



Australian Community Futures Planning

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27 August 2020

Rod Sims
Chairman, Australian Competition & Consumer Commission
By email
bargainingcode@acc.gov.au

Submission News Media Bargaining Code

Dear Mr Sims,

Further to my submission on 21 August 2020, please find additional comments on the ACCC mandatory News Media Bargaining Code. I repeat: this code will not save journalism and it is embedding an anti-competitive absolutely unfair market distortion that will harm Australian consumers.

Rebuttal of the ACCC's rationale for the Code

- 1. ACCC's claim:** "Google and Facebook derive a benefit from the ability to make Australian news content available to their users", – the implication being that Google should pay for news media content and only the content from the big providers.

Response:

- The reverse is also true.
- News media derive a benefit from custom funnelled to them by Google and Facebook, custom which they otherwise would not get.
- In Murdoch and Nine's case, however, they put up a paywall so that customers funnelled to them by digital platforms can't get in without paying.
- Therefore in the case of Murdoch and Nine it is the news media companies themselves who are crueLLing their own access to a bigger share of the available advertising market revenues. They have a business model that dictates that potential consumers must pay for their content and therefore must pay for the privilege of subjecting themselves to the advertising put out by Murdoch and Nine. The days of that business model being a viable one are over and they are not coming back.
- Murdoch and Nine are not being locked out of advertising revenues or payment for their content by Google and Facebook at all. They are being given an entry to a new more efficient market and they are being given this benefit for free by Google; but **they** are refusing it.

2. **ACCC's claim:** A mandatory code is required because "the core issue of payment for content was highly unlikely to be resolved through this voluntary process."

Response:

- Perhaps payment for content could be justified if Google were actually profiting from the content and excluding the content provider from making money from their content. But neither of these apply.
- Google News doesn't do advertising. They don't make advertising revenues from the Google news site. They may make some tiny subscription revenues but they are not cutting the Murdochs and Nines out of advertising revenue by this means. They are cutting them *in* on the action. It is the media companies who put up the paywalls that are cutting themselves out.
- What we are seeing here is simply the death of the print media advertising and the re-birth of journalism in the digital age, with the new business model necessary for that transition – one that can be hugely profitable to journalism as long as they don't put up a paywall.
- From the article below it seems Google may make about \$1billion a year world-wide from using news as a direct driver of advertising revenue from Google search.
<https://www.kamilfranek.com/how-google-news-makes-money/>
- But that in itself does not justify a mandatory arbitration system which requires the digital service provider to pay for content but not be paid for the service of funnelling custom to the content provider. The fact is, Google simply isn't buying the content and there is no need for it to buy the content. And it isn't selling the customer traffic to the news media for an exorbitant price imposed unfairly because of its market power. On the contrary, it is gifting the custom to the news media for free, enabling them to make money they never could before, albeit in a different way.
- The problem here is that Murdoch in particular wants to continue making it in the old way. He wants less players in the market and more inefficient means of access by customers. It won't work, because people simply won't buy print media. And the ACCC will be doing nothing more than attempting to force Australians back into buying content from fewer providers in an inefficient format. It is forcing Australians to pay to read advertising – which Australians are going to be extremely angry about. In the new market we don't have to pay to read advertising. Murdoch likes it structured that way, but that market is never coming back, no matter what excuses the ACCC may trot out (about the need for a healthy journalism industry) to drag consumers back to that arrangement.

3. **ACCC's claim:** "The ACCC's Digital Platforms Inquiry Final Report identified a fundamental bargaining power imbalance between Australian news businesses and each of Google and Facebook. This imbalance is undermining the ability and incentives for Australian news businesses to produce news content."

Response:

- There is no power imbalance because it is not the new player that is squeezing the old player out by market dominance. Google does not have a monopoly, although it is the best search services provider and Australia should not want to shun the best provider. It is popular mythology to say that Google and Facebook have too much power. They may, or they may not. But **there is no evidence that this power is being used to undermine the production of news content. On the contrary, the digital platforms are now the lifeblood of the news media.**
- More specifically, the digital platforms and the news media aren't competitors at all and there is no basis for Google or Facebook to be treated as though they have embedded and anti-competitive structure in the market. On the contrary they have broadened the competitive base for journalism and expanded the market, which is of course what Murdoch and Nine don't want.

