

# Australia's draft News Media Bargaining Code

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## Introduction

News, the media through which it is spread and the means by which journalism is funded have all been transformed by the internet.<sup>1</sup> That transformation has led to tensions between leading digital platforms and traditional news businesses, particularly on the issue of funding. The Australian government has produced a 'world first' in competition policy: a proposal to legislate to require designated digital platforms – initially Google and Facebook – to compensate news media businesses for news content. Although a handful of other jurisdictions have used copyright regulation to require digital platforms to pay publishers for content,<sup>2</sup> the Australian proposal is for an amendment to competition legislation to require platforms to negotiate with news businesses on remuneration for news content made available on the platforms, including through mediation and, if no agreement can be reached, binding arbitration.<sup>3</sup>

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1 A thorough review of the changes to news media and business responses internationally is given in F Cairncross, 'The Cairncross Review: A Sustainable Future for Journalism' (2019) chs 2, 3: [www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism](http://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism) accessed 12 January 2021 ('Cairncross Review').

2 See Part VI 'Overseas comparisons' below.

3 See Commonwealth Treasurer, 'Press Conference, CPO, Melbourne' (Transcript, 31 July 2020): <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/transcripts/press-conference-cpo-melbourne> accessed 12 January 2021.

The News Media and Digital Platforms Mandatory Bargaining Code (the ‘Code’) is also intended to set standards on other aspects of the relationship between platforms and news media businesses, including information that the platforms must provide to publishers about the algorithmic ranking of news content and about the data that the platforms collect on users interacting with news content. After the Australian government’s publication of a draft Code in July 2020,<sup>4</sup> Google and Facebook each started marketing campaigns, vigorously opposing the Code, calling the measures ‘unreasonable’, ‘onerous’ and ‘one-sided’,<sup>5</sup> and seeking consumer support in this opposition. The government has indicated its intention to introduce the final Code before the end of the year.

The proposal for the Code stems from recommendations by the Australian Competition and Consumer Commission (ACCC) in its *Digital Platforms Inquiry Final Report* (‘DPI Report’),<sup>6</sup> after the 18-month Digital Platforms Inquiry (DPI). Conceived as an inquiry to assess the impact of large digital platforms on the revenue of traditional news businesses after changes to Australian cross-media ownership laws, the DPI ultimately assessed the state of competition in a number of sectors in which digital platforms – especially Google and Facebook – operate, and produced wide-ranging recommendations for reform.

According to the ACCC, the proposed Code is intended to reduce substantial inequalities in bargaining power between large digital platforms and news businesses and contribute to the sustainability of independent, high-quality journalism, especially in light of the benefit that platforms derive from displaying news content funded by publishers.<sup>7</sup> A number of commentators, however, claim the government is showing favouritism to large Australian publishers for political reasons, and threatening media diversity.<sup>8</sup>

This article proceeds as follows. Part II explains the origins of the DPI in the debate over the future of media diversity and journalism in Australia. Part III outlines significant findings made by the ACCC in the DPI Report about the market power

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4 Exposure Draft: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (‘Draft NMB Code’); Exposure Draft Explanatory Materials: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (‘Explanatory Materials’).

5 See Part IV ‘Developments’ below.

6 Australian Competition and Consumer Commission, ‘Digital Platforms Inquiry: Final Report’ (2019) (‘ACCC DPI Report’).

7 See ACCC, ‘Draft media bargaining code’, ACCC website [www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code](http://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code).

8 See, eg, Kevin Rudd, ‘On the News Media Bargaining Code’ (31 August 2020): [www.youtube.com/watch?v=nL6XBJ5CoXo](https://www.youtube.com/watch?v=nL6XBJ5CoXo) accessed 12 January 2021; ‘Australia’s News Media Bargaining Code, Breaking Down the Code, Australia’s Fake News’ (blog post, 20 August 2020): <https://stratechery.com/2020/australias-news-media-bargaining-code-breaking-down-the-code-australias-fake-news> accessed 12 January 2021.

enjoyed by Google and Facebook, competitive dynamics between the platforms and news businesses, and the ACCC's reasoning in initially recommending voluntary codes. Part IV describes events after those recommendations, including the stalled negotiations over a voluntary code and Google and Facebook's campaigns against the draft Code. Part V outlines and analyses the provisions of the draft mandatory Code, in light of key criticisms. Part VI concludes with comparisons to measures in other jurisdictions and likely outcomes in Australia.

### **The origins of the DPI: media ownership and diversity**

The DPI Report has become renowned for its wide-ranging recommendations, from significant privacy and consumer law reform to methods of funding journalism and a further inquiry by the ACCC into the advertising technology ('ad tech') sector.<sup>9</sup> It is easy to lose sight of the fact that the DPI was born of concerns about the future of media diversity in Australia.

'Cross-media ownership' rules have been a topic of almost continuous debate in Australian media policy since their introduction in the 1980s.<sup>10</sup> Intended to preserve diversity, the rules set limits on the different forms of traditional media (print, radio and television) that a single proprietor could own in a geographic market.<sup>11</sup> The growth of the internet made the distinction between traditional media and geographic markets seem increasingly quaint as digitalisation led to the internet becoming a form of universal media. In the past decade, traditional news businesses also began to experience dramatic losses in advertising revenues, due to the greatly increased popularity of digital advertising via online search and social media platforms, as well as the migration of classified advertisements to online platforms.<sup>12</sup> This led to calls for the relaxation of cross-media ownership laws in the interests of the survival of traditional Australian news businesses and quality journalism.<sup>13</sup>

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9 ACCC, 'Ad tech and ad agency services inquiry kicks off' (media release, 10 March 2020): [www.accc.gov.au/media-release/ad-tech-and-ad-agency-services-inquiry-kicks-off](http://www.accc.gov.au/media-release/ad-tech-and-ad-agency-services-inquiry-kicks-off) accessed 12 January 2021.

10 See Jock Given, 'Cross-Media Ownership Laws: Refinement or Rejection' (2007) 30 *UNSW Law Journal* 258.

11 See Department of Communication, Australian government, 'Media Control and Ownership' (Policy Background Paper No 3, June 2014): [www.communications.gov.au/publications/media-control-and-ownership-policy-background-paper-no3](http://www.communications.gov.au/publications/media-control-and-ownership-policy-background-paper-no3) accessed 12 January 2021 5-8.

12 ACCC DPI Report, 120–124.

13 Department of Communication, 'Media Control and Ownership'.

In the event, the passage of this legislation<sup>14</sup> depended on the vote of Nick Xenophon, an independent senator, and his allies in the Senate.<sup>15</sup> Xenophon made his support conditional on, among other things, the government commissioning an inquiry into the large digital platforms contributing to a loss of advertising revenue from traditional news businesses.<sup>16</sup> In December 2017, the federal Treasurer issued the Terms of Reference for the DPI, requiring the ACCC:<sup>17</sup>

‘... to hold an inquiry into 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.’

