7 January 2021

Economics Legislation Committee

Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020: Inquiry Submission

Introduction

Thank you for the opportunity to provide input into the inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, as referred to your committee on 10 December 2020.

I've been following the code since the direction for its development was first announced by the government in April 2020. I was also alert to previous attempts at developing a voluntary code, and along with it the history of policy in this space at a local and global level. This my second submission to the process, the first of which was to the ACCC in regards to their exposure draft of this code. You can find my first submission in full on my personal website[1].

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

The idea that a mandatory code of the kind proposed is even considered for implementation in Australia is completely abhorrent, and counter to the fundamental principles of innovation and competition for which the Australian Government should be protecting.

There's no more democratic invention than the Internet, and this code is regressive in the extreme. It breaks core aspects of what makes the free and open Internet work, all simply to entrench and protect legacy monopolies in media distribution from competition.

The code also places a barrier to Australia becoming a true 21st century economy by sending a signal globally that fruits of innovation will be reclaimed through bad, technology-illiterate legislation lobbied for by those disrupted by it.

My submission draws attention to these and many other significant points of concern with the proposed legislation. For ease of reading I offer summaries of the concerns in bold, and explanation and evidence supporting those concerns underneath. I also make recommendations for how those concerns can be addressed at the end of the submission.

I call on you to reject this code in its entirety, as is absolutely fitting.

[1] https://www.dylanlindgren.com/2020/08/16/accc-submission-draft-media-bargaining-code/

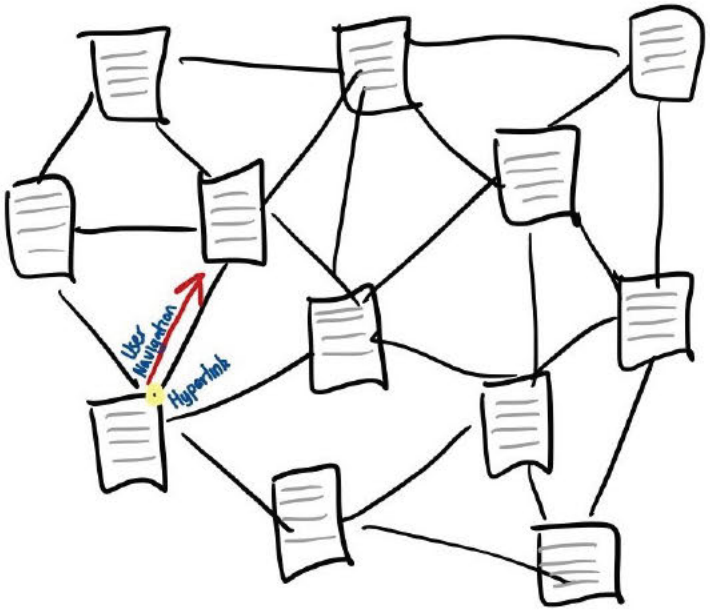
Points of Concern

Concern 1: The code is incompatible with the economics of the free & open Internet as have existed for 40+ years

Since Bob Kahn and Vint Cerf "fathered" the free and open Internet[2], at its core it's been centered around the ability to freely hyperlink. Hyperlinking allows websites to provide their users with the opportunity to navigate to other websites. To be hyperlinked to is so valuable that often websites pay for the privilege.

The code artificially rewrites the foundational aspects of the economics of the Internet in a way which significantly compromises what's made the Internet such an important enabler of democracy, free speech, innovation, and GDP growth.

At the core of the Internet is the concept familiar to most - that of the World Wide Web. This web is made up of pages, and "hyperlinks" between those pages. The below diagram shows a rudimentary representation of the way that hyperlinks connect pages to other pages on the Internet; one can easily see the "web" that forms as a result, with the yellow dot and red arrow denoting a hyperlink a user clicks to navigate from one page to another.



In almost all cases running a website is completely pointless unless you have users that actually visit and use it. One way you can get those users is offline marketing to get them to visit your website directly. Another is through hyperlinks from other websites. Due to these fundamental economics of the internet, having traffic sent to you through hyperlinks is much more valuable than sending traffic to a different website.

[2] https://www.theguardian.com/technology/2016/jul/15/how-the-internet-was-invented-1976-arpa-kahn-cerf

This point about the fundamental principle of hyperlinks has been explained in the powerful "A Fair Code for an Open Internet" blog post written by Vint Cerf himself[3].

> *Links are the cornerstones of open access to information online; requiring a search engine (or anyone else) to pay for them undermines one of the fundamental principles of the internet as we know it today.*

Section 52B(1)(b) judges this basic act of hyperlinking as something that qualifies the digital platform as "making content available", and thus attributes a cost to the act of hyperlinking.

52B Making content available

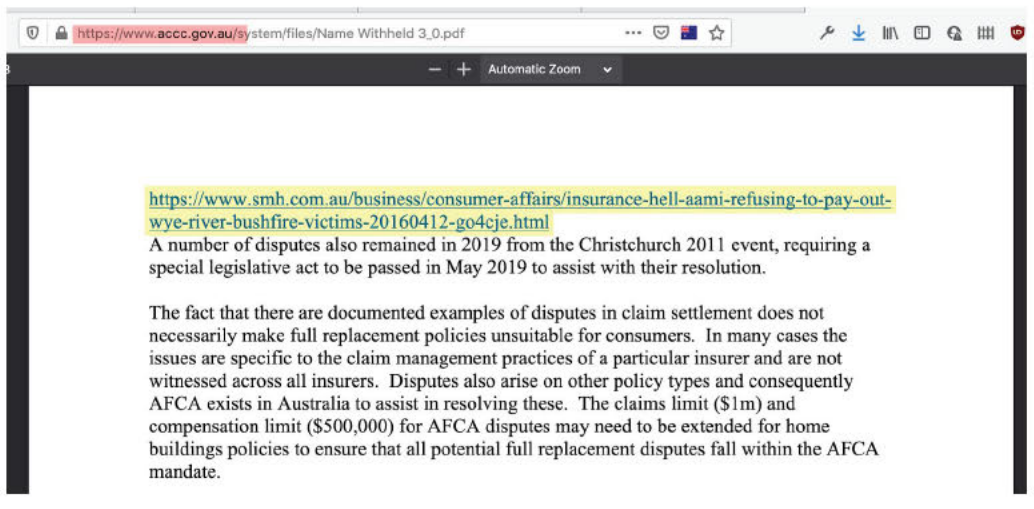
(1) For the purposes of this Part, a service makes content available if:
- (a) the content is reproduced on the service, or is otherwise placed on the service; or
- (b) a link to the content is provided on the service; or
- (c) an extract of the content is provided on the service.

(2) Subsection (1) does not limit, for the purposes of this Part, the ways in which a service makes content available.

