

## United States House Judiciary Committee

### Subcommittee on Antitrust, Commercial and Administrative Law

*Written Testimony of Rod Sims, Chair,*

*Australian Competition and Consumer Commission (ACCC)*

Chairman Cicilline, Ranking Member Sensenbrenner, and distinguished members of the Subcommittee, thank you for the invitation to make a written statement to the hearing on *Reviving Competition, Part 2: Saving the Free and Diverse Press*. It is an honour to be provided an opportunity to explain the News Media and Digital Platforms Mandatory Bargaining Code (*the code*) that recently became law in Australia. I hope this statement is useful to the Subcommittee as the 117<sup>th</sup> Congress seeks to deal with the market power of digital platforms and related antitrust issues in the United States.

This statement will:

- Outline the rationale for the code and its intention to support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses as well as its core elements. Namely the negotiate/arbitrate regime that allows eligible news businesses to bargain individually or collectively with designated digital platforms, including over remuneration to be paid for news content made available by the digital platforms. The code also includes a set of 'minimum standards' that govern the commercial relationships between platforms and news businesses on issues other than remuneration.
- Explain the function of key provisions in the legislation relevant to the Subcommittee's consideration of proposals in the United States such as the Journalism Competition and Preservation Act of 2019 (116th Congress: H.R.2054, S.1700). It will also address some of the concerns raised about the code — namely that the code unfairly grants special protections to news businesses compared to other industries.
- Contextualise the law as part of the Australian Government's broader regulatory response to the interrelated competition, consumer protection, privacy, media and advertising issues raised by large digital platforms.

### 1. Key provisions of the News Media and Digital Platforms Mandatory Bargaining Code

The code seeks to address the fundamental bargaining power imbalance between Australian news media businesses and major digital platforms by encouraging and incentivising good faith commercial negotiations between these parties.

The five main elements of the code include:

- 1) **Bargaining, mediation and arbitration** – digital platforms subject to the code must enter into good faith negotiations with participating news businesses that have indicated an intention to bargain, including in relation to remuneration for news on their platform. When negotiating under the code, news businesses may take part individually or as part of a collective. Where parties cannot come to a negotiated or mediated agreement about remuneration, an independent arbitration panel will be appointed. This panel will employ a method known as 'final offer arbitration', and will select between two final offers made by the bargaining parties. In making this decision, the arbitration panel would consider factors including the benefit each party receives from having news content available on the platform, the reasonable cost to the news business of producing journalism, the

reasonable cost to the digital platform of making the content available, and whether the amount of remuneration would place an undue burden on the commercial interests of the digital platform. The purpose of employing this particular form of arbitration is to encourage reasonable claims and to ensure a decision can be made in a relatively timely manner.

- 2) **Minimum standards** – the code includes a number of non-remuneration obligations for digital platforms in their general dealings with news businesses; for example, platforms must provide news businesses participating in the code with 14 days of advance notification before implementing planned changes that are likely to have a significant effect on referral traffic to news businesses.
- 3) **Non-differentiation requirements** – digital platforms subject to the code must not differentiate between the news businesses because of their participation or non-participation in the code; these provisions are intended to prevent platforms simply removing content from participating news businesses and relying on news content from non-participating news outlets, such as international sources.
- 4) **Contracting out** – the code explicitly recognises that a digital platform may reach a commercial bargain with a news business outside the code about remuneration or other matters. It provides that parties who notify the ACCC of such agreements would not need to comply with the code's requirements.
- 5) **Standard offers** – digital platforms may make standard offers to news businesses, which are intended to reduce the time and cost associated with negotiations, particularly for smaller and regional news businesses.

## 2. Purpose and development of the code

### Purpose

The ACCC is the independent Australian Government agency responsible for antitrust enforcement, consumer protection, telecommunications and infrastructure regulation. The code was developed following a recommendation in the ACCC's [Digital Platforms Inquiry](#) (DPI) that identified a fundamental bargaining power imbalance between Australian news businesses, and leading digital platforms Facebook and Google.

While bargaining power imbalances do exist in many other sectors, the ACCC considered that regulatory intervention is appropriate in this instance as failure to address the particular bargaining power imbalance threatens the sustainability of strong, independent and diverse news media landscape, which is essential to a well-functioning democracy.

