



**CENTRE FOR MEDIA TRANSITION**

# **Mandatory News Media Bargaining Code**

**Concepts Paper, 19 May 2019**

**Submission to Australian Competition and Consumer Commission**

DATE: 5 June 2020

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## About the Centre for Media Transition

The Centre for Media Transition is an interdisciplinary research centre established jointly by the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

We investigate key areas of media evolution and transition, including: journalism and industry best practice; new business models; and regulatory adaptation. We work with industry, public and private institutions to explore the ongoing movements and pressures wrought by disruption. Emphasising the impact and promise of new technologies, we aim to understand how digital transition can be harnessed to develop local media and to enhance the role of journalism in democratic, civil society.

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## Executive Summary

### Scope of the bargaining code

- The term 'news', unlike 'news media business', is misleading and unhelpful in this context. On the one hand, it includes material that *should not* be the subject of revenue sharing under this code; on the other, it appears to exclude content that *should* be supported, such as analysis and current affairs.
- It may be possible to target a category of 'public interest journalism' but in this submission we offer an alternative – '*public affairs content*' – which can be identified through computational analysis and natural language processing. Researchers at UTS and the University of Sydney are building such a tool, explained below.
- Issues 'of interest to Australians' is too broad; the definition of 'public affairs content' addresses this problem.
- Being subject to an *external* standards scheme should be a qualifying criterion for access to funds under this code; news organisations using 'equivalent journalistic standards set by individual media businesses' should be refused access to the scheme. The code could help fund a new cross-media standards and complaints scheme which participating news media organisations would join.

### Digital platforms covered by the code

- We suggest the ACCC establish the elements that would characterise a regulated service under a principle-based approach to coverage, but as an interim measure, the code could list the services required to comply.
- In the first instance, the listed services would be those which: (a) distribute news content, and (b) have been found by the ACCC to have market power.
- This means that initially, at least Google Search and Facebook News Feed would be covered, but the category of services could be expanded over time.

### Monetisation and the sharing of revenue

- Our first preference would be for an approach based on the value of news as a public good, with a scheme recognising that the management of this issue is a public, regulatory responsibility, not an element of commercial bargaining. As this is not the approach being adopted here, we offer comments on the design of a bargaining code founded on the principle that digital platforms derive at least indirect value from news.
- We favour Bargaining Framework D: collective licensing or fee arrangements, although news media organisations would not be required to participate and could pursue bilateral negotiations.
- The cost of producing news would be our preferred approach if the regulatory intervention were premised (as we suggest) on an obligation on participants within the sector. Some variation, which recognises one or two key inputs and some valuation of news products, may be possible.
- A weighting should be given to smaller and regional publishers that takes account of five factors: public affairs content; localism; originality; independent ownership; and organisational capacity. A designated share should be reserved for smaller and regional publishers to take account of the additional commercial challenges they face and the impact on the community if these services are lost. The reservation of funds for this class of suppliers would therefore be disproportionate to the size of their operations.

### **Algorithmic curation of news**

- We have suggested in the past that digital platforms should be regarded as having ‘a duty not to harm the public benefit provided by news and journalistic content’. This brings with it an obligation to provide reasonable notice of changes in algorithms that could have a material impact on news media.
- Additional positive obligations should be developed for promoting original content and signalling originality. News producers should be responsible for labelling such content, with the media standards body, funded through the scheme, responsible for monitoring legitimate labelling.
- A further distinction between original general news and investigative journalism is unnecessary.
- Unless the ‘appropriate revenue’ generated under the code is substantial, it would seem reasonable to require platforms to not discriminate against paywalled content that would otherwise be highly ranked.

### **Facilitating open communication**

- The Concepts Paper does not explain what is meant by a ‘mandatory code’ or nominate a legislative hook. It is therefore difficult to address aspects such as compliance and enforcement. These are matters that could affect the community’s confidence in the commitments themselves and how they will be enforced.

### **Review of the code**

- We suggest the code be reviewed after three years, except that the ‘listed services’ be reviewed after 12 months.

## A. Scope of the bargaining code

### Questions and short answers

**1. How should 'news' be defined for the purpose of determining the type of content that will be subject to the bargaining code?**

The term 'news', unlike 'news media business', is misleading and unhelpful in this context. On the one hand, it includes material that should not be the subject of revenue sharing under this code; on the other, it appears to exclude content that should be supported, such as analysis and current affairs.

It may be possible to target a category of 'public interest journalism' but in this submission we offer an alternative – 'public affairs content'

**2. How can a bargaining code ensure that both news media businesses and digital platforms can easily and objectively identify the content subject to the code?**

Public affairs content can be identified through computational analysis and natural language processing. Researchers at UTS and the University of Sydney are building such a tool, explained below.

**3. Would it be appropriate for the bargaining code's definition of 'news content' to capture material: - with the primary purpose of investigating, recording or providing commentary on issues of interest to Australians, and - that is subject to the professional standards set by a relevant journalism industry body, journalistic standards set in a relevant media industry code, or equivalent journalistic standards set by an individual news media business?**

Issues of interest to Australians' is too broad; the definition of 'public affairs content' addresses this problem.

Being subject to an external standards scheme should be a qualifying criterion for access to funds under this Code; news organisations using 'equivalent journalistic standards set by individual media businesses' should be refused access to the scheme.

The code could help fund a new cross-media standards and complaints scheme which participating news media organisations would join.

### Explanation

In the Concepts Paper (p 3) the ACCC says:

Some stakeholders expressed that such a definition [of news] should be set extremely narrowly, and that the voluntary bargaining codes should only apply to 'hard' news content, such as coverage of politics, courts and major current events. Other stakeholders sought a broader definition that covers a wide range of news content, including sports coverage, celebrity and entertainment news and recaps of reality television programming. The ACCC notes that some stakeholders also previously suggested that voluntary bargaining codes should apply beyond news content to cover a wider range of content produced by media businesses, on the basis that non-news content (e.g. the advertising revenue associated with entertainment and sports) subsidises the production of news.

In our view, the code should not be so *narrow* as to apply only to hard news, and should not be so *broad* as to apply to non-news and current affairs/analysis.

On the first element, a sports report would usually be regarded as not being 'hard news', but a report that includes an aspect relating to inadequate facilities or suspected misconduct by a player or official could mean that it engages with some dimension of public affairs beyond just sports results.

On the second element, we think the code should not take account of non-news content that subsidises the production of news because the purpose here is to act as a (partial) replacement for cross-subsidy. For TV broadcasters, there is commercial incentive to broadcast reality TV; this code does not seek to support that content even if it has suffered from the operation of platforms. There may be a case for reviewing the obligations of commercial broadcasters to meet drama quotas etc, but those issues are being addressed as part of another policy response, separate from this code which concerns news media.

