

The background of the cover is an aerial photograph of a person standing on a blue surfboard, riding a wave. The water is a vibrant turquoise color, and the waves are breaking in a way that creates white foam. The person is seen from behind, wearing a dark wetsuit. The overall mood is serene and adventurous.

# FINDING A WAY FORWARD FOR AUSTRALIAN NEWS

AN EXAMINATION OF LOCAL AND INTERNATIONAL REGULATORY INTERVENTIONS

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Centre for  
Media Transition

## About this report

This report has been produced by the UTS Centre for Media Transition with support from the Australian chapter of the International Institute of Communications.

## About the Centre for Media Transition

The Centre for Media Transition (CMT) is an applied research unit based at the University of Technology Sydney (UTS). Launched in 2017, the CMT is an interdisciplinary initiative of the Faculty of Arts and Social Sciences and the Faculty of Law.

CMT works across disciplines to explore and develop responses to the dramatic and ongoing movements wrought by digital disruption to the media industry, the role of journalism in Australian democracy and the world more widely, and the business models that support a diverse and prosperous industry.

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# EXECUTIVE SUMMARY

1. Australia's News Media Bargaining Code was an innovative model when implemented in 2021. It was a local response to a problem affecting many countries: how to maintain a sustainable news market in the face of increasing dominance of global digital platforms. However, its viability has been challenged by Meta's decision not to renew existing agreements with Australian publishers and by the prospect of it withdrawing news from Facebook in Australia if the statutory scheme is directly applied to it, as it has in Canada.
2. As public access to reliable and quality news to inform decision making and civic participation is regarded as a cornerstone of the democratic process, a new public policy response may be needed. While it could be possible to adapt the News Media Bargaining Code to address evolving conditions, it is apparent that policy will need to address news visibility on digital platforms as well as news funding; this involves having a presence as well as being discoverable in a cluttered information environment.
3. Two additional interventions now merit serious consideration:
  - measures to fund financial sustainability of news through industry levies or similar measures;
  - provisions to ensure continued presence and accessibility for news content or services such as "must-carry", "must-be-discoverable" or "must-not-deprioritise".
4. There are numerous variations of the two general approaches. Some are likely to attract opposition and some raise competing public policy problems, such as possible conflicts with Australian international trade agreements.
5. This paper does not advocate for any particular model but considers the design elements of these potential interventions and what may be viable in the Australian context.

## Industry levies

6. As the Productivity Commission recently observed, industry levies are surprisingly common in Australia. An important precedent is the Telecommunications Industry Levy which requires certain telecommunications carriers to financially support Australia's version of the universal service obligation. A variation is the scheme under which subscription TV broadcasters and some channel providers are required to make investments in Australian drama programs. This type of approach featured as the centrepiece of a proposal from the previous Government for a two-tiered investment scheme that would apply to streaming services and is an action under the National Cultural Policy, *Revive*.
7. Beyond Australia, there are numerous examples of governments taxing the digital economy. In Canada, regulations under recent legislation require online streaming services to support cultural industries as well as to support news; this includes a contribution of 1.5% of eligible revenue of audiovisual online streaming services to an Independent Local News Fund. In the US, Californian lawmakers were considering two bills requiring digital platforms to fund journalism until a funding deal was reached with Google in August 2024. A similar scheme is being considered in Illinois, while in Maryland a digital advertising tax supports investment in schools, rather than news.
8. In Europe, cultural levies that support local content are common; France, Italy, Portugal and other countries have imposed financial obligations on streaming services. In Denmark, for example, a new levy on audiovisual media service providers is based on annual streaming turnover, with a 2% basic rate and 3% surcharge for those investing less than 5% of Danish revenues in Danish content.
9. A different approach is evident in the examples of more general digital services taxes. These schemes tax gross revenue or revenue/profits from certain activities. Canada, the UK, Taiwan, Kenya and Columbia, for example, all have variations of these schemes. Some countries have indicated they will repeal their digital services tax if a multilateral agreement is reached through the OECD.

10. If designing a levy for the Australian environment, our own policy-makers will need to take account of the following aspects: alignment (whether it is designed to support a purpose in a similar way to the Telecommunications Industry Levy); flexibility (crafting a regulatory approach that could allow for future adjustment); distribution (deciding who will be the recipient of the funds); independence (creating an arms-length arrangement for administering the scheme); and evaluation (demonstrating how a levy meets its objectives). This may require a package of measures in which, for example, a new levy sits alongside the News Media Bargaining Code, operating as an alternative for news providers unable to strike agreements directly with digital platforms.

## Visibility and discoverability

11. As noted above, the policy problem to be solved is how trusted news sources can remain present, visible, accessible and discoverable on major digital platforms - particularly social media and search engines.
12. Among the approaches adopted elsewhere, concepts of “must-carry” for identified content or services are well established in broadcasting and telecommunications, with longstanding obligations in many countries for cable channels to carry free-to-air or other identified public interest services.
13. In Australia, while the telecommunications universal service obligation combines a must-carry element with a levy, the other example cited above – drama expenditure obligations on pay TV – does not because the obligation is complete when expenditure is made. In contrast, free-to-air broadcasters have transmission quotas for Australian content and local (regional) news.
14. More recently, a must-carry style prominence framework was implemented in 2024 with the aim of ensuring that Australian audiences can easily find and access the terrestrial and broadcast video-on-demand services of Australian free-to-air television broadcasters. The UK also passed legislation in 2024 that extends longstanding linear television and radio public service broadcasting must-carry requirements to online services. Similar rules were made by the EU in 2020.
15. While these obligations concern the prominence of broadcaster services on certain devices used to access television and radio, the concept of prominence has also been extended to digital platforms, including online video-sharing services and social media, as well as streaming services. This can involve obligations that certain content “must be discoverable” and even “must not be discriminated against”. The new Canadian rules for streaming services are one example (requiring streamers to promote and recommend Canadian content) while the Audiovisual Media Services Directive provides the basis for similar schemes in the EU. Its provisions have been transposed into member state rules in France, for example, where there are now online prominence obligations relating to “general interest services” of French public service broadcasters and others.
16. Germany has even more extensive obligations that protect local culture and the maintenance of journalistic standards. The scheme includes rules relating to “findability” and the operation of algorithms. There are prohibitions on “directly or indirectly unduly hindering” access to these platforms and on treating content differently in terms of “discoverability, in particular the sorting, arrangement, or presentation in user interfaces, without objectively justified grounds”.
17. Regulation dealing more generally with the online environment has also included protections for news and journalism. The UK *Online Safety Act* includes duties to protect news publisher content and to protect journalistic content. One of these provisions is described as a “temporary must-carry rule”, requiring the platform to not remove certain news content until the recognised news provider which published it has the chance to make representations about the proposed take down or ban. Similarly, the *European Media Freedom Act* gives “media service providers” protection against unjustified or arbitrary online content removal by very large online platforms. Both provide for fast-track resolution of news provider complaints.
18. Other developments can be seen in Indonesia as well as California, and here in Australia the News Media Bargaining Code includes provisions that require platforms to develop a proposal to recognise original news content.
19. Finally, there are provisions in the *Digital Services Act* in the EU around how large platforms and search engines manage risks and deal with certain types of content. These may have the effect of requiring them to apply their algorithms and recommender systems to prioritise trusted news content and minimise disinformation. It is expected that specific provisions on disinformation will be introduced by way of conversion of the existing voluntary code of practice – which includes reference to risk mitigation measures such as “designing recommender systems so as to improve the prominence of authoritative information and reduce the prominence of disinformation” – into a code of conduct under Article 45 of the Act. A provision in the current *Australian Code of Practice on Disinformation and Misinformation* refers to “prioritising credible and trusted news sources that are subject to a published editorial code”. A provision of this type could have wider application if a Bill before the Australian parliament (that

would likely result in the replacement of the voluntary, self-regulatory code with a mandatory, co-regulatory code) becomes law. There are also provisions around algorithms and transparency in competition legislation in the EU and Japan which may affect online media presence.

20. The analysis of this patchwork of rules and schemes suggests that different elements might need to work together. For example, a must-carry provision without related algorithm rules around search and recommender systems could result in legitimate media content being present on a platform but deprioritised behind less reliable or even malicious sources.

## Potential Australian Framework

Having regard to the range of approaches considered in this paper, a potential Australian framework could include the following elements.

**Financial sustainability** could be supported through a levy with the following elements:

- Levied broadly on defined online platforms that receive digital advertising revenue above a specified threshold.
- Applied through a new content licence for - or authorisation of - service providers that operate a specified type of digital platform, with the levy imposed on this category of service provider.
- Supplemented by a form of tax credit system for news producing organisations for the employment of journalists or journalist training.
- Available as grants to recognised/defined news providers which meet professional standards.
- Managed through an independent special purpose organisation with defined objectives and criteria, such as supporting regional news, diverse independent publishers or supporting journalism training and employment.
- Accountable through reporting to the regulator – with the ACMA as the likely regulator – on the use of funds received, supporting evaluation of the levy’s effectiveness.

**Media presence** could be supported through:

- Obligations on digital platforms that host or enable search, sharing or recommendation of news.
- Rights and exemptions for defined media providers (likely using the same definition as for financial sustainability).
- Protections modelled on EU and UK provisions and existing Australian legislation, which may include:
  - Notification by platforms of takedown of journalistic content and process for swift review with a fast-track complaints process for media content.
  - Strengthened provisions for prioritisation of recognised news content to counter misinformation and disinformation, for example:
    - building on the intent of Code 5.9K of the existing Australian DIGI Code, or
    - introducing rights for recognised public interest media providers, akin to those in sections 17, 18 and 19 of the UK *Online Safety Act*.
 If sufficiently strengthened, this could have the effect of preventing wholesale takedown of news services from digital platforms; alternatively, there could be exemption from takedown of certain types of news content which are subject to recognised codes.
  - Strengthened obligations and transparency around discoverability, recommender systems and algorithms.
  - Requirements on digital platforms to have a registered address in Australia.

Looking to local and international precedents, this may involve some form of co-regulatory approach based on systems and frameworks with monitoring and enforcement by the regulator.

- The **News Media Bargaining Code** could be retained, with some modification, as an option for digital platforms (potentially exempting them from the levy depending on extent of participation).
- **A package of reforms** could be linked around policy for supporting media sustainability; this could include must-carry/must-find/must-not-discriminate alongside support measures such as levies, and tax credits.



# INTRODUCTION

The question of how to maintain a sustainable Australian news market in the face of increasing dominance of global digital platforms has been a pivotal policy challenge of the last decade.

Australia's News Media Bargaining Code<sup>1</sup> was an innovative model when implemented in 2021 as a policy response to these issues. The scheme provides a stepped framework for eligible news organisations that have registered with the Australian Communications and Media Authority (the ACMA) to negotiate payment agreements for digital news content with certain digital platforms. If needed, the Treasurer has the power to designate platforms and impose mandatory requirements on them.

As the first cycle of voluntary agreements with Google and Meta was concluding, Meta announced its intention not to renew its agreements and to “deprecate” its Facebook News tab in Australia,<sup>2</sup> resulting in the Government considering designation. One of the complexities of this decision is the concern that, if designated, Meta could remove itself from the News Media Bargaining Code framework by withdrawing news from its Australian platforms.<sup>3</sup> During 2024, the Australian Government has considered other regulatory measures to support the presence of news on digital platforms and the sustainability of the Australian news market,<sup>4</sup> as has the Parliament's Joint Select Committee on Social Media and Australian Society (Social Media Inquiry).<sup>5</sup>

As news markets globally face challenges to their sustainability, there are efforts across many countries to find new regulatory responses to issues arising from the impact and influence of large digital platforms and to support the ongoing production of quality news. Facing new forms of regulation, large digital platforms actively engaged with governments, including through negotiation and litigation. The landscape is dynamic, with a diversity of solutions being tested in different jurisdictions.

The Centre for Media Transition has contributed to research and policy discussion on digital platform regulation since 2018 including around the News Media Bargaining Code<sup>6</sup> and alternative mechanisms.<sup>7</sup> This paper, which is current as at early November 2024, examines comparable local and international regulatory approaches which may provide a model for how to address issues facing Australian news. It considers, in turn:

1. Policy context: The current landscape and problems to be solved, including recent reviews of the news media sector and issues identified with current regulation;
2. Financial sustainability of news media in the digital environment: Local and international approaches to industry sustainability, with a focus on levies;
3. Visibility and discoverability of news on digital platforms: Local and international approaches to maintaining the presence of news and trusted information on digital platforms;
4. Where to from here: Take-outs from local and international experience, and elements that might be part of a future regulatory model.

The paper includes analysis and tables summarising some key design elements from those precedents. Its purpose is not to advocate for any particular regulatory model, but to consider aspects which could be viable in the Australian context.

<sup>1</sup> The News Media and Digital Platforms Bargaining Code (referred to in this report as “the News Media Bargaining Code”) was inserted into the *Competition and Consumer Act 2010* (Cth) as a new Part IVBA. For information on the Bill and parliamentary debate, see: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6652](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6652).

<sup>2</sup> Meta, “An Update on Facebook News” (29 February 2024) <https://about.fb.com/news/2024/02/update-on-facebook-news-us-australia/>.

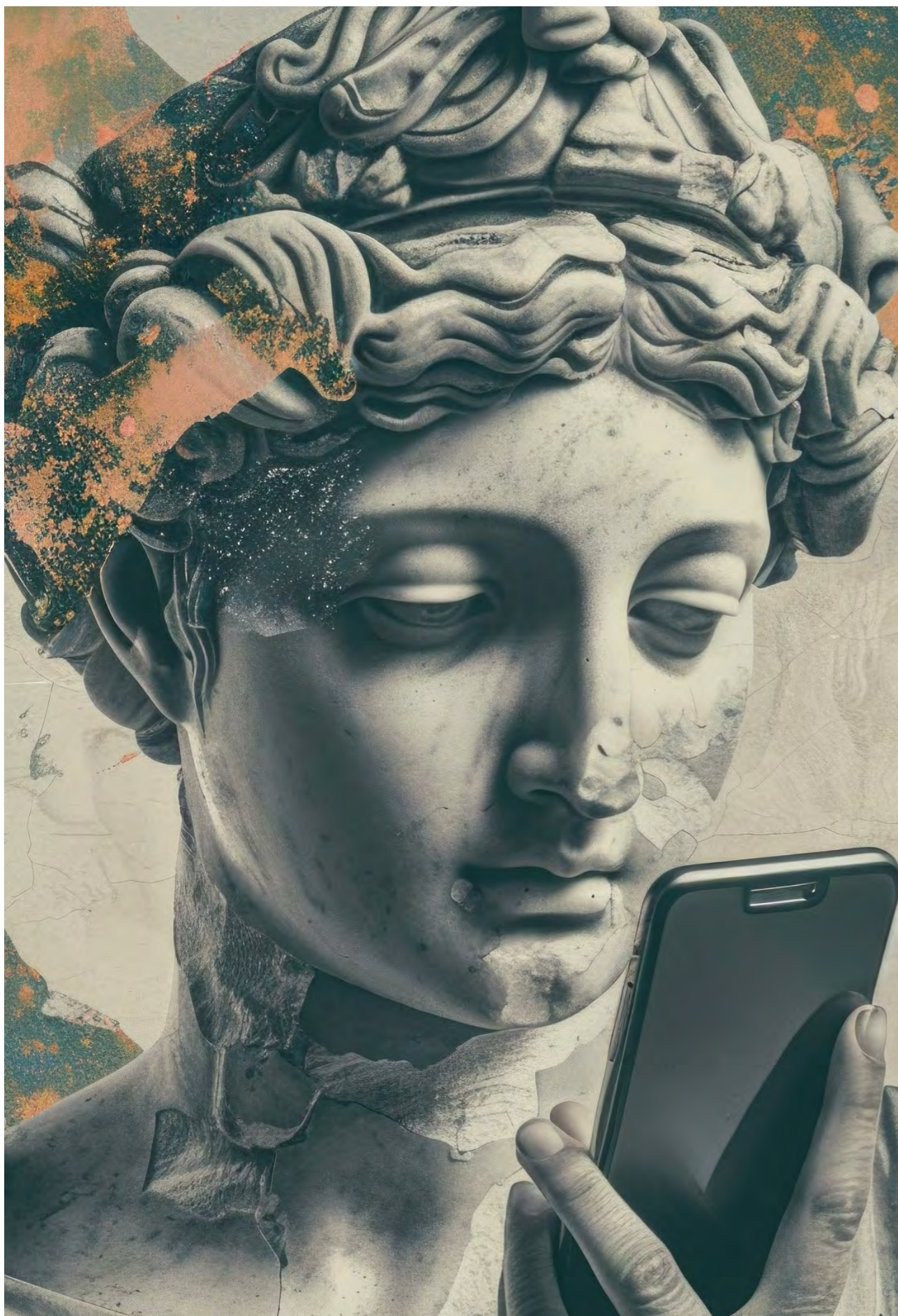
<sup>3</sup> In response to a question from the Chair of the Joint Select Committee on Social Media and Australian Society about whether Meta would “pull all news from your platform” if designated under the News Media Bargaining Code, Meta representative, Mia Garlick, stated: “All options are on the table”. Hansard (28 June 2024) 2 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Public\\_Hearings](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Public_Hearings).

<sup>4</sup> See, eg, Karp, P. & McLeod, C., “Social Media Companies Shouldn't ‘Ride Free’ on the Backs of Traditional Media, Albanese Says” *Guardian Australia* (8 August 2024) <https://www.theguardian.com/technology/article/2024/aug/08/facebook-google-news-media-deals-australia>.

<sup>5</sup> Parliament of Australia Joint Select Committee on Social Media and Australian Society [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media)

<sup>6</sup> See, eg, Wilding, D., Fray, P., Molitorisz, S. & McKewon, E., *The Impact of Digital Platforms on News and Journalistic Content* (Centre for Media Transition, University of Technology Sydney, 2018) <https://www.uts.edu.au/research/centre-media-transition/projects-and-research/impact-digital-platforms-news-and-journalistic-content>.

<sup>7</sup> See, eg, CMT submissions to the Australian Competition and Consumer Commission (ACCC) on its *Concepts Paper for the Mandatory News Media Bargaining Code* (June 2019) and on the Exposure Draft for the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (August 2020) <https://www.uts.edu.au/research/centre-media-transition/centre-contributions-policy>.



# 1. POLICY CONTEXT

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Changes in patterns of news consumption and media business models are well documented, including in recent trend research from the ACMA<sup>8</sup> and in research published by the University of Canberra<sup>9</sup> which found that 49% of Australians now use social media to access news, a 4% increase on 2023. Sixty per cent of Gen Z rely on social media as their main news source, a significant increase of 17 percentage points from 2023. It is now essential for digital news publishers to maintain a presence on digital platforms, as they rely on them for referrals.<sup>10</sup>

While they host news, digital platforms are not themselves news producers but have significantly diverted advertising revenue from the media sector, challenging its ability to fund journalism. The algorithms and recommender systems used by the digital platforms also have a significant impact on the visibility of news and, related to this, the viability of the organisations providing it.

In this context, the Australian government has been reviewing the effectiveness of various interventions around the news market and digital media. Since the introduction of the News Media Bargaining Code, the Government has:

- reviewed the News Media Bargaining Code;<sup>11</sup>
- considered whether the Government should exercise powers to designate Meta, including through ACCC stakeholder consultations;
- developed and adopted the ACMA's new Media Diversity Measurement Framework<sup>12</sup> as the evidence base for policy making around news;
- consulted on the Government's News Media Assistance Program (News MAP)<sup>13</sup> in February 2024, with its report yet to be issued; and
- introduced legislation proposing formalised regulation of mis- and disinformation on digital platforms in September

<sup>8</sup> Australian Communications and Media Authority (ACMA), *Communications and Media in Australia: How We Access News* (February 2024) <https://www.acma.gov.au/publications/2024-02/report/communications-and-media-australia-how-we-access-news>.

<sup>9</sup> Park, S., Fisher, C., McGuinness, K., Lee, J., McCallum K., Cair, X., Chatskin, M., Mardjianto, L. & Yao, P. *Digital News Report: Australia 2024* (News & Media Research Centre, University of Canberra, 2024) <https://www.canberra.edu.au/research/faculty-research-centres/nmrc/digital-news-report-australia>.

<sup>10</sup> The submission from the Digital Publishers Alliance to the Joint Select Committee on Social Media and Australian Society (Submission no 39, p 2) referred to a March 2024 member survey indicating 18% of independent publishers' traffic comes from Facebook referrals, ranging from 0-50%, although they believed this had declined due to changes in the Facebook algorithm.

<sup>11</sup> Australian Government (Treasury), *News Media and Digital Platforms Mandatory Bargaining Code: The Code's First Year of Operation* (November 2022) <https://treasury.gov.au/review/news-media-digital-platforms-mandatory-bargaining-code>.

<sup>12</sup> ACMA, *Media Diversity Measurement Framework* (December 2023) <https://www.acma.gov.au/media-diversity-measurement-framework>.