Section 52B of the proposed legislation

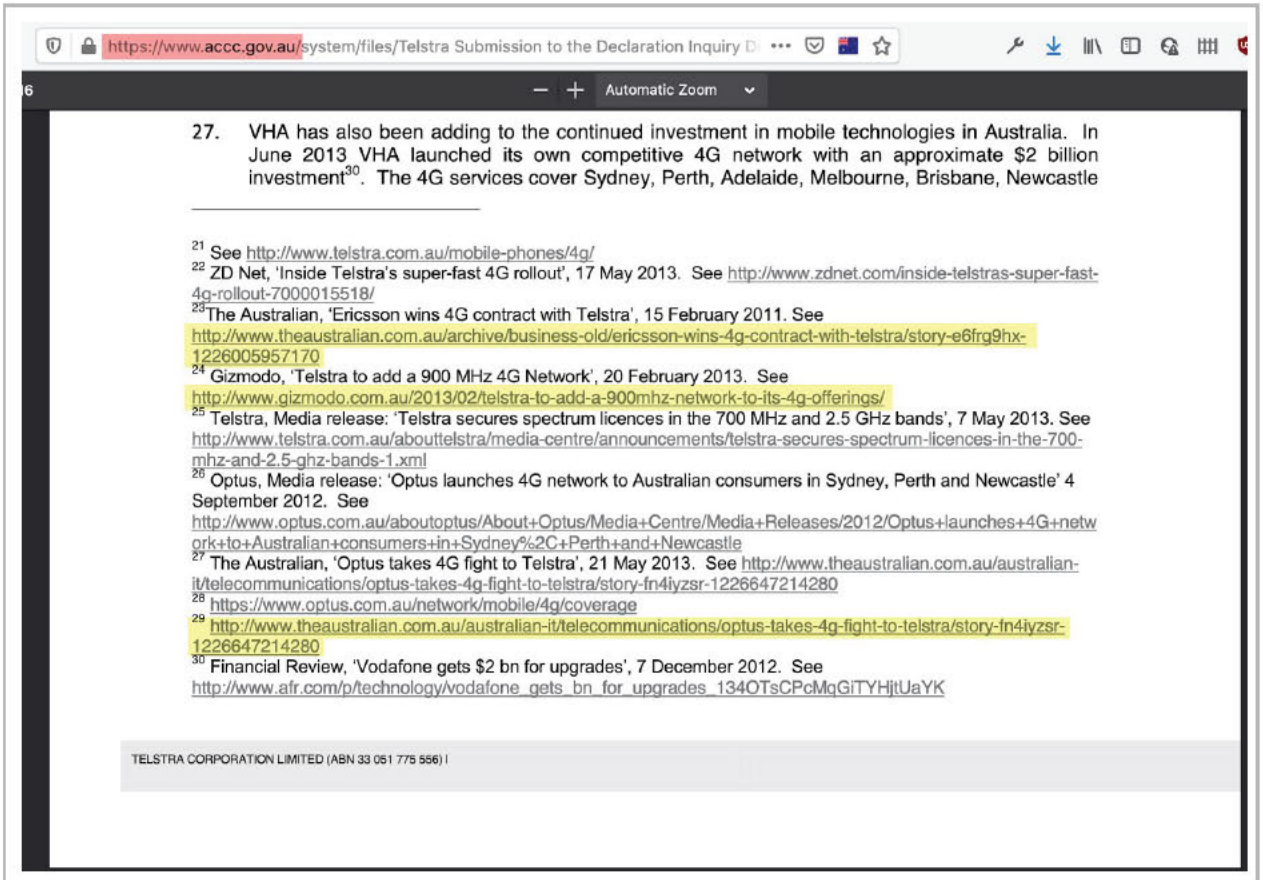
The inclusion of hyperlinking as an act of "making content available" is beyond ridiculous, and totally outrageous and offensive in its ignorance. Hyperlinking is something that every single website on the Internet does with almost zero exceptions. Complaining that digital platforms freely hyperlink to news articles is like complaining that the world is round, or that a charity gets too many donations. It's a fundamental aspect of the Internet and to claim people should pay to use hyperlinks is to deny reality.

In a breathtaking example of hypocrisy, even the ACCC themselves - the entity who drafted this code - freely hyperlinks to numerous news articles on their website as can be seen below.



Examples of the ACCC hyperlinking to a Sydney Morning Herald news article

[3] https://blog.google/around-the-globe/google-asia/australia/fair-code-open-internet/



https://www.accc.gov.au/system/files/Telstra Submission to the Declaration Inquiry D

Automatic Zoom

27. VHA has also been adding to the continued investment in mobile technologies in Australia. In June 2013 VHA launched its own competitive 4G network with an approximate $2 billion investment[30]. The 4G services cover Sydney, Perth, Adelaide, Melbourne, Brisbane, Newcastle

[21] See http://www.telstra.com.au/mobile-phones/4g/
[22] ZD Net, 'Inside Telstra's super-fast 4G rollout', 17 May 2013. See http://www.zdnet.com/inside-telstras-super-fast-4g-rollout-7000015518/
[23] The Australian, 'Ericsson wins 4G contract with Telstra', 15 February 2011. See http://www.theaustralian.com.au/archive/business-old/ericsson-wins-4g-contract-with-telstra/story-e6frg9hx-1226005957170
[24] Gizmodo, 'Telstra to add a 900 MHz 4G Network', 20 February 2013. See http://www.gizmodo.com.au/2013/02/telstra-to-add-a-900mhz-network-to-its-4g-offerings/
[25] Telstra, Media release: 'Telstra secures spectrum licences in the 700 MHz and 2.5 GHz bands', 7 May 2013. See http://www.telstra.com.au/abouttelstra/media-centre/announcements/telstra-secures-spectrum-licences-in-the-700-mhz-and-2.5-ghz-bands-1.xml
[26] Optus, Media release: 'Optus launches 4G network to Australian consumers in Sydney, Perth and Newcastle' 4 September 2012. See http://www.optus.com.au/aboutoptus/About+Optus/Media+Centre/Media+Releases/2012/Optus+launches+4G+network+to+Australian+consumers+in+Sydney%2C+Perth+and+Newcastle
[27] The Australian, 'Optus takes 4G fight to Telstra', 21 May 2013. See http://www.theaustralian.com.au/australian-it/telecommunications/optus-takes-4g-fight-to-telstra/story-fn4iyzsr-1226647214280
[28] https://www.optus.com.au/network/mobile/4g/coverage
[29] http://www.theaustralian.com.au/australian-it/telecommunications/optus-takes-4g-fight-to-telstra/story-fn4iyzsr-1226647214280
[30] Financial Review, 'Vodafone gets $2 bn for upgrades', 7 December 2012. See http://www.afr.com/p/technology/vodafone_gets_bn_for_upgrades_134OTsCPcMqGiTYHjtUaYK

TELSTRA CORPORATION LIMITED (ABN 33 051 775 556) I

Examples of the ACCC hyperlinking to news articles published by Gizmodo and The Australian.

Many more examples of this blatant hypocrisy by the ACCC can be found by searching for the below terms in any popular search engine:

Term	Result count
site:www.accc.gov.au "smh.com.au"	247
site:www.accc.gov.au "theaustralian.com.au"	133

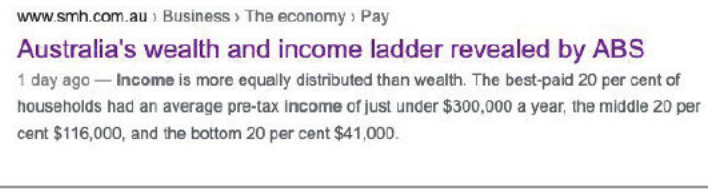
There's nothing more illustrative of the mental contortion needed in drafting this code than to mandate that "designated digital platforms" be required to pay news organisations for the very acts the ACCC do themselves on their own website.

Why is it ok for the ACCC and every other website on the Internet to freely hyperlink, but not digital platforms? This same charge of hypocrisy can be made against every supporter of this code who runs a website that doesn't pay to hyperlink to other websites (everyone).

