

[Public
Interest
Journalism
Initiative]



**PUBLIC INTEREST JOURNALISM INITIATIVE and
THE JUDITH NEILSON INSTITUTE FOR JOURNALISM AND IDEAS**

Joint submission to the Senate Standing Committees on Economics
on the Treasury Laws Amendment (News Media and Digital Platforms
Mandatory Bargaining Code) Bill 2020

18 January 2021

The Public Interest Journalism Initiative (PIJI) and Judith Neilson Institute for Journalism and Ideas (JNI) welcome the opportunity to provide comment to the Senate Standing Committees on Economics on the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020.

Our two organisations have participated in agency consultations and discussion, undertaken our own industry and community consultations and made several joint submissions on the development of the Bargaining Code over the past year as we share a common interest in the health of public interest journalism in Australia¹.

We are platform-neutral and size-neutral with respect to supporting news media production. With no commercial interests, our organisations are focused on the necessary favourable pre-conditions, including a mix of innovation, economic and regulatory settings, to ensure a diverse and thriving marketplace of public interest journalism that serves the Australian community, regardless of location or means.

1. INTRODUCTION

The impact of digital transformation in the news industry and the importance – and fragility – of public interest journalism to our community have been amply demonstrated over the past year containing national bushfires, a global pandemic and political disconcert amid rising misinformation and disinformation. PIJI's related research, the *Australian Newsroom Mapping Project*, has been tracking changes to news production and availability over the past 2 years and shows 171 of 194 contractions (eg. masthead or newsroom closures, suspension of services) occurred between late March and May 2020 during the initial wave of COVID-19 in Australia.²

The Code provides an opportunity for news media businesses and digital platforms to work together in a constructive fashion to deliver practical, meaningful outcomes for the community's benefit and that establishes global best practise for news. The legislation reflects many of PIJI-JNI's submitted recommendations to the ACCC's Exposure Draft. PIJI and JNI commend the quality of work undertaken by Treasury, ACCC, and the Department of Infrastructure, Transport, Regional Development and Communications and particularly welcome the following inclusions and amendments:

- **The variety of options available to negotiate agreements that reflects the broad spectrum of news media businesses and their respective operational capacity.** The standard offers mechanism provides the simple, no bargaining mechanism for participating news businesses that we called for in our August submission. We also support collective bargaining for news media businesses and the ability to negotiate agreements outside of the Code which will enable news businesses to move forward with existing drafted agreements if they so wish.

¹ For previous joint submissions see 'Mandatory News Media Bargaining Code', Public Interest Journalism Initiative <<https://piji.com.au/research-and-inquiries/our-submissions/accc-mandatory-news-media-bargaining-code-submission/>>

² Dickson G. *Australian Newsroom Mapping Project*. Melbourne: Public Interest Journalism Initiative <<https://anmp.piji.com.au/>>

- The recognition of ‘journalism’ as the key ingredient that provides unique value rather than a definitional reliance on ‘created by a journalist’, including in the definitions of ‘core news content’ and ‘covered news content’
- The professional standards test that requires news businesses’ editorial standards registered under the Australian Press Council, Commercial Television Industry, ABC or SBS’s published codes of conduct or equivalent internal editorial standards or other enumerated codes.
- The comprehensive capture of quality news content for bargaining purposes, regardless of public or private ownership. PIJI and JNI strongly support the underlying principle to include all content of public interest, including the national public broadcasters and newswires.
- The ability of peak bodies or other third parties to act as a designated agent on behalf of news businesses or groups of news businesses for bargaining purposes.
- The inclusion of the cost of news production as a factor for consideration in determining remuneration for a standard order offer and under final offer arbitration.
- The opportunity for the ACCC to develop guidelines to assist the fair value exchange calculation between digital platforms and news businesses.
- The public reporting obligations, including the requirement for ACMA to publish details of each registration and endorsement on its website (including the applicant corporation’s point of contract for the purposes of s 52Z (Facilitating open communication – registered news business corporation for registered news business)); and to establish and keep a register of bargaining code arbitrators.
- The review of the Code’s operation within one year from commencement.

As part of ensuring robust governance practice within public policy, we also support the specific commitment to bargaining in good faith and the record-keeping and monitoring measures included in the Bill.

Ultimately, this Code is intended to help ensure an informed Australian community as the underlying public interest test.

This submission focuses on issues consistent with PIJI-JNI’s previous submissions, concentrating on the nature of public interest journalism and as drawn from our ongoing industry and community consultations.

