



Response to ACCC Concepts Paper: mandatory news media bargaining code

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1 OVERVIEW

We appreciate the opportunity to respond to the ACCC's Concepts Paper on a mandatory news media bargaining code.

In responding to the paper, we have taken into consideration the completely unsuccessful attempts by regulators across the world to use legal and regulatory instruments to ensure that Google and other digital platforms pay for the use of media content.

The ACCC is very familiar with the failed attempts in Germany, Spain and France to use legal, regulatory and political instruments to compel Google to pay for its use of news content. The latest (currently) failed attempt is in France, where Google in particular has used the imbalance in negotiating power between it and the media companies to effectively compel the media companies to accept zero payment for Google's use of media content. This matter is now before the French Competition Authority as the ACCC is well aware.

Google took an extraordinarily aggressive legal approach to produce an outcome that is completely at odds with the intention of the European Digital Single Market Directive and the French law that gives effect to this directive. Notwithstanding the support of the French parliament and President, and all major media companies, for Google to pay for its use of media content, Google was prepared to wear the opprobrium and significant reputational damage of its actions.

To address the imbalance in negotiating power between the digital platforms and news media organisations the ACCC is developing a mandatory code as the initial vehicle through which to regulate Google and Facebook with the aim of ensuring they pay for news media content. The challenge with using an ACCC code is that the usual enforcement provisions are unlikely to work with Google because:

- the maximum penalty for breaching the code is in the order of \$60,000, which would have no material effect on a company the size of Google;
- the provisions for 'naming and shaming' companies that breach the code will have no effect whatsoever on the digital platforms; and
- any provisions that allow for the gradual imposition of obligations on the platforms would most likely be gamed by the platforms, based on their past behaviour.

The ACCC's paper also says that the regulator can take action for the alleged breaches under competition law. The difficulty here is that the news media is facing a severe crisis right now (with the closure of multiple publications and firing of journalists), but such actions usually take a considerable period of time.

In light of this, we believe that:

- any price setting mechanism used by the ACCC must ensure that the price is set in a 'short sharp' manner with minimum opportunities for gaming and delay;
- for pecuniary penalties to be an effective deterrent against breaching the code, the size of the penalties will need to be significant;
- the regulator should be able to bring court proceedings to seek other remedies including injunctive relief to compel parties to comply with the obligations in the code. Those obligations in turn need to be specific so that they compel meaningful action by the platforms to reach agreements with news content owners;
- the code should include a review mechanism to assess its effectiveness. If it has not been effective there could be escalated levels of regulatory intervention;
- the code should accommodate direct agreements between media companies and the platforms as well as collective arrangements; and
- the decision to make the ACCC the regulator is a very good one, as it has the experience and skills to undertake litigation.

2 ABOUT US

We are a not-for-profit organisation that negotiates, collects and distributes licence fees and royalties for creators and publishers of text and images. We also represent content creators in Copyright Tribunal proceedings if negotiations with users of their content do not result in a fair outcome.

The licence schemes we manage include the use of news content by media monitoring companies. These are currently the subject of proceedings in the Copyright Tribunal, and there are interim payments in place. We distribute the fees from media monitoring companies, using data provided by them, to a large range of content creators. We have provided the ACCC with some information about how the licensing of media monitoring companies works in practice, and we would be happy to elaborate on any aspects that the ACCC may find useful.

We comply with a range of governance requirements, including the Code of Conduct for Australian Collecting Societies. Our management of the statutory licence schemes for education and government, and the artists' resale royalty scheme, is subject to additional governance requirements including detailed reporting to the Minister for Communications, Cyber Safety and the Arts, and tabling of annual reports in Parliament.

The Concepts Paper recognises, at page 11, a potential role for collecting societies such as us.

3 AIM OF THE CODE

We note the ACCC's comments that the Code should include 'minimum commitments':

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

And that the aim of the Code is:

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.

The Concepts Paper refers to such outcomes as 'appropriate remuneration'.

4 RESPONSE TO ISSUES IN THE CONCEPTS PAPER

4.1 Definition of news

We agree that the definition of 'public interest journalism' in the DPI Final Report, developed for a different purpose, is too narrow for the bargaining code.

The Concepts Paper asks:

3. Would it be appropriate for the bargaining code's definition of 'news content' to capture material:

- with the primary purpose of investigating, recording or providing commentary on issues of interest to Australians, and*
- that is subject to the professional standards set by a relevant journalism industry body, journalistic standards set in a relevant media industry code, or equivalent journalistic standards set by an individual news media business?*

We think an approach that starts with ‘who’ rather than ‘what’ will be clearer and more workable. This would involve criteria to identify organisations that produce content that meets professional editorial standards. The Concepts Paper outlines some potential criteria:

- *are members of a relevant standards-setting body (such as the Australian Press Council, the Independent Media Council or the Media, Entertainment and Arts Alliance), or*
- *adhere to a relevant media industry code (such as the Commercial Television Industry Code of Practice or the Commercial Radio Codes of Practice), or*
- *adhere to and publish equivalent internal journalistic standards (such as the Guardian Editorial Code or the Conversation editorial charter).*

There are various options for identifying which content produced by these organisations is regarded as ‘news’ for the purposes of the Code. The Concepts Paper provides a high-level definition that could be developed with reference to existing guidelines and practices.

