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Mandatory news media bargaining code

Response to Concepts Paper

57 Carrington Road Marrickville NSW 2204

Phone 02 9577 3333 | Fax 02 9577 3377 | Email campaigns@choice.com.au | www.choice.com.au

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INTRODUCTION

CHOICE is interested in the development of a mandatory news media bargaining code (the code) because our organisation depends on people seeing our work. We need people to find our advice and investigations to meet our mission as a not-for-profit.

We have experienced firsthand the power imbalance between digital platforms and publishers in Australia. The digital platform services that we use are highly dependent on are given to us on a “take it or leave it” basis. The most important thing we think a code could achieve is transparency and accountability for algorithm changes in a way that allows small publishers to continue to compete. CHOICE wants to be consulted and respectfully heard when major decisions are made about platform algorithms that will affect our business model. We want assistance and guidance that is fair, particularly for the technical changes required that will involve significant investment and time to implement.

Most importantly, as a consumer advocacy organisation, we think it is essential that consumer needs are better considered in the code. Consumer data should not be bartered without the involvement of the party most affected: consumers.

We do not have strong views on specific drafting yet. We would like to see the code meet clear outcomes, regardless of how it is drafted and structured.

Outcomes CHOICE wants to see from a news media bargaining code:

1. The code should prioritise good outcomes for consumers and readers. This means the code should:
 - a. Support high quality, independent and original content.
 - b. Promote diversity of ownership and approach in the news media market.
 - c. Ensure that consumers have the confidence that they can safely engage online and trust all parties. This means that consumer privacy is respected, that it is clear how data is being used and businesses can guarantee that consumers’ data is not being used against them
 - d. Consumers must be included in conversations about their data. They must be considered as a party to any consultations about data sharing.
2. The code should support competition by:
 - a. creating outcomes that allow for new entrants to easily enter the news media market.

- b. not disadvantaging any publisher's business model, including subscription, donation and not-for-profit models.
3. Digital platforms should be encouraged to continue to innovate while also providing appropriate transparency and predictability for publishers.

RESPONSE TO CONCEPTS PAPER

1. About CHOICE: why we need a strong Code to continue our work

CHOICE is a not-for-profit organisation. Our mission is to make markets fair, safe and just for Australian consumers. We do this in two ways: by assisting people to make decisions and by advocating for change in the interest of all consumers.

CHOICE has invested in publishing original journalism since our first magazine was released in 1960. Today we publish two magazines - *CHOICE* and *CHOICE Computer* - and provide expert reviews, advice, opinion and investigations at choice.com.au.¹

CHOICE has invested in quality journalism. We have a small team of investigative journalists supported by the infrastructure that we believe is needed to deliver high quality work: a strong editorial team, original research (typically conducted by in-house experts), sub-editors and a fact-checking team that makes sure our work is accurate.

Our published work helps us achieve our mission in several ways:

- **Original investigations** from our team of journalists allow us to shine a light on industries that are failing consumers and to push for better standards.² For example, our 2019 multi-part investigation into the funeral industry³ helped us to make the case for reform, leading to NSW requiring funeral directors to clearly disclose prices.⁴
- Our **free advice** helps people to make decisions. For example, our guides on refund rights in a pandemic⁵ or our expert buying guides for common purchases.⁶
- Our **warnings** help people avoid unsafe or harmful products. For example, our work showing the pitfalls of timeshare products⁷ and warnings about button batteries in common household items.⁸

¹ <https://www.choice.com.au/about-us/editorial-guidelines/fact-checking>

² <https://www.choice.com.au/topics/investigations-and-news>

³ <https://www.choice.com.au/health-and-body/healthy-ageing/ageing-and-retirement/articles/funerals-investigation-how-much-do-funerals-cost>

⁴ <https://www.choice.com.au/health-and-body/healthy-ageing/ageing-and-retirement/articles/new-funeral-price-transparency-laws-for-nsw>

⁵ <https://www.choice.com.au/shopping/everyday-shopping/tickets/articles/coronavirus-and-event-and-concert-cancellations>

⁶ <https://www.choice.com.au/home-and-living/kitchen/ovens/buying-guides/freestanding-electric-ovens>

⁷ <https://www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case>

⁸ <https://www.choice.com.au/babies-and-kids/children-and-safety/avoiding-common-dangers/articles/choice-button-battery-test>

- Our **original research** contributes to major debates and highlights public interest issues. For example, our research into consumer challenges in the private rental market⁹ and our collection of nearly 100 cases of product failures to demonstrate safety issues with the Thermomix products.¹⁰
- Our website is a **platform for experts** to explain the big issues and progress debates. For example, this explainer of UK product safety laws from an international expert¹¹ and this opinion piece from a public health expert on why we need better labelling of added sugar.¹²
- Our **behind-the-paywall reviews** of products and services provides us with a sustainable business model to support our work.

