DRAFT NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE

SUBMISSIONS IN RESPONSE

28 AUGUST 2020

A. Overview / Executive Summary

This submission sets out Google's concerns with the exposure draft of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* which contains the draft News Media and Digital Platforms Mandatory Bargaining Code (**Draft Code**).

In short, the Draft Code is unworkable for Google. In its current form, the Draft Code presents substantial and unmanageable legal and commercial risks. It is a disproportionate and unfair interference with Google's investment and business in Australia.

The Draft Code contains numerous obligations, all of which are subject to penalties up to a maximum of 10% of our annual turnover in Australia, and all of which entitle news media businesses to seek court orders against us. Despite this, the obligations are, in critical respects, vague and uncertain. Central concepts, such as "news content" and "make available" are undefined and it is not even clear which Google services are subject to the Draft Code. (In our view, it appears that all of Google's products that make news content available may be caught, despite the injustice of imposing obligations on certain Google services without imposing the same obligations on competing services with more market share and bargaining power).

Many of the obligations are unworkable. For example:

1. The obligations to give 28 days' notice to each Registered News Business (**RNB)** of each algorithm change likely to significantly affect the ranking of their news content, and to describe how the RNB can minimise the effects of the change, are deeply intrusive. Even if we could

comply, which is far from certain, they risk compromising the operation of our products around the world.

2. Underpinning the Draft Code is a one-sided compulsory "final offer" arbitration mechanism for determining the amount of remuneration to be paid by us to each RNB. Despite the ACCC's Concepts Paper acknowledging that negotiations around compensation for the use of news should take into account the value that Google already provides to news media businesses,[1] that critical part of the value exchange is excluded from the compulsory arbitration criteria.

   Moreover, the one-sided mechanism, process, and factors to be considered by the arbitrator are unprecedented, unanchored in any standard form of business arbitration, and create unlimited and unknowable potential exposure for us.

3. Further, when combined with the non-discrimination obligation, the result is that each RNB would be able to demand and extract from Google far more than the fair value of their content. Google would be forced to choose between paying excessive amounts to an RNB, and ceasing to crawl, index, rank, display, and present all news content (which is impracticable given news content is undefined in the Draft Code, and ostensibly so broad that it includes "citizen journalism").

   There is no other context in Australian law in which the government requires a company to pay for a product input regardless of the value of that input, let alone to pay for providing a valuable audience to another business — such a payment would be unprecedented anywhere else in the world and contrary to the core principles on which the internet has operated since its creation.

These and other concerns are set out in detail below. We also propose changes to the Draft Code that, if accepted in totality, would likely address our concerns.

If, however, legislation substantially in the form of the Draft Code were to be enacted, we anticipate that our affected products in Australia could be:

- at best, separated from equivalent products in other jurisdictions and no longer upgraded (since we would have no assurance as to which upgrades might trigger Code violations) and, as a consequence, rapidly deteriorate as they are exploited by websites looking to manipulate results in their favour, all to the detriment of users; or
- no longer available in Australia.

[1] ACCC, "Mandatory news media bargaining code, Concepts paper", May 19, 2020 (**Concepts Paper**), p. 12.

B. Introduction

Google's position:

Google considers that the Draft Code is fundamentally misconceived, insofar as it is premised on the apparent characterisation of Google as an "unavoidable trading partner" or the perceived existence of a bargaining power imbalance between Google and Australian news media businesses.

A mandatory code that applies only to two companies is unprecedented. The Draft Code not only applies only to Google and Facebook, but also covers a potentially very broad range of the companies' services, and essentially subjects them to regulation that is more extreme than regulation applicable to monopoly services under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**), or remedies imposed on firms that have misused their market power.

The Draft Code would place an undue burden on Google that goes well beyond evening out any perceived imbalance in bargaining power. Google's rivals (other than Facebook) would not face the same burdens, even in markets in which they hold stronger or dominant positions. Many of the Draft Code's provisions are disproportionate, unreasonable and/or so uncertain as to make compliance very burdensome, if not impossible.

Google does not object to a fair code that meets the objectives of promoting competition, enhancing consumer protection, and supporting a sustainable Australian media landscape in the digital age. The Draft Code will do the opposite, severely distorting markets in which it imposes burdens on only one of many competitive participants, and creating incentives to reduce, worsen or potentially withdraw services that Australian consumers depend on.

Summary of required changes:

Before taking the unprecedented step of imposing a mandatory code that applies to only two companies, the Government should satisfy itself that:

- any bargaining power imbalance justifies the need for regulatory intervention in the form of a mandatory code;
- any bargaining power imbalance exists in relation to each digital platform service proposed to be subject to the code;
- the code equally addresses all competing services within a market that have the same or greater bargaining power imbalance;
- the code, and any obligations it imposes on the digital platforms that are subject to it, are limited to addressing any bargaining power imbalance, including by correcting only those aspects of commercial arrangements necessary to achieving this objective;
- the code does not "punish" or unfairly discriminate against the digital platforms that are subject to it, or disregard their legitimate business interests; and
- the code is consistent with the objectives of the CCA to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The Draft Code does not meet these criteria, and should be withdrawn, or substantially redrafted, before it is considered by Parliament.

The Draft Code's stated objective is to address bargaining power imbalances between Google and Facebook and Australian news media businesses, which were considered in the ACCC's Digital Platforms Inquiry (**DPI**) Final Report, and to "promote competition, enhance consumer protection and support a

sustainable Australian media landscape in the digital age".[2] The Explanatory Materials to the Draft Code contextualise the need for a code as follows:

- The size of Google's and Facebook's online Australian audience makes them "unavoidable trading partners" for Australian news businesses.
- Google and Facebook each appear to be more important to Australian news businesses than any one Australian news business is to each of Google and Facebook, and this has resulted in Australian news businesses accepting commercial deals that are less favourable than they would otherwise agree to.
- One of the concerns stemming from the inability of Australian news businesses to negotiate more favourable terms with Google and Facebook is their inability to successfully bargain to receive payment for the inclusion of their news content on flagship Google and Facebook services.
- Bargaining power imbalances between Google and Facebook and Australian news media businesses undermine the ability and incentives for Australian news businesses to produce news content.
- While bargaining power imbalances exist in many contexts, intervention is necessary in this context because of the public benefit provided by the production and dissemination of news and the importance of a strong independent media in a well-functioning democracy.[3]

Google fundamentally disagrees with these propositions, which are said to underpin the need for the Draft Code. We believe that these propositions are not only unsupported by robust evidence, but contrary to the way the internet has always operated in every other country in the world. Findings by the ACCC in its DPI Final Report, particularly those based on assertions by self-interested news media businesses, do not, with respect, constitute robust evidence.

Specifically:

- **Google is not an "unavoidable trading partner" to Australian news businesses.** As we stated in our submission to the Government regarding the ACCC's DPI Final Report, the finding that Google is an "unavoidable trading partner" for news businesses is not based on rigorous analysis with support in law or fact.[4]

  The concept of an "unavoidable trading partner" is not one with foundation in Australian competition law.

  In responding to the ACCC's Preliminary Report, we objected to the characterisation of Google as an "unavoidable trading partner". We provided data indicating that only 17.9% of referral traffic to news publishers comes from Google.[5] The DPI Final Report did not substantively engage with that data, finding instead that 26% of news referrals to news publishers come from Google.[6] But

[2] Exposure Draft Explanatory Materials for the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (**Explanatory Materials**), para 1.2 and 1.7.
[3] Explanatory Materials, para 1.3-1.8.
[4] See Google, Submission to the Government regarding the ACCC's DPI Final Report, pp.30-31.
[5] See Google, Preliminary Report Submission, p.32.
[6] DPI Final Report, p.101.

both estimates highlight that the majority of news referral traffic to publishers with an online presence comes from sources other than Google. The DPI Final Report also found that 44% of consumers accessed news websites directly by typing the web address into their browser.[7] These numbers also leave out that, according to the DPI Final Report, 57% of Australians continue to use print or broadcast formats as their main source of news.[8]

As previously submitted, we believe the data referred to above and provided by Google to the ACCC in the context of the DPI do not support a finding that Google is an "unavoidable trading partner" that holds substantial bargaining power in a hypothetical "news referral market" (the existence of which we do not accept).[9]

News Corp itself suggests, in the context of dismissing the value of Google's referral traffic to it, that "digital platforms have become a default conduit for many consumers who, without them, would otherwise access news content by accessing publishers' sites directly".[10] It is difficult to reconcile this with the purported notion of Google as an unavoidable trading partner.

- **There is no bargaining power imbalance between Google and Australian news businesses.** There is no evidence that news media businesses are dependent on Google or any of its services, or that they have no alternatives to dealing with Google.

  There is certainly no bargaining power imbalance that exists in the supply of each of Google's digital platform services that would be subject to the Draft Code on its current broad drafting, nor did the ACCC's DPI Final Report make such a finding.

  We understand that the Treasurer will designate Google Search, Google News and Google Discover as Google's "designated digital platform services". In respect of two of the three Google digital platform services proposed to be designated by the Treasurer (Google News and Google Discover), the ACCC has undertaken virtually no analysis and made no findings. In respect of Google News, the ACCC actually found that "only a small number of consumers in Australia use this service compared to Apple News".[11] There was no engagement whatsoever on Google Discover in the course of the DPI or even in the Concepts Paper.

  Most of the Draft Code's provisions apply to an even broader set of Google's digital platform services, as discussed in section C below, on the basis that those products "make available" news content. These products were not canvassed in the DPI, operate in competitive industries, and are in many cases not significant players. There is no rational basis for extending the Draft Code's application to these products, and subjecting them to regulatory burdens that do not apply to their competitors. Rather than promoting competition, the Draft Code will undermine it.

- **There is no evidence that Australian news businesses have accepted commercial deals that are less favourable than they would otherwise agree to.**

  Over the past few months, Google has been actively working on innovative solutions and partnerships that we believe can help news businesses better showcase and derive more value

[7] DPI Final Report, p.101.
[8] DPI Final Report, p.101, citing Caroline Fisher et al., Digital News Report: Australia 2019, News and Media Research Centre, University of Canberra (12 June 2019), p.13, available at: https://apo.org.au/node/240786.
[9] Google, Submission to the Government regarding the ACCC's DPI Final Report, September 12, 2019, p.31.
[10] News Corp Submission re ACCC Concepts Paper, p.11.
[11] DPI Final Report, p.208.

from their content. We have had discussions with Australian news businesses to license and pay to provide access to publisher curated news content, and have signed several agreements. These commercial deals were negotiated in good faith, and we are not aware of suggestions that our news business partners have accepted commercial deals that are unfavourable, or out of line with the valuations they receive for licensing their content in other contexts. In discussions since the release of the Draft Code, all signed partners have expressed a commitment to their agreements, and others have asked to continue negotiations.

Further, we are not aware of any commercial deals between Australian news businesses and other search engines. There is no evidence to suggest that Australian news businesses have demanded or are receiving payments for having their content appear in any other search engine's search results.

- **Australian news businesses have not been able to negotiate to receive payment for the inclusion of their news content on flagship Google services because <u>their news content is not fully displayed</u> in Google's flagship services.**

  Google Search (and News) do not display full news content. They include links, headlines, and short snippets of news content (with the length determined by each publisher) designed to direct traffic to the news publishers' own websites, none of which infringes copyright. News businesses are not paid for these uses because there has never been a basis in Australian law to require payment for them, and because these uses are a net benefit to news businesses.

  Google's perceived bargaining power has no bearing on this outcome. This is evidenced by the fact that Google has not paid for these uses since inception (well before it could be said it had any bargaining power); and other search engines and digital platforms without any conceivable bargaining power do not pay for such uses either. Further, Google provides publishers significant controls over these uses. Such controls include the ability to choose to not have their websites crawled and indexed at all, to not have snippets, to choose the maximum length of snippets, and to exclude images from Search results.

- **The ability and incentives for Australian news businesses to produce news content are not being undermined by any bargaining power imbalance between them and Google. Google's platforms (and conduct) are not the cause of the inherent difficulties with monetising journalism or any market failure.**[12]

  The changes in economics to news media businesses predate Google's existence and have primarily been driven by the rise of the internet, which increased competition in both the supply of classifieds and the supply of news to Australians, including increased competition between existing news publishers. As the DPI Final Report found, "[a]dvances in technology, particularly the rapid growth and uptake of the internet" disrupted the news ecosystem by "significantly reducing the cost of publishing and distributing journalism" and prompting "the unbundling of classified advertising from print news".[13] Similarly, online weather providers prompted the

[12] AlphaBeta Advisors, *Australian Media Landscape*, December 2019, p.3. See also the paper by Carl Shapiro, John Hayes and Hitesh Makhija, *The Financial Woes of Newspapers in Australia*, 27 August 2020 (**Second Shapiro Paper**), which concludes: "*The causal factors that explain the financial woes of news publishers - increased competition from online resources for audiences and the advertising dollars directed toward them - generally represent competition in action to the benefit of both users and advertisers. Furthermore, it seems clear these causal factors are not directly related to Google's position as the leading search engine in Australia. Nor are they substantively linked to the terms of trade between Google and Australian news publishers*…"

[13] DPI Final Report, pp.293, 295.

unbundling of weather, sports sites of scores and data, finance sites of stock data, and online event calendars of event listings.

There are thousands of new and innovative businesses enabled by the internet which have impacted news publishers' traditional hold on user attention. In this state of flux, the DPI Final Report concluded that "a single universally effective solution for monetising journalism online has not yet emerged".

The internet has brought increased competition through expanded user access to news from publications around the world. The cost of researching and distributing news online has declined and sparked competition from new entrants such as specialist blogs and online-only news sites. Search engines and services like Google News provide audience-finding opportunities for quality publishers in the digital age no matter what size or brand name. Google's services certainly deliver substantial traffic to legacy publishers, but the increased competition also provides these publishers a greater incentive to improve the quality of their content and, more generally, the attractiveness of their websites. That may be difficult for incumbents but it is good for consumers. By increasing the diversity of perspectives available to a user, Google's services promote competition for the production of content that consumers value and enhance consumer welfare.

Google considers that the Draft Code is fundamentally misconceived, insofar as it is premised on the characterisation of Google as an unavoidable trading partner or the existence of a bargaining power imbalance between Google and Australian news media businesses. These matters have not been made out.

It is important not to misdiagnose the cause of the challenges in monetising, producing, and distributing news content that are faced by Australian news media businesses. Regulatory intervention based on a misconceived footing will not achieve its stated objectives of promoting competition, enhancing consumer protection and supporting a sustainable Australian media landscape in the digital age. To the contrary, legislation like the present Draft Code will do the opposite, severely distorting markets in which it imposes burdens on only one of many competitive participants, and creating incentives to reduce or worsen services that Australian consumers depend on.

