

# Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code

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Australia is at a critical turning point in its history. One such turning point relates to whether we will remain a free and open democracy.

According to the Australian Competition and Consumer Commission (the ACCC), public interest journalism is an essential prerequisite for a “well functioning” democracy, as is “the ability of consumers to recognise high-quality news”. However, the ACCC is concerned that public interest journalism is under threat in Australia due to the rise of online platforms for information searches and sharing. In response to concerns by commercial news media businesses about their losses of advertising income and jobs for journalists in the non-digital platforms of print, radio and TV, the ACCC has conducted a “Digital Platforms Inquiry” in which they have canvassed the impact of the rise of the online information market on journalism in Australia.

In the last two decades the world has transitioned from a pre-digital era – when print, radio and TV platforms held a bargaining power imbalance over advertisers – to a post-digital era, when online platforms provide a cheaper and better targeted alternative for advertisers. The ACCC has concluded that this market shift has produced a new bargaining power imbalance in which two digital platforms – Google and Facebook – are putting the viability of news media businesses at risk. It contends that this is a threat to democracy and that this can only be corrected by introduction of a “News Media Bargaining Code” which compels Google and Facebook to:

- pay arbitrarily determined amounts for the content of certain Australian news media businesses (and only those businesses);
- provide these news media businesses access to “user” data currently not provided to any content publisher on digital platforms; and
- provide advance notice to certain news media businesses (and not other content publishers) of algorithm changes.

This essay rejects the ACCC's assertions about the news market and bargaining power imbalances and asserts that their Code, as drafted, is an extremely unbalanced anti-competitive market intervention that will have the opposite effect to that intended on democracy and free exchange of information. It examines:

- how the information market structure is likely to be changed by the Code,
- who will gain information market dominance,
- whose interests will be served and who will suffer,
- the adverse effect of this change on our democracy, and

- **how the foundations are being laid in the Code for a cross-media/cross-platform takeover by Australia’s news oligopoly of the information market in a manner that is wholly contrary to the public interest.**

This essay also proposes a suspension of the process for passage of legislation on the News Media Bargaining Code pending the establishment of a **community engagement process for development of a rational program of regulation of Australia’s modern digital age information market – a regulatory framework that is consistent with the aims and values of Australians in democracy.**

Dr Bronwyn Kelly does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this essay. Neither she nor Australian Community Futures Planning has any affiliation with, interest in, expectation of or dependency on any entity or person mentioned here.

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# Prospects for journalism, the free information market and democracy in Australia under the ACCC's News Media Bargaining Code

## Introduction – How does the information market work now?

In the digital age, those seeking news and information about current affairs and policies affecting their lives have free and equitable access to all content made public. The web has democratised information access and publication, and neither consumers nor producers of content face barriers to entry to the public information exchange market. They compete and trade in what is certainly the most open information market in history. The web, and our access to it, is arranged to facilitate entry for sellers and access for buyers, without discrimination.

Google is the biggest player in the search engine services part of this information trading market, a position it has reached because of the quality of its search engine and the satisfaction it provides to consumers. This portrayal may look like an advertisement for Google, but it is simply a statement of fact about their business model. That model is adapted fully to the open, freely competitive, democratic structure of the online information market and is focussed primarily on providing satisfactory *search* services to the content *searcher*, not necessarily to content sellers, and certainly not to one content seller more than another. Google's business model relies on repeat business from searchers for search services. It does not rely on content provision or repeat purchases of content. Business success in this model is dependent on maintaining a reputation for non-discrimination, not preferential treatment of some content suppliers. To monitor performance they place primary emphasis on "measuring whether people continue to find [their *search*] results relevant and reliable" and they state openly that:

We have a rigorous process that involves extensive testing and thousands of independent people around the world who rate the quality of Search.<sup>1</sup>

## What is the News Media Bargaining Code?

The Australian Competition and Consumer Commission (ACCC) has designed a draft Code to compel Google and Facebook to pay for the news content of certain Australian news media businesses.

In the ACCC's words, the Code also includes a set of "minimum standards" for the treatment of news on digital platform services, addressing issues such as:

- providing advance notice of changes to algorithmic ranking and presentation of news;
- appropriately recognising original news content; and
- providing information about how and when Google and Facebook make available user data collected through users' interactions with news content."

The ACCC has asserted that "there is a "fundamental bargaining power imbalance" between Australian news media businesses and major digital platforms and that "this imbalance has resulted in news media businesses accepting less favourable terms for the inclusion of news on digital platform services than they would otherwise agree to."

The ACCC has further asserted that its intervention in the current free trading arrangements of the online information market, via introduction of a mandatory Code compelling just two digital platforms, Google and Facebook, to pay arbitrarily determined amounts to certain news businesses, is justified because a strong and independent media landscape is essential to a well functioning democracy. The implication is that current trading arrangements in the online information market are a threat to democracy.

For more information on the Code visit the ACCC's [Draft news media bargaining code – Exposure draft explanatory materials](#).

<sup>1</sup> Google Search, "Our Approach to Search", <https://www.google.com/search/howsearchworks/mission/>

Consistent with this consumer focus, Google makes its policies of non-discriminatory search services transparent, inasmuch as they publish their guidelines on how searches and rankings may be determined and optimised. This cannot be characterised as the behaviour of an abuser of market power or bargaining power. It is sharing what would otherwise be considered proprietorial information without excluding its competitors. Google's stated mission is probably as neutral as could be expected in such a market. It is simply:

To organise the world's information and make it universally accessible and useful.<sup>2</sup>

In effect, in a world with billions of completely disorganised catalogues of websites, and where at least 15% of searches are entirely new every day, Google Search's business mission is simply "to help everyone find the information they are looking for". It is not to shut down journalism, or any information trader. On the contrary, it is to open the market of information up for both sellers and buyers. Indeed when Google posts advice for all content originators to enable them to "get found on Google", it is doing exactly that. This is what SEO (Search Engine Optimisation) is all about – helping content providers in a non-discriminatory framework maximise their chances of trading their wares. This allows billions of new potential competitors in information supply into the market, which is of course an unwelcome event for the non-digital advertising platforms of print, TV and radio. But it is not a threat to free trading, fair bargaining power balance, or democracy – quite the reverse.

Search services like Google's are like a giant library catalogue system, except that instead of having to use a research librarian to manually search for the information that may or may not be in that library catalogue and may not be found at all due to catalogue disaggregation, the search engines find it in seconds, speeding up not just the supply but the total value of tradeable information in the market. Some search engines find it faster than others and they find more relevant material. But generally the efficiency of the engines is super-fast. As a result, the digital age has produced the biggest increase in supply of a commodity and total value of a commodity than any other market development in history – that commodity being information. All of it can currently be traded as a commodity in its own right, and all of it can be used to attract advertising. This is a fully competitive, fully exposed market with free entry and exit arrangements. Within this market, the search engines and social media do not reduce sales and earning opportunities, they increase them.

As the digital age has brought websites together with search engines, the information market has burgeoned into the biggest trading opportunity ever known. That is what the search engines and social media are facilitating – more trade than ever before and, much to the regret of news businesses and journalists, more competitors to them than ever before. We can get an insight into the scale of the competition arising for journalism from these new entrants to the information supply market from the ACCC's own data about how we spend our time online in search and consumption of information. According to the ACCC, Australians spend only 2.3% of their time searching and browsing the "news outlets" of Murdoch, Nine, Seven West, Ten and the ABC<sup>3</sup> (although it is unclear how much of this time is spent in the news space of these businesses rather than the entertainment space). They spend the other 97.7% of their time online searching and browsing the websites of independent researchers, students, academics, commercial businesses, non-profits, social media, message systems, YouTube, bloggers, podcasters, tweeters, foreign newspapers, and online retailers of goods and services – endless types and sources of content which now dwarf Australian news media.

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<sup>2</sup> Ibid.

<sup>3</sup> Australian Competition and Consumer Commission, "Digital Platforms Inquiry Final Report", June 2019, page 6. <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

Players from the traditional news media businesses, whose platforms (i.e., print newspapers, TV and radio) have previously been able to corner the news market and advertising revenues, are still grappling with this new entrant – alternative information producers, such as YouTubers, podcasters, vloggers, bloggers and tweeters. They are also grappling with the fact that the whole online environment makes the advertising services on their old platforms too expensive. Their traditional market and the platforms they have used to control their share of the market – print, TV and radio – are in transition and this transition will not favour them, no matter what they do. The virtual monopoly they used to have on their platforms in advertising is a monopoly no more. Gone are the days when they can charge enormous amounts for tiny advertising spaces which reach smaller audiences than those on offer in the digital world.

In the face of the inevitable demise of their competitiveness as advertising platforms, the old established news businesses have been searching around for a way to get paid into the future. And their preference is naturally to do this without having to vacate the old platforms and the markets they can still dominate. They are reluctant to shift to a space where they will be required to compete alongside billions of others in the open online platforms. Information market dominance via the old offline platforms is still vital to them as it allows news businesses like Murdoch to continue to segment markets geographically – i.e., by electorates – and saturate them with a targeted supply of their news. Only on those offline platforms can they hope to crowd out the competition and, by extension, more surely influence voting preferences. That geographical control, particularly of key marginal electorates in Australia’s case in Queensland and western Sydney, is critical to control of voting patterns and success for the sorts of governments that will favour the interests of the current news oligopolies – namely conservative governments. This is why Murdoch owns all but a couple of the regional newspapers in Queensland for example. And to the extent the geographical borders may be broken down by online platforms (which know no borders) the rise of online markets is entirely unwelcome to those news business who seek to control election outcomes – namely those who dominate the current news oligopoly in Australia – Murdoch and Nine.

If Australia’s democracy is under threat it is more likely – far more likely – that this threat has originated from the market concentration that has been allowed to occur in the big non-digital news media businesses than from the intrusion of the “digital platforms” of Google and Facebook. Still, Murdoch and Nine have managed to persuade the ACCC that online trading, and two particular players within it, are the enemy of democracy. To support that argument they have been persuasive via disinformation, which the ACCC has then also generally echoed in its Final Report on its Digital Platforms Inquiry. Some of this disinformation that now ricochets around the debating forum is misleading in part, and some is entirely misleading, but it includes notions:

- that the digital platforms are infringing copyright and therefore stealing content;
- that Google and Facebook are abusing market power and/or bargaining power and seeking to pay less than news items are worth in their own right in a free market;
- that advertising income is being stolen from news producers and that somehow news producers are more entitled to advertising revenue than other information producers;
- that Google and Facebook should provide preferential service to the news businesses – such as algorithm advice, notification of changes to algorithms that may affect the news businesses, and user data – that is not available to others in the information trading market;
- that Google’s and Facebook’s “bargaining power” forces the news businesses to accept “terms of service which are less favourable” (less favourable than what, the ACCC does not say, but obviously not less favourable than terms provided to every other news market entrant because all content providers are offered the same terms of service);
- that digital platforms are solely responsible for trashing democracy by allowing fake news and disinformation to be peddled and that news media do not themselves indulge in fake

news, disinformation, electoral distortion and any other abuse of power made possible by their dominance of the print, radio and TV news platforms; and

- that democracy will be saved if a bargaining code is developed that forces one or two players in the digital spaces of the information market to fully cover the news production costs of a small number of powerful players in the non-digital spaces of the market, and to provide them with preferential access to advertising revenues available in the online information market.

All these misleading notions are intended to create and justify an impression in the minds of Australians that their democracy will not be saved unless Australia's media moguls get a better deal than everyone else. But the reality is that the ACCC's News Media Bargaining Code, in giving an extraordinarily better deal to Murdoch and Nine, is the real threat both to democracy and to our currently highly competitive, accessible and efficient information market, as I will show in this essay.

### How will the Code affect the information market in future?

The ACCC promotes its News Media Bargaining Code as an instrument that will:

*allow [my emphasis] news media businesses to bargain individually or collectively with Google and Facebook over payment for the inclusion of news on their services,*<sup>4</sup>

as though the news media businesses cannot bargain now, and as though an extraordinarily disruptive market intervention is justified because there is a public benefit that arises from commercial journalism that is at risk because one player is abusing market and/or bargaining power, and not because one player operating on non-digital platforms is simply uncompetitive in the digital age and does not wish to be exposed to the competition made possible by the rise of the world wide web and the search and share platforms that allow the competitors in journalism into the market. The ACCC has not made a compelling case – or indeed any case – that the demise of competitiveness of news delivered on non-digital platforms is the result of an abuse of market or bargaining power by Google and Facebook. Nevertheless they have proposed a Code which, as I will show, intervenes in the most efficient, competitively neutral market the world has ever enjoyed in information sharing and does so in the most heavy-handed, unfair, anti-competitive, and unnecessarily discriminatory manner – and all on the ostensible claim that this will protect the public benefit of good journalism in the face of the proliferation of fake news. The implication is that good journalism, truth, facts and virtue are the sole preserve of established news businesses and fake news is solely generated by everyone but the news businesses.

