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Online Markets and "Value Gaps" – the Australian Approach to News Aggregators

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Introduction

To understand the Australian way of dealing with news aggregators, it is necessary to ask and answer three questions: What is the problem that the Australian approach seeks to solve? What is the solution that the Australian approach adopts? What is the outcome that the Australian approach achieves? There is nothing radical about those questions. They are, self-evidently, the questions one needs to answer to understand the approach of any country to this issue.

Normally it would make sense to ask and answer the questions in the order in which they have been posed. However, there is nothing normal about what has happened in Australia; indeed, given what has occurred, it makes more sense to answer the questions in reverse order. Accordingly, the outcome that the Australian approach achieves is discussed first, before saying what is that approach, and then what is the problem it seeks to address.

Outcome of the Australian Approach

What is the outcome of the Australian approach? The answer is simple: we don't really know. Or, more accurately, apart from the two big digital platforms, Google and Facebook, and a number of news media businesses with whom revenue-sharing agreements have been reached, no-one knows. This is because those revenue-sharing agreements are private. Being private agreements, the details are confidential. So, no-one really knows exactly what has occurred.

At most, there is a sense that the Australian approach resulted in relatively modest payments from the digital platforms to various news media businesses. In evidence to an Australian Parliamentary inquiry,[1] the independent competition regulator, the Australian Competition and Consumer Commission (ACCC), estimated that the value of the agreements reached is "potentially $200 million upwards";[2] however, the period of time to which this amount relates was not specified. In a submission to that inquiry, the major regional newspaper group Australian Community Media stated: "The compensation from the platforms is significant and a vital part of our revenue mix … [but] it is far short of the amount of revenue lost to our newspapers through digital disruption ... the total is less than five per cent of our total annual revenue".[3]

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[1] Parliament of the Commonwealth of Australia, House of Representative's Standing Committee on Communication and the Arts, *The Future of Regional Newspapers in a Digital World – Inquiry into Australia's regional newspapers*, paras 4.38-4.47: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024888/toc_pdf/TheFutureofRegionalNewspapersinaDigitalWorld.pdf;fileType=application%2Fpdf.

[2] Evidence of Mr Tom Leuner, Executive General Manager, Mergers, Exemptions and Digital, ACCC to the Standing Committee Inquiry into Australia's regional newspapers, 1 March 2022: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommrep%2F25637%2F0008;query=Id%3A%22committees%2Fcommrep%2F25637%2F0000%22.

[3] Parliament Standing Committee, n 1 above, para 4.39.

Approach Adopted in Australia

What is the approach that the Australian way adopts? This time the answer is a little more complicated, but it can be summed up as the approach that parents have adopted for millennia to stop their children bickering about something. It is the approach of saying: "Sort it out yourself – because if you can't sort it out yourself, I will sort it out for you!". And, as we know, most children would rather not have the parents sort it out, because they may come up with a solution that neither child wants.

The Australian Government's 'parental' approach developed through a number of stages. At each stage, the approach was to hold a 'Damoclean sword' over the heads of the digital platforms – where the sword is a solution imposed by a third party in the event that the digital platforms didn't come up with an acceptable solution themselves.

Proposal for Voluntary Codes of Conduct

In December 2017, the Australian Government directed the ACCC to inquire into the impact of online search engines, social media, and digital content aggregators on competition in the media and advertising services markets. In its June 2019 Final Report on the inquiry, the ACCC found that there is an imbalance of bargaining power between news media businesses, on the one hand, and each of Google and Facebook, on the other hand. To counter this imbalance, the ACCC recommended that each digital platform voluntarily "implement a code of conduct to govern their relationships with news media businesses", to ensure that they treat them "fairly, reasonably and transparently".[4] The ACCC recommended that digital platforms be given nine months to develop a code. Where a digital platform was unable to produce an acceptable code within nine months, the communications and media regulator, the Australian Communications and Media Authority (ACMA), should create a mandatory standard to apply to the digital platform.[5]

The Government adopted the ACCC's recommendations in its December 2019 response, but with a slight modification. The Government resolved that the digital platforms were to develop a voluntary code of conduct in conjunction with the ACCC. The ACCC would provide a progress report on code negotiations in May 2020, with the codes to be finalised by November 2020. If acceptable voluntary codes were not agreed by that date, the Government would "develop alternative options … and this may include the creation of a mandatory code".[6]

