

# Response to the Australian mandatory news media bargaining code concepts paper

5 JUNE 2020

FACEBOOK

## Executive summary

Facebook supports the development of a code to frame the relationship between digital platforms and Australian news media businesses that encourages innovation, provides certainty for our investment in the Australian news ecosystem, accurately reflects the support we provide publishers, and protects the interests of consumers. We welcome the opportunity to provide feedback on the Australian Competition and Consumer Commission's (ACCC's) *Mandatory news media bargaining code - concepts paper* (the 'Concepts Paper') to assist in the development of a sensible and workable regulatory framework for an issue that is key to Australia's democracy: news.

We have been long-standing supporters of a code of conduct that sets a framework for the relationship between digital platforms and news publishers in Australia. We welcomed a code in our September 2019 submission to the Treasury in response to the ACCC's Digital Platforms Inquiry Final Report, on the basis that it could address concerns about the role that digital platforms play in the distribution of news online and help to set new rules to deliver a better internet for Australians.<sup>1</sup> And we published two blog posts in February and March 2020 during the voluntary code development process to outline more detail on what a code could contain.<sup>2</sup>

Facebook's commitment to sensible regulatory frameworks for digital news is in line with the significant support we provide to the Australian news ecosystem. Our support for publishers comprises: free organic distribution of news on our platforms that grows the audience for news publishers; customised tools and products to help news publishers monetise their content; initiatives to assist publishers to innovate with online news content; direct investments by commissioning Australian news content that can appear on online services, including Facebook; and the indirect value to publishers such as brand awareness and community-building.

A core issue at the heart of this policy debate and the Concepts Paper itself is determining the value exchange between digital platforms and news publishers in Australia, while setting aside the fact that we are competing for advertising dollars. In other words, who benefits (or suffers) more commercially when a publisher decides to share news content on online platforms (like Google search, YouTube or Facebook): news organisations or platforms?

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<sup>1</sup> M Garlick, *Smart regulation must promote trust, innovation and choice for all Australians*, blog post and submission published 16 September 2019, <https://www.facebook.com/notes/facebook-australia-new-zealand-policy/smart-regulation-must-promote-trust-innovation-and-choice-for-all-australians/2417839498543309/>

<sup>2</sup> M Garlick, *Transparency and fairness for all publishers is key to success for new code*, blog post published 10 February 2020, <https://www.facebook.com/notes/facebook-australia-new-zealand-policy/transparency-and-fairness-for-all-publishers-is-key-to-success-for-new-industry-2561697627490828/>.

M Garlick, *A Digital News Distribution Code for the Australian News Ecosystem*, blog post published 18 March 2020, [https://www.facebook.com/notes/facebook-australia-new-zealand-policy/a-digital-news-distributor-code-for-the-australian-news-ecosystem/2594059480921309/?\\_tn\\_ =HH-R](https://www.facebook.com/notes/facebook-australia-new-zealand-policy/a-digital-news-distributor-code-for-the-australian-news-ecosystem/2594059480921309/?_tn_ =HH-R)

We welcome the opportunity to provide more information about the value exchange between Facebook and Australian news publishers. This consideration should be informed by empirical and objective analysis, as the available evidence to date does not necessarily indicate that the value exchange favours Facebook. For example, we made a change to our News Feed ranking algorithm in January 2018 to prioritise content from friends and family.<sup>3</sup> These changes had the effect of reducing audience exposure to public content from all Pages, including news. Notwithstanding this reduction in news content on our services, the past two years have seen an increase in people engaging on our services and increased revenues, suggesting both that news content is highly substitutable with other content for our users and that news does not drive significant long-term commercial value for our business.<sup>4</sup>

We have quantified data on some aspects of the value that we drive for publishers. For example, Facebook's News Feed generated approximately 2.3 billion organic referrals to Australian news publisher domains from January through May 2020, which we estimate to be worth AU\$195.8 million to Australian publishers, noting that referral traffic totals from Facebook to news publishers vary with the news cycle.<sup>5</sup> Moreover, Australia-based news publishers also participated in revenue share programs, such as our In-Stream Video advertising program, and from January to May 2020, these publishers earned approximately AU\$2.1 million.

Furthermore, Australia-based news publishers generated approximately 27 million organic views in News Feed on tagged branded content posts<sup>6</sup> from January through May 2020. These are just some aspects of the value that flows to Australian news businesses from Facebook that we have been able to quantify to date.

In addition to this, we continue to ramp up our direct financial contributions to the news industry -- not to make a profit -- rather because we believe news is a public good and it plays an important social function. ACCC Chair Rod Sims is correct when he says that Facebook receives very little direct commercial value from news content.<sup>7</sup> We have built tools that allow news publishers to share their content on our services but not with the goal of driving revenue to us: advertisers cannot attach or target ads to specific content like news. In fact, notwithstanding the traffic we provide to news publishers, news content represents only a very small fraction of the content in the average Facebook users' News Feed, because Facebook is primarily a service used to connect with family and friends. Even if there is indirect value to digital platforms from news content, it is not healthy nor sustainable to expect that two private companies, Facebook and Google, are solely responsible for supporting a public good and solving the challenges faced by the Australian media industry.

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<sup>3</sup> Facebook Newsroom *Bringing People Closer Together* (11 January 2018).

<sup>4</sup> Facebook, *Q4 2018 Quarterly Earnings Presentation*, [https://s21.q4cdn.com/399680738/files/doc\\_financials/2018/Q4/Q4-2018-Earnings-Presentation.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q4/Q4-2018-Earnings-Presentation.pdf)

<sup>5</sup> Estimate prepared on the basis of the average cost-per-click auction pricing for Australian news publishers' link clicks on our platform. Publishers were defined as per the list of publishers provided to Facebook by the ACCC.

<sup>6</sup> Branded content is a creator or publisher's content that features or is influenced by a business partner (in particular, highlighting their brand, for an exchange of value).

<sup>7</sup> L Shanahan, 'News key for tech titans: "so pay up", says Rod Sims', *The Australian*, 19 May 2020, <https://www.theaustralian.com.au/business/media/news-key-for-tech-titans-so-pay-up-says-rod-sims/news-story/e01f7e199b3f6a5edeeb02bf5b70892f>

If there were no news content available on Facebook in Australia, we are confident the impact on Facebook's community metrics and revenues in Australia would not be significant, because news content is highly substitutable and most users do not come to Facebook with the intention of viewing news. But the absence of news on Facebook would mean publishers miss out on the commercial benefits of reaching a wide and diverse audience, and social value would be diminished because news would be harder to access for millions of Australians.

Given the social value and benefit to news publishers, we would strongly prefer to continue enabling news publishers' content to be available on our platform.

Facebook hopes this process will yield a balanced, pragmatic, realistic code that does not encourage media concentration or reduce diversity and plurality in the Australian media sector. If the ACCC can act in an evidence-based way, this code could give Australian news publishers, digital platforms and, ultimately, Australian consumers, confidence in the way ahead. While Facebook does not agree with the Final Report's finding that we possess unequal bargaining power compared to some of the largest media companies in Australia and the world, we recognise that there is merit in setting regulatory frameworks to give all Australian media organisations and Australian consumers confidence that we are contributing appropriately in the Australian news ecosystem.

Based on the consultations we held with 20 publishers during the voluntary code process and our own experience of news on Facebook, we believe a workable news code in Australia would:

- Set a reasonable framework to encourage commercial arrangements between digital platforms and publishers. We propose a framework that: upholds the primacy of commercial negotiations between digital platforms and publishers; and establishes a cooperative and representative Australian Digital News Council to air and mediate complaints and concerns from publishers (inspired by the Australian Press Council as a model).
- Require transparency about significant changes made by digital platforms to their central algorithms used to rank (i.e., order) content, including news content, for users (which for Facebook is the News Feed algorithms).
- Provide certainty to news publishers that they will continue to receive the first party data via referral traffic and subscriptions that they already receive, as well as up-to-date lists of the anonymised, aggregated data and insights about the audiences they are reaching on Facebook and the performance of their content.
- Articulate principles that guide digital platforms in surfacing news that meets the interests of users. Digital platforms could be required to publish information about the factors that inform the news content that people see, and the order in which they see it.

Between the free distribution, customised products, innovation initiatives, provision of data and insights, and our direct investments, we believe Facebook to date has made a significant contribution to the Australian news ecosystem. Subject to the right regulatory settings, we intend to increase our partnerships and investments in Australia, beyond what we are doing today. Despite claims of a bargaining imbalance that should impede the striking of such agreements, we have been steadily increasing our investments in the Australian news ecosystem. Our hope is a code will facilitate not impede further commercial agreements.

Best practice regulatory principles would see a code that sets broad-based obligations for industry participants, rather than singling out two companies on an arbitrary and subjective basis. The decision to limit the initial version of the code to two US companies is discriminatory and will inevitably give an unfair advantage to Facebook's competitors in the technology sector, including rivals from countries that propagate different and undesirable visions for the Internet. There should be a clear, objective future process and timeframe for extending the same requirements to other distributors of digital news in Australia to avoid distorting the market.

There is no necessity for the code to require greater sharing of user data (especially not personalised or identifiable user data), given the considerable amount of data we already make available and the need to protect user privacy. Our conversations with publishers through this code development process have revealed there is generally a low awareness or usage of the data we already make available. The ACCC may wish to consider giving publishers certainty that we will continue to make data available about the audiences they reach on Facebook and the performance of their content (noting specific datasets may change as products change).

Finally, the code needs to recognise that there is healthy, competitive rivalry in the relationship between digital platforms and news publishers, in that we compete for advertising revenue. Regulatory interventions which impose an excessive cost on one digital advertising provider in order to subsidise a competitor will inevitably distort advertising markets, potentially leading to higher prices. It is not reasonable to shift the burden and ask the hundreds of thousands of Australian small businesses who rely on digital advertising - especially in the midst of the coronavirus crisis and economic uncertainty - to bear the cost of subsidising the production of news.

We look forward to continuing to work closely with the ACCC to support the development of the digital news code.

## Summary of Facebook’s submission

Section of the Concepts Paper	Summary of Facebook’s response
<p><b>Scope of the bargaining code</b></p>	<p>We support a clear, publisher-driven definition to set the scope of the code. The code should capture news content when it is published by an organisation that is a member of the Press Council, a regulated broadcaster under the ACMA’s codes of practice or an Australian organisation registered in Facebook’s News Page Index.</p> <p>In relation to digital platforms covered by the code, we believe the mandatory code should contain separate sections for search services versus social media services. The review of the bargaining code should be used to identify how code obligations are extended to other digital platforms that distribute news.</p> <p>It is wholly inappropriate for Instagram or WhatsApp to be included within the mandatory code. There is no evidence or prior analysis to suggest that Instagram or WhatsApp play any meaningful role in the distribution of news, and certainly no role that is more significant than other competitors - such as MSN (Microsoft News), Apple News, TikTok, iMessage, WeChat, Twitter, LinkedIn, Snap or Bing - who would not be subject to the code.</p>
<p><b>Monetisation and sharing of revenue from the use of news</b></p>	<p>We support a framework for the code that upholds the primacy of bilateral commercial negotiations between digital platforms and news publishers, as the best way to ensure collaboration and strong partnership between publishers and Facebook over the long term (consistent with Option A but with some important adjustments).</p> <p>To give publishers, the Australian Government and consumers confidence in our approach to commercial negotiations, this could be accompanied by:</p> <ul style="list-style-type: none"> <li>• the inclusion of “commercial deal-making principles” within a bilateral negotiation bargaining framework</li> <li>• the establishment of a cooperative and representative Australian Digital News Council to air and mediate complaints and concerns from publishers in their relationships with digital platforms (inspired by the Australian Press Council as a model).</li> </ul> <p>We do not support options B and C, which would allow large and sophisticated global media companies to participate in an ACCC-sanctioned cartel that could damage the interests of smaller publishers and consumers.</p> <p>We do not support option D, which would obstruct - rather than facilitate - collaboration and strong partnerships between publishers and Facebook over the long term. It would not give Facebook the first opportunity to resolve publishers’ concerns, would introduce a high level of cost to commercial arrangements and is not conducive</p>

	<p>to building trust or collaborative partnerships. We strongly disagree that there is a need for a compulsory licence and price setting mechanism, as it limits the optionality for news media publishers to come to agreements that meet the commercial needs of their wide variety of business models.</p>
<p><b>Sharing of user data</b></p>	<p>Publishers already independently collect substantial user data (sometimes referred to as first party data) when collected directly from referral traffic to their websites and subscriptions. Also, as acknowledged in the Concepts Paper, Facebook already makes a large amount of aggregated user data available to news media businesses to assist them in monetising their content and services.</p> <p>Our conversations with publishers have revealed there is generally low awareness or usage of the data we already make available, suggesting there is no need for a regulatory intervention to require any more sharing. There are strong privacy concerns about any suggestions that Facebook should be sharing data associated with individual users with news publishers.</p> <p>Facebook would not object to the code requiring digital platforms to maintain and provide news media businesses with an up-to-date list of the types of user data, insights and tools that are available to them.</p>
<p><b>Algorithmic curation of news</b></p>	<p>In the spirit of providing news publishers with substantial transparency, Facebook supports in-principle a reasonable requirement to notify publishers when it makes changes to the News Feed algorithms with a significant impact on news content. As the Concepts Paper acknowledges, though, it is important that such a requirement be limited to truly “significant” changes, given the sheer number and frequency of ranking improvements Facebook makes to enhance our users’ experience on the platform, most of which have relatively minimal impact on news publishers.</p>
<p><b>Display and presentation of news on digital platforms</b></p>	<p>Facebook agrees with the ACCC’s observation that digital platforms “have a legitimate interest in carefully calibrating the look and feel of content displayed on their services, in order to preserve the usability of these services for consumers.” We believe establishing an Australian Digital News Council could assist in providing further opportunities to consult publishers about the display and presentation of news content on Facebook.</p>
<p><b>Facilitating open communication between digital platforms and news businesses</b></p>	<p>Establishing an Australian Digital News Council could assist in facilitating open communication between platforms and news businesses.</p> <p>Facebook would welcome the opportunity to contribute funds towards this Council to support a secretariat that can resolve any complaints and concerns and publish decisions.</p>



	<p>Facebook agrees that there is value in appointing a code compliance manager, and a single point of contact to address complaints. We also see value in facilitating discussion or mediation with news media businesses if there are concerns about a potential breach of the code, for example, through the proposed Australian Digital News Council.</p> <p>However, Facebook does not support the imposition of additional formal dispute resolution and punitive models such as arbitration requirements, infringement notices or other measures that would complicate the development of commercial relationships and potentially promote forum shopping for complaints (or other issues that should essentially be matters for commercial discussion and non-adversarial resolution). We believe the code should not include new monetary penalties, given the existing tools available to the ACCC to enforce competition laws.</p>
<p><b>Review of the bargaining code</b></p>	<p>The ACCC should use the Digital Platforms Services Inquiry to identify how similar code obligations should be extended to digital platforms that carry news content, in order to reduce the clear risk of distortions to competition and the creation of an uneven playing field.</p> <p>There should be a further and more wide-ranging review of a code as a whole initiated within two years of the code commencing, to be completed within a six month period.</p> <p>Each substantive review should be undertaken by a highly regarded independent body, preferably the Productivity Commission.</p>



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## Overview: The value exchange between Facebook and news publishers

Before turning to the specific issues discussed in the Concepts Paper, it is important to focus on the question of the value exchange between digital platforms, such as Facebook, and Australian news media businesses. Much of the public commentary surrounding the relationships between Facebook and Australian news publishers has focused on the value exchange and an assumption that this favours us.