To have this "one rule for platforms, another rule for everyone else" creates an economic system on the Internet akin to mandating that a small number of people must drive their cars on the right hand side of the street in Australia, whilst everyone else drives on the left.

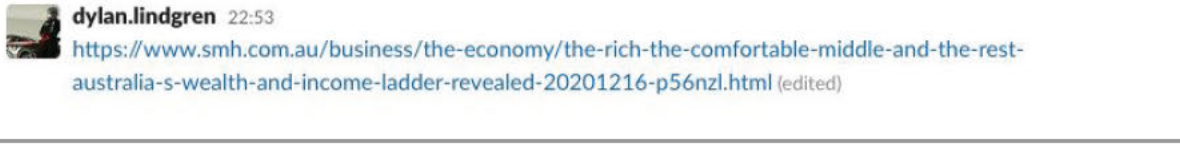
Given how integral to the Internet the free ability to hyperlink is, to use another analogy, the code is akin to a council installing parking meters in your driveway at home, and specifically just your home. It's a completely unfair imposition that's aim could easily be achieved with a much simpler solution; if the goal is to facilitate a transfer of money from digital platforms to news businesses, just do it with taxation, not by breaking the freedom of the Internet.

Furthermore, the code does not acknowledge that there are varying degrees of "use" or of "hyperlinking" to content. Examples below show some of these:

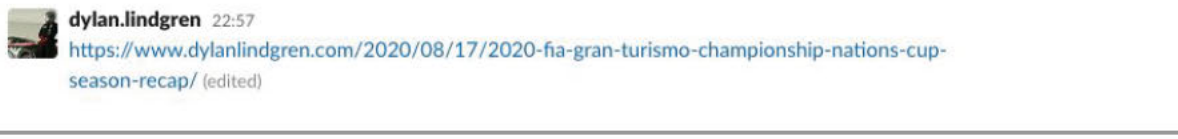


Example 1: A news article search result containing the title, category, date, and a brief snippet of the content of the article.

Example 2: A news article search result containing the title, name of publication, image, date, and an extremely brief snippet of the content of the article.



Example 3: A hyperlink to a news article appearing in the application "Slack", containing no content.



Example 4: A message in "Slack" containing only a hyperlink to a blog post, and no content.

Example 5: A message in the application "Slack" containing a user-created message as well as a hyperlink to a blog post, and the title of the page.

It is clear that examples 1 and 2 contain the content of news articles, and perhaps that a cost should be associated with this inclusion of content in a digital platform; even though currently news organisations freely allow digital platforms to use this content and have total power to deny them[4].

However, examples 3, 4 and 5 are simply hyperlinks, not content, and are not even created by the platform. These examples are user generated content; messages created by the user in and sent via the digital messaging platform Slack.

If anyone is responsible for content in examples 3, 4 and 5 it should be the user sending the content, just as it would be if you sent a copyrighted song in an email. To have the user responsible for content they send or post would ensure the code is consistent with Australian copyright law that includes "safe-harbour" principles protecting digital platforms and telecommunications companies from content posted by users.

To mandate platforms are responsible for paying for content their users post is counter to the way the Internet works and is exactly why Facebook threatened to block news on their platform[5]. Its effect would be similar to that if Donald Trump followed through on his threat to repeal Section 230 of the United States of America's Communications Decency Act of 1996[6]. The Electronic Frontiers Foundation[7] declared that "[w]ithout [section] 230, platforms would become more restrictive overnight and the Internet as we know it would be mangled."

A tweet by the Electronic Frontiers Foundation[8] declaring that "[w]ithout [section] 230, platforms would become more restrictive overnight and the Internet as we know it would be mangled."

[4] https://support.google.com/news/publisher-center/answer/9605477?hl=en
[5] https://about.fb.com/news/2020/08/changes-to-facebooks-services-in-australia
[6] https://www.eff.org/issues/cda230
[7] https://twitter.com/EFF/status/1344083698690322432
[8] https://twitter.com/EFF/status/1344083698690322432

Concern 2: Value is determined in a biased, unfair manner

The code mandates a bargaining and arbitration process that artificially ignores aspects of the value exchange beneficial to digital platforms.

For a bargaining process between two parties to be optimal and fair it must factor in both the favourable and unfavourable outcomes of the deal occurring for either party. It must also work towards the ideal balance between these outcomes so that ultimately both parties walk away with a deal that leaves them better off than without the deal, to the greatest extent possible.

After enormous critical feedback from their exposure draft, the ACCC implemented what has been referred to by the government as a "two-way value exchange" which sees value flow in both directions between the news organisation and the digital platform.

52ZZ Matters to consider in arbitration, etc.

(1) In making a determination under subsection 52ZX(1) (including in complying with subsections 52ZX(7), (8) and (9)), the panel must consider the following matters:

(a) the benefit (whether monetary or otherwise) of the registered news business' covered news content to the designated digital platform service;

(b) the benefit (whether monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content;

(c) the cost to the registered news business of producing covered news content;

(d) whether a particular remuneration amount would place an undue burden on the commercial interests of the designated digital platform service.

(2) In considering the matters set out in subsection (1), the panel must consider the bargaining power imbalance between Australian news businesses and the designated digital platform corporation.

Section 52ZZ of the final legislation introduced to parliament

While the addition of this "two-way value exchange" does improve the code from what was seen in the exposure draft, there's still glaring omissions making claims that the bargaining process created as a result of this code is "fair" to be simply laughable.

Some example omissions:

- <u>The cost to the digital platform of making available the news business' covered news content.</u>
  A digital platform hyperlinking to news content is not free of cost to them. These costs to hyperlink may include, but are not limited to the following:
  a. Hosting, infrastructure, electricity, and bandwidth fees
  b. human resources costs of engineers and staff to create the digital platform

c. the cost of monetising any benefit that is gained by digital platforms having news content on their platform

- Whether the use of the covered news content could be considered “fair use”.
  This is “fair use” as defined in the Australian Law Reform Commission’s final recommendations regarding a fair use exception in Australia, and further recommended in the Productivity Commission's final report on Australia's Intellectual Property Arrangements.

- The degree to which “content” is used.
  For example, verbatim reproduction of an article should cost more to digital platforms than the simple act of hyperlinking.

Failing to list as matters for consideration all positives and negatives of a deal occurring for both parties will result in the code failing to achieve its stated goal of resolving unfairness in the value exchange and bargaining process between digital platforms and news organisations.

Concern 3: Journalism should not be perpetually funded by advertising profits

Advertising and journalism are not the same thing. Just because historically journalism was funded by advertising profits due to news media organisations monopoly on content distribution, it does not mean that those advertising profits are attributable to journalism, or should perpetually fund it.

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

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

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

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

Research shows that the average Australian uses their smartphone 2.5 hours a day[9], and so not only are the advertising methods more effective, but as almost the entire society uses digital platforms, which can leverage ad-tech companies, they have replaced traditional media businesses as providers of advertising space at the local, state, national, and international level.

[9] https://www.averageaussie.com.au/smartphone-use-in-australia/

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

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

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

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

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

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

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

The journalism market must not be perpetually linked to the advertising market as this code attempts to do.

Concern 4: Bargaining power imbalances cannot be used to justify the introduction of this code

Any lack of bargaining power for news media businesses is due to the glut of free content available on the Internet, which has made content worth less now than ever.

