

**Australian Competition &
Consumer Commission**

Digital Platforms Inquiry

*News media bargaining code
consultation response*

Daily **Mail** Australia



August 28, 2020

1. Daily Mail Australia warmly welcomes the proposed legislation for a news media bargaining code, and commends the ACCC for the speed with which it has acted and the clarity of its drafting.
2. Payment for content is vital to sustain a vibrant Australian news media industry and we believe mandatory negotiation supported by time limits and binding arbitration is a simple and effective way to achieve it. We know from our colleagues in the UK that the ACCC's work is likely to be used as a model for securing payment for content in Europe and elsewhere.
3. We are also pleased that the draft legislation includes an anti-discrimination clause (52W) to prevent platforms using their algorithms to demote or delist news media business which have used the bargaining code to secure payment for content, in favour of others which have not. This is a tactic Google has used to thwart previous comparable legislation in Germany and Spain, and we believe the anti-discrimination clause will prevent this happening in Australia.
4. We also welcome the measures to prevent platforms making significant changes to algorithmic ranking and display of news content and advertising (clauses 52N, P and Q) without warning or explanation. Such changes have caused serious damage to news media businesses in the recent past.
5. In our view these measures should be taken further, and news media businesses should have access to a cheap, quick and effective means of seeking remedy by way of changes being suspended, blocked or reversed and, where losses have been incurred, compensation awarded. We would suggest this could be achieved by extending the powers of the arbitration service so arbitral panels can rule on disputes under these clauses.

6. We also have concerns about the content test (clause 52H). We believe the definition of core news content is over-restrictive and will be very difficult to interpret in practise.
7. The ACCC's explanatory Q&As give examples of news which would not be considered 'core content'¹:
 - *reporting about sport, such as interviews with coaches and players or investigative journalism focused on sports administration*
 - *reporting about entertainment and the entertainment industry, such as news about new film releases or television shows.*
8. With respect, we struggle to see how an investigation by a journalist into an issue in sport such as doping, corruption, match-fixing or paedophilia by youth coaches, all of which could result in criminal charges, political questions being raised, and changes in the law, are not issues of public significance for Australians.
9. Similarly 'reporting about entertainment and the entertainment industry' could disqualify, for example, all reporting of allegations against Harvey Weinstein, and the subsequent #MeToo movement, which has quite rightly been the subject of extensive coverage by all news sources, from the most serious to the least. It also seems perverse that news of a major new TV drama series, watched by millions of Australians, would be excluded, whereas a review of a small town amateur dramatic production would presumably be classed as a 'community and local event' and therefore be included.
10. Judging which news sources pass this test and which don't may be open to interpretation. Clause 52H requires news sources to show their content is 'is predominantly core news content'. 'Predominantly' is not defined and it is difficult to see how the ACMA will be able to come to a judgment without examining large

¹ <https://www.accc.gov.au/system/files/DPB%20-%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code%20Q%26As.pdf> p.6

samples of each news source's content and assessing every story. We are confident Daily Mail Australia would pass this test in all current circumstances, but there is a risk that the lack of definition might allow the ACMA or some other body charged with applying the test in the future to use to exclude certain perfectly legitimate news media businesses, if it chose to do so.

11. The content test also seems to be in conflict with the basic principle of the bargaining code, which is that the platforms have been using their dominant market position to deny news media businesses a fair exchange of value when platforms exploit their content. As far as consumers and the platforms are concerned, sport and entertainment content has just as much value as political and court reporting.
12. Indeed, the draft legislation appears to recognise this in its provision that once a news source has passed the content test all its covered news content – a much broader definition including sport and entertainment – is included in payment for content negotiations. We suggest the core news definition is removed from the content test, and the covered news definition is used instead.
13. We set out in our previous submission why we believe obliging the platforms to prioritise original news content is unworkable (clause 52T). Of course every journalist rightly feels pride in their exclusive stories, and wants their work to be recognised. But the truth is there is no copyright in facts, and once a story breaks it can develop very quickly. From the point of view of consumers, within 24 hours the most important news items may not be the original story, but reports of the events that have followed as a result.
14. We believe trying to give a privileged position in ranking to original content will be extremely difficult to achieve, and only result in disputes between rival news media businesses and journalists. We note the ACCC have not proposed a mechanism for achieving this, leaving it instead to be negotiated between the platforms and news media businesses. We suggest this clause is removed.