- In the digital age – which is here to stay, no matter how much Murdoch and the ACCC may wish to buck the reality – the digital platforms are behaving in a manner that ensures fairer and more efficient access to news than we have ever had before. And it is ensuring that news can be accessed alongside vast amounts of other information which news providers rarely bother to make available. If digital search services are forced to vacate the Australian market because the ACCC has a mandatory code that makes them pay extraordinary amounts for stuff they're not buying anyway, then Australians will have been served very ill by the ACCC.
- What the advent of Google – or rather the digital age – has uncovered is a market shift. It has uncovered the fact that when given the choice of free access to journalism or paid access to journalism, consumers choose the free access. It is not Google which is making the choice about whether and which consumers should be trafficked to Murdoch and Nine; it is Murdoch and Nine that are making the choice to shut consumers out. Murdoch's news in particular is not attractive enough to make most customers want to subscribe. And therefore advertisers have moved away from his product. Advertisers have not moved away because there is a free search engine. They have moved away because they can see that advertising with Murdoch doesn't reach a big enough audience any more. It isn't Google that is drumming Murdoch out of the market. It is a consumer preference not to buy his news when they can easily access something they prefer to his brand of news. Now he wants other companies to pay for his company failure and Nine is happy to go along for the ride. Both of them must be grateful that they have cut the ABC out of any share of this action. There is no money for the taxpayers in this code. Where is our share?

If the objective is to save journalism, then the solution is in the hands of the news media companies themselves. All Murdoch and Nine have to do to save journalism is to go fully digital and remove their pay walls. It won't save journalism to crash the consumer's access to news via the web. It will simply increase Murdoch's market power for a little while and all totally at the expense of Australians.

Thank you for your consideration. I expect both my submissions to be published in full by ACCC.

Your sincerely

Dr Bronwyn Kelly
 Founder, Australian Community Futures Planning

For convenience, here is the text of the earlier submission of 21 August 2020 from Australian Community Futures Planning:

Please accept my comments on the News Media Bargaining Code. I have significant concerns about this code and consider that in making the code compulsory the ACCC and the government are actually introducing anti-competitive measures into Australia's governance and economy, rather than reducing them. Nor do I consider that the compulsory nature of the code will do anything to save a free and independent press in Australia. On the contrary it will imbue already powerful sections in the news media with more power, without saving any jobs in journalism.

I provide these comments from the perspective of the news consumer and do not have any conflict of interest beyond being a consumer of both the media content and the search service provided by

Google. I'm just an ordinary retired Australian not seeking income from anything other than my superannuation. I don't use Facebook to search media content so I have no conflict there either.

I am strongly of the view that the ACCC's role is to protect consumer interests. Those interests are being threatened by the proposed legislation.

I should state at the outset that I had these concerns well before the open letter from Google and have not been influenced by any misinformation the ACCC may complain of on either Google's or Facebook's part.

I believe ACCC is correct in asserting that "A healthy news media sector is essential to a well-functioning democracy." But this mandatory code is not the way to get it. On the contrary, it could have the opposite effect.

What's wrong with this response to the current predicament of journalism in Australia?

The main problems are:

1. the switch to making the code compulsory, and
2. the selectivity of it – inasmuch as it excludes the ABC and SBS from any financial negotiations.

These two problems mean that the legislation has a distinct chance of replacing one anti-competitive problem with another.

The ACCC's explanatory paper on this states that:

While bargaining power imbalances exist in many other contexts, intervention is necessary [in this case] to address the bargaining power imbalance because of the public benefit provided by the production and dissemination of news and the importance of a strong independent media in a well-functioning democracy.

So we are to be persuaded that it is in the public interest to interfere in the market on this occasion. But the consumers are part of that market and it is not apparent how their interests will be served by a compulsory transfer of revenue from one player to another. Moreover, if the government were truly concerned about "preserving the public benefit provided by the production and dissemination of news and the importance of a strong independent media", they wouldn't be hacking the ABC to pieces as they are.

All that is really happening here is that a few excessively powerful private interests are being pandered to by both the government and the ACCC at the expense of the public interest and there is no guarantee that journalism will be saved at all. The government has simply responded to the complaints of Murdoch and Nine that they haven't been able to squeeze as much as they would like out of their new digital competitors on a voluntary basis. So now they are badgering the government to make it mandatory and the ACCC is succumbing to government pressure to favour some parts of the media over others.

This problem would not arise if the code were voluntary. It arises because of the compulsion. If the code is voluntary it allows free exchange of goods and services on transparent terms between the competitors. Once it is mandatory it introduces market distortions which are likely to be worse for

journalism and the consumer/public than the current admittedly sub-optimal market structure. That market is in transition but this is not the way to safely move it from one basis to another.

The fact that the code doesn't require payment to be made to the ABC or SBS for their content is another factor proving that this is a last ditch anti-competitive response by the government keen to unlevel the playing field in favour of conservative media organisations. As a taxpayer owner of that public content I resent that. Where's the taxpayer's share? If we're being excluded, that means this is just a sop to Murdoch and Nine. As a consumer faced with the prospect of not being able to access content I used to enjoy, or get paid for my taxpayer owned content, I consider that to be the real anti-competitive thing going on here. If Google's market power has hit the anti-competitive panic button inside the ACCC, fine. But why hit that with another anti-competitive move – this time against the consumer and against some quality independent players like the ABC?