After the publication of the Terms of Reference, a spokesperson for Xenophon’s political party, the Nick Xenophon Team, said:<sup>18</sup>

‘This inquiry will be important as it will expose the tactics search engines and social media platforms have employed to hoard advertising dollars, the conditions they have forced media organisations to accept, and the part they have played in the gradual erosion of the media’s bottom line. They need to be called to account for their behaviour and lack of transparency, which is irrefutably having an impact on Australian media organisations.’

Traditional news media businesses have now arguably benefited doubly from the repeal of the cross-media laws: first through the repeal itself and then through many of the ACCC’s recommendations, including proposal for the Code.

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14 Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017 (Cth) repealed the ‘75% reach rule’ (preventing a person being in a position to exercise control of commercial television broadcasting licences whose total licence area population exceeds 75 per cent of the population of Australia) and the ‘2 out of 3 rule’ (preventing mergers involving more than two of three regulated media platforms (commercial television, commercial radio and associated newspapers) in any commercial radio licence area).

15 See Rhonda Jolly, ‘Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017’, Bills Digest No 8, 2017–18.

16 Amanda Meade and Katharine Murphy, ‘Media bosses praise Xenophon and government for deal on ownership law’ *The Guardian* (15 September 2017): [www.theguardian.com/media/2017/sep/14/media-bosses-praise-xenophon-and-government-for-deal-on-ownership-law](http://www.theguardian.com/media/2017/sep/14/media-bosses-praise-xenophon-and-government-for-deal-on-ownership-law) accessed 12 January 2021.

17 Treasurer, Commonwealth of Australia, ‘Competition and Consumer Act 2010: Inquiry into Digital Platforms’ (4 December 2017).

18 James Riley, ‘ACCC targets tech platforms’, *InnovationAus* (4 December 2017): [www.innovationaus.com/accc-targets-tech-platforms](http://www.innovationaus.com/accc-targets-tech-platforms) accessed 12 January 2021, quoting Senator Stirling Griff.

## DPI findings and recommendations

The ACCC conducted the DPI over 18 months from 2018 to 2019. Although the title of the inquiry referred to digital platforms in general, the ACCC focused most of its attention on Google and Facebook, the two platforms with the greatest shares in digital advertising and the most significance as sites for online news content.

In the DPI Report, the ACCC stated its view that Google and Facebook each had substantial market power in several markets, including:

- Google, in the markets for general search services and search advertising services; and
  - Facebook, in the markets for social media services and display advertising services.
- The ACCC also noted that Google and Facebook each had 'substantial bargaining power in its dealings with news media businesses in Australia'.<sup>19</sup>

The ACCC stated that there was also likely to be a market in which Google and Facebook supply a 'news referral service' to media businesses.<sup>20</sup> This appears to be the first time such a market has been defined or proposed. The ACCC explained that a large percentage of Australian consumers of news content accessed that content via digital platforms (and Google and Facebook in particular) rather than visiting the website of a news business directly. The ACCC explained that each of these platforms provided 'news referral services' which 'can take the form of media aggregation services, online search services or social media services'.<sup>21</sup>

For example, Google search users are shown news items in 'Top Stories' at the top of the Google search results page where Google considers a search term to have 'news intent'.<sup>22</sup> Google users can also view news items on 'Google News', a news aggregation website and app that presents 'a continuous flow of headlines from news articles, grouped by story'.<sup>23</sup> Facebook users are shown news items in their personalised 'Facebook News Feed'. These include news articles or links posted by news publishers on Facebook, which appear in the News Feeds of users who have liked or subscribed to receive posts from that publisher.<sup>24</sup> Consumers also increasingly use YouTube (owned by Google) and Instagram (owned by Facebook) to view news.<sup>25</sup> News items displayed via 'news referral services' generally display only a headline, image, short summary or 'snippet' from the item in question. If the platform user wishes to read the whole story or view the whole video, they can click the incorporated hyperlink

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19 ACCC DPI Report, 8–9.

20 *Ibid*, 99–100.

21 *Ibid*, 207.

22 *Ibid*, 209.

23 *Ibid*, 207.

24 *Ibid*, 216.

25 *Ibid*, 219.

and be transferred to the publisher's website. According to the DPI Report, publishers receive a very high percentage of their traffic from either Google or Facebook.<sup>26</sup>

The ACCC found that Google and Facebook were in fact 'unavoidable trading partners' in the market for news referral services,<sup>27</sup> given that a publisher cannot feasibly refuse to have its content displayed on these platforms since the publisher will depend so heavily on the platform for traffic to its website and the subscription and advertising revenue that traffic creates. At the same time, Google and Facebook enjoy the benefits of providing their users with this news, without compensating the publishers for their content, especially when platform users skim news items on the platforms rather than continuing to the publisher website. This in turn reduces the resources available to pay for journalistic content.<sup>28</sup>

The ACCC formed the view that news businesses had no real power to negotiate with Google and Facebook individually to receive compensation for news content that is displayed on those platforms.<sup>29</sup> Publishers also claimed that attempts to negotiate could be met with retaliatory action by the platforms. In particular, the platforms are able to alter the algorithmic ranking of news content at will and dramatically decrease the referral traffic to a publisher without notice.

There is a clear public interest in access to quality, independent journalism in Australia, and particularly investigative journalism, which has higher costs and risks but also special significance in a thriving democracy. In the DPI Report, the ACCC made a number of proposals to improve the funding of quality journalism, including tax policies to encourage philanthropic support for journalism; stable government funding for public broadcasters; grants for local journalism; a mandatory take-down code for copyright-infringing content on platforms; and a process to implement a harmonised media regulatory framework. Most significantly, for present purposes, it recommended that 'designated digital platforms should provide codes of conduct governing relationships between digital platforms and media businesses' to the Australian Communications and Media Authority (ACMA).<sup>30</sup>

### **Developments: stalled negotiations, a draft mandatory code and platform reactions**

After the DPI Report, in December 2019, the Treasurer directed the ACCC to facilitate negotiations between Google and Facebook and the news businesses

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26 *Ibid*, 251. Some news businesses reported drops in website traffic of 40–50 per cent after a Facebook change in the algorithmic ranking of news content.

27 *Ibid*, 99–100.

28 *Ibid*, 17–19, 234.

29 *Ibid*, 253–254.

30 *Ibid*, recommendation 7, 16–17.

towards a single 'voluntary code to address bargaining power imbalances' between these parties, with the ACCC to provide an update on progress in May 2020 and a target date for the voluntary code to commence of November 2020.<sup>31</sup> However, in April 2020, the ACCC informed the Treasurer that negotiations between the parties had stalled. The Treasurer responded by directing the ACCC to draft a mandatory Code, a possibility foreshadowed in the Treasurer's original direction.<sup>32</sup>

In July 2020, the government published a draft Code for consultation.<sup>33</sup> Both Google and Facebook responded to the draft Code with claims that the Code itself would undermine the workings of the relevant markets. An 'Open Letter to Australians', from the Managing Director of Google Australia, warned Australian users that the draft Code 'puts the free services you use at risk' and claimed that Google may have to provide users' data to media businesses to comply with the Code.<sup>34</sup> (Google later clarified that it meant the Code puts Google's services at risk, and these services happen to be free, rather than suggesting it would start charging a monetary price for its services.<sup>35</sup>) In a blog post by the Managing Director of Facebook for Australia and New Zealand, Facebook announced that it would ban the sharing of news content on Facebook and Instagram by publishers and users in Australia if the draft Code becomes law.<sup>36</sup> The criticisms in these communications and others are explained in further detail in the following section.