Our sustainability as an organisation depends on people accessing our work online and, if it is the right fit for them, choosing to support our work financially. We do not take advertising - instead our business model is primarily supported by consumers.¹³ We currently have over 180,000 paying subscribers and some people choose to donate to support our mission.

Our financial sustainability and, therefore, our ability to deliver our purpose is critically dependent on Australians being able to discover our content and work through Google and Facebook. We are familiar with the bargaining imbalances between these digital platforms and publishers like us. For us, power imbalance is most acute when it comes to algorithms or other product changes to digital platforms - a change we may not know is coming can greatly affect who sees our work.

Our hope is that the code will ensure that publishers will be treated fairly by digital platforms and will recognise the value created from our investment in original content.

2. Scope of the code

If the objective of the code is to encourage investment in news for Australians, then the ACCC should set a high standard for organisations and content that the code will cover.

CHOICE believes that original work, independence and high editorial standards should be key factors determining what is covered by the code. Our preferred model is one where organisations must first qualify to be captured by the code and then only content they produce that meets set criteria is captured. This will ensure that the code captures organisations fully

⁹ <https://www.choice.com.au/money/property/renting/articles/choice-rental-rights-report-dec-2018>

¹⁰ <https://www.choice.com.au/about-us/media-releases/2016/may/thermomix-mass-incident-report>

¹¹ <https://www.choice.com.au/shopping/consumer-rights-and-advice/your-rights/articles/product-safety-in-the-uk>

¹² <https://www.choice.com.au/food-and-drink/nutrition/food-labelling/articles/why-we-need-added-sugar-labelling>

¹³ <https://www.choice.com.au/about-us/how-choice-is-funded>

investing in creating news, including the infrastructure needed to do that such as editorial staff and fact checking.

Criteria that organisations should meet to be captured by the code

Organisations captured by the code should:

- Adhere to editorial standards that are published on the organisation's website.
- Have clear lines of accountability, with a senior member of the organisation responsible for editorial direction and standards.
- Conduct fact checking, sub-editing and other quality control measures to ensure that their work meets high standards.
- Produce original work (as opposed to rewrites of the work of others).

We do not support requirements for an organisation to conduct a certain percentage of work directed towards the production of news. CHOICE offers reviews, services, advocacy activities and more to our readers. This work does not detract from our investment in journalism.

Like a number of small or subject-specific publishers, CHOICE is not currently a member of an Australian media standards-setting body or a media industry code. Requiring membership of a broadcast-style code of practice (like the Commercial Radio Codes of Practice or similar) or membership of traditional standards setting bodies is likely to exclude smaller members of the industry and some new entrants and so should be avoided.

Criteria that content should meet to be captured by the code

Content captured by the code should meet a clear definition of public interest work and should be original, independent and high quality.

Definition of public interest work

CHOICE supports the ACCC's definition of public interest journalism but would like to see it broadened slightly to capture a wider range of matters and with clear definitions.

Instead of:

Journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government.

We suggest this definition:

Content with the primary purpose of recording, investigating and explaining issues of public significance in order to engage readers in public debate or inform democratic decision making at all levels of government.

Originality

Originality should be the primary criteria used to guide what content is captured by the code. Original work is a significant investment for an organisation - it requires time and support from a range of experts such as fact checkers, sub-editors, data analysts, subject-matter experts, managers, user experience experts, photographers and graphic designers.

For work to be original it must not be a rewrite of the work produced by someone else. Original work involves an investment in creating new insights or telling a new story. For example, it could include original research, work with primary sources or significant investment in presenting data in a new way.

Content is independent from advertising and sponsorship

Independence should be the second criteria for content captured by the code. Genuine public-interest work must be free from commercial interference. This is best defined by what it is not. It cannot be advertising, such as advertorial. It cannot be sponsored. It cannot be content that has been created for the purpose of generating sales through e-commerce or other marketing channels. The work may come from an organisation that accepts advertising or uses approaches like sponsored content but anything getting the support of the code must be produced without these commercial influences.

High quality work

Finally, content must be high quality. Content could meet this criteria by attesting that it has been fact-checked, meets editorial standards and offers a clear way to contact the organisation or creator to correct any errors. Content could also meet quality standards by qualifying for external benchmarking, such as the The Trust Project.¹⁴

Other matters

CHOICE does not support a requirement that news must be produced by professional journalists. We think this measure could be easily exploited, for example, by an organisation hiring people with the required qualifications but then directing them to work on projects that do not meet the standards we hope this code will support.

