

# The Australian News Media Bargaining Code: Lessons for the UK, EU and Beyond

Karen Lee and Sacha Molitorisz

*Faculty of Law, University of Technology Sydney, Australia*

Dr Karen Lee is a Senior Lecturer in the Faculty of Law at the University of Technology Sydney (UTS). She can be contacted at [karen.lee@uts.edu.au](mailto:karen.lee@uts.edu.au). Dr Sacha Molitorisz is a Lecturer in the Faculty of Law and the Faculty of Arts & Social Sciences at UTS. He works with the UTS Centre for Media Transition. He can be contacted at [sacha.molitorisz@uts.edu.au](mailto:sacha.molitorisz@uts.edu.au)

## 1. Introduction

In Australia, as in other countries, journalism — a public good seen as essential for a well-functioning democracy and social cohesion<sup>1</sup> — is in crisis. The advertising revenue that once funded the production of news by private media businesses has declined significantly since the advent of the Internet — a decline exacerbated by the rise of the digital platforms, Google and Facebook, and their capacity to compete more effectively for online advertising spend.<sup>2</sup> This loss of revenue has led to widespread closures of newsrooms and significant job losses, a situation made worse by Covid-19.<sup>3</sup> Local and regional news providers have been especially hard hit. Between 2008-09 and 2017-18, 106 local and regional newspaper titles ceased production in Australia,<sup>4</sup> and in 2020, News Corp alone stopped the presses at 112 local and regional mastheads.<sup>5</sup> Further shutdowns have occurred in 2021.<sup>6</sup>

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<sup>1</sup> Marcel Broersma and Chris Peters, 'Rethinking Journalism: The Structural Transformation of a Public Good' in Chris Peters and Marcel Broersma (eds), *Rethinking Journalism: Trust and Participation in a Transformed News Landscape* (Taylor & Francis 2012) 1-12

<sup>2</sup> Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry (DPI): Final Report* (2019) 293-305

<sup>3</sup> Nikolas Dawson and others, 'Layoffs, Inequity and COVID-19: A Longitudinal Study of the Journalism Jobs Crisis in Australia from 2012 to 2020' (2021) *Journalism*, February 2021. <<https://journals-sagepub-com.ezproxy.lib.uts.edu.au/doi/full/10.1177/1464884921996286>> accessed 15 June 2021

<sup>4</sup> *DPI Final Report* (n 2) 321

<sup>5</sup> Amanda Meade, 'News Corp Announces End of More Than 100 Australian Print Newspapers in Huge Shift to Digital' *The Guardian* (Sydney, 28 May 2020) <<https://www.theguardian.com/media/2020/may/28/news-corp-announces-end-of-nearly-100-australian-print-newspapers-in-huge-shift-to-digital>> accessed 13 June 2021

<sup>6</sup> See, eg, Public Interest Journalism Initiative, *Australian Newsroom Mapping Project: Monthly Report* (May 2021) <<https://anmp.piji.com.au>> accessed 25 June 2021

However, unlike the European Union, which has thus far attempted to tackle the problem by mandating that member states provide publishers with an exclusive right to authorise the online use of their publications by ‘information society service providers’,<sup>7</sup> Australia has recently adopted a mandatory News Media Bargaining Code (the Code), the principal aim of which is to address the bargaining power imbalance that exists between news media businesses and the digital platforms.<sup>8</sup>

In this analysis piece, we explain the background to the Code and briefly summarise its key provisions. We then provide an analysis of important aspects of the Code: registration criteria for news businesses; designation of digital platform corporations and their services; the Code’s minimum standards and non-differentiation obligation; and its bargaining, mediation and arbitration mechanisms. Throughout our analysis, we highlight that while the Code is a significant milestone in Australia’s efforts to increase the revenue base of news media businesses and to halt the decline of news production, it contains a number of weaknesses, many of which arose as a result of concessions the government felt compelled to make while negotiating with Google and Facebook. We conclude by discussing the lessons Australia’s adoption of the Code may have for legislators and policymakers in the UK, EU and other jurisdictions that may be contemplating adopting similar frameworks.

## 2. Background

The Code had its genesis in May 2017, when the Australian government encountered resistance from crossbench Senators to its ‘Broadcast and Content Reform Package’,<sup>9</sup> which sought to remove longstanding restrictions on traditional media ownership, most notably by abolishing the ‘two-out-of-three rule’<sup>10</sup> and the requirement that the reach of a media proprietor’s holdings could not exceed 75 per cent of Australia’s audience.<sup>11</sup> To secure the crossbenchers’ votes needed to pass the legislation, the government, led by then Prime

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<sup>7</sup> Council Directive of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, art 15

<sup>8</sup> For analysis of the EU and Australian approaches, see David Lindsay, ‘Australian and EU Policy Responses to Algorithmic News Distribution: A Comparative Analysis’ in Sara Bannerman and James Meese (eds), *Algorithmic Distribution of the News* (Palgrave Macmillan, forthcoming)

<sup>9</sup> Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 (Cth)

<sup>10</sup> This limited any person or company to owning two of the three regulated media platforms (commercial television, commercial radio and associated newspapers) in any one area. Tyson Wils, ‘Media and Broadcasting in the Digital Age’ in Department of Parliamentary Services, *Briefing Book: Key Issues for the 46<sup>th</sup> Parliament* (2019) 178

<sup>11</sup> Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 8 of 2017-18, 8 August 2017) 3

Minister Malcolm Turnbull, agreed to launch an inquiry into the impact of Facebook and Google.<sup>12</sup> In December 2017, then-Treasurer Scott Morrison directed Australia’s competition regulator, the Australian Competition and Consumer Commission (ACCC):

to hold an inquiry into the impact of online search engines, social media and other digital content aggregation platforms (platform services) on the state of competition in media and advertising services markets, in particular in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers.<sup>13</sup>