There is an assumption that there is unaccounted-for revenue that Facebook is generating from news content, especially in News Feed, that should be returned to news publishers -- especially during a global health pandemic when all ad-supported businesses, including both publishers and digital platforms, are facing challenges at the same time as their services have never been more important to the public.

This public commentary has been based on three fundamentally incorrect assumptions:

- **Assumption 1: Facebook caused the challenges to the publishers' business model.** The challenges facing the Australian news industry have existed since the commercial phase of the internet began in the late 1990s. Already in 2005, two years before Facebook began running ads, senior media executives were noting that the news industry had been slow to react in the face of the internet.<sup>8</sup> Digital technology has driven the cost to distribute information to zero, but has also significantly reduced the cost of advertising.<sup>9</sup> At the same time, many news publishers decoupled their classifieds businesses and stopped using these to subsidise the creation of news content. The continued and misguided focus on Facebook as a cause of the challenges facing the news industry obscures the true challenges and this misdiagnosis of the problem hinders the identification of effective and innovative solutions to fund important journalism.
- **Assumption 2: Facebook “steals” content and publisher content “appears” on Facebook without any control by or benefit to publishers.** Facebook and Google are very different platforms. Facebook is a voluntary, opt-in service for our partners. News content appears on Facebook either because publishers post it directly themselves or because people share it. Publishers can exert control over what content is shared on our services by setting up a Page, posting links to content, enabling third party sharing of their content by users, or using Facebook plugins on their owned and operated websites. News media publishers have the ability to optimise links to web hosted content that people share by marking up their websites using our Open Graph markup language. And if they do not wish to have their content linked on Facebook, they can make this known by including a robots.txt file in their meta data.

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<sup>8</sup> R Murdoch, *Speech to the American Society of Newspaper Editors*, Washington DC, 14 April 2005 <https://www.theguardian.com/media/2005/apr/14/citynews.newmedia>

<sup>9</sup> M Mandel, Progressive Policy Institute, *The Declining Cost of Advertising: Policy Implications*, [https://www.progressivepolicy.org/wp-content/uploads/2019/07/Advertising2019\\_Mandel.pdf](https://www.progressivepolicy.org/wp-content/uploads/2019/07/Advertising2019_Mandel.pdf)

Above and beyond free distribution, we have also built customised tools to enable publishers to monetise their content. Facebook also enters into commercial agreements to pay publishers to produce content that is optimised for our services (and can then be used on other services).

- **Assumption 3: There is a value imbalance that favours Facebook**, particularly in News Feed, which means that we should pay significantly more to Australian publishers. Australian publishers have made ambitious claims that the benefit to Facebook is so large that digital platforms should be taxed at an amount that should be between AU\$600 million to AU\$1 billion based on a percentage of our presumed local revenues.<sup>10</sup> These assertions are not supported by any apparent, independent, economic evidence or empirical analysis.

If all factors that contribute to a value exchange assessment are quantified and objectively analysed, the picture is likely to be very different. This is demonstrated by changes that we made to our News Feed ranking algorithm in January 2018 to prioritise content from friends and family.<sup>11</sup> These changes had the effect of reducing audience exposure to public content from all Pages, including news. Notwithstanding this reduction in engagement with news content, the past two years have seen an increase in people engaging on our services and increased revenues.<sup>12</sup> This clearly suggests both that news content is highly substitutable with other content for our users (*i.e.*, if there is less news, they will engage with other content) and that news does not drive significant long-term commercial value for our business.

If a value exchange assessment is to be undertaken with respect to platforms such as Facebook and Australian news media businesses, all parties to this debate need to recognise that the outcome could also show a value-neutral exchange or a value imbalance in favour of the publishers (*i.e.*, news publishers gain more from Facebook than we gain from news content). To date, the public commentary and Concepts Paper have not addressed these two possible outcomes. Even while the Concepts Paper acknowledges that Facebook drives some value for publishers, the underlying and unsubstantiated assumption is that more value flows to Facebook. We do not agree that is the case.

Ultimately, Facebook provides a voluntary, opt-in platform for our partners, and our focus must -- and will be -- on protecting and enhancing the controls and experiences we provide to our community. News is beneficial for people, for society and for communities. And that's why we've innovated and provided tools for news publishers

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<sup>10</sup> M Mason and J Kehoe, 'Tech giants should pay media \$600m', *Australian Financial Review*, 14 May 2020, <https://www.afr.com/companies/media-and-marketing/tech-giants-should-pay-media-600m-costello-20200513-p54sgs>; L Shanahan, 'Content bill for Facebook, Google might top \$1bn', *The Australian*, 14 May 2020, <https://www.theaustralian.com.au/business/media/content-bill-for-facebook-google-might-top-1bn-says-news-corp-australasia-boss-michael-miller/news-story/f5eae6dc272c0e132f13da3ef1569d92>

<sup>11</sup> Facebook Newsroom *Bringing People Closer Together* (11 January 2018)

<sup>12</sup> Facebook, *Q4 2018 Quarterly Earnings Presentation*, [https://s21.q4cdn.com/399680738/files/doc\\_financials/2018/Q4/Q4-2018-Earnings-Presentation.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q4/Q4-2018-Earnings-Presentation.pdf)

to monetise their content and why we share data and insights with publishers to help support their businesses.

Notwithstanding the nominal commercial value of news content to Facebook, we are keen to continue our collaboration with publishers and contribute to the news industry. We also welcome external scrutiny to ensure we are living up to this intention. We're taking this particular approach for the news industry because of the unique function news plays in society.

But we also don't view it as healthy or justifiable to require one or a few private companies to subsidise the news industry in unsustainable ways, or to be made accountable for the profitability of news organisations that have a presence in Australia, particularly when there is no guarantee that this will support diverse Australian journalism. Investment by Facebook in the Australian news ecosystem should be grounded on genuine marketplace principles of free enterprise and freedom of contract and win-win transactions focused on value and investments towards building sustainable products to broadly support Australian journalism. For this reason, the code must reflect the genuine commercial interests of all stakeholders.

Although it is our strong preference to continue driving value for the local news ecosystem by showing news content on Facebook, the inevitable consequence of poorly considered regulation in Australia is that we may be forced to reconsider and re-prioritise our investments in news here. Ill-considered regulation could result in consequences such as reduced innovation and investment, or that it may not be possible for new products and data offerings to be made available in or brought to Australia. It would not be a good outcome for Australian consumers if an unworkable mandatory code forces digital platforms to a situation that reduces Australians' access to news online or interferes with innovation and investment that can sustainably support journalism in Australia.

## A. Value exchange between Facebook and Australian news publishers

We recognise that news is a public good. It has value societally. There is clearly value in having a robust and sustainable news ecosystem -- both for the Australian democracy and for society. However, as demonstrated by the "meaningful social interactions" change to our services in January 2018, news content is unlikely to deliver significant or measurable long-term commercial value to Facebook.<sup>13</sup>

The ACCC has also noted that there may be indirect value to Facebook from news content as part of our ongoing work to reduce misinformation on our services. However, we already invest significantly in removing and reducing misinformation on our services -- from the proactive detection technology we have developed and we use to identify and remove 1.7 billion fake accounts from January to March 2020 (99.7% of which was via proactive detection prior to a user report being received)<sup>14</sup> to

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<sup>13</sup> Facebook, *Q4 2018 Quarterly Earnings Presentation*, [https://s21.q4cdn.com/399680738/files/doc\\_financials/2018/Q4/Q4-2018-Earnings-Presentation.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q4/Q4-2018-Earnings-Presentation.pdf)

<sup>14</sup> Facebook, *Community Standards Enforcement Report Jan - Mar 2020*, <https://transparency.facebook.com/community-standards-enforcement#fake-accounts>

the paid partnerships to fact-checking organisations (including media businesses) to fact check content on our services, so that we can reduce the distribution of content concluded to be false and inform users about the misinformation, including the funds paid to our Australian fact-checkers AFP and AAP.

Facebook drives significant commercial value to publishers -- far above what the direct and indirect commercial value is to Facebook and in ways that are not acknowledged fully in the Concepts Paper.

Publishers derive significant commercial value from Facebook driving traffic to their owned and operated websites, and from the monetisation opportunities we provide for the content they choose to share. This includes, free publication and opportunities for potential distribution, customised commercialisation and innovation products, new commercial deals for premium content, and a variety of non-monetary data insights and other programs, like our support for Accelerator programs.<sup>15</sup> We have set out a summary of these opportunities below.

- **Publication and potential distribution on Facebook.** The Facebook platform allows news publishers to publish, distribute, monetise and interact with viewers of their content at no cost to publishers and consistent with their publishing preferences, via Facebook's business tools. This enables publishers to direct users to their websites where they can advertise directly to those users and monetise the traffic provided by Facebook. It also enables publishers to generate reader revenue through subscriptions and other engagements with their customers, on their terms.
  - Referral traffic totals from Facebook to news publishers vary with the news cycle. Facebook's News Feed generated approximately 2.3 billion organic referrals to Australian news publisher domains from January through May 2020.
  - We estimate the value of these organic referrals from January through May to be approximately \$135 million USD (AU\$195.8 million) on the basis of average cost-per-click auction pricing for Australia news publishers' link clicks on our platform.

As an opt-in platform, publishers choose to place their content directly on Facebook via their Facebook Pages. This opportunity exists for all businesses that wish to publish their content on Facebook, and is subject to complying with the Facebook terms of service. Facebook has built its services to respect the monetisation and data flows applied by the publisher to their content. Facebook doesn't require publishers to change their paywall policies, or dictate to them what happens once a user clicks on a link. Publishers can remove any content that they previously posted on the Facebook platform at any time. If publishers no longer want to enable other features such as Like, Instant Articles or the Share to Facebook plugin, they are free to discontinue their participation.

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<sup>15</sup> A Hunter, *Facebook Expands Local News Accelerator To Support Australia & New Zealand Publishers*, blog post published 18 September 2019, <https://www.facebook.com/journalismproject/facebook-accelerator-program-australia-new-zealand>.

Publishers also have the ability, through Facebook’s reporting tools, to request removal of any infringing content posted by third parties. For non-infringing news content, Facebook honours publisher’s choices about whether to allow third parties to render news content, as expressed by the publisher’s use of generally established coding tools, such as meta tags.

- **Facebook’s customised commercialisation products and innovations incorporate feedback from the news industry.** For many years, we have heard from publishers that free distribution is not sufficient to offset the significant impact of technological disruption on their business models -- in particular, the decline in their advertising revenue as advertisers move to less expensive and more targeted digital offerings. To assist publishers, we launched the Facebook Journalism project in 2017, and have continued to steadily increase our investment and products in the news sector since then. Through these efforts, we have incorporated publisher feedback into the development processes for:
  1. **Subscriptions:** Facebook built a native paywall tool to help support the business models of publishers that rely on subscriptions. When readers have reached the limit of free articles set by the publisher, Facebook displays a native paywall that prominently displays the publisher logo, subscription benefits and prices. 100% of this native paywall revenue goes to the publisher and publishers fully own the relationship and control the data of their subscribers who’ve signed up through our platform. When readers decide to subscribe to a publisher, Facebook displays a Welcome Screen to prompt if they would like to see more content from the publisher and whether they would like to follow the publisher’s Facebook Page. The welcome screen has increased the percentage of new subscribers who follow the publisher’s page from 54 to 94%, helping publishers grow their audience.
  2. **In-Stream Ads:** Publishers can sign up for the insertion of In-Stream Ads (formerly known as ad breaks) into their video content and receive a majority share of the ad revenue generated. From January to May 2020, these publishers earned approximately \$1.5 million USD (AU\$2.1 million) through this program.
  3. **Instant Articles:** Publishers can distribute articles on the Facebook platform via our “Instant Articles” product, which allows various types of ads to be included in the articles. These include (i) ads sold directly by the publishers’ sales team for which the publisher keeps 100% of total ad revenue, and (ii) use of Facebook’s Audience Network product to monetise any impressions that are not directly sold by the publisher. There are currently around 35,000 Facebook pages that use Instant Articles, and 65 of the top 100 most-clicked web domains on Facebook use Instant Articles.

