

# THE BATTLES BETWEEN GOOGLE, FACEBOOK, AND NEWS MEDIA PROPRIETORS OVER FAIR VALUE EXCHANGE FOR NEWS CONTENT

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## **The Battles Between Google, Facebook, and News Media Proprietors Over Fair Value Exchange for News Content**

*By Peter Leonard*

Google and Facebook have been in high profile dispute in Australia as to implementation of a news bargaining code promoted by a competition regulator, the Australian Competition and Consumer Commission (“ACCC”). Why is the Australian Government legislating to require Google and Facebook to pay media proprietors? What is the competition policy rationale for the ACCC being involved in this dispute? Why is continuing disruption of the business of production of in-depth or investigative journalism being addressed by a competition regulator? Why do both the competition regulator and the Australian Government refer to market power of Google and Facebook as a relevant concern to the question of whether, and if so, how much, these global digital platforms “should” pay to media proprietors? These questions have uniquely Australian answers, as examined in this paper. However, the media policy concerns that underlie these questions are common across many countries, some of which are considering levy, subsidy or targeted taxation schemes to transfer value from global digital platforms to domestic media proprietors. This paper considers how and why media policy concerns arising from disruption of news journalism business arose and came to be associated with business success in Australia and elsewhere of Google and Facebook.

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## I. GOVERNMENTS AND THEIR INDUSTRY POLICY FOR THE MEDIA SECTOR

In most countries around the world, the structure of traditional print and broadcast television and radio media has been determined by industry policy set by government. Governments, or regulators appointed by them, have determined who may own major print mastheads, how many they can own, whether they can also own broadcast or pay television or radio broadcasters, and the conditions of licenses issued to them. In those democracies that are reasonably functional, the government when making or adjusting these policy settings justify their decisions by stating diffuse concepts such as needs for diversity or plurality of voice (leading to restrictions such as a prohibition on owning both a major print masthead and a broadcaster in the same city), maintenance of distinct national cultural characteristics, ensuring “local voice” (either nationally, or within geographical regions within a jurisdiction). More recently, some governments have ventured into justification of media regulation to promote continuation of responsible and investigative journalism, which requires drawing a contestable distinction between “good journalism” and mere reportage of alleged facts, or “fake news.”

Whatever the stated policy justifications for a government’s industry policy as to who is licensed or otherwise (through approval or rejection of changes to ownership or control) of media assets, government and media proprietors have evolved complex symbiotic relationships of mutual dependence. Governments desire support of influential domestic media outlets. The continued ability of those media outlets to do business, and to differentiate their journalism, is dependent upon continuing political patronage and susceptible to grant or withdrawal of preferred access for favored media outlets to breaking stories out of government and government agencies.

Many countries do not directly regulate ownership or control of print media mastheads, other than through restrictions on foreign investment of major print mastheads. By contrast, ownership, control and operation of broadcast television or radio is usually highly regulated, with regulation sometimes including cross media controls such as a prohibition on ownership of a major masthead and a free to air broadcast television station in the same city. Often these restrictions operate entirely outside general competition law and the remit of competition regulators, sometimes administered by sector-specific (broadcasting and media) regulators, and sometimes directly by the legislature. As a result, broadly accepted reasoning in antitrust economics is often largely absent from justifications for government policy settings and in framing of legislation affecting the structure of traditional print and broadcast television.

## II. THE INTERNET DISRUPTS WORKABILITY OF INDUSTRY POLICY FOR THE MEDIA SECTOR

The internet changed everything, including the workability of industry policy for the media sector. Broadly, that disruption rolled in two waves.

The first wave was new online derivatives or copies of offline businesses, building audiences from about 2000. These first wave online businesses had already substantially eroded the business model of traditional print and electronic media by 2010, when the smartphone arrived. From that point the rate of erosion in

the business of print and electronic media substantially increased, brought on by combined effect of take-up of smart phones and penetration of broadband internet. Broadband and its wide adoption enabled growth in usage of social media. At the same time, developments by Google in deep data analytics and digital ad technology underpinned Google’s rise to ubiquity in universal search and the digital advertising.

The first wave of online businesses rapidly eroded the “rivers of gold” –revenue of mastheads from classified and display advertising which reliably drove profitability, funded in-depth and investigative journalism, and enabled low per print copy prices to consumers. Print media and free to air television were mature two-sided attention markets, already in decline before antitrust policy makers adopted concepts such as “two-sided markets” and “attention markets”. Traditional media outlets were readily disrupted by shift in the focus of consumer attention to alternative online marketplaces, such as eBay, online realty, online car sales and online employment ads. Most mastheads were reluctant to disrupt their proven business model. Print media by its nature was data poor as to behavior of its readers, at a time when data analytics rapidly fueled value of online business. Online businesses rapidly escalated in value because of the range and depth of data about online interactions (including metrics as to effectiveness of alternative calls to action through measured consumer response) that was available to online businesses, coupled with rapid developments in algorithmic methods and applied data science and network effects.

As a result, when the second wave of internet disruption really took hold (around 2013), few print media outlets had claimed defensible territory in the online classifieds space. Some masthead proprietors gave up and sold off their fledgling online classified businesses to the early online providers. Some of the sellers then burnt up the sale proceeds in loss making publication of mastheads, while waiting for a much heralded but never arriving new dawn of consumer willingness to subscribe, or to make micro-payments for story-by-story access, for quality journalism. Media owners that were late entrants to online were unable to catch up to online rivals who by then already enjoyed advantages in data analytics capabilities and network effects.

