

Mandatory bargaining code legislation

Submission

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Centre for Responsible Technology

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Level 1, Endeavour House, 1 Franklin St
Canberra, ACT 2601
Tel: (02) 61300530
Email: mail@tai.org.au
Website: www.tai.org.au
ISSN: 1836-9014

Summary

The mandatory bargaining code is an important step towards addressing the decline of journalism in Australia, and the Centre for Responsible Technology welcomes the draft legislation and supports its adoption.

However, the legislation is not beyond improvement. The use of a two-way value exchange model which places a monetary value on the traffic news sites receive from digital platforms runs the risk of double charging, since Google and Facebook have already monetised search results and traffic. Delivering search engine users to the websites they want to visit is the function of a search engine, not a special service that the digital platforms are providing to media companies.

The Government also has the opportunity to reverse the exclusion of Instagram and YouTube from the code, and the Centre recommends this takes place within a year of the code being implemented. One in 10 Australians use Instagram for news and one in five use YouTube for news. YouTube specifically prioritises “high-authority channels” in order to improve the accuracy and credibility of its video recommendations.

The adoption of the mandatory code represents a rare moment where journalism is explicitly valued. More rigorous professional and ethical standards in the media industry are needed to make sure that Australian journalism and reporting lives up to the value placed on it. The public broadcasters, most notably the ABC, set the standard here.

A 12-month review of the mandatory code is a good step, and the Centre acknowledges its inclusion in the draft legislation. Particular consideration should be given in the review to the effect of the code on small and regional publishers, which were some of the worst affected by closures and job losses in recent years and which lack the bargaining power of the larger media companies.

Critics of the mandatory bargaining code have argued that Google and Facebook are disruptors that should not be expected to subsidise their competitors. However, that misunderstands the relationship between the digital platforms and media companies: the digital platforms have disrupted how journalism is monetised, but are no substitute for the product itself – and in fact need access to news articles to stay relevant to their users.

The ABC and SBS require more public funding, and funds they receive from the mandatory code must not be used as an excuse to reduce the funding they receive from the Government. Private sector public interest journalism is also a public good that requires further public funding and government support.

Introduction

The Australia Institute's Centre for Responsible Technology welcomes the opportunity to make a submission to the inquiry into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020.

The Australia Institute established the Centre for Responsible Technology in 2019 to champion the design and deployment of digital technologies in ways that are appropriate, responsible and adhere to the core Australian values of fairness, egalitarianism and a commitment to democracy.

This submission builds on the Centre's previous submission to the Australian Competition and Consumer Commission (ACCC) draft news media bargaining code.¹ The previous submission supported the implementation of the mandatory code, noting the lack of progress on a voluntary code and the ability of a mandatory code to address the unequal bargaining power between digital platforms and media businesses.

The previous submission also recommended that the code be expanded to include financial compensation of the ABC and SBS, which has occurred, and made a number of recommendations and observations regarding sharing algorithm changes, monopoly power, the viability of payments to news partners, and news share of search queries.

The Centre welcomed the Government's decision in December 2020 to proceed with the code and commends the Government for undertaking this globally significant reform.²

Australia is experiencing a decline of journalism, with falling print circulation, thousands of journalists losing their jobs, and the loss of local and regional reporting from dozens of towns and regions.³

¹ Centre for Responsible Technology (2020) *Searching for a solution: Submission to the ACCC draft news media bargaining code*, <https://australiainstitute.org.au/report/searching-for-a-solution/>

² Lewis (2020) *Statement on News Media Bargaining Code: Big Tech Media Code Good News for Democracy*, https://www.centreforresponsibletechnology.org.au/statement_on_news_media_bargaining_code_big_tech_media_code_good_news_for_democracy

³ Meade (2020) *News Corp announces end of more than 100 Australian print newspapers in huge shift to digital*, <https://www.theguardian.com/media/2020/may/28/news-corp-announces-end-of-nearly-100-australian-print-newspapers-in-huge-shift-to-digital>; Simons & Dickson (2019) *Availability of local news and information*, pp. 6–9, <https://apo.org.au/node/248231>; Warren (2020) *Power of the press grows ever weaker as sales slump to new COVID-19 lows*, <https://www.crikey.com.au/2020/05/25/print-newspapers-power-weakens-as-circulation-slumps-coronaviurs/>

The growth of digital news has not reversed the general loss of journalist jobs and talent, with the ACCC finding that:

Collectively, the number of journalists employed by digital natives appears to be much smaller than the number of editorial job losses among print publishers.⁴

Journalism is a public good, and addressing its decline will require public funding and innovative reforms – of which the mandatory bargaining code is an important first step.

