

From: [David Powers](#)
To: [bargainingcode](#)
Subject: Issues with the proposed "Mandatory Bargaining Code for News Media and Digital Platforms"
Date: Wednesday, 26 August 2020 9:52:08 PM

I am concerned to read details of the ACCC's proposed "Mandatory Bargaining Code for News Media and Digital Platforms". It aims to unfairly advantage large Australian media corporations while singling out two large international corporations for unreasonable and unworkable demands. It would seem likely to result in severe disadvantage to the very Australian consumers and SMEs ACCC is required to protect, as well as the large Australian media companies that are presumably lobbying for these changes.

I am writing both as a concerned citizen and consumer, and as an expert in Computer Science, and in particular language and search technology in both an academic and a commercial context.

I will focus my comments on Google here, as I have been a user of Google services since before they incorporated. Although I am not an active Facebook user I would think the comments would apply similarly there, and indeed are fraught with additional problems as linking to new sites is done by users not employees.

I would also note that I am an inventor of enabling technology for the Australian search company YourAmigo, which has worked with both Google and Yahoo. Although this has always been a fully arms length relationship.

I use four dot points from the ACCC explanatory notes as a framework for my comments

- minimum standards – which require responsible digital platform corporations to provide registered news businesses corporations with advance notification of algorithm changes, information about the collection and availability of user data and advance notification of changes affecting the display and presentation of news content;

The algorithms that Google uses are proprietary and competitive, and requiring Google to provide details of such algorithms to one segment of users provides an unfair disadvantage to others. When Google makes a change to its ranking algorithms, this affects everyone - and I have personal experience of being disadvantaged by such changes both personally and corporately. Often many such tweaks are made, sometimes for different subgroups of users to allow testing and comparison, and thousands of such tweaks are made each year. Providing 28 day days notice of such algorithm adjustments is unreasonable, and accurately estimating the effect of such adjustments is impossible.

One significant concern is that this legislation will force Google to withdraw its services from Australia because it is impossible due to both its business model and the complexities of the information space.

It is particularly incomprehensible that Google should be required to provide their user data to Australian news corporations. These news services already have full information available to them of the source of links to their website, and providing any further would

require Google to breach the privacy of their users, and would likely mean Google's current user base went elsewhere (until ACC identified those services and had the Treasurer add them to the list of digital platforms corporations to whom this legislation applies).

- bargaining rules – which require the responsible digital platform corporations and registered news business corporations that have indicated an intention to bargain, to do so in good faith;

The nature of a search engine is to index websites and provide ranked lists of results to users. This is both a service to consumers searching for a product or information, and to individuals, companies and other providers that offer products and information. Traditionally, users would have to pay for access to such a service and providers would have to pay for listing. But Google has been a pioneer of novel advertizing models that have made this free to both consumers and providers.

Thus the starting point for good faith negotiation should be what news business should be paying Google for their services in pointing people to news providers - who in many cases require a subscription before users can access the information, and are thus profiting financially from Google's provision of services.

Another significant concern is that fair bargaining in good faith is actually excluded by the legislation itself, which is accentuated by the unfairness of the arbitration rules.

- compulsory arbitration rules – where parties cannot come to a negotiated agreement about remuneration relating to the inclusion of covered news content on designated digital Mandatory Bargaining Code for News Media and Digital Platforms 5 platform services, an arbitral panel will select between two 'final offers' made by the parties;

The arbitration rules provide that if Google and any "news business" that is effectively able to support one full time employee (\$150K) are unable to agree on anything, and in particular are unable to agree on fair arbiters, ACC will choose the arbiters from a list of arbiters that it maintains. Thus an international company is forced to accept biased arbitration in another jurisdiction purely because its services can be accessed from that jurisdiction.

The logical corporate response to such a huge impost is to simply cease operations in Australia, which is a market of relatively insignificant size. Indeed the primary function of Google to provide search services similarly dwarfs the news component, which represents of the order of 1% of search and is the component of search that is least rewarded with advertizing revenue based on the Google Adword model of advertizing commercial products to potential purchasers.

For Google to simply stop providing any news results to Australian residents would be a logical consequence and would be far cheaper for them than complying with this legislation, but would have a huge impact on the Australian media. If Google stopped serving news (from any news corporation) it would have a huge impact on Australian news

companies (figures I have seen suggest they could lose 30% of their income).

This legislation would seem to be at the behest of large Australian news corporations who have little understanding of Google (or Facebook's) business model and in particular do not understand that *whatever* Google's response to this legislation is, Australian's will suffer for it, and Australian news media will suffer too.

- 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.

This proposed legislation is explicitly discriminatory, in effect singling out two corporations for unfair treatment. Every ranking decision that Google makes advantages someone and disadvantages others. This legislation aims to make Australian news vendors special, and is a form of explicit discrimination in favour of these organizations and against other organizations that are not covered by the legislation.

If the legislation specifically provides that Google ceasing to link to Australian news sites as discriminatory, then Google will be forced to cut off Australia from all news sources so as not to discriminate against Australian news businesses. If it tries to provide that ceasing to link to news for Australian internet users is discriminatory, then Google will likely need to cease providing search services to Australians.

This legislation would seem to force Google into having to choose between solutions that are ludicrous according to both common sense and any reasonable business model.

My conclusion from consideration of the information and notes ACCC have provided on this proposed legislation is that it runs counter to Australia's best interests including both ordinary citizens, the news media, and companies engaged in every other business. I cannot see that Google continuing to operate search services in this jurisdiction will be feasible if this legislation goes forward, and probably that will need to extend to its full gamut of tightly integrated services.

I look forward to your response to these points,

sincerely,

David M W Powers

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