This joint submission by PIJI and JNI is divided into two sections and includes two annexures:

- Section 1 comprises this brief introduction.
- Section 2 sets out our comments on the legislation, including recommendations on key issues.
- Annexures:
 - Annex A: About PIJI and JNI
 - Annex B: Preparation of the Joint Submission

2. COMMENTS ON THE LEGISLATION

A. Core News Content, Covered News Content and the News Business Content Test (ss 52A, 52N)

In keeping with our previous submissions, PIJI and JNI support the use of ‘journalism’ (not ‘journalist’) in the revised definitions of ‘core’ and ‘covered news content’. We also support the requirement in the Content Test that the “primary purpose of each news source’ must be ‘to create content that is core news content’.

We also welcome that high quality, long form investigative journalism such as documentaries or multi-episode series fall within the definition of ‘core news content’, and that ‘news businesses’ which produce and publish such content online are covered under the Code’s bargaining terms.

B. Making content available (s 52B)/Interacting with content (s 52C)/Distribution of content (s 52D)

PIJI and JNI welcome the inclusions of making content available (s 52B), interacting with content (s 52C) and distribution of content (s 52D) into the Code. The examples included in s 52D provide additional clarity about the scope of, and when the digital platforms must comply with, certain minimum standards set out in Division 4 of the Code, including, for example, the giving explanations about types of data and notification of algorithmic changes that affect referral traffic.

We particularly welcome the example of alterations, given in s 52D(3)(c), ‘that increase the prevalence or prominence of content make available on the service to users who are affected by a natural disaster, if the content is reliable information about the disaster’ to illustrate the ways in which a service distributes content may be altered. As the report of the [Royal Commission into National Natural Disasters](#) noted:

Between 29 December 2019 and 4 January 2020, the ABC South East audio streaming service experience a 1,800% increase in usage and the ABC Emergency Facebook page received the equivalent of 12 months’ usage during the period December 2019 to January 2020.

We note, however, that the examples listed in each provision are non-exhaustive. The meanings of ‘making content available’, ‘interacting with content’ and ‘distribution of content’ therefore remain open to interpretation by news businesses and digital platforms alike and their ambiguity could be exploited by the digital platforms to the detriment of news businesses and public interest journalism. For that reason, the way in which these terms are being interpreted should be closely monitored by the ACCC. The non-exhaustive examples contained in the Code should be reviewed over time and updated where appropriate.

Recommendation 1: The ACCC closely monitor the interpretation of terms and update examples in s 52D as appropriate as part of the Code review.

D. Professional standards test (s 52P)

As outlined in our previous submission to the Exposure Draft legislation, we strongly recommend that registered news businesses for the purposes of this Code meet requirements for both editorial standards and the oversight of an *external* complaints process.

The Professional Standards Test captures applicable existing industry codes or their equivalent with respect to editorial standards although we would advocate for the complete inclusion of all existing codes registered by ACMA under Part 9 of the *Broadcasting Services Act 1992* (Cth), for example, Community Radio Broadcasting Codes of Practice.

Furthermore, all of the rules and codes listed in s 52P (1)(a)(i)-(iii) incorporate the use of a recognised external complaints service. We therefore recommend the addition of an explicit requirement in s52P for a complaints resolution system that is recognised and administered externally, in order to satisfy the Professional Standards Test.

Recommendation 2: The Professional Standards Test include all existing industry codes registered by ACMA under Part 9 of the Broadcasting Services Act 1992 (Cth).

Recommendation 3: The Professional Standards Test should be amended so that registered news businesses are subject to the oversight of an external complaints process.

E. Designated services (s 52E)

Section 52E of the Code stipulates that the Minister may, by legislative instrument, determine which services are designated to fall under the code. We understand that the Minister intends to designate Google Search and Facebook News Feed as digital platform services that are covered under the Code. PIJI and JNI suggest that YouTube, as a service that carries significant news content produced by broadcast news businesses, should also be considered for inclusion.

Nonetheless, given that the Minister retains the discretion to add further services, and that the Code is to be reviewed after 12 months, PIJI and JNI suggest that the revised draft code provides an effective starting point, if somewhat limited, list of designated services, which will enable all stakeholders to measure how the Code works in practice. However, should the 12-month review of the Code be extended, then PIJI and JNI propose that the list of designated services should be expanded now in the legislation.

Recommendation 4: The digital platform services designated by the Minister should be reviewed every 12 months.

F. The minimum standards (ss 52R-52W)

1. *Advance Notice of Algorithm Changes (s 52S); Ranking and Display of Paywalled Content (s 52T); Control over Display of Advertising Directly Associated with News (s 52U) (See also Dominant Purpose (s 52V); and Significant Effect (s 52W))*

Under ss 52S, 52T and 52U, the notice period has been shortened from 28 days to 14 days, and extra clauses have been added so that the provisions apply only where the ‘dominant purpose of the change is to bring about an identified alteration’ to how content is distributed by the platform. These changes presumably reflect an attempt to balance more effectively the legitimate operational/business interests of both digital platforms and news media businesses.

