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Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Re: Consultation on Mandatory News Bargaining Code

To Whom It May Concern

The following submission has been prepared by:

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We have chosen to address those questions relating to our expertise in the fields of digital news research, media and communications law, policy and regulation.

This submission forms a part of ongoing work being undertaken by Professors Flew and Suzor with Dr. Rosalie Gillett (QUT), and Associate Professors Martin and Dwyer (University of Sydney), as part of a three-year Australian Research Council Discovery Project, *Platform Governance: Rethinking Internet Regulation as Media Policy* (Australian Research Council Discovery-Project (DP190100222 – 2019-2021). We are happy to refer the Department to papers and publications that have arisen from this project.

Mandatory news media bargaining code submission - Platform Governance team

Definition of news to be covered by the code

As the code is designed to assist news media businesses which produce public interest journalism in their negotiations with platform companies, the definition of news needs to stipulate its production by these types of companies, rather than public relations and communications outlets or news aggregators. It should also emphasise original publication, given the scale of legal licensing and illegal re-publication of news. The use of the term analysis rather than commentary or opinion narrows the definition sufficiently to avoid covering material which is opinion-based but not clearly factual – a critical distinction in times of misinformation, which is a concern for 62% of Australian news consumers (Fisher et al 2019). With this problem in mind, we agree that that material in question must be subject to professional editorial and ethical codes to ensure it is subject to effective oversight.

We define news as original reporting, investigation and analysis by journalists, distributed by news publishers, of issues and events of social significance to Australians, as subject to professional editorial and ethical standards set out in organisational and industry codes.

The emphasis here on ‘original’ content is not a signal for companies to argue for the down-ranking or de-prioritisation of secondary, reaction or follow-up news stories. We support the widest availability of quality public interest journalism on social media platforms to support an informed citizenry. There are many signals of quality that could come into play during negotiations into the value of news, and its positioning in news feeds or search results, including accuracy, reliability, credibility and professional integrity.

Digital platform services to be covered by the code

The code would cover *digital communications platforms*: those which aggregate digital content including news, which deliver communications and publishing services, and which operate as multi-sided markets, facilitating information exchange and social networking by and between end users.

We do not recommend the use of a list to define which services are covered by the intended code, given the likelihood that new communications platforms could emerge that also create an imbalance of bargaining power in news markets. Rather the code would cover Facebook and Google, their communications platform subsidiaries, and other communications platform companies with a significant share of digital advertising display or classified market revenue as nominated by the ACCC, and more than two per cent share of Australians’ time spent online (see Australian Competition and Consumer Commission 2019, p.6).

Facilitating open communication between digital platforms and Australian news media businesses

A fundamental premise of developing a news media bargaining code is that there are dedicated and responsive corporate representatives on both sides of the bargaining table. In the past, it has been difficult for Australian companies to access Google and Facebook unless their business relationship is over a significant monetary threshold, anecdotally \$50,000 per annum. We argue there needs to be a designated, responsive local platform company contact for news businesses regardless of their size or spend.

In the interests of effective bargaining we suggest that the platform companies provide a publicly accessible, designated news media liaison, based in their Australian public policy team and accessible by phone and email. This person would have the responsibility for responding to news media enquiries in a timely fashion, within one working day from contact, and the authority to schedule and manage bargaining on behalf of the platform company. Similarly, each news media company needs to designate/appoint a platform liaison and negotiator with a solid understanding of digital advertising markets.

Monetisation and sharing of revenue from the use of news

Principles based regulation

We would favour a principles-based approach to determining which digital platform services would be subject to a bargaining code. This should be based primarily upon a threshold level of digital advertising market share (see above), and secondarily on the amount of traffic to news on the platform, as a percentage of overall traffic.

Principles-based regulation has been strongly advocated for as an alternative to regulation based upon detailed rules of conduct, as enabling an outcome-oriented rather than a process-driven approach. It allows the parties directly engaged in the process to best determine how objectives are to be achieved, subject to third-party oversight (Frieberg 2010, p.92).

