

**Submission from the Journalism Education & Research Association of Australia (JERAA)  
to the Australian Competition and Consumer Commission (ACCC)  
on the mandatory bargaining code between news media and digital platforms**

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The Journalism Education and Research Association of Australia Incorporated (JERAA Inc.) is the peak body of Australian journalism educators and researchers from tertiary education and industry organisations. JERAA's primary aim is to raise the standard of teaching and training in journalism in order to foster excellence and integrity in the future generation of journalism practitioners. JERAA also supports research, with the understanding that research can help communities to identify trends and issues, resolve problems, and promote or celebrate excellence in journalism and journalism education. JERAA runs annual awards and grants for journalism researchers and journalism students to recognise and encourage quality in journalism research, study and practice. This submission has been written on behalf of JERAA's executive by Vice President (Networks), Assoc Prof Angela Romano, with advice from the Association's President Alexandra Wake. The submission addresses four consultation topics that are germane to the Association's work.

## **1. Definition of news to be covered by the code**

There are varied definitions of journalism. Even among scholars whose occupation is to study journalism, there is no complete consensus (Shapiro, 2014). Definitions of journalism necessarily shift with time, as conceptualisations of journalism change due to new issues being raised by social, political and technological developments. Part of the challenge of defining journalism is that it is more than just a product. As Erin Carroll (2020) notes, "it is a method and a practice — an evolving system for gathering, curating, and conveying information. Among its aims are accuracy and truth, the checking of power, and the creation of spaces for criticism and compromise. Journalism realizes these aims through the use of certain tools. These include verification using multiple sources, interviewing those with first-hand knowledge, and correction of errors."

JERAA proposes that the bargaining code should not use the term 'news' for purposes of the bargaining code but should refer to 'journalistic reporting', which will include four essential characteristics:

- Journalistic reporting involves independent, systematic identification, investigation, verification, scrutiny and analysis of current events, issues, social trends, significant actors or elements of community life, and matters of public significance to create evidence-based reports or other journalistic works in words, audio, images, visuals, multimedia or emerging formats.<sup>1</sup>
- Journalistic reporting involves creation and/or editing of substantively original works, and not reproductions or curations as offered by news aggregators.

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<sup>1</sup> This definition has been distilled from definitions of journalism drawn from a number of sources, most particularly Kovach and Rosenstiel, 2014; Romano, 2010; Shapiro, 2010, 2014; and Zelizer and Allan, 2010.

- The creators of journalistic reports must be subject to ethical codes that are set by their own news media organisation or a body that oversees professional self-regulation, such as the Media, Entertainment and Arts Alliance.
- The organisations that produce journalistic reporting must be accountable to industry codes of practice, advisory guidelines, and regulatory standards that are defined and/or adjudicated by relevant regulatory, self-regulatory and statutory authorities such as the Australian Press Council, the Independent Media Council, and Australian Communications and Media Authority.

Journalistic reports as defined above include a range of genres. The news and current affairs genres are considered the hallmarks of journalistic practice, however, other genres are also central to journalistic reporting, such as feature writing and human-interest journalism; investigative reporting; analytical, evidence-based editorials, columns and opinion pieces; and fact-based reviews. Public relations, corporate communications, review services (such as TripAdvisor, Zomato and Yelp) and many other informational services often adopt the aesthetics and formats of journalism, but they rarely display the full range of attributes of journalistic reporting as outlined above, and their producers are not subject to the same standards of the ethical and professional accountability. For the purposes of this bargaining code, news media organisations should be considered to include commercial media organisations, publicly funded organisations and community-based organisations.

## **2. Establishing an effective bargaining framework**

There is substantial disparity between digital platforms and news media organisations in terms of their bargaining power. When the European experience is taken into account, it is difficult to see how such imbalances can be addressed through bilateral negotiation between digital media platforms and individual news media businesses or even collective bargaining between platforms and the combined forces of multiple news media industry entities in a smaller nation such as Australia.

In Spain, the national Congress approved an Intellectual Property Law, also known as a ‘link law’, in October 2014 that requires online aggregators to pay a copyright fee from January 2015 for linking to content created by newspapers and other publishers. Google News promptly shut down its service in the country, claiming the action was a necessary response to the new law.

This legislation requires every Spanish publication to charge services like Google News for showing even the smallest snippet from their publications, whether they want to or not. As Google News itself makes no money (we do not show any advertising on the site) this new approach was not sustainable.

We remain committed to helping the news industry meet challenges and look forward to continuing to work with our thousands of partners globally, as well as in Spain, to help them increase their online readership and revenues. (Google, 2014)

The European Union has adopted a new Copyright Directive, with Article 15 of this law establishing a ‘Publishers’ Right’ that protects EU publishers against unauthorized uses of their content by online

platforms. Specialist in law and creativity in the digital environment Joanne Gray notes that European news organisations and governments have placed intense pressure on Google News, and the EU directive is the most vigorous action taken to date to remunerate press publishers in Europe. She finds that its clauses are sufficiently rubbery to leave the determination of how these new rights and regulations work in practice to negotiations by industry actors (Gray, 2020, pp. 113-115).

