

Submission to the Senate Economics Legislation Committee

Inquiry into Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

18 January 2021

1. Introduction

Google's commitment to working collaboratively with the Australian Government and news media businesses to find a workable News Media and Digital Platforms Mandatory Bargaining Code (**Code**) reflects our belief in the importance of a strong Australian media industry and aligns with our ongoing commitment to the Australian economy.

A workable Code can and will support digital platforms and news media businesses to progress valuable commercial agreements, improving the financial future of Australian publishers of all sizes and increasing the reach and value of news content online.

In contrast, an unworkable Code would not only fail to realise that potential, but would be incompatible with how all search engines work, fundamentally damage Google Search and our core business, and expose Google to unmanageable levels of financial risk. The vital concerns we have raised consistently throughout this process about the Code and its direct impact on our services remain.

The Code recently introduced to the Australian Parliament remains unworkable because it includes a skewed arbitration process which forces Google to pay for links and snippets in Search. In particular the Code requires amendment in three areas:

1. The **designation of Search** creates an unprecedented and distortionary outcome in which Google would have to pay for links to news websites in Search results. An obligation to pay for links would break the way search engines and the internet work for everyone.
2. The **arbitration** provisions are untested, one-sided, and at odds with fair commercial agreements. They present unmanageable legal and commercial risk to Google.
3. The provisions on **notice of algorithm changes** misconceive how our systems operate, are unworkably broad and Google cannot operationalise them as written.

With reasonable amendments, however, there is a path to a Code that works for all parties — digital platforms, media companies, the Government, and the Australian businesses and public who use Google services.

2. Google Australia

Google Australia has grown with Australia’s digital economy. Starting with just one person in 2002, Google Australia now has 1,800 employees across Sydney and Melbourne including hundreds of software engineers. Google Maps was invented in Australia, and Google Australia now hosts one of the biggest Google Maps engineering teams in the world.

Our 2020 Google Economic Impact report shows Google’s search advertising and productivity platforms generated \$39 billion in business benefits in Australia in 2020,¹ roughly equivalent to the annual output of Australia’s construction sector. In addition to the contribution Google’s products make to the wider Australian economy, we directly invest more than \$1 billion in Australia every year. In 2019, Google spent more than AU\$300m on research and development in Australia.

During COVID-19 we’ve helped more than 1.3 million Australian businesses stay connected with their customers.

3. How Google Search serves Australian consumers and businesses

Search engines are of great importance to consumers and of significant value to businesses. They enable users to navigate the trillions of pages of information that make up the web.

More than 19 million Australians actively use Google Search each month.² Google Search works by responding to users’ queries with links to the most relevant information in its index — from news media content to the websites of small businesses, to travel booking sites, to online marketplaces. This works the same way for all sites on the internet.

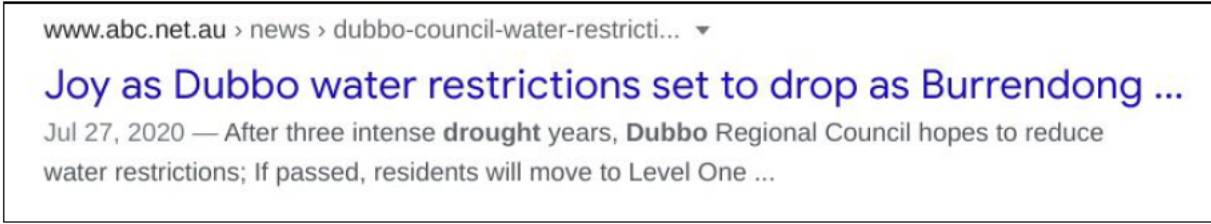
Because a page URL and title might not clearly indicate what a page is about, most Search results also include a short extract of text (called a “snippet”) showing how the user’s search term is used on the page.

All [website owners can choose](#) if they want to have their sites appear in our results, if they want to have snippets and thumbnails with their links, and how long or short their snippets should be.³ The image below illustrates how a snippet gives a preview to help users decide which result to click on — it’s not a substitute for the full content such as a news article on a publisher’s website.

¹ AlphaBeta, “Google’s Economic Impact in Australia”, December 2020, p. 5, available at: <https://alphabeta.com/wp-content/uploads/2020/12/googles-economic-impact-in-australia-2020.pdf>.

² Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Unique Audience, cited in ACCC, “Digital Platforms Inquiry Final Report”, June 2019, p 43, available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.

³ Google, “How Search organises information”, available at: <https://www.google.com/search/howsearchworks/crawling-indexing/>.



