

Daily **Mail** Australia

Concepts Paper submission

Australian Competition &
Consumer Commission

Digital Platforms Inquiry

June 5, 2020

Executive Summary

As a significant and growing player in Australia's news landscape, Daily Mail Australia (DMA) supports the Australian Competition Consumer Commission's development of a Mandatory News Media Code.

While DMA is fortunate in making most of its revenue from readers who come directly to our website, rather than via Facebook or Google, it shares the ACCC's view that the considerable 'bargaining power imbalances' that exist between news publishers and the digital platforms must be corrected.

In particular, the code is needed to ensure that news publishers are properly compensated for their content which adds significant direct and indirect monetary value to the digital platforms.

However, this should NOT be seen as a tax on the platforms to support journalism from which they derive no benefit.

The code should be a measure that enables publishers to share more fairly in the revenue their digital content brings the platforms.

Not a subsidy for publishers who have adapted poorly to the new digital economy or are producing content that would otherwise be uncommercial.

It should certainly not be used to keep alive non-digital forms of media that are no longer fit for purpose.

DMA does not believe that public interest journalism cannot also be profitable journalism. Arguably, only profitable journalism that does not rely on the generosity of proprietors, politicians or public bodies is free from interference.

And if society does believe that there are certain types of journalism that need a special subsidy in the public interest it should be done separately from the Code and with full oversight and transparency.

Not in a way that effectively encourages the whole sector to be dependent on a 'tax' on one type of private company.

The goal of the Code must be to encourage efficient digital news publishers who have found a viable, engaged audience to invest even further in good digital journalism.

To begin with, the Code must find a formula that calculates the value Google and Facebook derives from news, both directly from advertising displayed alongside it and indirectly helping them to attract and retain users and collect invaluable user data.

The Code must then determine what proportion of that should be shared with the Australian news industry, and how each news media business's remuneration should be calculated.

In the following detailed response, we suggest a method that we believe is fair and reasonable, and would sustain a competitive news industry.

DMA is open to direct or bilateral deals and arbitration with Google and Facebook (Option A in the ACCC's Concepts Paper).

But it also would consider a collective bargaining approach (Option B) where news publishers work together to broker an industry-wide deal – although the process must be clear, open and transparent.

DMA does not support a boycott (Option C) or licensing model (Option D).

Furthermore, DMA could only support collective bargaining if:

- a) The methodology for distribution of funds between news publishers is agreed in advance, and
- b) Revenue is distributed strictly in direct relation to the amount of value a publisher provides to the platforms, as measured by the engagement of their users (ie page views supplied to the platforms whether or not they are on the native formats like FBIA or Google AMP or on the publishers' own platforms). Subjective measures such as 'quality' and 'originality' are impossible to assess accurately and fairly, and should not be taken into account.

DMA would like the Code to include measures for binding arbitration should publishers and the platforms be unable to reach terms either collectively or bilaterally.

The term news should be defined as widely as possible as any content produced by a bona fide news organisation that provides benefit to the platforms.

The Code must also force the platforms to be transparent in the working of their algorithms.

Currently they are utterly opaque, subject to capricious change without notice and – in the case of Google – show obvious signs of significant political bias, evidence of which DMA will be happy to share.

The platforms should either be forced to make their algorithms transparent or justify fully for the changes they make to publishers' traffic.

This will become even more crucial if the Code takes effect.

They should also provide at least one month's notice of any significant change and brief publishers on the rationale behind them.

The platforms should also be forced to share more anonymised data about users who read news publishers' content so that its creators can compete more efficiently for advertising.

However, while DMA regularly breaks stories of national and international significance, it does not support measures to make the platforms prioritise exclusives or so-called 'original journalism'.

Not because it is not desirable but because no algorithm will ever be able to distinguish between original and attributed content in a fast moving news environment

The most effective way for publishers to get more value from their exclusive and original content is to persuade users to make them their primary news source in the first place, rather than the platforms.

While we fully support the aims of the Code and agree that a fairer remuneration from the platforms is long overdue, in the long run, recruiting regular users to consume our content directly remains the healthiest hope for journalism.

Introduction

1. Daily Mail Australia (DMA) entered the Australian market in 2014. DMA has made a major investment in the Australian news sector and established itself as a major source of news for Australians ¹. DMA has built an audience that now rivals, in page views and time spent, those of the ABC and the very long-established and previously dominant publications of News Corp Australia (News) and Nine Entertainment Co. (Nine). DMA and other new entrants to this market have increased competition and provided many new and different sources of news to Australians. It is essential to maintain and enhance this new competitive landscape.

2. Monetising digital news content in a way that secures investment in journalism has been a problem for news media businesses all over the world. DMA therefore welcomes the ACCC's Concepts Paper, which it believes promises solutions which will be watched very closely by regulators and legislators in other jurisdictions. As the paper itself acknowledges, it poses a great many questions, some of which are better answered by the platforms. To assist the ACCC this response will concentrate on what DMA sees as the central issues of principle. We understand this will be an iterative process and will be very happy to supply more detailed information if required.

