



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Mandatory news media bargaining code

## Concepts paper

19 May 2020

## Introduction

On 20 April 2020, the Australian Government announced that it had directed the ACCC to develop a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms. The government has asked that a draft mandatory code be released for public consultation before the end of July 2020, with a final code to be settled soon thereafter.

The ACCC recognises that bargaining power imbalances exist in other contexts, including in other commercial relationships involving digital platforms. However, the production and dissemination of news provides broad benefits to society beyond those individuals who consume it. The proposed bargaining code is intended to address bargaining power imbalances between Australian news media businesses and digital platforms in order to ensure that commercial arrangements between these parties do not undermine the ability and incentives for news media businesses to produce news for Australians.

The draft mandatory code of conduct to address bargaining power imbalances (**the bargaining code**) is being developed by the Australian Competition and Consumer Commission (**ACCC**) in close consultation with the Department of the Treasury (**Treasury**), and the Department of Infrastructure, Transport, Regional Development and Communications (**DITRDC**).

The ACCC is seeking the views of relevant stakeholders to inform the development of the bargaining code through a consultation period on this concepts paper scheduled for 19 May to 5 June 2020. This concepts paper is intended to guide the consultation process by clarifying the issues to be included in the draft bargaining code, identifying and exploring options for addressing these issues, and seeking stakeholder feedback by asking a number of specific questions about how these options may be implemented in the code.

The identification and explanation of issues in this concepts paper is based on:

- the research and findings of the ACCC's Digital Platforms Inquiry (**DPI**), including submissions made by stakeholders during the course of that Inquiry
- submissions made by stakeholders during the course of Treasury's 2019 consultation on the DPI's recommendations, and
- information provided by stakeholders to the ACCC during the course of negotiations to develop a voluntary news media bargaining code in early 2020 (a process that has now been superseded by the development of the bargaining code).

We expect that news media businesses' and digital platforms' responses to the concepts paper will also reflect the discussions held between them during negotiations as part of the previous voluntary code development process.

The ACCC notes that while some of the discussion in this paper has been informed by confidential submissions made during these previous processes, no confidential material has been disclosed or attributed unless agreed to by the relevant parties.

Where this paper refers to 'digital platforms', this should be read to mean only the services provided by Google and Facebook for the purpose of the draft bargaining code. This is because the Final Report of the DPI (**DPI Final Report**) found that Facebook and Google were the digital platforms currently benefitting from a significant imbalance in bargaining power in their commercial negotiations with Australian news media businesses. As the digital platform and news media industries continue to evolve, a significant bargaining power imbalance may also extend to news media businesses' commercial negotiations with other digital platforms. If this occurs, it may be appropriate to extend future iterations of the bargaining code to these other platforms.

Where this paper refers to ‘news media businesses’, this should be read to mean the full range of media organisations providing news services to Australian audiences. This includes commercially funded media businesses as well as news organisations that rely on alternative business models (including national broadcasters the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation).

The ACCC notes the fast pace of change to the technology and business models used by news media businesses, Google and Facebook. This creates challenges in identifying solutions that are able to address current and future issues arising from the commercial relationships between news media businesses and digital platforms. On this basis, the consultation questions in this concepts paper provide stakeholders with the opportunity to update the ACCC on any developments since the publication of the DPI Final Report.

The ACCC is not proposing to re-examine the core findings of the DPI Final Report, and this consultation process is not intended to encourage stakeholders to re-submit specific claims already considered by the ACCC. However, we note that some areas of the concepts paper revisit particular proposals that were considered, but not endorsed, in the DPI Final Report. We have done this to canvass the full range of options available in addressing particular issues, including issues that stakeholders have previously identified as important, or issues that have continued to be considered in other jurisdictions overseas.

This concepts paper does not represent the views of the Australian Government.

## Responding to this concepts paper

The ACCC invites stakeholders to provide their views in the form of written submissions, which can be sent to [bargainingcode@acc.gov.au](mailto:bargainingcode@acc.gov.au) until **5 pm AEST 5 June 2020**. The ACCC will also directly contact some stakeholders to request specific information.

The ACCC encourages you to provide your views on the issues most relevant to you, as well as on any other issues you consider directly relevant to the development of the mandatory code. We recognise that this concepts paper contains a large number of questions, and you are not expected to address every question. You may also wish to provide views on issues or options not canvassed in the questions, where you consider such issues or options relevant to the development of the code. Wherever possible, please provide reasons for your views and any evidence available to support your views, and focus on practical proposals and suggestions that will inform the code development process.

If any information in your written submission is confidential, please clearly identify what particular information is confidential. You may also wish to provide both a public and confidential version of the submission. The ACCC will publish all public submissions on our website when a draft code is released.

While the ACCC is responsible for receiving submissions, all submissions, including confidential versions, will be shared with the Treasurer, the Minister for Communications, Cyber Security and the Arts, Treasury and DITRDC, who will accept these submissions, shared by the ACCC, on a confidential basis.

# Scope of the bargaining code

## Definition of news to be covered by the code

An important threshold issue for the development of a bargaining code is determining the scope of news content that will be subject to the code.

During the ACCC's oversight of negotiations between news media businesses and Google and Facebook to develop voluntary bargaining codes, stakeholders expressed a wide range of opinions on how 'news' should be defined for the purpose of such codes. Some stakeholders expressed that such a definition should be set extremely narrowly, and that the voluntary bargaining codes should only apply to 'hard' news content, such as coverage of politics, courts and major current events. Other stakeholders sought a broader definition that covers a wide range of news content, including sports coverage, celebrity and entertainment news and recaps of reality television programming. The ACCC notes that some stakeholders also previously suggested that voluntary bargaining codes should apply beyond news content to cover a wider range of content produced by media businesses, on the basis that non-news content (e.g. the advertising revenue associated with entertainment and sports) subsidises the production of news.

## Issues for consideration

Due to the composition of the Australian news media industry, it is expected that many news media businesses subject to a bargaining code will produce a mix of content that does and does not constitute 'news', even if a definition of 'news' is drawn extremely broadly. For example, many newspapers contain investigative reporting as well as horoscopes and crosswords; television broadcasters produce news bulletins as well as entertainment programming; some digital native news outlets publish a mix of reporting and 'top 10' lists. For this reason, it will likely be appropriate for the bargaining code to incorporate a definition of news that focuses on the news content itself rather than the nature of the news media business producing the content. The definition should allow all parties to readily identify content subject to the bargaining code.

Under such a content-based definition, any Australian media organisation could be within the scope of the bargaining code if it produces at least some content that fits this definition; and only this proportion of its content will be subject to the bargaining code. Consideration may also be given to whether the bargaining code should require news media businesses to demonstrate a threshold level of involvement in the production of news content in order to be subject to the code.

The ACCC notes that while the DPI Final Report did not define 'news', it included a definition of 'public interest journalism':

*journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government.<sup>1</sup>*

This definition was useful in the context of the DPI in order to identify where the reduced provision of particular types of journalism is likely to cause the most significant detriment to society. The definition was incorporated into the DPI Final Report's recommendations relating to direct government funding, but was not used in the context of identifying the consequences of the imbalance in bargaining power between each of Google and Facebook and news media businesses, and the associated recommendation. On this basis, the definition of 'public interest journalism' may be too narrow for incorporation into the

---

<sup>1</sup> See p. 285 of the DPI Final Report.

bargaining code, and the ACCC seeks stakeholder views on whether to take a broader approach in defining news as part of this code development process.

The ACCC is also considering the issue of whether the bargaining code's definition of news should require that content is produced by professional journalists, or published by a professional news media business. This may be accomplished by extending the application of the code to material produced by journalists and news media businesses that:

- are members of a relevant standards-setting body (such as the Australian Press Council, the Independent Media Council or the Media, Entertainment and Arts Alliance), or
- adhere to a relevant media industry code (such as the Commercial Television Industry Code of Practice or the Commercial Radio Codes of Practice), or
- adhere to and publish equivalent internal journalistic standards (such as the Guardian Editorial Code or the Conversation editorial charter).

This third criterion may be necessary to avoid inappropriately excluding journalists and news media businesses that do not choose to be part of particular industry bodies or industry associations.

We seek stakeholder views on whether such mechanisms would provide a broad enough indicator of the news content that should appropriately be captured by the bargaining code.

Whatever definition of news is adopted, it should be able to be objectively and readily identified by parties to the bargaining code. If necessary, it should be identifiable through any arbitration process that may be required to resolve disputes.

#### **Consultation questions**

1. How should 'news' be defined for the purpose of determining the type of content that will be subject to the bargaining code?
2. How can a bargaining code ensure that both news media businesses and digital platforms can easily and objectively identify the content subject to the code?
3. Would it be appropriate for the bargaining code's definition of 'news content' to capture material:
  - with the primary purpose of investigating, recording or providing commentary on issues of interest to Australians, and
  - that is subject to the professional standards set by a relevant journalism industry body, journalistic standards set in a relevant media industry code, or equivalent journalistic standards set by an individual news media business?