<sup>13</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA), *News Media Assistance Program: Consultation Paper* (December 2023) <https://www.infrastructure.gov.au/media-communications-arts/news-map>.

2024, following consultations around an August 2023 exposure draft.<sup>14</sup>

The Parliament's Social Media Inquiry began in May 2024<sup>15</sup> with its final report due 18 November 2024. Its Terms of Reference include "the decision of Meta to abandon deals under the News Media Bargaining Code" and "the important role of Australian journalism, news and public interest media in countering mis- and disinformation on digital platforms."<sup>16</sup> As will be apparent from later consideration of regulatory mechanisms, the two issues are closely intertwined. The Social Media Inquiry's October 2024 interim report<sup>17</sup> made a number of recommendations. The most relevant to this paper include:

- exploring alternative revenue mechanisms such as a digital platform levy to supplement the News Media Bargaining Code, including protocols to ensure the sustainability of small, independent and digital-only publishers and those operating in underserved communities and rural regional and remote areas, and using this revenue to fund an independent oversight body;
- investigating the viability/effectiveness of "must carry" requirements for Australian news content;
- supporting mis- and disinformation legislation; and
- adopting European Union-style transparency requirements around recommender systems and mandatory access to platform data and algorithms, as well as measures for digital platforms to provide notice and rationale for algorithm changes.

Recommendations also include establishing a Digital Affairs Ministry with a broad remit, a Digital Media Competency Fund and a review of the effectiveness of the industry co-regulation model for digital platforms. The Coalition members' dissenting report supports the efficacy of the News Media Bargaining Code and objects to the Government's proposed mis- and disinformation legislation, while the additional Greens' report calls for a digital services tax, prioritisation of media diversity reforms and an overhaul of the regulator.

Concerns about the removal of news from Meta platforms have several precedents:

- In February 2021, in response to the then proposed News Media Bargaining Code, Facebook prevented Australian users from viewing or sharing Australian or international news content on Facebook or content from Australian and international news pages.<sup>18</sup> It restored access "following constructive discussions" with the then Treasurer and Minister for Communications.
- Since mid-2023, in response to Canada's *Online News Act 2023*<sup>19</sup> which includes a bargaining scheme, Meta has prevented Canadian users from accessing news on its platforms.<sup>20</sup> This has had a damaging impact on local news and particularly smaller publishers,<sup>21 22</sup> coupled with concerns about a potential rise in mis- and disinformation on Meta's platforms.<sup>23</sup> At the same time, the removal of news appears not to have negatively affected Meta's own business.

<sup>14</sup> Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2024 [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bid=r7239](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r7239).

<sup>15</sup> Parliament of Australia Joint Select Committee on Social Media and Australian Society [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media).

<sup>16</sup> The Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2024 was referred to the Senate Standing Committees on Environment and Communications, to report by 25 November 2024. [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/MisandDisinfobill](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/MisandDisinfobill).

<sup>17</sup> Joint Select Committee on Social Media and Australian Society, *Second Interim Report: Digital Platforms and the Traditional News Media* (October 2024). Recommendations appear on pp ix-xi.

<sup>18</sup> Facebook, "Changes to Sharing and Viewing News on Facebook" (17 February 2021) <https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia/>. Facebook restored access on 21 February 2021. The action also had the effect of taking down some emergency, cultural and government websites and also affected overseas access to Australian websites.

<sup>19</sup> *Online News Act 2023* (Canada) SC 2023 c23 (Assented to 22 June 2023) [https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2023\\_23/](https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2023_23/).

<sup>20</sup> Meta, "Changes to News Availability on Our Platforms in Canada" (1 June 2023) <https://about.fb.com/news/2023/06/changes-to-news-availability-on-our-platforms-in-canada/>.

<sup>21</sup> Parker, S., Park, S., Pehlivan, Z., Abrahams, A., Desblancs, M., Owen, T., Philips, J., Bridgman, A. (Media Ecosystem Observatory, McGill University), "When Journalism is Turned Off: Preliminary Findings on the Effects of Meta's News Ban in Canada" *SocArXiv Papers* (April 2024) <https://osf.io/preprints/socarxiv/eqn45>, <https://doi.org/10.31235/osf.io/eqn45>.

<sup>22</sup> Parker, S., Ross, C., Pehlivan, Z., Bridgman, A., (Media Ecosystem Observatory, McGill University), "A Year On, Local Canadian News Has Lost 58% of Online Engagement; National News Lost 24%" *Old News, New Reality: A Year of Meta's News Ban in Canada* (August 2024) <https://meo.ca/briefs>.

<sup>23</sup> the Discourse, "Annoying as Hell: Misinformation Spreads in Facebook News Void" (7 September 2023) <https://thediscourse.ca/cowichan-valley/annoying-as-hell-misinformation-spreads-in-facebook-news-void>.

- There was a similar experience in Spain in 2015-2021 after Google and Facebook removed news services in response to a copyright fee based on news links.<sup>24</sup>



As will be apparent from this paper, Australia is far from unique in grappling with these issues and we can look to other jurisdictions or comparable regulatory frameworks for ideas on how to address them.

## 1.1 Reviewing the News Media Bargaining Code?

Given the challenges facing some news bargaining-style arrangements (eg in Australia and Canada) the focus of this paper is not on re-examining the operation of bargaining codes, though elements may be relevant when considering alternatives and the current scheme may continue to operate as part of a package, alongside newer options.

While formal reviews of the News Media Bargaining Code have identified successes, some parties, including affected media organisations, have raised significant concerns, which may also be relevant when considering the design of alternative regulatory interventions. These include the following:

- Digital platforms decide which news organisations they will negotiate with, which has the effect of a gatekeeper role preventing some media from benefiting from the scheme.<sup>25</sup>
- The \$150,000 revenue threshold prevents smaller publishers, many of whom offer local and regional news, from accessing the scheme.<sup>26</sup>
- The scheme may help to consolidate the position of the existing dominant news businesses in an already concentrated market.<sup>27</sup>
- Media who meet the income threshold have still been unable to negotiate with the platforms under the voluntary part of the process, despite being registered by the ACMA under the scheme.<sup>28</sup>
- The scheme does not provide transparency about where funds are applied by recipients.
- The framework only works if the big platforms continue to host news, hence the dilemma presented by the anticipated withdrawal at Meta.

<sup>24</sup> See, eg, Majo-Vásquez, S., Cardenal, A.S., González-Bailón, S., "Digital News Consumption and Copyright Intervention: Evidence from Spain before and after the 2015 'Link Tax'" *Academic Journal of Computer-Mediated Communication* (2017) 22(4) 208-301 <https://doi.org/10.1111/jcc4.12196>. The "link tax" was removed in 2021.

<sup>25</sup> See: submissions to the Australian Parliament Joint Select Committee on Social Media and Australian Society (Social Media Inquiry) [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Submissions). Broadsheet Media's submission (no 48, p 2) noted it was registered with the ACMA for the NMBC but was unsuccessful in negotiating deals with either Meta or Google and "only seven of 60 publishers represented by the Digital Publishers Alliance received funding". Business News Australia (Submission no 5, p 2) said it missed out on Google funding even though registered with ACMA under NMBC criteria, as did the Public Interest Publishers Alliance (Submission no 133, p1), with 24 members registered to collectively bargain. Broadsheet Media estimated it would lose up to 52% of revenue "if Facebook blocks news."

<sup>26</sup> Local and Independent News Association, Submission no 44 to the Social Media Inquiry (June 2024) 4 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Submissions).

<sup>27</sup> Flew, T. "A News Levy on Big Tech Could Save Australian Journalism" *360info* (10 October 2024) <https://360info.org/a-news-levy-on-big-tech-could-save-australian-journalism/>.

<sup>28</sup> For example, the following submissions to the Social Media Inquiry: SBS (Submission no 45), 7; Broadsheet Media (Submission no 48), 2; Digital Publishers Alliance (Submission no 39) p 3; Business News Australia (Submission no 5), 2; and the Public Interest Publishers Alliance (Submission no 133), 1. [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/).

## 1.2 What are the policy problems we are (still) trying to solve?



Public access to reliable and quality news to inform decision making and civic participation<sup>29</sup> is regarded as a cornerstone of the democratic process and is at the heart of interventions designed to ensure the ongoing survival of the news sector. In the digital environment, much policy discussion has focused on the financial sustainability of news producers to be able to provide news to Australian audiences - especially local, regional and remote news and news for diverse communities. Alongside this, and in light of the trend towards audiences getting their news from digital platforms, an increasingly important aspect is the visibility or discoverability of trustworthy news sources on those platforms, which also supports the financial viability of news organisations.

While revenue from news content directly translates to the ability to continue news production, news visibility also serves a public dimension: trusted news that is easy to find (and even given prominence over less trusted sources) becomes critical in an environment of growing mis- and disinformation<sup>30</sup> which undermines civic engagement. There is a large and growing body of work on the impact of this trend<sup>31</sup> and it was a central focus of the Social Media Inquiry.<sup>32</sup>

For these reasons, public policy needs to address not only news funding but public interest news visibility on digital platforms; this involves having a presence as well as being discoverable in a cluttered information environment. While these outcomes are also driven by user choice, the platforms' own algorithm design decisions have the effect of prioritising or deprioritising different types of content to support their business models.<sup>33</sup> With digital platform revenue driven by clicks and user engagement, financial interests and the public interest may not always be aligned.

Media and other organisations have also raised concerns about the problem and impact of opaque digital platform algorithms in various forums on their viability, including in the News Media Bargaining Code reviews, the ACCC Digital Platforms Inquiry<sup>34</sup> and the Social Media Inquiry.

In several submissions to the Social Media Inquiry, media organisations report significant impacts to their online traffic as a result of changes to social platform algorithms<sup>35</sup> and the Committee's October 2024 report recommended that the

<sup>29</sup> There are different ways of defining "public interest news" and definitions appear in various interventions in different jurisdictions usually with reference to compliance with accepted industry or ethical codes. For the purpose of this discussion, concepts like "quality news" or "trusted news source" or "recognised news source" are used interchangeably with "public interest news" and comparable concepts.

<sup>30</sup> Molitorisz, S., "A Legal Cure for News Choice Overload: Regulating Algorithms and AI with 'Light Patterns' to Foster Autonomy and Democracy" *Policy & Internet* (2024) 16 (3) 643 <https://onlinelibrary.wiley.com/doi/10.1002/poi.3412>.

<sup>31</sup> See, eg, World Economic Forum, *Global Risks Report 2024* <https://www.weforum.org/publications/global-risks-report-2024/> ranks mis-/disinformation as No#1 short term risk. See also: Purpose, *Online Challenges for Election Integrity: 5 Case Studies from the 2023 NSW Election* (2023) <https://www.purpose.com/nsw-election-2023/>.

<sup>32</sup> Joint Select Committee on Social Media and Australian Society, *Second Interim Report: Digital Platforms and the Traditional News Media* (October 2024) 19: "In addition, while there was near universal agreement about the importance of public interest journalism as a bulwark against mis- and disinformation, questions were raised about its ability to fulfil this function in the face of falling advertising revenues, declining trust in journalism, increasing news avoidance and the sheer volume of misleading and false material circulating online." [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Second\\_interim\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Second_interim_report).

<sup>33</sup> "For instance, big digital platforms can exploit their informative advantage to self-preference their products against their small business rivals; or degradate the prominence of their competitors' offers by simply manipulating the algorithms managing rankings, or they may terminate traders' service contracts without stating any justifications." Di Porto, F. & Zupetta, M., "Co-Regulating Algorithmic Disclosure for Digital Platforms" *Policy and Society* (2021) 40(2) 272-292 <https://academic.oup.com/policyandsociety/article/40/2/272/6509319>.

<sup>34</sup> ACCC, *Digital Platform Services Inquiry 2020-2025* <https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25>.

<sup>35</sup> For example, SBS (submission no 45, p 5) noted "the de-prioritisation of news content and especially news content produced by organisations that do not have a commercial agreement with Meta, including SBS and NITV... in July 2024, 36% of SBSNews third party video views came from FB, this fell to 19% in May 2024, or nearly halved during the past 12 months". ABC's submission (no 65 at p 6) states: "Instagram algorithms were changed to deprioritise content it identified as political or related to politics. Such measures have meant that, across the major platforms, aggregate Facebook traffic to news and media properties has declined by 48%, with traffic from X/Twitter down 27% and Instagram by 10%".

Government "examine options to respond to the use of algorithms and recommender systems to deprecate news by digital platforms with significant power".<sup>36</sup>

## 1.3 What other types of policy solutions could be appropriate?

Having regard to the dual issues of financial viability and visibility of news media on digital platforms, it is possible to find precedents for how similar and comparable issues around news have been addressed here and globally.

If the News Media Bargaining Code fails to comprehensively address these issues, for reasons outlined below, two distinct but related approaches that merit serious consideration in the Australian context are:<sup>37</sup>

- measures to fund financial sustainability of news through industry levies or similar measures;
- provisions to ensure continued presence and accessibility for news content or services such as "must-carry", "must-be-discoverable" or "must not deprioritise" provisions.

The following sections consider how comparable concepts of levies/financial investment and must-carry/must-find and similar have been translated into regulation both in Australia and internationally, and how they might be adapted for solving problems around local access to public interest news. The solutions may involve applying existing interventions to new issues or designing novel approaches.

<sup>36</sup> Joint Select Committee on Social Media and Australian Society, *Second Interim Report: Digital Platforms and the Traditional News Media* (October 2024) Recommendation 10, p xi [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Second\\_interim\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Second_interim_report).

<sup>37</sup> This paper does not address government funding. The News Media Assistance Program (News MAP) has provided some funding "to establish a robust evidence base and clear principles to guide policies that support public interest journalism and safeguard media diversity." See the Minister's media release in which she announced urgent funding to help smaller regional and suburban publishers to "keep their doors open": Rowland, M., "Keeping Australian Communities Informed" (21 October 2024) <https://minister.infrastructure.gov.au/rowland/media-release/keeping-australian-communities-informed>. Other approaches, including those that are copyright-based, have been considered but are not covered in this paper. See, for example: Moon Sehat, C., Mitchell, A., Jens, S., "Enabling a Sustainable News Environment - A Framework for Media Finance Legislation" (Center for News Technology and Innovation, 20 September 2024) <https://innovating.news/article/enabling-a-sustainable-news-environment-a-framework-for-media-finance-legislation/>.





## 2. FINANCIAL STABILITY FOR NEWS MEDIA: INDUSTRY LEVIES

The concept of an industry levy to support public interest news has been considered in various policy forums of recent years and most recently as the large digital platforms rethink news payments under existing news bargaining frameworks.<sup>38 39</sup> For example, in the Social Media Inquiry, a number of submissions advocated for diverse types of levies.

- The Public Interest Journalism Initiative (PIJI) called for a “digital advertising levy” to be used for a variety of applications including “the funding of innovation; start-up capital or loans; original public interest content; collaborative, investigative journalism; or hyper local content or community-led cooperative models in markets that may not be commercially viable.”<sup>40</sup>
- University of Sydney Media and Communications recommended an online advertising levy with revenues “earmarked towards the support of news production, with a particular focus on public interest journalism and news provision to underserved communities in rural, regional and remote areas.” Models included a digital services tax or Public Interest Journalism Levy paid by Content Service Providers which meet a revenue threshold through a new form of “Content Licence” (akin to the Telecommunications Industry Levy/Universal Service Obligation scheme).<sup>41</sup>
- QUT Digital Media Research Centre proposed a “corporate tax” generated from very large online platforms or “bolstered by an additional Windfall Advertising Revenue tax” to support “public interest journalism by both public interest and corporate media sectors.”<sup>42</sup>

### 2.1 Concept of industry levies in Australia

Industry levies are surprisingly common in Australia. Research for a 2023 report by the Productivity Commission<sup>43</sup> shows there has been a proliferation of these narrowly applied sector-specific taxes, with four in 1960, 26 in 1980 and 248 in 2023. The United Kingdom is listed in the research as the second-biggest user of levies as a policy instrument “although with only a double-digit number of levies.”

<sup>38</sup> Buckingham Jones, S., “Google Wants to Slash What it Pays News Outlets as Levy Calls Grow” *Australian Financial Review* (25 August 2024) <https://www.afr.com/companies/media-and-marketing/google-wants-to-slash-what-it-pays-news-outlets-as-levy-calls-grow-20240823-p5k4vc>.

<sup>39</sup> Peter Greste has suggested a Medicare-style levy on the public, recognising a collective societal benefit in “good journalism that’s free from commercial or political pressure.” Greste, P., “How Will Meta’s Refusal to Pay for News Affect Australian Journalism – And Our Democracy?” *The Conversation* (2 March 2024) <https://theconversation.com/how-will-metas-refusal-to-pay-for-news-affect-australian-journalism-and-our-democracy-224872>.

<sup>40</sup> Submission no 158, p 7. PIJI has also done work around a Public Interest Journalism Tax Rebate, also referenced in its submission.

<sup>41</sup> Submission no 154, p 17. See also: Nicholls, R., McTernan, C., Fitzgerald, S., Flew, T., “Google is Worth More in Australia Than Major News Outlets. Here’s How it Could Better Fund Journalism” *The Conversation* (17 September 2024) <https://theconversation.com/google-is-worth-more-in-australia-than-major-news-outlets-heres-how-it-could-better-fund-journalism-239093>. An alternative would be a mechanism for registration and authorisation of service providers without the need to create an additional licence category. The consultation conducted by the Australian Government in late 2023 on changes to arrangements for carriage service providers offers an explanation of different approaches for that industry. See: DITRDCA, *Registration or Licensing Scheme for Carriage Service Providers: Discussion Paper* (September 2023) <https://www.infrastructure.gov.au/have-your-say/discussion-paper-carriage-service-provider-csp-registration-or-licensing-scheme-telecommunications>.

<sup>42</sup> Submission no 165, p 13.

<sup>43</sup> Productivity Commission, *Towards Levyathan? Industry levies in Australia* (December 2023) <https://www.pc.gov.au/research/completed/industry-levies>.

While that research suggests there is no clear legal distinction between general taxes and levies, it notes the terminology of “levy” suggests a degree of “requited-ness” – that is, the connection between the sector or area being levied and the purpose to which the revenue from it is applied. However, “As industry levies have evolved, their scope has expanded and new levies are progressively becoming more unrequited” and “the levy does not always have to involve a benefit to the levy-payer.”<sup>44</sup>

## 2.2 Comparable examples of Australian levies or investment requirements

Despite the adoption of various types of digital taxes in other countries in recent years and some government consideration of this, there are currently no industry-specific levies or taxes on digital platforms in Australia. However, useful comparators can be found in and around the Australian media, communications and cultural sectors.

The Telecommunications Industry Levy (TIL) under the *Telecommunication Industry Levy Act 2012* (Cth) is administered by the ACMA under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth). Paid by telecommunications carriers with more than \$25 million eligible annual revenue, TIL funds go towards providing standard telephone services, payphones and prescribed carriage services that would otherwise not be cost effective to provide, as defined under the Universal Service Obligation (USO). Telstra is designated as the single Universal Service Provider to deliver the specified services. Similarly, the Regional Broadband Scheme under the *Telecommunications (Regional Broadband Scheme) Charge Act 2020* (Cth) subsidises the provision of essential broadband services to regional, rural and remote Australians. This approach reflects the United States’ Universal Service Fund under the US Telecommunications Act 1996, a factor ensuring it is not inconsistent with Australia/US trade agreement obligations.

Although not levies, there are direct investment requirements on licensees under the *Broadcasting Services Act 1992* (Cth) (BSA) to support the production of Australian content. For example, the New Eligible Drama Expenditure (NEDE) scheme requires subscription television licensees that broadcast drama channels to invest 10% of their total expenditure for those channels in new Australian drama programs. The requirement also applies to channel providers that provide drama channels.<sup>45</sup> Commercial free-to-air broadcasters also voluntarily provide the ACMA with program expenditure data<sup>46</sup> although their obligations in the BSA are for content hours, not financial quotas as such.

In the online space, some video-on-demand services operating in Australia have voluntarily reported their expenditure on local content to the ACMA since 2019-20. *Revive: A National Cultural Policy* included as an action that requirements for Australian screen content on streaming platforms be introduced in the third quarter of 2023, commencing no later than 1 July 2024, “to ensure continued access to local stories and content.”<sup>47</sup> This is yet to be legislated and the timeline has not been updated. There was also consultation in 2022 around the previous Government’s proposal for a two-tiered Streaming Services Reporting and Investment Scheme,<sup>48</sup> which provided that if a Tier 1 service invested less than 5% of its gross Australian revenue, the Minister could designate it as Tier 2, triggering a formal investment requirements and enforcement regime, with the percentage of investment to be determined at time of designation rather than ex ante. It is not clear to what extent this is the model for the *Revive* action.