⁴ ACCC (2019) *Digital platforms inquiry - final report*, p. 322, <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

Issues for consideration

While the Centre for Responsible Technology welcomes the mandatory bargaining code draft legislation, legislators should reconsider the use of a two-way value exchange model and the Government should reconsider the exclusion of Instagram and YouTube from the code.

With the code recognising the value of journalism, the media industry needs to be subject to more rigorous professional and ethical standards. The effect of the code on small and regional publishers, some of the media companies that have been worst affected by closures and job losses in recent years, needs to be monitored and evaluated in the 12-month review.

The inclusion of public broadcasters in the code is welcome, but this new, reliable source of funding cannot be used as an excuse to deprive the ABC and SBS of the additional funding that they need to provide quality reporting, including rural and regional reporting.⁵ Further public funding for private sector public interest journalism is also needed.

“TWO-WAY VALUE EXCHANGE” MODEL

The Centre for Responsible Technology is concerned that the addition of a “two-way value exchange” criterion when arbitrating agreements made under the code represents a form of “double charging”.

It is true that news media companies benefit from the users that search engines direct to their articles and homepages. However, finding those articles and homepages is the service for which the user engaged the search engine, and which the search engine has already monetised in the form of on-page ads and the usage data they acquire from their users.

Google benefits from the specific, quality news content created by news companies; conversely, news companies would benefit from any search engine and only benefit from Google specifically because that search engine has an overwhelming majority market share.

⁵ For more of The Australia Institute’s work on rural and regional reporting by the ABC, see Campbell (2016) *First Submission to the ABC (Rural and Regional Advocacy) Bill 2015*, <https://australiainstitute.org.au/report/first-submission-to-the-abc-rural-and-regional-advocacy-bill-2015/>; (2016) *Second Submission to the ABC (Rural and Regional Advocacy) Bill 2015*, <https://australiainstitute.org.au/report/second-submission-to-the-abc-rural-and-regional-advocacy-bill-2015/>; Johnson (2015) *Heartland - Why the bush needs its ABC*, <https://australiainstitute.org.au/report/heartland-why-the-bush-needs-its-abc/>

EXCLUSION OF INSTAGRAM AND YOUTUBE

The Centre for Responsible Technology is concerned that the decision to exclude Instagram and YouTube from the mandatory bargaining code, at least for now, will have a negative effect on video news producers.

According to the most recent data from web traffic tracker Alexa, Youtube.com is Australia's second "top site" (based on unique visitors and pageviews), behind Google.com but ahead of Facebook.com.⁶ YouTube has no serious competitors in the video-sharing market, and the presence of news media on YouTube demonstrates its use as a publisher of news.

The widespread presence of incorrect information and false reporting on YouTube also demonstrates the importance of authentic, established media publishers being represented on the platform. A 2020 study found that of YouTube's 69 most widely-viewed coronavirus-related videos at the time, 19 (28%) contained misinformation. The videos containing misinformation had been viewed over 62 million times.⁷ YouTube says that it prioritises "authoritative voices" and "high-authority channels" in an effort to counteract misinformation,⁸ demonstrating again how important independent and quality reporting is for the platform.

While a smaller platform than YouTube, Instagram is also used as a source of news. The Reuters Institute and University of Oxford found that the share of people globally using Instagram for news doubled between 2018 and 2020, and is likely to overtake the share using Twitter for news by 2021. One in 10 Australians (9%) use Instagram for news, one in five (21%) use YouTube for news, and overall half of Australians (52%) use social media for news. The share of Australians using social media for news is greater than the share of people in the UK, USA, Germany or South Korea using social media for news.⁹

The draft legislation will allow the Treasurer to include additional platforms within the scope of the code. The Centre urges Minister Frydenberg to do so for Instagram and YouTube within 12 months of the code beginning operation.

⁶ Alexa (2021) *Top Sites in Australia*, <https://www.alexa.com/topsites/countries/AU>; (n.d.) *How are Alexa's traffic rankings determined?*, <https://support.alexa.com/hc/en-us/articles/200449744-How-are-Alexa-s-traffic-rankings-determined->

⁷ BBC News (2020) *Coronavirus: False claims viewed by millions on YouTube*, <https://www.bbc.com/news/technology-52662348>

⁸ Hutchinson (2019) *YouTube Outlines its Ongoing Efforts to Reduce the Spread of Misinformation its Platform*, <https://www.socialmediatoday.com/news/youtube-outlines-its-ongoing-efforts-to-reduce-the-spread-of-misinformation/568378/>

⁹ Reuters Institute & University of Oxford (2020) *Reuters Institute Digital News Report 2020*, pp. 10–11, 96, <https://www.digitalnewsreport.org/>

NEED FOR MORE RIGOROUS PROFESSIONAL AND ETHICAL STANDARDS

The mandatory bargaining code would recognise the special value of news media and reporting to society, as well as its financial benefits and its importance to consumers. However, it is important that news media lives up to the value that is placed on it by the public, governments and – now – digital platforms.

