

# Searching for a solution

Submission to the ACCC draft news  
media bargaining code

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August 2020

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ISSN: 1836-9014

# Introduction

The Australia Institute's Centre for Responsible Technology welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (ACCC) draft news media bargaining code.

The Australia Institute established the Centre for Responsible Technology last year to champion the design and deployment of world-impacting digital platforms and technologies that are appropriate, responsible and adhere to the core Australian values of fairness, egalitarianism and a commitment to democracy.

It is difficult to imagine an issue more pertinent to that mission statement than the decline of media revenues and the overwhelming power of Google and Facebook.

It is clear that action is needed to address the loss of funding for journalism, the substantial market power of Google and Facebook, and the lack of a formal negotiation structure. This submission discusses the ACCC proposal, as well as the broader policy issues, and makes a number of recommendations – primarily for the federal government.

# The need for a mandatory code

The Australia Institute's Centre for Responsible Technology supports the implementation of a news media bargaining code proposed by the ACCC. Media businesses must be supported to provide the independent journalism that is crucial to Australia's democracy.

Traditional media companies cannot fairly compete with large monopoly platforms for advertising revenue, and revenue shortfalls have resulted in media centre closures and job cuts throughout news businesses.<sup>1</sup> Digital platforms derive significant benefit from news produced by media businesses, yet these businesses are not fairly compensated for this. Platforms are "unavoidable trading partners" for news publishers because publishers have reasonable control over how their content is used but cannot realistically exclude their content from the platforms without decimating their digital business.

The necessity of a mandatory code has been made even more urgent with the pressures media businesses have faced during the COVID-19 pandemic to date. There has been little progress in developing a voluntary code. A voluntary code is also insufficient due to unequal power balance between monopoly platforms and diverse media businesses. A mandatory code is therefore crucial to address the unequal bargaining power between digital platforms and media businesses.<sup>2</sup> A mandatory code addresses power imbalance by allowing media businesses to bargain in a structured way and, if unsuccessful, elevate cases to compulsory arbitration to reach a solution.

A strong mandatory code will ensure that monopoly digital platforms cannot use their inflated bargaining power to walk away from negotiations with news creators. Although Google has reached voluntary agreements with certain individual media businesses, a mandatory code will ensure that any potential compensation can be received by all qualifying media businesses under the code. It is also worth noting that deals Google has struck with publishers exclude search, which is where the most traffic and benefit is.<sup>3</sup>

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<sup>1</sup> Carson & Dodd (2020) 'Suck it and see' or face a digital tax, former ACCC boss Allan Fels warns Google and Facebook, <http://theconversation.com/suck-it-and-see-or-face-a-digital-tax-former-accc-boss-allan-fels-warns-google-and-facebook-145041>

<sup>2</sup> Fletcher (2020) *Joint Media Release: Release of the ACCC Digital Platforms Report*, <https://www.paulfletcher.com.au/media-releases/joint-media-release-release-of-the-accc-digital-platforms-report>

<sup>3</sup> For example, a licensing program announced in June pays for "a new news experience" launching out of Google News: Samios (2020) *Google to pay publishers under new licensing deal*, <https://www.smh.com.au/business/companies/google-to-pay-publishers-under-new-licensing-deal-20200625-p55694.html>

Likewise, Facebook has done deals which exclude their news feed, where most of the traffic is.<sup>4</sup>

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<sup>4</sup> For example, in 2019 Facebook was in talks to licence content for a dedicated “news tab”: Associated Press (2019) *Facebook reportedly in talks with news publishers to offer “millions” for content*, <http://www.theguardian.com/technology/2019/aug/08/facebook-news-tab-stories-industry-millions>

# Public broadcasters

The scope of the code should be expanded to include the Australian Broadcasting Service (ABC) and Special Broadcasting Service (SBS) to ensure the public broadcasters are compensated for the use of their content just as private broadcasters will be.

News content benefits digital platforms regardless of whether it is publicly or privately produced.