Finally, the 2020 Media Reform Green Paper<sup>49</sup> contemplated an investment scheme to support journalism, setting up two trusts with injection of funds from spectrum sale proceeds. One was a “Public Interest Newsgathering Trust”, with a new entity to manage a capital fund to support regional media services via competitive grants for public interest journalism, and a priority on employing journalists and providing opportunities for cadets especially in court reporting and investigative journalism. Though not adopted, these concepts may still be relevant to the design of a digital media levy.

<sup>44</sup> Ibid, 10.

<sup>45</sup> ACMA, “Subscription TV Australian Drama Expenditure Results” (December 2023) <https://www.acma.gov.au/articles/2023-12/subscription-tv-australian-drama-expenditure-results-2022-23#:~:text=Under%20the%20NEDE%20rules%2C%20subscription,subscription%20TV%20licensees%20in%20Australia>.

<sup>46</sup> ACMA “Spending on Commercial TV Programs Report for the 2022-23 Financial Year” (2024) <https://www.acma.gov.au/commercial-tv-program-expenditure>.

<sup>47</sup> Australian Government (DITRDCA), *Revive: A Place for Every Story, A Story for Every Place* (January 2023), 8 <https://www.arts.gov.au/publications/national-cultural-policy-revive-place-every-story-story-every-place>.

<sup>48</sup> Australian Government (DITRDCA), “Have Your Say on the Streaming Services Reporting and Investment Scheme” (February 2022) <https://www.infrastructure.gov.au/department/media/news/have-your-say-streaming-services-reporting-and-investment-scheme>.

<sup>49</sup> Australian Government (DITRDCA), *Media Reform Green Paper – Modernising Television Regulation in Australia* (December 2020) 28 <https://www.infrastructure.gov.au/have-your-say/media-reform-green-paper-proposals-modernise-television-regulation-australia>.

## 2.3 Comparable examples of international levies or investment requirements

Globally, there have been a range of ways in which governments have approached taxing the digital economy,<sup>50</sup> particularly in recent years. The most relevant include:

- levies or taxes which are specifically aimed at funding of journalism or public interest news;
- cultural contribution levies or taxes which go to support cultural outcomes;
- broader based taxes on digital platforms (including digital services taxes or digital advertising taxes) which go to general revenue rather than to support a particular sector.

Each of these contains elements which may be useful to consider when designing a mechanism to support the sustainability of Australian media and journalism in the digital environment. They also demonstrate the barriers or boundaries in seeking to levy or tax different types of digital platforms.

### 2.3.1 Levies to fund news and journalism

#### Canada

The most direct example of a levy to fund news and journalism (among other purposes) is found in Canada’s *Online Streaming Act 2023*.<sup>51</sup> The regulatory framework is based on the regulator - the Canadian Radio-television and Telecommunications Commission (CRTC) - setting policy to ensure that online streaming services “make meaningful contributions to Canadian and Indigenous content”.<sup>52</sup>

The CRTC’s *Broadcasting Regulatory Policy CRTC 2024-121*,<sup>53</sup> issued on 4 June 2024, provides for online streaming services which make more than CAD25 million in annual “contributions revenue” and which are not affiliated with a Canadian broadcaster to contribute 5% of those revenues to certain funds from 1 September 2024. The 5% revenue is allocated in tranches to a range of specified recipients in cultural industries, as well as for the following news-specific purposes:

- For revenues received from *audiovisual* online streaming services, a 1.5% tranche allocated to an Independent Local News Fund;
- For revenues received from *audio* online services:
  - a 1.5% tranche goes to a new temporary fund supporting local news production by commercial radio stations outside of the designated markets;
  - a 0.5% tranche goes to the Community Radio Fund of Canada (which funds a range of initiatives including a Local Journalism Initiative).

Journalism providers who receive funds are required to attest they have spent funds on news journalists and support staff.

Although the levy is now in force,<sup>54</sup> the path ahead may not be straightforward. In July 2024, Amazon, Apple, Spotify, the Motion Picture Association-Canada (MPA-Canada), Netflix, Disney and Paramount announced legal proceedings against the Attorney General of Canada over the above regulations. At time of writing, court documents were not readily

<sup>50</sup> See examples in: KPMG, *Taxation of the Digitalized Economy* (October 2024) <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023-/digitalized-economy-taxation-developments-summary.pdf>. (This paper does not address other measures such as copyright fees or government grants.)

<sup>51</sup> *Online Streaming Act 2023* (Canada) S.C 20233, c8 [https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2023\\_8/](https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2023_8/).

<sup>52</sup> *Broadcasting Regulatory Policy CRTC 2024-121*, Para 21: “Further, for decades, traditional Canadian television and radio services have financially supported the creation of content made by and for Canadians, and have showcased that content on their services. Meanwhile, online streaming services, which have been operating in Canada for well over a decade, have not been required to contribute in similar ways.” <https://crtc.gc.ca/eng/archive/2024/2024-121.htm>

<sup>53</sup> Ibid

<sup>54</sup> An amended version of conditions of service around the contributions proposed in the above policy was implemented via CRTC Order 2024-194. CRTC, *Broadcasting Regulatory Policy CRTC 2024-121-1* and Broadcasting Order CRTC 2024-194 29 (August 2024) <https://crtc.gc.ca/eng/archive/2024/2024-121-1.htm#bml>.

available; court files indicate procedural matters were being addressed in October 2024.<sup>55</sup> However, public statements by the MPA-Canada (which represents subscriber and free-to-consumer streaming services) described the CRTC measure as “discriminatory,”<sup>56</sup> later clarifying<sup>57</sup> that the appeal is “about two things:

1. The CRTC has no authority to force global entertainment streaming services to contribute monies to support local news production;
2. The CRTC is prohibited from allowing confidential information to be disclosed to others.”

MPA-Canada says other requirements to contribute to production funds (eg Indigenous Screen Office, Black Screen Office and Canada Media Fund) “are not part of the appeal process based upon errors of law and jurisdiction”. This is interesting as it suggests that streamers have accepted obligations to contribute to screen production through the broader cultural levies, but not news.<sup>58</sup>

Though not specified in these statements, it is possible that the “discrimination” is connected to the Canada-United States-Mexico Agreement, which requires that cross-border digital services be dealt with no less favourably than Canadian services. However, if the concerns are around the news aspect of the levy, Canada’s cultural exemption<sup>59</sup> under that trade agreement could be relevant. Canada may in turn consider local news is a cultural purpose, but explanatory material for the legislation does not invoke this exemption (which would entitle the US under the above treaty to take retaliatory action).<sup>60</sup> The statements may also suggest issues around the CRTC’s jurisdiction to impose this type of measure.

While not directly related to the above, on 30 August 2024 the US Government formally made trade agreement objections<sup>61</sup> against Canada’s *Digital Services Tax* (which applies to other online services, but not streaming services). Although it has expressed concerns about the Online Streaming Act<sup>62</sup> it appears that the US has not, at time of writing, done so against this online streaming regulation.

There is further important context to the above media legislation, adding to the complexity of issues facing Canadian regulators.

The above provisions co-exist alongside news bargaining legislation and regulations<sup>63</sup> introduced in June 2023 in Canada’s *Online News Act*. Following the enactment of that legislation, Meta removed news organisations from its platforms in Canada,<sup>64</sup> with damaging impact on local news media including significant loss of revenue and traffic.<sup>65 66</sup> In contrast,

Google is keeping Canadian news on its search engine and, following CRTC consultation,<sup>67</sup> has been granted a five-year regulatory exemption<sup>68</sup> from the bargaining requirement on the basis of the Google/Canadian Journalism Collective (CJC) agreement for an annual \$100m news fund, with funding to be distributed by the CJC.<sup>69</sup> Around 1,500 Canadian publications applied to Google’s initial open call for the fund<sup>70</sup> and the CJC is also taking applications.<sup>71</sup>

While demonstrating a direct attempt to support local news through a levy on digital services as part of a package of measures,<sup>72</sup> Canada’s experience illuminates how complex and contested they may be.<sup>73</sup>

## California

Though not enacted<sup>74</sup> California lawmakers introduced two Bills in 2023 and 2024 aimed at requiring digital platforms to fund journalism, which offer distinct but related approaches.

- Journalism Preservation Act (AB886)<sup>75</sup> proposed that certain very large online platforms – defined as those exceeding 50 million US monthly users (or one billion worldwide) and US net sales or market capitalisation above USD550 billion,<sup>76</sup> and which access, aggregate or distribute news – pay an annual percentage of revenue to compensate digital journalism providers for accessing their websites which are aimed at a California audience or, as an alternative, submit to arbitration. The Bill also required fund recipients to spend at least 70% of funds received on employed news journalists and support staff (50% for those with five or fewer employees).
- Amendments to Revenue and Tax Code (SB1327)<sup>77</sup> were for a proposed 7.5% tax on digital advertising based around user data on companies with worldwide gross revenues above \$2.5 billion, funding California media outlets with a tax credit for employing journalists as well as other educational grants. Revenue, which was estimated at around \$500 million,<sup>78</sup> was to go to a State Treasury “Data Extraction Mitigation Fee Fund”, with appropriation of:
  - \$15 million for journalism fellowships (\$10 million to the University of California Berkeley *California Local News Fellowship* program and \$5 million for hiring and training journalists and media professionals from “historically underrepresented and marginalized background to support their professional growth ... strengthen newsroom and ownership diversity for ethnic and underserved communities”); and
  - remaining moneys to be used for eligible non-profit local news organisations applying for tax credits, which are administered and prioritised in line with specified criteria by the Franchise Tax Board.

AB886 was withdrawn following the announcement of a funding deal with Google on 21 August 2024.<sup>79</sup> While SB1327 passed in the California Senate in June 2024, in the context of the Google deal it is regarded as unlikely to proceed (though it does not appear to have been formally withdrawn).

<sup>55</sup> See, eg, the record for *Apple Canada Inc v Attorney General of Canada* 24-A-30 in the Court File database for the Canadian Court of Appeal which refers to a conference to consolidate various parties’ proceedings, 25 October 2024: <https://www.fca-caf.ca/en/pages/hearings/court-file-database>.

<sup>56</sup> MPA-Canada, *Motion Picture Association – Canada Files for Review of CRTC Decision to Force Global Entertainment Streaming Services to Pay for Local News* (4 July 2024) <https://www.mpa-canada.org/press/motion-picture-association-canada-files-for-review-of-crtc-decision-to-force-global-entertainment-streaming-services-to-pay-for-local-news/>.

<sup>57</sup> Lapierre, M., “Canada’s Motion Picture Association Files for Review of CRTC’s New Domestic Content Requirement” *Exclaim!* (4 July 2024) <https://exclaim.ca/film/article/motion-picture-association-canada-files-for-crtc-review-of-new-requirement-for-streaming-services-to-support-domestic-content>.

<sup>58</sup> The confidentiality issue appears to relate to reporting requirements in the above orders and is partly addressed in CRTC 2024-194.

<sup>59</sup> See explanation of cultural exemption at: Government of Canada, *Cultural Industries Summary* <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/culture.aspx?lang=eng>.

<sup>60</sup> As all the pleadings are not readily available, these comments are on the public statements and may not reflect the actual causes of action in each of the plaintiffs’ proceedings.

<sup>61</sup> Office of the United States Trade Representative, Executive Office of the President, *United States Request USMCA Dispute Settlement Consultations on Canada’s Digital Services Tax* (30 August 2024).

<sup>62</sup> Stephens, H., “Could or Would the US Retaliate Against the Online Streaming Act (C-11) Now it Is Law?” (University of Calgary, School of Public Policy) (May 2023) <https://www.policyschool.ca/wp-content/uploads/2023/05/IPT7-Communique.WouldtheUSRetaliate.pdf>.

<sup>63</sup> *Online News Act and Online News Act Application and Exemption Regulations*.

<sup>64</sup> Meta, “Changes to News Availability on Our Platforms in Canada” (1 June 2023) <https://about.fb.com/news/2023/06/changes-to-news-availability-on-our-platforms-in-canada/>.

<sup>65</sup> Parker, S., Park, S., Pehlivan, Z., Abrahams, A., Desblancs, M., Owen, T., Philips, J., Bridgman, A. (Media Ecosystem Observatory, McGill University), “When Journalism is Turned Off: Preliminary Findings on the Effects of Meta’s News Ban” *SocArXiv Papers* (April 2024) <https://osf.io/preprints/socarxiv/eqn45>, <https://doi.org/10.31235/osf.io/eqn45>.

<sup>66</sup> See also: Bruns, A., “If Meta Bans News in Australia What Will Happen? Canada’s Experience is Telling” *The Conversation* (2 July 2024) <https://theconversation.com/if-meta-bans-news-in-australia-what-will-happen-canadas-experience-is-telling-233662>.

<sup>67</sup> CRTC, *Online News Notice of Consultation CRTC 2024-143* (27 June 2024) <https://crtc.gc.ca/eng/archive/2024/2024-143.htm>. This sets out conditions to be met before exemption determination can be made.

<sup>68</sup> CRTC, *Online News Decision CRTC 2024-262* (28 October 2024) <https://crtc.gc.ca/eng/archive/2024/2024-262.htm>.

<sup>69</sup> CRTC, “CRTC Approves Google’s Application and Paves the Way for Annual \$100 million Contribution to Canadian News Organizations” (28 October 2024). See also the consultation about Google’s exemption application under the *Online News Act*: <https://crtc.gc.ca/eng/consultation/exempt.htm>. The Canadian Journalism Collective is a federally incorporated non-profit organisation created for the purposes of distributing funds allocated under the *Online News Act*. See: <https://cjc-cj.ca/en/>.

<sup>70</sup> CRTC, “Google’s Open Call Under the *Online News Act*” <https://crtc.gc.ca/eng/industr/comp.htm>. The list of news organisations is at: [https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/Open\\_Call\\_Response\\_-\\_catalog.pdf](https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/Open_Call_Response_-_catalog.pdf).

<sup>71</sup> CJC, “Apply to Share in Compensation from the Online News Act” (1 October 2024) <https://cjc-cj.ca/en/>.

<sup>72</sup> Canada also has a series of tax measures to support local and national news organisations including tax credits for Qualified Canadian Journalism Organisations’ (QCJO) salaries of employees who spent at least 75% of their time on “original written news content”, individual tax credits for news subscriptions, and charitable status for QCJOs meeting additional eligibility criteria. See: Lapowsky, I. & White J., *Rescuing Local News Through Tax Credits: A Review of Policy in the U.S. and Canada* (Chapel Hill: Center on Technology Policy, University of North Carolina) (2023) [https://techpolicy.unc.edu/wp-content/uploads/2023/06/UNC\\_Tech\\_Policy\\_Future\\_Report.pdf](https://techpolicy.unc.edu/wp-content/uploads/2023/06/UNC_Tech_Policy_Future_Report.pdf).

<sup>73</sup> Carol Christopher, L., “16 Months Later Canadian *Online News Act* Is Not What it Used to Be” *Digital Platform Initiative Blog* (International News Media Association) (10 October 2024) <https://www.inma.org/blogs/Digital-Platform-Initiative/post.cfm/16-months-later-the-canadian-online-news-act-is-not-what-it-used-to-be>.

<sup>74</sup> Wicks, B., “Assembly Member Wicks Secures Agreement with State, Major Tech Companies to Support the Work of California Journalists” (Media Release) (21 August 2024) <https://a14.asmdc.org/press-releases/20240821-assemblymember-wicks-secures-agreement-state-major-tech-companies-support>.

<sup>75</sup> See: Journalism Preservation Act 2023-24 AB-886 Assembly Bill [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240AB886](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB886).

<sup>76</sup> Unless otherwise indicated, further references to monetary amounts in section 2.3.1 are USD.

<sup>77</sup> See: California Senate Bill SB 1327 Amendments to Revenue and Taxation Code <https://legiscan.com/CA/text/SB1327/2023>.

<sup>78</sup> Sheeler, A., “California Bill Would Tax Big Tech to Create Tax Credit for News Organisations” *The Sacramento Bee* (2 May 2024) <https://www.sacbee.com/news/politics-government/capitol-alert/article288198840.html>.

<sup>79</sup> Allyn, B., “Google Will Pay California’s Local News Outlets \$110 million. Some Say it’s Not Enough” NPR (25 August 2024) <https://www.npr.org/2024/08/25/nx-s1-5088131/google-will-pay-californias-local-news-outlets-110-million-some-say-its-not-enough>.

The Google deal establishes a partnership agreement between the State of California (which also provides funding), news publishers, major tech companies and philanthropy. Beneficiaries include a new fund based at University of California Berkeley School for Journalism (with a percentage allocated for locally focused publications and those targeting underrepresented groups), and a National AI Innovation Accelerator, with the State of California committing to prioritise state government advertising in local publications and publications in underserved markets, aiming to redirect millions in advertising dollars. Details of the proposed framework were still being finalised at time of writing.<sup>80</sup>

The above Bills are still interesting for how they attempt to directly address news funding, prioritisation and accountability for funds received, concepts, definitions and scope.

They were apparently partly influenced by 2021 Maryland state legislation for a digital advertising tax on businesses with at least \$100 million in global annual gross revenues. That tax (which ranges from 2.5% to 10% and is on gross revenues from digital advertising services in that state) is levy-like in that it funds a specific plan for investment in schools. A US Federal Court Judge dismissed a First Amendment Challenge to the legislation,<sup>81</sup> suggesting similar media-focused levies could be upheld in the US.

## Illinois

In February 2024, the Journalism Preservation Act<sup>82</sup> was introduced in the Illinois Senate and in late June was referred to the Assignments Committee. It has similarities to the California Bill of the same name and provides for covered online platforms to track and record the number of times the “online platform’s websites link to, display, or present a digital journalism provider’s news articles, works of journalism, or other content that are displayed or presented to Illinois residents” and for a “journalism usage fee” payment to be made to covered digital journalism providers. Its preamble references the importance of local and ethnic media.

Obligations attach to very large online platforms: those with at least 50 million US based monthly active users/subscribers or where the owner/controller has annual US sales or market capitalisation over \$550 billion (CPI adjusted) or at least one billion worldwide monthly active users. The Illinois Bill includes similar obligations to those in the California Bill, requiring recipients to attest that they have spent required percentages of funds received on employing journalistic staff (with specific definitions around hours worked by such journalists). The recipients of usage fees include eligible digital journalism providers that meet certain thresholds, including 30,000 annual search occurrences in Illinois searches or 10,000 annual social media impressions. As with the California bills, there have been vocal opponents.<sup>83</sup>

It is reported that Senator Steve Stadelman, who introduced the Illinois Bill, is waiting to see “what precedents might be set in California” before moving forward, and that other US states are monitoring the outcome of the California Google deal and considering introducing their own legislation.<sup>84</sup>

Were any of these Bills to pass, this may be a factor in arguing that a comparable Australian scheme was not discriminatory and as such would not breach Australia/US trade obligations.

## Tax credits for journalism employment

While clearly different from digital levies as they do not involve any payment by a digital platform, tax rebates have been included as a component of packages to support news sustainability, as has occurred in Canada<sup>85</sup> and was the case in

<sup>80</sup> Miller, H. Love, J., Kamisher, E., “Google Used Influence, Ultimatum to Cut Deal on California News” *The Detroit News* (12 October 2024) <https://www.detroitnews.com/story/business/2024/10/12/google-used-influence-ultimatum-to-cut-deal-on-california-news/75646247007/>.

<sup>81</sup> *Chamber of Commerce of the USA v Brook Llerman* (Maryland Comptroller) (July 2024) <https://www.uschamber.com/assets/documents/Memorandum-Opinion-Chamber-v.-Lierman-D.-Md.pdf>.

<sup>82</sup> See: *Journalism Preservation Act 2024* <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3591&GAID=17&DocTypeID=SB&LegID=153333&SessionID=112&GA=103>.

<sup>83</sup> Davis, W., “Meta is Ready to Drop News in Illinois if Forced to Pay Local Publishers” *The Verge* (14 March 2024) <https://www.theverge.com/2024/3/13/24099439/meta-news-block-illinois-journalism-preservation-act>.

<sup>84</sup> Carroll, H., “A Big Tech Local News Precedent?” (28 October 2024) Northwestern/MEDILL Local News Initiative <https://localnewsinitiative.northwestern.edu/posts/2024/10/28/california-google-local-news-deal-aftermath/index.html>.

<sup>85</sup> Lapowsky, I. & White, J., *Rescuing Local News Through Tax Credits: A Review of Policy in the U.S. and Canada* (Chapel Hill: Center on Technology Policy, University of North Carolina, 2023). [https://techpolicy.unc.edu/wp-content/uploads/2023/06/UNC\\_Tech\\_Policy\\_Future\\_Report.pdf](https://techpolicy.unc.edu/wp-content/uploads/2023/06/UNC_Tech_Policy_Future_Report.pdf).

California Bill SB1327. Most recently, in May 2024, Illinois passed measures to give local news organisations \$25 million in tax credits over 5 years to hire and retain journalists,<sup>86</sup> similarly to an April 2024 New York \$30 million tax incentive plan.<sup>87 88</sup>

## 2.3.2 Cultural levies on digital services and platforms

Though they do not directly address the funding of news and journalism, it is worthwhile to consider international examples of cultural levies and taxes on digital services, some of which resemble existing Australian quotas and direct investment obligations and others which are levy-based models. The diversity of frameworks and definitions may be useful reference points in designing a local model.