Accordingly, we think the code needs to be pitched between these two points of hard news and non-news. There is, however, a larger problem with the term ‘news’. Even if it can be defined as only certain types of news, it excludes material created by journalists and their editorial teams – namely, analysis and current affairs – that contribute to the public good function of news media and which should be supported under the code.

Our proposal is for it to target a category identifiable as ‘public affairs content’ (PA content).

### ***Meaning of ‘public affairs content’***

The concept of ‘public affairs content’ is taken from the Media Pluralism Project being conducted by researchers from the University of Sydney and University of Technology Sydney.<sup>1</sup> One of the main aims of that project is to find ways of measuring media pluralism that are relevant for a multi-platform news ecosystem in Australia. In brief, the concept of ‘public affairs’ allows us to separate (and measure) the kind of content that contributes to media pluralism. We think this is essentially the same as the news content that should be valued – and receive funding – under the bargaining code: that aspect of news media which constitutes a public good and for which the business model is in a state of crisis.

Classifying content as ‘public affairs’ is therefore a mechanism for identifying material that might be the subject of public subsidy, philanthropy or some form of regulatory intervention. It avoids the traditional distinction between ‘hard news’ and ‘soft news’, which can be useful when material that is usually seen as soft news has a public affairs angle. For example, a sports article might be about the need for public funding, health or corruption in sport. Even articles apparently about celebrities can have some kind of social function. It also avoids the need to distinguish between ‘news’ on the one hand and comment/analysis/current affairs on the other: all such content is covered by the code provided it has a public affairs angle.

Making a distinction between public affairs and non-public affairs content is not meant to suggest non-public affairs has no value – it might, for example, be important in maintaining a sense of community – but it does allow us to identify material that is part of news media’s role in contributing to government, public administration and civic society in a democratic society. Again, media more broadly contributes to other areas of life – for example, Australian drama programs contribute to Australia’s cultural life, while children’s programs contribute to childhood learning – but the target of subsidies and other interventions in relation to news is this public affairs purpose. Importantly, this content must be provided by a news media organisations that employ professional journalists, with some established presence (for example, at least 12 months operation), and possibly some qualifying threshold level of public affairs content. Book publishers, bloggers and others create content that deals with public affairs. This project seeks to support news media which demonstrates additional features such as immediacy, verification of sources and trained journalists working to professional standards.

We define public affairs (relative to non-public affairs) in the following way:

**Public affairs** reporting conveys timely factual and opinion based information about events and issues in government, politics, business, and public administration. This will include education, health, science and other matters that have broad social significance. Examples are items that cover contentious public debates on climate change, immigration, and land use.

**Non-public affairs** reporting conveys timely factual and opinion based information about topics of entertainment, art and culture, leisure and lifestyle. This will include sport, well being, fashion, and music. A sports article that just gives sports results or commentary, for example, will be non-public affairs, unless it has a public affairs angle such as government funding or health concerns.

<sup>1</sup> ‘Media Pluralism and Online News’ project, an Australian Research Council funded Discovery Project (2018-2021). See <https://mediapluralism.org.au>.

It should also be noted that PA content is different from ‘public interest journalism’, although the two often overlap. We think ‘public interest journalism’ is a very useful term to describe a certain activity and the content that results; however, sometimes it is seen as a narrow concept (in the sense of investigative reporting) while other times it is seen as expansive (for example, as all hard and soft news provided this is produced by journalists). ‘Public affairs content’ might be seen as sitting in the middle, but in essence it is any content, produced by a news media organisation, that has some public affairs angle. In the example given above, it would cover an article that is largely about sports results if the article also dealt with the lack of suitable facilities at a sports ground. While such a report is included in some definitions of ‘public interest journalism’, it is excluded from others. We recognise that these definitions are still in development and over time they may coalesce further. It may be that a definition produced by the Public Interest Journalism Initiative, for example, is the best fit for the code, and that our tool could be adapted in order to identify PIJI’s formulation of ‘public interest journalism’.

Whether the code uses ‘public affairs’, ‘public interest’ or some other formulation, we think it would be misguided for ACCC to extend it to content ‘with the primary purpose of investigating, recording or providing commentary on issues of interest to Australians’ (the second element of standards schemes is addressed below). Content ‘of interest to Australians’ is far too broad in scope. At its edges, it would include some commercial content, as well as other forms of content which are likely to be commercially viable or do not otherwise deserve regulatory intervention and financial support.

One quality the PA designation does not recognise is originality. We think this should be a part of the code, but it should go to the weighting some publications or content receive over others. We address this in a separate section of the submission.

### ***Identifying ‘public affairs content’***

The Media Pluralism Project has worked with data scientists from Sydney Informatics Hub at the University of Sydney to develop a computational tool that allows us to collect the content from the homepages of news websites and to analyse it for its public affairs content. We are working on other functions for the tool in order to provide a richer picture of media diversity, but for the purposes of the Bargaining Code, the Public Affairs/Non-Public Affairs function is most relevant.

The dataset we are working with for the prototype version of the tool is the entire data scrape of the homepages of the top 20 news sources as identified by Roy Morgan Single Source News data.<sup>2</sup> The time frame was across three months in 2019, and the Australian Federal Election was underway. We currently have four cross sections of the data: six-hourly, daily, weekly and monthly. The tool classifies the content into public affairs and non-public affairs. It provides a proportion of the total number of articles that are considered public affairs for each publication.

Figure 1 below is a modelled representation of one of the outputs of the tool, allowing us to visualise relative public affairs content using one of the timeframes (eg daily, weekly) averaged across the three month span of the source data. Figure 2 shows the variation in public affairs content of all sources across an eight week period.

As noted above, we designed this tool in order to provide one measure of media diversity in a digital environment. With some additional work, we think it can be adapted to provide a useful guide to the content that is subject to the Bargaining Code.

<sup>2</sup> See, for example: <http://www.roymorgan.com/findings/7595-top-20-news-websites-march-2018-201805240521>.

