



**Atlassian's submission to the ACCC
in relation to the draft media bargaining code**

Australian Competition and Consumer Commission (ACCC)
GPO Box 3131
Canberra ACT 2601

By email: bargainingcode@acc.gov.au

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Dear Sir/Madam,

We appreciate this opportunity to provide input on the draft news media bargaining code published on 31 July 2020 (the Code), which is intended to address bargaining power imbalances between Australian news media businesses (NMBs) and digital platforms (namely, Google and Facebook).

Atlassian's Interest in the Code

As an interested party which is neither an NMB nor a digital platform (as defined in the final report of the Digital Platforms Inquiry), Atlassian seeks to provide objective input into the ACCC's consideration of the Code, with the overriding concern that, if implemented as currently written, the Code would be another chapter in a worrying trend of hasty, heavy-handed regulation of the technology sector in Australia, in a manner that damages Australia's global reputation for technology business and investment.

While we understand that it may be unpopular for Atlassian to speak out on this issue, we consider it an important part of our role in the Australian technology landscape--and our corporate responsibility--to highlight concerns which impact the sector and reflect to government how proposed regulations may be perceived in the global tech economy.

Atlassian is a firm believer that the trend toward greater digitisation will continue at an increasing pace, and that Australia's future jobs and economic prosperity will increasingly flow from its budding technology sector. As such, it is key that government tackles the very real regulatory challenges of digitisation in a fair, reasonable, and proportionate manner, in view of global standards, and mindful of the business implications for the tech sector. The ultimate aim



of our advocacy is to create a reliable regulatory environment for technology businesses in Australia that addresses the legitimate concerns of all stakeholders and that fosters business and jobs growth.

We submit that the draft Code fails this standard currently.

Atlassian's Concerns with the Code

We recognise and appreciate the large body of work that the ACCC has performed to date on this complex issue--in its Digital Platforms Inquiry, the final report and recommendations, and engagement with the digital platforms and NMBs on a draft code of conduct--and that the ACCC has asserted a number of reasons why a code of conduct is required between digital platforms and NMBs: mainly that an imbalance of power exists between them that creates unfavorable conditions for NMBs, for example, with respect to control over "snippets," use of allegedly restrictive publication formats, attribution and recognition for NMBs creating original content, access to user data, and algorithmic transparency.

We presume that the digital platforms have a differing view on the existence of any anti-competitive imbalance and the economic value that they bring to NMBs, and will leave those points for them to address with the ACCC. But even if we treat at face value the stated rationale for the Code, Atlassian has strong concerns that it is not a clear or proportionate regulatory response to these issues.

Mandatory licensing payment to NMBs is not required to address the issues identified by the ACCC. Atlassian submits that even if some imbalance of power is identified between digital platforms and NMBs, more surgical regulations can directly address those issues and re-establish the balance between the parties. As a hypothetical example, if an imbalance exists with respect to "snippets," NMBs could be given greater control over the form and substance of them, without penalty in how their stories will appear in search results or on social media platforms. That is, specific findings can be addressed in the Code with specific regulations.

There is, however, no corresponding rationale or economic analysis for compelling payment from the digital platforms to the NMBs for the privilege of displaying links to news stories--impressions to online users that the NMBs themselves highly value. Such a drastic step is not justified by the alleged imbalance and, in conjunction with the anti-discrimination clause, shifts the bargaining power overwhelmingly to the side of the NMBs. No other types of web sites on the Internet are paid in this way, for merely appearing in search results or on social media platforms. Legislation creating "government-favoured" categories of web sites will only disrupt neutrality on the Internet, create a slippery slope for other types of potentially-favored content, and is simply not required to accomplish the policy goals of the ACCC. It's too much regulation.