Although the ACCC did not advise the Morrison Government on whether to include the ABC and SBS in the remuneration scheme, chair Rod Sims “had previously expressed an intention to include ABC and SBS in the revenue-sharing part of a code of conduct”. Sims identifies a risk that significant commercial funding may compromise the public broadcasters, or that the government may appropriate funding that the public broadcasters received from such a scheme.<sup>5</sup>

The public broadcasters should receive adequate public funding, and never be dependent on commercial funding. Any commercial funding, such as through the mandatory code, should complement the core public funding rather than replace it. Regardless of whether the public broadcasters are included in the mandatory code, public funding for the ABC and SBS should increase.

Nonetheless, at the current time, both ABC and SBS experience similar financial constraints to the private media in their endeavour to produce high quality journalism. Funding and employment cuts have been ongoing at ABC, while additional costs have also been placed on the public broadcaster to deliver emergency broadcasting services during the 2019–20 summer bushfires and the COVID-19 pandemic.

The public broadcasters are already required to navigate commercial relationships, which they do well.<sup>6</sup> In particular, the SBS has commercial advertising and sponsorship – in 2019, own-source income of \$125 million made up 30% of total operating revenue.<sup>7</sup> Since limited advertising began in 1992, the SBS has successfully managed this potential conflict of interest through a strict code of practice and editorial guidelines.<sup>8</sup>

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<sup>5</sup> Samios & Hunter (2020) *ABC, SBS exclusion from tech giants' payments a “government” decision*, <https://www.smh.com.au/politics/federal/abc-sbs-exclusion-from-tech-giants-payments-a-government-decision-20200731-p55hfh.html>

<sup>6</sup> Denniss, Richardson, Browne, & Bennett (2018) *Inquiry into the competitive neutrality of the national broadcasters: Submission*, <https://www.tai.org.au/content/inquiry-competitive-neutrality-national-broadcasters-submission>

<sup>7</sup> SBS (2019) *Annual report 2019*, pp. 84, 127, <https://www.sbs.com.au/aboutus/transparency>

<sup>8</sup> SBS (n.d.) *Advertising guidelines*, <https://www.sbs.com.au/aboutus/advertising-guidelines>

The public broadcasters would benefit from additional revenue from digital platforms that utilise their news content. If digital platforms benefit from public broadcasting news content, those public broadcasters have legitimate interests in reinvesting revenue from those benefits back into journalism. Additionally, taxpayers that fund the public broadcasters would benefit from the ABC and SBS reinvesting returns from the use of their content by digital platforms.

One possibility could be to ring-fence the funding that public broadcasters receive from the digital platforms for a specific, supplementary purpose. This would reduce the risk that the new commercial funding stream is used to justify cuts to the public broadcasters' public funding.

The ABC has already highlighted the benefits of other forms of value exchange possible under the mandatory code, such as data and analytics.<sup>9</sup>

There are also competitive reasons for including the public broadcasters. Were the ABC and SBS not included in the code, digital platforms may be incentivised to prefer their content to content for which they have to pay.

The ACCC has acknowledged the importance of public broadcasters in delivering and supporting public interest journalism and that adequate and stable funding for them is necessary for them to continue playing this role.<sup>10</sup>

**Recommendation:** The federal government adequately fund the ABC and SBS in the Budget.

**Recommendation:** The ABC and SBS be included in the mandatory code as full participants.

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<sup>9</sup> ABC (2020) *ABC Response to the ACCC Concepts Paper*,  
[https://www.accc.gov.au/system/files/Australian%20Broadcasting%20Corporation\\_2.pdf](https://www.accc.gov.au/system/files/Australian%20Broadcasting%20Corporation_2.pdf)

<sup>10</sup> ABC (2020) *ABC Response to the ACCC Concepts Paper*

# Pooled fund model

The Australia Institute's Centre for Responsible Technology supports the ACCC's approach. That said, there are policy alternatives that the federal government could also consider.