Many of those in Europe are modelled on the provisions of the European Audiovisual Media Services Directive (AVMSD).<sup>89</sup> Article 13(1) of the AVMSD requires that 30% of works carried by on-demand media service providers (VOD) are to be European in origin and given prominent placement. Under Article 13(2), member states may impose additional financial obligations on VOD providers and broadcasters (media service providers) based on revenues they generate in, or are targeted towards, the member state, with proceeds used towards production of European works.

These provisions sit alongside Articles 7(a) and 7(b) which provide for member states to implement prominence of audiovisual media services, free from alteration or modification. In this way, the framework contemplates a relationship between must-carry/prominence requirements and levies/investment obligations. Under the AVMSD, member states may, through legislation, require direct investment obligations or contributions to national funds. They may also choose to exempt VOD providers which, for example, have small audiences or small local incomes or where the nature of the service makes a levy impractical.

There are longstanding obligations in the non-digital environment on, for example, broadcasters and pay TV. It is noted that, like Canada, the EU has a cultural exemption in trade agreements, but it is more narrowly defined around audio-visual services. European cultural levies or comparable direct investment requirements include the following:

- **Denmark** introduced a new levy<sup>90</sup> on audio-visual media service providers effective 1 July 2024 based on annual streaming turnover, with a 2% basic rate and 3% surcharge for those investing less than 5% of Danish revenues in Danish content. Public service and educational providers, or those with small audiences/revenue are exempt. Levy funds support Danish film and television production (80% Danish films and 20% Public Service Fund for television series/documentaries).
- **France** implemented a tax<sup>91</sup> on music streaming services of 1.2% of revenues above €20 million, with the proceeds allocated to the Centre National de la Musique to fund music programs. Despite negative response from the streaming services,<sup>92</sup> there does not appear to have been any comparable action to the legal actions brought by streaming services in Canada.
- **Italy** has a direct investment and must-carry style obligation, requiring non-linear providers to invest from 1 January 2024 onwards 20% of net annual Italian revenues for purchase or production of European works produced by independent producers, half for works of original Italian expression by independent producers in the last five years, and to reserve 30% of their catalogue for recent European works (half for original Italian expression as above).<sup>93</sup>

<sup>86</sup> Caro, M., “Illinois Passes \$25 Million in Tax Credits to Boost Local Journalism” (Northwestern/MEDILL Local News Initiative) (30 May 2024) <https://localnewsinitiative.northwestern.edu/posts/2024/05/30/illinois-tax-incentive-legislation-local-journalism/>.

<sup>87</sup> The News Guild (20 April 2024) <https://newsguild.org/new-york-legislature-passes-historic-journalism-jobs-tax-credit/>.

<sup>88</sup> PIIJ’s submission (no 158) to the Social Media Inquiry (from p 19) outlines a range of tax-based approaches in different jurisdictions.

<sup>89</sup> *Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 Amending Directive 2010/12/EU on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Actions in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) in View of Changing Market Realities* <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

<sup>90</sup> Denmark, no 615 of 11/06/2024, *Act on the Contribution of Certain Media Service Providers to the Promotion of Danish Culture* (Cultural Contributions Act) <https://www.retsinformation.dk/eli/Lta/2024/615>.

<sup>91</sup> France, *Finance Act 2023*. See Centre Nationale de la Musique, “Streaming Tax” (16 September 2024) <https://cnm.fr/en/news/streaming-tax/>.

<sup>92</sup> Tencer, D., “What’s Behind France and Canada’s Music Streaming Taxes, and Where Could They Happen Next (Hint: The USA?)” *Music Business Worldwide* (13 June 2024) <https://www.musicbusinessworldwide.com/whats-behind-france-and-canadas-music-streaming-taxes-and-where-might-they-happen-next-hint-the-usa/#:~:text=France's%20music%20streaming%20tax,back%20to%201.2%25%20of%20revenue.>

<sup>93</sup> Apa, E., Foco, E., Cavalano, P., “[IT] Italy adopts new regulation on programming and investment obligations in favour of European Works” (EU Audio Visual Observatory) *IRIS Merlin* (2023) 3:1/20 <https://merlin.obs.coe.int/article/9682>.

- **Portugal** has a 1% levy on streaming platform local income, with proceeds going to the Institute of Cinema and Audiovisual (ICA), plus a 4% Exhibition Levy on advertising on their platforms.
- **Romania** implemented a levy of 4% on individual transactions with, or subscriptions to, streaming services, going to the Romanian Film Centre-managed National Film Fund to support domestic film production, exempting providers with ratings below 1% and annual revenues under €65,000.<sup>94</sup>
- **Switzerland** introduced its so-called “Netflix Tax” following a public referendum in May 2022 through amendments to the *Film Act 2001*.<sup>95</sup> Effective from 1 January 2024, streaming services that generate more than CHF2.5 million per year are required to invest 4% of annual gross Swiss revenue in Swiss film and television. Switzerland is not in the EU.

At least 17 EU countries have imposed financial obligations on streaming services (including, in addition to the above, Germany, Poland, France, Croatia, Belgium and Greece).<sup>96</sup> As is the case in Canada, the European Union has a cultural exemption incorporated into trade agreements.<sup>97</sup>

### 2.3.3 Digital services and digital advertising taxes

Governments in recent years have implemented a range of taxes on large digital platforms, which are more broadly based and directed towards consolidated revenues rather than supporting specific industries, which include both direct and indirect measures. When considering the design of a levy in Australia, there is value in looking at the different approaches including the diverse definitions of digital platforms and activities they cover, range of revenue thresholds and enforceability.

The landscape is fast-moving, against a background of attempts at global tax treaties through the Organisation for Economic Cooperation and Development (OECD) and United Nations (UN) and countries moving ahead with digital services taxes (DSTs) in the absence of global agreements.<sup>98</sup>

The OECD’s multilateral tax framework, in development since 2021, addresses tax challenges from digitalisation and globalisation;<sup>99</sup> Pillar 1 of the scheme targets the largest and most profitable companies. While around 145 countries, including Australia, have committed to the framework, the 30 June 2024 deadline for an agreement passed without consensus and work is ongoing. The US regards the scheme as discriminatory as many of the largest digital companies affected are US-based.<sup>100</sup> Australia has moved to implement aspects but not yet Pillar 1.<sup>101</sup>

The UN Ad Hoc Committee has also proposed a new universal tax accord which would cover online services including advertising, intermediary platforms, social media, digital content, cloud computing, sale of user data and standardised online teaching. In August 2024, Australia, Canada, the UK, the US and others voted against the terms of reference for this proposed new treaty.<sup>102</sup>

<sup>94</sup> Cristian, D., “Romania Imposes Financial Contributions on Streaming Platforms to Support National Film Fund.” *Business Review* (17 October 2022) <https://business-review.eu/business/legal/romania-imposes-financial-contributions-on-streaming-platforms-to-support-national-film-fund-236584>.

<sup>95</sup> The Federal Council - The Portal of the Swiss Government, *Amendment to the Federal Act on Film Production and Film Culture* (15 May 2022) <https://www.admin.ch/gov/en/start/documentation/votes/20220515/amendment-to-the-federal-act-on-film-production-and-film-culture.html#:~:text=In%20brief&text=Switzerland, in%20Switzerland%20in%20local%20filmmaking>.

<sup>96</sup> Streaming services have expressed concern about the patchwork of obligations. See, eg, Dams, T., “Streamer Squeeze: Why Europe is Taking on the SVODs” *Screen Daily* (13 September 2024) <https://www.screendaily.com/features/the-us-streamer-squeeze-why-europe-is-taking-on-the-svods/5185829.article>.

<sup>97</sup> Yenbou, S., *Cultural Policy in EU and External Relations* (European Parliament Research Service) (December 2022) [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/739234/EPRS\\_ATA\(2022\)739234\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/739234/EPRS_ATA(2022)739234_EN.pdf).

<sup>98</sup> See, eg, KPMG, *Taxation of the Digitalized Economy* (21 October 2024) <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf>.

<sup>99</sup> OECD, “Base Erosion and Profit Shifting (BEPS) Project” <https://www.oecd.org/en/topics/policy-issues/base-erosion-and-profit-shifting-beps.html>.

<sup>100</sup> Gravelle, Jane G., *The OECD/G20 Pillar 1 and Digital Services Taxes: A Comparison* (Congressional Research Service Report R47988) (1 April 2024) <https://crsreports.congress.gov/product/pdf/R/R47988>.

<sup>101</sup> *Taxation Multinational – Global and Domestic Minimum Tax Bill 2024* [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=7220](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=7220). See also: Australian Taxation Office, *Implementation of a Global Minimum Tax and a Domestic Minimum Tax* (14 August 2024) <https://www.ato.gov.au/about-ato/new-legislation/in-detail/international/implementation-of-a-global-minimum-tax-and-a-domestic-minimum-tax>.

<sup>102</sup> United Nations, “Why the World Needs a UN Global Tax Convention” UN News (16 August 2024) <https://news.un.org/en/story/2024/08/1153301#:~:text=What%20will%20a%20UN%20tax,Hoc%20Committee%20terms%20of%20reference>.

In the meantime, many countries with their own DSTs have agreed to repeal them once Pillar One is implemented (eg OECD countries and others who support the framework).<sup>103</sup> The US has at various times initiated retaliatory action against and negotiated with some jurisdictions to suspend their DSTs. Other jurisdictions’ DSTs continue to be applied, so the landscape remains fragmented.<sup>104</sup>

The design and scope of the unilateral DSTs vary. They tend to have lower global/local revenue thresholds than Pillar 1 for the digital platforms they target (eg 0–€750m global revenue/€0–30m local revenue vs €20 billion global revenue threshold for Pillar 1).<sup>105 106</sup>

As noted earlier, one of the reasons the US opposes the taxes is that most targets are US companies. However, this is not exclusively the case. At the time of the introduction of the DST in France in 2019, for example, the Finance Minister suggested the DST would target 30 companies which were mostly US based but also included Chinese, German, Spanish and British organisations, a French company and originally French companies purchased by foreign organisations.<sup>107</sup>

Another concern is the taxing of gross (local) revenues. Advocates for a tax on digital advertising (as opposed to a tax imposed on gross local revenue) argue this is more palatable, as such taxes are in the nature of more familiar VATs or GSTs. Critics regard profitability as a fairer basis than gross revenues.

While Australia considered a DST in 2021, a 2023 Treasury Impact Analysis recommended that the best option for Australia was the two-pillar solution. Australia has imposed the GST (an indirect tax) on digital services of non-residents, including digital platforms, since 2017.

The following examples illustrate the differing scope of a small selection of DSTs/proposed DSTs.

- **Canada** since 2024 has levied revenue from online marketplace services, online advertising services, social media services and the sale or licensing of user data obtained from an online marketplace, a social media platform or online search engine. (Responding to US formal trade objections, Canada says it is meeting trade obligations and that while it supports the OECD’s two-pillar plan, it has been disadvantaged by the DSTs of “many of our closest partners – including France, the United Kingdom and Italy”).<sup>108</sup>
- **Colombia** since 2024 has taxed online advertising, digital content, streaming, monetisation of information and/or data of users located in Colombia generated by their activities in digital markets, intermediation platforms, digital subscriptions data management, search engine licensing or services and other digital and digital market services.<sup>109</sup>
- **Kenya** since 2021 has taxed gross revenue on services including digital content, streaming, licensed sales on digital marketplaces, subscription-based media including news, magazines and journalism, data management, booking, search engine, distance education and digital marketplace services.<sup>110</sup>
- The **New Zealand** government introduced a Bill<sup>111</sup> in August 2023 proposing a tax on intermediation platforms, social media and content sharing platforms, search engines, digital advertising and activities relating to user generated data, although the NZ Minister for Revenue said at the time “a multilateral solution remains our preferred approach”. The

<sup>103</sup> OECD, “Base Erosion and Profit Shifting (BEPS) Project” <https://www.oecd.org/en/topics/base-erosion-and-profit-shifting-beps.html>.

<sup>104</sup> See, eg, the Direct Taxes map on p 8 of: KPMG, *Taxation of the Digitalized Economy* (October 2024) <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf>.

<sup>105</sup> See, eg, Borers, K., Balladares, S., Barake, M., Baselgia, E., *Digital Services Taxes* (EU Tax Observatory) (June 2023) [https://www.taxobservatory.eu/www-site/uploads/2023/06/EUTO\\_Digital-Service-Taxes\\_June2023.pdf](https://www.taxobservatory.eu/www-site/uploads/2023/06/EUTO_Digital-Service-Taxes_June2023.pdf).

<sup>106</sup> Australian Government (The Treasury), *Two-Pillar Solution: Addressing the Tax Challenges Arising from the Digitalisation of the Economy. Impact Analysis* (March 2023) <https://oia.pmc.gov.au/sites/default/files/posts/2023/05/Two-Pillar%20Solution%20-%20Addressing%20the%20Tax%20Challenges%20Arising%20from%20the%20Digitalisation%20of%20the%20Economy%20IA.pdf>. This report suggests that few Australian platforms would fall into the Pillar 1 revenue threshold, but that may change in the future (see p 22).

<sup>107</sup> Chrisafis, A., “France Hits Back at US Over Tax on Digital Giants” *The Guardian* (12 July 2019) <https://www.theguardian.com/world/2019/jul/11/france-us-tax-big-digital-companies-donald-trump-amazon-facebook>.

<sup>108</sup> *Statement by the Government of Canada on International Tax Reform, 30 August 2024*. <https://www.canada.ca/en/department-finance/news/2024/08/statement-by-the-government-of-canada-on-international-tax-reform.html>.

<sup>109</sup> See the Direct Taxes map (p 8) in: KPMG, *Taxation of the Digitalized Economy* (21 October 2024) <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf>.

<sup>110</sup> Ibid.

<sup>111</sup> New Zealand Digital Services Bill 2023 <https://www.legislation.govt.nz/bill/government/2023/0288/latest/whole.html>.

2024 budget stated that the “Government is still deciding whether or how to progress the DST”.<sup>112</sup>

- **Taiwan** since 2017 has taxed payments for online advertisement and remuneration for digital services, such as online games, videos, audio broadcast, movie, TV series music and online platform services provided to Taiwanese customers by foreign service providers without a fixed place of business or business agent in Taiwan.<sup>113</sup>
- **United Kingdom** since 2021 has levied the revenue of certain UK related digital services providing a social media platform, search engine or online marketplace to UK users.<sup>114</sup>

A key reason for the attempts at global tax treaties is to harmonise fragmented systems applied to the same entities operating across multiple jurisdictions, and the diversity of the above approaches underscores the importance of working towards this. The above examples also show a range of different ways that their targets may be defined, which may be useful to consider when thinking about who should be covered by a digital levy designed to support the news market in Australia.

## 2.4 Designing and distributing a digital levy – options

### 2.4.1 Rationale

Having regard to the above examples, the design of a levy for Australia would need to take into account not only local factors but, depending on scope, may need to consider trade implications. This paper does not propose a single solution but considers factors to be taken into account in the design of a levy, having regard to comparable examples and the Australian levy landscape.

The broad policy basis for such an intervention is not dissimilar to that of the News Media Bargaining Code and rationales for further intervention centre around the importance of protecting public interest news and journalism<sup>115 116</sup> in the context of current environmental factors, including:

- “market failure”/market distress of Australian news organisations due to loss of significant revenue streams;
- impact of large digital platforms in diverting traditional sources of advertising revenue from news media (that is, not just platforms that host or share news but potentially also product-focused digital advertising platforms around cars, real estate and other services which do not host or share news); and
- competition for traditional news sources from other forms of content distribution including user-generated content sharing platforms and the like, affecting news organisation revenue.<sup>117</sup>

Despite their prevalence, more broadly-based digital services taxes may be seen as susceptible not only to trade arguments but also to the lack of connection between target and purpose. While this does not preclude an “unrequited” levy design in Australia, the justification needs to be clearly articulated. One way is by levying only those platforms that host and share news and/or information. Another way of looking at it, though articulated in a different context, is the statement in the preamble to the *European Media Freedom Act 2024*, which could apply more broadly to any large platforms that have redirected traditional forms of media revenue:

*those platforms are essential providers of online advertising, which has diverted financial resources from the media sector affecting its financial sustainability and, consequently, the diversity of content on offer.*<sup>118</sup>

<sup>112</sup> Deloitte, “Digital Services Tax - Keeps a Seat at the Table” (30 May 2024) <https://www.deloitte.com/nz/en/services/tax/perspectives/budget-2024-digital-services-tax.html>.

<sup>113</sup> See the Direct Taxes map (p 8) in: KPMG, *Taxation of the Digitalized Economy* (21 October 2024) <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf>.

<sup>114</sup> UK *Finance Act 2020* Part 2 <https://www.legislation.gov.uk/ukpga/2020/14/part/>.

<sup>115</sup> Ibid. See also: Social Media Inquiry, Committee View (p 96) and Recommendation 2 (p 98).

<sup>116</sup> UNESCO, “UNESCO: The Business Model of the News Media is Broken; Our Fundamental Right to Information at Risk” (20 April 2023) <https://www.unesco.org/en/articles/unesco-business-model-news-media-broken-our-fundamental-right-information-risk>.

<sup>117</sup> Similar justifications are expressed in terms of market factors in preamble (4) to the EU’s *European Media Freedom Act 2024*: “the good function of the internal market for media services is challenged by providers, including those controlled by certain third countries, that systematically engage in disinformation or information manipulation and interference, and use the internal market freedoms for abusive purposes, thus thwarting the proper functioning of market dynamics.” [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L\\_202401083](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401083).

<sup>118</sup> *European Media Freedom Act 2024*, Preamble paragraph 4. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL\\_202401083](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401083).

In essence, the argument for a levy is that to support a more trustworthy information environment, digital platforms which have affected news sustainability by diverting their revenue sources should contribute to the solution, while trusted news sources which benefit from the levy should be able to show that the funds received are being used to meet its objectives.

### 2.4.2 Take-outs from local and international examples

Given local and international experience, it is self-evident that any new levy or tax would be strongly contested by those organisations required to pay. Assuming the above rationales are established, other factors to consider include:

- **Alignment:** In a contested environment, the more closely aligned a digital levy is to comparable taxes or the more diverse the countries of origin of the target, the less likely it will be susceptible to challenge on trade or discrimination grounds. For example, a levy imposed on a new category of service providers under the *Telecommunications Act*<sup>119</sup> would sit alongside the existing levy imposed on other providers under the TIL/USO scheme which is comparable to its US counterpart. But a scheme designed along these lines might also sit in standalone legislation or, for example, alongside the News Media Bargaining Code in the Competition and Consumer Act. Similarly, it is possible to look to numerous precedents for defining targeted services, targeted activities and revenue thresholds.
- **Flexibility:** In a fast-changing environment, there is a case for maintaining adaptability. Canada’s digital levy scheme, for example, is determined and adjusted through regulator policies rather than being mandated in the legislation. This allows for specific allocation of levy funds to sectors deemed to meet the public policy requirements of the legislation (eg local news, community broadcasting, Indigenous news) and for any of these elements to change in response to market or policy changes. Though this may be more novel in the Australian context, there are precedents for maintaining adaptability - for example, Ministerial designation powers in prominence legislation.
- **Distribution:** Assuming a levy can be appropriately designed, there will be important questions around how it is best distributed and which news organisations (or individuals) can access it.<sup>120</sup> There is also the opportunity to address concerns around the definitions in the News Media Bargaining Code, which resulted in more funding going to larger organisations and barriers to local and diverse media, and are said to undermine the sustainability of parts of the sector.<sup>121</sup>
- **Independence:** An essential element would be an arms-length distribution of levy funds, based on objective criteria that meet the goals of the scheme. (One of the concerns with the current scheme has been that digital platforms decide which news organisations are funded.) In Canada, for example, this has involved the establishment of a new entity<sup>122</sup> while other jurisdictions have used existing institutions (eg some of the European cultural levies).
- **Evaluation of impact:** To demonstrate that a levy achieves its purpose, it would be appropriate for recipients to be required to attest that the funds were used as intended (as, for example, in the California and Illinois proposals). Ideally the overall scheme would link to formal measurement processes that could determine if it was achieving its objectives. This may involve reference to the ACMA’s *Media Diversity Measurement Framework*, which is intended to adapt to and reflect changing media markets.
- **Package of measures:** As seen in some other jurisdictions, a levy or financial investment obligation may be part of a broader set of interventions and may be linked to supporting media presence on the platforms that host or share their content. There may be a need for counterbalancing measures – for example, a broader digital advertising levy may capture platforms that are owned or related to Australian news organisations which are themselves seeking support. Solutions may involve including, for example, tax credits to sit alongside the News Media Bargaining Code.

<sup>119</sup> University of Sydney (Submission no 154, pp 16-17) to the Social Media Inquiry [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/Social\\_Media/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/Social_Media/Submissions).