The ACCC began its ‘Digital Platforms Inquiry’ shortly thereafter. It published its Preliminary Report in December 2018 and its Final Report in July 2019. The 600-page Final Report found that both Facebook and Google had substantial market power and derived the vast bulk of their income from advertising.<sup>14</sup> The report further detailed the ongoing financial pressures causing news media businesses to close and journalists to lose jobs.<sup>15</sup> The report then made 23 wide-ranging recommendations, with Recommendation 7 stipulating that ‘designated digital platforms’ should ‘provide codes of conduct governing relationships between digital platforms and media businesses to the ACMA [Australian Communications and Media Authority]’.<sup>16</sup> The ACCC further provided: ‘where the digital platform obtains value, directly or indirectly, from content produced by news media businesses, that the digital platform will fairly negotiate with news media businesses as to how that revenue should be shared, or how the news media businesses should be compensated.’<sup>17</sup>

In December 2019, the government responded to the ACCC’s Final Report by releasing an ‘Implementation Roadmap’, which included a call for ‘the ACCC to work with the relevant parties to develop and implement a voluntary code’.<sup>18</sup> In April 2020, however, Treasurer Josh Frydenberg announced that progress on the voluntary code had been too slow,

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<sup>12</sup> ABC News, ‘Government’s Media Ownership Law Changes Pass Senate with Help from NXT, One Nation’ (Sydney, 14 September 2017) <<https://www.abc.net.au/news/2017-09-14/media-law-changes-bill-passes-senate/8946864>> accessed 13 June 2021

<sup>13</sup> Treasurer (Cth), *Competition and Consumer Act 2010: Inquiry into Digital Platforms* (4 December 2017)

<sup>14</sup> *DPI Final Report* (n 2) 7-12, ch.2.

<sup>15</sup> *Ibid* 17-22, ch.6

<sup>16</sup> *Ibid* 32

<sup>17</sup> *Ibid*

<sup>18</sup> Australian Government, *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (2019) 8

and that a mandatory news media bargaining code would be drafted by the end of July 2020, and introduced ‘soon thereafter’.<sup>19</sup>

The process moved quickly. In May 2020, the ACCC released a Concepts Paper seeking input on the code.<sup>20</sup> In late July, the ACCC released an Exposure Draft of the new law for public consultation.<sup>21</sup> Following a review of submissions (as well as, reportedly, a second closed round of consultation on the draft legislation<sup>22</sup>), the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Code) Bill 2020 (Cth) was introduced into the House of Representatives on 9 December 2020.

In response, Google, Facebook and their supporters became increasingly outspoken. On January 20, 2021, world wide web inventor Tim Berners-Lee told an Australian Senate Inquiry into media diversity that the prospect of having Google and Facebook pay for links would breach a fundamental principle of the open web.<sup>23</sup> In early 2021, after running a six-month publicity campaign, Google ran an ‘experiment’ in which about 1 per cent of Australian users received older or less relevant content when searching for news.<sup>24</sup> On January 21, Google threatened to remove Google search from Australia if the Code became law<sup>25</sup> and released a video in which Google Australia managing director Mel Silva criticised the Code as unworkable.

The government pushed ahead nonetheless. However, on 18 February 2021, without warning, Facebook withdrew news from its platform.<sup>26</sup> This meant that: Australian news

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<sup>19</sup> The Hons Josh Frydenberg and Paul Fletcher MPs, ‘ACCC Mandatory Code of Conduct to Govern the Commercial Relationship Between Digital Platforms and Media Companies’ (Media Release, 20 April 2020)

<sup>20</sup> ACCC, *Mandatory News Media Bargaining Code: Concepts Paper* (19 May 2020)

<sup>21</sup> Exposure Draft, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Cth)

<sup>22</sup> Zoe Samios, ‘“Totally Undermines Policy Intent”: Media Bosses Push Government on Tech Giant Crackdown’ *The Sydney Morning Herald* (Sydney, 4 November 2020)

<<https://www.smh.com.au/business/companies/totally-undermines-policy-intent-media-bosses-push-government-on-tech-giant-crackdown-20201103-p56b7g.html>> accessed 13 June 2021.

<sup>23</sup> Calla Wahlquist, ‘Australia’s Proposed Media Code Could Break the World Wide Web, Says The Man Who Invented It’ *The Guardian* (London, 19 January 2021) <<https://www.theguardian.com/media/2021/jan/20/australias-proposed-media-code-could-break-the-world-wide-web-says-the-man-who-invented-it>> accessed 15 June 2021

<sup>24</sup> Tama Leaver, ‘Going Dark: How Google and Facebook Fought the Australian News Media and Digital Platforms Mandatory Bargaining Code’ (2021) 24(2) *M/C Journal* <<https://journal.media-culture.org.au/index.php/mcjournal/article/view/2774>>

<sup>25</sup> BBC News, ‘Google Threatens to Withdraw Search Engine from Australia’ (London, 22 January 2021) <<https://www.bbc.com/news/world-australia-55760673>> accessed 13 June 2021

<sup>26</sup> William Easton, ‘Changes to Sharing and Viewing News on Facebook in Australia’ Facebook Australia (Sydney, 17 February 2021) <<https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia>> accessed 13 June 2021

publishers could not post content on Facebook pages; news content by international news publishers could not be viewed or shared by Australian Facebook audiences; Australian Facebook users could not view or share Australian or international news content; and international Facebook users could not view or share Australian news content. Meanwhile, Google had softened its stance. Following Microsoft's endorsement of the Code and promises to invest further in its Bing search engine platform should Google withdraw from the Australian market,<sup>27</sup> Google was now making deals with news businesses to pay to use their content on its new product, Google News Showcase.<sup>28</sup>

Over ensuing days, as Google was making deals, Treasurer Josh Frydenberg and Facebook CEO Mark Zuckerberg were talking by SMS, phone call and video call. On February 23, the Treasurer announced that Facebook had 'refriended' Australia. He also announced further amendments to the Bill.<sup>29</sup> On 25 February 2021, the Bill became law, in a form that differed markedly from the original Exposure Draft released in July 2020.