As stated in our submission to the Government regarding the ACCC's DPI Final Report, we believe that smart, evidence-based regulation is in the interests of Australian consumers and businesses alike. The Government should consider regulation that addresses clearly defined problems, is proportional to those problems, applies to industry-wide concerns, applies consistently to similarly situated businesses, and does not seek to dictate commercial outcomes.[14]

Even if a bargaining power imbalance between Google and Australian news businesses did exist, before taking the unprecedented step of imposing a mandatory code that applies to only two companies, the Government should satisfy itself that:

- any bargaining power imbalance justifies the need for regulatory intervention in the form of a mandatory code (appreciating that imbalances in bargaining power exist in many industries, as acknowledged in the Explanatory Materials);

[14] Google, Submission to the Government regarding the ACCC's DPI Final Report, September 12, 2019, p.6.

- any bargaining power imbalance exists in relation to each digital platform service proposed to be subject to the code;
- the code equally addresses all competing services within a market that have the same or greater bargaining power imbalance;
- the code, and any obligations it imposes on the digital platforms that are subject to it, are limited to addressing any bargaining power imbalance, including by correcting only those aspects of commercial arrangements that are necessary to achieving this objective;
- the code does not "punish" or unfairly discriminate against the digital platforms that are subject to it, or disregard their legitimate business interests. Mandatory industry codes typically seek to address imbalances in bargaining power, and market failures, through obligations that seek to even out the parties' bargaining power. They are generally not designed to "punish" or tax a participant, by requiring them to pay for activities which other businesses are not required to pay for, or requiring them to undertake activities (or provide services) which benefit another party and pay the other party for doing so; and
- the code is consistent with the objectives of the CCA to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

As it currently stands, the Draft Code meets none of the above criteria. It is extremely onerous. It would place an undue burden on Google that goes well beyond evening out any perceived imbalance in bargaining power. Google's competitors other than Facebook would not face the same burdens, even in markets in which they hold stronger or dominant positions. Many of its provisions are disproportionate, unreasonable and/or so uncertain as to make compliance very burdensome, if not impossible, as explained below.

The Draft Code goes far beyond any other mandatory industry code. It interferes with Google's products, operations and business interests, on the basis of an alleged (and in our view unsubstantiated) bargaining power imbalance, to an extent that goes beyond the regulation of monopoly services under Part IIIA of the CCA and well beyond remedies imposed by courts on firms with a substantial degree of market power even after findings of misuse of that market power, which are absent here.

For these reasons, Google submits that the Draft Code should be withdrawn, or substantially redrafted, before it is considered by Parliament. If the Draft Code is substantially redrafted, Google would ask to have the opportunity to provide feedback on the updated Draft Code, consistent with the Australian Government's Guide to Regulation.[15]

[15] Australian Government, *The Australian Government Guide to Regulation*, March 2014, available at: https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf.

C. Scope of the Draft Code

Google's position:

Essential elements of the Draft Code are undefined, not meaningfully defined, or so loosely defined as to be so uncertain they are unworkable. This is particularly in relation to the expressions "digital platform service", "make available", "covered news content", and "news content", which are central to establishing the scope of the Draft Code and its various penal provisions.

The potential scope of the Draft Code is too broad. It applies to designated digital platform corporations and designated digital platform services which the Treasurer essentially has unfettered discretion to determine. It also applies to *every* digital platform service of designated corporations that makes available RNBs' news content. There is potentially a wide range of Google's services from which users may possibly be able to access news content, which might be subject to the Draft Code — but, as drafted, Google cannot ascertain this with any confidence. And yet it would be exposed to potentially huge penalties if it gets it wrong.

It would not be appropriate for the Draft Code to apply to the supply of services outside Australia, and this should be made clear in the Draft Code.

Summary of required changes:

- The Code, including the minimum standards, should apply only to designated digital platform services rather than digital platform services.
- It is not appropriate for services to be designated and subject to Code unless there has been robust analysis of those services and a finding that there is a significant imbalance in bargaining power in relation to each of those services.
- The meaning of Digital Platform Service must be limited to services both supplied to and targeted at users in Australia.
- "Made available" should be narrowly defined consistent with copyright law.
- The definition of "covered news content" should be limited to current-events content created by a journalist of a defined list of RNBs about a matter of public interest.
- The definition of news content should be clear and align with the definition of covered news content (as amended) — news of public interest created by a professional journalist in the employ of a professional news organisation.

The Draft Code is unworkably uncertain in its scope and excessive in its extra-territorial application.

1. Digital platform service

An essential element of the Draft Code, including its various penal obligations and prohibitions, is the activity referred to as a "digital platform service". In particular:

- the minimum standards in Division 4 Subdivision A and the recognition of original covered news content obligations in Subdivision B apply to *every* digital platform service of a designated digital platform corporation by virtue of section 52L(1);
- the discrimination prohibition in Division 5 applies to all digital platform services of a designated digital platform corporation; and

- the bargaining obligations in Division 6 apply to every digital platform service of a designated digital platform corporation nominated by a bargaining news business corporation that 'makes available' news content.

Despite its central importance, "digital platform service" is not meaningfully defined. The so-called definition in section 52B simply deals with the required relationship between a "designated digital platform corporation" and a "digital platform service". It provides no guidance at all as to the features of a service that would make it a digital platform service. It leaves entirely open the question of whether a service (e.g. Cloud storage services) offered by Google would be a digital platform service simply because Google LLC will be a designated digital platform corporation. The definition could potentially cover any Google "service" anywhere in the world.

The definition also does not establish what divides one service from another where there may be an overlap in features and capabilities. For example, Google considers its service Search to be distinct from its service Maps, though components from each separate service may appear together on a search results page. Google does not know whether obligations applicable to its Search service should also be considered to apply to its separate Maps business unit.

There is potentially a wide range of Google's products from which users may possibly be able to access news content, which might be caught by this definition. For example, is the Code intended to catch some or any of these products: YouTube, Assistant, hardware devices with Assistant functionality, Gmail, Drive, Photos, Android TV, Blogger (a blog-publishing service hosted by Google), Cloud services used by RNBs for hosting their news content, the Play store and the Chrome browser, ads (eg Search ads placed by RNBs)? These services were not substantively considered in the DPI; they are supplied in competitive markets and, in some cases, are minor players in those markets; there is no conceivable bargaining power imbalance in relation to them, and yet they're potentially subject to the onerous obligations in the Draft Code.

The Draft Code also confers an extremely broad discretion on the Treasurer to designate digital platform corporations and digital platform services, if the Treasurer *has considered whether there is* significant bargaining imbalance between Australian news providers and the digital platform's corporate group. Is it sufficient for the Treasurer to simply have turned his mind to this question? Even if the Treasurer were required to make a finding that there is a significant bargaining imbalance, given that all of the obligations in the Code fasten upon individual, separately offered digital platform services, the Treasurer ought to be required to make findings that a bargaining power imbalance exists in relation to the supply of each service to be designated, upon a robust and substantive assessment of the competitive dynamics of each affected market or segment.

It is inappropriate to focus on the bargaining position of the corporate group generally, as that would result in the ability to designate and regulate any and all services of the corporate group, regardless of their competitive position or importance to the other party, so long as a bargaining power imbalance existed in relation to one of its services.

Additionally, the broad conferral of power on the Treasurer is accompanied by a "no invalidity" clause if the Treasurer fails to properly comply with the requirements of the provision.[16] This renders the need to

[16] By providing, in section 52C(3), that the Treasurer's designation is "not invalid merely because of a failure by the Treasurer to comply with" the obligation to consider a bargaining imbalance, the code allows the Treasurer to designate corporations and services for any reason or no reason, which invites misuse of the designation power.

be satisfied that a bargaining power imbalance exists null, and amounts essentially to an unfettered discretion to designate a corporation or service. This invites arbitrary and discriminatory enforcement, and is not consistent with the rule of law.

For the reasons outlined above, the definition of "digital platform service" is unworkably uncertain as currently drafted. Trying to comply with the Draft Code in its current form relying on this definition presents substantial and unmanageable legal and commercial risks to Google.

2. "Make available"

The central uncertainty created by the current definition of digital platform service is compounded by the fact that most of the obligations and prohibitions referred to above apply to a digital platform service which "makes available" covered news content. This critical distinguishing feature is not defined. There is no guidance at all as to what activities on the part of the digital platform service operator amount to "making available". For example, does Search "make available" news content if, in response to a search for a news business' name (a navigational query in which the user already knows what website she seeks and merely needs to obtain the address), the results include an organic link to that news business' home page? Does a web browser "make available" news content if the user navigates to the news business' home page using the web browser? Does Google Search make available news content if it refers to a user's Twitter feed that in turn refers to a news-related item? Similarly there is no indication as to what user experience is relevant to assessing whether news content is made available.

The uncertainty of "make available" makes it virtually impossible for Google to identify with confidence those products which are subject to the penal obligations and prohibitions in the Draft Code.

3. Covered news content

The definition of "covered news content" in the Draft Code has an incredibly broad and vague meaning, as it includes content created by a journalist (a term that is not defined) that is "relevant in recording, investigating or explaining" "issues of interest" to Australians.

As previously submitted in our submission in response to the ACCC's Concepts Paper, we propose that the code only apply to news of "public interest".[17] By omitting the word "public", the current definition of covered news content in the Draft Code potentially captures any content created by news media businesses, regardless of its journalistic value to society.[18] The exclusions mentioned in the Explanatory Materials do not go far enough to resolve this concern.[19] The definition of "covered news content" will still effectively provide a subsidy to those major corporations that produce a large and/or diverse range of content that extends beyond news in the "public interest". This potentially conflicts with the ACCC's goal of promoting access to news content. By providing this subsidy to RNBs for their covered content, the code would also impact competition in other markets where the RNB competes against non-RNBs. An example could be the market for travel content. If the travel section of an RNB is included in the definition of covered news content, then under the code they will receive advantages through the minimum standards not afforded to non-RNB competitors such as Lonely Planet or Tripadvisor.

[17] Google, *Submission to the ACCC Concepts Paper* <https://www.accc.gov.au/system/files/Google.pdf> p 5.
[18] DPI Final Report, Ch 6.2.1.
[19] Explanatory Materials, para 1.66.

Further, there is substantial risk that RNBs will be incentivised to shift resources away from cost-intensive public interest journalism to other, potentially lower-quality, content that will be just as equally subject to negotiated remuneration requirements under the Code.

The current definition is broad, nebulous, highly subjective, and open to differences in interpretation. It is also at odds with the stated objectives of the Code. Google's algorithms make billions of crawling, indexing, etc. decisions a day. It is not possible for Google to accurately identify what is and is not "covered news content" under the current approach. The definition should be susceptible to being applied algorithmically. This is important because the vast majority of the obligations imposed by the Draft Code on Google are tethered to RNBs' "covered news content". Uncertainty about the scope of this defined term presents a fundamental hurdle to compliance with the Draft Code, and makes contraventions near-inevitable. For example, each of the minimum standards relates to covered news content (and not other content that may be produced and published by RNBs or other publishers). RNBs are also entitled to bargain in relation to remuneration for all covered news content made available by Google.

Even with a tighter definition of covered news content, it would be unreasonable to require Google to identify "covered news content", when it does not create that content and has no practical way of distinguishing between covered news content and other content of RNBs, given the volume of content that is continuously being created. If the responsibility rests with Google, as it does under the current Draft Code, Google might have to assume that all content created by an RNB is covered news content. This would effectively materially broaden the reach of the Draft Code, making the Government's attempt to limit it to covered news content redundant.

By contrast, RNBs are well placed to identify which of their content is "covered news content", and could readily do so by applying tags to that content. It should be the responsibility of RNBs that produce and publish the content to satisfy themselves that it is "covered news content" and identify it as such. The Code should make it clear that RNBs must only tag content that is genuinely covered news content, and that a failure to do so (for example, by tagging other content) is a breach of the Draft Code that attracts penalties.

4. News content

Both core news content and covered news content are defined (although see above for the need for further clarity over the definition of "covered news content"). That content must be created by a journalist and have one of the specified nexus(es) with Australians. By contrast "news content" is not defined despite the fact that its meaning is central to the interpretation and scope of the discrimination prohibition in Division 5 of the Draft Code as well as the information sharing provision in section 52ZC.

Critically, it is unclear whether "news content":

- even needs to be created by a journalist (the Explanatory Material's reference to "citizen journalism"[20] suggests that anyone can create news content);
- extends beyond the professional content created by journalists in the present employ of a news business, and includes retired journalists, people with journalism degrees who work in other fields, people who create personal content outside of their job duties, etc.;

[20] Explanatory Materials, para 1.102.

- needs to be of any interest to, or, in fact, have any connection with Australians; or
- includes content excluded from covered news content. For example, does it include, from any part of the world, broadcasts of sports games, publication of sports results, entertainment content such as reality TV programming, specialty and industry reporting, product reviews, talk-back radio and content produced by academics?

For example (one of an almost infinite number of possible examples), given that any website could be a "news source", information concerning the latest developments with COVID-19 regulations in Florida and their significance for travellers from other States and overseas could be news content. If a Florida State Government website produces and publishes such information online, the website would be a news source and the operator of the website would be a "news business". In that case, Google's treatment of that content in Search in Australia compared with content from a RNB would be subject to the discrimination prohibition. The almost infinite application of the prohibition, and the requirement to treat unlike things in a like manner, makes it an entirely unworkable provision.

5. Extra-territorial application

The problems created by the absence of effective definitions clarifying the scope of the Draft Code are not limited to Australia.

The Draft Code is intended to be capable of applying to the conduct outside Australia of any Google body corporate that carries on business in Australia. The illegitimate consequences of this potential extra-territorial application and the unworkable uncertainty of the provisions of the Draft Code are illustrated by the following hypothetical example:

- Google supplies Search services accessible in Australia.
- Google supplies Search services accessible in the United States.
- Amy's Articles (**AA**) is the RNB in respect of the online newspaper called "A+ Articles".
- Google Search in the United States makes available, in its search results, some covered news content of A+ Articles.

In these circumstances, could AA notify Google of bargaining issues in respect of Google Search in the United States? Would Google be required to engage in good faith bargaining even though no inequality of bargaining power in the United States between Google and AA has been suggested, let alone established? Similarly, would Google be required to comply with all the obligations in Division 4 Subdivisions A and B in respect of Search in the United States? The same analysis could potentially apply in, for example, South Korea, even though the market conditions there concerning search are fundamentally different. The Draft Code does not clearly resolve these crucial issues.

In short, the potential extra-territorial application of the Draft Code as it currently stands would result in unjustified and unreasonable interference by Australian legislation in Google's businesses and investments outside (as well as in) Australia.

6. Required changes

Having regard to the absence of effective definitions clarifying the scope of the Draft Code, we propose the following changes:

Digital platform service

- The Code, including the minimum standards, should apply only to designated digital platform services rather than digital platform services.

- It is not appropriate for services to be designated and subject to Code unless there has been robust analysis of those services and a finding that there is a significant imbalance in bargaining power in relation to each of those services.

- The ACCC made findings in the DPI related to Search and alleged bargaining power. For the reasons outlined above, Google disputes those findings. But neither the ACCC nor any relevant court has conducted analysis and made findings on bargaining power imbalance for Google services beyond Search. It is therefore inappropriate for any of these services to be designated.

- The meaning of Digital Platform Service must be limited to services both supplied to and targeted at users in Australia.

Made available

- "Made available" should be narrowly defined consistent with copyright law.

Covered news content

- The definition of "covered news content" should be limited to current-events content created by a journalist of a defined list of RNBs about a matter of public interest.