4. **Branded content:** Publishers can partner with advertisers to create and post branded content on their Facebook pages. Advertisers directly pay publishers for such content and publishers retain 100% of revenue generated. While the partnerships are between advertisers and publishers, Facebook's tools help publishers connect with interested advertisers. Australian news publishers generated approximately 27 million organic views in News Feed on tagged branded content posts from January through May 2020.
5. **Commercial deals:** Facebook has also recently concluded commercial deals for new premium content (*i.e.*, content that publishers have not previously posted on Facebook).
  - a) During the past 12 months, we have directly invested in high quality-quality news video, striking agreements with publishers and broadcasters to incentivise the publication of longer-form video content onto the platform. These agreements were in the form of minimum guarantees against ad revenue for:
    - i. Clips content -- which are segments that have already been put to air being published, on a non-exclusive basis, to Facebook. Clips partners include Sky News, Seven, Nine, Ten, SBS and the ABC.
    - ii. Original, exclusive news shows -- we recognise that the formats and stories that work on Facebook are sometimes different to the traditional content produced by publishers and broadcasters. This is why we have invested in original news programming with partners, such as Seven, Nine, Junkee, PedestrianTV and Sky News.
6. **Facebook provides significant amounts of data to publishers.** We provide more than a dozen different tools which can be used by news publishers to gather data and insights on the performance of their posts and advertising campaigns -- and support their operations. We do not currently charge for this data. For example, we provide the following insights and tools:
  - a) Page and domain insights (Facebook Pages product)
  - b) Facebook Audience Insights (Facebook Pages product)
  - c) Facebook Performance Insights (Videos)
  - d) CrowdTangle (CrowdTangle is a standalone product, provided for free to news publishers which allows for monitoring of all public posts)
  - e) Facebook Stories Insights (Facebook Stories product)
  - f) Facebook Analytics Dashboard (Facebook Pages running ads)
  - g) Monetisation Manager
  - h) Reference File Insights in Rights Manager
  - i) Brand Collabs Manager
  - j) Business Manager
  - k) Creator Studio
  - l) Metrics for Boosted Posts.



## 7. Innovation Beyond Data and Deals: The Accelerator Program.

- a) We have invested more than \$1.5 million in our Accelerator program that brought together journalists, product managers, data analysts, and marketers from 11 regional and smaller publishers and industry experts from around the globe to develop strategies for encouraging readers to subscribe and donate. Earlier this year as part of that investment, we provided funding of \$100,000 to publishers for reader revenue projects. So far, this has generated more than AU\$1 million in customer lifetime value for that group.<sup>16</sup>
- b) Participants in the Accelerators are forecast to drive an estimated AU\$5 million in lifetime customer value up to July 2020. Digital reader support has doubled on a month-over-month basis, on average, among Accelerator publishers since the start of COVID-19. We are providing extra unencumbered funds to each of these Accelerator partners as part of our COVID-19 relief program.<sup>17</sup>

During the past 12 months, Facebook has directly invested cash in - or paid for new, premium content from - 19 Australian news organisations.

Facebook does not currently charge for any of the costs of providing the infrastructure for the free distribution, nor the data or research and development that we invest to innovate and identify new product solutions for publishers. While the Concepts Paper recognises the costs to publishers of producing news, it does not appear to acknowledge any of the costs to digital platforms. This will need to be remedied if the code seeks to explicitly recognise value and cost to both sides.

From all of the data points that we see, any value that we receive from publishers is outweighed by the significant costs and investment that we make in news relative to this direct and indirect value. We do this because news has societal value for the people who use our services and the broader community, however, we do not agree that it only falls to one or a handful of private, internet-based companies to subsidise this public good above and beyond the investments that make sense for our business.

## B. Principles for thinking about value exchange in the code

There are seven key principles that should be acknowledged if the code is to accurately reflect the value exchange between Facebook and publishers:

1. The code should recognise that Facebook is an opt-in platform, where users and publishers engage by choice. Publishers choose to put their content on their Pages or enable third party sharing to organically reach new audiences.

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<sup>16</sup> A Hunter, *Facebook Expands Local News Accelerator To Support Australia & New Zealand Publishers*, blog post published 18 September 2019, <https://www.facebook.com/journalismproject/facebook-accelerator-program-australia-new-zealand>.

<sup>17</sup> A Kapoor and A Hunter, *Australian newsrooms can now apply to the COVID-19 news relief fund*, blog post published 18 May 2020, <https://www.facebook.com/journalismproject/programs/grants/coronavirus-australian-relief-fund>

Facebook does not “steal” content. A code will not be workable if it prescribes specific revenue share or remuneration regimes for content that is voluntarily and freely provided by publishers. This would establish perverse incentives for publishers to post more content regardless of user engagement or the quality of the journalism.

The code should be based on realistic analysis of the two-way value exchange between digital platforms and news publishers, including the significant value Facebook provides to news publishers at no charge. The commercial value that Facebook drives for news publishers may materially outweigh the value derived by us.

2. Facebook doesn’t currently charge for referral traffic or the products we have built for publishers, in spite of the hard infrastructure costs to support these tools and the opportunity costs of showing news content (rather than ads or other types of content). We have developed stand-alone programs where we share revenue, and we give the majority of revenue to publishers (anywhere from 55% in the case of video ad breaks to 100% in the case of directly sold ads in Instant Articles and the subscriptions tool). And we make a significant amount of data and insights available at no cost to publishers.

The code should recognise that digital platforms have a right to determine their own business model and how they design their own products to suit the needs of their users around the world. A multi-sided platform needs to balance the needs of a wide range of users: advertisers, publishers of all types and most of all users.

3. While news publishers provide valuable feedback on product design, the code should not elevate publishers’ interests at the expense of other users, or indeed our own legitimate business interests, particularly in areas such as product design. Much of the benefit Facebook brings to Australians comes from the ability to personalise their experience of Facebook.
4. Digital platforms and news publishers should be allowed to negotiate commercial arrangements that suit each individual party. The code should not seek to standardise commercial offerings or prescribe the same terms for all publishers. It should recognise that different publishers have different strategies in their use of digital platforms, and commercial agreements or pricing models should not have to be one-size-fits-all.
5. The code should not encourage greater concentration in the media sector or adversely impact media diversity and plurality. Different news publishers have different interests and the smaller and medium-sized publishers (especially regional and local publishers) should not be disadvantaged by the code.
6. The code should recognise that the online news industry is highly dynamic. For example, since the ACCC concluded its Digital Platforms Inquiry, two major competitors (Apple and TikTok) have entered as distributors of online news in Australia, in addition to existing digital distributors of news such as MSN

(Microsoft News), Twitter, LinkedIn, Snap, Bing and others. For our part, Facebook is constantly innovating and looking at products that support news publishers.

The code should allow sufficient flexibility to adapt to changes in products and business models, and should not prescribe specifics around digital platforms' products.

We do not agree with the ACCC's view that we have substantial bargaining power in a market for news referral services (or even that there is a separate market for news referral services).<sup>18</sup> But, even if we did, it would not be appropriate to embed this view of commercial relationships in a static regulatory instrument like a code, given the dynamism in the online news industry.

7. The code should recognise that Facebook and Google are very different businesses, with products and business models that work in vastly different ways. We also have different relationships and partnerships with the Australian news industry.

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<sup>18</sup> The submission from Professor Catherine Tucker during the Digital Platforms Inquiry on referral traffic shows that Facebook accounts for less than 10% of traffic for 70% of the sites reviewed and a fraction of traffic provided by search (<https://www.accc.gov.au/system/files/Facebook%20Australia%20Submission%203%20%28April%202019%29.pdf>).

## Correcting misconceptions

In the recent public debate in Australia, there have been a number of incorrect claims about the mandatory news code. A code will only be workable and sustainable if it is based on a correct understanding of Facebook's business, how publishers choose to use our services, and our investment in the Australian news ecosystem.

There are eight misconceptions that we have observed regularly appearing in the debate, and these are addressed below.

### Misconception #1: Facebook steals or improperly takes content created by news organisations without paying for it.

Facebook does not steal or scrape publisher content. Publisher content appears on Facebook for one of three reasons.

First, publishers choose what content to post to their Facebook Page. Publishers can choose to post content in order to build an audience, engage a community, monetise it directly on Facebook via customised monetisation tools, or to drive traffic back to their owned and operated sites.

Second, users choose to share a link to publisher content on Facebook, often using sharing functionality a publisher adds to their own webpage. People share news content to discuss it with their friends and family, and when they do choose to share news content, Facebook respects the monetisation and data flow decisions that publishers have applied to that content.

Third, if Facebook commissions publishers to produce new, high-quality content to be shared on Facebook or other digital news distribution platforms. Facebook enters into commercial deals with Australian news publishers for high-quality content to appear in specialised products, like Facebook Watch, when additional investment is desired.

The Concepts Paper and much of the public debate gloss over this fact. The Concepts Paper refers throughout to the "use of news content" by Facebook and references the "featuring", "reproducing" or "scraping" of news content and also the user activity of liking and commenting on it.<sup>19</sup> All of these terms overlook the roles and choices of publishers and consumers, and incorrectly imply that Facebook actively takes news content from publishers without permission or payment. The code cannot be predicated on this fundamental misconception.

### Misconception #2: Facebook decides what news users should see.

People build their own News Feed by connecting to the people, communities, and organisations – including news publishers – they find to be most meaningful to them.

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<sup>19</sup> Concepts Paper, page 14

People can tailor the content that appears in their News Feeds in multiple ways. Most fundamentally, News Feed is principally composed of content to which a user chooses to connect: content from her Friends, the Pages she follows, and the Groups she joins. To the extent a user has news content in their News Feed, the most likely reasons are that it was posted from a publisher's Page that the user chose to follow or that was shared by one of the user's Friends. In addition, News Feed includes important controls and transparency. For example, people can decide to follow or unfollow a publisher. They can use features like "Why Am I Seeing This?" to understand why a specific item came up in their News Feed and then choose to see less of that type of content in the future. We also rely on surveys to help us better understand the content people value, and view as time well spent on our platform, in order to help improve our personalised ranking signals.

### Misconception #3: Facebook has built its business on and derived long-term value from news content.

News accounts for a very small amount of the content in the average Facebook user's News Feed. People come to Facebook to connect with friends and family, to join Groups and receive updates from the Pages that they choose to follow which can be from their local cafe, a favourite band or a news organisation, among many other categories of Pages.

Facebook's News Feed Values<sup>20</sup> confirm that "friends and family come first". To that end, in January 2018, we made updates to the News Feed ranking to prioritise posts that spark conversations and meaningful interactions between people.<sup>21</sup> Because the amount of content that people want to see in News Feed is limited, showing more posts from friends and family meant less public content was viewed, including videos and other posts from publishers or businesses.

If Facebook derived long-term commercial value from news content, then this change should have resulted in reduced user engagement and revenues. This has not happened because people do not principally come to Facebook for news, and when they do not see news on the platform, they simply engage with other content.

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<sup>20</sup> A Mosseri, *Building A Better Facebook News Feed For You*, blog post published 29 June 2016, <https://about.fb.com/news/2016/06/building-a-better-news-feed-for-you/>; Facebook, *News Feed Publisher Guidelines*, <https://www.facebook.com/business/help/872613956197195?id=193136622109756>; Facebook, Facebook, *News Feed: An Introduction For Creators*, <https://www.facebook.com/business/learn/lessons/facebook-news-feed-creators>.

<sup>21</sup> Facebook Newsroom *Bringing People Closer Together* (11 January 2018)

## Misconception #4: Facebook does nothing to promote quality news on its services and is replete with misinformation.

People have told us that out of all the news content they see, they want more credible and informative news stories. We have built a range of tools to assist with this, including product features that highlight breaking news, context buttons to help consumers be more informed about the content they see on Facebook, and ensuring publisher logos are displayed prominently in search results. These and other features are detailed in *Section 5.0 Display and presentation of news* below.

In addition, Facebook is dedicated to reducing the spread of misinformation on our platform. We use multiple means to achieve that goal, including removing fake accounts, disrupting the financial incentives of those people who propagate false and misleading information, working with third-party fact-checkers to let people know when they are reading or sharing information (excluding satire and opinion) that has been disputed or debunked, and limiting the distribution of stories that have been flagged as false or misleading by these fact-checkers. For example, from January 2020 to May 2020, we removed 1.7 billion fake accounts, 99.7% of which we proactively detected before anyone reported it to us.<sup>22</sup>

Further, our third-party fact-checking partners — who are signatories to the non-partisan International Fact-Checking Network Code of Principles — investigate claims and make determinations about a post's truth or falsity. These fact-checkers include Agence France-Presse (AFP) and Australian Associated Press (AAP) in Australia. When a fact-checker determines that a story is false, we have built systems that substantially reduce the distribution of that content. In April, we also displayed warnings on about 50 million posts related to COVID-19 on Facebook, based on around 7,500 articles reviewed by our independent fact-checking partners. When people saw those warning labels, 95% of the time they did not go on to view the original content.<sup>23</sup>

Finally, where misinformation is likely to lead to imminent physical harm, we remove it from our platform instead of reducing its distribution. During the month of March 2020, for example, in the midst of the COVID-19 global health pandemic, our systems removed hundreds of thousands of pieces of misinformation.<sup>24</sup>

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<sup>22</sup> Facebook, *Community Standards Enforcement Report Jan - Mar 2020*,

<https://transparency.facebook.com/community-standards-enforcement#fake-accounts>

<sup>23</sup> G Rosen, *An Update On Our Work To Keep People Informed and Limit Misinformation About COVID-19*, blog post published 16 April, <https://about.fb.com/news/2020/04/covid-19-misinfo-update/>

<sup>24</sup> Examples of misinformation we've removed include harmful claims like drinking bleach cures the virus and theories like physical distancing is ineffective in preventing the disease from spreading. More information at: G Rosen, *An Update On Our Work To Keep People Informed and Limit Misinformation About COVID-19*, blog post published 16 April, <https://about.fb.com/news/2020/04/covid-19-misinfo-update/>

## Misconception #5: Facebook does not share data with publishers and this limits the ability of publishers to monetise their content.