### **3. The Code's Provisions**

#### ***a) Code Registration Requirements for News Businesses***

News businesses must be registered by ACMA to obtain the benefit of the Code. ACMA is obliged to register news businesses,<sup>30</sup> provided they can demonstrate they meet six key requirements. First, news businesses must be corporations.<sup>31</sup> Second, the primary purpose of each of their 'news sources' (ie, newspapers, magazines, television and radio programs or channels, websites, or audio or video content programs designed for distribution over the internet, that produce, and publish online, news content) must be to create 'core news content' — content that 'reports, investigates or explains: (a) issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or (b)

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<sup>27</sup> Jade Macmillan, 'Microsoft Backs Media Bargaining Code, Suggests Bing Can Fill Gap if Google and Facebook Depart' ABC News (Sydney, 3 February 2021) <<https://www.abc.net.au/news/2021-02-03/microsoft-supports-media-bargaining-code-google-facebook/13117280>> accessed 13 June 2021

<sup>28</sup> Kate Beddoe, 'Answering Your Top Questions about Google News Showcase' Google Blog (10 February 2021) <<https://blog.google/around-the-globe/google-asia/australia/answering-your-top-questions-about-google-news-showcase/>> accessed 13 June 2021

<sup>29</sup> Georgina Hitch, 'Facebook to Reverse News Ban on Australian Sites, Government to Make Amendments to Media Bargaining Code' ABC News (Sydney, 23 February 2021) <<https://www.abc.net.au/news/2021-02-23/facebook-reverses-news-ban-on-australian-sites-media-code/13173984>> accessed 13 June 2021

<sup>30</sup> As of 28 May 2021, ACMA has registered nine news businesses. See <https://www.acma.gov.au/register-eligible-news-businesses>

<sup>31</sup> For the definition of corporation, see s 4(1) of the *Competition and Consumer Act 2010* (Cth)

current issues or events of public significance for Australians at a local, regional or national level'.<sup>32</sup> Third, every news source must operate 'predominantly in Australia for the dominant purpose of serving Australian audiences'.<sup>33</sup> Fourth, each news source must be covered by a specified news quality standard, such as the Australian Press Council's Standards of Practice or Free TV's Commercial Television Industry Code of Practice; or be subject to internal editorial standards with rules relating to quality journalism analogous to specified standards. Fifth, each news source must have 'editorial independence from the subjects of its news coverage'.<sup>34</sup> Finally, the annual revenue of the applicant corporation (or the related body corporate) must exceed \$150,000 for the most recent year for which there are accounts; or for at least three of the five most recent years for which there are accounts.

### ***b) Digital Platform Obligations***

Digital platform corporations and one or more digital platform services they operate or control are subject to the Code if they are 'designated' by the relevant Minister (currently the Treasurer). Unless making 'standard offers' or other agreements that fall under Division 9 of the Code, 'responsible digital platform corporations'<sup>35</sup> need to comply with a set of 'minimum standards', a 'non-differentiation' obligation, bargaining rules, as well as compulsory mediation and arbitration provisions.

#### *Minimum Standards and Non-differentiation*

Under the minimum standards imposed by the Code, responsible digital platform corporations have obligations to: share data; give advance notice of algorithmic changes; facilitate open communication; and recognise original news content. Specifically, they must:

- ensure, if the designated digital platform service makes available 'covered news content' — core news content and 'content that reports, investigates or explains current issues or events of interest to Australians'<sup>36</sup> — of a registered news business, the designated digital platform service gives the registered news business 'readily

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<sup>32</sup> Ibid s 52A

<sup>33</sup> Ibid s 52O(1)

<sup>34</sup> Ibid s 52P(2)

<sup>35</sup> These are corporations, related to designated digital platform corporations, whether incorporated or managed in Australia, that by themselves or with other corporations, operate or control designated digital platform services in supplying services used by Australians; or the designated digital platform corporation of a designated digital platform service

<sup>36</sup> Ibid 52A

comprehensible' lists and explanations of data relating to users' interactions with that content on an annual basis, provided it shares that information with other news businesses;

- ensure the designated digital platform service provides registered news businesses a minimum of 14 days' notice of planned changes to an algorithm if the dominant purpose of those changes is to alter the ways in which content is made available and they are likely to have a significant effect on referral traffic to the covered news content of a registered news business;<sup>37</sup>
- facilitate open communication, which requires (among other things) the responsible digital platform corporation to set up a point of contact in Australia and acknowledge every communication to that point of contact; and
- ensure a proposal is developed for the designated digital platform service to recognise original covered news content.

Aside from the minimum standards, non-differentiation obligations require responsible digital platform corporations to ensure that the supply of the designated digital platform service does not, in relation to crawling, indexing, making available and distributing registered news businesses' covered news content, differentiate between: registered news businesses; registered news businesses and unregistered news businesses; and unregistered news businesses for specified reasons. These reasons vary, but include, for example, if a registered news business has notified the responsible digital platform corporation of an intention to bargain or arbitrate under the Code.

### ***c) Bargaining Rules, Compulsory Mediation and 'Final Offer Arbitration'***

Under the Code, if a responsible digital platform corporation receives notification from a registered news business that it wishes to bargain over issues relating to its covered news content made available by the designated digital platform service, the responsible digital platform corporation and registered news business must negotiate in good faith. This obligation of good faith extends to the issues notified by the registered news business as well as any other issues (subsequently agreed to by the parties) relating to covered news content on designated and non-designated digital platform services.

