16 August 2020

ACCC

News media bargaining code: Draft legislation submission

Thanks for the opportunity to provide my views on the draft version of the mandatory “news media bargaining code” as released by the ACCC on 31 July 2020. I’ve been following the code since the direction for its development was first announced by the government in April 2020. I was also alert to previous attempts at developing a voluntary code, and along with it the history of policy in this space. This is however my first submission to the process.

I am writing as a concerned citizen, and the views outlined in this submission are entirely my own and not that of my employer. I’ve had an avid interest in technology and the internet since growing up as a child in the 90s, and this passion has led to a career in technology. I comprehensively understand both the abilities and limitations of what technology can deliver in 2020. I am also interested in public policy, and am a strong believer in the power of innovation and competition to improve the lives of humans - driving them, their governments, and companies to be better.

I find the idea that a mandatory code of the kind proposed is even being considered for implementation to be completely abhorrent, and counter to the fundamental principles of competition that the ACCC was established to protect. Instead, it seeks to entrench existing monopolies in the media business, and protect them from competition. It rewards simply the volume of output of news businesses with little connection to the quality of content or outcomes for the Australian public for which Australian competition law is meant to enhance.

The premise the code is based upon is also entirely flawed as it is grounded upon a fundamental misunderstanding and conflation of the journalism and advertising markets. It should be clear to the ACCC and the government that these are two separate markets, and proceeds historically derived from one to fund the other does not entitle that funding arrangement to be perpetuated into eternity, especially when it is at the cost of innovation.

The code also unfairly punishes digital platforms for using core, basic internet technology such as hyperlinks, web requests, and automation. Laughably, even the ACCC itself hosts hyperlinks to content in the same way that digital platforms that are apparently “stealing content” do. One simply has to do a search on Google for the below terms to see many hyperlinks to news content hosted on the “digital platform” that is www.accc.gov.au. Should the ACCC pay news businesses for these links as well?

- site:www.accc.gov.au "smh.com.au"
- site:www.accc.gov.au "theaustralian.com.au"

What distinguishes the internet service hosted at ACCC versus one hosted by Google or Facebook? I challenge the ACCC to define what “digital platform” means, and distinguish it from the service they provide at www.accc.gov.au.

The clear single action fitting of this code is it's permanent abandonment as it stands, and true reform of the media landscape focusing on quality journalism, rather than entrenchment failed business models.

The Advertising Market

The advertising market of old has been revolutionised since the invention of the internet. Media businesses used to be the best way to get a message delivered to an audience, however ad-tech companies (such as Google) can now provide this in a much more effective way due to extensive tracking of users and their:

- Internet browsing habits
- Private messages
- Email content
- Location
- Interests
- Social circle
- Purchasing habits
- Ambitions and desires
- Personal traits such as age, gender, nationality, race

This list is in no way exhaustive, and there would be many other things that ad-tech companies know about their users which could be added to the list above. Knowledge of users, combined with the technology to do so, has allowed ad-tech companies to offer much enhanced targeting of ads to users who (in the view of the advertiser) are perhaps more likely to be receptive to the message being advertised.

Targeted advertising benefits not only the user in that they see relevant ads, but also the advertiser as they're not spending money advertising to people unreceptive to their message. It also benefits the ad-tech company as they can sell more advertising space. For example, instead of selling a single ad and displaying it to everyone (in the case of a traditional news business operating a newspaper), an ad-tech company can sell many ads. By splitting ads and targeting those ads to just interested users, the advertiser is more likely to achieve the desired outcome from their ad, and thus ads are individually now more valuable than they were. This is competition at its very best, as through innovation all parties benefit.

Research shows that the average Australian uses their smartphone 2.5 hours a day (https://www.averageaussie.com.au/smartphone-use-in-australia/), and so not only are the advertising methods more effective, but as almost the entire society uses digital platforms, which can leverage ad-tech companies, they have replaced traditional media businesses as providers of advertising space at the local, state, national, and international level.

Changes to the advertising market have been the absolutely normal result of innovation in a functioning competitive market and something that the ACCC should be welcoming.

The Journalism Market

The market for journalism has been similarly affected by the internet. While no more than 25 years ago it required a printing press, radio, or tv station to distribute journalistic content (especially on a mass-scale), this can now be done completely free via sites like Twitter, Medium, Wordpress, YouTube, and Facebook amongst others.

I run my own blog which costs around $10 per month to maintain, and lets me distribute content globally, instantly. While this in no way offers journalistic content, sites like michaelwest.com.au and johnmenadue.com.au having the traction that they do in Australia would not be possible prior to the internet.

The surge of new content sources has led to a rebalance in the equation of supply & demand, with an increased supply of content. This has driven down the amount that consumers of journalistic content need to pay for that content. This is also accentuated by the fact that most journalistic content on the internet is offered free of charge and it is of sufficient quality for consumers thirst for information to be satiated.

