



# PERISCOPE

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## The Australian News Media Bargaining Code

Jake Goldenfein\*

The *News Media Bargaining Code* is Australia's response to calls to redistribute advertising revenues between digital platforms and News Media Organisations (**NMOs**). Newspaper circulations and advertising revenues have declined with the growth of online news.<sup>1</sup> In Australia, print advertising revenues are predicted to decline a further 14.5% between 2019 – 2024.<sup>2</sup> Advertising has always generated more profit than newspaper subscriptions, but online advertising has proved less lucrative for NMOs than print,<sup>3</sup> and the ratio of print to online advertising revenue is decreasing.<sup>4</sup> There are multiple causes, including new forums for advertising spend,<sup>5</sup> the growth of behavioural advertising (where advertisers bid on ad space according to the likelihood of influencing consumer behaviour, informed by rich profiles and inferences about user behaviour and preferences) over contextual advertising (*ie* advertising based on the features of a website or piece of content), and platforms' control of the profitable ad-tech ecosystem where NMO ad inventory is sold online.<sup>6</sup> One suggested policy response is to increase public support for journalism through grants and tax incentives. The NMBC, however, reflects a different policy direction, one that attributes responsibility for the decline of NMO profit on the platforms themselves, and requires platforms to remunerate NMOs for indexing news content on platform services.

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1 Statista, Newspaper Industry in Australia (2020) (summary available: [www.statista.com/topics/5109/newspaper-industry-in-australia/#dossierSummary](https://www.statista.com/topics/5109/newspaper-industry-in-australia/#dossierSummary)).

2 PwC, *Australian Entertainment and Media Outlook 2020 - 2024* (available: [www.pwc.com.au/industry/entertainment-and-media-trends-analysis/outlook/newspapers.html](https://www.pwc.com.au/industry/entertainment-and-media-trends-analysis/outlook/newspapers.html)).

3 ACCC, *Digital Platforms Inquiry: Issues Paper* (26 February 2018) (available: [www.accc.gov.au/system/files/DPI%20-%20Issues%20Paper%20-%20Vers%20for%20Release%20-%2025%20F..\\_%20%28006%29.pdf](https://www.accc.gov.au/system/files/DPI%20-%20Issues%20Paper%20-%20Vers%20for%20Release%20-%2025%20F.._%20%28006%29.pdf)) reports that from 2011-2015 Australian newspaper and magazine publishers lost \$1.5billion AUD (news) and \$349million AUD (magazines) in print advertising revenues, and gained only \$54million AUD (news) and \$44million (magazine) in digital advertising.

4 Felix Richter, 'The Decline of Newspaper Advertising Continues' *Statistica* (7 September 2012) (available: [www.statista.com/chart/596/advertising-revenue-of-us-newspapers/](https://www.statista.com/chart/596/advertising-revenue-of-us-newspapers/))

5 Australian Communications and Media Authority, *Communications Report 17/18* (2019) at 15 (available: [www.acma.gov.au/sites/default/files/2019-08/Communications%20report%202017-18.pdf](https://www.acma.gov.au/sites/default/files/2019-08/Communications%20report%202017-18.pdf)) reports that Australian print media's share of advertising expenditure has decreased from 46 to 13%, while the share of online advertising has increased from 15 to 48%.

6 In 2019, around 20% of Google's advertising profit was generated by intermediating between third party publishers' (Network Members') properties via AdMob, AdSense and Google Ad Manager. The remaining 80% is from selling on Google and YouTube. See Alphabet Inc. *Form 10K United States Securities and Investment Commission* (2020) (available: [www.sec.gov/Archives/edgar/data/1652044/000165204420000008/goog10-k2019.htm](https://www.sec.gov/Archives/edgar/data/1652044/000165204420000008/goog10-k2019.htm)).