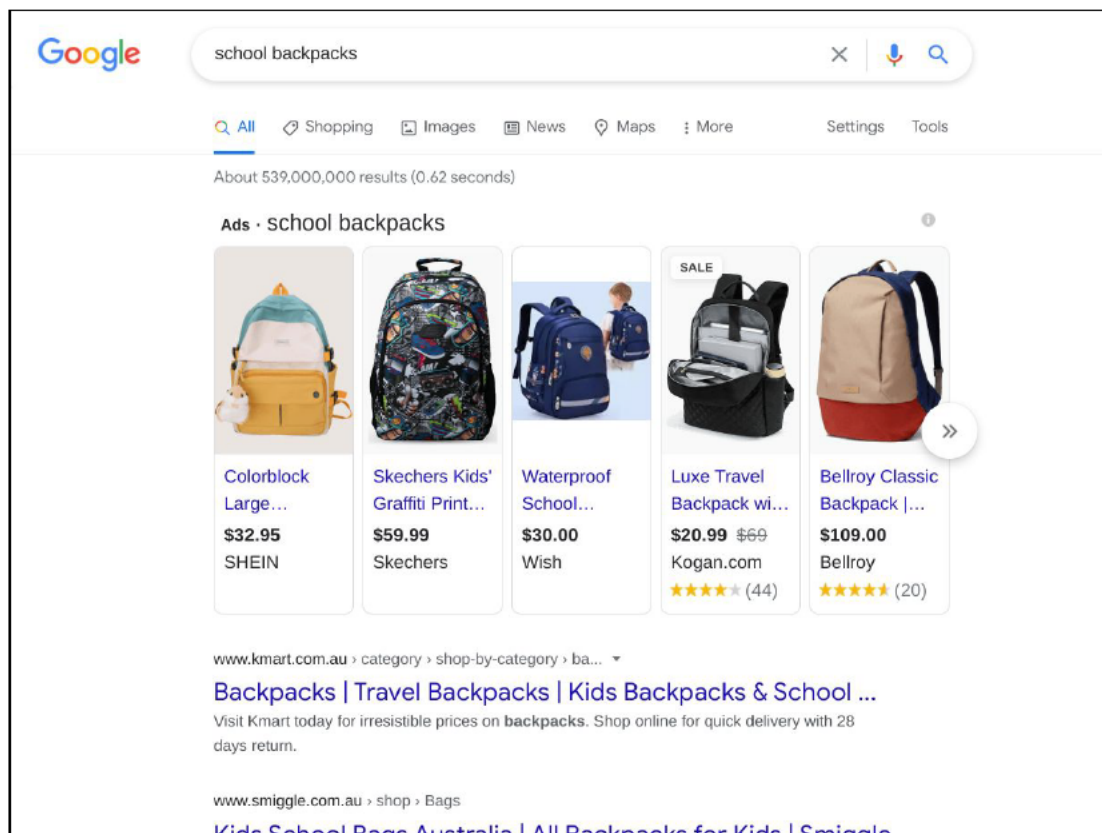
The blue text is a link to the publisher's website. The grey text underneath is a snippet, which allows the publisher to inform the person using Search what they can expect to see when they click the link. Publishers decide the length and content of a snippet.

The way Google Search works — surfacing links and snippets in response to a query and allowing the consumer to choose to click through to spend time and money on the website of their choosing — delivers considerable benefit to Australia's business community.

4. How Search ads work for Australian businesses

Our Search advertising business helps Australians find the information that is relevant to their queries, helping businesses large and small connect with people when they search and supporting Australia's digital economy:

- Online search advertising (where ads appear separate to our 'organic' search results) removes historical barriers to entry in advertising, providing an affordable and efficient way for small and large Australian businesses to advertise and reach new customers, both in Australia and globally.



The above image illustrates the paid advertising [marked 'Ads'] and the organic search results below. Some search results may also include small "thumbnail" images giving a visual preview of the page.

- We work with more than 1.3 million Australian businesses of all sizes, supporting direct connections with customers, including through referrals from search results and ads, directions, phone calls, bookings and reviews. A recent report by AlphaBeta for Google found that Google brings about \$31.7 billion in net advertising benefits annually to Australian businesses. The report also found that 60 percent of Google's business benefits go to small and medium sized enterprises and 97 percent of Google's business benefits go to non-technology sectors.⁴
- As a whole, Australian businesses are estimated to save 44 million hours in travel time a year through Google Maps, and 52 million hours in search time through Google Search.⁵

Given the Code considers the relationship between news media businesses and digital platforms, it is important that the fundamental principles of Google Search advertising are clear.

