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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**News Media and Digital Platforms – Note by Australia**

3 December 2021

This document reproduces a written contribution from Australia submitted for Item 3 of the 136th OECD Competition Committee meeting on 1-3 December 2021.

More documents related to this discussion can be found at  
<https://www.oecd.org/daf/competition/competition-issues-in-news-media-and-digital-platforms.htm>.

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## *Australia*

### 1. Overview

1. This submission draws on the Australian Competition and Consumer Commission's (ACCC) experience in considering and acting on issues relating to the imbalance in bargaining power between leading digital platforms and Australian news media businesses in digital markets.

#### 1.1. Role of the ACCC

2. The Australian Competition and Consumer Commission (ACCC) is Australia's national consumer protection and competition regulator. Most of the ACCC's work is conducted under the provisions of the *Competition and Consumer Act 2010* (CCA).

3. The purpose of the CCA is to enhance the welfare of Australians by:

- promoting competition among business
- promoting fair trading by business, and
- protecting consumers in their dealings with business.

4. Australia's competition and consumer law framework allows the government to develop mandatory industry codes of conduct administered by the ACCC. Industry codes of conduct set out minimum obligations and standards of commercial conduct for industry participants.

5. Mandatory industry codes can address industry-specific market failures that have not otherwise been addressed by industry participants or by other regulation but that nonetheless undermine the competitive process, leading to inefficient market outcomes and a loss of welfare for the public.

#### 1.2. Other Australian agencies with relevant responsibilities

6. The Australian Communications and Media Authority (ACMA) is Australia's national communications and media services regulator. One of the ACMA's responsibilities is to oversee the Australian Code of Practice on Disinformation and Misinformation. A final code was published in February 2021 and has been adopted by Adobe, Apple, Facebook, Google, Microsoft, Redbubble, TikTok and Twitter. The ACMA provided a report to the Australian Government on the effectiveness and impact of the code in June 2021, which is currently under consideration.<sup>1</sup> This code arose from a recommendation of the ACCC's Digital Platforms Inquiry, discussed further below.

7. The Australian Government is continuing to assess the code's effectiveness in providing safeguards against the serious harms that arise from the spread of misinformation and disinformation, and will consider further action if warranted.

8. The Australian Government Department of Infrastructure, Transport, Regional Development and Communications (DITRDC) is also involved in improving digital media literacy in the Australian community. This includes establishing a network of experts to

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<sup>1</sup> See - <https://www.acma.gov.au/australian-voluntary-codes-practice-online-disinformation>

develop media literacy materials, with a current focus on adult media literacy and Australians with English as a second language. This program arose following a recommendation of the ACCC's Digital Platforms Inquiry, which aimed to improve digital media literacy by equipping consumers with the ability to critically assess news and determine whether it is trustworthy and accurate. It also sought to combat the spread of low-quality news and misinformation on some digital platforms.

## 2. Digital Platforms Inquiry (2017–2019)

9. On 4 December 2017, the Australian Government directed the ACCC to hold an inquiry into the impact of digital search engines, social media platforms and other digital content aggregation platforms on the state of competition in media and advertising services markets (the Digital Platforms Inquiry (DPI)).

10. The ACCC published its final report (DPI Final Report) on 26 July 2019 and made 23 recommendations to the Australian Government for law or policy change to address behaviour identified in the report.<sup>2</sup>

11. The ACCC outlined its findings that the value of digital platforms to users and the lack of close alternatives has afforded both Google and Facebook substantial market power in a number of digital markets. In addition, the ACCC found that both companies had substantial bargaining power in their dealings with individual Australian news media businesses.

12. The report found both Google and Facebook to be important channels through which consumers access news. Both are seen by many news media businesses as critical sources of referral traffic, and important avenues to reach audiences. Consequently, a significant number of Australian news businesses consider Google and Facebook to be unavoidable trading partners. While Google and Facebook derived an aggregate benefit from the presence of Australian news on their services, no individual Australian news business is as important to these platforms as each of these platforms are to an individual Australian news business.

13. The ACCC found this bargaining power imbalance between news media businesses and Google and Facebook had resulted in media businesses accepting less favourable commercial terms than they otherwise might accept relating to the availability of their content on each of these platforms. This affected the news media businesses' ability to monetise their news content and, ultimately, to fund original public interest journalism.<sup>3</sup>

14. A number of additional concerns were raised in relation to news media businesses including:

- the lack of warning provided by digital platforms to news media businesses of changes to key algorithms relating to the display of news content or news referral links

<sup>2</sup> See - <https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0>

<sup>3</sup> The Digital Platforms Inquiry Final Report defines 'public interest journalism' as 'journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government.'; see [Digital Platforms Inquiry Final Report](#) pp. 284-286.

- the implementation of policies and formats that may have a significant and adverse impact on the ability of news media businesses to monetise their content and/or to build or sustain a brand and therefore an audience, and
- the impact of such policies on the incentives for news and journalistic content creation, particularly where significant effort is expended to research and produce original content.