Publishers already independently collect substantial user data (sometimes referred to as first party data) when collected directly from referral traffic to their websites and subscriptions. Publishers also receive considerable anonymised and aggregated data and insights from Facebook to help them understand how their content performs on our services, their audience on our platform, and also trends across our services.

When a publisher or user places news content on Facebook, we provide free distribution for the publisher. When a user clicks on a piece of news content and is redirected to the publisher's website to engage with the content, the publisher can collect first party data in accordance with its own data policies.

We build Facebook products with a design that allows us to share anonymised aggregated data about how publishers' content performs across our services and the composition of their audience.

Publishers can view audience, traffic, demographic and engagement data via insights products like Page Insights, Instant Articles Insights, Facebook Analytics, and Creator Studio. The data is aggregated and anonymous but allows publishers to learn which of their content is performing well and which isn't. Facebook also has a separate platform for publishers called CrowdTangle that lets newsrooms use public data insights to benchmark their social performance against competitors and discover emerging stories on various sites, including Facebook.

## Misconception #6: Publishers don't derive value nor benefit financially from Facebook.

As set out above, Facebook is an opt-in platform, where users and publishers engage by choice. It is entirely voluntary. Publishers choose to put their content on their Pages, to enable third party sharing to organically reach new audiences, or to enter into a commercial deal where Facebook pays for content (for example, where new, high-quality content appears on surfaces like Facebook Watch). They also choose whether to use the customised products Facebook has built and which enable publishers to monetise their content on our services.

They would not do so unless they derive value.

When publishers or people share links to publisher content like articles on Facebook, and people click on those articles, they are redirected to publisher sites where publishers can show ads or sell subscriptions. Publishers keep **all** of the revenue they generate from this referral traffic driven to their sites from Facebook. Facebook does not earn any revenue from that traffic and does not charge for distributing publisher content. In addition, publishers can choose to use tools to monetise their content directly on Facebook. For example, publishers can choose to post video directly to Facebook and have those videos monetised through in-stream ads.



Publishers can also choose to use Instant Articles to generate revenue through ad sales. Instant Articles is a product that enables publishers to have their articles appear in a standardised format on the Facebook platform. Instant Articles load faster so engagement is higher. If a publisher sells an ad in Instant Articles, they keep 100% of the revenue. If a publisher opts to have Facebook sell those ads, there's a revenue share or split, with publishers keeping most of the revenue. As with video ads, using Instant Articles is optional, publishers actively opt in, and the terms are clear and agreed upon in advance. We are currently experimenting with similar direct sales options for our video ads as well.

To ensure that audiences see high-quality news video on Facebook, we've partnered with publishers in Australia and New Zealand to experiment with video, trial new formats and build sustainable video businesses on the platform. These partnerships include Facebook funding to support the creation of exclusive news content for Facebook from a variety of Australian publishers including traditional news broadcasters and digital-first publishers.

### **Misconception #7: Facebook doesn't respect paywalls.**

Facebook respects and adheres to publisher paywalls and subscription business models and always has. If a publisher shares a link on Facebook to an article that sits behind a paywall, a person who clicks that link will hit the paywall, regardless of whether it's shared through Instant Articles or as a standard link that leads back to a publisher's own website. Publishers determine how their paywall operates on Facebook. For example, a publisher can allow people to get a predetermined number of free articles before hitting the paywall. Conversely, a publisher can set it up so people hit a paywall immediately.

Additionally, we've developed a customised subscriptions product for publishers who prefer to use Instant Articles so that they can connect directly with customers on Facebook, secure first party data on their own websites, and increase their reader revenues. Publishers who use Instant Articles to sell subscriptions to consumers directly on Facebook keep 100% of the revenue.

Finally, any publisher can set up a button on their Facebook Page that leads directly to a subscription page on their own website.

### **Misconception #8: Facebook does not respect copyright.**

Some claims have casually employed the term "use" to imply that Facebook's hosting of news content (and allowing people to share or comment on that content) constitutes use of the content in a copyright sense. Globally, "use" is a well-understood copyright concept.

Specifically, the Concepts Paper suggests that various different “uses” of news content on Facebook (such as allowing people to share or comment on news content, or rendering hyperlinks based on the Internet industry standard) could trigger new obligations for remuneration. The Concepts Paper also references pre-existing rights, such as copyright, as relevant for determining remuneration.

The Concepts Paper potentially conflates Facebook’s hosting of news content (and allowing people to share or comment on that content) with use of the content in a copyright sense. This is inaccurate.

Facebook respects copyright. The sharing of news content on our services either does not trigger copyright rights or is authorised by the publisher. This is fully permitted under Australian copyright law.

Engagement with news content by users is also expressly not copyright violations. This is discussed more in Section 2.0.

If the code referred to hosting news content or allowing engagement with it, the code would blend two different concepts in a way that would undoubtedly lead to significant confusion and uncertainty, would result in conflict of laws between the code and copyright law, and would fall well outside the scope of the code.

Nor should this bargaining code contort conduct like engagement into a remunerable use. Doing so would provide publishers with claims over fundamental public goods, such as the implied freedom of political communication conducted on Facebook, review and criticism, and parody and satire - all of which occur on Facebook as “engagement”.

# Specific response to the concepts paper

## 1.0 Scope of the bargaining code

When framing the scope of the code, it needs to be clear both which publishers and what content are within scope. To assist the ACCC with finalising these foundational concepts, we propose a multi-layered approach which defines “news”, “news content” and “news media businesses”. We propose a publisher-driven definition (as distinct from a content-based definition of news) and a definition that supports journalistic standards.

We also provide suggestions on the definition of digital platforms. It is also important that the code delineates appropriately between the very different services provided by Facebook and Google, and between the very different business models and value exchanges that take place as between Facebook and Google respectively, on the one hand, and news media businesses, on the other.

The ACCC should also use the Digital Platforms Services Inquiry to identify additional services that should be subject to the code (see Section 7.0). Since the ACCC’s Final Report was issued in July 2019, for example, Apple News and TikTok have had substantial growth in popularity, in addition to other services that provide news such as MSN (Microsoft News), Twitter, LinkedIn, Snap and Bing.

Given the very different nature of the services provided by Instagram and WhatsApp, there is no logical basis to include them within the code at this time, without a comprehensive review of similar services such as iMessage and other text-based and email services.

### Definition of news content

We share the view expressed in the Concepts Paper<sup>25</sup> that any definition of news should be objectively and readily identifiable by parties to the code. To achieve this, the definition of news content should flow from the definition of Australian media business or publisher. To adopt a definition that is tied to the nature of the content is likely to be practically unworkable for a digital platform because the code is intended to regulate interactions between platforms and news media businesses and there must be a simple and objective means of determining who is and is not a news media business to whom the code applies.

Instead of a content-based definition of news, we support a multi-layered definition that begins with defining the news publisher. News content should be potentially within scope of the code when it is published by an organisation that is a member of the Press Council of Australia, a regulated broadcaster under the ACMA’s codes of practice or an equivalent organisation registered in Facebook’s News Page Index.

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<sup>25</sup> Concepts Paper, page 4.

For those publishers that meet one of these criteria, we then propose a multi-layered approach which defines “news” and “news content” for the purposes of the code as discussed below.

The definition of “news” must be capable of determination by reference to clear hallmarks of what is generally accepted as journalistic news that the code is intended to support. We think news should be defined as content that follows journalistic standards that reflect the initiation, judgment and control of a multi-person editorial staff to report on current events or timely information for the benefit of the public.<sup>26</sup> Therefore, the definition should also require that the content meets at least 2 of the following criteria:

- cites and/or links to fact-based sources for published information (by contrast, citation to parody and satire as fact, or repeated citation to known publishers of misinformation and hoaxes, will not meet this requirement);
- primarily publishes content that is not user-generated or aggregated from other websites;
- provides transparent information about reporters and editorial staff (*e.g.*, by-lines with full names or a staff directory); and
- includes dates/timestamps on published content (which is one indicia of originality of content).

This is a complex area that requires a fact-based approach and deserves a much more robust and open discussion.

### Definition of an Australian media business

Given that community value is derived from news that is objective, accurate, independent and timely, it is important that “news” covered by the code is identified by reference to journalistic standards and ethics. This also supports the ACCC’s focus on quality news content and the sustainability of public interest journalism.

An objective way of determining the publishers whose content is within scope is to define news content by reference to news published in titles that are subject to the Australian Press Council’s jurisdiction in relation to standards of practice and adjudication of complaints. Similarly, for broadcasters, the definition of news content should reference broadcasters that are subject to industry codes of practice that are regulated by the Australian Communications and Media Authority (ACMA) and are applicable to relevant national broadcasters or commercial television broadcasters.

For those equivalent publishers that choose not to or are unable to join the Press Council, the code could also apply if the Australian publisher has registered their News Pages with Facebook for the purposes of inclusion in the Facebook News Page Index.

Finally, to confirm that they are an Australian news media business: the code should only apply to news media businesses that carry on business in Australia, have Australia as their principal place of business, and have an Australian Business Number.

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<sup>26</sup> Certain content is clearly not “news” such as statistics, stock prices, restaurant addresses, crosswords, horoscopes, opinion pieces, book reviews and recipes.

## Digital platform services captured by the mandatory code

When considering the digital platform service providers that should be captured by the mandatory code, it is important to acknowledge the fact that Facebook and Google are very different services, and that just because other apps exist within the Facebook family of apps, it does not mean that they play a relevant role in the Australian news ecosystem by virtue of corporate ownership.

Accordingly, the mandatory code should contain separate sections for search services versus social media services. Without clearly delineated sections, there is a significant risk of the code being vague and inaccurate by conflating Facebook and Google, as has occurred on numerous occasions throughout the Digital Platforms Inquiry and in public commentary.

With respect to other services to be included within the code, the ACCC should use the Digital Platforms Services Inquiry to identify how similar code obligations should be extended to digital platforms that carry news content. Best practice regulatory principles would see a code that sets broad-based obligations for all industry participants, rather than singling out two companies on a contested basis. The decision to limit the initial version of the code to two US companies is discriminatory and will inevitably give an unfair advantage to Facebook's competitors in the technology sector, including rivals from countries that propagate different and undesirable visions for the Internet.

When considering the specific service products that should be included within the code, if the code is to have longevity for its duration, it is unwise for it to refer to specific product features of Facebook, such as Instant Articles, given these are discovered as part of Facebook News Feed and given that, in any event, product features may change over time. It is also inappropriate for the code to name check product features that have not launched in Australia, such as Facebook News.

Finally, it is wholly inappropriate for Instagram or WhatsApp to be included within the mandatory code. By contemplating whether Instagram and WhatsApp would be subject to the code, the ACCC appears to be moving the scope of the code beyond products and services that play any meaningful role in the “dissemination of news” or that have relevant “commercial relationships with news media businesses”, towards photo/video sharing or messaging platforms simply because they are part of the Facebook group of companies. Even though we strongly disagree with the analysis in the Digital Platforms Inquiry that claims there is a “news referral market” in which Facebook has substantial market power, the decision to include Facebook within the mandatory code is at least based on a process conducted over some years where some consultation occurred. There is no evidence or prior analysis to suggest that Instagram or WhatsApp play any meaningful role in the distribution of news, and certainly no role that is more significant than apps and services such as MSN (Microsoft News), Apple, TikTok, Twitter, LinkedIn, Snap or Bing - who would not be subject to the code.

Instagram is a very different service to Facebook because it is based on a follower model (similar to Twitter) and because its primary purpose is not to allow linked content (similar to Pinterest). The primary purpose for which Australians use Instagram is to be creative and be inspired by other creators. The “dissemination of news” is far outside the core services that Instagram provides to its users. Instagram is a free photo and video sharing product, dedicated to visual, not textual, media. As CEO Adam Mosseri explained in March 2020, Instagram is “visual first, always.”<sup>27</sup> Consistent with its core mission, many of Instagram’s central product surfaces - Instagram Feed, Explore, and hashtag pages - do not allow clickable links to news or any other content.

If the ACCC wishes to consider whether the code should be extended to Instagram, despite its considerable differences to the Facebook app, then the ACCC will also need to consider whether and how to extend the code to other apps.

With respect to WhatsApp, it is a private messaging service, principally for direct conversations between friends and family or direct communication with small businesses. In fact, approximately 90% of the total messages sent on WhatsApp are sent between two people.

WhatsApp is not designed for widespread sharing, whether of content from news publishers or otherwise. It is predominantly used for one-to-one conversations. Although people can join small groups on WhatsApp, the vast majority of groups are less than 10 people. Moreover, any sort of mass messaging is prohibited. That prohibition is strictly enforced - WhatsApp bans more than 2 million accounts per month for sending bulk or automated messaging. The product is also not designed to facilitate the discovery of content or new contacts. Unlike other social media products, WhatsApp does not provide mechanisms to search for content. Finally, to protect people’s privacy and security, all messages on WhatsApp are end-to-end encrypted. Neither we nor anyone beyond the sender and recipient of a message can see its content.

As Mark Zuckerberg explained in 2019, WhatsApp “is different from broader social networks,” which are suited to “telling all your friends about something” or “following creators and media”.<sup>28</sup> Instead, WhatsApp is designed to approximate “a more intimate space like a living room.” WhatsApp is much more similar to Short Messaging Services (SMS), the products used by millions of people to send and receive text messages, or email -- than to the products the ACCC proposes be covered under the code. If WhatsApp is subject to the code, then the ACCC will also need to consider extending private emails and services like Apple’s iMessage within the scope of the code.

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<sup>27</sup> Byers Market, *Transcript: Instagram’s Adam Mosseri*, transcript of a podcast, 14 March 2020, <https://www.nbcnews.com/podcast/into-america/transcript-instagram-s-adam-mosseri-n1158106>

<sup>28</sup> M Zuckerberg, *A Privacy-Focused Vision For Social Networking*, blog post, 7 March 2019, <https://www.facebook.com/notes/mark-zuckerberg/a-privacy-focused-vision-for-social-networking/10156700570096634/>

## 2.0 Monetisation and sharing of revenue from the use of news

### Our proposed frameworks for bargaining

Whilst Facebook does not agree with the Final Report's finding that we possess unequal bargaining power with respect to some of the largest media companies in Australia and the world, we recognise that there is merit in setting regulatory frameworks to provide all Australian media organisations and Australian consumers with confidence about various aspects of our relationships with media organisations.