We make money only if ads are useful and relevant, as indicated by your click on the ad. We've long said that we don't show ads — or make money — on the vast majority of searches. In fact, on average over the past four years, 80 percent of searches on Google haven't had any ads at the top of search results. Even for the fraction of search queries where we do show ads, we don't make a cent unless people find it relevant enough to click on the ad.

Nearly all of the ads users see are on searches with commercial intent, such as searches for "t-shirt" or "plumber." Advertisers rarely advertise their goods in response to news-seeking queries given they do not contain commercial intent. In 2019, for example, advertisers only spent approximately \$10 million on Google ads on news-seeking queries in Australia.

5. Changes to news and the media industry in the digital economy

In the past, news media businesses cross-subsidised journalism largely through classified advertising revenues. Between 2002 and 2018, newspaper revenue fell from \$4.4 billion to \$3 billion. Of that decline, 92 percent was from the loss of classified ads, and most of these classified revenues went to specialist online providers such as Carsales and Seek. Many specialist sites are owned by media businesses, Domain.com.au (59 percent owned by Nine Entertainment), Realestate.com.au (61 percent owned by News Corp), and earn significant revenue that is no longer used to cross-subsidise the costs of journalism.

Google's growth is the result of a new form of advertising that reduced the costs and therefore the barriers to entry for smaller businesses to start advertising. Between 2002 and 2018, total Australian advertising grew from AU\$8.9 billion to \$16.6 billion - \$3.6 billion of this growth is due to the creation and growth of online search advertising.⁶

⁴ AlphaBeta, "Google's Economic Impact in Australia", December 2020, p. 19, available at: <https://alphabeta.com/wp-content/uploads/2020/12/googles-economic-impact-in-australia-2020.pdf>.

⁵ AlphaBeta, "Google Economic Impact Australia 2019", September 2019, p. 6, available at: https://alphabeta.com/wp-content/uploads/2019/09/ab006_google_business_web-1.pdf.

⁶ AlphaBeta, "Australian Media Landscape Trends", September 2020, p. 13, available at: <https://alphabeta.com/wp-content/uploads/2020/09/australian-media-landscape-report.pdf>. Figures are nominal AUD.

Google Search also helps small and regional publishers get discovered and attract an audience. By increasing the visibility of stories — no matter whether they run in a big national branded paper or a local one without a well-known name — Search supports local journalism and media diversity. That lowers barriers to entry for small papers and new “digital only” entrants, creating new revenue streams and giving readers a wider variety of choices.

In any case, most Australians still cite print or TV as their main source of news (55 percent), and only a relatively small portion of online referral traffic to news publishers comes from Google (26 percent according to the ACCC Digital Platforms Inquiry Final Report).⁷

6. News and Google Search

Search results for news articles, like search results for any other kind of content, are fundamentally links, with some additional material (such as page title and snippet) to identify what is being linked to and to help the user decide whether to click.

News results typically include the publisher’s name, article headline, and publication date, and depending on the publisher’s settings may also include a thumbnail and/or snippet.⁸ Google Search does not publish the news article content itself; it links users to content on the publisher’s website.

News media businesses, like any other business choosing to make their content available for search, derive value from referral traffic from Google. In 2019, Google Search sent more than 3 billion visits to Australian news businesses’ websites, representing an estimated value of more than \$200 million.⁹ By sending user traffic to news publishers, Google helps those businesses generate revenue on their websites, including through advertising and subscriptions. By providing links to the most relevant content, Google Search provides opportunities for all publishers — major, small, regional and specialised — to reach new audiences with the quality and relevance of their content, which helps contribute to Australian media diversity.

7. Google News Showcase

In October 2020, Google [launched](#) Google News Showcase, a global product and paid licensing program that increases the value that Google provides publishers above and beyond the significant value of traffic we send in organic search.¹⁰ Based on agreements with each participating publisher, it highlights the articles and perspectives publishers want their audiences and potential new audiences to see, Google buys ‘beyond-the-paywall’

⁷ ACCC, “Digital Platforms Inquiry Final Report”, June 2019, pp. 101 and 290, available at:

