

ABC Response to the ACCC Concepts Paper

June 2020



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1. Introduction

The ABC welcomes the opportunity to provide feedback on the Concepts Paper released by the Australian Competition and Consumer Commission (ACCC), in May 2020, to inform its design and implementation of a mandatory Code (“Code”) to apply to designated digital platforms.

The ACCC’s Digital Platforms Inquiry (“Inquiry”) found, among other things, that Google and Facebook have market power in several markets in which they operate, which means they are unavoidable business partners for news media organisations, and in turn, this has created a bargaining power imbalance in their favour. This is a public policy problem to the extent that this imbalance adversely affects the production, range, scope and depth of public-interest journalism in Australia. Public-interest journalism delivers not only private benefits to news audiences but broader benefits to Australian society beyond those who consume it.

A mandatory code under the *Competition and Consumer Act 2010* has been chosen by the Australian Government as the regulatory tool to address this problem. It is understood that the objective of this Code is to correct the bargaining imbalance identified in the Inquiry’s final report, such that the parties reach terms (or near enough) that they would achieve if the imbalance did not exist.

All of the above is taken as given and the ABC understands it is not the subject of this consultation process. The ACCC has sought feedback on a range of questions that relate to the design and implementation of the Code. This submission responds to issues that are likely to affect the ABC and/or where it considers that it can offer useful insights for the ACCC’s consideration.

2. Applicability and relevance to the ABC

The Code will aim to address a bargaining imbalance, as identified by the ACCC in its Inquiry report, between designated digital platforms and news media businesses. A key policy rationale is to address “monetisation and the sharing of revenue generated by news”.¹ It can also be viewed in the broader media market context — as outlined in the Inquiry report — of commercial news media organisations facing significant declines in traditional sources of advertising revenue and a more contested market for digital advertising.²

As the ABC is publicly funded, it does not face this problem. Nevertheless, the ABC faces many of the same pressures and opportunities as traditional commercial media in responding to the impact of news and information aggregator platforms. Digital platforms have created new services and value for audiences, consumers and businesses. For news media businesses, they

¹ The Hon Josh Frydenberg MP and The Hon Paul Fletcher MP, Joint Media Release, ‘ACCC Mandatory Code of conduct to govern the commercial relationships between digital platforms and media companies’, 20 April 2020. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accc-mandatory-code-conduct-govern-commercial>

² ACCC, *Digital Platforms Inquiry: Final Report*, June 2019, pp.17-18.

offer new ways to reach audiences — as a source of referrals and as distribution channels in their own right — and can offer insights into audience behaviour and preferences.

The ABC makes extensive use of social media and other third-party platforms. Use of these platforms allows the ABC to reach new audiences; drive discovery of ABC content, products and services; and engage with audiences. Effective use of these platforms helps the ABC to maximise the public benefits it delivers to Australians.

Given the intended breadth of the Code —including areas such as the sharing of data, the algorithmic curation of news and the display and presentation of news on digital platforms — the way in which digital platforms are regulated has implications for all news media organisations in Australia, including public broadcasters.

The final report of the Inquiry noted the vital role that the ABC and SBS play in contributing to the integrity, delivery and plurality of public-interest journalism in Australia, including in local and regional areas, as part of the broader media ecosystem. Consistent with this approach, the ACCC has noted that, for the purposes of this Code, “news media businesses” should be read to mean the full range of media organisations providing news services to Australian audiences, including public broadcasters.

The ABC also has a strong interest in ensuring that it continues to be part of a healthy media ecosystem in Australia. Australian audiences benefit from a diverse media environment, where Australians have access to a wide range of quality news sources that add to the depth of news coverage, including in rural and regional areas.

3. Scope of the Code

3.1 The definition of news

A definition of what constitutes “news” for the purposes of this Code would be most usefully framed around the concept of “public-interest journalism”. This category of journalistic content has positive impacts on the broader community, is produced subject to certain professional standards and is typically more expensive to produce to a high standard. It is under significant pressure from market dynamics, which have been fundamentally reshaping the media industry in Australia and around the world.