News media businesses should make better, more valuable content which would fix the imbalance naturally, rather than introduce a biased bargaining system that artificially inflates the value of specific content for which the free-market economics of the Internet have already set a fair value for.

Even MP's within the Government itself find it laughable that a bargaining power imbalance exists, let alone requires action. A recent Sydney Morning Herald[10] article described Government MP's reactions to this when the final legislation was explained to them:

> *"There's a view [among committee members] of 'What problem are we trying to fix here?' To that end, we were told there's a power imbalance – and people were just laughing. People were saying 'Are you really trying to say there's a power imbalance between News Corp and Google?'," the MP said.*

Assuming a bargaining power imbalance does exist, why does this specific one require intervention but not others? And if it's to support a particular industry like journalism, why is it this bargaining power imbalance that gets attention rather than - for example - that between commercial real estate and news media organisations?

When I visit my local supermarket, if I'm of the opinion that a litre of milk isn't worth the one dollar it's listed at, and instead I offer twenty cents, the supermarket simply isn't going to sell me the milk. This relationship between me and the supermarket is a bargaining power imbalance, however it is absolutely just that it exists. Bargaining power imbalances are completely normal in a market-driven society and do NOT warrant market intervention such as forcing the supermarket to sell me milk for twenty cents, or even eighty cents.

The value digital platforms provide to news organisations through hyperlinking to their services is extremely large; so large in fact that news organisations frequently pay digital platforms to advertise hyperlinks to their news articles, as does any business big or small that runs a website. Hyperlinks are extremely valuable.

What is important is not whether a bargaining power imbalance exists, but rather whether the value transfer is fair. The fact that news organisations pay to have hyperlinks put on digital platforms perhaps suggests that the value transfer and prominence given to news organisations for free on digital platforms may be overweight and perhaps digital platforms need to charge news organisations!

Some examples of these advertisements are shown below, which were run by The Australian on Facebook's News Feed in December 2020.

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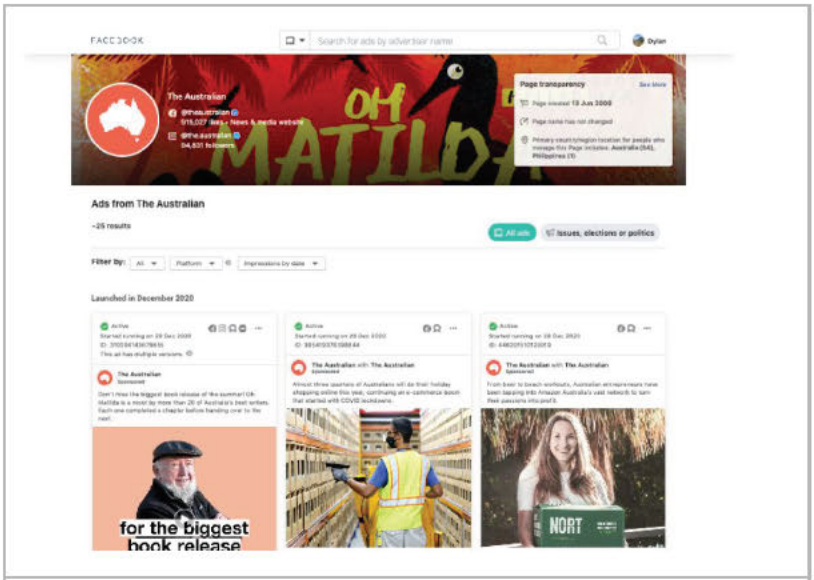
10 https://www.theage.com.au/politics/federal/abc-sbs-included-in-news-media-code-as-tech-giants-win-some-concessions-20201207-p56l7h.html



Examples of advertisements that The Australian has paid Facebook to place on their digital platform in December 2020.

Lastly, the ACCC, the Government, and the news media organizations frequently claim that if it weren't for a bargaining power imbalance they would be able to charge for hyperlinking to and using their content. This implies that in their dealings with digital platforms & other websites for which this alleged bargaining power imbalance *doesn't* exist they are charging money to hyperlink to their content.

However this is patently not the case as they do not charge Instagram, YouTube, TikTok, or the ACCC's website for hyperlinking to their articles. None of these digital platforms are proposed for inclusion under this code so one assumes there is no bargaining imbalance between them and news organisations.

This is also evidenced by the fact news businesses actively offer, promote, and encourage the consumption of their content via RSS feeds they host. RSS feeds are content presented in a computer-readable format intended for inclusion in external platforms.

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

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

Concern 5: Treasurer's ability to surreptitiously designate new digital platforms is anti-democratic

The code gives the Treasurer the power to designate new digital platforms through legislative instrument. This power will be used by news media organisations to surreptitiously lobby for and get more and more undeserving digital platforms designated under the code. This is anti-democratic as it neutralises the ability for Australian citizens to politically organise and lobby against content from news media businesses from being given preferential treatment on the digital platforms they use.

The Treasurer stated in a press release on 8 December 2020[11] that this code will apply initially to Facebook News Feed and Google Search, and it gives the Treasurer the authority to *"by legislative instrument, make a determination"* to specify additional designated digital platform services that are covered under the code.

52E Minister may make designation determination

(1) The Minister may, by legislative instrument, make a determination that:

(a) specifies one or more services covered by subsection (2) in relation to a corporation as ***designated digital platform services*** of the corporation; and

(b) specifies the corporation as a ***designated digital platform corporation***.

(2) This subsection covers a service in relation to a corporation if:

(a) the corporation, either by itself or together with one or more related bodies corporate of the corporation, operates or controls the service; or

(b) a related body corporate of the corporation, either by itself or together with one or more other related bodies corporate of the corporation, operates or controls the service.

(3) In making the determination, the Minister must consider whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate.

(4) In making the determination, the Minister may consider any reports or advice of the Commission.

Section 52E of the final legislation

This is an extremely concerning and anti-democratic power, as it renders the code into effectively a "trojan horse" that enables the shaking down of digital platforms by rent-seeking news media businesses. This power is anti-democratic as it neutralises the ability of affected citizens that are users of the to-be-designated platform to politically organise to stop it from being designated as such.

11 https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/news-media-and-digital-platforms-mandatory-bargaining

The fact that this law is even being proposed is indicative of the power that news media businesses have over our political process. By allowing the Treasurer to designate new platforms as being included in the code, through a combination of surreptitious lobbying by news media businesses as well as a broad definition of a “bargaining power imbalance”, it is extremely likely this code will eventually expand to apply broadly to many digital platforms such as YouTube, TikTok, Twitter, Instagram, Snapchat, LinkedIn, Gmail, and Slack.

This should be obvious, as if it can be claimed there's a "bargaining power imbalance" between Google Search and news media organisations via the simple act of hyperlinking, that same claim can easily be made about almost every website on the Internet and news businesses.

Significant backlash against this code has been from so-called “YouTube creators”, who are individuals, groups, and organisations that post content to YouTube. Some YouTube creators’ livelihood revolves around their content being discovered and seen, and thus revenue from ads being shown on their content and shared with them.

YouTube creators rightfully fear that this code will grant news organisations special privileges on YouTube, above what they have access to; to things such as knowledge about ranking and suggestion algorithms used by the platform, as well as increased payments.

The passing of this code, and the subsequent inclusion of YouTube as a designated digital platform will likely result in content from news organisations being more successful on YouTube (due to better targeting of the algorithms with their extra knowledge of it). It will thus lead to decreased payments for YouTube creators as their content is seen less often, and the funding pool content as a larger amount of money is paid to news organisations. This same scenario can apply to any digital platform designated under the code.