Online News Public Affairs Proportion - Weekly

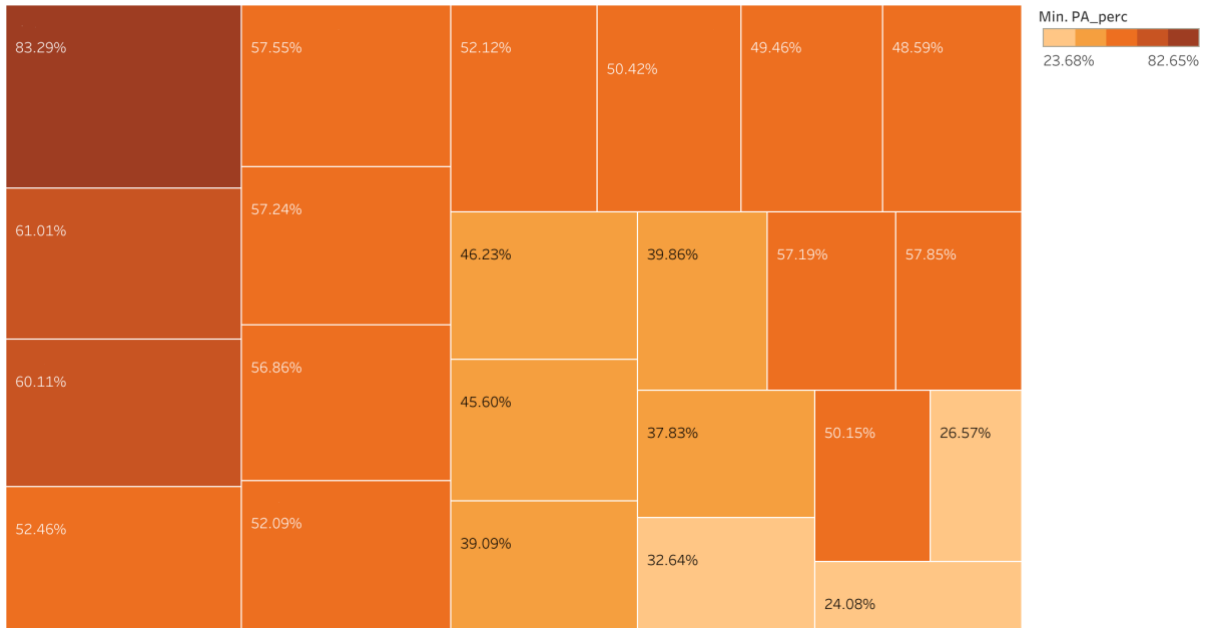


Figure 1, Weekly Representation of Online News Public Affairs Proportions – Model Only

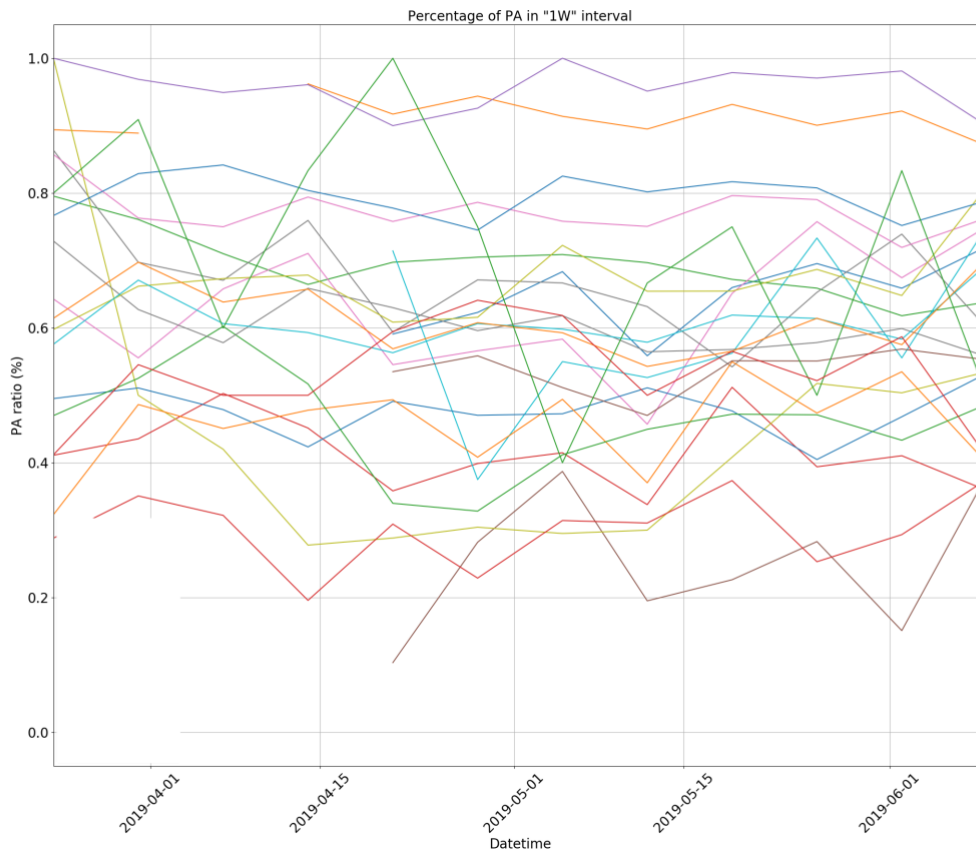


Figure 2, Representation of Online News Public Affairs Over Time – Model Only



## **Media standards**

The second part of question three proposes that the code capture material:

that is subject to the professional standards set by a relevant journalism industry body, journalistic standards set in a relevant media industry code, or equivalent journalistic standards set by an individual news media business?

We think it should be a criterion for support under this scheme – i.e. not part of the definition of ‘news’ or ‘public affairs content’ or some other category – that content is produced under a standards scheme. However, we strongly oppose the suggestion that the scheme includes content produced under a set of in-house ethics or standards. To qualify for regulatory intervention and the resulting redirection of revenue from digital platforms, it is reasonable to expect the company producing the content is subject to an independent, external standards scheme with a recognised complaints service. On current arrangements, this would require the organisation to be subject to a code of practice registered under the *Broadcasting Services Act 1992* (or, if the ABC and SBS are part of the scheme, notified to the ACMA and subject to investigations by the ACMA) or to be a fee-paying member of the Australian Press Council.

In previous submissions to both the ACCC and Treasury<sup>3</sup> we have stated our view that the system of fragmented industry codes and guidelines should be consolidated. In our research report for the ACCC’s Preliminary Report<sup>4</sup> we counted 14 separate schemes establishing rules about accuracy and fairness. In our view the Bargaining Code presents an opportunity to achieve a consolidated cross-media standards scheme, with a single destination for consumer complaints, by making membership a precondition for receiving funds under this code.

It would also be desirable for the operation of the standards scheme itself to be at least partly funded via the Bargaining Code. A cross-media standards scheme, partly funded by platforms, recognises the reality of how businesses are now structured and how consumers receive news. The removal of Australia’s cross-media rules may have been a necessary reform in the face of global competition; a logical and necessary next step is to apply the same standards of accuracy and fairness to journalistic content produced by news media in Australia, regardless of the medium in which it appears.

## **B. Digital platforms covered by the code**

### **Questions**

4. Would a principles-based, or list-based approach be preferable in determining which digital platform services are captured by the bargaining code?
5. If a list is referenced in the bargaining code, what amendments should be made to the list below? [omitted]
6. How might a bargaining code include mechanisms to incorporate newly emerging and newly relevant products and services in the future?

We appreciate the difficulty faced by the ACCC in establishing which digital platforms, and which aspects of their operations, should be covered by the code.