¹⁴ <https://thetrustproject.org/>

The other consideration here is that not all public interest content is produced by journalists. It can also be produced by experts, with the support of editors, fact checkers and sub editors. The best example of this is the opinion section in most newspapers. At CHOICE, our experts frequently contribute to journalistic work. Another important example is the academic produced work at The Conversation.

Digital services to capture

Where possible, we ask the ACCC to take a broad approach when determining what services from Facebook and Google are included in the code. Our preference is for the code to contain a set of principles about what services to include within the code, allowing for additions without a full code review.

3. Content of a code

Revenue sharing

Bargaining frameworks

CHOICE has a strong preference for a bargaining framework that is based on collective licensing or fee arrangements. This is the only approach that will allow small publishers to fairly participate.

Bilateral approaches (including negotiation, mediation and arbitration) and collective bargaining would likely favour large organisations with the resources to invest in legal and negotiation advice. Smaller organisations like CHOICE do not have in-house legal council or dedicated resources for negotiations like these. We are particularly cautious about a collective bargaining approach - it is unclear how this option could balance the variety of business models and interests across the publishing sector.

Collective licensing or fee arrangements would allow all organisations to fairly participate in revenue sharing. To work, this approach requires a third-party to establish revenue benchmarks, to collect and distribute revenue. Revenue benchmarks could be established within the code, but given the pace of change in the media and digital platform sectors, is likely best left to a third-party.

This third-party could be an existing body with collections experience, a body representing media interests able to expand into this role, a regulator or a new organisation established specifically for this purpose. A Code should specify what role this third-party will play, guidance for making decisions and requirements for review. A tender process run by the ACCC could

help determine the best organisation to take on this role initially and potentially ongoing, if the tender is reconducted at appropriate intervals (three to five years).

How should value be determined?

CHOICE favours an indirect model for calculating value - it should be based on the revenue and general benefit generated by published content for digital platforms. This best reflects the value exchange between publishers who provide original content and digital platforms who benefit from this work.

We are wary of any approach that factors in the value of user data - this is an input that has another party involved (the consumer). For reasons outlined in section four, we do not believe that user data should be considered as part of the value exchange without consumers represented in the discussion and appropriate protections in place to prevent the misuse of data.

We are not supportive of calculating value based only on the cost of producing news. This consideration would only consider supply-side costs. With no reference to consumer demand, this measure could create unhelpful distortions in our media market.

We also ask the ACCC to consider distortions that would occur if the code allowed for different values to be assigned based on the advertising value for different content. For example, if a story about health insurance would have greater value due to associated demand for related advertising compared to a story about delays in the judicial system, which may have lower advertising demand.

Assigning prices based on individual content subject matter risks creating a new market that would prioritise news with greater connections to advertising spend. Instead, the best approach would be to find a weighted average for all content to set prices. CHOICE's preference is that this is done across all content for all industry members, so that there is no reasonable economic incentive to divest in content with high public interest but lower associated advertising potential.

Advance notice of algorithmic changes

CHOICE is highly dependent on people finding our work through online search - over 70% of traffic to choice.com.au currently comes via search. Major changes to search or social algorithms has potential to significantly affect our sustainability.

The code should require more transparency about algorithms from digital platforms. Currently we are unable to determine exactly what factors affect who sees our work through search and

social platforms. We rely on a combination of vague advice from platforms and experimentation to figure out what drives the algorithms that affect our work.

The code should require digital platforms to do more to help publishers understand how algorithms operate and affect rankings. CHOICE would like to see requirements for digital platforms to be more transparent about how algorithms work and provide a contact person to answer queries.

Notice periods for changes

Even when we know an algorithm is about to change, we may have limited ability to respond to this change. Some algorithm changes require significant technical adjustments to websites and resource investments. Where any change is about the technical delivery of content, it penalises the smaller players who generally don't have the resources to rebuild websites to meet the new criteria. Any changes that would require technical changes to website presentation or layout should be given with six months notice or greater. Changes that affect how content is written or other factors could have shorter notice periods.

Weighting of paywalled work

Currently, organisations that use a paywall or membership/subscription model appear to be penalised by digital platforms. This is difficult to confirm as we do not have precise information about how Google and Facebook's algorithms work. Google has provided some guidance to publishers about how to make sure their search algorithm can crawl (read, recognise and list) paywalled content.¹⁵ However it is not clear how paywalls precisely affect rankings in Google search.