[G]iven Google's history with the policy in other markets and its approach to Google News in Europe generally, it is reasonable to have doubts about the policy's potential efficacy, at least as applied to Google.... Google's ability to resist the application of laws not in its interest—and its ability to compel rightsholders to work within its system—reveal Google's impressive capacity to influence copyright in practice, even in the face of great economic and political hostility. Evidently, Google's unwavering faith in innovation, along with its deep pockets and technical prowess, give Google the ability to turn adversary into business partner. (Gray, 2020, pp. 113-114)

Gray goes so far as to describe Google as an 'apex predator' (2020, p. 130), cross-referencing to research by a University of California Berkeley and Columbia University team that found Google employs a combination of legal, technological and other actions to dominate the establishment of industry norms and collective perceptions of good practice (Urban, Karaganis & Schofield, 2017).

France became the first European country to ratify the new EU link law in 2019. Under the law's copyright protections for news media content that is used on websites such as search engines or social media platforms, Google should have been required to pay publishers for displaying snippets of their news story. After the law's passage, Google announced that it would only display previews and thumbnail images from any European news stories displayed in France if publishers agree to provide them for free. If the publishers declined, only a headline and a bare link to the content would appear, thus potentially impacting on the story's visibility and the news media organisation's potential to earn advertising income. In a follow up response, France's competition regulator ordered Google in April 2020 to negotiate in good faith with news media organisations to pay them display snippets on its news, search and discovery pages (Lomas, 2020).

Recognising that Australia is a comparatively small news media market compared to Europe, it is questionable as to how bargaining would work in practice. Even if collective bargaining was to provide Australian news media entities with sufficient weight to negotiate on a mutually agreeable playing field with digital media platforms, there remains a major power imbalance between Australian news media giants such as News Corp Australia or Nine Entertainment Co. in relation to smaller media groups and independent news media organisations. Such an imbalance even exists within news media giants, as is evidenced in the greater decision-making power and influence of leaders of the big-city news media organisation compared to their smaller stablemates in local and regional news organisations. The patterns of the pre-internet era, in which a small number of news media organisations dominate the overall media ecology continue in the digital media age, with the same companies generally continuing to dominate the vast majority of the digital news content market (Hindman, 2009). *New York Times* CEO Mark Thompson argues that national news organisations may actually profit in the short term from the closure of local news media, as 'the

survivors could enjoy a kind of last-men-and-women-standing sort of benefit for a bit' (Doctor, 2017). If bargaining is to occur between digital media platforms and a collective of news media organisations, mechanisms will need to be established to ensure that the perspectives of large groups do not become overly dominant, and smaller entities are not pushed to waive their own claims and interests for the sake of a common good.

A range of alternatives have been proposed in many countries as an alternative to bargaining. Some scholars advocate that firms should pay a nominal 'public media tax' on 1 per cent of their earnings (Pickard, 2019, p. 171). Another suggestion is to treat platforms as 'information fiduciaries' (Balkin & Zittrain 2016) or to establish a legal obligation to engage in a 'duty of care' based on legal obligations such as harm prevention, risk assessment, and public accountability (UK Dept for Digital, Culture, Media and Sport & the Home Office, 2019; Tambini, 2019). There are also proposals for establishing a new social-media regulatory agency (Feld 2019) or a social media council (Tworek 2019). There are further recommendations that aggregate user data, which platforms rely upon, should be treated as a public resource in the same way that broadcast spectrum is, so that public interest regulations will apply (Napoli 2019). In its submission and Appendix to the 2017 Senate Select Committee on the Future of Public Interest Journalism, JERAA pointed to multiple ways in which governments could use revenue gained through a tax or similar system to support journalism, particularly public interest journalism, without compromising the objectivity of news media organisations.

### **3. Prioritising original news content**

JERAA strongly supports a prioritisation of original news content in the bargaining code. The term 'original' refers specifically to journalism that involves endeavour from reporters and editorial teams in initiating new ideas, investigation, verification, and imaginative storytelling of stories that are resonant for the communities that the media serve. Such stories will sometimes be 'breaking news', but more often they will provide new information, voices, insights and understandings about personalities, issues or events that are to some degree already known or creatively extend known information to new audiences by recrafting them to use different media forms or to appeal to different demographics. The originality of the content cannot be considered in isolation of its value.

In considering an effective bargaining framework, the *Mandatory News Media Bargaining Code: Concepts Paper* refers to the value of the news that news media platforms obtain from the media businesses. The *Digital Platforms Inquiry Final Report* defines public interest journalism as "journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government". The ACCC is correct when it states in the *Mandatory News Media Bargaining Code: Concepts Paper* notes the particular value of this type of journalism to society, the definition of public interest journalism is too narrow to form the basis of the definition of journalism within the bargaining code.

The definition of journalism must be broader, and so too must journalism's valuation. Playwright Arthur Miller famously expressed the concept that a good newspaper is 'a nation talking to itself', and in the 21<sup>st</sup> century, this concept extends to forms of news media undreamt of in Miller's heyday.

