

Getting Facebook and Google to Pay for News: Explaining Australia's News Media Bargaining Code

Andrea Carson*

TRANSCRIPT

Thank you very much. I'd just like to say what a great pleasure it is to be here albeit at 3:13 in the morning. And it's really wonderful to be able to hear what's going on in the United States.

I'm going to share some slides just to give some context to what's happened in Australia with the News Media Bargaining Code, which relies on competition law, which has been referred to here as antitrust.

So I guess, the background to the Australian context is it's been a very concentrated media ownership environment, probably, one of the most concentrated environments of any developed democracy.

And it's become further concentrated over time with changes to media merger and acquisition laws. And we saw a significant change in 2017-- there are two main media newspaper companies in Australia, that's Fairfax Media and News Corp Australia, which, of course, is owned by media baron Rupert Murdoch.

After the last raft of changes to media ownership laws in 2017, Channel 9, the television station took over Fairfax Media,¹ which led to further ownership consolidation. Coming off the back of the global financial crisis, newspapers had lost millions of dollars, well, billions, actually, in advertising revenue exacerbated with online competitors coming on board.

And that led to an inquiry by the Australian Competition and Consumer Commission ("ACCC"). In 2017, the federal Government asked the ACCC to look at what the state was of media in Australia with growing concerns about the sustainability of newsrooms, particularly with misinformation circulating online. And

* Andrea Carson is a Professor of Political Communication in the Department of politics, Media and Philosophy at La Trobe University, Melbourne. She has a PhD in political science and was a former journalist at The Age and the ABC in Melbourne, Australia. For details, visit <https://scholars.latrobe.edu.au/alcarson> [<https://perma.cc/X9LD-B4JP>] [<https://web.archive.org/web/20230428012534/https://scholars.latrobe.edu.au/alcarson>].

1. Fairfax Media was a predominantly print and radio broadcast company and was the second largest Australian media company after Rupert Murdoch's News Corp Australia.

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as Hal's² talk explained, the arrival of digital competitors such as Facebook and Google had created an uneven playing field of bargaining power for traditional media to compete to attract advertising.

In 2019, the ACCC reported back with twenty-three recommendations for change. Of those, the federal government, which was a conservative government, at the time, instructed the ACCC to develop the News Media Bargaining Code, which is what I'm here to talk about today.

The objective of the code that arose out of the ACCC inquiry was to address bargaining power imbalances so that news outlets receive fair remuneration from digital platforms for the value their content generates.

The News Media Bargaining Code was developed during 2020. By early 2021 it looked like it was about to come into law. And that is when Google and Facebook ran counter online campaigns. In Google's case, it told users its Google services would be severely disrupted if the law succeeded. And Facebook, for its part, actually pulled news from its platform for ten days.

News was defined very broadly by Facebook and it actually removed some important emergency services information from its platform during a time when Australia was experiencing bushfires. That caused some public backlash towards Facebook, yet the maneuver also forced the government to make some amendments to the bill, which I'll go into in just a moment, which I think we can see were clearly in the interests of the big tech companies.

So just a little more background. Similar to what Hal has been reporting, over time, the ACCC inquiry found that 3.48 billion [Australian dollars] was the estimated loss in classified advertising in Australia between 2001 and 2016.³ And that reporting staff across newspapers and television and radio had decreased by twenty percent between 2014 and 2018.⁴

If we look at the advertising, distribution in Australia, it's a similar picture of decline with over eighty percent going to Google and Facebook, which is why Google and Facebook are exclusively named in the News Media Bargaining Code. The other big platforms that operate in Australia, at this point in time, are not subject to that code. Only nineteen percent of the advertising revenue was going to the news media sector.

As a consequence, also, of the COVID-19 pandemic, Australia was developing more news deserts in local media with 164 outlets, closing in the first year of the COVID-19 pandemic.⁵

2. Hal J. Singer, another panelist at the 2022 Kernochan Symposium.

3. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, DIGITAL PLATFORMS INQUIRY 17 (June 2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> [<https://perma.cc/Q6GP-KDMX>] [<https://web.archive.org/web/20230315044731/https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>].

4. *Id.* at 18.