The Australian Law Reform Commission (ALRC) has advocated for a principles-based approach to regulation. In its *Final Report on Privacy Law and Practice* (Australian Law Reform Commission 2008), it observed that principles-based regulation had the merits of being more flexible, technology-neutral, adaptable across agencies and activities, able to achieve ‘buy-in’ from stakeholders, and better able to be ‘future-proofed’ for technological, economic and social changes.

In the 2012 National Classification Scheme Review, the ALRC also recommended principles-based regulation as allowing for greater flexibility in determining policy instruments to achieve particular policy goals, allowing stakeholders with divergent views to nonetheless sign on to shared principles, and to be more adaptive to ongoing technological change (Australian Law Reform Commission 2012).

Bargaining framework

One difficulty in developing a collective bargaining framework for negotiations between digital platforms and news publishers is that neither group has traditionally thought of itself as belonging to a wider collective entity, as compared to, for instance, the role played by Free TV in representing commercial broadcasters. We have concerns about promoting a collective bargaining framework, that include the risk of promoting collusion and anti-competitive practices, the sheer diversity of types of news content providers, and the risks of actors being excluded based on criteria unrelated to the news product itself (e.g. excluding the ABC and SBS from a consortium of commercial news providers).

A preferred framework would be that of an independent third party that can oversee bilateral negotiations, mediate where required, and set principles and benchmarks to inform negotiations, such as the development of ‘market’ benchmarks that seek to independently cost the value of news on digital platforms. These parameters would shift over time, and the

independent agency would have the capacity to intervene if bargaining was not taking place in ‘good faith’ or if one or another party was using its market power coercively.

Factors guiding the determination of remuneration: cost/value of news

The value of news is not simply the same as the costs of producing it. The media economist Robert Picard has argued that we need to start from the perspective of *value*, and to consider the value of news from the point of view of its consumers as well as its producers (Picard 2010). Picard observed that the value of news is never simply what people are prepared to pay for it, quoting investment guru Warren Buffett in saying ‘Price is what you pay. Value is what you get’ (Picard 2010, p. 48). Moreover, news clearly has social value as well as individual value, and intrinsic as well as instrumental value, particularly when it goes beyond simply providing information to enabling greater engagement, participation and understanding in social affairs (Picard 2010, p. 50).

Picard identified five key stakeholders in news: (1) investors; (2) advertisers; (3) journalists; (4) consumers; and (5) society. This is represented graphically below:

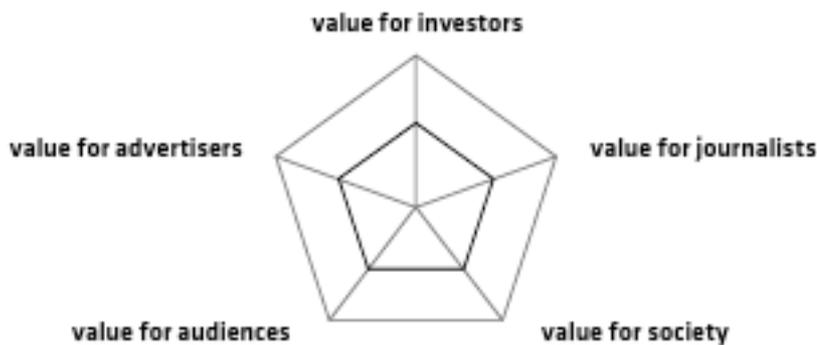


Figure 1. Value Conceptualization for News Organizations (Picard 2010, p. 41)

There are changes in value that benefit some stakeholders more than others. In what is sometimes described as the ‘Golden Age’ of journalism in the 1970s and 1980s, there was high investment in all forms of journalism, and the promotion of public interest and investigative journalism generated significant social benefits. By contrast, the digital era has seen a significant value shift to audiences and advertisers, as well as digital platforms that host news content, but at the cost of journalists, publishers, and investors in news media businesses.