NMOs typically characterise platform business models as undermining profit in three related ways:

### 1) Piracy

NMOs claim that platforms substitute their readership by scraping titles and “snippets” for indexing on news aggregators. The suggestion is that platforms are *stealing* just enough content to prevent consumers clicking through to NMO properties. NMOs thus lose page impressions and associated advertising revenue to platforms, who reap those returns on their search engine results, news aggregator indexes, and social media feeds. While there is some evidence that a proportion of news aggregator users do not click through to NMO websites,<sup>7</sup> evidence for market substitution is equivocal, and contradicted by empirical studies showing that platforms divert more traffic to news websites than they substitute.<sup>8</sup>

### 2) Free-riding

Even without market substitution, a complimentary claim for redistribution suggests platforms unfairly free-ride on expensive to produce, high-quality journalistic content. Quality content improves search engine and social media products, increasing platform revenue even if users *do* click through to NMO properties. Further, because platforms better control and exploit data flows between users, platforms, and ad tech ecosystems, stakeholders argue platform ad inventory is priced higher than inventory on NMO properties.<sup>9</sup>

This claim is empirically more complex because of the opacity of data and traffic flows. The link between diminishing NMO revenue and growing platform profit is hard to quantify. It may be that platforms free-ride on NMO content, but search engines and social media services index a large and diverse media ecosystem. And NMOs simultaneously benefit from increased traffic and greater exposure provided by platforms.

These claims have nonetheless achieved some willingness from platforms to financially contribute to news generation.<sup>10</sup> Deals proposed, however, have not satisfied all parties, with some NMOs arguing they were offered only commercially unfavourable terms that directly restrict options for content monetisation, and limit access to valuable audience data collected by platforms that might enable NMOs to better exploit their inventory or improve their services.<sup>11</sup>

### 3) Market power

A third basis for redistribution is platforms’ excessive market power. Specifically, because NMOs rely on monopolistic search engines and social media services to make their content discoverable, platforms are essential trading partners. NMOs thus have limited power to negotiate the terms on which to supply their content. Platform market power has now become the trigger-point around which incumbent media industries work to resist the platform business model that is producing dramatically higher advertising revenues, and the highest value firms in the world.

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<sup>7</sup> Maria-Daphne Papadopoulou and Evanthis-Maria Moustaka, ‘Copyright and the Press Publishers Right on the Internet: Evolutions and Perspectives’ in Tatiana-Eleni Synodinou et al, *EU Internet Law in the Digital Era* (Springer 2020), at 104.

<sup>8</sup> Ibid.

<sup>9</sup> ACCC, *Digital Platforms Inquiry: Preliminary Report Submission* (4 March 2019), News Corp Submission (available: [www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/preliminary-report-submissions](http://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/preliminary-report-submissions)).

<sup>10</sup> Google Europe Blog, ‘Partnering with Belgian News Publishers’ (12 December 2006) (available: <https://europe.googleblog.com/2012/12/partnering-with-belgian-news-publishers.html>); Frederic Filloux, ‘Inside Google’s Deal with the French Media’ *Monday Note* (30 November 2020) (available: <https://mondaynote.com/inside-googles-deal-with-the-french-media-c903290b7914>); Sundar Pinchai, ‘Our \$1 Billion Investment in Partnerships with News Publishers’ *Google News Initiative* (available: <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/>).

<sup>11</sup> ACCC, *Digital Platforms Inquiry: Submissions* (3 May 2018), News Corp Submission (available: [www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/submissions](http://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/submissions)).

## The Digital Platforms Inquiry

Whereas privacy and free-riding primarily inform European regulatory strategy in this domain, platform market power framed the Australian regulatory response to calls for advertising revenue redistribution. In December 2017, the Australian treasurer requested the Australian Competition and Consumer Commission (ACCC) investigate the impact of platforms on the state of media and advertising services markets, in particular in relation to the supply of news and journalistic content.<sup>12</sup> The result was the Digital Platforms Inquiry, and in 2021, its first substantial output, the News Media Bargaining Code (NMBC).<sup>13</sup>

Two general themes emerged from stakeholder submissions and discussions for the Digital Platforms Inquiry. The first was the need for remuneration models between platforms and NMOs. There were some calls to mirror the European approach of extended copyright enforcement.<sup>14</sup> But other industry stakeholders preferred avoiding new copyright extensions, instead requesting the ACCC assist directly in negotiating fair terms and conditions with Google and Facebook. Suggestions included binding dispute resolution related to the pricing of third-party content.<sup>15</sup>