But obviously, fake news has been around since time immemorial and to the extent that fake news and disinformation may threaten democracy – as they have throughout history – then we are long overdue for an enforceable code of conduct binding both publishers and information sharing platforms to standards about responsible publication and distribution of information. However, the ACCC's Code, so drafted, does not address the problems of fake news and disinformation at all. It merely focusses on making two supposedly too-powerful but undoubtedly efficient competitors for advertising revenues fully subsidise the ostensibly powerless and undoubtedly inefficient competitors. The Code places no obligation on any of the parties to clean up their act in regard to any disinformation and fake news. Democracy gains nothing from this strangest and most

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<sup>4</sup> Australian Competition and Consumer Commission, "Q&As: Draft news media and digital platforms mandatory bargaining code", July 2020, page 3. <https://www.accc.gov.au/system/files/DPB%20-%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code%20Q%26As.pdf>

compromised of market interventions. The cause of truth in journalism or in wider information sources is in no way advanced. So from the point of view of the real challenges to our democracy, the Code is useless, worse than useless inasmuch as it is so anti-competitive as an intervention that it is capable of disabling the most efficient service providers – Google and Facebook – as a participants in the Australian information market. The Code, as drafted, can act as a facilitated raid on Google and Facebook, effectively running them out of town. This essay will show how that can happen.

The News Media Bargaining Code, structured as it is, does not offer Australians the prospect of fairly re-balancing any supposed bargaining power imbalance in such a way as to ensure that the interests of democracy and news/information consumers will be well served. For those interests to be served we would have to devise a Code which does not unlevel the playing field of competition so strongly in favour of one type of information provider – the commercial news oligopoly – against all the other information traders. Unfortunately this Code unlevels the field for everyone but the oligopoly of offline news providers – the big businesses of Murdoch and Nine. And the danger down the track is that these two businesses will end up running *both* the news content production and distribution platforms *and* the services that allow us to search for their competitors in content production. It's a ghastly prospect.

In the current market structure there is a healthy division between search services and the other parts of the digital information market. Were the market structure to be amended to allow concentrated cross-ownership – basically before an appropriate Chinese wall between search, distribution and content origination functions can be established as a proper regulatory control on conflict of interest – then we would enter a period of corruption, authoritarian control, social regression and extreme inequality that is wholly at odds with the enlightened but still nascent democracy that has been made possible in the dawn of the digital age. To the extent that the Code will facilitate that corruption and authoritarian control – and it has that capacity in spades – our democracy is at risk.

The ACCC's Code has been developed by taking the above listed misleading notions – about how the information market works and how Google and Facebook may be abusing their market power – as though they are reasonable, balanced and factual. But none of these notions is a reasonable or balanced portrayal of the good or bad faith of the market players at the moment. On the contrary, they completely misrepresent the way the market works. That market is not without its problems. Every player in it is struggling with an array issues about their ethical responsibilities in the information market. But the Code does not solve the real problems we are all facing here, and it creates new ones for our democracy and for our equitable access to information. The Code picks winners – and these winners do not include information consumers and liberal democracies. They include the existing oligopoly of private sector commercial news businesses and conservative politicians – nothing more.

In this essay I will explain how that is so and how destructive it can be to the free and fair functioning of the information market all Australians have come to enjoy in the digital age.

## Winners and losers in the ACCC's News Media Bargaining Code

In the brawl over the ACCC's News Media Bargaining Code, who are the likely winners and losers?

- **The losers** are:
  - news consumers,

- the web browsers, independent researchers and authors, students, businesses and non-profits that have come to depend on the open source platforms for access to information and income offered to them for free by the digital platforms,
  - taxpayers,
  - the ABC and SBS,
  - journalists and quality journalism itself,
  - independent producers of content in current affairs or social commentary (eg., small journalism businesses, vloggers, bloggers, YouTubers and podcasters),
  - public broadcasting, and finally
  - democracy.
- **The winners** are Murdoch, Nine, and to a lesser extent, Seven West and maybe Ten.

Google and Facebook are also likely to be losers, although in their case the possible outcomes are a little more uncertain. The government clearly *intends* that they should be losers – a fact which cannot be denied when it is considered that the draft Code released in July 2020 rejected the only part of the ACCC’s original concept for the Code that may have fairly recognised the interests of the digital platforms. In its “Concepts Paper” of 19 May 2020 on the Code, the ACCC stated that:

Negotiations around compensation for the use of news should also take into account the value that Google and Facebook already provide to news media businesses for using their news content. This value needs to be considered when assessing the direct and indirect value of news media content to each digital platform in the course of commercial negotiations regarding remuneration.<sup>5</sup>

But the final Code excluded the possibility that the benefits Google and Facebook provide to news businesses should be taken into account in calculating direct and indirect benefits of the appearance of news media content (or even just snippets of it) on digital platforms. Indeed as far as Google and Facebook are concerned, the government’s policy question seems to be less about whether they should lose than it is about how much. How much is too much? If the Code is applied to its full practicable extent and if it is to be applied to the extent necessary to correct what the ACCC perceives as a market imbalance currently capable of bringing down democracy, then it would appear that the point at which “too much” loss is reached for Google and Facebook, at least in the ACCC’s view, is only just before the point where they face the prospect of going out of business in Australia. It is the point at which the demands of the Code are deemed by the arbitrator to place an “undue burden on the commercial interests of the digital platform service”<sup>6</sup>. The News Media Bargaining Code has been structured in a way that will ensure Google’s and Facebook’s losses cannot be offset and that if there is a bargaining power imbalance in the current market arrangements it will not be just neutralised, it will be reversed. The apparent intention is to make Google and Facebook the biggest losers – although it will not end there. And the apparent concomitant intention is to deliver wins strictly to the current news oligopoly in Australia – Murdoch, Nine and, to a lesser extent, Seven.

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<sup>5</sup> Australian Competition and Consumer Commission, “Mandatory news media bargaining code: Concepts paper”, 19 May 2020. <https://www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%2019%20May%202020.pdf>

<sup>6</sup> ACCC’s Draft News Media Bargaining Code: Commonwealth Government, “Treasury Amendment Laws (News Media and Digital Platforms Mandatory Bargaining Code) 2020” Draft Exposure Bill. Clause 1.139. <https://www.accc.gov.au/system/files/Exposure%20Draft%20EM%20-%20NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%20BILL%202020.pdf>



I could round off the lists of winners and losers by adding conservative governments to the winners' list and progressive governments to the losers' list. But we can let politicians fend for themselves – accustomed to brawling as they are – while we examine how the losses will play out for everyone else.

**Loser no. 1 is news consumers.** They stand to lose much of the diversity they have come to enjoy in news, since the rise of the digital age. The ACCC will argue that this will not occur because its Code allows both big and small news businesses (those earning above \$150,000 a year) a seat at the bargaining table and that this is designed to support a diversity of news vital to a well-functioning democracy. But “news” – as it has been defined by the Code itself – is these days provided online from far more diverse sources than those being given a seat at the table. The Code does not propose that the content from these small alternative sources should be paid for, no matter how well they maintain standards for quality publications that would otherwise fit within the ACCC’s definition of “news”. This definition is wide in one way and narrow in another. For those permitted a seat at the bargaining table – and only them – the definition of covered news includes sports and entertainment news, which of course has nothing to do with democracy<sup>7</sup>. But it specifically excludes a range of other content that has everything to do with democracy such as “content produced by academics and documentaries”.<sup>8</sup> As such, it gives us **loser No. 2 – all those alternative news content originators** – all those web browsers, independent researchers, students, academics, businesses and non-profits that have come to depend on the open source platforms for their access to information necessary for production of their content and for the income opportunities offered to them by the digital platforms. That is all at risk because of the structure of the ACCC’s mandatory Code.

The Code discriminates against a wide variety of news producers in our modern democracy in that it determines which news is eligible for funding by the digital platforms on the basis of who produces it, not whether it is news content vital to democracy. Content covered by the Code is

content that is created by a journalist [and only by a journalist] which is relevant to recording, investigating or explaining issues of interest to Australians.<sup>9</sup>

Indeed in the definition of “covered news content”, certain news publishers such as The Conversation would be excluded from bargaining and benefitting under the Code because their content – which looks just like news and high quality news at that – is produced exclusively by academics, not journalists.

These alternative news content originators will lose, not just because they won’t be paid for their content but because their share of the advertising market will decline. It’s paltry now, but it will drop to near zero under the Code. And indeed if the Code results in Google’s withdrawal from operation in Australia – a prospect which cannot be ruled out – then not only will these alternative content originators lose advertising income, they will lose much of their ability to conduct research for their productions and to post their articles in websites that have a chance of actually being found by readers.

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<sup>7</sup> ACCC, *Ibid.*, Clause 1.66 “‘Covered news content’ is intended to capture content including sports and entertainment related news such as interviews with coaches and players, reporting about the entertainment industry and coverage of reality television, but is intended to exclude: • broadcasts of sports games or publication of sports results or scores; and • entertainment content such as drama or reality TV programming.”

<sup>8</sup> ACCC, *Ibid.*, Clause 1.67 “‘Covered news content’ is also intended to exclude specialty or industry reporting, product reviews, talk-back radio discussions, content produced by academics and documentaries.”

<sup>9</sup> ACCC, *Ibid.*, Clause 1.65.

The Code also compels Google and Facebook to provide access to marketing data<sup>10</sup> and advice only to those permitted a seat at the bargaining table. The ACCC will say there is nothing to stop Google and Facebook providing this access to everyone but the advice on what it means for each individual client is clearly beyond the resources of both Google and Facebook. The privilege for those permitted to bargain will allow them to game the system and increase their shares of the market of available advertising income streams. The total available market of advertising has declined due to Covid-19 and is likely to stay in a trough for the coming decade. Shares of whatever is left of it will be dragged away from those who cannot gain a seat at the ACCC's table. Among those who are actually permitted to negotiate, the bigger news businesses will have far more clout by virtue of their capacity to analyse the incredibly complex market data they will now be able to use to syphon as much as possible of the remaining advertising income towards their mastheads. All this will lead to a loss of diversity in news.

In Australia, news consumers will in the main be stuck once again with the narrow and increasingly conservative journalism that is the result of a massive increase in market power offered in the last couple of decades to Murdoch and Nine by changes favourable to them in Australia's cross-media ownership laws. These changes culminated in 2017 in the scrapping of the "two-out-of-three" rule that had until then prevented news businesses from owning all three non-digital platforms – print, radio and television – in one geographical market. Australia now has what is acknowledged as one of the most concentrated news oligopolies in the world.<sup>11</sup> This concentration of market power has been further compounded since 2014 by the federal government's progressive de-funding of the public's own broadcasters, the ABC and SBS. According to independent researchers at Per Capita, funding for the ABC has been reduced by \$783 million since 2015.<sup>12</sup> The government has also used taxpayer funds to directly subsidise Murdoch with grants worth \$40 million<sup>13</sup>. This is a gross betrayal of taxpayers' legitimate interests in shares of the news media market as well as their interests in quality independent journalism and diverse programming. It forces taxpayers to fund private sector profits with no accountability for service to taxpayers (since it does not remove the paywalls allowing taxpayers free access to the content they have funded). And it narrows diversity in journalism. The assault on the ABC's funding has led to a demonstrable shift towards conservatism in news and current affairs coverage and programming at the ABC as journalists, fearing for their jobs under a conservative government, try to prevent further assaults on their funding. It should be noted that this tactic is not working – the ABC's funding is still being stripped. And the ACCC has now accentuated this disadvantage for taxpayers by excluding their ABC and SBS from being able to benefit from its new Code. So **loser No. 3 is taxpayers, loser No. 4 is their public broadcaster, and loser No. 5 is wider diversity in journalism.**

In effect the Code will produce the opposite of its own objective. It will increase the market concentration problems in our news media and homogenise our journalism because it is actually an

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<sup>10</sup> Note: by market data I mean aggregated user data and explanations of how algorithm changes may affect those permitted to bargain. I do not mean data on individuals, since the draft Code at least indicates that the Privacy Act 1988 is not over-ridden by the Code. See ACCC, *Ibid.*, Clause 1.76.

<sup>11</sup> Tim Dwyer and Dennis Muller, "FactCheck: is Australia's level of media ownership concentration one of the highest in the world?" *The Conversation*, 12 December 2016. <https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437>

<sup>12</sup> Emma Dawson, "It's Our ABC", *Per Capita and GetUp*, May 2020. [https://percapita.org.au/wp-content/uploads/2020/05/2749-ABC\\_Report.pdf](https://percapita.org.au/wp-content/uploads/2020/05/2749-ABC_Report.pdf)

<sup>13</sup> See Amanda Meade, "Coalition gives another \$10 million to Foxtel to boost women's sport on TV", *The Guardian*, 22 July 2020: "The Morrison government has given another \$10m to the Murdoch-controlled Foxtel to boost women's and underrepresented sport, bringing to \$40m the total handout to the subscription TV service since 2017." <https://www.theguardian.com/australia-news/2020/jul/22/coalition-gives-another-10m-to-foxtel-to-boost-womens-sport-on-tv>

anti-competitive mechanism – one designed specifically to shore up and increase the already excessive market concentration of Australian print, television and radio news providers against other news providers who have entered the information market via online channels and are now flourishing. The Guardian in Australia is a good example of success in this alternative digital-age business model. That news provider has risen to prominence and financial success in Australia by deliberately *not* putting up paywalls in online news and not insisting on payment for content appearing online. It is the opposite strategy to Murdoch's and Nine's, but it works for both the journalists and the news consumers, once they both accept that online trading of news is preferred and is here to stay. And it is working for increasing numbers of journalists and news commentators, for example Michael West, The Conversation and – much to the irritation of Murdoch and Nine and even the ABC – numerous podcasters and YouTube commentators like friendlyjordies. Australians have benefitted vastly from access to diverse quality journalism that has been possible because of digital platforms and to the extent that the ABC and SBS and new formats like Guardian Australia and The Conversation have adroitly moved into digital delivery of programs and news, Australians have been granted an extraordinary boost in accessibility to news, emergency information and quality content in general, particularly in regional Australia. They live remotely no more.