Of the around 1,406 submissions that the ACCC received regarding their exposure draft, a whopping 93% of those were emails rejecting this code in its entirety, and a significant portion of those were from YouTube creators. The YouTube channel Economics Explained started a campaign called #OurYouTube and a petition[12] which garnered (as of 1 January 2020) more than 76,611 signatures.

Each digital platform has their own ecosystem and community, and this abhorrent code allows news media organisations the ability to surreptitiously foist themselves above that community regardless of the detriment to that community, or to Australian society as a whole.

[12] https://www.change.org/p/parliament-of-australia-save-youtube-by-stoping-australia-s-proposed-law-news-media-bargaining-code-ouryoutube-d9a6388b-a916-46c3-ab86-1a412ae1ba2b

Concern 6: Australians have consistently voiced their overwhelming opposition to the introduction of this code, even in the face of pro-code media bias & propaganda

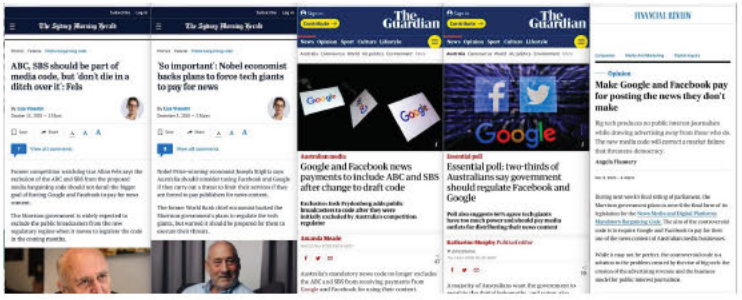
Australian legacy media organisations and journalists will regain a huge amount of undeserved power lost with the invention of the Internet; one of the most democratic inventions in history. Despite the scandalous - yet illustrative in why that power is undeserved - almost blanket pro-code coverage in the media, Australians are still opposed to this code's introduction as is evidenced by:

- **75,000+ signatures on the #OurYouTube anti-code petition compared to only 1,189 on the "Google Open Letter" pro-code petition.**
- **93% of submissions to the ACCC's exposure draft were anti-code.**
- **72% of those polled by Essential Media Communications at best unconvinced this code is necessary.**
- **Thousands of emails sent to MP's voicing opposition to the code.**

With the consolidation of Fairfax and Nine Entertainment Company[13], and the shutdown of regional newspapers by News Corp[14], it is clear Australia has a media landscape diversity extremely far away from what is ideal to ensure a well functioning democracy. The lack of diversity of Australian media gives extreme power to news media businesses to control the agenda and effectively spread propaganda throughout the Australian population

A recent petition started by former Prime Minister Kevin Rudd gained more than 500,000 signatures and resulted in, on 11 November 2020, the Senate referring an inquiry into the state of media diversity, independence, and reliability to the Senate Environment and Communications References Committee[15].

It would be hard to find an issue more heavily skewed in its representation in the media than that of this code, or one that more clearly demonstrates why alleging this code's introduction will strengthen democracy is false. Media companies see themselves as financially benefiting from this code's introduction, and have been actively campaigning for the code and drowning out resistance to it through biased articles.



Examples of numerous biased articles published across various news outlets

[13] https://www.smh.com.au/business/companies/what-does-the-nine-fairfax-merger-mean-20181204-p50k1o.html
[14] https://www.meaa.org/mediaroom/news-corp-cuts-are-a-massive-blow-to-communities/
[15] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Mediadiversity

This bias is introduced through various opaque, perhaps in some cases unintentional, yet ultimately corrupting techniques.

For example, when Vint Cerf (an esteemed technologist, and authority on the Internet due to being world renowned as one of the "Fathers of the Internet") came out decrying the code for being fundamentally against a free and open internet[16], acknowledgement of this was buried within 4 paragraphs of a single, largely pro-code 22 paragraph article on The Guardian[17]. Not a single mention of this was published in the Sydney Morning Herald.

In contrast, when Joseph E Stiglitz (an economist) made public statements in support of the code, multiple articles were dedicated entirely to his views even though his understanding of the code and its implications are deeply flawed. An example of this flawed knowledge is when Mr Stiglitz wrote an article for the Financial Times published on 2 December 2020[18], in which he states that the proposed code would "force [...] the sharing of user data" of digital platforms with news media businesses. The ACCC on numerous occasions has denied sharing of user data is mandated under the code.

Another example is on multiple occasions when Alan Fels - a former Chair of the ACCC and current Chair of the Public Interest Journalism Initiative - made statements supporting the code he gets entire articles[19] dedicated to his views[20], however his understanding of digital platforms and the Internet is extremely questionable given the persistence of what one assumes is a "pocket-dialled" tweet on his Twitter timeline[21] since 6 April 2020.

Screenshot of the @afels1 Twitter timeline[22] stating "To7,eg.frufotrcrohr"

[16] https://blog.google/around-the-globe/google-asia/australia/fair-code-open-internet/
[17] https://www.theguardian.com/media/2020/nov/25/google-and-facebook-news-payments-to-include-abc-and-sbs-after-change-to-draft-code
[18] https://www.ft.com/content/234d44b5-b876-489c-8639-056f48205ac7
[19] https://www.theguardian.com/commentisfree/2020/sep/02/facebooks-threat-to-block-australians-from-sharing-news-is-a-premature-overreaction
[20] https://www.smh.com.au/politics/federal/abc-sbs-should-be-part-of-media-code-but-don-t-die-in-a-ditch-over-it-fels-20201014-p5651e.html
[21] https://twitter.com/afels1/status/1247126213929209857
[22] https://twitter.com/afels1/with_replies

This is not to say that neither of these people deserve to have their voice heard, however the prominence given to people with pro-code views and burying of those with anti-code views in the media should be seen as an indictment on the industry and throw into question its deserving of special treatment and payment for its content via legislation.

Another corrupting technique from journalists is to misrepresent what the code says, or present it in the most favourable light possible. For example, an article from Gizmodo[23] regarding the potential for additional digital platforms to be designated as such under the code:

> *"The final legislation [...] will exclude Google's YouTube and Facebook's Instagram"*

As outlined in concern 6, the legislation does nothing of the sort. The code gives full power to the Treasurer to designate new digital platform services. There is no reference in the code to which services are included or excluded. Under the legislation introduced to parliament, YouTube and Instagram can both be included without the passing of any additional legislation, and the treasurer has made clear Google Search and Facebook News Feed are only the initial list, implying there will be more designated in the future.

Yet, even after the consistently biased representation of this code in the media, Australians are ***still*** unconvinced by the need for it. Essential Media Communications published a poll in early December 2020 asking 1,034 voters for their opinion on the statement *"Facebook and Google should be required to pay media outlets for distributing news content"*.

Of the respondents, only 28% strongly agreed with that statement, with the remaining 72% at best somewhat agreeing, or at worst strongly disagreeing with it. Again, this was spun in the media as a good result[24].