- Given the breadth and subjectivity of the definition, Google has no way of systematically identifying covered news content and non-covered news content at scale. For the identification of "covered news content" to be practically feasible, RNBs should have to identify relevant "covered news content" to Google's web indexing technology through "tagging". Tags are a well-established and objective standard: all content hosts (including RNBs) already use similar tags to optimise the presentation of their content on Google and other online platforms.
    - This is an objective data point that Google's algorithms can use to decide how to treat the content, reducing uncertainty and increasing Google's ability to comply.
    - RNBs must not tag news content that falls outside the definition above, with violations subject to the general penalty regime.

News content

- The definition of news content should be clear and align with the definition of covered news content (as amended) — news of public interest created by a professional journalist in the employ of a professional news organisation.

D. Minimum Standards - Data Information

Google's position:

Section 52M as currently drafted is overly burdensome and potentially exposes Google to an unnecessary and invasive level of mandated disclosure compared to other businesses, including in relation to its services where no bargaining power has been alleged. Google already provides a significant amount of information to Australian news businesses about its products, as well as data about their content.

If the intention of section 52M is to only provide for the disclosure of the types of information and data which Google already makes available to RNBs about users' engagement with RNBs' covered news content made available by the relevant digital platform service, the section needs to be substantially redrafted. Further, if it is not the Draft Code's intention to require Google to share additional data with RNBs, that should be made explicit in the code.

The carve outs for disclosure of "trade secrets" in sections 52V and 52ZC(7) are uncertain and not commonly used in Australian legislation. The carve outs should be amended to refer to "confidential information".

Summary of required changes:

- Sections 52M(2)(a), (b), (d), and (e) should be removed from the Draft Code.
- Sections 52V and 52ZC(7) should be amended to state that the minimum standards (and the obligation to share information) do not require the giving of confidential information.

Section 52M of the Draft Code is the first of its "Minimum Standards". The Draft Code appears to be designed to facilitate negotiations between RNBs and digital platforms about a limitless range of issues, including the minimum standards. Under the Draft Code's bargaining provisions in Division 6 (discussed below at section K), RNBs can request that Google negotiate, in effect, higher standards or greater benefits than are applicable under the minimum standards, and Google is required to negotiate with each RNB in good faith. To adopt an inflexible position at the outset of these negotiations might be regarded as against good faith. In the absence of such negotiation, the minimum standards set the "floor". In considering the minimum standards and the burden placed on Google, it is necessary to keep in mind that they set the baseline, and that RNBs may seek to negotiate different outcomes (such as, for example, greater access to data, or longer notice periods), and that Google will be obliged to engage with these requests in good faith.

Section 52M requires Google to provide readily comprehensible information to each RNB (within 28 days of its registration by the ACMA) that explains the types of data which Google collects in relation to its users' interactions with the RNBs' covered news content made available by Google's digital platform services, and **how the RNB can gain access to that data**. The section also contemplates that regulations may specify other requirements relating to the information Google is required to provide.

Section 52M applies to *every* digital platform service provided by Google by virtue of section 52L(1).

On the face of the Draft Code, it appears to us that the purpose of section 52M is to enable RNBs to pursue access to user data, including through the good faith bargaining process. This is reflected in the Treasurer's statement that the Draft Code: "covers issues such as *access to user data*, the transparency of algorithms used by the digital platforms for the ranking and the presentation of media content, as well as of course, payment for content".[21]

We are concerned that section 52M (combined with the requirement to bargain in good faith) may expose Google to potentially unbounded requests for data from RNBs including requests in relation to private user information. RNBs have already said they'd like data relating to the ranking of RNBs content, user data collected on audiences which view news content, data relating to engagement with RNBs' news content, and any data collected on pages of digital platforms used to navigate to the news content of RNBs.[22] The Draft Code does not say anything about how RNBs must treat any data they obtain. RNB demands for access to user information would be contrary to users' privacy expectations.

Google considers that section 52M as currently drafted is overly burdensome, and exposes Google to an unnecessary and invasive level of mandated disclosure compared to other businesses, including in relation to its services where no bargaining power has been alleged. This is particularly relevant as Google already provides a significant amount of information to Australian news businesses about its products, as well as data about their content.

If the intention of section 52M is to only provide for the disclosure of the types of information and data which Google collects and already makes available to RNBs about users' engagement with RNBs' covered news content made available by the relevant digital platform service, the section needs to be substantially redrafted. Further, if it is not the Draft Code's intention to require Google to share additional data with RNBs, that should be made explicit in the code.

1. Section 52M ignores the considerable information already made available by Google

Google makes a wide variety of data available that already enables Australian news businesses to make informed decisions about their site and business. In fact, relative to other categories of content creators, the tools and data provided to news businesses are already significant.

This data is provided in different ways but is broadly passed on in three ways:

- Google tools that provide aggregated insights into how users interact with links and extracts of publisher content displayed in search results before they visit a news site (e.g. Google Search Console, Google Structured Data Testing Tool).

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[21] Treasurer, *"Press Conference, CPO, Melbourne"*, July 31, 2020, available at: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/transcripts/press-conference-cpo-melbourne. See also Treasurer and The Hon Paul Fletcher MP, "ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies", 20 April 2020, available at: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accc-mandatory-code-conduct-govern-commercial, "Among the elements the code will cover include the sharing of data, ranking and display of news content and the monetisation and the sharing of revenue generated from news."

[22] See Media, Entertainment and Arts Alliance, Submission to ACCC Concepts Paper, June 5, 2020, p.5, available at: https://www.accc.gov.au/system/files/Media%2C%20Entertainment%20and%20Arts%20Alliance.pdf; Commercial Radio Australia, Submission to ACCC Concepts Paper, June 2020, pp.21-22, available at: https://www.accc.gov.au/system/files/Commercial%20Radio%20Australia_1.pdf; Free TV Australia, Submission to ACCC Concepts Paper, June 2020, pp.24-25, available at: https://www.accc.gov.au/system/files/Free%20TV.pdf; Daily Mail Australia, Submission to ACCC Concepts Paper, June 5, 2020, p.4, available at: https://www.accc.gov.au/system/files/Daily%20Mail%20Australia.pdf; NewsCorp Australia, Submission to ACCC Concepts Paper, June 5, 2020, pp.24-25, available at: https://www.accc.gov.au/system/files/News%20Corp%20Australia%20Submission%20to%20Concepts%20Paper.pdf.

- By integrating Google products with popular analytics tools that allow publishers to understand the users that arrive on their site (e.g. through referral IDs or tracking pixels).

- Specific tools developed for the news industry (e.g. Google's News Consumer Insights).

Publishers also have a wide range of third party tools they can use to analyse their site and competitive position (e.g. Similarweb or App Annie).

Google Tools

Google currently provides publishers (including Australian news businesses) with a variety of data about their own Search experiences. For example, Google Search Console[23] contains a set of tools and reports any publisher can use to access data about their website's performance in Google Search. Using Google Search Console, a publisher can see how many impressions and clicks their site gets in organic search results every day, and understand their average position in search results for different search queries. They can also understand how their site appeared in Google Search, for example how many pages had valid markup. Publishers can also see which pages of their site are included in, and excluded from, the Google Search index.

Integrations with analytics tools

Publishers can also track news content performance on different Google surfaces with a range of analytics tools. For example, publishers can track the performance of their content on Google News using referrer IDs and tracking pixels[24] that can be easily integrated into popular analytics tools such as Adobe or Chartbeat. Publishers combine these referrer IDs with their own cookies and tracking pixels to build rich user profiles that can then be used to optimise their site for different cohorts and channels.

Google generally aims to provide data in industry-standard formats and has established integrations with major analytics platforms. This work is ongoing, however it would be impractical and unreasonable to require Google to reformat data outputs to meet the various unique requirements of different web publishers, who use a wide variety of independent tools to measure the performance of their content.

News-specific tools

As part of the Google News Initiative, Google has developed a number of tools aimed at specific needs of the news industry, for example:

- *News Consumer Insights* - a report that helps news organisations of all sizes understand and segment their audiences with a subscription strategy in mind.

- *Realtime Content Insights* - a free insights tool built to help newsrooms make quick, data-driven decisions on content creation and distribution. Journalists are able to identify which articles are the most popular across their audience and what broader topics are trending in their regions.

- *Data Maturity Benchmark* - a collaboration with Deloitte to help news publishers assess their data maturity, compare themselves to other news publishers, and take steps to improve.[25]

[23] See Google, "*Google Search Console*," available at: https://search.google.com/search-console/about.

[24] Tracking pixels allow a publisher to track impressions, including for individual articles. See Google, "*Use tracking pixels*," available at: https://support.google.com/news/publisher-center/answer/9603438?hl=en&ref_topic=9545240.

[25] Data maturity is a measure of a publisher's ability to responsibly collect, analyse and activate audience data to improve overall engagement, increase direct-paying relationships with readers, and drive revenue from advertisers. See Deloitte, "*Deloitte releases*

Insights from the news-specific tools have driven strong business results for publishers internationally (e.g. Business Insider developed a set of optimisations that led to a 150% growth in subscription revenue in one quarter).[26]

Data available from third parties

In addition to receiving data directly from Google and Facebook, Australian news businesses can also easily access third party sources like Similarweb and App Annie that provide a wide range of market intelligence.[27] These tools allow Australian news businesses to benchmark against their competitors and industry (e.g. understand how their traffic share compares to competitors), identify emerging trends (e.g. new traffic sources) and better understand consumer intent (e.g. new keywords).

Having regard to the significant amount of information already provided to Australian news businesses, there is no justification for the obligations proposed in section 52M which only serve to impose a disproportionate regulatory burden on Google.

2. The purpose of section 52M is to enable RNBs to pursue access to more data

The Draft Code requires Google to tell news media businesses what user data Google collects, what data it supplies to them, and how they "can gain access to the data" which Google does not supply to them (section 52M(2)(e) of the Draft Code). If the intent of section 52M was simply to assist RNBs in understanding how to access data that Google already makes available, the reference to paragraph 52M(2)(a) in paragraph (e) in addition to the reference to paragraph (c) is redundant. As it is there, a court will give it meaning and the only available construction is that it requires Google to explain how RNBs can gain access to the data not currently made available to them.

There appears to have been no consideration of why the information requested in section 52M is useful to Australian news businesses over and above the information already available. In the light of the vast amount of information and data that Google already makes available, on its face, the requirement to provide the information listed under section 52M appears to be of questionable utility.

When understood in the context of news media businesses' thirst for user data,[28] and the Draft Code's good faith bargaining process, section 52M appears intended to provide RNBs with a shopping list of data (including user data) so they can pursue the collection of some or all of it through the bargaining process. As discussed, this intent is reflected in the Treasurer's statement, set out above.

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global data maturity report in collaboration with the Google News initiative," March 25, 2019, available at: https://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/deloitte-releases-global-data-maturity-report-with-google-news-initiative.html?nc=1.

[26] See case studies at Google, *"News Initiative,"* available at: https://newsinitiative.withgoogle.com/training/datatools.

[27] See Similarweb, *"Analyse any Website or App,"* available at: https://www.similarweb.com/; App Annie, *"The Mobile Performance Standard,"* available at: https://www.appannie.com/en/.

[28] The following third party submissions to the ACCC's Concepts Paper advocated for access to data relating to the ranking of RNBs content, user data collected on audiences which view news content, data relating to engagement with RNBs' news content, and any data collected on pages of digital platforms used to navigate to the news content of RNBs: Media, Entertainment and Arts Alliance, Submission to ACCC Concepts Paper, June 5, 2020, p.5, available at: https://www.accc.gov.au/system/files/Media%2C%20Entertainment%20and%20Arts%20Alliance.pdf; Commercial Radio Australia, Submission to ACCC Concepts Paper, June 2020, pp.21-22, available at: https://www.accc.gov.au/system/files/Commercial%20Radio%20Australia_1.pdf; Free TV Australia, Submission to ACCC Concepts Paper, June 2020, pp.24-25, available at: https://www.accc.gov.au/system/files/Free%20TV.pdf; Daily Mail Australia, Submission to ACCC Concepts Paper, June 5, 2020, p.4, available at: https://www.accc.gov.au/system/files/Daily%20Mail%20Australia.pdf; NewsCorp Australia, Submission to ACCC Concepts Paper, June 5, 2020, pp.24-25, available at: https://www.accc.gov.au/system/files/News%20Corp%20Australia%20Submission%20to%20Concepts%20Paper.pdf.

Perceived information asymmetries are more effectively addressed by directing Australian news businesses to the significant amount of information already published by Google. We believe training on how to access and use the data already available would have more impact and be more effective than the codified obligations, as currently drafted. Better use of this existing information would put Australian news businesses in a stronger position to understand how to build their subscriber bases and sell more relevant and profitable ads against their content.

3. The requirement is overly burdensome and disproportionate

The section 52M requirements apply to each of Google's services which makes available RNBs' "covered news content" and that collects data about users through their engagement with news content made available by the Google service. The broad definition of "covered news content" (as discussed at section C above) and the nonsensical qualifier, "collects data about the registered news business' users through their engagement with covered news content", provide Google with effectively no certainty as to which of Google's services may be subject to section 52M, and to which content section 52M applies. This uncertainty puts Google at undue risk of not complying, and being subject to significant civil penalties.

As discussed above, the purpose of section 52M appears to be to enable RNBs to pursue access to more data (including user data), which Google will be required to respond to in good faith. This may lead to negotiations requesting Google to disclose commercially sensitive information and data relating to users, such as data about users' search queries or interests that they have chosen to share with Google and not with RNBs. This represents a significant interference with Google's commercial operations without appropriate measures to safeguard use by RNBs or compensation to Google for disclosing its proprietary information.

Disclosures of user data are likely inconsistent with users' privacy expectations. At a minimum, the Draft Code encourages and facilitates RNBs to pressure Google for user data, even if the reference to informing RNBs how they can "gain access" to user data is interpreted not to explicitly require that disclosure. This is despite the DPI Final Report recognising that "consumers would not expect media businesses to have access to their browsing history, search queries or navigational history from a visit to the website of a news media business",[29] and accordingly not recommending that digital platforms should be expected to share such data with news publishers. Google agrees that the sharing of data beyond aggregate audience metrics would run contrary to consumer expectations and raise significant privacy concerns. Google strongly opposes any provision, such as section 52M, which, once coupled with the obligation to bargain in good faith, could lead to a requirement for Google to give RNBs private user information.

4. Required changes

Google considers that section 52M should be removed from the Draft Code given:

- the significant amount of data already provided by Google to Australian news businesses;
- a lack of clarity about how the data requested in section 52M would be useful to RNBs (beyond encouraging the provision of further data by Google);
- the compliance burden placed on Google as a result of the uncertain application of section 52M; and
- significant privacy and confidentiality concerns associated with sharing additional data facilitated by section 52M.

[29] DPI Final Report, p.248.

Alternatively, Google should not be required to disclose information to publishers beyond the considerable information that it already discloses, as further disclosures would permit gaming and unfair exploitation of search results at the expense of users and Google's global search quality. That is, sections 52M(2)(a), (b), (d), and (e) should be removed from the Draft Code. Under no circumstances should Google be compelled to disclose any data connected to any identifier for a user, or any data pertaining to a sufficiently narrow set of users that the data could be identifying if joined with other datasets.