We would like to support the ‘principle based’ approach to regulation, rather than relying on listed services. However, we understand the practical difficulty of investigating and making a fair determination on each service that could be subject to obligations under the code. We suggest the

<sup>3</sup> See <https://www.uts.edu.au/research-and-teaching/our-research/centre-media-transition/publications/centre-contributions-policy>.

<sup>4</sup> Wilding, D., Fray, P., Molitorisz, S. & McKewon, E. 2018, *The Impact of Digital Platforms on News and Journalistic Content*, University of Technology Sydney, NSW.

ACCC establish the elements that would characterise a regulated service, but as an interim measure, require only listed services to comply with the code. In the first instance, the listed services would be those which:

- (a) distribute news content, and
- (b) have been found by the ACCC to have market power.

This means that at least Google Search and Facebook News Feed would be covered. Further news distribution services would be listed if, following an appropriate period for comment by the service provider, they are found by the ACCC to have market power. The list could also be expanded over time if the ACCC replaces this interim approach with a more sophisticated principle based approach. We assume, for example, the ACCC would monitor services such as Facebook's Instant Articles and Google's AMP, as well as Instagram and YouTube.

## C. Monetisation and the sharing of revenue

### Questions and short answers

#### **7. What are the necessary elements for a bargaining framework to effectively address the bargaining power imbalance between news media businesses and each of Google and Facebook?**

Our first preference would be for an approach based on the value of news as a public good, with a scheme recognising that the management of this issue is a public, regulatory responsibility, not an element of commercial bargaining. As this is not the approach being adopted here we offer comments on the design of a bargaining code founded on the principle that digital platforms derive at least indirect value from news.

#### **8. How effective would the following bargaining frameworks be in achieving appropriate remuneration for news media businesses for the use of news content by each of Google and Facebook: bilateral negotiation, mediation and arbitration; collective bargaining; collective boycott or 'all in/none in'?**

#### **9. Are there major practical issues involved in the implementation of any of the bargaining frameworks listed in Question 8 above? If so, how might such practical issues be overcome?**

#### **10. Are other bargaining frameworks more likely to effectively address the bargaining imbalance between news media businesses in Australia and each of Google and Facebook?**

We think there are significant problems with all of these approaches. We favour Bargaining Framework D: collective licensing or fee arrangements, although news media organisations would not be required to participate and could pursue bilateral negotiations.

#### **11. Would it be useful for the bargaining code to include a requirement for parties to negotiate 'in good faith'?**

#### **12. Should the bargaining code include requirements (such as time limits) and/or guidance on how negotiations should be conducted? What requirements or guidance are likely to be productive? What requirements or guidance are likely to be counterproductive?**

A more comprehensive canvassing of Bargaining Framework D, or expert input from those who administer similar schemes, is needed to answer these questions.

#### **13. How relevant are the following factors to determining appropriate remuneration for news media business: the value of news to each digital platform; the value a news media business derives from the presence of its news on each digital platform; the value of the availability of news on each relevant digital platform to digital platform users?**

They are all relevant and all difficult to quantify. We are not in a position to do so.

#### **14. Would it be appropriate for commercial negotiations conducted under the bargaining code to have regard to the cost of producing news content?**

#### **15. How might any of the factors listed in Questions 13 and 14 above be quantified and/or treated in the course of negotiations between parties?**

The cost of producing news would be our preferred approach if the regulatory intervention were premised (as we suggest) on an obligation on participants within the sector. Some variation, which recognises one or two key inputs and some valuation of news products, may be possible.

#### **16. What other factors may be relevant to determining appropriate remuneration for news media businesses?**

**17. Are there any relevant ‘market’ benchmarks that may assist in the determination of appropriate remuneration?**

**18. How might the bargaining code define ‘use’ for the purpose of any mechanisms facilitating negotiation on payment for the use of news content?**

**19. How might any bargaining framework implemented by the bargaining code deal with the full range of businesses present in the Australian news media industry, including smaller, local and regional news media businesses and not-for-profit news media organisations?**

We address this question in detail as we think a weighting should be given to smaller and regional publishers that takes account of five factors: public affairs content; localism; originality; independent ownership; and organisational capacity. We think a designated share should be reserved for smaller and regional publishers to take account of the additional commercial challenges they face and the impact on the community if these services are lost. The reservation of funds for this class of suppliers would therefore be disproportionate to the size of their operations.

## **Explanation**

### ***Suitability of the ‘appropriate remuneration’ model and the bargaining framework***

In the earlier sections of this submission and again below we comment on specific matters relating to the design of the Bargaining Code. However, on p 7 of the Concepts Paper the ACCC refers to the outcomes resulting from the most important part of the code in terms of the ‘appropriate remuneration’ that would be provided to news media. At least as it has been characterised publicly by media organisations, this term could be used to describe the conceptual framework for the code more generally. Before returning to the specifics of the code design, we would like to make some preliminary comments on the suitability of this approach.

Two assumptions or prior findings are critical to the way in which the design of a bargaining code is approached:

1. The ACCC’s finding that digital platforms (in this context, Google and Facebook) do obtain value, albeit indirectly, from news content.
2. The ACCC’s finding that Google and Facebook (at least in relation to some of their activities) have market power.

We know both of these propositions are disputed to some extent, with news producers stating that the value obtained by platforms is direct as well as indirect, and platforms disputing the fact that they have market power.

Nevertheless, these assumptions or findings are taken as the starting point for comments on how this issue should proceed, along with a further assumption that is critical to this code development process: government requires there to be rules to address revenue sharing.

Taking that as our backdrop, we still think revenue sharing, or something like it, could be addressed in a context other than a ‘bargaining code’, which inevitably shapes our understanding of the underlying problem for public policy. We acknowledge there is a bargaining power imbalance and that news producers are not in a position to withhold their product, but the reason that matters is that news is a public good, and that the business case for the supply of that public good is in crisis.

There is no perceived need to develop a bargaining code for other online retailers who are now dependent on digital platforms. It is because news is a public good, and the business model that has supported the production of that public good has collapsed, that regulatory intervention is being considered.

Approached from this perspective, supporting news production is a similar public policy problem as supporting Australian drama and children’s programs, and less like the other ad tech problems that the ACCC will investigate. New ways of funding Australian and children’s content are being explored as part of a parallel policy process, so this is not a wholly new way to think about the role of platforms and the contributions they can make. In the past, ‘service providers’ of one kind or another have contributed

financially to schemes that give effect to public policy objectives, for example: the Telecommunications Industry Levy that funds ‘payment of contractors, grant recipients and eligible administrative costs to ensure continuity of key safeguards required under the telecommunications universal service obligations’;<sup>5</sup> or the New Eligible Drama Expenditure scheme which requires subscription television licensees and channel providers to contribute to the costs of producing Australia drama.<sup>6</sup>

We do not advance the view, as some do, that there is ‘theft’ of news content by digital platforms, but if there was, that would be a problem for copyright law. Here, what we are concerned with is the question of who should support the public good of news production. There is market failure in the production of news as a result of the movement of advertising revenue from news producers to digital platforms. If, as a community, we think that needs to be rectified, we should face the market failure and set out who should do what to rectify it.