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31 Australian government, 'Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry' (December 2019) 8, 12: <https://treasury.gov.au/publication/p2019-41708> accessed 12 January 2021 ('Government DPI Response').

32 Explanatory Materials, 4.

33 Draft NMB Code.

34 Mel Silva, Google Australia, 'Open letter to Australians' (17 August 2020): [https://about.google/intl/ALL\\_au/google-in-australia/aug-17-letter](https://about.google/intl/ALL_au/google-in-australia/aug-17-letter) accessed 12 January 2021 ('Google Open Letter'). A similar open letter was published and directed to YouTube users, and promoted on the YouTube page and at the front of YouTube videos watched by users: Gautam Anand, 'New Australian regulation will have negative consequences for the YouTube Community: what you need to know' (Google Australia blog post, 17 August 2020): <https://blog.google/around-the-globe/google-asia/australia/new-australian-regulation-will-have-negative-consequences-youtube-community> accessed 12 January 2021.

35 The original letter was updated by a further letter: Mel Silva, Google Australia, 'Update to our open letter to Australians' (undated 2020): [https://about.google/intl/ALL\\_au/google-in-australia/an-open-letter/?utm\\_source=google&utm\\_medium=hpp&utm\\_campaign=middleslot-p2](https://about.google/intl/ALL_au/google-in-australia/an-open-letter/?utm_source=google&utm_medium=hpp&utm_campaign=middleslot-p2) accessed 12 January 2021 ('Google Updated Letter'). See further Mel Silva, 'Australian code's unreasonable payment rules' (Google Australia blog post, 11 October 2020): <https://blog.google/around-the-globe/google-asia/australia/australia-code-payments> accessed 12 January 2021.

36 Will Easton, Facebook, 'An Update About Changes to Facebook's Services in Australia' (blog post, 31 August 2020) <https://about.fb.com/news/2020/08/changes-to-facebooks-services-in-australia> accessed 12 January 2021.

## The draft Code: criticisms and obligations

The draft Code,<sup>2</sup> published in July 2020, would impose various obligations on designated digital platforms in their dealings with certain news businesses. Initially, Google and Facebook would be the only platforms designated under the Code.<sup>37</sup> The obligations owed by the platforms would apply to their relationships with news businesses that obtain registration with the ACMA under the Code ('registered news businesses').<sup>38</sup>

The draft Code imposes certain minimum standards on the platforms in respect of all registered news businesses.<sup>39</sup> These include obligations to provide the registered news businesses with information and notice about the platform's algorithmic ranking of news content, and information about the platform's practices in respect of users' data, which will be explained further.

The draft Code also provides that platforms must negotiate with registered news businesses to reach an agreement about certain aspects of their relationship when requested by a registered news business.<sup>40</sup> For most news businesses, these matters will include remuneration for news content that appears on the platform. Under the draft Code, registered news businesses can negotiate with each platform individually or as a group. The platform must submit to mediation as part of these negotiations and, if no agreement is reached after three months, submit to binding arbitration on the remuneration payable for news content.<sup>41</sup>

The draft Code proposes that this arbitration would consist of a process commonly known as 'final offer' or 'baseball' arbitration, of the kind popularised in salary arbitrations between baseball teams and players.<sup>42</sup> Each party has one opportunity to submit an offer to the arbitrator, and, with very limited exceptions, the arbitrator

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37 Explanatory Materials, 4.

38 *Ibid*, 5-6. To be eligible for registration, news businesses must meet tests broadly requiring annual revenue in excess of AU\$150,000; creation and online publication of predominantly 'core news content'; an Australian audience; and that news sources are subject to specified professional standards: Draft NMB Code, cl 52E-52K. 'Core news content' is content produced by a journalist that records, investigates or explains 'issues of public significance to Australians'; 'issues relevant to engaging Australians in public debate and in informing democratic decision making'; or 'content which relates to community and local events': Draft NMB Code, cl 52A.

39 Draft NMB Code, part IVBA, div 4.

40 *Ibid*, part IVBA, div 6.

41 Draft NMB Code, cl 52ZF; Explanatory Materials, 24.

42 Draft NMB Code, cl 52ZO; Explanatory Materials, 24. On 'baseball' arbitration, see Lochlin B Samples, 'Resolving Construction Disputes Through Baseball Arbitration', *American Bar Association* (12 March 2019): [www.americanbar.org/groups/construction\\_industry/publications/under\\_construction/2019/spring/resolving-dispute-baseball](http://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/resolving-dispute-baseball) accessed 12 January 2021; Productivity Commission, 'Telecommunications Competition Regulation: Inquiry Report' (Report No 16, 20 September 2001) 357.

must choose one of the party's offers as the final award. The rationale is that this process will compel parties to make their most reasonable offer up front, without prolonged hearings and negotiations.

One striking feature of the draft Code is that these provisions mandating mediation and arbitration on remuneration would apply only to commercial news businesses.<sup>43</sup> News businesses that receive government funding – the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) – are excluded from taking advantage of these provisions, although the Code's minimum standards would still apply in respect of the ABC and SBS. The rationale is that the impact of Google and Facebook on commercial news businesses is greater as a result of their loss of advertising revenue to these platforms.

The Code also imposes a non-discrimination obligation on the platforms in dealings with news media businesses.<sup>44</sup> The Explanatory Memorandum for the Bill explains that:<sup>45</sup>

'Discrimination in this context will be considered to occur if the news content of a registered news business is disadvantaged in comparison to other news content in terms of the crawling, indexing, ranking, display, presentation or other process undertaken by the digital platform on any service provided by the digital platform, on the basis of the registered news business' participation in the code.'

As explained later,<sup>46</sup> in other jurisdictions, Google in particular has established a pattern of excluding the news content of publishers that have sought to rely on laws that require Google to pay for online news content. The non-discrimination obligation is intended to avoid such a strategy in Australia, by preventing discrimination against a news business on the basis of its participation under the Code. A possible additional effect of this obligation would be to create a *de facto* right for Australian local media to access the news referral services of Google and Facebook, as soon as the platforms provide those services to any domestic or international media business.

It is not within the scope of this article to provide an encyclopaedic account of the machinery of the draft Code. Such an exercise would probably have limited value until there is a final Code. The remainder of this section assesses some of the key criticisms that have been raised against the draft Code, including claims that it:

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43 Draft NMB Code, cl 52Y(6), 52ZF(1).

44 *Ibid*, cl 52W.