### **Digital platform services to be covered by the code**

When announcing that the ACCC would develop a mandatory bargaining code, the government highlighted the ACCC's finding that Facebook and Google have each become unavoidable trading partners for Australian news media businesses in reaching audiences online, resulting in an imbalance in bargaining power. The bargaining code will therefore initially apply only to Google and Facebook. However, the ACCC intends for the code to include mechanisms to allow the addition of other digital platform services, should other digital platforms attain a significant imbalance in bargaining power in their relationships with news media businesses in the future.

Both Facebook and Google provide a wide range of services beyond their flagship consumer offerings (Google Search and Facebook News Feed respectively). While the DPI Final Report found that the bargaining power imbalances possessed by Google and Facebook are currently derived from the use of news by their main service offerings (search and social

media respectively), the platforms may leverage this same bargaining power imbalance in the use of news on other services.

For example, Google Search includes a 'Top Stories' carousel above organic search results in cases where this is relevant to a user's search terms. For searches on mobile devices, 'Top Stories' results only draw on news published in the 'Accelerated Mobile Pages' (AMP) format, which was developed by Google and other businesses and which is hosted on the Google cache.<sup>2</sup> Given the importance of Google Search placement to news media businesses, particularly on mobile devices, this provides a strong incentive to publish news using the AMP format.

The pace of innovation in the industry is expected to continue with further developments in the range of services made available on digital platforms. The ACCC also notes that issues related to digital platforms and news media businesses are likely to continue to evolve, and it is important that the bargaining code is developed in a way that enables emerging issues arising from the imbalance of bargaining power to be addressed.

### Issues for consideration

The digital platform services to be included in the bargaining code could be defined through a set of principles, or by setting out a list of currently available services, supplemented by a process to determine how to include additional services in the future. These may be new services offered by Facebook or Google, or services provided by other new or existing digital platforms that may in the future benefit from a significant bargaining power imbalance in their commercial relationships with news media businesses.

A combination of a list of current services supported by a set of principles to guide future additions is also an option.

Regarding the list of current services, the ACCC seeks stakeholder feedback on whether the bargaining code should apply to the use of news content by the following products and services **in addition to** Google Search and Facebook News Feed:

- Google News
- YouTube (owned by Google)
- AMP (closely associated with Google, including through hosting on Google cache)
- Google Assistant voice activation services and related services provided through 'Google Home' hardware and home automation devices
- Android TV
- Google's ad tech intermediary services (noting that potential competition issues associated with such services are currently subject to the ACCC's separate Digital Advertising Services Inquiry, which is scheduled to conclude by August 2021<sup>3</sup>)
- Facebook Instant Articles
- Facebook Watch (Facebook's in-platform video service, which already carries some Australian news content)

---

<sup>2</sup> Accelerated Mobile Pages (AMP) is an open-source publishing format for mobile devices that enables the near-instant loading of content as the pages are cached. This means that AMP are preloaded so that when users click on a hyperlink to the AMP, the AMP loads quickly on the user's device. There are currently three AMP cache providers—Google, Bing and Cloudflare. Media businesses do not choose the AMP cache on which their pages are uploaded; instead, it is the platform that chooses the AMP cache to use. AMP pages on Google Search are cached by Google and sit on Google's servers. This provides Google with some level of control over content created by media businesses that it would otherwise not have, if the pages remained on the servers of media businesses.

<sup>3</sup> See: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry>.

- Instagram (owned by Facebook)
- WhatsApp (owned by Facebook)
- Facebook News Tab (yet to be launched in Australia, but which commissions and publishes news content in a separate 'tab' to the main Facebook News Feed, and which is accessible through Facebook's main website and mobile app).

#### **Consultation questions**

4. Would a principles-based, or list-based approach be preferable in determining which digital platform services are captured by the bargaining code?
5. If a list is referenced in the bargaining code, what amendments should be made to the list below?
  - Google Search
  - Google News
  - YouTube
  - AMP (cached on Google's servers)
  - Google Assistant voice activation services and related services provided through 'Google Home' hardware and home automation devices
  - Android TV
  - Facebook News Feed
  - Facebook Instant Articles
  - Facebook Watch
  - Instagram
  - WhatsApp
  - Facebook News Tab
6. How might a bargaining code include mechanisms to incorporate newly emerging and newly relevant products and services in the future?

## Monetisation and sharing of revenue from the use of news

In recommending a code of conduct to address the bargaining power imbalance between Australian news media businesses and each of Facebook and Google, the DPI Final Report stated that such a code should include ‘minimum commitments’ to:

*where the digital platform obtains value directly or indirectly from content produced by news media businesses, fairly negotiate with news media businesses as to how that revenue should be shared, or how the news media businesses should be compensated.<sup>4</sup>*

The government’s recent announcement on the development of a bargaining code stated that the code should address ‘monetisation and the sharing of revenue generated from news’.

Further, many Australian news media businesses that the ACCC consulted during the DPI, and in the course of negotiations to develop voluntary bargaining codes, expressed a view that they are not currently being adequately compensated by Google and Facebook for the use of their content. As such, these businesses view monetisation and revenue-sharing as a necessary and central element of any code addressing bargaining power imbalance.

The bargaining power imbalance between Australian news media businesses and each of Google and Facebook underlies all issues to be addressed by the mandatory bargaining code. In the context of the monetisation and revenue-sharing regarding the use of news by digital platforms, the aim of the code is to address the bargaining power imbalance by facilitating commercial negotiations that will allow news media businesses to achieve outcomes consistent with those that would be achieved in the absence of the bargaining power imbalance. For the purpose of the concepts paper, such outcomes are termed ‘appropriate remuneration’.

### Establishing an effective bargaining framework

A number of potential bargaining frameworks are considered below, including those that have been raised by news media businesses in their discussions with the ACCC or as part of discussions with digital platforms around the previous voluntary code process. However, the ACCC notes there may be other frameworks that stakeholders consider appropriate. The ACCC encourages stakeholders to provide feedback on the frameworks below, as well as views about any alternative bargaining frameworks not considered in this paper.

The bargaining frameworks outlined below will likely be most relevant to facilitating commercial negotiations involving determination of appropriate remuneration for the use of news. However, the ACCC notes that some of these same bargaining frameworks may also be useful to facilitate commercial negotiations involving other aspects of the use of news by Facebook and Google, such as sharing of user data, which are specifically addressed later in this concepts paper. While the discussion of individual frameworks has not been duplicated in every section of this paper, we encourage stakeholders to consider whether and how these same frameworks may have a broader application beyond determining appropriate remuneration.

---

<sup>4</sup> DPI Final Report, p. 256.



## A. Bilateral negotiation, mediation and arbitration

One potential bargaining framework involves bilateral negotiations between each of the digital platforms and news media businesses, supported by recourse to independent arbitration if a negotiation does not result in a commercial agreement.

### *Negotiation*

There are several potential approaches the bargaining code could take in setting out a framework for negotiation between each of the digital platforms and news media businesses on appropriate remuneration.

At one end of the scale, the bargaining code could be silent on how negotiations are to be conducted, and parties could rely on a dispute resolution mechanism if agreement cannot be reached.

Alternatively, the bargaining code could expressly deal with how negotiations are to be conducted by:

- including requirements for parties to take **prescribed factors** into account when conducting commercial negotiations regarding remuneration (such as direct and indirect value to each of the digital platforms), and/or
- **including principles and methodologies** to be taken into account in commercial negotiations on remuneration for the use of news on digital platforms (such as reference to relevant 'market' benchmarks), and/or
- requiring a third-party body to publish **written guidelines** detailing relevant principles and methodologies for determining remuneration for the use of news on digital platforms that parties must take into account in their commercial negotiations.

As has been implemented in other codes that regulate commercial bargaining, the bargaining code may also include mechanisms requiring parties to negotiate in 'good faith'. The ACCC seeks views on whether stakeholders believe that such a requirement would be useful in the context of the bargaining code.

### *Time limits on negotiations*

Prescribing a period of time within which negotiations may take place may be another important aspect of a bargaining framework. This may involve setting boundaries around the length of time that may be taken for negotiations; for example, requiring negotiations to be concluded within three months of their commencement. The bargaining code could also include transitional requirements for digital platforms to settle commercial agreements for the use of content by a certain date (for example, three months after the code comes into effect).

### *Information disclosure obligations*

Any bargaining framework set out in the bargaining code may also be supported by mechanisms addressing information asymmetries between the parties, such as information asymmetries regarding the value that Facebook and Google derive from the availability of news on digital platforms. In particular, it is currently very difficult for news media businesses to ascertain the value (especially the indirect value) that each of Google and Facebook derive from the use of news on their services.

The availability of this information may in itself place news media businesses in a stronger bargaining position when negotiating with each of Google and Facebook. However, the calculation of the indirect value that news provides to each platform is likely to be highly complex and contestable. This means that underlying data that will allow testing and verification of opposing parties' claims about value may also be very important to any calculations of value. The ACCC notes that smaller news media businesses may not have the resources or technical expertise required to contest claims about the value Google and

Facebook derive from their content in this way, and this may limit the utility of any information disclosure obligations to these businesses.