Professor Andrew Jaspan, former newspaper editor and founder of The Conversation, suggested an Independent Future Fund for Journalism in his 2019 submission to the ACCC's inquiry.<sup>11</sup> The fund would be in the form of a social licence levy, perhaps 10% of sales turnover. Jaspan calculates that this would raise \$400 million per annum; more if the digital platforms' sales turnover continues to increase exponentially.

Nine chair and former federal treasurer Peter Costello has also suggested a figure of 10% of online advertising revenue as the amount Google and Facebook should pay into a fund, although his model differs from Jaspan's proposal in other regards.<sup>12</sup>

Under Jaspan's model, the fund would be targeted at the public good functions of journalism, especially local and court, specialist, regional, foreign and parliamentary reporting, as well as investigative journalism. Significantly, the ABC and SBS would be eligible to apply.

The fund would be a legal trust or public ancillary fund, with a board drawn from the wider community. A committee would allocate funding according to an established formula, with public service tests for each allocation. Grant recipients would have to commit to best-practice journalism, including fact-checking and timely correction of mistakes.

Jaspan's model has the benefit that funding is directed specifically at the public good element of journalism: those parts that benefit individuals whether or not they pay for it.<sup>13</sup> Public interest journalism helps to expose wrongdoing, hold the powerful to account, place on the public record what would otherwise be impossible or difficult to access, and allows for marginalised voices to be heard.

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<sup>11</sup> Jaspan (2019) *Independent Future Fund for Journalism*,  
[https://www.accc.gov.au/system/files/Andrew%20Jaspan%20\(March%202019\).pdf](https://www.accc.gov.au/system/files/Andrew%20Jaspan%20(March%202019).pdf)

<sup>12</sup> Mason & Kehoe (2020) *Tech giants should pay media \$600m: Costello*,  
<https://www.afr.com/companies/media-and-marketing/tech-giants-should-pay-media-600m-costello-20200513-p54sgs>

<sup>13</sup> For more on the news media as a public good, see Wilding, Fray, Molitorisz, & McKewon (2018) *Impact of Digital Platforms on News & Journalistic Content*, pp. 28–29, <https://www.uts.edu.au/node/247996/projects-and-research/impact-digital-platforms-news-journalistic-content>

A levy also makes conceptual sense, because it would produce more quality news content that digital platforms can then aggregate. In Australia, it is very common for companies within an industry to pay levies for programs that benefit companies across the industry.

Jaspan's model also disaggregates journalism funding from a requirement to attribute benefit or loss specifically to digital platforms. This avoids the complication of having to figure out direct and indirect costs. This is a strength of the proposal, but a new tax is likely to be more politically difficult to implement than a mandatory code would be.

Interestingly, critics of the ACCC model, such as media and technology business journalist Ben Thompson, have identified the model of taxing digital platforms to pay for the media as a public good as preferable.<sup>14</sup> Google Australia has recommended Thompson's article where he outlines the tax model.<sup>15</sup>

**Recommendation:** The federal government should consider a revenue-based levy on large digital platforms to pay for a fund for public interest and other public good journalism, subject to competition law.

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<sup>14</sup> Thompson (2020) *Australia's News Media Bargaining Code, Breaking Down the Code, Australia's Fake News*, <https://stratechery.com/2020/australias-news-media-bargaining-code-breaking-down-the-code-australias-fake-news/>

<sup>15</sup> Google Australia (2020) *13 things you need to know about the News Media Bargaining Code*, <https://australia.googleblog.com/2020/08/13-things-you-need-to-know-about-news.html>

# Other points for consideration

In August 2020, Google published a blog post, “13 things you need to know about the News Media Bargaining Code”, setting out its case against the ACCC’s proposed reforms.<sup>16</sup> The points raised by Google are an opportunity to discuss the role and power of major digital platforms, and their implications.

