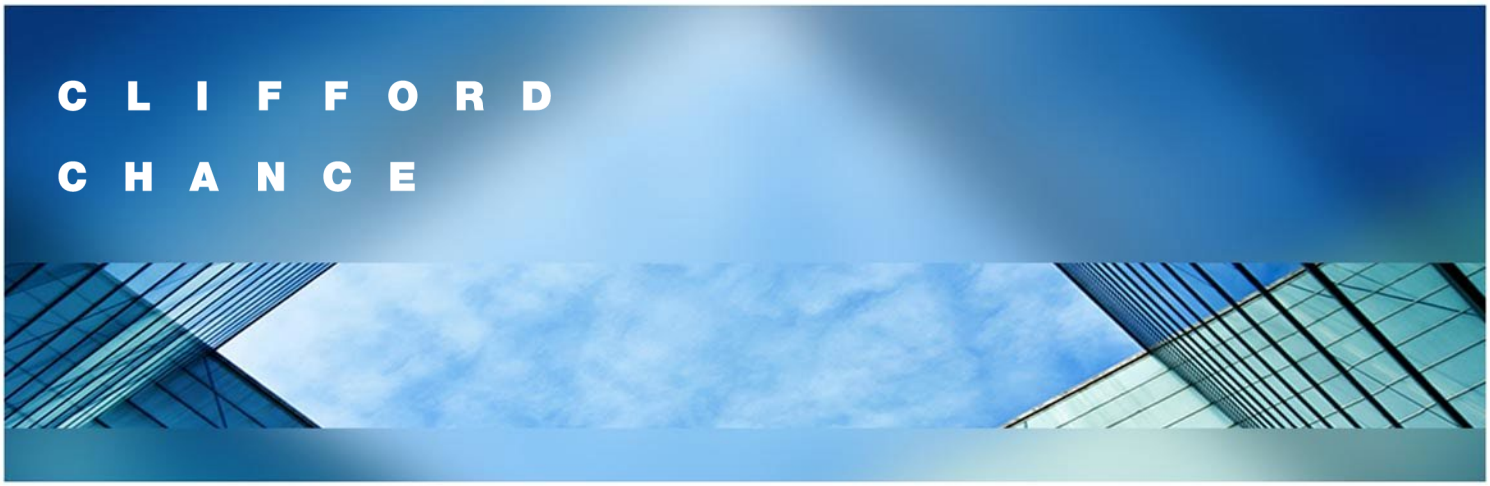

ACCC PROPOSES COMPULSORY "*FINAL OFFER ARBITRATION*" FOR DISPUTES BETWEEN MEDIA BUSINESSES AND THE DIGITAL PLATFORMS, GOOGLE AND FACEBOOK, IN AUSTRALIA

1. Introduction

On 31 July 2020, the Australian Competition and Consumer Commission (**ACCC**) released a consultation draft of the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (**Draft Bargaining Code** or the **Code**). The Draft Bargaining Code is a proposed new piece of legislation designed to give Australian media businesses the ability to bargain with Google and Facebook to secure fair payment for news content. Under the Draft Bargaining Code, if the Australian news business (or businesses) fail to reach an agreement with Google or Facebook through negotiation or mediation, the Australian news business has the right to commence compulsory arbitration to determine the remuneration that Google or Facebook must pay for the use of its news content.

In this Briefing Paper we focus on the novel system of "*Final Offer Arbitration*" that the Draft Bargaining Code proposes, a form of arbitration that originally came to prominence in player salary disputes in professional sports in the United States (hence its colloquial name "*baseball arbitration*").

2. Background

In December 2019, the ACCC released its Final Report on its Digital Platforms Inquiry as to the impact of digital search engines, social media platforms and other digital content aggregation platforms on competition in the media and advertising services markets. In response to the Final Report, the Australian Federal Government directed the ACCC to work with Google, Facebook and Australian media companies to develop a voluntary code to address what the ACCC identified as bargaining imbalances between those parties in relation to the payment for news content.

While the voluntary code was to be implemented by November 2020, the Federal Government warned that if a code could not be agreed voluntarily, the Government would consider imposing a mandatory code.