5. PUBL. INT. JOURNALISM INITIATIVE, SUBMISSION TO THE SENATE STANDING COMMITTEE ON ENVIRONMENT AND COMMUNICATIONS: INQUIRY INTO MEDIA DIVERSITY IN AUSTRALIA 3 (Jan. 2021) https://piji.com.au/wp-content/uploads/2021/02/piji-submission_senate-committee_media-diversity-inquiry.pdf [[perma.cc link unavailable](https://perma.cc/link/unavailable)] [https://web.archive.org/web/20230312081026/https://piji.com.au/wp-content/uploads/2021/02/piji-submission_senate-committee_media-diversity-inquiry.pdf].

Let's talk about the platforms' backlash. I've got an example there in the slides of what the advertising campaign looked like that Google ran with that yellow triangle, warning Australians that their experience on the platform would be disrupted if the News Media Bargaining Code was legislated. And Facebook went one step further, rather than threatening to remove services, it actually did pull news content from its platform.

So what did the code look like? It has some criteria about who's eligible. A news organization must have a turnover of 150,000 [Australian dollars] per annum, which is consistent over at least a three- or five-year period.

It needs to produce core news. "Core news" is not well defined. Meaning that to be eligible, if you are a core news provider, you must be registered with the Australian Communication and Media Authority ("ACMA"), who oversees that component of the News Media Bargaining Code. And from there, once you're registered, you're in a position to be able to, in theory, bargain with either Google or Facebook for the value of the platforms presenting third-party news on their platforms. Initially, before the backlash from Google and Facebook, it was going to be a one-way value exchange.

What that meant was that the news media companies were able to determine what they thought their value was that was being exploited by the big tech companies. This part of the bill changed after Google's and Facebook's online campaigns against the code. The federal Treasurer backed down on that element of the bill and made it a two-way exchange.

As Hal pointed out, this code, also, has final offer arbitration. But there's a really important caveat here, which I want to underscore. And that is that arbitration and negotiation does not occur unless the code is actually activated, or what is officially known as designated.

The designation power of the code resides with the Treasurer. To date designation has not occurred. We had a change of government in Australia in May 2022. And so in actuality, the code, although it's been legislated, it hasn't been activated.

So the deals that have happened up until this point have been with the fear of the code being activated. Designation will force the big tech companies to negotiate. At this point in time, that negotiation with news media companies has been on a voluntary basis because there hasn't been the activation.

And as one can imagine, the big tech companies have only been engaging in negotiations with the larger media companies. Those smaller companies do have the right, under the News Media Bargaining Code, to collectively bargain. But because the code hasn't been designated, it makes it very hard, even when they come together as a group, to force Google or Facebook to the negotiation table.

In fact, as we will see with the deals that have been done, and keep in mind these deals are commercial-in-confidence, so the figures and the companies that I'm reporting here are based on media interviews and anything that has leaked out into

the public sphere. There's no formal documentation of these deals because of commercial confidentiality arrangements.

So the threat of final offer arbitration has never been realized because the code has not been activated to date. The law came into power in February 2021. So there's been just over a year of these negotiations. They range from five years to just two years in duration. They're not consistent.

To date, Facebook has made fourteen deals that we know of, and Google has undertaken twenty. By talking to some of the outlets that have gone through this negotiation process, Google has been an easier operator to deal with by more readily coming to the table with its deals. Facebook seems to have drawn a line at a given point, perhaps thinking it has satisfied enough deals to prevent the Treasurer from designating and forcing negotiation.

So as we can see there it's been estimated by the former head of the ACCC that 200 million [Australian] dollars have been exchanged between news media companies in Australia and Google and Facebook in the past year.

When we look at the recipients of those deals, it's estimated that News Corp has been the biggest winner, getting approximately seventy million [Australian dollars] a year. And Nine Entertainment Co., getting approximately fifty million [Australian dollars] from its deal, leaving a much smaller proportion going to media startups.

Now, one of the important things here is that the policy intention of the Code was to improve public interest journalism.⁶ However, there is no actual provision in the Code that any of the exchange of money from platforms to news media companies needs to be spent on journalism.