### III. FURTHER CHALLENGES OF SECOND WAVE INTERNET DISRUPTION FOR THE MEDIA SECTOR

The second wave brought more fundamental challenges. Growth in consumer utility of universal search disrupted the business model of the online classifieds marketplaces: organic search and AdWords on Google disintermediated many marketplaces. Internet users could more readily browse more widely, and their attention could be captured and directed by the new intermediaries of social media and universal search.

Good online journalism could itself capture attention, but even when it did the economic value of that attention to the media outlet was bounded by the relative paucity of the data about the interaction of the user and the story as compared to the richness and depth of data captured by the new intermediaries of social media and universal search. Value shifted from the entity that owned the destination – the media proprietor – to those entities that could meter, measure and analyse the journey that led to that destination, and those entities that could correlate actual or inferred interest, preferences and characteristics of the journeying consumer and the decisions that they made as to the news that they consumed.

Once the route that a journeying consumer (whether or not identifiable) might elect to take could be predicted in real time and with reasonable probability), intermediaries could seek to influence the choice of destination, and offer products or services to the journeyer was offered along the route to a destination. This new, data analytics driven, capability of intermediaries fundamentally altered both politics and distribution of value along the digital advertising supply chain. Along with manifest consumer benefits of interconnectedness, convenience and choice, we saw emergence of Cambridge Analytica, “fake news,” populist politics, and ever more granular and intrusively targeted digital ads.

Australian media illustrated the global trend. Between 2002 and 2018, Australian newspaper revenue fell from AU\$4.4 billion to AU\$3 billion. Of that decline, 92 percent was from the loss of classified ads: most of these classified revenues went to specialist online providers that targeted niches such as job advertisements, second-hand goods and or real estate listings.<sup>2</sup> Another estimate was that classified advertising revenue declined in nominal terms from AU\$2 billion in 2001 to AU\$200 million in 2016, or in inflation adjusted terms from AU\$3.7 billion to AU\$225 million.<sup>3</sup>

As profitability of big mastheads leached away, so did the capacity of masthead owners to fund in-depth and investigative journalism. This further promoted a shift in audiences to international trusted brands such as *The New York Times*, *Financial Times*, and *The Economist*, or new specialist segment commentators, such as *The Conversation*. It is now forgotten by many commentators, government policy makers and competition regulators, that the fundamental disruption of the business model of masthead print journalism preceded by at least a decade the rapid growth of the global digital platforms. By 2013, and before the subsequent rapid expansion of the respective advertising businesses of Google and Facebook, many print media readers had already moved online, and many were already unmoored from habits and allegiances to reading of local masthead brands. Most of these readers (as new online users) directly navigated to the mastheads, or used media outlet apps on their new smartphones to conveniently find the online news published by these mastheads. But already by 2013, many online users were starting to find and use alternative news sources. Some of these alternative media were reputable, in-depth and investigative journalism outlets. Many were entertainment driven, light on reportage alternatives.

The second wave internet intermediaries also disturbed the relationship of mutual dependence between politicians and media proprietors. The global digital platforms were increasingly profitable, less dependent upon local political patronage and operating largely outside constraints of regulation of traditional media regulation. Data and algorithms tilted the business battleground for consumer attention in favour of the new intermediaries, but they remained behind in the battle for political patronage. The power of traditional media to shift public opinion continued as a potent political issue. In Australia, this well illustrated by Australia's largest-ever parliamentary e-petition, initiated by former prime minister Kevin Rudd (Australian Labor) and later supported by his political opponent and former Prime Minister Malcolm Turnbull, which called for a royal commission into media diversity and had more than 500,000 signatures. The petition stated:

Our democracy depends on diverse sources of reliable, accurate and independent news. But media ownership is becoming more concentrated alongside new business models that encourage deliberately polarizing and politically manipulated news. We are especially concerned that Australia's print media is overwhelmingly controlled by News Corporation, founded by Fox News billionaire Rupert Murdoch, with around two-thirds of daily news-

2 AlphaBeta, Australian Media Landscape Trends, September 2020, available at <https://alphabeta.com/wp-content/uploads/2020/09/australian-media-landscape-report.pdf>.

3 ACCC, Digital Platforms Inquiry: Final Report, June 2019, page 17, available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

paper readership. This power is routinely used to attack opponents in business and politics by blending editorial opinion with news reporting. Australians who hold contrary views have felt intimidated into silence. These facts chill free speech and undermine public debate. Powerful monopolies are also emerging online, including Facebook and Google.<sup>4</sup>

A contrasting perspective was recently expressed by Australian Prime Minister Scott Morrison, in his Facebook post following the Facebook's decision to block Australian users from accessing and sharing news on the Facebook platform:

These actions will only confirm concerns that an increasing number of countries are expressing about the behavior of “BigTech” companies who think they are bigger than governments and that the rules should not apply to them. They may be changing the world, but that doesn't mean they run it.<sup>5</sup>

#### IV. ELECTRONIC BROADCASTING UNDER CHALLENGE

Thus far, our discussion has focused upon print news media and its online disruption of print mastheads from the year 2000 to the present.

Over the same period of disruption of print media, television and radio broadcast media was suffering its own, technologically driven, existential crisis.

Scarcity of radiocommunications spectrum was relieved by shift of broadcasting from analog to digital and rapid improvements in compression technologies for radiocommunications.

