

Katherine M Cooper – Submission to ACCC
Re: Draft News Media and Digital Platforms Mandatory Bargaining Code

28 August 2020

Australian Competition and Consumer Commission (ACCC)

Via email: bargainingcode@acc.gov.au

Submission regarding the Draft News Media and Digital Platforms Mandatory Bargaining Code ('the Code) that would be created under the Draft Bill: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 ('the Bill') to amend the *Competition and Consumer Act 2010* ('the Act').

1. Privacy

My submission content in its entirety may be made public except for my email address and other contact details, listed in my cover email, which I appreciate you keeping confidential. Thank you.

2. Good faith disclaimer and explanation of terminology

Firstly, a vital piece of information not provided in the ACCC documents in relation to the Code is a description of what the status quo *is* for the current negotiations between digital platforms and news media businesses that would necessitate the introduction of the Code. We have no right to commercial information, but asking for feedback on a Code which doesn't specify the problems with the existing negotiations asks us to make assumptions on what the status quo is, which may be incorrect. So I acknowledge in making this submission that I am not privy to the secret financial dealings between Australian news media businesses and Facebook and Google (digital platforms) and I ask your good faith in reading my explanations for my opinions.

I disclose that I have Google and Facebook accounts and therefore consider myself an 'interested party' to this matter. I am an irregular user of Facebook and am a regular consumer of Google email and search engine products. However, I do not feel any strong loyalty to only using their products to provide the services that they offer. I do not make these arguments out of my care about their particular businesses but about the principles concerning the introduction of such a Code.

In this submission I will refer to digital platforms in general, rather than specific platforms Facebook and Google, the initial target of the Code as per the Exposure Draft Explanatory Materials (EDEM), because my opinions extrapolate to any digital platform, and I note that under S52C of the Bill that the Treasurer may specify further digital platforms as they see fit in the future. I will make specific references to Facebook and /or Google where I think it is relevant.

I base my opinions upon my understanding of viewing the exposure draft of the Bill, the Draft Code Q&A (the Code Q&A) and EDEM published through the ACCC website. I have opinions about most of the Code, however, that would be a very lengthy submission so I confine my comments below to the key points about the rationale for and proposed implementation of the Code.

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3. Submission

My position is that the Draft Code should not be implemented as currently proposed or in any derived form and I am opposed to the apparent principles that deem the Code necessary at all.

EDEM 1.3: Google and Facebook derive a benefit from the ability to make Australian news content available to their users. The size of their online Australian audience makes them unavoidable trading partners for Australian news businesses. Google and Facebook each appear to be more important to Australian news businesses than any one Australian news business is to each of Google and Facebook. This has resulted in Australian news businesses accepting commercial deals with these platforms that are less favourable than they would otherwise agree to.

Quoted from Google Ads website (<https://ads.google.com/home/resources/seo-vs-ppc/>):

“What’s the difference between SEO (search engine optimisation) and PPC (pay-per-click advertising)?”:

“There’s no cost to appear in organic search results like Google’s”.

“Why won’t google ads PPC marketing help my SEO?”:

“Google’s first responsibility is to provide Search users with the most relevant possible results”.

Assuming good faith that the text on the Google Ads website is honest, my understanding is that the commercial deals that news media businesses have struck with Google are for advertising (also referred to herein as ‘ads’) which is a legitimate business relationship. Therefore the EDEM seems misleading that Google obtains a material benefit directly from news media businesses to be included in their search results (“*Google and Facebook derive a benefit from the ability to make Australian news content available to their users*”) whereas Google is explicit that there is no cost to appear in organic search results. As I mention above, it is not made clear what the actual problem is that is trying to be solved by the introduction of the Code. If the premise for the Code is based upon the assumption that digital platforms charge to be included in search engine results, then the reality of the situation does not warrant the introduction of the Code.

Google can charge a lot of money for PPC advertising promotion, and why shouldn’t they? They are members of a free market and do not force news media businesses to pay for advertising to be featured in their search results. The reason why so many consumers use their platform is because Google has invested heavily in the design, infrastructure and language technology that means that their search engine is considered the most comprehensive and accessible in Western cultures. If you have a quality product you can charge people to access its premier features, and Google advertising is their premier feature.

If news media businesses want to use advertising to promote their products then they accept that as a cost of doing business like any other business does. Where they choose to invest their advertising dollars is a business decision that is theirs alone to make. This is not a matter that any government should be concerned with, let alone legislation.