	TOTAL: Agree	TOTAL: Disagree	Strongly agree	Somewhat agree	Neither agree nor disagree	Somewhat disagree	Strongly disagree
Facebook and Google have too much power and should be regulated by the government	59%	13%	28%	31%	28%	8%	5%
Facebook and Google should be required to pay media outlets for distributing their news content	57%	15%	28%	29%	29%	10%	5%

		Gender		Age Group			Federal Voting Intention			
TOTAL: Agree	Total	Male	Female	18-34	35-54	55+	Labor	TOTAL: Coalition	Greens	TOTAL: Other
Facebook and Google have too much power and should be regulated by the government	59%	63%	56%	49%	59%	68%	58%	65%	60%	64%
Facebook and Google should be required to pay media outlets for distributing their news content	57%	62%	51%	47%	55%	67%	53%	64%	56%	54%
Base (n)	1,034	528	506	329	320	385	322	430	88	107

Results of December 2020 poll by Essential Media Communications

Further evidence that the Australian public do not want this code unintentionally comes from the pro-media lobby group The Centre for Responsible Technology. This group is run by and employs journalists & those with a background in media who without a doubt have an interest in seeing money flow from digital platforms to media companies. The individual who runs it, Peter Lewis, often writes opinion articles across many of the media outlets who

[23] https://www.gizmodo.com.au/2020/12/facebook-google-news-media-code-australia-2021/
[24] https://www.centreforresponsibletechnology.org.au/strong_public_support_for_big_tech_to_pay_for_news

would financially benefit from this code, and also runs Essential Media Communications which one assumes has a financial interest in the media status-quo due to its close relationship with The Guardian through its The Guardian Essential Report.

On 20 August 2020, the Center for Responsible Technology ran a full-page advertisement in the Sydney Morning Herald containing an “Open Letter to Google”, and asking for people to sign their petition supporting the code becoming law. As of 1st January 2021 this “Google Open Letter” petition has only a pitiful 1,189 signatures[25].

In contrast, the YouTube channel Economics Explained[26] ran a campaign dubbed #OurYouTube, as well as a petition calling for abandonment of the code which as of 1st January 2021 has 76,611 signatures[27].

Predictably the media tried to discredit[28] the #OurYouTube campaign with no evidence by suggesting somehow it was illegitimate, seeking comment from Senator Tony Sheldon after thousands of letters and emails of opposition to the code were received by federal MP’s:

> *“I am the target audience of this scare-letter campaign and I am not buying it. And no one bought them crying poor this week either. Australians know how big their profits are and how little tax they pay here,” he said.*
>
> *“I would be interested to know if this campaign is to any extent being funded by Google or its associated companies.”*

However, the fact that the activism of the Australian public against this code is so large that the thought of it being funded by Google or its associated companies is even entertained speaks volumes.

The last technique by the media is to conflate issues concerning digital platforms together to paint technology companies that run those platforms as bad, and thus deserving of punishment through the introduction of this code. Some issues that are conflated are unproven tax avoidance/minimisation allegations, concerns about dis/misinformation, and privacy issues. None of these issues are addressed in this code.

Lastly, of the around 1,406 submissions that the ACCC received regarding their exposure draft, a whopping 93% of those were emails rejecting this code in its entirety.

In the face of overwhelming attempts by news media businesses to propagandise, it is abundantly clear from the evidence that Australians do NOT want this code.

[25] https://www.centreforresponsibletechnology.org.au/google_open_letter
[26] https://www.youtube.com/channel/UCZ4AMrDcNrfy3X6nsU8-rPg
[27] https://www.change.org/p/parliament-of-australia-save-youtube-by-stoping-australia-s-proposed-law-news-media-bargaining-code-ouryoutube-d9a6388b-a916-46c3-ab86-1a412ae1ba2b
[28] https://www.theaustralian.com.au/nation/politics/google-a-suspect-in-scare-tactics/news-story/7008182b8f475ec0b922f7bca9f563dd

Concern 7: The code does not incentivise true, quality, independent journalism

The code professes to be about protecting democracy through support for journalism, yet it only mentions "journalism" a single time and asks for no additional commitment from news media organisations to improve the quality of journalism in Australia.

For a code proposed as a method to increase the quality of journalism in Australia, it is shocking that the word "journalism" only appears a single time within the legislation.

Australian news media organisations are due to receive significant additional financial benefit from this legislation which is being enacted by the representatives of Australian citizens. In light of this, the code's professional standards test is extremely underwhelming:

52P Professional standards test

(1) The requirement in this subsection is met in relation to a news business if:

(a) every news source covered by subsection (2):

(i) is subject to the rules of the Australian Press Council Standards of Practice or the Independent Media Council Code of Conduct; or

(ii) is subject to the rules of the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice; or

(iii) is subject to the rules of a code of practice mentioned in paragraph 8(1)(e) of the *Australian Broadcasting Corporation Act 1983* or paragraph 10(1)(j) of the *Special Broadcasting Service Act 1991*; or

(iv) is subject to internal editorial standards that are analogous to the rules mentioned in subparagraph (i), (ii) or (iii) to the extent that they relate to the provision of quality journalism; or

(v) is subject to rules specified in the regulations that replace those mentioned in subparagraph (i), (ii) or (iii); or

(vi) is subject to other rules specified in the regulations; and

(b) every news source covered by subsection (2) has editorial independence from the subjects of its news coverage.

(2) This subsection covers a news source if it comprises, whether by itself or together with other news sources, the relevant news business.

Section 52P of the final legislation introduced to parliament

If this code is to become law, Australian citizens must be respected for their actions in support of the news media industry, and as such Australian news media organisations must make a reciprocal additional commitment to professional standards through the introduction of a mandatory code of practice/conduct with significant penalties for breaches of this code, including financial penalties and/or exclusion from this code.

Some examples of the weak provisions in this professional standards test are as follows:

1. The Australian Press Council does not have the power to order compensation, fines or other financial sanctions[29] for breaches to its Standards of Practice. The limit of punishment it can apply is to force its judgements to be published by the offending publication.
2. The Independent Media Council[30] only has the power to recommend the making of an apology, or the withdrawal of an article. The limit of punishment it can apply is to force its judgements to be published by the offending publication.

Currently if a news media organisation does a bad job or becomes untrusted by the public they will lose significant revenue due to loss of readership, which one assumes is the reason that the above codes do not include financial penalties because the economic system they operated in had penalties built in.

However, as this code reinvents the economic model of publishing news content in Australia, this code removes the ability for the public to assign penalties to news organisations. Therefore, effectively this code creates an exclusive class of organisations and individuals that get paid to speak on the Internet, with no way for that privilege to be revoked.

The code is thus likely to degrade the quality of journalism in Australia through lack of penalties for producing poor quality journalism.

[29] https://www.presscouncil.org.au/handling-of-complaints/
[30] http://www.independentmediacouncil.com.au

Concern 8: The code offers to news businesses unfair access to privileged information about algorithms

Algorithms of digital platforms are highly sensitive, and information about them is carefully controlled to both ensure performance, and protect against cheating/gaming poor quality content higher in the rankings than it deserves to be.

By granting privileged access to information about algorithms to news media organisations the code will result in a poorer Internet experience for Australians, and will disadvantage small businesses, organisations, and individuals in Australia whose content competes for position with content of news media organisations, and thus will be ranked poorer due to the introduction of this code.