Public funding for public broadcasting is, in itself, a critical public policy tool to address the risk that public-interest journalism would otherwise be under-provided in national, local and regional communities. As evidenced by the recent withdrawal of commercial media from regional Australia, this cannot be left alone to market forces. This fact was acknowledged by the ACCC in its Inquiry final report, which endorsed the vital role the public broadcasters (ABC and SBS) play in delivering and supporting public interest journalism and the need they have for adequate and stable funding so that they can continue this role (Recommendation 9).

The ABC is supportive of the ACCC’s definition proposed in Question 3 for a number of reasons, including its focus on journalistic content being subject to professional standards, such as set out in a relevant media-industry code or by an individual news media business. Such standards should include effective and transparent complaint-handling processes. The definition should not prescribe a single professional standard or code, as news organisations apply different editorial policies and complaint-handling frameworks, and the Code should provide flexibility for the adoption of different standards, as appropriate (now and in the future).

For example, the ABC’s editorial independence is enshrined in the *Australian Broadcasting Corporation Act 1983* (Cth) (“ABC Act”). Under the ABC Act, the ABC has developed a strong editorial framework, which includes:

- Comprehensive editorial standards and guidelines
- A process of upward referral, which includes practical and effective editorial oversight and responsibility
- Editorial training for all ABC content makers
- An independent public complaints process that allows the public to raise concerns over potential editorial breaches.

Furthermore, this editorial framework has been designed to operate in a converged media environment applying to all ABC content, regardless of the format or the platform over which it is delivered to the public. The ABC believes that its editorial framework should be sufficient to satisfy any reasonable definition included in the Code, while acknowledging that it is not necessarily appropriate for other news organisations.

3.2 Services covered

The ABC submits that a list of products would provide greater clarity to all parties as the starting point of a bargaining framework and for enforcement purposes, should that be necessary. The decision about which products are in the list would benefit from the application of overarching principles that describe the type or defining features of products the Code is intended to capture and to provide a consistent basis for future changes to the list.

The Code should include a mechanism for the ACCC to periodically revisit and review the list to add new products or remove old ones, as appropriate. Ensuring the initial list of products is guided by an overarching principle will make it easier for all parties to understand the type of new products the list is intended to capture (thus making it easier to review every 12 months). This annual review may also provide an opportunity or impetus for digital platforms to provide greater transparency to news media organisations on their forward-looking product roadmap.

More broadly, the ACCC should have the ability to designate additional digital platforms under the Code framework, as required, to ensure it remains relevant in the future, given the dynamic nature of the digital media landscape.

4. Monetisation and sharing of revenue from the use of news

As explained in the Concepts Paper, “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”³ or to determine “appropriate remuneration”.

As a publicly-funded broadcaster, the ABC often has different motivations for utilising these third-party digital platforms than commercial news media organisations, given that commercial revenues do not underpin the ABC’s operations. As noted above, the ABC makes extensive use of social media and other third-party platforms to reach news audiences; drive

³ ACCC Concepts Paper, p. 7.

discovery of ABC content, products and services; and engage with audiences. Effective use of these platforms helps the ABC to maximise the public benefits it delivers to Australians.

The ABC's news service is not motivated by commercial considerations. Its investigative journalism aims to be distinctive and to present a diversity of views, and is focused on the public interest. The ABC delivers a news service that Australians can and do trust — the ABC consistently rates as the most trusted media organisation in Australia.⁴

All ABC content is provided on its own platforms and services, across its TV, radio and digital media services. Some of this content is also made available on third-party digital platforms (and products within their ecosystems), including those operated by Google and Facebook.

If the ACCC forms the view that there is value to third-party digital platforms in having news media content (including from the ABC) and establishes a mechanism for platforms to better share this value with news media organisations (within the scope of the Code, see section 3), then the ABC should be part of this framework.