We strongly believe the right framework should (a) facilitate genuine partnership to promote innovation and collaboration between platforms and publishers; and (b) support the primacy of commercial negotiations to achieve the shared objective of mutually beneficial agreements. The code should be grounded on genuine marketplace principles of freedom of contract and win-win transactions focused on value and investing in building sustainable products to broadly support Australian journalism. The code must reflect the genuine commercial interests of all stakeholders.

Digital platforms and news publishers should be able to put in place bespoke commercial arrangements that suit the individual parties and their business objectives. The code should not seek to standardise commercial offerings or prescribe the same terms for all publishers. In our consultations as part of the voluntary code development process, we heard very clearly from media publishers that they do not want their confidential commercial arrangements with Facebook codified or revealed to the entire industry.

More importantly, upholding the primacy of bilateral commercial negotiations between digital platforms and news publishers will be the best way to ensure collaboration and strong partnership between publishers and Facebook over the long term. There has been no evidence to date that we have not been able to enter into partnership agreements with Australian publishers, and indeed both through the voluntary and mandatory code development process, we have been able to continue locking in and renewing deals with Australian publishers. Facebook is committed to continuing to work in good faith as a collaborative partner with Australian news publishers, and we believe many of the challenges news publishers face as a result of the internet can be best tackled over time with close, collaborative and innovation-focused relationships. Our preferred approach draws from Option A that the ACCC has proposed in the bargaining frameworks (albeit with some important adjustments).

We believe the approach we are advocating is preferable to other alternatives for the following reasons.

- We do not believe a bargaining framework will be durable or effective if it provides incentives for news publishers to raise any issues or complaints about commercial matters with a third party before raising and seeking to resolve those issues directly with us. This does not give Facebook the opportunity to resolve concerns, introduces a high level of cost to the commercial



arrangement and is not conducive to building trust or collaborative partnerships. To the contrary, it can operate as a powerful disincentive to reach commercial agreements, effectively promote regulatory gaming, and perpetuate oversight of what should be commercial arms-length bargains readily entered into by sophisticated businesses on both sides. For example, introducing a third party arbitration process will simply add delay, cost and inflexibility to already effective and fast deal making between Facebook and Australian news publishers.

Rather than promoting commercial outcomes, the threat of third party intervention such as arbitration is likely to result in perverse incentives, a reduction in innovation and harm to Australian consumers. It is likely to make it more difficult for Facebook to offer innovative solutions or different deals to meet different news media businesses' requirements. There is a significant risk of it driving a "lowest common denominator" approach and effectively setting a regulatory one-size-fits-all. It is also likely to reduce incentives for offering new deals or introducing services in Australia, given the risk of any requirement to supply on unacceptable terms. This is in addition to any oft-cited risks in relation to regulatory error, which are particularly problematic if, contrary to fairness requirements, any third party decisions do not carry clear review and appeal rights.

- All of the large publishers in Australia are sophisticated parties, adept at commercial negotiation. Together, these publishers and the platforms are in the best position to determine the most appropriate commercial arrangement, including payment terms or more innovative outcomes. An external party, like an arbitrator, is not likely to be particularly well-placed to address these issues. There is no reason to think that issues under negotiation between large and sophisticated companies, operating in a dynamic digital environment, could be better resolved by a third party. In addition, given the dynamics of the Australian media industry, we do not believe that the interests of the larger players should determine the commercial outcomes for the whole Australian news ecosystem (we elaborate on this more below).
- We also agree with the ACCC that it would be very challenging to develop an objective, considered methodology for quantifying "indirect value" in the context of the code development process. As the ACCC has acknowledged, the issue of indirect value by any party is especially complex and contestable, which makes it particularly ill-suited for codification. Rather than seeking to identify a precise indirect value, an approach that upholds the primacy of bilateral negotiations will mean publishers and platforms will - in one sense - agree what the unquantifiable benefits of their partnership is worth to them through negotiation. Again, there is no reason to think that these issues could be better resolved by a third party.

To formalise the collaborative approach that has been adopted to date between publishers and platforms, at least with respect to Facebook, we are proactively proposing a range of other measures that could be adopted alongside bilateral

commercial negotiations, to give publishers, the Australian Government and consumers confidence in our approach to commercial negotiations:

- Following our consultation with publishers in the voluntary code development process, we came to the view that the inclusion of “commercial deal-making principles” within a bilateral negotiation bargaining framework could provide Facebook, news publishers and Australian consumers with confidence that we are making appropriate investments in the Australian news ecosystem. This could include principles such as:
  - an obligation for all parties to act in good faith, which could include an admonition that they not seek positions that are arbitrary or manifestly unreasonable having regard to normal industry practices;
  - an obligation for both Facebook and news media businesses to confidentially exchange relevant information that they reasonably require in order to evaluate a proposal within a reasonable time period. This cannot override basic principles of business confidentiality, user privacy, or be used to gain competitive advantage over other negotiating parties subject to the code, whether publisher or platform.<sup>29</sup> The collection of this data should not impose an undue burden on any party; and
  - because the ACCC’s mandate is to enhance the welfare of Australians through the promotion of competition and fair trading, an overarching requirement that deals should not harm consumer welfare.
- We propose establishing a new body - which we propose calling the Australian Digital News Council - to exchange information about product roadmaps and industry trends, consider issues or concerns around dealings between publishers and platforms, and to air and mediate complaints and concerns from publishers about their relationship with digital platforms. We believe this body should include balanced representation of news publishers and digital platforms, and bring these parties together in a spirit of collaboration. The model is inspired by the Australian Press Council, which airs complaints, gives the company in question the first opportunity to respond, but provides transparency and accountability if the complainant is not satisfied with the response. The Australian Digital News Council could make non-binding recommendations to members and develop its own set of principles and standards for engagement.

The Australian Digital News Council could include interested government representatives - such as the ACCC, the Treasury Department and the Department responsible for communications policy - as observers. And roundtables could be held regularly, in order to discuss trends or industry-wide developments that may need to be considered.

This framework encourages platforms and publishers to collaborate on new innovations for the news industry and to work out issues together themselves (where necessary, with recommendations or advisory views from the Council),

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<sup>29</sup> Note this refers to commercial data, and not user data (covered in section 3.0).

before resorting to escalation to third parties such as regulators, courts or other third parties.

We would consider a framework like this as an opportunity for structured, regular consultation with publishers to enable new and existing business solutions and endeavour to provide certainty to help address concerns about imbalance in bargaining power. We could offer additional capability, such as services to alert publishers about opportunities to participate in early stage tests of the products.

Facebook would welcome the opportunity to contribute funds towards this Council to support a secretariat that can resolve any complaints and concerns and publish decisions.

We provide specific comments on the other approaches proposed by the ACCC below.

### Other approaches

The Concepts Paper proposes four potential models for establishing a bargaining framework. Facebook does not support B - Collective Bargaining, C - Collective Boycott, or D - Collective Licensing.

**B and C - Collective bargaining and boycott frameworks that involve large and sophisticated news publishers are unnecessary, harmful to the public, and seek to create immunity from collusion for the special interests championing them**

Facebook has concerns with any suggestion that an ACCC-sanctioned cartel between publishers is necessary to facilitate commercial arrangements, if collective bargaining was to involve large and sophisticated global media companies.

The Australian news industry is diverse, and requiring an “all in/none in” approach would allow the business model or agreement requirements of one publisher to stymie the interests of all publishers, to the detriment of public interest journalism. A collective bargaining framework would not create the intended incentives to reach agreements that benefit the news media industry as a whole, because the interests and needs of the industry vary so widely that a one-size-fits-all approach subjects the preferences of the many to the demands of the few. There is a risk that collective bargaining arrangements would disadvantage small to medium sized publishers and effectively lead to greater concentration within the news industry.

For example, Facebook has a history of mutually beneficial partnerships and initiatives such as the Accelerator<sup>30</sup> with smaller and medium sized and regional publishers which should not be jeopardised by a mandatory code that takes choices and optionality away from that important segment of the news ecosystem.

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<sup>30</sup> A Hunter, *Facebook Expands Local News Accelerator To Support Australia & New Zealand Publishers*, blog post published 18 September 2019, <https://www.facebook.com/journalismproject/facebook-accelerator-program-australia-new-zealand>.

Further, a collective bargaining framework that involves large news publishers would distort competition between publishers themselves. It may also force the news media industry to adopt the same approach to their business models, funding mechanisms and distribution strategies at a time when the publishing industry also must be iterative and innovative to address the challenges they are facing. There is no evidence to suggest collusion of large news publishers would provide the industry as a whole with a viable long-term business model or incentivise increased distribution.

Finally, there is a serious risk that collective bargaining would likely result in severe detriment to the public, if this avenue is available to large news publishers. Cartels involving large players are illegal for a reason: they are anti-competitive, drive up prices and shelter companies from competition. This does not promote the creation of higher-quality products and services, or encourage innovation that would benefit users.

Just as collective bargaining does not provide flexibility for publishers with diverging needs or interests, a collective boycott in the event that one publisher is unable to reach agreement with Facebook seems harsh for all publishers, and may place individual publishers (smaller or local publishers) at the mercy of larger, global publishers who have different focuses in their negotiations that extend beyond Australia. As previously discussed, we agree with the ACCC that news provides great community value and it plays an important social function. Accordingly, we would be concerned about a framework that actively encourages a denial of access to news by Australians at the option of any one publisher. Facebook shares the scepticism of this framework outlined in the ACCC's Concepts Paper.<sup>31</sup>

In addition, given the mandatory code is solely targeted at Facebook and Google, the use of collective bargaining approaches that involve large media companies would distort competition in the distribution of online news. This will allow other services such as TikTok and WeChat to innovate with news -- unburdened by an onerous scheme -- and the ACCC and the Australian Government will be left playing catch-up with these newer services from countries that have very different visions for the future of the internet.

#### **D - Collective licensing or flat fee arrangements are too limiting to be an effective mandatory bargaining scheme**

An approach such as D obstructs - rather than facilitates - collaboration and strong partnerships between publishers and Facebook over the long term. It would provide incentives for news publishers to - in the first instance - speak with a third party about any issues with the commercial arrangements with Facebook before raising them with us directly. This does not give Facebook the opportunity to resolve concerns, introduces a high level of cost to the commercial arrangement and is not conducive to building trust or collaborative partnerships.

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<sup>31</sup> Concepts Paper, page 10.

We strongly disagree that there is a need for a compulsory licence and price setting mechanism, as it limits the optionality for news media publishers to come to agreements that meet the commercial needs of their wide variety of business models.

The view that publishers have expressed to the ACCC and in public that they are not being adequately compensated by Facebook for the “use of their content”<sup>32</sup> repeats misunderstandings media publishers have about the value exchange between Facebook and news organisations. It also repeats the mischaracterisations reflected in the Concepts Paper about Facebook’s “use” of news content without paying for it.<sup>33</sup> This is discussed further below.

### Factors guiding the determination of remuneration

We do not agree that the code should include mechanisms requiring the parties to take certain prescribed factors relating to remuneration into account when conducting negotiations. With respect to the principles governing value exchange and commercial deal making, Facebook does not support these being focused on value components, but rather based on principles of commercial behaviour. We believe that this is preferable for all stakeholders given the very real possibility that the value exchange is neutral or favours publishers. Given the importance of news as a public good and the feedback from the Australian Government and publishers that they wish us to increase our investment in news in Australia, a code that dictates remuneration based on value may result in the opposite outcome.

If the ACCC wishes to pursue the inclusion of value-exchange related factors, it would be helpful for guidance on how the code will function, if these factors show either a value neutral exchange or a value imbalance in favour of Australian publishers.

With respect to the factors outlined in the Concepts Paper relating to the value that flows to Facebook, as has been noted by the ACCC, it is unlikely that the direct value is commercially significant. On indirect value, it would be very challenging to develop an objective, considered methodology for quantifying “indirect value” in the context of the code development process. As the ACCC has acknowledged, the issue of indirect value by any party is especially complex and contestable, which makes it particularly ill-fit for codification.

In terms of the value that flows to publishers from Facebook, the Concepts Paper only lists out direct value and does not consider indirect value. Specifically, the Concepts Paper highlights publishers receive direct value:

- via the referral traffic to their owned and operated properties, including direct reader revenues and advertising revenues.
- via the customised revenue sharing products that we have developed for them such as Instant Articles and In-Stream Ads. In addition, publishers receive

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<sup>32</sup> Concepts Paper, page 7.

<sup>33</sup> See Misconception #8.

- direct value from the commercial arrangements where Facebook pays for content, and Accelerator programs through which they increase their revenues.
- via commercial arrangements with digital platforms.

However, the Concepts Paper does not fully take account of the indirect value that publishers receive from Facebook, such as brand awareness and community-building in the short and longer term. Publishers receive value from having their brand -- particularly at a time when news is breaking -- shared directly in people's News Feeds and reshared with their friends. From January through May 2020, 20 per cent of the views on Australia-based news publishers' Page posts resulted from re-shares. In addition, some publishers do not use Facebook for referrals but instead use it solely for brand awareness, which is another indirect value for which to account.

The Concepts Paper is also one-sided in its consideration of the value exchange when it references the cost of producing news content but fails to acknowledge the (very considerable) cost of providing the infrastructure that supports the free distribution, referral traffic, data generation, customised product development and the payments we make to publishers through our commercial deals. Any value exchange calculation that considers the costs to publishers to produce news needs to take account of the costs to Facebook to generate the value we bring.

With respect to the issue of consumer benefit that is floated in the Concepts Paper<sup>34</sup>, it is not clear how this would be factored into any value exchange. At Facebook we build products to benefit and serve the needs of our user base. Our News Feed Values prioritise friends and families first, which may contribute to tensions with publishers. Consequently, it is not apparent how this can be measured nor the contribution it would make to a value exchange assessment between Facebook and publishers.