45 Explanatory Materials, 20 [1.100].

46 See Part VI 'Overseas comparisons' below.

- fails to take account of the value platforms provide to publishers;
- proposes an inappropriate and unworkable solution in mandating ‘baseball’ arbitration;
- favours powerful publishers at the expense of small businesses by requiring notification of changes in algorithmic ranking; and
- jeopardises consumer privacy by requiring platforms to provide publishers with information about user data collected by the platforms.

### *Platform value to publishers*

A key criticism levelled by the platforms is that the draft Code ignores the value that the platforms provide to publishers. Facebook claimed that the ‘ACCC presumes that Facebook benefits most in its relationship with publishers, when in fact the reverse is true’, and that:<sup>47</sup>

‘News organisations in Australia and elsewhere choose to post news on Facebook [...] and they encourage readers to share news across social platforms to increase readership of their stories. This in turn allows them to sell more subscriptions and advertising. Over the first five months of 2020 we sent 2.3 billion clicks from Facebook’s News Feed back to Australian news websites at no charge – additional traffic worth an estimated \$200 million AUD to Australian publishers.’

Google made similar arguments. It invested in a television advertisement in which a comedian acts out a trip on a bus to a restaurant and claims that the draft Code essentially requires the bus driver (Google) to pay the restaurant (publishers) for the privilege of delivering customers to the restaurant.<sup>48</sup> The analogy suggests that Google refuses to acknowledge any benefits it obtains by making publishers’ news content available on its platform services. Facebook similarly claims that the benefit it receives from making publishers’ news content available to its users is very small.

The draft Code requires the arbitrator, in determining the award, to take into account:<sup>49</sup>

- the direct benefit (whether monetary or otherwise) of the registered news business’ ‘covered news content’<sup>50</sup> to the digital platform service;

47 See n 36, Facebook blog post.

48 Mariam Cheik-Hussein, ‘Google uses Aussie comedian Greta Lee Jackson to fight draft bargaining code’ *AdNews* (30 September 2020): [www.adnews.com.au/news/google-uses-aussie-comedian-greta-lee-jackson-to-fight-draft-bargaining-code](http://www.adnews.com.au/news/google-uses-aussie-comedian-greta-lee-jackson-to-fight-draft-bargaining-code) accessed 12 January 2021.

49 Draft NMB Code, cl 52ZP.

50 According to the Explanatory Materials, 14, “‘Covered news content’ is intended to capture content including sports and entertainment related news such as interviews with coaches and players, reporting about the entertainment industry and coverage of reality television’ but not broadcasts of sports games, drama or reality TV, talk-back radio, product reviews or industry reporting. This is a broader concept than the ‘core news content’ that the news business corporation must predominantly produce to become a registered news business, which requires content produced by a journalist who records, investigates or explains ‘issues of public significance to Australians’; ‘issues relevant to engaging Australians in public debate and in informing democratic decision making’; or ‘content which relates to community and local events’”: Draft NMB Code, cl 52A.

- the indirect benefit (whether monetary or otherwise) of the registered news business' covered news content to the digital platform service;
- the cost to the registered news business of producing covered news content; and
- whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform service.

The arbitrator can also consider a submission from the ACCC. The 'indirect benefit' to be considered is the value of the service to the platform, including 'increased usage of the digital platform service and public perception benefits arising from the inclusion of Australian news'. The Explanatory Materials states that making 'news sources [available] on their digital platform services increases user trust and reliance on these services' and that indirect benefits 'also flow due to increased use of digital platforms because of the presence of covered news content generally'.<sup>51</sup>

It is apparent from the terms of these provisions that the draft Code does not require the arbitrator to take the value of a digital platform's news referral services into account, as opposed to the question of whether a proposed remuneration amount would 'place an undue burden on the commercial interests of the digital platform service'. In fairness, the arbitrator should have regard to the value received by both parties to this transaction. Another potential flaw in the Code is more fundamental: mandating remuneration by Google and Facebook for news businesses' content may make Australian news media businesses more reliant on these platforms, and less inclined to focus on rival platforms. This could effectively entrench the power enjoyed by the two dominant platforms.<sup>52</sup>

#### *Effectiveness of 'baseball' arbitration for platform content*

While the 'baseball' arbitration has an attractive simplicity of design, the resulting determination will effectively be a single figure reflecting all the complexity of the value exchanges between platforms and news media businesses, over which the parties are likely to have starkly different views. The parties' submissions on their respective offers are also limited to a relatively short 30 pages. While the arbitral award will only last for one year, there is nonetheless an element of finality about the arbitration, bearing in mind that a failure to implement an agreement giving effect to the determination within 30 days will expose the party to civil penalties of up to AU\$10m or 10 per cent of turnover.<sup>53</sup>

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<sup>51</sup> Explanatory Materials, 25–26.

<sup>52</sup> Michael Bradley, 'Canberra (and Rupert) v big tech: can the government rein in Facebook and Google?' *Crikey* (31 August 2020): [www.crikey.com.au/2020/08/31/scott-morrison-v-facebook-google](http://www.crikey.com.au/2020/08/31/scott-morrison-v-facebook-google) accessed 12 January 2021.

<sup>53</sup> Draft NMB Code, cl 52ZU–52ZV.

With that background, it seems inevitable that the ‘losing’ party in the arbitration will look to explore multiple bases for challenge. These may range from simple administrative judicial review challenges that the arbitrator did not take into account some relevant information, to a full constitutional challenge on the basis that the arbitrator is effectively performing a judicial function without being a duly-constituted court under Part III of the Australian Constitution.

There is precedent in other areas of infrastructure regulation that suggests the making of a determination by the arbitrator is unlikely to be the end of the dispute between the parties and instead will start another, more fundamental battle as to the legal basis for resolving the commercial dispute between the parties by this form of ‘regulated negotiation’.<sup>54</sup> Given the pattern of Google’s responses in particular to comparable regulation in other jurisdictions,<sup>55</sup> there is significant potential for extended litigation over the outcome of the arbitration, or the legitimacy of the Code at the outset.

#### *Information regarding algorithmic ranking*

The platforms have argued that the draft Code unfairly obliges them to reveal information concerning their algorithms to Australian publishers, which would: degrade the quality of the algorithmic ranking and therefore the platform service; potentially permit those publishers to ‘game’ the algorithmic ranking; and disadvantage smaller publishers who are not eligible for registration under the draft Code.

The draft Code provides that the platforms must generally<sup>56</sup> give a registered news business at least 28 days’ notice if:

- changes are planned to be made to an algorithm of the digital platform service; and
- the changes are likely to have a significant effect on the ranking of the registered news business’ covered news content made available by the digital platform service.<sup>57</sup>

The notice must describe the relevant change and the effect on the ranking of the registered news business’ covered news content<sup>58</sup> made available by the digital platform service in terms that are readily comprehensible, as well as describing

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54 See Productivity Commission, ‘Telecommunications Competition Regulation: Inquiry Report’ (Report No 16, 20 September 2001) 338–339.

55 See Part VI ‘Overseas comparisons’ below.

56 If the change relates to a matter of urgent public interest, notice can be given no later than 48 hours after the change is made: Draft NMB Code, cl 52N(2) (b) (ii).