Unfortunately, self-regulation of the media is failing. Neither the Press Council or the Australian Communications and Media Authority (ACMA) do enough to hold media companies to account for misleading and inaccurate reporting.

The introduction of a new code that places a special value on journalism is a logical time to introduce higher standards and new models of quality control. The public broadcasters, most notably the ABC, set the standard for accountability, complaints handling and unbiased reporting, and could serve as a model for the media industry more generally.

IMPACT ON SMALL AND REGIONAL PUBLISHERS

Independent MP Helen Haines has raised concerns that small and regional news publishers face challenges that are different from those of larger publishers, who have been mostly driving the lobbying for and negotiation around the mandatory bargaining code.¹⁰ 2020 saw the closure of many small and regional publishers, with News Corp announcing the closure of 36 of its local and regional newspapers and the switch to online-only for another 76 in May 2020.¹¹

Haines recommended that the legislation's 12-month review specifically consider and report on the impacts on small and regional publishers. In response to Haines, Minister for Communications Paul Fletcher noted that the legislation allows for smaller companies to bargain collectively or to take up default offers from Google and Facebook – but did not specifically commit to expanding the 12-month review's scope.¹²

While the mandatory bargaining code has the potential to better fund journalism in Australia, it is important to ensure that it lives up to its promise. Explicitly measuring and reflecting upon its impacts on small and regional news publishers, and an assessment of whether the default offers from Google and Facebook are fair, is needed.

¹⁰ Haines (2020) *Question time: Will the government commit to amending the news media bargaining code*, <https://www.helenhaines.org/media/question-time-will-the-government-commit-to-amending-the-news-media-bargaining-code>

¹¹ Meade (2020) *News Corp announces end of more than 100 Australian print newspapers in huge shift to digital*

¹² Haines (2020) *Question time: Will the government commit to amending the news media bargaining code*

GOOGLE AND FACEBOOK ARE NOT MERELY “DISRUPTORS”

Critics have argued that the mandatory bargaining code is a subsidy for media companies that have failed to adapt to modern conditions.¹³ Successful companies, even ones that disrupt entire markets, do not generally compensate their competitors. A popular analogy is that the streaming site Netflix is not required to subsidise movie cinemas or cable TV companies.¹⁴

However, Netflix’s relationship to its competitors is not analogous to Google and Facebook’s relationship with media companies. Google and Facebook do not create their own news, they use existing reporting to increase the value of the service that they offer customers. Netflix creates its own content, or it licences the content – and pays for it – from others.

A famous example of disruption is the collapse of the photographic film industry, after it was “disrupted” by digital cameras (especially those embedded in mobile phones).¹⁵ No one would argue that digital camera manufacturers owe photo film manufacturers compensation for collapsing revenue, but that is because digital cameras *substitute* for the existing cameras (and where they are not a suitable substitute, customers still buy photo film). This is observably different to the relationship between Google and Facebook and the media companies. The public still demands journalism and reporting, including in their search results and on their social media feeds, but Google and Facebook now capture much of the advertising revenue that would otherwise fund that journalism and reporting.

In economics, this is the “free rider” problem: where a public good is under-produced because those who benefit from it do not have to pay for it. The free rider problem is a form of market failure for which government intervention is a textbook solution.¹⁶

The disruption in this case is not to the product – the journalism – but to the way in which it is monetised. The product itself is still needed, and those that produce it still need to be compensated. A similar precedent is how the availability of recordable media (first cassette

¹³ See for example Cartwright (2020) *Google is so pissed with the Australian Government’s proposed new media code it’s on the home page!*, <https://techau.com.au/google-is-so-pissed-with-the-australian-governments-proposed-new-media-code-its-on-the-home-page/>

¹⁴ Australian Financial Review (2020) *ACCC code will test big tech’s news value*, <https://www.afr.com/policy/economy/accc-code-will-test-big-tech-s-news-value-20200810-p55k57>; Mike Cannon-Brookes (2020) *Should Netflix be forced to pay for reduced cable bills? For lower popcorn revenues at movie theatres? And those are actual substitute products! Should they pay the Yellow Pages too? Boggles the mind.*, <https://twitter.com/mcannonbrookes/status/1289489740517928960>

¹⁵ See for example Anthony (2016) *Kodak’s Downfall Wasn’t About Technology*, <https://hbr.org/2016/07/kodaks-downfall-wasnt-about-technology>

¹⁶ Khan Academy (n.d.) *What is a free rider?*, <https://www.khanacademy.org/economics-finance-domain/microeconomics/market-failure-and-the-role-of-government/externalities-topic/a/the-role-of-government-in-paying-for-public-goods>

tapes, but now including music players, memory sticks, external hard drives and cloud storage) affected the revenue of musicians, authors, recording studios, and other content creators. Many countries introduced private copying levies on recordable media and distributed the proceeds to collecting societies representing the copyright holders who are likely to lose out from private, unauthorised recording.