Improvements in compression technologies for digital audiovisual content delivered over broadband cable, shift from 3G to 4G mobile communications networks, and upgrade of cable and line-based broadband networks, created bandwidth for new over-the-top and other audiovisual programming streams.

On-demand audiovisual platforms accessible through new broadband networks enabled consumer choice, and enabled program-

ming to be targeted to online audience segments created through data analytics, or tailored to a particular individual.

Fragmentation of audiovisual content audiences eroded the advertising revenue base for broadcast television streams and the ability of television and radio broadcasters to fund in-depth and investigative journalism, resulting in downsizing or closure of television and radio newsrooms. As with text-based news media, data and algorithms tilted the business battleground for attention of consumers of audiovisual news coverage in favour of the new intermediaries.

#### V. THE POSITION BY 2013

In summary, by 2013 and accordingly before the rapid expansion of the advertising businesses of Google and Facebook, the disruption of the business of in-depth and investigative journalism, and the concomitant rise of “fake news,” were well underway.

There had been no relevant failure of competition policy, no failure of media policy, no relevant neglect of competitor regulators or data privacy regulators, abuse or misuse of market power by global digital platforms, or endemic breach of copyright (in media reports generated by media outlets) by global digital platforms.

There had been a technologically driven shift in attention markets for consumers of both text-based and audiovisual “news” in all its varieties – heavy journalism, light entertainment reportage, speculation, gossip and mischievous or malevolent “fake news” – driven by collapse of the two-sided market for newspapers, magazines and television and radio broadcasting.

#### VI. DISRUPTION OF TRADITIONAL MEDIA ACCELERATES FROM 2013 TO THE PRESENT

The rapid expansion of the respective advertising businesses of Google and Facebook from about 2013 exacerbated then existing trends.<sup>6</sup>

##### A. *Google Bowls a Googly*

In the case of Google,<sup>7</sup> consumers of media reports already unmoored from habits and allegiances to reading of local masthead

4 Petition EN1938 - Royal Commission to ensure a strong, diverse Australian news media, available at [https://www.aph.gov.au/petition\\_list?id=EN1938](https://www.aph.gov.au/petition_list?id=EN1938).

5 <https://www.facebook.com/scottmorrison4cook/posts/3992877800756593> (February 18, 2021).

6 A 2019 University of Canberra Digital News Report found that that 33 percent of Australian consumers report accessing news through social media, with 25 percent using search engines to search for news brands and 20 percent using search engines to search for particular news stories. The ACCC noted that between 8 and 14 percent of Google search results trigger a “Top Stories” result, which typically includes reports from news media websites (including niche publications and blogs).

7 A *googly*, also known as a *flipper* or a *wrong un*, is a cricket ball bowled as if to break one way that actually breaks in the opposite way. I could go on to list those few bowlers who were global leading exponents in their day, but any attempt at that list would create more controversy in certain countries than anything else that I say in this paper.



brands could more readily search by story for media content, using increasing poorly spelt and less specific search terms, and thus further unmoor from previous habits and allegiances.

As Google search algorithms improved, so did the quality of algorithmic inferences as to interests, or preferences or characteristics of individual users. Google became less reliant upon identification of a user or correlation of user with actual or express interests, preferences or characteristics. As inferences that Google could draw became more granular and better correlated across groups of users to create audience segments of individual users (whether or not those individuals identifiable by Google) inferred to share inferences or preferences in common, the value to an advertiser of being able to address those audience segments continued to escalate.

Google AdWords – perhaps the greatest marketing innovation of the 21<sup>st</sup> century – enabled users to better self-serve, advertisers to better target, and Google to derive premium for closer match of buyer and seller.

As well as inferences down by users' organic search activities, use of AdWords and clicks on "sponsored links," Google was able to refine audience segments by reference to activities of internet users on YouTube, on Android devices, on media content sites for which Google provided digital advertising services, and so on. Economies and efficiencies of scale and scope created unprecedented business value for Google.

These economies and efficiencies were not directly related to continuing disruption of the business of in-depth or investigative journalism. However, the business success of Google in capturing an escalating share of total expenditures by advertisers on digital advertising further eroded the two-sided funding of in-depth or investigative journalism.

Clearly, disruption of funding for in-depth or investigative journalism is not good for democracy, at least where that journalism is reasonably independent of influence by politicians. But did this disruption promote mere reportage, or fake news? A reasonable contention may be that Google is not economically incentivized to promote in-depth or investigative journalism over mere reportage or fake news, and might be incentivized to put mere reportage or fake news before users that Google algorithms infer prefer such entertainment content over heavy journalism. However, even if this contention is correct, it is no more indicative of a competition policy problem than a choice by a bookseller as to

the respective prominence given to categories of books or individual titles, to match known or inferred preferences of the audience segment being likely patrons of the bookstore.

In other words, it is not at all clear that the success of Google's advertising businesses fundamentally changed the dynamic of continuing disruption of the business of in-depth and investigative journalism as already well underway before the success of those businesses.

Further, Google's search business delivers users to content, not content to users.<sup>8</sup> The media content provider determines whether a story is discoverable through search (the provider can readily block searchability of the provider so wishes), how a story is presented to a user who comes through Google search, and whether digital ads are presented to a user who views a story.