For example, it could go to the paper stock of the annual reports for reporting annual statements. It doesn't have to be spent on journalism and that's something that might be reviewed, given that there's been a change of government in May 2022. And Australia now has a left-of-center government.

The losers of the deal are several. As I mentioned that Facebook drew a line in the sand and just stopped negotiating halfway through this year. It did not negotiate a deal with Australia's second national broadcaster, the SBS, nor did it negotiate a deal with The Conversation, which is -- I think you've got The Conversation also in America -- a non-profit outlet that uses academic resources combined with journalism to provide public interest information.

The Conversation ran quite a campaign about how it was frozen out by Facebook. And that has led to no avail because there is no designation of the Code. If we look at some of the major critiques since the Code has come into power, it's been that the

6. The Treasurer explicitly said a code aim was to "sustain public interest journalism in Australia." See Joint Media Release, Paul Fletcher & Josh Frydenberg, Parliament Passes News Media and Digital Platforms Mandatory Bargaining Code, MINISTERS, TREASURY PORTFOLIO (Feb. 25, 2021), <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/parliament-passes-news-media-and-digital-platforms> [<https://perma.cc/7GTK-CQK3>] [<https://web.archive.org/web/20230428014450/https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/parliament-passes-news-media-and-digital-platforms>].

small startups, largely those under 150,000 [Australian] dollars in revenue a year, are excluded from participating in the process of deal-making.

They also have limited capacity to collectively bargain because the Code has not been designated. There's no requirement to spend the revenue on public interest journalism, which goes against the grain of the policy intention of the Code. The deals of commercial-in-confidence, and they vary in years.

And there's no opacity after the expiry of these deals. We don't know what the future holds or whether the Code will ever be designated to compel the big tech companies to renegotiate these deals in the future.

But on the other hand, more optimistically, it is world-first legislation. It does use competition law as opposed to copyright law to have a financial exchange between news media organizations and big tech companies to address bargaining power imbalances so as to ensure news businesses receive fair remuneration from digital platforms for the value their content generates.

There have been little funds going to startups at this point. But with a review in place now, which is due to report to government this month. And that may be publicly released in the next two months, we might see some changes with the recommendations from the labor government.⁷

So some conclusions, perhaps, up for discussion is that essentially, the beneficiaries of the News Media Bargaining Code, to date, have been legacy media.

One might argue that further distorts the already concentrated media market and that there's been a silencing effect from mainstream media who are quite happy to have their 200 million [Australian] dollars exchanged in the last year that creates a path dependency for media companies, which now are quite reliant on big tech as a fairly significant revenue source for them.

There are no great incentives for new media startups in the Australian space given, I should say, that when the ACCC did its initial digital platforms report in 2019, the main twenty-three recommendations, as Dana⁸ pointed out, one of those recommendations was also for tax breaks, both to news subscribers and to news media companies.

Those tax breaks were not taken up, and there are not many incentives for startups in the Australian environment, given the power imbalance to try and negotiate with big tech. And the concentrated media environment landscape still remains as such in Australia.

So the next steps, as I mentioned, the Department of Treasury has reviewed the News Media Bargaining Code to see how it's performing. We don't yet publicly know

7. The Treasury review reported in December 2022 and thirty-four stakeholder submissions were made to it, which are on the website at <https://treasury.gov.au/consultation/c2022-264356> [perma.cc link unavailable] [<https://web.archive.org/web/20230428014657/https://treasury.gov.au/consultation/c2022-264356>]. It made five recommendations, the most significant being that the government consider if ACCC information-gathering powers could be used to obtain information about commercial agreements between digital platforms and news businesses. A further review was recommended in four years' time.

8. Dana Scherer, another panelist at the 2022 Kernochan Symposium.

what has gone into that review. Its reporting to the new government this month or last month. And hopefully, we might see the public side of that later this year.

What was asked to review on was to ask media companies to make clear how many more journalists they had employed as a consequence of these deals, whether they had invested in the professional development of journalists or investment in hardware and infrastructure, and what they see as the long-term sustainability of news businesses as a consequence of the Code.

I will leave it there, and I'm happy to take questions. Thank you very much.

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