The COVID-19 pandemic and associated economic downturn have accelerated downward trends in advertising revenue for news media businesses, even as audiences and readerships have grown (Grieco 2019; Tracy 2020). Such developments threaten the sustainability of commercial news media production, which would have a significantly detrimental social impact, as documented in the ACCC Digital Platforms Inquiry Final Report and in other relevant studies (Australian Competition and Consumer Commission 2019; Cairncross 2019; Sims 2019).

The ACCC Mandatory News Media Bargaining Code Concepts Paper identifies five factors

guiding the determination of remuneration by digital platforms to news publishers for the distribution of news content that they have produced:

1. Value of news to digital platforms:
 - a) Direct value, through advertising displayed within or adjacent to the news content on the digital platform's services;
 - b) Indirect value, including the collection of user data that can improve the digital platform's ad targeting across its advertiser-facing services and/or improve the user experience across all of the digital platform's consumer-facing services.
2. Value that news media businesses derive from the presence of news on digital platforms (visibility/audience reach);
3. Value of the availability of news content to digital platform users (discoverability; incidental exposure);
4. Cost of producing news content;
5. Use of 'market' benchmarks.

While factors 1(b), 2 and 3 are important, the estimation of any such value is, as the ACCC rightly observes, 'highly complex and contestable' (Australian Competition and Consumer Commission 2020, p. 12). In that light, it is recommended that measures to set a monetary value on news content focus primarily upon its direct value in terms of advertising revenue (1a) and the cost of producing news content (4). This will enable the creation of a 'market' benchmark to be developed that can form the basis for negotiations between digital platforms and news publishers. There should also be studies commissioned to develop comparable international benchmarks against which the Australian 'price' can be compared.

Sharing of user data

Until late 2015, media businesses and developers had some access to information about what news content was being shared on Facebook and how users reacted to it (likes, comments etc), using platform's public application programming interface (API). Facebook and other platforms like Twitter shared this user data in order to support an emerging ecosystem of software developers building applications for the platforms and to encourage publisher dependence on social statistics as a measure of audience engagement. This type of data is critical for helping media businesses understand where platform users are encountering their content, how they react to it and what value they place on it.

Since the Cambridge Analytica scandal, Facebook has discontinued a range of other APIs used by news media businesses to extract data on platform use. In a similar vein, the DPI found that Google provides limited access to unique audience data for AMP format pages and Stories, and for pages on which Google provides advertising contact.

News organisations require a process to negotiate access to that data, potentially in return for the advertising value their content generates for the platform companies.

However, any data sharing arrangements must take into account consumer expectations of privacy. This is more than an issue of 'calibration'. It is not sufficient for platforms to obtaining consent to data sharing through Terms of Service; to the extent that the government is getting involved in mandating or encouraging sharing of identifiable or re-identifiable information, fully informed consent is required from users. For this reason we recommend

that any data-sharing contemplated by the code be limited to anonymised and aggregated data.

Algorithmic curation of news

There is now a growing body of research focusing on the ways in which algorithmic curation of news shapes the selection, surfacing and discoverability of news articles on digital platforms (Cairncross 2019; Helberger 2019; Martin and Dwyer 2019; Newman et al 2019). It raises concerns about the ways platform news curation can weaken news branding and quality-ensuring editorial practices, as well as platforms' unaccountable influence on citizen information access and democratic process. We argue the new code must support the greater visibility of quality public interest journalism in search rankings or news feeds, and enable platform companies to be held to account for the public value they inscribe in news curation.

Platforms' automated news placement algorithms follow a formula that, in the first instance, was designed to be of commercial benefit to their own businesses, and which is shrouded in commercial confidentiality. Any rebalancing of the unequal power between the platforms and traditional news media producers needs to take account of these foundational aspects of platform news provisioning (Cairncross 2019). In this respect alone news media organisations require a clearer understanding of how news content is ranked and what factors will affect the visibility and reach of their content, in order to compete fairly for audience attention.