<sup>120</sup> There is the opportunity here to address concerns around the definitions used in the News Media Bargaining Code, which resulted in more funding going to larger organisations and barriers to local and diverse media, undermining the sustainability of significant parts of the sector.

<sup>121</sup> These concerns appear to be among those addressed in Recommendation 3 of the interim report of the Social Media Inquiry, page 98.

<sup>122</sup> Canadian Journalism Collective, <https://cjc-cj.ca/en/>.

## 2.4.3 Design elements

While a number of different models have been deployed internationally to address news media sustainability,<sup>123</sup> not all will be suitable in the local environment. The following table considers some elements of an Australian digital levy to support local news media by reference to local and global precedents. The examples outlined in this section apply to a wide diversity of levy and tax rates. Any levy rate would be set by reference to economic factors and budgetary goals, which are not addressed in this paper. The table includes an indicative, rather than comprehensive, set of factors that have been used in different contexts.

<sup>123</sup> Moon Sehat, C., Mitchell, A., Jens, S., “Enabling a Sustainable News Environment: A Framework for Media Finance Legislation” (Center for News Technology and Innovation, September 2024) <https://innovating.news/article/enabling-a-sustainable-news-environment-a-framework-for-media-finance-legislation/>.

**Table 1: Design Elements: Financial Sustainability**

| ELEMENTS                          | BODY REFERENCES   |
|-----------------------------------|---|
| <b>Why</b>                        | <p><b>Objectives</b></p> <ul style="list-style-type: none"> <li>Support sustainability of public interest journalism as an essential element of democracy and civic engagement including for underserved audiences and areas</li> <li>Address the diversion of traditional news media revenue to digital platforms</li> </ul>   |
| <b>Who</b> pays the levy?         | <p><b>Target organisation examples</b></p> <ul style="list-style-type: none"> <li>Very Large Online Platforms and Very Large Search Engines (eg European and other definitions – see section 3 below)</li> <li>Social media and search engines</li> <li>Digital advertising platforms (eg cars, real estate etc), with consideration for those with impact on local news businesses</li> <li>Online marketplaces</li> <li>Broader scope may help overcome trade issues</li> </ul>   |
|                                   | <p><b>Eligibility thresholds</b></p> <ul style="list-style-type: none"> <li>Revenue (local/global)</li> <li>Audience thresholds (annually or monthly) for example: <ul style="list-style-type: none"> <li>local/global users</li> <li>social impressions</li> <li>local search occurrences</li> </ul> </li> </ul>   |
|                                   | <p><b>Unlikely targets</b></p> <ul style="list-style-type: none"> <li>Online streaming platforms – planned to be covered in Australia under proposed Streaming Services Reporting Investment scheme</li> </ul>  |
| <b>What</b> is levied?            | <p><b>Local nexus</b></p> <ul style="list-style-type: none"> <li>Assume levied only on Australian-derived or related income</li> </ul>  |
|                                   | <p><b>Types of revenue levied</b></p> <ul style="list-style-type: none"> <li>Gross revenues over a threshold</li> <li>Advertising revenues over a threshold</li> <li>Data extraction levy/monetisation of data</li> </ul>   |
| <b>Where</b> does the revenue go? | <p><b>What entity receives/distributes the levy funds?</b></p> <ul style="list-style-type: none"> <li>Could be paid directly to funds/trusts or redirected from consolidated revenue</li> <li>Issues with Government directly distributing to news media due to actual or perceived risk to editorial independence</li> <li>Issues with platform-based funds as decision makers</li> <li>Most likely model for distribution is an independently governed fund as it overcomes issues with direct government/platform funding</li> </ul> |

| ELEMENTS  | BODY REFERENCES  |
|---|--|
| <b>Which</b> organisations or activities benefits from the revenue? | <p><b>Eligible purposes eg:</b></p> <ul style="list-style-type: none"> <li>Percentages to defined sectors from independent funds</li> <li>Journalist/news production employment</li> <li>Public interest journalism</li> <li>Local news fund</li> <li>Journalism training</li> </ul>   |
|   | <p><b>Eligible recipient criteria may include some or all of:</b></p> <ul style="list-style-type: none"> <li>Reference ACMA's Media Diversity Framework for policy basis</li> <li>News Bargaining Code definitions updated to include smaller, local, regional, community broadcasting etc</li> <li>Media representing diverse or underserved communities</li> <li>Regional markets and local news deserts</li> <li>Media businesses that are part of an independent standards and complaints scheme</li> <li>Thresholds – employees/revenue/audience thresholds – noting concerns of smaller news publishers</li> <li>Should funding grants be available to freelance journalists?</li> <li>Universities providing journalism training (as per California deal) and with focus on diversity, underrepresentation</li> </ul> |
| <b>How</b> is it accounted for?                                     | <p><b>Accountability measures</b></p> <ul style="list-style-type: none"> <li>Specified percentages received by news organisations for specific purposes eg to employ journalists or other staff</li> <li>Expenditure at the discretion of the news business itself</li> </ul>  |
|   | <p><b>Reporting measures</b></p> <ul style="list-style-type: none"> <li>Annual or other regular report demonstrating how funds are spent (referable to grant application)</li> <li>Published report, eg on fund administrator website or annual report to the ACMA</li> </ul>  |
| <b>Where</b> and <b>how</b> is it regulated?                        | <p><b>Legislative home for regulation – most likely options</b></p> <ul style="list-style-type: none"> <li>Levy itself likely to need separate legislative home (as per other industry levies)</li> <li>Monitoring and administration could be under <ul style="list-style-type: none"> <li><i>Broadcasting Services Act</i></li> <li>Telecommunications regulation</li> <li><i>Competition and Consumer Act</i></li> </ul> </li> </ul>  |
|   | <p><b>Which regulator?</b></p> <ul style="list-style-type: none"> <li>ACMA</li> <li>ACCC (Treasury)</li> </ul>   |
|   | <p><b>Form of regulation</b></p> <ul style="list-style-type: none"> <li>Content licence or authorisation and related levy</li> <li>Direct regulation as financial impost</li> <li>Co-regulation eg aspects determined by regulator to maintain flexibility.</li> <li>Alternative (as per New York and Illinois) could be tax credits for employment of journalistic staff and/or cadets and training.</li> </ul>   |
|   | <p><b>Should it be linked to must-carry style regulations?</b></p> <ul style="list-style-type: none"> <li>Could model on the longstanding USO/TIL model with direct US comparator, to overcome potential trade objections</li> <li>Holistic solution to sustainability includes need for ongoing presence, prioritisation (or at least non-discrimination/non-de-prioritisation) of news on media platforms</li> </ul>   |



# 3 • VISIBILITY AND DISCOVERY: MUST CARRY, PROMINENCE AND COMPARABLE MEASURES

As Australians - especially younger people - increasingly turn to large digital platforms for news,<sup>124</sup> the sustainability of public interest news organisations is not only about funding: it is heavily dependent on those organisations' continued presence and visibility in such information-dense environments.

In this context, the policy problem to be solved is how trusted news sources can remain present, visible, accessible and discoverable on major digital platforms - particularly social media and search engines. An essential aspect of this is that quality news not be overwhelmed or even rendered invisible by the increasing proliferation of online mis- and disinformation. The solution is not just about supporting the media industry but connects more broadly with concerns about maintaining healthy civic engagement and the stability of Australian democracy.

While this paper does not directly address media literacy, it is noteworthy that this concept is covered in some of the legislative solutions discussed below, including the Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2024 and was a focus of the Social Media Inquiry, including in the recommendations.<sup>125</sup> This paper also does not address the impact of generative artificial intelligence but flags it as significant element to be considered in any enduring solutions for news media sustainability.<sup>126 127</sup>

This section looks at examples of legislation and regulation in Australia and overseas where:

- “**must-carry**” or “**prominence**” regulation has been implemented in a range of relevant contexts, including for digital services;
- **news-specific** provisions have been applied to support the presence of news on online platforms, including through codes-based co-regulation; and
- “**must-find**”, “**discoverability**” or “**must not discriminate**” principles are applied in the social media and digital platforms context, including the consideration of how to regulate algorithms.

<sup>124</sup> Park, S., Fisher, C., McGuinness, K., Lee, J., McCallum K., Cair, X., Chatskin, M., Mardjianto, L. & Yao, P., *Digital News Report: Australia 2024* (News & Media Research Centre, University of Canberra) (September 2024) <https://www.canberra.edu.au/research/faculty-research-centres/nmrc/digital-news-report-australia>.

<sup>125</sup> See, eg. Recommendation 6 on p 99: “The committee recommends that the Australian Government investigate the viability and effectiveness of ‘must carry’ requirements for digital platforms in relation to Australian news content from large and small news providers, including an assessment of the legal pathways and barriers to such requirements.”

<sup>126</sup> For example, the Explanatory Memorandum for the Communications Legislation (Combating Misinformation and Disinformation) Bill 2023 states (at p 33): “As the features and nature of digital communications platforms are constantly evolving, including through generative artificial intelligence, it is necessary to have the flexibility, through instrument, to carve in and out types of digital communications platforms from the scope of Part 2.”

<sup>127</sup> Attard, M., Davis, M and Main, L., *Gen AI and Journalism* (Centre for Media Transition, University of Technology Sydney, December 2023) <https://www.uts.edu.au/research/centre-media-transition/projects-and-research/gen-ai-and-journalism>.



As will be seen, there is a patchwork of regulatory measures which approach the problem in quite different ways. While international approaches offer diverse precedents for a local solution, there are substantial and viable regulatory avenues including new forms of rights and obligations found in Europe and the UK. Many provisions have only come into force in the last year or so and are still being implemented, including through new regulator-led instruments which require consultation, so their effectiveness is yet to be determined. Most have been strongly contested, with opponents raising ongoing concerns about their limitations and impact.

In Australia, there have been calls throughout 2024 for consideration of “must-carry” style regulation of digital platforms, including in the Social Media Inquiry. Its October 2024 Committee report noted that Treasury had been investigating the potential application and enforceability of must-carry rules and their compatibility with the News Media Bargaining Code.<sup>128</sup>

A number of organisations that made written submissions advocated for some form of regulation around media presence. Suggestions included compelling platforms to maintain news content availability (whether or not there is a commercial agreement)<sup>129 130</sup> and protocols for timely and accurate news dissemination on digital platforms during public emergencies, natural disasters and similar circumstances to counter misinformation and disinformation.<sup>131</sup>

There is significant overlap between the above concepts, so these categories could be regarded as fluid, but there are also distinct characteristics which can be applied to the issue of maintaining news presence. The following list of diverse approaches and parallels is not exhaustive.

### 3.1 Must-carry concepts in licenced sectors

Concepts of “must-carry” for identified content or services are well established in broadcasting and telecommunications.

Familiar examples include the longstanding obligations in many countries for cable channels to carry free-to-air or other identified public interest services, such as in the United Kingdom, the United States and Canada and in various European, Asian and African countries.<sup>132</sup>

In some of those jurisdictions, more traditional provisions have been used as the model for extending regulation into the online environment. While these provisions are not news-specific, and most commonly attach to licensed services, they are often focused around identified genres of content considered important to those societies and generally designed to support and enhance the cultural contribution of local media or audiovisual services, which may include local news services.<sup>133</sup>

A variation on the must-carry concept is also well used in the telecommunications context. For example, Australia and the United States have longstanding Universal Service Obligations (USOs) which compel telecommunications carriers to offer certain services to consumers which might not otherwise be economically viable, such as standard telephone services, emergency call services, public payphones and services for hearing-impaired customers. In both of these countries, the “must-carry” obligation is funded, at least in part, by an industry-specific levy. In Australia, this is the Telecommunications Industry Levy, which goes towards funding the USO.<sup>134</sup> This model serves as a clear parallel for a potential levy/must-carry approach for digital platforms formulated around a common policy problem, although there are tangible differences in the context for and content of these interventions.

<sup>128</sup> Joint Select Committee on Social Media and Australian Society, *Second Interim Report* (October 2024) [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Second\\_interim\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Second_interim_report) p 93.

<sup>129</sup> Submissions to the Social Media Inquiry, including, eg: Free TV (no 54, p 25); SBS (no 47); Broadsheet Media (no 48, p4); Daily Aus (no 43, p 15); Country Press Association (no 196, p 2); Media Entertainment and Arts Alliance of Australia (no 53, p 3).

<sup>130</sup> Free TV (Submission no 54, p 25) refers to recommendations in the ACCC’s *Digital Platform Services Inquiry Report No 5 – Regulatory Reform* which recommended targeted rules in mandatory, service specific codes and suggests these should be extended to “restrictive terms of service, blocking content inappropriately, contributing to mis and disinformation ... and should also include prohibiting designated platforms from self-preferencing their own products and services in ranking, indexing and crawling. For example, serving a video of a news clip in search results on a video platform owned by the search service, rather than the original clip on the news publisher’s website.”

<sup>131</sup> Submission from Daily Aus (no 43 p15) and The Conversation (no 6 at p 4).

<sup>132</sup> The following are some examples: China (cable must-carry free-to-air services); Japan (news and education content); South Korea (content requirements on cable/satellite); and South Africa (must-carry public broadcasting service licensees).

<sup>133</sup> For example, must-carry requirements for public service channels in the UK, and Canada’s local news content requirements.

<sup>134</sup> *Telecommunications Industry Levy Act 2012* (Cth), *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth); *Telecommunications Act 1996* (US) and *Cable Communications Policy Act of 1984* (US).

Licensed broadcasters in Australia have also long been subject to obligations to carry certain types of content under the *Broadcasting Services Act 1992* (BSA) including, for example, provisions for licensees in certain circumstances to be required to carry emergency broadcasts and, during elections, certain election material. The BSA also contains local news requirements for regional commercial radio<sup>135</sup> and local content requirements for commercial television.<sup>136</sup> In the latter case, these are in the form of time quotas around defined content genres (such as Australian content, local and regional news and Australian content in advertising), and are designed to meet public policy imperatives including to contribute to the sense of Australian identity, character and cultural diversity.<sup>137</sup>

## 3.2 Prominence for free-to-air radio and television services on devices

### 3.2.1 Australia

More recently, the Australian Government implemented a must-carry style prominence framework<sup>138</sup> for television to ensure that Australian audiences can easily find and access the terrestrial services of Australian free-to-air television commercial broadcasters, national broadcasters and community broadcasters, certain broadcast video-on-demand services and other services designated by the Minister (together defined as “regulated television services”).<sup>139</sup>

Manufacturers of internet-connected television devices must incorporate minimum prominence requirements for regulated television services on those devices, including around where the services will be positioned on the TV home screen and visibility of the apps through which viewers access those services. The policy purpose is to ensure “Australian audiences continue to have access to the local television services that play a crucial role in supporting Australia’s sense of cultural identity and informing and entertaining all Australians”.<sup>140</sup>

The legislation was enacted after long and contested consultation.<sup>141</sup> Free-to-air broadcasters advocated for greater protections for findability in the nature of “must-promote”, for example arguing that in search results for the popular ABC-produced children’s program *Bluey*, the ABC result should appear, at no cost, at least alongside or above those of paid-for television services.<sup>142</sup> Despite advocacy for broader protections for free services, the final legislation did not include provisions around search, Electronic Program Guide or remote-control prominence.

The Government is also examining the introduction of comparable protections for Australian free-to-air radio on connected radio devices.<sup>143</sup>

Although (as with the telecommunications Universal Service schemes) these provisions apply to services rather than specific types of content such as news, they provide a potentially useful precedent.

### 3.2.2 Other jurisdictions

Various jurisdictions have also included a range of different types of prominence protections designed to address changes in audience behaviours as they increasingly access content through new internet enabled devices. As was the imperative behind the new Australian prominence legislation, this regulation responds to the monetisation of device

<sup>135</sup> The Broadcasting Services (Regional Commercial Radio-Material of Local Significance) Licence Condition 2024 is issued under s 43C of the *Broadcasting Services Act 1992* (Cth) (BSA).

<sup>136</sup> ACMA: “Australian Content on Commercial TV” <https://www.acma.gov.au/australian-content-commercial-tv>.

<sup>137</sup> When considering the issue of alignment with international obligations later in this paper, it is worthwhile to note that regional news obligations for commercial television were introduced as amendments to the BSA through the *Broadcasting Services Amendment (Media Ownership) Act 2006* which post-dates the Australia/US Free Trade Agreement, <https://www.dfat.gov.au/trade/agreements/in-force/ausfta/australia-united-states-fta>.

<sup>138</sup> *Communications Legislation Amendment (Prominence and Anti-siphoning) Act 2024* (Cth).

<sup>139</sup> Consultation by the ACMA on new TV prominence rules in 22 October 2024 sought input on proposed regulations including an Exposure Draft to give effect to the scheme which comes into effect in 2026. See: <https://www.acma.gov.au/consultations/2024-09/our-approach-implementing-tv-prominence-rules>.

<sup>140</sup> *Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023* Explanatory Memorandum, p1.

<sup>141</sup> The proposals were opposed by streaming and pay TV services and device manufacturer representatives.

<sup>142</sup> Senate Environment and Communications Legislation Committee, Hansard (23 February 2024) 3 [https://www.aph.gov.au/-Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/ProminenceAntiSiphoning/Public\\_Hearings](https://www.aph.gov.au/-Parliamentary_Business/Committees/Senate/Environment_and_Communications/ProminenceAntiSiphoning/Public_Hearings).

<sup>143</sup> The Government’s “Consultation on Radio Prominence Framework on Smart Speakers” sought submissions by 11 November 2024. See: <https://www.infrastructure.gov.au/have-your-say/prominence-framework-radio-smart-speakers>.

interfaces, such as the home screen of smart televisions, to ensure that public interest or culturally important services retain at least equal visibility with other services that have the capacity to pay manufacturers more for preferential positioning.

### United Kingdom

The *Media Act 2024* came into force in May 2024 and is still being implemented.<sup>144</sup> It extends longstanding linear television public service broadcasting must-carry requirements to online services.

For **television**, this means new prominence requirements protect “internet programme services” (IPs) on designated internet “television selection services”.<sup>145</sup> IPs which are given prominence protection under the scheme include audiovisual (but not audio-only) services provided by the BBC, another public service broadcaster or their subsidiaries. BBC iPlayer is automatically covered, but other on-demand services will need to be designated by the regulator, Ofcom, and fulfil a public service remit.<sup>146</sup> Public service broadcasters in the UK can include commercial broadcasters.<sup>147</sup>

For **radio**, the new legislation applies to voice-activated devices with “significant” levels of use. (No services have yet been designated but may include, for example, Google Home/Google Nest.)<sup>148</sup> Designated Radio Selection Services must take users to the simulcast station directed by the user’s voice command, free of charge (to both user and the IPS) and with no advertising overlay.

The new rules supplement existing protections under the UK’s *Communications Act 2003* which ensure that public service broadcasting channels hold top position (Channels 1 to 5) on Electronic Program Guides, but which did not previously extend to TV guides and other interfaces within online TV platforms, as the new Act does.<sup>149</sup> As with other prominence regulations, these are not news-specific.

### European Union

Prominence of broadcast services is also dealt with in the EU Electronic Communication Code<sup>150</sup> which was required to be transposed into national laws by 21 December 2020. Article 113 requires car radio receivers in new vehicles be capable of receiving digital terrestrial radio broadcasting. Its provisions have been implemented across multiple European countries, the UK and several countries in the Middle East. Article 114 provides for member states to impose reasonable must-carry obligations for the transmission of specified radio and television broadcast channels “and related complementary services” (including disability access and data supporting connected television services and Electronic Program Guides), where “a significant number” of end-users and services use them as their “principal means to receive radio and television broadcast channels”. Obligations must meet general interest objectives defined by member states and are required to be “proportionate and transparent”.<sup>151</sup>

## 3.3 Prominence for audiovisual media and journalism on digital platforms and streaming services

Beyond guaranteeing that devices carry certain public-interest services, some jurisdictions have extended prominence to ensuring that certain types of content are present on certain digital platforms, protecting local content, culture and news. In some cases, these go beyond must-carry to “must be discoverable” and even “must not be discriminated against”.

<sup>144</sup> Ofcom, “Update on Implementing the Media Act” (20 August 2024) <https://www.ofcom.org.uk/tv-radio-and-on-demand/public-service-broadcasting/update-on-implementing-the-media-act-august-2024/>.

<sup>145</sup> UK Government (Department for Culture, Media & Sport), *Prominence - Specifying Internet Television Equipment: A Policy Statement* (24 October 2024) <https://www.gov.uk/government/publications/prominence-specifying-internet-television-equipment-a-policy-statement/prominence-specifying-internet-television-equipment-a-policy-statement>.

<sup>146</sup> Part 1 of the UK *Media Act 2024* describes the public service remit for television <https://www.legislation.gov.uk/ukpga/2024/15/part/1>

<sup>147</sup> Ofcom, “Regulating Public Service Broadcasters” <https://www.ofcom.org.uk/tv-radio-and-on-demand/public-service-broadcasting/psb/>

<sup>148</sup> Ofcom, “Update on Implementing the *Media Act*”. Other details of prominence requirements will be set out in Ofcom regulations.

