

**Paul Fletcher**  
**Shadow Minister for Science & the Arts, Shadow Minister for**  
**Government Services & the Digital Economy**  
**Australia's News Media Bargaining Code**  
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## **Introduction**

I am delighted to be in New Delhi to speak at this important conference organised by the Digital News Publishers Association of India.

You have asked me to share some lessons from the work of the former Morrison Government in Australia as we sought to regulate the impact of the global digital platforms, Facebook and Google, on the news media sector in our country. It is a pleasure to do so.

At the outset, I do not want to give them impression that it was easy. We had some very rocky moments along the way.

On 18 February 2021, for example, Australians woke to discover that the Facebook pages of many Australian organisations were off the air. This included our main newspapers such as The Australian, The Sydney Morning Herald, The Melbourne Age and the Australian Financial Review, as well as television and radio broadcasting organisations such as the Australian Broadcasting Corporation.

Why did this happen? Because the global management of Facebook strongly objected to the legislation the Australian Government was about to enact, which established what is now known as the News Media Bargaining Code.

Facebook's objective was that the Australian Government would back down.

We did not.

Within days all of these Facebook pages were restored. Just a few days later the legislation successfully passed the Parliament with strong support across the political spectrum. Within a few months, Facebook and Google had entered into commercial deals with a substantial number of Australian news media organisations.

Today I want to speak about the problem the News Media Bargaining Code is designed to address - namely the market power of the global digital platforms Facebook and Google and the corrosive impact this was having on the vibrancy and sustainability of our local media businesses. Next I want to talk about what the Australian Government did about the problem - and the results we secured.

And in the third and most substantial portion of my remarks, I want to talk about why we succeeded in our approach in Australia - even though we are a relatively small market and the problem we were facing was not unique, indeed it is a problem in just about every market around the world.

## **The Problem**

Let me start, then, with the problem the News Media Bargaining Code is designed to address: the remarkable market power of Facebook and Google in the market for digital advertising. In every market in which they operate, these two companies capture an enormous share of digital advertising and the revenue it brings.

In the Australian market Facebook and Google compete with privately owned Australian media businesses such News Corporation, Nine Entertainment, Seven West Media and Australian Community Media. These companies operate the majority of Australia's newspaper, radio and television businesses.

Facebook and Google also compete with our two government owned broadcasting organisations, ABC (Australian Broadcasting Corporation) and SBS (Special Broadcasting Service.) They compete vigorously for eyeballs and attention. And while the ABC does not carry advertising, SBS does.

Yet the content which Facebook and Google use to attract to their platforms – and which they very successfully monetise with advertising revenue – comes from many places, including the very media businesses with which they compete.

The aim of the Code is to solve a serious public policy problem: Google and Facebook were using content generated and paid for by Australian news media businesses, but were not paying for it.

When a video clip from a television news service like Nine News appears in a Facebook feed, or a Google search leads to an article in the West Australian newspaper, that content is helping Facebook and Google to attract people to their platforms.

Facebook and Google have been spectacularly successful at attracting eyeballs and in turn generating stupendous amounts of advertising revenue. They are two of the world's largest and most profitable companies. Google's parent company Alphabet has a market capitalisation of around USD 1.18 trillion; Facebook's parent Meta is around USD 349 billion.

Google and Facebook are unavoidable trading partners for Australian news media businesses - as indeed they are for businesses around the world. But in the Australian market, as in others, until our government took action on this issue, Facebook and Google simply refused to offer fair remuneration for use of Australian news media content.

Whether Facebook and Google should pay for that content, and on what terms, is a very important question – and first and foremost it is a competition policy problem. This is why, as I will discuss further, we chose to assign our competition regulator, the Australian Competition and Consumer Commission (ACCC) to investigate this issue and recommend a solution.

In doing so, we were acutely aware that this problem is not unique to Australia; it is a global problem. Yet attempts by several European countries to resolve it had failed. The Spanish government, for example, passed a law in 2014 compelling Google to pay local publishers for content. Google responded by shutting down Google News in Spain.

This is a good point at which to highlight a difference between the Australian approach and that used in some other countries which sought to deal with this as a copyright issue. We did not take that approach. We saw this as first and foremost a problem of competition policy.