In our view, platforms should contribute, but implementing a scheme to achieve that result is a public, regulatory responsibility, not an element of commercial bargaining. If platforms did contribute in this way, their contribution could be based on the cost of producing news in Australia.

### ***Most suitable bargaining framework***

While we acknowledge the proposition set out above means we think government should be heading in a different direction, most of what we suggest can be accomplished within the framework of a bargaining code. This is because we agree with the proposition that digital platforms obtain indirect value from news content (as well as the collection of user data). And it should be clear from the comments above that the bargaining framework most closely related to the ‘public good’ approach is the Bargaining Framework D, Collective licensing or fee arrangements. We have little expertise on the matters raised under the other frameworks, but simply note that all appear to have significant drawbacks, partly on account on the fundamental differences between the news providers themselves. Given that some news media organisations appear to be in a position to negotiate directly with the platforms, we think they should not be required to participate in a collective system, and could pursue bilateral negotiations.

### ***Factors guiding the determination of remuneration***

We agree with almost all of the points the ACCC makes in relation to the value of news to digital platforms; the value news business derive from platforms; the value to users; and the cost of producing news. We think all of the ‘uses’ described on page 14 (eg, headlines, links and snippets) are relevant to an overall question of value but it would be impracticable to try to quantify the specific uses for any news outlet or to remunerate it for each and every one of these.

Most importantly, we agree with the proposition that the implementation of the bargaining framework should not advantage larger businesses over smaller businesses; in fact, we think there is a case for smaller and regional news media to receive a weighting that acknowledges both the additional challenges they face and the risks to their users of these services collapsing.

We acknowledge that we have not answered the question of what the allocation to news media should be based on. However, we noted above that if a ‘public good’ approach is adopted instead of an ‘appropriate remuneration’ approach based on commercial bargaining, an evaluation of the cost of producing news could be used as the base for calculating a contribution by digital platforms. We think it is worth exploring that option, although we recognise there is no direct link between costs of production and the value to digital platforms under a bargaining framework.

<sup>5</sup> See <https://www.acma.gov.au/telecommunications-funding-arrangements>.

<sup>6</sup> See <https://www.acma.gov.au/spending-subscription-tv-drama#:~:text=New%20eligible%20drama%20expenditure%20scheme,be%20on%20new%20local%20dramas>.

We will consider the views advanced by others on this question, and at this point say only that, under the ‘collective licensing or fee arrangements’ approach, a total annual contribution should be established for each of Google and Facebook, and that the distribution of this fund should not be determined solely by size of the media business, remuneration, number of employees etc. Instead, we think smaller and regional publishers as a distinct category requiring a minimum allocation of funds raised from digital platforms in order to support news media.<sup>7</sup>

This allocation or reservation of funds would be disproportionate to the size of these operations and to their annual revenue relative to other, larger news media organisations. The justification for this is based on the public good offered by news media. Within the class of providers of this public good, smaller and regional publishers are distinguished both for the nature of the product they supply and for the added difficulty in competing in a digital environment where digital platforms serve as news distributors and the beneficiaries of advertising revenue.

In some cases, the collapse of these suppliers would lead, not to a reduction in competition, but to the absence of any professionally produced local journalism.

Below we set out a five factors which characterise members of this group and provide substance for the claim to a special reservation from the funds generated via the Bargaining Code. Of the five factors, four are essential for membership of this group. The fifth, localism, is the defining characteristic of some members, but – providing other factors are present – is not mandatory as some small, independent publishers producing original public affairs content contribute at a national or state level, rather than a local level. The factors are as follows:

1. Public interest journalism or public affairs content
2. Originality
3. Localism
4. Independent ownership
5. Organisational capacity

### *1. Public interest journalism/public affairs content*

Our views on the suitability of ‘public affairs content’ as the category of content that would be subject to the code are set out in section B above.

### *2. Originality*

Originality refers to content that is created by the news publication itself. While this can be a difficult quality to identify, it is possible to establish guidelines and to distinguish content that is not materially different from other content. An example is a news wire story with an additional couple of lines that do not substantially add to the story. This story may well be a valuable piece of content that makes an important contribution to a publication at any point in time, and newswires overall help to contribute to media diversity, but the article would not receive the special credit that would be given to an article on the same topic researched and written by a publication’s own journalist.

In forming the view that originality should be recognised, we were influenced by the comments of News Corp during the Digital Platforms Inquiry.<sup>8</sup> Although in a different context (i.e. algorithmic rankings), News provided the example of one of its publications funding an investigation that involved a local reporter researching a story, travelling to Argentina to interview subjects, and posting the story online. After the story was posted, other publications reported on it, but the original story by News was pushed down the rankings.

<sup>7</sup> The substance of this part of the submission has been provided to some small and regional publishers.

<sup>8</sup> See News Corp Australia, *Submission to the ACCC Digital Platforms Inquiry – Issues Paper*, 20 April 2018, p 87. <https://www.accc.gov.au/system/files/News%20Corp%20Australia%20%28April%202018%29.pdf>.

Using the same example for the purposes of giving credit to content or publications for recognition under the Bargaining Code, it would be desirable to recognise publications that generate a high proportion of content that is researched or exclusively purchased by them. This would not preclude similar recognition for a follow up story by another publication where its own journalist pursued a new line, but it would mean that reports posted on the same day as a competitor's story breaks, which essentially inform readers of the subject covered by the competitor, are not recognised in the same way.

As for public affairs content, giving additional recognition for original content does not mean there is no value in having a publication write a report on its competitor's story; it just means that the originator is given recognition under this scheme.

### 3. Localism

Localism would be valued under this scheme for its social function. Coverage of local courts and councils in a regional centre, for example, is a function of local news media not undertaken by a metropolitan daily newspaper or a capital city TV news program.

As noted in the ACCC Digital Platforms Inquiry final report there is evidence from the US that local newspaper closures are associated with higher local government wages and deficits<sup>9</sup>. Having a dedicated reporter attend council meetings, once the norm for all local newspapers and often local radio and TV, is a significant expense because these meetings happen at night and time-in-lieu needs to be given back to the reporter. Nevertheless, journalism of record is important.

The ongoing tracking and scrutiny has the cumulative effect of creating a more informed citizenry and allows significant events to be understood in context. Professional journalism is crucial. Even in markets with significant numbers of community-run hyperlocal journalism, such as the UK, research has found that, in the main, these news outfits have neither the capacity nor the intention of replicating journalism of record functions.

