



*Consultation Submission*

to the Australian Competition and Consumer Commission  
("ACCC") and the Australian Government

News Media and Digital Platforms Mandatory Bargaining Code

**AUGUST 2020**

submitted by Sally A Illingworth

## Foreword

With consideration to the proposed News Media and Digital Platforms Mandatory Bargaining Code (“The Code”) and in review of the Australian Competition and Consumer Commission (“ACCC”) “Q&A” document published July 2020 in relation to The Code, the following submission (“Submission”) is made after much respectful deliberation. This Submission is made independently and has not been submitted with the direct or indirect support of funding from any party. This Submission has been drafted, prepared and submitted by Sally A Illingworth relative to a sincere concern for the Australian Governments imminent decision relating to the news media industry in Australia. This sincere concern is characterised by passion for communication, advocacy of democratised media and an emotionally, financially, socially and physically invested interest in the prosperity of Australia.

Technological advancements and the evolution of the internet have provided us with unprecedented opportunities to pursue, leverage, exploit and develop. These opportunities continue to offer Australia an accelerated opportunity to enhance and strengthen its position in the global value chain, improve the quality of life for Australians, diversify and develop gross domestic product performance and attract and retain talent.

Mainstream Media has experienced a drastic transformation in the last decade, particularly as content curation, creation, refinement, production, distribution and promotion have been beneficiary to quality and cost improvements for efficiency and effectiveness in the context of their economic purpose. The ongoing transformation of Mainstream Media directly and indirectly offers benefit to traditional news media businesses. Further, digital platforms have enabled news media businesses in Australia to access niche, segmented and global captive audiences to the benefit of their economic performance. For the news consumer, this transformation has resulted in many experiential improvements including, but not limited to, enhanced personalisation, access efficiencies, diversification of choice and dynamic consumption behaviours.

Ultimately, the ongoing transformation of Mainstream Media has enabled Australian based news media businesses and Australian citizens with access to global media markets which has ensured Australia’s capability to pursue, leverage, exploit and develop global media opportunities. Australia’s embrace of and contribution to the Mainstream Media transformation means that Australian talent can develop their skills, attract foreign direct investment and build competitive news media sources.

Subsequent to the transformation of Mainstream Media, Australians have been beneficiaries and contributors to Media Democracy. Mainstream Media, of which news media is a critical component to, enables all Australians to contribute to discussions and debates of interest to Australia and its international affiliations. Media Democracy advocates for free and independent media, which Australia has continued to benefit from domestically and on the global stage.

The democratisation of media has allowed for Australian news media businesses and Australian citizens to more freely pursue, contribute to, engage with, consider and endorse discussions that are important to Australia and its citizens. Importantly, the democratisation of media has threatened traditional business models for news media businesses.



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The business model of the stereotypical news media business in Australia isn't the only business model in Australia that has been impacted by market changes and transformation. The business model of brick and mortar food retail businesses is another business model that has experienced systemic and systematic failure in the majority of cases, which is detrimental to the Australian economy if not dealt with adequately. Considering the proposed particulars of The Code, if a similar approach was to be taken with the food retail industry it would see something to the effect of addressing the imbalance of bargaining power between food retail outlet owners (and or food retail franchisors) with digital food ordering platforms, such as UberEats and Deliveroo. The question to be asked is: *would such a legislative approach address the fundamental issues associated with the failure of the food retail business model?* The unambiguous answer is NO. Instead, such an approach would serve as a surface-level solution that naturally will become obsolete due to how markets work (unless of course, it is proposed that innovation and advancement will be made illegal globally or, at minimum, drastically intervened through legislation).

It is not suggested that there is an easy answer to address and solve the issues threatening the business model of news media businesses in Australia. Albeit it is suggested that the proposed allowances for eligible news media businesses in the scope of The Code are not the right strategic solution for Australia.

The influence of the consumer and or user must not be ignored, particularly in digital environments. Consumers on digital platforms are most commonly referred to as 'users', and as such the label 'users' will prevail. On digital platforms users are indisputably subject to influence from algorithms that generally take advantage of machine learning capabilities. Conversely, algorithms for digital platforms are indisputably subject to influence from users given the explicit nature of how disciplines of artificial intelligence, such as machine learning, actually function. Consequently there is a complex-adaptive, interdependent relationship between users and digital platforms. The importance of this interdependent relationship contributes critical relevance to decisions made relating to the governance of digital platforms.