But of course it is much more than that. To have a diverse and vigorous media sector producing high quality journalism is a very good thing. But journalism costs money.

Whether it is the salaries of journalists or the cost of printing newspapers or operating a broadcast transmission network, it all needs to be paid for. In most countries, privately owned media businesses which generate much of their revenue from advertising play a very important role in providing diverse sources of news which are not, for example, reporting only that which the government would wish to be reported.

Hence the market power of Facebook and Google is a problem not just as a matter of competition policy but also as a matter of media policy. If incumbent news media businesses are losing eyeballs and in turn advertising revenue to

Facebook and Google, then they become weaker financially, they employ fewer journalists, stories become shorter and less detailed, investigative journalism is harder to fund, and media outlets start to go out of business.

That creates a third, and related, problem - it undermines the very important role that a free and independent media sector plays in a liberal democracy. The work of journalists is important in holding governments up to public scrutiny - but if the commercial model which sustains the employment of journalists is fundamentally eroded due to unfair competition, then that means fewer journalists, less scrutiny of government, and a material reduction in the effective operation of the democratic system under which nations like Australia and India operate.

So for all of these reasons the previous Australian Government, under then Prime Minister Morrison, was determined to do something to address the market power of Facebook and Google.

### **What We Did About it**

Let me turn, then, to what we did. The story goes back to 2017, when Mr Morrison was Australia's Treasurer. In that role he had responsibility for the oversight of competition policy issues, and our competition regulator the ACCC fell within his portfolio. He directed the ACCC to conduct what was called the Digital Platforms Inquiry, to examine the effect the giant global digital platforms Facebook and Google were having on competition in the Australian media and advertising services markets.

The ACCC produced its final report in mid 2019. In that report, it comprehensively laid out the way that new technologies, and new market participants - particularly the giant global digital platforms such as Google and Facebook - had disrupted the market for advertising.

It found the digital platforms have changed how people and businesses connect. In a given month, around 19.2 million people in Australia use Google Search, 17.3 million use Facebook, 17.6 million use YouTube (owned by Google), and 11.2 million use Instagram (owned by Facebook).<sup>1</sup> These numbers of course are tiny by Indian standards - but for a country with a population of 25 million people they are huge.

The ACCC found that digital platforms have fundamentally changed the way media content is produced, distributed and consumed, and Facebook and Google have grown rapidly to become the dominant players in important online markets in Australia. This dominance is underpinned by the volume of data these companies gather and control.

The ACCC's Final Report contained 23 recommendations ranging across competition, consumer protection, privacy and media regulatory reform. A key recommendation was that a Code should be established to regulate commercial relationships between Google and Facebook on the one hand, and Australian news media businesses on the other.

Our Government responded in December 2019, and we accepted all of the ACCC's recommendations - and asked the ACCC and other relevant government organisations to get on with implementing them.

Of course in early 2020, Australia, like many other nations, was hit by COVID - and by a significant downturn in economic activity. In particular, media businesses came under pressure with a sharp drop in advertising revenue. At the same time, negotiations to establish the proposed Code were not making much progress, largely because at that point it was envisaged as a voluntary

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<sup>1</sup> ACCC (2019) Digital Platforms Inquiry – Final Report, p 6

arrangement between Facebook and Google on the one hand and Australian news media businesses on the other.

So we took a decision in April 2020 that there would be a mandatory Code - and we asked the ACCC to get on with drafting it as quickly as possible. At the end of July 2020 a draft of the Mandatory Code was released for comment, and following amendments made in response to the comments, legislation to give effect to the Code was introduced into our Parliament in early December 2020.

There was a Senate Committee process - which allowed all stakeholders including Facebook and Google to make submissions and, if asked to do so by the Committee, appear before it and answer questions. The Senate Committee - which included representatives of all the major parties - recommended that the legislation be passed in the form it was introduced. By late February 2021, the legislation had been passed by both Houses of the Australian parliament and was law.

What then was the result of the Code? The key outcome was that it led to multiple commercial deals being done between each of Facebook and Google on the one hand and Australian news media businesses on the other hand. Negotiations got under way from early 2021, and it was not too long before there were public announcements of the first deals being concluded.

