

## Response to ACCC Concepts Paper on News Media Bargaining Code

Date: 5 June 2020  
To: Australian Competition and Consumer Commission  
From: Marque Lawyers

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### 1. Introduction

1.1 Marque Lawyers is a Sydney based law firm. Our practice areas include competition law and our client-base includes both independent news publishers and ecommerce platforms. Although those platforms are not the immediate subject of the proposed bargaining code, our experience and academic interests are focused heavily on the role of the internet and digital platforms in disseminating information to the general public.

1.2 This submission addresses the following question posed in the Concepts Paper.

*7. What are the necessary elements for a bargaining framework to effectively address the bargaining power imbalance between news media businesses and each of Google and Facebook?*

1.3 Broadly, our concern is that the bargaining inequality between the digital platforms and news publishers stems from the ability, and documented propensity, of the platforms to withdraw news referrals without suffering any material commercial consequence.

1.4 Accordingly, in order to operate effectively, the Bargaining Code should take account of the underlying obligation to supply news referrals in the first place, as well as addressing the terms on which those news referrals are supplied. We submit that consideration of that underlying obligation is a necessary element of the bargaining framework. We elaborate below.

### 2. The Bargaining Code should take account of Google's actions in the EU

2.1 In the EU there have been several attempts already to impose a legal obligation on Google to pay for news content displayed in its Google News search results. The outcome of those attempts is relevant to the Bargaining Code, as it evidences Google's ability, practically and commercially, to withdraw supply of news referrals if pressed towards paying for news snippets. In our view, this is the fundamental basis for its strength of bargaining power.

2.2 In 2013, Germany introduced an ancillary right for press publishers which would allow them to prohibit non-commercial uses of their work. Google responded to press publishers claiming compensation from Google for the use of snippets of articles in "Google News", by reducing those publisher's visibility on its services. As a result, the majority of press publishers, including Axel Springer – one of Germany's biggest publishers - licenced the use of these works to Google and resigned from compensation.

2.3 Similarly, in 2014 Spain enacted a legislative regime which sought to compensate news publishers for the use of non-significant fragments of their work by search engines. Rather than

paying publishers, Google shut down Google News in Spain and removed Spanish publishers from other international news sites.

- 2.4 More recently, France has been the first EU state to introduce the Directive on Copyright in the Digital Single Market into its national law. Following Google's early indications that it would not pay for Google News content sourced from news publishers, France's Autorité de la Concurrence ordered Google to negotiate with news outlets, and said that Google withdrawing news snippets is likely to comprise an abuse of a dominant market position.

### 3. **The French regulatory decision against Google may not be replicated in Australia**

- 3.1 The effect of the French decision is to create a positive obligation on Google to continue supplying news snippets. This is necessary to support the news publishers' negotiations with Google in France.
- 3.2 The outcome in France was based on their laws regarding abuse of dominance. Australian laws regarding misuse of market power may not offer the same outcome. As a result, there may not be any immediate legal consequence of Google refusing to supply news referrals or news snippets.
- 3.3 Under the effects test in section 46 of the *Competition and Consumer Act 2010 (Cth) (CCA)*, a company with market power must not engage in conduct which substantially lessens competition in that market, or in any other market in which it operates. Misuse of market power laws are a potential source of a positive obligation to supply goods or services by a business with substantial market power. But the language of the legislation means that the positive obligation might only arise in the contexts of supplies which occur in a 'market'.
- 3.4 The difficulty in the present situation is the doubt of whether the Google's supply of news referrals comprises a supply in a 'market'. In the preliminary report on the Digital Platforms Inquiry, the ACCC proposed that there is a market for the supply of news referrals, and that Google and Facebook have market power in that market<sup>1</sup>. Following further submissions however, the final report changed tack. Instead, it concluded that Google and Facebook had 'bargaining power'<sup>2</sup>, which has no direct legal consequence in the CCA.
- 3.5 On some level, this change in position recognises the challenges in establishing that the news referrals are supplied in a 'market', in an economic sense. Google's submission on the preliminary report addressed this<sup>3</sup>. We can see force in their arguments that they do not compete for news referrals and that there is not a 'market' for the supply of news referrals.
- 3.6 Where there is doubt as to there being a market for news referrals, then misuse of market power laws may not assist in creating a positive obligation for Google to supply news referrals or new snippets in Australia, as occurred in France.