### **Mediation and arbitration**

A bargaining framework that centres on bilateral commercial negotiations may include mechanisms requiring disputes to be referred to mediation before independent arbitration is triggered. Such mediation should ideally be conducted by an independent third-party mediator agreed on by the parties.

If mediation is not successful, commercial negotiation between the parties could ultimately be supported by recourse to third-party arbitration. In order for such an arbitration mechanism to be effective, it would need to be independent and unbiased, credible, and able to facilitate binding and enforceable decisions within commercially reasonable time frames.

The framework could either specify a particular arbitration body to be used in every case, or provide parties in dispute with the option to agree on an arbitrator to use, including a process for appointing an appropriate arbitrator, such as a commercial arbitrator, where the parties cannot agree.

The ACCC seeks stakeholder feedback on how this framework may deal with the appointment of an arbitrator if such a framework is incorporated into the draft bargaining code. In particular, we would welcome feedback and suggestions to assist the identification and potential appointment of an arbitrator that:

- is independent,
- has necessary information gathering powers, and
- has experience in resolving disputes through arbitration.

### **B. Collective bargaining**

A framework that allows for collective bargaining by news media businesses may provide an alternative approach to addressing the bargaining power imbalance that exists between individual news media businesses and the digital platforms. Under such a framework, Australian news media businesses would be able to negotiate as a collective with each of Google and Facebook, in order to secure more favourable commercial terms for the use of content than they might achieve through individual negotiations.

If a collective bargaining framework does not fully address the bargaining power imbalance between news media businesses and digital platforms, it might also be supported by recourse to third-party mediation and arbitration, through similar mechanisms to those explored in the section on bilateral negotiation and arbitration above.

Given the diversity of the Australian news media industry, including the wide range of business models and funding mechanisms employed by these businesses, and the varying approaches they take to distributing news through each of Google and Facebook, a collective bargaining approach may not meet the commercial needs of some news media businesses.

As collective bargaining can be anti-competitive, it normally requires authorisation from the ACCC under the *Competition and Consumer Act 2010* (Cth) (the CCA) and authorisation is only provided if the ACCC is satisfied that this conduct would likely result in a benefit to the public that would outweigh the public detriment that would likely result from the conduct.<sup>5</sup>

---

<sup>5</sup> Paragraph 90(7)(b) and subsection 90(8) of the *Competition and Consumer Act 2010* (Cth).

However, authorisation from the ACCC would not be required if the conduct is expressly authorised in legislation or regulation.

### **C. Collective boycott or ‘all in/none in’**

An alternative bargaining framework may allow commercially funded news media businesses to put in place a collective boycott if commercial negotiations are unsuccessful. A collective boycott, or the threat of a collective boycott, may encourage each of Google and Facebook to offer news media businesses more appropriate remuneration for the use of their content.

This bargaining framework could be incorporated into a bargaining code by including mechanisms preventing each of Google and Facebook using news published by all (or a significant subset of) news media businesses in the absence of commercial agreements with each of these businesses. A level of compulsory participation in this collective boycott is likely necessary for this mechanism to be effective, as without the participation of all (or at least a majority) of prominent news media businesses, each platform may circumvent the collective boycott by reaching agreements individually with one or two large publishers, undermining the bargaining power of the remaining group.

Like collective bargaining, a collective boycott is a form of collective arrangement that would normally require ACCC authorisation under the CCA, although authorisation is not required where the conduct is authorised by legislation or regulation.<sup>6</sup>

The ACCC notes that a number of practical and policy concerns may arise as a result of relying on a collective boycott mechanism in the bargaining code.

A collective boycott would not only harm the digital platform subject to the boycott. It would also damage news media businesses, which will lose the benefits of news referrals from the platform, and harm users through the reduced availability of news on the services of Google and Facebook.

A collective boycott process may be prolonged by the fact that commercial arrangements will be negotiated between parties concerned primarily with their own commercial interests rather than the public interest, and delays may reduce the news available and accordingly, the public benefit it provides. Further, a compulsory collective boycott mechanism requiring Google and Facebook to reach agreement with **all** (or a large group of) news media businesses is likely to encourage some news media businesses to ‘hold out’ on their agreement. Alternatively, an individual business may intentionally delay reaching agreement in order to ‘spoil’ the negotiating process for its competitors—particularly if it believes it derives less benefit than other news media businesses from use of its content by that digital platform.

Finally, as noted in the section above in relation to collective bargaining, not all news media businesses may be interested in participating in a collective boycott to secure favourable terms on remuneration for content. In particular, consideration should be given to the relevance of such a mechanism to news media businesses that are not primarily funded by commercial revenue.

---

<sup>6</sup> Paragraph 90(7)(b) and subsection 90(8) of the *Competition and Consumer Act 2010* (Cth).

## D. Collective licensing or fee arrangements

The issue of appropriate remuneration may be addressed by requiring the parties to enter into collective arrangements for the payment of fixed fees for the use of news content by digital platforms. This framework could involve the determination of the relevant fees in the code itself, via an arbitrator, or through collective negotiations between news media businesses and each digital platform. Such negotiations could be conducted by a collective of news media businesses directly, or through an intermediate body such as a collecting society. In addition to assisting with the setting of fees, a collecting society could assist with the collection and distribution of appropriate remuneration.

If this framework includes negotiation, it could allow news media businesses to negotiate a baseline rate or set of criteria for determining 'appropriate remuneration' for the use of their news content by each of Google and Facebook in a range of different situations. For example, fees may differ depending on the extent to which news content is directly monetised through the receipt of direct advertising revenue, or the extent to which the use of news content provides an indirect benefit, such as through enabling the collection of user data.

This framework could also adopt some elements of, but not be identical to, collective licensing models that already exist in Australia. For example, such arrangements could involve negotiations to set fixed fees under 'blanket licences' for the use of certain news content, such as those that apply to the public performance of background music in commercial premises. Alternatively, this framework may involve negotiation of tailored arrangements to suit the needs of particular news media businesses, or characteristics of particular news content, as occurs in relation to some more bespoke music licences that are negotiated between music publishers and large industries such as gyms and nightclubs.

The ACCC notes that this framework is not intended to replicate copyright-based policy approaches pursued in overseas jurisdictions to address the bargaining power imbalance between digital platforms and news media businesses. The Australian Government has asked the ACCC to develop a mandatory bargaining code, which would **not** involve changes to Australian copyright law. Instead, we are seeking stakeholders' views on whether it would be appropriate for the bargaining code to include a bargaining framework based on negotiations to determine fixed fees, which may be partly influenced by the operation of licence arrangements based on copyright law.

### Factors guiding the determination of remuneration

As noted above, the mandatory bargaining code could include mechanisms requiring parties to take certain prescribed factors into account when conducting negotiations regarding remuneration.

Some possible factors are described below. The ACCC encourages stakeholders to provide their views on these factors, as well as any other factors that may be relevant in informing commercial negotiations.

### Value of news to digital platforms

The availability of news on each of Google and Facebook (as extracts of, hyperlinks to, and/or full reproductions of, news content) provides value to these platforms in the form of:

- **direct value:** revenues from advertising displayed within or adjacent to the news content on the digital platform's services (direct revenue), and
- **indirect value:** the value of the increased use of the digital platform's services by users attracted or retained by the availability of news content, which may include:
  - increased advertising revenue generated by the digital platform's services

- collection of additional user data that can be used to improve the digital platform's ad targeting across all of its advertiser-facing services
- collection of additional user data that can be used to improve the user experience across all of the digital platform's consumer-facing services.

The list above is not intended to be exhaustive, and it is likely that the quantum and type of direct and indirect value that each of Google and Facebook derive from news content will vary between both platforms, and will also vary across their range of different services. This is because there are significant differences in the volume, format and consumption of news content between each platform and across various services offered by each of Google and Facebook.

The ACCC notes that the estimation of the indirect value of news by any party is likely to be highly complex and contestable, due to the difficulty of accurately quantifying the increased use of services offered by each of Google and Facebook resulting from the availability of news content.

Nonetheless, it will be important that consideration of the value news provides to each of Google and Facebook does not neglect indirect value, particularly as indirect value may greatly outweigh direct value on some of the services of these digital platforms. Such services include Google Search, which does not generally place advertising against news stories featured in search results, and Facebook News Feed, which does not directly place advertising against discrete news content (with news content appearing alongside many other types of content in users' feeds, including separate advertising). On other services provided by or closely associated with each of Facebook and Google, such as the Instant Articles and AMP publishing formats and YouTube, advertising is more directly integrated into news content.

### **Value news media businesses derive from the presence of news on digital platforms**

Negotiations around compensation for the use of news should also take into account the value that Google and Facebook already provide to news media businesses for using their news content. This value needs to be considered when assessing the direct and indirect value of news media content to each digital platform in the course of commercial negotiations regarding remuneration.