¹<https://mumbrella.com.au/news-com-au-tumbles-to-sixth-in-ranking-of-australias-most-popular-websites-as-australias-most-popular-websites-as-abc-maintains-lead-630211>

Scope of the bargaining code

3. DMA believes the scope of the Mandatory News Media Code (Code) should be defined precisely. It should address the market imbalance between the two dominant platforms, Google and Facebook, and news media businesses which deliver huge audiences to them, for which news media businesses receive no direct payment. It is reasonable to expect the platforms to pay for the digital news they serve to their users. It is not reasonable to expect them to pay for news delivered in print or by broadcast. Nor should the Code cover content which is not news.

4. DMA agrees the previous ACCC definition of ‘public interest news’ was too narrow. News, as most Australians would understand it, reports and comments on every facet of life. We therefore support the concept paper’s definition of news as:

‘Material published with the primary purpose of investigating, recording or providing commentary on issues of interest to Australians.’

However we are concerned that the second part of the definition ties news media businesses too closely to membership of a media regulator. Whilst DMA is a constituent member of the Australian Press Council (APC) and requires its journalists to follow the APC’s Principals and Guidelines, it would be against the principles of self-regulation for commercial viability to depend on membership of a regulator. It would create a danger of regulation turning into a licensing system. We therefore suggest a definition that focuses on the legal status of a legitimate news media publisher:

...that is published by an organisation employing trained journalists producing content under the direction of a named editor, which accepts legal responsibility for what it publishes, and follows a published code of standards.

The digital platforms to be covered by the Code must clearly be Google and Facebook, and it must apply to all their services which serve news content to their users. The services listed in the concepts paper would all qualify, but there needs to be a mechanism to keep any list updated.

The bargaining framework

5. DMA believes the bargaining framework needs to allow for both collective and bilateral negotiations. The essential problem with the digital industry, apart from market dominance, is lack of transparency. News media businesses have no means of measuring the true value of news to Google and Facebook, though DMA knows through deals its parent company has concluded with other internet service providers / platforms, such as Snap, that news does have a significant value. Bargaining will therefore have to begin with an estimation of the overall value of Australian news to the platforms – the size of the cake to be shared. DMA would agree with Peter Costello, chairman of Nine, that a starting point for this calculation would be the value of advertising sold by Google and Facebook in the Australian market – \$6 billion in 2018². If approximately 10pc of that figure can be attributed to news, then the value of the cake to be shared would be \$600m.

6. The share to be received by each news media business must be determined reasonably and fairly. This is digital money, earned from digital news, and the quantity of each business's news served to the public (in or referred from the platforms) should be the only metric. The currency of the internet is page views, and each business's share of revenue should be calculated on the number of page views served. Page views are an objective measure, and independently audited – this should reduce the possibility of disputes, which will bedevil any more subjective measure.

² <https://www.afr.com/companies/media-and-marketing/tech-giants-should-pay-media-600m-Costello-20200513-p54sgs>

7. Other factors, such a scale of business lost since the digital revolution, size of editorial budget or numbers of journalists employed should not be considered. To do so would be to turn remuneration into a subsidy, under which digital consumers would reinforce the dominance of the two major incumbent news media businesses in Australia. Payment for news content will best serve the ACCC's aims of securing a sustainable and competitive news media, and delivering a good deal to the consumer, if it rewards innovation and efficiency, and news media businesses producing the content Australians prefer to read online. There would be no point in securing payment from one duopoly to featherbed another.

8. Calculations based on page views should not be adjusted to allow for the presence of paywalls. News media businesses which operate paywalls have made a considered decision to sacrifice audience reach for subscription revenue. That revenue is their reward and it would not be reasonable if they were to be paid for users they have chosen not to serve.

9. Nor should allowance be made for 'originality' or 'quality' of content. Originality will always be a bone of contention for journalists, who naturally feel ownership of their stories. However audience data over many years shows that audiences do not distinguish between 'original' and other news content; revenue sharing is about the sharing of revenues derived by the platforms, not about some other sort of subjective redistribution; and news media businesses are in any event subject to very clear rules about attribution and, if those rules are not complied with, they can be sued should any copyright infringement take place. Likewise 'quality' in journalism is entirely subjective, therefore impossible to assess. In any case some of the best and most courageous journalism is produced by titles which would generally be considered 'tabloid'. We share the ACCC's belief that this issue is better addressed by the ACMA's work on a voluntary code of conduct.