Paywalls and membership/subscription fees are some of the few approaches available to fund public interest journalism that are completely free from commercial influences. At a minimum, detailed transparency about how the paywalls and subscription or membership fees are treated by current algorithms would allow organisations to better plan how they use these features. Ideally, the code should require that paywalls and subscriptions or memberships are not penalised.

Tools to support comment moderation

The code should require that digital platforms provide appropriate tools to publishers to allow them to meet legal requirements for moderating and managing content.

¹⁵ <https://support.google.com/webmasters/answer/7532484?hl=en>

A recent legal case, *Fairfax Media Publications v Voller* [2020] NSWCA 102, has set a high bar for moderation required by publishers on digital platforms.¹⁶ Publishers are required to take responsibility for third-party comments on digital platforms when they post stories. Our understanding of this case is that we need to invest significant resources into comment moderation on platforms like Facebook in order to avoid liability for comments made by third-parties. The tools currently provided by Facebook make this work difficult.

Currently publishers have no way to turn off comments on Facebook. They are left with two choices: not to post a story or post with high investment in manual moderation from staff. Active moderation is not feasible at all times, such as weekends, evenings and public holidays. At a minimum, Facebook needs to provide publishers with the ability to turn off comments on posts at certain times. This feature should be considered for inclusion in the Code.

¹⁶ <https://www.caselaw.nsw.gov.au/decision/1725e1ead406ec197776976c>

4. Protecting and including consumers

A key concern for CHOICE in the development of the code is consumer protection. Chapter 7 of the ACCC's Digital Platforms Inquiry Final Report (DPI Final Report) identified a comprehensive range of considerations for data usage that could affect consumers on digital platforms. The Concepts Paper also notes the importance of protecting the privacy of individuals and that comprehensive data sharing 'may not be appropriate or desirable'. However, the Concepts Paper does not go far enough to address these problems.

The volume and quality of user data available to Facebook and Google is derived from users' interaction with all content available through the digital platforms' product and services, and far more extensive than news media businesses can ever acquire. Some parties to the Code want the ability to access further user data held by digital platforms. It is unclear what they want specifically, apart from the ability to precisely target content and advertising to news audiences.

Releasing a wider range of data could potentially provide media businesses with the ability to track user interactions across multiple websites, apps and platforms. However, many news and media businesses already do not fully understand the nature and volume of data that the digital platforms collect from users that engage with news content on their platforms. A wide range of users would also be unaware of the full extent to which news businesses' can track their online behaviour.

Consumer protections beyond privacy

The ACCC must consider how to manage likely consumer harms beyond privacy breaches, for example, the misuse of data for pricing. The problem does not come from businesses accessing data but using data in harmful ways and exploiting information. In the worst cases, data about sensitive attributes, such as age, gender, sexuality and race may be used to vary prices in a way that amounts to discrimination.

Consumer consent is not an appropriate protection from these harms. As the ACCC is well aware, consumers are frequently asked to accept lengthy and unreadable terms and conditions for digital services that allow data use in a variety of unclear ways in perpetuity.

Asking individual consumers to consent to activity they are unlikely to have the time or legal and technical training to fully consider is not a reasonable way to mitigate harms. Consumers need to have their interests represented in ways that match the bargaining power of digital platforms and news media organisations.

Independent consumer representatives should be present for any negotiations about consumer data

Although user data is classified as a resource that has value, there is no reference in the Concepts Paper to any form of consultation with the users who produce the user data. The voice of the people who use the digital platforms is currently absent from the code, yet it is their information that has been identified as a source of value in the negotiations over revenue. Consumers must be included in conversations about their data and considered as a party to any consultations about data sharing.

Consumer interests should be represented in any bargaining that results from the code about consumer data. This could be achieved by requiring that an independent consumer representative is appointed to oversee any negotiations resulting from the code that covers consumer data. The representative should be independent and have no commercial interest in any publishing business. They could be appointed by the ACCC or an appropriate consumer body, such as the Consumers' Federation of Australia or the Australian Communications Consumer Action Network (ACCAN).

The code should specify that a consumer representative must be appointed in any bargaining discussion to involve the exchange of consumer data. The position should be funded, ideally by the parties conducting the bargaining. The code should outline the consumer advocate's roles and powers. At a minimum, the consumer representative should have the ability to veto terms harmful to consumers and to consider the consumer interest in the overall position to ensure consumer privacy is protected and that data is used in a way that will not harm consumers. Ideally, the consumer representative should have the ability to conduct public conversations about how data could be used or traded in negotiations.