In April 2020 the ACCC reported that it did not believe agreement on a voluntary code would be reached. As a result, on 20 April 2020, the ACCC was tasked by the Federal Government with developing a mandatory code

Key issues

- The ACCC has proposed a Mandatory Bargaining Code between Australian news businesses and the digital platforms Google and Facebook to deal with an imbalance in negotiating power
- The proposed Code introduces a form of arbitration rarely used in Australia, colloquially referred to as "*baseball arbitration*" after its use in player salary disputes in US professional sports.
- In baseball arbitration, the parties are obliged to each make an offer and the arbitral tribunal is required to choose one party's offer or the other, rather than making its own independent determination of the merits of the dispute.
- But in circumstances where Google and Facebook are not voluntarily engaging in arbitration and may well have very different views on value to the news businesses with whom they are bargaining, the conditions that make baseball arbitration effective in other contexts may be lacking.
- While the ACCC and Australian Government are to be commended for seeking to establish an innovative framework for successful bargaining, the arbitration process proposed by the Code is likely to be far more lengthy, more complex and prone to litigious disputes than is perhaps anticipated, for the reasons described in this Briefing.

which was issued in draft on 31 July 2020. The ACCC will consult on the Draft Bargaining Code in August with the intention that it be finalized shortly thereafter.

3. Procedure under the Draft Bargaining Code

The system of arbitration that the Draft Bargaining Code prescribes is "*Final Offer Arbitration*" (**FOA**), colloquially known as "*baseball arbitration*". Though there is some variation in the way it is practised, FOA can generally be described as a process in which the parties are obliged to each make an offer and the arbitral tribunal is required to choose one party's offer or the other, rather than making its own independent determination of the merits of the dispute. The principal attraction of baseball arbitration is that it incentivises the disputing parties to act reasonably, because the design of the system intends that the most reasonable party prevails.

In the Draft Bargaining Code, the FOA system is set out in Division 7 ("*Arbitration about remuneration issue*"). The process may only be initiated when the news business corporation and the digital platform corporation have failed to resolve the issues between them after three months of bargaining (including at least one day of mediation in relation to the remuneration issue).

The arbitration procedure under the Draft Bargaining Code involves the following steps:

- The bargaining party wishing to commence arbitration (which may be the news business corporation or the digital platform corporation) issues a notification to the ACCC, stating that "*arbitration about the remuneration issue should start*" – this notice must be in writing and meet the requirements of any regulations that may be subsequently issued.
- The bargaining parties must then discuss the formation of the arbitral panel. If the bargaining parties cannot agree on the matter being decided by a single arbitrator, the arbitral panel shall be comprised of three arbitrators. The parties may agree to appoint any person as arbitrator, but if they fail to agree on who to appoint as arbitrator, the Australian Communications and Media Authority (**ACMA**) shall appoint the arbitrator (or arbitrators) from a list of 10 persons on its register of bargaining code arbitrators. The Draft Bargaining Code suggests that all of this must occur within 5 business days.
- The Chair of the arbitral panel must then notify the bargaining parties that the arbitration will start on a specified date, which must not be later than 5 business days after the date on which the ACCC was first given notice by a bargaining party that arbitration should start. The notice given by the Chair must be in writing and meet the requirements of any regulations that may subsequently be issued.
- Within 10 business days of the start of arbitration (as notified by the Chair), each bargaining party must "*submit to the panel a final offer for what the remuneration amount should be*", providing copies of its final offer to the other bargaining party, and the ACCC. The final offers must not exceed 30 pages in length and, once submitted, "*cannot be withdrawn or amended*".