57 *Ibid*, cl 52N.

58 On the meaning of ‘covered news content’, see n 47 above.

how the news business can minimise negative effects of the change on the ranking of that news content.<sup>59</sup>

Google's public campaign opposing the draft Code emphasised its view that these obligations would advantage large media businesses at the expense of both small businesses and the quality of Google Search, stating that:

'The current draft law would force us to give news publishers advance notice of significant changes to Search and other products and tell them how to minimise the effect on them. If you have a blog, YouTube channel or a small business website that appears in Search results, you'll be at a disadvantage compared to these news businesses. And if you use Search to find information, you'll be worse off because this rule will force us to slow down upgrades that improve Search for everyone.'

A number of commentators have also claimed that the government is using the Code to show favouritism to big publishers for political reasons, at the expense of the platforms and small businesses that produce news content.<sup>60</sup>

The non-discrimination obligation, discussed previously, is intended to prevent discrimination against news businesses based on their participation under the Code, as well as discrimination between registered news businesses. However, there are some concerns that are not solved by that obligation. First, it only applies in relation to registered new media businesses. Some smaller publishers will (by definition) be excluded from participation in the Code as a result of the monetary threshold for participation of AU\$150,000 in annual revenue.<sup>61</sup> Second, identical outcomes may not result in substantive non-discrimination where the parties are themselves different. For example, a requirement by a platform that news media businesses receive notifications using a particular technology or interface may impose disproportionate fixed costs on small publishers that would make participation uneconomic or place them at a competitive disadvantage.

#### *Information regarding personal data of platform users*

In its open letter, Google complained that the draft Code would jeopardise the privacy of Australian Google users, stating that the draft Code 'could lead to your data being handed over to big news businesses'. It continued to explain to its users that:<sup>62</sup>

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59 Draft NMB Code, cl 52N(2)(c),(d).

60 See, eg, n 8 above, Kevin Rudd.

61 The news business must have annual revenue in excess of AU\$150,000 to register under the draft Code: Draft NMB Code, cl 52E, 52G.

62 Google Open Letter.

‘You trust us with your data and our job is to keep it safe. Under this law, Google has to tell news media businesses “how they can gain access” to data about your use of our products. There’s no way of knowing if any data handed over would be protected, or how it might be used by news media businesses.’

In its response to Google’s letter, the ACCC refuted several of its claims, including the suggestion that the platforms would be forced to share user data, stating that ‘Google will not be required to share any additional user data with Australian news businesses unless it chooses to do so’.<sup>63</sup>

The ACCC’s response does seem consistent with the terms of the draft Code, which states that, as part of the minimum standards that will apply to the platforms, the digital platform must ensure that certain information is provided to register news business corporations, including:<sup>64</sup>

- a list and explanation of the data the platform collects about the news business’ users ‘through their engagement with covered news content made available by the digital platform service’;
- a list and explanation of the products and services supplied by the platform that collect such data about the news business’ users;
- a list and explanation of the data that the platform has a practice of making available to registered news businesses; and
- ‘information about how the registered news business corporation can gain access to the data mentioned in’ the previous three bullet points.

These obligations do not expressly mandate any disclosure of user data. However, there is reason to clarify this position in the final Code. In the DPI Report, the ACCC originally recommended that, as part of the proposed Code, the platforms ‘would be required to commit to sharing data on users’ consumption of the media business’ news content on the digital platform’.<sup>65</sup> The ACCC argued that, while consumers would not expect their ‘browsing history, search queries or navigation history’ to be passed on to media businesses, it was reasonable for media businesses to expect the platforms to provide data about users’ consumption of the media business’ news content on that platform and that such data ‘could make media businesses more competitive in the supply of advertising services’.<sup>66</sup> Accordingly, it is clear that the ACCC did originally propose mandated disclosure of user data.

It may be true that the provision of such user data would allow media businesses to compete more effectively for advertising business, no doubt based in large part on more detailed profiling of consumers. At the same time, the news content an

63 ACCC, ‘Response to Google open letter’ (17 August 2020): [www.accc.gov.au/media-release/response-to-google-open-letter](http://www.accc.gov.au/media-release/response-to-google-open-letter) accessed 12 January 2021.

64 Draft NMB Code, cl 52M(1)–(2).

65 ACCC DPI Report, 249.

66 *Ibid*, 248.

individual consumes and the quantity, frequency and timing of that consumption could allow these businesses to infer highly personal information about the individual, including their political views, ethnicity, level of education, sexuality, views on vaccination, health issues, age and family situation.

In the DPI Report, the ACCC highlighted the fact that news businesses can generally only track the behaviour of their users while they are on the news business' website. By contrast, Google and Facebook are able to track consumers across numerous third-party websites, in addition to their own services, due to the embedded Google and Facebook technologies in those third-party websites – such as 'sign-in' with Google or Facebook, Google analytics, the Facebook 'like' button and embedded YouTube videos.<sup>67</sup> News businesses argued that they should have access to more data collected by Google and Facebook about the news businesses' users, including data collected by Google and Facebook via their technologies embedded on the news businesses' own websites.<sup>68</sup>

In other contexts, Google and Facebook have been strongly criticised for these practices of tracking consumers across third-party websites without providing any or adequate opportunities for consumers to opt out of the tracking.<sup>69</sup> These practices do not respect consumer choices and should be stopped. In Australia, this is likely to require increased enforcement of existing privacy regulation as well as the reform of that regulation, in line with several other recommendations by the ACCC in the DPI Report.

After publication of the draft Code, Google argued that the final Code should clarify that the platforms are 'not required to share any additional data, over and above what publishers are already supplied'.<sup>70</sup> Readers might reasonably suspect that this argument is largely driven by Google's commercial interest in the competitive advantage it gains by having exclusive access to certain consumer data, including for its own advertising businesses. Google and Facebook have each been accused of,

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67 *Ibid*, 247–248.

68 *Ibid*, 248.

69 Dina Srinivasan, 'The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16 *Berkeley Business Law Journal* 39, 72–81; Facebook Inc i.a. – The Use of Abusive Business Terms pursuant to Section 19(1) GWB (B6-22/16, Bundeskartellamt, Administrative Proceedings, 6 February 2016); BUNDESKARTELLAMT, GERMANY, 'Bundeskartellamt prohibits Facebook from combining user data from different sources: Background information on the Bundeskartellamt's Facebook proceeding' (7 February 2019); ACCC, 'Google Allegedly Misled Consumers on Collection and Use of Location Data' (media release, 29 October 2019); ACCC, 'ACCC Alleges Google Misled Consumers About Expanded Use of Personal Data' (media release, 27 July 2020). See further ACCC DPI Report, 389, 417–418.

70 Google Updated Letter.

and found to have engaged in, a number of unlawful activities that have seriously jeopardised the privacy of their users and other individuals.<sup>71</sup>

However, mandating that Google and Facebook share data about consumers' news consumption with news businesses risks exacerbating the degradation of consumers' privacy. Any proposal to improve competition in advertising services by increasing access to consumers' personal data should be subject to thorough consultation with consumer advocates and privacy advocates, to avoid creating a net social harm.