The Code's requirement for 28-day notification on algorithmic changes is problematic from an operational perspective. While we cannot speak to what the digital platforms can or cannot do from an operational perspective, Atlassian can offer some perspective as a company that stands up cloud-based software products daily around the world. In particular, given the fast



pace of software and product development in today's technology sector, it is the usual practice for code and algorithm updates to take place on a daily basis. In that operational hum, it would be extremely disruptive, if not impractical, for a technology company to pause its global product development for 28-days to satisfy the regulatory needs of a single market. (As we understand the issue, search algorithms used, for example, in the U.S. or European markets would also impact the appearance of news stories from Australian NMBs and would be subject to the 28-day rule.) Moreover, many algorithm changes are produced as a result of artificial intelligence or machine learning, such that it is next to impossible to provide advance notice of changes or clear cut explanations without divulging proprietary details. A regulation mandating such advance notice of each discrete product change would have a heavy impact on a technology company's operations and could reasonably push reconsideration of whether it can continue to offer products and services in that market, given significant and detrimental impact to its broader global operations.

We also raise a question as to whether "algorithmic transparency" is necessary to accomplish the ACCC's regulatory goals. No other types of web site on the Internet receive transparency reports from Google and Facebook and this requirement would be another badge of peculiar "government-favoured" status for NMB web sites. Even if such algorithmic reporting were deemed unavoidable, it can be done on a real-time basis as changes are rolled out, with a trailing period of time (say 28 days) for NMBs to complain and provisions made for any "unfair" loss of revenue. In that approach the interests of the NMBs will be protected, while the daily operations of digital platforms will not be held up on a 28-day regulatory hurdle, which is an impracticable age in the modern product development cycle. We urge the ACCC to reconsider this requirement and its implementation.

The Code lacks clear criteria for when it will apply to a digital platform and vests too much discretion in the Treasurer for future determinations. Atlassian submits that the Code is flawed in that it is a law written for just two digital platforms--without a clear criteria for why they were the two chosen for legislative action or when other platforms will become subject to its provisions. And even though the DPI report included some detailed findings with respect to Google and Facebook, it also did not purport to frame a controlling criteria for when a digital platform should be subject to a code of conduct. Rather, the Code leaves future decisions to bind further digital platforms to the discretion of the Treasurer, with advice from the ACCC. This proposed "black box" framework renders it unclear to the public and to the regulated companies when they might be subject to the code in the future, and provides limited opportunities for a company to challenge these determinations in practice. Such an approach lacks transparency and creates substantial uncertainty for digital platforms operating in Australia. It also sets a poor example for future tech and anti-competition regulation.

We submit that an alternate framework would target only prohibited behaviours, for example, identified actions that inappropriately leverage market dominance vis a vis NMBs, while making the Code company-agnostic and generally applicable to digital platforms. Such an approach may provide companies with a clearer line of sight on the regulatory boundaries and encourage cooperation and compliance.



The Code in its current form is heavy-handed, reflects a worrying trend in Australian policy-making toward the tech sector, and will harm future tech investments and the economy at large. Atlassian is concerned that the Code, while somewhat similar to efforts in France and other European nations to compel licensing for news snippets based on broadly-applicable copyright laws, represents an outlier on the global stage in terms of direct legislation against targeted digital platforms to compel revenue sharing with local NMBs.

Given its targeted nature and drastic form, the Code may read on the global stage like protectionism for established Australian media at best and open hostility to the tech sector at worst. Businesses considering Australia for further investment may note not only the heavy-handed nature of this law, but will fear the uncertainty of future regulations yet to come. If the current regulatory trend continues, it will have a powerful, negative impact on Australia's business-friendly reputation and, over the long term, Australian jobs and economic prosperity.

Furthermore, we fear that the impression of protectionism against American-owned businesses in Australia will be hard to avoid, and that reciprocal disadvantage may befall Australian businesses, here and while operating abroad, as a result. As Australia's technology sector is a net exporter of goods and services, we have little to gain and much to lose if a global trend of protectionism arose in technology regulations--a trend that would only be stoked by the current requirements of the Code.

Proposed Path Forward

But there is no need to arrive at this negative result. The ACCC is fully empowered to balance the scales between digital platforms and NMBs without the most drastic measures in the Code. We propose that the ACCC undertake significant reforms to the Code, with the aim of producing a more proportionate and targeted regulation to govern the relationship between digital platforms and news outlets.

Sincerely,

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