## SHARING ALGORITHM CHANGES

Google warns that the obligation to share details of its algorithm changes:

would provide an unfair advantage to large news businesses and help them feature more prominently in organic search results at the expense of other businesses, creators and website owners.<sup>17</sup>

This misrepresents the position the code would place Google in. The ACCC’s draft code would not require Google or other digital platforms to *exclusively* give news businesses advance notice of significant algorithm changes. If a digital platform is concerned that advance notice of algorithm changes gives some organisations an unfair advantage, it should level the playing field by making that advance notice public.

Of course, the option for asymmetrical notice would still exist. If this remains a competition concern, then the draft code could be revised to mandate public advance notice of algorithm changes. This is not a novel proposal, and there are strong public policy arguments in favour beyond just market competition.

Concern over Google’s power, market share and opacity has grown in recent years. In 2019, investigative journalism by the Wall Street Journal found that Google has:

intervened in its algorithm to demote spam sites and maintain blacklists as well as make changes to its algorithm that favored the search ranking of a major advertiser, eBay, contrary to its public position.<sup>18</sup>

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<sup>16</sup> Google Australia (2020) *13 things you need to know about the News Media Bargaining Code*

<sup>17</sup> Google Australia (2020) *13 things you need to know about the News Media Bargaining Code*

<sup>18</sup> Feiner (2019) *Google exercises more direct control over search results than it has admitted, report claims*, <https://www.cnn.com/2019/11/15/google-tweaks-its-algorithm-to-change-search-results-wsj.html>; Grind, Schechner, McMillan, & West (2019) *How Google Interferes With Its Search Algorithms and Changes Your Results*, <https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753>

The arbitrary and potentially discriminatory behaviour of YouTube’s algorithms is discussed further in the Centre for Responsible Technology’s submission to the inquiry into the impact of technological and other change on the future of work and workers in New South Wales.<sup>19</sup>

German Chancellor Angela Merkel in 2016 supported more transparency for search algorithms, saying:

I’m of the opinion that algorithms must be made more transparent, so that one can inform oneself as an interested citizen about questions like ‘what influences my behaviour on the internet and that of others?’.

Algorithms, when they are not transparent, can lead to a distortion of our perception, they can shrink our expanse of information.<sup>20</sup>

Merely publishing the source code to these algorithms may not be sufficient, but a combination of publication of some details of the algorithms, inspection regimes by regulators and a legislated legal liability could address the problem.<sup>21</sup>

**Recommendation:** The ACCC consider whether mandating the public advance notice of algorithm changes would serve public policy and competition goals better.

## MONOPOLY POWER

Google argues that news businesses already get a say on how their content is used, because:

All websites can opt out of appearing in Search results, including news media sites, and we share guidance on how to do this.<sup>22</sup>

Terms offered on a “take it or leave it basis” by a monopoly do not truly give news businesses a say.

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<sup>19</sup> Lewis (2020) *Workplace surveillance*. Expected to be published on the committee’s webpage after submissions to the inquiry close:

<https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx>

<sup>20</sup> Connolly (2016) *Angela Merkel: internet search engines are “distorting perception,”*

<http://www.theguardian.com/world/2016/oct/27/angela-merkel-internet-search-engines-are-distorting-our-perception>

<sup>21</sup> Naughton (2016) *Good luck in making Google reveal its algorithm,*

<http://www.theguardian.com/commentisfree/2016/nov/13/good-luck-in-making-google-reveal-its-algorithm>

<sup>22</sup> Google Australia (2020) *13 things you need to know about the News Media Bargaining Code*

While exact figures prove hard to find, Google’s share of search is consistently reported as being above 90%.<sup>23</sup>

By contrast, in Australia as of 2018 Woolworths and Coles together had a 68% share of the supermarkets and grocery stores market. The four “major players” (Woolworths, Coles, ALDI and Metcash) between them had 84% market share, still well below the over 90% market share attributed to Google.<sup>24</sup>

In other words, a website opting out of Google Search results is equivalent to a supplier opting out of Woolworths, Coles, ALDI and the numerous independent retailers supplied by Metcash, and another third of the remaining market.

