious threat to equality of access to reliably factual information.

In 2020 in Australia, however, the far greater pernicious influence on our democracy is coming from the irresponsible corporate behaviour of the Murdoch-dominated non-digital news media oligopoly, aided and abetted as it has been by successive Australian governments in their irresponsible weakening of cross-media ownership laws. The reality of our democratic decline is that it has been caused by successive governments that have given in to the bullying of Murdoch and that are now giving in again by blaming Google and Facebook for the threats to our democracy that they themselves have caused.

More than that, with the mandatory News Media Bargaining Code our government has been sponsoring an unfair regulatory measure with capacity to set our democracy into even further decline. It will make things worse in relation to media diversity and it will fail utterly to deal with the real challenges to democracy that are arising from the digital age – namely, surveillance capitalism, data security and misuse, privacy and personal information protection, consumer scams, political interference, production of quality ethical news content and reduction of misinformation and fake news. None of these things are dealt with at all by the News Media Bargaining Code. Instead, the Code – both drafts of it – increases risks for journalism, the information market and democracy.

A critical issue with the News Media Bargaining Code is that, structurally, it ***cannot*** result either in improved diversity in our news media or an equitably accessible information market. News is only a small part of the information market required for a well-functioning democracy[31] and the Code inordinately favours one set of players within that small part of the wider information market. **Both drafts of Code are an anti-competitive instrument of market distortion attempting to drag Australia back to the dark ages of inefficient news production and dissemination by an elite few who will have no greater standards for quality and ethics imposed on them in return for the funds they are granted.**

If the quality and diversity of journalistic production is to be improved at all, this can only occur via the introduction of a framework that ensures we can establish an ethically regulated information market. As yet Australia has not described what this broader information market would (and should) look like if it were structured to support a well-functioning democracy. **The Senate Committee urgently needs to engage the Australian community to describe what that market should look like.**

[31] According to the ACCC's Digital Platforms Inquiry Final Report, of the total time Australians spend online less than 2.5% is spent browsing the news and entertainment sites of Murdoch, Nine, Seven, Ten and the ABC. Australian Competition and Consumer Commission, "Digital Platforms Inquiry Final Report", June 2019, page 6, https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

If we wish to protect democracy, we need to protect open access to information, not subsidise unaccountable journalists and news businesses.

Scrap the News Media Bargaining Code.

Replace it with an ethical regulatory framework for a democratic information market.

The terms of reference for this Senate Inquiry tend to suggest that if we just create a lifeline for journalists this will protect democracy, when in fact access to the fullest array of information is what needs to be protected. The News Media Bargaining Code will decrease access to broader information resources and homogenise news content at the same time. It will increase concentration of media business ownership which will reduce the diversity of news content.

This submission asserts that the News Media Bargaining Code should be scrapped and replaced with a process of community engagement for collaborative planning of a democratic information market fit to handle the challenges to truth and ethics arising from the digital age.

Evidence for assertions in this submission

Fully detailed evidence justifying the assertions of this submission is provided in the following resources (these are hyperlinks):

- **Dr Bronwyn Kelly: *Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code*.[32] (hyperlink)**

- **Videocast extract: *The State of Australia in 2020, Episode 4 Part 3 – Corporate Irresponsibility*, presented by ACFP Founder, Dr Bronwyn Kelly (hyperlink)**

Part 1 – Commentary on the Terms of Reference

The Senate Inquiry's terms of reference would seem to be underpinned (or perhaps overshadowed) by a largely unquestioned assumption that independent journalism and democracy are in crisis in Australia mainly or purely because digital platforms have disrupted their preferred business model of reliance on income from advertising.

This submission from Australian Community Futures Planning argues that this **disruption of the advertising-dependent business model for news media should, in the long run, be a good thing for democracy *as long as governments do not shirk responsibility for regulating the things that really need to be regulated in the digital-age information market*.**

Australia's parliament at present is proceeding to regulate bargaining between non-digital news media market participants and the digital platforms – as though this will reverse threats to a well-functioning democracy. But the reality is that the News Media Bargaining Code is more likely to increase market concentration in non-digital news media businesses and may assist Murdoch to dominate news delivery in digital platforms as well, thereby exacerbating problems in the functioning of our democracy to an unprecedented degree. This will be even worse if no action is taken to develop a regulatory framework for the things that are really going wrong in the digital age information market. If we fail to reverse Murdoch's dominance and at the same time fail to properly regulate the digital platform space – for instance, by stipulating cross-media ownership rules which prohibit a news producer from owning a search engine as well – our democracy will not be

[32] Dr Bronwyn Kelly: "Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code", Australian Community Futures Planning, 30 September 2020.

recoverable. There is a real prospect in the News Media Bargaining Code that Murdoch will be more easily able to enter the search engine part of the information market, although this potential is much greater in the exposure draft of the Code than the revised draft. If we do not guard against the sort of vertical integration that can arise from the Code, it will be a disaster for our access to diverse information. See **Attachment A – News market distortion under the News Media Bargaining Code** for a description of how this intervention can result in vertical integration and a near monopoly for Murdoch in the Australian news market if the Code is implemented in such a way as to drive Google out of Australia. The exposure draft of the Code is replete with capacity to do that. The revised draft has less capacity but it is still an anti-competitive intervention which can result in greater market concentration in Australian news media. It cannot result in less market concentration.