Sections 52S, 52T, and 52U all contain similar clauses stating that the digital platforms must give notice of changes they make to algorithms with significant effects on various aspects that affect news media organisations in relation to their content:

52S Change to algorithm or practice to bring about identified alteration to distribution of content with significant effect on referral traffic

(1) Subsection (2) applies if:

(a) a change is planned to be made to an algorithm or internal practice of the designated digital platform service; and

(b) the dominant purpose of the change is to bring about an identified alteration to the ways in which the designated digital platform service distributes content that is made available by the service; and

(c) the change is likely to have a significant effect on the referral traffic from the designated digital platform service to the covered news content of registered news businesses (considered as a whole) that the service makes available.

(2) The responsible digital platform corporation for the designated digital platform service must ensure that:

(a) notice of the change is given to the registered news business corporation for each registered news business; and

(b) the notice is given:

(i) unless subparagraph (ii) applies—at least 14 days before the change is made; or

(ii) if the change relates to a matter of urgent public interest—no later than 48 hours after the change is made; and

(c) the notice describes the change, and the effect mentioned in paragraph (1)(c), in terms that are readily comprehensible; and

(d) if there are other designated digital platform services of the responsible digital platform corporation—the notice is given in terms that relate specifically to the designated digital platform service (and not in terms that relate to that service and those other designated digital platform services in aggregate).

(3) However, subsection (2) does not apply if the change is made within 14 days after the day on which the registered news business corporation was registered under section 52G.

Section 52S of the final legislation introduced to parliament

The code is absolutely ignorant of the fact that the majority of algorithms are not used exclusively for news content, but instead position news content along with many other types of content. By mandating that details of changes to algorithms be shared with only with news organizations that meet the criteria for inclusion under this code it will give them significant unfair advantage over those other types of content and resources, and the businesses and individuals that create it.

For example, Google Search might come back with the below results when searching for the term “Cafes in Sydney”:

A. An article created by a publication eligible for inclusion in this code titled *“Top 10 cafes in Surry Hills”*

B. An article created by a publication not eligible for coverage under this code titled “The Best Sydney Cafes Ranked”

C. The website of a popular small cafe business in Darlinghurst

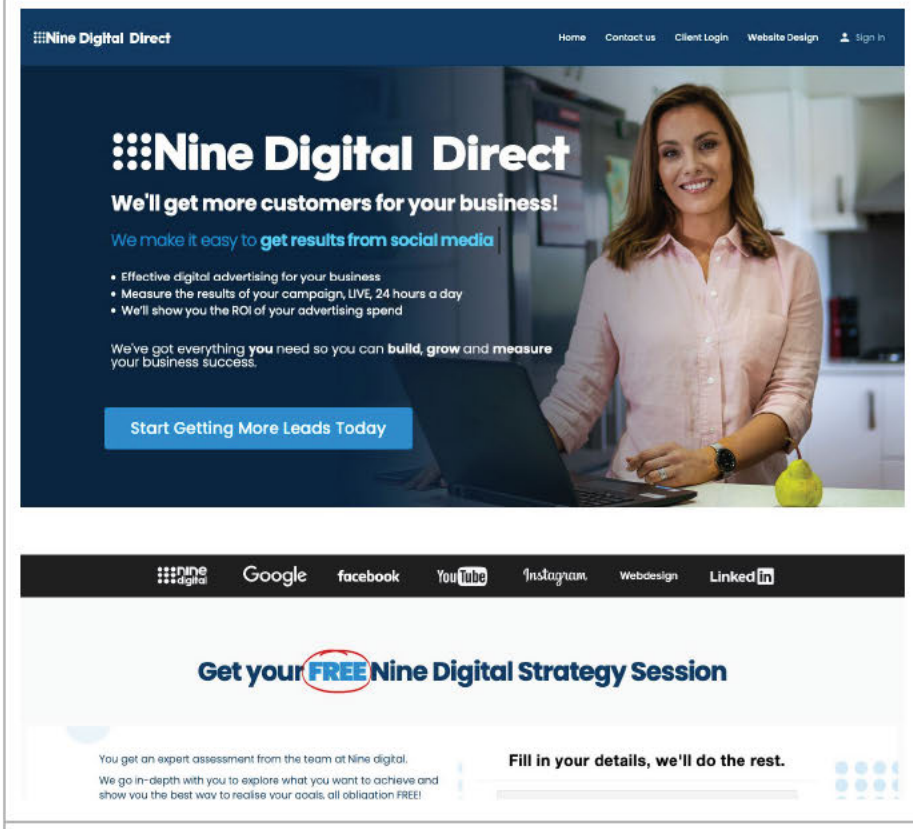
As a result of this code's introduction, as news media organisations learn more and more about the algorithms used by Google Search they will be able to “game” their content higher in the search results using their additional knowledge of how the algorithm works. This will mean that content from news media organisations will appear above where it deserves to be, pushing down more relevant content in the results such as perhaps that of the small cafe business listed at item C above. This will lead to less clicks through to the small cafe’s website, less customers, and a less successful business due to the introduction of this code.

Furthermore, because the publication that created item B above is not eligible for inclusion under this code (as they only publish social articles, not “core news content”) they will also receive less clicks through to their content even though this search isn’t even related to “core news” in the way that a search for “Coronavirus case count” would be.

This information learnt by news organisations will significantly benefit them in other ventures unrelated to news, and financially disadvantage businesses that do not have a “core news content” generating business. There are no restrictions on what the news organisation can do with the learnings gained from the sharing mandated under the code.

For example The Sydney Morning Herald will be able to share learnings about how digital platform’s algorithms work with their Drive.com.au as they are both owned by Nine Entertainment, leaving CarSales.com.au at a disadvantage which does not have a news media arm to feed it this type of information.

Similarly, this knowledge of how algorithms work will be able to be shared between The Sydney Morning Herald and Nine Digital Direct, which is Nine Entertainment’s digital marketing business specialising in Search Engine Optimisation and as their website says “getting results from social media”. This will significantly disadvantage other SEO businesses that compete with Nine Digital Direct.



The home page of Nine Entertainment's Nine Digital Direct division[31]

As discoverability of content and the receipt of referrals from digital platforms is so important for businesses, information disclosed to news media businesses about the operation of algorithms must be treated in the same way as insider information is treated on financial markets.

News media businesses must be heavily penalised if information disclosed to them under this code is used to benefit ventures that are not related to journalism.

[31] https://ninedigitaldirect.com.au/

Concern 9: The code offers payment exclusively to news media businesses for content of neither public significance nor democratic value in an anti-competitive manner

When a media organisation is a publisher of primarily *core* news content, they're unfairly allowed to bargain and seek remuneration over the expanded definition of *covered* news content which could include anything from sports, to restaurant reviews, to the top 10 online cat videos from 2020.

This introduces an extreme disadvantage for content providers who are not considered to be publishers of primarily *core* news content, as for the content they publish (which meets the definition of *covered*, but not *core* news content) they will have to compete against potentially worse content from news businesses that is subsidised under this code, and better targeted at the algorithms of digital platforms.

Core and covered news content is described in section 52P of the final legislation:

core news content means 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) current issues or events of public significance for Australians at a local, regional or national level.

covered news content means content that is any of the following:

(a) core news content;

(b) content that reports, investigates or explains current issues or events of interest to Australians.

Section 52P of the final legislation introduced to parliament

The code mandates that as long as the primary purpose of a news source is to publish core news content, that bargaining can (and thus will) be conducted around payment for content described by the expanded covered news content definition.

52ZZ Matters to consider in arbitration, etc.