Between February 2021 and February 2022 Google entered into commercial deals with at least 19 news organisations, and Meta with 11. By October 2022, Google had reached agreement with 23 news organisations and Meta with 13.<sup>2</sup>

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<sup>2</sup> Key figures in this paragraph and subsequent paragraphs are sourced from the Treasury Review of the News Media and Digital Platforms Mandatory Bargaining Code, Nov 22, [treasury.gov.au](https://www.treasury.gov.au)

At least one of Google's agreements is with a non for profit organisation negotiating on behalf of 24 smaller publishers. Google says there are 183 mastheads covered by its agreements.

As to the amounts paid by Facebook and Google under these deals, there is no authoritative single figure for this, but there are certainly some strong indications of the quite large amounts of money which in total are being paid under the deals.

One of Australia's largest media businesses is Seven West Media, a listed company, and its deal for example has been reported to be worth around \$30 million in additional revenue.

Public reporting of deals announced in the twelve months from February 2021 suggests that their value exceeds \$150 million. The former chair of the ACCC, Rod Sims, in a report prepared for a journalism foundation, estimated that around \$200 million in total will flow to Australian news media businesses under deals done in response to the News Media Bargaining Code.

The agreements are typically for periods of three to five years, and there have been a number of announcements by news media organisations of the way they are putting this money to use to strengthen their journalism.

One good example is one of our two public broadcasters, the Australian Broadcasting Corporation. As Communications Minister I made a public commitment that the ABC would not see any reduction in its public funding if the ABC secured deals with Google and Facebook; in turn the ABC committed that all funds it received from such deals would be dedicated to employing more journalists in regional areas, that is, outside of Australia's main cities. The deals were secured and in December 2021 the ABC announced it would hire more than 50 extra journalists in regional and remote Australia.



In early 2022, News Corporation announced it was joining with Google to establish a Digital News Academy at Melbourne Business School, to provide digital skills training for Australian journalists.

The Australian Financial Review announced that it would hire an additional 18 journalists; similarly the Sydney Morning Herald and The Age have been hiring trainees.

Guardian Australia says it has expanded significantly since completing deals with Facebook and Google, with its newsroom growing by over 40 journalists. It noted that while not all of these roles were a direct result of the funding from the deals, that funding gave extra financial security and in turn gave the management team confidence to bring forward investments that would otherwise have been made in subsequent years.<sup>3</sup>

After a decade or more with a steady drumbeat of redundancies and closures across the Australian media sector, this has all been a refreshing change.

## **Why We Succeeded**

Let me turn then to why, in my view, our government succeeded in achieving these outcomes, particularly when similar attempts by other governments have not been successful. Both political and policy factors were important, and I want to single out four:

- Misjudgements by Facebook and Google management
- Very strong political commitment and direction from the Prime Minister down
- A careful and methodical process which respected property rights
- Very careful design of the specific policy mechanisms used in the Code.

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<sup>3</sup> Guardian Australia submission to Treasury Review of News Media Bargaining Code

## Misjudgements by Facebook and Google management

The first factor, then, was misjudgements by Facebook and Google management. In both cases this was in my view largely the result of decisions made by the global management teams without fully appreciating the likely response that would occur in Australia.

Certainly both companies, once they started to focus on what we were doing in Australia, realised at the highest levels of management that what Australia did could well have a global precedent value. It was very noticeable, over the last part of 2020 and the early weeks of 2021, that the seniority of the people we were dealing with escalated rapidly.

This culminated in several video conferences where, at our end, the participants were the Prime Minister, the Treasurer and me, and, at the other end, participants included, in one case, Google chief executive Sundar Pichai, in another case, Facebook chief executive and founder Mark Zuckerberg, and in a third case, Microsoft Chief Executive Satya Nadella.

I have already mentioned Facebook's decision to shut down, without notice, the Facebook pages of Australian news media businesses. This was done in a very blunt way, and many other organisations were also shut down - including a rape crisis centre and emergency services such as ambulance and police.

Rather than, as was presumably intended, having the effect of putting the Australian Government under pressure to back down, this action instead fortified our resolve. In particular, it united all Australian political parties in support of the code. Of course the Australian news media gave it very extensive coverage.

Google had earlier on made a misjudgement of its own, when it threatened to shut down its search service in Australia. It was a rather ill defined threat, as it

was not at all clear how Google could prevent Australian users from accessing its US or other sites. Did they plan to impose geoblocking? It seems implausible.