For purposes of the Senate Inquiry it is important to clarify that news diversity in Australia is not under threat from digital platforms. On the contrary, the digital platforms are the only thing standing between Australians and the decline of their democracy in the digital age. This is not to say that digital platforms are not engaging in their own market abuses. But to date, the decline of diversity in news in Australia is much more the result of the dominance of non-digital platforms by Murdoch and Nine than it is the result of the rise of the digital platforms.

Problems with the functioning of Australia's democracy are coming from two distinct quarters:

1. Murdoch and Nine's dominance of the non-digital news market which is the main cause of narrowed diversity in news (this is a problem confined to the non-digital platforms – the digital platforms actually enhance the prospects for news diversity); and
2. Proliferation of misinformation and fake news via *both* digital and non-digital platforms.

In short, truth is being assaulted by both digital and non-digital platforms and in Australia both are using market dominance strategies. Murdoch is using those strategies for purposes of power. Google and Facebook are using them for purposes of capitalism. Both are of course highly problematic but policy makers are completely confusing the two. They are:

- blaming Google and Facebook for the thing they haven't done (they haven't narrowed media diversity in Australia, they've widened it – which is what Murdoch doesn't like);
- doing nothing about the wrong things that Google and Facebook have actually done (failing to stem proliferation of misinformation and fake news); and
- letting the wrong things Murdoch has done multiply into gross market abuse by developing a News Media Bargaining Code to maim or kill viable operation of his competitors in news, inasmuch as it can maim or kill the efficient digital platform providers (particularly Google) who are making that competition to Murdoch possible.

The News Media Bargaining Code – as per its exposure draft – is a grossly disproportional market intervention that, if passed, will have far reaching impacts on Australia's democracy. The revised draft is somewhat less gross but is still an unfair and dangerous market intervention – one that can upset and restrict the freedom and openness of the information market that we have come to enjoy, as never before, courtesy of the digital age. Both versions of the Code are unwisely based on an array of fictions[33]:

- fictions about the cause of our current news market problems; and

[33] See "Ten fictions behind the ACCC's News Media Bargaining Code", Dr Bronwyn Kelly in *Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code*, pages 19-34, accessible at https://543a0e22-a7ba-40a3-aea3-cc0010263a7e.filesusr.com/ugd/2b062e_6ef9680488fd4fa898735132fe4abec4.pdf

- fictions about the ostensible benefits that will arise from unfair interventions that attempt to treat one (and only one) aspect of our information market problems – news market concentration – but in a manner that is entirely contrary to the interests of seekers of diverse news.

These fictions have been irresponsibly peddled by the ACCC and they have created significant barriers to sensible debate about the priority strategies that should be developed for ethical and balanced regulation of the wider digital-age information market (as opposed to the tiny bit of that market that is news content).

Failure to understand the way that the wider digital-age information market works to diversify news and ensure open democracy, and indeed putting out misinformation about it (something many journalists are doing now too), will have serious implications for development of solutions to the problems arising for democracy from the digital platforms, problems which are real but which thus far have actually had less impact on Australia's democracy than has the concentrated media business ownership in the non-digital news market. The failure of understanding about the way the now vast digital-age information market works – how much more democratic it actually is compared to the much smaller non-digital news market – is currently threatening to drag us back to the dark ages of the non-digital news market, where misinformation always abounded (and still does). Simultaneously, this failure of understanding will cause us to miss the opportunity we really should seize to set ethical rules for operation of the whole digital-age information market.

The Senate Committee needs to untangle this confusion about the culprits in this two-pronged threat to our democracy and it needs to understand exactly what each culprit is doing that is irresponsible, rather than attribute the sins of one to the other. The terms of reference are still limited by that confusion. For as long as that confusion prevails, solutions will be likewise confused and counterproductive.

ACFP submits that it would be deeply regrettable if the Senate Inquiry ended up aiding and abetting one of the culprits (Murdoch) and at the same time did nothing to stem the abuses perpetrated by the digital players. The ACCC is fond of characterising Google and Facebook as having inordinate power in the market compared to news producers. But in terms of political power in Australia, Murdoch actually has more – much more – and the Australian government is in thrall to that power, so much so that it has attempted to (and is probably still attempting to) gear our regulatory system to facilitate a raid on Google in particular to Murdoch's advantage (and to Australian information consumers' severe disadvantage). In short, the parliament is attempting to take the wrong regulatory approach to non-digital market abuses and no regulatory approach at all to digital market abuses. It is attempting to regulate (badly) a small part of the information market (news) instead of establishing the market rules which will provide the best chance of ensuring that readers, viewers and commentators can find truth in the digital age.

It is facts and truth that are under threat in the 2020s, not journalism as a profession or as a business. Journalism will survive. But because of the rise of the digital age the prospects for journalism are not limited to mere survival. With the digital age, we can establish fine world-standard journalism. If journalists can transition to the new funding structures offered by digital platforms they will be less dependent on advertising income streams. In that event their independence will be more assured than it has ever been and this will benefit democracy more than any Code which artificially props up inefficient news businesses that are so large that they dominate and therefore homogenise Australian news content.

The opportunity not to be missed by the Senate – collaborative planning for a democratic information market

Australians are very lucky that the Senate Inquiry into Media Diversity in Australia has been established at this critical turning point in the history of our democracy – before any more damage can be done by news media market abusers. If it can be arranged that the Inquiry becomes the springboard for establishment of a truly visionary regulatory framework for the information market in the digital age then the benefit for democracy will be momentous.

