

CPI's Oceania Column Presents:

When Code is Law: Bargains Between News Publishers and Platforms

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I. Introduction

In July 2019, the Australian Competition and Consumer Commission (“ACCC”) published the final report of its Digital Platforms Inquiry.¹ In that report, the ACCC made two findings of a substantial degree of power. It considers that Facebook has substantial market power in the supply of display advertising and that Google has substantial market power in the supply of both general search services and search advertising services as well as substantial bargaining power in its dealings with news media businesses in Australia.² Under section 46 of the *Competition and Consumer Act 2010* (Cth), a business with a substantial degree of power in a market is not allowed to engage in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.

The ACCC has not found that there has been misuse of market power. However, it expressed concern about market structure and bargaining power imbalances in some of the 23 recommendations made in the Digital Platforms Inquiry report. These included wide-ranging reforms to consumer protection and privacy laws. In December 2019, the government supported six of these recommendations in their entirety and ten “in principle” (with plans for further reviews). It “noted” five others and rejected two.³

One of the six supported recommendations was to:

The Government will address bargaining imbalances between digital platforms and news media businesses by asking the ACCC to work with the relevant parties to develop and implement a voluntary code to address these concerns. The ACCC will provide a progress report to Government on code negotiations in May 2020, with codes to be finalised no later than November 2020. Any code will be considered binding on the parties who elect to sign up to it. If an agreement is not forthcoming, the Government will develop alternative options to address the concerns raised in the report and this may include the creation of a mandatory code.

After the ACCC had conducted initial meetings with Facebook and Google, it reported back to the Australian Government. As a result, on 20 April 2020, the ACCC was directed to develop a mandatory code of conduct.⁴ The direction included the requirement that the:

draft mandatory code will be released for consultation by the ACCC before the end of July, with a final code to be settled soon thereafter.⁵

On May 19, 2020, the ACCC released a Concepts Paper seeking views on each of the issues to be covered in a mandatory code to address bargaining power imbalances between Australian news media business and each of Google and Facebook. There was an unusually short time allowed for responses and they were due by June 5, 2020.⁶

This article considers the nature of the value relationship between news publishers and platforms. It provides a context for industry codes and analyses the platform position in respect of that value relationship. It also notes the likely next code on “fake news.”

II. The Value Arguments

One of the issues that is most difficult in dealing with this is defining “news.” Indeed, it is considered by the ACCC to be a threshold issue which is why it's question number one in the

Consultation Paper. One of the important concepts that drives this is a definition of “Public Interest Journalism:”⁷

journalism with the primary purpose of recording comma investigating and explaining issues of public significance in order to engage citizens in public debate and informed democratic decision making at all levels of government.

The challenge for the ACCC is that although this is a useful definition it does not address where there is an imbalance of bargaining power between, on the one side Google and Facebook and on the other side news media businesses. This leads to an issue as to how content of news can be readily identified for the purpose of any code. It brings up the usual challenges of issues such as whether a blog is news or whether material produced for example by WikiLeaks would also fall into the news category.

At the heart of the issue that the ACCC needs to deal with is the two-way exchange of value between the platform and the news publisher. If news is identified on the platform, a “click through” to the new publisher’s website means that the news provider can gain revenue for advertising on its site. The fact that news is available within the platform’s ecosystem adds value by keeping the customer in that ecosystem and able to be targeted with advertising.

The issue of two-way value exchange is not new to competition regulators. As an example, in telecommunications the interconnection of networks creates value to consumers by allowing them to communicate with others on different networks. In most jurisdictions, this is based on “calling party network pays.” That is, the receiving party network receives a terminating payment from the calling party network. The calling party pays a retail price to its network operator. In practice, there is likely to be symmetry between the networks so the terminating charge acts as a price signal, but the net value tends to zero. As a result, if the price signal is not required, then symmetry can be assumed and there is no wholesale charge. This is called “bill and keep.”⁸

In telecommunications networks, there is symmetry, which is absent from the interaction between news publishers and platforms. This means that any payments made under the code will need to reflect the net exchange of value. This value exchange is highly contested. Google argues that the driver for search results to include news is “societal and not economic.” Facebook also takes the view that there should be no net payment. On the other hand, the chair of a major Australian media company (Nine), Peter Costello suggested that the fee payable should be 10 percent of annual Australian revenue and estimated this amount to be \$A600 million (about \$420 million). Costello is a former Commonwealth treasurer⁹ for the party currently in government.