By contrast, Murdoch has been losing money in Australia. This is at least partly attributable to the slowness with which his print and TV media have adapted to operating in the online space and his reluctance to acknowledge that the market he used to be able to dominate – print, TV and more lately radio – is transitioning into a market that he will no longer be able to dominate – the online news market – unless of course laws are enacted that secure his dominance in the new market. Those laws are now being enacted and they have been drafted as an intervention on an extraordinary scale, because only an intervention as huge as this Code will be capable of shifting the small number of businesses permitted to bargain into a position of dominance in the online information market. Print and TV are no longer competitive media for news delivery. It is far too expensive to advertise with them and being a savvy businessman Murdoch would know that this advertising income is not coming back. Print news in particular is no longer a sustainable business. However, this does not mean that journalism itself is under threat from online activity as such. On the contrary, what is under threat in the digital era (unless the laws are changed as Murdoch would prefer) is Murdoch's dominance of the news market. That dominance has probably done more, in Australia at least, since the late 1990s to damage our democracy (not to mention our climate and even our national security) than any infiltration of fake news made possible by the rise of social media. And to the extent that the ACCC's new Code re-consolidates that old oligopoly and at the same time marginalises the ABC – the nation's preferred news provider – it will do Australia's democracy no favours at all. **Our democracy is loser No. 6.**

**Loser No. 7 under the Code is journalists.** Many journalists are doing it tough. And so it is little wonder that the ACCC's Code is attractive insofar as it appears (at first glance) to offer them a lifeline. The Code offers them (and only them) the prospect of being paid for their content by those platforms that currently connect readers to the websites of the content originators, free of charge, and that drive hundreds of millions of dollars each year in prospective advertising income opportunities to the news websites. It forces Google and Facebook to pay for the full costs of production of the "covered news content" uploaded (i.e., published) by those news businesses permitted to bargain under the Code, and it forces these two digital platforms (and only these two) to hand over any and all income derived as either a direct or indirect benefit from the appearance of snippets of the content in a search result or via a Facebook user's sharing of the item. And it forces all this despite the fact that Google and Facebook are not themselves publishing the content and do not acquire publishers' rights over the content.

Facebook currently allows sharing of articles but the news businesses are still the decision makers on publishing and they can and do prevent people from reading shared articles without payment by putting up paywalls on their websites. They and not Facebook are locking themselves out of payment for their content. Nor is Google the publisher of content freely uploaded by others; it simply provides snippets of uploaded content which display the words searched for by the reader. Neither Google's nor Facebook's practices constitute an infringement of copyright or use of content without payment. They simply constitute free advertising and income opportunities for journalists themselves and their mastheads. But if the Code becomes law it will – at least initially – produce a triple boon to journalists in businesses that can get a seat at the ACCC's exclusive bargaining table. (The ACCC likes to promote its proposed bargaining table as a space inclusive of big and small news producers but it is in fact a highly exclusive club just for some journalists.) This benefit will be temporary and possibly quite short-lived for the smaller news businesses because the Code is so aggressive that it actually has the capacity to kill the goose that journalists expect will lay their golden eggs. But at least initially journalists will get paid more for their content, plus they will get access to advertising income. And they will get all this without having to compensate the digital platforms for their costs in provision of this extraordinary free service.

Structured this way, the Code looks like a dream come true for journalists' job security (unless of course they work at the ABC or SBS or some other excluded entity). However, in reality the Code stands to shower less of this triple benefit on some news providers and journalists than others because it gives inordinate bargaining power to the current media oligopoly in Australia and it will re-consolidate the dominance of Murdoch and Nine over the smaller, more progressive and diverse news media that have risen with the digital age. It is pulling down barriers to domination of the online news market for the big, lumbering near-crippled players like Murdoch, which will of course create the conditions to crowd out the smaller ones – conditions which do not currently exist in the market because the search and share services are free to all publishers and readers alike. Journalists at independent quality news outlets like The Guardian with only a small share of the news market compared to Murdoch and Nine are very likely to end up being pushed into the category of loser No. 7 if this Code is taken to its logical extreme.

Some journalists and commentators are happy that Murdoch has badgered the government to make what should have been (and was originally designed to be) a *voluntary* code encouraging fair trade between a willing buyer and a willing seller (the only sort of code that can ensure a fair, economically efficient and sustainable market) into a *mandatory* code that is entirely unfair for everyone but the big news businesses. Perhaps the smaller news businesses assume they can ride safely on Murdoch's coat-tails. But any detached reflection on this notion should reveal that they are competitors with Murdoch and that commercial players like him, accustomed to such cut and thrust, are unlikely to hesitate in squashing them at the first opportunity, especially if they are on the progressive side of journalism. Sooner or later this Code will not work out well for those in loser group No. 7. It will simply make the existing oligopoly of Murdoch, Nine, Seven West and Ten – but mainly Murdoch and Nine – a lot stronger – and this time in all four platforms – print, radio, TV and online. With that, we will experience a return in our democracy to homogenous conservatism.

Some journalists who feel it is correct to subscribe to the contention that Google and Facebook:

- are responsible for all the troubles in our democracy,
- are stealing their content,
- are proliferating fake news,
- are pushing quality journalistic reports down in rankings compared to poorer quality information sources and fake news,
- are muscling them out of advertising income, and

- are not just market dominant but are *abusing* their market and bargaining power,

will be reluctant to accept that quality journalists from online smaller news businesses will be losers under the Code. They may also be incredulous that Google and Facebook – companies they have come to view as gigantic and well able to throw \$600 million or even \$1 billion a year their way<sup>14</sup> – can't afford to meet these and other essentially unlimited demands and/or will back out of the Australian market. But bearing in mind how significant this proposed market interference is – how it may completely change the ways in which, and the freedom with which, we have been able to access information since the rise of the digital age, perhaps even collapsing not just our *free* access to diverse information sources but our access *per se* – it would be as well to examine how the Code might play out in the long term and whether it is likely to result in a healthy, competitive market in journalism and, by extension a healthy democracy. The ACCC asserts that this is the point of its Code. For everyone's sake, it's worth thinking through whether it is actually likely to achieve that objective.

## Will the Code result in a healthy fair market for journalism?

If we think ahead about how the News Media Bargaining Code could play out for the structure of the news market and the broader information market, there is some considerable concern as I've already indicated that the chips may not fall in favour of those news media businesses and small content/information originators operating solely in the digital space and who are not part of the print, radio and TV oligopoly. As market interventions go, this one is venturing into truly uncharted territory and journalists might be well advised to be careful what they wish for.

The Code contains a number of mechanisms which increase the chances of the very big news players – Murdoch and Nine – to game the system and soak up disproportionate shares of the available supply of advertising income opportunities, and because of Covid-19 there isn't as much of that around as there used to be. The information market may be infinite but the advertising market is surely finite. When you crowd more players into a finite market, more often than not you end up shifting it in favour of the big players, especially if you're offering them truckloads of data and inside information on how to game that market. This is what the ACCC's Code does – in part. It doesn't level the playing field for big and little content originators. It *unlevels* it, so much so that these bigger players on the news side could come to completely dominate the available advertising market and not just in three platforms – print, radio and TV – as they do now, but in all four delivery platforms – print, radio, TV and online. Smaller players have gained an advantage in the online sphere over the last decade, but they stand to lose that, or much of it, under the Code.

The Code facilitates what is in effect a new form of cross-media takeover. In fact, it's a facilitated raid on two of the digital platforms – a very heavy-handed, shameless shake-down abandoning all principles of free and fair trading between willing buyers and willing sellers – and one that, contrary to the ACCC's promotional material, doesn't care at all about the existing smaller digital news players. And should the raid fail – in other words, should Google and Facebook still choose to hang around in a market where they have no fair bargaining power but still enough of the advertising to make it worth their while – well, no matter – it's still a full bail out (and more) of the big inefficient print and TV news providers. The Code is a really good plan for those big news businesses who have

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<sup>14</sup> See Max Mason and John Kehoe, "Tech giants should pay media \$600m – Costello", Financial Review, 14 May 2020, <https://www.afr.com/companies/media-and-marketing/tech-giants-should-pay-media-600m-costello-20200513-p54sgs> and "Forget \$600m! News Corp boss wants tech giants to pay \$1 billion a year for news", B&T Magazine, 15 May 2020, <https://www.bandt.com.au/forget-600m-news-corp-boss-wants-tech-giants-to-pay-1b-a-year-for-news/>

simply failed to adapt their business models to the digital age and to a market that is structured along totally different and far more egalitarian lines to the paywall business models preferred by the print and TV media. Either way, the oligopoly members can hardly lose under the Code.

But the smaller online players will have less advertising pull than they do now. They may assume this loss will be compensated by the price Google and Facebook will be forced to pay under the Code for their content. But if that price is more than Google and Facebook are willing to pay, they may vacate the market entirely. In fact the Code leaves them with only the option to vacate, and that will leave the players outside the oligopoly with only their websites and no means of reliably receiving the level of traffic currently directed to them for free by the search engines and the social media that Australians have come to enjoy. They might assume that everyone would then just go straight to their proprietary websites for their news. But bearing in mind the hundreds of millions of clicks being provided to them by the search engines it is likely that traffic would decline overall and indeed new customers would not find them, so their businesses would be less likely to expand. Alternatively the smaller news businesses might assume that Bing or Yahoo would step in to provide search services for free and pay all the content costs being imposed on Google; but it is quite risky to assume that Bing or Yahoo would be any more likely than Google to step in and provide services at a loss.

The prospect that Google and/or Facebook might depart Australia may seem remote and incredible. But so did Covid-19. So did Trump. Incredible things happen. Indeed it should be supposed that this prospect is exactly what Google has tried to warn Australians about in its now famous answer to “Question #8” in its August 2020 blog, “13 things you need to know about the News Media Bargaining Code”<sup>15</sup>:

Question #8: Are you going to charge for your services?

Google’s answer: No. We never said that the proposed law would require us to charge Australians for Search and YouTube. *What we did say is that Search and YouTube, which are free services, are at risk in Australia.* [my emphasis]

What they mean is that the whole service is at risk in Australia. Google quite clearly thinks that because of the way the Code draws in every aspect of its business and prescribes huge penalties for breaches – penalties which amount to 10% of its total annual turnover<sup>16</sup> (**note: not its profit but its total revenue**) – that it is therefore a potent risk to Google’s business viability in Australia. The reality is that on top of every other cost imposed by this Code, the fine for just one offence could spell the end of their operations here. Google may eventually have no better alternative than to cease services in Australia.

For its part, Facebook seems to have contemplated the notion that its best option is to refuse to allow sharing of Australian news, but it too may be forced to vacate the Australian market entirely. Because of the way the Code is structured, Facebook’s strategy of ejecting just the Australian news, and not all news, may constitute a breach of the Code’s discrimination provisions. This is what

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<sup>15</sup> Google Australia Blog, “13 things you need to know about the News Media Bargaining Code” 24 August 2020, <https://australia.googleblog.com/2020/08/13-things-you-need-to-know-about-news.html>

<sup>16</sup> ACCC’s Draft News Media Bargaining Code, Op. Cit., Clause 1.153, “Civil penalties apply for contraventions of the new Part IVBA. The maximum civil penalty, for an act or omission, is the greater of: ... 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the act or omission occurred.” It is unclear how “body corporate” will be defined. Eg., will it be Google Australia or the Google global group? Either way, a penalty of 10% of annual turnover is potentially ruinous for Google.

Google has tried to explain in its answer to Question #10 in its blog, “13 things you need to know about the News Media Bargaining Code”<sup>17</sup>:

Question #10: Why won't you just shut down Google News like you did in Spain, or remove Australian news websites?

Google's answer: This proposed law is written extremely broadly. If we show Australians any content from any “news publisher” (defined to include any “website”) in the world, we must also show all news content of news businesses registered under the Code. For this purpose, “news” is defined very broadly – way beyond what most of us would consider “news”. This includes covering issues that are of ‘interest to Australians’, including foreign news and citizen journalism - which go well beyond traditional journalism to capture all kinds of information, blogs, videos and websites. That means we'd have to undertake a mass cull of content globally to stop them being visible to Australians – we'd have to remove all foreign newspapers, bloggers, YouTube citizen reporters, but also sports reporting, discussions of global health issues, tweets about current events, and literally endless other types of content from all sources around the world.

This is why Google has been saying the Code is unworkable. It is. And because of the way the Code is structured, it will be almost impossible for the digital platforms bound by it to avoid breaching it on a daily basis. Indeed it may well be impossible to run Google or Facebook sustainably even if they manage not to breach it.

Why would this be so? There are several reasons. Clauses 1.112, 1.139 and 1.153 introduce the possibility of exorbitant costs, losses, fines and business risk for the digital platforms and provide no possibility that such risks and costs can be covered by means of charging the news providers for services Google and Facebook will be obliged to continue to provide to them because of the Code. The Code is structured such that Google and Facebook will be permitted neither discretion nor lawful means to withdraw their services to news content providers unless they withdraw services for everyone – i.e., unless they withdraw entirely from the market. It's akin to indenturing Google to slavery and more than that, making them pay for the privilege of being a slave.