Google’s monopoly results in an unreasonable power imbalance, and short of the monopoly being broken up it is reasonable for the state to intervene to make negotiations fairer. This has been standard practice in Australia for the supermarket “duopoly”, even though the duopoly’s market share is significantly smaller than Google’s market share.<sup>25</sup>

## VIABILITY OF PAYMENTS TO NEWS PARTNERS

Google argues that

We have news partners in other countries, as well as countless other categories of websites and content that people search for. It simply isn’t viable for us, or any digital platform, to pay unreasonable and exorbitant amounts to one group in one country.<sup>26</sup>

However, it is worth noting that the absence of payments to Google’s news “partners” in other countries is in large part thanks to Google’s lobbying efforts. Australia is not the first country to attempt to regulate Google in this way; Spain in 2014 was a victim of Google’s “take it or leave it” approach to bargaining.<sup>27</sup>

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<sup>23</sup> See for example, Acker (2020) *What Did People Use Before Google to Search the Web?*, <https://www.gizmodo.com.au/2020/07/what-did-people-use-before-google-to-search-the-web/>; Statista (2020) *Google market share countries 2020*, <https://www.statista.com/statistics/220534/googles-share-of-search-market-in-selected-countries/>

<sup>24</sup> IBISWorld (2018) *IBISWorld reveals state of the supermarkets and grocery industry*, <https://www.ibisworld.com/industry-insider/press-releases/checkout-update-q1-2018-ibisworld-reveals-the-state-of-play-in-the-supermarkets-and-grocery-stores-industry/>

<sup>25</sup> See for example Elmas (2019) *Government agrees to tougher rules for Woolworths, Coles, Aldi supplier dealings*, <https://www.smartcompany.com.au/industries/retail/code-woolworths-coles-aldi-suppliers/>

<sup>26</sup> Google Australia (2020) *13 things you need to know about the News Media Bargaining Code*

<sup>27</sup> Smith (2020) *Big Tech Has Crushed the News Business. That’s About to Change.*, <https://www.nytimes.com/2020/05/10/business/media/big-tech-has-crushed-the-news-business-thats-about-to-change.html>

Nor will Australia's success come at the expense of news companies in other countries. On the contrary, the New York Times reports that Australia (and France, which is pursuing a similar arrangement) will set a precedent that will help news publishers and regulators in other countries.<sup>28</sup>

## NEWS SHARE OF SEARCH QUERIES

Google and the ACCC have presented alternative measures of the value of news to Google's search function.

Google reports that "in the last year, news-related queries accounted for just over 1 percent of total queries on Google Search in Australia",<sup>29</sup> although they provide no information on their methodology or how they arrived at that number.

Conversely, the ACCC reports that "between 8 and 14 per cent of Google search results trigger a 'Top Stories' result, which typically includes reports from news media websites including niche publications or blogs".<sup>30</sup>

Google describes its "Top Stories" as displaying when "you're searching for information on a timely topic", with the carousel of articles "highlighting relevant news". That sounds like a description of a "news-related query". If only 1% of queries are news-related, why does Google interrupt 8–14% of queries with a special selection of news stories? The decision by Google to prioritise news results ahead of other content gives further credence to the argument that news content is of special value to Google and its users.

**Recommendation:** Google provide full details on its definition of "news-related queries" and its methodology for arriving at the 1% figure, or a rebuttal of the ACCC's use of searches that trigger a "Top Stories" result as the metric.

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<sup>28</sup> Smith (2020) *Big Tech Has Crushed the News Business. That's About to Change*.

<sup>29</sup> Google Australia (2020) *A fact-based discussion about news online*, <https://australia.googleblog.com/2020/05/a-fact-based-discussion-about-news.html>

<sup>30</sup> ACCC (2019) *Digital Platforms Inquiry: Final report*, p. 15, <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>