The interdependent relationship between users and digital platforms significantly influences how content, including news content, is distributed on digital platforms. The personalised contributions of users to the learnings of digital platform algorithms are, at minimum, indicative of user tastes and preferences. In an age of democratised media and freedom of expression at scale, it would be illogical to assume that the tastes and preferences of users on digital platforms can be ultimately or significantly controlled by providing legislative allowances to news media businesses contributing to such digital platforms. Simply, preferential allowances for news media businesses at the enforced monetary expense of digital platforms does not strategically address or solve the fundamental issues threatening the viability of the stereotypical business model for news media businesses in Australia.

It is understood that the particulars of The Code are designed to try and preserve the economic viability of eligible news media businesses in Australia. The particulars of The Code do offer to eligible news media businesses in Australia certain advanced privileges to deprive users of their ability to engage with and or contribute (i.e. through comment) to public debate about topics of interest to Australia and its citizens.



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Such moderation and intervention capabilities are necessitated in particular scenarios where, for example, it is of interest to National Security or National Health however it is understood that existing legislations provide the Australian Government and other entities with the advanced ability to moderate and or intervene in such situations. Commentary moderation allowances within The Code are not designed for substantial reason and are instead designed for undue political reason, which is not in the interests of a democratic country such as Australia. For reference, the Assistance and Access Act 2018 was an initiative of the Australian Government to ensure it has the capabilities to moderate and or intervene in technology environments, such as through digital platforms, where it may need to in the interests of Australia and its citizens.

Particulars of The Code in effect grant eligible news media businesses with legalised permission to be recipients of insider trading benefits from certain digital platforms, for example advanced notice of algorithm changes that are likely to materially impact the performance of the relevant news media businesses. In the Securities market, insider trading and its monetary and non-monetary benefits are punishable by law in Australia.

The Code grants precedence to eligible news media businesses that have not sustained economically sound business strategies and financial models. Notably, The Code specifies that eligible news media businesses only require to have annual revenue of at least \$150,000 AUD “*in either the most recent financial year or in three out of the five most recent financial years*”. The low nature of the minimum revenue requirement within the eligibility criteria signifies the extremity of the issues facing the viability of news media business financial models in 2020.

Further, The Code will establish a precedent for government intervention to preserve failing business models in competitive and evolving markets. The weight of this precedent must not be disregarded as it is likely to have immediate and delayed impacts on innovation sentiment, in addition to other critical aspects of economic health including, but not limited to, global value chain positioning and commitment to solvency.

### Key Concerns:

- Use of coordinated inauthentic behaviour
- Creation of artificial business performance
- Crippling of capability to compete in global markets
- Legalisation of insider trading in a democratised market



## Feedback relating to the “Q&A’s: Draft news media and digital platforms mandatory bargaining code” resource published by the ACCC in July 2020

### Section 1.2 “Which digital platforms would be covered by the code?”

The Australian Government’s announcements suggest that Facebook and Google are most powerful in the context of inequality of bargaining power on the global information distribution stage. The power of Facebook and Google is not disputed, however it is important to consider how digital platforms such as Facebook and Google have effectively achieved their powerful positioning. Inequality of bargaining power occurs when one party to a situation, contract or agreement has more and better alternatives than the other party or parties. In a perfectly competitive market it would be rendered appropriate that there is no such imbalance with bargaining power between parties.

In the context of The Code and its targeting of Facebook and Google in the first instance, this initiative is justifiable primarily due to the fact that Australian news media businesses aren’t operating competitively in global media markets. Further, the nature of The Code highlights the lack of competitive edge Australian news media businesses have with regards to their technological capabilities (such as skills and intellectual property shortage). Given the absence of competitive behaviour by Australian news media businesses they have merely been victimised by the growth and advancements of global information distribution in media. The Code does not encourage nor reward competitive market behaviour and as such the Australian Government must consider the indirect message it is delivering to the innovation landscape in Australia.

### Section 1.3 “Why is this code necessary?”

This section stipulates that the imbalance in bargaining power has “*resulted in news media businesses accepting less favourable terms for the inclusion of news on digital platform services that they would otherwise agree to*”.

- Does the Australian Government understand that how information is created, collected, curated, refined, distributed and promoted globally has experienced unprecedented change particularly subsequent to technological advancements and the capabilities that have enabled for democracies?
- Does the Australian Government understand that business models must evolve and adapt to ensure they are sustainable and feasible as market dynamics change?
- Does the Australian Government recognise the impacts of natural market supply and demand forces on the news media business industry, akin to any other market dynamic?

This statement suggests that the Australian Government is seeking to protect a, in effect, broken business model that has become less profitable due to its inability to innovate and adapt in response to the evolution of markets and an industry. The reference to acceptance of less favourable terms than they would otherwise agree to indicates a recollection of historical profitability mechanics of news media businesses in Australia.



This section stipulates that “a strong and independent media landscape is essential to a well-functioning democracy”.