### Development

In December 2017, the Government directed the ACCC to conduct an inquiry into the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets, with a particular focus on the impact of digital platforms on the supply of journalism. The DPI was wide ranging, addressing competition (antitrust), consumer protection, privacy law, advertising and media issues. We considered the market power of the digital platforms and the role of data and particular behaviour in entrenching that market power; the competitive impact of the platforms on media and advertising markets; consumers' understanding of how their data is collected and used; the privacy implications of the use of that data and the impact of digital platforms on news and journalism. We published the Final Report of the DPI in July 2019, and I [provided testimony to this Subcommittee](#) in October 2019 about the inquiry, its findings and recommendations.

In the Final Report of the DPI, the ACCC found that much of the internet in Australia has become dominated by two companies – Google and Facebook. The services provided by these two companies have now become the key gateway to the internet for most Australians. Google has a monthly audience of 19 million and Facebook of 17 million.<sup>1</sup> Australia's current population is only 25 million. As a result, where Australians go online is largely determined by these two companies' algorithms.

The Inquiry found that Google and Facebook had become unavoidable trading partners for news businesses, giving rise to a fundamental bargaining power imbalance between these parties. While digital platforms benefit from news media content, they do not need the content of any individual news media business. This situation has resulted in Australian news businesses accepting less favourable terms for the inclusion of news on digital platform services than they would otherwise agree to.

At the same time, the major digital platforms have captured an overwhelming share of advertising revenue that once supported the production of journalism in Australia. The ACCC found that in 2019, for every AU\$100 spent by advertisers, \$53 went to Google, \$28 to Facebook and \$19 to all other websites and ad tech service providers.<sup>2</sup> However, despite disrupting the business model for selling advertising once employed by media businesses, digital platforms have not replaced an important function of the disrupted companies, as they do not produce journalism. This has led to significant declines in the availability of public interest journalism; particularly in public interest news categories such as local government coverage and court reporting.<sup>3</sup>

To address this issue, the Final Report of the DPI recommended developing a code of conduct to govern relationships between digital platforms and news businesses, including minimum commitments around data sharing, notification of changes to ranking and display of news content and fair negotiation of revenue sharing arrangements. In December 2019, as part of its public response to this report, the Australian Government directed the ACCC to work with major digital platforms (specifically Google and Facebook) and Australian news businesses to develop and implement a voluntary code of conduct, with the possibility of a mandatory code being legislated if agreement was not forthcoming.

The Government directed the ACCC to accelerate the development of a mandatory legislative code in April 2020. This reflected that the:

- Australian media sector was already under significant pressure, which was being exacerbated by a sharp decline in advertising revenue driven by COVID-19; and
- advice of the ACCC that digital platforms and news businesses were unlikely to reach voluntary agreement on the key issue of revenue-sharing.

The ACCC along with Government departments including The Treasury, the Department of Infrastructure, Transport, Regional Development and Communications and the Australian Communications and Media Authority engaged consistently and transparently with all relevant stakeholders in developing the code, including consulting with digital platforms, large and small news media businesses, advocacy organisations and researchers. The legislation passed both houses of the Australian Parliament on 25 February 2021 and entered into force on 3 March 2021.<sup>4</sup>

As an industry code, this scheme employs a similar mechanism to a number of other industry codes used in Australia to address significant imbalances in bargaining power in

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<sup>1</sup> Australian Competition and Consumer Commission, Digital Platforms Services Inquiry, [September 2020 interim report](#).

<sup>2</sup> Australian Competition and Consumer Commission, Digital Platforms Services Inquiry, [September 2020 interim report](#).

<sup>3</sup> Australian Competition and Consumer Commission, [Digital Platforms Inquiry Final Report](#), section 6.7.

<sup>4</sup> [Treasury Laws Amendment \(News Media and Digital Platforms Mandatory Bargaining Code\) Act 2021](#).

other sectors, such as the Dairy Code of Conduct that regulates commercial dealings between farmers and milk processors, and the Franchising Code of Conduct that regulates commercial dealings between franchisors and franchisees.

### 3. Key elements of the code relevant to the Subcommittee

#### **A market-based mechanism**

The code has been designed as an explicitly market-based mechanism that provides multiple incentives, encouragements and opportunities for platforms and news businesses to undertake good faith commercial negotiation. This includes through good faith individual or collective negotiation within the code; explicitly allowing digital platforms to make commercial 'standard offers'; and by recognising commercial agreements made outside of the code.

This encouragement of commercial negotiation extends to the structure of the code itself, including its mechanism for designating digital platforms.