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<sup>37</sup> Planned changes urgently required in the public interest must be notified no later than 48 hours after they are made

If the bargaining parties cannot reach agreement on the issues notified by a registered news business within three months or they agree to mediate, they must mediate in good faith. The mediator is appointed by ACMA and must conduct the mediation in accordance with any applicable regulations, which may specify which party is to pay the mediator's costs.

If mediation is unsuccessful, the bargaining parties may notify the ACCC that 'final offer arbitration' should begin. If the ACCC receives notification, each party must submit its final offer relating to remuneration (along with related information about existing contracts between the parties) to an arbitral panel. The arbitral panel must decide which of the two offers to accept, unless it considers that each offer is not in the 'public interest', which is defined to mean if it 'is highly likely to result in serious detriment to: the provision of covered news content in Australia; or Australian consumers.'<sup>38</sup> If neither offer is in the public interest, the arbitral panel is required to adjust the most reasonable of the two offers so that the offer is in the public interest. There is no right of appeal on the merits from an arbitral decision. Before making their final offers to the arbitral panel, the bargaining parties may request information from each other.

The arbitral panel consists of a chair and two other members (unless the bargaining parties agree otherwise). All members are to be appointed by agreement of the parties, but if they cannot agree, ACMA must appoint the members from a register it is required to establish and maintain.

#### *Standard Offers and Other Agreements*

If responsible digital platform corporations make standard offers to registered news businesses, subject to one exception, the parties may agree that the Code's bargaining obligations and/or the compulsory mediation and arbitration provisions are not applicable. Responsible digital platform corporations are also permitted, with the agreement of registered and non-registered news businesses and subject to two exceptions, to contract out of all Code obligations in relation to designated digital platform services.

#### **4. Analysis**

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<sup>38</sup> *Competition and Consumer Act 2010* (Cth) s 52ZX(7)



The Code raises a number of issues, not all of which can be addressed here. We focus below on three areas that attracted significant interest and concern from news businesses and digital platforms during its development and continue to raise concerns for news businesses following its enactment: registration criteria for news media businesses; the obligations of digital platforms (specifically, those that flow from designation, minimum standards and non-differentiation); and the arbitration mechanism.

#### ***a) Registration Criteria***

In its professional standards test, the Code acknowledges the importance of quality news and editorial independence. Further, in its definition of core news content, the Code recognises the importance of public interest journalism, the democracy-building functions of news, and the community-building role of news (even if it does not explicitly require registered news businesses to spend the money received from designated digital platform corporations on the creation of news content, let alone public interest journalism). The Code also does not limit core news content exclusively to content created by a journalist, thereby reflecting contemporary newsroom practices and embracing core news content generated by academics, volunteers and trainees (among others).

Despite the breadth of the definition of core news content, however, concerns that the Code undermines, or does not promote, media diversity remain, with some justification. The Code does not capture all news organisations even if they satisfy the professional standards and content tests. For example, the registration criteria preclude incorporated but non-trading entities, and also unincorporated news organisations, from taking the benefit of the Code. This limitation of the Code arises for reasons of Australian constitutional law. The Commonwealth Parliament has limited jurisdiction under the Constitution, and, like the vast majority of provisions in the *Competition and Consumer Act 2010* (Cth), the Code is grounded in Parliament's corporations, and trade and commerce powers.<sup>39</sup> The consequence is that market imbalances between designated digital platforms and not-for-profit news organisations and other outfits structured as partnerships and cooperatives are likely to persist. Further, the \$150,000 threshold excludes new market entrants and 'hyperlocal' publications with low

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<sup>39</sup> See, respectively, ss 51(xx) and 51(i) of the Australian Constitution. For further discussion, see Arlene Duke, *Corones' Competition Law in Australia* (LawBook Co, 7<sup>th</sup> ed, 2018) 189-92

turnover, although the ability to take into account the annual revenue of related bodies corporate and acquirers of news businesses may assist some fledgling news businesses.

### ***b) Obligations of Digital Platform Corporations and their Services***

#### *Designation*

The Treasurer has not yet designated any digital platform corporation or digital platform service, which means none of the Code’s protections apply. Google’s deals were not made pursuant to the Code and are not subject to its terms, including: agreements Google signed with mid-tier Australian publishers, including Private Media, Schwartz Media, and Australian Community Media, while the ACCC was developing the Code; agreements it signed with Guardian Australia and Australia’s three largest commercial news businesses —News Corp Australia, Nine Entertainment Co, and Seven West Media<sup>40</sup> — after the legislation was enacted on 25 February 2021; and the letter of intent it signed with the ABC in May 2021.<sup>41</sup> The same is true of the agreements and letters of intent Facebook has signed with News Corp Australia, Nine Entertainment,<sup>42</sup> Seven West Media,<sup>43</sup> Private Media, Schwartz Media, Solstice Media<sup>44</sup> and the ABC<sup>45</sup> since the Code was adopted. A key question therefore is whether the Treasurer will designate Google or Facebook and one or more of their services, notwithstanding these agreements.