Development of a Mandatory Code of Conduct

In April 2020, the Government stated that the ACCC had advised that "progress on a voluntary code has been limited" and "it is unlikely that any voluntary agreement would be reached with the respect to the key issue of payment for content". In response, the Government instructed the ACCC to develop a mandatory code that would apply to all digital platforms. This mandatory code would address "the sharing of data, ranking and display of news content and the monetisation and the sharing of revenue generated from the news", and would "establish appropriate enforcement, penalty and binding dispute resolution mechanisms".[7]

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[4] ACCC, *Digital Platforms Inquiry – Final Report* (June 2019), p. 257: https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf.

[5] *Ibid*.

[6] *Regulating in the digital age – Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (December 2019): https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf.

[7] The Treasurer and the Minister for Communications, Cyber Safety and the Arts, "ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies" (20 April 2020): https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accc-mandatory-code-conduct-govern-commercial.

Following publication of a *Concepts paper* for a mandatory code of conduct in May 2020,[8] the ACCC released a draft of the mandatory code in July 2020.[9] More than 70 submissions were received on the draft enactment.[10] Legislation implementing the Mandatory Code of Conduct was passed by the Australian Parliament on 25 February 2021,[11] and it came into operation on 3 March 2021 as Part IVBA of the *Competition and Consumer Act 2010* (Cth).[12]

To Whom the Mandatory Code Applies

The Mandatory Code has the potential to apply to news media businesses and to digital platforms. A news media business may choose whether or not to have the code apply to them. If it wishes the Mandatory Code to apply, it must register with ACMA – in which case it becomes a "registered new business".[13] A news media business will be entitled to become a registered news business if all of the following requirements are satisfied: (1) it has annual revenue of greater than AUD 150,000; (2) its primary purpose is to create "core news content", which is defined to be content that reports issues or events that are relevant to engaging Australians in public debate or that are of public significance for Australians; (3) it operates predominantly in Australia, for the dominant purpose of serving Australian audiences; and (4) it is subject to a recognised code of practice regarding professional journalistic standards.[14]

The Mandatory Code will apply to a digital platform if the relevant Minister determines that it should – in which case, it becomes a "designated digital platform". In making a determination that a digital platform is a designated digital platform under the Mandatory Code, the Minister must consider whether there is a significant power imbalance between Australian news media businesses and the digital platform, and whether the digital platform has a made a significant contribution to the sustainability of the Australian news industry through agreements (including remuneration agreements) in relation to the news content of Australian news media businesses.[15]

What the Mandatory Code Mandates

The Mandatory Code stipulates minimum standards of conduct by digital platforms making use of a news media business's content, as well as setting out a regime for determining the payment required for such use. The minimum standards of conduct require digital platforms: (1) to give news media businesses advance notice of changes to their algorithms for referring and ranking news; (2) to give news media businesses information about the nature and availability of user data they collect; (3) to publish proposals for them to appropriately recognise original news; and (4) to not differentiate between various news media businesses (registered or unregistered) in relation to crawling, indexing, distributing and making available their news content.[16]

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[8] ACCC, Mandatory news media bargaining code – Concepts paper (May 2020): https://www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%2019%20May%202020.pdf.

[9] *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 – Exposure Draft*: https://www.accc.gov.au/system/files/Exposure%20Draft%20Bill%20-%20TREASURY%20LAWS%20AMENDENT%20%28NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%29%20BILL%202020.pdf

[10] ACCC, "News media bargaining code – submissions to exposure draft": https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/submissions-to-exposure-draft.

[11] *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Cth): https://www.legislation.gov.au/Details/C2021A00021.

[12] *Competition and Consumer Act 2010* (Cth): https://www.legislation.gov.au/Details/C2021C00528.

[13] *Ibid*., s. 52F.

[14] *Ibid*., s. 52M; ss 52N and 52A; s. 52O; s. 52P.

[15] *Ibid*., s. 52E.

[16] *Ibid*., s. 52S; s. 52R; s. 52X; s. 52ZC.