### Overseas comparisons

To provide further context and identify trends relevant to the likely outcomes after legislation of the Code in Australia, this section outlines comparable measures proposed or adopted in other jurisdictions in an effort to require major digital platforms to pay for news content displayed on their platforms.

#### *United Kingdom*

In its original recommendation for a Code in the DPI Report, the ACCC expressly referred to the fact that its proposal 'shares many features with' the code proposed in the UK Cairncross Report.<sup>72</sup> In 2018 the UK Government commissioned a review, led by the journalist Dame Frances Cairncross, into the sustainability of the production and distribution of high-quality journalism in a news media market significantly affected by the 'digital revolution'.<sup>73</sup> The first recommendation of the 2019 Cairncross Report was that there should be new codes of conduct to rebalance the relationship between online platforms and publishers: that is, those online platforms upon which publishers increasingly depend for traffic should be required to set out codes of conduct to govern their commercial arrangements with news publishers, with oversight from a regulator.<sup>74</sup>

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71 See, eg, Federal Trade Commission, 'FTC's \$5 Billion Facebook Settlement: Record-Breaking and History-Making' (24 July 2019): [www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history](http://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history) accessed 12 January 2021; Office of the Australian Information Commissioner, Australian Government, 'Commissioner Launches Federal Court Action Against Facebook' (9 March 2020): [www.oaic.gov.au/updates/news-and-media/commissioner-launches-federal-court-action-against-facebook](http://www.oaic.gov.au/updates/news-and-media/commissioner-launches-federal-court-action-against-facebook) accessed 12 January 2021; ACCC, 'Google Allegedly Misled Consumers on Collection and Use of Location Data' (media release, 29 October 2019); ACCC, 'ACCC Alleges Google Misled Consumers About Expanded Use of Personal Data' (media release, 27 July 2020).

72 ACCC DPI Report, 254.

73 Cairncross Review, 5.

74 *Ibid.*, 90.

The ACCC originally proposed that the ACCC and the ACMA would 'engage with the regulator responsible for overseeing the code of conduct proposed in the Cairncross Review' in the interests of international cooperation, shared learning from each other and, where appropriate, alignment of approaches to achieve the same objectives.<sup>75</sup> The UK Government has responded to the Cairncross Report, stating it agrees that there is an unequal relationship between publishers and search and social media platforms, that 'codes of conduct that formalise the relationships between news publishers and online platforms may help to rebalance that relationship'<sup>76</sup> and that it is working on this recommendation as part of a broader programme of work in respect of competition in digital markets. However, at this stage, the UK Government has not taken steps to implement this recommendation.<sup>77</sup> It seems unlikely there will be cooperation or shared learning on such codes between the two jurisdictions in the immediate future.

### *France*

In 2019 France became the first country to implement the 2019 European Union Directive on Copyright in the Digital Single Market<sup>78</sup> into its national law.<sup>79</sup> The Directive permits publishers to request 'an appropriate share of revenues' as fees (referred to as a 'neighbouring right') from online platforms when the platforms display content online.<sup>80</sup> Google responded by stating it would show 'stripped-down' French news search results, limiting the use of snippets or thumbnail images from European publishers where the publishers did not provide their explicit consent.<sup>81</sup>

75 ACCC DPI Report, 255.

76 UK Department for Digital, Culture, Media and Sport, 'Government response to the Cairncross Review: a sustainable future for journalism' (policy paper, 27 January 2019) [10]–[11].

77 While the government's response on the media code recommendation was expected after the report on the Competition and Markets Authority's (CMA) market study into online platforms and digital advertising, that report was published in July 2020, without any subsequent announcement on the media code recommendation: UK Department for Digital, Culture, Media and Sport, 'Government response to the Cairncross Review' [12]–[13]; CMA, 'Online platforms and digital advertising: Market study final report' (1 July 2020, market study report).

78 Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

79 The French law was passed on 24 July 2019 and entered into force on 24 October 2019: Autorité de la Concurrence, 'Related rights: The Autorité imposes urgent interim measures on Google' (media release, 9 April 2020). Other Member States are required to translate the Directive into domestic legislation by June 2021: Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92, Art 29(1).

80 Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92, Art 15(5).

81 Aoife White, 'Google to strip down French news results under new rules' *Bloomberg* (25 September 2019), [www.bloomberg.com/news/articles/2019-09-25/google-to-change-french-news-results-under-copyright-rules](http://www.bloomberg.com/news/articles/2019-09-25/google-to-change-french-news-results-under-copyright-rules) accessed 12 January 2021.

However, the Autorité de la Concurrence granted requests for urgent interim measures sought by publishers and the news agency Agence France Presse, ordering Google to ‘negotiate in good faith’ with French publishers for licensing fees for the reuse of their protected contents, within a three-month window.<sup>82</sup> In granting the publishers’ requests, the Autorité found that Google’s practices (that is, its threats to limit its display of news unless publishers consented to such display without remuneration) were likely to constitute an abuse of a dominant position.<sup>83</sup>

Google appealed the decision to the Paris Court of Appeal, arguing that it was adequately compensating news businesses by sending referral traffic to them. The Court dismissed the appeal, upholding the order of the Autorité requiring Google to negotiate with French publishers.<sup>84</sup> At the same time, Google indicated it had nearly reached a deal with French publishers to accept the neighbouring rights regime and pay publishers through its new News Showcase product.<sup>85</sup>

### *Spain*

In 2014 Spain enacted a copyright law – nicknamed the ‘Google fee’<sup>86</sup> – that required news aggregators to compensate publishers for displaying news snippets and links to news stories.<sup>87</sup> The law allows for sanctions of up to US\$758,000 for violations.<sup>88</sup> Leading up to the introduction of the law, Google threatened to shut down its news aggregator service, Google News, in Spain.<sup>89</sup> It followed through on

82 Autorité de la Concurrence, ‘Related rights: The Autorité imposes urgent interim measures on Google’ (media release, 9 April 2020). See also Thibault Larger and Laura Kayali, ‘French publishers win decisive battle against Google’ *Politico* (4 September 2020), [www.politico.com/news/2020/04/09/french-publishers-win-decisive-battle-against-google-177686](http://www.politico.com/news/2020/04/09/french-publishers-win-decisive-battle-against-google-177686) accessed 12 January 2021.

83 *Ibid.*, Autorite de la Concurrence.

84 ‘French court: Google must open payment talks with publishers’ *AP News* (8 October 2020), <https://apnews.com/article/paris-europe-archive-france-676170fc19d38cb4d6a8885f9f839d7c> accessed 12 January 2021; Natasha Lomas, ‘Google must negotiate to pay for French news, appeals court confirms’ *TechCrunch* (8 October 2020), <https://techcrunch.com/2020/10/08/google-must-negotiate-to-pay-for-french-news-appeals-court-confirms> accessed 12 January 2021.