Under the Code, before designating a digital platform corporation or service, the Treasurer must take into account two factors: whether there is a significant bargaining power imbalance between Australian news businesses and the digital platform corporation concerned, including its related corporate entities (collectively referred to as a ‘group’); and

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<sup>40</sup> See, eg, Zoe Samios, ‘News Corp Formalises Google and Facebook Deals, Announces Hiring Spree’ *The Sydney Morning Herald* (Sydney, 10 May 2021) <<https://www.smh.com.au/business/companies/news-corp-formalises-google-and-facebook-deals-announces-hiring-spree-20210509-p57q8d.html>> accessed 13 June 2021

<sup>41</sup> Olivia Kruiemel, ‘ABC Signs Letters of Intent with Both Google and Facebook’ *Mumbrella* (Sydney, 27 May 2021) <<https://mumbrella.com.au/abc-signs-letters-of-intent-with-both-google-and-facebook-684803>> accessed 13 June 2021

<sup>42</sup> See, eg, Zoe Samios, ‘New Corp Australia; Nine Strike Facebook Content Deals’ *The Sydney Morning Herald* (Sydney, 16 March 2021) <<https://www.smh.com.au/business/companies/news-corp-australia-signs-deal-with-facebook-20210316-p57b1f.html>> accessed 21 March 2021

<sup>43</sup> Max Mason and John Kehoe, ‘Seven First to Sign Deal as Facebook “Refriends” Australia’ *The Australian Financial Review* (Sydney, 24 February 2021) <<https://www.afr.com/technology/facebook-to-restore-news-in-new-deal-with-government-20210223-p5753s>> accessed 22 March 2021

<sup>44</sup> See, eg, Zoe Samios, ‘Hopes Google, Facebook Deals Underpin a Rise in Journalism Jobs’ *The Sydney Morning Herald* (Sydney, 28 February 2021) <<https://www.smh.com.au/business/companies/hopes-google-facebook-deals-will-underpin-a-rise-in-journalism-jobs-20210226-p57685.html>> accessed 21 March 2021

<sup>45</sup> Kruiemel (n 41)

whether that group has made ‘a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for the news content)’.<sup>46</sup> The first consideration — and until last-minute amendments to the Code were agreed between the Treasurer and Facebook the only specified consideration<sup>47</sup> — clearly weighs in favour of designating Facebook and Google and their services. The ACCC’s DPI Final Report established that a significant bargaining power imbalance existed between them and Australian news businesses. Facebook’s decision on 18 February 2021 to block Australian users from accessing Australian and international news content further highlighted this imbalance. However, the second consideration, added at the eleventh hour, makes designation of Facebook and Google and their services less straightforward. The Code provides no guidance about the number of agreements or level of investment into news businesses that designated digital platform corporations must make to ensure the sustainability of the Australian news industry, giving the Treasurer a large degree of discretion when interpreting the provision.

Thus far, the Treasurer has not indicated how he interprets ‘significant contribution’. However, Rod Sims, chair of the ACCC, has opined that Google and Facebook are unlikely to satisfy the significant contribution threshold unless, as a minimum, they enter into arrangements with Australia’s ‘top three news organisations’, which include the state-owned ABC and Special Broadcasting Service (SBS), and smaller players, including Australian Community Media and ‘players like that’.<sup>48</sup>

Even if the Treasurer were inclined to designate Facebook and Google, it remains unclear which of their digital platform services he might designate. The Exposure Draft Explanatory Materials, released by the ACCC in July 2020, stated the Treasurer was expected to designate Facebook’s News Feed (including Facebook Groups and Pages), its News Tab (if and when released in Australia), and Instagram, along with Google’s Discover, News and Search

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<sup>46</sup> *Competition and Consumer Act 2010* (Cth) s 52E(3)

<sup>47</sup> See Government amendments proposed in the Senate on 23 February 2021 (available at [https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6652\\_amend\\_49f1e4e9-d99c-4b80-84d4-3225e4f6491a/upload\\_pdf/B21PG138.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6652_amend_49f1e4e9-d99c-4b80-84d4-3225e4f6491a/upload_pdf/B21PG138.pdf;fileType=application%2Fpdf))

<sup>48</sup> Evidence to Senate Environment and Communications References Committee, Parliament of Australia, Canberra, 12 March 2021, 18, 21 (Rod Sims, Chair, ACCC)

products.<sup>49</sup> On the eve of the Bill's introduction to Parliament in December 2020, the Treasurer announced that he would initially designate only two services: Google Search and Facebook Newsfeed.<sup>50</sup> But the Explanatory Memoranda for the Bill introduced in Parliament make no reference to these or other possible services.<sup>51</sup>

At the time of writing, it looks unlikely that any service or platform will be designated before the Code is reviewed at the end of its first year (as is required under the legislation).

One final point: the Code enables the Treasurer to designate platform services; and currently Google and Facebook are striking deals to use news content on News Showcase and News Tab, respectively. In other words, both under the Code and the ad hoc deals being made, the focus is on individual services. However, perhaps the focus ought to be on parent companies. The overarching issue identified by the ACCC is market imbalance. Given that the market power of digital platforms stems from the way their services and data collection practices can be integrated across the entirety of their operations, there is potentially an argument to be made that parent companies, rather than individual platforms or services, ought to be the focus of the Code or any deals.

### *Minimum Standards*

The data sharing mandated under the Code is likely to be limited, and of limited use for news businesses. In the Exposure Draft, responsible digital platforms were required to give readily comprehensible information to registered news businesses explaining *all* types of data collected in relation to their users' interactions with their covered news content. Under the amended legislation, the requirement has become more convoluted, and weaker. For instance, a responsible digital platform corporation must share data relating to a specific designated service, but explicitly not to various services in aggregate. In other words, if Facebook Newsfeed, Instagram and Facebook News Tab were each designated, Facebook would not be required to provide aggregated data about consumers of covered news content. Admittedly,

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<sup>49</sup> Exposure Draft Explanatory Materials to the Exposure Draft Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

<sup>50</sup> The Hon Josh Frydenberg and Paul Fletcher MPs, 'News Media and Digital Platforms Mandatory Bargaining Code' (Media Release, 8 December 2020)

<sup>51</sup> See the Explanatory Memoranda to the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021

data sharing was not unanimously advocated by news media businesses during the Code's development, with some arguing for broader privacy law reform instead.<sup>52</sup>

Similarly, the final legislated version of the Code contains a heavily-qualified version of the algorithmic notification requirement. In the final version, the addition of a new 'dominant purpose' test introduces a tricky subjective element: no obligation arises unless the dominant purpose of a digital service in making an algorithmic change is to alter the way news is distributed. Specifically, the change will not qualify if it is part of 'routine maintenance' or if in fact the dominant purpose is to ensure an algorithm is operating 'more quickly or more effectively'. The notice period was also reduced from 28 days to 14 days, which will give news media businesses little time to prepare. Past algorithmic changes have had drastic impacts on publishers. In 2018, Facebook changed its algorithm to downgrade news and surface content from family and friends, driving some small news publishers out of business.<sup>53</sup> News media businesses consistently argued for a strong algorithmic notification requirement; however, the dominant purpose test in particular will make it difficult for a digital platform to be found in breach.