Journalism is the means to providing ‘independent, reliable, accurate and comprehensive information that citizens require in order to make sense of the world around them’ (Kovach and Rosenstiel, 2014, p. 4). The ‘issues of public significance’ do not just relate to the major centres of political, business or other forms of power, but also to the smaller stories that keep communities connected through updates and insights about events and activities within their community, the character of people and places in their community, and challenges and concerns that affect everyday life. Journalism of this nature can be considered “social glue” that strengthens communal identity, bridges across and bonding within groups, and social cohesion. Smaller media organisations that serve local communities might thus have disproportionate significance to their size because of the way that they connect people across physical and digital spaces in both public and private domains (Hess, 2015). In common with investigative or issues based reporting that is expensive due to the labour time and resources involved in investigative reporting is clear, this type of reporting can also come at an increased cost due to the extra effort involved in moving away from the pulse-points of business, government and bureaucratic power where news regularly breaks and instead spending time to learn about community leaders, the spaces where people gather to talk about issues that concern them, and emerging issues. The costs increase even further when reporting on local, regional, rural, remote and lower socio-economic communities; ethnic or religious minorities; people with disabilities; and other communities in which people may be minorities or marginalised.

Infotainment and reportage on entertainment, sports and other ‘lighter’ matter often has less public interest value but still must be considered within a ‘package’ of journalistic reporting. Reporting on sport, fashion, film, arts and other matters also contribute in varying degrees to shared community identity and belonging, while also contributing indirect benefits to reporting on politics, health, business, education and other social matters. Easy-to-produce stories about popular or ‘light’ topics regularly provide the income that cross-subsidises more expensive investigative or analytical reporting within news media organisations and between news media organisations in the same media company. Stories about popular and ‘light’ topics can also be magnets that attract audiences, and once they are drawn to a particular media organisation’s service, they may linger to read, listen to, view or click on ‘weightier’ public interest stories that surround the initial story that attracted their attention. The loss of audience share for such popular fare through the wholesale copying of journalist reports by digital media platforms and their subsidiaries thus damages the revenue streams that support public-interest journalism.

The urgency for a bargaining code that recognises both originality and value is underscored by the way in which the social and commercial value of original journalism has undergone massive upheaval since the declaration of the CoVID-19 pandemic. Numerous polls in recent months indicate that Australians’ level of trust in and use of the news media has increased substantively since the declaration on March 11 (e.g., Carson, Ruppner and Ratcliffe, 2020; Farr, 2020; Park et al., 2020). Australian society has benefited enormously from the value of news media’s costly investigations and fact-checking of the “infodemic” of muddled facts and disinformation about the spread, impact of and response to CoVID-10, and the craftsmanship involved in fashioning the results of that research into meaningful, engaging journalism. Google, Facebook and their subsidiaries have ability to monetise searches, shares, comments and other reactions to the massive amounts of news

content that their platforms have circulated about CoVID-19, but the media organisations that created much of that content have generally not been able to profit from it. Since the commencement of the pandemic, more than 157 Australian newsrooms have shut permanently or temporarily, more than a newspapers have ceased their print editions and offer online only, many newspapers have reduced page length and some radio stations have reduced the number of bulletins due to plummeting advertising incomes for media industries and unstable share prices (Meade, 2020). Local and regional media have been particularly seriously affected. Soon after announcing a \$91 million rescue package for regional media, the Minister for Communication, Cyber Safety and the Arts estimated that the number of shutdowns could increase to as many as 200 (Kelly, 2020). This creates an enormous loss to society overall, and the intense blow to local and regional media will have a particularly large impact on Australians who are poor, have low education or are isolated (Giotis, 2020). The Australian situation mirrors global patterns, with BuzzFeed’s Craig Silverman (2020) dubbing the coronavirus a ‘media extinction event’.

JERAA thus recommends coupling measures of originality with multiple measures that recognise value in journalistic reporting. This includes financial values of income gained by digital media platforms, income lost through direct decline in audience share or indirect loss of audience through clickthrough or follow-on to other stories, advertising foregone due to reduced audiences or cannibalisation of the most marketable content, costs of creating different types of news content, and financial impacts of reduced capacity to cross-subsidise different more expensive forms of journalism with revenues from popular journalism. It also includes the social value of a diverse array of media sources and a representative variety a voices and issues within those media; of smaller media organisations that serve a vital function to local, regional, ethnic or religious communities or other minorities, marginalised communities or ‘communities of interest’; and of varied palate of public interest journalism, news about community life, and infotainment to provide the essential infrastructure for an informed, connected democracy and society. While there is particular value in what is traditionally known as ‘public interest journalism’, that probes weighty public issues and can inform decision-making at government level, JERAA urges that the bargaining table includes consideration of the respective importance of other forms of journalism that serves the public interest in direct and indirect ways, such as community-based journalism and ‘soft’ news.

### **Facilitating open communication between digital platforms and Australian news media businesses**

To ensure effective communications that are responsive to the needs of Australian news media organisations, JERAA advises that that digital media platform operators provide media liaison staff that are easily accessible to all media organisations—commercial, publicly funded and community-based—through their social policy units. Contact names, telephone numbers and email addresses should be provided, and minimum response times required.

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