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The statement that “*Google and Facebook each appear to be more important to Australian news businesses than any one Australian news business is to each of Google and Facebook*” is probably true. However, Australian news media businesses are included in Google’s search engine functionality free of charge, like any other content provider. Individually they may not be so valuable, but as an industry they are of high value to Google because Google needs to offer a range of news sources in their search results. It would diminish the trust in Google’s search results if news sites were not included.

To my knowledge Australian news media businesses get their primary exposure to the Australian public through digital platforms, in particular Google and Facebook. People share news articles on Facebook. When searching Google for ‘news’ the first non-advertising results are always the Australian news media businesses such as ‘the ABC’, ‘The Australian’, ‘The Guardian’, ‘Sydney Morning Herald’ and ‘News.com.au’. Google needs the news media so that they can serve their consumers the results they seek; it’s not a one-sided street, this is a mutually beneficial arrangement between both parties.

If the Code were arguing that the price of advertising with digital platforms should be capped then I would find that a breach on a business’ right to assert the value of their products. In a free market, a product is only worth what someone will pay for it. If other businesses are paying for Google’s ad services, then clearly their ad services are worth what they are paying. To then demand that digital platforms pay news media businesses to deliver their content (which they are already doing free of charge) is a complete distortion of free market principles, in the wrong direction. This is a gross injustice and outside of what I believe to be the scope of the Australian Government’s responsibilities for business regulation.

Q&A 1.4: While bargaining power imbalances exist in other areas, the bargaining power imbalance between news media businesses and major digital platforms is being addressed as a strong and independent media landscape is essential to a well-functioning democracy.

I do not agree with this statement. This makes a massive assumption that Australian news media businesses are ‘independent’, and that introducing the Code will impact their strength. I don’t believe that current Australian news media businesses have anything to do with the promotion of democracy in Australia at all, quite the contrary. The problem with Australian news media businesses is not that they lack strength because of the success of digital platforms. They are not strong because they do not offer products that are valued by the Australian public.

Australian news media businesses *could* be strong if they produced rigorous, quality products that the Australian public recognised as providing value to their lives. Their problem of strength and independence will not be solved by Australian news media businesses being paid by the digital platforms responsible for disseminating their information to consumers. The quality of their products and the actual independence of their journalism would do that, an issue quite apart from the subject of the Code.

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Q&A 2.3: The minimum standards would also require digital platforms to give news media businesses at least 28 days' notice of algorithm changes likely to materially affect referral traffic, to affect ranking of news behind paywalls, or to result in substantial changes to the display and presentation of news, and advertising directly associated with news, on their services. This advanced notice would give all news media businesses the opportunity to implement strategies to maintain or increase audience reach and engagement with their news on digital platform services.

I do not support a notification period for changes to algorithm changes for paying news media businesses. The inclusion of this as a principle of the Code demonstrates the lack of understanding by the ACCC about the security needs of digital platforms. I further wonder about what other facts relating to the issues that have given rise to the need for this Code that the ACCC is also mistaken about.

This item is unrealistic as digital platforms need to ensure their algorithms need to stay ahead of the activities of subversive parties on the internet trying to negatively impact the delivery of their products. They need to be able to be changed very quickly to respond to immediate threats. Hackers do not provide 28 days' notice. I will refer to Google in this example but this applies to any high profile digital platform. Google, as a very high value service, is under constant attack from hackers, and they invest heavily in technology to respond to these threats to maintain the exceptional quality and security of their products. Part of that security response is making changes to their algorithms and systems. A fundamental principle of their algorithms is to promote their paying customers to the largest range of the most relevant consumers ("**Google's first responsibility is to provide Search users with the most relevant possible results**"), so even with sudden changes to their algorithms, it is logical that the changes will be made in good faith and continue to aim to best serve their clients *and* consumers.

Q&A 3.1 The code allows collective bargaining by news media businesses in order to help address the existing significant imbalance in bargaining power between those businesses and the digital platforms

I do not agree with this assertion. This item relates to **Q&A 1.4** and my responses are relevant to this item as well. The imbalance of bargaining power is a reflection of the success of the businesses that are party to the negotiation. Where one business is more financially successful, it is natural that their negotiating position will be greater. It is in both party's interest that digital platforms promote news. It is only because of digital platforms' excellent products that consumers continue to use their services to access news. Digital platforms have heavily invested in the design, data infrastructure and language processors that make their products as successful as they are. If the products of news media businesses were as successful as digital platforms, then they would be in a better bargaining position. It is a fact of free markets that everyone has the same opportunity to be successful and success is dictated by the decisions that businesses make. Do not punish better decision-makers.