Finally, there is a significant role played by local media in terms of community building. In 2014 journalism academic Ian Richards<sup>10</sup> found that residents in the South Australian towns of Mount Gambier and Naracoorte describe local newspapers as holding a central place in the community, even to the point of giving the community a 'sense of itself' and 'leading' the community. This community building function is especially important for more disadvantaged communities. 2016 research led by Andrea Carson<sup>11</sup> in the outer Melbourne suburb of Broadmeadows and the regional NSW town of Moree found local media were 'valued for giving a more nuanced account of neighbourhood realities than did the media from outside'.

While there are different levels of 'local', the recognition of localism under the Bargaining Code scheme would presumably work in a similar way to the obligations imposed on regional broadcasters under the broadcasting regulation, which identifies regions where the economic incentives for producing content are insufficient to ensure the market operates effectively without regulation. Without proposing a specific mechanism here, it can be seen how meeting certain content quotas under broadcasting law provides a starting point for rewarding regional news provision more generally. Importantly, there are two dimensions: content about a local area, and content made within the local area. Broadcasting regulation recognises the first but effectively awards more 'points' to the second. A similar approach

<sup>9</sup>See ACCC 2019 *Digital Platforms Inquiry — Final Report* p. 562 <https://www.brookings.edu/blog/up-front/2018/07/16/how-closures-of-local-newspaper-increase-local-government-borrowing-costs/>

<sup>10</sup> Richards, I. 2014, 'Differences over Difference: Journalism beyond the metropolis', *Australian Journalism Review*, vol. 36, no. 1, p. 10.

<sup>11</sup> Carson, A., Muller, D., Martin, J. & Simons, M. 2016, 'A New Symbiosis? Opportunities and challenges to hyperlocal journalism in the digital age', *Media International Australia*, vol. 161, no. 1, p.141.

could be taken under the Bargaining Code, so that local publications are those with editorial staff on the ground in the region.

#### 4. Independent ownership

Ownership of media is now widely recognised as only one aspect of 'media plurality' or 'media pluralism' or what is more commonly described in Australia as 'media diversity'. There are many sources that explain the reasons behind recognition of media diversity, but for a succinct explanation of two important dimensions, it is worth noting the guiding statement by Ofcom, the UK equivalent of the ACMA, on why plurality matters:<sup>12</sup>

Plurality matters because it makes an important contribution to a well-functioning democratic society. Media plurality is not a goal in itself but a means to an end. Plurality in media contributes to a well-functioning democratic society through:

- **informed citizens** who are able to access and consume a wide range of viewpoints across a variety of platforms and media owners; and
- **preventing too much influence over the political process** being exercised by any one media owner.

This statement from Ofcom neatly brings together different aspects of media content and media ownership. It's important to see it in the context of the highly concentrated nature of commercial media in Australia, where three companies control most newspapers, two of the three metropolitan commercial TV networks, the only subscription television network and some very popular radio stations as well as leading online news sites, catch-up TV services and streaming services. In many regional areas there has only been one significant source of local journalism; increasingly news sources that included a print platform are moving to digital only.

In their assessment of media ownership and concentration in Australia, Franco Papandrea and Rodney Tiffen<sup>13</sup> make the following observation on levels of concentration since digitisation:

While the Internet has been instrumental in the growth of 'new media' and the emergence of new global players such as Google, at the local level, its transformative effects on concentration have been limited.

They conclude (733):

While convergence brought about by the development and rapid growth of online information services may have eroded traditional industry boundaries, the resultant impact on industry concentration does not appear to be significant ... The most popular online news services are associated with traditional media, including daily newspapers and broadcasters. Among the 'thousands of voices' accessible online, very few have the capacity to challenge the influence of traditional media on public opinion.

The dominance of Australia's major media suppliers is seen in the Roy Morgan listing for the top 20 news websites, cited earlier, and in Nielsen results:<sup>14</sup> the majority of the top news site are all major players.

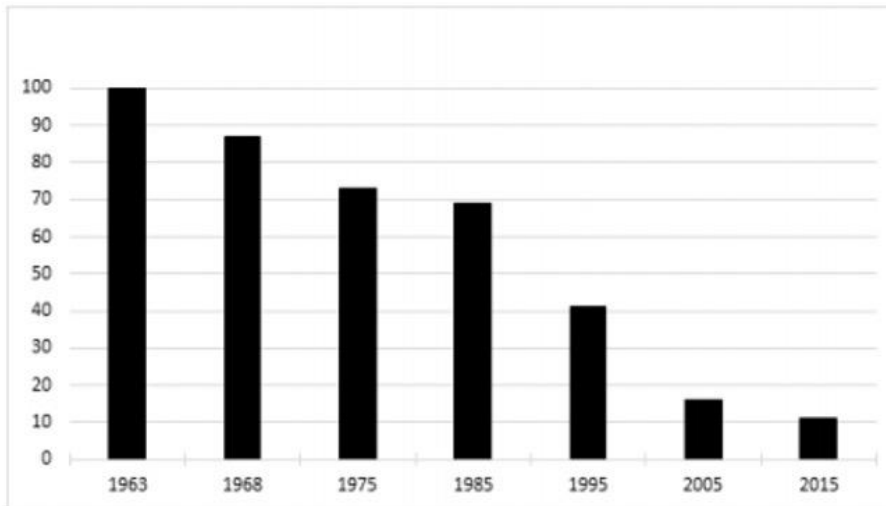
<sup>12</sup> Ofcom, *Measurement Framework for Media Plurality – Statement*, 5 November 2015, p 6. [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0024/84174/measurement\\_framework\\_for\\_media\\_plurality\\_statement.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0024/84174/measurement_framework_for_media_plurality_statement.pdf)

<sup>13</sup> Franco Papandrea and Rodney Tiffen (2016), 'Media Ownership and Concentration in Australia' in Eli M Noam, *Who Owns the World's Media? : Media Concentration and Ownership Around the World*, Oxford University Press, p 703.

<sup>14</sup> For the latest Nielsen results for 'Top 10 Current Events And Global News - Tagged March 2020', see <https://www.nielsen.com/au/en/press-releases/2020/australians-turn-to-digital-news-to-stay-informed/>.

There is some specific data for *regional* Australia regarding commercial television ownership and control. 'This 'independence quotient' (shown below) has been derived by calculating the total number of controlling entities as a percentage of the total number of licences in operation at a given point in time'<sup>15</sup>.

**Figure: Independence quotient, 1963-2015**



Source: (Thurlow & Griffen-Foley 2016, p. 118)

Unlike most other democratic countries, we have no rules restricting cross-media ownership. Unlike the UK, we have no 'public interest consideration' under which a test of 'sufficient plurality' can be applied to media mergers.<sup>16</sup> We also restrict the number of commercial television licences and radio licences. And we have no tax incentive schemes to support either consumer subscriptions or investment in public interest journalism.

In these circumstances, it is difficult to see that the role of independent media would be more important in any democratic country than it is in Australia.