4.2 Bargaining frameworks

The Code should encompass more than one bargaining framework. Bilateral negotiation may be effective for certain services and/or media companies, but a collective approach will be required for a successful outcome in other areas.

4.3 Collective licensing

The Concepts Paper says that the bargaining framework:

is not intended to replicate copyright-based policy approaches pursued in overseas jurisdictions to address the bargaining power imbalance between digital platforms and news media businesses.

And:

Instead, we are seeking stakeholders’ views on whether it would be appropriate for the bargaining code to include a bargaining framework based on negotiations to determine fixed fees, which may be partly influenced by the operation of licence arrangements based on copyright law.

There are many aspects of collective licensing, including for media monitoring services, that could be reflected in the bargaining frameworks in the Code. These include:

- representation of all, or a near majority, of disparate content creators in a single negotiation or fee-setting process;
- identification of factors relevant to fair payment;
- an arbiter to determine the fee payable if negotiation does not produce a fair outcome for content creators;
- obligations of users to pay fees, at a rate agreed or set by the arbiter, while proceedings for determination of a final rate are on foot; and
- provision of data by users, as well as the payment of appropriate remuneration.

4.4 Distribution of remuneration paid to a collective

We have extensive experience in distributing remuneration from a variety of sources to a range of content creators, from big to small. The models we use vary according to the data available. There are various approaches that could be taken to achieve fair distribution of remuneration paid by the platforms, depending on the data available from the platforms and/or the content creators. We are happy to provide more information about distribution methodologies if useful.

Criteria and arrangements for distribution of collective payments from the platforms do not belong in a Code for addressing the bargaining power imbalance between platforms and media companies. They are a matter for the content creators and the body managing the distribution processes, such as a collecting society. There are various governance models for these arrangements, including the Code of Conduct for Australian Collecting Societies.

5 ENFORCEMENT OF THE CODE

We confirm our view that the regulator for the Code should be the ACCC, for the reasons set out in our response to the ACCC's final report from the Digital Platforms Inquiry. These include the ACCC's experience in competition law, and enforcement.

The bargaining imbalance is huge, and the position for media companies is further exacerbated by information asymmetry. As the ACCC recognises, the Australian government will need mechanisms to address the behaviour that has so far defeated proposals to compensate media companies in Germany, Spain and, more recently, France.

We support the comments made by the ACCC in the DPI Final Report that the code should include 'appropriate investigative and information gathering powers and the capacity to impose sufficiently large sanctions for breaches to act as an effective deterrent.' Without effective deterrents the code risks becoming a mechanism the platforms can use to delay the negotiation of commercial fees with news content owners.

Mandatory codes of conduct typically provide for a range of response options that can be used to monitor and enforce regulatory obligations. Pecuniary penalties, and now infringement notices, are routinely used as an effective means of deterring non-compliance with code obligations. However, for pecuniary penalties to be an effective deterrent against breaching the code, the size of the penalties will need to be significant. For example, the maximum penalty in the Competition and Consumer Act for breach of an industry code at present is approximately \$63,000 being 300 penalty units (section 51AE(2)) which will be insignificant for digital platforms and, for that reason, seriously risks being regarded as simply a 'cost of doing business' in Australia.

For the code to be effective it must include enforcement mechanisms that are appropriate considering the size and scale of the digital platforms. Unless pecuniary penalties of a quantum akin to those imposed for breaches of the Australian Consumer Law are imposed they will not be an effective enforcement mechanism.

In those circumstances, the regulator should be able to bring court proceedings to seek other remedies including injunctive relief to compel parties to comply with the obligations in the code. Those obligations in turn need to be sufficiently specific so as to compel meaningful action by the platforms to reach agreements with news content owners. For example, an obligation to provide usage data regarding specific content which is a necessary input into the determination of an appropriate price for use of the content. The ability to seek declarations and injunctions regarding compliance with such obligations, and the risks of failing to comply with injunctions, would provide an important deterrent against non-compliance (or at the very least ongoing non-compliance).

The code should also, as identified in Consultation Question 59, include a review mechanism after an appropriate period to assess the effectiveness of the code. Part of that review should assess the effectiveness of the enforcement mechanisms and whether, for example, the level of pecuniary penalties is insufficient. One option would, for instance, be to consider a further legislative response that provides for higher penalties modelled on those for breaches of the Act and the Australian Consumer Law or the imposition of other regulatory measures.