The exorbitant costs accrue to Google and Facebook, and only to them, because under these clauses the arbitrator is neither bound to nor authorised to take the digital platforms' costs into account in determining what they shall pay over to each news media business. The Code in no way acknowledges that the digital platforms incur costs in sending advertising income opportunities to the news businesses and does not compensate the platforms for their costs. Instead it forces them to keep on incurring these costs, by threatening them with huge fines for withdrawing service to Australian content originators. Additionally the Code forcibly transfers to the news business the full value of both any direct and indirect benefits that the arbitrator may deem to have been gained by the digital platforms as a result of their provision of custom and income opportunities to the news content originators; and that value cannot be discounted by calculations of the benefit that Google and Facebook provide to the news businesses. And on top of all that, the Code forces the platforms to pay up to the full costs of the registered news businesses in their production of covered news content. In summary, it forces Google and Facebook to:

1. pay the news businesses for the privilege of advertising the news businesses' content, regardless of its quality; **AND**
2. pay for the news businesses' cost of production of the news content itself; **AND**

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<sup>17</sup> Google Australia Blog, “13 things you need to know about the News Media Bargaining Code” 24 August 2020, <https://australia.googleblog.com/2020/08/13-things-you-need-to-know-about-news.html>

3. continue to direct all custom to the news businesses without discrimination; **AND AT THE SAME TIME**
4. it refuses payment to Google and Facebook for their costs in services they are forced to provide to the news originators.

This is effectively compelling Google and Facebook to pay three or four times over to purchase something from one small set of providers that they are not seeking to acquire anyway from *any* content provider – namely copyright and content ownership – especially not on such prohibitive terms. Copyright is not a necessary purchase for a digital platform because nothing that is being done on the platforms infringes copyright. Indeed, even the ACCC concurs that there is no basis in law for a conclusion that the mere provision of a digital platform, such as Facebook, on which a third party may breach copyright can constitute a breach of copyright by the platform owner:

The mere ‘provision of facilities’ that enables a copyright infringement to occur does not constitute an authorisation in itself. Therefore, a digital platform that only provides facilities for copyright-infringing content would not be liable for the copyright-infringing acts of its users, unless there is something more to show that the digital platform authorised the infringement.<sup>18</sup>

Nor is copyright infringed by Google when it displays snippets of a news item in response to a search query. A popular conception has arisen that shares of content on Facebook and snippets of content in search results on Google is a theft of content and that laws are required to “end the conceit that news content is a free natural resource”<sup>19</sup>. This posits its own subtle replacement conceit – namely that search services are a free and natural resource – which of course isn’t true either although the Code has been built on the presumption that search and share services provide no value to the service user and incur no cost for the service provider, at least not a cost the news businesses or journalists should be required to pay for.

The Code has been built on the basis of a number of “conceits” or what might more accurately be called unsupported false impressions or misinformation – such as:

- search services are unworthy of compensation in a properly commercial transaction;
- journalistic content (and no other content) is worthy of being paid for in dollar amounts way beyond its value to willing purchasers; and
- that even if content is paid for by the unwilling purchasers (because they are forced), ownership of the content should still not transfer to the purchaser.

These conceits are all designed to distract from the fact that the digital services providers have in fact paid “to store, display, or use any uploaded content”<sup>20</sup>. They have paid for freely uploaded content with the services that they provide free of charge to the news businesses. It is just that the news businesses want to be paid more. Don’t we all! Well may they join the queue. But the preference of the news businesses – since, courtesy of the rise of the digital world, they have been obliged to compete with the hoi polloi. i.e., with billions of other information suppliers – is to jump the queue. To secure for themselves, and only themselves, the benefit of being paid more than a willing buyer is prepared to offer in a market that is structured this way (i.e., to the benefit of everyone and to the benefit of democracy) they have argued to the ACCC that they are not getting

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<sup>18</sup> ACCC, Digital Platforms Inquiry Final Report, Op. Cit., page 259.

<sup>19</sup> Peter Lewis, “The stakes are high for Facebook and Google if Australians decide to get their news elsewhere”, The Guardian, 8 September 2020. <https://www.theguardian.com/australia-news/commentisfree/2020/sep/08/the-stakes-are-high-for-facebook-and-google-if-australians-decide-to-get-their-news-elsewhere>

<sup>20</sup> ACCC, Digital Platforms Inquiry Final Report, Op. Cit., page 3.



as much as they otherwise would because, and only because, of an ostensible bargaining power imbalance. The conceit here is that journalism is inherently and uniformly worth more than other types of information in sustaining democracy and that therefore journalism (as defined by the Code) is the only information that should be privileged and we should pay handsomely for access to it regardless of its quality or interest to us.

It is easy to imply that big tech is abusing its power in relation to little news businesses (although within the total information market, some news businesses are not little). And to the big news businesses, this facile, shallow and therefore wholly misleading representation of the trading relationship between big and little information market participants is preferable to adapting their business model so that they can flourish in an online world, as lots of news businesses now can and do. It is certainly preferable to vacating the offline markets they currently dominate, even though the thing that has caused their financial troubles arises from their clinging to those high-cost, inefficient business models. Their financial troubles do not arise from a bargaining power “imbalance” where, in exchange for a licence to store, display, or use any freely uploaded content they are not only given free services but they are given new income earning opportunities. There is no demonstrable imbalance in that arrangement. There may or may not be another type of bargaining power imbalance between Google/Facebook and the news businesses, but if an imbalance does exist, there is nothing to support the contention that the current balance of bargaining power has itself caused the news businesses to be paid less than their news would be worth in an otherwise fairly balanced market.

The ACCC has spent over 600 pages in its Final Report on the Digital Platforms Inquiry, straining to establish a defensible basis for an unprecedented large scale anti-competitive market intervention, and in the process it has propagated a whole array of these dubious impressions. On the basis of such, they have come up with what is surely a tenuous assertion that there is a bargaining power imbalance and that this and nothing else is directly and solely causal of non-digital news business losses. In turn, the whole tenuous argument about a bargaining power imbalance is then relied on as the sole justification for a Code that doesn’t just rebalance the fair trading relationship, it hands full bargaining power to the news businesses. If there is a bargaining power imbalance, this Code is designed not to correct it but to flip it 180 degrees the other way.

Reading the Final Report of the ACCC’s Digital Platforms Inquiry therefore makes for an excruciating experience, at least for those who will not be permitted a seat at this new exclusive table of self-appointed elites in the information market. Logic is defied in many places and in some cases the recommendations proposed are in opposition to the evidence that the ACCC itself has accepted. A good example of this is that the ACCC has admitted on page 233 that it has *not* been persuaded by News Corp’s arguments that if Google displays a snippet of a news article in the results of a search query that this makes the reader stay within the digital platform, rather than migrate to their news website, and acts as a barrier to the news business’s capacity to earn advertising income.<sup>21</sup> A whole rigmarole about snippets and an assertion that their publication constitutes a loss of value to news businesses, rather than a gain, was basically the only case put forward by News Corp for the establishment of a bargaining code. The ACCC didn’t accept this and accordingly they initially

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<sup>21</sup> ACCC, “Digital Platforms Inquiry Final Report”, Op. Cit., page 233: “The ACCC is not recommending a mandatory licensing regime to apply to the use of snippets at this time because: (a) the issues identified in relation to snippets stem from a wider set of issues regarding an imbalance in bargaining power, which the ACCC recommends be addressed at first instance through a code of conduct, and (b) past experience in other countries suggests that the regime may not work; rather, the ACCC considers that it would be more appropriate for digital platforms and news media businesses to negotiate payments between themselves. This would provide flexibility to the payment model, which can be adjusted to the requirements of digital platforms and news media businesses”

recommended that any market imbalance issues be addressed by a *voluntary* Code in which the value of Google's and Facebook's services would be recognised alongside the value of news. Nevertheless News Corp's snippet argument ultimately prevailed because the ACCC eventually chose to rescue it from its trash bin and use it as flimsy justification for a Code which discarded the value of the digital services. In short, after instructions from federal Treasurer Josh Frydenberg, the ACCC stooped to contorting their own findings about the snippet argument because they had nothing else to justify the introduction of his requested *mandatory* punitive Code.

Were the ACCC's market intervention capable of producing a more efficient, healthy, open market for fair trading where one player does not exploit another, the Code as drafted might be acceptable. But it is really only capable of taking an efficient market and turning it into a completely inefficient one, playing favourites with a few powerful news producers. And far from protecting democracy, it will assist an oligopoly to capture it and suborn the public interest once again to powerful commercial interests. Those commercial interests are of course politically conservative which means that the Code can only skew Australia's democracy to resemble the political landscape of America under Trump, where Murdoch has managed to push all his competitors to the margins, or edge them out, and has entrenched the very type of government we say we want to avoid – one that thrives on fake news, division, disinformation and suppression of healthy journalistic debate. That should be a warning to Australia about the type of news market and democracy they will end up with if they support the introduction of a Code which gives Murdoch the upper hand. That market will not edge out fake news. It doesn't even seek to regulate that on the social media platforms. The Code will have no effect whatsoever on the quality of news. There will still be as much rubbish in it as there is now, if not more (much of it from Murdoch), and our democracy will thereby become the biggest loser.

Bearing in mind that the assertions of those supporting the mandatory Code seem to have been so disproportionately persuasive, it is worth interrogating the key assumptions underpinning the Code. In the main, these assumptions are hollow and the evidence supplied by the ACCC to justify the Code does not stand up to scrutiny:

- The ACCC's Final Report on its Digital Platforms Inquiry does not demonstrate that there is a need for a market intervention, especially not one on this scale and with this compulsory scope.
- It does not demonstrate that journalism is under threat and cannot thrive in an online market; it simply shows what everyone knows anyway – that the old business models of uncompetitive news media are under threat.
- It does not establish that any threats to journalism or democracy or even news businesses themselves arise specifically from a bargaining power imbalance between Google and Facebook on one hand and news content producers on the other.
- In effect it does not convincingly establish that the asserted bargaining power imbalance really exists or that if this particular imbalance exists it is being abused and is resulting in unfair deals for journalistic content.
- It does not indicate that small news businesses will not survive and thrive in the digital world without the Code. And it certainly does not indicate that smaller news businesses will be better off in a market arrangement where search and share services are kicked out and readers simply go straight to websites. Instead it creates more uncertainty for smaller news businesses and alternative information providers, regardless of whether they get a seat at the bargaining table or not. And it creates an environment in which emergent, alternative news voices are actively suppressed.
- It does not indicate that digital platforms are acting in a manner contrary to the public interest, any more than news oligopolies the world over.

- And finally it does not justify a Code which hands power to an oligopoly or indeed a duopoly – Murdoch and Nine.

The introduction of the News Media Bargaining code marks a turning point for the operation of information markets in Australia and for our democracy. The Code effectively asks Australians to believe that digital age free market settings, which are supporting a freer flow of information than we have ever had before, are a threat to democracy but that undue domination of an information market by a news duopoly is not. The ACCC's feint is that democracy needs to be protected from the infiltration of fake news but as I've said the Code does nothing about that problem at all. If anything it makes the problem worse. That being so, it is the Code that is the threat to democracy, not the digital platforms as I will now show. Fortunately, because the web is the web and the digital platforms are not dominated by the duopoly (yet), we can still easily search for information to examine whether the Code is based on reasonable assumptions. I would argue that it's not. But if I'm wrong, then at least the following analysis should be useful in shedding light on what can go wrong – horribly wrong – under the Code and on appropriate market regulations and market settings that would support a healthy Australian democracy.

## Ten fictions behind the ACCC's News Media Bargaining Code

### Fiction No. 1: News content is being stolen by Google and Facebook

Some journalists who have keenly supported the ACCC's Code have done so on the basis that news is not a free and natural resource and should be paid for. They have also asserted that Google is:

using [its] power as one of the largest companies on earth to threaten [journalists].<sup>22</sup>

But journalists have a conflict of interest in this argument and some are clearly not dealing well with that. In particular it has prevented journalists who are attached to mastheads from recognising at least a couple of obvious things. One of these is that news content originators are indeed paid (handsomely and repeatedly some would say) by the digital platforms to license their content for use on those platforms.

"Use" in this particular bargain does not mean that publication rights are being transferred exclusively to Facebook or Google and part of the problem with the whole idea that news content originators are not being paid enough (and should be the only ones who are paid) arises from a misunderstanding about which particular rights are being conferred on Google and Facebook by content producers when they grant the digital platforms a "licence" to store, display or use uploaded content. In this particular transaction it is useful to understand the difference between three types of property transactions – a licence, a lease and an outright sale:

1. A licence will grant access to a property (be it, say, land or a house or a news article) but only on a non-exclusive basis and on limited terms. Hence licences are the cheapest form of property transaction.
2. A lease grants exclusive access to and use of a property for a defined period but does not hand over ownership.

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<sup>22</sup> The Australia Institute, "An Open Letter to Google", "Google Threats Show ACCC Media Code is Vital", Australia Institute Centre for Responsible Technology blog, 20 August 2020, [https://www.centreforresponsibletechnology.org.au/google\\_threats\\_show\\_accc\\_media\\_code\\_is\\_vital](https://www.centreforresponsibletechnology.org.au/google_threats_show_accc_media_code_is_vital)

3. An outright sale hands over full ownership and hence this is the most expensive type of property transaction.

In the transactions over news content for use of it and access to it online, it would not ordinarily be expected that news businesses would be able to command the same price for a licence as they would for a sale outright. The licence is granted merely so that others can access the content and this is very much in the news content originator's favour. Publishers' and/or authors' rights (such as copyright or intellectual property) are not transferred by this licence, nor does either party to the transaction need them to be. By the same token, the property rights over the content are not being sold outright – nor need they be. If they were being sold outright, then we certainly would be expecting Google and Facebook to pay more but they are not seeking to own the news content any more than they are seeking to own anyone else's content. The transaction between the digital platform owner and the content owner is simply facilitating use of the content in line with the preferred purpose of the news content owner when that owner first voluntarily uploads the content for public access. For this, the content owners are paid with services provided to them by the platforms for free, services which are far more valuable to the content creators than their content is to the digital platforms, services lucrative enough to allow the news content providers operating in the digital space to grow and flourish, as they certainly have in the transition to the digital information market.