<sup>149</sup> The *Ofcom Code on Electronic Program Guides*, updated July 2023, sets out “the practices to be followed by EPG providers to give appropriate prominence for public service channels, to provide the features and information needed to enable EPGs to be used by people with disabilities and to secure fair and effective competition”. See: <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-standards/epg-code/>.

<sup>150</sup> European Union, *European Electronic Communications Code* <https://eur-lex.europa.eu/EN/legal-content/summary/european-electronic-communications-code.html>.

<sup>151</sup> Interestingly, the *European Media Freedom Act* also contains a provision that manufacturers, developers and importers of devices and user interfaces should make sure that such visual identities as provided by such media service providers are not removed or modified.

## 3.3.1 European Union

The EU has in recent years enacted a jigsaw of regulatory measures for the digital environment, with a focus on maintaining a presence for local culture and public interest content.<sup>152</sup>

- **Audiovisual Media Services Directive (AVMSD):** The 2010 AVMSD, which initially applied to broadcasting, was amended in 2018 to address the increasing use of online video-sharing platforms and social media, especially by young people.<sup>153</sup> In particular:
  - Article 7(a) provides that member states may take measures to ensure the appropriate prominence of audiovisual media services of general interest;
  - Article 7(b) provides for appropriate and proportionate measures to ensure audiovisual media services are not overlaid or modified without the media service provider’s consent;
  - Article 13(l) provides for 30% of works carried by on-demand audiovisual media services (VODs) to be European in origin and given prominent placement.<sup>154</sup>

Several member states have implemented provisions including Germany, France and Belgium.

- **EU Guidance note:** Though non-binding, 2021 Council of Europe principles<sup>155</sup> contain recommendations that member states “act to make public interest content more prominent” including though new obligations for platforms and intermediaries and minimum standards which should apply “particularly strictly” to platforms “that are more dominant given their reach and scale and influence”. Encouraging states to adopt its “Good Practice Principles” to regulate prominence, the Guidance suggests transparency requirements including standards for defining public interest content, processes for selecting content worthy of prioritisation, and reporting.

## 3.3.2 France

*General Broadcasting Law Article 20-7*<sup>156</sup> provides for online prominence of “general interest services” of French public service broadcasters and other organisations designated by the regulator Arcom.<sup>157</sup> These must be prominently displayed on user interfaces that meet the following usage thresholds: 150,000 user interfaces marketed, provided under subscription contract, or rented in France per month; or 3 million unique visitors in France per month for user interfaces of online audiovisual services or available via app stores.

Visibility for services is ensured on the home screen of user interfaces, their search engines and recommendations “while respecting the aims of proportionality, fairness and non-discrimination between actors”. The regulation covers remote controls and identification of service provider. Prominence obligations also apply to certain audiovisual catch-up television services and on-demand media services which meet certain thresholds.<sup>158 159</sup>

<sup>152</sup> Ledger, M., *Towards Coherent Rules on the Prominence of Media Content on Online Platforms and Digital Devices Issues Paper* (Centre on Regulation in Europe, December 2023) [https://cerre.eu/wp-content/uploads/2023/12/CERRE\\_Prominence-of-Media-Content\\_Issue-Paper.pdf](https://cerre.eu/wp-content/uploads/2023/12/CERRE_Prominence-of-Media-Content_Issue-Paper.pdf).

<sup>153</sup> *Audiovisual Media Services Directive* <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>. EU Observatory AVMSD implementation tracking can be found at [www.obs.coe.int/en/web/observatoire/avmsd-tracking](http://www.obs.coe.int/en/web/observatoire/avmsd-tracking).

<sup>154</sup> The report on the 2019-22 application of this directive noted only a few member states had adopted new prominence measures but some were exploring new legislation. See: *Commission Report on the Application of the Audiovisual Media Services Directive* (9 January 2024) <https://digital-strategy.ec.europa.eu/en/library/commission-report-application-audiovisual-media-services-directive>.

<sup>155</sup> Council of Europe, *Guidance Note on the Prioritisation of Public Interest Content Online*. Adopted by the Steering Committee for Media and Information Society in December 2021. See: <https://rm.coe.int/cdmsi-2021-009-guidance-note-on-the-prioritisation-of-pi-content-e-ado/1680a524c4>.

<sup>156</sup> See: <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068930/>.

<sup>157</sup> Following the 2023 Arcom consultation, there were 30 free-to-air digital terrestrial television channels and regional digital terrestrial television services. See *Délibération du 25 Septembre 2024 Relative à la Liste des Services Qualifiés d'Intérêt Général, en Application des Dispositions de l'Article 20-7 de la Loi n°86-1067 du 30 Septembre 1986 Relative à la Liberté de Communication* (25 September 2024) <https://www.arcom.fr/nos-ressources/espace-juridique/textes-juridiques/deliberation-relative-la-liste-des-services-qualifies-dinteret-general-en-application-des-dispositions-de-larticle-20-7-de-la-loi-86-1067-du-30-septembre-1986-relative-la-liberte-de-communication>.

<sup>158</sup> Decree 22 June 2021, Art 27 <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043688681>.

<sup>159</sup> Arcom, “Prominence of the Services of General Interest (SGI). Specificities of the French Approach” (Presentation, 5 December 2023) <https://rm.coe.int/session-2-dan-lle-sartori-arcom/1680aef787>.

### 3.3.3 Germany

The *Interstate Treaty*,<sup>160</sup> which came into force in November 2020 with the aim of modernising media regulation, is the principal regulatory framework for “broadcasting and telemedia”<sup>161</sup> in Germany, with individual states adopting its provisions in local regulation. It is notable in that it specifically mentions both the protection of local culture as well as the maintenance of journalistic standards.<sup>162</sup>

Rules around prominence and findability are found in Section V, which contains separate provisions for “broadcast-like telemedia” and “media platforms and user interfaces”. These go further than Australia, UK and other European provisions by addressing aspects of findability and even algorithms.

They provide protections for defined public interest broadcasters and some private broadcasters that deliver public interest content including news coverage, current affairs, regional information, German or European productions and youth-focused content. Certain provisions are worth considering in detail as they provide a unique conceptual framework for considering issues around prominence and findability.

- *Article 77* mirrors the EU AVMSD provision in providing for 30% European productions in the “catalogues” of broadcast-like telemedia (eg streaming services), with exemptions for those with low revenue, low viewership or where impractical or unjustified, as specified.
- *Article 80* prevents alteration to linear broadcasts or broadcast-like telemedia, such as advertising overlay, or fees and charges (similarly to Australian and UK prominence provisions).
- *Article 82* requires providers of media platforms to enable “a diverse range of offers”. Paragraph (2) contains the following prominence-style requirement.

“To ensure diversity of opinion and diversity of offers, radio broadcasting, broadcast-like telemedia, and telemedia in accordance with Article 19 (1) may not be directly or indirectly unduly hindered in access to media platforms and may not be treated differently from similar offers without justified grounds; this particularly applies to

1. conditional access systems,
2. application programming interfaces,
3. other technical specifications in relation to nos. 1 and 2 also with regard to manufacturers of digital broadcasting reception equipment,
4. the arrangement of access conditions, in particular fees and tariffs”.

- *Article 84* addresses “Discoverability in User Interfaces”, providing, among other things, that

“(2) similar offers or content may not be treated differently in terms of their discoverability, in particular the sorting, arrangement, or presentation in user interfaces, without objectively justified grounds; the discoverability may not be unfairly impeded. Permissible criteria, in particular, for sorting or arrangement are the alphabet, genres or scope of us. All offers must be discoverable without discrimination by using a search function.”

“(3) the broadcast transmitted via a user interface has to be directly accessible and easy to find in its entirety on the first selection level...” This section provides for the prioritisation of types of programming “that make a particular state-wide contribution to the diversity of opinions and offers” and those subject to plurality requirements in Article 59(4).

(4) specified state broadcasters and their apps must be “easy to find in the context of the presentation of broadcast-like telemedia or software-based applications that serve their direct control”. This provision includes the telemedia offers of the ZDF, Deutschlandradio or comparable broadcast-like telemedia offers and other

<sup>160</sup> Germany *Interstate Media Treaty* (Medienstaatsvertrag) [https://www.die-medienanstalten.de/fileadmin/user\\_upload/Rechtsgrundlagen/Gesetze\\_Staatsvertraege/Interstate\\_Media\\_Treaty\\_en.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Media_Treaty_en.pdf) (Non-official translation).

<sup>161</sup> See: Wilding, D., “Defining Journalism in Germany” *CMT Newsletter* (3 November 2023) <https://www.uts.edu.au/research/centre-media-transition/news/defining-journalism-germany>.

<sup>162</sup> Its preamble notes, in part: “in a media world that is increasingly shaped by the Internet, there is a need for guard rails ... which ensure compliance with journalistic standards and promote equal opportunities for communication.”

designated commercial services “which make a significant contribution to the diversity of options and offers in Germany”.

- *Article 85* sets out transparency requirements, requiring platform providers to make disclosures around their algorithms including “the criteria according to which content is sorted, arranged, and presented, how the sorting or arrangement of content can be individualised by the user, and the basic criteria according to which recommendations are made” including conditions under which Article 80 telemedia are *not* displayed in their original format. This information must be available to users “in an easily perceptible, directly accessible, and continuously available manner”.

Further provisions deal with “media intermediaries” which are services with “journalistic-editorial offers” that aggregate and host content but don’t publish under their own editorial control – for example, search engines and social media. As seen in other recent examples of European digital platforms regulation, media intermediaries are required to designate an authorised recipient in Germany and make this information readily available. They are also subject to obligations including the following:

- *Article 93* deals with transparency around algorithmic criteria including “the central criteria of an aggregation, selection, and presentation of content and the weighting thereof, including information about the functionality of the implemented algorithms in plain language”.
- *Article 94* deals with non-discrimination. Specifically, paragraph (1) provides that “In order to safeguard diversity of opinion, media intermediaries are not allowed to discriminate against journalistic-editorial offers, the discernibility of which they have a particularly high influence on.” Providers of journalistic-editorial content can complain to the state media authority which can also “prosecute ex officio in self evident cases”.

As noted above, the scope and subject matter of these provisions provide a relatively extensive set of protections beyond those addressed in, for example, Australian prominence legislation, spanning online streaming to the algorithms of digital platforms used in Germany. Concepts around non-discrimination, accessibility and prioritisation of specified public interest content or “journalistic-editorial” offers may be relevant when considering the design of Australian provisions.

### 3.3.4 Canada

The Canadian *Broadcasting Act 1991* outlines high level principles which are given effect in instruments developed by its regulator, the Canadian Radio-television and Communications Commission (CRTC).<sup>163</sup> Longstanding principles include that each element of the system must contribute to the creation and presentation of Canadian programming; and that cable companies and other distributors of broadcasting services, such as direct-to-home satellite services, should give priority to the carriage of Canadian television signals and, in particular to the carriage of local Canadian stations. Since 2016, the CRTC has required television broadcast licensees to broadcast a minimum level of local news and allocate a percentage of their previous year’s revenues to such programs, with levels determined at licence renewal.<sup>164</sup> This is another example of must-carry linked to a funding measure.

The *Online Streaming Act 2023*,<sup>165</sup> which amended the *Broadcasting Act 1991*, is aimed at modernising the framework and ensuring online streaming services contribute to Canadian and Indigenous content. The following new provisions co-exist with a set of regulatory measures - including the levy (in the same legislation) and the news bargaining framework - designed to support Canadian media sustainability and, within that, the news media.

The Act defines *online undertaking* as “an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus”. (Social media that do not exercise programming control over programs uploaded by their users are excluded). Provisions include:

- *Paragraph 3(1)(r)*: “online undertakings shall clearly promote and recommend Canadian programming in both official languages as well as in Indigenous languages, and ensure that any means of control of the programming generates results allowing its discovery”;
- *Paragraph 3(1)(q)*: “online undertakings that provide the programming services of other broadcasting undertakings should (i) ensure the discoverability of Canadian programming services and original Canadian programs, including

<sup>163</sup> CRTC, *Ensuring a Place for Canadian Services* [https://crtc.gc.ca/eng/cancon/c\\_services.htm](https://crtc.gc.ca/eng/cancon/c_services.htm).

<sup>164</sup> CRTC, *Broadcasting Regulatory Policy CRTC 2016-224*. Policy Framework for Local and Community Television <https://crtc.gc.ca/eng/archive/2016/2016-224.htm>.

<sup>165</sup> Canada, *Online Streaming Act 2023* [https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2023\\_8/](https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2023_8/).

original French language programs, in an equitable proportion;”

- *Paragraph 3(1)(t)*: “distribution undertakings  
(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations ...”

Other new obligations require certain “online undertakings that broadcast audio or audio-visual content intended to inform, enlighten or entertain” to register with the CRTC and provide it with basic information.<sup>166</sup> This requirement applies to streaming services, social media, online subscription TV, live stream radio stations, podcast services and transactional streams with more than CAD10 million revenue (excluding videogames and audiobooks).

While this provision does not impose a must-carry obligation, it is interesting in terms of how the scope of covered services is defined and potentially as an element of a must-carry/prominence style regulation. It also reflects EU and other regulations requiring registration of online platforms to ensure a notifiable presence in the jurisdiction<sup>167</sup> which is one way to address concerns expressed in Australia around how to enforce provisions against digital platforms without a local presence.<sup>168 169</sup>

### 3.3.5 Colombia

Colombia’s National Development Plan (NDP) for 2018–2022 includes a prominence requirement for SVOD providers (though there are no related local content quotas). Implemented through a May 2020 Ministerial decree, online SVOD providers are required to ensure users in Colombia “have an easily accessible and clearly identified section” for audiovisual works of national origin.

### 3.3.6 Australia

Since 2022–3, ahead of the proposed co-regulatory Streaming Service Reporting and Investment Scheme,<sup>170</sup> large SVOD services operating in Australia have been voluntarily reporting<sup>171</sup> to the ACMA how they make Australian content discoverable on their platforms. This includes information about Australian content collections, carousels, marketing and recommendations. Government background material about the scheme suggests this may become part of a formal prominence requirement when the scheme is enacted.<sup>172</sup>

## 3.4 New types of duties relating to media and journalistic or news content

Beyond legislation dealing specifically with media and broadcasting, some provisions that support an ongoing news media presence in the digital platform environment appear in less expected places.

### 3.4.1 United Kingdom

The UK’s *Online Safety Act 2023*<sup>173</sup> requires providers of internet services which allow user-to-user services and search services, as well as pornographic services, to protect UK users from certain illegal and harmful content (similarly to but

more broadly than Australia’s *Online Safety Act 2021*). The scheme is based on digital platforms implementing systems rather than giving the regulator (Ofcom) powers to address specific content.<sup>174</sup> The Codes are drafted by the regulator rather than the industry, through a consultative process.

There was debate around including broader misinformation/disinformation protections prior to its passing<sup>175</sup> – its origins are in the Online Harms White Paper<sup>176</sup> – and, more recently, calls for it to be strengthened following social media fuelled riots in the UK in August 2024.<sup>177</sup>

Though yet to be fully implemented, the Act contains some novel duties, applied to defined “Category 1 services” which cover hosting and treatment of news and journalistic content by digital platforms. These provisions may become a powerful reference in the design of regulation to guarantee media presence.

Ofcom has recommended<sup>178</sup> that Category 1 services be defined as those that meet either of the following conditions<sup>179</sup> (with the definition to be determined in secondary legislation by the Secretary of State following consideration of that advice):

- Condition 1 – uses a content recommender system; and has more than 34 million UK users on the user-to-user part of its service, representing around 50% of the UK population;
- Condition 2 – allows users to forward or reshare user-generated content; and uses a content recommender system; and has more than 7 million UK users on the user-to-user part of its service, representing around 10% of the UK population.

Category 1 services will be subject to the following new “duties”<sup>180</sup> (among others) described in the legislation, noting that the framework does not create individual rights: duties to protect content of democratic importance (section 17), duties to protect news publisher content (section 18) and duties to protect journalistic content (section 19). There is also a duty in section 21 for Category 1 services to allow for easy access complaints in relation to the above categories, among others.

Each of the following sections, which have been in force since 10 January 2024,<sup>181</sup> includes requirements for the Category 1 service provider to operate under systems and processes around the treatment of content on their platforms, with direct reference to news and journalistic concepts.

- **Section 17** creates a duty to “operate a service using proportionate systems and processes” designed to ensure that “the importance of the free expression of *content of democratic importance* is taken into account” in decisions around how content is treated and actioned and to ensure they are applied in the same way to a “wide diversity of political opinion”. The duty extends to specify these policies and process in clear and accessible terms of service. Subsection 7 defines “content of democratic importance” to include, among other things, “news publisher content” ... which “is or appears to be specifically intended to contribute to democratic political debate in the United Kingdom or a part or area of the United Kingdom”.
- **Section 19** creates a duty to “operate a service using proportionate systems and processes” designed to ensure that “the importance of free expression of *journalistic content* is taken into account” when making decisions about how content is treated and actioned, similarly to s17.

<sup>166</sup> *Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330* <https://crtc.gc.ca/eng/archive/2023/2023-329.htm>.

<sup>167</sup> For example, Brazil’s suspension of X after, among other things, it failed to appoint a notifiable local representative. See: Phillips, T., *The Guardian* (9 October 2024) <https://www.theguardian.com/technology/article/2024/aug/30/elon-musk-x-could-face-ban-in-brazil-after-failure-to-appoint-legal-representative>.

<sup>168</sup> For example, the Tattarang submission (no 58, p 2) to Joint Select Committee on Social Media and Australian Society [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Submissions).

<sup>169</sup> Subdivision D of the News Media Bargaining Code, “Facilitating open communication”, s 52Y, provides for designated digital platforms to set up a point of contact in Australia, meet the requirements of any regulations, give contact details to registered news business and acknowledge every communication about content from them. Section 52Z contains a comparable provision for registered news businesses.

<sup>170</sup> Australian Government (DITRDCA), *Revive: A Place for Every Story, A Story for Every Place* (January 2023), 89 <https://www.arts.gov.au/publications/national-cultural-policy-revive-place-every-story-story-every-place>. See also: Australian Government (DITRDCA), *Streaming Services Reporting: Fact Sheet* <https://www.infrastructure.gov.au/sites/default/files/documents/factsheet-3-streaming-services-reporting-and-investment-scheme.pdf>.

<sup>171</sup> ACMA, “Spending by Subscription Video on Demand Providers” (2024) <https://www.acma.gov.au/spending-subscription-video-demand-providers>

<sup>172</sup> DITRDCA, *Streaming Services Reporting and Investment Scheme: Fact Sheet* <https://www.infrastructure.gov.au/sites/default/files/documents/factsheet-3-streaming-services-reporting-and-investment-scheme.pdf>.

<sup>173</sup> The Act received Royal Assent on 26 October 2023. Its provisions are being progressively implemented, with not all yet in force.

<sup>174</sup> Its remit is slightly broader than the Australian legislation – it includes references to misinformation/disinformation, for example in the context of Ofcom action around media literacy and a “false communications” offence in section 179, with a related media exemption in section 180. Broader misinformation proposals around “serious harm” to adults did not make into the final version of the legislation.

<sup>175</sup> Coe, P., “Tackling Online False Information in the United Kingdom: *The Online Safety Act 2023* and its Disconnection from Free Speech Law and Theory” *Journal of Media Law* (2023) 15(2) <https://doi.org/10.1080/17577632.2024.2316360>.

<sup>176</sup> UK Government, *Online Harms White Paper* (2019) <https://www.gov.uk/government/consultations/online-harms-white-paper>.

<sup>177</sup> Antoniou, A., “Is the *Online Safety Act* fit for ‘purpose?’” *LSE Blogs* (3 September 2024) <https://blogs.lse.ac.uk/mediase/2024/09/03/is-the-online-safety-act-fit-for-purpose/>.

<sup>178</sup> Ofcom, *Implementing the Online Safety Act: Additional Duties for “Categorised” Online Services* (25 March 2024) <https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/additional-duties-for-categorised-online-services/>.

<sup>179</sup> Ofcom, *Categorisation: Advice submitted to Secretary of State* (25 March 2024) <https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/categorisation-research-and-advice/>.

<sup>180</sup> UK *Online Safety Act 2023* <https://www.legislation.gov.uk/ukpga/2023/50>.

<sup>181</sup> Ofcom, *Implementing the Online Safety Act: Additional Duties for “Categorised” Online Services* (25 March 2024) <https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/additional-duties-for-categorised-online-services/>.

This section includes a duty to “make a dedicated and expedited complaints procedure available to a person who considers the content to be journalistic content and who is a user who generated, uploaded or shared the content or its creator. Section 19 duties extend to ensuring that if the complaint is upheld, the content is “swiftly reinstated” on the service, or other action taken against the user is “swiftly reversed”. There is a duty to include provisions in the terms of service on methods for how content on the platform is identified as journalistic content, how the importance of free expression of journalistic content will be taken into account in decisions, and the complaints handling policies for journalistic content.