- Does the Australian Government uphold the understanding that a democratic governing system is characterised as a government by the people for the people?
- Does the Australian Government understand the behavioural dynamics of algorithm configurations on digital platforms such as Facebook and Google?
- Does the Australian Government realise that by providing preference treatment to particular media businesses it is creating a conflicting suggestion about entity independence in markets?
- Does the Australian Government believe that a “well functioning democracy” is characterised by unjust control mechanisms that explicitly intervene with natural forces?
- Does the Australian Government believe that a “well functioning democracy” can be achieved by deploying information governance mechanisms of similarity to that of communist governing systems?

### **Section 2.1 “Which news media businesses can participate in the code and how would they apply?”**

This section makes reference to news sources and core news forms, in particular it states that “Based on the news sources they nominate, news media businesses can participate in the code if they predominantly produce ‘core news’, and publish this online. The draft code defines ‘core news’ as journalism on publicly significant issues; journalism that engages Australians in public debate and informs democratic decision making; and journalism relating to community and local events”.

- Does the Australian Government understand that the determination of “core news” sources is subjective relative to the individual interests, beliefs and judgement of each Australian citizen?
- Does the Australian Government respect that “publicly significant issues” are effectively discussed by peers and trusted stakeholders relative to receptiveness?
- Does the Australian Government realise that preferential treatment for sources does not allow for sincere and authentic “public debate” on important topics?
- Does the Australian Government wish to disregard the importance of freedom of speech and its role for impacting democratic understanding to support democratic decision making?

### **Section 2.2 “What type of news is covered by the code?”**

This section stipulates examples of “content that is not defined as ‘core news’ but would still be covered by the code when reported by an eligible news media business”. These content examples include reporting about sport and reporting about entertainment but does not include broadcasting of sports, entertainment content (such as TV programs), product reviews, talkback radio, academic publications and documentary films.



- Does the Australian Government believe in media control for political influence hence the allowance of sports reporting, “such as interviews with coaches and players or investigative journalism focused on sports administration”, within the scope of The Code for eligible news media businesses?
- Does the Australian Government believe in manipulation of market forces by allowing news media businesses to effectively be paid more by digital platforms for promotion of film releases or television shows when other democratic market players are required to do the reverse (pay the digital platform to promote any such releases or upcoming releases)?

### **Section 2.3 “How would the code benefit smaller, regional and rural news media businesses?”**

This section stipulates that digital platforms will be required to provide news media businesses with a minimum of 28 days notice about “*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*”.

- Does the Australian Government believe that preferential treatment of sympathetic nature will spur valuable innovation by eligible news media businesses?
- Does the Australian Government believe that its legislative powers should be used to provide eligible news media businesses with unfair advantage over non-eligible news media businesses?
- Does the Australian Government believe that legislative changes to preserve the life of broken business models it has a biased interest in is a conscionable and sustainable decision for advertisers who spend considerable money with the respective businesses?
- Does the Australian Government believe that confirmation bias preservation measures are effective for fair and economic legislative decisions?

### **Section 4.7 “How would the arbitrator decide between the parties’ final offers?”**

This section stipulates three key considerations the arbitrator must honour in the case it is required to decide between the final offers of the parties. Notably these considerations are: “*the direct and indirect benefit that the content of the news business provides to the digital platforms service, the cost to the news business of producing news content and whether a particular payment amount would place an undue burden on the commercial interests of the digital platform*”.

- Does the Australian Government have access to, and the ability to retain, the skills and expertise required to support appointed arbitrators with the technical and non-technical know how to make informed judgement on the direct and indirect monetary and non-monetary benefits a digital platform derives from any content?
- Does the Australian Government endorse preservation of broken business models through legislative intervention?
- Does the Australian Government believe that redistribution of funds from entities with greater disposable funds to entities that do not remain competitive, in some type of sympathy gesture, is sustainable and a reflection of good economic decision making?



- Does the Australian Government believe that, in effect, welfare legislation for the news media business industry will provide long term benefit to the Australian economy, including with consideration to its position in the global value chain based on its ability to generate real economic value?

### **Section 5.1 “What are the minimum standards under the code and why are they necessary?”**

This section stipulates the proposed minimum standards for The Code which would require digital platforms to:

- *“Give news media businesses at least 28 days’ notice of algorithm changes likely to materially affect referral traffic to news, algorithm changes designed to affect ranking of news behind paywalls and substantial changes to display and presentation of news, and advertising directly associated with news, on digital platform services*
- *Give news media businesses clear information about the nature and availability of user data collected through users’ interactions with news on their services*
- *Publish proposal to appropriately recognise original news on their services*
- *Provide flexible user comment moderation tools for news media businesses and*
- *Allow news media businesses to prevent their news being included on any individual digital platform service”*

It is understood that any government may need and or want to intervene at times to ensure that misinformation and disinformation are suspended from digital platforms in the interests of the public, for example during the COVID-19 pandemic certain behaviour necessitated the censoring, preference and or suspension of certain content assets due to their likely harmful impact on the health, social and economic interests of Australians. By comparison, the Chinese Communist Party (“CCP”) is globally condemned for its extreme approach to the censoring, preference and suspension of content, not exclusive to the COVID-19 pandemic. Further, the CCP is strongly criticised for its approach to control mechanisms exercised over the private business industry through undue interference, interception and influence - whether permitted by legislation or not.