It is a conceit – in fact it is a complete fiction – to imply that the digital platforms “take” journalists' content for “free” without giving anything in return. If anything, the news content producers are the ones getting something for free. They are getting free publicity and for this they are not even being required to transfer ownership of their content to the platforms. Because in this arrangement content ownership remains with the content originators, they can continue to make money every time someone clicks on it. If their news item appears only once in a newspaper or for a fleeting moment on TV or radio, their ability to make money from the item is very limited in both space and time. But in the digital world there are no such spatial or temporal limitations. Their content can keep making money for them, repeatedly. This is indeed how the music distribution market works now. Artists voluntarily put their original content into platforms like Spotify and earn royalties they would otherwise never have acquired for music that would otherwise never have been heard at all. Some content creators may feel the royalties are not enough and this may or may not be true. But there is no doubt that the vast majority of those who take up this digital age deal will get more than they ever would under a system where a few music publishers acquire the content of a select few and restrict everyone else from entering the market and having their music heard.

Publishing companies through the ages have made an art of paying writers less than their content is worth and getting sole rights in perpetuity for use and publication of that content. *That* practice approximates theft far more closely than does the arrangement in the online information market. Theft is not what is going on here. And yet the ACCC is aiding and abetting those who would suggest that content is being stolen or taken for less than it is worth, even while they develop a Code that allows news content providers to steal the services of the digital platforms – i.e., to use their search services without payment.

More than that – the Code will effectively make Google and Facebook pay the news providers for the ostensible privilege of servicing them. It's mind-boggling really, based as it is on conceits:

- that news is worth more to distributors than distributors are to news;
- that if a news business's news content wasn't available, distributors like Google and Facebook would be unable to make money – as though news content is the only commodity

capable of being monetised to the digital distributor's advantage in an information market;  
and

- that news content – and indeed the content of just a few select journalists, not all – is the only content *worthy* of being paid for.

Nevertheless, despite these ridiculous presumptions the ACCC has successfully managed to create a myth that content is being stolen and all to support an otherwise unsupportable anti-competitive market intervention – one that will compel Google and Facebook to pay top dollar and beyond, without actually even being able to acquire the property they are being forced to pay for. Free markets should not work this way either in morality or fair competition and there is no reason in smart, efficient economies that they should be forced to work that way. Nevertheless some journalists who have become understandably fearful for their future have clutched at the myth without always applying their usual independence, disinterestedness and detachment – detachment they have hitherto asserted is a key difference between them and the fake news producers.

The world is transitioning to a far more open market for news, just like the one we have transitioned to for music. But the problem for the news content producers going through the same transition is that the news oligopoly members desperately want to deny entry to as many other news content producers as possible. They want to limit the number of competitors in journalism in the online market, just as they have been able to do in the offline market. In this campaign they have made as if the digital platforms are the competitors of journalists and thieves of content, when in fact the competitors to journalists are simply other journalists and other producers of factual content on current affairs. The digital platforms are not their competitors in either the production or publication of news and they are not thieving anyone's content, news or otherwise. They offer the same terms of service to everyone. These terms are simple:

Put your content here, for free, and we'll promote it for you, for free.

That is not a threat to journalism or any other type of content producer. It simply increases the competition in the information market by increasing opportunities and facilitating entry for millions of commentators.

In this new market, the reality is that news and journalism per se are not "ailing"<sup>23</sup>. They are thriving. There has been explosion of diversity in news which has its upsides and downsides, depending on which political perspective you support and whether you work for an established news masthead or not. But overall the opportunities for *journalism* have grown exponentially. And with platforms being organised now like INKL and other fully digital news media like The Conversation, Guardian Australia and Michael West, the growth in opportunities for journalists to engage in production of quality news articles without having to sell their soul to the big news business editors (or to one particularly pernicious mogul) is surely an exciting prospect from which everyone can benefit (except the current oligopoly, which simply doesn't like the competition of the explosion in alternative news offerings). If this opportunity for diversity in news is to be retained, journalists simply have to re-group with business models that suit the new digital market. That opportunity will be lost if the Code goes ahead.

## Fiction No. 2: Without the Code, journalism will die, and so will local news

The lure of the Code consists in its being promoted as if it is all about helping news media businesses – little and big – survive in Australia and by extension, ensuring jobs for journalists in Australia. As Rod Sims, the Chair of the ACCC, claims:

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<sup>23</sup> Peter Lewis, Op. Cit.

This is about helping news media businesses survive and prosper. If this Code was in place [last year], BuzzFeed would still have journalists in Australia.<sup>24</sup>

This is mischievous. BuzzFeed can and does employ Australian journalists but it simply no longer wishes them to cover Australian local content. It is focussing on global content and expects to make a profit in 2020. It has adapted its business model to operate on the field of its natural and preferred advantage. That is all. Mr Sims, however, has asserted that without the Code, little businesses like BuzzFeed will fail and that Australian news content – particularly regional and local council or local court news – will die. This is entirely disingenuous because:

- It elides the real cause of the problems in big news media businesses – their sheer lack of competitiveness as non-digital platforms in the provision of advertising services and their stubborn, unjustifiable and plainly petulant refusal to adapt their business models to compete in the growing market of information.
- It also obfuscates the fact that the Code contains no inbuilt incentive whatsoever to make the big news businesses return to covering local news. It merely sets up arrangements that will help prevent alternative news providers on digital platforms move into or stay in the local news market.<sup>25</sup>
- And it creates an entirely false impression that news content is not being (and is not able to be) produced on alternative platforms such as YouTube by “new age commentators” who, like BuzzFeed, appeal to young people and who, like friendlyjordies, have moved into the regional news market, freshening it up and releasing it from the grip of Murdoch. As NSW Shooters and Fishers MP, Helen Dalton, observed in September 2020, these alternative new age commentators

“are the ones coming out to regional news areas and asking questions. We’ve seen the demise of our regional TV news, our papers are doing it tough and we are having less and less say. Friendlyjordies are filling the spot.” ... [Ms Dalton] praised friendlyjordies for covering regional council corruption, water, grants and environmental issues that are being overlooked by mainstream media.<sup>26</sup>

This is journalism that Rod Sims says will die without his Code, whereas the reality is that regional and local council issues coverage will die as a result of the Code (unless of course it is produced by Murdoch – in which case it won’t be “asking questions” that would be asked by friendlyjordies). The alternative news content providers present entirely efficient and very unwelcome competition to the news mastheads and the clear intention of the Code is to squash that competition and with the same stroke alleviate the need for the news mastheads to cover local news. The ACCC’s Code will not save regional journalism or local news coverage, it will homogenise or destroy it outright if that is Murdoch’s whim.

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<sup>24</sup> Rod Sims, quoted by Amanda Meade, “Chris Uhlmann’s damnation of Daniel Andrews delayed at the Age”, The Guardian, 18 September 2020, [https://www.theguardian.com/media/commentisfree/2020/sep/18/chris-uhlmanns-damnation-of-daniel-andrews-delayed-at-the-age?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/media/commentisfree/2020/sep/18/chris-uhlmanns-damnation-of-daniel-andrews-delayed-at-the-age?CMP=Share_iOSApp_Other)

<sup>25</sup> In fact we can see this happening in 2020 in Murdoch’s and Nine’s recent divestment of AAP and their clear intention to create a competing newswire service that will undercut AAP until it drives it out of business, at which time it will have a monopoly on this service. Smaller news outlets beware.

<sup>26</sup> Lucy Cormack and Fergus Hunter, “How to solve a problem like friendlyjordies? Politicians debate new age commentator”, Sydney Morning Herald, 20 September 2020. <https://www.smh.com.au/national/nsw/how-to-solve-a-problem-like-friendlyjordies-politicians-debate-new-age-commentator-20200918-p55x4a.html>

### Fiction No. 3: Google is responsible for destroying independent journalism

The Australia Institute's Centre for Responsible Technology posted "An Open Letter to Google" in August 2020 which among other things stated that:

You [Google] have exploited your understanding of our personal interests and behaviours to draw advertisers away from traditional media, destroying the business model that supported independent journalism for more than 150 years.<sup>27</sup>

This lays responsibility for the decline of viability in non-digital media businesses entirely at the door of Google. In high standard journalism, big sweeping claims like that can really only be justifiable if the author also provides the balanced, fact-based reporting that "independent" journalists and news businesses like to claim is their stock in trade and their prime responsibility. Such balance was absent on this occasion and indeed the authors of the letter clearly felt no need to justify the assertion.

If Australians are of a mind to write an open letter to Google and engage with them in a manner where they might expect to get somewhere – the manner we might expect of reasonable and good faith bargainers – then it would be far more helpful if they included some relevant facts about the multiple complex causes of the decline of news business viability. Not least among those facts is that big news businesses, particularly Murdoch and Nine, have cruelled themselves in the advertising model by putting up paywalls on their own websites, preventing people from reading content appearing in Google search results or circulated on Facebook (and thereby reducing their own attractiveness as advertising sites and subscription-worthy news outlets). Content producers who contribute online articles in order to attract advertising income are actually choosing on a daily basis to reject the subscriber and advertising income opportunities directed to them by online platforms. They are blaming Google for taking away advertising that they are themselves turning away.

There are reasons for this perversity and they relate to the way the news duopoly is seeking to retain power in our democracy, a power which is being dissipated by the rise of the world wide web. They have nothing to do with maintaining "independence" in journalism. On the contrary, the Code is a naked attempt to stop the growth of independence in journalism – and a big bullying one at that. Both the Open Letter and Australia's Prime Minister<sup>28</sup> Scott Morrison have accused Google of bullying Australians and they have then suggested that the ACCC's Code is an appropriate non-bullying response to those digital giants who, they imply, would insidiously and intentionally prevent ethical independent journalists from carrying out their mission. The authors of the Open Letter claim that mission is to:

keep us informed, give all Australians a voice, monitor the activities of the powerful and ensure that all levels of government are held accountable.<sup>29</sup>

Here we have some journalists:

- characterising themselves as the detached, unconflicted, disinterested, independent good guys protecting Australians – and "giving all Australians a voice" no less – and then

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<sup>27</sup> Australia Institute, "An Open Letter to Google", Op. Cit.

<sup>28</sup> Paul Karp, "Morrison warns Facebook and Google he won't respond well to any threats over news code", The Guardian, 7 September 2020. <https://www.theguardian.com/australia-news/2020/sep/07/morrison-warns-facebook-and-google-he-wont-respond-well-to-any-threats-over-news-code>

<sup>29</sup> Australia Institute, "An Open Letter to Google", Op. Cit.

- characterising search engines and social media (the big ones anyway) as the bad guys intent on squashing journalists who hold governments accountable.

There's not much self-insight or balanced fact-based journalism going on here. For a start, it is Google and Facebook and the other digital platforms that have made genuinely independent journalism possible for the first time in history. There are now groups of journalists who are running journalism and current affairs businesses *without income from advertising* and they are succeeding. Michael West Media is a fine example of this.

To an outsider, i.e., to a reader of Australian news, the idea that Murdoch is, or has ever been, or is ever likely to be the champion of independence in journalism is laughable. Murdoch's News Corp is the most powerful market dominating non-digital information platform in Australia and he personally is probably the most powerful voice inside the governments of the USA, the UK and Australia (how many people on Scott Morrison's personal staff are ex-employees of Murdoch?<sup>30</sup>). It is equally laughable to suggest that a journalistic industry which has had to kowtow to advertisers for more than century is now or has ever been "independent". In that regard, if Google's entry to the information market is indeed breaking the nexus between advertising and journalism, then perhaps we should send an open letter to thank them.

If we set about crafting a narrative that our old non-digital, advertising-dependent information industry structure, dominated as it is by an increasingly conservative news duopoly, is the only thing that can preserve independent journalism and "give all Australians a voice", then we are probably doing nothing more than subjecting ourselves to a kind of obtuse denial akin in scale to climate change denialism. The reality of our situation in the early 21<sup>st</sup> century, living as we do with all the teething problems of the rise of digital media, is that it is the web, not Murdoch or Nine, that has offered us both a voice as Australians and the possibility of greater independence in journalism – if only journalists and Australians will take it up. Thank goodness many of them are. This new opportunity for journalists and all Australians has arisen purely because of the rise of the web ***and because of the way that access to it has thus far been organised as free and open access for buyers and sellers of content alike***. If Google had been an intentionally malevolent force in the market, running some sort of counter-mission to stop us being informed, stop all Australians from having a voice, ensuring that the activities of the powerful can be hidden rather than exposed, and ensuring that governments can never be held accountable again, then that would have indeed been a very unlucky stroke for humanity on its entry to the digital age. But clearly Google has done nothing of the sort. Google has not acted as the antithesis of the mission that is near and dear to journalists. Rather, the evidence suggests that Google and good journalists are compatible partners, albeit in their different ways, in the task of keeping people informed and particularly in giving all Australians a voice.

But, if we wish to re-set the digital age information market arrangements so that one set of content producers will get paid but all others won't, we will be behaving as insanely and as self-destructively as we are in our approach to climate change. We will cut ourselves off from all hope that accountability in governance can be restored.

