Draft News Media Bargaining Code

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Background

I'm a software industry professional with 20 years experience in the field, and a keen observer of tech regulation activity in jurisdictions around the world. I'm also a habitual news consumer - I access most of my news via Google Search and Apple News, plus the occasional print media purchase. I don't use Facebook at all, so most of my submission relates to Google's obligations under the Code.

I believe the Draft Code is attempting to use the wrong tool for the job - while I'm sympathetic to the idea that tech multinationals operating here should contribute more to Australia, and that media businesses need to find new revenue streams to maintain the level of service they provide to the community, the Draft Code is likely to deliver significant negative unintended outcomes.

Unclear Copyright Position

As previous submissions have noted, it's questionable whether there's copyright infringement in the "inclusion of news content" (in the case of Google search: deep links, headlines, snippets & thumbnails). However, the fact that platforms were engaged in negotiating a voluntary code does seem to imply some level of uncertainty in exactly how Australian copyright law might apply to common web practices. If Google's use of news infringes copyright, this has broad implications within the Australian web industry, and ultimately I'd expect updated legislation will be required to give clarity & certainty.

In the absence of government leadership, a code governing content publishers & digital platforms could establish agreed rules around infringing & non-infringing uses of news content. Unfortunately the Code instead seeks to mandate a blanket IP licensing agreement between parties, but does not clearly state in which instances licensing is required or which uses of content would otherwise be infringing, and thus does nothing to clarify the issues facing the industry. If anything, it muddies the waters by effectively granting expanded copyright to a small number of content publishers - this is highly likely to compromise any future discussions on copyright reform.

Barriers to entry & competition

Eligibility under the code (particularly the revenue test & professional standards test, s. 52G & 52K) is explicitly designed to exclude/disadvantage new market entrants, small media businesses and independent journalists. It's difficult to reconcile these barriers to

competition with the stated goal of 'a strong and independent media landscape' (and the ACCC web page tag of 'Competing fairly'). In order to be equitable, the Code should have some provision for these types of media businesses whose news content is no less valuable, and who experience a far greater imbalance in bargaining power with platforms than News Corp et al.

User Data

s. 52M seems to require Google to provide access to user data; even if this excludes PII under the terms of the Privacy Act there's likely to be more than sufficient data to enable news media organisations to re-identify users in at least some instances.

Even leaving aside the question of re-identification, third-party data sharing is a considerable privacy concern to many users, and one of the mechanisms we use to control this is disabling third-party cookies in the browser to prevent online businesses tracking our browsing behaviour across different sites. Back-channel communication of user data completely circumvents this control. The ACCC should be actively curtailing third-party user data sharing, not mandating its proliferation.

Ranking/Algorithms and 'black hat SEO'

An apt analogy for ranking algorithms is that they're akin to editorial independence - a large proportion of the user value is derived from the confidence & trust that the subjects of the article/search had no influence on the content/ranking.

Several provisions in the Code appear to have the effect of undermining or compromising this trust:

- s. 52M requires disclosure of potentially large lists of the types of data available to Google via the search process but not publicly available to web publishers. I note that modern machine learning algorithms are predominantly data-driven rather than based on explicitly coded logic, and a mere list of available data may provide considerable insights into the ranking algorithms to Code participants, giving them an advantage over other publishers. There doesn't appear to be any provision for platforms to refuse to provide the data on the basis that it exposes proprietary ranking information.
- The 28 day notice period relating to changes to ranking performance (s. 52N), if not publicly available to other publishers, also provides an unfair advantage to Code participants. For context, as far as I'm aware the main instances where Google page rankings have decreased to that extent are where the sites have employed 'black hat SEO' techniques to artificially boost their rank by exploiting loopholes in the ranking algorithm, and Google subsequently closes those loopholes.
- The vaguely defined "proposal for recognising original covered news content" (s. 52T) grants news media businesses 'consultation' rights over changes to ranking

algorithms - in my opinion this is every bit as inappropriate as granting Google & Facebook consultation rights over editorial content.

- The non-discrimination requirement in s. 52W could apply to prevent Google adjusting their algorithms to downgrade ranking relating to deceptive SEO practices, where those practices were enabled by information or access provided under the terms of the Code.

In my view a likely unintended outcome of the requirements in the Code will be to usher in a golden age of black hat SEO within Australian news media businesses. The combination of access to private details around search ranking, direct remuneration from Google for clicks/impressions, and insulation from the negative repercussions normally associated with risky SEO techniques (via s. 52N & 52W), will inevitably give rise to increased investment within news media businesses in gaming & manipulating search rankings. This will deliver a lesser experience to Australian search users, an unfair playing field for non-Code competitors, and ultimately a decrease in the value & quality of Google's Search.

Commercial Incentives

The rationale for a bargaining code over a tax & subsidy model is that it is "market based" rather than requiring the government to make an assessment of value, however on the face of it I can't see how a commercial agreement under these conditions will deliver a useful price signal encouraging high-quality original news content. Google is no better equipped to make a judgement about the commercial value of news search results than the government; allocating a share of news search ad revenue to specific results seems like it will be insufficient for the news media businesses given the low ad revenue for these searches and the Code's references to "indirect benefits". Additionally, the likelihood of arbitration means the government via the ACMA will end up making the assessment of value regardless.

However, given the appearance of a commercial agreement needs to be in place, revenue will presumably end up being allocated on the basis of clicks and/or impressions. This will incentivise the production of large volumes of low-quality clickbait that technically covers the requirements of original news content. I acknowledge that the media industry has struggled for many years with the disconnect between news content that is popular/lucrative vs news content that's important (delivers value to our democracy), but the so-called commercial arrangements made under this Code will only make this worse.

Conclusion

This is not a bargaining code, it's a handout to (a subset of) big news media businesses; a thinly disguised tax & subsidy model that appears to have been specifically framed by the government so that they can avoid their policy responsibilities. I urge the government to consider an explicit (and much more honest) targeted tax and subsidy

policy; this will result in a clearer and more sensible public debate, and will avoid the risk of consumer-unfriendly behavioural incentives that result from forcing arbitrated commercial agreements onto situations where there's no genuine exchange of value.

Regarding the non-revenue component (minimum standards), I don't believe there's any public interest justification for these at all, and they're almost certainly going to deliver negative consumer & competition outcomes.