15. We are also opposed to including the cost of producing news content as a factor in negotiations over payment (clause 52ZP). The code is about establishing a fair exchange of value for news content – it should not be forcing platforms to subsidise inefficient news media businesses. We recommend this clause is removed. In our view the only metric should be user engagement – i.e. page views – because that is the most direct and fairest measure of the value of our content to the platforms.
16. However, those provisions aside, we believe the legislation drafted by the ACCC is excellent. It will go a long way to sustaining a vibrant news media in Australia, to the benefit of all Australians, and very likely serve as a model to the rest of the world. We look forward to seeing it passed into law, and successfully concluding negotiations with the platforms.

Google Misinformation campaign

17. It is very regrettable, and illustrative of the problems news media businesses routinely encounter in their relationships with Google, that it has responded to the ACCC's draft legislation by using its dominant position in search to launch an aggressive campaign of misinformation.
18. On August 17 all Australian users of Google search were presented with a pop-up ad, resembling a warning notice, saying "The way Aussies use Google is at risk". It clicked through to an open letter² from Google Australia Managing Director Mel Silva, making a number of misleading statements about the ACCC draft legislation.
19. The chief of these, that the legislation would put Google's 'free' services at risk, and require it to share additional user data with news businesses, were immediately rebutted by the ACCC³. Daily Mail Australia reported this and rebutted further points in Google's open letter in an article headlined 'Google goes to war with Australian press: Web giant launches brazen 'misinformation' campaign warning an end to free

² https://about.google/intl/ALL_au/google-in-australia/an-open-letter/

³ <https://www.accc.gov.au/media-release/response-to-google-open-letter>

internet searches if they are forced to pay for news'⁴. The DMA rebuttal is attached as Appendix 1.

20. Despite widespread criticism of its open letter, Google continued its campaign, with the publication on August 24⁵ of a blog entitled '13 things you need to know about the News Media Bargaining Code', which makes a number of misleading claims. Among the more tendentious are the following:

21. Google claim: *'An obligation to share details about our algorithm changes... would provide an unfair advantage to large news businesses and help them feature more prominently in organic search results at the expense of other businesses, creators and website owners.'*

Truth: We are not seeking any unfair advantage, and the Code applies to all news businesses, not just large ones. We are simply seeking fair protection from the damage wreaked by unfair and arbitrary action such as Google's June 2019 algorithm change, which reduced Daily Mail search visibility by 50 per cent worldwide, without warning, explanation or redress. We are quite sure many other businesses have been treated in a similar fashion and, far from seeking advantage; we would have no objection at all to this protection being extended to all legitimate businesses.

22. Google claim: *'An unfair arbitration process... ignores the real-world value Google provides to news publishers and opens up to enormous and unreasonable demands'*

Truth: Google are wilfully misrepresenting the final bid arbitration process, which has been constructed specifically to discourage unreasonable demands by news businesses – and unreasonable offers from platforms. Google will be perfectly free to make a case for the real-world value it provides to news

⁴ <https://www.dailymail.co.uk/news/article-8634213/Google-launches-misinformation-campaign-warning-Australians-lose-free-internet.html>

⁵ <https://australia.googleblog.com/>

publishers. It is just that for the first time it will have to disclose the evidence on which its claims are based, rather than presenting them on a take it or leave it basis, which is how, as an effective monopoly, it is accustomed to doing business.

23. Google claim: *'If we want to keep our algorithms fair for everyone, we would have to stop making any changes in Australia. This would leave Australians with a dramatically worse Search and YouTube experience.'*

Truth: Googles' algorithms aren't fair for everyone, they are often grotesquely unfair (see paragraph 21). Furthermore, there is nothing in the draft legislation to stop Google making changes to its algorithms: It is required to give warning only if *'the changes are likely to have a significant effect on the ranking of the registered news business' covered news*'.⁶ The numerous minor changes Google makes every day will not be affected.