### 5. Organisational capacity

This criterion is related to independent ownership but specifically recognises that smaller organisations will vary in their ability to take advantage of opportunities to expand or otherwise improve their businesses. These include small scale operations that make it impossible or impractical to cross-subsidise operations through activities such as event management or other related businesses. It also takes account of the high fixed costs of content production, and the disadvantages faced by smaller publishers in recouping these costs through the network effect of large scale distribution. And while some smaller operations will be able to take advantage of other opportunities offered by digital platforms, such as making use of customer data, others will not.

As distribution channels multiply, these problems will only compound for smaller players. The larger the organisation the more likely it is that it can invest in tailoring its content for the vast array of online

<sup>15</sup> Thurlow, M. & Griffen-Foley, B. 2016, 'Station break: A history of Australian regional commercial television ownership and control', *Australian Journalism Review*, vol. 38, no. 1, p118.

<sup>16</sup> Section 58 of the *Enterprise Act 2002* sets out the public interest considerations, while sections 42 and 67 give the Secretary of State the power to issue an 'intervention notice' or a 'European intervention notice' respectively if one or more of the public interest grounds in section 58 is activated. For newspapers, for example, where reasonable and practicable, there will be a test of 'a sufficient plurality of views' (s 58[2B]).



distribution channels. The investment required is substantial. In the United States an ongoing, multi-year study by the Tow Center for Digital Journalism at Columbia Journalism School<sup>17</sup> into the relationship between large-scale technology companies and journalism found even significant regional metropolitan mastheads such as the *Los Angeles Times* and *Chicago Tribune* have struggled to post on multiple distribution platforms. In the UK, market overview research from the Department for Digital Culture Media and Sport similarly found local and regional press were the entities most in trouble due to their lack of size hampering their ability to generate profitable income online. This was further compounded by the low propensity to pay for news online.<sup>18</sup>

### **Sharing of user data**

We do not have sufficient information or expertise to answer these questions at this stage. We agree with the ACCC's observations that platforms obtain a benefit from the data of visitors to news sites; that Google in particular has made efforts to provide publishers with data tools; that variations among publishers means there are differences in their bargaining power and the utility of user data. We are also concerned about the protection of user privacy and effective consent for making information available to other providers and would urge the ACCC to continue the consideration it gave this aspect in the DPI.

## **D. Algorithmic curation of news**

### **Advance notification of algorithmic changes**

**30. What would be an appropriate threshold for identifying a significant algorithm change which requires advance notice to be given by each of Google and Facebook, and what criteria should be used to determine this threshold?**

**31. How much notice should be provided by each of Google and Facebook for significant algorithm changes? How can this notice period be set in order to not unreasonably limit digital platforms' flexibility to implement algorithm updates that may benefit consumers?**

**32. What information do each of Google and Facebook currently provide to news media businesses about the ranking and display of news, particularly with respect to ranking algorithms for content and changes to these algorithms?**

**33. What type of information would help news media businesses better understand and adapt to significant changes to ranking and display algorithms?**

**34. Under what circumstances might it be acceptable (or socially desirable) for each of Google and Facebook to not provide advance notice of significant algorithm changes?**

**35. Would it be appropriate for a bargaining code to include:  mechanisms requiring digital platforms to provide news media businesses with advance notice of algorithm changes that may significantly affect the ranking and display of news at least X days in advance of implementing these changes, and/or  mechanisms requiring digital platforms to notify news media businesses of algorithm changes that may significantly affect the ranking and display of news within X days of making a decision to implement such changes, and/or  relevant exemptions or flexibility in complying with any advance notification requirements where the digital platform considers urgent algorithm changes must be made in the interests of its users?**

<sup>17</sup> [https://www.cjr.org/tow\\_center\\_reports/the-platform-press-at-the-heart-of-journalism.php](https://www.cjr.org/tow_center_reports/the-platform-press-at-the-heart-of-journalism.php)

<sup>18</sup> Department for Digital Culture Media and Sport 2019, *The Cairncross Review: A Sustainable Future for Journalism*, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779882/021919\\_DC\\_MS\\_Cairncross\\_Review\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DC_MS_Cairncross_Review_.pdf)>. pp. 52-53

We have not had an opportunity to consider these questions in detail. In our research report for the ACCC's Preliminary Report we stressed the importance of the issue of notice of algorithmic changes. We suggested that digital platforms should be regarded as having 'a duty not to harm the public benefit provided by news and journalistic content' (p 150). Our rationale for this approach was as follows:

... a common, constant and legitimate complaint from news media companies is that the producers of news and journalistic content simply don't know what comprises the algorithms of digital platforms and when they will change. Publishers are subject to the whims of organisations that are primarily motivated not by notions of serving the public with news, rather than by maximising profits—in part by using that news content to do it. Of course, this is essentially what publishers did with news in the pre-digital era; they used it to attract advertisers with the proposition that they (the publishers) had all the audience any advertiser might need. However, the change is that now the producers of news are often not the distributors of news. The roles have been de-coupled. In this context, the public interest motive is crucial. And it is easy to see why unpredictable changes made by a company over which producers of news and journalistic content have no say would cause consternation among those who rely in large part on those companies to distribute their product.

[In chapter One of the report], we observed how the 'product' of news is fundamentally different from others. All manner of businesses can be harmed by algorithmic changes that affect communication with their customer base; but with news media—an industry already struggling with the economic challenges of producing a public good in a multisided market—the impacts can be more widespread. For citizens, these impacts can affect relationships with business, government and each other. In this environment, there is a case for digital platforms to be more transparent, at least by explaining to consumers as well as to the producers of news and journalistic content the ways in which decisions on content delivery are made. The public benefit which distinguishes news media from other businesses establishes a strong case for requiring platforms to give advance warning of changes which significantly affect news media business operations and revenues. In more general terms, it is reasonable to regard digital platforms as having a duty not to harm the public benefit provided by news and journalistic content.

The 'duty not to harm the public benefit provided by news and journalistic content' brings with it an obligation to provide reasonable notice of changes in algorithms that could have a material impact on news media.

## **Prioritising original news content**

**36. What benefits, if any, did Australian news media businesses experience following Google's adjustment to its ranking algorithm to prioritise original news in September 2019?**

**37. In order to prioritise original news content on each of Google and Facebook, would it be appropriate for the bargaining code to include:  mechanisms requiring news media companies to identify and advise platforms of material that is original news content, so that this could be taken into account by platforms in prioritising or communicating original content to users, and/or  a set of broad principles governing how digital platforms prioritise original news content through their ranking and display algorithms, and/or  mechanisms setting prescriptive requirements governing how digital platforms prioritise original news content?**

**38. How could 'original news content' be defined and identified under the bargaining code, and who should be responsible for defining or identifying this content?**

**39. Should any bargaining code requirement to prioritise original content distinguish between original investigative journalism and other types of news content? If so, how could this distinction be drawn?**

We acknowledge there are some risks to user choice and freedom of speech associated with undue interference in algorithmic activity, particularly search results. But the primary influences on algorithmic

decisions are commercial, and some level of intervention can assist in public policy objectives – just as commercial disclosure rules are considered necessary for news providers. Accordingly:

- there should be requirements for promoting original content
- it is appropriate for news producers to signal originality (although we see this as a voluntary activity by news producers, rather than an obligation imposed on them)
- a further distinction between original general news and investigative journalism is unnecessary
- there is a need for independent assessment of news producers' signalling of originality; this is a function that could be undertaken by the standards body we suggest should be at least partly funded through the bargaining code
- there is also a need for ready access by news media organisations to platform representatives to address any difficulties or disputes relating to these matters.