However, the likely net value exchange will be significantly lower than the amount proposed by the chair of Nine. The referral by the Treasurer does not stop Google and Facebook from proposing prices to the ACCC as the ACCC is drafting the mandatory code. Indeed, this is to be expected from both the news publishers and the platforms. In the debate about value flow, the effect of Google’s exit from providing news search in Spain in 2014 will likely be discussed. There is some evidence, albeit from news publishers, that the effect of the Google news exit was to drive news seeking web users directly to publisher’s websites.¹⁰

III. Codes in Australia

A. *Legislative Background*

The ability to make and enforce codes by the ACCC is provided in Part IVB of the *Competition and Consumer Act 2010* (Cth) (“CCA”). Unless otherwise directed or as determined by the ACCC, section 51AE of the CCA provides that the ACCC can make regulations that “declare the industry code to be a mandatory industry code or a voluntary industry code.” The Government direction in this case means that the code will be mandatory.

In order to understand the implication of a mandatory code of conduct it is worthwhile reviewing the legislative and regulatory arrangements which allow a code of conduct to be enforced. There are two types of code which can be administered by the ACCC. The first is a voluntary code which is typically one made by an industry association and which provides a level of harmonization of the activities of members of that association. Such voluntary codes have also been associated with authorizations provided by the ACCC. These authorizations permit conduct which might be otherwise anticompetitive provided that it is in the public interest. Industry codes contain an internal dispute resolution scheme as well as provisions for monitoring conduct and enforcing industry compliance.

One of the issues that flows from the code process is that the ACCC has a right of audit of businesses which are part of a code. Essentially the ACCC gives notice and the business has 21 days to comply with that notice. The ACCC can use that documentation to ensure that compliance with the code is enforced.

B. *Other Sectors Other Regulators*

The ACCC enforces mandatory codes in the franchising sector, the energy sector and ports for bulk wheat. It also enforces voluntary codes in sectors from horticulture to groceries. In the mandatory code space, there is a part considered to be weaker and in a negotiating power imbalance. For franchising, the weaker parties are the franchisees. In energy, the weaker party is the consumer and in ports, the weaker parties are the farmers.

The Australian Communications and Media Authority (“ACMA”) also deals with sector specific industry codes. Industry bodies develop codes and submit them to the ACMA. Once they are approved and registered, the ACMA enforces the codes. One of the critical codes managed by the ACMA is the Telecommunications Consumer Protections (“TCP”) Code. Enforcement under this code is by way of an infringement notice and the ACMA considers that each affected consumer is a separate infringement.

The ACMA has also introduced its views on fake news. This has been done by publishing an “expectations” note on what would form part of a voluntary code on disinformation.¹¹ It outlines the ACMA’s expectations for a voluntary code of practice on misinformation and news quality to be developed by digital platforms. The ACMA paper, “Misinformation and news quality on digital platforms in Australia: A position paper to guide code development,” includes a model code framework. It sets out the ACMA's views on objectives and outcomes to be achieved from a code that it considers would benefit Australian users of digital platforms. The ACMA has the power to enforce industry codes and an example is the TCP.

C. Enforcement

The chair of the ACCC, Rod Sims has pledged that Australia's mandatory code of conduct will feature "heavy penalties" for Facebook and Google if they fail to comply, involving fines that are "large enough to matter."¹²

Breach of a code is a civil offense and an industry code may prescribe maxim pecuniary penalties of about \$45,000 for civil penalty provisions of the industry code. This does not sound like the "heavy penalties" mentioned by the ACCC chair. In practice, when a code is breached the ACCC chooses to enforce using more than the code provisions. The ACCC will typically take an action under each of

section 18 of the Australian Consumer Law ("ACL"), which is Schedule 2 to the CCA for misleading or deceptive conduct for which damages is a remedy; and section 29 of the ACL for misrepresentation.

In the latter case, the penalty is up to the greater of \$A10 million or 10 percent of annual revenue.¹³ The ACCC can also ask the court for directions including corrective advertising and a requirement that the business give an undertaking not to repeat the conduct. These undertakings are enforceable by the Federal Court.

