# Bilateral v Collective Bargaining and Arbitration Options

## Response to the ACCC Concepts Paper on the Mandatory News Media Bargaining Code


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# 1. INTRODUCTION AND OVERVIEW

1. We have been engaged by the law firm Allens to respond to the ACCC's "Concepts Paper" released on 19 May 2020 in the context of the ACCC's consultation on the forthcoming mandatory news media bargaining code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms. In particular, Allens has asked us to consider the following two issues:

    a. Whether bargaining between digital platforms and news media businesses should be bilateral or collective; and

    b. If the code were to mandate arbitration in the event that bargaining impasses arise, what are the advantages and disadvantages of alternative arbitration frameworks.

2. This report is structured as follows.

    a. In Section 2 we provide a brief background to the ACCC's Concepts Paper and a summary of parts of the Concepts Paper that are relevant context for this report. Regarding effective bargaining frameworks, the Concepts Paper contemplates, among others, bilateral bargaining, voluntary collective bargaining and collective licensing, which we understand to be a form of mandatory collective bargaining. For each of these alternative bargaining frameworks, the Concepts Paper contemplates the possibility of recourse to mediation and arbitration. This report focuses on the bilateral bargaining and mandatory collective bargaining alternatives.

    b. In Section 3 we consider the relative merits of bilateral and mandatory collective bargaining between digital platforms and news media businesses. While mandatory collective bargaining offers an advantage of savings in external transaction costs between the digital platforms and news media businesses, the extent of heterogeneity in the business models, nature of content and incentives of news media businesses will result in significant internal coordination costs and significant costs of compromise, for both news media businesses and the public generally, including an adverse impact on original and quality journalism. While these internal coordination and compromise costs will depend on the extent to which matters in dispute between the digital platforms and news media businesses are directly codified in the mandatory code of conduct, we consider that bilateral bargaining is likely to be more efficient and socially preferable to mandatory collective bargaining, in relation to both monetary payment and other matters.

    c. In Section 4 we consider two alternative forms of arbitration: conventional arbitration (CA) and final offer arbitration (FOA). Both have merit as means of addressing bargaining power imbalances. FOA, while novel in Australia, has a number of attractive properties that warrants its consideration for inclusion in the mandatory code of conduct if the ACCC decides to include an arbitration framework.

# 2. BACKGROUND AND SUMMARY OF THE ACCC'S CONCEPTS PAPER

## 2.1. Background to the Concepts Paper

3. In July 2019 the ACCC published its Digital Platforms Inquiry Final Report (DPI Report). Our report takes as assumptions the following findings of the ACCC presented in Chapter 5 and the Executive Summary of the DPI Report.

    a. Significant proportions of Australians access news through social media and search for news brands and particular news stories using search engines;

    b. Google is a "critical source of internet traffic (and therefore audiences) for news media businesses";

    c. A news media business "risks losing a significant source of revenue if it prevents Google from providing links to its websites in search results";

    d. Facebook contributes a significantly lower proportion of traffic to new media businesses, but "remains a vital distribution channel for a number of media businesses, particularly those seeking to target a particular demographic group";

    e. The content produced by news media businesses is important to digital platforms with 8-14% of Google search results triggering a "Top Stories" result, which typically includes reports from news media websites including niche publications or blogs;

    f. While Google and Facebook each "clearly value the news media content that they are able to display to their users" they "each appear to be more important to the major news media businesses than any one news media business is to [them]". This provides each of Google and Facebook with substantial bargaining power in relation to many news media businesses;

    g. News media businesses, consumers and digital platforms all benefit from the reproduction of news content in snippets:

        i. Media businesses benefit because "a snippet provides context and an indication to the user of the value of that content, increasing the likelihood of consumers clicking through than if no snippet were provided (although this may depend on the length of the snippet)";

        ii. Consumers benefit because the context provided by the snippet "enables them to make an informed choice of which article to click on";

        iii. Google benefits because "the inclusion of news stories and snippets in search results increases the attractiveness of the google search engine" which "in turn increases the likelihood that consumers will use the search engine for other queries, which can be directly monetised"; and

        iv. Facebook benefits because "news stories appearing on a user's news feed retain the user's attention, enabling more advertisements to be displayed";

    h. However, "the inability of news media businesses to individually negotiate terms over the use of their content by digital platforms is likely indicative of the imbalance of bargaining power": individual news media businesses require Google and Facebook referrals more than each platform requires an individual news media business's content.

4. The DPI Report included a recommendation (Recommendation 7), based on the factual findings summarised above, that designated digital platforms should each separately provide a voluntary code of conduct to the Australian Communications and Media Authority (ACMA) to govern their commercial relationships with news media businesses, and that the code should be informed by a consultation process with news media businesses and contain a strong enforcement mechanism. The DPI Report also recommended that if a digital platform were unable to submit an acceptable code to the ACMA within nine months of designation, the ACMA should create a mandatory standard to apply to the designated digital platform. The DPI Report also recommended that each code of conduct "should ensure that [designated digital platforms] treat news media businesses fairly, reasonably and transparently in in their dealings with them and contain at least the following commitments:

   a. The sharing of data with news media businesses;

   b. The early notification of changes to the ranking or display of news content;

   c. That the digital platform's actions will not impede news media businesses' opportunities to monetise their content appropriately on the digital platform's sites or apps, or on the media businesses' own sites or apps; and

   d. Where the digital platform obtains value, directly or indirectly, from content produced by news media businesses, that the digital platform will fairly negotiate with news media businesses as to how that revenue should be shared, or how the news media business should be compensated.

5. The DPI Report also stated that "determining such issues by commercial negotiation, *taking into account the unique nature of each commercial relationship*, is more appropriate than having a regulator determine aspects of the relationship such as an appropriate price or snippet length" (emphasis added).

6. In December 2019, the Federal Government published its response to the DPI Report and its "Implementation Roadmap", and asked the ACCC to work with Google, Facebook and news media businesses to develop and implement a voluntary code of conduct, flagging that if an agreement were not forthcoming the Government would develop alternative options that may include the creation of a mandatory code.

7. In April 2020, the Federal Government announced that it was directing the ACCC to develop a mandatory code of conduct "to address bargaining power imbalances between digital platforms and media companies".[1] In that announcement, the Government stated that "the development of a code of conduct is part of the Government's response to the ACCC's Digital Platforms Inquiry final report to promote competition, enhance consumer protection and support a sustainable Australian media landscape in the digital age".[2]

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1 Joint media release by the Hon. Josh Frydenberg MP (Commonwealth Treasurer) and the Hon. Paul Fletcher MP (Minister for Communications, Cyber Safety and the Arts), *ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies*, 20 April 2020.

2 Above note 1.

8. Before deciding to direct the ACCC to develop a mandatory code of conduct, the Government took advice from the ACCC that it was unlikely that any voluntary agreement would be reached with respect to the key issue of payment for content.[3]

9. The Government stated that the mandatory code of conduct is to govern commercial arrangements between digital platforms and news media businesses and "include the sharing of data, ranking and display of news content and the monetisation and the sharing of revenue generated from news" and that it should "establish appropriate enforcement, penalty and binding dispute resolution mechanisms".[4]

10. The Government also emphasised that it is "delivering a regulatory framework that is fit for purpose and better protects and informs Australian consumers, addresses bargaining power imbalances between digital platforms and media companies, and ensures privacy settings remain appropriate in the digital age."[5]

## 2.2. The Concepts Paper

11. The ACCC's Concepts Paper is intended to guide the ACCC's consultation process towards a mandatory code of conduct to address bargaining power imbalances between digital platforms and news media businesses.[6]

12. For the purposes of our report, the section of the Concepts Paper titled "Establishing an effective bargaining framework" is most relevant.[7] This section falls within a broader section on "Monetisation and sharing of revenue from the use of news"[8] that includes consideration of both monetary remuneration for the use of news, and sharing of user data, which the ACCC recognises has monetary value for digital platforms and news media businesses.[9]

13. The Concepts Paper describes the "aim" of the mandatory code of conduct in the context of monetisation and sharing of revenue from the use of news as to "address the bargaining power imbalance by facilitating commercial negotiations that will allow news media businesses to achieve outcomes consistent with those that would be achieved in the absence of the bargaining power imbalance".[10] We consider the emphasis on seeking to facilitate *commercial negotiations* (free of bargaining power imbalance) in relation to monetisation and sharing of revenue is sensible, and preferable to a regulatory route.[11]

14. The first two commercial negotiation frameworks that the Concepts Paper considers – bilateral bargaining and (voluntary) collective bargaining – differ in just one respect: whether

3 Above note 1.

4 Above note 1.

5 Above note 1.

6 Concepts Paper, page 1.

7 Concepts Paper, pages 7-11.

8 Concepts Paper, pages 7-18.

9 Concepts Paper, page 16.

10 Concepts Paper, page 7.

11 Regulation is likely to encounter similar issues to those discussed in relation to mandatory collective bargaining in Section 3 below, including "one size fits all" compromises and inflexibility in a dynamic environment.

the news media businesses are allowed to bargain collectively.[12] The Concepts Paper also considers, as an alternative, a collective licensing arrangement. We assume that when discussing the collective licensing alternative the Concepts Paper is contemplating the possibility of imposing a *mandatory* collective bargaining regime, in which the news media businesses are *required* to negotiate with the digital platforms as a collective, and may not bargain bilaterally or in voluntary collectives.

15. This report focuses on the relative merits of bilateral bargaining and *mandatory* collective bargaining. We treat *voluntary* collective bargaining as a special case of bilateral bargaining, since it is at the option of the news media businesses, rather than forced upon them.[13] The mechanism that will bring the digital platforms "to the table" and address the bargaining power imbalance is essentially the same for each of these forms of bargaining. That mechanism is not the negotiation stage, but the threat of compulsory arbitration should negotiations fail. As we will discuss in Section 4, the design of the arbitration stage may be critical and there is much to consider there.

## 3. BILATERAL V MANDATORY COLLECTIVE BARGAINING BETWEEN DIGITAL PLATFORMS AND NEWS MEDIA BUSINESSES

16. In this section we consider the advantages and disadvantages of a bilateral bargaining framework compared to a mandatory collective bargaining framework in the context of bargaining between digital platforms and news media businesses.