ACFP submits that Australia can lead the world in development of an ethical and fair regulatory framework for the digital-age information market – not by a disproportionate market intervention under a Code favouring one set of players over another, ***but by commencing a process which puts news and information consumers and their democracy first***. In that regard, ACFP has suggested in the essay on ***Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code*** that a community engagement process should be established for collaborative planning of an ethically regulated democratic information market fit for the 21st century. ACFP has provided an outline in this essay of a possible 4-step process of consultation with Australians to establish this world-first. Senators can view an extract of the essay which outlines this option at **Attachment B – Collaborative planning for a democratic information market**.

The vital obligation of the Senate – prohibition of greater market concentration via cross-media / cross-platform takeovers

In addition to setting up the above community engagement program for a world-first regulatory framework, the Senate should not miss the opportunity to ensure that our statutes guard against cross-media and cross-platform ownership concentration. Ideally the "two-out-of-three rule" (preventing news businesses from owning all three non-digital platforms – print, radio and television – in one geographical market) that was relaxed in 2017 should be reversed. But failing that (if that damage is irreversible), Australia should at least prevent cross-platform takeovers.

At present there is no protection in legislation against the prospect of a news content producer acquiring a search engine. The News Media Bargaining Code will bring us closer to that prospect – a prospect which would spell the end of the free access we currently enjoy to diverse content and the end of our open democracy. Although the revised draft of the Code has somewhat less capacity than the exposure draft to result in a situation where a large near-monopolistic news business can also own a search engine, there is still a big chance that at the dawn of the digital age Australia can fall into such a trap.

If we are going to end up with a News Media Bargaining Code along the lines of either draft (or even if we are not), a safeguard against this new type of market concentration – cross-platform vertical integration – is imperative. The Senate should:

1. develop robust legislative frameworks prohibiting cross-platform ownership by news businesses (i.e., a news business should never own a search engine), and
2. ensure that a News Media Bargaining Code is not legislated before these safeguards are firmly in place.

For an explication of how easy it can be under the News Media Bargaining Code for a news market dominant player to achieve this vertical integration, with the aid of a Code that attacks his competition, see **Attachment A – News market distortion under the News Media Bargaining Code**.

Part 2 – Comments in relation to the specific terms of reference

ACFP submits the following comments in relation to the stated Terms of Reference:

The state of media diversity, independence and reliability in Australia and the impact that this has on public interest journalism and democracy, including:

Terms of reference		Response from Australian Community Futures Planning
A:	"the current state of public interest journalism in Australia and any barriers to Australian voters' ability to access reliable, accurate and independent news"	**Summary response:** **There are fewer barriers to Australian voters' ability to access reliable, accurate and independent news than there have ever been.** **Further comment:** • Over the least two decades, media diversity has narrowed in Australia among large-scale mastheads as their dominance of the non-digital news media has increased. Murdoch and Nine now dominate the non-digital media (print newspapers, TV and radio). • But the Murdoch and Nine mastheads have not dominated the digital media and the digital platforms have in fact enabled an explosion of diversity in public interest journalism. Australians are seeking their news more and more from independent digital sources and less and less from the narrow journalism businesses of Murdoch and Nine. • Courtesy of the rise of digital platforms, there are now fewer barriers to access "reliable, accurate and independent news" than there have ever been. • Where there are barriers, these are the result of news businesses themselves that have put up paywalls. These barriers are resulting in news businesses strangling their own financial prospects by rejecting custom delivered to them by the digital platforms and therefore reducing the attractiveness of their websites to potential advertisers. • Commentators have asserted that: a) public interest journalism is in peril and that b) this is because of the rise of digital platforms. But neither of these assertions is correct. The industry of public interest journalism is simply in transition to a far more efficient production and distribution chain. This is an unstoppable transition and it is good, not bad, for journalistic diversity – **as long as the digital realm of operation for public interest journalism is regulated properly**. At present, governments are not stepping up to set a regulatory framework for public interest journalism on digital platforms. This needs to be addressed urgently but carefully through a process of open consultation with Australians – See

Terms of reference		Response from Australian Community Futures Planning
		Attachment B – A 4-step process of collaborative planning for a democratic information market.
B:	"the effect of media concentration on democracy in Australia"	**Summary response:** **Where concentration of news media business ownership occurs, which is only in the non-digital platforms (now unfortunately dominated by Murdoch and Nine), it is having significant detrimental effects on democracy.** **On the good side, the digital platforms are shaving off the market power of the concentrated non-digital news oligopoly. They are the only thing standing between Australians and the Murdoch media in his incessant drive for power.** **The News Media Bargaining Code will increase Murdoch's power. It will increase his dominance of the news market and therefore will be a blow to democracy in Australia. For evidence of how this can happen see Attachment A – News market distortion under the News Media Bargaining Code.** **Further comment:** • People often mistake the growth in concentration of media ownership in Australia for a narrowed media diversity across the board – i.e., across both the non-digital and digital platforms. The reality is that it is only in the non-digital platforms that diversity of journalistic perspectives has become narrowed: a) In the non-digital platforms of print, TV and radio, heavy concentration of media ownership and narrow diversity in news articles, particularly in print, have gone hand-in-hand. b) But in the digital platforms that rely on online search and share, diversity of news content has widened as these platforms have enabled new entrants to efficiently produce news with less reliance on funding from advertising. New entrants operating on the digital platforms are effectively taking advantage of new business models which allow smaller news businesses to attract advertising and subscriptions. They are now enabled to compete with Murdoch because of the digital platforms. These businesses are succeeding. Guardian Australia, Michael West and The Conversation are good examples, and because they are less dependent on advertising (and don't foolishly put up paywalls like Murdoch and Nine) they are more truly independent in their content. • The digital platforms which provide search and share options to discover and propagate this material are