Archaic Business Models

Traditional media businesses relied on interplay between the advertising market, and the journalism market to make the profits they used to. They had a monopoly on the supply of journalistic content due to the high barriers for entry, which led to large numbers of people obtaining their product as their only source of journalistic content.

Media businesses would then on-sell access to these sometimes millions of people to advertisers who also had no more effective method to advertise to such a large number of people. Due to the low amount that could be charged for their product, journalistic content was married up with the advertising market for significant profits for the media business to be achieved.

The marriage of the advertising and journalistic market is no longer possible as media businesses cannot provide the same value to advertisers that ad-tech companies can, and they no longer control the supply of content. The business models that media businesses operated upon have been disrupted; the clock cannot be wound back.

Flaws in the Code

The ACCC and the government have their head in the sand in thinking that a mandatory bargaining code will achieve anything more than stifling innovation. While the code is being sold to the public as protecting journalism, the word “journalism” is only mentioned 3 times in the 33 page draft bill, whereas “news business” is mentioned 142 times. It’s clear that this code is not about protecting journalism, instead it’s about protectionism of media businesses.

If indeed the goal is to offer protectionism of media businesses, it should be done in a similar way to how the car manufacturing industry was supported (taxpayer money), rather than uniquely punishing digital platforms for utilising core capabilities of the internet which they are built upon.

I will in the following sections outline some specifics of the code which must be addressed before even considering implementing it:

1) The code mandates the exposure of trade secrets (algorithms) to potential competitors of rival search and aggregation services.

In section 5.4 of the Q&A's document, the following statement is made:

> *Does the code require digital platforms to disclose the content or source code of their proprietary algorithms?*
>
> *No. The code's minimum standards would simply require digital platforms to provide news media businesses with 28 days' advance of algorithm changes that are likely to affect their business models. The code does not prevent digital platforms from making these changes.*

This is a misrepresentation. The draft code states that the digital platform corporation must:

> *notify news businesses in relation to changes of their algorithms likely to affect their news business*

For this notification "in relation to" the algorithm change to occur, it would require disclosure of the changes to components of the algorithm, factors that make up the algorithm, and their relation, which is in fact the content of the algorithm and so it does require the "disclosure of the content [...] of the algorithm".

Furthermore, given the ranking of content from a news organisation is directly related to their business, any change to this algorithm is likely to result in impact to a news business and so the majority, if not the entirety, of the algorithm would need to be exposed.

Disclosure of the content of proprietary algorithms not only disadvantages the technology company who invented the algorithm, but also offers unfair advantage to news businesses designated as such via the code over smaller competitors, allowing them to optimise their service to ensure they are placed higher in the rankings than potentially better content supplied by news businesses without access to the content or understanding of the algorithm.

2) The code ineffectually evaluates the value of news content, whilst professing not to do so

In section 1.6 of the Q&A's document the following statement is made:

> *We also note that the implementation of any 'funding pool' arrangement would require the government to make complex upfront decisions on value of news content, and on the distribution of funds between news media businesses; such decisions are best left to the parties themselves.*

By making mandatory the final offer arbitration, the ACCC is ***not*** leaving the decision to the parties themselves; instead, it's leaving the decision on the value of news content to the arbitrator, and even worse limiting that decision to only two options. The fact that news organisations and digital platforms have been unable to agree on terms for many years, it should be clear that the two options given will set an incorrect value on news content.

3) The code relies entirely on the conflation of the advertising market and the journalism market, but they are in fact two separate markets.

The code unfairly punishes only technology companies due to the historical link of the advertising and journalism markets. Just because advertising is how journalism used to be made profitable does not mean it should be perpetually funded this way. This point has been expanded upon in previous sections, so please refer to that for further detail.

Furthermore, for technology companies who do not have an ad-tech component of their business, or another source of income to pay news businesses, it unfairly disadvantages them in comparison to ones that do (if the treasurer decides that they are to be included in the code).

4) The code unreasonably penalises taxpayers by excluding the ABC and SBS from monetary benefit

Australian taxpayers fund the creation of content at the ABC and the SBS, in the same way that private media businesses fund the creation of their own content. If indeed digital platforms have to wear the burden of funding journalistic content, Australian taxpayers should be rewarded similarly to private media businesses by ensuring there is no distinction between private and public media businesses in what they are entitled to do under the mandatory code.

All exclusions for the ABC and SBS must be removed, and they must be considered "news businesses" as part of the code.

5) The code is incongruent with Australian copyright law

As it relates to the Facebook News Feed, the code ignores the fact that it is users posting links to news articles there, not Facebook. Copyright law determines that, as long as

platforms are not effectively “authorising” the infringement, and they offer methods for that content to be pulled down, they are not liable for content posted by users. However, the code mandates that they are indeed responsible for that content. This is incongruent and contradictory, and the code should be adjusted to be compliant with liability provisions of copyright law as it relates to user generated content (such as posting of links).