24. Google claim: *'28-day advance notice is really a 28-day waiting period before we can make important changes to our systems. That's 28 days before we can roll out defences against new kinds of spam or fraud.'*

Truth: This is nonsense. The draft legislation contains a specific exemption to the 28-day warning rule if changes need to be made in the urgent public interest: *'if the change relates to a matter of urgent public interest—[notice must be given] no later than 48 hours after the change is made'*.

25. Google claim: *'you currently have control over your personal data thanks to easy-to-access tools in your Google Account. If we are required to hand that data over to news organisations, there's no way to know what controls they will give you, nor how your data will be protected—or how it might be used by news businesses'*

⁶ ACCC Exposure Draft, s.52N

Truth: As the ACCC have already made clear, the draft legislation does not require Google to share any more personal user data than it does already.

26. Google claim: *'We never said that the proposed law would require us to charge Australians for Search and YouTube. What we did say is that Search and YouTube, which are free services, are at risk in Australia.'*

Truth: Google's open letter said twice that its 'free services' are 'at risk'. If juxtaposition was not intended to convey the impression that Australians might have to start paying for Google's services, perhaps Google could explain why it chose to emphasise they are 'free'. Of course in truth their services are not free – users pay for them with their data.

27. Finally, both Google's open letter and its blog repeatedly suggest that the ACCC draft legislation is not only unreasonable, but out of line with digital legislation elsewhere in the world. This is not true. The European Union has been trying for many years to reform European copyright law to force Google and other platforms to pay for news. Until recently Google has succeeded in thwarting this by using the aggressive lobbying tactics we are now seeing in Australia. However in April this year the French competition authority ruled that Google must pay news businesses, and Google said it will comply⁷. Google has also opened negotiations with publishers in Germany and Brazil, where it has come under similar pressure.⁸

28. Google's arbitrary and discriminatory use of algorithms has also come under scrutiny elsewhere, It was also one of the subjects addressed in the UK Competitions and Markets Authority's year-long investigation into digital advertising markets, which published its Final Report in June. It concluded:

⁷ <https://www.reuters.com/article/us-google-france/french-regulator-google-must-pay-french-news-and-publishing-firms-for-using-their-content-idUSKCN21R14X>

⁸ <https://www.reuters.com/article/alphabet-publishing/google-to-pay-some-publishers-in-australia-brazil-germany-for-content-idUSL8N2E15CE>

It is clear that many publishers rely on Google and Facebook for a significant proportion of their traffic and that changes to key search algorithms by either of these can have a significant impact on publisher businesses. We would, therefore, consider it reasonable that publishers have sufficient explanation of how these algorithms work and sufficient notification of changes to them where they might notably impact upon their businesses. We consider that provision to publishers of sufficient explanation about how the key search algorithms work as well as explanation and notification of changes to these are areas that would appropriately be covered by the proposed code of conduct.⁹

In the USA, the Department of Justice is also taking evidence on Google's arbitrary changes to as it prepares to launch action under US anti-trust laws.

29. Australia is therefore not an outlier – on the contrary, it is in the vanguard of reforms to digital marketplaces which are being pursued by many other countries around the world. The passage of the ACCC's draft legislation is being watched with keen interest and, far from putting search services at risk, is likely to prove the model for fair regulation of the platforms for the benefit of consumers everywhere.

⁹ https://assets.publishing.service.gov.uk/media/5efb22fbd3bf7f768fdcdfae/Appendix_S_-_the_relationship_between_large_digital_platforms_and_publishers.pdf para 31

The TRUTH about how new laws will affect Google's users

PUBLISHED: 18 August 2020

'We need to let you know about new Government regulation that will hurt how Australians use Google Search and YouTube'

Not true. The new law will make no difference at all to how Australians use Google Search and YouTube. You will be able to search both in exactly the same way you do at present. The only change will be that Google will have to pay for Australian news content which at the moment they use for free. As Google's Australian revenue in 2019 was \$4.8 billion it should not find this difficult.