If it is not the Draft Code's intention to require Google to share additional data with RNBs, that should be made explicit in the code.

Finally, the carve outs for disclosure of "trade secrets" in sections 52V and 52ZC(7) are uncertain and not commonly used in Australian legislation. Sections 52V and 52ZC(7) should be amended to state that the minimum standards and information sharing obligations do not require the giving of confidential information.

E. Minimum Standards - Algorithmic Ranking Notifications

Google's position:

When we make changes to our algorithms, it is to improve the quality of our products for the benefit of users. We already have in place a variety of long-standing resources and tools to help all publishers (including RNBs) understand how our ranking algorithms work. There is no basis for requiring us to treat RNBs more favourably than other publishers, in the provision of advance notice of these changes, which may allow third-party gaming of our system and counter our ongoing efforts to provide high quality, reliable, and relevant results to users.

Even if there was a principled basis on which to impose an obligation to provide advance notification of algorithm changes, section 52N is practically unworkable, presents a threat to the integrity of our products, and is an unjustified interference in our business and investments in Australia and other jurisdictions.

It is simply not possible for Google to identify each change which is likely to have a significant effect on the ranking of each RNB's covered news content, describe that change in readily comprehensible terms, and describe how the affected RNB can minimise negative effects. To assume so belies a fundamental misunderstanding of the way algorithmic ranking works.

Even if we could comply, we are concerned that the notification requirement would compromise our efforts to ensure that users get high quality, relevant results when they use our Search engine. We would effectively be prevented from making changes to algorithms before the expiry of the notice period, and our results would be open to gaming by RNBs, which would have an opportunity to artificially improve their ranking, to the detriment of users and other publishers.

Our services also generally use a common global architecture, and the obligation to give 28 days' notice would affect that common architecture and reach beyond Australia, unless we split out Australian services. This would result in Australian users having second rate products compared to their global counterparts, as the quality we are able to achieve will be impacted by the gaming and spam-enabling consequences of the notifications. Our product quality is our brand strength, and vice versa. The viability of the forked products in Australia would be assessed on stand-alone bases.

Summary of required changes:

- In the event that the Code does include such an obligation, it should be limited to "actionable" changes that are likely to have a "significant effect".
- The notice period should not be fixed at 28 days. Rather, it should be notice that is reasonable in all the circumstances, having regard to the nature of the change and the reasons for making it.
- There should be no obligation to describe how RNBs can minimise "negative effects" of the change in their ranking. Even if it were possible to give this guidance, it would unfairly enable RNBs to advantage their websites over other, potentially more relevant, websites, harming the quality of Google services worldwide.

Section 52N of the Draft Code requires Google to provide 28 days' notice to RNBs in relation to changes of its digital platform services' algorithms, where the changes are likely to "significantly affect" referral traffic to the RNB's covered news content. The requirement is described as a notice provision, but it in fact operates to prohibit changes until the expiry of the required notice period.

As described above at section C, as currently drafted, this requirement would apply to every Google digital platform service that makes available RNBs' covered news content, which would include Search, News,

Discover, YouTube, Assistant, and potentially a large range of other services.

Google's notice must describe the change and effect on referral traffic in a way that is readily comprehensible and must describe how a RNB can minimise the effects of the change on the ranking of its news content.

As currently drafted, Google cannot comply with section 52N. This obligation imposes an unworkable burden on Google. It effectively restricts Google's ability to operate and make changes to its algorithms and limits Google's control over its own product offering. In doing so, RNBs are given an opportunity to improve or game their content to maximum effect, which may disrupt the integrity of our product and undermine users' trust in the independent and objective nature of our search engine, and penalise website owners who create similar content (e.g. Food, Travel, or Fashion content).

1. Practically unworkable

Each failure to comply is subject to a maximum penalty which is likely to be 10% of Google's annual turnover in Australia. This means Google must be conservative in its interpretation of the proposed law.

To comply, Google would need to be able to identify each change which is likely to have a significant effect on the ranking of each RNB's covered news content, describe that change in readily comprehensible terms, and describe how the affected RNB can minimise negative effects. That is simply not possible. To take the example of Google Search (although these points would apply to many other services):

- **Google cannot determine the impact of algorithm changes on individual RNBs**. The complexity of the hundreds of factors in Google's algorithms and the constantly evolving nature of the Web and user preferences make it effectively impossible to predict and evaluate all of the implications of any given algorithmic change on existing results, let alone to anticipate how it might impact future results (such as news stories not yet written).

- **Google will not be able, reliably, to determine whether the effect will be significant**. "Significantly affect the referrals" is used as a threshold for the purposes of section 52N of the Draft Code. This is a broad concept that is not defined in the Draft Code and the "guidance" in the Explanatory Materials is circular and unclear.[30] The Explanatory Materials make reference to 15/25% thresholds but then undercut those thresholds by saying that "significant effect on ranking" also means "otherwise likely to significantly affect the performance of a registered news business' covered news content". There is no metric to determine this. This effectively places Google in the onerous position of over-notifying or facing potentially steep fines.

- **Many updates are the results of machine-learned models whose effects Google cannot articulate "in readily comprehensible terms."** Many of Google's core updates are the results of machine-learned models whose effects Google cannot articulate "in readily comprehensible terms", except to note that their outputs better match the scores Search Raters have assigned to pages and search result sets using Google's Webmaster Guidelines. The Webmaster Guidelines themselves tell publishers how to optimise their performance in Search and the guidance is the same for every core update (i.e. Google rewards good quality content). Such guidance seems unlikely to satisfy the obligation in the Draft Code to separately explain what is changing with each change.

2. Threat to the integrity of our products

We are constantly making changes to our algorithms to improve our products. In the case of Google

[30] Explanatory Materials, para 1.79.

Search, we continuously update our algorithms to ensure we continue to return high quality and relevant results to users. Last year, for example, we made more than 3,000 updates to our Search algorithms. Many of these changes are designed to address ongoing efforts by millions of websites to manipulate our Search results in order to promote the interests of individual websites at the expense of our goal of providing authoritative and relevant information. Disclosing the details of these changes would allow the recipients of the disclosure to game our algorithms and artificially inflate their ranking compared to others. There is no basis for requiring us to treat RNBs more favourably than other publishers, in the design of our algorithms or the provision of advance notice of changes, which may allow third-party gaming of our system and counter our ongoing efforts to provide high quality, reliable and relevant results to users.

We are concerned the requirements in section 52N would compromise our efforts to ensure that users get high quality, relevant results when they use our Search engine. Section 52N:

- effectively prevents Google from making changes to algorithms prior to the expiry of the notice period;
- is unclear whether and when the notice period expires if the RNB claims that the notice of change is deficient;
- compromises Google's usual practices of making changes efficiently and promptly to meet its business needs and the interests of users;
- is open to abuse by RNBs which will have an opportunity to improve or game their content to maximum effect; and
- risks the further disclosure of this proprietary information from hacks, leaks, or intentional publication by RNBs.

This may, or may be perceived, to disrupt the integrity of Search, by compromising Google's efforts to ensure that users get high quality, relevant results when they use Search. We consider that this will undermine users' trust in the independent and objective nature of Search.

As noted above, although the example provided is specific to Search, these observations also apply to other Google products which may be subject to the Draft Code as currently drafted, including YouTube.

3. Unjustified interference in Google's business and investments in other jurisdictions

Google currently uses common architecture (for indexing, crawling, and ranking etc) for Google Search in different countries. Google's other products which may be subject to the Draft Code as currently drafted also use a common architecture. The obligation to give 28 days notice would apply to changes to algorithms comprising parts of that common architecture.

The requirement in section 52N of the Draft Code would mean that, if Google Search retains its common architecture, it would effectively be subject globally to the requirements of the Draft Code. This would not be workable because it would force Google to give disclosure of algorithm changes in a way that would:

- if leaked or published, allow bad actors to game its algorithms;

- if held by RNBs, allow them unfair advantage against other content, including the news content of publishers which are not RNBs; and

- give competitors a one-month head start on new features, by requiring only Google but not those other companies to pre-announce changes and wait 28 days for implementation.

Alternatively Google could consider forking Search for Australia. This would involve essentially splitting

out the Australia country version of Search from the global Search architecture. This would result in Australian users having a second rate search product compared to their global counterparts. It would also mean that the viability of the forked Search in Australia would be assessed on a stand-alone basis.

Although the example above is specific to Search, the above observations also apply to other Google products which may be subject to the Draft Code as currently drafted, including YouTube.

4. Google regularly and voluntarily provides notice about actionable updates

As previously explained, we are constantly making changes to our Search algorithms to ensure we are returning high quality and relevant results to users.

Some of our algorithmic improvements are designed to address aspects of user experience. For example, users prefer to have pages that are fast-loading, or pages that are "mobile-friendly" so that they don't have to pinch-and-zoom to view content on smartphones.

Most of our updates seek to better align the performance of our search ranking algorithms with the guidance we publish in our Rater Guidelines or address recently-discovered types of spam or abuse. Some updates, however, more fundamentally re-balance the ranking algorithms to address a particular new component of a good user experience. In those cases, there is new guidance for sites to follow in order to continue performing well in our search engine. For example, sophisticated websites may have different versions that they show to users on mobile phones versus desktop computers, because the screen sizes and dimensions are so different. Google Search historically treated the desktop version of a website as the primary one to be used in ranking, because most users browsed the web on desktop computers. When that balance began to shift, and more users were coming to Google Search on smartphones, Google determined that it should recognize the mobile versions of websites as the primary versions users would encounter. Google first announced that it was exploring "mobile-first" indexing in November 2016[31], and over the next few years shared information about a gradual rollout of this change with months of advance notice.[32] Google also gave webmasters guidance about how to improve their mobile versions in order to address this ranking change.[33]

This is why we refer to such updates as "actionable" updates. There are clear, helpful actions that we recommend sites should undertake. This is also why we have a long history of regularly communicating about actionable updates, often with extensive notice, so that sites can prepare for them.

Here are some examples of major actionable updates we've communicated voluntarily:

- The "Page Experience" update was preannounced on 28 May 2020, with a guarantee that no changes would be made before 2021, and that once a launch date was finalised, publishers would receive six months' notice before any changes were rolled out, giving them time to make whatever improvements they feel would be merited.[34]

- Our "Speed Update" was pre-announced in January 2018, with six-months notice for sites to

[31] https://webmasters.googleblog.com/2016/11/mobile-first-indexing.html
[32] Google Webmaster Central Blog, "Getting your site ready for mobile-first indexing," December 18, 2017, available at: https://webmasters.googleblog.com/2017/12/getting-your-site-ready-for-mobile.html.
[33] https://developers.google.com/search/mobile-sites
[34] Google Webmaster Central Blog, *"Evaluating page experience for a better web,"* May 28, 2020, available at: https://webmasters.googleblog.com/2020/05/evaluating-page-experience.html.

consider actionable advice about it.[35]

- Our mobile-first indexing update was announced in November 2016, a year-and-a-half before it went live, with actionable advice for sites to consider.[36] In December 2017, we shared a further "get ready" post with advice, three months before it began.[37] In March 2018, we shared further advice, when the update began to go live.[38] The rollout process progressed carefully over a year, until it became (as we shared) our new indexing practice beginning in May 2019.[39]

- Our mobile-friendly update was preannounced in February 2015 with actionable advice,[40] two months before it began in April 2015.[41]

- Broad core updates happen several times per year. They are designed to ensure that, overall, we are delivering on our mission to present relevant and authoritative content to users. They have been announced since March 2018,[42] most recently in May 2020.[43] While there is no particular action that publishers should take in response to an individual core update, we nevertheless pre-announce these so that publishers can be aware that a change is coming. That way, they are less likely to misattribute a change to their ranking to any recent changes on their side; our notification thus saves them time and effort. We provide general advice for sites to consider for success with our systems overall; this advice can be acted on at any time.[44]

As mentioned, we regularly and voluntarily provide notice about actionable updates. We're already motivated for publishers to understand these updates, because taking action helps them, helps us improve our results, and ultimately ensures that together we're helping users connect to the best information. In the event that the Draft Code imposes an obligation to notify algorithm changes, it should be limited to reasonable public notification of changes that are "actionable".

As noted above, although the examples provided are specific to Search, these observations also apply to other Google products which may be subject to the Draft Code as currently drafted, including YouTube.

5. Required changes

For the reasons provided above, Google considers that the Code should not contain an obligation to provide notice of algorithm changes, even "significant" ones, beyond what it already provides.

In the event that the Code does include such an obligation, it should be limited to "actionable" changes that are likely to have a "significant effect", where:

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[35] Google Webmaster Central Blog, *"Using page speed in mobile search ranking,"* January 17, 2018, available at: https://webmasters.googleblog.com/2018/01/using-page-speed-in-mobile-search.html.

[36] Google Webmaster Central Blog, *"Mobile-first indexing,"* November 4, 2016, available at: https://webmasters.googleblog.com/2016/11/mobile-first-indexing.html.

[37] Google Webmaster Central Blog, *"Getting your site ready for mobile-first indexing,"* December 18, 2017, available at: https://webmasters.googleblog.com/2017/12/getting-your-site-ready-for-mobile.html.

[38] Google Webmaster Central Blog, *"Rolling out mobile-first indexing"*, March 26, 2018, available at: https://webmasters.googleblog.com/2018/03/rolling-out-mobile-first-indexing.html.

[39] Google Webmaster Central Blog, *"Mobile-First indexing by default for new domains,"* May 28, 2019, available at: https://webmasters.googleblog.com/2019/05/mobile-first-indexing-by-default-for.html.

[40] Google Webmaster Central Blog, *"Finding more mobile-friendly search results,"* February 26, 2015, available at: https://webmasters.googleblog.com/2015/02/finding-more-mobile-friendly-search.html.

[41] Google Webmaster Central Blog, *"Rolling out the mobile-friendly update,"* April 21, 2015, available at: https://webmasters.googleblog.com/2015/04/rolling-out-mobile-friendly-update.html.

[42] See Twitter, *"Google SearchLiaison,"* available at: https://twitter.com/searchliaison/status/973241540486164480.

[43] See Twitter, *"Google SearchLiaison,"* available at:https://twitter.com/searchliaison/status/1257376879172038656.

[44] Google Webmaster Central Blog, *"What webmasters should know about Google's core updates,"* August 1, 2019, available at: https://webmasters.googleblog.com/2019/08/core-updates.html.

- “actionable changes” is defined as changes where Google, “acting reasonably, intends affected registered news business corporations to be able to, wholly or materially, address or mitigate the impacts of that change on traffic with respect to its covered news content”; and
- “significant effect” is defined by reference to the impact on RNBs collectively rather than individual RNBs (for example, the changes are likely to result in a [15]% or greater change in referral traffic, for at least [25]% of RNBs).

The notice period should not be fixed at 28 days. Rather, it should be notice that is reasonable in all the circumstances, having regard to the nature of the change and the reasons for making it.