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<sup>30</sup> Michael West Media, Independent Journalists, "Revolving Doors": "Many of Morrison's senior communication team have long-held ties to the Murdoch press. News Corporation is pro-coal and anti climate change. Positions taken by News Corp staffers in the Prime Minister's office include Matthew Fynes-Clinton's role as speech-writer. Fynes-Clinton was formerly deputy chief of staff and editor of The Courier Mail. Press Secretary, Andrew Carswell, formerly chief of staff at The Daily Telegraph and advisor Thomas Adolph, formerly with The Australian." <https://www.michaelwest.com.au/scott-morrison/>



Australians are witnessing not a loss but an expansion of independence in journalism, courtesy of the web. This is of course the last thing the news duopoly wants. Therefore, at this juncture it does not help us travel safely through the transition of the information market if we plunge ourselves into denial of the full causes of the transition. The web is a disruption to the old advertising-dependent structure of the journalism industry but it is not a killer of independence. Sure, it does not free journalism entirely from its dependence on advertising – or at least it hasn't yet. But in spreading access to the advertising income around much more widely, it does actually support diversity. In that regard, instead of focussing on a notion that Google has stolen the advertising it might be more instructive to view Google as Robin Hood. I doubt Google had that in mind as a business model. But there is no doubt that the rich news businesses are getting less and the diverse poor are getting more when it comes to shares of the total available advertising income. And the poor are paying a lot less when they advertise.

The genius of Murdoch in this drama is that he has woven a plot that suggests Google and Facebook are the thieves of all advertising, when in fact it is simply that the sharing arrangements have changed. There are journalists around who have analysed what Google makes from advertising associated with news<sup>31</sup> and their published analyses suggest it is nowhere near as much world-wide as Murdoch and Nine have suggested. In preparing its Open Letter the Australia Institute has not engaged with this. Nor has it attempted to verify its assertions that:

While your service may appear free, you [Google] make eye-watering amounts of money by selling access to us. We don't quite know how you do it, but you don't make \$4.8 billion in advertising revenue without deriving real value from our usage.

Doubtless Google gains some value from news "usage", but the implication of all the assertions by Murdoch, Nine and now the Australia Institute is that if Google makes \$4.8 billion (revenue, not profit), then \$1 billion of that – more than 20% - at least should go back to the news businesses, even though in other places, Nine's Chair Peter Costello has suggested that only 10% of Google's and Facebook's advertising revenue is derived from displaying news content<sup>32</sup>. Despite the difference of 100% between these two figures, it seems that we are meant to infer that news attracts 20% of Google's advertising revenue when in fact even the ACCC has not dared to state that we spend anything like 20% of our online time strapped to news. As I've already noted, according to the ACCC we spend less than 2.3% of our time online browsing news and according to Google:

News-related queries accounted for just over 1 percent of total queries on Google Search in Australia.<sup>33</sup>

Google has also quite correctly pointed out that they "don't run ads on Google News or the news results tab on Google Search."<sup>34</sup> And they have asserted that:

looking at our overall business, Google last year generated approximately AU\$10 million in revenue—not profit—from clicks on ads against possible news-related queries in Australia. The bulk of our revenue comes not from news queries, but from queries with commercial intent, as when someone searches for 'running shoes' and then clicks on an ad.<sup>35</sup>

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<sup>31</sup> See Kamil Franek, "How Google News Makes Money: Business Model Explained", 17 December 2019. <https://www.kamilfranek.com/how-google-news-makes-money/>

<sup>32</sup> Max Mason and John Kehoe, "Tech giants should pay media \$600m – Costello", Op. Cit.

<sup>33</sup> Mel Silva, "A fact-based discussion about news online", Google Australia Blog, 31 March 2020. <https://australia.googleblog.com/2020/05/a-fact-based-discussion-about-news.html>

<sup>34</sup> Mel Silva, Ibid.

<sup>35</sup> Mel Silva, Ibid.

Nor have Nine and Murdoch attempted to calculate the difference between this supposed entitlement of 20% of Google's advertising income and the advertising income the news businesses already derive from Google referrals and the advertising income they rudely turn down from Google referrals by putting up paywalls. Nor have they allowed for Google's costs in referring these advertising income opportunities to them. A failure by Australian journalists to verify their own figures of an entitlement to 20% of Google's revenue, in the face of data supplied by multiple other sources (not just Google) is really just a lazy attempt at theft by Australian media. In this drama Australians might be forgiven for musing that Murdoch is playing the Sherriff of Nottingham to Scott Morrison's Prince John. (Or is Murdoch Prince John? Is he the king-maker or the king? It's getting very hard to tell.)

Putting aside all these narratives, what is clear is that the web is the only thing making it vaguely possible for alternative independent news producers to unshackle themselves from at least some of their compromising ties with advertising and to find other ways to sustain themselves. Journalists will always struggle to maintain detachment and independence. Who doesn't? So perhaps the best we humans can all do amid this complexity is to continually examine our conflicts of interest when we write and resist slipping into bullying. That simply plays straight back into the hands of the all too dominant duopoly and does so at our peril as I will show in the next sections.

#### Fiction No. 4: An unprecedented market intervention is required to save journalism and content diversity

There may be an argument for some sort of market intervention that guarantees saving journalists' jobs, at least for those who can demonstrate that they consistently produce high standard public interest journalism. But the Code as drafted does nothing of the sort. News businesses will not be obliged to take on more journalists. For instance they won't be required to take on those being made redundant at the ABC. And although the Code may incentivise an increase in the volume of stories posted by those who can force a bargain with the digital platforms, it does not incentivise a diversification of content or reward for high quality content. If anything, we are likely to see a higher volume of lower quality content from news mastheads.

Moreover, because the Code sets up the market to force Google and Facebook to distribute the "covered news content"<sup>36</sup>, at exorbitant costs to themselves, it sets incentives in place that in the long run are more likely to reduce the news content on display, both in total overall volume and diversity. If Google and Facebook think their businesses will collapse because they are forced to pay every time an Australian news business puts up an article, this will incentivise them to covertly hunt around for every opportunity not to display Australian news. Of course the ACCC has tried to stop that by creating huge business-busting penalties in the Code for suppression of Australian news, but this too will do nothing to support news diversity. Why? Because if in the combination of huge fines and unrecoverable costs there is only loss, not profit, that can be accrued by those two platforms compelled to provide access to the content produced by journalists, they will simply vacate the Australian market entirely. What other choice do they have? Some journalists and news businesses may welcome this, especially perhaps in relation to Facebook. But if the Code does end up forcing the departure of the only two parties compelled by the Code to fund journalism and news business owners, the benefits to journalists will evaporate. In jig time they will be deprived of all the money they thought they would get under the Code. All those costs they thought they had covered, all that direct and indirect benefit they thought they had snaffled to themselves, all that insight they

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<sup>36</sup> For definitions of "covered news content" under the Code see clauses 1.64 to 1.68 of ACCC's Draft News Media Bargaining Code, Op. Cit.

thought they had cornered on search results – all gone. So much for funding jobs in journalism. We would be back to square one. What a self-defeating, thoughtless embarrassment is this excessive intervention, not to mention absolutely contrary to the public interest.

If the Australia Institute’s Open Letter to Google is anything to go by, it will be quite difficult to convince those journalists permitted a seat at the ACCC’s bargaining table that the Code will cause net losses to Google and Facebook and that they will give up all the billions they make in Australia from sources other than journalism in order to avoid those losses. These journalists are likely to assume that Google is being insincere about their services being at risk and that when it comes to the crunch Google will not vacate the Australian market. But there is a strange set of contradictions in the news businesses’ assumptions here about the financial outcomes of the Code. On one hand, these journalists are implying that the income news content brings in for Google and Facebook forms the bulk of how the digital platforms make their money:

You [Google] make eye-watering amounts of money by selling access to us.<sup>37</sup>

Where would Google be without journalism, eh? So the assumption is that the money Google makes from news is so large that Google would miss the income the news platforms bring to them and will stay in the Australian market, even though they will have to hand over all that money and will end up “missing” it anyway. That in itself is totally illogical. But it is not the only illogical thing going on here because these journalists seem simultaneously minded to suggest that the amounts they are demanding do *not* form the bulk of how Google makes its money and will not impact Google’s business viability. This second implication is that there’s oodles of other income that will make it worthwhile for Google to stay, even after it has handed over the \$1 billion the news businesses think they and they alone are entitled to. Which estimates are correct here? It is important for the journalists to figure this out because the reality is that Google is going to look at how its profit margins are impacted, not its revenues. If journalists are eyeing off revenues, and disregarding the probability that the costs they are imposing on Google will turn a profit to a loss, then they are doing nothing more than exposing themselves to total loss of service from Google.

That being so, it is silly to sabre-rattle at Google as the Australia Institute’s Open Letter does:

You [Google] are using your power as one of the largest companies on earth to threaten us. When we ask you to consider paying a fair amount for the journalism from which you benefit, you threaten to charge us for your search engine. If you don’t want us to use your engine just tell us and we’ll go elsewhere.<sup>38</sup>

Well – if I were Google and I read that, I’d simply say to myself that I’d much prefer to lose the “AU\$10 million in revenue—not profit—from clicks on ads against possible news-related queries in Australia”<sup>39</sup> than lose \$1 billion and/or all profit from Australian operations. I would respond that journalists are welcome to take their business elsewhere. But of course, the disingenuousness of the Australia Institute’s threat is that the Code does not leave this option open to Google. The choice Google is being given is either to stay in Australia and lose revenue and maybe even all profit, or hit the road. This may hold initial appeal for journalists. And it has a lot of ongoing appeal for Murdoch and Nine. But once Google vacates the market, any advertising income that may revert to the news platforms may turn out to be zero or close to it, as will the payments the news businesses thought they would get for their content.

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<sup>37</sup> Australia Institute, “An Open Letter to Google”, Op. Cit.

<sup>38</sup> Australia Institute, “An Open Letter to Google”, Ibid.

<sup>39</sup> Mel Silva, “A fact-based discussion about news online”, Op. Cit.

That being so it would be advisable for journalists to think this through to the next step. If a news business is going to put the bite on someone else's business to cover its costs and provide all its profits, then it would be best not to put that source of income and profit out of business. Insofar as the Code has the potential to drive Google and Facebook totally out of Australia – and it does have that potential – it is not a solution to the financial problems of the journalism industry. Instead it has the capacity to kill off the one thing that has the potential to save independent journalism – efficient free trading in an open digital information market.

Supporters of the Code in the small news businesses like The Guardian are absolutely committed to quality and diversity in journalism. They have done so much for Australia through their incredible efforts to brave the big players in the market. But oddly enough what they have proved by their success is that we, as Australians committed to democracy, don't need this Code at all. We certainly don't need it to inject diversity into our journalism. The web, including YouTube, has done that for us. Crippling our access to the diverse material we can now source on the web is obviously the last thing we should be doing. Instead of providing financial security to the small news businesses and supporting diversity in news sources, the Code will simply consolidate the already concentrated market power of Murdoch and Nine. It will do that because it is so excessive as an intervention. It is so anti-competitive that it can only have the opposite effect to the ACCC's stated objective.

### Fiction No. 5: If Google and Facebook remove news content, readers will buy their news direct from news websites

Some journalists have been keen to argue that if Google and Facebook opt out of supplying news distribution services in Australia, then people will simply migrate direct to the news business websites and that rivers of advertising revenues will be unlocked from the greedy strongboxes of Google and Facebook and flow to them direct. But this makes two very unreliable assumptions:

1. It assumes that news is what attracts us to the platforms and that without news there will be a lot less advertising income for Google and Facebook. Statements like Rod Sims' media release on 1 September 2020 that:

39% of Australians use Facebook for general news, and 49% use Facebook for news about COVID-19.<sup>40</sup>

are intended to imply that Facebook would suffer a serious loss if it didn't display news. But this does not mean that we spend 39-49% of our browsing time looking at news on Facebook or any other platform – far from it. And as we have just seen it is more likely that if news is taken off the digital platforms, the loss of advertising revenue for Google and Facebook would be a mere bee-sting to Google and Facebook compared to the loss they may face if forced to stay in the market under the punishing terms of the Code.

2. It assumes Google and Facebook will not opt out of Australia entirely, when in fact the Code may leave them with no other choice. If that happens – and it may be exactly what Murdoch would love to see happen – then it won't only be Facebook and Google who suffer, it will be all those losers I listed above.

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<sup>40</sup> Rod Sims, Statement on Facebook, 1 September 2020 <https://www.accc.gov.au/media-release/statement-on-facebook>

Some journalists and news businesses outside the oligopoly might rely on data like that of the Guardian Essential poll of September 2020 which concluded that if Google and Facebook remove news content from their platforms:

Three quarters of us say we will go to a news website and choose the news for ourselves, while more than half will find another social platform. Yes, the majority predict they will read less news, but 30% say they would use Facebook less. For companies whose value lies in their human network, these are the highest stakes. If you start using your humans as bargaining chips, you risk losing them altogether. Lose your network and you are just another website.<sup>41</sup>

It does ring true – solidly true – that if a business whose value lies in a human network loses that network then that business will be just another website. But that is exactly what is very likely to happen to, say, The Guardian, if Google and Facebook are forced out of the market in Australia. If that happens, the small news businesses are very likely to lose network to the bigger ones. They too will become “just another website” and this time they will have far less capacity to attract new subscribers.