85 Foo Yun Chee, ‘Google poised to strike deal to pay French publishers for their news’ *Reuters* (8 October 2020), [www.reuters.com/article/us-alphabet-france-publishing/google-poised-to-strike-deal-to-pay-french-publishers-for-their-news-idUSKBN26S33C](http://www.reuters.com/article/us-alphabet-france-publishing/google-poised-to-strike-deal-to-pay-french-publishers-for-their-news-idUSKBN26S33C) accessed 12 January 2021.

86 Mariana Marcaletti, ‘Under Spain’s ‘Google Fee’ law, news aggregators must pay publishers’ *The Washington Post* (26 July 2014), [www.washingtonpost.com/news/business/wp/2014/07/25/under-spains-google-fee-law-news-aggregators-must-pay-publishers](http://www.washingtonpost.com/news/business/wp/2014/07/25/under-spains-google-fee-law-news-aggregators-must-pay-publishers) accessed 12 January 2021.

87 Ley de Propiedad Intelectual 1996 (Spain), art 32.2.

88 Joe Mullin, ‘Country by country, Europe falls in and out of love with a “Google tax”’ *ArsTechnica* (1 November 2014), <https://arstechnica.com/tech-policy/2014/10/country-by-country-europe-falls-in-and-out-of-love-with-a-google-tax> accessed 12 January 2021.

89 Chris Johnston, ‘Google ‘Plays Hardball’ in Spanish news row’ *The Guardian* (16 December 2014), [www.theguardian.com/technology/2014/dec/15/google-spanish-news-row](http://www.theguardian.com/technology/2014/dec/15/google-spanish-news-row) accessed 12 January 2021; Eric Auchard, ‘Google News to go dark in Spain over copyright fees’ *The Sydney Morning Herald* (12 December 2014), [www.smh.com.au/technology/google-news-to-go-dark-in-spain-over-copyright-fees-20141212-125hud.html](http://www.smh.com.au/technology/google-news-to-go-dark-in-spain-over-copyright-fees-20141212-125hud.html) accessed 12 January 2021.

the threat. Once the law was passed, Google closed Google News in that jurisdiction, and it remains unavailable in Spain.<sup>90</sup>

In 2015 a group of publishers commissioned a report which found that the Google fee law had an anti-competitive effect on online publishing, and that there was no real justification for the imposition of the fee.<sup>91</sup> The report suggested that:<sup>92</sup>

‘an external intervention is not necessary and that solutions do exist for this alleged problem through bilateral negotiations between the parties. Indeed, this has occurred in countries including France, Belgium, and Germany, and at European level, where there have been attempts to implement a similar fee and where aggregators (particularly Google News) and publishers have reached “cooperation agreements”.’

### *Germany*

In 2013 Germany passed an ancillary copyright law, effectively requiring Google and other online search engines and news aggregators to pay for quotation snippets.<sup>93</sup> Headlines and very small text blocks were exempt from the remuneration obligation.<sup>94</sup> According to the new law, ‘[t]he publishers of newspapers and magazines shall have the exclusive right to make the newspaper or magazine or parts thereof available to the public for commercial purposes, unless it consists of individual words or very short text excerpts’.<sup>95</sup> This right was transferable and would expire one year after the publication of the newspaper or magazine.<sup>96</sup> The law further provided that it would be ‘permissible to make the newspaper or magazine

90 Natasha Lomas, ‘Google and Facebook must pay media for content reuse, says Australia’ *TechCrunch* (21 April 2020), <https://techcrunch.com/2020/04/20/google-and-facebook-must-pay-media-for-content-reuse-says-australia/?guccounter=1> accessed 12 January 2021.

91 NERA Economic Consulting, ‘Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual: Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP)’ (9 July 2015, report).

92 *Ibid.*, xii.

93 With effect from 1 August 2013: Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) s 87f inserted by achttes Gesetz zur Änderung des Urheberrechtsgesetzes (Eighth Law amending the Law on Copyright) of 7 May 2013.

94 Gerrit Weismann, ‘Axel Springer persists with Google demands’ *Financial Times* (London, 6 March 2013).

95 Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) [87f]. For these purposes, a newspaper or magazine is defined as the editorial and technical preparation of journalistic contributions that are compiled and published periodically on any media under one title, which, after an assessment of the overall circumstances, is to be regarded as largely typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions are, more specifically, articles and illustrations which serve to disseminate information, form opinions or entertain.

96 Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) [87g].

or parts thereof available to the public unless this is done by commercial operators of search engines or commercial operators of services that similarly publish content'.<sup>97</sup>

Google campaigned against the proposed amendments, aiming to mobilise German internet users in support of its position, with messages such as 'defend your web' and 'protect your web – find what you're looking for'.<sup>98</sup> Ultimately, the legislation passed was less onerous than initially proposed, since it excluded 'single words or very short text excerpts' from the remuneration obligation.<sup>99</sup>

By 2014, in compliance with the law and in response to legal action brought by VG Media, Google published only the headlines of articles unless publishers gave express consent for their content to be published by Google.<sup>100</sup> However, even the biggest German publisher, Axel Springer, subsequently agreed to Google's terms,<sup>101</sup> providing consent for its content to be published by Google, noting that it was forced to do so after traffic to its website fell sharply during the two weeks in which it refused consent for Google to publish without remuneration. Axel Springer regarded the dramatic drop in traffic to its publications as 'proof of Google's overwhelming power in the search market'.<sup>102</sup>

In 2017, the Landgericht Berlin sought intervention by the European Court of Justice, which in 2019 ruled that the German law was not enforceable and 'must be disregarded' on the basis that the regulation was a technical regulation of the

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97 Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) [87g]. Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) [87h] provides that 'The author shall be entitled to an equitable share of the remuneration'.

98 Michiel Willems, 'Google campaigns against German tax proposals' *SNL Kagan Media & Communications Report* (Charlottesville, 30 November 2012); Gerrit Wiesmann, 'Google goes public over German copyright law' *Financial Times* (London, 27 November 2012).

99 Cornelius Rahn and Rainer Buerger, 'Google defeats publishers over web copyright in German vote' *Bloomberg* (1 March 2013), [www.bloomberg.com/news/articles/2013-03-01/google-defeats-publishers-over-copyright-in-german-parliament](http://www.bloomberg.com/news/articles/2013-03-01/google-defeats-publishers-over-copyright-in-german-parliament) accessed 12 January 2021.

100 Philipp Justus, 'News zu News bei Google' (Google Germany blog post, 1 October 2014), <https://germany.googleblog.com/2014/10/news-zu-news-bei-google.html> accessed 12 January 2021. VG Media, a consortium made up of about 200 publishers, took Google to regional court (Landgericht Berlin) for violation of the law.

101 According to Harro Ten Wolde and Eric Auchard, 'Germany's top publisher bows to Google in news licensing row' *Reuters* (Frankfurt, 6 November 2014), Google 'require[d] publishers who want their content to continue to show up in Google search results to give it explicit permission to do so and freedom from any liability for licensing fees under such laws'.