The second central theme in submissions was platforms' lack of transparency in content ranking (*ie* gatekeeping and curating), as well as data asymmetries that made it impossible for NMOs to know their audiences, undermining NMO bargaining positions, and preventing sophisticated engagement with the platform-controlled ad-tech ecosystems.<sup>16</sup>

The *preliminary* ACCC Digital Platform Report focussed on the second theme, and suggested mechanisms for oversight and regulation of how platforms rank news content; new transparency requirements, investigatory powers; and ad price monitoring for a newly created regulator – a broad approach to addressing market power through regulatory supervision. There was no discussion of a mandatory bargaining code.

Subsequent submissions by powerful NMOs urged the ACCC to also focus on remuneration models. The final Digital Platforms Inquiry report thus proposed assisting NMOs bargain with platforms via voluntary codes of conduct, with general concerns about transparency narrowed into dealing with platforms' ability to alter curatorial algorithms without warning, and implement policies and formats affecting the display of news and ads. The idea of a regulator empowered to investigate and oversee platform practices was dismissed.

The idea of voluntary codes was short-lived, however, as it became clear that remuneration for content could not be achieved through a voluntary process. Accordingly, in May 2020, the ACCC released a "concepts paper" announcing a plan to develop a *mandatory* code of conduct to address bargaining power imbalances between Australian NMOs and digital platforms.<sup>17</sup>

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<sup>12</sup> ACCC, *Digital Platforms Inquiry: Terms of Reference* (4 December 2017) (available: [www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/terms-of-reference](http://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/terms-of-reference)).

<sup>13</sup> *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021* (Cth).

<sup>14</sup> ACCC, *Digital Platforms Inquiry: Submissions* (3 May 2018) (available: [www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/submissions](http://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/submissions)) primarily from Film, Stock Image, TV industry groups, Australian Film & TV Bodies.

<sup>15</sup> *Ibid*, submissions by Free TV Australia and Network Ten.

<sup>16</sup> *Ibid*, News Corp Submission 1.

<sup>17</sup> ACCC, *News Media Bargaining Code: Concepts Paper* (19 May 2020) (available: [www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%202019%20May%202020.pdf](http://www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%202019%20May%202020.pdf)).

## The News Media Bargaining Code

The “exposure” draft of the NMBC focussed heavily on platforms sharing user data with NMOs,<sup>18</sup> greater transparency in the ad-tech system, and advanced warnings for changes in curatorial algorithms that might affect the display or presentation of NMO content or ads as ways to address asymmetrical bargaining power. Although there was no transparency to a regulator, platforms were still burdened with considerable transparency obligations to NMOs with whom they bargained under the code. That included transparency around: data collected by platforms about NMO users; the products and services collecting that data; data the platforms make available to NMOs and an explanation of why it is different from the data platforms generally collect. Critically, the draft NMBC introduced a bargaining framework that included collective bargaining for smaller NMOs, obligations to negotiate in good faith, and binding “final offer” arbitration.<sup>19</sup>

To be subject to those obligations and benefits, platforms first needed to be “designated” by the Treasurer,<sup>20</sup> and NMOs had to apply as registered news businesses to the Australian Communication and Media Authority (the media industry regulator).<sup>21</sup> To protect NMOs seeking to negotiate under the code, the NMBC prohibited platforms discriminating (in terms of ranking content) between NMOs that participate in the scheme and those that do not.<sup>22</sup>

Google and Facebook responded fiercely to the draft NMBC. After a campaign of persistent online messaging, in January 2021, Google experimented with downranking Australian news content.<sup>23</sup> Ostensibly intended to probe data and traffic flows between platforms and NMOs, the action also demonstrated the degree to which the Australian news industry was subject to Google’s whims.<sup>24</sup> Facebook’s action was more dramatic, however. On 17 February 2021, Facebook removed all Australian news content posted by NMOs or general users,<sup>25</sup> which (intentionally or not)<sup>26</sup> included a large amount of government information and community content related to essential health services, fire and rescue agencies, and weather information, as well as trade union and community radio station Facebook pages.