15. While bargaining power imbalances exist in many other sectors, the ACCC considered that regulatory intervention was appropriate because of the important public benefits associated with public interest journalism. A failure to address this particular bargaining power imbalance threatened the sustainability of strong, independent and diverse news media landscape, which is essential to a well-functioning democracy. This problem was particularly acute as the DPI Final Report also found that media businesses experienced a significant fall in advertising revenue that coincided with the strong growth of online advertising, with Google and Facebook together accounting for nearly two-thirds of online advertising expenditure.

16. On this basis, the DPI Final Report recommended the development of a code or codes of conduct to address this imbalance and govern relationships between digital platforms and news businesses, including minimum commitments around data sharing, notification of changes to ranking and display of news content and fair negotiation of revenue sharing arrangements.

### 3. The News Media and Digital Platforms Mandatory Bargaining Code

17. In December 2019 the Australian Government accepted the ACCC's findings, and asked the ACCC to work with Google, Facebook, and Australian news businesses to develop and implement a voluntary code, or codes, of conduct. In April 2020, the Government asked the ACCC to accelerate the development of a mandatory bargaining code (the Code) after it appeared that the platforms would not reach agreement with news businesses on satisfactory terms of a voluntary code.

18. The ACCC worked with colleagues from the Treasury and the Department of Infrastructure, Transportation, Regional Development and Communications to develop the Code over the course of 2020 and undertook an extensive consultation and design process.

19. The Code was implemented under the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 (the Act), which came into effect on 2 March 2021.<sup>4</sup> The Australian Government will review this legislation in 2022 to ensure it remains fit for purpose.

#### 3.1. Designation of digital platforms under the Code

20. The Act provides that the Treasurer may designate a digital platform corporation and digital services that must comply with the Code. To date, the Treasurer has not designated any digital platforms or services in Australia.

21. When deciding whether to designate a digital platform, the Treasurer must consider:

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<sup>4</sup> See – Final legislation <https://www.legislation.gov.au/Details/C2021A00021> and explanatory memorandum <https://www.accc.gov.au/system/files/Revised%20explanatory%20memorandum.pdf>

- whether there is a significant bargaining power imbalance between Australian news businesses and the digital platform
- whether the digital platform has made a significant contribution to the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).

### 3.2. Digital platform opposition to the Code

22. Google and Facebook both publicly criticised the Code as it was developed during 2020 and while it was before Parliament in early 2021.

23. Most prominently, Facebook temporarily blocked Australia users from viewing or sharing news content on Facebook for a total of 8 days in February 2021, just before the legislation enacting the Code was passed.<sup>5</sup>

24. However, it resumed offering services in Australia following substantial public criticism both within Australia and internationally.

### 3.3. Voluntary agreements with Australian news businesses

25. While the Code does not yet apply to either Google or Facebook, as the Treasurer has not yet designated any digital platforms, it has encouraged both of these platforms to complete commercial content deals with a number of large and small Australian news businesses. As at October 2021, both companies have publicly announced voluntary agreements with a wide range of Australian news publishers of different scales, including:

- Government-owned public service broadcasters SBS (Google only) and the ABC
- Large publishers and commercial broadcasters such as News Corp Australia, Nine Entertainment Co, and Seven West Media
- Mid-size and smaller digital native outlets including the Guardian Australia, Junkee Media, Solstice Media, Private Media, The New Daily, Schwartz Media and the Conversation (Google only)
- Regional publishing groups Australian Community Media and Times News Groups and the small rural and regional newspapers represented by Country Press Australia.

26. The majority of these voluntary agreements involve licensing news content for news-specific services launched by the platforms in Australia during 2021 – Facebook News Tab and Google News Showcase. However, some agreements also involve licensing for other services (such as Facebook Watch video platform), and some involve an element of funding to support digitisation of news.

### 3.4. Participation in the Code

27. To participate in the Code, a news business must apply to the ACMA for registration. The news business must operate or control the nominated news sources, and

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<sup>5</sup> See – <https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia/> and <https://www.abc.net.au/news/2021-02-18/facebook-to-restrict-sharing-or-viewing-news-in-australia/13166208>

have an annual revenue above AUD150,000 (~EUR96,000) in the most recent year or in three of the last five years. The news sources comprising the news business must:

- have the primary purpose of creating and publishing ‘core news content’ (defined as ‘content that reports, investigates or explains issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making, or current issues or events of public significance for Australians at a local, regional or national level’);
- be subject to relevant professional journalistic standards which support the accuracy and impartiality of news content and provide a transparent mechanism for complaints about news content, and
- operate predominantly in Australia for the dominant purpose of serving Australian audiences.

28. A number of news businesses have now registered with the ACMA.<sup>6</sup> However, as no digital platforms have yet been designated, registration by the ACMA does not yet formally confer any benefits or entitlements to those currently registered.

### 3.5. Features of the Code

29. The Code creates incentives for the major digital platforms to make commercial deals with Australian news businesses by providing a framework for good faith negotiations and a fair and balanced arbitration process to resolve outstanding disputes. The Code does not regulate the subject matter of news content (or other content) displayed on digital platforms in Australia.