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<sup>1</sup> ACCC Digital Platforms Inquiry – [Preliminary Report](#), part 2.7

<sup>2</sup> ACCC Digital Platforms Inquiry – [Final Report](#), 26 July 2019 (**DPI Report**), part 5.3.1

<sup>3</sup> Google [submission](#) to ACCC, 28 February 2019, part 4.1

#### 4. **An effective bargaining code must consider the underlying supply obligation**

- 4.1 The chain of events in the EU demonstrates the necessity for a positive obligation for Google to supply news referrals or snippets in order to facilitate meaningful negotiations for terms of that supply. Absent that, Google can simply walk away if it is not offered favourable terms. And it has displayed its preparedness to do so.
- 4.2 As discussed above, misuse of market power laws may not be the key to creating a positive supply obligation. In our view, the next consideration ought be how else that might be achieved.
- 4.3 A mandatory industry code such as the Bargaining Code obtains the force of law pursuant to Part IVB of the CCA. Section 51ACA provides that an 'industry code' is '*a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry*'.
- 4.4 Based on this language, the potential scope of an industry code are broad. They are not, for example, limited to providing for the terms on which particular supplies must be negotiated, or even the precise terms on which particular supplies must be provided. To date however, that is largely how industry codes established under Part IVB have operated.
- 4.5 We submit that the Bargaining Code could, and should, introduce a positive obligation for the relevant digital platforms to supply news referrals. This is in addition to the other matters canvassed in the Concepts Paper in relation to the basis for negotiations etc. as to the terms of that supply. For the reasons outlined above, we remain concerned that the Bargaining Code may not ultimately achieve its goal of creating a more evening bargaining position between the digital platforms and the news providers, absent such an obligation.
- 4.6 As an alternative, the Bargaining Code might introduce steps that must be taken prior to a platform limiting or ceasing its supply of news referrals or news snippets. This should include notification to the ACCC of any such intention. This would allow potential regulatory intervention to block such action if appropriate.
- 4.7 Although misuse of market power may not provide grounds to block a digital platform's action in this scenario, there may be grounds for action on the basis of unconscionable conduct in particular withdrawal of supply scenarios. Accordingly, an obligation to notify the ACCC might facilitate bargaining equality by allowing the Commission an opportunity to review and investigate as appropriate, prior to any refusal to supply taking effect.

#### 5. **The longer view: reform of the access to services regime**

- 5.1 The legal position in respect of the relationship between Google and Facebook on the one hand, and news publishers on the other, is somewhat novel on account of the doubt that there is a 'market' for the supply of news referrals.
- 5.2 The broader issue of businesses' unavoidable reliance on digital platforms, however, is only likely to become more common. To address this, we suggest that there should be a review of the access to services regime in Part IIIA of the CCA, or alternatively a specific access regime established for digital platforms along the lines of the Telecommunications Access Regime in Part XIC of the CCA.

- 5.3 Part IIIA is unlikely to be able to assist in mandating access to services supplied by digital platforms in its current form. This is on account of the definition of a 'service' which is capable of declaration in section 44B. The consequence of the definition is that only services supplied via 'facilities' are capable of declaration. 'Facility' is not defined, but the case law indicates that it applies to physical equipment, and may not readily capture digital supplies.
- 5.4 The most efficient means of addressing this may be an amendment to the definition of 'service' and/or an introduction of a legislative definition of 'facility' which expressly includes digital facilities. This approach may be more flexible than a specific digital platforms access regime, where the scope of the services for which access might be mandated is likely to continue to evolve over time.
- 5.5 Creating a legislative framework for mandated access to key digital supplies would be the most efficient approach long term, in our view. The alternative, as more scenarios such as the present one arise, is to consider enforcement action under the CCA or use industry codes to the same effect. We submit that an access framework would ultimately be simpler, more certain, and avoid the time, expense and punitive nature of enforcement action.

Please do not hesitate to contact us if you require clarification or elaboration on any aspect of this submission.

Yours sincerely



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