'A proposed law, the News Media Bargaining Code, would force us to provide you with a dramatically worse Google Search and YouTube, could lead to your data being handed over to big news businesses, and would put the free services you use at risk in Australia.'

Not true. The Code will not force Google to provide a worse service, on the contrary it contains provisions to prevent it removing Australian news websites and replacing them with foreign ones. It will not lead to your data being handed over to news businesses, big or small. This is the ACCC's response Google's claim: 'Google will not be required to share any additional user data with Australian news businesses unless it chooses to do so'. Nor will the Code put free services at risk. The ACCC says: 'Google will not be required to charge Australians for the use of its free services such as Google Search and YouTube, unless it chooses to do so.'

'The way Aussies search every day on Google is at risk from new regulation. You've always relied on Google Search and YouTube to show you what's most relevant and helpful to you. We could no longer guarantee that under this law. The law would force us to give an unfair advantage to one group of businesses - news media businesses - over everyone else who has a website, YouTube channel or small business ... We've always treated all website owners fairly when it comes to information we share about ranking.'

Blatantly untrue. Google's search algorithms are a secret 'black box', and rankings are regularly changed without warning or explanation, sometimes with catastrophic effects for businesses.

To give just one example: June 2019 Google made an algorithm change which reduced the Daily Mail's search visibility by 50pc worldwide – meaning dramatic reductions in the number of Daily Mail stories appearing in your search requests. There was no warning or explanation – nor did Google inform you, the user. Three months later our search visibility was suddenly restored, again without warning or explanation. Many other websites have had similar experiences.

The Code simply provides that Google will have to give warning and explanation of changes that could impact traffic to a news website – and tell it how it can minimise any damage. If Google thinks that is unfair, fine – they can provide the same information to every website. Now, that would be fair.

'Your Search data may be at risk. You trust us with your data and our job is to keep it safe. Under this law, Google has to tell news media businesses 'how they can gain access' to data about your use of our products.'

Not True. As the ACCC says, Google will not have to share any more user data than it does already. The ACCC's explanatory notes make clear it is lists of types of data Google must provide to news media businesses, not the data of individual users. In any case, why should users trust Google more than any other business? Only last month the ACCC launched Federal Court action over the alleged misuse of users' personal data by Google, and Google has previously been fined millions of dollars in Europe for misusing users' data.

'Hurting the free services you use.'

Not true. Google's services aren't free - you pay for them with your data, which Google collects in order to sell advertising targeted at you. Google doesn't pay news media businesses millions of dollars. It currently pays nothing at all for the news it uses – and only began offering to pay when it realised the ACCC was going to call its bluff by introducing legislation.

It has also bought control of digital advertising by taking over smaller businesses to create a virtual monopoly, where it acts as both buyer and seller in digital advertising markets it controls, and for which it makes the rules. It forces news media businesses and advertisers to use its services and charges both millions of dollars, some it in hidden fees. The result is consumers pay more for the goods they buy. These anti-competitive practises are under investigation by the ACCC here in Australia and by regulators in other countries.

This law wouldn't just impact the way Google and YouTube work with news media businesses - it would impact all of our Australian users, so we wanted to let you know.

Not true. The only impact this law will have on Australian users is that intended by the ACCC – that instead of Australian journalism dying through being starved of revenue by monopolistic internet giants, it will have a sustainable future, for the benefit of all Australians. Oh, and Google - global annual revenue in 2019 \$161 billion dollars - might make just a little less profit

You'll hear more from us in the coming days - stay tuned.

True, regrettably. Google has won immunity from libel laws all over the world by claiming it has no opinions. Well, it does when its bottom line is under threat. It runs one of the world's largest lobbying operations and have no doubt, Australian legislators will be bombarded with misinformation as Google tries to overturn the ACCC's proposals. Watch out!