An approach likely to back-fire

In practice the News Media Bargaining Code, as framed, is reasonably likely to backfire on Murdoch and Nine because if I were Google I'd simply change the algorithm to suppress Murdoch's and Nine's content. That would keep the advertising share I'd have to pay to them to a minimum. In that respect, I'm glad the ABC has been excluded because as a consumer I'd prefer their content to be pushed to the top. The new Act apparently attempts, in part, to preclude that by insertion of “non-discrimination requirements – which require responsible digital platform corporations to prevent a digital platform service from disadvantaging the news content of an Australian news business.” But how will ACCC ever police that? It would require an understanding of their algorithms that is way beyond the budget of the ACCC. And in any case, it is not clear how such a provision, which is supposed to prevent Google from “disadvantaging the news content of an Australian news business”, would be feasible as a “non-discriminatory” measure. It's unworkable. The only players who would benefit there are the lawyers who would laugh all the way to the bank.

More to the point though, it is the ACCC – not Google or Facebook – who is introducing the discrimination. This code discriminates against the ABC and the taxpayer. It is a ghastly piece of discrimination.

And since when is it up to government to assure funding for private news businesses that aren't attractive enough to consumers to make them profitable? Since when is it the role of government to bully one private provider into giving over billions of dollars free and clear to other private providers – and uncompetitive providers at that? And since when is it reasonable to let taxpayers suffer continuing poor quality service as a result?

An approach breaching consumer rights to privacy and personal information protection

I also particularly object to Google or Facebook being compelled to transfer data to organisations covered by the code to enable them to understand how to market their news better to me. If news media companies want to understand that, they can and should go out and do independent market research themselves. They should not be able to rummage through my data and I do not give permission for such. Any provision requiring transfer of data – any data – from Google or Facebook to anyone – competitor or not – should be discarded.

Indeed if Murdoch and Nine want to understand how they can market their news better to me they can take a look at how their competitors do it – i.e., by not putting up a pay wall. Murdoch and Nine don't need my browsing data for that. If they dropped their pay walls and delivered a quality product, that would get me in. Otherwise I'm going to refuse to click on them at all.

An unfair approach

The design of the Code is all one way. It doesn't acknowledge the increase in revenue delivered to Murdoch and Nine by the greater number of clicks provided by Google through their search service. If Google has to share the advertising revenue, it should be net of the increase in revenue it has provided for the media companies for trade they would otherwise not have received, but for Google. Of course if that were included it might cancel the whole advantage for the media companies or maybe make them owe money to Google, so that's not going to get a guernsey. But Google should be able to insist on some recognition for the customers they send free of charge to these dominant media moguls who have done nothing but display their willingness to use their market power unduly to go puling and whinging to the government to make one free market player pay arbitrarily determined amounts to keep another uncompetitive market player afloat. There are other ways to save journalism if that is the main intent. This new code will not save journalism. It will simply save Murdoch and Nine – and then perhaps only temporarily.

An unethical intervention in the market that will embed consumer disadvantage and won't save journalism

This is a slugging match between a dying business structure and a nascent business structure for journalism in the digital age. The consumer is getting caught in the middle because the regulator is responding to a government that is acting in the interests of only one of the players, not the taxpaying consumer. Government intervention, especially as it excludes benefit for the publicly owned market player (the ABC and SBS), is absolutely inappropriate.

If we want to save journalism, this isn't the way. The way to save journalism is to create the environment where ethical quality journalism businesses can re-structure the industry along new business model lines – those being where a news outlet attracts readership, sponsorship, subscription and advertising revenue by a consistent display of compliance with quality journalistic standards.

An anti-competitive move by the ACCC

Any contract arrangement being proposed by the ACCC should have preservation of competition at its heart. But this one does not. It seems to be aimed only at preserving profits for some media outlets and doing nothing to reduce the trend of their growing concentration of power in the market. Google's reaction is the one I have expected for a while. It is to imply to Australian users of its service that we will have to pay for what we currently value as a free service (yes, I know I give them my data, but I do get the access I want and I don't have to fall victim to their advertising unless I choose – so far, I reckon I've come out way ahead). Currently I can access the quality journalism I want for free, although I actually pay subscriptions for these media outlets. I took up those subscriptions because I found out about the quality of their journalism for free and was impressed by the quality and breadth of journalism – nothing more, nothing less. I was able to choose them: they weren't forced on me by Google. The ACCC should ensure that level playing field is still available. There should be a free entry point to the good journalism market for the writers and the consumers. That's how the ACCC can stimulate the industry. The playing field should be levelled by the ACCC from the bottom, not at the top. The ACCC shouldn't be favouring the big players as it is in this legislation.

Your sincerely

Dr Bronwyn Kelly
Founder, Australian Community Futures Planning