News media businesses derive value from the presence of news on each of Google and Facebook through:

- advertising and subscription revenues accruing to news media businesses from users that navigate to their websites from each of Google and Facebook (news media referrals)<sup>7</sup>,
- user data collected by news media businesses as a result of news media referrals,
- user data made available to news media businesses by each of Google and Facebook as a result of users' interactions with news content on the digital platform's services, and
- revenue derived from direct advertising and revenue-sharing arrangements for the use of content on the digital platform's services (noting that such revenue sharing arrangements are not generally currently available to news media businesses on Google Search and Facebook News Feed).

---

<sup>7</sup> The DPI Final Report found that as at 2017–18, 32 per cent of all visitors to Australian news websites arrived via Google search results, and 18 per cent arrived via Facebook links: DPI Final Report, p. 101.

However, quantifying the value of news media referrals is complicated by the effect of ‘navigational referrals’—referrals that may have occurred if the content were not available through each of Google and Facebook, with users choosing instead to visit the webpages of news media businesses directly. Examples of such referrals include referrals sourced from users directly typing the name of a news source into Google Search (or visiting or relying on updates from the source’s Facebook page) in order to access its content. If a news media business were to refuse referrals from Google, many of these users may subsequently switch to accessing the news website directly, or via a news media business’s mobile app.

### **Value of the availability of news content to digital platform users**

The users of Google and Facebook also benefit from the availability of news content on each digital platform’s services. This includes easy and direct access to news provided by the availability of news content in search results, and the opportunity to share and discuss news articles with friends and family on social media feeds.

While these benefits are not part of the direct value available to be shared between each of Google and Facebook and news media businesses, the value to users will be relevant in considering the importance of news content to each digital platform in attracting and retaining users.

### **Cost of producing news content**

Some stakeholders have previously submitted to the ACCC that commercial negotiations conducted under a bargaining code should have regard to the cost that Australian news media businesses incur in producing the news content used by Google and Facebook. We note, however, that the cost of producing news may have no direct or indirect link with its value to the digital platforms. The ACCC seeks further stakeholder views on this issue.

In this context, the ACCC notes that the amendments to the French Intellectual Property Code to incorporate Article 15 of the European Commission Directive on Copyright in the Digital Single Market, which allows news media businesses to benefit from earnings received by digital platforms due to the use of news content, set out a broad list of relevant factors to determine remuneration. This French legislation requires that digital platforms compensate French publishers for the use of news, with remuneration to be determined by factors including ‘elements such as the human, material and financial investments made by the publishers and press agencies, the contribution of press publications to political and general information and the importance of the use of press publications by [digital platforms]’. The ACCC notes that this French copyright legislation is a different policy approach than is being taken in Australia through the bargaining code, and this reference is not intended to suggest that the bargaining code should directly mirror such provisions.

### **Use of ‘market’ benchmarks**

As discussed above, accurately quantifying appropriate remuneration that should be provided to news media businesses for the use of news by each digital platform involves considerable complexity.

To the extent that they may be available, ‘market’ benchmarks may be valuable in gauging the likely upper and lower boundaries of the appropriate level of remuneration. ‘Market’ benchmarks may also be valuable in ‘testing’ the outcomes of methods used to quantify the level of remuneration.

Ideally, such ‘market’ benchmarks would include the outcomes of bargains that are similar to the bargains between news media businesses and each of Google and Facebook, but in circumstances where there is no bargaining imbalance. These could include benchmarks in Australia or overseas. However, the ACCC recognises that such benchmarks may be difficult to identify.

The ACCC seeks views and proposals about the usefulness of such benchmarks, as well as suggestions of relevant examples from other jurisdictions and in other markets. Any such 'market' benchmarks may provide useful guidance for commercial negotiations under the bargaining code, or for any associated mechanism used to determine appropriate remuneration for the use of news on each digital platform.

### **Issues for consideration**

The sections above have consistently referred to the 'use' of news media content by each of Google and Facebook. However, it is important to highlight that various services provided by each digital platform interact with news content in a number of different ways, including:

- featuring headlines of news articles
- featuring hyperlinks to news content hosted on news media businesses' own websites
- featuring short extracts or 'snippets' of news content
- featuring images extracted from news content
- fully reproducing news content in full in text, audio, video and image formats
- 'scraping' the content of news media websites in order to produce snippets and index content for later use in potential search results<sup>8</sup>
- allowing the digital platform's users to 'share', 'like', comment on and discuss individual pieces of news content.

The implementation of a bargaining framework to address remuneration would need to determine which of these interactions would, and would not, constitute a 'use' of news content that triggers obligations for remuneration. Questions around the applicability of pre-existing rights that may subsist in news content, such as copyright, may also be relevant to assessing what constitutes a remunerable 'use' of news content.

Consideration should also be given to how any bargaining frameworks incorporated into the bargaining code would apply to the wide range of news media businesses in Australia. In particular, the implementation of bargaining frameworks should not unduly advantage larger news media businesses at the expense of smaller news media businesses, including regional and local news outlets.

---

<sup>8</sup> 'Scraping' refers to the process by which search engines such as Google use automated processes to collect and index the content of third-party websites for inclusion in their search results. All website owners, including news media businesses, have the option to include code in their websites that prevents Google scraping their content; doing so would prevent the website's inclusion in Google Search results.

### Consultation questions

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?
8. How effective would the following bargaining frameworks be in achieving appropriate remuneration for news media businesses for the use of news content by each of Google and Facebook:
  - bilateral negotiation, mediation and arbitration
  - collective bargaining
  - collective boycott or 'all in/none in'?
9. Are there major practical issues involved in the implementation of any of the bargaining frameworks listed in Question 8 above? If so, how might such practical issues be overcome?
10. Are other bargaining frameworks more likely to effectively address the bargaining imbalance between news media businesses in Australia and each of Google and Facebook?
11. Would it be useful for the bargaining code to include a requirement for parties to negotiate 'in good faith'?
12. Should the bargaining code include requirements (such as time limits) and/or guidance on how negotiations should be conducted? What requirements or guidance are likely to be productive? What requirements or guidance are likely to be counterproductive?
13. How relevant are the following factors to determining appropriate remuneration for news media business:
  - the value of news to each digital platform
  - the value a news media business derives from the presence of its news on each digital platform
  - the value of the availability of news on each relevant digital platform to digital platform users?
14. Would it be appropriate for commercial negotiations conducted under the bargaining code to have regard to the cost of producing news content?
15. How might any of the factors listed in Questions 13 and 14 above be quantified and/or treated in the course of negotiations between parties?
16. What other factors may be relevant to determining appropriate remuneration for news media businesses?
17. Are there any relevant 'market' benchmarks that may assist in the determination of appropriate remuneration?
18. How might the bargaining code define 'use' for the purpose of any mechanisms facilitating negotiation on payment for the use of news content?
19. How might any bargaining framework implemented by the bargaining code deal with the full range of businesses present in the Australian news media industry, including smaller, local and regional news media businesses and not-for-profit news media organisations?



## Sharing of user data

The DPI Final Report found that digital platforms often have access to greater and higher quality data on the users that view or listen to the news content featured on digital platform services than the news media businesses that produce this news content. It also found that Google and Facebook appear to provide media businesses with some data that media businesses are likely to consider valuable.

It is also noted that the volume and quality of user data available to Facebook and Google is derived from users' interaction with all content available through the digital platforms' products and services, which is broader and more diverse than just news content; as well as user data collected outside of their platforms and services (including via third party websites) which can be then be associated with users' accounts. This data is far more extensive than news media businesses can ever acquire. News media businesses' lack of access to this data, or at least some of it, hinders their ability to precisely target content and advertising to news audiences.

As noted in the DPI Final Report, consumers would not expect a news media business to have access to their broader browsing history, search queries or navigational history as a result of simply visiting the news media business's website.

However, as digital platforms obtain a benefit from the data they collect due to users' interactions with news content published or distributed on their services, it may be reasonable for digital platforms to share this data with relevant news media businesses.

The ACCC notes that the collection and sharing of user data might also be taken into account as part of negotiations between news media businesses and each of Google and Facebook to determine appropriate remuneration for the use of news, given the monetary value these parties may ascribe to this data. Similarly, data sharing arrangements could also take into account the costs incurred by digital platforms in collecting and sharing user data with news media businesses. As discussed earlier in the paper, such negotiations may be facilitated through one of the bargaining frameworks outlined in the **Monetisation and Sharing of Revenue from the Use of News** section above, which could have a broader application than simply negotiations for appropriate remuneration.

Feedback from stakeholders suggests that any ability for news media businesses to negotiate the extent of data access, or restrictions on a digital platform's use of data collected through their news content, is limited by the bargaining power imbalance between each digital platform and the news media businesses.

On these grounds, the majority of large news media businesses and some smaller digital natives have raised access to user data as an important issue to be covered in a bargaining code. However, some smaller news media businesses, including local and regional publishers, have put less emphasis on addressing data sharing through the code. Other news media organisations have provided general feedback that they would like access to more user data from Google and Facebook, but most have indicated that they do not fully understand the extent and nature of the data that Google and Facebook hold on users' movement between digital platforms and news media businesses' websites, and do not know what types of data would be valuable for them to request.