<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

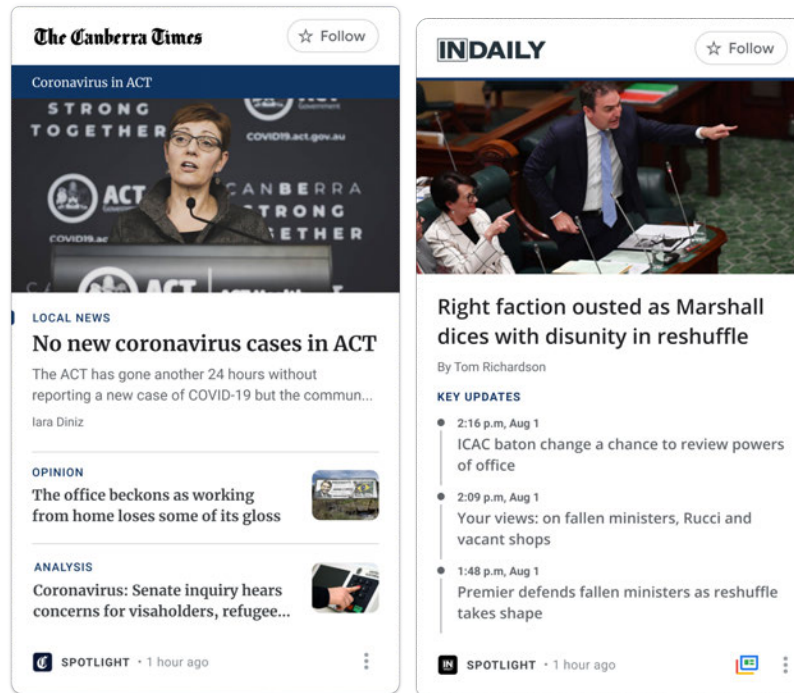
⁸ In 2019, news-seeking queries made up about 1.2% of Australians’ total queries on Google Search.

⁹ Calculated based on the lower end of the estimated value range for a click in Deloitte, “*The impact of web traffic on revenues of traditional newspaper publishers*,” September 2019, available at:

<https://www2.deloitte.com/content/dam/Deloitte/es/Documents/financial-advisory/The-impact-of-web-traffic-on-revenues-of-traditional-newspaper-publishers.pdf>.

¹⁰ Google Blog, “*Our \$1 billion investment in partnerships with news publishers*”, October 1, 2020, available at: <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/>.

access for users to demonstrate the value of news subscriptions, and builds brand affinity for publishers by providing a customisable space for news content display on Google (Google News and Discover initially, and Search integrations set to follow in future).



Google has committed \$1.38 billion to News Showcase globally over an initial three years with plans to expand beyond that, and has signed deals with over 400 publications, including seven publishers in Australia and many others in France, India, Argentina, Canada and the UK.

News Showcase is an appropriate vehicle for bilateral good faith negotiations, and also allows for collective bargaining and standard offers, in line with the intent of the Code.

If a workable Code is adopted by the Government, Google could progress News Showcase deals with all registered news businesses either within or outside of the Code. The workable Code would ensure good faith negotiations for News Showcase with recourse to binding arbitration to resolve disputes based on comparable deals already in place.

8. Proposed Solutions for a Workable Code

Three significant areas of the Code remain problematic, but with straight-forward amendments there is a path to a workable Code for all parties — digital platforms, media companies, the Government, and the Australian public and businesses.

A. Designating News Showcase, rather than Search, for payment to publishers

Problem to be solved

The designation of Google Search under the remuneration and arbitration provisions of the Code would require Google to include and pay all registered news businesses for merely having a link to their covered news content in Search, where those businesses have chosen to allow their content to be available in Search.

No website and no search engine pays to link people to other websites. Payment for links and snippets undermines the basic principle of the internet — the ability to freely link between websites. Google has never paid, nor accepted payment, for inclusion in organic search results, nor given special treatment to any class of web publisher. Such a requirement would destroy the business model of any search engine, Google included. The ACCC's Digital Platforms Inquiry Preliminary Report also highlighted the downside of a mandatory licensing regime for snippets:

Such systems of levies or fees [for the use of snippets] present several issues. For instance, if media businesses are paid for the production of content regardless of readership, this may reduce the incentive for those businesses to meet the demands of consumers for relevant, reliable, and high quality content. Moreover, it does not move towards a system that rewards producers of original content relative to re-publishers. It may also impact the spread of information from sites that are willing to waive the fee or levy where they are motivated by non-commercial concerns.”¹¹

But while the Code is phrased in terms of commercial negotiation, the current version of the Code is in fact a mandatory payment regime for links and snippets in organic Search. For good reason, no country anywhere in the world has adopted this approach.