There should be no obligation to describe how RNBs can minimise “negative effects” of the change in their ranking. Even if it were possible to give this guidance, it would unfairly enable RNBs to advantage their websites over other, potentially more relevant, websites, harming the quality of Google services worldwide.

F. Minimum Standards - Other notifications (paywalled content, display of covered news content and display of advertising)

Google's position:
Sections 52O, 52P and 52Q are practically unworkable and unjustified, for similar reasons as those set out in relation to section 52N.
Summary of required changes:
Sections 52O, 52P, and 52Q must be removed.

1. Section 52O - Ranking and display of paywalled content

Section 52O of the Draft Code requires Google to give 28 days' advance notice to an RNB of changes to algorithms used by each Google service to rank and display news, where the changes are specifically designed to affect the ranking of paywalled content, along with a readily comprehensible explanation of such changes.

We have explained in previous submissions to the ACCC that Google Search algorithms and Google News algorithms do not penalise paywalled news content in the ranking or display of search results.[45]

For each of Google's digital platform services, RNBs who utilise paywalled content are only a subset of entities we deal with, or who benefit from our services. To take Search as an example, these RNBs would only be a very small subset of the trillions of other websites we crawl and index, and display links to in our Search results. Yet, section 52O effectively forces Google to favour this cohort over other websites. There is simply no basis for introducing a requirement to provide paywalled news businesses with special treatment.

For the same reasons discussed above in section E, section 52O is also unworkable because:

- Google cannot determine the impact of algorithm changes on individual RNBs (including in respect of RNBs utilising paywalled content);
- Google will not be able, reliably, to determine whether the effect will be significant (which is in any event not defined by the Draft Code, nor do the Explanatory Materials provide any guidance);
- many updates are the results of machine-learned models whose effects Google cannot articulate "in readily comprehensible terms";
- if Google retains its common architecture, it would effectively be subject to the requirements globally; and
- the requirements would compromise our efforts to ensure that users get high quality, relevant results when they use our Search engine.

For these reasons, Google considers that the section 52O obligations should be removed.

[45] Google, *Submission to the ACCC Concepts Paper* <https://www.accc.gov.au/system/files/Google.pdf> pp.46.

2. Section 52P - Display of covered news content

Section 52P of the Draft Code requires Google to give 28 days' advance notice to an RNB of changes to its platform services, where the changes are likely to have a significant effect on the display and presentation of their covered news content on Google's services, along with a readily comprehensible explanation of such changes. The Draft Code does not define what a "significant effect" means in this context, and there is no guidance in the draft Explanatory Materials.

Australian news businesses already have significant control over the presentation of their content on our services, including the ability to control snippet length and logos. Our services are carefully calibrated to optimise user experience.

Our overriding interest is to help our users find what they are looking for from the wealth of information available on the Internet, including news content. How we provide preview displays of content, including news, is an extension of this. As the ACCC acknowledges in the Concepts Paper, we have a "legitimate interest in carefully calibrating the look and feel of content displayed on [our] services, in order to preserve the usability of [our] services for consumers" (p.24).

We make changes to the display and presentation of news content to improve the quality of our products for the benefit of users. There is no basis for requiring digital platforms to treat RNBs more favourably than other publishers, in the provision of advance notice of changes, which may allow third-party gaming of our systems and counter our ongoing efforts to optimise user experience.

Further, section 52P is practically unworkable for the same reasons outlined in section E.

Google considers that the section 52P obligations should be removed.

We are also concerned about the suggestion in the Explanatory Materials (at [1.84]) that the final code will include requirements "about genuinely considering reasonable proposals from registered news business corporations to ensure that the display and presentation of news on platforms' services provides appropriate prominence to their content". There is simply no basis for requiring us to treat RNBs more favourably than other publishers by providing "appropriate prominence" to their content. This would be a completely unjustified interference in our services and the markets in which those other publishers participate.

3. Section 52Q - Display of advertising

Section 52Q of the Draft Code requires that Google give 28 days' advance notice to an RNB of changes to an algorithm of its digital platform services, where the changes are likely to have a significant effect on the display and presentation of advertising directly associated with news on the digital platform, along with a readily comprehensible explanation of such changes. The Draft Code does not define what a "significant effect" means in this context, and there is no guidance in the draft Explanatory Materials.

Broadly, Google's concerns with section 52Q are the same as those in relation to section 52N.

For these reasons, Google considers that the section 52Q obligations should be removed.

G. Open Communications

Google's position:
We are supportive of efforts to facilitate better open communications with RNBs. Section 52R (and any regulations) should ensure that the parties are afforded adequate flexibility to deploy their resources efficiently to meet this requirement and ensure the effective resolution of issues.
Summary of required changes:
The point of contact need not be physically located in Australia.

Section 52R requires that Google set up a point of contact in Australia for each RNB, give details of that point of contact to the relevant RNB, and acknowledge each communication from the RNB. According to the exposure draft explanatory materials in respect of section 52R, the Governor-General can make regulations which contain requirements for the registered point of contact and acknowledgement of the contact. These regulations are proposed to include that the points of contact must be available during Australian business hours and that the acknowledgment must occur within two business days.

Subject to reviewing the proposed regulations in full, we agree that there is benefit in facilitating better open communication between digital platforms and RNBs as proposed in section 52R. However, given the potential number of RNBs and the broad range of requests that the contact points are likely to receive, Google should be afforded adequate flexibility to deploy its resources efficiently to meet this requirement. We anticipate that this may involve providing contacts located outside of Australia who would nevertheless be contactable during Australian business hours for RNBs.

Accordingly, we do not consider it necessary for section 52R to include a requirement that our point of contact be located *in* Australia. Rather, we propose that our point of contact for each RNB should be *available during Australian business hour*s, consistent with the proposed regulations. Removing the location requirement will provide us with more flexibility to efficiently allocate resources and effectively address the substantive requirements of section 52R.

H. User Comments

Google's position:
Google is not aware of any concerns raised by news media businesses about lack of control over comments on its services, nor has this been raised in our engagement with the ACCC. In this context, section 52S is unjustified. As a matter of principle, Google objects to any Government-mandated intervention in our product design that is not driven by an overarching focus on our users.
Summary of required changes:
Section 52S must be removed.

Section 52S of the Draft Code requires that upon receiving written requests from an RNB, Google must:

- ensure that the RNB is provided with flexible content moderation tools that allow the RNB to remove or filter comments on the RNB's covered news content that are made using the digital platform service and are made on a part of the digital platform service that is set up and able to be edited by the RNB;
- ensure that the RNB can disable the making of such comments; and
- ensure that the RNB can block the making of such comments by particular persons or in particular circumstances.

Google is not aware of any concerns raised by news media businesses about lack of control over comments on its services, nor has this been raised in our engagement with the ACCC. In this context, it is not clear why this obligation is needed.

If section 52S is intended to address recent judicial decisions regarding the liability of the administrators of social media pages for allegedly defamatory third party comments, Google considers that the impact of these decisions is not simply a matter for RNBs. It is a matter better addressed through holistic legislative reform, in particular the proposed Stage 2 of the Council of Attorneys-General's review of the Model Defamation Provisions, rather than through piecemeal regulations that impose stringent and unjustifiable constraints on product development. The introduction of section 52S as part of the Code would inappropriately pre-empt the outcome of this existing reform process without considering moderation in the context of broader questions around the liability of online intermediaries for defamation.

We are also concerned that if the scope the digital platform services that are subject to the Draft Code extends to a broad range of products, such as, for example, Google Play, section 52S could potentially extend to requiring Google to allow RNBs to remove comments containing negative reviews of their news apps, which would inappropriately and without justification, privilege RNBs over other users of the service.

As a matter of principle, Google objects to any Government-mandated intervention in our product design that is not driven by an overarching focus on our users.

I. Original News

Google's position:
Our focus is on providing our users with relevant, accurate, authoritative and timely information — this will sometimes (but not always) be original content. While there is no obligation to implement whatever proposal is developed under section 52T, once coupled with the obligation to negotiate in good faith, this could lead to an expectation to implement, and may lead to unprecedented publisher interference in Google's product decisions. We fundamentally object to any government mandated intervention in our product design that is not driven by the overarching focus on our users.
Summary of required changes:
If the Code seeks to address original content through a mechanism by which Google develops a proposal, the obligation should be amended to make clear that this is limited to a one-off, voluntary proposal, without requiring mandatory consultation.

Section 52T of the Draft Code requires Google to consult with RNBs and publish a proposal to appropriately recognise original covered news content published by the RNBs within six months of the ACMA registering the first RNB. Section 52T(2)(c) imposes an ongoing obligation to update this proposal every 12 months and consult all RNBs on the updated proposal.

While there is no obligation to implement whatever proposal is developed, once coupled with the obligation to negotiate in good faith, this could lead to an expectation to implement, and may lead to unprecedented publisher interference in Google's product decisions. An external requirement to prioritise certain content above other content, by reference to publisher concerns rather than users' interests in obtaining results ranked based on quality and relevance, is of serious concern.

We fundamentally object to any government mandated intervention in our product design that is not driven by the overarching focus on our users. Our algorithms are designed to promote high quality content that is relevant to a user's query, and original content may not be high quality or the most relevant to the user's query. An artificial recognition of original news content would also further incentivise a "race to publish" rather than thorough fact-checking and review.

1. Flawed assumption that original content is the highest quality and most relevant

Google's focus is on providing our users with relevant, accurate, authoritative, and timely information. The article that is published first is not necessarily the most relevant, accurate, authoritative, and up to date information in answer to a user's query. There could be a more recent update that contains important additional detail. Further, a story appearing for the first time may not have been verified or be authoritative — in fact, it may be shown to be incorrect by following coverage. Whether or not other news organisations link to a story is something that we also look at in evaluating how authoritative it is, but is far from the only factor we take into account.

We recognise, however, that provenance is an important issue for Australian news businesses, and we have made changes to our search algorithm to better recognise original reporting, surface it more prominently in Search, and ensure it stays there longer.[46]

[46] Google, R Gingras, "*The Keyword: Elevating original reporting in Search*," September 12, 2019, available at: https://www.blog.google/products/search/original-reporting/.

2. Complexity involved in identifying original content

In the DPI Final Report, the ACCC acknowledged the difficulties with requiring digital platforms to prioritise original content, and concluded that it was not appropriate to require digital platforms to include an originality signal in its algorithmic determinations:

> "*While it would appear reasonable for the original source of a news story to be a factor considered by a digital platform's algorithm, the ACCC recognises that:*
> - *digital platforms would need clear signals as to which article is 'original', and these signals may not always exist*
> - *originality may be difficult to establish in some cases, given that stories can develop and evolve, and may include a mix of original and attributed content and original analysis*
> - *if originality were used as a signal for the algorithm for the purposes of ranking items of journalistic content, it may be considered alongside other factors, and may not necessarily be the deciding factor.*
>
> *In the absence of signals from media outlets as to which content was 'original', and in the absence of an agreed basis for defining and identifying 'original' news content, any attempts by digital platforms to unilaterally determine the originality of journalistic content for the purposes of ranking could be problematic. The ACCC does not consider it appropriate to require a digital platform to include such a signal in its algorithmic determinations."*[47]

Section 52T is clearly inconsistent with this position.

3. Required changes

We have described above the complexity involved in identifying original content and the fundamental flaw in assuming that original content is the highest quality and most relevant content to show in response to a search query. In this context, it is not appropriate for the Draft Code to contain mandatory obligations requiring Google to prioritise original content, even if that requirement only extends to annually developing and consulting on a proposal to recognise original covered news content.

If the Code seeks to address original content through a mechanism by which Google develops a proposal, the obligation should be amended to make clear that this is limited to a one-off, voluntary proposal, without requiring mandatory consultation.

[47] DPI Final Report, p.250.

J. Discrimination prohibition

Google's position:

The non-discrimination obligation is so uncertain that it is unworkable. It appears intended to prevent Google from removing RNBs' news content from its services without also removing all other forms of news (without actually defining "news content"). In combination with the Draft Code's one-sided binding final offer arbitration process, it effectively forces Google to submit to excessive remuneration demands (and subsequent arbitration awards) by opportunistic RNBs, unless it can cease to "make available" any news content at all. While there may be intention to enable Google to choose the latter course, without any definitions of what content and activities are within the scope of the code at all, this is impracticable. This lack of clarity, combined with the extravagant penalties in case of breach caused by misinterpretation, would push Google to a more extreme alternative — withdrawal of services in their entirety. The provision is simply a disproportionate and unfair interference with Google's business in Australia.

The provision also seeks to prevent Google from discriminating between RNBs themselves, which seems at odds with a code intended to facilitate bilateral bargaining between Google and RNBs, where RNBs can request to bargain over any issue including the dimensions covered by section 52W.

Summary of required changes:

Section 52W should be removed, or alternatively replaced with the following:

"The responsible digital platform corporation for a designated digital platform service may intentionally cease to make available the covered news content of a registered news business on the designated digital platform service on the basis of the registered news business' participation in the Code only if:

- it has first offered terms to that registered news business that are commercially equivalent to the terms offered or to be offered to other similarly situated registered news businesses offering similar news content; and
- the registered news business has declined those terms."

As drafted, the non-discrimination provision in section 52W is unclear. We understand, however, that it is primarily intended to prevent Google from removing RNBs' news content from its services without also removing all other forms of news (such as foreign news or "citizen journalism"). In other words, if Google displays any news content, it must display all RNBs' news content.

However, the result is that an RNB would be incentivised to demand and extract from Google far more than the fair value of their content, with the one-sided arbitration provisions (discussed in Part L below) which will discourage healthy negotiations between the parties and be incongruous with the objectives of the Code to facilitate such agreements. Google is forced to choose between paying an excessive amount to that RNB, and ceasing to crawl, index, rank, display, and present all news content, which already is disproportionate and lacks economic reality. But this is a Hobson's choice — by using broad and vague definitions of news business and news source, and failing to define news content, the Draft Code makes it impossible for Google to effectively remove news, because it isn't possible for Google to be certain it has ceased to crawl, index, rank and display all of it. The only way for Google to guarantee avoidance of

uncapped financial liability brought on by demands for extreme remuneration backed by a biased arbitration process would beto withdraw its services.

The financial exposure brought about by the Draft Code is an even more extreme outcome in the current context because the payments that Google is required to pay for "making available" the RNB's news content are not required to be paid by its rivals, and Google is not entitled to claim payment for the activities involved in "making available" that news content. There is no other context in Australian law in which the government requires a company to pay for a product input regardless of the value of that input, let alone to pay for providing a valuable audience to another business — such a payment would also be unprecedented anywhere else in the world and contrary to the core principles on which the internet has operated since its creation. Even in infrastructure access regimes, the service provider receives, rather than makes, a payment, and the terms of access take into account, among other things, its costs together with its legitimate business interests.

The provision is simply a disproportionate and unfair interference with Google's business in Australia.

The clause also, however, seeks to prevent Google from discriminating between RNBs themselves. This is at odds with a code intended to facilitate bilateral bargaining between Google and RNBs, where RNBs can request to bargain over any issue including the dimensions covered by section 52W.

The provision's ambitions in trying to achieve multiple purposes result in it being essentially so uncertain as to be unworkable. It also opens Google up to constant allegations by RNBs that Google is discriminating against them because their news content may not be ranking as high as other news businesses' news content.