Terms of reference		Response from Australian Community Futures Planning
		therefore a very good thing for media diversity. They are enabling a transition away from the corporate dominance of Murdoch and Nine. • Suffice to say Murdoch and Nine are doing everything possible to stop this industry transition. • If the News Media Bargaining Code is passed in anything approaching its exposure draft form this will increase Murdoch's market power and propel our democracy into further decline. The revised draft will work more slowly to disable competition to Murdoch and Nine but it is still anti-competitive in Murdoch and Nine's favour. It props up their market dominance when it should be broken down.
C:	"the impact of Australia's media ownership laws on media concentration in Australia"	**<u>Summary response:</u>** **Changes to cross-media ownership for news media operating on print, TV and radio platforms in the last two decades have had far more significant detrimental effects on our news media diversity than the ownership arrangements for digital platforms. In fact, if it weren't for the digital platforms being so successful in making a space for competition to Murdoch in journalism production, we would probably now be living in a news media monopoly.** **Google and Facebook have their faults but news media market concentration isn't one of them. It's the fault of governments who have over the past twenty years loosened cross-media ownership laws, when they shouldn't have.** **<u>Further comment:</u>** The News Media Bargaining Code will increase market concentration problems in Australian news media. The Code is an anti-competitive entirely unjustifiable intervention. In its most extreme form (the exposure draft) it will remove competition to Murdoch because it will squash those efficient platforms and search engines which are enabling true competitors to Murdoch to transition to sustainable competitive business models in news production. In its less extreme form (the revised draft) it may still do the same, but more slowly. The exposure draft of the Code was designed to force Google in particular out of Australia. It is not a properly proportional market intervention designed merely to fairly correct some sort of imbalance in bargaining power; it is a ***dis***proportional intervention that has the architecture of a facilitated raid on Google in particular. And it is well designed to create a new market imbalance. And this time – if the Code is adopted in anything like the exposure draft

Terms of reference		Response from Australian Community Futures Planning
		form – it will be an imbalance where Murdoch doesn't just dominate the non-digital offline platforms of print, TV and radio, he will dominate the last frontier of the information market as well – the online digital platforms. If the federal parliament wishes to avoid intensifying the market concentration problems it has created by its cross-media ownership laws, especially in Murdoch's favour, then the parliament should scrap the News Media Bargaining Code. Neither form of the Code deals with the market concentration issues in the non-digital realm that are the cause of the current decline of openness in our democracy.
D:	"the impact of significant changes to media business models since the advent of online news and the barriers to viability and profitability of public interest news services"	**Summary response:** **The new business models made possible by digital platforms have enabled smaller more diverse news outlets to establish themselves and to de-couple themselves from the compromising conflicts of interests that arise when news businesses become overly dependent on advertisers.** **News producers that are heavily dependent on advertisers are not and have never been independent.** **It is a good thing for news businesses to be de-coupled as far as possible from advertising and for news providers to be set up at smaller scales to trade sustainably online and to trade on the basis of the quality of their journalism.** **The proof that there are workable alternative business models is given in that outlets like Guardian Australia, Michael West and multiple others have been successful and they are able to produce better quality in news content.** **The new business models, made possible by the free and open structure of the information market in the digital age, help journalists make money outside big news businesses without constraining their content. Murdoch's preferred business model has done nothing more than allow him to rip journalists off for far too long (in the way that publishers through the ages have exploited authors) and to muscle out competition from smaller players.** **In summary, the impact made possible by digital age business models is on balance a good impact, not a bad one.**

Terms of reference		Response from Australian Community Futures Planning
		Further comment: Because of the internet and the free nature of search and share, journalists can now monetise content through time and across several markets, getting paid repeatedly each time a story is clicked on, whereas in the pre-digital age they got ripped off by being paid only once for a story which was then usually lost in the market and much harder to access. New platforms like INKL pay journalists for their content and the world is better off. The news business becomes unhealthy whenever it is too dependent on advertising. Taxation of Google and Facebook and all other digital platforms is a better answer to create a funding base for truly independent quality journalism.
E:	"the impact of online global platforms such as Facebook, Google and Twitter on the media industry and sharing of news in Australia"	**Summary response:** **The rise of Google, Facebook, Twitter, YouTube and the like has on balance led to substantial benefits to journalists but not to big news business owners. It is a good thing to see the excessive power of big news business owners being whittled down. For too long they have been allowed to consolidate into oversized, inefficient, disproportionately powerful entities with little or no accountability in terms of actual production of quality journalism. Murdoch in particular does not carry on the proud tradition of responsible journalism and no-one should be forced to pay for his brand of content – or any other brand.** **News is both produced and distributed far more efficiently because of digital platforms and there is no need to prop up non-digital platforms, especially if they are not being held accountable for the quality of the news they produce. Smaller news outlets in the digital age can offer – and are offering – journalists a new space for healthy balanced journalism.** **Further comment:** It will be suggested by many journalists who do not wish to transition away from heavy advertising dependency to new business models that digital platforms are stealing income and intellectual property. This is of course false. See **Attachment C – Ten fictions behind the ACCC's News Media Bargaining Code** for a list of falsehoods being relied on by some journalists (and the ACCC) to protect the advertising dependent business model. These journalists should also be challenged to demonstrate that advertising dependent business models are good for democracy, how and to what extent. The fact