This approach has been used by the ACCC in each of *Australian Competition and Consumer Commission v. Ultra Tune Australia Pty Ltd* [2019] FCA 12 and *Australian Competition and Consumer Commission v. Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 4)* [2020] FCA 23. The absence of major pecuniary penalties in the code is unlikely to reduce the effectiveness of ACCC enforcement. The cases cited above are in the car wash and mobile mechanic sectors. These have a far smaller interaction with consumers than Facebook or Google.

The audit power may well be used in respect of changes to algorithmic processes. The ACCC was particularly concerned that news publishers may be disadvantaged by changes in algorithm by either Facebook or Google:¹⁴

The ACCC understands that digital platforms make very frequent changes to their ranking and display algorithms, which vary from minor alterations to significant changes. A bargaining code mechanism requiring advance notice would need to include a threshold of significance that would trigger the obligation to provide advance notice.

Additionally, such a mechanism would need to specify the length of time required for advance notice of significant changes. This period should be set to provide news media businesses with sufficient time to amend their business strategies to address the effects of the algorithm change.

The audit provision may well be used to determine whether there had been a change, whether notified or otherwise.

IV. Reaction

A. Facebook's Response

Facebook provided its response in the form of a blog and a copy of its submission.¹⁵ It makes the argument that the symbiotic relationship between news publisher and platform creates value for the news publisher:

Between January and May this year, Facebook's News Feed sent 2.3 billion clicks back to Australian news organisations - for free. These referrals were worth approximately AU\$195.8 million for publishers, based on what the average costs would be for similar activity through our paid advertising tools. In all, we delivered billions of opportunities for publishers to monetise their stories, gain new paying subscribers, serve ads, and keep Australians on their websites.

We've also invested millions of dollars locally to support Australian publishers through COVID-19 relief funds, paying publishers directly for content, coaching and grant programs and industry sponsorships. With an effective Code, we'd like to continue to collaborate and increase our partnerships and investments in Australia.

That is, Facebook is positioning the two-way value exchange as one which benefits news publishers to the same extent that it benefits Facebook. A precursor to a “bill and keep” argument.

B. Google's Response

One of the areas which has had most interest from the ACCC is Accelerated Mobile Pages (“AMP”). These enable near instant loading of content and content as the pages are cached. The AMP are preloaded so when a user clicks on a hyperlink to the AMP it loads quickly on the user's device. One of the issues is that although there are three potential providers of an AMP (Google, Microsoft, Cloudflare), the fact that Google has control of both the AMP cache and its own servers provides some concern to the ACCC. This concern has been expressed in both the Consultation Paper and the Digital Platforms Inquiry report. Google has not made recent comments on AMP. The ACCC regards AMP as a platform in its own right and the Concepts Paper sought stakeholder on whether the bargaining code should apply to AMP (among others) in addition to Google Search and Facebook News Feed (original emphasis).¹⁶ These additional services are also supplied by Google and Facebook and include WhatsApp and YouTube. The ACCC has indicated that the bargaining power imbalance should also be considered for these services.

Google has not published its submission and the ACCC has not published any of the submissions. However, Google has entered into licensing arrangements to license some forms of news in Australia and other countries.¹⁷ This has included licensing news from local and national publishers in Germany Australia and Brazil. However, it is also important to note that Google's licensing does not extend to snippets. The blog emphasizes the potential for monetization by news publishers:

This program will help participating publishers monetize their content through an enhanced storytelling experience that lets people go deeper into more

complex stories, stay informed and be exposed to a world of different issues and interests.

Where available, Google will also offer to pay for free access for users to read paywalled articles on a publisher's site. This will let paywalled publishers grow their audiences and open an opportunity for people to read content they might not ordinarily see.

This blog was written in the context of another Google position, also published as a blog.¹⁸ This sets out a similar argument to that of Facebook. Namely, that the flow is two-way and in favor of news publishers:

Sending people to publishers' news sites—not keeping them “walled” up on Google products, as some claim—is a key way we provide value to the news industry. Every month we send Google users to news sites 24 billion times, providing an opportunity for publishers to grow their audiences and show Google's users ads or offers for subscriptions. Deloitte puts a value of each click for large publishers at roughly between 4-7 U.S. cents.