A number of news media businesses have also expressed an interest in obtaining more specific data related to the provision and effectiveness of advertising technology ('ad tech') services. These services provide for, or assist with, the automated buying, selling and delivery of display advertising online. While we acknowledge the importance of these issues, potential competition issues associated with ad tech services are being considered separately through the ACCC's Digital Advertising Services Inquiry, which is scheduled to conclude by August 2021.<sup>9</sup> Some issues raised by stakeholders in this area may be more

---

<sup>9</sup> See: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry>.

appropriately considered through this separate process, which may make recommendations relevant to the bargaining code.

Both Facebook and Google consider that news media businesses already have access to a sufficient amount of user data through their platforms under current settings, and have noted that some of these news media businesses may not be fully aware of the amount of user data already available to them.

The ACCC also notes that in March 2019, Google provided new data tools for publishers through the Google News Initiative,<sup>10</sup> demonstrating a willingness to provide increased information about data to news media organisations. However, the ACCC understands that the availability of these tools has not alleviated the concerns of Australian news media businesses regarding the amount of data they receive from Google.

## **Issues for consideration**

A primary issue to consider in developing a bargaining code that may require or promote data sharing between commercial entities is the importance of protecting the privacy of individuals. Any mechanisms in the code related to sharing of user data should be calibrated to prevent any increase to the collection and distribution of personally identifiable information without a user's informed consent.

In this context, it is important to note that Facebook and Google track users' interaction with multiple websites, apps and platforms.<sup>11</sup> Many of these sources will be unrelated to the distribution of news content, or even to the digital platforms' own services. For this reason, as noted in chapter 7 of the DPI Final Report, comprehensive data sharing between each of Google and Facebook and news media businesses may not be appropriate or desirable, as it would give rise to privacy concerns and may be inconsistent with consumer expectations. These concerns may potentially be managed by requiring any data shared by digital platforms to be anonymised or pseudonymised.

It will also be important for any data-sharing mechanisms in the bargaining code to appropriately address issues of consumer consent. For all of these reasons, bargaining code mechanisms involving data sharing will require careful consideration.

The ACCC also notes that beyond the disparity in the level of data accessible to digital platforms and to news media businesses, there is an information asymmetry between news media businesses and each of Google and Facebook that limits the quantity, nature and value of user data that news media businesses can seek. Even some larger and more sophisticated news media businesses believe they do not fully understand the nature and volume of data that each of Facebook and Google collect from users that engage with news content on their respective platforms.

In order to address this information asymmetry, it may be appropriate for the bargaining code to include mechanisms requiring each of Google and Facebook to maintain and provide news media businesses with an up-to-date list of the types of user data they collect on news audiences. This may also avoid overly broad requests for data being submitted by Australian news media businesses to either platform.

Finally, data sharing may be a more important issue to some news media businesses than to others. It will be important that the bargaining code's treatment of data sharing does not unduly favour certain types of news media businesses over others.

---

<sup>10</sup> See: [www.blog.google/outreach-initiatives/google-news-initiative/new-data-tools-google-news-initiative-built-publishers/](http://www.blog.google/outreach-initiatives/google-news-initiative/new-data-tools-google-news-initiative-built-publishers/).

<sup>11</sup> DPI Final Report, p. 389.

## Consultation questions

20. What factors do Google or Facebook consider when determining the type or amount of user data that they share with third parties under their existing data-sharing policies?
21. What specific user data do news media businesses already receive from each of Facebook or Google in relation to users' engagement with news media business content and what further user data would news media businesses like to receive from each of Facebook and Google?
22. Should the bargaining code include minimum data-sharing obligations for each of Google and Facebook? If so, what should these minimum data-sharing obligations require?
23. How should data-sharing and revenue-sharing arrangements facilitated by the bargaining code interact, given both would be intended to recognise that digital platforms obtain a benefit from content produced by news media businesses?
24. How should costs incurred by digital platforms in collecting and sharing data with news media businesses be recognised in data-sharing arrangements facilitated by the bargaining code?
25. Would it be appropriate for the bargaining code to address data sharing by putting in place commitments requiring 'good faith' negotiations on this subject between news media businesses and each of Google and Facebook?
26. Would it be appropriate for any data-sharing requirements in a bargaining code to be limited to data collected during the course of users' direct interaction with each news media business's content? Should this include data relating to aggregate audience numbers, audience demographics and audience interactions, such as how many and which users clicked on, 'liked', 'shared' or otherwise interacted with the content of that particular news media business? What other specific metrics might be relevant?
27. Would it be appropriate for each of Google and Facebook to provide news media businesses with access to additional data associated with individual users (based on anonymised user IDs), such as whether a visit to a news media business's website follows previous interaction with this business's content on a digital platform? If so, what steps should be taken to ensure an individual's privacy is protected?
28. Would it be appropriate for each of Google and Facebook to provide each news media business with a list of all types of user data they collect through users' engagement with their news content on their services, such as data collected on users accessing content published in the AMP and Instant Articles formats?
29. If the bargaining code were to include any commitments related to data sharing, which of the following services provided by Google and Facebook should those commitments apply to:
  - Google Search
  - Google News
  - YouTube
  - AMP
  - Google Assistant voice activation services and related services provided through 'Google Home' hardware and home automation devices
  - Android TV
  - Facebook News Feed
  - Facebook Instant Articles
  - Facebook Watch
  - Instagram
  - WhatsApp

- Facebook News Tab?

## Algorithmic curation of news

Google's and Facebook's ranking and display algorithms are designed to provide consumers with content that is most relevant to them. The algorithms used by Google and Facebook are the intellectual property of the companies that own them, and each company maintains the right to change its algorithms as it sees fit. This gives Google and Facebook a significant amount of control over the content likely to be accessed by consumers, and consequently on businesses' ability to monetise their content through Google and Facebook services.

This section seeks views on how this manifestation of the bargaining imbalance can be resolved through the bargaining code. This includes seeking stakeholder feedback on the most appropriate method to address the following matters:

- the provision of advance notice of significant algorithm changes to news media businesses
- the prioritisation of original news content, and
- the treatment of paywalled news content.

### Advance notification of algorithm changes

The DPI Final Report identified a lack of transparency around Google's and Facebook's algorithms. It found that news media businesses appear to have little choice but to accept the lack of transparency and notice of changes to Google's and Facebook's ranking and display algorithms.

The DPI Final Report considered that the lack of algorithmic transparency (including the absence of notice of changes to their algorithms) is likely a manifestation of the bargaining power imbalance between the digital platforms and news media businesses.<sup>12</sup> Requiring Google and Facebook to provide notice of significant algorithm changes to news media businesses may mitigate the potentially substantial impacts such changes may have on news media businesses' operations. For example, news media businesses reported a significant effect on their operations when Facebook, changed its News Feed algorithm in January 2018 to increase user-posted content in users' news feeds and decrease the amount of news content, without consulting or notifying news outlets. This led to a substantial decrease in traffic to a number of news media businesses' websites, with some experiencing a decline in traffic of 40 to 50 per cent.<sup>13</sup>

As the DPI Final Report also noted, these concerns of news media businesses need to be balanced against the concern that providing such information may allow content creators and website owners to effectively 'game' digital platforms' ranking and display algorithms.

This section seeks stakeholder feedback on whether news media businesses that are subject to the bargaining code should be provided with advance notification of changes to these algorithms. It also seeks feedback on determining an appropriate threshold for significant algorithm changes that would require this advance notice, and on the period of advance notice that would provide a reasonable time frame for news media businesses to respond.

Both Facebook and Google have recently introduced measures to address concerns about the lack of transparency of their ranking and display algorithms.

---

<sup>12</sup> DPI Final Report, p. 252.

<sup>13</sup> DPI Final Report, p. 227.

On 18 March 2020, as part of its initial work in developing a voluntary news media bargaining code, Facebook published a blog post indicating that its proposed voluntary bargaining code would provide greater transparency to media businesses about the operation of its News Feed algorithm in ranking news content, potentially including giving advance notice to media businesses about significant changes.<sup>14</sup> This blog post also indicated that Facebook was considering the appropriate time frames for providing advance notice and the threshold for algorithm changes that would require notice.

Google has already taken some steps to address stakeholder feedback about receiving sufficient notification for ranking changes and providing information about significant algorithm changes. Google currently provides a brief public overview of how Google Search algorithms work<sup>15</sup> and its approach to ranking news content<sup>16</sup> on its website. Since March 2019, Google has also regularly provided information about significant search algorithm changes (which it calls ‘core updates’) including through its Search Liaison Twitter account.<sup>17</sup> These ‘core updates’ appear to occur every few months, but are usually announced a maximum of several days in advance of the changes being made.<sup>18</sup>

### **Issues for consideration**

The ACCC understands that digital platforms make very frequent changes to their ranking and display algorithms, which vary from minor alterations to significant changes. A bargaining code mechanism requiring advance notice would need to include a threshold of significance that would trigger the obligation to provide advance notice.