When deciding whether to include a digital platform in the code, the relevant Government Minister, the Treasurer, must consider whether there is a significant bargaining power imbalance between Australian news businesses and the digital platform (including all of its related bodies corporate). In forming a view, the Treasurer may consider ACCC reports or advice. The designation process has been designed so that other digital platforms may be designated in the future if another digital platform's Australian audience and role in news media distribution increases. The Treasurer must also consider whether that digital platform has made a significant contribution to the sustainability of the Australian news industry through agreements in relation to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).

While the Government originally announced that it was considering designating the specific services Google Search and Facebook News Feed when the code came into effect, as yet, the Treasurer has not designated any digital platforms. It appears the prospect of regulatory intervention was a sufficient incentive for Google and Facebook to begin making commercial deals with Australian news businesses. The ACCC understands that the recently-announced deals with Google already cover a range of large and small Australian publishers, provide material amounts of annual remuneration, and require the news businesses to produce a set amount of content daily for the new Google Showcase news product.

We note that despite its focus on commercial negotiations, the code has been criticised as a 'link tax' that would risk undermining the open model that the internet was founded on.

These claims represent a misunderstanding of the code. Commercial negotiations facilitated by the code are intended to recognise the two-way value exchange between news businesses, who derive a benefit from having their content available on digital platform services, and digital platforms, which derive a benefit from making news available to their users. Deals under the code are not intended to be similar to the approach under the European Copyright Directive's neighbouring rights reforms, which involve a calculation of the sum value of the snippets and articles made available.

The ACCC understands that the commercial agreements struck with platforms so far are all involve lump sum payments. Indeed, under the code arbitrated offers cannot result in per-click or per-article payments.

Critics of the code have claimed it gives an unfair protections from market forces to one industry, which is not how bargaining power imbalances are resolved in other sectors of the economy. However, the findings of the ACCC's DPI Final Report demonstrate that such a measure is appropriate in this instance to address the bargaining power imbalance between

news media businesses and major digital platforms. Not doing so threatens the sustainability of needed to be addressed to protect a strong, high-quality and diverse news media sector, essential to the healthy functioning of Australia's democracy.

### **Arbitration mechanism**

The code uses final offer arbitration (FOA) — also known as baseball style arbitration — as the mechanism for determining terms where parties cannot reach a commercial agreement through good faith negotiation and mediation.

Use of FOA recognises the significant challenges involved in determining remuneration for Australian news on digital platforms services, and recognises that determining this remuneration is not an appropriate role for the Government to undertake.

While digital platform services such as Google Search and Facebook News Feed do derive some direct monetary value from showing advertising alongside news, much of the benefit that these services derive from Australian news is indirect and difficult to precisely quantify.

Given these challenges, FOA leaves it to the parties to determine a suitable amount of remuneration through their final offers. The fact that the arbitration panel would be choosing from one of two offers rather than attempting to determine remuneration would discourage ambit claims and provide a strong incentive for both parties to submit their most 'reasonable' offers. Standard commercial arbitration based on comparable transactions would not provide such an incentive. This is particularly the case due to the lack of comparable commercial arrangements made between platforms and news businesses with the existing bargaining power imbalance. Where such arrangements have previously been made, the underlying bargaining power imbalance has resulted in news businesses accepting less favourable terms for the inclusion of news on digital platform services than they would otherwise have agreed to.

FOA also provides much quicker and more cost effective outcomes than conventional commercial arbitration would allow, with the arbitrator able to make a decision within a much shorter timeframe.

We note that use of FOA model is not unprecedented in a regulatory context, and it has been used effectively by regulators in both the United States and in Canada. In the U.S., FOA was imposed by the Federal Communications Commission as a vertical merger clearance condition in the joint venture between Comcast Corporation and NBC Universal. The Canadian Radio-television and Telecommunications Commission has used FOA to adjudicate disputes between broadcasters and programmers over payment for broadcast content for over a decade.

### **Provisions to assist smaller news businesses**

Some concerns have been raised that the code has only been developed at the behest of large news businesses such as News Corp and Nine Entertainment Co, and will only serve to benefit these businesses. This is certainly not the case.

The code extends eligibility to news businesses of all scales, subject to an eligibility threshold of earning commercial revenue of at least AU\$150,000 (around US\$115,000) in either the most recent financial year or in three out of the five most recent financial years. While this revenue threshold is necessary to limit participation in the code to professional news media businesses, based on consultation with the news media industry this threshold has been set at a relatively low level broadly equivalent to a level of revenue necessary to employ a single full-time journalist.