10. The price paid per page view should be determined by negotiation, and the platforms will clearly seek to factor in the value of advertising served as a result of exposure on their services. However, the platforms also take a share of revenue when advertising is served, and that share will also have to be considered in negotiations. One of the major causes of

commercial friction between media businesses and the platforms has been the refusal of platforms to provide transparent information about the fees and revenue shares they take out of the programmatic advertising supply chain. Recent research by the UK advertisers' body ISBA shows news media businesses only receive 51 cents for every dollar spent by advertisers, with much of the remaining 49 cents being taken by the platforms, and 15 cents disappearing altogether³. Negotiations accompanied by enforceable disclosure will be a good opportunity to improve the transparency of the digital ad industry.

11. The platforms must be obliged to share the user and revenue data necessary to make an accurate assessment of the value of news to their operations. They should also be made to share more anonymised data about users who engage with news publishers' content, so those businesses can compete for advertising more effectively. However, DMA is sceptical about including the value of access to data in content revenue calculations. The platforms will undoubtedly try to do so, but in our experience the little data they supply is very difficult to value, and often supplied in a format which renders it unusable. It is likely to be of far more value to a platform operating a walled garden with a logged-in user base than to a news media business. There is a danger that it simply will be used as a device to limit financial compensation for the platforms' use of news content.

12. As negotiations proceed it is highly likely both news media businesses and the platforms may seek to make bilateral deals. Our understanding is the platforms recognise they are now under pressure to pay for content in many jurisdictions, and rather than fight a series of expensive battles around the world, may wish to resolve the issue with individual news media businesses on a global basis. They should be free to do so, but with one proviso. It will not serve the purposes of competition and a good deal for consumers if the platforms are able to buy off the two dominant players in Australia and leave other players with no bargaining power. Therefore, no news media business should be obliged to accept terms which are less advantageous than those won by either Nine or News. We agree that all parties should be required to negotiate in good faith.

³ <https://www.isba.org.uk/media/2424/executive-summary-programmatic-supply-chain-transparency-study.pdf>

Algorithmic curation of news

13. DMA welcomes the inclusion of this very important issue in the bargaining Code. At present search and social media algorithms are a black box: news media businesses are given very little information about why changes are made, what effect those changes will have on their businesses, or even when changes will be made. However we can measure the damage that changes have at times done to our business: Google's June 2019 algorithm change reduced search visibility by 50pc across our global operations in Australia, the UK and US. We would suggest any algorithm change which is likely to have more than a marginal effect – say 5pc – on a news media business's search visibility should be subject to advance warning of at least 30 days.

14. We should also make clear that warning of algorithm changes is not enough. The platforms must also be required to give explanation of the effects changes are likely to have on news media businesses, and they must be open to challenge through a binding arbitration process. The arbitrator must have power to pause, block or reverse changes, and to award compensation where publishers can show damage to their businesses. It is not possible to plan and develop a viable media business if market dominant distribution channels are free to reduce its visibility dramatically, without warning or explanation.

15. Payment for content will introduce a new motive for discriminatory algorithm changes, in that platforms may seek to direct traffic away from news media businesses which have negotiated a well-remunerated deal, to those which are selling their content more cheaply. There will need to be measures to prevent this happening.

16. Of course, we accept it may be necessary for platforms to make changes without warning where there is a serious and imminent threat to data security. However, such changes should not have an effect on the search rankings of legitimate businesses such as the news media. If they do have a substantial effect, they should be open to challenge with, if necessary, the arbitrator taking evidence in confidence.

17. Like all news media businesses DMA finds it frustrating that sometimes its original exclusive content is ranked below other publications' versions of its stories. However, as we explain in paragraph 9, we do not believe this is a suitable issue for the Code, nor do we believe platforms should be required to make judgments about the ownership of exclusive stories. If this was to become a requirement of the Code a great deal of time and effort would have to be expended on resolving disputes between rival editors and journalists, with little obvious benefit to the consumer. In any event no algorithm will ever be able to distinguish between original and attributed content in a fast moving news environment.

Enforcement

18. The history of attempts to secure payment for content across many jurisdictions shows that, if allowed, the platforms will prevaricate and obfuscate. Therefore, to ensure the bargaining code delivers the desired result, there must be enforcement mechanisms:

- There must be an arbitrator with the power to make binding orders. Mediation will not be effective where the disparity in market power between the platforms and news media businesses is so large
- The Code must set time limits, to force parties to the table
- There must be a disclosure mechanism, so news media businesses have the information they need to assess the value of their content to the platforms and ensure compliance with any deal agreed
- If bargaining fails and agreements do not function because of a failure to supply timely information, this should be a factor that is taken into account in any arbitration

19. We believe there is little value in pecuniary penalties – the vast global income of the platforms means there is a danger such penalties would be seen as no more than another cost of business. However the arbitrator must have the power to impose business terms; pause, block or reverse actions by the platforms; and award compensation where a news media business has suffered loss as a result of a failure of a platform to observe the Code.