Additionally, such a mechanism would need to specify the length of time required for advance notice of significant changes. This period should be set to provide news media businesses with sufficient time to amend their business strategies to address the effects of the algorithm change.

However, requiring notification too far in advance may limit digital platforms’ ability to implement algorithm changes that may benefit their users, such as through improved search results and easier access to more relevant information on social media feeds. If the bargaining code’s approach is too stringent on this issue, it may delay or prevent the implementation of such changes that benefit consumers. It may also be appropriate for the bargaining code to include a further level of flexibility for digital platforms to implement socially desirable ‘urgent’ algorithm changes, such as recent changes made by both Google and Facebook to improve the quality of information being provided to users about COVID-19.

Finally, an advance notice mechanism would need to specify the type of information that Google and Facebook would be required to provide as part of the advance notice. This level of detail should be enough to be useful for news media businesses in anticipating the effects of the algorithm change (based on the best estimate of the platform). However, it should also balance the need of Google and Facebook to protect the confidentiality of information about the exact operation of their algorithms, given that such information is a key commercial asset of each platform, and in order to avoid ‘gaming’ by content providers, which would have a negative impact on the value of Google’s and Facebook’s services to consumers.

---

<sup>14</sup> See: <https://www.facebook.com/notes/facebook-australia-new-zealand-policy/a-digital-news-distributor-code-for-the-australian-news-ecosystem/2594059480921309/>.

<sup>15</sup> See: <https://www.google.com/search/howsearchworks/algorithms>.

<sup>16</sup> See: <https://newsinitiative.withgoogle.com/hownewsworks/approach/surfacing-useful-and-relevant-content/>.

<sup>17</sup> See: <https://twitter.com/searchliaison/>.

<sup>18</sup> See: <https://www.webfx.com/blog/marketing/what-is-a-google-core-update/>.

## Consultation questions

30. What would be an appropriate threshold for identifying a significant algorithm change which requires advance notice to be given by each of Google and Facebook, and what criteria should be used to determine this threshold?
31. How much notice should be provided by each of Google and Facebook for significant algorithm changes? How can this notice period be set in order to not unreasonably limit digital platforms' flexibility to implement algorithm updates that may benefit consumers?
32. What information do each of Google and Facebook currently provide to news media businesses about the ranking and display of news, particularly with respect to ranking algorithms for content and changes to these algorithms?
33. What type of information would help news media businesses better understand and adapt to significant changes to ranking and display algorithms?
34. Under what circumstances might it be acceptable (or socially desirable) for each of Google and Facebook to not provide advance notice of significant algorithm changes?
35. Would it be appropriate for a bargaining code to include:
  - mechanisms requiring digital platforms to provide news media businesses with advance notice of algorithm changes that may significantly affect the ranking and display of news at least X days in advance of implementing these changes, and/or
  - mechanisms requiring digital platforms to notify news media businesses of algorithm changes that may significantly affect the ranking and display of news within X days of making a decision to implement such changes, and/or
  - relevant exemptions or flexibility in complying with any advance notification requirements where the digital platform considers urgent algorithm changes must be made in the interests of its users?

## Prioritising original news content

The public benefits provided by news and journalism rely on news media businesses producing original news content by employing journalists to undertake research, investigation and analysis of current events. This process requires up-front investment of resources by news media businesses, despite uncertainty about whether any particular investigation or research process will result in a publishable story of commercial value.

However, once original news content is published (i.e. a new story is 'broken' by a particular outlet), the information contained in the story can be easily shared between individuals or republished by other news media businesses. This means 'rewrites' of breaking stories can be published by competing outlets that have not invested in the story to the same degree.

It is currently difficult for consumers to identify the original source of news stories on digital platforms. While this challenge predates the use of digital platforms to disseminate news, if digital platform services do not identify or prioritise original news content, rewrites can appear higher in results within hours of the publication of the original content. In particular, rewrites of original investigative journalism that appear higher in search results than the original content can reduce the ability of the news media business that conducted the investigative journalism to monetise its content, as it may receive less referral traffic. Due to the resource-intensive nature of investigative journalism, this may reduce the incentive for news media businesses to invest in this type of news, which provides significant public benefits.

Many news media businesses have expressed concern that ranking algorithms used by Google and Facebook do not give appropriate weight to original journalism, and that this can result in 'rewrites' quickly outranking, attracting more views, and therefore generating more revenue than original articles. These businesses have called for a bargaining code to require

search, social media and news aggregation ranking algorithms to prioritise original news content, thereby incentivising and rewarding investment in original journalism.

Google has recently acknowledged the importance of this issue to news media businesses. On 12 September 2019, Google announced that it had made changes to its search algorithm to 'better recognise original reporting, surface it more prominently in Search and ensure it stays there longer'.<sup>19</sup>

### Issues for consideration

The DPI Final Report stated that giving additional weight to original news in digital platform algorithms would require algorithms to give 'clear signals' as to which article is 'original'.<sup>20</sup> This creates a tension between the core function of algorithms driven by consumer behaviour, and the public policy benefit provided by ensuring that consumers are alerted to the original source of the news.

The originality of news content may be difficult to establish in some cases, given that stories can develop and evolve over time, and individual articles may include a mix of original content, original analysis and attributed content—i.e. content reproduced from earlier coverage.

Given the challenge of identifying original content, consideration may be given to the bargaining code including a mechanism by which news media businesses have a role in providing a signal that particular stories meet the standard of being original. In addition, consideration should also be given to how, and whether, the bargaining code should distinguish between original general news content and original investigative journalism. The bargaining code would also need to ensure that news media businesses do not 'game' this mechanism by simply identifying all of their content as original news content in order to seek prioritisation through ranking and display algorithms.

Additionally, due to the mandatory nature of the bargaining code, mechanisms or provisions requiring certain treatment of original content, and even definitions of original content, will need to be carefully considered to avoid any real or perceived interference with freedom of expression.

### Consultation questions

36. What benefits, if any, did Australian news media businesses experience following Google's adjustment to its ranking algorithm to prioritise original news in September 2019?
37. In order to prioritise original news content on each of Google and Facebook, would it be appropriate for the bargaining code to include:
  - mechanisms requiring news media companies to identify and advise platforms of material that is original news content, so that this could be taken into account by platforms in prioritising or communicating original content to users, and/or
  - a set of broad principles governing how digital platforms prioritise original news content through their ranking and display algorithms, and/or
  - mechanisms setting prescriptive requirements governing how digital platforms prioritise original news content?
38. How could 'original news content' be defined and identified under the bargaining code, and who should be responsible for defining or identifying this content?

---

<sup>19</sup> See: <https://www.blog.google/products/search/original-reporting/>.

<sup>20</sup> DPI Final Report, p. 250.

39. Should any bargaining code requirement to prioritise original content distinguish between original investigative journalism and other types of news content? If so, how could this distinction be drawn?

## Treatment of paywalled news content and alternative news media business models

The ACCC understands that some aspects of the digital platforms' ranking and display of news may have different effects on news media businesses based on the business models they choose to employ.

For example, several news media businesses seek transparency about how digital platforms' ranking algorithms treat news content that requires a subscription fee to access ('paywalled' content) in comparison to news that is freely accessible without payment. Some of these businesses believe that Google's algorithms, in particular, appear to penalise paywalled news content, which is ranked lower than free news content in search results. Some news media businesses also believe that the penalisation of paywalled content by ranking and display algorithms may hinder their ability to attract and retain subscribers, adversely affecting their subscription revenue and referral traffic.

The ACCC also notes that some news media businesses have made commercial decisions not to charge audiences for news, instead monetising their content through advertising revenue. Accordingly, not all news media businesses share concerns about the treatment of paywalled content by Google and Facebook.

Facebook and Google have not publicly expressed their views in relation to the ranking of paywalled content in social media feeds and search results in the course of voluntary bargaining code negotiations. However, both platforms have voluntarily supported stakeholders, including subscription-based Australian news media businesses, by implementing news initiatives and offering partnerships that focus on helping these businesses build revenue, including through the innovative use of subscription-based business models.

### Issues for consideration

Consumers have an interest in the easy and direct availability of free content, including news, on digital platforms. Free and convenient access to online news helps keep consumers informed of issues and events that affect their daily lives, and stimulates public debate on democratically and culturally important issues. Accordingly, it will be important to consider the balance between the consumer and public benefit provided by free news against the need to prevent undue disadvantaging of a broader range of news media business models, including those relying on subscriptions and payment for content.

Additionally, as outlined above, users expect digital platform services to prioritise content that is most useful, relevant, accessible and 'attractive' to them. Digital platform ranking algorithms are generally calibrated to promote content deemed 'attractive' to users, which they do in part by demoting content that has a high 'bounce rate'—for example search engine results or links that users visit, but quickly close or move on from to another site. It may be the case that news content behind a paywall is being penalised based on this core element of ranking algorithms, as users without a subscription will quickly close paywalled articles or move on to other content that they can fully access. This may be considered to accurately and fairly reflect the fact that content behind a paywall may be less attractive to many digital platform users.