In practical terms, these changes are likely to lessen the obligation on designated services substantially than would have been the case under the ACCC’s Exposure Draft. As such, PIJI and JNI are concerned that the effect of these changes will be to set the threshold too high. Under the ‘dominant purpose’ test, it may be hard to hold designated services to account for failing to notify news media businesses of relevant changes. We recommend careful monitoring by the ACCC and review of the sections in 12 months.

In the bill, ‘significant effect’ for the purposes of ss 52S and 52T is defined in s 52W. As PIJI-JNI submitted in August, greater clarity would be achieved if ‘significant effect’ included a specific benchmark measure, for example: ‘algorithmic changes significant if they are likely to: result in 15% or greater change in referral traffic for at least 25% of registered news businesses; and/or significantly affect the performance of the covered news content of a registered news business.’

The ACCC should carefully monitor the operation of the algorithmic notification provisions, paying particular attention to whether the ‘dominant purpose’ test sets the threshold too high, and review the provisions’ efficacy within 12 months of the adoption of the Code

2. Giving list and explanation of data provided to registered news businesses (s 52R)

Section 52R eases the obligation from the Exposure Draft on digital platforms, requiring them to provide registered news media businesses with lists and explanations of data relating to how users interact with covered news content on the service. Digital platforms must update this data annually, and digital platforms are not required to give specific data to NMBs.

PIJI and JNI believe s 52R strikes a good balance, but nonetheless requires regular review (a point we stress throughout). What’s more, it is essential to reiterate the importance of privacy law reform and that the Code complements rather than contradicts such reform currently underway. As the ACCC has noted, the use of data is central to the market power of digital platforms (ACCC DPI Final Report, pg 2).

The obligation requiring digital platforms to give explanations about types of data provided should be regularly reviewed.

3. User comments; Changes to display of content; Opting out of services

In the Bill, these minimum standards have been removed. However, the problems that sparked them, such as defamation issues stemming from user comments, remain.

PIJI and JNI believe that these measures should be kept in mind for future iterations of the Code, and for policy measures outside the Code. Once the effects of the Code become clear, the introduction of one or more of these measures may be necessary or desirable, either via the Code, or in other policy instruments.

Recommendation 5: Minimum standards relating to user comments, changes to display of content, and opting out of services are potentially significant provisions. They should be investigated for

application in future iterations of the Code, and/or for further policy measures beyond the Code.

G. Recognition of original covered news content (s 52X)

Like the ACCC's Exposure Draft, the Bill requires digital platforms, in consultation with news media businesses, to develop a proposal that appropriately recognises original covered news content. However, the requirements from the Exposure Draft to update this proposal annually and consult every registered news business have been abandoned.

PIJI and JNI submit that recognising, and indeed promoting, original news content is substantive to the objectives of the Code. PIJI and JNI also recognise that Google and Facebook already take steps to 'surface' original journalism. Although aspects of quality have presumably informed the definition of 'covered news content' and also underpin the Professional Standards Test (s 52P), the Code does not explicitly recognise or promote 'quality' journalism. An unintended consequence is that the Code may recognise and promote low quality journalism.

In the absence of any express commitment to 'quality' journalism, PIJI and JNI submit that a positive commitment to 'original' journalism is vital, and further periodic reviews of proposals developed under this provision would be desirable.

We further note that originality is not always easy to identify. However, it is certainly possible, and the recognition and promotion of original news content can serve as a partial proxy for the promotion of quality news content. As such, we believe the recognition and promotion of original news content would simultaneously help public interest journalism to thrive. Therefore, alongside any commitment to original news content in the legislation, PIJI-JNI support its inclusion in the development of the ACCC's guidelines.

Recommendation 6: The ACCC's bargaining guidelines should expressly acknowledge original news content and its importance in the value exchange between news businesses and digital platforms.

H. Digital Service to be supplied without differentiating in relation to registered news businesses (s 52ZC)

PIJI and JNI welcome the addition of the non-differentiation provision in s 52ZC, which seeks to prevent digital platforms from engaging in retaliatory conduct against news businesses as a result of exercising rights conferred by the Code. This section clearly specifies to whom the obligation applies - responsible digital platform corporations, either by itself or together with other corporations - and the grounds the digital platforms may not use to differentiate between registered news businesses.

However, whether the provision adequately protects registered news businesses in practice will need to be carefully monitored.