Terms of reference		Response from Australian Community Futures Planning
		is that advertising dependent business models for journalism result in compromised content – content that is not truly independent. That is bad for democracy, as anyone can see. These journalists will also suggest that their output is the only quality news product. Being employed by a big news agency does not guarantee quality journalism and advertising-dependent business models do not guarantee truth in journalism – far from it.
F:	"the barriers faced by small, independent and community news outlets in Australia"	**<u>Summary response:</u>** **The rise of digital platforms has <u>reduced</u> barriers to financial sustainability for small outlets and it will continue to reduce them, at least as long as interventions are not sponsored by the government and the ACCC which reinforce and consolidate the market dominance of Murdoch and Nine, the two most inefficient media businesses in Australia.** **The biggest barriers faced by small news outlets come from the big news outlets, not the digital platforms that allow the small outlets to connect more efficiently with both their readers and their sources of information.** **<u>Further comment:</u>** There are fewer barriers now than there have ever been for smaller news outlets. The industry is in transition but this does not mean that barriers for small outlets have grown. They have dropped. It will take time for small outlets to reorganise, but anti-competitive moves by the ACCC and government to prop up highly concentrated business ownership will make the highly desirable transition to a larger number of smaller owners in news unnecessarily painful and protracted.
G:	"the role that a newswire service plays in supporting diverse public interest journalism in Australia"	**<u>Summary Response:</u>** **Newswire services are vital. And it is important that Murdoch does not establish a monopoly in that service.** **<u>Further comment:</u>** Murdoch used to act somewhat more cooperatively and collegiately in newswire service than he does now. However, he has recently sold out and set up in opposition and now threatens to crush AAP at the first opportunity. If this is permitted, he will attain a monopoly in newswire. New laws should be enacted and a federally funded independent news wire service should be established to ensure that cannot happen. This should compete with

Terms of reference		Response from Australian Community Futures Planning
		Murdoch and if well run as an independent government trading enterprise it is likely to make money for taxpayers. Regardless of whether a government owned newswire service might trade at a profit, Murdoch should not be allowed to attain a monopoly in newswire services. The Senate can prevent that.
H:	"the state of local, regional and rural media outlets in Australia"	**<u>Summary Response:</u>** **Local news outlets are declining as <u>print</u> outlets. But this does not mean they cannot be operated with efficient business models online.** **The demise of local news in print is being blamed on Google and Facebook. But local news outlets are quite capable of attracting readership via online operation and with that they can re-gear to attract advertising and other income sufficient to cover the costs – most of which are lower because of not having to produce print newspapers.** **<u>Further Comment:</u>** The ACCC has laid the blame on Google and Facebook for the demise of local news reporting. But the reality is that in Australia it is Murdoch who has shackled the small outlets unnecessarily with outmoded business models and in several cases has chosen to shut them down rather than let them re-structure. The fact is these businesses (and the big ones too) can still get advertising income (and maybe even more with the assistance of Google and Facebook) as long as they don't themselves put up paywalls and refuse to accept the benefit of traffic sent to them by the digital platforms. If local, regional and rural media outlets are in a poor state in Australia, that has little to do with Google and Facebook and more to do with Murdoch's refusal to engage in competition via efficiency on a level playing field.
I:	"the role of government in supporting a viable and diverse public interest journalism sector in Australia"	**<u>Summary Response:</u>** **Only government can establish a regulatory framework for the information market capable of ensuring a viable diverse public interest journalism. This is because only government can establish the rules for fair competition. At the moment the government, through its News Media Bargaining Code is doing nothing more and nothing less than establishing a completely unfair playing field for competition in the news and information market. This is utterly contrary to the national interest.**

Terms of reference		Response from Australian Community Futures Planning
		Government needs to stop the unbalanced market intervention of the News Media Bargaining Code (present in both drafts) and support a viable and diverse public interest journalism sector by setting up a regulatory framework for fair and ethical operation of the news and information market and by restoring funding to the ABC and SBS.

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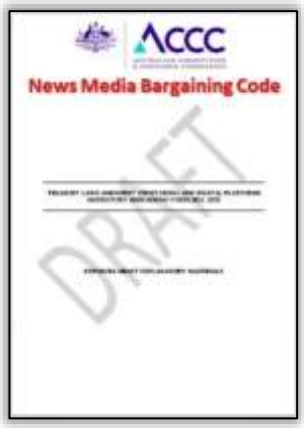
Attachment A – News market distortion under the News Media Bargaining Code



The road to narrowed diversity in news media in Australia under the ACCC's News Media Bargaining Code.

The exposure draft of the ACCC's News Media Bargaining Code is laden with capacity to drive Google in particular out of operation in Australia. The revised draft has less capacity in this regard but is still a risk. To the extent that any Code may decrease competition to Murdoch, this will result in increased capacity for Murdoch to dominate not just the non-digital platforms of print, TV and radio as he does now but online news market as well. At its worst, it may open up the prospects for Murdoch to acquire a search engine business, establishing a vertically integrated news market structure where news production and distribution are controlled by a single corporation. The following step diagram shows how the Code can facilitate this.