On this basis, any consideration of mechanisms requiring certain treatment of paywalled content may also require detailed consideration of how those requirements would interact with the general operation of digital platforms' ranking algorithms.



### Consultation questions

40. Should the bargaining code contain any mechanisms requiring each of Google's and Facebook's ranking and display algorithms not to penalise the use news media business models that incorporate paywalls and subscription fees?
41. How might any relevant mechanisms in the bargaining code ensure treatment of paywalled news content is fair, without interfering with the general operation of ranking algorithms or unreasonably limiting consumers' access to free news?

## Display and presentation of news on digital platforms

### Control over the display and presentation of news

The DPI Final Report found that the substantial bargaining power of Google and Facebook affects the ability of media businesses to control the display and presentation of news to consumers, and may impede their ability to monetise content.

The display and presentation of news is determined by platform-wide policies and practices, which can have the effect of diminishing the value of news media businesses' brands and associated content, and reducing traffic to news websites that can generate advertising or subscription revenue.

Some news media businesses have noted that digital platforms' practices and policies include restrictions on how news media businesses brand their content, such as the prominent display of masthead branding (e.g. the *Sydney Morning Herald* or the *Australian* logos) that strongly associates news content with its originating outlet. These restrictions have the capacity to affect audiences' perceptions of news content, weakening brand association and consumer loyalty, and thereby having a negative impact on news media businesses' ability to generate revenue from their content.

Another example of this issue, highlighted by a number of stakeholders during the DPI, was the use of snippets on Google Search. At the time of the release of the DPI Final Report in June 2019, news publishers only had the option to 'opt in' to or 'opt out' of having Google display snippets of their news stories in Google Search results. Since September 2019, Google has provided news media businesses additional control over the content and length of text, and the use of snippets, associated with their news.<sup>21</sup> However, Google has the ability to retract these controls at any time.

Digital platforms have represented to the ACCC that they already provide news media businesses with sufficient control over the display and presentation of their news content. The ACCC also accepts that digital platforms also have a legitimate interest in carefully calibrating the look and feel of content displayed on their services, in order to preserve the usability of these services for consumers.

### Issues for consideration

Several practical difficulties may arise in addressing the presentation and display of news on digital platforms through a bargaining code.

The policies and practices affecting presentation and display differ considerably between different types of multimedia content carried on digital platforms, and between individual digital platform services, each of which is influenced by different design and functionality considerations.

---

<sup>21</sup> See: <https://webmasters.googleblog.com/2019/09/more-controls-on-search.html>.

Finally, prescriptive and static requirements incorporated into a bargaining code (e.g. to allow masthead branding of particular minimum dimensions) may become out of date as multimedia formats and platform services evolve over time. Therefore, any bargaining code provisions should be capable of keeping pace with developments in the market and in relevant technologies.

The ACCC invites stakeholders to provide feedback on whether policies and practices affecting the display and presentation of news should be included in the bargaining code.

#### **Consultation questions**

42. What level of control do news media businesses have over how news is displayed on the services provided by each of Google and Facebook?
43. What restrictions on the display and presentation of news content on digital platforms do you consider necessary, and why?
44. Which specific digital platform policies and practices affecting the display of news have a negative impact on the business models of news media businesses and/or their ability to monetise content?
45. How might a bargaining code strike the appropriate balance between:
  - providing news media businesses sufficient control over presentation and display of news content
  - providing consumers with easy access to news content, and
  - protecting the user experience on digital platforms, including providing digital platforms with the flexibility to improve this user experience?
46. Should a bargaining code include:
  - mechanisms requiring digital platforms to enter into good faith negotiations with individual news media businesses on the display and presentation of their news content, and/or
  - mechanisms requiring digital platforms to provide news media businesses with advance notice of and/or consultation on changes to policies and practices affecting the display and presentation of news, and/or
  - mechanisms setting out either principles-based or prescriptive requirements for digital platforms to grant news media businesses a greater degree of control over display and presentation of content than is granted to other content creators?

### **Control over advertising directly associated with news**

A number of news media businesses have expressed concern that digital platforms' policies and practices affecting advertising directly associated with news restrict their ability to monetise content. Such advertising commonly includes:

- display advertising: text and image-based advertisements that appear alongside news content, and
- embedded video advertising: video advertising contained within video-format news content produced by news media businesses; this can often take the form of short advertisements before ('pre-roll'), during ('mid-roll') or after ('post-roll') the news content itself.

Some news media businesses have also raised concerns about digital platforms' treatment of sponsored content (also sometimes called 'branded content' or 'native advertising'), which is news content produced in partnership with commercial sponsors, or which has otherwise had its editorial direction influenced by a commercial relationship with a third party.

Some of the platform services on which these restrictions currently apply include YouTube, Facebook News Feed, and the Instant Articles and AMP publishing formats.

Many news media businesses see the provision of this type of advertising as an important part of their business models, providing additional revenue streams that fund their journalism. However, some news media businesses consider that the policies of digital platforms constrain their ability to monetise news through this type of advertising on certain digital platform services. This includes limits on the size and number of banner advertisements that can be displayed alongside news published in the AMP and Instant Article formats, restrictions on news media businesses' flexibility to show pre-roll, mid-roll or post-roll advertising in video content, and limiting the visibility to users (and therefore value to sponsors) of sponsored content.

Digital platforms maintain that such policies and restrictions are necessary to ensure platform users understand that certain content is sponsored, and that there is transparency about the nature of the relationship between the content producer and the third party.<sup>22</sup> Additionally, digital platforms have an interest in imposing some restrictions on advertising directly associated with news to ensure that this content does not detract from the user experience on their services. These may include restrictions on content with a disproportionate volume of ads relative to news, or on content which increases the load times of pages.

### **Issues for consideration**

Similar practical issues discussed in the section above on 'control over display and presentation of news' also apply to the application of a bargaining code to in-content advertising. That is to say, digital platform policies and practices affecting in-content advertising differ considerably between different types of multimedia content carried on digital platforms, and between individual digital platform services.

Additionally, prescriptive and static requirements incorporated into a code (e.g. to allow minimum levels of flexibility around the inclusion of pre-roll, mid-roll or post-roll advertising) may become out of date as multimedia formats and platform services evolve over time. Therefore, any code mechanisms should be capable of keeping pace with developments in the market and in relevant technologies.

Further, while the ACCC recognises news media businesses' commercial interest in seeking additional flexibility around the use of sponsored content, this should be balanced against the interest of digital platform users in having such content clearly delineated and distinguished from independent editorial content that is not influenced by commercial sponsors.

Finally, the ACCC notes that potential competition issues associated with advertising technology services (services that provide for, or assist with, the automated buying, selling and delivery of display advertising online) are being considered separately through the ACCC's Digital Advertising Services Inquiry, which is scheduled to conclude by August 2021.<sup>23</sup> Some issues raised by stakeholders in this area may be more appropriately considered through this separate process, which may in the future make recommendations that are incorporated into the bargaining code.

---

<sup>22</sup> See: <https://www.facebook.com/business/news/branded-content-update>.

<sup>23</sup> See: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry>

## Consultation questions

47. What specific controls do news organisations currently have over the use of advertising directly associated with news on the services provided by each of Google and Facebook?
48. Which restrictions on advertising directly associated with news content are necessary for each of Google and Facebook to impose, and why are these restrictions necessary?
49. Which restrictions on the use of advertising directly associated with news do news media businesses believe constrain their ability to monetise their content?
50. How might a bargaining code strike the appropriate balance between:
  - supporting the ability of news media businesses to monetise news through advertising directly associated with news
  - consumers being adequately informed about the nature of sponsored content, and
  - preserving the user experience of consumers accessing news through digital platforms?
51. Should a bargaining code include:
  - mechanisms requiring digital platforms to enter into good faith negotiations with individual news media businesses on the use of in-content advertising, and/or
  - mechanisms requiring digital platforms to provide news media businesses with advance notice of and/or consultation on changes to policies and practices affecting in-content advertising technical standards for formats such as AMP or Instant Articles, and/or
  - mechanisms setting out either principles-based or prescriptive requirements for digital platforms to grant news media businesses a greater degree of control over in-content advertising than is granted to other content creators?

## Flagging ‘quality’ journalism

A number of news media businesses have expressed the view to the ACCC that ‘quality journalism’ should be distinguished from other forms of content that is featured on digital platforms.

However, the ACCC believes these important consumer-facing issues are best considered through the separate process underway to develop a voluntary code (or codes) of conduct for disinformation and news quality being overseen by the Australian Communications and Media Authority (the ACMA). More information on the ACMA’s process can be found as part of the government’s response to the DPI Final Report.<sup>24</sup>

## Facilitating open communication between digital platforms and Australian news media businesses

The DPI Final Report found that the lack of ability of entities, including even large news media businesses, to contact digital platforms and submit a complaint highlighted the ineffectiveness of the digital platforms’ internal dispute resolution processes, and that these processes could be improved.