The regime for payment by a digital platform for use of a news media business's content has the following features. First, a registered news media business can notify a designated digital platform that it requires the platform to engage in bargaining over payment for use of its news content. Where such bargaining is requested, each party must participate in it, and it must be undertaken in good faith. Contrary to the general prohibition on collective bargaining, multiple registered new businesses may bargain as a group with an individual digital platform;[17] however, designated digital platforms remain prohibited from bargaining collectively with registered news businesses.

Secondly, where the bargaining fails to produce an agreement within three months of a bargaining request, each party must participate in mediation. Where such mediation is required, the parties must engage in the mediation in good faith.[18]

Thirdly, where the mediation fails to produce an agreement between the parties, the registered news media business may request an arbitration to resolve the issue of payment. Where such an arbitration is requested, it is conducted as a "final offer arbitration", in which the arbitral panel chooses between a final offer proposed by each of the bargaining parties.[19]

In choosing between the two final offers, an arbitral panel must take into account all of the following factors: (1) the benefit to the digital platform of the news content used by it; (2) the benefit to the news media business of the digital platform's making available of that news content; (3) the reasonable cost to the news media business of producing that news content; (4) the reasonable cost to the digital platform of making available that news content; and (5) whether a particular remuneration would place an undue burden on the commercial interests of the digital platform. In considering these matters, the arbitral panel must take into account the bargaining power imbalance between the news media business and the digital platform.[20]

Practical Effect of the Mandatory Code

As of April 2022, 28 news media businesses (the majority of which appear to be small enterprises) had registered with ACMA to have the Mandatory Code apply to them.[21] However, no digital platform has been designated by the Minister to have the Mandatory Code apply to them. Thus, the Mandatory Code currently has no practical application.

Nevertheless, the Mandatory Code has had a practical effect. A recent inquiry by an Australian Parliament House of Representative's Standing Committee was told that, following the establishment of the Mandatory Code, three major regional newspaper businesses, two public broadcasters and a few smaller news services reached agreements regarding payment for use of their news content with one or both of Google and Facebook.[22] The understanding is that these agreements were struck by the digital platforms voluntarily, so as to avoid being designated by the Minister under the Mandatory Code. This understanding is consistent with evidence given to the inquiry by one of the major news media businesses, Seven West Media, about its agreement with Google: "The terms of it are highly confidential … But I do want to stress that it wouldn't have happened without the government intervention".[23]

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[17] *Ibid*., ss 52ZE, 52ZH and 52ZD.

[18] *Ibid*., s. 52ZIA.

[19] *Ibid*., ss 52ZL and 52ZX.

[20] *Ibid*., s. 52ZZ.

[21] ACMA, "Register of eligible news businesses": https://www.acma.gov.au/register-eligible-news-businesses.

[22] Parliament Standing Committee, n 1 above, paras 4.38-4.47.

[23] *Ibid*., para 4.41.

Problem that the Australian Approach Solves

That leaves one question to be answered: what is the problem that the Australian approach seeks to solve? This is both a harder and a more interesting question to answer.

Not Classical Free-riding

The reader who has been paying attention will have noted there is one word that has not yet been mentioned – the word "copyright". The reason it has not been mentioned so far is that copyright has nothing to do with the Australian approach. Neither the proposal for a voluntary code of conduct nor the Mandatory Code of Conduct makes mention of copyright.

The fact that copyright was never mentioned tells us that the problem which the Australian approach seeks to solve is not a copyright problem – and, in particular, is not the classical free-riding problem. The problem of free-riding is best exemplified by the scenario in which a lighthouse shines a light that can be seen by all boats nearby, including boats that haven't paid the port fee which helps pay for the lighthouse to shine its light. Put simply, the problem is that the lighthouse can't extract payment from all who take advantage of its service because it can't control who has access to its light. In relation to literary and artistic works, the free-riding problem occurs when a user obtains access to a work without paying for that access, and thus takes advantage of (free-rides on) the investment of the author in creating the work. Copyright law solves this free-riding problem by giving the author exclusive rights (copyright) over their work, thereby allowing them to control who can access the work. Non-payers can be excluded from access by the author enforcing its exclusive rights.