On the question of market benchmarks, we are not convinced that the code needs to include provisions around market benchmarks, given that the code should not include an industry-wide price setting mechanism. Assuming a code upholds the primacy of bilateral commercial negotiations, as we have recommended, it is not clear that market benchmarks would need to play so significant a role as to be included in the code.

There are practical difficulties in the use of market benchmarks, given that there is not a large number of industry indices or benchmarks available that could be used in this context. We believe market benchmarks may evolve organically over time as platforms and publishers continue to reach commercial agreements. Market benchmarks may play a helpful role for individual publishers in future as a source of analysis to inform their bilateral negotiation with platforms, but that should be a decision for individual publishers based on their bespoke commercial arrangements and negotiation strategies.

The potential inclusion of market benchmarks in the code in future could be considered in the scheduled review of the code.

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<sup>34</sup> Concepts Paper, pages 11 - 14.



Finally, the factors listed out in the *“Issues for Consideration”* appear to reflect some of the misconceptions around news content on Facebook<sup>35</sup>, and conflates how news appears on Facebook in full respect of copyright law, which is outside the scope of the code, with a potential basis for creating new legal expectations of what constitutes a remunerable “use” of news content under the code.

The concept of “use” under Australian copyright law is well-understood and does not correspond with the suggested remunerable uses within the Concept Paper. Incorrectly tying the meaning of use within the Concepts Paper to pre-existing legal concepts within Australian copyright law will undoubtedly lead to significant confusion and uncertainty. Not only is reference to existing concepts of “use” in copyright law likely to cause confusion, it will likely lead to new interpretations of copyright law concepts which are inconsistent with settled Australian copyright law and fall well outside the scope of the code.

A number of the suggested “uses” under the Concept Paper clearly fall outside the concept of “use” under copyright law. For example, it is not an infringement of copyright to post a hyperlink to a news publication, nor simply allow users to share, like, comment on and discuss individual pieces of news content. Australian copyright law generally will not afford publishers with copyright to short phrases, slogans or titles. These simply do not constitute a literary work which triggers copyright protection. In all these cases, no right is triggered and therefore no remuneration should be payable. Proposing otherwise would serve to muddy the concept of “use” both in the bargaining code and in the context of copyright law generally. The sharing of news content on our services is authorised by publishers, and no copyright right of action is triggered.

If users choose to share a link to an item of news content, they post a URL to that item and we display short extracts retrieved from the domain’s meta data. As set out in *Section 5.0 Display and presentation of news*, news media publishers have the ability to optimise links to web hosted content that people share by marking up their websites using our Open Graph markup language. And if they do not wish to have their content linked on Facebook, they can make this known by including a robots.txt file in their meta data.

The ACCC should not use the creation of a mandatory code to construct an entirely new set of legal rights around “use” of digital news content. Any change to copyright laws would require extensive consultation and should be considered in light of Australia’s existing IP Treaty obligations. Despite this, the ACCC’s consideration of use of news content sits uncomfortably against established legal concepts like fair dealing, representing an encroachment into existing laws. Reproducing news content could give rights to other claims such as copyright infringement, rights holders already have grounds for a claim in those circumstances and do not need a code to widen these rights beyond established laws.

It also makes the false assumption that users engage with content solely because of the value of the content itself. This would ignore the bedrock of Facebook that wasn’t

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<sup>35</sup> Refer to Misconception #1 and #8.



built by and doesn't depend on news media publishers: it is the community people create and connect with. It is a dangerous and inappropriate intrusion into public rights to tie an economic right to political and social discourse. It also creates a perverse disincentive to amplify distribution of news on the platform.

### 3.0 Sharing of user data

Facebook already makes a large amount of user data available to publishers for free

As acknowledged in the Concepts Paper<sup>36</sup>, Facebook already makes a large amount of aggregated user data available to news media businesses to assist them in monetising their content and services.

Publishers are able to independently collect substantial user data (sometimes referred to as first party data when collected directly) from referral traffic to their websites and subscriptions. In addition, Facebook makes available to publishers anonymised and aggregated data on audience, the performance of content and ads and trends on our services.

Given we learned from publishers during this code development process that they were not aware of and/or did not make sufficient use of the data and insights that are already available to them via our platform, it seems unnecessary for the code to include any minimum data-sharing requirement. However, the code could include a requirement on digital platforms to maintain and provide news media businesses with an up-to-date list of the types of user data, insights and tools that are available to them.

First party data that publishers already collect themselves

Much of the discussions during this code development process has focused on what first party data is available to publishers. Publishers are able to directly collect first party data on their owned and operated websites and, although such data collection is entirely independent of Facebook or any user activity on Facebook, it represents value that publishers can choose to monetise from the referral traffic they receive from distribution platforms like Facebook. When a person clicks on a link to a publisher's content on our services, they are directed to the publisher's owned and operated website, whereupon the publisher has control over what user data it wishes to capture. This referral traffic, which varies with the news cycle, was estimated to 2.3 billion organic (free) referrals to Australian news publisher domains from January through May 2020.

Data on audience, content and trends that Facebook shares with publishers

For other news content that is shared on our services -- for example, for videos, organic posts or Instant Articles -- Facebook provides extensive anonymised and aggregated data and insights to publishers and advertisers and provides a range of Facebook Business Tools to help them understand the audience, engagement and performance of their posts and advertising campaigns on our services.

While this clearly involves costs for Facebook, we provide these data and insights to news media businesses for free.

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<sup>36</sup> Concepts Paper, page 16

Providing access to these tools for news media and other businesses is consistent with our business strategy of helping to ensure that posts and advertisements are as relevant and as effective as possible, to benefit publishers, advertisers and users.

Following the release of the Concepts Paper, Facebook provided the ACCC with a detailed list containing information about the more than a dozen different tools that are available to news publishers to gather data and insights on the performance of their posts and advertising campaigns.

These tools include:

- Page and domain insights (Facebook Pages product);
- Facebook Audience Insights (Facebook Pages product);
- Facebook Performance Insights (Videos);
- Instant Articles Insights (Instant Articles);
- CrowdTangle (a standalone product that Facebook provides for free and which allows for monitoring of all public posts);
- Facebook Stories Insights (Facebook Stories product);
- Facebook Analytics Dashboard (Facebook Pages running ads);
- Monetisation Manager;
- Reference File Insights in Rights Manager;
- Brand Collabs Manager;
- Business Manager;
- Creator Studio;
- Metrics for Boosted Posts.

Together, these tools provide a significant amount of information to news media and other businesses at no cost to them.

The Facebook Business Tools allow publishers to implement sophisticated strategies to understand and measure their products on Facebook, and also to target content and advertising to users, without the need for individual user data.

This is in addition to the large amounts of data and insights that are available to news media businesses through other sources.

Many news media businesses themselves collect significant amounts of user data. As set out in the expert reports prepared by Professor Catherine Tucker — and provided to the ACCC as part of the Digital Platforms Inquiry process<sup>37</sup> — news media and other businesses can obtain a range of first, second and third-party data. They are not in any way hindered in their ability to obtain data and target content and advertising to news audiences. In fact, news publishers may have **more** data than Facebook about the use of their news content - given that they have publicly advised that they collect significant third party data about the consumption and performance of news content

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<sup>37</sup> C Tucker, *Submission to the ACCC's Digital Platforms Inquiry - News Referrals*, <https://www.accc.gov.au/system/files/Facebook%20Australia%20Submission%203%20%28April%202019%29.pdf>

on their own websites, where the most important data relating to news content is actually generated.<sup>38</sup>

#### A requirement to share up-to-date lists of available data

In the context of the considerable data that publishers already receive and acquire and given the insight from publishers during this code development process is that they are not fully utilising all datasets currently available to them, it is not appropriate for the code to include additional obligations for data sharing by platforms. There is no problem that the code needs to solve through additional data sharing by platforms, and such data sharing can be risky.

During the code development process, a suggestion was made that Facebook should be sharing more individual user data - personal information for the purposes of Australian privacy laws - with publishers. Sharing of user data with third parties raises significant privacy and data protection challenges. Privacy is — and should rightly be — a key limitation to the extent of any user data that Facebook provides to news media businesses, notwithstanding that some publishers may prefer to have this data.

Facebook does not provide the identifiable, personal information of our users to news media businesses that would be necessary for linking that data with their own individual level data because of the risk associated with sharing this kind of information with third parties. Data sharing practices should be consistent with users' privacy expectations. As Facebook's recent experience demonstrates, doing so in a manner that is not consistent with those expectations may be harmful to users and undermine trust in a platform. In light of these challenges, we have made very public commitments to our users to do better in protecting the privacy of our users, especially when it comes to sharing user data with third parties.

Any requirement that user data be shared with publishers is inconsistent with the transparent and user-centred approach to data protection that has been developed by Facebook and regulators globally.

We are therefore not in a position to provide personally identifiable information about our users to news media businesses under the code. While superficially attractive, we do not think that this can be addressed by providing news media businesses with some sort of hashed or pseudonymised user ID that is specific to a user. This is tantamount to providing personally identifiable information about those users, as it would enable the news media businesses to match the hashed or pseudonymised user IDs with other information in order to re-identify the relevant users. There are many examples that demonstrate the ability of data scientists doing this.

Privacy obligations and the expectations of our users are central to the provision of our service. However, we also recognise that both advertisers and content providers benefit from detailed aggregated and anonymised information about user engagement with their ads or content. We have listed above the kinds of tools that

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<sup>38</sup> News Corp, *2019 Annual Report*, <https://newscorpcom.files.wordpress.com/2019/10/news-corp-2019-annual-report.pdf>

give them a broad range of data that they can access, which will give them granular and useful information about their audiences – however we cannot and will not disclose who the specific users are. We expect that over time, we will be able to provide more sophisticated data analytical tools to our advertisers and content providers if there is a demand for them, and are happy to commit to ensuring that there is an up to date means for news media businesses to obtain information on the tools and data that is available to them.

Given the large amount of data and insights that Facebook already makes available to news media and other businesses, Facebook does not consider that there is any basis on which the code should specify minimum data-sharing obligations. This is both because Facebook already makes available a wide range of sophisticated tools, data and insights, and because these tools, data and insights are continually evolving. Our conversations with publishers have revealed there is generally low awareness or usage of the data we already make available, suggesting there is no need for a regulatory intervention to require any more sharing.

As our products evolve to meet the needs of the people and businesses that use them, the data and metrics that are available will naturally continue to evolve. It is in our business interest to ensure that anyone that chooses to share public content on our services has access to data about the performance and audience for their content, because that helps inform their own strategy and enables them to share relevant content for end users.

It is important that these developments are not jeopardised by seeking to entrench unnecessary requirements in the code, which could serve as a disincentive to innovate and develop new products.

As noted in the Concepts Paper<sup>39</sup>, some news media businesses—or people within news media businesses—may not be fully aware of the amount of user data already available to them. Moreover, Facebook also considers that there is a further role for us to play in educating news media businesses on the range of tools, data and insights that are available, potentially through the proposed Australian Digital News Council.

To assist with this objective, Facebook would not object to the code requiring digital platforms to maintain and provide news media businesses with an up-to-date list of the types of user data, insights and tools that are available to them. This could be made available in a section of our website dedicated to news publishers, which sets out all important developments relating to news on Facebook.

Finally, the Concepts Paper mooted the idea of the code covering data sharing in relation to ad tech services, Facebook does not agree that the code should extend to data related to the provision and effectiveness of ad tech services. This issue, together with others, is currently the subject of the ACCC's Digital Advertising Services Inquiry. It would be premature for any mandatory requirements to be introduced before the conclusion of that process.

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<sup>39</sup> Concepts Paper, page 16

## 4.0 Algorithmic curation of news

Facebook supports the proposal that we provide notice to news publishers of ranking changes made to our News Feed distribution algorithms that significantly impact news content. To ensure that this is workable, having regard to the very frequent and necessary changes to the News Feed distribution algorithms as well as the prioritisation of consumer preferences, we have proposed some new frameworks within which platforms such as Facebook can work with publishers on ranking changes and also continue to provide a relevant and personalised experience to Australians.

### Notice of ranking changes

By way of background, the distribution of content on Facebook is driven by personalisation. Facebook strives to surface to each user the content that is most relevant to him or her. To that end, Facebook prioritises serving users content from the sources they have expressly told Facebook they prefer: their Friends on the platform, the Pages they follow (including Pages from news publishers), and the Groups they join. On News Feed, the most-used product for engaging with content on Facebook, the ranking (*i.e.*, ordering) of content within each user's Feed is guided by additional values. First among them is we prioritise posts from friends and family over content from other sources. Facebook uses algorithms to help it distribute content to users and to rank content within users' Feeds in accordance with these principles.

As the Concepts Paper recognises, platforms like Facebook “make very frequent changes to their ranking and display algorithms, which vary from minor alterations to significant changes.”<sup>40</sup> We are constantly striving to improve our users' experience on our platform, which in turn requires us to constantly refine and iterate on our News Feed ranking algorithms. Given the sheer number of such changes, many of which are small in nature and effect, Facebook agrees with the ACCC that any obligation in the code to provide transparency about ranking changes “would need to include a threshold of significance.”<sup>41</sup>

The Concepts Paper solicited views on the appropriate definition of “significant.” In Facebook's view, a change should only be deemed to likely result in a significant impact when, using best efforts, Facebook reasonably predicts, based on data analysis of experimentation, that the ranking change will result in a change to overall “engagement with News Content” from the News Publishers by more than +/- (plus or minus) twenty (20) percent over a seven-day (7) period (the “Relevant Period”) relative to the seven-day (7) period directly preceding the Relevant Period. Engagement with News Content could be measured by either clicks on links on Facebook that bring a user to the website of a News Publisher or watch time of videos posted onto Facebook by News Publishers. A predicted 20% change in *either* metric would be considered “significant.”