Step	Impact
1. Trading rules under the code establish an anti-competitive and unfair market structure and introduce a new bargaining imbalance.	• The News Media Bargaining Code establishes an anti-competitive market intervention by insisting that, in any bargains made between news content producers and content distributors, only one side can charge the other for services provided (or only one side must come out ahead). • In the exposure draft this effect can be extreme: ○ Murdoch and Nine (and other permitted bargainers) may charge Google and Facebook but Google and Facebook may not charge Murdoch, Nine or others. ○ Google and Facebook must cover all the news businesses' costs in news production at the whim of the arbitrator, who is not required to take reciprocal costs borne by Google and Facebook into account and is in no other way restrained from unfairness to Google and Facebook.
2. Impose prohibitive fines for breaches of the Code – breaches which are almost impossible to avoid.	• Again on pain of crippling fines, Google and Facebook must also provide advance notice of algorithm changes and information about the types of "user data" they collect and how the news businesses can access this "user data". The exposure draft of the Code is so flawed in this respect that it will be almost impossible to avoid breaching it on a daily basis.
3. Dismantle the free online information market.	• In addition to the above, Google and Facebook must also effectively pay to provide services to all permitted news business bargainers. Due to non-discrimination clauses in the Code, Google and Facebook cannot opt to deny service to Australian news content producers (they cannot discriminate against them in search results) or refuse to purchase their content. Google and Facebook must therefore incur costs they cannot recover or face exorbitant fines. Under the exposure draft of Code, there is no way for Google to avoid these costs other than to exit the market completely. The possibility that Facebook will have to exit the market is less clear but the information market re-designed in this way is no longer a free and fair market.
4. Wait for the cumulative effect of the above to drive out the competition to Murdoch.	• The combination of: ○ arbitrated fees to be imposed on Google and Facebook for content made available through their search and share services ***plus*** ○ the size of the fines for breaches ***plus*** ○ the fact that costs cannot be avoided may sap the equivalent of the entire profit for Google. The revised Code will work more slowly, but the Code in the exposure draft effectively ensures that Google and Facebook will be forced to stay in the market incurring losses until they go broke and exit the market completely.
Completion of the process: Once the process of ejection of Google from Australia is complete, Murdoch will have free rein to dominate news on the digital platforms and, unless regulations are developed, can also move more easily to acquire a search engine. Vertical integration of the information market will embed the growth of a monopoly in news in Australia.	

Attachment B – A 4-step process of collaborative planning for a democratic information market

This is an extract from ACFP's major essay ***Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code*** by Dr Bronwyn Kelly.

The extract provides one option as a model for community engagement with Australians on how we may set up a fair and ethical free information market in Australia in the digital age. The Senate Committee may wish to consider other models but it is to be hoped that the basic suggestion of collaborative planning on a sound regulatory framework will be given serious consideration and responded to by the Committee in its final report.

Collaborative planning for a democratic information market

Before [Australia] plunges into the dystopia that can all too easily arise from the News Media Bargaining Code, we should consider how we might resolve the real problems [of the information market in the digital age] in a more rational sequence. This is bound to be better than solving the wrong problems in an irrational sequence, as we are doing now. The following is a suggested rational sequence of steps that can be taken to develop a plan for regulation of an open, competitive, efficient, ethically responsible modern information market. As with any good planning process, it starts with community engagement.

A suggested process for community engagement on and development of a rational program of regulation of Australia's information market

Step 1: Call a halt to the debate on the legislation for the News Media Bargaining Code, pending establishment of a conference between:

- the Australian Communications and Media Authority (ACMA),
- Google, and
- one other suitably qualified independent expert in ethics, democratic governance and information market design

on the potential for development of a draft framework for fair and ethical regulation of the information market (meaning operation of, and responsibilities for, open transmission and quality of public interest content on both the non-digital and digital platforms).

Establish a cross-party Senate committee for the purpose of selecting the third independent expert and starting the process.

Charge ACMA, Google and the third chosen expert with joint responsibility for a program of community engagement on development of a draft proposal for a harmonised regulatory framework for information market players.

Set a minimum scope for the expected regulatory framework – in other words, list the essential matters that are in need of regulation, such as:

- responsible operation of social media, search engines and any other open access mechanisms;
- responsible use and security of user data;
- compliance procedures for ensuring responsible management of published content on digital and non-digital platforms;
- rules for cross-media/cross-platform restrictions necessary to prevent information market manipulation and monopolisation; and
- any other notable area of concern for which regulation is currently non-existent or faulty and which, if not regulated properly, has the potential to introduce anti-competitive pressures into the market.

Require ACMA, Google and the third expert to present their proposal for the community engagement process to the Senate (and seek approval for commencement and instructions for report-back – see Step 2).

Establish secure funding for the engagement process.

Step 2: Once the engagement process and its objectives have been developed to the satisfaction of the three experts and the Senate committee:

a) Set a requirement for ACMA, Google and the third expert to jointly lead a full, open and transparent consultation with stakeholders and with the Australian public about the scope of and options for the regulatory framework (taking the minimum scope already set by the Senate as a given).
b) Charge ACMA, Google and the third expert with preparing a joint report on the outcome of the consultation, their suggestions for the regulatory framework, full explanations of each aspect of the recommended framework, and any areas of disagreement about the framework.