### *Non-Differentiation Loopholes*

The non-differentiation obligations are subject to some important qualifications, all of which were added as last-minute concessions to Facebook, which argued that in their absence the non-differentiation obligations required them to remunerate all news businesses registered under the Code, or else offer no news content. First, the obligations do not apply to responsible digital platforms corporations when entering commercial agreements that contain non-identical pricing or preferential ranking terms with news businesses, provided the differentiation arises solely because of those terms. Second, the non-differentiation obligations do not apply to all covered news content. Rather they apply to the covered news content of news sources that regularly produce covered news content.

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<sup>52</sup> See, eg, Country Press Australia, *Mandatory News Media Bargaining Code: Submission to Concepts Paper* (5 June 2020) 11 <<https://www.accc.gov.au/system/files/Country%20Press%20Australia.pdf>> accessed 15 June 2021.

<sup>53</sup> Kathleen Chaykowski, 'Facebook's Latest Algorithm Change: Here Are the News Sites That Stand to Lose the Most' (6 March 2018) *Forbes* <<https://www.forbes.com/sites/kathleenchaykowski/2018/03/06/facebooks-latest-algorithm-change-here-are-the-news-sites-that-stand-to-lose-the-most/?sh=3feed92d34ec>> accessed 13 June 2021

### *c) Bargaining, Mediation and Arbitration*

Notwithstanding the robustness of the negotiations that took place between the Treasurer and Google and Facebook and the consequential legislative amendments that followed, the final offer arbitration mechanism remains at the heart of the Code. It is arguably the reason the digital platforms have been willing to enter into agreements with Australian news businesses even though they have not been designated under the Code. As the ACCC stated, when the Exposure Draft of the legislation was released, requiring the arbitral panel to choose one of two offers creates a strong incentive for the bargaining parties to make reasonable offers<sup>54</sup> — an incentive that conventional arbitration is said to lack because of the ‘likelihood that the arbitration award will be a compromise of the demands of the opposing parties’.<sup>55</sup>

However, the final version of the Code incorporates some important elements that constrain arbitral panels in significant ways when they assess offers made by the bargaining parties. Some of these elements are likely to work to the disadvantage of news businesses and to the detriment of public interest journalism more generally if the Treasurer designates Google or Facebook or any of their services. First, the ACCC has a relatively limited role in the arbitral process. Whereas in the Exposure Draft the ACCC could make submissions on any and all aspects of both offers and provide additional sources of information to assist arbitral panels, its submissions must now include only ‘impartial factual information that relates to the relevant market’ and ‘impartial information that relates to relevant economic principles’.<sup>56</sup> Second, the determination of the arbitral panel must be consistent with the rights under contracts in force between the responsible digital platform corporations and registered news business corporations, even if those agreements pre-date the adoption of the Code and were negotiated without its protections. Third, unlike in the Exposure Draft, which gave arbitral panels the flexibility to set remuneration for one year effectively as it saw fit, the Code now requires arbitral panels to stipulate remuneration as a ‘lump sum amount’ for two years.<sup>57</sup> Throughout the development of the Code, Google and Facebook had correctly argued this provision of the Exposure Draft included the power to force digital platforms to

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<sup>54</sup> ACCC, *Q&As: Draft News Media and Digital Platforms Mandatory Bargaining Code* (July 2020) 9

<sup>55</sup> Charles W Adams, ‘Final Offer Arbitration: Time for Serious Consideration by the Courts’ (1987) 66 *Nebraska Law Review* 213, 215

<sup>56</sup> *Competition and Consumer Act 2010* (Cth) s 52ZZC (1A)

<sup>57</sup> *Ibid* s 52ZX(1)(b)

pay news businesses per click or page view.<sup>58</sup> The final version of the Code addresses this concern, as well as the criticism of Tim Berners-Lee regarding the impact on an ‘open web’, as described above. However, according to economists, lump sum payments create significant disincentives to increase news production.<sup>59</sup>

For small, under-resourced news businesses that satisfy the registration requirements, the Code incorporates some mechanisms to make reaching agreements with designated digital platforms administratively easier and financially less burdensome. For example, two or more registered news businesses may bargain collectively under the Code; they may also designate an industry association or other legal or natural person as their bargaining representative. Further, the ability of responsible digital platform corporations to make standard offers that may cover designated or non-designated digital platform services for two-year periods has the potential to minimise negotiation costs. However, the requirement of compulsory mediation before final offer arbitration may begin — also introduced as a result of negotiations between the Treasurer and Facebook — provides designated digital platforms with opportunities to delay negotiations, which are more likely to adversely affect smaller news businesses, especially those with limited cash flow. As mentioned above, mediation cannot start unless three months have passed since bargaining began or the parties have otherwise agreed, and subject to two exceptions, must last for a minimum of two months.<sup>60</sup> Additional amendments stipulate that arbitration can begin no earlier than 10 business days after a party has notified the ACCC of its decision to proceed with arbitration.<sup>61</sup> When coupled with other time periods stipulated for aspects of the arbitration process itself, notwithstanding the obligation on both bargaining parties to negotiate, mediate, and arbitrate in good faith, it is possible that remuneration decisions would not be made for at least nine months. In the Exposure Draft, arbitration could be triggered if the parties had attended at least one day of mediation, and either the bargaining parties had not reached agreement within three months or they had