### ***B. Facebook: Moving Destinations by Metering the Pathways***

Facebook's advertising businesses are more vertically integrated into the primacy Facebook platform than Google's more diverse ad tech offerings. Business value of Facebook's advertising businesses is closely aligned to depth of knowledge of Facebook of each particular and known user's use of Facebook and associated Facebook properties including Instagram, Facebook Messenger and WhatsApp.

Facebook itself creates audience segments that it markets to advertisers.

Facebook also enables advertisers to match their own audience segments to Facebook's audience segments: the Facebook Custom Audiences enables Facebook to conduct this matching within an anonymization zone and thereby derive further premium from closer fit of buyer and seller, targeting advertising content to Facebook users segmented at a higher granular level. In the main Facebook service, Facebook can serve inferred-of-interest news stories in or through a Facebook frame that also presents accompanying, granular targeted display or banner advertising to the Facebook user. Unprecedented business value of Facebook derives from combination of availability of audiences at scale, ability to closely target digital ads to actual or express interests and preferences of Facebook users, ability to draw inferences and make correlations to create lookalike audiences and to market audience segments to advertisers, and ability to measure and report upon individual responses to calls to action. Journalist generated news stories are a small part of content made available through the Facebook plat-

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8 There is an important qualification to this statement: Google Search results may also include a summary, or snippet, from or about the story. This leads to a reasonable proposition that Google may divert traffic from a destination at which a story is displayed, by a user seeing sufficient information to then self-select an alternative destination. If the snippet is in fact a direct derivation of text from the story at the destination, a further legal question may arise as to whether the snippet is a copy of, or adaption from the original story, and sufficiently substantial as to be an infringing copy of a copyright work. There is significant divergence between national copyright laws as to such matters. As to snippets, see further ACCC, Digital Platforms Inquiry: Final Report, June 2019, page 16.

form. As with Google, Facebook is not economically incentivized to promote in-depth or investigative journalism over mere reportage or fake news. To the contrary, the depth of Facebook's knowledge of individual users' interests and preferences, and Facebook's ability to derive premium from display or banner advertising that is granularly targeted to the Facebook user, create financial incentive for Facebook to serve mere reportage to Facebook users known to prefer such content. However, it is not clear that the success of Facebook's advertising business fundamentally changed the dynamic of continuing disruption of the business of in-depth and investigative journalism as already well underway before Facebook become the dominant social network. As with Google, Facebook delivers users to content: Facebook claims that in Australia in 2020 Facebook sent 5.1bn clicks to Australian media publishers, which it claims were worth AU\$407m (US\$317m).<sup>9</sup>

#### VII. THE AUSTRALIAN NEWS BARGAINING CODE: WHY SHOULD GOOGLE AND FACEBOOK BARGAIN WITH NEWS PROPRIETORS?

Given the preceding analysis, it may seem strange that news media proprietors, Google and Facebook have recently been in high profile dispute in Australia as to implementation of a news bargaining code as promoted by a competition regulator, the Australian Competition and Consumer Commission ("ACCC").

Why is the Australian Government legislating to require Google and Facebook to pay media proprietors for their business activities as described above?

What is the competition policy rationale for the ACCC being involved in this dispute? Why is continuing disruption of the business of production of in-depth or investigative journalism being addressed by a competition regulator?

Why do both the competition regulator and the Australian Government refer to market power of Google and Facebook as a factor relevant to the question of whether, and if so, how much, these global digital platforms "should" pay to media proprietors?

These questions have uniquely Australian answers, as discussed below.

However, the media policy concerns that underlie these questions are common across many countries, some of which are considering levy, subsidy or targeted taxation schemes to transfer value from global digital platforms to domestic media proprietors. The balance of this paper considers how and why the underlying media policy concerns as to disruption of the business of in-depth and investigative journalism in Australia came to be associated with the business success in Australia and elsewhere of Google and Facebook.

#### VIII. THE AUSTRALIAN GOVERNMENT SETS OFF THE MEDIA BARGAINING DEBATE

The direct association of global digital platforms, Australian media proprietors and the Australian competition regulator started with a referral from the Australian Government in December 2017.

That referral followed a political deal that the Australian Government did to secure agreement of minority party parliamentarians to passage through the Australian Senate of a statute<sup>10</sup> abolishing the "75 percent audience reach rule" and the "two-out-of-three rule." The audience reach rule began life in 1987 and had the effect that the population of the broadcasting license areas controlled by one person or company could not exceed 60 percent (later 75 percent) of the total Australian population. The "two-out-of-three rule," introduced in 2006, was intended to prevent a single person or company from controlling more than two out of three media platforms – commercial radio, commercial television and newspaper – in the same radio license area.

The intended effect of these and related rules was to provide a safety net for voice diversity. Abolition of the rules was proposed as a response to erosion of profitability of broadcast journalism. Abolition of the rules enabled mergers between regional and major city television networks, and cross-media mergers, such as the acquisition of major print masthead owner Fairfax Media by television broadcaster Nine Entertainment, and further consolidation of print mastheads into the portfolio of News Corporation's many mastheads. Prior to these changes Australian media ownership, and print media in particular, was among the most con-

9 See Facebook's submission to the Australian Senate's Economics Legislation Committee, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions).