Step 3: Oblige ACMA, Google and the third expert to submit the above report to a cross party Senate committee that should be open for further public hearings.

Step 4: Depending on those factors on which agreement has been reached, the Senate committee may request the government to draft law reforms consistent with the agreed aspects of the regulatory framework. For aspects on which agreement cannot be reached, the Senate committee may of course recommend an alternative process for selection of any valid reforms that may be demonstrably in the public interest.

What is the logic of this proposal?

The point is to allow Australians the opportunity:

1. to understand the *priority* problems in our information market which, believe it or not, are not about whether journalism will survive – because it will, it is truth not journalism that is under threat; and then
2. to consider the relative merits of different regulatory responses, and particularly the potential effects of any proposed responses on their democracy, their access to information, their freedom of speech, their consumer rights, and their control over their own privacy and personal information.

The ACCC's process for development of the Code has not allowed Australians this opportunity. As a result, the ACCC has ended up solving Murdoch's and Nine's problems but has done so by exposing

Australians to the risk of a failed democracy. The suggested alternative process for engagement with Australians allows them an opportunity to explore solutions to:

- other problems in the modern information market that the ACCC rightly identified, such as consumer scams, proliferation of fake news and misuse of data; and
- problems which would arise for the information market and Australian democracy if the ACCC's Code were to be implemented.

These problems are in fact far more pressing for democracy than whether two dominant news businesses survive or not.

Why should ACMA, Google and a third expert in governance and ethics jointly lead the engagement process in Steps 2 and 3?

ACMA and Google are the most experienced players in the two main parts of the information market where regulation needs to be adjusted, or established, or harmonised – namely between the digital and non-digital platforms. A third expert is required for assessment of the implications of different regulatory options for democracy and the public interest. This has not been thought through at all in the ACCC's Digital Platforms Inquiry. That process paid lip service to democracy and was captured by the non-digital platforms, resulting in development of a Code that does nothing to resolve the most pressing problems for democracy in the digital age.

If our task is to solve the right problem instead of the wrong one, we will need to devise a draft model regulatory framework that brings together:

- regulations that have served us well in the non-digital market (ACMA's skill) and could be used as the basis for regulation of content in the digital part of the market;
- yet to be devised regulations for ensuring efficient, practicable (workable) and ethical operation of the digital part of the market (Google's and the third expert's skill); and
- yet to be devised regulations for preventing anti-competitive and anti-democratic trends within and across the platforms (all three skill sets).

The framework as a minimum should aim to promote:

- the maintenance of the highest quality journalistic standards,
- responsible use of digital and non-digital platforms by all authors, and
- an open, ethical market structure in which conflicts of interest can be minimised (in other words, the right Chinese walls and cross-media/cross-platform ownership rules are in place).

ACMA and Google are best placed to engage with the Australian community on these matters and the inclusion of a third independent ethics and governance expert would provide a good basis for confidence in the community that a regulatory framework will support their democracy rather than just the interests of a small section of the information market (news).

Why should the ACCC not be involved in leadership of this engagement process?

The above suggested step-by-step process does not exclude the ACCC and nor does it give complete control to ACMA, Google or anyone else. On the contrary ACMA, Google and the third expert in democratic governance would simply be partnering to lead an open engagement process and organising a report back to the Senate on priority reforms. The ACCC can still submit their Code for consideration as to whether it does serve the broader objectives of regulatory reforms for the protection of fair markets and democracy but allowing them to lead an engagement process would

simply put them in a position of being able to proffer their own proposals over others and this would diminish public confidence in the process. This does not mean that the ACCC's work should be discarded; rather it should be considered alongside other options and independently assessed on its merits, particularly in terms of its potential effect on democracy and efficient, ethical information market operation.

Joint leadership of the process between ACMA, Google and another agreed independent expert means we will have players from the key parts of the information market – the digital and non-digital and information producers and information access technicians – who can use their expertise to lead a well balanced engagement process – transparently. We will have:

1. ACMA who can contribute the perspectives of authors and appropriate regulations for content;
2. Google who can contribute the experience of library [information] cataloguing and access; and
3. A third expert in supporting the interests of readers, consumers and our democracy.

Bearing in mind that the community engagement process is not a decision making process and that equal standing is being given to the three areas of expertise and interests in the market (authors, [digital] libraries and readers), there is no danger that the process can cause lasting harm to our information market and our access to it. This is quite a contrast to the process run by the ACCC for the Digital Platforms Inquiry. That process was not well balanced and indeed was obviously captured by vested interests, resulting in development of an anti-competitive Code which will undermine our democracy. With the suggested alternative engagement process though, we have a chance to set a world-first benchmark for ethical operation of the now deeply interconnected – irretrievably globalised – market of information. This is totally consistent with the image that Scott Morrison wishes to promote for Australia on the world stage – an image of a nation which values, among other things, "democracy", "freedom of speech", "freedom of expression", and "equality", particularly "equality of opportunity"[34]. We can't claim to have all that if we shut down some authors and not others, if we reduce access to knowledge, and if we do not champion a regulatory framework for information that prioritises truth over vested interests.

It is obviously worth going back to the drawing board to develop a decent regulatory code for our information market. Let's ask the people that the Australian Competition and Consumer Commission didn't put first but should have – the consumers of information. An intelligent conversation with them is possible and vital at this turning point in our democracy.