The proposition that digital platforms benefit from journalism and have an obligation to support news media is not the invention of the ACCC or the Australian Government. Google and Facebook already make revenue sharing agreements with media companies to reflect the benefit they receive from original journalism – it is just that at the moment these agreements are ad hoc and voluntary. For example, the former Fairfax mastheads have an existing revenue deal with Google.¹⁷ Since the principle that media companies are entitled to compensation has been recognised by the digital platforms, the question is simply whether a voluntary code is sufficient for that entitlement to be met. The power imbalance between Google and Facebook and Australia’s media companies supports the Government’s conclusion that a voluntary code is not sufficient.

PUBLIC BROADCASTERS

The Centre for Responsible Technology welcomes the decision to include the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) within the code’s remuneration scheme. This was one of the Centre’s recommendations in its submission to the ACCC draft news media bargaining code.¹⁸

However, as the Centre noted in its ACCC submission, the public broadcasters should receive adequate public funding, and never be dependent on commercial funding. Any commercial funding, such as through the mandatory code, should complement the core public funding rather than replace it.

The mandatory code is a once-in-a-generation opportunity to give the ABC a supplementary, stable funding base. The ABC may want to dedicate these additional funds to a particular aspect of its operations, such as regional and rural reporting.

PRIVATE SECTOR PUBLIC INTEREST JOURNALISM

The mandatory bargaining code is a significant step towards properly funding journalism and reporting, and the Centre congratulates the ACCC and the Federal Government for

¹⁷ Australian Financial Review (2020) *ACCC code will test big tech’s news value*

¹⁸ Centre for Responsible Technology (2020) *Searching for a solution: Submission to the ACCC draft news media bargaining code*

pursuing it. However, it is not in itself sufficient funding for public interest journalism, or a guarantee that the news media will be able to serve its function in the future.

Other countries provide substantial financial support for public interest journalism, including direct subsidies to newspapers and other publications, tax credits and deductions for media subscriptions, lower tax rates for journalists, and funding for newswire services.¹⁹

The government should consider additional funding for Australia's newswire services, following a welcome one-off \$5 million grant to the Australian Associated Press (AAP) in September 2020.²⁰ A formal and ongoing arrangement would help ensure the viability of an independent newswire service. Such arrangements are not unusual elsewhere in the world. For example, the French government provides an annual subsidy to the publicly-owned, commercially operated newswire Agence France-Presse (AFP) – in 2019, of €124.4 million (A\$200 million).²¹

¹⁹ Examples, but by no means an exhaustive list, can be found in: MEAA (2017) *MEAA submission to public interest journalism inquiry*, <https://www.meaa.org/download/meaa-submission-to-public-interest-journalism-inquiry-170714/>; Schmidt (2018) *Canada introduces a \$595 million package in support of journalism*, <https://www.niemanlab.org/2018/11/canada-introduces-a-595-million-package-in-support-of-journalism/>; Schweizer, Puppis, Künzler, & Studer (2014) *Public funding of private media*, <http://blogs.lse.ac.uk/mediapolicyproject/>; Van Besien (2013) *What state subsidies are available for Belgian media*, <https://www.newmedia-law.com/news/what-state-subsidies-are-there-for-belgian-media/>

²⁰ Meade (2020) *AAP given \$5m government lifeline as newswire finds itself in financial difficulty*, <https://www.theguardian.com/media/2020/sep/18/aap-given-5m-government-lifeline-as-newswire-finds-itself-in-financial-difficulty>

²¹ Agence France-Presse (2020) *AFP's 2019 operating result shows strong growth as the Agency assesses the early impact of the Covid-19 pandemic*, <https://www.afp.com/en/agency/press-releases-newsletter/afps-2019-operating-result-shows-strong-growth-agency-assesses-early-impact-covid-19-pandemic>

Conclusion

The mandatory bargaining code is historic legislation, and when it is adopted it will set the standard for other countries in their negotiations with the powerful digital platforms. The Centre welcomes its adoption, but notes that it is not beyond improvement – with the unnecessary two-way value exchange and the absence of YouTube and Instagram from the scope of the code as two clear examples.

Because the mandatory bargaining code would be a historic, substantial correction of the power imbalance between publishers and digital platforms, and because it offers a significant funding increase for the news media, it is tempting to see it as the only reform needed to repair Australia's fraying public discourse. The code is a necessary first step, but not a complete solution.

The Centre for Responsible Technology urges the Government to give public broadcasting the funding it needs, to increase the transparency of digital advertising, to ensure the proposed code of practice for disinformation for digital platforms is functional and to continue with the review of privacy laws pertaining to data collection currently underway.