17. The main advantages of a bilateral bargaining framework are the avoidance of coordination and compromise costs that are likely to be significant in a mandatory collective bargaining framework due to the significant heterogeneity among news media businesses in their business models and incentives. To explore the advantages, the first two sub-sections consider, separately, a situation in which bargaining takes place only in relation to the single issue of monetary payments (this might occur if the mandatory code were to fully specify all other terms and conditions for the commercial relationships between digital platforms and news media businesses, including the extent of access to data, among other things) and a situation in which bargaining takes place over multiple issues (e.g. also including the issue of access to data).

18. In the third sub-section, we consider the (external) transaction cost disadvantages of a bilateral bargaining framework, which must be balanced against the avoidance of coordination and compromise costs that we identify in the first two sub-sections, and in the final sub-section we draw our conclusion.

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12 This distinction seems minor compared to the distinction between: (i) a framework in which news media businesses may elect to bargain bilaterally or collectively; and (ii) a framework in which news media businesses are required to bargain as a collective (mandatory collective bargaining).

13 We assume that voluntary collective bargaining is likely to occur when the news media businesses within the collective view their business models and incentives as sufficiently aligned for the benefits to them of collective bargaining to outweigh the costs. This collective would then negotiate "bilaterally" with the digital platforms, separately from other news media businesses. For more on the benefits and costs of bargaining as a collective, see Section 3 below.

19. Before we begin, an important observation that applies to all frameworks (including the bilateral and mandatory collective bargaining frameworks that are the focus of this report, and a regulatory framework in which the ACCC or another third party determines terms and conditions) is that variable payments (e.g. payments that depend on the number of impressions of content on the platforms, or the number of clicks to news media business sites) would risk distorting the platforms' incentives regarding ranking of news content (either in general or in favour or against particular news media businesses).[14]

20. We therefore consider it important that the mandatory code specify that monetary payments between digital platforms and news media businesses (individually or collectively) must not depend in any direct way on the volume of news content (in general or in relation to any one news media business) on the platforms.[15]

21. An alternative, perhaps, would be a provision in the mandatory code that the digital platforms must not rank or favour or dis-favour content on the basis of payments between themselves and news media businesses. However, this would require constant monitoring of the platforms' algorithms and may not be effective. The simpler and more cost-effective, non-regulatory, solution is to ban variable payments. In a mandatory collective bargaining framework, this would not preclude the allocation of a fixed "pot" among the members of the collective according to variable measures. Once the fixed "pot" has been agreed with a platform, how it is allocated among the collective members would not affect the platform's ranking incentives.

22. More generally, the ACCC should consider a provision in the mandatory code that no agreement between a digital platform and a news media business may require or give a platform an incentive to alter its algorithms or ranking of news content.

### 3.1. Advantages of a bilateral bargaining framework in the context of negotiations over the single issue of monetary payments

23. In principle, if there were only the single issue of monetary payments to be negotiated (e.g. if the mandatory code of conduct fully specified all of the other terms and conditions for commercial relationships between the digital platforms and news media businesses), and if the views and preferences of the various news media businesses were largely homogenous regarding valuing news content and methods of allocation, a mandatory collective bargaining framework (with compulsory arbitration – see Section 4 below) would be an attractive solution for addressing the bargaining power imbalance identified by the ACCC.

24. A mandatory collective bargaining framework under these (strict) conditions might involve a single advocate for the entire news media sector bargaining with the digital platforms,

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14 In a mandatory collective bargaining context, variable payments from the platforms to the collective of news media businesses would risk the platforms favouring non-news content (which would not attract any variable cost) over news media content. In a bilateral bargaining context, variable payments from the platforms to one news media business would risk the platforms favouring other news media business that may have reached fixed payment terms with the platforms. It is also conceivable that some news media businesses may seek bilateral agreements with the platforms for variable payments in the other direction, to incentivise the platforms to rank their content higher.

15 The Concepts Paper (at page 11) contemplates payment of fixed fees for the use of news content by digital platforms when considering collective licensing arrangements. We consider there is a more general need for any fees to be fixed, regardless of the bargaining framework that is adopted.

with instructions to extract the largest possible "pot" of money each year (e.g. a fixed amount or a percentage of the platforms' revenues directly and indirectly associated with news content).[16] That pot could then be allocated among all news media businesses using objective allocation drivers that all news media businesses would find satisfactory, as there would be little disagreement among them regarding the appropriate drivers.

25. If these (strict) conditions held, the mandatory collective bargaining framework just outlined would offer a single solution via a single negotiation that would adequately remunerate the entire news media sector based on objective measures. Importantly, it would realise efficiencies from economies of scale in transactions costs, significantly reducing these costs compared to bilateral bargaining, and increasing the overall "pie" available to news media businesses.[17]

26. These conditions are essentially the conditions that exist in relation to blanket licenses for music royalties administered by music royalty collection societies, where licensees pay fixed amounts that are then allocated to musicians on the basis of objective metrics that essentially allocate more to musicians the more their recordings are listened to.

27. News content, however, differs from music in significant respects that mean that the condition of largely homogenous preferences of news media businesses is unlikely to hold. In particular, news media businesses are diverse in business models, incentives and the content they produce. Some news media businesses engage in relatively more original journalism than others. Some produce relatively more in-depth or investigative journalism. Some focus more on local or national news. Some may focus more on images or video. Some produce more regular updates. And there exist a variety of monetisation models, with some news media businesses relying largely on advertising while others charge monthly subscription fees to users.

28. Under mandatory collective bargaining, this diversity is likely to preclude efficient resolution of the question of how to allocate a collective pot. In particular, the greater the degree of heterogeneity within a collective, the greater the internal costs of coordination and the greater the (internal and external) costs of compromise by the collective.[18]

    a. **Coordination costs.** The internal costs of coordination are the internal transaction costs associated with negotiations among the collective parties towards a common position to present to the counterparty. If heterogeneity among the collective is sufficient, these internal transaction costs may, by themselves, outweigh savings in external transaction costs (i.e. the additional costs of negotiating bilaterally with the counterparty).

    b. **Compromise costs.** In addition to internal coordination costs, there are costs of the compromises that must be made by the collective to reach a single agreement with the counterparty. These compromise costs will also increase with the degree of heterogeneity of the members of the collective and may fall on both members of the collective and society more generally. In particular, a collective is likely to adopt a

16 In each case the amount of the "pot" should not vary with the amount of news content actually used by the platform form year to year: see paragraphs 19-20.

17 See Stephen P. King (2013), "Collective Bargaining by Business: Economic and Legal Implications," 36(1) *UNSW Law Journal* 107-138 at 113.

18 See King, above note 17, for an introduction to these concepts.

compromise negotiating position and achieve an outcome from bargaining with the counterparty that fails to reflect the heterogeneity in the business models of the members of the collective and incentivises conformity among them. Not only will the collective members have incentives to converge on business models that are most rewarded by the compromise outcome, but innovative business models will be discouraged. This will harm both the collective members that are unable to differentiate themselves as they would like to do, and society more generally.

29. These dynamics can be further illustrated by considering the matters of originality and quality.

### 3.1.1. Originality

30. In the music industry, originality is easily identifiable and valued highly by both licensees (e.g. radio stations) and listeners. Original recordings are far more likely to be played and listened to than covers, and consequently attract greater royalties. Even where a "cover" of an original recording is played, or a recording that "samples" from an original, the original can usually be identified and will still attract a royalty payment reflecting its contribution. This system incentivises originality.

31. Originality in news content, by contrast, is often more difficult to establish and appropriate. One news media business might break a story, but another might quickly report on it using their own words and perhaps an alternative or additional angle. This second news item might then attract more attention (impressions and/or clicks) on a digital platform than the first. The second news media business might even claim their work to be original, and this may be difficult to dispute. News media business models might even be constructed around attracting user "attention" on digital platforms (impressions and clicks) without much original reporting, focusing instead on search engine optimisation (SEO) and other strategies to achieve high rankings on the platforms (e.g. publishing frequent "updates" without much additional content, if a platform's algorithm prioritises recency).

32. Free riding effects therefore preclude news media businesses from appropriating all of the interest in an original story that they break, and in a mandatory collective bargaining framework these effects will create divergence of preferences among news media businesses regarding allocation methods. This is different to the music royalty situation where originality can more easily be identified and free riding more easily precluded. In the example given above, under mandatory collective bargaining the second news media business would prefer an allocation method based on user attention on the digital platform (similar to the allocation methods used for music royalties), whereas the first would argue that this would disincentivise the production of original content, and prefer alternative allocation methods that seek to identify and reward originality. Coordination within the collective is likely to be difficult to achieve with these diverging preferences. At the same time, a compromise by the collective (e.g. to allocate based on attention metrics) would disincentivise originality and incentivise efforts to attract attention.

33. Bilateral bargaining, by contrast, would allow diverse news media businesses to negotiate with digital platforms freely on the basis of their values and preferences, without the need to compromise on allocation methods with other news media businesses that may operate different business models.

### 3.1.2. Quality

34. Another difference between news content and music is that attention-based metrics measuring the amount of listening to music recordings provide a reasonably good proxy for quality and value to society, and can be used as an allocation mechanism to reward quality, whereas the same is not the case for news content.

35. While one person might regard the recordings of Sting to represent high musical quality, another person might feel the same about the recordings of Mortal Sin (a thrash metal band of the same vintage). Ultimately, however, the amount that each artist's recordings are listened to is a reasonably good barometer of quality and value to society, unless one considers there to be a public interest concern with the broadcasting of a particular music genre (or artist).[19] For this reason, it has not been too difficult for the music industry to settle on measures of listening as drivers for allocating blanket license fees to musicians.

36. By contrast, attention-based metrics, such as the number of impressions or clicks on digital platforms, may not reflect well the quality and value to society of news content. This is for at least two reasons.

    a. First, whereas high quality music will be listened to over and over again (generating more and more royalties for a high-quality artist) news content only need be read once to inform and fulfil a reader. This means that rewarding news content on the basis of impressions or clicks will under-reward high quality content (including in-depth and investigative journalism) and over-reward other content.

    b. Second, the incentives of digital platforms when ranking news content may bear little relation to the quality of the content. Platforms have incentives to prioritise content that users want to see, to gain their attention. This may not be high quality or in-depth or investigative journalism. While "market" signals may be working here, this outcome may not be in the public interest, and an allocation method based on impressions or clicks may again under-reward high quality content. Platforms may also have incentives to prioritise content that is more likely to be clicked through to sites where the platforms will earn advertising revenues. Again, this may not be the highest quality content.