Any additional revenue accruing to the ABC as a result of the Code would be applied to the delivery of ABC Charter objectives. In this case, the ABC's disposition would be to direct funds to further investment in public interest journalism at the local and regional level.

The ABC is aware of an argument that it should not be able to share in any such revenue, should the Code contain this type of framework, because it is publicly funded by Government.

However, there are several reasons why the ABC should be included if this type of framework is introduced by the ACCC. If digital platforms are deriving value from the use of ABC news content on their platforms or products, the ABC and taxpayers have a legitimate interest in ensuring that a portion of that value is reinvested into ABC journalism. The ABC is a proven public policy tool for delivering quality news and information. A further argument is that exclusion of the ABC from this aspect of the Code could have the unintended consequence of compromising the effectiveness of the regime, by distorting the playing field in the market for public-interest journalism.

Further, as noted above, like all media organisations the ABC has been subject to pressure on the revenue (funding) and cost side of its operations. The pause in the ABC's indexation announced in 2018 will result in an ongoing funding cut of \$41 million per annum by 2022 and comes on top of ongoing funding cuts that were imposed on the ABC in 2014. On the cost side, and in common with the commercial sector, the ABC faces rising cost pressures in the market for producing high-quality drama content. The ABC has also faced substantial additional costs in delivering its emergency broadcasting services during the recent bushfire crisis.

The relevance of this aspect of the Code to the ABC's operations will depend on the design of the regime (further thoughts on this are in section 4.1) and the ABC's own evaluation about how it interacts with its Charter. Further, and as noted above, the ABC notes that value exchange between digital platforms and news media businesses can occur via multiple ways, including sharing of useful data and analytics, not just via revenue.

⁴ For example, the August 2019 Roy Morgan *State of the Nation* report recognised the ABC as the most trusted media corporation in Australia.

4.1 Establishing an effective bargaining framework

From the ABC's perspective, **Option A** (Bilateral negotiation, mediation and arbitration framework) is likely to be the most feasible of the potential options outlined in the Concepts Paper, given the range of different business models, funding mechanisms and approaches to distributing news through each of Google and Facebook's platforms and various products. The effectiveness of this model would rely on the ACCC's ability to act as a backstop and arbitrate disputes when an impasse between parties occurs. The regime would also benefit from guidelines on time limits and a requirement for parties to negotiate in "good faith".

One potential risk with this type of framework, however, is that it could leave some news organisations (for example, smaller news media organisations) disadvantaged in terms of the terms and conditions they are able to extract in their negotiations with Google and Facebook, and could also distort or harm competition.

To address this potential risk, the ACCC could explore the feasibility of the following additional mechanisms or protections:

- The ACCC could request access to the commercial agreements reached between the platforms and news media organisations on a confidential basis, to enable them to assess how far they depart from broadly similar terms in other comparable agreements and, thus, whether the terms have anti-competitive intent or impact.
- The ACCC could seek assurances from digital platforms in the Code that, whatever commercial terms and conditions are reached with news media organisations, they will have no impact on the way news articles are prioritised and rated in search algorithms or other newsfeed products.

Alternatively, a tailored version of **Option B** (Collective Bargaining) could also be an effective bargaining framework for a group (or groups) of news media organisations with broadly similar operational drivers and goals, particularly if the model allowed parties to opt in or out, depending on their individual circumstances. In a sense, this means that the Code bargaining framework could be a combination of Options A and B, with both models having the backstop of an independent arbitration process.

The ABC has concerns with **Option C** (Collective Boycott) as it could inherently disadvantage smaller media organisations. Further, one potential unintended consequence from a "hold out" is that public broadcasters could be prevented from fulfilling their public service mandate.

The **Option D** model (Collective Licensing or Fee arrangements) could also warrant consideration as a possible option. It would be important, however, to understand a number of design features, including:

- How it would intersect with Australian copyright law (if at all) in practice and Australia's international obligations under various agreements
- Whether it would be an "opt-in" model and could work in a complementary manner with the bilateral negotiation/arbitration model envisaged by Option A
- How this model could be effectively designed to (where appropriate) reflect the value of different types of content provided, and given news media organisations use these platforms (and products within them) more/less extensively.
- Whether this type of model would disadvantage news media organisations that operate under different restrictions (for example, restrictions or controls on advertising)

- The quantum of additional costs required to establish and administer this type of model.