Although the below points relate to Search, many of them apply equally to, for example, YouTube.

1. So uncertain as to be unworkable

The drafting of the non-discrimination provision is hopelessly uncertain:

- "discriminate" is undefined;
- "[discriminate] ... in relation to the application of this Part ..." is vague and cannot be understood by the company required to comply with the prohibition; and
- the news businesses which " ... are not registered news businesses ..." may be infinite in number.

"Discriminate" is undefined

The section requires Google to ensure that, among other things, it does not discriminate between one RNB and another. "Discriminate" is undefined. Relying on its ordinary English meaning (i.e. to distinguish or to differentiate), Google appears to be prohibited from distinguishing, in relation to crawling, indexing, ranking, displaying and presenting, between the news content of two news businesses (whether both are registered or only one is). This is unworkable.

The prohibition appears to apply to any differentiation, whether intentional or not. Google could apparently expose itself to a massive penalty by unintentionally differentiating in relation to crawling, indexing, ranking, displaying and presenting the news content of two news businesses.

If the fact that the discrimination must be " ... in relation to the application of this Part ..." imposes a requirement of intention, that should be made explicit.

The requirement that discrimination be " .. in relation to the application of this Part .." is unclear

There is no indication in the Draft Code as to the required nature of the relationship between differentiated treatment of news publishers and the application of the Draft Code.

The Explanatory Materials contain three glosses on this apparently crucial element of the prohibition:

- [discrimination] " ... in relation to the registered news business proposing to or having relied on any rights or entitlements under the code ...";
- [discrimination] " ... solely in relation to any agreement entered into under the code ..."; and
- [discrimination] " ... on the basis of the registered news business' participation in the code ...".

These glosses are, at best, examples of some types of relationship between the differentiated treatment of news publishers and the application of the Draft Code. They provide no guidance as to the boundaries of the necessary relationship with "the application of this part". This uncertainty as to the relationship between, for example, differentiated ranking of the news content of two publishers and "the application" of the Draft Code makes it impossible for Google to ascertain whether such differentiation would contravene the prohibition and expose it to a massive penalty and civil proceedings for damages.

"Not registered news businesses" - a near infinite set

The prohibition requires Google not to differentiate or distinguish between RNBs and news businesses that are not RNBs. In order to comply with this prohibition, Google must be able to identify all news businesses that are not RNBs.

A "news business" is defined as a news source or combination of news sources.

A "news source" is defined as one of a number of formats (eg newspaper masthead, website etc) which produces and publishes online "news content".

"News content" is not, however, defined, which means, effectively, that there is ultimately also no definition of "news business". The draft Explanatory Materials highlight the problem. They state that the prohibition is intended to ensure that "citizen journalism content" is not used as replacement news content. This indicates that a news business need not be a business, it need only be, for example, a website which produces and publishes "news content" (which is then not defined in the Draft Code).

The meaning of news content is entirely unclear

As discussed in section C above, "news content" is not defined despite the fact that its meaning is central to the interpretation and scope of the discrimination prohibition in Division 5 of the Draft Code.

Critically, it is unclear whether "news content":

- even needs to be created by a journalist (the Explanatory Materials' reference to "citizen journalism" suggests that anyone can create news content);
- needs to be of any interest to, or, in fact, have any connection with Australians; or
- includes content excluded from covered news content. For example, it may include, from any part of the world, broadcasts of sports games, publication of sports results, entertainment

content such as reality TV programming, specialty and industry reporting, product reviews, talk-back radio and content produced by academics.

The almost infinite application of the prohibition due to the absence of an effective definition of news content makes it an entirely unworkable provision.

2. Disproportionate and unfair interference with Google's business

If we understand its intention correctly, section 52W effectively mandates compulsory discrimination, by forcing Google to treat all RNBs and news businesses equally even when they are situtated differently. For example, Google's only recourse to unreasonable remuneration demands from one RNB would be to cease to crawl, index, rank, display and present all news content.

We refer to the paper by Dr Fabien Curto Millet and other economists, titled "Economic comments on the Draft News Media and Digital Platforms Mandatory Bargaining Code", which observes that the "ironically labelled" non-discrimination provision in section 52W contrives an externality, from one RNB's unreasonable remuneration demand to the removal of all links to news content, which leads to an equilibrium in which RNBs will demand even higher remuneration to what a cartel would ask for, and possibly more than 100% of any bargaining surplus associated with their content.

Is the intention to prevent Google from discriminating against RNBs, or to enable RNBs to extort? This seems to go well beyond correcting any imbalance in bargaining power. It is also inconsistent with the apparent objective of establishing a fair remuneration regime.

Without the non-discrimination clause, Google would be able to adjust its algorithms as it currently does, with freedom to operate so as to ensure that its products return the most relevant, quality results. It would also be able to choose to adjust its algorithms so as to not make available content of RNBs who demand unreasonably high remuneration, and have refused to accept remuneration payments that are comparable to remuneration amounts payable to other news businesses, or other market benchmarks. The non-discrimination provision appears intended to prohibit this.

The non-discrimination obligation (combined with the remuneration obligation) imposes substantial burden on the operation of our global search engine. It appears intended to impose, in effect, a requirement to carry all registered news businesses' news content, even if some news media businesses demand that their content be carried on terms that are not fair. In any other forced carriage regime, the provider required to carry is entitled to be paid for being required to carry. We discuss this further in section L.2 below.

The provision also opens Google up to constant allegations by RNBs that Google is discriminating against them because their news content may not be ranking as high as other news businesses' news content. Because the prohibition is inherently uncertain, its application is therefore contestable. It creates incentives for well-resourced RNBs to use the regime to gain advantage relative to those without resources by repeatedly alleging discrimination. To prove the negative — that the RNB's content simply performs poorly on its merits and is not subject to demotion on the basis of the code — Google would have to expose confidential and proprietary details of its ranking system.

3. Undermines the bargaining framework which the Draft Code is intended to establish

The section 52W prohibition also appears to be entirely at odds with the potentially different outcomes of the bilateral negotiations between Google and RNBs, which the Draft Code seems intended to facilitate. Each negotiation between Google and a RNB will concern the range of issues specified by the RNB. Those issues may vary from one RNB to another and the outcomes of Google's negotiations with different RNBs may differ significantly. For example, the upshot of negotiation with one RNB might be that the RNB authorises detailed snippets and that user preference for more informative snippets is found to result in higher ranking of that RNB's news content. If that outcome contravened the prohibition, Google would be liable for potentially massive penalties. Similarly, if Google proposed a new product or feature to RNBs in negotiations under the code, any RNB who did not accept could prevent the launch of the product or feature for all, because their content would be disadvantaged in presentation by being excluded from the feature.

The existence of the discrimination prohibition would deter Google from agreeing to any differential treatment of a RNB that may (directly or indirectly) affect crawling, indexing, ranking, displaying and presenting, notwithstanding that it reflected the outcome of bilateral negotiations required by the Draft Code. The prohibition completely undermines the intent of the legislation to foster bilateral negotiations by imposing, in effect, a lowest common denominator straitjacket on the outcomes of the negotiations. It also puts Google between the proverbial rock and hard place, on the one hand required to negotiate in good faith about any issue nominated by the RNB, and on the other prohibited from agreeing to outcomes that would result in the RNB being treated differently than its rivals.

4. Required changes

Google submits that section 52W be removed, as it is unworkable. It is unclear what would and would not constitute a violation of the non-discrimination provision. The current Explanatory Materials are sweeping, saying that "[d]iscrimination in this context will be considered to occur if the news content of a registered news business is intentionally disadvantaged in comparison to other news content in terms of the crawling, indexing, ranking, display, presentation or other process undertaken by the digital platform on any service provided by the digital platform, on the basis of the registered news business' participation in the Code."[48] This would contravene the core purpose of search engines, which seek to differentiate between more and less relevant and useful content. Given the millions of changes to search rankings every day, individual changes cannot create an opening for litigation.

Recognising the intent sought to be achieved by the non-discrimination provision, if it is necessary to include such an obligation, section 52W should be replaced with the following:

> "The responsible digital platform corporation for a designated digital platform service may intentionally cease to make available the covered news content of a registered news business on the designated digital platform service on the basis of the registered news business' participation in the Code only if:
>
> - it has first offered terms to that registered news business that are commercially equivalent to the terms offered or to be offered to other similarly situated registered news businesses offering similar news content; and
> - the registered news business has declined those terms."

[48] EM, para 1.100. The reference to "or other processes" goes beyond the language of section 52W. It is unclear whether this is deliberate.

We note that Google has already concluded a number of deals with publishers that could form reference points for this clause.

We consider that an “intent” element is necessary to distinguish inadvertent or unintended occurrences, such as those caused by system errors or outages, and to allow Google sufficient flexibility to engage, for example, in small-scale experiments and tests, which in practice often only involve a limited group of partners. This would also be consistent with many provisions in the CCA, which contain a purpose element, and should be sufficient to meet the Draft Code’s objectives.

This clause must not interfere with Google’s ability to maintain, develop, and improve its products, or disadvantage Google relative to companies offering similar services. The Code should clearly recognise Google’s right to remove or demote RNBs for reasons unrelated to the Code, if, for example, an RNB publishes hate speech or misinformation, engages in behaviour designed to defraud Google’s users, or otherwise violates Google’s generally applicable policies and terms of service.

K. Bargaining framework

Google's position:

The bargaining obligations under section 52Y of the Draft Code are onerous. There are effectively no limits to the scope of issues that may be raised by RNBs, or the number or frequency of bargaining requests. Google must bargain about these issues in 'good faith' (a concept which unhelpfully isn't defined, and invites disputes) and, in the process, may be exposed to unjustified, unnecessary, and invasive transparency (under section 52ZC) not experienced by other businesses.

These onerous obligations are disproportionate to the issues the Draft Code is seeking to address given their application to a potentially broad range of Google's digital platform services, some of which are already underpinned by commercial agreements, and the existence of the minimum standards.

Summary of required changes:

- RNBs' rights to give bargaining notifications should be limited to the specific issue of remuneration in respect of only those digital platform services where an imbalance in bargaining power exists.
- The good faith obligation should be more clearly defined and should not compel the parties to act against their legitimate commercial best interests.
- Google considers that the section 52ZC obligations to provide information are not justified and should be removed.

1. RNBs' unfettered right to bargain on any issue

Section 52Y of the Draft Code gives RNBs the right to notify Google that they wish to bargain over "one or more specified issues" relating to their covered news content made available by Google. There is no limit on:

- the range of issues that may be raised;
- the number of issues that may be raised; or
- the number of news businesses that may seek to raise such issues (accepting that only RNBs will have this right) or the number of times that they can give bargaining notifications.

The services in respect of which such issues may be raised are also uncertain, because the definition of digital platform service is completely unilluminating, and the concept of "making available" news content is undefined and vague, as discussed above in section C.

RNBs' rights to give bargaining notifications are essentially unfettered. As currently drafted, section 52Y(4) does not even require the RNB to set out its position on the bargaining issues.

Upon receiving a bargaining notification, Google is obliged (by section 52ZB) to negotiate in good faith on the issues raised in bargaining notifications regardless of their subject matter, materiality, or whether they are frivolous or vexatious. It is obvious that this provision has the potential to impose a very significant compliance burden on Google, particularly if a large number of bargaining notifications are received simultaneously.

We consider that the bargaining obligations in the Draft Code are not only onerous, but are also disproportionate to the issues the Draft Code is seeking to address. This is particularly the case given that the Draft Code also contains very prescriptive and burdensome minimum standards applicable to digital platform services, including those regarding data and notification of algorithm changes and other changes to the platforms. If Google does not comply with the minimum standards, it will be exposed to enforcement action and significant civil penalties.

RNBs' rights to give bargaining notifications should be limited to the specific issue of remuneration in respect of only those digital platform services where an imbalance in bargaining power exists. The issue of remuneration is not addressed in the minimum standards and it is appropriate that it be negotiated between the parties.

RNBs should also be required to put forward, in the bargaining notification, their position on the bargaining issues.

2. Good faith requirement in section 52ZB needs clarification

The Draft Code requires Google to bargain in good faith, but does not define what that means. The Draft Code should define what is meant by "good faith", or explicitly identify examples of negotiating conduct that would not contravene the obligation to negotiate in good faith (for example, a negotiating position that is reasonably necessary to protect a party's legitimate interests). Unless some guidance is provided on this issue, the Draft Code could result in unnecessary and costly disputes about whether each party has acted in good faith. Given the substantial penalties that apply to breaches of the Draft Code, it is insufficient to leave terms such as "good faith" undefined and subject to their common law interpretation, which is fluid and may change over time, and may be the subject of dispute.

It is also important to bear in mind that many of the digital platform services offered by Google that would be subject to the Draft Code as it currently stands are standard products that are offered on standard terms. Google can't reasonably make changes to these products for a single business. As currently drafted, the Draft Code could be interpreted as essentially requiring Google to negotiate bespoke terms with RNBs for these services, as a refusal to do so could be alleged to be against good faith. This would essentially force Google to defend or amend its standard products and their terms. It is not clear whether the Government intends the Draft Code to have this outcome, and if so, this seems unreasonable and disproportionate to the concerns the Draft Code is seeking to address, given the nature of Google's services and the prevalence of standard form contracts in many Australian industries.

The good faith obligation should be more clearly defined and should not compel the parties to act against their legitimate commercial best interests.

3. Obligation to provide information under section 52ZC

Section 52ZC gives RNBs the right to require Google to give them information and data relating to the digital platform service that is relevant to assessing:

- the benefit that the digital platform service receives from covered news content of the RNB;
- the benefit that the digital platform service receives from news content of every Australian news business; and

whether a payment in respect of the digital platform service in relation to the bargaining issues would place an undue burden on the commercial interests of the digital platform service.These categories of information correspond to the one-sided arbitration factors, which ignore the value RNBs receive from Google services and the cost to Google of providing those services, and as such will result in unjustified and unreasonable arbitration awards out of all proportion to the true value each party derives from the other. We discuss the problems with these factors in the following section.

These categories of information and data are very broad, and not subject to any limitation. For example, an RNB could request data about Google's revenues, impressions, clicks, or any internal reports on the value of news content, at a very granular level and over a long period of time.

Google seems to be required to comply with each such request regardless of how broad, granular, invasive or burdensome. The obligation exposes Google to an unnecessary and invasive level of transparency not experienced by other businesses.

The obligation to provide information is one-sided, and Google receives nothing in exchange for providing it. Google receives no compensation for providing this information, and there is no corresponding requirement for RNBs to give Google information regarding the benefit that they receive from Google making available their content. Google is only entitled to request information and data from RNBs that is relevant to assessing the costs incurred by each RNB in creating covered news content.

Additionally, it is not clear why an RNB ought to have the right to be provided with information about the benefit that Google's digital platform services receive from news content of its competitors. Even if it is important to assess the value to Google of RNBs' news content as a whole in determining any remuneration amount, it would not be appropriate for Google to be required to disclose this data to each RNB. At the very least the obligation to disclose such data should be modified so as to require disclosure only to an arbitrator (or court) on a strictly confidential basis.