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<sup>40</sup> Concepts Paper, page 19.

<sup>41</sup> Concepts Paper, page 19.

Before Facebook launches a ranking change, it can only predict likely impact. We may use small experiments to extrapolate what the impact might be for a given change. Because Facebook cannot know the actual impact of any given ranking change before implementing it, the code should only require platforms to make best efforts in predicting which changes will cross the threshold and to provide notice in good faith based on those efforts.

For significant ranking changes, Facebook has long believed that transparency and consultation with users and stakeholders is very important. As we have previously noted, consultation with key constituencies for our products, like news publishers, provides valuable perspective and benefits in relation to the development of significant ranking changes, especially those designed to protect the integrity of information on our platform. Not only does Facebook regularly engage with news publishers, for this and other purposes, we have an entire division dedicated to that specific work.

Further, Facebook ordinarily publishes blog posts in its Newsroom<sup>42</sup> about significant ranking changes it is implementing to provide insights into how those changes will work and why Facebook has pursued them. This practice, which dates back many years, provides publishers and other users more information about new ranking changes like those designed to address clickbait<sup>43</sup>, misinformation<sup>44</sup> or sensational health claims.<sup>45</sup>

In light of our practices around consultation and transparency, Facebook supports the ACCC's proposal that we should provide notice to news publishers of significant ranking changes made to its News Feed distribution algorithms. This notice should be provided to the public at-large, such as through a public blog post, and include information about the changes made, how they will operate, and why Facebook has pursued them. For competitive reasons, any required notice should be made very close in time to the implementation of the ranking change, which allows Facebook to provide increased transparency in the post. We agree with the ACCC that "requiring notification too far in advance may limit digital platforms' ability to implement algorithm changes that may benefit their users." To be clear, we do not consider that user choices, changes in user controls, and the users' ability to influence the content they see in their News Feed themselves constitute ranking changes and are outside the scope of our proposal.

In addition, the ACCC proposes applying this requirement only to Facebook and Google. Therefore, not only would a long notice period impede our ability to improve people's experiences, it would also put Facebook at a material competitive disadvantage. The vast majority of Facebook's ranking changes are global in scope. Between notice and implementation, myriad competitors around the world who are

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<sup>42</sup> Available at <https://about.fb.com/>

<sup>43</sup> K El-Arini and J Tang, *Click-baiting*, blog post published August 2014, <https://about.fb.com/news/2014/08/news-feed-fyi-click-baiting/>

<sup>44</sup> A Mosseri, *Working to Stop Misinformation*, April 2017, <https://www.facebook.com/facebookmedia/blog/working-to-stop-misinformation-and-false-news>

<sup>45</sup> T Yeh, *Addressing Sensational Health Plans*, July 2019, <https://about.fb.com/news/2019/07/addressing-sensational-health-claims/>



not subject to the code (listed earlier in this submission) would have the ability to move forward on a similar path immediately upon seeing Facebook’s notice.

In addition to the form of notice described above, in the spirit of providing news publishers with substantial transparency, Facebook could provide a high-level overview of anticipated and recently implemented ranking changes as part of the semi-regular convenings (approximately bi-annually) of a possible Australian Digital News Council.

Finally, as the ACCC recognised, to the extent the code requires any type of advance notice of significant ranking changes, such a provision should have an exception for changes made on an “urgent” basis. Ranking changes falling under this exception would be made to immediately benefit users, usually in response to quickly evolving circumstances. For example, Facebook made numerous ranking changes in response to the COVID-19 pandemic to help users find higher-quality information about the disease and governments’ responses. Platforms would be held to a good-faith standard in using this exception, requiring a reasonable belief that the ranking change is “urgent.”

#### Prioritisation of original news content and respect for paywalls

The Concepts Paper further seeks guidance on the question of whether digital platforms should be required to algorithmically identify and uprank “original” news content. Facebook believes that any such requirement would be misplaced. Among other things, a code provision requiring the development of this form of ranking change would be technically complex or even infeasible and transgress Facebook’s principles of developing ranking changes in response to demonstrated user needs and interests, not external mandates.

The ACCC acknowledges that the “originality of news content may be difficult to establish.” That statement significantly undersells the complexity and uncertainty around such a requirement. Whether machine-learning models can identify a single original source for each news event is an open question. Facebook has invested time and effort into answering that very question, but as of today it is not clear that algorithms can accomplish this complicated task. It would be inappropriate to impose a legal requirement on Facebook without any certainty that compliance is possible.

Although the Concepts Paper proposes that News Publishers could simply identify their own content as “original,” this proposal is also problematic. For one, the Concepts Paper suggests that a “publisher-identified” system of identifying originality would need to be policed in some way, which could only mean policed by digital platforms themselves. However, a platform could no more police the overuse of such a label than it could identify each “original” source on its own in the first place.

Moreover, if a “publisher-identified” system could not be policed in any meaningful way, it stands to reason that the label would be overused, even if in well-intentioned ways. Flooding a ranking algorithm with content labelled “original” that must be given some unidentified ranking boost would skew our ability to actually deliver users the

content that is most relevant to them in their News Feeds, one of the core services Facebook provides.

In addition, Facebook develops ranking changes based on extensive user research, technical research, and external engagement across a broad range of global stakeholders, including publishers, civil society organisations, thought leaders in specialised areas such as health, news, free expression, online safety, advocacy organisations, and academics. The changes that move forward are intended to deliver identified user value or otherwise respond to user needs. Facebook submits that it would be inappropriate, and set a troubling precedent, for outside authorities to demand specific ranking changes, fundamentally altering our ranking iteration process.

We implement ranking changes designed to incentivise publishers to create the kind of high-quality content our users most enjoy. These efforts include algorithmically identifying and reducing the distribution of clearly unoriginal content, as well as demonetising such content in Instant Articles.<sup>46</sup> Although the task of identifying repurposed content is more technically feasible than the task identifying the single original source of content, Facebook continues to pursue opportunities to algorithmically identify and elevate original content. (That said, we outline in Section 5.0 the other tools we have available to support quality news.)

Finally, the ACCC inquires about Facebook's treatment of publisher content that is behind a paywall. Our position is clear: Facebook fully respects publishers' paywalls everywhere on our platform. We recognise that publishers make different choices about how best to monetise their content and we support whatever choice they make.<sup>47</sup> As the Concepts Paper alludes, because ranking algorithms are personalised, content a user ordinarily spends meaningful time with is likely to be ranked higher than content from a source with which the user does not engage. If some users choose not to subscribe to paywalled content, it is possible that over time that content would not be ranked as high as content from publishers with which the user regularly engages. However, the content from the paywalled publisher would be treated no less favourably than free content from any publisher with which the user does not normally engage.

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<sup>46</sup> Facebook, *People, Publishers, the Community*, blog posted published April 2019, <https://about.fb.com/news/2019/04/people-publishers-the-community/>

<sup>47</sup> Facebook, *Facebook News*, <https://www.facebook.com/news/howitworks>

## 5.0 Display and presentation of news

How our products and services appear to users is fundamental to our business, but news media business have a significant level of control over how news is displayed

As the ACCC acknowledges in the Concepts Paper, digital platforms “have a legitimate interest in carefully calibrating the look and feel of content displayed on their services, in order to preserve the usability of these services for consumers.”<sup>48</sup> Decisions about how news is presented and displayed on our platform are no different in principle to how we decide other content should be presented and displayed. This is a core decision that is fundamental to our product offerings, their usability, look and feel, and how we optimise them for engagement with our users. These legitimate business interests are no different to any news media business deciding how it wishes to present and display content on its website and in its print publications.

We devote significant resources and efforts to innovate and constantly improve the user experience of our services. The enormous work that we undertake to determine how to present content also benefits publishers: no one benefits if Australian users do not find content on Facebook to be engaging.

How content is presented on Facebook is also greatly influenced by the device that the content is shown on, as there are user interface limitations based on the character set and screen width of the device which will affect the amount of text, title, article preview, and image that can be displayed.

However, within the constraints of the overall presentation of content on Facebook described above, publishers have significant control over how their news content is displayed and presented. This control is given through our Open Graph markup language which enables publishers to optimise web-hosted content that people share to Facebook, regardless of whether it's shared from the desktop or mobile web or a mobile app. Marking up websites with Open Graph tags enables publishers to take control over how their content appears on Facebook. Here's an example of content formatted with Open Graph tags for optimal display on Facebook:

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<sup>48</sup> Concepts Paper, page 24.



We also make available tools such as Sharing Debugger that enables publishers to troubleshoot issues with how links to their content are presented on Facebook.<sup>49</sup>

Like other platforms, over time, we experiment with the format and experience of our products and modify to that format and experience for a variety of reasons, some of which may change how news content is presented and displayed. We expect that many changes that we may make would in fact improve the presentation of news content. It is clearly in our business interests to present all content in a way that is as engaging and attractive as possible for users. These improvements may relate to the way we present thumbnails and headlines relating to news (and other) content, and should not raise concerns on the part of news media publishers.

However, as explained above, where we make significant changes to the distribution or display of content, including news content, our practice has been to consult with stakeholders to improve whatever changes we may ultimately make. News publishers have been and will continue to be one of our core stakeholders for this form of engagement, especially for changes likely to impact news content.

Facebook is working to promote news publishers and high-quality journalism, including by innovating with local publishers on the display and presentation of news content on the platform

Facebook is working to promote news publishers generally and quality journalism specifically. Facebook has rolled out significant innovations in the display and presentation of news for Australia over the past 18 months, based on direct feedback and testing with local publishers (among many others), including:

- **Breaking News** indicators to help people easily identify timely news or urgent stories, which has delivered a significant boost to publishers' engagement metrics.

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<sup>49</sup> Further information on Open Graph Markup and associated tools are available at <https://developers.facebook.com/docs/sharing/webmasters/>

- **Context buttons** that people can use to find out more information on the publishers behind the links that appear in News Feed (which clearly indicate publisher names). These help people to be better informed about what to read, trust and share and also help publishers build their brand and grow their audiences on the platform.
- **Instant Articles**, a native Facebook format, allows readers to load articles at lightning speed and helps publishers leverage Facebook’s state-of-the-art infrastructure to serve their content, while still maintaining control of the reading experience with prominent publisher logos and design customisation options so readers still recognise the source of news. Publishers can monetise Instant Articles using Facebook’s programmatic ad platform (Audience Network) or serve their own ads (direct sold). 100% of the revenue from direct sold publishing goes to the publisher and Facebook maintains an industry standard revenue sharing model and rate for publishers using Audience Network. Publishers have access to analytics and data on Instant Article views and aggregated demographic data of people who consume their content.
- **Search results** on Facebook prominently display publisher logos and names.
- **Subscriptions:** Facebook has built a native paywall tool to help support the business models of publishers that rely on subscriptions. When readers have reached the limit of free articles set by the publisher, Facebook displays a native paywall that prominently displays the publisher logo, subscription benefits and prices. 100% of this native paywall revenue goes to the publisher and publishers fully own the relationship and control the data of their subscribers who’ve signed up through our platform. When readers decide to subscribe to a publisher, Facebook displays a Welcome Screen to prompt if they would like to see more content from the publisher and whether they would like to follow the publisher’s Facebook Page. The welcome screen has increased the percentage of new subscribers who follow the publisher’s page from 54 to 94%, helping publishers grow their audience. This has also increased the articles read by subscribers on Facebook by 40%.
- **Video:** News publishers also have control over how their videos are displayed. We allow publishers the option of customising the thumbnail images of their video so they can better display their brand or the subject matter of their video. Publishers can also monetise their video content using Facebook’s In-stream Ads, which will place short ads before, during or after their video content.
- **Monetisation products:** In addition, Facebook offers a variety of products to help publishers monetise their content on and off the platform. These products include Instant Articles that allow publishers to serve their own advertising and receive 100% of the revenue, subscription support that delivers 100% of revenue to publishers, Audience Network that helps publishers monetise their content through effective targeting, and In-Stream Ads that allow publishers to earn money from their video content.

## There are important controls over advertising directly associated with news

News media publishers have different levels of control over advertising associated with their news content, depending on how that news content is made available on Facebook.

- **Video:** News media publishers who meet basic eligibility requirements can use In-Stream ads. Publishers have extensive controls over In-Stream Ads placed before, during or after their video content on Facebook pages. They can manage this through Facebook Creator Studio and can place ads in specific videos (including where in the video ads should be placed), or enable ads for all videos on a Facebook Page. Publishers can also create “block lists”, which prevent certain advertisers, categories of advertisers or competitors from appearing within or around their video content. As with all Facebook products and services, there are some requirements that we impose in order to maintain user experience and engagement on Facebook. We balance that against a content owner’s desire to maximise their advertising opportunities and revenue. At any point in time, the rules that we establish (for example, that video content should be at least 3 minutes long and that there must be at least 120 seconds between ads) reflect our judgement as to what best achieves that balance – it is in no one’s interest if video content contains so much advertising that a user either stops viewing that content or stops using Facebook altogether.
- **Instant Articles:** For this reason, we also have limits on what can be done in news articles published in Instant Articles (for example, that ads must not exceed 15% of the content in an Instant Article that consists primarily of images or media). However, within these parameters, news media businesses have significant flexibility to sell and serve their own rich-media and display ads including banner ads, video ads (click to play or sound off), and animated ads containing HTML, Javascript or CSS -- provided the ads do not expand, collapse or block any content.
- **M-web links:** For articles published using mobile web links, once a user clicks through from Facebook to the news media businesses’ own website, the news media business will also have complete control over the advertising that is then presented to users.
- In **News Feed**, we do not treat news content differently to other content on Facebook in terms of the advertising inventory that may appear within or in close proximity to the news content. However, if news media publishers are concerned about the kinds of ads that could be placed within or in close proximity to their news content, they can take comfort from our Ads Policies, which govern the kinds of advertising that can appear on Facebook.<sup>50</sup> We put these policies in place to better protect our community; prohibit the placement of certain types of ads (for example, ads that promote illegal activities, encourage discrimination, or promote deceptive practices); restrict or control

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<sup>50</sup> Facebook, *Advertising Policies*, <https://www.facebook.com/policies/ads/>



the way ads for certain products or services are placed, such as to ensure compliance with local laws; and protect the privacy of our users or our legitimate business interests.