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<sup>58</sup> Exposure Draft (n 21 s 52ZO(1)(b). See also Rod McGuirk and Kelvin Chan, ‘Australian Media Law Raises Questions about ‘Pay for Clicks’ *AP News* (Canberra, 18 February 2021) <<https://apnews.com/article/business-europe-australia-media-journalism-771b10a4efd00d47a703655708f45e57>> accessed 28 March 2021

<sup>59</sup> Simon Wilkie, ‘The News Media Bargaining Code Could Backfire if Small Media Outlets Aren’t Protected: An Economist Explains’ *The Conversation* (Melbourne, 23 February 2021) <<https://theconversation.com/the-news-media-bargaining-code-could-backfire-if-small-media-outlets-arent-protected-an-economist-explains-155745>> accessed 15 June 2021

<sup>60</sup> The two exceptions are if the parties have agreed to or a two-month extension or they have agreed to terminate the mediation

<sup>61</sup> *Ibid* s 52ZL(2)(b)

agreed to arbitration no earlier than 10 business days after bargaining began. Each bargaining party must also pay half of the costs of each member of the arbitral panel — costs which may not be insignificant given the necessary legal, economic and/or industry expertise arbitrators will need to properly evaluate the offers made by the parties.

## 5. Implications for Other Countries

Australia is the first jurisdiction successfully to enact bargaining code legislation that seeks to compel digital platforms to pay for news content. Already, it appears to have provoked the EU to consider if code-related measures, in addition to the 2019 amendments to the Copyright Directive, are needed to level the playing field for news publishers.<sup>62</sup> And in Canada, lawmakers have said they want to enact a Code like Australia's.<sup>63</sup> However, it is too early to assess the Code with any certainty. If success is measured by the passage of legislation and getting commercial deals done - as the chair of the ACCC, Rod Sims, has suggested<sup>64</sup> - then the Code could already be judged a success. By the end of May, Google and Facebook have signed binding contracts with News Corp Australia, Nine Entertainment and Co, and Seven West Media (among others). Yet it remains unclear if fully developed agreements and/or letters of intent will emerge between the digital platforms, SBS and smaller news businesses. In addition, as the Treasurer has not yet designated any digital platform corporations and services, the Code's collective bargaining authorisation, designed to assist news media businesses of all sizes in their negotiations with the digital platforms, does not apply. Since June 2021, news businesses with less than \$10 million revenue benefit from a class exemption, granted to all small businesses, which authorises collective bargaining without the ACCC's prior approval.<sup>65</sup> The ACCC may also authorise collective bargaining for news businesses whose revenue exceeds \$10 million under Part IV of the *Competition and Consumer Act 2010* (Cth), but the process of obtaining authorisation imposes a burden on news businesses, and until an authorisation is granted a significant

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<sup>62</sup> See Javier Espinoza and Alex Barker, 'EU Ready to Follow Australia's Lead on Making Big Tech Pay for News' *Financial Times* (London, 9 February 2021) <<https://www.ft.com/content/4c40c890-afd3-40a3-9582-78a66c37a8af>> accessed 13 June 2021

<sup>63</sup> Daniel Van Boom, 'Facebook Could Block News in Canada like It Did in Australia' *CNET* (29 March 2021) <<https://www.cnet.com/news/facebook-could-block-news-in-canada-like-it-did-in-australia/>> accessed 13 June 2021

<sup>64</sup> Evidence to Senate Environment and Communications References Committee (n 48) 21

<sup>65</sup> ACCC, 'Collective Bargaining by Small Business Facilitated by Class Exemption' (Media Release, 3 June 2021).



bargaining imbalance continues to exist between them and the digital platforms.<sup>66</sup> In addition, it remains highly uncertain, now that the attention of government and the largest media players has largely shifted elsewhere, that the threat of designation under the Code will be sufficient to sustain the desire of the digital platforms to reach agreements with smaller news businesses. Nevertheless, three important lessons for countries considering adoption of a bargaining code clearly emerge from the Australian experience to date.

First, securing the passage of legislation adopting a Code will be a fraught process between news businesses, digital platforms and government, akin to a three-way tug of war. Because of their significant market power, Google and Facebook will be tough negotiators, seeking to water down the strength of Code provisions and minimise, in particular, the involvement of competition regulators in the bargaining process. Governments will need to exercise strong political will if they are to withstand the demands of the digital platforms and the political fallout if Facebook, which is less vulnerable to market competition because of the network effects of its platform, were to withdraw news from national markets. In the Australian context, the strength of the Coalition government's political will is arguably (and perhaps ironically) attributable in significant part to the high level of concentration in the news media market.<sup>67</sup> Four players — Nine Entertainment (2020 revenue \$2.2b<sup>68</sup>); Murdoch's News Corp Australia (Australian revenue unavailable); SevenWest Media (2020 revenue \$1.2b<sup>69</sup>) and the taxpayer-funded public broadcaster the Australian Broadcasting Corporation (2020 government funding \$1.1b<sup>70</sup>) — account for the vast majority of the news media market; and while most (if not all) news organisations of all sizes were supportive of the Code during its development, the three dominant commercial entities were particularly vocal in their support, and at least one advocated for it prior to its inception. Indeed, some

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<sup>66</sup> In April the ACCC announced it had given permission on an interim basis for Country Press Australia (CPA) members - who represent 160 regional newspapers - to collectively negotiate with Facebook and Google over payments for their news content. See ACCC, Country Press Australia Members Can Collectively Bargain with Google and Facebook' (Media Release, 54/21, 29 April 2021); .