4. Required changes

For the reasons outlined above, Google submits the following changes should be made to the Draft Code:

- RNBs' rights to give bargaining notifications should be limited to the specific issue of remuneration in respect of only those digital platform services where an imbalance in bargaining power exists. The issue of remuneration is not addressed in the minimum standards, and it is appropriate that it be negotiated between the parties. RNBs should also be required to put forward, in the bargaining notification, their position on the bargaining issues.

- The good faith obligation should be clearly defined and should not compel the parties to act against their legitimate commercial best interests. Google submits the following definition:

> ***"good faith*** means that a person has acted honestly and not arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives, but does not mean that a person:
> (a) is under an obligation that is fiduciary in nature;
> (b) is required to act in the interests of the other party; or
> (c) is required to act against its own commercial interests."

- Google considers that the section 52ZC obligations to provide information are not justified and should be removed. If there is a need to provide this information, the requirement should be to

provide it on a confidential basis directly to the arbitrator, rather than to the other party.

L. Arbitration about remuneration issues

Google's position:

The binding final offer arbitration mechanism in the Draft Code — prohibiting the arbitrator from selecting any amount other than an offer from one of the parties — is completely unreasonable and unprecedented, and is an extreme response to any perceived imbalance in bargaining power. It will not result in fair remuneration, and it will discourage RNBs from bargaining with Google and reaching commercial agreements.

The requirement to pay remuneration for covered news content is itself unjustified and discriminatory, as only Google and Facebook (but not their rivals) would be required to make payments and have them determined through a one-sided binding arbitration process. This would distort competition and create an uneven playing field in the industry.

For Google Search, News and Discover, the Draft Code (through the arbitration process and the non-discrimination obligation) effectively imposes a "must carry, must pay" regime, for the reasons explained below. There is no precedent for this approach anywhere in the world.

Final offer arbitration is employed only rarely, and typically in situations where the arbitrator and parties can rely upon comparable transactions as a baseline for reasonableness. Concerningly, the matters that the arbitrator is required to consider in determining the remuneration amount are entirely skewed in the favour of RNBs and based on a one-sided assumption of value exchange. The arbitrator is required to have regard to the value Google gets from making available RNBs' covered news content and the RNBs' costs of producing news — but the Code is silent on the value provided by Google or its costs. There is no reference to benchmarks from comparable market transactions. In summary, the design of the arbitration mechanism is contrary to standard business practices, untethered from economic principles and reality, and unfair in taking a one-sided view of both benefits and costs.

RNBs, and particularly well-resourced and savvy RNBs, will understand that the matters that the arbitration panel must consider are entirely in their favour, conferring on them an opportunity to exploit the mechanism with ambit claims.

And in a situation in which arbitration is between politically influential local companies, and platforms headquartered outside of Australia, there is a significant risk that arbitrators may feel political pressure to support inflated offers from RNBs. This is particularly where ACMA selects the pool of arbitrators and appoints the panel if the parties' can't agree, and there is no right of appeal on the merits.

There is no cap on the amount of remuneration that Google may be required to pay for "making available" RNBs' covered news content, and no way for Google to know what its financial exposure in any given year might be until all RNBs have exercised their rights to bargaining and arbitration.

Summary of required changes:

- Each Arbitration should be conducted in accordance with the standard rules for business arbitration of an independent body such as the Australian Centre for International Commercial Arbitration (**ACICA**). The parties should seek to reach agreement on arbitrators, failing which an independent organisation such as the ACICA should appoint the arbitrators in accordance with the rules of the organisation.

- Arbitration should be conducted on the standard business basis of reviewing comparable transactions for comparable content. If "costs" and "benefits" are relevant at all, the arbitration factors must recognise the two-way value exchange between Google and RNBs.
- Digital platforms must have the ability to decline to display (and pay for) covered news content of an RNB where they decide, acting reasonably and in good faith, that it would be uncommercial to do so, even after arbitration, subject to the revised non-discrimination provision discussed above. A decision by a platform to stop offering services that are commercially irrational to provide or that it could offer only by degrading their quality should not be deemed a violation of the Code.
- Merits review to the Australian Competition Tribunal should be available for decisions under the Code, including the arbitration panel's remuneration decision. The review process should be subject to appropriate time frames, consistent with other similar review processes. Digital platforms could be required to comply with a determination during the pendency of any review.

Under Division 7 of the Draft Code, if an RNB has requested that Google bargain with it concerning remuneration for Google "making available" the RNB's covered news content on one of Google's designated services, and Google and the RNB have not reached an agreement within three months after bargaining starts (and have participated in at least one day's mediation), the RNB can give notice to the ACCC that arbitration about the remuneration issue should start.[49]

If that occurs, Google is required to participate in binding final offer arbitration.

The binding final offer arbitration process involves the following:

- Each party lodges just one offer with the arbitrator, which must be in writing and be no longer than 30 pages. The party can provide one submission in response to the opposing offer, which can be no longer than 20 pages.

- Within 45 business days of the start of the arbitration process, the arbitration panel must choose one of the offers unless the panel considers that each final offer is not in the public interest because it is highly likely to result in serious detriment to the provision of covered news content in Australia or Australian consumers.

- In making its determination, the panel must consider the following matters:

    - the direct benefit (whether monetary or otherwise) of the RNB's covered news content to the digital platform service;

    - the indirect benefit (whether monetary or otherwise) of the RNB's covered news content to the digital platform service;

    - the cost to the RNB of producing covered news content; and

    - whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform service.

  Notably, there is no requirement for the panel to consider the benefit to the RNB of having its covered content "made available" on the digital platform service. Nor is there any explicit

[49] Section 52ZF. Google can also give notice to the ACCC that arbitration should start. The parties can also agree to arbitrate earlier than this (no earlier than 10 days after bargaining starts).

requirement for the panel to take into account comparable transactions, which is typically the fundamental basis for commercial arbitration.

- Additionally, there is a presumption that Google will make a payment for making available RNBs' covered news content.[50]

Our concerns with the binding final offer arbitration regime in the Draft Code are as follows:

1. Requirement to pay remuneration for "making available" covered news content is unjustified and discriminatory

The Draft Code requires Google to negotiate remuneration payments for "making available" news content, and in effect, presumes that Google will make such payments.

While "make available" is not defined (as discussed above in section C), the Explanatory Materials and comments by the ACCC and Treasurer suggest that Google's flagship digital platform services "make available" news content. In the case of Google Search, which does not display more than snippets of news content, "making available" news content could involve nothing more than linking to the location on the internet from which the news content is available. If enshrined into law, this principle that a linked website has a legal right to demand payment from a linking website could undermine the very architecture of the World Wide Web, a global engine of free expression and commerce built on a principle of open linking. Google may be the first to be subject to this new limitation on the freedom to link, but it doubts the principle will end here.

There is no principled basis, under Australian copyright law or Australian laws generally, for making such activities by Google subject to payment, particularly while allowing Google's competitors (other than Facebook) and other businesses to continue with such activities without payment. This would distort competition by increasing Google's costs of operation, and create an uneven playing field within the industry.

The Draft Code effectively imposes a burden (in effect an uncapped tax) on Google because it is successful, not because it operates unfairly.

2. A "must carry, must pay" regime?

The obligation on Google to remunerate RNBs for Google making available their covered news content (with the remuneration amounts being subject to binding final offer arbitration), combined with the non-discrimination obligation in section 52W of the Draft Code, imposes a substantial burden on Google, and specifically its designated digital platform services.

For Google Search, News, and Discover, it effectively imposes a "must carry, must pay" regime, and does so on remuneration terms that are unlikely to be fair for the reasons discussed below. There is no precedent for this approach anywhere in the world.

The Draft Code effectively leads to this outcome by forcing Google to choose between:

[50] In accordance with section 52ZO of the Draft Code, the panel must make a determination about the terms for resolving the remuneration issue that sets out the 'remuneration amount'. The 'remuneration amount', by definition, contemplates only one-way payment from digital platforms to RNBs. Accordingly, there is a presumption that digital platforms will make payment to RNBs regardless of commercial reality or actual value exchange.

- "making available" no "news content" on its services (including RNBs' content and news content produced by others, where news content is not defined and appears, based on the Explanatory Materials, intended to capture a sweeping range of content, including citizen journalism); or
- "making available" all RNBs' news content and paying RNBs for doing so.

If an RNB makes an unreasonably high claim for remuneration, and that is accepted by the arbitrator — which may happen given the one-sided criteria in the Draft Code (discussed in more detail below) — Google cannot choose to not make available that RNB's content without breaching the Draft Code. Our only choice would be to also cease to make available all other news content (which as a technical matter may require even broader cessation of services, particularly given the uncertainty about the meaning of "news content" and "make available").

It also seems that the Code would deprive Google of the right to charge (or offset) for the value of the service it provides to RNBs in "making available" their news content and these benefits are not otherwise required to be taken into account by the arbitrator. In any other must-carry regime, the provider required to "carry" is entitled to be paid for being required to carry.

The regime in the Draft Code as currently designed is even more extreme than regimes applicable to regulated infrastructure. For example, Australia's national access regime under Part IIIA of the CCA facilitates third-party access to certain services provided by means of significant infrastructure facilities. Part IIIA is reserved only for nationally significant natural monopoly facilities declared as such after comprehensive and robust analysis that has resulted in a sound evidentiary basis. That regime recognises the need to protect the legitimate interests of the service provider through provision for access fees and other terms and conditions that are fair and reasonable. Under Part IIIA, there is also a robust arbitration process (which does not limit the arbitrator to choosing one of the parties' offers, whilst also being bound to considering a narrow (and one-sided) set of matters in determining payments). Further, there is a well established mechanism for the arbitrator's decisions to be appealed (to the Australian Competition Tribunal and the Federal Court).

In this context, the regime under the Draft Code is extreme, unprecedented, and disproportionate to the perceived problems the Draft Code is seeking to address.

3. One-sided arbitration criteria

The matters that the arbitrator is required to consider in determining the remuneration amount are entirely skewed in the favour of RNBs and based on a one-sided assumption of value exchange.

Ignores benefits that news publishers derive from the news media referrals

Section 52ZP, which prescribes the list of matters that the arbitration panel must consider when adjudicating between remuneration proposals, simply ignores, for example, any benefits that news publishers derive from the news media referrals.

This is despite the ACCC in its May 2020 Concepts Paper stating: "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)."[51]

[51] Concepts Paper, p. 12.

There is no rational basis for disregarding the value that Google's digital platform services provide to RNBs. For example, NMBs derive value from the presence of links to their news on Google Search:

- Google Search allows publishers to gain discoverability and access to users worldwide, for free. In practice, we refer billions of free clicks every year to Australian news businesses. These free clicks convey a monetary benefit on news publishers who use this traffic to generate ad and subscription revenues.
- We also provide value through free services such as Search Console and Publisher Center. These services let news businesses monitor and improve the performance of properties in Search and News.
- Google supports news businesses in a range of other ways including through commercial arrangements that help them more effectively monetise their content, and programs such as the Google News Initiative, which includes digital journalism training programs and tools, direct investment through grants, and innovative monetisation models such as Subscribe with Google.

Any arm's length commercial negotiations, to the extent they went beyond the prevailing commercial rate for similar products and services, would naturally consider the benefit gained and costs incurred by both parties to the negotiation from concluding an agreement. In this case, those include both the benefit to Google of news content and the benefit to the news publisher of links to its content (as well as the costs to both parties of providing their respective services). It is unrealistic to expect there to be a reasonable commercial negotiation when all of the factors to be considered in that negotiation (conducted as it is in the shadow of arbitration) are one-sided.

The May 2020 Concepts Paper recognised this basic principle. After explaining that the value of news content to Google and Facebook should be included among the "factors guiding the determination of remuneration," it stated: "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."[52]

The ACCC[53] and the Australian Government[54] have both acknowledged that there is a two-way value exchange between digital platforms and news media businesses. The ACCC has provided no explanation for why this benefit to news publishers was excluded from the list of matters to be considered by the arbitration panel. As noted in a report by Carl Shapiro, John Hayes and Hitesh Makhija, titled "Comments on the ACCC's News Media Bargaining Code", dated 18 August 2020 (**Shapiro Paper**), there is no economically coherent basis for doing so.

Ignores Google's costs in providing its services

Additionally, Google incurs costs in providing the digital platform services that make available RNBs' news content. This includes developing and providing infrastructure and technology, increasing the reach of its services, crawling and indexing the web on an ongoing basis, generating and improving ranking algorithms and display formats in order to generate relevant and high-quality search results, protecting systems against fraud and misuse, winning new and supporting existing advertisers, invoicing and collecting revenues generated from ads, and hosting and running the Google website on which search results and ads are shown.

[52] Concepts Paper, p.12.
[53] ACCC DPI Final Report, pp 8, 16, 206, 226, 229-232.
[54] Australian Government, "Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry", December 2019, p8.

And yet, while the Draft Code requires the arbitration panel to take into account RNBs' cost of production, it is silent on Google's costs.

Will not result in fair remuneration

The matters for consideration by the arbitration panel are so biased in favour of RNBs that they in essence mandate transfer payments. They will not result in fair remuneration. We refer to the Shapiro Paper, which clearly demonstrates that the arbitration mechanism and criteria in the Draft Code will result in asymmetric outcomes in favour of news businesses, and undermine the Draft Code's goal of fair remuneration for news content.

In contrast to the Concepts Paper, the Draft Code also does not include any reference to benchmarks from comparable market transactions. Such benchmarks are fundamental to standard business arbitration practices.[55] Benchmarking is also endorsed by the ACCC in its Guidelines to the Australian Copyright Tribunal, in which the ACCC recommends it as an appropriate method for pricing copyright materials, and observes: *"Consistency with appropriate benchmarks can give greater confidence that a proposed licence scheme is reasonable. Conversely, if the appropriate benchmark(s) differ substantially to the remuneration that is provided for in a licence scheme then its reasonableness may be open to question."*[56]

In summary, the design of the arbitration mechanism is contrary to standard business practices, untethered from economic principles and reality, and unfair in taking a one-sided view of both benefits and costs.

The one-sided nature of the matters the arbitrator is required to consider would incentivise RNBs to dispense with any genuine negotiation in order to proceed to arbitration, and to make unfounded claims, as discussed below. The regime would likely result in rent-seeking and inefficient remuneration amounts that do not reflect commercial reality or fairly account for Google's contribution and investment in its services.

The Draft Code should be amended to explicitly require the arbitrator to take into account the benefit that RNBs derive from having their covered news content made available on Google's digital platform services.

In addition to the requirement to take into account the value that RNBs derive from Google, if the Draft Code retains the requirement that the arbitrator consider the cost to the RNB of producing covered content, it should:

- require the arbitrator to take into account the cost to Google associated with the relevant digital platform service that makes available the RNB's covered news content; and
- explicitly state that it would only be appropriate to take into account the costs that relate to the RNB's covered news content that is made available on the digital platform service in Australia, as opposed to the cost of producing news (or other content) more broadly. It would be inappropriate for the costs factor to encompass, for example, the costs of RNBs' print operations,

[55] See Shapiro Paper, at p4: *"In our experience, most if not all rate-setting entities rely on market-based rates as benchmarks, adjusting those rates as needed (e.g., if the benchmark transactions involve different benefits and costs to the two parties, or if the benchmark transactions are affected by an imbalance in bargaining power)."*

[56] ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration, April 2019, available at: https://www.accc.gov.au/system/files/ACCC%20Copyright%20Guidelines.pdf, at p14-15.

and operations outside Australia. If the arbitrator is required to take into account the total cost of producing covered news content, it should also be required to take into account the total cost of operating the digital platform service.