What we do know about how Facebook's news feed curation structures news visibility underscores the need for greater algorithmic transparency from platforms to support quality public interest journalism. For example, Facebook has acknowledged that it prioritises audience satisfaction ahead of news publishers, app developers, advertisers and 'even its own monetization' (Constine 2016), suggesting that consumer sovereignty is now driving what news gets priority in feeds rather than editorial expertise, brand legitimacy or public interest. As platforms enable users to target their searches and feeds, and base their curation on personal preferences, news consumption is increasingly "different for different people", as well as incidental and serendipitous (Fletcher and Nielsen 2018). As Ofcom research has noted, preference led algorithms and the posts of social media friends have shaped "the content that individuals consumed as opposed to more transparent differences driven by conventional newspaper loyalty" (Revealing Reality 2018).

Ofcom commissioned research has also showed that the preference reinforcing algorithms of social media can disadvantage quality news brands. Those British people who relied on social media and news aggregators for their news "rarely came across BBC News, and did not click on it even when it did feature on those portals" because the headlines and images were not as emotive or "catchy" as other providers (Revealing Reality 2019, p. 61). Instead users' "former clicks and engagement led to the offer on their feeds becoming 'softer' and focusing on articles with 'clickbait' titles, often from non-BBC providers." (ibid).

Our partner investigator Phillip Napoli suggests that the monopolistic/oligopolistic distribution structure characteristic of contemporary social media can contribute to market failure in the algorithmic marketplace of ideas (Napoli 2019, p.122). He argues that as influential gatekeepers, platforms have the right to curate the content they disseminate 'as they see fit' (p.121) and yet even small flaws in their selection and moderation processes can have tremendous consequences, for example when Russian-sponsored misinformation was

promoted to 126 million North Americans during the 2016 presidential campaign. The consequences of unaccountable news moderation were also highlighted earlier this year when Facebook moved rapidly to wholesale machine content filtering, which removed legitimate news about COVID19 (Koetsier 2020). Certainly Facebook may now be taking steps to demote or limit the reach of low quality news sites (Dreyfus and Lapowsky 2019) and to warn those who engage with mis- and disinformation, but a full account of the types of material it is acting on is not available.

Overall then the algorithmic curation of personalised news has significant consequences for audience access to accurate, authoritative information. In our view these new industry practices need to frame the practicalities of any bargaining code.

Advance notification of algorithm changes

Given that changes to platform ranking and recommendation algorithms can have significant negative impacts on news visibility, and social referrals to news websites (Martin 2019), it is important that platforms flag all changes which could substantially affect those referrals, and well in advance of their introduction.

As noted in the DPI final report, it remains unclear how platform algorithms weight the ranking and display of certain kinds of news stories and stories from particular publishers. In order to introduce some equity into any bargaining process around the value of digital news, these algorithmic priorities ought legitimately be made more transparent to all stakeholders. This transparency should be both in general terms (in a way that does not jeopardise specific commercial-in-confidence aspects of their businesses), but then also in such a way that news business providers should be given sufficient advanced notification for ongoing significant algorithm changes.

We do not have a calculation of the precise ‘appropriate threshold’ for identifying a significant algorithm change, or the ideal lead time on notification of changes, although we observe that news media business will know what kinds of transformation to news feed priorities are likely to detrimentally impact their business and how quickly they can respond - and these kinds of changes should be included as an explicit mechanism in the bargaining code. Provision can be built into the code to take into account shorter change notifications when there are urgent events, such as the Christchurch attacks, or important public issues such as COVID-19.

Prioritising original news content

As noted previously, the notion of ‘original’ news should form part of the definition of news content which can be considered under the terms of this code. This stems in part from the need for the code to support organisations which spend their resources on news research, assembly, analysis and innovation, and which can incur considerable risk in the process (see ‘Factors guiding the determination of remuneration’ discussion). There is also a connection between this original construction of news content and the production of investigative and public interest journalism. The importance of investing in journalistic training and skills should underpin any assessment of original news content value.

In order to sustain quality journalistic output we support the inclusion of a mechanism in the bargaining code which requires platforms to recognise the value of original public interest journalism in their rankings and feeds and to positively weight this type of content. In the

concentrated Australian mediascape there is a limited number of publishers generating this type of material, and they require a mechanism by which they can negotiate the visibility of that content in order to recoup their investment in reporting.