## **Treatment of paywalled news content and alternative news media business models**

40. Should the bargaining code contain any mechanisms requiring each of Google's and Facebook's ranking and display algorithms not to penalise the use news media business models that incorporate paywalls and subscription fees?

41. How might any relevant mechanisms in the bargaining code ensure treatment of paywalled news content is fair, without interfering with the general operation of ranking algorithms or unreasonably limiting consumers' access to free news?

Perhaps the principal rationale for bargaining code is the collapse of the traditional advertiser-funded business model for news. Making content available only to subscribers is one of the few alternatives for generating revenue. Unless the 'appropriate revenue' generated under the code is substantial, it would seem reasonable to require platforms to not discriminate against paywalled content that would otherwise be highly ranked.

## **E. Display and presentation of news on digital platforms**

### **Control over the display and presentation of news**

42. What level of control do news media businesses have over how news is displayed on the services provided by each of Google and Facebook?

43. What restrictions on the display and presentation of news content on digital platforms do you consider necessary, and why?

44. Which specific digital platform policies and practices affecting the display of news have a negative impact on the business models of news media businesses and/or their ability to monetise content?

45. How might a bargaining code strike the appropriate balance between:  providing news media businesses sufficient control over presentation and display of news content  providing consumers with easy access to news content, and  protecting the user experience on digital platforms, including providing digital platforms with the flexibility to improve this user experience?

46. Should a bargaining code include:  mechanisms requiring digital platforms to enter into good faith negotiations with individual news media businesses on the display and presentation of their news content, and/or  mechanisms requiring digital platforms to provide news media businesses with advance notice of and/or consultation on changes to policies and practices affecting the display and presentation of news, and/or  mechanisms setting out either principles-based or prescriptive requirements for digital platforms to grant news media businesses a greater degree of control over display and presentation of content than is granted to other content creators?

We will consider the views advanced by publishers and platforms, but we are less concerned with these aspects as we think they would be balanced by other benefits flowing to publishers under the code – principally, remuneration.

## Control over advertising directly associated with news

47. What specific controls do news organisations currently have over the use of advertising directly associated with news on the services provided by each of Google and Facebook?

48. Which restrictions on advertising directly associated with news content are necessary for each of Google and Facebook to impose, and why are these restrictions necessary?

49. Which restrictions on the use of advertising directly associated with news do news media businesses believe constrain their ability to monetise their content?

50. How might a bargaining code strike the appropriate balance between:  supporting the ability of news media businesses to monetise news through advertising directly associated with news  consumers being adequately informed about the nature of sponsored content, and  preserving the user experience of consumers accessing news through digital platforms?

51. Should a bargaining code include:  mechanisms requiring digital platforms to enter into good faith negotiations with individual news media businesses on the use of in-content advertising, and/or  mechanisms requiring digital platforms to provide news media businesses with advance notice of and/or consultation on changes to policies and practices affecting in-content advertising technical standards for formats such as AMP or Instant Articles, and/or  mechanisms setting out either principles-based or prescriptive requirements for digital platforms to grant news media businesses a greater degree of control over in-content advertising than is granted to other content creators?

We are not able to contribute on these specific questions but we would like to add to the ACCC's observation (on p 26 of the Concepts Paper) of a clear delineation of editorial and commercial content by noting this is in the public interest as well as the interests of platforms.

## Flagging 'quality' journalism

We accept that this aspect has been referred to the parallel project on development of a disinformation code, but we repeat our earlier point that funding for a standards scheme, and perhaps quality journalism initiatives, should be considered as one of the objectives of the Bargaining Code.

## F. Facilitating open communication between digital platforms and Australian news businesses

52. How could the bargaining code best ensure a contact point at a digital platform provides timely responses to issues and concerns communicated by news media businesses?

53. Would a point of contact outside of Australia be able to sufficiently address concerns of news media businesses in a timely manner?

54. Aside from availability and responsiveness of points of contact, what other obligations or guidance should the bargaining code include about ensuring open communication between both Google and Facebook and news media businesses?

55. What potential practical issues may arise from requiring contact points?

56. Are there any other means of communication that might usefully be included in the provisions of bargaining code?

We noted above the need for ready access by news media organisations to platform representatives to address any difficulties or disputes relating to matters such as prioritising original content. We acknowledge that both Google and Facebook have made significant efforts to improve access, including in relation to smaller businesses. This is a positive step, particularly for businesses that have fewer resources. A code provision that encouraged good faith consultation would be welcome.

## Dispute resolution and enforcement

57. What would be the most appropriate and effective mechanisms for resolving disputes about, and enforcing, compliance with the bargaining code?

58. What enforcement mechanisms should be included in the code? Should the code include pecuniary penalties?

We note that there is no explanation in the Concepts Paper of what is meant by ‘mandatory code’. For example, there is no guidance on whether the code would be authorised or registered under an Act of Parliament. However the enforcement section refers to ‘an enforcement body’.

We assume the only currently available statutory option would be a code made under Part IVB of the *Competition and Consumer Act 2010*, and it would be enforced by the ACCC. However, the distinction between voluntary and mandatory is not the same as the distinction between self-regulatory and regulatory. The codes made under Part 9 of the *Broadcasting Services Act 1992* and Part 6 of the *Telecommunications Act 1997* are mandatory in two senses: they apply automatically to certain classes of service provider; and providers are required to comply with them because a breach is enforceable by the regulator. However, it is possible for a statutory code to be voluntary in the sense that it only applies to those who opt in, and it is possible for a self-regulatory code to be mandatory in the sense that compliance by signatories is obtained through some kind of contractual obligation.

As these matters could affect the community’s confidence in the commitments themselves and how they will be enforced, we would appreciate information on the range of options under consideration by the ACCC.

## G. Review of bargaining code

59. Should the bargaining code include a compulsory review mechanism? If so, when and how often should this compulsory review occur?

There should be a standard review period, such as three years, which allows for adjustment but does not impose unnecessary burdens on the participants. Earlier we suggest the code should initially apply only to Google Search and Facebook News Feed; we suggest that this ‘listing’ aspect of the code be subject to review after 12 months, with other aspects reviewed after three years.