Another potential design consideration is whether it could be more difficult to incorporate other elements of value exchange to be brought within this type of bargaining framework.

4.2 Factors guiding the determination of remuneration

Given that the production of public-interest journalism exhibits aspects of a public good, the ACCC has identified a useful conceptual framework as a starting point to take into account in negotiations under a mandatory Code, and to help ensure that negotiations around remuneration should take into account the direct and indirect value of news to digital platforms. The offsetting value-exchange already provided to news media organisations through having their content on third-party platforms should also be taken into account.

In summary, and in response to consultation Q.13, the following factors should be taken into account within the bargaining framework and discussions:

- The value (direct and indirect) to digital platforms of having news content on their platform/product.
- The value (direct and indirect) already provided to news media organisations from having their content on digital platforms.
- The public good of remuneration of news organisations to sustain serious Australian news services, especially investigative and local/regional journalism.
- To a lesser extent, the cost of news organisations producing public-interest journalism.

5. Sharing of user data

The sharing of user data is an additional or alternative source of potential value-exchange between digital platforms and news media organisations. In its discussions with Google and Facebook, including during the voluntary code process, the ABC focused on this aspect of value-exchange as a potential area where greater transparency information-sharing could bring opportunities for greater levels of value-exchange in other areas, such as data and analytics.

In response to questions raised in the Concepts Paper and discussions with platforms during the voluntary Code process, the ABC provides the following responses and observations:

- In the ABC's experience, Google and Facebook already provide the ABC with a range of data, much of which is meaningful to informing the ABC's understanding and activities. However, not all data is made available in an easily usable form.
- There may be some additional data (i.e. non-personal data provided on a non-identifiable, anonymised basis) about audiences consuming ABC content on third-party digital platforms that would be useful to assist the ABC in understanding how its content is consumed and to inform its activities, but which the digital platforms have not made available to date.
- The ABC does not have a comprehensive/exhaustive understanding of all of the types of available data captured by digital platforms, which can make it difficult to make specific requests. Discussions around further and future opportunities around value-exchange in the form of sharing of data—subject to relevant data protection and privacy laws—would benefit from a greater level of transparency (even at a relatively high level)

of the type/categories of data that Google and Facebook collect through each of their products.

- It is important that the Code covers this aspect of value-exchange and the ACCC considers whether this element of the Code could be incorporated into the bargaining framework that is established to guide negotiations. A requirement for “good faith” negotiations on the subject of data sharing in the Code would be welcome.

6. Algorithmic curation of news

As observed in the ACCC’s Concepts Paper⁵, the algorithms used by Google and Facebook are the intellectual property of the companies that own them.

Given the dominance of these platforms in several digital markets, many news media organisations (along with other businesses) make complementary investments and build strategies to try to utilise these platforms as effectively as possible. A lack of transparency and changes to how algorithms work can have a detrimental impact on these investments.

If one of the purposes of the Code is to move closer towards replicating outcomes that would be expected if the bargaining imbalance did not exist (for example, if the market was more competitive), it should include requirements that improve current practices in this area, while still balancing the legitimate business interests of the platforms.

6.1 Advanced notice of algorithm changes

The ABC welcomes the steps that Facebook and Google have recently taken, or signalled that they intend to take, to provide greater transparency, notice and greater explanation about significant changes to their algorithms (p.20 of the Concepts Paper). This is a useful starting point for the types of reasonable requirements that could be formalised in the Code to provide greater transparency and forewarning to news media businesses.