In any event, this threat prompted Microsoft to publicly express its interest in expanding the operation of its Bing search service in Australia. Our Prime Minister was very happy to make himself available for a well publicised video conference with Microsoft's CEO and other senior executives.

Following this meeting, Brad Smith, Microsoft's president, issued a blog post expressing Microsoft's support for the Australian Government's News Media Bargaining Code. Following this we did not hear much more from Google about shutting down search in Australia.

### Strong political commitment and direction

This brings me to the next factor which was important to the outcome we secured: the strong political commitment shown and direction from the very highest levels of our government, from the Prime Minister down. As I have mentioned, both the Prime Minister and the Treasurer met personally with global leaders of big tech firms, and indeed over a period of several days there was sustained personal negotiation between Treasurer Frydenberg and Facebook CEO Mark Zuckerberg.

The fact is that our government came under significant pressure from these global technology businesses. It took political will to stand up to that pressure. I well remember the concern expressed to me by a number of media and other businesses when their Facebook pages were shut down. They were worried that they had just lost an important channel - in some cases the most important channel - to their customers. It was an anxious time - but our government never

contemplated giving in to the pressure. In our view the policy case for what we were seeking to do was very strong.

Certainly our government welcomed the services provided by Facebook and Google in Australia, the employment those businesses provide locally and the innovation they have delivered, both in Australia and globally. But at the same time, we insisted on the core principle that if you want to do business in Australia you must abide by Australian law. Of course the Indian Government or the Mexican Government or the Government of any other country around the world would rightly insist on the analogous principle applying.

#### [A careful and methodical process which respected property rights](#)

The third factor which was important was that we followed a careful and methodical process - and in particular took great care to respect property rights. Of course, one element of that careful process was the very detailed work our competition regulator, the ACCC, did in studying the problem and in preparing its multi-hundred page report. As part of that process all stakeholders were given the chance to provide submissions, and to comment on a draft report before the ACCC issued its final report to government in mid 2019.

Even more important was the care we took once we had decided to impose a mandatory Code. Our process offered all stakeholders, including of course Facebook and Google, the chance to consider the proposed provisions and operation of the Code, to get comprehensive legal and economic policy advice from both Australian and global advisers, and to make submissions as we worked to devise and finalise the legislative provisions.

As I have mentioned, the first draft of the Code was issued in June 2020; there was extensive consultation before legislation embodying the Code was introduced into Parliament in December 2020; and there was further

consultation through the Senate Committee process before the legislation was voted on.

A careful and thorough process to develop the Code is one thing. But it was also important that what happens under the Code gives all parties a fair opportunity to make their case, and to have their rights and interests properly weighed up before decisions are made.

So we took care to ensure that the Code sets out clearly the steps which must occur and the criteria which must be applied by decision makers. Naturally all of this is subject to legal appeal processes where any dispute is heard by judges who are independent of the government.

Our government valued Australia's reputation as place where global companies are welcome to do business, and where the rules which apply are fair and transparent and are enforced by an efficient and independent court system. We emphatically did not want a Code which would detract from that reputation.

Another thing we emphatically did not want was Australian government officials getting involved in detailed price setting processes. Rather, we wanted the Code to incent market participants - that is, Google and Facebook on the one hand and news media businesses on the other hand - to do commercial deals. Our aim therefore was to regulate just enough to get the parties to the table to conduct the commercial negotiations that would have happened naturally were it not for the extraordinary market power of Google and Facebook.

#### [Very careful design of the specific policy mechanisms used in the Code](#)

Let me come lastly then to the specific policy mechanisms used in the Code - which we designed very carefully. I believe that this careful design has been very effective in getting the outcome we most wanted, which was for Facebook

and Google to come to the bargaining table and do the deals that, in the absence of their high degree of market power, they would already have been doing.

Our starting point was to use some well proven policy tools which are widely used in Australian competition law. One is the use of a Code to govern bargaining within particular industries. For example, Australia's supermarket sector is heavily concentrated, giving the big supermarket powers considerable market power in negotiating terms with suppliers. To help address this, there is a bargaining Code which governs the relationship between supermarkets and their suppliers.