37. Since news media businesses differ in the quality of their content and the extent to which they invest in in-depth and investigative public interest journalism, and (unlike in the case of music) attention-based metrics do not provide good signals of quality, there is again likely to be disagreement among news media businesses in a mandatory collective bargaining framework regarding how to allocate a collective "pot". Some are again likely to favour attention-based metrics such as impressions or clicks, while others are likely to favour allocation methods that better reflect quality or the production of in-depth or investigative public interest journalism. Moreover, should an allocation method such as impressions or clicks ultimately be settled on for the collective, this would be likely to disincentivise high quality and public interest journalism.

19 Obviously, we don't mean Mortal Sin.

## 3.2. Advantages of a bilateral bargaining framework in the context of negotiations over multiple issues

38. Our review of the DPI Report and the Concepts Paper suggests a number of matters *in addition to monetary payments* that may be the subject of negotiation between news media businesses and digital platforms, including the matters set out below.

    a. **Access to data.** The Concepts Paper contemplates negotiations over sharing of data potentially taking place together with negotiation over monetary payments, given the monetary value that can be ascribed to data.[20] The Concepts Paper also observes that different news media businesses may value data sharing differently.[21]

    b. **Branding.** Another matter that may be the subject of negotiations is how news media business brands are presented and promoted on the platform. Different news media businesses may have different preferences regarding this.

    c. **Transparency.** Transparency of algorithms and of the nature of data on users collected by the platforms may be another matter that may be the subject of negotiations.

39. The advantages of bilateral bargaining over mandatory collective bargaining (i.e. avoiding coordination and compromise costs) increase if negotiations need to take place with digital platforms over multiple issues, as multiple issues will mean that the number of dimensions for disagreement within a mandatory collective of news media businesses will increase.

## 3.3. Disadvantages of a bilateral bargaining framework

40. The main disadvantage that we see of a bilateral bargaining framework is the additional transaction costs associated with a potentially large number of negotiations and potential arbitrations, given the fragmentation of the news media sector. Bilateral bargaining sacrifices the benefit of economies of scale in negotiations offered by mandatory collective bargaining: the negotiation costs borne by each news media business will be greater if negotiations are not pooled and the costs are not shared, and there will also be greater costs for the platforms.[22] Higher transaction costs may also result in more incomplete contracting (i.e. failure to agree on terms and conditions that would be mutually beneficial).[23] These disadvantages must be balanced against the benefits of bilateral bargaining discussed above.

41. The disadvantages of bilateral bargaining may be mitigated to some extent. One possibility would be for the mandatory code to provide that only publishers above a certain size have a right to bargain bilaterally with the platforms, and that small publishers must bargain collectively. Such a provision may not even be necessary: at some point economies of scale are likely to incentivise smaller news media businesses to voluntarily form collectives to negotiate with the digital platforms, rather than attempt bilateral negotiations.

42. If a size cut-off for bilateral bargaining were included in the code, it should reflect the different news media business models and not favour one business model over another.

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20 Concepts Paper, page 16.

21 Concepts Paper, page 17.

22 See King, above note 17, at 113.

23 See King, above note 17, at 114.

For example, the size cut-off might allow a news media business to engage in bilateral bargaining with the digital platforms if it is considered sufficiently large based on at least one of a number of measures: e.g. proportion of impressions on the digital platform; unique audience; and/or number of subscribers.

43. Such a system would not need to be static and could evolve with the news media sector. For example, if a news media business declined in size over time, it may not be entitled to bilateral bargaining when its existing agreement expires and would have to move into the mandatory collective. Conversely, a news media business that grew over time may be permitted to enter into bilateral bargaining with the platforms once it has maintained a size above the threshold for a non-trivial period of time.

44. We appreciate that, regardless of how news media businesses are classified, a size cut-off may be contentious. However, if preference heterogeneity among news media businesses tends to diminish with size, mandatory collective bargaining for smaller news media businesses may be viewed as an acceptable expediency. If heterogeneity remains a concern, a possibility might be to allow news media businesses that do not qualify for bilateral bargaining to nominate one or the other of two or more collectives. For example, if remaining differences in preferences among smaller news media businesses were driven by differences in valuation of data, one mandatory collective might represent small news media businesses with strong preferences for access to data and another might represent the rest.

### 3.4. Conclusion on bilateral v mandatory collective bargaining

45. While mandatory collective bargaining offers an advantage of savings in external transaction costs between the digital platforms and news media businesses, the extent of heterogeneity in the business models, nature of content and incentives of news media businesses will result in significant internal coordination costs and significant costs of compromise, for both news media businesses and the public generally, including an adverse impact on original and quality journalism. While these internal coordination and compromise costs will depend on the extent to which matters in dispute between the digital platforms and news media businesses are directly codified in the mandatory code of conduct, we consider that bilateral bargaining is likely to be more efficient and socially preferable to mandatory collective bargaining, in relation to both monetary payment and other matters.

## 4. ALTERNATIVE ARBITRATION FRAMEWORKS

46. In this section we consider two alternative arbitration frameworks that the ACCC might consider when developing the mandatory code of conduct, should the ACCC prefer a negotiate/arbitrate framework for addressing the bargaining power imbalance. These alternative frameworks are conventional arbitration (CA) and final offer arbitration (FOA). The observations in this section apply equally whether the mandatory code of conduct specifies bilateral or mandatory collective bargaining, unless otherwise stated. This section first provides a brief overview of the alternative arbitration frameworks and the arguments for and against FOA. The rest of the section introduces a number of design choices that would need to be considered if the mandatory code of conduct were to prescribe FOA.

## 4.1. Conventional arbitration and final offer arbitration

47. Both CA and FOA, as compulsory arbitration schemes, have the attractive property of bringing the digital platforms to the bargaining table and promising a resolution of matters in dispute between the digital platforms and news media businesses, including monetary payments for news content.

48. Under CA, arbitrators have the power to impose their own outcome, which may be the same as the best offer of one of the parties or different from the best offers of each of the parties. Under FOA, by contrast, the arbitrator is unable to impose their own outcome and must choose one of the "final offers" presented by the parties.

49. CA has been criticised for having a "chilling effect" on commercial negotiations and increasing the length and costs of disputes.[24] The concern with CA is that parties enter negotiations with an expectation of a likelihood that if the matter reaches arbitration the arbitrator will "split the difference" (i.e. find a middle ground) between the parties' positions. This is said to lead to "positional" negotiations: during negotiations parties have incentives to establish extreme positions in the hope of skewing the arbitrator's award in their favour, and corresponding disincentives to make compromises toward the "middle". CA is therefore seen as an obstacle to good-faith bargaining in negotiations. Note that it does not matter whether the arbitrator actually "splits the difference". The potential for the arbitrator to do so is what impacts the parties negotiating incentives and positions.

50. The primary purpose of FOA is to remove incentives for positional negotiation to counteract the chilling effect, instead incentivising the parties to come closer together in the negotiation stage and reach negotiated settlements more frequently. The theory is that by precluding a "split the difference" arbitration outcome, parties are less likely to maintain extreme positions and are more likely to find common ground and settle the dispute before arbitration:[25] each party has incentives to prepare offers that are reasonable, bringing both to a "middle ground". As Abrams has explained: "[w]inning means being more reasonable, which is the key that unlocks the door to settlement".[26] The primary purpose of FOA is therefore to more often achieve negotiated outcomes and avoid arbitration altogether. Efficiency in dispute resolution is therefore the primary purpose of FOA.[27]

51. The theoretical benefits of FOA over CA extend beyond reducing the chilling effect and increasing rates of negotiated settlements. Even if parties do not reach a negotiated settlement and arbitration takes place, FOA provides the parties with incentives to bring reasonable "middle ground" positions to the arbitration, in the knowledge that the arbitrator is more likely to choose a reasonable offer over an extreme offer. Each party faces a trade-off in devising its final offer: if they submit an extreme offer they have a chance of a windfall gain, but if the other party submits a more reasonable offer there is a much higher chance

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24 See P. Feuille (1975), "Final Offer Arbitration and the Chilling Effect," 14(3) *Industrial Relations*, October 1975, pp. 302-310.

25 Carl M. Stevens (1966), "Is Compulsory Arbitration Compatible with Bargaining?", 5(2) *Journal of Industrial Relations* pp. 38-52 at 46.

26 Roger Abrams (2000), *The Money Pitch: Baseball Free Agency and Salary Arbitration*, Temple University Press, p. 153.

27 Benjamin A. Tulis (2010), "Final Offer 'Baseball' Arbitration: Contexts, Mechanics & Applications," 20(1) Seton Hall Journal of Sports and Entertainment Law pp. 85-130 at 89.

that the extreme offer will not be accepted. As noted by Stevens, "[E]ach party may assume that the arbitrator will reject an 'exaggerated' position in favor of an opponent's more moderate claim."[28]

52. FOA also offers the prospect of quicker and more efficient resolution of disputes compared to CA.[29] There are three aspects to this. First, protracted negotiation periods under CA – with each party maintaining extreme positions and preparing arguments for arbitration – can be avoided, as the parties are incentivised to exchange reasonable offers and are more likely to reach settlements ahead of arbitration. Second, the arbitration stage itself can be much shorter as the arbitrator only needs to make a decision between two offers and does not need to prepare a lengthy reasoned statement justifying their own outcome. Third, since the arbitrator has limited discretion, there is no basis for any appeals process: the FOA arbitrator's decision is final.

53. While some have disputed the theoretical basis for the benefits of FOA over CA described above,[30] FOA has been employed in a number of countries since it was first proposed in the 1960s (including the US, Canada, the UK and New Zealand) and in a range of contexts, from collective bargaining over public sector employment terms and conditions to tax disputes, disputes in the transport and telecommunications sectors and disputes over terms and conditions for the supply of TV channels to distributors. A number of studies of real-world implementations of FOA compared to CA, and anecdotal reports, suggest that FOA increases rates of negotiated settlements and narrows the "gaps" between the positions of the bargaining parties.[31] The fact that FOA has been continuously operating in a number of contexts in the US for decades (in particular, for baseball salary negotiations and in the context of public sector collective bargaining regimes in many US states) suggests that FOA has generally been successful in these settings.