In response to questions raised in the Concepts Paper and discussions with platforms during the voluntary Code process, the ABC provides the following responses and observations:

- While some efforts have been made to provide greater explanation of the factors that feed into the operation of newsfeed algorithms, generally speaking there remains a lack of transparency in this area.
- It is reasonable to expect the Code would formalise some commitments for the platforms to provide advanced notice and explanation of changes that could be reasonably described as having a “significant impact” on the activities of news media businesses and their ability to utilise these platforms to reach audiences.
- In terms of what criteria could be used to help determine the threshold of whether an algorithm change is significant enough to trigger any notification/explanation commitments (consultation Q.30), the ACCC could consider whether proposed changes would be likely to have a significant impact on matters such as the complementary investments made by news media businesses on these platforms, the ranking of content in search or news feeds and how content will be presented and displayed.
- In response to consultation Q.35, it would be reasonable to expect that a Code would include mechanisms for digital platforms to provide news media businesses with

⁵ ACCC Concepts Paper, p. 19.

advance notice of algorithm changes that may significantly impact the ranking and display of news. In this context, advanced notice would be sufficient notice that news media businesses could act upon it to adjust their business strategies. The amount of notice provided could depend on the nature and significance of the change.

- In addition, advance notice on other product changes would be reasonable; including new product features, enhancements to existing products; and clear communication regarding bugs and other issues.

6.2 Prioritising original news content

The ABC considers it important that the Code helps ensure that the ranking algorithms used by Google and Facebook give significant weight to original journalistic content and prioritise it over “rewrites” of that same content. The source of the journalistic content should be easy for the user to clearly identify when reviewing search results or consuming news via a digital platform’s service. This is an important aspect for consumers of news, because it enables them to understand the source, authority and level of trust to place in the content.

The ABC welcomes the fact that Google has already acknowledged the importance of this issue and, in September 2019, 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.⁶ Formalising this type of commitment in the Code terms would ensure that there is more ongoing certainty that this change will continue and can be applied to other designated platforms under the Code in the future.

Of the options set out in consultation Q.37, it is likely that the most workable mechanism would be for the bargaining Code to include a **set of principles** governing that digital platforms should prioritise original news content through their ranking and display algorithms. To ensure that the principles governing the actions of digital platforms are translated into effective outcomes, the Code could also include scope for notifications and a complaints-handling process to cover these issues.

7. Display and presentation of news on digital platforms

7.1 Control over and the display and presentation of news

The ABC has concerns about the current low level of control that news media businesses have in terms of the display and presentation of their news on some third-party digital platforms. For example, the way in which news content (including articles in the category of professionally produced public interest journalism) is presented within several Google and Facebook products creates a risk of audiences not easily or consistently being able to identify its source or its authority, and creates brand dilution for the news media organisation that created the content.

In response to consultation Q.46, the ABC considers that the Code should include a requirement for digital platforms to enter into good faith negotiations with news media businesses on the display and presentation of their news content, including around more effective news media branding and prominence. In addition, the Code should include a set of principles-based requirements for digital platforms to make the source of original news content covered by the

⁶ ACCC Concepts Paper, p. 22.

Code clear to their users, analogous to typical trademark owner controls to protect the integrity of the brand as a badge of origin and quality on which consumers may rely.

ABC Brand planning research (October 2019) indicates that 99 per cent of Australians have awareness of the ABC; and 86 per cent of Australians can correctly attribute the ABC logo as the mark of the ABC. The ABC is the most trusted news provider in Australia. The ABC has noted in recent research conducted into the Bushfire Season (2019-20), that these high levels of trust are strongest in our broadcast and owned digital platforms and lower in social platforms. Ensuring strong and consistent branding across all our platforms is important in driving up our trust levels in social media channels.

Another area where a lack of control over display and presentation creates increasing challenges for the ABC is the handling of user comments. Some digital platform products, such as Facebook pages, do not allow news organisations to effectively moderate, take-down or disable harmful user-generated comments. In the absence of improved tools, news media businesses may be forced to withdraw from use of some of these products.