Another well proven tool is a model in which parties first negotiate commercially, but if this is unsuccessful, the party with less bargaining power can refer the matter to the regulator to arbitrate. This is called the negotiate-arbitrate model. It is extensively used for example in the telecommunications sector in Australia to govern negotiations between incumbent telecommunications companies which typically have extensive network assets and smaller players wishing to agree terms for the use of certain network elements to allow them to supply an end to end service to their customers.

The Code therefore starts by establishing two key categories of businesses, the first being a registered Australian news media business. If a business meets certain criteria, our media regulator, the Australian Communications and Media Authority, can make a decision to register it under the code. To date 34 businesses have been registered as news media businesses.

The second category is a Designated Digital Platform - which is the category to which Facebook, Google and potentially other businesses can be subject.

The core of the Code is that a registered news media business can commence a negotiation process with a Designated Digital Platform and, if that news media

business is not satisfied with the outcome of the negotiations, it can trigger provisions in the Code. Under these provisions, the Designated Digital Platform must engage in good faith bargaining for up to three months with that news media business.

If that does not give a satisfactory outcome, then there must be mediation. But if that still does not produce an outcome, then the registered news media business can initiate a compulsory arbitration process to determine the amount of remuneration that designated digital platforms must pay them.

I mentioned that to date 34 news media businesses have registered - and numerous deals have been done. But you may be surprised to know that so far neither Facebook nor Google have been 'designated' under the Code.

Designation is a decision made by the Treasurer, on the basis of advice from the ACCC, applying specified criteria. One is whether there is a significant bargaining power imbalance between the digital platform and Australian news businesses. The other is whether the platform has made a significant contribution to the sustainability of the Australian news industry through agreements relating to the news content of Australian news businesses, including agreements about remuneration.

In designing the Code we sought to give Facebook and Google strong incentives to do commercial deals. The first incentive is that by doing so they avoid having a third party, the arbitrator, set the remuneration they are required to pay to a news media business. The terms of a commercial deal typically include a provision which excludes the operation of the Code – and the Code specifically says such a provision is valid, as a further measure to incent entry into commercial deals.

The second incentive is that if Facebook or Google can demonstrate having done a lot of commercial deals, that is a factor making it less likely that they will be ‘designated.’

If Facebook and Google had refused to come to the bargaining table, it is very likely that by now both would have been designated, and both would have faced pricing decisions being imposed on them by a third party arbitrator.

There are good reasons for preferring rapid commercial deals to a formal regulatory process. As well as speed, it is much more likely that a commercial deal, negotiated by well informed executives from both businesses, will deliver outcomes that are in fact commercially useful on both sides.

Informally, that has been the feedback I have heard from both sides: the negotiating process has been effective in identifying value-creating opportunities for the content generated by Australian news media businesses to be distributed more effectively across the digital platforms.

This is not the first time the Australian Government has dealt with global technology giants by using this kind of trigger mechanism, in which we have a fully developed and legislated regulatory scheme ready to come into operation upon a decision being taken by an Australian Minister or Government official.

We took a similar approach when we legislated for online safety in 2014, legislation which has been expanded and strengthened considerably since then. We found this approach was effective to get rapid co-operation, and allowed us to avoid lengthy and ponderous formal regulatory processes. As we hoped, it has also worked effectively in the case of the news media bargaining code.



## Conclusion

Let me conclude then by returning to the place where I started: the problem of news media businesses, under intense competitive pressure from the global digital platforms, facing shrinking revenues and profits and in turn being forced to reduce the extent and quality of their journalism. Of course this in turn further reduced the appeal and hence profitability of their product, and created a self-reinforcing downward spiral.

As I have sought to explain, the former Morrison Government in Australia set out to tackle this problem in a careful way which involved just enough regulation to get to the market outcome we wanted - namely, fair commercial agreements between Australian news media businesses and the global digital platforms.

Nearly two years after the legislation came into force, our approach has been demonstrably successful - as a formal review conducted by Treasury and published late last year has also concluded.

Let me emphasise that I am not here to say what India, or any other nation, should do. These are decisions for the sovereign government of each nation.

I must say though that I have been struck by the degree of interest shown in Australia's approach to these issues which has been shown by governments, media businesses and journalism academics around the world.

It has been a pleasure to share some of our experience with you today.