- Each bargaining party then has the right to file submissions on the final offer made by the other bargaining party. These submissions must be filed within 5 business days of the arbitral panel receiving the final offers from the bargaining parties and must not exceed 20 pages in length.
- If the ACCC wishes to make submissions on the bargaining parties' final offers, the ACCC may do so within 10 business days of the ACCC receiving the final offers. Unlike the bargaining parties, the ACCC is not subject to any page limit on its submission, which may also include "*additional sources of information to assist the panel to fulfil its obligations in considering the final offers of both parties*". If the ACCC files a submission, the bargaining parties may provide comments on the ACCC's submission within 5 business days, and these comments must not exceed 20 pages in length.
- Within 45 business days of the start of the arbitration, the arbitral panel must accept one of the bargaining parties' final offers. There is an exception for situations where the arbitral panel considers that each final offer "*is not in the public interest because it is highly likely to result in serious detriment*" to "*the provision of covered news content in Australia*" or "*Australian consumers*". If the arbitral panel reaches this conclusion, and therefore does not accept one of the final offers, the panel must adjust one of the final offers "*in a manner that results in that offer being in the public interest*".
- The arbitral panel must endeavour to make a unanimous decision but if it cannot, the decision shall be by majority. Once the arbitral panel makes its decision – whether that entails outright acceptance or adjustment of one of the final offers – the bargaining parties "*must comply with the determination*" and, within 30 business days, make a written agreement providing for the payment of the remuneration determined by the arbitral panel.

Accordingly, the arbitration process prescribed by the Draft Bargaining Code has a maximum period of 45 business days from start to finish. At all times until the arbitral panel issues its determination, the parties may continue to negotiate (and the arbitration process ceases if they reach an agreement).

Under Section 76(1)(a) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), certain penalties apply where a party breaches a "*civil penalty provision of an industry code*". The Draft Bargaining Code proposes to amend Section 76(1A) (aa), such that any bargaining party who contravenes a "*civil penalty provision*" of the Draft Bargaining Code may be liable to the imposition of a pecuniary penalty of $10 million (per contravention). This penalty regime will apply to the entirety of Division 7 of the Draft Bargaining Code, meaning any failure to comply with an arbitration provision which is also deemed to be a civil penalty provision may give rise to a considerable fine.

4. Practical Considerations

In its press release introducing the Draft Bargaining Code on 31 July 2020, the ACCC stated:

> "*We believe that our final offer arbitration proposal provides a compelling incentive for parties to put forward fair and reasonable* proposals*, given each has just one chance to make an offer, and only one offer can prevail*".

Though the drafters of the Draft Bargaining Code are to be commended for their innovative approach, the arbitration system they have crafted raises certain practical difficulties.

First, the Draft Bargaining Code imposes a very short time limit for the formation of the arbitral panel: 5 business days. In commercial arbitrations, the selection and appointment of arbitrators is a crucial step and ordinarily takes at least one month to be completed (in a large case, it often takes two or three months to constitute a three-member arbitral tribunal). Although experienced arbitration practitioners should be able to work within the 5-day time-frame prescribed by the Code, it must be assumed that parties will often fail to agree on whom to appoint as their arbitrators and, therefore, that the ACMA will be regularly be required to appoint arbitrators. To ensure impartiality and independence in the arbitral process, the ACMA will need to think carefully about the 10 people it names on its register of arbitrators, as these individuals are likely to play a prominent role in the operation of the Code.

Second, in terms of the wider process, the 45-day time limit for completion of arbitration imposed by the Code is highly compressed and, at least in more complex cases, unrealistic. Though arbitration is generally faster than litigation, 45 business days is a very short period to determine the types of disputes contemplated between news business corporations and digital platform corporations by the Code. This is especially so given that:

- the Code calls upon arbitrators to consider and rule on complex questions of fact in selecting the final offer - these questions include a requirement to determine the direct and indirect benefit that the content of the news business provides to the digital platform's service, the cost to the news business (or news businesses) of producing news content, and whether a particular payment amount would place an undue burden on the commercial interests of the digital platform. This task will be most complex, and take longest, where the arbitral panel concludes that neither of the final offers made are in the public interest, and therefore has to engage in the adjustment process under Section 52ZO(5); and
- the Draft Bargaining Code also allows for third-party submissions from the ACCC, meaning there is significant potential for remuneration disputes under the Code to take on a policy dimension. The need to properly consider submissions by the ACCC, and any additional sources of information the ACCC provides, will place arbitrators under considerable time pressure during the proceedings (which may become effectively multi-party arbitration), and this is without even factoring-in the time the arbitrators will need to deliberate and draft their determination.

Nevertheless, there are other arbitration systems which require awards to be issued within very short time frames. Although the 45-day time limit for arbitration under the Code will likely present problems for larger and more complex cases, skilled arbitration practitioners should be able to complete the process in time, at least in simpler cases.