Despite Australian government officials insisting they would not back down on the NMBC,<sup>27</sup> and a general admonishing of the platforms’ behaviour, Facebook’s action successfully elicited *major* amendments to the final Bill released on 25 February.

18 ACCC, News Media Bargaining Code: Exposure Draft (31 July 2020)

(available: [www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation](http://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation))

19 Meaning an arbitration panel makes a determination about remunerating after each party submits a final offer for what that amount should be (see s52ZO).

20 s52C.

21 s52D.

22 s52W.

23 See eg Paul Karp, ‘Google admits to running “experiments” which remove some media sites from search results’ (13 January 2021) (available: [www.theguardian.com/technology/2021/jan/13/google-admits-to-running-experiments-which-remove-some-media-sites-from-its-search-results](http://www.theguardian.com/technology/2021/jan/13/google-admits-to-running-experiments-which-remove-some-media-sites-from-its-search-results)).

24 Belinda Barnett, ‘Google’s “experiment” hiding Australian news just shows its inordinate power’ *The Guardian* (14 January 2021) (available: [www.theguardian.com/commentisfree/2021/jan/14/googles-experiment-hiding-australian-news-just-shows-its-inordinate-power](http://www.theguardian.com/commentisfree/2021/jan/14/googles-experiment-hiding-australian-news-just-shows-its-inordinate-power)).

25 Mitchell Clark, ‘Facebook’s Australian media ban is taking down official government pages’ *The Verge* (17 February 2021) (available: [www.theverge.com/2021/2/17/22288256/facebook-australia-news-ban-governmental-agency-accounts](http://www.theverge.com/2021/2/17/22288256/facebook-australia-news-ban-governmental-agency-accounts)).

26 Josh Taylor, ‘Treasurer says Facebook “damaged its reputation” with Australian News Ban’ *The Guardian* (18 February 2021) (available: [www.theguardian.com/australia-news/2021/feb/18/facebook-to-restrict-australian-users-sharing-news-content](http://www.theguardian.com/australia-news/2021/feb/18/facebook-to-restrict-australian-users-sharing-news-content)).

27 Natalie Oliveri, ‘Treasurer tells Facebook “we’re not backing down” as talks continue’ (19 February 2021) (available: [www.9news.com.au/national/facebook-news-ban-australia-prime-minister-rallies-international-support-foreign-governments/a5f164b2-a447-4fa6-ab2e-b042c303c19c](http://www.9news.com.au/national/facebook-news-ban-australia-prime-minister-rallies-international-support-foreign-governments/a5f164b2-a447-4fa6-ab2e-b042c303c19c)).

The final Bill amended criteria for designating platforms as subject to obligations under the NMBC. Whereas the exposure draft required the Treasurer to make such a designation taking into account whether there is a significant bargaining imbalance between NMOs and platforms, the final legislation also requires consideration as to whether a platform 'has made a significant contribution to the Australian news industry through agreements relating to news content of Australian news business (including agreements to remunerate those businesses for their news content).'<sup>28</sup> The result being that if commercial deals (of unspecified scope and with unspecified parties) are made between platforms and NMOs, platforms can avoid being subject to the code entirely.

Second, even if platforms are designated as subject to the code, the transparency obligations owed to NMOs are considerably diminished from those outlined in the exposure draft. Platforms are now only obliged to supply data relating to interactions of users who interact with NMO content through a platform service,<sup>29</sup> and to give prior warning about changes in algorithmic curation and ranking that might affect NMO content or advertising.<sup>30</sup> The final amendments excluded transparency obligations around data that platforms collect on NMO users generally (*ie* even when not interacting with NMO content), how (*ie* through which products and services) that data is collected, and the difference between the data collected by platforms and the data given to NMOs.

Third, the NMBC introduced "standard offers" that enable parties to contract out of even those remaining transparency requirements, as well as arbitration.<sup>31</sup> And finally, discrimination between NMO content is not prohibited if based on commercial deals that included preferential rankings.<sup>32</sup> In other words, platforms and NMOs are now entitled to make deals that result in preferential rankings. This amendment makes higher ranking for content legitimate compensation for less financial remuneration, which undermines, to an extent, the spirit of the prohibition on differentiation between NMOs that participate in the code and those that do not. The amendment also disadvantages the ABC and SBS (Australia's publicly funded NMOs) who are less incentivised to bargain about remuneration or make commercial arrangements with platforms because of their public funding.