10 The Broadcasting Legislation Amendment (Media Reform) Bill 2016, later passed as the Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017. See the Report of the Australian Senate Select Committee on Environment and Communications on the Bill, and submissions made in relation to the Bill, at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/MediaReformBill45/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/MediaReformBill45/Report). As to the link between passage of the Bill and the referral to the ACCC, see Amanda Meade & Katharine Murphy, "Media bosses praise Xenophon and government for deal on ownership law," *The Guardian Australia*, September 15, 2017, at <https://www.theguardian.com/media/2017/sep/14/media-bosses-praise-xenophon-and-government-for-deal-on-ownership-law>, Andrew Tillett & Max Mason, "It was a close run thing': how media reform finally got done," *Australian Financial Review*, September 23, 2017, at <https://www.afr.com/companies/media-and-marketing/it-was-a-close-run-thing-how-media-reform-finally-got-done-20170922-gymo6d>.

centrated in the world.<sup>11</sup> These subsequent corporate transactions significantly increased this concentration of ownership.

The Government's deal with the minority party parliamentarians included funding for rural and regional news reporting and requiring the ACCC to inquire and report as to "the impact of digital search engines, social media platforms and other digital content aggregation platforms (platform services) on the state of competition in media and advertising services markets, in particular in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers." Matters to be taken into consideration were to include: "the extent to which platform service providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers; the impact of platform service providers on the level of choice and quality of news and journalistic content to consumers; the impact of platform service providers on media and advertising markets; and the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets; and the impact of information asymmetry between platform service providers, advertisers and consumers and the effect on competition in media and advertising markets."<sup>12</sup>

The ACCC, in its 618-page Digital Platforms Inquiry: Final Report, concluded that Google has substantial market power in the supply of general search services in Australia, substantial market power in the supply of search advertising services in Australia, and substantial bargaining power in its dealings with news media businesses in Australia. The ACCC concluded that "a significant number of media businesses rely on news referral services from Google to such a degree that it is an unavoidable trading partner. Many news media businesses would be likely to incur a significant loss of revenue, damaging their business, if Google users could no longer click on links to their website in search results. For commercial news media businesses, having links to their websites on Google is a necessity."<sup>13</sup>

The ACCC stated that Facebook has substantial market power in the supply of social media services in Australia, substantial market power in the supply of display advertising services in Australia, and substantial bargaining power in its dealings with news me-

dia businesses in Australia. Facebook's alleged bargaining power derived from "the case that many news media businesses in Australia would likely lose significant revenue, with adverse impacts on their business, should they forego referrals from Facebook."<sup>14</sup>

#### IX. THE INABILITY OF NEWS MEDIA BUSINESSES TO INDIVIDUALLY NEGOTIATE TERMS OVER THE USE OF THEIR CONTENT BY DIGITAL PLATFORMS

The ACCC expressly noted that it did not "focus on whether digital platforms have misused their market power,"<sup>15</sup> instead concluding that "the inability of news media businesses to individually negotiate terms over the use of their content by digital platforms is likely indicative of the imbalance in bargaining power. Individual news media businesses require Google and Facebook referrals more than each platform requires an individual media business's content."<sup>16</sup>

The ACCC's key recommendation on news content bargaining was as follows:

Given the imbalance in the relationships between the leading digital platforms and Australian news media businesses, the ACCC recommends that designated digital platforms should each separately be required to provide a code of conduct to the Australian Communications and Media Authority (the ACMA) to govern their commercial relationships with news media businesses. The ACMA would be responsible for designating which digital platforms should be required to implement a code. The development of each code should be informed by a consultation process with news media businesses and contain a strong enforcement mechanism.<sup>17</sup>

This writer contends that "the inability of news media businesses to individually negotiate terms over the use of their content by digital platforms" is not indicative of "imbalance in bargaining power." News and other content – quality journalism, mere reportage and fake news- are shared on digital platforms. Some news content is shared by the content providers electing to post links on social media. Some news content is made available by digital platforms selecting and posting links. Some news content is shared for by users who post links for use by other users. There are two

11 See Tim Dwyer & Denis Muller, "FactCheck: is Australia's level of media ownership concentration one of the highest in the world?," *The Conversation*, December 12, 2016, <https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437>.

12 Terms of Reference dated 4 December 2017, Appendix A to ACCC, Digital Platforms Inquiry: Final Report, June 2019.

13 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Executive Summary at page 8, see further Chapter 5.

14 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Executive Summary at page 10.

15 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Executive Summary at page 10.

16 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Executive Summary at page 16.

17 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Chapter 5, Recommendation 7.



principal beneficiaries: the digital platforms, for whom such links generate traffic and intelligence as to user preferences and interests, which drives revenue for the digital platform, and the content providers, who post links or permit third party links because they want people to click on them. Both beneficiaries receiving benefits and both have the ability to veto the practice (content providers can block linking if they so elect). If the regulatory objective is to compensate beneficiary content providers to the extent that they are disadvantaged in negotiation of a value exchange between these beneficiaries (an exchange which remains one that content providers can elect not to allow), the fair amount of true up to compensate for that disadvantage needs to be capable of objective assessment in order for a regulatory intervention to be reasonable. However, the “fair” true up amount is not capable of calculation by applying commonly accepted economic analysis.

Further, use of advantage in a commercial negotiation is not a misuse or abuse of market power for which compensable legal liability should arise.

Given the difficulty in determining a fair amount of true up for imbalance of bargaining power in a voluntary negotiation and in absence of any evidence of misuse or abuse of market power, it should not be surprising that the regulator elected not to undertake this Herculean task itself, instead sending the task back to the beneficiaries, for them to argue amongst themselves.