As noted in our August submission, effective monitoring and enforcement of compliance with the Code's non-differentiation provision will be complex. The government will need to ensure the ACCC has sufficient resources to undertake these tasks effectively.

I. Transparency and public accountability mechanisms

Although the obligations for ACMA to publish details of each registration and endorsement on its website (including details of the applicant corporation's point of contract for the purposes of s 52Z *Facilitating open communication – registered news business corporation for registered news business*) and to establish and keep a register of bargaining code arbitrators (s 52ZK) introduce some public transparency into the Code process, PIJI and JNI note there remains an absence of obligations on ACMA or ACCC to disclose, or publicly report, if arbitration has been undertaken pursuant to the Code. There are also no obligations (in s 52ZK or s 52ZM) requiring ACMA to publish the names of arbitrators appointed by the bargaining parties, who are not listed on the register of bargaining code arbitrators, nor for these external appointments to declare actual or potential conflicts of interest akin to those governing ACMA appointments (s 52ZN). Such reporting and disclosure are necessary to promote some measures of outcomes and decisions.

PIJI and JNI therefore reiterate the recommendation made in our August 2020 submission that ACMA should be required to include in its s 52ZK register or publish in its annual reports:

- the names of all appointed arbitrators – as appointed by the bargaining parties and/or ACMA;
- the names of parties who arbitrate; and
- the dates of any arbitral decisions.

The requirement for ACMA to disclose the names and conflicts of interest of arbitrators appointed by the bargaining parties is important for consistent transparency and accountability of the process.

In addition, ACMA should be required to indicate in its annual report if it has distributed standard offers to news businesses on behalf of responsible digital platform corporations in accordance with s 52ZZK.

Recommendation 7: Under the Code, ACMA should include in its s 52ZK register and/or publish in its annual reports: the names of appointed arbitrators; the names of parties who arbitrate; and the dates of any arbitral decisions.

Recommendation 8: Section 52ZM should be amended to require ACMA to publish the names of arbitrators appointed by the bargaining parties.

Recommendation 9: ACMA should state in its annual report if it has distributed standard offers to news businesses on behalf of responsible digital platform corporations in accordance with s 52ZZK.

J. Notification of bargaining (s 52ZE) – Inclusive bargaining process for all news media businesses

PIJI-JNI welcome the Code's capture of all news media businesses - including national public broadcasters - to participate in the bargaining process and to receive remuneration under Code.

K. Code review (s 52ZZS)

While the introduction of a requirement for the Minister to cause a review of the operation of the Code within one year after it commences is important, PIJI and JNI believe the Bill should also specify the Code's frequency of review thereafter.

In addition to the rapidly changing market conditions noted in our 28 August 2020 submission, there are numerous uncertainties surrounding the application and effects of various aspects of the Bill and its related instruments including:

- the definitions of ‘core news content’ and ‘covered news content’ in s 52A;
- the examples of making content available (s 52B), interacting with content (s 52C) and distribution of content (s 52D);
- the designation of digital platforms services (s 52E);
- the registration requirements of news businesses (ss 52F-52P), especially the revenue threshold of \$150,000 (s 52M); and,
- the minimum standards provisions (ss 52R-52W) specifically, the efficacy of the arrangements for advance notice of algorithmic changes (ss 52S, 52T, 52U, and 52W).

To ensure the Code can evolve and remain fit for purpose and responsive to market requirements, we therefore suggest that s 52ZZS be revised to stipulate that the Code must be reviewed every two years after the initial review is completed or earlier if required for the sections of the Code identified in section G of our submission.

Recommendation 10: The Code should be reviewed every two (2) years after the initial review is completed or earlier if required.

ANNEX A: ABOUT PIJI AND JNI

THE PUBLIC INTEREST JOURNALISM INITIATIVE (PIJI)

The Public Interest Journalism Initiative (PIJI) is a non-partisan organisation established to ensure that Australia develops a sustainable ecosystem of independent journalism. It conducts research to inform practical policy solutions and public conversation on the importance of an effective, pluralistic news media of all sizes.

As a non-profit company limited by guarantee (ACN 630 740 153), PIJI is governed by its [Board](#) of independent directors and guided by its [Expert Research Panel](#) and [Policy Working Group](#). Established in December 2018, it is designed as a limited shelf-life entity of no more than five years. It operates as a major research project of the NewDemocracy Foundation and a registered charity with the Australian Charities and Not-for-profits Commission (ACNC).

PIJI's research focuses on the three themes in public interest journalism: assessment of media diversity; community value and support; and investment and financial sustainability. Within its first 2 years, PIJI has undertaken over 15 research projects to fill critical data gaps including the [Australian Newsroom Mapping Project](#), which charts changes to news production across the country. All PIJI research is guided by our Expert Research Panel.