54. One concern that has been raised with FOA is the risk that the arbitrator will be forced to choose between two unreasonable proposals. However, this concern may not be a realistic one,[32] and in any event seems to be specific to "package" FOA – a particular form of FOA to deal with multiple issues in dispute – and may be addressed by an alternative form of FOA called "issue by issue" FOA. Research also suggests that transparency of the offers may help avoid instances of duelling unreasonable offers.[33] At the end of the day, the FOA scheme can only offer improved incentives for the parties to negotiate and submit

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28 Carl M. Stevens (1966), "Is Compulsory Arbitration Compatible with Bargaining?", 5(2) *Journal of Industrial Relations* pp. 38-52 at 46.

29 See Tulis, above note 27, p. 107

30 See, for example, S.J. Brams and S. Merrill III (1983), "Equilibrium Strategies for Final-Offer Arbitration: There is no Median Convergence," 29 *Management Science* 927-941.

31 A number of studies of the effectiveness of FOA relative to CA in the context of employment disputes are identified and discussed in the Annex to this Report. Although based on limited data, these studies, together with anecdotal evidence from other contexts, suggest that FOA has been more effective than CA in achieving negotiated settlements and narrowing the range of offers made at arbitration.

32 See Powers, B. (2019), "An Analysis of Dual-Issue Final-Offer Arbitration", 48 *International Journal of Game Theory* pp. 81–108 at pp. 82 - 83.

33 See Carell, M. and Bales, R. (2013), "Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining", 28(1) *Ohio State Journal on Dispute Resolution* pp. 1-36 at 31-32 and Justin Kelly (2009), "Study of Final-Offer Arbitration," 63(4) *Dispute Resolution Journal* 8-9.

reasonable proposals in arbitration: it cannot completely govern their behaviour. However, we have not come across any evidence in the literature that two unreasonable proposals is a frequent occurrence in FOA contexts.

55. Another concern that sometimes appears in the literature is that one party might be undercompensated or overcompensated for the good or service it provides. Concerns of this nature need to be evaluated carefully. There is a high likelihood that any arbitration (CA or FOA) will result in an outcome in which at least one party considers that it is undercompensated or paying too much for the good or service in dispute. Some claims of over or under compensation may derive from concerns that compulsory arbitration forces a party that would have leverage over another party in the absence of arbitration to make concessions that it would not otherwise have had to make. If the goal of an arbitration framework is to address that bargaining leverage, it is that goal that creates the issue, not the form of arbitration per se.

## 4.2. Design choices for FOA

56. If the mandatory code of conduct were to incorporate FOA, a number of design details should be considered and potentially also codified.

### 4.2.1. "Package" or "issue by issue" offers

57. Commercial negotiations between digital platforms and news media businesses may include many matters in addition to monetary payments. Some of these other matters are listed in paragraph 38 above. FOA is capable of resolving multi-issue disputes and it is commonly used in multi-issue contexts, for example in public sector collective bargaining contexts. A design choice to make here is whether the parties should submit "package" final offers that address all of the disputed issues, with the arbitrator choosing one of those packages in its entirety, or "issue by issue" final offers, with the arbitrator choosing the most reasonable final offer of each party in respect of each issue.

58. A concern that has been raised with the package approach is that it may provide an incentive for one or both parties to take extreme positions in respect of just some of the issues that are the subject of debate. If extreme positions on a subset of issues are taken by both sides, the arbitrator may find it impossible to choose a reasonable offer. Alternatively, the arbitrator may find it difficult to weigh up the two different offers, particularly if one is reasonable except for a few elements and the other is generally less reasonable, but more consistent.

59. A possible mechanism to mitigate (though not eliminate) these issues would be for the parties in a multi-issue arbitration to be allowed to submit multiple offers (e.g. two offers each). We discuss this further below. We also note that while this concern has been expressed, it may be more a theoretical concern than a practical one. As mentioned earlier, we have not come across any evidence in the literature that two unreasonable proposals is a frequent occurrence in FOA contexts, and Powers (2019) finds that both players' optimal strategy in a multiple-issue FOA setting is to make all final-offers reasonable, irrespective of whether the "package" or "issue-by-issue" approach is applied.[34]

34 Powers, B. (2019), "An Analysis of Dual-Issue Final-Offer Arbitration", 48 *International Journal of Game Theory* pp. 81–108 at 82.

60. Under the "issue-by-issue" approach, the parties cannot try to "railroad" an arbitrator into an extreme position on one issue by packaging it with a set of reasonable positions on the other issues. Another potential advantage of the "issue by issue" approach is that it gives an opportunity for the parties to consider reasonable offers in relation to each issue and may increase the likelihood of reaching pre-arbitration settlements on some issues, thereby reducing the number of issues remaining in dispute for arbitration. Conversely, Powers (2019) argues that the additional variance in the awards and higher risk for each party under the "package" approach acts as a greater motivator for the parties to reach agreement during negotiations.[35]

61. An obvious disadvantage of the "issue by issue" approach is that it limits the scope for the parties to trade their preferred positions on the various issues to arrive at a settlement pre-arbitration and, more generally, to bargain over holistically conceived integrated packages of inter-related issues. For example, an employee union would be unable to "trade" vacation time for pension benefits or vice-versa. Related to this, the "issue by issue" approach precludes the arbitrator from being given holistic solutions and choosing between these.

62. It has also been argued that the "issue-by-issue" approach may reintroduce the chilling effect on negotiations that FOA is designed to avoid, because with multiple issues to be decided the arbitrator can effectively adopt a "split the difference" approach by choosing the offers of one party with respect to half the issues and the offers of the other party with respect to the other issues. The concern is that this may discourage the parties from reaching a negotiated settlement, defeating the primary purpose of FOA. This concern is not well founded. Even though an arbitrator could "split the difference" across multiple issues, the parties have no way of knowing pre-arbitration which issues the arbitrator will choose to find in their favour, and therefore retain the desirable incentives of FOA to make reasonable offers on each and every issue.[36]

63. Whether "package" or "issue by issue" FOA is preferable remains an open question. In the context of public employment collective bargaining in the US, state governments that have adopted FOA have typically codified one or other of these methods, with roughly half choosing "package" FOA and the other half choosing "issue by issue" FOA.[37] The fact that after a number of decades they have not converged on one approach suggests that both methods can operate effectively.

64. It is also possible to combine the approaches, and this has been done in some public sector collective bargaining disputes in the US and also tax treaties. For example, issues that

35 Powers, B. (2019), "An Analysis of Dual-Issue Final-Offer Arbitration", 48 *International Journal of Game Theory* pp. 81–108 at 82-83.

36 See Tulis, above note 27, at 104.

37 According to Carell and Bales, of the 12 States that have codified FOA and the form of FOA, five have codified "issue by issue" FOA, six have codified "package" FOA and one (New Jersey) allows for a range of methods including a "package" method (for non-economic issues) and an "issue by issue" method (for economic issues): see Carell, M. and Bales, R. (2013), "Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining", 28(1) *Ohio State Journal on Dispute Resolution* pp. 1-36, Table 2 at 24-25.

both parties agree are inter-related might be dealt with using "package" FOA, while all other issues might be dealt with using "issue by issue" FOA.[38]

### 4.2.2. Multiple final offers

65. In principle, FOA might take the form of each party submitting two (or more) final offers. In a multi-issue context under "package" FOA, this would, for example, allow the parties to submit a final offer that is restricted to one issue only (with the status quo to prevail on the other issues) and an alternative final offer that makes some claim or concession in regard to a second issue. A more sophisticated form of multiple final offers has been contemplated in the theoretical literature, called "double offer" arbitration (DOA).[39] While DOA is claimed to improve negotiating incentives and convergence pre-arbitration, we are not aware of any real-world implementation of DOA.

### 4.2.3. Timing of offers

66. It is obviously important that the procedural rules for FOA allow adequate time for negotiations between the parties, as settlement of the dispute prior to arbitration is the main goal of FOA. The parties should be encouraged to make a number of offers during negotiation prior to their final offers, to create an environment in which the parties can battle over the reasonableness of their offers.[40] It is also desirable that the final offers be submitted and exchanged (simultaneously) well in advance of the arbitration hearing and disclosed to each party, to allow further negotiation and opportunity for settlement prior to the hearing.

### 4.2.4. Nature of the arbitrator

67. The arbitrator should ideally have the following three characteristics: independence, considerable experience as an arbitrator and digital platform industry knowledge. Since it may be difficult to identify a single person with all of these attributes, a panel of three independent arbitrators might be considered (e.g. one with considerable legal and arbitration experience, another with economic expertise and a third with digital platform industry expertise). Use of a fact-finder might also be considered if an arbitrator or arbitration panel with the required industry knowledge cannot be identified (see below).

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38 According to Petruzzi et al, the "issue by issue" approach is the approach set out in the Memorandum of Understanding associated with the US-Canada international tax treaty, except for where issues are inter-related, in which case the US and Canada may agree to present "package" offers: R. Petruzzi, P. Koch and L. Turcan, *Baseball Arbitration in Comparison to Other Types of Arbitration*, Chapter 6 of M. Lang and J. Owers, *International Arbitration in Tax Matters*, International Bureau of Fiscal Documentation, Amsterdam, 2nd Ed. 2015, pp. 139 – 158 at 143..

39 See Dao-Zhi Zeng, Shinya Nakamura and Toshihide Ibaraki (1996), "Double-Offer Arbitration," 31(3) *Mathematical Social Sciences* 147-170.

40 As Abramsom has put it: "[i]nstead of participants posturing about who will win in court (or arbitration), they posture about who will resent the more reasonable final offer. Instead of settlement offers consisting of painful compromises of positions … they consist of proposals that harmonize with the final offers that will be submitted to the arbitrator": Harold I. Abramson (2013), *Mediation Representation: Advocating as Problem Solver*, 3rd Ed., p. 448.

### 4.2.5. Use of fact-finders

68. Some FOA schemes allow for the use of a "fact-finder": an independent third party that provides assistance to the arbitrator. This may be worth consideration given the complex issues involved in disputes between digital platforms and news media businesses, particularly if the arbitrator does not have the required industry knowledge. In Canada, arbitrators of transport disputes are able to request assistance from the regulator.[41] If fact-finders of this kind were allowed, the parties should be allowed to see and comment on any report of the fact-finder.

69. Fact-finders may also improve the information sets of the parties, assisting them to come closer together in their positions and potentially reducing the number of issues that the parties ultimately submit to the arbitrator. They may therefore have added value in a FOA context even if the arbitrator has their own industry expertise.