6) The code’s discrimination clause is entirely unworkable

Section 6.1 of the Q&A’s document states the following:

> *A decision by digital platforms to place more reliance on international news and lower the ranking of, or cease carrying, Australian news content on the basis of participation in the code would also be considered discrimination.*

Whereas section 4.5 states the following:

- *Facebook News Tab (when launched in Australia)*

The ACCC in their draft code through the exclusion of “Facebook News Tab” is itself highlighting how unworkable the discrimination clause is. When the digital platform is provided by a foreign company (which all included digital platforms are), often platform changes are accessible by Australians but have not been developed or inclusive of Australian news content. What is considered “launched” in Australia?

A hypothetical: if Google LLC (the Google company in the USA) launches a news aggregator service only accessible through google.com (not google.com.au), hosted on servers in the USA, why should they in any way wear the burden of Australian regulation? The website will be accessible in Australia, but only by fact of American websites being accessible on the Internet, not due to them purposely “launching” in Australia.

Digital platforms are working hard to remove “coordinated inauthentic activity” (such as bots) and other undesired use from their platforms. If the digital platform was to focus on removing Australian news content posted by a bot due to the increased costs to them of that type of coordinated inauthentic activity being posted on their platform, this would likely put them in violation of this discrimination clause.

One could easily argue that it is the ACCC that is being discriminatory not the digital platforms, by only including Google and Facebook in the proposed code.

7) The code is ignorant of the fundamentals of the Internet

The code is ignorant of the fact that navigation and free expression on the internet is built around the concept of “hyperlinks”, which allow users to get from one resource to another. The code places a cost on hyperlinks to particular resources, effectively restricting freedom of expression.

Media businesses have been very effective in using their ability to set agendas and influence opinion to repeat the claim that Google and Facebook are “stealing” their content, however if indeed what they are doing (hyperlinking) is “stealing”, then the entire architectural model of the internet is based upon the act of theft.

A link to a news article can also be posted in Gmail, and emailed to users, which is a “sharing” operation. Why is a sharing operation on Gmail considered ok, but the same sharing operation on the Facebook News Feed determined to require payment to the apparent creator of the linked-to content?

As pointed out earlier, even the ACCC itself hosts links to news content. The hypocrisy in criticising digital platforms for doing the same would be funny if the code wasn’t such an attack on internet freedom.

8) The code strangely includes Instagram

Although it’s listed at section 1.34 that the code applies to Instagram, it is not in any way clear how this would or should be the case given that on Instagram it is mostly news media companies themselves posting links to & content from their own articles.

If indeed it applies in this case it would leave digital platforms hostage to news businesses who can extract money from the digital platform by posting links and spamming their own articles (of potentially no value to Instagram users), and the digital platform cannot respond by stopping them due to the earlier highlighted discrimination clause.

9) News businesses implicitly authorise the inclusion of their content in platforms due to existence of RSS feeds

RSS feeds are content presented in a computer-readable format, and are mostly used for aggregating different websites into a single feed. News businesses actively offer, promote, and encourage the consumption of their content via RSS readers. I have listed 3 of those RSS feeds below which as you can see are freely open and accessible on major Australian news services:

- Sydney Morning Herald - https://www.smh.com.au/rssheadlines
- The Australian - https://www.theaustralian.com.au/help/rss
- SBS - https://www.sbs.com.au/news/feeds

To the extent that Google and Facebook are using media businesses content, this same content is provided free of charge by news organisations for use in the exact way Google and Facebook do - for aggregation using the RSS feeds they supply.

The fact that these “RSS feeds” are published by Australian news companies should be seen as implicit authorisation in the use of their content in external applications, such as Feedly (https://feedly.com) and other RSS readers. Given many RSS readers are moving to the cloud, it’s impossible to make the distinction of what is considered a “digital platform”

versus a “cloud application” as it relates to aggregation, especially as applications like Feedly are incorporating premium and social aspects.

Real Problems

I do recognise however that due to this shift in markets there are significant problems which have surfaced. Democracies require an extremely strong journalism sector to ensure transparency, to hold the powerful to account, and to allow citizens to make informed, fact-based decisions.

With the link between the advertising market and journalism market destroyed, and thus the funding model of journalism, a solution needs to be found to ensure that journalism can continue to play its crucial role in Australia’s democracy.

However, this solution needs to be targeted at funding and encouraging great journalism, not entrenching failed business models like the flawed draft code does for news businesses.

I also feel sorry for the journalists and employees of news businesses who through no fault of their own have had the funding model for their industry disrupted. They should be properly supported by a model that is going to benefit them, and allow those that create the best journalistic content to be rewarded.

Thank you again for the opportunity to respond to the proposed code and please seriously consider the above points and ensure they are addressed in future versions of the draft code.

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