102 Harro Ten Wolde and Eric Auchard, 'Germany's top publisher bows to Google in news licensing row' *Reuters* (Frankfurt, 6 November 2014).

kind required to be communicated to the European Commission, which had not in fact been notified.<sup>103</sup>

### *Belgium*

In 2006 three collecting societies in Belgium – Copiepresse, a news publishers trade group, SAJ, a journalism trade group, and Assuocopie, a scientific, research and educational publishers trade group<sup>104</sup> – brought an action against Google, alleging copyright violations for its use of snippets and headlines in Google News and by virtue of its caching system. At first instance, the High Court of Brussels found that Google infringed the copyright of Belgian publishers (by default, as Google failed to appear at the hearing). It ordered Google to withdraw the infringing material from Google News and from its caching system and to establish a procedure that would require Google to take down any republished copyrighted material on 24 hours' notice from a collecting society or its members.<sup>105</sup>

Google opposed the default order, resulting in a case review by the High Court. In 2007 the High Court affirmed the original order, holding in part that the Google cache and Google News unlawfully reproduced original parts of copyrighted works.<sup>106</sup> On appeal to the Court of Appeal of Brussels in 2011, the Court affirmed the decision at first instance, relevantly requiring Google to withdraw infringing material from Google News and its cache (and to pay €25,000 per day for failure to do so).<sup>107</sup> In response, Google removed Copiepresse newspapers from all its search

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103 *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC* (Court of Justice of the European Union, C-299/17, ECLI:EU:C:2019:716, 12 September 2019); Court of Justice of the European Union, 'A German provision prohibiting internet search engines from using newspaper or magazine snippets without the publisher's authorisation must be disregarded in the absence of its prior notification to the Commission' (press release No 108/19, 12 September 2019). See also Foo Yun Chee and Klaus Lauer, 'Google wins legal battle with German publishers over fee demands' *Reuters* (US, 12 September 2019).

104 Philippe Laurent, 'Copiepresse SCRL & alii v. Google Inc. – In its decision of 5 May 2011, the Brussels Court of Appeal confirms the prohibitory injunction order banning Google News and Google's "in cache" function' (2011) 27(5) *Computer Law & Security Review* 542.

105 Philippe Laurent, 'Google News banned by Brussels High Court – Copiepresse SCRL v. Google Inc. – Prohibitory injunction of the President of the High Court of Brussels, 5 September 2006' (2007) 23(1) *Computer Law & Security Review* 82.

106 Philippe Laurent, 'Brussels High Court confirms Google News' ban – Copiepresse SCRL v. Google Inc. – Prohibitory injunction/stop order of the President of the High Court of Brussels, 13 February 2007 [opposition procedure against the first default stop order by the same President]' (2007) 23(3) *Computer Law & Security Review* 290.

107 Philippe Laurent, 'Copiepresse SCRL & alii v. Google Inc. – In its decision of 5 May 2011, the Brussels Court of Appeal confirms the prohibitory injunction order banning Google News and Google's "in cache" function' (2011) 27(5) *Computer Law & Security Review* 542.

results and Google News.<sup>108</sup> After that action, Copiepresse agreed to allow Google to use its content in its cache and to permit Google to re-index its newspaper websites for Google search (although the content was still not included on Google News).<sup>109</sup>

The following year, Google and the publishers reached an agreement that was to end ‘all litigation’ involving partnerships on a range of business initiatives aiming to promote the publishers’ and Google’s services, increase publisher revenue, increase reader engagement and increase content accessibility.<sup>110</sup> It appears that this involved Google buying ‘millions of dollars of advertising’ (reportedly, about US\$6m) from the publishers, as well as paying the publishers’ legal fees.<sup>111</sup> It did not involve any admission of copyright infringement or take the form of remuneration for news content.<sup>112</sup>

## Conclusion

According to the Australian Government, the news content produced by Australian news media businesses has significant value for large digital platforms such as Google and Facebook, including the indirect value from users being more likely to frequent platforms that incorporate news content, and the increased trust and legitimacy associated with a platform that offers news content. The government believes that these platforms should provide some remuneration for the value they receive – under a mandatory code if necessary – rather than relying on their market power to refuse payment and deprive news businesses of vital funding for journalistic content. Google and Facebook each vigorously dispute these claims, arguing that they receive very little benefit from making such news available on their platforms and instead provide enormous benefits to news businesses in the form of referral traffic from their platforms, and resulting advertising and subscription revenue.

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108 Matthew Lasar, ‘Google v Belgium ‘link war’ ends after years of conflict’ *ArsTechnica* (20 July 2011), <https://arstechnica.com/tech-policy/2011/07/google-versus-belgium-who-is-winning-nobody> accessed 12 January 2021.

109 Peter Ollier, ‘Google puts Copiepresse back in search results’ (2011) *Managing Intellectual Property*; Steven Musil, ‘Google settles copyright dispute with Belgium newspapers’ *CNet* (13 December 2012), [www.cnet.com/news/google-settles-copyright-dispute-with-belgium-newspapers](http://www.cnet.com/news/google-settles-copyright-dispute-with-belgium-newspapers) accessed 12 January 2021.

110 Thierry Geerts, ‘Partnering with Belgian news publishers’ (Google Europe blog post, 12 December 2012), <https://europe.googleblog.com/2012/12/partnering-with-belgian-news-publishers.html> accessed 12 January 2021.

111 Xavier Ternisien, ‘En conflit avec la presse belge, Google accepte de l’indemniser’ *Le Monde* (Paris, 13 December 2012); Stephanie Bodoni, ‘Google, Belgian Newspapers Settle Copyright Link Dispute’ *Bloomberg* (14 December 2012), [www.bloomberg.com/news/articles/2012-12-13/google-belgian-newspapers-settle-copyright-dispute-over-links](http://www.bloomberg.com/news/articles/2012-12-13/google-belgian-newspapers-settle-copyright-dispute-over-links) accessed 12 January 2021.

112 See n 110 above.

Over the past 15 years, there is a clear trend of Google reducing or eliminating the availability of news content on its services in other jurisdictions when regulation has been introduced in an effort to mandate payment for online news content. In a number of cases, Google has removed the relevant news content from its services to avoid payment under the regulation, used legal avenues to challenge the regulation and negotiated with publishers on its own terms outside the regulation, generally avoiding establishing any precedent for direct payment for news content. In Australia, Facebook has now similarly threatened to ban the posting of news content by Australian publishers and users to avoid mandated payment for news content.

Under the Australian Code, the non-discrimination obligation and substantial penalties for breaching it make it unlikely that the platforms would attempt to target individual news businesses for exclusion based on the news business' attempts to rely on the Code to negotiate for remuneration. The stakes are higher. Google or Facebook would need to prevent the availability of all Australian news content to avoid paying remuneration under the Code. There is an opportunity for an interesting natural experiment concerning the actual value of news content to the relevant digital platforms services' if either platform proceeds with that strategy when the Code is enacted.

### **About the author**

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