We understand from the Concepts Paper that news media businesses may have some concerns about their ability to limit the visibility to users (and therefore value to sponsors) of sponsored content. However, we would have very real concerns if this were to mean that news media businesses would have the ability to publish sponsored content in a way that is not clear or misleads users into believing that the content is not sponsored. One of our fundamental design principles is to employ standardised formats to help reduce cognitive load for our users. In the case of sponsored content, we spend a lot of time and effort developing formats that clearly indicate to users when content is sponsored and when it is not. It is not helpful to users and puts us at risk if individual content providers could adopt different means of identifying sponsored content that ultimately lead to confusion among our users.

Our policies and procedures around how news media businesses can create sponsored content (or as we term it, Branded Content) are clear.<sup>51</sup> Our rules essentially require that branded content be tagged with a “Paid Partnership” label so that users understand that the content features or is influenced by a business partner for an exchange of value. Our Branded Content policies<sup>52</sup> also prohibit certain interruptive branded content types that cannot be included within published posts on Facebook pages. These include banner ads, interstitial cards (in the first 3 seconds of video content or at the beginning, middle or end of a Facebook story), and roll ads before, during and after the content.

We do this because:

- Facebook Pages are not intended to function as advertising platforms in themselves, but as a means for users and businesses to communicate and engage with each other; and
- the prohibited forms of advertising adversely affect and interrupt the user experience on Facebook and the Facebook advertising products and solutions that we do offer (*e.g.*, Facebook In-stream Ads and Instant Articles). News media businesses that wish to monetise their content on the Facebook platform can do so through those products.

We do not think it is appropriate for news media businesses to have a different or greater level of control over in-content advertising than other content creators. If digital platforms were to advertise with a news publisher, they would be expected to conform to the advertising policies, formats and restrictions of that publisher, just as any advertiser would.

As a platform, we strive for consistent treatment of all content providers. This is particularly the case as:

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<sup>51</sup> Facebook, *Branded Content*, <https://www.facebook.com/facebookmedia/solutions/branded-content>

<sup>52</sup> Facebook, *Branded Content That Is Not Allowed In A Public Post*, [https://www.facebook.com/business/help/1190980254246452?recommended\\_by=1859041471004169#](https://www.facebook.com/business/help/1190980254246452?recommended_by=1859041471004169#)



- the nature and extent of advertising is not directly linked to journalistic integrity or quality.
- it is not clear why news media business should be treated differently to other kinds of businesses or content creators that also use advertising in ways that support public policy goals, including political figures, government agencies, charities, public health organisations, or education service providers.

## 6.0 Facilitating open communication between digital platforms and news businesses

We support the ACCC's focus on measures to facilitate open communication between digital platforms and news publishers. As highlighted earlier in our submission, we believe a workable code would set the right framework that facilitates genuine partnership to promote innovation and collaboration between platforms and publishers.

We have made one proposal that could assist in this respect: the establishment of a cooperative and representative Australian Digital News Council to air and mediate complaints and concerns from publishers (inspired by the Australian Press Council as a model). We believe this body should include balanced representation of news publishers and digital platforms, and bring these parties together in a spirit of collaboration. It would provide a clear forum for publishers to raise and resolve concerns, and an identified point of contact from Facebook for any queries from publishers.

The establishment of an Australian Digital News Council could be a welcome complement to the steps we have recently taken to provide robust support for news publishers, including teams and points of contact located within Australia. This support is outlined in more detail below.

Facebook offers robust support for news organisations via dedicated online resources and in-person engagement.

**In Person Engagement:** Our News Partnerships team provides news organisations with support to help them reach their strategic business goals. Our team has direct and regular contact with all the major -- and many of the smaller -- publishers and broadcasters in Australia. These individual contacts number in the several hundreds, and include multiple touchpoints within each news organisation, from social teams to CEO and executive engagement.

During the past 24 months, the Facebook team in Sydney servicing news partners has grown threefold and, in 2020, will include dedicated technical and partner solution staff for news based in Australia. The team is constantly reviewing its partnership engagements and meeting new publishers as they emerge. In addition to the people based locally, news partners are also supported by a large number of support, operational, product and engineering teams based in Singapore and the US.

All partners should be aware of the contact details of our news partnerships team to escalate issues that require bespoke support from the Australian team, or Facebook experts from elsewhere around the region or the globe.

We have not been privy to feedback from news organisations about the lack of availability of contacts at Facebook to consult on news issues. It would be helpful if the ACCC could supply examples relevant to Facebook so we can investigate further and seek to remedy any legitimate communication gaps.

In addition to the in-person strategic support of our news partnership team, Australian publishers have access to online resources, training and product. Publishers get support from Facebook news partnerships with online resources and training and product support. Our news partnerships team regularly supports industry events as well as host in-person meetings. In addition, we have built a collection of resources for our partners to provide information about best practices to optimise on Facebook.

To ensure that Facebook's news partners have efficient resolution of questions and operational issues, Facebook has a number of resources available to our partners to get access to information about our products. These resources are designed so that publishers can access independently, as they need.

#### **Online Resources:**

- **Facebook Media Support Portal** provides publishers access to technical support and best practice information for managing their Facebook and Instagram accounts. It includes answers to some of the most frequently asked questions. Partners have the ability to submit requests for technical support, including on the following common issues:
  - Apply for verification
  - Account Security and Access
  - Account Changes
  - Monetisation Appeals
  - Product Support and Bugs
  - Ad Manager Support
  
- **Creator Studio** brings together all the tools publishers need to effectively post, manage, monetise and measure content across their Facebook Pages and Instagram accounts. Creator Studio also provides information on new features including monetisation opportunities. Anyone who manages a publisher page can use Creator Studio and gain access to insights about their audience including performance of their video content such as minutes viewed, engagement helping them curate content for their audience and increasing their monetisation opportunities.
  
- **Facebook Journalism Project Website, Newsletter and Facebook Page:** The Facebook Journalism Project website and newsletter provides updates on the latest features and product launches, including case studies from around the world. This is also where we share details on our local and international partnerships to support news organisations and application information for related grants and program opportunities.
  
- **Online Training Resources:**
  - Everyone is able to access our [Blueprint training](#) to learn about digital marketing, improve skills and receive industry certification.
  - Facebook offers online courses where journalists can learn how to use Facebook tooling to meet their business needs.
  - Facebook provides free online training to partners via webinars. Facebook has responded to the limitations on in person engagement

during the COVID-19 pandemic by increasing opportunities for digital learning, focused on best practices and new products and features.

- **In-product notifications on Facebook:** These are shown to administrators of news organisation's pages when a relevant feature or product is launched
- **Facebook Page Quality Tab:** The Page Quality Tab is designed to help people who manage Pages understand how well their Pages comply with our policies. Failure to adhere to these policies, such as our Community Standards, may result in content being removed or having its distribution reduced. Facebook communicates about certain actions taken on content posted by Pages that may impact a publisher's performance via the Page Quality Tab:
  - Recent Community Standards violations.
  - Content shared by a Page that's been rated false by third-party fact-checkers.
  - Intellectual property rights violations.
  - Content shared by a Page that's been identified as clickbait.
  - Removal of Events.
  - Job postings shared by a Page that have been identified as misleading, deceptive or fraudulent.

### Enforcement of the code

While we recognise the commitments in the code need to be accompanied by enforcement mechanisms, we believe that enforcement should - as with the frameworks to govern commercial agreements - enhance collaboration between platforms and publishers. These would be best achieved through the appointment of a code compliance manager and single point of contact to handle complaints, and reliance on existing regulatory enforcement powers, rather than the imposition of arbitration requirements, infringement notices or other measures that would complicate the development of commercial relationships and potentially promote forum shopping for complaints (or other issues that should essentially be matters for commercial discussion and non-adversarial resolution)

Key goals for any dispute resolution or enforcement mechanisms should be simplicity and certainty. Obligations should be clear, so that all parties have certainty and confidence that the code facilitates commercial arrangements without frequently resulting in dispute resolution. Processes for ensuring compliance should also be as simple as possible.

As reflected in the Concepts Paper<sup>53</sup>, it would not achieve the objectives of the code if the enforcement mechanisms or other obligations meant it was too hard for mutually beneficial bargains to be struck or if it ultimately created incentives for digital platforms to reduce or remove the amount of news content they serve in Australia.

Fundamentally, Facebook does not support the imposition of monetary penalties as a means of governing commercial relationships. The imposition of penalties is very

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<sup>53</sup> Concepts Paper, page 28.

unlikely to meet the objective of facilitating genuine commercial relationships and agreements and may in fact impede the creation of relevant commercial arrangements designed to bring value to publishers, consumers and Facebook. Through Facebook's investment in the news ecosystem, we work alongside the publishing industry to support their innovation to adapt to our increasingly digitised society and economy. Dispute resolution frameworks that incentivise contentious or uncooperative behaviour, resulting in an over reliance on dispute resolution, will ultimately undermine solutions that support sustainable journalism.

The process for negotiating and entering into commercial agreements should be governed by the framework set out in Section 4.0, not a penalty and regulatory enforcement regime. It is clearly not appropriate for any party to be subject to penalties simply because they do not reach an agreement with another party. First, it takes two parties to reach any agreement. And, second, each party should clearly be entitled to consider their own commercial position and interests without threat of monetary sanctions.

In addition, while the code is also likely to carry other obligations (for example, commitments on algorithmic transparency and data), these obligations do not need to be enforced through monetary penalties. This is particularly the case when there are other means of ensuring and creating incentives for compliance, as demonstrated by the range of existing codes in important sectors (for example, the bulk wheat code, the oil code, the unit pricing code and the sugar code) that do not carry monetary penalties for any breach. There is no evidence of a heightened level of breaches of those codes as a result of them not carrying potential monetary penalties.

The code development process is - in and of itself - a key mechanism to drive outcomes. The code will be public, will be subject to extensive oversight by the ACCC, and a number of very large and sophisticated news media businesses that have been vocal in relation to their concerns. This will put enormous pressure on all parties impacted by the code to comply and drive to the outcomes and objectives outlined in it. The code will regulate the commercial dealings between some of the largest media companies in Australia, and in some cases globally. While this makes it an outlier compared to other codes of conduct administered by the ACCC, it is clear that the parties to the code will be well-able to monitor performance and identify and place significant focus on any concerns with compliance.

Facebook agrees that there is value in appointing a code compliance manager, and a single point of contact to address complaints. We also see value in facilitating discussion or mediation with news media businesses if there is concern about a potential breach of the code, for example through the Australian Digital News Council.

However, Facebook does not support the imposition of additional formal dispute resolution and punitive models such as arbitration requirements, infringement notices or other measures that would complicate the development of commercial relationships and potentially promote forum shopping for complaints (or other issues that should essentially be matters for commercial discussion and non-adversarial resolution)

There is also no need for further ACCC powers or avenues of complaint for news media businesses. If the code is implemented under section 51AE of CCA, there are already effective mechanisms to ensure compliance. News media businesses already have an ability to seek injunctions or compensation if they genuinely suffer loss as a result of a breach, and the ACCC already has substantial powers to investigate potential breaches.

A number of codes also contain clear reporting obligations, rather than intrusive compliance audit requirements. This is preferable for both the parties involved, and we expect, the regulator charged with oversight.

## 7.0 Review of the bargaining code

Facebook agrees that the code should include a mechanism for frequent review. The purpose of these reviews should be to ensure that the code continues to be fit for purpose, and promotes competition and ultimately outcomes that benefit Australian consumers.

As mentioned earlier, the environment in which Facebook and news media businesses operate is rapidly changing. There are constant technological developments and innovations, which drive not only changes in the way that Facebook and new media businesses offer services, but also fundamental changes in the way that people consume information and engage with content. Most changes are consumer-led, with companies and their business models rapidly evolving to keep pace with consumer demands, innovations and competitive pressures.

It is critical that the code supports—and does not inadvertently entrench regulatory settings that hinder—the provision of significant demonstrable benefits to Australian consumers.

Given the dynamic environment in which the code will operate, Facebook believes the ACCC should use the Digital Platforms Services Inquiry to identify how similar code obligations should be extended to digital platforms that display or distribute news content, in order to reduce the clear risk of distortions to competition and the creation of an uneven playing field.

There should be a further and more wide-ranging review initiated within two years of the code commencing -- to be completed within a six month period. If the code continues following this review, there should be further periodic reviews each two or three years to ensure that the costs of the code to Australian consumers and to the economy do not outweigh any benefits.

Facebook considers that each substantive review should be undertaken by a highly regarded independent body – preferably the Productivity Commission given its independence, economy-wide experience, and expertise in analysing economic benefits for Australia and the costs and benefits of regulation.

The reviews should provide an opportunity for a wide range of stakeholders to provide feedback, with the code specifying key issues for consideration. These issues should include at a minimum:

- the success or otherwise of the code in achieving its objectives during the previous period;
- any changes to the competitive environment in which digital platforms and news media businesses operate, including changes in technology, changes to the production and distribution of news content, the entry and expansion of market participants and other developments in Australia and globally;
- the effectiveness of the code in facilitating commercial agreements between digital platforms and news media businesses, including whether the code or alternative mechanisms are necessary to facilitate effective commercial agreements;



- the effectiveness of the code in facilitating transparency in relation to the placement of news content on digital platforms, including whether the code or alternative mechanisms in Australia are required to facilitate such transparency;
- opportunities for de-regulation, including whether or not the Code should be revoked, or amended to better facilitate the objectives of the code and reduce regulatory costs – there should not be any presumption that the code will continue;
- if the code continues, whether it should apply to other digital platforms to reduce any competitive distortions; and
- the legitimate interests of all relevant stakeholders – digital platforms, news media businesses and, importantly, consumers.