A further level of complexity confronted the beneficiaries. Regulating to address imbalance in bargaining power can be simple enough when a product or service is supplied in return for money or money’s worth. Where (as in this case), value flows both directions across multiple party, two-sided attention markets, calculating a true-up for imbalance in bargaining power is another level of difficulty.

Even before a fair and reasonable compensatory payment can be considered, it is necessary to find some level of consensus as to whether value captured by one party should flow at all. News media operators dispute the value delivered to the news outlet by Google and Facebook respectively presenting links to the news content to Google and Facebook users. But more fundamentally and intractably, news media operators also ascribe part of digital advertising value captured within Google and Facebook to use of news content as destination clickbait, in essence saying this value is unfairly appropriated. In response, Google and Facebook contend that this capture of value is not the result of imbalance in bargaining power, because there is no commercial bargain that legally needs to be made. Digital advertising value accrues to a digital intermediary through creation of data value through the

intermediary’s own analytics, which is associated with provision to users of *links to destination news content*. This is not value fairly to be ascribed to any *use by the intermediary of the news content itself*. Should a commercial bargain be expected by a regulator or a government in circumstances where changes in technology have caused value to shift from news content destinations to intermediaries within a supply chain? Absent any evidence as to misuse or abuse of market power, a reasonable question might be whether accretion of digital advertising value in digital intermediaries is so egregious that this revenue should be specially taxed, or so likely to endure that changes to the role and structure of intermediaries the supply chain should be forced through divestiture orders, structural separation or other regulatory mandated action. Absent these measures, it is reasonable to expect that Google and Facebook respectively and news media operators will be unable to find a bargain, because the bargain is really about how much Google and Facebook are taxed to the benefit of the tax recipient being the news outlet, and there is no accepted economic theory to apply to determine what a fair level of taxation might be.

## X. COMMERCIAL BARGAINING FAILS AND THE LEGISLATURE STEPS IN

The Australian Government in December 2019 announced its response to the ACCC’s recommendations. The Government accepted the ACCC’s recommendation that Facebook and Google respectively and the respective major media proprietors each be required to negotiate a code as to value exchange from news content, but did not accept the ACCC’s proposal to refer responsibility to the media regulator, the Australian Communications and Media Authority (“ACMA”), for overseeing development of codes. Accordingly, the ACCC remained the relevant overseeing authority, although no breach of competition law had been found.

Facebook and Google respectively and the major media proprietors then commenced discussions about a code.

Neither the ACCC, nor the Australian Government, provided any kind of parameters, or guidance, or definition of value, as to financial liability of Google or Facebook if they participated in a code. There was no mechanism proposed for ensuring that any code support diversity of media ownership, or for weighting incentives towards in-depth and investigative journalism.

Niche quality journalism outlets complained that the proposed scheme “should create meaningful financial support for Australia’s 100 or so small-to-medium regional and urban news publishers – so that the vast proportion of funding does not end up in the pockets of News and Nine.”<sup>18</sup>

18 See for example Eric Beecher, “Digital bargaining code needs to protect Australia’s media diversity,” InDaily, February 2, 2021, available at <https://indaily.com.au/opinion/2021/02/02/digital-bargaining-code-needs-to-protect-australias-media-diversity/>.

The purported justification for a requirement for payment to the media proprietors as compensation for imbalance in value exchange was highly contested by each of Facebook and Google. Google argued that the driver for search results to include news is “societal and not economic.” Facebook also argued that there should be no net payment. The chair of major Australian media proprietor Nine Entertainment (and former Australian Treasurer), Peter Costello, suggested that the fee payable should be 10 percent of annual Australian revenue and estimated this amount to be AU\$600 million (about US\$420 million). News Corporation proposed various amounts, ranging up to in aggregate AU\$ 1 billion.

After about three months of unfruitful discussions between (principally) Nine and News and Google and Facebook, in April 2020 the Government directed the ACCC to develop and publish a mandatory code. The ACCC outlined a draft code on 31 July and opened a new consultation.

The draft code proposal recognised a “two-way value exchange” between Google and news media companies, reflecting Google’s position that news businesses get a bigger audience when their products are on Google or Facebook. News Corp Australia’s Executive Chairman, Michael Miller, said that the unveiling of the draft code was a “watershed moment to benefit all Australians,” continuing that “the tech platforms’ days of free-riding on other peoples’ content are ending. They derive immense benefit from using news content created by others and it is time for them to stop denying this fundamental truth.”<sup>19</sup>

Under the ACCC’s code proposal, media businesses<sup>20</sup>, individually or collectively, could notify Google or Facebook that they wish to negotiate under the code. The parties then have three months to strike a deal, and if they are unable to do so, there is a mandatory referral to “final offer arbitration” (also known as “baseball

arbitration”). In the event of a referral, each party would be required to lodge a content payment offer with the arbitrator. The arbitrator must then choose either of the offers, but cannot substitute another amount. The draft code also proposed that Google and Facebook must give publishers 28 days’ advance notice of any changes to their algorithms that might affect traffic to news sites.

The ACCC was unsuccessful in persuading Google and Facebook to make commercial proposals to forestall any need for a mandatory Code. In December 2020, the Australian Government introduced into the Australian Parliament an enabling statute for a legally mandated code.<sup>21</sup> The proposed statute broadly reflected the ACCC’s code proposal. The new code would not require details of deals between Google or Facebook and media publishers to be revealed, or for media publishers to guarantee the money is spent on journalism.