<sup>67</sup> See, eg, Franco Papandrea and Rodney Tiffen in Eli M Noam and the International Media Concentration Collaboration (eds), *Who Owns the World's Media?: Media Concentration and Ownership Around the World* (OUP, 2016) 703-734

<sup>68</sup> Nine, '2020 Full Year Results Announcement' (27 August 2020) 2

<sup>69</sup> SevenWestMedia, *Annual Report 2020* (25 August 2020) 9

<sup>70</sup> Josh Frydenberg and Mathias Cormann, *Budget 2019-20: Budget Measures, Budget Paper No 2* (2 April 2019) 57

have criticised the mechanism as ‘Murdoch’s code’.<sup>71</sup> In countries such as the UK, which also has concentration of ownership,<sup>72</sup> media businesses may be able to exert the necessary leverage, but in countries with less concentrated markets, sustaining political impetus might be more difficult. One positive note in this regard comes from Google CEO Sundar Pichai, who said in late May that the final Code was ‘the right construct’, while signalling Google’s willingness to work with regulators globally.<sup>73</sup>

Second, countries should anticipate the need to develop additional measures that support smaller, but registrable, news media businesses in parallel with a code in the event they are forced to bargain in its shadow. If possible, competition regulators should authorise smaller news media businesses to engage in collective bargaining under existing competition law before introducing any code legislation. Unlike the Australian government, other governments ought to be prepared to release some guidance about determining the value exchange between news businesses and digital platforms as soon as legislation adopting a code is enacted, especially if activation of the code is dependent on a subsequent designation or ‘significant market status’ determination. One of the advantages of final offer arbitration is said to be the ability of the parties to determine remuneration,<sup>74</sup> but smaller players without the benefit of key information that should be disclosed pursuant to the code will continue to find it difficult to arrive at a fair price in the absence of any guidance. Competition regulators have an important role to play in this regard. Further, significant consideration should be given to allocating funding for smaller news media businesses, who qualify under a code, so they have the resources to develop the skills and/or procure the expertise needed to initiate and sustain negotiations (either individually or collectively) with the digital platforms. Where there is an absence of a peak industry body or no history of collective negotiations, it cannot be assumed the necessary skills will emerge without some financial investment. On this point, it is also telling that among the first deals that digital platforms struck in Australia were those with mid-tier companies, including Private Media, Schwartz Media and Solstice Media

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<sup>71</sup> Jeff Jarvis, ‘As Rupert Murdoch Works to Dismantle the Internet, Why Are Other Media Outlets Helping Him?’ *Crikey* (Sydney, 15 February 2021) <<https://www.crikey.com.au/2021/02/15/rupert-murdoch-news-media-bargaining-code/>> accessed 14 June 2021

<sup>72</sup> Media Reform Coalition, *Who Owns the UK Media?* (14 March 2021) <<https://www.mediareform.org.uk/media-ownership/who-owns-the-uk-media>> accessed 15 June 2021

<sup>73</sup> Zoe Samios and John McDuling, ‘How Google Boss Sundar Pichai Learned to Live with Australia’s Media Laws’ *Sydney Morning Herald* (Sydney, 28 May 2021) <<https://www.smh.com.au/business/companies/why-google-boss-sundar-pichai-learnt-to-love-australia-s-media-laws-20210527-p57vpj.html>> accessed 14 June 2021

<sup>74</sup> *Q&As* (n 53) 9

before the Code was enacted.<sup>75</sup> Arguably, Google and Facebook were eager to create the impression that smaller players would not be overlooked.

Finally, the adoption of a Code is not a panacea for the problems that led to the crisis in journalism. To its credit, the Code has already prompted significant payments to flow to news businesses, but for more comprehensive support for quality news and public interest journalism, and to better foster innovation, further government policy initiatives are required. Options that have been canvassed in Australia include tax offsets for the costs incurred by news media businesses in the production of public interest journalism and making subscriptions for certain types of news tax deductible for consumers.<sup>76</sup> It has also been argued that funding for public broadcasters ought to be increased. More directly, governments can channel money directly into public interest journalism. This has already started in Australia: in late 2020, the Public Interest News Gathering (PING) Fund, set up as a COVID relief measure, granted \$55m to support regional news and the AAP newswire; beyond that, the government has proposed an ongoing PING Trust.<sup>77</sup> These options all warrant exploration, particularly in light of overseas initiatives responding to the widespread market failure in news.<sup>78</sup>

#### Disclosure Statement

Drs Lee and Molitorisz assisted the Public Interest Journalism Initiative (PIJI) in preparing its submissions to the government's News Media Bargaining Code policy initiative. Until June 2021, Dr Lee was seconded to PIJI one day a week as its policy manager. This article was drafted in their academic capacities. The views expressed herein do not necessarily represent those of PIJI.

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<sup>75</sup> Brittney Rigby, 'Facebook signs deals with Private Media, Schwartz Media and Solstice Media' *Mumbrella* (Sydney, 26 February 2021) <<https://mumbrella.com.au/facebook-signs-deals-with-private-media-schwartz-media-and-solstice-media-670915>> accessed 25 June 2021

<sup>76</sup> ACCC, *DPI: Preliminary Report* (2018) 15-16

<sup>77</sup> Max Mason, 'Morrison government gives AAP \$5m' *Australian Financial Review* (Sydney, 18 September 2020) <<https://www.afr.com/companies/media-and-marketing/morrison-government-gives-aap-5m-20200918-p55wza>> accessed 25 June 2021; Australian Government, *Media Reform Green Paper: Modernising Television Regulation in Australia* (November 2020) 27-29

<sup>78</sup> See, eg, Hal Crawford, 'Using Public Money to Pay for News: A Kiwi fund is blazing the trail' *Crawford Media Blog* (Sydney, 8 June 2021) <<https://halcrawford.substack.com/p/using-public-money-to-pay-for-news>> accessed 15 June 2021.