### Fiction No. 6: The Code will save us from the scourge of fake news

If Facebook’s lax responsibility in circulation of fake news gets on your craw, as it should, it probably feels right to draw a tincture of satisfaction from the possibility that “30% say they would use Facebook less”<sup>42</sup> if it ceased circulating news. But there is value in looking squarely at the market structure that may arise from the Code, because it may not work out as we might prefer. The Code is somewhat more likely to disable Google entirely but leave us with a Facebook business that has no greater accountability for the quality and veracity of information circulated on its network. We could end up doubly worse off in terms of the things we are trying to achieve for democracy – still stuck with fake news but unable to search as well as we can now for all the information that is most relevant to our search queries and unable to attract/receive as much traffic as we can now to our websites.

Like it or not, Google’s expertise is second to none in search and it is this expertise which is keeping the democratic balance reasonably level in access to information as we work our way through the teething problems of the digital age. There is no reason why we should drive that search expertise out of our lives. Sure, we might have to give over our data to get these services free. But we shouldn’t delude ourselves that we would not have to give over our data to get services from news websites. That happens now anyway with several media organisations. But if we lost Google, all Australians, including journalists, would be hamstrung in researching and preparing the content we need to counterbalance fake news and the content we ourselves can now seek to monetise.

Musicians and composers don’t need Spotify to help them create content; they only need it for distribution. But when it comes to intellectual content – ideas, facts, comment, analysis and proofs – the relationship between the producers and the distributors is today totally symbiotic. It is one of deep and ongoing mutual dependence. Quality information content can no longer be either created efficiently or sold without digital search. Benefits can only be gathered by one party if they are gathered by the other – if they are mutual. For this reason, the business planners in the smaller news businesses could benefit by focussing more thoughtfully on the nature of their relationship with Google and Facebook and how they would prefer to shape that in future in the public interest – if indeed the public interest and not their venal interest is truly what they care about. There are

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<sup>41</sup> Peter Lewis, Op. Cit.

<sup>42</sup> Peter Lewis, Ibid.

differences in the things being offered by Google and Facebook and these things have different values for the news businesses. The Code does not contemplate these distinctions and as such, it is unlikely to result in a bargain that shares benefits in a manner that is sustainable for both sides of the bargain, particularly in relation to bargains with Google. It is especially unlikely to benefit democracy and the public interest if the value that Google contributes in this essentially symbiotic relationship is not respected because it is the news businesses' relationship with quality search engines that underpins and assures the quality of information that is accessible in our democracy.

We might indulge ourselves in a little schadenfreude over any discomfort that may arise from the Code for Facebook, but we would simply be deluding ourselves if we let this indulgence close our minds to the multiple downsides of the Code.

### Fiction No. 7: A bargaining power imbalance between media businesses and Google and Facebook is undermining media businesses' advertising market shares

Digital platforms are not competitors with news businesses in their core business of news production. But of course they are competitors for the advertising income that can accrue to both digital and non-digital platforms. Because of the cost structures of digital and non-digital platforms, the digital platforms are crueing the non-digital ones in provision of advertising. This disadvantage for non-digital news platforms has not arisen from any so called "bargaining power imbalance" between the news businesses and Google and Facebook. It is simply a function of the high cost, inefficiency and general unattractiveness of non-digital platforms.

Of course, the ACCC is intent on breaking the supposed bargaining power imbalance and its purported effect on news media advertising revenues, and its chosen method for this purpose is to introduce a "code of conduct" requiring Google and Facebook to provide 28 days' notice of changes to algorithms "where the changes are likely to significantly affect referral traffic to a registered news business corporation's covered news content"<sup>43</sup>. The objective here would seem to be to give preference to news businesses in gaming the system for attracting clicks and advertising.

But one the great follies of the Code is that the advertising market transition problems for the news businesses will not be resolved by the massive market intervention of a Code seeking to address a supposed bargaining power imbalance that isn't causing the loss of advertising revenues for the news content originators in the first place. With or without the Code, the advertising income will not revert to the non-digital platforms, and the Code does not and cannot address the cause of Murdoch's, Nine's, Seven's and Ten's problems in attracting advertising.

But as I have already pointed out, this is no matter to the big news businesses. Even if it fails – as it will – to increase the share of the advertising market available to non-digital platforms, the Code will still act as a bail out to the news oligopoly. And if its members are lucky enough to drive Google and Facebook completely out of the market, perhaps they can step in to begin domination of the online advertising market down the track. They might even be able to take over the search engines themselves. What a ghastly piece of vertical integration and monopolisation that would be. Just imagine how the content of Murdoch's competitors would be pushed down in the search results then. It's a chilling prospect but it is not at all a remote one. Murdoch will have thought through to that step and the Code, designed as it is, is the perfect facilitator of such a market takeover. That the ACCC doesn't seem to see it coming is scary. They are the ones who should be protecting us from such a prospect but they are enabling the biggest cross-media takeover of all.

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<sup>43</sup> ACCC's Draft News Media Bargaining Code, Op. Cit., Clause 1.77.

If Australians wish to assert that things are bad in our information market and democracy because one company like Google has gained dominance in just the search part of the wider digital information market (note: not the whole information market, just a part of it), we might still do ourselves the favour of taking a moment to consider whether that dominance in a part of the information market – the presence of a giant money-making company in search engine expertise – is evidence in this case of a risk to the public interest. The fact is, the current market structure and the split between the roles of players within it – information seekers and creative content producers on one side and information finders and distributors on the other – is strongly in the public interest. The Code has the potential to upset this and drag us back to the dark ages of controlled information flow and suppression of facts that do not fit with the preferred view of a few corporate powers. It is an Orwellian dystopia in the making.

The fact that the information market is not afflicted by this vertical integration nightmare at the moment should stand as an indication to any market analyst that the market has at least some features of a healthy, efficiently competitive structure that should not be threatened. The ACCC should have been able to think forward to the potential impacts of its Code but it has not. On the contrary, the Code as designed has the potential create a new, completely different bargaining power imbalance in place of the one it claims to be correcting. It will set up the pre-conditions for a cross-media/cross-platform takeover which could indeed produce a bargaining power imbalance, the like and scale of which we have never seen before. It could produce a truly monstrous corporation controlling all aspects of the information market.

The evidence in support of the contention that there is a bargaining or market power imbalance in 2020 between the digital and the non-digital seekers of advertising revenue is not strong. Nor is there unequivocal evidence that the imbalance, if it exists, is the thing causing harm to democracy. But if there is an imbalance of the type described by the ACCC, and if it is doing more harm than good, this imbalance and the harm it may do will be nothing in comparison to the potential harm from the imbalance that is capable of growing up under the Code insofar as it can facilitate a convergence of control on parts of the market not currently controlled by any one player. The new imbalance would be between those media moguls who own all the platforms, digital and non-digital – or one mogul, most likely Murdoch – and every other competitor in news and information exchange who is seeking to use the platforms.

In its Final Report on its Digital Platforms Inquiry, the ACCC provides some good examples of the real problems that need to be resolved as the digital information market transitions from infancy into youth. There are consumer issues such as online scams, false representations, data security, user rights, and of course the now ubiquitous fake news. But the Code doesn't begin to address any of these; it just caters to the concerns of the commercial news oligopoly. More than that, the Code is so demonstrably in the oligopoly's favour and so demonstrably capable of destruction of the operation of our open media platforms in Australia that Murdoch's lawyers may as well have written it.

If we want to travel through this transition safely, we still have time to avoid the problems that the Code would propel us into. We only have to ask ourselves a simple question: do we want to revert to the old non-digital market structure that can be dominated by Murdoch and Nine, or do we want to stick with the trend towards diversification of the information market made possible by the present organisation of the online information market? If we prefer the latter, well and good; the ACCC can then skip the Code, save us all a lot of trouble, and get on with solving the real problems for consumers of information.

## Fiction No. 8: Information consumers will not be disadvantaged by the Code

Under the Code the above described market invasion (dominance of the digital information and advertising market) will be made possible for the big news businesses at the expense of news consumers and taxpayers. This is because the Code refuses to allow Google and Facebook to stop providing services in Australian news results and shares, and sets up a situation where the only options may be for them to vacate the market entirely or change their business models entirely in a manner that certainly will not favour consumers. In other words the Code is designed to pincer Google and Facebook into introducing charges for search and share services. In that regard it is designed to result in taxpayers funding both their own news services in the ABC and SBS and the uncompetitive private news services as well. Taxpayers and other consumers who are too poor to pay tax will fund all these news outlets, one way or another, with no returns in terms of service, improved journalistic quality or access to a share of profits. It doesn't come any more anti-competitive than this. And it is totally contrary to the public interest.

The ACCC is keen to insinuate that the digital platforms are free to cover the costs being imposed on them by the Code by charging people for searches and social network entry if they want to. Certainly this is what Rod Sims has implied in his statement that:

Google will not be required to charge Australians for the use of its free services such as Google Search and YouTube, unless it chooses to do so.<sup>44</sup>

In other words, as far as Mr Sims is concerned, Google and Facebook can charge news consumers if that is what it takes to stay in Australia and the ACCC won't stop them. But of course this sets up a market structure where consumers are forced to pay for something regardless of whether they want to or not, and they get to blame Google and Facebook, not the ACCC, the federal government, or Murdoch or Nine. News consumers are being forcibly manoeuvred by this Code into payment for something they currently can, and do, choose not to buy. As free market interventions go, it doesn't come any less free than that. We get to be the only consumers in the world who don't have free access to the web, and all because a couple of news businesses want us to buy stories and advertising services we don't currently choose to buy.

## Fiction No. 9: Digital platforms are solely responsible for proliferation of fake news

Journalists may consider that the rise of the digital platforms has led to "a takeover of our public square with lies and bile"<sup>45</sup>. This may or may not be true, although to tar all digital platforms with this one brush is to be wilfully and dangerously blind to the full truth about both:

- the important role that search engines (as opposed to social media) play transparently in ensuring ethical and equitable arrangements for information access; and
- the integrity with which some news businesses (not just some digital platforms) have approached the public square through the ages.

The phrase "gutter press" is not axiomatic for no good reason. Journalists – or at least some – are just as capable of proliferating fake news as anyone on social media. They are just as capable of peddling climate denialism, just as capable of stoking homophobia, xenophobia and racism, just as capable of demonising the unemployed, just as capable of stories about weapons of mass

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<sup>44</sup> Rod Sims, Statement on Facebook, 1 September 2020 <https://www.accc.gov.au/media-release/statement-on-facebook>

<sup>45</sup> Peter Lewis, Op. Cit.



destruction that don't exist, just as capable of supporting economic policies that cause growth in inequality, and just as capable of partisan political misinformation such as promoting a carbon price as if it is a tax. Indeed there is an argument that purveyors of this stuff in certain news businesses have done far more damage to the public interest than fake news, QAnon-style conspiracy theories and lies by foreign interlopers, in Australia at least. From the news consumer's point of view, social media platforms and news media are probably about neck and neck in this latest race to trash Australia's public square. But if the News Media Bargaining Code is adopted then the likely result is that the big news businesses will streak ahead in that unholy race to the bottom. They have already won that race in Trump's America.

### Fiction No. 10: A bargaining power imbalance between digital giants and news media is threatening decent journalism and democracy

There can be no disagreement that the public square needs liberation from all that is vile and misleading about news. But a Code which cements news media concentration on digital platforms in addition to non-digital platforms is not going to address that. In fact it is likely to reinforce the sort of arrogance that makes even highly experienced journalists, who we might think would know better, think it is OK, even funny, to tell alternative commentators not to start podcasts and to "shut the fuck up"<sup>46</sup>. If the problem we are trying to solve is truly about threats to quality journalism and democracy – and not just about an industry that is simply transitioning to an arrangement where the current dominant players in the news oligopoly can no longer be dominant (but could still be viable if they were re-structured) – then our true problem will not be solved by a Code which deals with something other than the actual cause of the problem. It certainly will not be solved by treating a bargaining power imbalance that does not actually exist. *That* claim is fake news – news fabricated alongside another piece of fake news, namely that the suggested imbalance is threatening democracy when the reality is that excessive concentration of our news media is the greatest threat to democracy.

Australia is facing many problems with its democracy at the moment but a bargaining power imbalance between Google and Facebook on one hand and Murdoch, Nine, Seven and Ten on the other isn't one of them. There is no real bargaining power imbalance between the two sides. There's just one uncompetitive type of platform and another competitive type of platform that the news oligopoly is seeking to take over. Giving four news businesses dominance on both the non-digital and digital platforms will do nothing for democracy. It will simply start a whole new set of problems. Our news market will end up looking more like America's than we would care for – one where Murdoch will shove competitors to the margins. He has already succeeded in that by his coup of Australia's NBN (where he succeeded in changing the design of the network from fibre-to-the-home to cable-to-the-node – a success which muscled out potential competition to his Foxtel network).

If the ACCC's News Media Bargaining Code had been designed to do something to address the proliferation of fake news, then the ACCC would have some credibility in claiming that they are saving democracy. But the Code leaves that particular problem entirely unattended to and starts Australia down a road to a monopoly in the information market.

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<sup>46</sup> ABC, "Don't Start a Podcast" from At Home Alone Together, 20 May 2020, <https://www.youtube.com/watch?v=hN0njKleK5M>. This clip became the ABC's "deplorable moment", the moment where, like Hilary Clinton, high profile journalists and public broadcasting figures sneered at Australians and spent taxpayer money to strut their own superiority over those funding them. It was a regrettable misstep and displayed a lack of self-insight.