The Australian Senate referred the Bill to Senate’s Economics Legislation Committee, which received and reviewed 55 submissions<sup>22</sup> and held public hearings.<sup>23</sup> In a Senate hearing that took place on Friday 22nd January, Google Australia’s Managing Director, Mel Silva, outlined issues with the proposed News Media Bargaining Code and suggested “technical amendments” that would make the Code “workable” for Google. These suggestions included that instead of (or in addition to smaller) payment for links and snippets, the Code could designate Google News Showcase. This appears to be a similar proposal to the deal struck with France in October 2020, whereby Google reportedly (full details have not been published) will pay French publishers for content showcased on Google News Showcase, negotiate individual licenses with media outlets whereby payment for use of snippets would be based on specific and measurable metrics, and Google would pay (on behalf of users) for any content published behind paywalls where users may access new content they otherwise they would not be able to see unless they made a payment.<sup>24</sup>

19 Quoted in Josh Taylor & Amanda Meade, Google and Facebook to be forced to share revenue with media in Australia under draft code, *The Guardian Australia*, July 31, 2020, available at <https://www.theguardian.com/media/2020/jul/31/google-and-facebook-to-be-forced-to-share-revenue-with-media-in-australia-under-acccs-draft-code>.

20 To qualify, a news business would be required to predominantly create and publish news in Australia, serve an Australian audience, be subject to professional editorial standards, and editorial independence from the subject of the news coverage, and have revenue exceeding AU\$150,000 per year.

21 The Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, available at [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/).

22 Submissions are available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions); see also Google and Facebook responses to questions on notice at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/TLABNewsMedia/Additional\\_Documents](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Additional_Documents).

23 Transcripts are available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/TLABNewsMedia/Public\\_Hearings](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Public_Hearings).

24 The status of the arrangements in France remains unclear. In January 2021 Google and the Alliance de la presse d’information générale (“APIG”) said that they had agreed to a copyright framework for Google to pay news publishers for content online, with payments based upon criteria the daily volume of publications, monthly internet traffic and “contribution to political and general information”: Mathieu Rosemain, “Google seals content payment deal with French news publishers,” *Reuters*, January 21, 2021.

In its submissions on the draft Bill, Google repeated its assertions that organic search should remain a free commodity, where no payment is required by either party to fill the search results, and sought “reasonable amendments to the arbitration mode,” including abandonment of the baseball determination model.<sup>25</sup>

In February 2021, the Senate Committee reported to the Senate, recommending that the Bill be passed.<sup>26</sup>

#### XI. THE FINAL BATTLE: OUT OF THE PARLIAMENT AND BACK TO THE MARKETPLACE

However, events moved quickly, prior to passage of the Bill. In the week ending February 19, 2021, Google was reported<sup>27</sup> to have made over 50 deals with publishers in Australia. Seven announced a deal with Google worth AU\$30 million per year, Google and Nine agreed a five-year AU\$30 million-a-year cash deal, youth-focused publisher Junkee Media signed an agreement believed to be worth between AU\$200,000 and AU\$2 million, and Google agreed with The Guardian Australia to feature its journalism in the News Showcase product. Google also concluded a three-year global deal with News Corporation for an undisclosed sum, but also featuring News Corp journalism on Google News Showcase. News Corp content will include Australian based News Corp publications, including The Australian and The Daily Telegraph, and other News Corp mastheads including The Times of London and The (London) Sun, the Wall Street Journal and the New York Post. News Corp will also develop a subscription platform available through Google, share advertising revenue through Google’s ad technology services, and build out audio journalism and develop video journalism published through YouTube. Google was also reported to be close to finalizing a deal with the Australian Broadcasting Corporation.

Facebook took a different path.<sup>28</sup> Facebook asserted that news journalism makes up less than 4 percent of content that Facebook people see in Facebook’s news feed, and complained that the coverage of “core news content” in the code was overly broad, encompassing anything that “reports, investigates, or explains issues that are relevant in engaging Australians in public debate.” On February 18, 2021, Facebook blocked in Australia the sharing of all news articles, Australian or otherwise, as well as banning the sharing worldwide of any articles that originated in Australia: as the Australian Prime Minister Scott Morrison put it, Facebook unfriended Australia.<sup>29</sup> A flurry of telecons between the Australian Treasurer Josh Freudenberg and Facebook CEO Mark Zuckerberg then followed.

On the date of finalization of this paper (February 25, 2021), the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 passed both Houses of the Australian Parliament<sup>30</sup>, including amendments made to address concerns raised by Facebook. Several days earlier, Facebook had agreed with the Australian Government to restore access of Australian Facebook users to Australian news pages. Facebook stated that it was recommencing negotiation of commercial deals with news organizations.

Amendments to the media bargaining code include a requirement that a decision to designate a platform under the code must take into account whether it has made a significant contribution to the sustainability of the Australian news industry through commercial agreements with local media companies. The government must notify a digital platform if it intends to designate a platform under the code, with the final decision about whether to include a platform to be made no sooner than one month after notification. Will Easton, Managing Director, Facebook Australia & New Zealand, blogged:

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25 See further Google, “Answering your top questions about the News Media Bargaining Code,” Google blog post of January 31, 2021, at <https://blog.google/around-the-globe/google-asia/australia/top-questions-news-code/>, and Google, “Update on the News Media Bargaining Code and Google in Australia,” undated, at <https://about.google/google-in-australia/an-open-letter/>. For an independent perspective on the baseball determination model, see Casey Newton, “Australia’s bad bargain with platforms,” Platformer, February 17, 2021, at <https://www.platformer.news/p/australias-bad-bargain-with-platforms>, contrast Rob Nicholls submission to the Economics Legislation Committee of the Australian Senate, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions).