Workable solution

In contrast, a workable Code would guarantee remuneration of news media businesses by designating News Showcase and similar offerings featuring licensed news content, as described above. Payment for deals in News Showcase would operate to ensure payment for commercial value. Binding arbitration and the application of minimum obligations to News Showcase agreements under the Code would ensure a framework for good faith negotiations.

The Code can designate Search for the purposes of application of minimum standards but not for the purposes of remuneration and arbitration under the Code.

¹¹ ACCC, “Digital Platforms Inquiry Preliminary Report”, December 2018, p279, available at: <https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf>.

B. Standard arbitration mechanism

Problem to be solved

While we appreciate that the arbitration scheme proposed by the Code has improved in part, it remains unworkable.

Final offer (or ‘baseball style’) arbitration is inappropriate and unreasonable in this context, given the nature of the issues to be resolved under the Code. Final offer arbitration is usually applied only to standardised discussions which are narrowly framed, and has never been mandated by law in Australia without the parties’ consent.

The existence of binding arbitration, on standard commercial terms, in itself would meet the Government’s goal of ensuring digital platforms and news media businesses reach fair commercial agreements that deliver payment to news businesses. The fact that an independent adjudicator would determine the price would in itself remove any perceived bargaining imbalance. To then require the arbitrator to apply biased criteria to their decision-making incentivises publishers to seek disproportionate payments and makes normal commercial negotiations difficult or impossible.

In particular:

- The arbitration provision instructs arbitrators to consider only the costs of production incurred by news businesses but not Google’s costs;
- Example 1.7 in the Explanatory Memorandum suggests arbitrators might discount the value Google provides to publishers by hypothesising that publishers could obtain some of that referral traffic from elsewhere in a world without bargaining power imbalance; however, this introduces an asymmetry in treatment that is also incoherent; and
- The arbitration provision does not require the arbitrators to consider the value of comparable transactions as a means of determining a fair price.

As such, the Code tilts the outcome of the arbitration in a manner inconsistent with fair dispute resolution, and undermines good faith commercial negotiation.

Combined, the final offer arbitration mechanism and the biased factors create incentives for news businesses to make ambit claims and have recourse to arbitration with little downside risk. In fact, the Explanatory Memorandum of the Code states that 75 percent of bargaining processes are expected to end in arbitration. Clearly the Code incentivises news businesses to ‘roll the dice’ in arbitration with every expectation of prevailing. Google has already seen a number of news businesses dramatically increase their demands (in one case three fold) in commercial negotiations since the bill was tabled.

Workable solution

The Code should adopt a standard commercial arbitration mechanism.

Standard arbitration is recognised by regulators and businesses as an established and effective process for reaching fair, commercial agreements. By giving the arbitration panel

the discretion to consider all relevant factors, including the value of comparable transactions, and to depart from the parties' offers and determine an outcome which aligns with legal principles and commercial reality, standard arbitration would encourage both parties to approach negotiations in good faith with a goal of achieving a satisfactory settlement prior to arbitration. In this way, standard arbitration would increase the efficacy of the bargaining process, reduce incentives to 'gamble', and create a baseline for bargaining without the need for costly arbitration processes.

The arbitration panel should be appointed by an approved independent arbitration organisation, such as the Australian Centre for Independent Commercial Arbitration (ACICA), which is purpose-built to identify and provide arbitrators that have the relevant skills and independence for conducting arbitrations.

C. Clear and feasible algorithm notification

Problem to be solved

The proposed system for sharing of algorithmic changes in the Code is improved from the consultation draft. However, the provision remains unworkable in three respects:

1. The exceptions to the application of the minimum standards are currently limited to improvements in speed and efficiency, but fail to include changes that make the algorithm more *effective*. The efficiency of algorithms in giving users what they want is at the heart of Google's value to Australians.
2. The "significance" threshold for algorithm changes is undefined and unclear, and Google expects that it will be unable to operationalise it in practice.
 - a. For paywalled content, it will be difficult for Google to predict "significant" effects for content behind paywalls. This is because where there is less content behind paywalls (relative to free content), small or unexpected fluctuations are more likely to trip this threshold.
 - b. For changes affecting the distribution of advertising, Google is not in a position to measure (let alone anticipate) the impact of algorithm changes on ad impressions or clicks on ads on third-party webpages.
3. The clauses now apply to changes to any Google 'internal practice', which is unworkably broad.