However, we do not support any attempt to determine or prioritise the original source reporting of an issue, due to the complexity, likely cost burden and possible negative effects of this process. In particular, interfering with news rankings or content visibility in order to de-prioritise the re-reporting of news poses major costs to an informed public. It would, for example, unfairly impact regional and community publications reliant on news wire and syndicated copy.

Concerns about copying should be appropriately dealt with under copyright law, which explicitly only protects expression, not facts, in order to promote the public interest in a well-informed citizenry. This is not the appropriate forum to seek to renegotiate a fundamental copyright bargain that has existed for centuries, which would be the practical outcome, if not the legal effect, of a mandated change in ranking algorithms to prioritise breaking reports or scoops. Breaking reports may also be generated by news wire services, and so shared with all subscribers.

Treatment of paywalled news content and alternative news media business models

As noted in the Concepts paper, there is industry concern that platform ranking algorithms may be deprioritising news behind paywalls.

Where paywalled news is deemed important public interest-oriented content, and is ordinarily made available to platforms under existing publishing agreements (e.g. Instant Articles, Accelerated Mobile Pages or News Tab), there ought to be mechanisms in the bargaining code that ensure this content is prominently ranked. More generally where direct access to news content requires a subscription, this should not limit or down rank its availability on a platform. There is clear evidence to indicate the rising popularity of news paywall models of various kinds, be they so-called ‘freemium’, metered or ‘hard’ (Dwyer and Martin 2019, p.287). Paywalls are part of a trend towards more diversified news media revenue models, signalling a shift away from advertising towards subscriptions or other forms of membership, and are critical to publishers’ financial viability. As paywalled content may generate a greater incidence of bounces for search queries, bounce signals could be deprioritised as a ranking or visibility indicator for public interest news domains.

Control over the display and presentation of news

It is critical that the bargaining code include mechanisms to frame negotiations about the display and presentation of news articles. As we mentioned earlier these factors are critical determinants of whether news will engage audiences.

We accept that the Digital Platforms have a proprietary right to adjust the ‘look and feel’ of news surfacing and framing, and also that templating and automation of content are central to affording all users ease of self-publication. Yet we also support the news media’s need to visually distinguish itself as a marketing and engagement strategy and to ensure the quality of its content and associated advertising, in order to protect its return on investment.

We therefore support the suggestion of including a mechanism/s to support good faith negotiations in relation to this area of policy and practice. Similarly, we support the establishment of a mechanism that ensures that the Digital Platforms provide adequate advance notice and/or consultation to facilitate any suggested changes to display and presentation of branded news. We also agree that a principles-based mechanism is developed to grant news business a greater degree of control over their own content and associated advertising.

Flagging quality journalism

We agree that as recommended in the Concept paper this issue should be primarily the preserve of the ACMA's new code for disinformation and news quality.

That said, we note that there is inevitably a thread that links a number of the concepts raised by the ACCC in their paper to a notion of 'quality journalism' including: the definition of news itself; the costs of producing news; the value of news to platforms; original news and algorithmic curation among others. Therefore quality public interest journalism needs to be central to and inseparable from the public interest objectives which underpin the ACCC's oversight of the bargaining code.

Review of the bargaining code

The development of this code is largely to support negotiation between industry bodies - but the effects will no doubt have a complex and unforeseeable impact on the long-run ability and willingness of people to engage with news. As such, the expected benefits of this scheme should be appropriately specified in advance, and their achievement measured and evaluated on an ongoing basis.

We also suggest that some measure should be developed to ensure that the public is, in fact, better informed after this code than before. If the introduction of the code indirectly introduces impositions on the social sharing of news, by limiting access to certain types of news, then like any other tax, the mechanism will almost certainly work to discourage the activity being taxed. Engagement with news by individuals is something that we should strive to encourage, not limit. So, in evaluating the effectiveness of this scheme, we suggest that a key metric should be avoiding any relative decrease in the rate at which people currently engage with news online.

The code should be regularly evaluated and these evaluations should be publicly available, and we suggest a sunset period to ensure that any the consequences of any unintended effects are minimised.

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