Commercial deals between platforms and major Australian NMOs have been agreed, but the terms are unknown. No platform has been designated under the code to date, and future designations appear unlikely. Although the Digital Platforms Inquiry proposed broad regulatory goals, the final iteration of the NMBC exchanged the possibility of transparency in the platform-content supplier market for a redistribution of advertising revenues between platforms and NMOs. If the only regulatory goal was to increase NMO bargaining power in the competition over the rents generated by consumer culture and advertising, then the government succeeded. Better deals for NMOs were achieved. But the cost was the opportunity to regulate platform market power through fairness, transparency and oversight.

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<sup>28</sup> *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021* (Cth) s52E(3)(b).

<sup>29</sup> s52R3(3).

<sup>30</sup> s52S.

<sup>31</sup> *eg* s52ZZL indicating that if offers are accepted by NMOs then general requirements, as well as bargaining and arbitration rules do not apply.

<sup>32</sup> s52ZC.

## Issues for discussion

The Australian effort to regulate the relationship between platforms and NMOs has revealed several important issues.

- 1) The threat of regulation is a powerful lever to mitigate platform bargaining power. This is not surprising considering platform market power builds off the opacity of data flows, enabling control over both consumers and market participants. This provokes the question of whether achieving greater remuneration for private media companies was worth giving up the chance to address that market power more broadly through transparency and accountability. Has the NMBC allowed platforms to buy their way out of regulation?
- 2) The European approach leans more heavily on piracy and free-riding normative claims than the Australian strategy. The result is extended property rights to information goods. What are the benefits and detriments of these different approaches to market design? Is Australia sensible in avoiding the doctrinal baggage associated with extending copyright and focussing on transparency and binding arbitration?
- 3) The democratic necessity of journalism was deployed as the normative lodestone for intervening in a competition between industrial sectors over advertising revenues. Is this a fair rationale, especially if the result challenges media plurality, and increases reliance on private platforms to support the production of public goods?
- 4) Media pluralism may be collateral damage under the amended NMBC. Once platforms enter into commercial arrangements with large NMOs, the chance of being designated as subject to the code diminishes, decreasing incentives to enter into similar arrangements with smaller NMOs.<sup>33</sup> Is this appropriate?
- 5) Platforms are critical infrastructure for political communication, especially in the context of election campaigning, and their threat to interfere with government communications was highly effective. This speaks to the general power dynamics between governments and platforms. What does this regulatory story say about the ability of governments like Australia to successfully regulate in this domain?
- 6) Australia has demonstrated little appetite for addressing the diminishing profitability of NMOs and associated democratic consequences through public funding. What does it mean to fund the public good of journalism through the profits of platform controlled behavioural advertising? Does it render journalism dependent on platform advertising revenue? Does it legitimise and entrench platform processes of data extraction, trading behavioural “insights”, and influencing consumer behaviour, that provoked the ACCC, elsewhere in the Digital Platforms Enquiry, to call for reform to privacy laws and the ad-tech ecosystem?
- 7) Commercial arrangements with NMOs appear oriented around new aggregator products like Google News Showcase. Could this affect the quality and priorities of news content (and associated advertising) when explicitly produced to conform with platform dynamics?<sup>34</sup>

33 Denham Saddler, 'Lack of media deals with small firms “concerning”': *Sims' Innovation Aus* (26 April 2021) (available: [www.innovationaus.com/lack-of-media-deals-with-small-firms-concerning-sims/](http://www.innovationaus.com/lack-of-media-deals-with-small-firms-concerning-sims/)).

34 Derek Wilding et al, 'The Impact of Digital Platforms on News and Journalism Content' *Centre for Media Transition – University of Technology Sydney* (2018).

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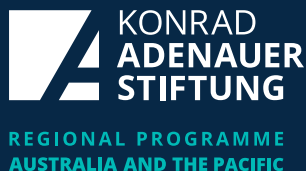
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