70. In some FOA schemes, fact-finders are allowed to make a third "offer" to the arbitrator that the arbitrator may choose. This is referred to as "tri-offer" arbitration. We do not recommend "tri-offer" arbitration. The existence of a third offer has the potential to alter the incentives of the parties and recreate the "chilling effect" on negotiations that FOA is designed to overcome.[42]

### 4.2.6. Criteria that the arbitrator may or may not take into account

71. It is common for FOA schemes to include specification of criteria that the arbitrator may or may not take into account when choosing between the final offers. According to Tulis (2010), the ideal list is short, but detailed, to limit arbitrator discretion.[43]

72. The Concepts Paper sets out several criteria that may be relevant for an arbitrator to consider when choosing between offers:

    a. The value of news content to digital platforms;

    b. The value news media businesses derive from the presence of news on digital platforms;

    c. The value of the availability of news content to digital platform users;

    d. The cost of producing news content (although the ACCC observes that the cost of producing news may have no direct or indirect link with its value to the digital platforms); and

    e. Market benchmarks, if any can be found.

73. Given the aim of the mandatory code of conduct to address the bargaining power imbalance between digital platforms and news media businesses, it will be important for the criteria to clarify that the value of news content to the digital platforms should not be measured by reference to the *marginal* value to the digital platform of a particular news media businesses content assuming all other news content would remain available to the digital platform.

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41 Canada Transportation Act, Part IV, 159 and 169.

42 If each party believes that the fact-finder will take the "middle-ground" and submit an offer that sits somewhere in-between their own, they each have an incentive to make their final offers more extreme than they would in the absence of the third-party offer. See Tulis, above note 27, at 99.

43 Tulis, above note 27, pp. 128-129.

Adoption of such a measure as a criterion for assessment of the final offers would perpetuate the bargaining power imbalance that the mandatory code of conduct is supposed to address.[44]

74. A further criterion that might be specified is the extent to which the offers promote original content and quality journalism in Australia. According to a PaRR news report dated 19 May 2020, in a conference call soon after the release of the Concepts Paper, ACCC Chairman Rod Sims noted the potential for news media businesses to quickly "create a whole lot of news items which aren't very well put together" and posed the following question: "[h]ow do we actually get a bias to the sort of journalism that adds to democracy and our society?".[45] Limiting the criteria to the value of the content of the news media business to the digital platform (even with the adjustments suggested above) and the value the news media business derives from the presence of its content on the platform, or attempting to measure value using attention measures such as impressions or clicks on a platform, may fail adequately to reward the public interest value of certain news content.

44 A further observation regarding the value of news content to the digital platforms is that the total value of *original* content (including the original output of investigative journalism) cannot be measured by reference to impressions or clicks directly in relation to that content, because without that original content, many of the impressions and clicks directly in relation to follow-on content published by other news media businesses would not have occurred. Moreover, to the extent that the availability of the follow-on content on a platform enhances users' perceptions of the quality of the platform overall and allows the platform to earn indirect ("spill-over") revenues, some of this should, in principle, be attributable to the original content.

45 Sam McKeith, "ACCC chief labels revenue sharing 'key issue' in code between tech giants and media outlets", PaRR, 19 May 2020.

# ANNEX: PRACTICAL APPLICATIONS OF FINAL OFFER ARBITRATION

75. This Annex reviews practical applications of final offer arbitration (FOA) around the world for the resolution of various types of disputes.

76. FOA has been used extensively in the United States (US), Canada and New Zealand for the resolution of salary and other employment disputes, including in Major League Baseball (hence the term "baseball arbitration" that is often given to FOA) and public sector employment disputes (e.g. for the determination of police and firefighter terms and conditions under collective bargaining). It has also been used in the United Kingdom for the resolution of employment disputes in the private sector.

77. FOA has also been used in a range of other contexts, including disputes in the transport, telecommunications and broadcasting sectors, domestic and international tax disputes and medical insurance disputes.[46] A notable application of FOA has been its incorporation into conditions for vertical merger clearance in Comcast/NBCU to assist the resolution of audio-visual content carriage disputes between Comcast/NBCU and cable and online distributors.

78. In Australia, consideration has been given to the introduction of FOA in the context of negotiate/arbitrate frameworks for access to essential infrastructure. In particular, in 2017 the Gas Market Reform Group (GMRG) considered whether to adopt FOA as the arbitration mechanism in its proposed negotiate/arbitrate framework for disputes between shippers and gas pipelines.[47] And in 2018, in the context of the Productivity Commission's review of the economic regulation of airports, Airlines for Australia and New Zealand (A4ANZ) – an aviation industry group –proposed that FOA be introduced as part of a negotiate/arbitrate framework for access to airside services provided by Australian airports.[48] Although some consideration was given to these proposals, they were not adopted.

## A.1 Salary and Other Employment Disputes

### A.1.1 United States

79. In the US, FOA has been in use for close to 50 years in salary and other employment disputes, including Major League of Baseball (MLB) salary disputes between contracted players and their teams, and to resolve public sector employment-related disputes in many US states.

46 FOA is believed to have been used as early as in Ancient Greece, during the trial of Socrates: see Ashenfelter, O., J. Currie, H.S. Farber and M. Spiegel, "An Experimental Comparison of Dispute Rates in Alternative Arbitration Systems," 60 *Econometrica* 1407-1433 at 1408.

47 Gas Market Reform Group, Gas Pipeline Information Disclosure and Arbitration Framework: Implementation Options Paper March 2017 at and Gas Market Reform Group, Gas Pipeline Information Disclosure and Arbitration Framework: Final Design Recommendation, June 2017 at http://gmrg.coagenergycouncil.gov.au/publications/gas-pipeline-information-disclosure-and-arbitration-framework-implementation-options and http://gmrg.coagenergycouncil.gov.au/publications/gas-pipeline-information-disclosure-and-arbitration-framework-final-design

48 See: https://www.pc.gov.au/__data/assets/pdf_file/0007/231379/sub044-airports.pdf

### *Major League Baseball Salary Disputes*

80. The use of FOA for the determination of MLB player salaries was introduced in 1974 at a time when MLB teams had the right to retain players for their entire career.[49] FOA afforded players with some protection from being locked-in to a team for an indefinite period by allowing them to test their market value based on their performance. Although the rules have since changed, teams still have the right to retain players for their first six years of service in the MLB.[50] Due to this lock-in, players with three to six years of service are entitled to file for FOA when they cannot reach agreement with their team over their salary for the upcoming season.[51]

81. Players can file for FOA in early January, with salary offers exchanged shortly thereafter. If the player and the team are unable to come to an agreement, the matter will be heard by a panel of arbitrators by mid-to-late February.[52] The arbitration panel, which is comprised of three arbitrators, is required to make a decision within 24 hours of the hearing.[53] One reason why FOA is so quick in this context is that the only issue in dispute is the player's salary, not any other terms and conditions of employment.[54]

82. Although a significant number of MLB players invoke arbitration, the vast majority come to a negotiated settlement before the arbitration hearing. According to Vishwanathan (2019), over the period from 2011 to 2017 inclusive, players and teams exchanged final offers 269 times, with the parties proceeding to an arbitration hearing on only 45 occasions (i.e. less than 17% of the time).[55] This understates the settlement rates of FOA in MLB, as many disputes are settled before final offers are filed. For example, according to Tulis (2010), in the 2009 season 111 players filed for arbitration, 46 exchanged numbers with their respective teams and only three continued to a hearing (implying a settlement rate of 2.7%).[56] Similarly, Monhait (2013) reports that out of 119 players that filed for salary arbitration in 2011, only three (2.5%) went to hearings, and for the 2012 season out of 142

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49 Tulis B.A., (2010), "Final Offer "Baseball" Arbitration: Contexts, Mechanics & Applications", *Seton Hall Journal of Sports and Entertainment Law*, Vol. 20, No. 1, pp. 85-130 at 91.

50 After six years a player becomes what is known as a free agent and is able to negotiate with other teams. With alternative options, it is rare for free agents to seek arbitration with their existing team.

51 FOA is also available to a special class of players called "Super 2s". A Super 2 is a player who has between two and three years of service time, has at least 86 days of service time during the second year and ranks in the top 22 percent of players who fall into that classification. See: https://www.sportingnews.com/us/mlb/news/mlb-salary-arbitration-process-breakdown-spring-training-2016/4jkawqkczi8i17cb4rhqjxseh.

52 Sievert, J., Breaking down the MLB salary arbitration process at: https://www.sportingnews.com/us/mlb/news/mlb-salary-arbitration-process-breakdown-spring-training-2016/4jkawqkczi8i17cb4rhqjxseh.

53 Abrams, Roger, 'Inside baseball's salary attribution process'. The University of Chicago Law School Roundtable, vol. 6, no. 1, 1999, p. 55 at: https://chicagounbound.uchicago.edu/roundtable/vol6/iss1/6/

54 Carell, M. and Bales, R., "Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining", *The Ohio State Journal on Dispute Resolution*, Volume 28, No. 1, 2013, pp. 1-36 at 19.

55 Vishwanathan, N.S., (2019), "File and Trial: Examining Valuation and Hearings in MLB Arbitration," Spring 2019 *Baseball Research Journal* at: https://sabr.org/research/file-and-trial-examining-valuation-and-hearings-mlb-arbitration.

56 Tulis B.A., (2010), "Final Offer "Baseball" Arbitration: Contexts, Mechanics & Applications", *Seton Hall Journal of Sports and Entertainment Law*, Vol. 20, No. 1, pp. 85-130 at 90.

players that filed, only seven (5%) went to hearings.[57] This suggests that FOA works much as intended in the MLB context, by promoting the parties reaching negotiated settlements and avoiding arbitration.

83. Vishwanathan studies what happens between the moment that final offers are filed and the hearing. Vishwanathan finds that players and their teams are less likely to proceed to hearings the larger the difference in their final offers: in the aggregate sample of players, an increase of $100,000 in the bid difference reduced the likelihood of a hearing by 2.7 percent.[58] This suggests that when players and the teams for which they play are widely apart in their views of the player's value, fear of losing at arbitration provides them with strong incentives to reach negotiated settlements, and that when arbitration hearings do occur it is likely to be when any remaining differences between the parties' positions by the time of their final offers are small.