The first step to achieving this would be to have an open and direct line of communication between digital platforms and Australian news media businesses, including a dedicated point of contact within each of Google and Facebook for news media businesses and vice versa.

---

<sup>24</sup> See: <http://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf>.

The ability of news media businesses and digital platforms to communicate openly on issues related to the use of news will likely be essential to the effective functioning of the bargaining code.

Numerous news media organisations, including smaller and regional news media businesses, have expressed concern that they often have trouble contacting Facebook and Google to discuss issues involving the use of their content on these platforms. Some news media businesses have previously claimed that they have been unable to access reliable contact details for relevant Australian-based staff within Facebook and Google. Some smaller news media businesses have expressed a positive view that Google and Facebook began engaging materially with them on news-related issues for the first time during the voluntary bargaining code negotiation process.

### **Consultation questions**

52. How could the bargaining code best ensure a contact point at a digital platform provides timely responses to issues and concerns communicated by news media businesses?
53. Would a point of contact outside of Australia be able to sufficiently address concerns of news media businesses in a timely manner?
54. Aside from availability and responsiveness of points of contact, what other obligations or guidance should the bargaining code include about ensuring open communication between both Google and Facebook and news media businesses?
55. What potential practical issues may arise from requiring contact points?
56. Are there any other means of communication that might usefully be included in the provisions of a bargaining code?

## **Dispute resolution and enforcement**

In order for the bargaining code to operate effectively, it should contain appropriate dispute resolution and enforcement mechanisms. In particular, the code should contain strong mechanisms to ensure parties comply with all of its requirements. However, in doing so, it will also be important to prevent avoidance of code obligations, and to ensure the code does not create incentives for digital platforms to minimise or limit the distribution of Australian news.

The dispute resolution and enforcement mechanisms considered in this section—which would address compliance with the code itself—are separate from the mediation and arbitration mechanisms discussed in the Monetisation and Sharing of Revenue from the Use of News section above, which apply to the commercial negotiations between news media businesses and digital platforms.

### **Issues for consideration**

#### ***Dispute resolution***

There are a range of dispute resolution mechanisms that could be included in the bargaining code to potentially help news media businesses and each of the digital platforms to resolve day-to-day complaints about alleged breaches the code.

For example, parties to the code could be required to nominate a code compliance manager to address complaints in relation to issues arising under the code in the first instance. The code could also include mandatory mediation requirements on the parties to resolve such complaints, or the option for the parties to agree to refer a complaint to an arbitrator, without the need to resort to court action. These forms of dispute resolution can provide a degree of flexibility in determining how each dispute could be resolved on a case-by-case basis.

Further details such as the distribution of costs, location and any reporting requirements associated with dispute resolution may also need to be considered in the code.

## **Enforcement**

While some aspects of the bargaining code may be more suitably supported by a dispute resolution process, other aspects may be more appropriately enforced by a third-party 'enforcement body'.

Consideration of such enforcement mechanisms will require deciding whether the bargaining code should include penalties, and, if so, which aspects of the code these penalties should apply to. For example, penalties might be applied for failures to comply with potential requirements to negotiate 'in good faith', or other specific provisions central to the operation of the code. However, it may not be appropriate for penalties to apply to technical breaches such as any contraventions of requirements around providing contact details. The quantum of penalties to be imposed for breaches of the code may also have to be determined in respect of the digital platforms industry, in order to provide the appropriate deterrent effect.

An enforcement body may also require appropriate tools to investigate and remedy potential breaches of the code, such as information gathering powers and the ability to conduct compliance audits. Further, it may be appropriate to consider including other enforcement tools such as giving an enforcement body the power to issue infringement notices which require the payment of a penalty. This will also include deciding what aspects of the code an infringement notice may apply to.

Another consideration is whether other specific remedies should apply to breaches of the code apart from penalties. A range of remedies that could be made available for breaches include injunctions (to either prevent or require particular conduct) or actual damages (to compensate for loss or damage resulting from a contravention of a code). However, it will be necessary to consider how the enforcement regime and remedies available interact with the determination of other issues addressed by the bargaining code.

Finally, consideration should also be given to whether the availability of alternative, non-pecuniary remedies may better enhance the relationship between news media businesses and each of Google and Facebook.

### **Consultation questions**

57. What would be the most appropriate and effective mechanisms for resolving disputes about, and enforcing, compliance with the bargaining code?
58. What enforcement mechanisms should be included in the code? Should the code include pecuniary penalties?

## **Review of the bargaining code**

It may be appropriate for the bargaining code to include a mechanism that triggers a review of the code itself, either through a one-off statutory review or a process of regular periodic review. This will future-proof the code and ensure its long-term integrity, particularly given the rate of change to the technology, services and business models under which each of Google and Facebook and news media businesses operate.

For example, a compulsory review could be required to be initiated within three years of the bargaining code commencing, and could include an opportunity for a wide range of stakeholders to provide feedback as part of this review. The code could also include a list of key issues for the review to consider.

**Consultation questions**

59. Should the bargaining code include a compulsory review mechanism? If so, when and how often should this compulsory review occur?

# Glossary

## Accelerated Mobile Pages (AMP)

AMP is an open-source publishing format for mobile devices that enables the near-instant loading of content as the pages are cached. This means that AMP are preloaded, so that when users click on a hyperlink to the AMP, the AMP loads quickly on the user's device. There are currently three AMP cache providers—Google, Bing and Cloudflare. Media businesses do not choose the AMP cache on which their pages are uploaded; instead, it is the platform that chooses the AMP cache to use. AMP pages on Google Search are cached by Google and sit on Google's servers. This provides Google with some level of control over content created by media businesses that it would otherwise not have if the pages remained on the servers of media businesses.

## Advertising technology or 'ad tech' services

Intermediary services that provide for, or assist with, the automated buying, selling and delivery of display advertising.

## Algorithm

A sequence of instructions that performs a calculation or other problem-solving operation when applied to defined input data. In this concepts paper 'algorithm' generally refers to the algorithms used by Google and Facebook to rank and display content on their services.

## Android TV

A version of the Android operating system developed by Google designed for use on digital media players, set-top boxes, soundbars and televisions.

## Facebook News Feed

The primary service through which Facebook users are exposed to content posted on the Facebook platform. The News Feed displays information that includes photos, upcoming events, links to websites (including news articles) and posts by Facebook friends, among other content. Using a proprietary algorithm that aims to maximise user engagement with this content by personalising the News Feed to each user, Facebook curates and displays updates to show users every time they visit their feed on a desktop or mobile web browser or Facebook's mobile applications.

## Facebook News Tab

A tab on the top navigation bar within the Facebook app or website that allows users to access a personalised news feed, with a curated listing of content from news media businesses that have been verified by Facebook. Users will be able to view the latest news by topic, hide sections or publications, or get a general update of top stories. The feature is currently being tested with Facebook users in the United States and is not yet available in Australia.

## Facebook Watch

A video-on-demand service that combines aspects of Facebook's video-sharing functionality with content created specifically for the Facebook Watch service. This service is accessible to all Facebook users through the Facebook app web browsers, and it features video content posted by content creators as well as content specifically commissioned by Facebook.



## Google News

Google News is a news aggregator application developed by Google. It presents a continuous, customisable flow of articles organised from news media businesses and other publishers.

## Instagram

A free, online photo-sharing application and social network platform that was acquired by Facebook in 2012. Instagram allows users to edit and upload photos and short videos through an app.

## Instant Articles

A publishing format offered by Facebook that is designed to allow pages to load faster on the Facebook mobile app. It is only accessible on mobile devices.

## Referral

Where a user is directed from one website to another via a hyperlink.

## Snippets

The small amount of text, an image, or a short video that is provided in addition to a hyperlink generated in response to a search query. The purpose of a snippet is to provide context to the hyperlink and an indication of the contents of the relevant website to the user.

## Sponsored content

Sponsored content (also sometimes called 'branded content' or 'native advertising') is news content produced in partnership with commercial sponsors, or which has otherwise had its editorial direction influenced by a commercial relationship with a third party. It may resemble a publication's editorial content but is paid for by an advertiser and intended to promote the advertiser's product.

## Top Stories

A specialised search result offered by Google that displays sets of related results horizontally with images and includes articles, live blogs and videos on breaking news stories. Top Stories can contain news articles from different publishers, or from one news publisher.

## Voice assistant

A voice assistant is an interactive application that uses a microphone, voice recognition software, speech synthesis and natural language processing to provide a range of services to a user. Popular voice assistants include Google Assistant, Siri (Apple), Alexa (Amazon) and Cortana (Microsoft).

## WhatsApp

WhatsApp is a cross-platform messaging service owned by Facebook. It allows users to send text messages and voice messages, make voice and video calls, and share images, documents, user locations and other media, including news content.

## YouTube

An online video-streaming service offered by Google. It is available as an app on the Android and iOS operating systems, but can also be accessed through a web browser.