Facebook (temporarily) Un-Friends Australia: Arbitration as a Tool in Online Media Regulation

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In February 2021, Facebook made the unprecedented decision to ban Australian news-related content posted by Australian users. Facebook's move was reportedly in retaliation to the Federal Government's introduction of the News Media and Digital Platforms Mandatory Bargaining Code (**Code**).

Under the Code, operators of "*designated digital platform services*" in Australia will be required to negotiate with and pay registered Australian news businesses for sharing their content online. The Government has indicated that Facebook Newsfeed and Google Search will be designated digital platform services for the purposes of the Code, with other digital platform services to be added in the future, if required. Among the concerns held about the Code by the digital platform corporations is the introduction of a novel form of mandatory arbitration to resolve disputes over the price to be paid for online news content sharing.

Arbitration under the Code

The novel procedure under the Code to resolve disputes over price between the digital platform corporations and the news businesses has not only concerned the

digital platform corporations but also attracted the interest of arbitration practitioners.

The Code will implement a system of mandatory "*final offer arbitration*", or what is more colloquially known as "*baseball arbitration*" having derived from the system used to settle baseball player salary disputes in the United States. Final offer arbitration typically involves each party submitting to the arbitral tribunal the proposed award setting out the amount to be paid, together with submissions justifying that amount. The arbitral tribunal then determines the matter by issuing an award in the terms proposed by one of the parties.

Google has labelled the arbitration provisions as "*untested, one-sided, and at odds with fair commercial agreements*" and that they "*present unmanageable legal and commercial risk to Google*".

Final offer arbitration under the Code is only available if the issue in dispute is a "*remuneration issue*". This is defined in the Code as an issue concerning "*the remuneration to be paid to a registered news business for the making available of the registered news business' covered news content by the designated digital platform service*".

The news business can only commence arbitration after the parties have engaged in good faith negotiations for at least three months. The arbitration is commenced by written notice from the news business to the Australian Competition and Consumer Commission (**ACCC**) (as the Code will sit within the *Competition and Consumer Act 2010* (Cth)). It is this notice that effectively compels the digital platform corporation to use the arbitration process.

Constitution of the arbitral tribunal

Once the ACCC has received the notice, it must notify the Australian Communications and Media Authority (**ACMA**) and the parties that an arbitral tribunal is to be formed. Under the Code, the ACMA will establish and maintain a register of bargaining code arbitrators and may appoint the arbitral tribunal if the parties fail to agree.

The default position under the Code is that the arbitral tribunal shall comprise

three members, unless the parties agree on a sole arbitrator. The parties may agree on the arbitrator(s), and they are not restricted to those on the register maintained by ACMA. However, the Code requires the parties to agree on the appointment of the arbitrator(s) within 10 business days of the ACCC's notice requesting them to appoint the arbitral tribunal. In the absence of an appointment, the ACMA then makes the appointment from the register of bargaining code arbitrators. The ACMA cannot appoint an arbitrator who is not on its register.

The two-week time limit under the Code for the parties to agree on appointing the arbitral tribunal is tight, and experience suggests that the ACMA may be called upon to make appointments in matters referred to arbitration under the Code.

Arbitration proceedings

The procedure for the arbitration provided under the Code is short, straight-forward and prescriptive.[fn]For example, final offers are restricted to no more than 30 pages and submissions in support of final offers are to be no more than 20 pages.[/fn] The arbitral tribunal must notify the parties that the arbitration will start within five business days of appointment. The parties then have 10 business days from the arbitration's commencement to exchange simultaneously the final offer lump-sum amounts they claim should be paid by the digital platform service to the news business for a period of two years. The arbitral tribunal may extend the time limit of 10 business days to make the final offer if it considers that "*exceptional circumstances*" justify it.

The Code requires strict compliance with time limits and page lengths. It stipulates that offers that do not comply with the requirements of the Code are not final offers for the purpose of the Code. The Code also prohibits the withdrawal or amendment of a final offer.

If only one party submits a final offer, the arbitral tribunal must accept that final offer (subject to the public interest exception discussed below). If both parties fail to submit a final offer within the time period stipulated under the Code, then the arbitration simply terminates, which would appear to result in no bargain being struck between the parties, either voluntarily or by arbitral determination.

The Code does not address whether or not the arbitration proceedings are to be

conducted on a confidential basis. A contentious point may well be whether or not the "opt-out" confidentiality provisions in the *International Arbitration Act 1974* (Cth) or any of the uniform domestic commercial arbitration legislation apply to an arbitration under the Code, especially considering the public interest concerns behind the introduction of the Code. The possibility of having negotiations aired in public is another incentive that may encourage digital platform corporations and news businesses to reach agreement on remuneration.

ACCC's role

The ACCC is entitled to make submissions on "*impartial factual information*" to the arbitral tribunal (which are also shared with the parties). The parties are then given an opportunity to make submissions about the ACCC's submissions.

The ACCC is also allowed to issue written guidelines about the conduct of an arbitration under the Code which the arbitral tribunal may take into account, although the Code expressly states that such guidelines are not a legislative instrument.

Determination

The Code identifies the matters that an arbitral tribunal is to take into account when making its determination (which must be made within 35 days of the last offer or submission received). These include:

- the benefits (monetary or otherwise) to both the news business and the digital platform service of the sharing of the news content;
- the reasonable cost the news business incurs in producing the news content;
- the reasonable cost the digital platform service incurs in sharing that content; and
- whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform service.

When considering these matters, and in-line with the purpose of the Code, the arbitral tribunal also considers the bargaining power imbalance between the news

businesses and the digital platforms.

The final offer arbitration process set out in the Code differs from a typical baseball arbitration process in one aspect. The Code provides an exception to the tribunal simply adopting one party's offer over the other. If the tribunal considers that both the final offers are not in the public interest because they are "*highly likely*" to result in "*serious detriment*" to the provision of covered news content in Australia or Australian consumers, the arbitral tribunal may adjust the remuneration amount of the most reasonable final offer so that the offer is in the public interest.

Under the Code, the parties are required to comply with the determination made by the arbitral tribunal and, in addition to the news businesses being able to seek a court order for payment in accordance with the arbitration determination, the digital platforms may be fined the greater of $10 million, three times the value of the benefit or 10% of the corporation's annual turnover, for failure to comply.

Costs

As far as arbitration costs are concerned, the Code only stipulates that the parties are to pay the arbitral tribunal's costs equally. The Code is silent as to any liability for the legal fees of the party whose award the arbitral tribunal does not choose.

Conclusion

So far, Seven West Media and News Corp have reached agreements with Google and Facebook which gives early indication that the Code may achieve its primary objective of encouraging digital platform corporations and news businesses to reach an agreement on remuneration issues without the need to resort to arbitration. It is certainly clear that if the digital platform corporations fail to reach an agreement with news businesses on remuneration issues they face the commercial risk of having price determined instead through final offer arbitration. If parties fail to agree on the amount news businesses are to be paid, it will be interesting to see how the use of baseball arbitration in Australian digital media regulation plays out.