### *Public Sector Employment Disputes*

84. Since the early 1960s various US state governments have allowed public sector employees to collectively bargain but have not allow them to strike. Absent the ability to strike, employees require an alternative form of dispute resolution such as mediation or arbitration to resolve bargaining impasses. FOA was introduced as one form of arbitration of public sector employment disputes in the early 1970's in Oregon, Michigan and Wisconsin[59] and by 2013 FOA had been codified in legislation in at least 14 US states.[60]

85. In some states FOA is limited to disputes over salaries, wages, or other entitlements (referred to as "economic" issues). In others, "non-economic" issues may also be considered, such as whether police officers are permitted to carry guns while off-duty.[61]

86. Disputes that involve a wider range of issues than salary and benefits alone can be determined on a "package" basis or an "issue-by-issue" basis. Some states such as Michigan, Iowa and Ohio adopt an issue-by-issue approach, whereas others such as Washington, Oregon, Illinois, and Indiana adopt the package approach.[62] At least one state, New Jersey, takes a hybrid approach: where the parties do not agree on an available method of arbitration, the arbitrator can accept package offers in relation to economic elements and issue-specific offers in relation to non-economic elements.[63]

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57 Jeff Monhait (2013), "Baseball Arbitration: An ADR Success," 4 *Harvard Journal of Sports & Entertainment Law* 105-143 at 138-139.

58 Ibid.

59 FOA was utilised in disputes involving the Eugene (Oregon) city government as early as 1972 and was also used by labour groups in Michigan and Wisconsin from 1973. See Feuille, P., (1975), "Final Offer Arbitration and the Chilling Effect," *Industrial Relations*, Vol. 13, No. 3, October 1975, pp. 302-310.

60 Carell, M. and Bales, R., "Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining", *The Ohio State Journal on Dispute Resolution*, Volume 28, No. 1, 2013, pp.1-36 at 23.

61 Ibid, pp. 24 – 25.

62 Ibid, pp. 24 – 25.

63 Ibid, pp. 24 – 25.

87. Early studies of FOA in the context of US public sector employment disputes suggest that FOA has been effective in achieving a higher rate of negotiated settlements after arbitration had been invoked.

    a. Feuille (1975) reports, based on studies by others, that over the period 1973 to 1974, following the implementation of FOA in Michigan and Wisconsin, the proportion of all negotiations involving public safety workers that were determined in arbitration was only around 10-12%, compared to 19% in Michigan in 1969-1971 under CA.[64]

    b. Stern (1975) found that in Michigan the proportion of negotiations that settled before arbitration rose from 39% to 64% following the switch from CA to FOA.[65]

    c. In a study of arbitration experience in New York City, Pennsylvania, Michigan, Minnesota, Wisconsin, Massachusetts, New York, Iowa, and New Jersey, Lester (1984) reportedly found that arbitration usage rates were significantly lower in states with FOA than they were in states with CA.[66]

88. Another study suggests that FOA was more successful than CA in achieving convergence of final offers. In 1997, in response to dissatisfaction with what were viewed as overly generous awards being made in favour of police officers and firefighters, New Jersey switched from the use of FOA to CA. Stokes (1999) found that following this switch, the average spread between the final positions of the parties increased from 29% in 1995 and 1996 to 44% in 1997 and 55% in 1998.[67]

### A.1.2 United Kingdom

89. In the United Kingdom, FOA was voluntarily implemented at a small number of privately owned plants in the 1980's, often in combination with strike-avoidance or no-strike clauses in bargaining agreements with unions (although such clauses were not legally enforceable).[68] The form of FOA differed between plants with some requiring the parties to go to mediation before arbitration in the event that they could not reach agreement and some allowing for arbitration only at the request of both parties (i.e. one party could not force an arbitrated outcome on the other; both parties had to agree to the arbitration for it to proceed). In a 1992 study of 72 plants that recognised unions for bargaining, Metcalf and Milner found that 44 had some form of arbitration mechanism in place, of which 27

64 Feuille, P., (1975), "Final Offer Arbitration and the Chilling Effect," *Industrial Relations*, Vol. 13, No. 3, October 1975, pp. 302-310.

65 As summarised in Stevens, C. (1976), "Final Offer Arbitration", *The Journal of Business*, Vol. 49, pp. 574 - 575, at p.575.

66 Lester, R.A, (1984). Labor Arbitration in State and Local Government: An Examination of Experiences in Eight States and New York City (Princeton, NJ: Princeton University, 1984) as reported in Lipsky, D., and Katz. H., (2006). "Alternative Approaches to Interest Arbitration: Lessons from New York City", *Public Personnel Management*, Vol 35, No. 4, p. 10.

67 Stokes, G. (1999), "Solomon's Wisdom: An Early Analysis of the Effects of the Police and Fire Interest Arbitration Reform Act in New Jersey," *Journal of Collective Negotiations*, Vol. 28, pp. 219 – 231 at 228.

68 Metcalf, D. and Milner, S. (1992), "Final Offer Arbitration in Great Britain: Style and Impact", *National Institute Economic Review*, No. 142, pp. 75-87. Metcalf and Milner note (at p. 75) that plants that introduced FOA were predominantly greenfield plants owned by foreign, often Japanese, hi-tech companies. In many cases the Electrical, Electronic, Telecommunications and Plumbing Union (EETPU) was a co-signatory to the agreement. They also note that some FOA arrangements existed in the Victorian and Edwardian era.

relied on FOA and 17 relied on CA. In assessing the relative effectiveness of FOA and CA the authors found that FOA did not deter disputes more effectively than non-FOA procedures, but did out-perform CA in deterring disputes when it was coupled with conciliation and/or mediation. The authors concluded that an unaccompanied mediation/conciliation procedure will be made more effective by the addition of FOA rather than CA.[69]

### A.1.3 New Zealand

90. In New Zealand FOA was available over the four years between 1988 and 1991 as a means of resolving bargaining disputes involving government employees (provided that both parties to the dispute elected to forgo strike action or lockouts).[70] Over those four years FOA was used infrequently, with the option removed for most of the public sector in 1991. The police force is currently the only occupation for which compulsory arbitration of wage disputes still occurs.[71]

91. The FOA system has evolved over time with major changes made in 1995 with the establishment of the *Police Negotiations Framework* (PNF). These changes were designed to address perceived problems with the then existing framework, which were thought to have contributed to a confrontational nature of the 1993–1994 negotiations.[72]

92. One of the main changes made over this period related to the involvement of the arbitrator in the mediation process (at that time there was only one arbitrator). In the 1997 negotiations both the mediator and arbitrator sat through all the bargaining sessions at the mediation stage. At this point in the process the matter had not yet been referred to arbitration: the arbitrator was simply an observer. When the matter was referred to arbitration the arbitrator was required to issue an interim decision,[73] with reasons, setting out which party's position he would accept based on the information acquired over the course of negotiations. Following the interim decision the parties engaged in further negotiations, with the arbitrator again sitting in as an observer. The matter proceeded to FOA with the arbitrator ultimately deciding in favour of the Commissioner of Police.

93. In a later review of the negotiation framework, stakeholders generally endorsed the presence of the arbitrator throughout negotiations at the mediation stage as this was thought to have influenced the behaviour of the negotiators and enhanced the arbitrator's understanding of the issues prior to making his decision. Concerns were raised over the requirement of the arbitrator to issue an interim decision. This requirement was thought to have a chilling effect on negotiations, with neither party willing to compromise until the issue of the interim decision. However, both parties were of the view that some form of feedback from the arbitrator was important to the success of the process. Following that round of negotiations, the PNF was amended so that, at any stage during the mediation phase,

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69 Ibid, p. 82.

70 McAndrew, I., (2003), "Final-Offer Arbitration: A New Zealand Variation", *Industrial Relations*, Vol. 42, No. 4, pp. 736 – 744, at p. 737. McAndrew notes that prior to 1988 New Zealand had a stable compulsory conciliation and arbitration system for private-sector interest disputes. See p. 737.

71 This is the case for sworn officers of the police, being those with law enforcement powers, not support staff, with the current system provided for in the Police Act. Ibid, p. 737.

72 Ibid, p. 739.

73 At the time this was required under the PNF.

either or both parties could request feedback from the arbitrator on their present positions with the arbitrator required to provide a reasonable level of feedback in order to guide the parties toward settlement.[74]

94. Under the current system, disputes are heard by more than one arbitrator selected by the Commissioner of Police and the service organisations that are party to the dispute.[75] The parties have the freedom to devise their own procedures for the arbitration, although at the conclusion of proceedings the arbitrator must choose one or the other final offer in its entirety (i.e. package arbitration applies).

## A.2 Transport Disputes

### A.2.1 Canada

95. In Canada, FOA was introduced in 1987 as one of a number of options available to shippers to resolve disputes with carriers.[76] Under the *Canada Transportation Act 1996* (the Transportation Act), subject to a few exclusions, FOA can be used to resolve disputes concerning the carriage of goods by air, rail or water.[77]

96. The key elements of the FOA framework, as set out in Part IV of the Transportation Act, are as follows:[78]

a. A shipper that is dissatisfied with the rates charged or proposed to be charged by a carrier, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Canadian Transportation Agency (the Agency) for FOA.

b. The shipper can request that the FOA be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators. The arbitrator or arbitrators are independent of the Agency, but the Agency is tasked with the job of maintaining a roster of persons who agree to act as arbitrators in FOAs.[79]

c. The submission needs to include:

i. the final offer of the shipper to the carrier in the matter, excluding any dollar amounts;

ii. the period requested by the shipper for which the decision of the arbitrator is to apply (this must not exceed two years);

iii. an undertaking by the shipper to ship the goods to which the arbitration relates in accordance with the decision of the arbitrator;

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74 Ibid, p. 741.

75 Schedule 2 of the Policing Act 2008.

76 FOA was introduced under the *National Transportation Act 1987*, now the *Canada Transportation Act 1996*.

77 Transport Act, Part IV, 159 and 160. See: https://laws-lois.justice.gc.ca/eng/acts/C-10.4/FullText.html#h-56733 and https://otc-cta.gc.ca/eng/publication/final-offer-arbitration-a-resource-tool.