[34] Values as listed in "Australian Citizenship: Our Common Bond", Commonwealth of Australia, 2018. https://immi.homeaffairs.gov.au/citizenship-subsite/files/our-common-bond.pdf

Attachment C – Ten fictions behind the ACCC's News Media Bargaining Code

Dr Bronwyn Kelly's major essay on ***Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code***, outlines ten fictions relied on by the ACCC and some journalists and commentators to support the Code. The list is provided below with a summary response. For full explanations and evidence as to why these assertions are fictional and for the full reality of what is going on in the news and information market, read the section on the ten fictions in the essay.

Fiction	Reality
Fiction No. 1: News content is being stolen by Google and Facebook.	News content is being promoted by Google and Facebook and without charge.
Fiction No. 2: Without the Code, journalism will die, and so will local news.	The Code will not save local news outlets. It places no obligation on Murdoch to keep them open. The digital realm is local news' best prospect for a sustainable business model.
Fiction No. 3: Google is responsible for destroying independent journalism.	Google is unleashing journalism from the dependence on advertising that causes loss of independence in new production. It is offering a lifeline to journalists who wish to retain independence from the editorial perversions of big news businesses.
Fiction No. 4: An unprecedented market intervention is required to save journalism and content diversity.	The unprecedented market intervention of a mandatory code will destroy content diversity and save Murdoch.
Fiction No. 5: If Google and Facebook remove news content, readers will buy their news direct from news websites.	This will only hold true for smaller news outlets if Google and Facebook aren't forced entirely out of the market in Australia. If they are forced out – and that is exactly what Murdoch wants – everyone else in the market will lose traffic.
Fiction No. 6: The Code will save us from the scourge of fake news.	Fake news is more likely to proliferate if big news businesses gain even more dominance in the news market. And beware! The exposure draft version of the Code is more likely to disable Google entirely but leave us with a Facebook business that has no greater accountability for the quality and veracity of information circulated on its network. We could end up doubly worse off in terms of the things we are trying to achieve for democracy – still stuck with fake news but unable to search as well as we can now for all the information that is most relevant to our search queries and unable to attract/receive as much traffic as we can now to our websites.
Fiction No. 7: A bargaining power imbalance between media businesses and Google and Facebook is undermining media businesses' advertising market shares.	Because of the cost structures of digital and non-digital platforms, the digital platforms are cruelling the non-digital ones in provision of advertising. This disadvantage for non-digital news platforms has not arisen from any so called

Fiction	Reality
	"bargaining power imbalance" between the news businesses and Google and Facebook. It is simply a function of the high cost, inefficiency and general unattractiveness of non-digital platforms. Big news media businesses are cutting themselves off from advertising income opportunities by putting up paywalls. That – and not a fictitious bargaining power imbalance – is another key cause of their losses in advertising revenue.
Fiction No. 8: Information consumers will not be disadvantaged by the Code.	The Code refuses to allow Google and Facebook to stop providing services in Australian news results and shares, and sets up a situation where the only options may be for them to vacate the market entirely or change their business models entirely in a manner that certainly will not favour consumers. The Code is designed to pincer Google and Facebook into introducing charges for search and share services. In that regard it is designed to result in taxpayers funding both their own news services in the ABC and SBS and the uncompetitive private news services as well. Taxpayers and other consumers who are too poor to pay tax will fund all these news outlets, one way or another, with no returns in terms of service, improved journalistic quality or access to a share of profits.
Fiction No. 9: Digital platforms are solely responsible for proliferation of fake news.	Journalists may consider that the rise of the digital platforms has led to "a takeover of our public square with lies and bile". The phrase "gutter press" is not axiomatic for no good reason. Journalists – or at least some – are just as capable of proliferating fake news as anyone on social media. They are just as capable of peddling climate denialism, just as capable of stoking homophobia, xenophobia and racism, just as capable of demonising the unemployed, just as capable of stories about weapons of mass 44 Rod Sims, Statement on Facebook, 1 September 2020 https://www.accc.gov.au/media-release/statementon-facebook 45 Peter Lewis, Op. Cit. 33 destruction that don't exist, just as capable of supporting economic policies that cause growth in inequality, and just as capable of partisan political misinformation such as promoting a carbon price as if it is a tax. Indeed there is an argument that purveyors of this stuff in certain news businesses have done far more damage to the public interest than fake news, QAnon-style conspiracy theories and lies by

Fiction	Reality
	foreign interlopers, in Australia at least. From the news consumer's point of view, social media platforms and news media are probably about neck and neck in this latest race to trash Australia's public square. But if the News Media Bargaining Code is adopted then the likely result is that the big news businesses will streak ahead in that unholy race to the bottom. They have already won that race in Trump's America.
Fiction No. 10: A bargaining power imbalance between digital giants and news media is threatening decent journalism and democracy.	Australia is facing many problems with its democracy at the moment but a bargaining power imbalance between Google and Facebook on one hand and Murdoch, Nine, Seven and Ten on the other isn't one of them. There is no real bargaining power imbalance between the two sides. There's just one uncompetitive type of platform and another competitive type of platform that the news oligopoly is seeking to take over. Giving four news businesses dominance on both the non-digital and digital platforms will do nothing for democracy. It will simply start a whole new set of problems. Our news market will end up looking more like America's than we would care for – one where Murdoch will shove competitors to the margins.