It is a free market principle that parties enter into negotiation freely without government intervention. The Code replaces one imbalance of bargaining power with another imbalance when business negotiation is mandated by government. It is contrary to our fundamental beliefs to force a digital platform business to take responsibility for removing natural free market pressures from news media businesses in order to overcome (news media) business deficiencies, let alone make them pay for it. In the newly imbalanced system, you are not really advocating negotiation, you are essentially sanctioning 'bargaining' at the end of the barrel of a gun.

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That success and negotiating positions are unequal is a natural state of every aspect of business. You cannot control that and expect the market to flourish. You should not control that and expect anyone to respect you. Even the beneficiaries of your favour will not respect you for they know that they have obtained favour at the cost of someone else's success. You cannot tell one business that their imbalance of power is unfair because of another businesses' success. Where no monopoly exists – and you cannot argue that Facebook or Google have a monopoly on the internet – you cannot regulate to control business relationships.

Why does the Code only relate to news media businesses? Why are they so special that they require regulation in this regard? Are there not many, many other businesses in Australia who pay money to digital platforms to promote their businesses? I am not for any moment advocating that the intention of the Code be applied to all businesses who conduct business with digital platforms. News media businesses aren't the only businesses needing to disseminate desired information to the Australian public.

Is the opportunity to access food suppliers less important than the news? Is being able to access electricity and communications suppliers less important? These businesses conduct a significant part of their business through the internet, and I would argue that the search function of digital platforms are more important for every industry *over* that of the news media industry. Australians can directly find news media businesses on the internet – we all know their names – but when searching for other products and services, we rely heavily on digital platforms to present search results that are relevant and comprehensively serve the question that we need answered. We are also much more likely to encounter advertising in those non-news searches than with news media search results.

News media businesses could redress the imbalance of power in negotiating their advertising costs if they could prove that they are a trusted information source to Australians and that we value their products. There is an imbalance in power because Australians have clearly indicated that we do not value Australian news media businesses as much as the Australian Government thinks we should.

Q&A 4.5 [list of which platforms are included]: *These services have been selected on the basis that they display Australian news, without typically offering revenue-sharing arrangements to all news media businesses that produce this content.*

The idea of revenue-sharing in this statement is incorrect. No one pays digital platforms to see search results. Consumers can click ads which are paid for by businesses engaging the advertising services of digital platforms. In all other advertising mediums in all of business history, one business pays an advertising business to advertise them. The business who pays for the advertising gets a material benefit for their exposure to their relevant audience and the advertising business makes money from selling the advertising. The advertising business does not then pay the first business *because* they showed their ad. The idea that internet advertising on digital platforms – which is the only thing that I can deduce is the subject and need for the Code – should be subject to inverse rules, when the advertising exposure possibilities on digital platforms are so much greater, more accessible and immediate than any other medium ever created – is completely absurd.

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Assuming that Google makes revenue from every single search that every consumer performs in their search engine is incorrect. Only Google Ads make Google money in search results, and they are open about which results are ads, and which results are not. As a consumer, I can choose whether to click an Ad or not.

It is Google's prerogative as a business to sell advertising space on their website. It is a business decision for any company whether they advertise with digital platforms. No one forces a business to advertise with digital platforms. The search algorithms of digital platforms are designed to provide the most relevant results to the consumer, not discriminate against those who don't pay for advertising. It is a news media business' free choice as to whether they wish to pay Google to further promote their business.

However, I would also argue that news services don't necessarily need to pay for advertising because when searching specifically for news, Google's outstanding algorithms will provide what they think is the most relevant, which, normally (in my experience), are Australian news media businesses. I do not recall ever seeing a notification that those news results were ads. It is the business decision of news media businesses, like every other business in Australia, if and where they invest their advertising and promotion budgets. If they choose to invest in advertising on digital platforms, that is their choice and they should negotiate with digital platforms based upon free market principles, free of government intervention.

It is the opposite of free market principles to tell a successful business that they must *pay* a business to use their service. We are not a communist or socialist regime in Australia. This is not a case that big business is rich enough that they have a social responsibility to prop up a dying industry because of the public good that it offers. Public good is evaluated by the public and is established by where the public invest their time and money. If the Australian public is not investing in the products our news media businesses are providing, it is not anyone's fault but the news media businesses.