78 Part IV, 161 – 169.

79 For a list of arbitrators and their qualifications see: https://otc-cta.gc.ca/eng/list-arbitrators-sections-362-1691-and-16942-canada-transportation-act

iv. an undertaking by the shipper to the Agency whereby the shipper agrees to pay to the arbitrator's fee; and

v. the name of the arbitrator, if any, that the shipper and the carrier agree should conduct the arbitration or, if they agree that the arbitration should be conducted by a panel of three arbitrators, the name of an arbitrator chosen by the shipper and the name of an arbitrator chosen by the carrier.

d. Within 10 days after a submission is served, the shipper and the carrier submit to the Agency their final offers, including dollar amounts. The shipper and the carrier will receive each other's final offers without delay.

e. Within five days after final offers are received, the Agency will refer the matter for arbitration. The procedure for the arbitration may be agreed between the arbitrator and the parties and if no agreement is made, the arbitration shall be governed by the rules of procedure made by the Agency.[80]

f. Within fifteen days after the Agency refers a matter for arbitration, the parties are required to exchange the information that they intend to submit to the arbitrator in support of their final offers, with timeframes set for the interrogation of that information by each party. The arbitrator may also request information from the parties and take that into account in making its decision.

g. If they agree, the parties may refer a matter that is the subject of the arbitration to a mediator, which may be the Agency. If requested by the arbitrator the Agency may also provide administrative, technical and legal assistance to the arbitrator.

h. Within 60 days the arbitrator will select the final offer of either the shipper or the carrier (30 days for disputes involving freight charges of less than $2,000,000). The arbitrator's decision will be in writing but no reasons will be set out in that decision. The parties can, however, request written reasons, which are to be provided by the arbitrator within 30 days of its decision.

i. The decision of the arbitrator is final, binding and enforceable as if it were an order of the Agency. It is applicable to the parties as of the date on which the submission for the arbitration was received by the Agency from the shipper.

97. In relation to rail disputes, FOA has primarily been used to determine rates rather than service conditions. Over the course of its 2010/11 Rail Freight Service Review, Transport Canada received feedback from shippers that introducing service conditions significantly complicated the process, with shippers reluctant to lose the rate issue based on a service complication.[81] The Panel believed that the requirement for the shipper to submit its final offer in advance of the railway's final offer was also a disincentive to use the FOA provision for disputes that are limited to or focussed on service.[82]

98. More recently, in its final report on the Canada Transportation Act Review, Transport Canada noted that many stakeholders had been critical of the dispute resolution

80 See: https://otc-cta.gc.ca/eng/procedures-conduct-final-offer-arbitration-pursuant-part-iv-canada-transportation-act-0

81 Transport Canada, Rail Freight Service Review – Final Report, 2011, p. 8. See: https://www.yumpu.com/en/document/read/12359310/final-report-transports-canada

82 Ibid.

mechanisms within the Transport Act, calling them ineffective, costly,[83] time-consuming, and inaccessible, with the potential to create acrimony in a shipper-railway relationship.[84] Some parties have also raised concerns that railways are not required to provide costing information as part of the FOA process, which puts shippers at a disadvantage.[85] However, FOA is seen by some stakeholders as the only effective limit to excessive rates charged by railways to captive shippers. As noted by the Commissioner of Competition, even where a shipper does not ultimately resort to FOA, the threat of initiating the process serves as an important bargaining tool for shippers in their negotiations and serves to limit the rates proposed by the railways.[86]

99. In considering how the dispute resolution mechanisms in the Transport Act could become speedier, more efficient, more effective and more accessible to all shippers, Transport Canada considered that one option may be to introduce mandatory mediation between shippers and railways before they embark on a formal dispute resolution procedure.[87] It also considered that the dispute resolution process should be streamlined so that it is quicker, commercially grounded, more accessible for smaller shippers, and provides for timely payment of penalties and reimbursement of harmed parties.[88]

### A.2.2 United States

100. Based on the experience in Canada, the Surface Transportation Board (STB) in the US has recently proposed to establish a similar final offer procedure to determine rate reasonableness for smaller cases, with the intention of providing faster, less costly review of claims of unreasonable railroad rates.[89]

## A.3 Telecommunications and Broadcasting Disputes

### A.3.1 United States

101. In the US, FOA was imposed by the Federal Communications Commission (FCC) as a vertical merger clearance condition in the broadcasting sector.

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83 The Commissioner of Competition noted that the costs incurred by a shipper in relation to a single FOA application are estimated to be in the range of $500,000 to $1,000,000. See Commissioner of Competition, Submission to the Canada Transportation Act Review Panel, February 2015, See: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04040.html

84 Transport Canada, Pathways: Connecting Canada's Transportation System to the World, Volume 1, p. 137.

85 See, for example: https://business.financialpost.com/opinion/ottawa-just-tied-canadian-miners-to-the-tracks-of-a-railway-duopoly and https://business.financialpost.com/transportation/rail/complete-and-utter-disrepair-business-groups-slams-ottawas-changes-to-transportation-bill

86 Commissioner of Competition, Submission to the Canada Transportation Act Review Panel, February 2015, See: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04040.html

87 Transport Canada, Pathways: Connecting Canada's Transportation System to the World, Volume 1, p. 137.

88 It also considered that the then $750,000 freight charge limit on the less-expensive summary FOA might be increased to $2 million to make that mechanism more accessible.

89 Surface Transportation Board, Notice of proposed rulemaking; request for comments, 17 September 2019. See: https://www.federalregister.gov/documents/2019/09/17/2019-20093/final-offer-rate-review-expanding-access-to-rate-relief.

102. In 2011, the FCC approved a joint venture between Comcast Corporation and NBC Universal with conditions to protect cable TV distributors in their bargaining with Comcast/NBCU over carriage of Comcast/NBCU channels. One of these conditions was that if a dispute arises about prices, terms and conditions of the retransmission of Comcast/NBCU programming, distributors may invoke an FOA process.[90]

103. Under the arbitration procedures imposed as a condition of FCC clearance, no more than five days after the expiration of a carriage agreement or an agreement for online display of video programming, or no more than 90 days after a first time request for carriage or online distribution, a TV distributor may notify Comcast/NBCU of an intention to request arbitration to determine the terms and conditions of a new agreement.[91] A "small" TV distributor, with 1.5 million or fewer subscribers, may appoint an independent bargaining agent to bargain collectively on its behalf.

104. The notification must describe with specificity the video programming to be covered by the request for arbitration. The TV distributor may demand a standalone offer for broadcast programming, regional sports network programming, a bundle of all cable programming or any bundle of programming that Comcast/NBCU has made available to similar TV distributors. Following notification of intent, a "cooling off" period commences, during which negotiations shall continue.

105. The TV distributor must formally file its complaint with the American Arbitration Association (AAA) between 10 and 15 days following its notification of intent. This must include its final offer, which shall remain confidential. If it files a complaint in time, Comcast/NBCU must participate in the arbitration proceeding. Within two days of the being notified of the TV distributors' complaint, Comcast/NBCU is required to file its own final offer to the AAA.

106. The final offers must be in the form of a contract for carriage for three years of the video programming identified in the TV distributor's notice of intent. A final offer may not include any provision to carry any other video programming.

107. Once filed, the parties are required to provide a copy of their final offers to the FCC and to each other. Following the exchange of offers the parties may negotiate or enter into mediation. At the conclusion of mediation, the parties can, if they both agree, revise their final offers.

108. If the matter proceeds to arbitration it will be heard by a single arbitrator. The arbitrator must have at least seven years of experience, including prior experience in mediating or arbitrating disputes concerning media programming contracts, and have negotiated or have knowledge of the terms of retransmission contracts.[92]

109. If the arbitration relates to online conditions and there is a dispute regarding (i) whether the online video distributor is qualified, (ii) what comparable programming a qualified online distributor is entitled to, or (iii) whether there is a defence to the claim (such as an argument by Comcast/NBCU that it is reasonable to deny programming because it would otherwise

90 See FCC (2011), Memorandum Opinion and Order, 18 January 2011, section VII: Commercial arbitration remedy, pp. 127 – 132 at: https://www.fcc.gov/proceedings-actions/mergers-transactions/comcast-corporation-and-nbc-universal-mb-docket-10-56.

91 Comcast/NBCU is required to continue to supply programming under an expired agreement until the dispute is resolved: Ibid, p. 128.

92 Ibid, section VIII. Modifications to AAA Rules for Arbitration, p. 133.

be in breach of contract with another party), the arbitration will be heard in two phases: in the first phase the arbitrator will determine the validity issue, and in the second, the arbitrator will determine which of the two offers will stand.[93]

110. The arbitrator must make their decision within 90 days of their appointment. The arbitrator must choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.[94] To determine "fair market value" the arbitrator may consider any relevant evidence and may require the parties to submit such evidence. The arbitrator may not compel production of evidence by third parties. The arbitrator also may not consider offers made by the parties prior to the arbitration. This includes any final offer made prior to mediation if the final offer was subsequently revised following mediation.

111. Both parties are bound by the arbitrator's decision, although either party may have the arbitrator's award reviewed by the FCC or a court with jurisdiction over the matter. The FCC or court must examine the same evidence that was presented to the arbitrator and choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.

### A.3.2 Canada

112. FOA was formally introduced into the Canadian Radio and Telecommunications Commission's (CRTC) framework for dispute resolution in 2000.[95] At that time the CRTC noted that given the increasing demands that were being placed upon it, processes that allow for the speedy resolution of disputes under the Telecommunications Act and the Broadcasting Act were essential to minimize the strain on the CRTC's resources and, more importantly, achieve its objective of fair and sustainable competition. The framework adopted by the CRTC was built upon informal practices that it had adapted over the years and provides for a variety of procedures to ensure the fair, effective and timely resolution of disputes.

113. The practices and procedures that apply in respect of FOA are set out in Broadcasting and Telecom Information Bulletin CRTC 2013-637.[96] In line with the CRTC's view that FOA is not suitable for disputes that involve a large number of issues,[97] FOA is only available to parties in relation to disputes that are exclusively monetary, involve two parties only and where the parties involved have failed to resolve the dispute through staff-assisted mediation.

114. The key elements of the FOA framework applied by the CRTC are similar to that applied in relation to transport disputes. Under the CRTC's framework:

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93 Ibid, section VII: Commercial arbitration remedy, subsection C, pp. 130 – 131.

94 The arbitrator may not consider offers prior to the arbitration made by the Claimant and the C-NBCU Programmer or Programmers for the programming at issue in determining the fair market value.