30. The Code has six main features:

- good faith bargaining – which requires designated digital platform corporations and registered news business corporations that have indicated an intention to bargain, to do so in good faith; the code also allows registered news businesses to form collectives to bargain with a designated platform
- compulsory arbitration – where parties cannot come to a negotiated agreement about remuneration relating to the making available of news content on designated digital platform services, and this cannot be resolved through mediation, an arbitral panel will select between two final offers made by the bargaining parties
- general requirements – which include requirements for designated digital platforms to:
  - provide registered news business corporations with advance notification of planned changes that are likely to have a significant effect on covered news content (such as major algorithm changes);
  - provide all registered news businesses with equal access to clear information about the collection and availability of data collected through users’ interactions with news content
  - develop a proposal to appropriately recognise original news content in consultation with registered news businesses.

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<sup>6</sup> See - <https://www.acma.gov.au/register-eligible-news-businesses>

- non-differentiation requirements – designated digital platforms must not differentiate between the news businesses participating in the Code, or between participants and non-participants, or between non-participants e.g., where one news business has elected to see eligibility to participate in the code or negotiate with the platform. This is intended to prevent platforms demanding news businesses agree to provide their content for zero cost; or relying solely on international news sources and blocking Australian news sources.
- contracting out – a designated digital platform may reach a commercial bargain with a news business outside the Code about remuneration or other matters. Parties who notify the ACCC of such agreements would not need to comply with the general requirements, bargaining and compulsory arbitration rules of the Code
- standard offers – a designated digital platform may make ‘standard offers’ to news businesses, which are intended to reduce the time and cost associated with negotiations, particularly for smaller news businesses. If the parties notify the ACCC of an agreed standard offer, those parties do not need to comply with good faith bargaining and compulsory arbitration as set of in the Code.

31. The Code includes serious financial penalties for failure to comply with its central provisions. For example, a failure to bargain in good faith or failure to comply with the arbitration panel’s determination is subject to a maximum civil penalty of the greatest of AUD10 million (~EUR 6.4 million), an amount determined by the court of the value of the benefit (times three), or 10% of annual Australian turnover during the last 12 months.

32. However, as stated above, the Code’s obligations and penalties do not yet apply to any digital platforms as no platforms have been designated. Instead, the practical effect of the Code so far has been to incentivise Facebook and Google to conduct voluntary negotiations outside the code with Australian news businesses, as outlined above.

### 3.6. Collective bargaining

33. Where a digital platform is designated, registered news businesses are able to bargain collectively with that platform under the Code, which is likely to reduce the burden on smaller and regional news businesses.

34. However, if a digital platform has not yet been designated by the Treasurer, news businesses may separately seek authorisation from the ACCC to enter into collective bargaining with a digital platform or in relation to small businesses, notify the ACCC of their intent to bargain collectively.

35. To date the ACCC has authorised regional publishing peak body Country Press Australia, which represents 81 rural and regional newspaper publishers publishing 160 regional newspapers – to collectively bargain with each of Facebook and Google concerning payment for news on these platforms, which is valid for 10 years.<sup>7</sup> This resulted in a successful agreement with Google to include these publications in Google News Showcase.<sup>8</sup>

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<sup>7</sup> This authorisation is for Country Press Australia. See – <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/country-press-australia-cpa>

<sup>8</sup> See – <https://blog.google/around-the-globe/google-asia/australia/country-press-australia-titles-join-google-news-showcase/>

36. The ACCC has also granted interim authorisation to collectively bargain with Google and Facebook to a second applicant, Commercial Radio Australia which represents 260 members from Australia's commercial radio industry.<sup>9</sup>

### 3.7. Comparison with other jurisdictions

37. The ACCC understands that the European Union (EU) has sought to address issues regarding the commercial relationships between digital platforms and news businesses through Article 15 of the Directive on Copyright in the Digital Single Market. This Directive grants 'ancillary rights' to cover online use of press publications by information service providers, including 'snippets', meaning digital platforms, like Google, would need to agree licensing deals with news businesses to use their content.

38. While this article seeks to address some of the same issues as the Code in Australia, the ACCC understands that it does so through the lens of intellectual property policy, while Australia's regulations directly address the bargaining power imbalance through an industry code of conduct incorporated into Australian competition legislation.

39. The EU Directive has been incorporated into national law in France and Germany, and both country's competition authorities are investigating Google's compliance with these laws.

40. In July 2021, the French Autorité de la Concurrence fined Google for failure to adequately negotiate with publishers following an interim order in April 2020 requiring Google to do so. This action is based on the Autorité's finding that failure to adequately negotiate constituted an exploitative abuse of Google's dominant market position, and the ACCC notes that Australian competition law does not prohibit such exploitative abuses.

41. Despite the differences in methodology, the ACCC hopes that parallel action on this issue across multiple jurisdictions encourages large digital platforms to deal more fairly with news businesses in every country in which they operate.

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<sup>9</sup> This authorisation is for Commercial Radio Australia (excluding Nine Entertainment). See - <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/commercial-radio-australia>