“Journalistic content” is defined to include news publisher content as well as user-generated content that is generated for the purposes of journalism; in both cases the content must be UK-linked (that is, UK users are a target market or it is likely of interest to “a significant number” of UK users).

A further section, enacted but not yet enforced, has been described in explanatory material as a “temporary must-carry”,<sup>182</sup> designed “to prevent platforms from arbitrarily removing news content.”<sup>183</sup>

- **Section 18** creates a duty to notify a recognised news publisher (as defined in section 56) of proposed action around their content (eg take-down or ban), give reasons, and where the news publisher content is also “journalistic content”, explain how they “took the importance of the free expression of journalistic content into account when deciding on the proposed action” and give the news publisher a reasonable period to respond. The service provider must consider the publisher’s representations and notify them of the decisions and reasons. Exceptions allow the provider to take down content, for example where it reasonably considers it would be criminally or civilly liable if the content was not removed. If so, there is a duty to “swiftly notify” the news publisher.<sup>184</sup>

This protects recognised news publishers including the BBC, Sianel Pedwar Cymu and *Broadcasting Act* licence holders who publish news-related material in connection with broadcasting activities authorised under the licence; and certain other UK based entities with the principal purpose of publication of news-related material and which are subject to editorial controls and standards.

The practical effect of the duties in protecting news and journalism will not be fully understood until the categorisation thresholds are formally determined by the Secretary of State, the regulator issues its codes and guidance, and these are then implemented by the covered platforms. Ofcom’s roadmap for the development of these codes of practice and guidance (which it is required to produce under the Act) suggests that these aspects will not be addressed until 2025-6.<sup>185</sup> Discussion around their scope and potential impact continues.<sup>186</sup>

### 3.4.2 European Media Freedom Act 2024 (EMFA) – media rights to deal with content removal

Coming into force in May 2024 with most provisions to apply from 8 August 2024, the EMFA does not create a positive right of must-carry but includes safeguards for Media Service Providers (MSPs) against unjustified or arbitrary online content removal by very large online platforms (VLOPs). VLOPs may include social media, online marketplaces and collaborative economy marketplaces.<sup>187</sup> It does not define “rights” as in the UK *Online Safety Act 2023*, but the complaints/content removal protections have some similarities.

The policy context is set out in paragraph 4 of the preamble, which describes “market failures that have increased due to digitalisation”, including that:

- “global online platforms act as gateways to media content, with business models that tend to disintermediate access to media services and amplify polarising content and disinformation”; and

<sup>182</sup> In this context the “temporary” appears to mean that the content must be carried at least until the news publisher has had the chance to make representations about a proposed take down or ban and does not have the effect of requiring the platform to keep it up on an ongoing basis, as might normally be the case for a must-carry requirement.

<sup>183</sup> UK Government, *Fact Sheet on Enhanced Protections for Journalism Within the Online Safety Bill* (23 August 2022) <https://www.gov.uk/government/publications/fact-sheet-on-enhanced-protections-for-journalism-within-the-online-safety-bill/fact-sheet-on-enhanced-protections-for-journalism-within-the-online-safety-bill>.

<sup>184</sup> There is a parallel here with the arrangements under the *European Media Freedom Act*, discussed below.

<sup>185</sup> Ofcom, “Ofcom’s approach to implementing the *Online Safety Act*” (17 October 2024) <https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/road-map-to-regulation/>.

<sup>186</sup> For example: Woods, L Prof., Antoniou, A Dr., Walsh, M., “Disinformation and Disorder: The Limits of the *Online Safety Act*” (Online Safety Act Network) (10 August 2024) <https://www.onlinesafetyact.net/analysis/disinformation-and-disorder-the-limits-of-the-online-safety-act/>.

<sup>187</sup> MSPs’ professional activity is to provide a media service, with editorial responsibility for the choice of content of the media service and how it is organised; a VLOP exercising editorial control could qualify as an MSP. User-generated content is excluded unless professional and paid for.

- “the good function of the internal market for media services is challenged by providers, including those controlled by certain third countries, that systematically engage in disinformation or information manipulation and interference, and use the internal market freedoms for abusive purposes, thus thwarting the proper functioning of market dynamics.”

Article 18 sets up a fast-track complaints engagement process for MSPs to communicate their complaints and have them resolved “without undue delay” and to escalate if needed. MSPs must:

- make a declaration to the VLOP that they are:
  - editorially independent (eg from a member state, political party, third country or entities they control and finance);
  - subject to oversight by a competent national regulatory body or adhere to recognised/accepted editorial standards; and
  - don’t provide AI-generated content without human review or editorial control;<sup>188</sup> and
- provide their and their regulator’s contact details.

VLOPs are required to publish the declaration on their website, advise if they accept/reject it and give the MSP their contact details so they can communicate “quickly and directly”. VLOPs can only suspend MSP content under their terms and conditions (unless the suspension is to do with harmful or illegal content under the *Digital Services Act* or *AVMSD*). They must report annually on their decisions to restrict/suspend, reject declarations and about disputes. While the EU law applies directly to member states and does not require transposition into local law, local regulators may be involved in aspects of compliance; some states are consulting around this.<sup>189</sup>

Article 19 sets up a process for “structured dialogue” between VLOPs, MSPs and civil society representatives to discuss Article 18 best practice. A new Board will monitor and report to the Commission on adherence to “self-regulatory initiatives which aim to protect users from harmful content including disinformation and foreign information manipulation and interference”.

### 3.4.3 Indonesian Presidential Decree 32

One of the most recent interventions in the online environment is an Indonesian Presidential Decree<sup>190</sup> which came into effect on 20 August 2024 and includes some requirements relating to bargaining with news organisations.<sup>191</sup>

Under the Decree, “Digital Platform Companies” are companies which provide certain services in Indonesia, including “collecting, processing, distributing, and presenting news digitally” and facilitating “interaction with news content, primarily aimed at mediating news presentation services with a focus on business objectives”. Article 5 requires a Digital Platform Company to “support quality journalism through...

- (b) Making its best efforts to prioritize the facilitation and commercialization of Content produced by Press Companies;
- (c) Ensuring fair treatment of all Press Companies in the Provision of Digital Platform Services...
- (e) Providing its best efforts in designing News distribution algorithms that support the realization of quality journalism in accordance with the values of democracy, diversity, and laws and regulations; and
- (f) Cooperating with Press Companies”.<sup>192</sup>

Article 1.1 defines the responsibility of Digital Platform Companies “to preserve a healthy news ecosystem business model to support quality journalism”.

<sup>188</sup> There were concerns about non-legitimate entities self-declaring through this process, leading to prioritisation of bad sources; however, these may be addressed in the Article 19 processes.

<sup>189</sup> Government of Ireland, *Public Consultation on the Implementation of the European Media Freedom Act* (4 October 2024) <https://www.gov.ie/en/consultation/3f019-emfa-public-consultation/#:~:text=EMFA%20aims%20to%20strengthen%20the,into%20force%20in%20May%202024.>

<sup>190</sup> *Responsibility of Digital Platform Companies to Support Quality Journalism - Presidential Decree No 32 of 2024* (Indonesia).

<sup>191</sup> Reuters, “Meta Believes it Is Not Required to Pay for Indonesia News Content Posted Voluntarily” (22 February 2024) <https://www.reuters.com/technology/meta-says-not-required-pay-indonesia-news-content-posted-voluntarily-2024-02-22/>.

<sup>192</sup> English translation of original Indonesian text

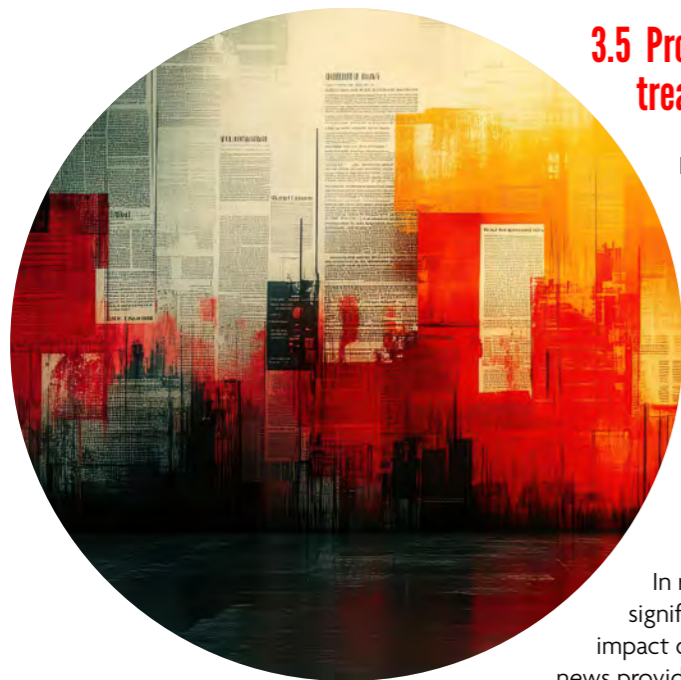
While requiring news organisations to comply with journalistic codes of ethics and laws and providing for dispute resolution, the Decree contains no enforcement provisions. Its provisions are very general (and exist in the context of broader regulation around media freedom). However, it is interesting in that it connects prominence, algorithms and news media bargaining in a single instrument.

### 3.4.4 California: Journalism Preservation Act AB 886 (not enacted) – non-deprioritisation

In addition to levying certain very large online platforms, this Bill (referred to above in section 2.1) contains provisions to prohibit platforms from “retaliating against a digital journalism provider for asserting its rights under the act by refusing content access or changing the ranking, identification, modification, branding or placement of the content of the digital journalism provider on the platform”.<sup>193</sup>

### 3.4.5 News Media Bargaining Code – non-discriminatory treatment and recognition

Section 52ZC(2) of the News Media Bargaining Code requires responsible digital platforms to “ensure that the supply of the digital service does not, in relation to crawling, indexing, making available and distributing news businesses’ covered news content: (a) differentiate between registered news businesses or between registered and non-registered businesses” on the grounds specified in subsection (2).<sup>194</sup> Further, section 52X requires designated platforms to develop a proposal in consultation with registered news business corporations to recognise original covered news content.



## 3.5 Promotion of authoritative information and treatment of disinformation

Provisions that have the capacity to protect media and journalism, while not necessarily specifically addressing the manner of prominence or media prioritisation, also appear in a range of other contexts in legislation seeking to tackle societal impacts of very large digital platforms. These provisions also contribute to contribute to media visibility and provide a reference point for developing more direct forms of regulation.

### 3.5.1 EU Digital Services Act 2022 - Risk assessments, algorithms and disinformation

In recent years, the European Union has enacted several significant pieces of legislation addressing different aspects of the impact of large digital platforms, which have the effect of protecting news providers that are present on or engage with those platforms.

These are in addition to the media rights to deal with content removal by digital platforms under the *European Media Freedom Act*, outlined in section 3.2 above.

The *Digital Services Act 2022*<sup>195</sup> sets out risk assessment and algorithm requirements for digital platforms to improve prominence of authoritative information and give people more control over what algorithms serve to them, including news. This legislation is focused on creating a safer digital space for consumers. Its objective is to harmonise European laws “with the objective of a predictable and trusted online environment, addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate”. It has applied across the EU since 17 February 2024. Paragraph 84 of the preamble notes that large providers should “pay

<sup>193</sup> Section 3723.85 *California Journalism Preservation Act 2023-24 AB-886 Assembly Bill* [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240AB886](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB886).

<sup>194</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021.

<sup>195</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (*Digital Services Act*) (DSA). VLOP and VLOSE provisions came into effect 15 February 2023 with the balance of the Act on 17 February 2024. Each Member state needs to appoint its own Digital Services Coordinator as independent regulator for enforcing rules locally and liaising with the Commission. See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065&qid=1670837883291>.

particular attention on how their services are used to disseminate or amplify misleading or deceptive content, including disinformation.”

The DSA contains no must-carry provisions or specific prioritisation for media but it does impose obligations around how Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs) deal with certain types of content which may, in practice, have the effect of requiring them to apply their algorithms, recommender systems and crisis response processes to prioritise trusted news content and minimise disinformation. The Commission is the primary regulator for VLOPs and VLOSEs while other platforms and search engines are under the supervision of member states where they are established.

This includes key obligations<sup>196</sup> for VLOPs and VLOSEs<sup>197</sup> to “manage systemic risks through annual risk assessments around the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services including, among others:

(b) any actual or foreseeable negative effects for the exercise of fundamental rights, in particular...to freedom of expression and information, including the freedom and pluralism of the media ...

(c) any actual or foreseeable negative effects on civic discourse and electoral processes, and public security;

(d) any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequence for the person’s physical and mental well-being.

Risk assessments must consider the influence of factors including design of recommender systems and algorithms, content moderation systems, and terms and conditions and their enforcement. They must analyse how these risks “are influenced by intentional manipulation of their service, as well as the amplification and potentially rapid and wide dissemination of illegal content and of information that is incompatible with their terms and conditions”<sup>198</sup> and “put in place reasonable, proportionate and effective mitigation measures”<sup>199</sup> These obligations extend to requirements to take actions required by the European Commission during public security or public health crises<sup>200</sup> including assessing how “the functioning and use of their services significantly contribute to a serious threat” and identifying “specific, effective and proportionate measures to eliminate this”. In this way, the platforms may need to address how they prioritise trusted news sources and reduce the impact of disinformation sources.

It is expected that specific provisions on disinformation will be introduced by way of the conversion of the existing voluntary code of practice<sup>201</sup> into a code of conduct under Article 45 of the DSA. The Act also allows for Commission-initiated voluntary crisis protocols for “extraordinary circumstances” affecting public security or public health.<sup>202</sup> While the framework is based around voluntary actions, there are stepped processes leading to Commission enforcement powers for breaches of the higher level obligation in the Act itself, including substantial daily fines and the power to seek court intervention for temporary suspension of service.<sup>203</sup>

Building on the original 2018 EU Code, the latest version of the EU Strengthened Code of Practice on Disinformation<sup>204</sup> has 44 signatories and, as mentioned above, is now a tool of implementation of the DSA in relation to VLOPs which sign up to it.<sup>205</sup> Relevant provisions include the following:

- Commitment 18 addresses risk mitigation measures such as “designing recommender systems so as to improve the

<sup>196</sup> DSA Article 33 (5).

<sup>197</sup> DSA Article 33(2): those with monthly active EU users of 45 million or more and that are designated by the Commission.

<sup>198</sup> DSA Article 34(1) and Article 34(2).

<sup>199</sup> DSA Article 35.

<sup>200</sup> DSA Article 36.

<sup>201</sup> For example, the *EU Strengthened Code of Practice on Disinformation* <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

<sup>202</sup> DSA Articles 45 and 46.

<sup>203</sup> European Commission, “Questions and Answers on the *Digital Services Act*” (23 February 2024) [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2348](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2348).

<sup>204</sup> *EU Strengthened Code of Practice on Disinformation* <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>.

<sup>205</sup> See paragraph (i) of the Code’s preamble which states that it aims to become a Code of Conduct under Article 35 of the DSA (now Article 45). Text of Article 45: [https://www.eu-digital-services-act.com/Digital\\_Services\\_Act\\_Article\\_45.html#:~:text=The%20Commission%20and%20the-%20Board.and%20systemic%20risks%2C%20in%20accordance](https://www.eu-digital-services-act.com/Digital_Services_Act_Article_45.html#:~:text=The%20Commission%20and%20the-%20Board.and%20systemic%20risks%2C%20in%20accordance).

prominence of authoritative information and reduce the prominence of disinformation”. Though not explicit, this could arguably include trusted news sources.

- Commitment 19 addresses the transparency of recommender systems.

The Codes also focus on tools to enable users to better understand and identify the difference between trusted information and disinformation.

## 3.5.2 Australian approaches to mis- and disinformation and prioritisation of news sources

### Voluntary Australian Code of Practice on Disinformation and Misinformation (Dec 2022)

This Code – first published in early 2021, then reviewed and updated in late 2022 – was developed by the Digital Industry Group Inc (DIGI), drawing on the EU Code. Each of the nine signatories voluntarily publishes an annual transparency report.<sup>206</sup> The signatories do not include all members – for example, X is no longer a signatory, after having its status withdrawn in November 2023.<sup>207</sup>

The ACMA monitors the transparency reports and provides its own report to Government.<sup>208</sup>

Under Objective 1 (“Provide safeguards against Harms that may arise from Disinformation and Misinformation”) are a series of measures, which include Code 5.9K:

prioritising credible and trusted news sources that are subject to a published editorial code (noting that some Signatories may choose to remove or reduce the ranking of news content which violates their policies...).

DIGI's reports to date have not specifically addressed compliance with this provision for trusted news prioritisation, and the latest ACMA report notes more broadly that “data points ... tend to focus on content removal.”<sup>209</sup> As a result, there is no readily accessible information on how Code 5.9K works in practice for each digital platform and whether it has a substantive effect on reducing the impact of mis/disinformation.

### Communications Legislation Amendment (Misinformation and Disinformation) Bill 2024

In September 2024, the Australian Government introduced the Communications Legislation Amendment (Misinformation and Disinformation) Bill 2024 which is being reviewed by a Committee due to report on 25 November 2024. The Bill is targeted at “serious harms” including, among others, damage to electoral/referendum integrity, public health, damage to critical infrastructure and imminent harm to the Australian economy. Obligations on digital platforms include requirements around digital literacy, policy approaches and risk assessments.

Section 11 exempts from the Bill's scope certain types of dissemination including, as defined in 16(2), “professional news content” produced by publishers which are subject to specified industry codes or analogous codes relating to quality journalism. (Code 4.4 D of the DIGI Code also excludes professional news content unless propagated by spam or other “inauthentic behaviours”). Arguments for and against the exemption have been vigorously contested in submissions and hearings on the Bill.<sup>210</sup>

The Bill provides new powers for the ACMA to make certain rules, require reporting and approve and register industry codes. It provides for an escalating series of sanctions up to civil penalties, which have similarities with European requirements. As with the EU Code, there is a focus on media literacy tools, rather than any specific requirements in

<sup>206</sup> See the DIGI Transparency Reports: <https://digi.org.au/disinformation-code/transparency/>.

<sup>207</sup> The issue is explained by DIGI here: “Complaint by Reset Australia Against X (F.K.A Twitter) Upheld By Australian Code of Practice on Disinformation and Misinformation Independent Complaints Sub-Committee” (27 November 2023) <https://digi.org.au/complaint-by-reset-australia-against-x-f-k-a-twitter-upheld-by-australian-code-of-practice-on-disinformation-and-misinformation-independent-complaints-sub-committee/>.

<sup>208</sup> ACMA, *Third Report on Digital Platforms' Efforts Under Voluntary Arrangements to Address Disinformation and Misinformation* (September 2024) <https://www.acma.gov.au/third-report-digital-platforms-efforts-under-voluntary-arrangements-address-disinformation-and-misinformation>.

<sup>209</sup> Ibid, 22.

<sup>210</sup> Parliament of Australia Senate Standing Committee on Environment and Communications, *Inquiry into Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill* (Public Hearings) [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Misand-Disinfobill/Public\\_Hearings](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Misand-Disinfobill/Public_Hearings).

the Bill for the treatment of news sources by digital platforms (other than the above exemption). The ACMA is not empowered to directly regulate content.

Although the Bill does not directly address the role of quality journalism in countering “serious harms” (other than by providing a media exemption), the defined harms relate to matters which could be countered by trusted news sources operating under recognised news/journalism codes. In this context, rules made under the legislation could extend to prioritisation of recognised news services at least to the extent of the existing voluntary DIGI Code, with a more detailed framework for what this means in practice. In the context of media diversity, the rules could ensure that smaller entities and those reflecting underserved markets or audiences are included.

It is not clear whether the scope of this legislation, if enacted, would be sufficient (either in terms of regulatory power or the length of time required to invoke penalties) to prevent, for example, a repeat of Facebook's 2021 removal of news sites. The current draft does not provide for the type of process for news media concerns or complaints about digital platforms removing their content to be dealt with immediately (as they are in UK and EU legislation).

## 3.6 Other algorithmic and transparency provisions

Several jurisdictions have more broadly addressed the market power of large gatekeepers. These provisions, which do not specifically address news or information may nevertheless have the effect of protecting this content from unfair treatment or deprioritisation.

### 3.6.1 EU: Digital Markets Act 2022

Again, although this legislation<sup>211</sup> does not directly address news prominence or must-carry, it contains tangential provisions which require designated gatekeeper platforms to apply equal treatment and objective and unbiased parameters for ranking, indexing and crawling by designated platforms.