The Australian Government should thoughtfully consider its stance on influence of information distribution and promotion. Further, the Australian Government should consider the similarities of its proposed controls on information collection, curation, creation, distribution and promotion within the Australian news media business industry in comparison to approaches of other major governments across the globe.

The particulars of the proposed minimum standards of The Code emulate a similar sentiment to that of the Assistance and Access Act 2018 in terms of their impact on innovation, decision making and democratic enthusiasm.

- Does the Australian Government endorse the enforcement of preference treatment to business models that have not effectively adapted and evolved to survive modern market dynamics?
- Does the Australian Government believe that legislative protection, that discourages innovation, is in the strategic interests of Australia’s economic prosperity particularly with consideration to global markets?



- Does the Australian Government agree that advanced moderation tools for democratic intervention on digital platforms should be provided to the entities that it believes are critical to enabling public debate in the interests of Australia’s democracy?

### **Section 5.2 “Does the code affect the privacy of digital platform users?”**

This section stipulates that The Code minimum standards require “*digital platforms to provide clear information about the data they currently collect through news content*”.

- Does the Australian Government believe that enforced disclosure of technical-know-how practices (in effect, intellectual property) by digital platforms to an exclusive subset of news media businesses adequately supports the dynamics of a fairly competitive market?
- Does the Australian Government believe that enforced disclosure of technical-know-how practices by digital platforms to, in effect, competing businesses offers incentive to the technology innovation landscape of Australia’s startup ecosystem?

### **Section 5.4 “Does the code require digital platforms to disclose the content or course code of their proprietary algorithms?”**

This section stipulates that the code's minimum standards would require “*digital platforms to provide news media businesses with 28 days’ advanced notice of algorithm changes that are likely to affect their business models*”.

- Does the Australian Government believe that competition is not important to markets?
- Does the Australian Government believe that preservation of broken business models, at the expense of innovation and economic sustainability, is good economic governance?
- Does the Australian Government believe that legislated preferential treatment offers incentive to the development of sustainably solvent business models?
- Does the Australian Government believe that privileged access to intel of digital marketplaces, with an effect similar to that of insider trading which for the securities market is punishable by law, to accelerate decisions is of conscionable economic governance?

### **Section 5.5 “Would the code give news media businesses more control over news content and advertising?”**

This section stipulates certain privileges that eligible news media businesses would have under the code, and in particular specifics that “*News media businesses would also have more control over user comments made against stories they post or publish to digital platform services, with digital platforms required to provide flexible moderation tools that allow: removing or filtering user comments, disabling user comments against individual news items and blocking user comments or accounts*”.

It is respected that any distributor of content on digital platforms may reasonably require the ability to remove, filter or block commenting from specific users. Most major digital platforms,



including Facebook and Google, already grant this capability to users of the services who deploy and promote news media content as well as content of different nature.

The provision of extended preferential treatment to eligible news media businesses to allow for extreme moderation capabilities conflicts with the Australian Governments claim that such news media businesses are critical to enabling public debate on matters of interest to the democracy of Australia. The Australian Government is of the belief that news media businesses in Australia are critical to ensuring a “*well-functioning democracy*” and as such it is important to consider the characteristics of residing in and contributing to a democratic country. Notably, the democratic governance of Australia empowers and encourages freedom of speech which is an important aspect of ensuring accountability for government. Freedom of speech is understood to be fundamental in a democracy and as such legislative actions to provide undue control over freedom of speech and expression explicitly conflicts with the fundamental contribution of freedom of speech to the Australian democracy.

- Does the Australian Government value freedom of speech in a democracy?
- Does the Australian Government believe freedom of speech is an enabler of public debate on matters of interest to Australia?
- Does the Australian Government understand control mechanism capabilities to govern freedom of speech in the interests of Australia?
- Does the Australian Government believe that legislating the allowance for preferential treatment to enable entities to exert greater control over freedom of speech is a conscionable and fair economic decision in a market that exists on the basis of expression?





# *End of Submission*

to the Australian Competition and Consumer Commission  
("ACCC") and the Australian Government

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