26 Report is available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/TLABNewsMedia/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Report)

27 Josh Taylor, “Guardian Australia strikes deal with Google to join News Showcase,” The Guardian Australia, February 20, 2021, available at <https://www.theguardian.com/technology/2021/feb/20/guardian-australia-strikes-deal-with-google-to-join-news-showcase>.

28 For divergent views as to the divergent paths taken by Google and Facebook, see “Done over down under: Facebook walks as Google caves in,” The Economist, February 18, 2021, at <https://www.economist.com/business/2021/02/18/facebook-walks-as-google-caves-in-australia>; “Australia’s Big Tech fight does not provide a model,” Financial Times, February 19, 2021, “Australia’s misguided attack on Big Tech,” Financial Times, August 31, 2020; Casey Newton, “Why Google caved to Australia, and Facebook didn’t,” The Verge, February 18, 2021, at <https://www.theverge.com/2021/2/18/22288510/google-facebook-australia-news-media-bargaining-code>.

29 Amanda Meade, “Prime minister Scott Morrison attacks Facebook for ‘arrogant’ move to ‘unfriend Australia,’” The Guardian Australia, February 18, 2021, <https://www.theguardian.com/technology/2021/feb/18/prime-minister-scott-morrison-attacks-facebook-for-arrogant-move-to-unfriend-australia>.

30 See [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6652](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6652).

We're pleased that we've been able to reach an agreement with the Australian government and appreciate the constructive discussions we've had with Treasurer Frydenberg and Minister Fletcher over the past week. We have consistently supported a framework that would encourage innovation and collaboration between online platforms and publishers. After further discussions, we are satisfied that the Australian government has agreed to a number of changes and guarantees that address our core concerns about allowing commercial deals that recognize the value our platform provides to publishers relative to the value we receive from them. As a result of these changes, we can now work to further our investment in public interest journalism and restore news on Facebook for Australians in the coming days.<sup>31</sup>

## XII. CONCLUSION

The Financial Times on February 19, 2020, editorialized that “Australia’s approach is flawed” because it is in essence an intervention “on behalf of one side in an intercorporate battle. It has helped the Murdoch empire – one of the big beasts of the ‘old’ media world – wring a deal out of a big beast of the new, but done little to help small, struggling local publishers.”<sup>32</sup> The Financial Times then suggested that “governments and regulators need to co-operate across borders to police the biggest tech companies, which have become quasi-utilities, or “gatekeepers” to different online sectors,” employing in combination “legal and regulatory tools on tax, competition, copyright, privacy and data protection, and potentially including a digital services tax (as proposed by the OECD).”

Earlier in this paper it was noted that in 2013 and before the rapid expansion of the advertising businesses of Google and Facebook, disruption of the business of media publishing of text and audiovisual journalism was well underway. This disruption was largely driven by market forces unleashed by the broadband internet: there had not been relevant failure of competition policy, of media policy, or neglect of competition or data privacy regulators. In the eight years to 2021, growth in market power of Google and Facebook further disrupted the business of media publishing of text and audiovisual journalism, but did not change the funda-

mental problem of shift in value along the digital advertising supply chain, or evidence relevant abuse or misuse of market power by Google or Facebook.

In this writer’s view, the newer challenge of ubiquitous fake news, and the continuing challenge of providing incentives for production and distribution of reports of in-depth and investigative journalism, should not be addressed through competition regulatory tools, through blunt statutory interventions such as Australia’s news bargaining code, or through jiggling of copyright law to require payment of licensing fees for links on global platforms to broadly defined news content. Regulatory interventions to compensate for imbalances in the bargaining power of leading digital platforms and news media businesses may be politically attractive, particularly when the government can avoid calling resultant payment flows a new form of business tax, when those news media businesses will report favorably to their readers as to the government’s role in delivering those financial benefits, and those news media businesses can assert their intention to invest their financial windfalls in better and deeper journalism. The outcome may therefore be good politics. However, good politics is often not good competition policy or sound antitrust economics. The Australian news bargaining code example should be treated with due caution. ■

31 Will Easton, ‘Changes to Sharing and Viewing News on Facebook in Australia’, Facebook blog post, February 22, 2021, <https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia/>.

32 “Australia’s Big Tech fight does not provide a model,” Financial Times, February 19, 2021. An alternative perspective was expressed by News Corp CEO Robert Thomson, in welcoming the proposed Code: “There is not a single serious digital regulator anywhere in the world who is not examining the opacity of algorithms, the integrity of personal data, the social value of professional journalism, and the dysfunctional digital ad market” (quoted in Dominic Ponsford, “News Corp strikes global cash-for-content deal with Google as tech giant fights regulation in Australia,” Press Gazette, February 17, 2021). For a regulatory economist’s analysis of the value exchange between media publishers and Google and Facebook, see Joshua Gans, “Australia surrenders to monopolists and codifies corporate oligarchy,” blog post to Core Economics, February 19, 2021, available at <https://economics.com.au/2021/02/19/australia-surrenders-to-monopolists-and-codifies-corporate-oligarchy/>.



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