95 Public Notice CRTC 2000-65, 12 May 2000 at: https://crtc.gc.ca/eng/archive/2000/pb2000-65.htm.

96 Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013, See: https://crtc.gc.ca/eng/archive/2013/2013-637.htm

97 See: Broadcasting and Telecom Information Bulletin CRTC 2019-184, May 2019 at https://crtc.gc.ca/eng/archive/2019/2019-184.htm

a. Either party may request FOA by filing a written application with the CRTC and serving it on the other party. The application must set out the matter(s) for which a determination by the CRTC is requested, include a concise statement of the facts and issues, and explain why the application meets the criteria for FOA.

b. The respondent must advise the CRTC whether it supports the application for FOA. If both parties support the FOA, they will be expected to agree not to apply for a review and variance of the decision resulting from the FOA (for Telecommunications disputes only). The CRTC considers that removing the prospect of review will help to ensure that parties have the requisite incentive to submit reasonable final offers.

c. Following consultation with the parties, the CRTC will advise them within 15 days of receiving the application whether it is prepared to accept the request for FOA.

d. The FOA will be conducted by a panel of CRTC Commissioners.[98] The panel will set out in an advice letter the specific dates upon which the final offer process is to be conducted and the matter(s) upon which it will make a determination. The CRTC's establishment of the disputed matters is designed to ensure that the parties submit comparable offers.

e. Within 15 days of being notified of the final offer process, each party must submit its final offer to the CRTC. These submissions must refer to the disputed matters upon which the CRTC will make a determination. They must also include concise arguments in support of the party's position. These submissions must be no longer than ten pages (although the parties may file, as an attachment, a copy of any written material upon which they rely).

f. Within five days of receiving the final offer submissions of the parties, and upon confirmation that both offers respond to the identified disputed matters, the CRTC will forward to each of the parties a copy of the other party's offer. Each party will be given an opportunity to comment on the other party's offer but will not be able to change its original offer. These commenting documents must be submitted by each party to the CRTC within five days of each party having received the offer of the other party and may be no longer than ten pages.

g. In regard to broadcasting disputes, the CRTC may, at some point in the process, require parties to participate in a mediation before a person appointed by the CRTC. If mediation fails, the FOA continues.

h. The CRTC arbitration panel will select one or the other offer in its entirety. The CRTC will then issue its decision, generally within 55 days of having accepted a request for FOA (in those cases where parties have met their filing obligations). The CRTC's decision is binding.

i. Where neither party's final offer is, in the opinion of the CRTC, in the public interest, both final offers will be rejected by the CRTC and the parties involved will be so advised. In this event, which occurs only on a very exceptional basis, the CRTC may refer the matter to an expedited hearing.

115. The CRTC consulted with stakeholders on the effectiveness of the FOA mechanism in 2013 as part of its "Let's Talk TV" review of Canada's television system. The CRTC notes that

98 See: https://crtc.gc.ca/eng/industr/rddr/arbitra.htm

some parties raised concerns that the existing dispute resolution mechanisms were too slow, too costly and too risky.[99] Similar to concerns raised in the transport sector, broadcasting distributors and independent programmers raised concerns about the impact that filing a complaint would have on their long-term relationship with those parties on whom they rely for programming or distribution. Some independent programmers argued that the disparity of bargaining power renders dispute resolution ineffective, particularly for those programmers without carriage rights, since broadcasting distributors decide whether or not to carry them.

116. Bell proposed that the existing dispute resolution mechanisms no longer apply to large broadcasting distributors, defined as those with more than 500,000 subscribers.[100] Others disagreed, arguing that FOA, while imperfect, was better than no recourse at all. The CTRC rejected Bell's suggestion noting that dispute resolution has been a helpful recourse for parties when negotiations have broken down.[101]

## A.4 Tax Disputes

117. FOA was utilised in 1993 in the context of a tax dispute between Apple Company Inc (Apple) and the Internal Revenue Service (IRS).[102] In early 1992, the IRS audited Apple for its 1984-1986 tax years and filed a transfer pricing adjustment of USD 114.6 million, claiming that Apple had inflated the costs it incurred in connection with its dealings with its Singaporean subsidiary. Apple challenged the decision. Instead of embarking on a lengthy court process, Apple and the IRS agreed to resolve the dispute through voluntary FOA.

118. The parties agreed on a panel of three arbitrators to hear the matter: a retired federal judge, an economist, and an industry expert.[103] Each party presented a settlement offer for every tax year that was the subject of the dispute, with the arbitration panel determining the matter on an issue-by-issue basis (i.e. choosing one or the other of the parties' settlement amounts for each of the three years). The procedure took approximately two months (not including the design of the procedure itself and the selection of arbitrators), with the panel of arbitrators issuing their decision within two weeks of the hearing, without a written opinion.

119. Although the arbitration panel selected the value proposed by the IRS for each of the three years in dispute, by the time the parties reached arbitration they had narrowed their differences such that Apple paid much less than the IRS' initial demand. William E. Bonano, International Special Trial Attorney at the IRS was quoted as saying that although

99 CTRV, Broadcasting Regulatory Policy CRTC 2015-96, Let's Talk TV, para 93 at: https://www.ctvnews.ca/polopoly_fs/1.2288258!/httpFile/file.pdf

100 Ibid, para 95.

101 Ibid, para 102.

102 Since 1990, US Tax Court Rule 124 permits any factual issue to be resolved via voluntary binding arbitration rather than litigation. Although most of the 20 cases where voluntary binding arbitration has been used have involved CA, FOA is an option available to parties. Sansing, R. (1997), "Voluntary binding arbitration as an alternative to tax court litigation," 50(2) *National Tax Journal* pp. 279 – 296.

103 "After Successful Use of Baseball Arbitration, Apple, IRS Both Declare Themselves Winners", *Alternatives*, Vol. 11, No.12, 1993, pp. 163 – 164.

the need to come up with a realistic number under FOA did not in itself achieve settlement, it "brought the parties closer together".[104]

120. The United States has since pioneered the inclusion of FOA in international tax treaties to resolve disputes under those treaties.[105] Under the US-Canada double tax treaty, FOA is available for disputes involving particular provisions of the treaty.[106] Where a matter goes to arbitration, it is heard by a panel of three arbitrators: each treaty partner appoints one arbitrator and those two arbitrators jointly appoint a third member as Chair of the panel. The arbitrators are required to be impartial and to have significant international tax experience. Within 60 days of the appointment of the Chair, each treaty partner is allowed to submit a proposed Resolution Paper of no more than ten pages, along with a supporting Position Paper of no more than 30 pages. Each treaty partner may reply to the Resolution Paper and Position Paper of the other within 120 days by way of a Reply Submission of no more than ten pages.

121. Although the Memorandum of Understanding between the two countries specifies various rules for dealing with information disclosure and other issues, the arbitration panel is free to adopt procedures that it considers necessary to conduct the arbitration.[107] Where the matter concerns multiple issues (e.g. multiple discrete proposed adjustments arising from an audit) the authorities are required to consider these separately, with the arbitrators taking an issue-by-issue approach in reaching their decision (although there is some scope for packages of interrelated issues to be considered). There is no time requirement for the arbitrators' decision, which is provided in writing without any rationale or analysis.

122. While the panel's decision is binding on both authorities, it must be accepted by a "Concerned Person" (being a taxpayer whose tax liability may be directly affected by a mutual agreement) within 30 days, otherwise it will be considered rejected.[108] A Concerned Person may also terminate an arbitration proceeding by withdrawing its request for assistance at any time. In either case, the matter will be closed and the Concerned Person will not be allowed access to the mutual agreement procedures for the same matter and same years. It will, however, be free to seek judicial remedies.

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104 "After Successful Use of Baseball Arbitration, Apple, IRS Both Declare Themselves Winners", *Alternatives*, Vol. 11, No.12, 1993, pp. 163 – 164 at 163.

105 Grlica, I, Baseball Arbitration: Comparison of the Rules under the U.S.-Canada Tax Treaty with the Rules under the Multilateral Instrument, Chapter 14 of OECD Arbitration in Tax Treaty Law: Schriftenreihe IStR Band 111, 2018, pp. 317 – 336 at: https://books.google.com.au/books?id=Xf5tDwAAQBAJ&pg=PA319&lpg=PA319&dq=United+States+and+international+arbitration+and+tax+and+final+offer+arbitration&source=bl&ots=gb_REhvAHk&sig=ACfU3U1kYV5pKF_WANnNAaYh6FvL4uxHjw&hl=en&sa=X&ved=2ahUKEwiDnJHto9PpAhXyxDgGHVQIAZUQ6AEwC3oECAwQAQ#v=onepage&q=United%20States%20and%20international%20arbitration%20and%20tax%20and%20final%20offer%20arbitration&f=false

106 US Canada Double Taxation Convention, Memorandum of Understanding Between The Competent Authorities of Canada and The United States of America at: https://www.irs.gov/pub/irs-utl/2010_arbitration_mou_nov_8-10_-_final.pdf. Even in respect of these disputes, the treaty parties may agree that any particular case is not suitable for arbitration. See Grlica, p. 323.

107 Grlica, p. 325.

108 Grlica, p. 325.

123. Largely based on the US-Canadian tax treaty, FOA has recently been adopted by the Organisation for Economic Co-operation and Development (OECD) as the default arbitration option under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).[109]

## A.5 Medical Insurance Disputes

124. In 2015, the State of New York passed a bill that introduced FOA as a means of settling payment disputes between insurance companies and physicians in circumstances where a patient is treated by a physician outside the patient's insurance network.[110] Under this law, patients are only required to pay the co-payment that would be payable had the physician been within the patient's insurance network. If the insurer and out-of-network provider(s) are unable to agree on a payment amount for the balance, an arbitrator must decide whether the final payment should be the insurer's initial allowed amount or the provider's charges.

125. Although the arbitrator is required to choose one or the other value, the State has provided guidance that that the arbitrator consider the 80$^{th}$ percentile of billed charges when determining the final amount (i.e. the amount charged by 80% of physicians for a particular billing code as published by FAIR Health, an independent insurance claims database). A recent study found that arbitration decisions have averaged 8% higher than the 80$^{th}$ percentile of charges, suggesting that arbitrators focus on this value when making their determination.[111]

109 See Article 23 of the MLI at: https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

110 Adler, L, Experience with New York's arbitration process for surprise out-of-network bills, at: https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2019/10/24/experience-with-new-yorks-arbitration-process-for-surprise-out-of-network-bills/

111 Ibid.