We can be confident that the problem solved by the Australian approach is not the classical free-riding problem, for the following reason. News media businesses already have the means – in this case, technological means – to control whether a digital platform can access their news content. By using a robots "noindex" meta tag, news media businesses can prevent the digital platform's crawlers from indexing the contents of their sites.[24] Alternatively, a news media business can use a robots "nosnippet" meta tag, to ensure that a text snippet or video preview is not shown in the search results for content that has been indexed.[25] So, if a news media business wishes to prevent digital platforms from making available its news content, it can easily do so. Accordingly, a news media business does not need to rely on copyright to prevent free-riding, because it already has the means to prevent non-payers accessing its content.

Imbalance of Bargaining Power

If the problem being solved is not the classical free-riding problem, what it is? Following its investigation, the ACCC found that "for many media businesses, Google and Facebook are 'must have' platforms … media businesses cannot afford *not* to be on the Google and Facebook platforms and, therefore, Google and Facebook have become unavoidable trading partners for many media business".[26] This is because "approximately 50 per cent of traffic to Australian news media websites comes from Google or Facebook".[27] It follows that any one news media business needs its content distributed by a digital platform more than any one digital platform needs access to the content of a news media business. Put another way, Google and Facebook can survive without

[24] Google, "Block Search indexing with noindex": https://developers.google.com/search/docs/advanced/crawling/block-indexing.

[25] Google, "Robots meta tag, data-nosnippet, and X-Robots-Tag specifications": https://developers.google.com/search/docs/advanced/robots/robots_meta_tag.

[26] ACCC, n 4 above, p. 253.

[27] ACCC, *Digital Platforms Inquiry – Preliminary Report* (December 2018), p. 6: https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry.pdf.

providing snippets of news content to their users, but news media businesses cannot survive if Google and Facebook don't make available snippets of their news content.

As a result, there is "a fundamental bargaining power imbalance between media businesses and Google and Facebook that results in media businesses accepting terms of service that are less favourable" to them.[28] In particular, news media businesses cannot optimise the length and content of snippets so as to maximise the number of users clicking through to their websites without diminishing the value of their content, and cannot monetise content effectively on their own websites.[29] Thus, it can be seen that the problem the Australian approach solves is the inability of a news media business to be *paid* for use of its content. This is why the Australian solution focusses on compelling bargaining – and, if necessary, mediation and arbitration – to achieve ensure that digital platforms pay news media businesses for use of their content.

Concluding Observations

The Australian approach contrasts starkly with the European approach. The European approach sees the problem as the classical free-rider problem. Accordingly, it adopts a copyright-like solution – the creation of exclusive rights in press publications.[30] However, as the ACCC starkly concluded, "the Copyright Directive does not create an obligation on digital platforms to compensate media businesses for the use of their content", because the Directive expressly states it does not apply to hyperlinking or to the use of very short extracts (snippets) – these being the main things that the digital platforms do.[31]

The European approach appears to be an application of the so-called 'law of the hammer'; a principle usually attributed to Abraham Maslow, although an earlier version was provided by Abraham Kaplan.[32] According to Maslow, "If the only tool you have is a hammer, it is tempting to treat everything as if it were a nail".[33] The European approach is, undoubtedly, the product of copyright lawyers. The 'hammer' of a copyright lawyer is copyright (exclusive rights), and so to every copyright lawyer a non-payer scenario looks like the classical free-rider problem (the inability to exclude). However, the Australian experience reminds us that not every non-payer scenario is a case of classical free-riding. Sometimes, a non-payer is simply taking advantage of an imbalance of bargaining power. In that situation, the appropriate tool to solve the problem is not copyright, but a compulsory bargaining and payment determination scheme.

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[28] ACCC, n 4 above, p. 226.

[29] *Ibid*.

[30] *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, art. 15: https://eur-lex.europa.eu/eli/dir/2019/790/oj.

[31] ACCC, n 4 above, p. 254

[32] Wikipedia, "if all you have is a hammer, everything looks like a nail": https://en.wiktionary.org/wiki/if_all_you_have_is_a_hammer,_everything_looks_like_a_nail.

[33] Abraham Maslow, *The Psychology of Science* (Harper Row, 1996), p. 15