Board of Directors

[Professor Allan Fels AO](#) (Chair)

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[Professor the Honourable Marilyn Warren AC QC](#)

Expert Research Panel members

Dr Margaret Simons (Chair), Honorary Principal Fellow, University of Melbourne

[Associate Professor Jason Bosland](#) Melbourne Law School, University of Melbourne

[Professor Axel Bruns](#) Digital Media Research Centre, Queensland University of Technology

[Associate Professor Andrea Carson](#) Department of Politics, Media and Philosophy, La Trobe University

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[Professor Julian Thomas](#) Technology, Communications and Policy Lab, RMIT University

[Professor Glenn Withers AO](#) Australian National University

Policy Working Group

[Richard Eccles](#) (Chair), consultant and company director

Professor Glyn Davis AC

Professor Allan Fels AO

Professor the Honourable Marilyn Warren AC QC

[Professor Simon Wilkie](#), Monash Business School, Monash University

THE JUDITH NEILSON INSTITUTE FOR JOURNALISM AND IDEAS (JNI)

The Judith Neilson Institute for Journalism and Ideas encourages quality journalism in Australia and internationally through grants and education and is a forum for civil and evidence-based debate. The Institute collaborates with traditional and emerging news organisations on a wide range of projects. In its first year, it has helped generate more than 500 pieces of original journalism, including news stories, podcasts, videos and magazine articles. Journalists in national, regional and local media reported on subjects as diverse as the coronavirus pandemic, climate change, Asia and the Pacific Islands, First Nations peoples, arts, business, and issues affecting older Australians. This year it will launch Asian Stories, a long-term project to encourage more reporting and analysis on Asia and greater engagement between Australian journalists and their peers across the region.

Details about about JNI's Board and International Advisory Council were provided in our public submission of 28 August to the ACCC Exposure Draft.

Board of Directors

The Hon. Jim Spigelman, AC QC, Chairman - former Chief Justice of New South Wales and former chairman of the Australian Broadcasting Corporation

Mark Ryan – Executive Director, JNI

Bridget Fair - Chief Executive Officer of Free TV Australia.

Edward Jewell-Tait - member of the Investment Committee of the Judith Neilson Family Office.

Paul Kelly - Editor-at-Large at The Australian.

Jonathan Teperson - Chairman of the Judith Neilson Family Office and Chairman of the JNFO Investment Committee.

Kate Torney - CEO of the State Library of Victoria and former Director of ABC News and Head of Asia Pacific News.

International Advisory Council

Desi Anwar – Indonesia – veteran journalist and currently host of CNN's Insight program.

Yuen-Ying Chan – China/United States – former US-based journalist and foreign correspondent. Co-founder of the Journalism and Media Studies Centre at Hong Kong University.

Steve Coll - United States - Dean of the Columbia University Graduate School of Journalism, a staff writer at The New Yorker, the author of eight books of nonfiction, and a two-time winner of the Pulitzer Prize.

John Lloyd - United Kingdom - Contributing Editor for the Financial Times and co-founder of the Reuters Institute for the Study of Journalism at the University of Oxford.

Kyle Pope - United States – Editor-in-Chief of the Columbia Journalism Review, former editor and foreign correspondent.

Bruce Shapiro - United States - Executive Director of the Dart Center for Journalism and Trauma, a project encouraging innovative reporting on violence, conflict and tragedy worldwide.

Siddharth Varadarajan – India – co-founder of online news outlet The Wire and former editor of The Hindu.

Haiyan Wang - China - Associate Professor at the School of Communication and Design at Sun Yat-sen University.

ANNEX B: PREPARATION OF THIS SUBMISSION

PIJI-JNI Submission Development Processes

The joint PIJI-JNI was developed by PIJI's Policy Working Group and the joint project team:

- PIJI board directors, Professors Allan Fels AO and Marilyn Warren AC QC and external members, Professor Simon Wilkie and Richard Eccles (Chair).
- Anna Draffin (PIJI's Chief Executive Officer), Gary Dickson (PIJI's Research and Projects Manager), Mark Ryan (JNI's Executive Director) and consultants from the University of Technology Sydney (UTS) — Drs Karen Lee (Senior Lecturer, Faculty of Law) and Sacha Molitorisz (post-doctoral research fellow at the Centre for Media Transition).

The PIJI board delegated its authority to approve submissions on the News Media Bargaining Code to the PIJI Policy Working Group. Within JNI, the joint PIJI-JNI submission was reviewed and approved by Mark Ryan, Executive Director.