In the ABC's view, there should be more flexible tools provided by digital platforms to allow news media businesses to deal with these issues. This is another area where the Code could help address the current arrangements by, as a starting point, specifying a requirement for digital platforms to enter into good faith negotiations with news media businesses, to identify key contact points for notifying and resolving issues. Further, the Code framework could include other mechanisms to help guide platforms (where they do not already offer adequate tools) to providing news media businesses with enhanced moderation tools to help them manage risk, including, for example, the ability to:

- disable comments on specific/all posts on news media businesses' social media pages;
- temporarily disable or pre-moderate comments during high-volume scenarios (e.g. Christchurch attack); and
- engage in pre-moderation at page level, enabling rostered moderators to manually approve what is seen by the public.

Further, the ABC would prefer a more efficient and streamlined process that enables notification of fake news stories to a dedicated team within a platform service provider and an expeditious timeframe for the take down of the offending content by the platform.

7.2 Control over advertising directly associated with news

As noted above (section 4), the ABC is restricted under the ABC Act from advertising on its own platforms, including digital platforms. However, the ABC can enter into commercial arrangements with digital platforms whereby advertising appears alongside ABC content, including ABC news content, on third-party digital platforms. Any such ABC content is also freely available on ABC platforms.

In such circumstances, it is important that the ABC has the capacity to have input into what is (and is not) advertised adjacent to ABC news content on these third-party platforms. As such, the ABC seeks to ensure strict controls on all third-party digital platforms regarding the types of advertising that can be displayed next to ABC content, including news content. From the ABC's perspective, it is imperative that nothing in the development of this Code dilutes or takes away its ability to seek these types of controls.

7.3 Flagging quality journalism

Informed choice is key to assessing the accuracy and trustworthiness of information and the independence of news analysis. This includes understanding why and how the information has been curated and presented, and its source and its authority.

There is a valid case for considering how policy frameworks can be utilised to help combat the spread of disinformation on digital platforms and to elevate the prominence and discoverability of high-quality public interest journalism that is created by and subject to professional standards (as discussed in section 3.1).

The ACCC has indicated that consumer-facing issues around how “quality journalism” is distinguished on digital platforms — and, at the extreme, how disinformation is treated on these platforms — is being considered through a separate process underway to develop a voluntary code (or codes) of conduct for disinformation and news quality to be overseen by the ACMA. This remains an important policy issue for the ABC and an issue also worthy of bringing within the scope of a mandatory code. Moreover, as a consumer issue that involves many of the stakeholders in this process, the ABC would support the ACCC also having ongoing involvement in the development of this separate code.

8. Facilitating open communication

8.1 Point of contact

The ability to communicate effectively and in a timely fashion with digital platforms is an important element of the business relationship, particularly given the dynamic and fast-moving nature of the news media industry.

The ABC has developed constructive relationships with Google and Facebook through various contact points and connected to the use of different products, including through the early phases of the voluntary code process. While there are constructive relationships, they have tended to be connected to individuals or product areas. As a result, it is not always possible to get responses to all queries and requests. As such, the ABC would support requirements in the Code to require designated digital platforms to have specified domestically-based points of contact at a business level to facilitate interactions between the platforms and news media businesses, and to build on the constructive dialogue initiated by the voluntary Code process.

8.2 Dispute resolution and enforcement

In response to consultation Q.57 and Q. 58, the ABC would support a dispute mechanism in the Code involving mandatory mediation and, potentially, arbitration in the event that mediation was unsuccessful. The ABC would consider the detail of any proposed arbitration model and whether it provided any advantage over existing court processes. While it is difficult to anticipate the range of issues that may arise, it seems appropriate that breaches of the Code could be dealt with by using pecuniary penalties and, if appropriate, the range of remedies outlined in the Concepts Paper, including injunction and actual damages.

8.3 Review mechanism

The ABC considers that the Code should include a compulsory review mechanism to determine whether it is working effectively and delivering on the policy objectives. An initial review could occur 2–3 years after the Code is first put into place but with the ability for the ACCC to revisit the Code (or aspects of it) earlier, if something is clearly not working.