Focused on creating fair markets (rather than on consumers, which are dealt with in the DSA), these provisions are designed to prevent gatekeepers from treating services and products they offer more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platforms. This may have some application in the media environment. In terms of prioritisation of certain services (see articles 6(5) and 6(12)), Meta and Google are among those initially designated as gatekeepers.<sup>212</sup>

### 3.6.2 Japan: Act on Improving Transparency and Fairness of Digital Platforms 2020

In force since February 2021, this co-regulatory scheme requires designated digital platforms to make “voluntary and proactive efforts towards improving the transparency and fairness of their digital platforms” which may include disclosures around algorithms.<sup>213</sup>

### 3.6.3 South Korea: Bill on Online Platform Monopoly Regulation

South Korea is considering a similar scheme to the *EU Digital Markets Act*<sup>214</sup> after withdrawing a proposal for a *Platform Competition Promotion Act* in July 2024, apparently following US trade discussions.<sup>215</sup> Its purpose includes to “prevent abuse of dominant market positions by online platform operators” and to “strengthen fairness and transparency in the

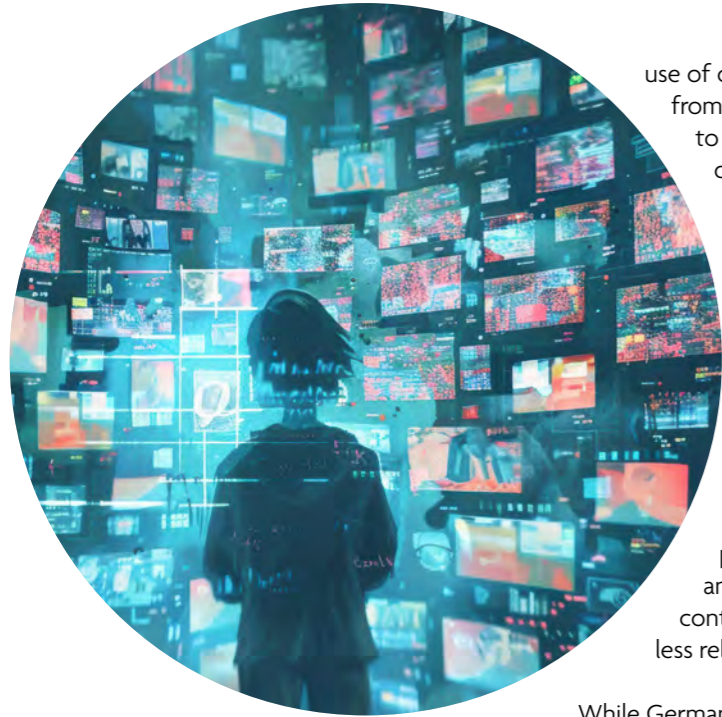
<sup>211</sup> *EU 2022 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R1925>.

<sup>212</sup> European Commission, “*Digital Markets Act: Gatekeepers*” [https://digital-markets-act.ec.europa.eu/gatekeepers\\_en#:~:text=On%206%20September%202023%20the,Digital%20Markets%20Act%20\(DMA\)](https://digital-markets-act.ec.europa.eu/gatekeepers_en#:~:text=On%206%20September%202023%20the,Digital%20Markets%20Act%20(DMA)).

<sup>213</sup> Government of Japan (Ministry of Economy, Trade and Industry), *Key Points of the Act on Improving Transparency and Fairness of Digital Platforms* [https://www.meti.go.jp/english/policy/mono\\_info\\_service/information\\_economy/digital\\_platforms/pdf/0401\\_001b.pdf](https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/0401_001b.pdf).

<sup>214</sup> A proposed Platform Competition Bill was withdrawn; the 9 July 2024 proposal is for Bill on Online Platform Monopoly Regulation <https://www.kfcf.or.kr/news/trend/read.do?no=624>.

<sup>215</sup> Computer & Communications Industry Association, “*CCIA Response to a Fair Trade Commission Direction on Platform Competition Bill*” (7 March 2024) <https://ccianet.org/news/2024/03/ccia-response-to-korea-fair-trade-commission-direction-on-platform-competition-bill/>.



use of online platforms”<sup>216</sup> Designated services will be prevented from prioritising their own products and limiting users’ ability to access third party services, and will be required to make disclosures around their algorithms.

### 3.6.4 Summary of the above algorithmic and transparency provisions

As outlined earlier, the above provisions are not designed specifically to prioritise news and journalism on digital platforms but provide a potential starting point for scope, definitions and/or regulatory frameworks. For example, a must-carry provision for content on digital platforms without related algorithm rules around search and recommender systems could result in legitimate media content being present on a platform but deprioritised behind less reliable or even malicious sources.

While German telemedia and French prominence regulations (which reflect the EU AVMSD) provide examples of the most specific regulations for digital platforms in addressing the discoverability of media on digital platforms, the more common approach is not to specify or mandate algorithmic requirements, but to address them through the combination of transparency requirements (including in voluntary codes) or through the articulation of principles such as preventing disinformation or removing anti-competitive barriers.<sup>217 218</sup>

## 3.7 Designing a regulatory framework for news prominence on digital platforms

### 3.7.1 Rationale

Concepts of must-carry, must-find, must-not-discriminate and the like are centred around recognition of the importance of certain types of content and services for societies, whether for cultural maintenance or the protection of democratic systems. The current challenges to the presence and sustainability of authoritative news services are well understood and articulated; the question of how to best maintain this presence while not unduly infringing commercial (and, to some extent, free speech) rights of businesses operating digital platforms is the more difficult one.

### 3.7.2 Take outs from local and international examples

At their simplest, must-carry and prominence requirements exist in licensed environments as part of well-established schemes, with clearly defined boundaries. The long-time TIL/USO model which exists in the US and Australia around service provision, as well as the proliferation of mandated local content and service “must-carry” or “prominence” requirements for broadcasters (and more recently device manufacturers) in many countries demonstrate workable and durable mandated approaches.

The many attempts to extend these protections into less regulated digital platform environments involve a diversity of models, and the choice of regulatory instrument may be equally diverse. Just as broadcasting legislation (including the Australian *Broadcasting Services Act 1992*) has long ago moved beyond linear broadcasting into regulating certain online activities, it is not surprising that a jurisdiction such as Canada has placed provisions for online services, including content

<sup>216</sup> Korea, Fair Trade Commission, [2201430] *Bill on Online Platform Monopoly Regulation* (7 May 2024) <https://www.kfcf.or.kr/news/trend/read.do?no=624>. Referred to Political Affairs Committee on 8 July 2024

<sup>217</sup> Di Porto, F. & Zupetta, M., “Co-Regulating Algorithmic Disclosure for Digital Platforms” *Policy and Society* (2021) 40(2) 272-292 @ 272 <https://academic.oup.com/policy-and-society/article/40/2/272/6509319>.

<sup>218</sup> Ulbricht, L. & Yeung, K., “Algorithmic Regulation: A Maturing Concept for Investing Regulation Of and Through Algorithms” *Regulation and Governance* (2021) 16(1) 3 <https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12437>.

requirements and a levy, in amendments to its *Broadcasting Act 1991*. Other prominence and content regimes have seamlessly moved from linear to online – for example, the European Audiovisual Media Services Directive and UK *Media Act 2024*.

What is interesting is that provisions that are potentially useful in protecting news and journalism are finding their way into the regulation of online safety and disinformation and even competition policy, as evidenced in various examples of European and UK regulation. Some of the clearest statements around the importance of the role of “recognised news publishers” for democracy appear in the less immediately obvious environment of the UK *Online Safety Act 2023* alongside consumer protection for other more conventionally understood online safety risks.<sup>219</sup>

While it is well accepted that proactive measures have been taken by digital platforms in the course of public health crises (such as attempts to counter disinformation in the pandemic), this can be more difficult to translate into the day-to-day public good of making trusted news sources more prominent than those of other content providers. And while voluntary misinformation codes may not be a solution – as they articulate principles without necessarily offering specific actions or enforceability – some of the concepts they use may be adaptable into structured regulation.

As outlined earlier, in the digital environment the challenge is not just about presence but about placement: findability in search and non-deprioritisation in algorithms are critical. The statements of intent in disinformation codes provide a helpful point of reference but their translation into more concrete actions is likely to be strongly contested. With this in mind, designing with reference to provisions that digital platforms must already comply with (for example, those found in UK or European regulations, albeit in different regulatory contexts, or commitments made in Australian voluntary codes) could be one way to reduce these points of friction.

### 3.7.3 Design elements

In some ways, the choices around how to create a “must-carry”, “must-be-discoverable” and “must-not-deprioritise” scheme to protect the presence of news on digital platforms are less clear than the imposition of a levy, as there is significant diversity in how these issues are approached in different jurisdictions. The following table considers some of the elements to be addressed in designing a must-carry option. It summarises some key provisions but is not a comprehensive list.

<sup>219</sup> As noted earlier, there are some aspects of this legislation touching on disinformation, which was more explicitly addressed in the original Bill, and there have been recent calls to extend it to those types of harms.



**Table 2: Design Elements: Visibility and Discoverability**

| ELEMENT   | EXAMPLE REFERENCES  |
|---|---|
| <b>Why?</b>   | <p><b>Objectives</b></p> <ul style="list-style-type: none"> <li>Support the visibility of public interest journalism as an essential element of democracy and civic engagement including for underserved audiences and areas</li> <li>Counter misinformation and disinformation through the presence of trusted and responsible media sources</li> </ul>  |
| <b>Who has to comply with obligations?</b>                            | <p><b>Covered digital platforms</b></p> <ul style="list-style-type: none"> <li>Wide variety of definitions across different regulation; should cover platforms that find, host, recommend or enable sharing of news</li> <li>News Bargaining Code doesn't define "digital platforms" and Explanatory Memorandum refers to its "ordinary meaning"</li> <li>Combating Misinformation and Disinformation Bill applies to a "digital communications platform"; being a connective media service, content aggregation service, internet search engine, media sharing service or as designated by Minister – but not internet carriage service, SMS service or MMS service</li> <li>Australian <i>Online Safety Act</i> covers a social media service, relevant electronic service or designated media service</li> <li>UK <i>Online Safety Act</i> covers search services and services that allow users to post content or interact with each other</li> <li>Query if size relevant: <ul style="list-style-type: none"> <li>VLOPs/VLOSEs</li> <li>Audience and revenue thresholds?</li> </ul> </li> </ul>  |
| <b>What types of obligations might there be on digital platforms?</b> | <p><b>Prioritise</b></p> <ul style="list-style-type: none"> <li>Must prioritise authoritative sources</li> </ul> <p><b>Must-carry</b></p> <ul style="list-style-type: none"> <li>Many precedents for services (such as channels) but few around specific news providers on digital platforms (see <i>Interstate Treaty</i>)</li> </ul> <p><b>Content systems</b></p> <ul style="list-style-type: none"> <li>Duty to operate service with "proportionate systems and processes" taking into account free expression of content of democratic importance, including news publisher content</li> </ul> <p><b>"Temporary" must carry</b></p> <ul style="list-style-type: none"> <li>Duty requiring platform to notify recognised news provider of proposed action and give right of response</li> </ul> <p><b>Treatment of journalistic content</b></p> <ul style="list-style-type: none"> <li>Duty to include in terms of service how content is identified as journalistic, how importance of free expression of journalistic content will be taken into account and complaints handling</li> </ul> <p><b>Media complaints systems</b></p> <ul style="list-style-type: none"> <li>Dedicated and/or fast-track complaints process for media service providers and swift restoration of content</li> </ul> <p><b>Discoverability/findability</b></p> <ul style="list-style-type: none"> <li>Must-be discoverable and/or easy to find</li> </ul> |

| ELEMENT   | EXAMPLE REFERENCES  |
|---|---|
| <b>What types of obligations might there be on digital platforms? (cont.)</b> | <p><b>Non-discrimination</b></p> <ul style="list-style-type: none"> <li>Unbiased parameters for ranking, indexing and crawling for influential platforms/must not discriminate</li> <li>Prohibition on platform retaliation against digital journalism provider for asserting financial rights (California Bill)</li> </ul> <p><b>Algorithms, recommender systems</b></p> <ul style="list-style-type: none"> <li>Risk assessments connected with transparency provisions</li> <li>Obligations to take measures during public security or public health crises (EU) – subject to voluntary adoption of Codes</li> </ul> <p><b>Search prominence</b></p> <ul style="list-style-type: none"> <li>Visibility or priority in search results for specified services</li> </ul> <p><b>Content recognition</b></p> <ul style="list-style-type: none"> <li>Provision for specified news content to be recognised by platforms</li> </ul> <p><b>Takedown limitations</b></p> <ul style="list-style-type: none"> <li>Suspension of media provider content only under terms of service</li> </ul> |
| <b>Which forms of news and news organisations could be protected?</b>         | <p><b>Defined news organisations/producers</b></p> <ul style="list-style-type: none"> <li>News organisation definitions – note concerns with News Bargaining Code definitions excluding smaller and independent media</li> <li>Note issues with potential self-designation of media under EU and UK legislation</li> <li>Coverage of small publishers, freelancers</li> <li>Redistributors of trusted news vs just news producers?</li> </ul> <p><b>Defined news content</b></p> <ul style="list-style-type: none"> <li>News and journalistic content definitions examples: <ul style="list-style-type: none"> <li>Professional news content (Aust)</li> <li>Media Service Provider (EU)</li> <li>Recognised news provider (UK)</li> </ul> </li> </ul>  |
| <b>How to ensure enforceability</b>   | <p><b>Local presence requirements</b></p> <ul style="list-style-type: none"> <li>Platforms and news providers to establish Australian point of content</li> <li>Could also include local communication requirements</li> </ul>  |



# 4.

## WHERE TO FROM HERE?

It is broadly accepted that there is an urgent need to address the sustainability of the Australian media sector, and the policy rationale for change is compelling.

In the context of a very active international regulatory environment, the above analysis demonstrates that there is a plethora of comparable local and international approaches that could be considered by the Australian Government to support Australian public interest news and journalism.

Local and international experience also shows that it is to be expected that many of these approaches will be vigorously contested, not only by regulated or affected parties but potentially by governments which have trade agreements with Australia.

### 4.1 What new regulation might look like

New regulations do not necessarily mean the end of the News Media Bargaining Code,<sup>220</sup> but potentially a framework of related and complementary pieces of regulation centred around objectives of media sustainability and presence.

It seems reasonably clear that a levy alone will go only part of the way, just as forms of prominence or must-carry regulation will maintain presence but not necessarily financial sustainability for news media. Accordingly, a solution is likely to require both of these aspects to be addressed.

Just as there have been significant global efforts towards more harmonised tax regimes, including for digital platforms, it would make sense for there to be a globally consistent approach around how digital platforms deal with public interest news content. However, the challenges in doing this may be insurmountable: the lack of global accord on digital services taxes after years of negotiation foreshadows how much harder this would be to achieve for media levies on digital platforms. The bar is raised even higher in the context of must-carry/prominence regulations, which are anchored in delicately balanced issues of freedom of expression, cultural protections and other locally focused laws founded in dramatically different national regulatory frameworks.

If digital platforms are already complying with requirements in other jurisdictions, that is a reasonable starting point: it can be argued that they would not be prejudiced by comparable obligations enacted in Australia.

There are viable options for Australia to address both aspects as part of a holistic framework. Different limbs may need to contain different approaches: for example, a levy may be aimed more broadly at specified categories of digital advertising

<sup>220</sup> Joint Select Committee on Social Media and Australian Society, *Second Interim Report of the Social Media Inquiry* (October 2024) 96. The Committee view was also that "alternative or additional mechanisms other than the Code should be explored". [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Second\\_interim\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Second_interim_report).

platforms, whether or not they host news; in contrast, a must/carry or prominence provision would, by definition, only need to be focused on digital platforms that host, recommend or enable the sharing of news content.

Having regard to the range of approaches considered in this paper, a potential Australian framework could include the following elements:

- **Financial sustainability** could be supported through a levy with the following elements:
    - Levied broadly on defined online platforms that receive digital advertising revenue above a specified threshold.<sup>221</sup>
    - Applied through a new content licence for - or authorisation of - service providers that operate a specified type of digital platform, with the levy imposed on this category of service provider.<sup>222 223</sup>
    - Supplemented by a form of tax credit system for news producing organisations for the employment of journalists or journalist training.<sup>224</sup>
    - Available as grants to recognised/defined news providers that meet professional standards. (News Media Bargaining Code or UK recognised news provider definitions could be a starting point but there is a need to ensure smaller, regional and special purpose news providers are included for specified purposes, linked to media diversity policy).<sup>225</sup>
    - Managed through an independent special purpose organisation with defined objectives and criteria, such as supporting regional news or diversity in independent publishers or supporting journalism training and employment.<sup>226</sup>
    - Accountable through a process of reporting to the regulator and requiring recipients to account publicly for funds received, supporting the evaluation of the levy's effectiveness. Looking to existing precedents and powers, ACMA could be the regulator whether the levy was housed in broadcasting, telecommunications, competition or other legislation.
  - **Media presence** could be supported through:
    - Obligations on digital platforms that host or enable search, sharing or recommendation of news.
    - Rights and exemptions for defined media providers (likely using the same definition as for financial sustainability)
    - Protections modelled on EU and UK provisions and existing Australian legislation, which may include:
      - Notification by platforms of takedown of journalistic content and process for swift review.
      - Fast-track complaints process for media content.
      - Strengthened provisions for prioritisation of recognised news content to counter misinformation and disinformation, for example:
        - building on the intent of Code 5.9K of the existing Australian DIGI Code with the addition of more detailed and substantive guidelines; or
        - introducing rights for recognised public interest media providers, akin to those in sections 17, 18 and 19 of the UK *Online Safety Act*.
- If sufficiently strengthened, this could have the effect of preventing wholesale takedown of news services from digital platforms.

<sup>221</sup> Nicholls, R., McTernan, C., Fitzgerald, S., Flew, T., "Google is Worth More in Australia Than Major News Outlets. Here's How it Could Better Fund Journalism" *The Conversation* (17 September 2024) <https://theconversation.com/google-is-worth-more-in-australia-than-major-news-outlets-heres-how-it-could-better-fund-journalism-239093>.

<sup>222</sup> Ibid.

<sup>223</sup> The Google deal to withdraw the California journalism legislation provides for a "partnership" with some Government contribution, so this could be a factor in overcoming local objections. Also, given that this is law in two US states, this may overcome trade issues.

<sup>224</sup> See 2.3.1 above.

<sup>225</sup> Eligibility may hinge to some extent on being subject to professional standards codes. In the contexts of recent reforms, including prominence for BVOD services and debate around misinformation and disinformation legislation, it has been argued that existing media codes covering professional standards for news need to be extended to their online forms of dissemination and potentially that the ACMA's powers under the BSA will need to be extended.

<sup>226</sup> Joint Select Committee on Social Media and Australian Society, *Second Interim Report of the Social Media Inquiry* (October 2024) Recommendation 3, 98 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Social\\_Media/SocialMedia/Second\\_interim\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media/SocialMedia/Second_interim_report).

- Exemption from takedown of certain types of news content which are subject to recognised codes. (This could involve extending the operation of existing industry codes to specifically address online dissemination.)
- Strengthened obligations and transparency around discoverability, recommender systems and algorithms.
- Requirements on digital platforms to have a registered address in Australia. Looking to local and international precedents, this may involve some form of co-regulatory approach based on systems and frameworks, with monitoring and enforcement by the regulator.

- The **News Media Bargaining Code** could be retained, with some modification, as an option for digital platforms (potentially exempting them from the levy depending on extent of participation).
- **A package of reforms** could be linked around policy for supporting media sustainability; this could include must-carry/must-be-discoverable/must-not-discriminate alongside support measures such as levies and tax credits.

Given the speed of change in the digital environment, any framework should retain some flexibility to avoid the need for more cumbersome legislative amendment processes, for example through Ministerial designation powers that can be reviewed by Parliament.

## 4.2 If not now, then when?

Over the last few years, the Australian Government has actively engaged with critical issues of media reform through higher level strategies and specific interventions to solve urgent issues facing local media.

These types of reforms involve long implementation timeframes – for example, new television prominence requirements legislated in July 2024 in fulfillment of a 2022 election commitment<sup>227</sup> will be implemented in early 2026. With some aspects of digital platform reform proving to be a fiercely contested battleground at each stage of reform, it remains to be seen whether the speed of legislation will be able to keep up with the pace of change.

While reform is clearly needed, large digital platforms have made significant efforts to improve their internal processes and address public concerns – for example, around disinformation and misinformation. However, Australia is not yet in step with new forms of digital platform regulations appearing in other jurisdictions. As globally operating platforms adapt their governance and processes to those new frameworks, it is arguable that they should be able to bring these changes into the local environment for the benefit of Australian users.

The seriousness of the issues arising from well-documented audience trends towards less trusted sources of news is not the subject of differences. Through all the debates, it is rare to find any protagonist arguing that nothing should be done. The issue is what and how much should be done, who should be responsible and who should pay.

Timing will be everything. It is to be hoped any new interventions can be considered, designed and implemented expeditiously.

<sup>227</sup> Rowland, M., "Modernising Australia's Media Laws - for all Australians" (Media Release) (29 November 2023) <https://minister.infrastructure.gov.au/rowland/media-release/modernising-australias-media-laws-all-australians>.



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