We also invest in ad technologies that thousands of news publishers around the world choose to use to grow their digital advertising businesses. We analyzed the revenue data of 100 news publishers globally with the highest programmatic revenue generated in Google Ad Manager. On average, we found news publishers keep over 95 percent of the digital advertising revenue they generate when they use Ad Manager to show ads on their websites.

V. Conclusions

Industry codes are designed to provide protection to the weaker party its bargaining with a stronger one. The ACCC has found that Facebook and Google have substantial market power in relevant markets associated with news publication but has not found that there has been misuse of market power. A voluntary code would have addressed this imbalance, but a failure to negotiate a voluntary code led to an Australian Government direction to the ACCC to impose a mandatory one.

There is a two-way value interaction between platforms and news publishers. Publishers have argued that this should lead to payments by Facebook and Google to news publishers. The ambit claim was \$420 million. The response from the platforms is that the value received by the news publishers is high already. The ACCC must draft a mandatory code which addresses these issues. The code will be in force before the end of 2020. It is likely that the ACMA code on misinformation and news quality will be implemented in a similar timeframe.

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- ¹ ACCC, *Digital platforms inquiry - final report* (2019), <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.
- ² *Id.* at 8 and 9.
- ³ Australian Government, *Government Response and Implementation Roadmap for the Digital Platforms Inquiry* | [Treasury.gov.au](https://treasury.gov.au/publication/p2019-41708) (2019), <https://treasury.gov.au/publication/p2019-41708> (last visited July 1, 2020).
- ⁴ Australian Treasurer & Australian Minister for Communications, *Media release: ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies* | *Treasury Ministers* (2020), <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accc-mandatory-code-conduct-govern-commercial> (last visited July 1, 2020).
- ⁵ *Id.*
- ⁶ ACCC, *Mandatory news media bargaining code: Concept paper* (2020), <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/concepts-paper>.
- ⁷ *Id.* at 3.; ACCC, *supra* note 1 at 285.
- ⁸ Nicholas Economides, *Competition Policy in Network Industries: An Introduction*, in *THE NEW ECONOMY AND BEYOND: PAST, PRESENT, AND FUTURE*, 111 (Dennis Jansen ed., 2006).
- ⁹ In Australia, the Treasurer is part of the executive and a cabinet member. The role is usually considered to be second in power after the prime minister.
- ¹⁰ NEWS MEDIA ALLIANCE, *The Effects of the Ancillary Right for News Publishers in Spain and the Resulting Google News Closure* (2019), http://www.newsmediaalliance.org/wp-content/uploads/2019/10/Final-Revised-Spain-Report_11-7-19.pdf (last visited July 1, 2020).
- ¹¹ ACMA, *ACMA releases guidance to digital platforms on voluntary misinformation and news quality code* (2020), <https://www.acma.gov.au/articles/2020-06/acma-releases-guidance-digital-platforms-voluntary-misinformation-and-news-quality-code> (last visited July 1, 2020).
- ¹² Aaron Patrick, Max Mason & Yolanda Redrup, *Local publishers line up for Big Tech revenue boost*, *AUSTRALIAN FINANCIAL REVIEW* (2020), <https://www.afr.com/companies/media-and-marketing/big-tech-penalties-will-be-large-enough-to-matter-20200420-p54lce> (last visited July 1, 2020).
- ¹³ Specifically, 10 percent of the annual revenue of the business during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.
- ¹⁴ ACCC, *supra* note 6 at 20.
- ¹⁵ Mia Garlick, *Media rules must help news providers harness the value digital platforms can deliver* (2020), <https://tinyurl.com/yag9ajt3> (last visited July 1, 2020); MIA GARLICK, *Response to the Australian mandatory news media bargaining code concepts paper* (2020), <https://tinyurl.com/yap7a5kj> (last visited July 1, 2020).
- ¹⁶ ACCC, *supra* note 6 at 5.
- ¹⁷ Brad Bender, *A new licensing program to support the news industry*, <https://www.blog.google/outreach-initiatives/google-news-initiative/licensing-program-support-news-industry/> (last visited July 1, 2020).
- ¹⁸ Richard Gingras, *Setting the record straight on news*, <https://www.blog.google/outreach-initiatives/google-news-initiative/setting-record-straight-news/> (last visited July 1, 2020).