The Australian news media businesses were showing massive drops in public engagement before the internet and it's not because the Australian public does not value information. On the contrary, the success of the internet and digital platforms highlight how much value we place on the delivery of content. But because we have more options now, we choose to give our time and money to those services which provide *value* to us. The value proposition of the Australian news media industry to the Australian public does not justify implementing this legislation. By making payment mandatory from digital platforms to news media businesses to either (whichever is relevant) (a) continue promoting their business through advertising or (b) ranking their relevance in search results, you are diminishing the returns of the successful to prop up the returns of businesses which, by the apparent judgement of the Australian people, are not worth paying money to. The implementation of this Code will set a dangerous precedent for government interference in the operation of businesses in Australia. If you impose limits to the success of a business you only hurt the community, not improve it.

The Australian news media industry used to be all-powerful in the dissemination of information in Australia. Following the emergence of other sources of information and new mediums to distribute information, Australian news media businesses had a fresh opportunity to reinvigorate themselves and carve a niche for themselves as the primary trustworthy and comprehensive source of information.

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However, the Australian public has determined – by the only measure possible for the success of a business, where they spend their dollars – the relevance of the Australian news media industry to be of low value.

It is not hard to link the drop in value placed on news media businesses with the drop in journalistic standards, biased representation of news and blatant tabloid style of news presentation that is the current standard. It is entirely relevant to include a conversation about the relevance and value placed by Australian consumers on the news media industry in relation to whether the Code is necessary, let alone just.

Section 52W: Non-discrimination

I disagree with Section 52W in its entirety. Firstly, this is an item of bad faith. Digital platform searches are designed to match the most relevant search results to what the platform determines is the particular information the consumer is seeking. If digital platforms discriminated in their results – if they didn't actually provide the most relevant results – do you really think they'd be as successful as they are? As stated on the Google Ads website: **Google's first responsibility is to provide Search users with the most relevant possible results.** Consumers continue to use digital platforms because they get the information – in this case, news – that they want, and it's usually the Australian news media who are at the top of the news search results. Google would experience serious consumer backlash if they started excluding content from search results.

However my previous point is as irrelevant as the apparent reasons for S52W. Irrespective of how digital platforms actually operate, on principle you cannot tell a non-monopolistic business who they can or cannot do business with. You cannot tell them the value or priority that they must place on the products of other businesses. A business in a free market can choose which products are of value and which ones to ignore. In this example, if Google or Facebook or any other digital platform choose not to prioritise one news source over another, that is their business decision to make based upon their own business model. With respect to Google, they have been clear what their business model is: **Google's first responsibility is to provide Search users with the most relevant possible results.**

Consumers know that there are many other sources that provide news content, and, in a free market, we are free to choose. Users of digital platforms accept that the machinations and algorithmic decisions of digital platforms are unknown to us and are at the core of the service that they provide to us. In using their platform we accept we see what they *choose* to show us and because we value those choices that we continue to use their services.

Similarly, when consumers visit news media websites we know that the content that they choose to publish is in accordance with their values, priorities and business models. Not for one second do we believe that any news media website (etc) provides us with unbiased, comprehensive, non-discriminatory information.

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With respect to news, do we accept that we should trust news media businesses to tell us what is important for us to know, who to discriminate against? But we do not accept that digital platforms have that choice as well? Both are concerned with the issue of relevance, but in different ways. Digital platforms choose what to show based upon their relevance algorithms; over the last 20 years I've experienced the diminishing quality and therefore diminishing relevance of the Australian news media. Again, you may argue that the quality of the news media content is irrelevant to this conversation but the quality of the content is at the core of why the news media industry needs the Code in the first place.

As mentioned above, Australian news media businesses were suffering diminishing returns as businesses prior to the emergence of the internet when they were the primary source of news information for Australians. During my lifetime, I have seen journalism reduced in quality and breadth of coverage, accuracy (even down to spelling and punctuation errors) and an increase in biased, tabloid-style reporting.

The internet as a medium provided opportunities for the suffering news media business models to capitalise on the reduced infrastructure (internet requires no printing presses nor the real estate to house them, no transportation, no delays in publishing news) and to reinvent themselves to continue to serve the news-hungry public in the 21st century. Instead, it is my opinion that the quality of their content actually reduced as they tried to compete with the tabloid-style media that gets lots of attention but does not have the substance to satisfy the public who still value unbiased, comprehensive and accurate reporting.