(1) In making a determination under subsection 52ZX(1) (including in complying with subsections 52ZX(7), (8) and (9)), the panel must consider the following matters:

(a) the benefit (whether monetary or otherwise) of the registered news business' covered news content to the designated digital platform service;

(b) the benefit (whether monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content;

(c) the cost to the registered news business of producing covered news content;

(d) whether a particular remuneration amount would place an undue burden on the commercial interests of the designated digital platform service.

(2) In considering the matters set out in subsection (1), the panel must consider the bargaining power imbalance between Australian news businesses and the designated digital platform corporation.

References to "covered news content" in section 52ZZ of the final legislation introduced to parliament

This is an incredibly unfair aspect of the code as it gives special, undeserved privilege to news media businesses in covering topics which are neither of public significance or democratic value.

For example, I personally have an interest in Formula 1 motorsport. This has at times in the past made me consider starting a publication covering topics of interest to Formula 1 fans, such as analysis of race strategies, race reports, travel guides, and other related information. On my personal blog I have written examples of such articles[32].

If I were to attempt a foray into publishing my commentary about Formula 1 motorsport on the Internet as I've considered doing, I will receive no financial or other benefit from this code when my content appears on digital platforms.

However, news media businesses writing about Formula 1 will receive the full complete benefit of this code for their articles due to them also publishing content considered *core* news content. But these articles are in no way related to public debate or informing democratic decision making; they are about sport.

This use of *core* news content to determine the beneficiaries of the code, and use of *covered* news content to determine what content is bargained over creates an extremely out-of-balance and anti-competitive market on the Internet for content not considered core news content.

[32] https://www dylanlindgren com/2018/05/02/a-spectators-guide-2018-chinese-grand-prix/

Concern 10: The code is incongruent with the current position and proposed direction of Australian copyright legislation

The code through attributing costs for user generated content to digital platforms makes it incongruent with Australian copyright legislation which has a "safe harbour" principle that provides indemnity for services for which the content of users transits through.

Furthermore, the United States of America has a "fair use" clause when it comes to copyright which countries like Australia are moving towards which this code also potentially contradicts.

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

Copyright law determines that, as long as platforms are not effectively "authorising" the infringement, and they offer methods for that content to be pulled down, they are not liable for content posted by users.

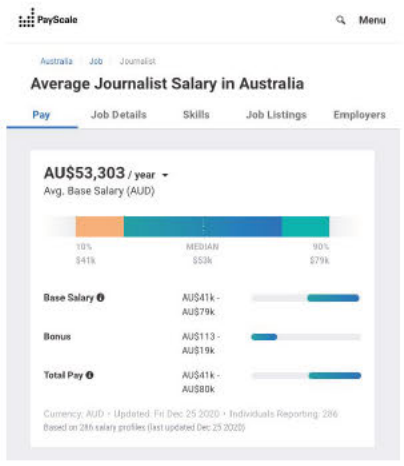
For example, the NBN (National Broadband Network) is not liable if a pirated movie travels across their network, and Telstra is not liable if a terrorist uses their network to plan a terrorist operation.

However, the code mandates that digital platforms are responsible for content posted by users by attributing a cost for that content posted by users to the digital platform. This is incongruent and contradictory with Australian copyright law.

Concern 11: The code stifles business models for journalism that can exist without onerous legislation such as this code

Many journalists such as Matt Taibbi, Andrew Sullivan, Erick Erickson and Glenn Greenwald are starting their own independent newsletters, sometimes using digital platforms like Substack to facilitate this. These newsletters can be profitable for the journalist, and are just one example of many journalism funding models that are viable in the Internet age. People are willing to pay for good journalism. But this code significantly handicaps these new funding models potential for success.

A lot of new journalism funding models are individual based, and as the average salary for a journalist in Australia (as listed on PayScale.com[33]) is between $41k and $80k, most journalists using this new funding model would be excluded from this code as the revenue test in section 52M mandates a turnover of at least $150k.



Average salary of a journalist in Australia as listed on PayScale.com

25 **52M Revenue test**

26 (1) For the purposes of this Division, the requirement is that the annual
27 revenue of the corporation (or of a related body corporate of the
28 corporation), as set out in the corporation's (or the related body
29 corporate's) annual accounts prepared in accordance with generally
30 accepted accounting principles, exceeds $150,000:
31 (a) for the most recent year for which there are such accounts; or
32 (b) for at least 3 of the 5 most recent years for which there are
33 such accounts.

Section 52M of the final legislation introduced to parliament

In combination with concerns 7 (professional standards test), 8 (algorithm notification), and 9 (unfair payment) this exclusion is particularly toxic as not only will journalists using this new business model not get financial benefit for journalism they produce, but also will not get the benefit of algorithm knowledge, driving their content lower in search results and feeds. This code will harm journalism funding models that could exist without the need for the "red tape" and handout that this code mandates.

[33] https://www.payscale.com/research/AU/Job=Journalist/Salary

Recommendations

While it is without question the sensible position that this abhorrent code must be abandoned entirely, there are alterations that at a minimum must be implemented and will provide sensible relief from some of the most significant concerns listed above. These recommendations are listed below.

Recommendation 1: Factor in costs for digital platforms for making news content available

The costs to digital platforms for “making content available” should be included in the “two-way value transfer”. These may be things like:

- Hosting, infrastructure, electricity, and bandwidth fees
- human resources costs of engineers and staff to create the digital platform
- the cost of monetising any benefit that is gained by digital platforms having news content on their platform

Digital platforms must be consulted to determine a complete, thorough list of costs to include.

Recommendation 2: Recognise the act of hyperlinking as a part of the free and open Internet

Remove “hyperlinking” as something that is considered to be “making available” content on digital platforms, and protect the foundational aspects of a free and open Internet.

Recommendation 3: Ensure the code offers Australian citizens a sufficient chance oppose digital platforms being designated by the Treasurer

For example, by removing the ability for the Treasurer to designate new digital platforms through legislative instruments.

Instead, require the digital platforms designated as such under this code be included within the legislation.

Ensure that any new designations have public consultation periods of at a minimum 3 months to allow Australian citizens who are users of the digital platform sufficient to have their voice heard.

Recommendation 4: Increase incentive for quality journalism through reciprocal commitment from news organisations

Australian news media organisations must make a reciprocal additional commitment to professional standards through the introduction of a mandatory code of practice/conduct with significant penalties for breaches of this code, including financial penalties and/or exclusion from this code.

Introduce a mandatory media ethics code (as opposed to the voluntary ones which news media currently subscribe to) which protect Australian democracy by ensuring fairness and impartiality, and results in exclusion from the benefits provided by the News Media Bargaining Code if it is breached too many times/too severely.

Recommendation 5: Algorithm knowledge to be treated similarly to insider trading information on financial markets

Knowledge gained about the changes to algorithms must be kept securely inside the news media organisation ,and only used for purposes of optimising core news content.

Heavy penalties should apply if knowledge about changes to algorithms is shared with related entities of the news media organisation, or if it is used to optimise non-core news content.

Recommendation 6: Consistency with “fair use” and “safe harbour“ principles

Ensure this code is consistent with “fair use” and “safe harbour” principles by for example ensuring that any content posted or sent by users does not require payment from digital platforms under this code.

If content posted by users, but subsequently “enhanced” by the digital platform by automatically retrieving additional content (e.g. an image from an article for which the user posted a hyperlink to) this can require payment by the digital platform.

Conclusion

Thank you again for the opportunity to respond to the inquiry, and please seriously consider the above points and ensure they are fully addressed in the code prior to it becoming law.

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