## Solving the real problems of Australia's news information market

Australia's news information market is not yet as afflicted with the problems of fake news and populist manipulation as, say, America's information market. Nor have we yet stepped fully into autocracy and suppression of information, although there is evidence that we have been verging towards it and that the ACCC's Code, if introduced in its current form, would take us another step – several steps – closer towards a monopolisation not just of the news market but of the whole information market. It could result in a vertical integration of the search engine and content supply functions, an information market structure with no Chinese walls between things that should never be in the hands of a single owner.

At the start of this essay I described how the information market works in the digital age. There are three big distinct players in that market:

1. The authors – all those billions of people clamouring to be heard;
2. The librarians – all those cataloguers who put the authors' creations in a place where people can find them; and
3. The readers – all those people who want free access and free choice in what they read or listen to in their lifelong quest for the truths they need.

There are those who will argue that this is a facile over-simplification of the information market but even if the market is much more complicated it doesn't help us to think sensibly about how our information market should be ethically and democratically organised if we allow ourselves to be lured into thinking that we must give priority to solving the concerns of one interest group (news media) in one part of the market. It doesn't help the readers if one set of authors arrogantly elevates themselves above all others to such an extent that they strangle the free flow of information, placing their truths above all others. More specifically, in any sane information market the authors should never be able to control what's in the library or lock the library door. And yet that is what the Code will probably facilitate. The potential effect of such a market structure on our information access and our capacity to seek truth is an appalling prospect for anyone aspiring to live in a well functioning democracy. For now though, there is still time to rescue the situation.

But what we are missing is a cooperative planning process for the rescue. This is something the ACCC should be facilitating. Instead they have been orchestrating an intervention that will aggravate the problems of Australia's information market transition. Nevertheless, in the absence of a responsible and fair market regulator there is nothing to stop those who have been set unnecessarily on combative footings against each other from sitting down and working out a plan for implementation of rules which will establish not just a sustainable market for journalism but a fair and accessible information market in the public interest. The constructed combatants are genuinely thoughtful journalists and Google. Rather than allowing themselves to be pushed into opposing corners, as they have been by the ACCC, they should be voluntarily re-grouping to set out a plan for establishment of a sustainable and ethical information market structure. This option is wide open to them at this time – the option to stop falling for the divisive strategy they have been pushed into by the nation's Prime Minister and Treasurer, the powers behind their throne (Murdoch and Peter Costello), and the ACCC.

What we need at this point is a visionary regulator which the ACCC most certainly is not. But in the absence of such a regulator and being poised as we are right at the beginning of the rise of the digital age, we can still devise a planning process to regulate the information market for the public benefit – and by that I mean not just the competition within the market but the standards and

quality of the market's product (published information), the responsibility of publishers, and the open and ethical management of circulation of whatever is in the library.

This option obviously will not suit Murdoch. But based on the above, it does appear that if Australians were given a genuine open choice about whether they wanted to move towards:

- A. an even more concentrated news media industry, across all four platforms of print, radio, TV and online, and also allow a single player, say Murdoch, eventually to own/control both the search functions and the news functions in the market; or towards
- B. a properly regulated information market where the ground rules for responsible big tech, responsible journalism and safely limited news cross-media and information cross-platform ownership are set transparently so that they are consistent with maintenance of a healthy democracy,

they would be unlikely to agree that a more concentrated news media, at least on the face of it, would be conducive to a healthy democracy. "A", which is the almost certain upshot of the ACCC's Code, would not lead to "B". Not only does the Code NOT solve the real problem, it aggravates it. "A" and "B" represent the real choices we are facing and they are diametrically opposed. And if we are not told at this critical time that this is the choice – if we are misled by the ACCC about the real problem that we need to solve – we will track towards the loss of our democracy without recognising that we are doing it to ourselves.

At the moment the ACCC is framing the debate in terms suggesting that if we are to save democracy we simply have to save journalism and news businesses and that to do that we must squash the efficient players in the market and re-install the inefficient players as the dominant force in information production and distribution. The subtle implication is that we will save democracy if we throw out the players that have actually given us open democratic access to information and free speech. It demonises the democratisers and deifies the monopolisers.

Certainly, it is enticing to assume that we could rid ourselves of all the "lies and bile" if we just break Facebook, and to the extent that the Code might achieve that it can appear useful, at least at first glance. But it is not a proper fix to our fake media woes – not by a long shot. It is more likely to leave us stuck with old fake news purveyors and imposes no further controls on them in spreading their lies and bile. In the absence of a proper regulatory framework which sets out the legal obligations of *all* mainstream media *and* social media players for responsible administration of content placed on their sites and responsible use of the data we provide, we will just end up with another behemoth that is still able to replicate Facebook's worst behaviour. And this time it is possible that the dominant social media platform and the dominant news platform could be owned by the one corporation – regulated, ineffectually, for its journalistic standards on its news platforms and entirely unregulated on its social media platforms.

If the Code works as anti-competitively as I have suggested it can – ejecting Google from the marketplace – we will suffer a double whammy. The most drastic possible outcome of the Code is that it will throw out the good instead of the bad. It can throw out the very thing we need – a strong reliable independent search engine capacity – to help us counterbalance the effect of the thing we don't need but which always has been and always will be with us – lies. It will rob us of chances to find the truths amid the lies.

It is a betrayal of Australians, on so many levels, for the ACCC to walk away from the real challenges of our information market transition – challenges it has actually documented quite insightfully in

many places in its Digital Platforms Inquiry – and resort to portraying the challenge to our democracy in the dishonest manner that they have. Still, as I have said, it is not too late to fix it. Collaborative planning can help us do that.

## Collaborative planning for a democratic information market

At this point, being on the brink of passage of legislation which looks like it is intended to save journalism but is in fact intended to kill opposition to Murdoch and Nine and open up the possibility for Murdoch to dominate all four platforms (print, radio, TV and online) not just for news but for the vast majority of the information market's operation, it is imperative that we press the pause button.

Before we plunge into the dystopia that can all too easily arise from the Code, we should consider how we might resolve the real problems in a more rational sequence. This is bound to be better than solving the wrong problems in an irrational sequence, as we are doing now. The following is a suggested rational sequence of steps that can be taken to develop a plan for regulation of an open, competitive, efficient, ethically responsible modern information market. As with any good planning process, it starts with community engagement.

### **A suggested process for community engagement on and development of a rational program of regulation of Australia's information market**

**Step 1:** Call a halt to the debate on the legislation for the News Media Bargaining Code, pending establishment of a conference between:

- the Australian Communications and Media Authority (ACMA),
- Google, and
- one other suitably qualified independent expert in ethics, democratic governance and information market design

on the potential for development of a draft framework for fair and ethical regulation of the information market (meaning operation of, and responsibilities for, open transmission and quality of public interest content on both the non-digital and digital platforms).

Establish a cross-party Senate committee for the purpose of selecting the third independent expert and starting the process.

Charge ACMA, Google and the third chosen expert with joint responsibility for a program of community engagement on development of a draft proposal for a harmonised regulatory framework for information market players.

Set a minimum scope for the expected regulatory framework – in other words, list the essential matters that are in need of regulation, such as:

- responsible operation of social media, search engines and any other open access mechanisms;
- responsible use and security of user data;
- compliance procedures for ensuring responsible management of published content on digital and non-digital platforms;
- rules for cross-media/cross-platform restrictions necessary to prevent information market manipulation and monopolisation; and

- any other notable area of concern for which regulation is currently non-existent or faulty and which, if not regulated properly, has the potential to introduce anti-competitive pressures into the market.

Require ACMA, Google and the third expert to present their proposal for the community engagement process to the Senate.

Establish secure funding for the engagement process.

**Step 2:** Once the engagement process and its objectives have been developed to the satisfaction of the three experts and the Senate committee:

- a) Set a requirement for ACMA, Google and the third expert to jointly lead a full, open and transparent consultation with stakeholders and with the Australian public about the scope of and options for the regulatory framework (taking the minimum scope already set by the senate as a given).
- b) Charge ACMA, Google and the third expert with preparing a joint report on the outcome of the consultation, their suggestions for the regulatory framework, full explanations of each aspect of the recommended framework, and any areas of disagreement about the framework.

**Step 3:** Oblige ACMA, Google and the third expert to submit the above report to a cross party Senate committee that should be open for further public hearings.

**Step 4:** Depending on those factors on which agreement has been reached, the Senate committee may request the government to draft law reforms consistent with the agreed aspects of the regulatory framework. For aspects on which agreement cannot be reached, the Senate committee may of course recommend an alternative process for selection of any valid reforms that may be in the public interest.

### What is the logic of this proposal?

The point is to allow Australians the opportunity:

1. to understand the *priority* problems in our information market which, believe it or not, are not about whether journalism will survive – because it will, it is truth not journalism that is under threat; and then
2. to consider the relative merits of different regulatory responses, and particularly the potential effects of any proposed responses on their democracy, their access to information, their freedom of speech, their consumer rights, and their control over their own privacy and personal information.

The ACCC's process for development of the Code has not allowed Australians this opportunity. As a result, the ACCC has ended up solving Murdoch's and Nine's problems but has done so by exposing Australians to the risk of a failed democracy. The suggested alternative process for engagement with Australians allows them an opportunity to explore solutions to:

- other problems in the modern information market that the ACCC rightly identified, such as consumer scams, proliferation of fake news and misuse of data; and
- problems which would arise for the information market and Australian democracy if the ACCC's Code were to be implemented.

These problems are in fact far more pressing for democracy than whether two dominant news businesses survive or not.

### **Why should ACMA, Google and a third expert in governance and ethics jointly lead the engagement process in Steps 2 and 3?**

ACMA and Google are the most experienced players in the two main parts of the information market where regulation needs to be adjusted, or established, or harmonised – namely between the digital and non-digital platforms. A third expert is required for assessment of the implications of different regulatory options for democracy and the public interest. This has not been thought through at all in the ACCC's Digital Platforms Inquiry. That process paid lip service to democracy and was captured by the non-digital platforms, resulting in development of a Code that does nothing to resolve the most pressing problems for democracy in the digital age.

If our task is to solve the right problem instead of the wrong one, we will need to devise a draft model regulatory framework that brings together:

- regulations that have served us well in the non-digital market (ACMA's skill) and could be used as the basis for regulation of content in the digital part of the market;
- yet to be devised regulations for ensuring efficient, practicable (workable) and ethical operation of the digital part of the market (Google's and the third expert's skill); and
- yet to be devised regulations for preventing anti-competitive and anti-democratic trends within and across the platforms (all three skill sets).

The framework as a minimum should aim to promote:

- the maintenance of the highest quality journalistic standards,
- responsible use of digital and non-digital platforms by all authors, and
- an open, ethical market structure in which conflicts of interest can be minimised (in other words, the right Chinese walls and cross-media/cross-platform ownership rules are in place).

ACMA and Google are best placed to engage with the Australian community on these matters and the inclusion of a third independent ethics and governance expert would provide a good basis for confidence in the community that a regulatory framework will support their democracy rather than just the interests of a small section of the information market (news).

### **Why should the ACCC not be involved in leadership of this engagement process?**

The above suggested step-by-step process does not exclude the ACCC and nor does it give complete control to ACMA, Google or anyone else. On the contrary ACMA, Google and the third expert in democratic governance would simply be partnering to lead an open engagement process and organising a report back to the Senate on priority reforms. The ACCC can still submit their Code for consideration as to whether it does serve the broader objectives of regulatory reforms for the protection of fair markets and democracy but allowing them to lead an engagement process would simply put them in a position of being able to proffer their own proposals over others and this would diminish public confidence in the process. This does not mean that the ACCC's work should be discarded; rather it should be considered alongside other options and independently assessed on its merits, particularly in terms of its potential effect on democracy and efficient, ethical information market operation.

Joint leadership of the process between ACMA, Google and another agreed independent expert means we will have players from the key parts of the information market – the digital and non-digital and information producers and information access technicians – who can use their expertise to lead a well balanced engagement process – transparently. We will have:

1. ACMA who can contribute the perspectives of authors and appropriate regulations for content;
2. Google who can contribute the experience of library cataloguing and access; and
3. A third expert in supporting the interests of readers, consumers and our democracy.

Bearing in mind that the community engagement process is not a decision making process and that equal standing is being given to the three areas of expertise and interests in the market (authors, libraries and readers), there is no danger that the process can cause lasting harm to our information market and our access to it. This is quite a contrast to the process run by the ACCC for the Digital Platforms Inquiry. That process was not well balanced and indeed was obviously captured by vested interests, resulting in development of an anti-competitive Code which will undermine our democracy. With the suggested alternative engagement process though, we have a chance to set a world-first benchmark for ethical operation of the now deeply interconnected – irretrievably globalised – market of information. This is totally consistent with the image that Scott Morrison wishes to promote for Australia on the world stage – an image of a nation which values, among other things, “democracy”, “freedom of speech”, “freedom of expression”, and “equality”, particularly “equality of opportunity”<sup>47</sup>. We can’t claim to have all that if we shut down some authors and not others, if we reduce access to knowledge, and if we do not champion a regulatory framework for information that prioritises truth over vested interests.

It is obviously worth going back to the drawing board to develop a decent regulatory code for our information market. Let’s ask the people that the Australian Competition and Consumer Commission didn’t put first but should have – the consumers of information. An intelligent conversation with them is possible and vital at this turning point in our democracy.

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<sup>47</sup> Values as listed in “Australian Citizenship: Our Common Bond”, Commonwealth of Australia, 2018. <https://immi.homeaffairs.gov.au/citizenship-subsite/files/our-common-bond.pdf>