4. The binding "final offer" arbitration process is unprecedented and extreme

The binding final offer arbitration mechanism in the Draft Code — prohibiting (in all but extremely limited circumstances) the arbitrator from selecting any amount other than an offer from one of the parties — is completely unreasonable and unprecedented, and is an extreme response to any perceived imbalance in bargaining power. We note that this draconian arbitration mechanism was recommended by only one of the forty-three public submissions made to the ACCC. The vast majority of submissions that favoured arbitration were in favour of conventional arbitration models.

Final offer arbitration is employed only rarely, and typically in situations where the arbitrator and parties can rely upon comparable transactions as a baseline for reasonableness.

We understand that the ACCC has selected the final offer arbitration mechanism because of the difficulties with calculating direct and indirect value derived from RNB's covered news content which is made available by digital platform services. The ACCC says in its Q&A document:

> *"The code's use of final offer arbitration recognises the significant challenges involved in setting a price for the inclusion of Australian news on digital platforms services….*
>
> *Given these challenges, final offer arbitration leaves it to the parties to determine a suitable price through their final offers. The fact that the arbitrator or arbitration panel would be choosing from one of two offers rather than attempting to determine a price would discourage ambit claims and provide a strong incentive for both parties to submit their most 'reasonable' offers."*[57]

The ACCC has not been able to formulate a way to calculate the value exchange, despite looking at these issues for more than two years, and yet its solution is to let an arbitrator determine the remuneration amount in 30 days after receiving submissions (which are limited to 30 pages), by effectively choosing between two offers.

This places significant decision making burden on the arbitration panel in a context where the ACCC has already identified in its DPI Final Report that:

> *"to determine the price of access of any such product or service would be extremely difficult, with a risk of determining an inappropriate price and potentially negatively affecting competition in the relevant markets."*[58]

Given such difficulties, it is simply absurd that the arbitration panel is restricted by time (effectively 30 days) and information (effectively 60 pages). These restrictions further demonstrate that the FOA mechanism is untethered from commercial reality and, in essence, designed to mandate that Google

[57] ACCC, Q&As: Draft news media and digital platforms mandatory bargaining code, July 2020 (**ACCC Q&A**), p.9, available at:<https://www.accc.gov.au/system/files/DPB%20-%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code%20Q%26As.pdf>

[58] ACCC DPI Report, p.253.

transfer funds to news media businesses without any meaningful consideration of the economic reality of the commercial relationship.

The difficulties in calculating a value should be no reason to adopt a process that does not involve an attempt by an independent party with expertise and access to relevant evidence to determine the value, and instead requires the arbitrator to effectively choose between two offers, with limited information (given the limits on documentation and time), and having regard to one-sided criteria.

The arbitrator's discretion to depart from the parties' offers is extremely limited. It can only determine an amount that differs from one of the parties' offers if it considers that the final offers are not in the public interest because they are "*highly* likely to result in *serious detriment* to the provision of covered news content in Australia or Australian consumers" (emphasis added). The threshold is very high. And, once again, there is no reference to detriments to the provision of digital platform services. The ACCC acknowledges in its Q&A document that departure from one of the parties' offers is expected to be rare.[59] It is difficult to see this limited discretion being used, let alone being used to reduce an offer made by an RNB.

The Draft Code also fails to follow standard practice for the appointment of commercial arbitrators (by making the ACMA responsible for selecting the pool of arbitrators and appointing arbitrators in the event the parties cannot agree), and fails to make any arbitration award subject to appeal (discussed further below). Moreover, as we noted above, it is particularly inappropropriate to have a governmental authority appoint the arbitrator in disputes between politically influential local companies, and platforms headquartered outside of Australia. In such disputes, there is a significant risk that arbitrators may feel political pressure to support inflated offers from RNBs.

5. Meaning of "undue burden" is unclear and does not protect Google's legitimate interests

The interpretation of the criterion "whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform service" is uncertain at best. It provides no meaningful protection to Google nor permit informed business planning, especially given that Google apparently would likely have no practical right to stop sending traffic to a publisher even under commercially unreasonable (and unappealable) terms. It is not clear whether this criterion requires the arbitrator to consider whether a particular remuneration amount is so high as to make the digital platform service unprofitable in Australia, or whether the precedent set by the payment amount would have that effect if repeated for each RNB.

6. Ambit claims are likely, including due to disagreements about "indirect value"

Having decided not to have arbitrators consider comparable commercial deals — traditionally the best evidence of market value — the ACCC has left the arbitrators with only speculative, subjective, and potentially inflated bases for their valuation.

As noted above, we understand that the ACCC believes that the binding final-offer arbitration mechanism will discourage parties from making ambit claims, and that it has selected the mechanism because of the difficulties with setting a price for the inclusion of Australian news on digital platform services,[60]

[59] ACCC Q&A, p9.
[60] ACCC Q&A, p9.

stemming from the challenges in calculating direct and indirect value derived by digital platforms from RNBs' covered news content.

The ACCC suggests that "much of the benefit that [digital platform] services derive from Australian news is indirect", and that these indirect benefits include "the public perception benefits of being known as a provider of Australian news; the ability to attract and retain digital platform users on the basis of featuring Australian news; and the value of user data collected through the presence of Australian news, which can be used to improve the services digital platforms provide to users and advertisers."[61] This is nothing more than a hunch, it is not based on data or evidence, and presumes that news content is more valuable to Google than any other content we surface on Search.

We are concerned about the inclusion of "indirect benefit" as an arbitration criteria given the broad interpretation that could be given to that factor, and the extreme difficulty of quantifying such value. RNBs could well draw on the ACCC's speculative suggestion that such value exceeds the direct benefit to ascribe significant value to that factor. Unless it departs from its position to date, the ACCC would likely also support this in its submissions to arbitration panels.

The presumption that Google will be required to make a payment, along with the matters the arbitrator is required to consider in making its determination (including the indirect benefit), will in fact encourage ambit claims by RNBs. RNBs, and particularly well-resourced and savvy RNBs, will understand that the matters that the arbitration panel must consider are entirely in their favour, conferring on them an opportunity to exploit the mechanism precisely with ambit claims. It is not clear how this mechanism could result in a fair remuneration amount.

7. Uncapped and potentially significant financial exposure

There is no cap on the amount of remuneration that Google may be required to pay for "making available" RNBs' covered news content, and no way for Google to know what its financial exposure in any given year might be until all RNBs have exercised their rights to bargaining and arbitration.

Arbitrators would be considering remuneration issues only on an individual and sequential basis (unless RNBs choose to bargain together), without any regard to the total remuneration amount that may ultimately be payable by Google in any given year.

News Corp and Nine Entertainment have publicly stated that Google should be required to pay between $600 million and $1 billion per year to Australian news media businesses. These are very significant amounts completely divorced from commercial reality, which in no way reflect the value that Google derives from Australian news media business' news content.

8. No consistency in arbitration determinations

Different arbitrators may take different approaches to determining remuneration, and there is nothing to ensure consistency between determinations. This may result in some larger or more politically influential RNBs receiving disproportionate remuneration payments compared to other RNBs. The possibility that this may occur is exacerbated by the design of the final-offer arbitration mechanism, and specifically the one-sided arbitration criteria discussed above, which will encourage ambit claims by RNBs and increase the likelihood that those claims will be accepted by the panel. (Contrast this with standard commercial

[61] See ACCC Q&A, p.9.

arbitration processes, which typically empower the arbitrator to calculate an appropriate, fair remuneration amount.)

9. No appeal or review mechanism

Unlike other provisions in the CCA, the Draft Code does not provide for merits review or any appeal mechanism for decisions made under the Code. As a result, key determinations (including the designation of Google as a designated digital platform corporation and the arbitration panel's decision) would be subject to judicial review only. This provides only very limited review. The grounds of review are limited, for example, to biased decisions or decisions beyond power. As a practical matter, this is unlikely to provide any meaningful check on the arbitration panel's determination, given the high level of discretion granted to the panel under the Draft Code. This is a serious abrogation of parties' legal rights in circumstances where the determinations of the arbitrator could result in very significant financial exposure.

We note that in the intellectual property context, decisions of the Patent and Trade Marks Office, which are made by trained experts, are subject to de novo review by the Federal Court. Decisions of the Australian Copyright Tribunal regarding licence fees can be appealed to the Federal Court on questions of law. The Court provides an appropriate check and balance against decisions made by the Copyright Tribunal even though most Tribunal members are themselves sitting members of the Federal Court who have extensive experience in determining copyright and competition matters. Judicial oversight is of particular importance in the context of novel disputes or a novel regime, such as that proposed under the Draft Code. As noted above, the ACCC acknowledged in its DPI Final Report the difficulties of determining remuneration in this context, and the risk of potentially negatively affecting competition in relevant markets through inappropriate pricing.[62]

Google and other internet companies have been delivering traffic to Australian news businesses for many years. It is not clear why there would be exceptional urgency in the need for RNBs to receive unprecedented remuneration payments sufficient to justify depriving the parties of the legal right to have the merits of an arbitrator's decision reviewed. In any case, there are other ways to ensure that any appeal process does not slow the implementation of an arbitration determination. For example, a party could be required to make any required payment to the other party while an appeal is pending.

10. Onerous process

Google may be required to participate in the arbitration process many times, as each RNB (the number of which is not yet known) can seek to bargain with Google about remuneration in relation to every digital platform service that makes available their covered news content. While only issues about remuneration on Search, News and Discover can be referred to binding final offer arbitration at the outset, an RNB could initiate a separate process for each product, and could do so every 12 months. This difficulty will only grow if new services are designated.

For all the reasons outlined above, the arbitration process in the Draft Code is not fit for purpose and should be struck out and substantively reconsidered.

11. Required changes

Each of these flaws in the proposed arbitration process works to compound the others. For example, the

[62] ACCC DPI Report, p.253.

use of final-offer arbitration increases the risk, bias and uncertainty inherent in the one-sided criteria, while the lack of an appellate mechanism increases the likelihood of unfair and inconsistent determinations from arbitrators appointed by a government agency.

For all of the reasons outlined above, Google would require the following changes be made to the Draft Code:

- Each Arbitration should be conducted in accordance with the rules of an independent body such as the Australian Centre for International Commercial Arbitration (**ACICA**).

- The parties should seek to reach agreement on arbitrators, failing which an independent organisation such as the ACICA should appoint the arbitrators in accordance with the rules of the organisation.

- Each of the bargaining parties must disclose to the panel and to the Australian Competition Tribunal (if applicable) the terms of any bona fide and arm's length contracts or arrangements to which they (or the represented registered news business which they represent, if applicable) are a party for the online provision to the public of news content by the designated digital platform service or a reasonably similar service. This would be consistent with the recommendations in the Shapiro Paper. The terms of any such contracts or arrangements must not be disclosed by the panel or Australian Competition Tribunal (if applicable) and must only be used by them for the purpose of making their determination under 52ZO(2).

- Arbitration should be conducted on the standard business basis of reviewing comparable transactions for comparable content. If "costs" and "benefits" are relevant at all, the arbitration factors must recognise the two-way value exchange between Google and RNBs. Specifically, the panel would have to consider the market value to each party from the inclusion of the RNB's covered news content on the digital platform service, having due regard to the contracts or arrangements disclosed. This again would be consistent with the recommendations in the Shapiro Paper.

- The ACCC should not seek to influence the course of an arbitration.

- The arbitrator should be empowered to reach a result that he or she thinks best reflects prevailing market value for comparable content, not limited to picking between proposals from the parties.

- Digital platforms must have the ability to decline to display (and pay for) covered news content of an RNB where they decide, acting reasonably and in good faith, that it would be uncommercial to do so, even after arbitration, subject to the revised non-discrimination provision discussed above. A decision by a platform to stop offering services that are commercially irrational to provide or that degrade the quality of its products should not be deemed a violation of the Code.

- Sections 52ZQ and 52ZR should be replaced by a reference to the standard provisions on timing etc as recommended by a standard commercial arbitration body from time to time.

- Merits review to the Australian Competition Tribunal should be available for decisions under the Code, including the arbitration panel's remuneration decision.

- The review process should be subject to appropriate time frames, consistent with other similar review processes. Digital platforms could be required to comply with a determination during the pendency of any review.

M. Enforcement

Google's position:
There is no case for the inclusion of pecuniary penalties in the Draft Code, let alone the significant penalties that are being proposed. As currently drafted, each of the Draft Code's provisions (even provisions like the requirement to acknowledge communications in section 52R) attracts the same significant penalties as breaches of substantive competition law provisions in the CCA, being the greater of $10 million, three times the benefit of the gain or 10% of annual turnover in Australia.
Summary of required changes:
The Code should not set pecuniary penalties, in line with the operation of similar codes in other sectors in Australia and the Commonwealth.

We maintain our position that there is no case for the inclusion of pecuniary penalties in the Draft Code, because there is no reason to suspect the parties will not comply with the Code (assuming it is amended so that it is workable as described in these submissions).[63]

We believe that the Code should not set pecuniary penalties, in line with the operation of many industry codes in other sectors in Australia and the Commonwealth. It is generally understood that the primary objective of pecuniary penalties is deterrence, both general and specific. This is not a case where a party has contravened the law, voluntary codes have failed, or participants have not adhered to code provisions in ways that would suggest a need for expanded deterrence. In this context, imposing a Code that is subject to pecuniary penalties would be disproportionate and unjustified.

There are no other mandatory codes which impose penalties as significant as those which will apply to the Draft Code. Under the Draft Code, breaches can attract the same penalties as breaches of the competition law provisions in the CCA, being the greater of $10 million, three times the benefit of the gain or 10% of annual turnover in Australia. Ordinarily, the maximum penalties applicable to breaches of penalty provisions of mandatory industry codes are 300 penalty units ($66,600).

In the event that the Code does specify penalties, only its core provisions should be subject to penalties, and those penalties should reflect the penalties applicable to breaches of other mandatory codes.[64] For example, it seems extreme that a breach of some of the open communications requirements in section 52R, such as a failure to acknowledge an email communication, could attract maximum penalties of the greater of $10 million, three times the benefit of the gain or 10% of annual turnover in Australia. For this reason, Google submits that section 52ZU(2) should be removed.

Additionally, acknowledging the significant compliance burden imposed by the Draft Code and uncertainty about the interpretation of key terms and scope of obligations, it would not be appropriate for the ACCC to seek to impose penalties for technical breaches.

[63] Google, *Submission to the ACCC Concepts Paper* <https://www.accc.gov.au/system/files/Google.pdf> p.55.
[64] Google, *Submission to the ACCC Concepts Paper* <https://www.accc.gov.au/system/files/Google.pdf> pp.55-56.