Workable solution

This provision should be amended to require only reasonable notice about significant actionable changes to Google's algorithm. While still creating some risk to the gaming and manipulation of our services, this would achieve the same intended outcome of ensuring publishers are in a position to respond to changes that affect them.

Alternately, the following amendments would make the algorithm provisions workable:

- The exceptions to the notification obligation must extend to changes with the dominant purpose of ensuring the algorithm operates more effectively (as well as the existing exceptions for changes to improve the algorithm's speed and efficiency);

- The obligation in relation to paywalled content should be deleted or at least limited to changes made on the basis of the paywall, not just those having an incidental effect on paywalled content;
- The obligation in relation to the distribution of advertising should be deleted, since Google will not have knowledge of particular news businesses' distribution of advertising, or whether changes it makes to its Search algorithms will have an effect on such distribution; and
- There should be no requirement to notify changes in Google's "internal practices".

YouTube and the Code

Google's understanding is that the Treasurer does not currently intend to designate YouTube under the Code. However, Google is concerned that YouTube could readily be designated in the future under section 53E, given the breadth of the Treasurer's discretion in that provision.

Designation of YouTube under the Code at any stage goes beyond the stated intention of the Code for the following reasons:

- YouTube operates in a highly competitive environment and content creators, and news media businesses in particular, have many options as to how they distribute and monetise their video and audio content online. There are many other ad-supported video platforms, such as Vimeo, Dailymotion, Metacafe, TikTok, Instagram TV, Facebook Videos and broadcaster video-on-demand services such as 9Now, 7plus, 10play and SBS On Demand.
- YouTube is a video hosting platform, on which users can access a broad range of content. Under the commercial model of YouTube, content creators, artists, broadcasters and publishers elect to produce and upload their video and audio content to their own YouTube channels. Channels primarily earn revenue from advertisements that play before and during their videos. This revenue is split between YouTube and the creator or partner, with a greater share in favour of the creator or partner.
- Publishers, including news businesses, choose to upload their content to YouTube as well as other platforms, in addition to broadcasting it and/or having it available on their own online video streaming apps and services, to increase their discoverability and ad revenue. Australian news businesses already distribute their content through their own channels (free-to-air TV and Video on Demand) — some choose to also distribute that content through YouTube, which facilitates views/followers outside of Australia and provides an additional revenue stream.
- If publishers choose to distribute their content through YouTube, they enter into agreements with YouTube that govern the terms on which publishers can make their content available on the platform, how the content may be monetised, and how revenue is to be shared between YouTube and publishers. Under these agreements, publishers receive the majority of ad revenue from Google-sold ads displayed on their content watch pages or on the YouTube video player in conjunction with streaming of their content. Additionally, publishers receive the majority of subscription revenue that is attributable to the views or watchtime of their content as a percentage of participating content in the relevant content pool for the subscription offering.

- YouTube provides content creators (including news businesses) full control over when and how their content is made available on YouTube, and news businesses can change these settings instantly, at any time, or remove their content at any time.

Designation of YouTube would have similar adverse impacts as those outlined above for Search. It is clear there is no need for a Code that requires news businesses and digital platforms to bargain with each other in relation to YouTube, when those parties have already signed agreements that provide for revenue sharing, and there is no evidence that those agreements are unfair.

Conclusion

The Code is an important new law that has serious implications for Google, and for Australia. We have engaged constructively with the ACCC, Treasury and Government throughout the drafting process and recognise some of the changes that have been made to the Code to date.

In its current form, however, the Code remains unworkable and would be detrimental to not just Google, but small publishers, small businesses, and to the millions of Australians that use our services every day.

Throughout our engagement with ACCC, Treasury and Government, Google has consistently outlined its deep concerns about the practical implications of some key elements of the Code and proposed a workable solution:

1. A Code that designates Search for the purpose of paying for links and snippets would set an untenable precedent for our businesses and the digital economy. It undermines the foundation on which not just search engines but the internet work. Just as you don't pay to include a link in an email, no website, and no search engine, pays to provide a link to other sites. This can be solved by designating News Showcase to ensure payments flow to publishers.
2. The unbalanced final offer arbitration process is unfair compared to any normal commercial arbitration. This can be solved by having an arbitration process based on comparables which would provide market value for licensed content of publishers.
3. The requirement of disclosing our algorithms would undercut the integrity of our services. This can be solved by ensuring that notification requirements are limited to significant actionable changes.

There is a clear path to a workable Code that allows Google to reach commercial arrangements with news publishers under our licensing program, Google News Showcase. With straight-forward amendments we can have a workable Code for all parties.

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