Many articles have been published in the news media about Rupert Murdoch's news media businesses publishing articles that align with his political views. I do not take away his right to do this. They are his media, and they can say what they like about whatever they think is important. We do, after all, have a free media. Where it is permissible for a newspaper to publish a front cover like this from the Daily Telegraph (5 August 2013):



Daily Telegraph front page, August 5.

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The famous quote by Evelyn Beatrice Hall of writer Voltaire's attitude: *I disapprove of what you say, but I will defend to the death your right to say it.* I may not agree with the type of journalism depicted on the front page of the Daily Telegraph of 5 August 2013, but it is absolutely the prerogative of the Daily Telegraph to publish it. It is also the prerogative of the Australian people to decide how much value they place on that decision and the other journalistic decisions of that news media provider and, in turn, whether to do business with them.

In the same way, it is absolutely the prerogative of the Australian digital platforms to decide what to prioritise on their platforms based upon what is relevant to their consumers.

However, I will state it again that that does not mean that Australians have to value the products that are published by our news media. People whose values align with Rupert Murdoch (or any other domestic or international news media business) will be more likely to consume their content. However, that still doesn't mean that they will value their products enough to provide a financial response. Any business who does not serve their customers will find their customers moving to other businesses to receive the value that meets their standards. Every business provides their services based upon what they think is important for their consumers, and whether they are correct in their market research, business planning, product development and promotion strategies is reflected in their market share. If the Australian news media is not getting its share of internet attention, it is not the job of the Australian Government to make digital platforms compensate for the lack of value that the Australian public places on news media products.

General comments on the Code:

The Code has all the appearance of corporate welfare for an industry that is failing because it continually refuses to take responsibility for its own failure to provide compelling value to consumers. News media businesses and journalists destroyed their own credibility through complacency while they were on the sweet gravy train of having the stranglehold on communications technology prior to the introduction of the internet. When the internet arrived and took away the monopoly, their already failing models became even more obsolete.

Now the news media industry is struggling because there is no practical difference between the most respected news media businesses and the worst kind of partisan tabloid trash. They squandered consumer trust in their integrity when they didn't need it, and now that their integrity is the only thing they have to sell they have no idea how to actually be trusted sources that people would pay for again. I'm not entirely sure what the values currently *are* for Australian news media businesses; but it does not appear that integrity is one of them.

If you are operating upon the assumption that Australia's news media businesses would fail without the Code, and that their failure would be catastrophic for the dissemination of core news to the Australian people, you are wrong. There will always be someone who steps into a gap left by an unsuccessful business to deliver the service demanded by the Australian public. The Australian public are always hungry for quality content – with the quality we're given by Australian news media, by now we're starving – and will reward anyone who provides it to us. Just as we have rewarded digital platforms who invested heavily to provide us with the exceptional products that are valued so highly.

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Due to the inequity of the Code in relation to all other Australian industries who are equally subject to the same advertising negotiations with digital platforms as news media businesses, this appears to be a case of successful lobbying by the news media industry to the Australian Government. If this Code was suggested to be applied to all Australian businesses I would not take such a cynical view, but my horror at such a suggestion would be paramount. Please do not consider expanding the Code to apply to any other businesses.

Do not take this step along the road to limiting free market principles in Australia. As stated earlier, we are not socialists or communists. We are proudly part of a free market. We are part of a market that rewards successful business models and accepts the failures of antiquated or irrelevant businesses. If the Australian news media industry is dying, then let it die its natural death. Let them exist or end upon their own merits, like other Australian businesses and industries have to. Let them choose where to invest their advertising dollars like any other Australian business. Let their failures drive them to revisit their values, re-evaluate their business models and invest in growth and innovation. Let them find their own relevance in today's market because we, the Australian people, are moving forward with the internet and we love it, not in small part because it represents freedom of information and contains the potential for anyone to be a success.

Do not demand that digital platforms – who are massively responsible for news media businesses' existing exposure to the public and part of why they continue to limp along – pay news media businesses to advertise their businesses or rank them (organically or force them to rank them artificially) in their search results. Do not try to control the legitimate activities of successful businesses and implement measures that diminish and punish their success. If you start punishing businesses for being successful, you only bring all our standards down, not raise anyone up.

The stated reasons for the need for the Code, not entirely properly enunciated, are flawed and the implications for the future of the internet and Australian business regulation completely unacceptable. It is not the responsibility of the successful to reward the unsuccessful and antiquated for their government lobbying abilities.

Please, do not pass the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 or any derivative of it.

Thank you very much for your time.
Katherine Cooper