The code also recognises that smaller, regional and rural news businesses are particularly likely to find it difficult to individually bargain with the major digital platforms, even if they can compel the platforms to enter into negotiations. As such, the code allows registered news businesses to form a group for the purpose of bargaining collectively pursuant to the code. Bargaining as part of a collective would allow such smaller businesses to negotiate from a stronger position than negotiating individually with global companies such as Facebook and Google. Collective bargaining is also likely to reduce costs for individual news media businesses, and allow groups to pool resources and expertise during the negotiation process. The code also includes a provision that enables digital platforms to set a standard offer for remunerating smaller news businesses; which for every news business that agrees to this, avoids the need to engage in bargaining altogether. Both Google and Facebook have now reached commercial deals with some quite small news media businesses in Australia.

## **Non-differentiation**

These provisions are essentially anti-avoidance mechanisms, preventing platforms circumventing the application of the code by blocking, or giving less favourable treatment to news businesses that choose to participate in the code. The non-differentiation requirements prevent a digital platform from differentiating between news businesses in relation to crawling, indexing, distributing or making available covered news content because of matters that arise in relation to their participation or non-participation in the code.

This means, for example, that designated digital platforms could not simply block all news from participating news businesses and instead rely on news sources that are not participating in the code (such as overseas sources). However, crucially, this is not a 'must carry' regime, as it would not prevent digital platforms from stopping featured content from particular news businesses for reasons other than participation in the code (for example due to terms of service violations), or even deciding to stop providing any news on their service.

This provision does not preclude platforms from making commercial deals with terms which are not identical, and is not intended to interfere with the ordinary operation of the proprietary algorithms that determine how and what content is shown in digital platform services.

## **4. Conclusions**

### **The code as part of a broader regulatory response to concerns identified with news and journalism**

Digitalisation and the growth of digital platforms have had both positive and negative impacts on the production of news and journalism in Australia. Digital platforms have created opportunities and cost savings for online media by enabling news media businesses to reach a larger potential audience and by lowering the costs of research, production and distribution.

The ubiquity of the Google and Facebook platforms has placed them in a privileged position. They act as essential gateways to reaching Australian consumers and they are, in many cases, critical and unavoidable partners for many Australian businesses, including news businesses. For example, the degree to which many businesses rely on Facebook was demonstrated starkly by the company's decision to briefly block large swathes of Australian content including news during their negotiations with our Government over the final legislation.

The News Media Bargaining Code is not by itself a regulatory panacea for the declining production of public interest journalism, or for limiting the power of companies like Google and Facebook to act as gatekeepers in digital markets. The code was only one of a number

of measures related to public interest journalism recommended by the Final Report of the DPI which the Australian Government has accepted, which also included:

- stable and adequate funding should be provided to Australia's public broadcasters (the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation), in recognition of their role in addressing the risk of under-provision of public interest journalism that generates broad benefits to society;
- expanding targeted grants to support the production of original local and regional journalism, including that related to local government and local courts.

The DPI Final Report also made a number of additional recommendations relating to regulation of digital platforms more broadly. This included strengthening Australia's privacy laws to address collection and use of data by platforms; the introduction of a merger notification regime for large digital platforms; an inquiry into the supply of advertising technology services, and developing an industry code to govern large digital platforms' handling of complaints about instances of disinformation that may cause serious public harm.

### **International coherence**

As a competition and consumer protection regulator, the ACCC has been tasked with actively monitoring the growth and market power of the digital platforms. As part of this work, the ACCC will continue to enforce existing laws and consider whether more targeted policy measures from our government may be necessary to address emerging competition and consumer harms. Given these are global businesses, which nevertheless have a substantial impact on business in Australia, we monitor international developments closely and consult frequently with our overseas counterparts on these issues.

In this vein, the code does not exist in a vacuum globally. The development of the code reflects the ACCC's consideration of existing and announced measures taken by governments in other countries, which have faced comparable concerns about the risk of under-provision of local journalism. Many of the concerns we identified to justify the implementation of the code are similar to those arising in the United States. While the solutions we propose can be implemented by one country acting alone, they will clearly benefit significantly from international cooperation.

Other jurisdictions have already begun to develop policy proposals in this area. Countries including the United Kingdom and Canada have begun engaging with the Australian Government to explore the possibility of developing their own similar codes. Member States of the European Union have begun to implement the Directive on Copyright in the Digital Single Market which grants news businesses a right to be compensated for any commercial use of their content on digital platforms.

The ACCC remains committed to engaging with colleagues across the globe to work to develop a coherent response to the rise of dominant digital platforms.

We welcome any further questions the Subcommittee may have.



Rod Sims

Chair

Australian Competition and Consumer Commission