The third difficulty relates to the nature of baseball arbitration itself. FOA or baseball arbitration is relatively (if not almost completely) unknown in Australia, even amongst arbitration specialists. It will take time for businesses and their advisers to familiarise themselves with the FOA process, which is very different from traditional commercial arbitration procedures (and has an entirely different psychology). Indeed, interested parties may well take issue with the FOA system prescribed by the Code – for example, it may be said that the FOA system is fundamentally unequal because, in requiring both parties to make final offers, it assumes liability to make payments for news content on the part of the digital platform corporation (when, the digital platform may have grounds for arguing it has no liability at all).

Finally, the penalty regime of the Code may be problematic, when viewed in the light of the other provisions of the Code. For example, Section 52ZL prescribes that "[e]*ach bargaining party must participate in the arbitration in good faith*", and Section 52ZO(2) requires the parties to make final offers. If, following an honest and genuine assessment, a digital platform concludes it has liability to pay for the relevant news content but makes no final offer (or offers nil), that could contravene the good faith obligation and expose the digital platform to a fine. While this would be a difficult thing to prove, the Code does leave this possibility open. It may be said, therefore, that a digital platform is doubly coerced by the Code: first, the digital platform is coerced into making an offer by the baseball arbitration system itself, in which a party who makes no offer (or offers nil) is almost guaranteed to lose, because the other party's offer will often be accepted by default; second, the digital platform is coerced into making an offer by virtue of the manner in which the broad penalty regime in Section 76 of the CCA interacts with certain procedural obligations under Division 7 of the Code.

5. Legal considerations

The Draft Bargaining Code does not expressly provide for any form of appeal. In assessing whether the determination of an arbitral panel under the Code may be appealed or subjected to other forms of judicial review, complex legal questions arise.

The first is whether the process can be considered an "*arbitration*" for the purposes of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**), which is the template arbitration statute that forms the basis of the *International Arbitration Act 1974* (Cth) (**IAA**) and the Commercial Arbitration Acts of the States and Territories in Australia. The definition of "*arbitration*" in the Model Law is very broad, extending to "*any arbitration whether or not administered by a permanent arbitral institution*". If an arbitral procedure under Division 7 of the Code is an "*arbitration*" in the Model Law sense, the next question is whether it is "*commercial*" (a term the Model Law also defines broadly) and "*international*". These are important points of definition because if an arbitration under the Code is an international

commercial arbitration for the purposes of the Model Law, then the IAA applies and the parties have no right of appeal against the arbitral panel's determination – they may instead only challenge the determination on limited, non-substantive grounds, in a process known as "*annulment*" (Australian courts are notoriously reluctant to annul arbitral awards). Additionally, if the Model Law applies, arbitrations under the Code will have to comply with certain mandatory procedural rules (including that a hearing be held if a party so requests), which may make it even harder to complete the process within the 45-day time frame prescribed by the Code.

Conversely, if the FOA process under the Code is not an arbitration in the Model Law sense, then the question becomes whether the determination of an arbitral panel under the Code is a "*decision of an administrative character*", such that the determination is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). On their face, the functions that the Code delegates to arbitrators are more judicial than administrative in nature, which means that the ADJR Act is unlikely to apply. Furthermore, if this is correct, a question may arise as to whether the Code purports to delegate the judicial power of the Commonwealth in a manner contrary to Chapter III of the Australian Constitution.

6. Conclusion

The drafters of the Draft Bargaining Code are to be commended for their innovative approach to dispute resolution. The baseball arbitration system that Division 7 of the Code prescribes has proven to be effective in other contexts, not just sports salary disputes but also real estate and other areas of commercial activity.

However, the Code imposes a 45-day time limit that will not be achievable for cases with any degree of complexity. Key steps, such as the process of appointing arbitrators, are unnecessarily compressed, and no allowance is made for situations in which the arbitral panel needs extra time to make its determination (or consider additional submissions and information provided by the ACCC).

The main legal issues presented by Division 7 of the Draft Bargaining Code are whether the system of arbitration it prescribes is an "*arbitration*" for the purposes of the Model Law and whether it will be possible to appeal an arbitral panel's determination (and, if so, on what grounds). These and other issues, including the constitutionality of the current text, will require careful consideration by the ACCC and the Government.

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