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Instruments and objectives; explaining the News Media Bargaining Code.

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Australia's News Media Bargaining Code (NMBC) is seen as world leading for allowing media businesses to bargain on broadly equal terms, and so commercially, with dominant digital platforms. Based on my close observation, it has facilitated over \$200m being paid annually by Google and Facebook to news media businesses, large, medium and small.⁽²⁾ Further, these media businesses feel they could successfully bargain on much more equal terms with the dominant platforms in ways not imaginable prior to the NMBC legislation being passed.

There have been, however, a range of criticisms of the NMBC. There is nothing wrong with criticism; indeed, issues of such importance need to be constantly debated and some improvements can be made. This is particularly the case as other jurisdictions, such as Canada, the USA and UK, seek to follow the NMBC example and introduce their own legislation to facilitate commercial bargaining between the dominant platforms and the news businesses.

The issue this article seeks to address is that much of the criticism focusses on the NMBC not achieving objectives it never sought to address. I was once in a forum where it was said... "Rod, this Code does not seem to be addressing all the problems of journalism". Of course, it was never meant to.

Rod Sims AO ⁽¹⁾



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Not only were there nine recommendations concerning media and journalism in the ACCC's Digital Platform Inquiry final report, but the NMBC was precisely targeted at the issue of an imbalance of bargaining power.

The Tinbergen Rule, named after one of the first two Nobel laureates in economics, is a basic principle of effective policy. Distinguishing between policy targets, on the one hand, and policy instruments, on the other hand, Tinbergen (1952) argued that to successfully achieve *nn* independent policy targets at least the same number of independent policy instruments are required. This has become known as the Tinbergen Rule.⁽³⁾

The Tinbergen Rule is a sound basis for all public policy, and a rule I have always adhered to. In my terms for this article, if you have one instrument, the NMBC in this instance, then it can only directly seek to achieve one objective. It can have other side benefits, but to be effective it needs to stay true to the single objective for which it was designed.

Two further points. First, I am not, with this article, seeking to write the history of the development of the NMBC, and how it came to be what it is today. Hopefully I will get to this later.

Second, I do not claim to be an unbiased commentator on the NMBC. I was Chair of the Australian Competition and Consumer Commission (ACCC) when it conceived of the NMBC and were then charged by the Australian Government with its implementation. It is hard to step back and be objective. That said, I also bring

a deep understanding of the logic of the NMBC which I believe must be understood before others seek to introduce versions of it in their jurisdictions.

This article is in 5 parts, as follows.

1. I explain the logic of and context for the recommendation to introduce the NMBC.
2. I briefly describe the essential features of the NMBC.
3. I very briefly outline the negotiations that led to the NMBC's introduction into the Parliament.
4. I then explain what has been the result of the NMBC legislation being approved by the Parliament.
5. I address the many criticisms of the NMBC.

The first four parts are brief. The reader will be left with many questions which is why I will try to write a much longer paper at a later stage. These sections will, however, provide all that is needed to understand the all-important section 5, which needs to be read and understood now as other jurisdictions seek to base their own legislation on the NMBC. This article is also timely given the current Treasury review of the NMBC discussed below.



Australian Government

Logic of and context for the NMBC Recommendation.

The Australian Government has the power to direct the ACCC to conduct Inquiries and, when it does this, the ACCC can compel information from relevant organisations. In late 2017 the then Treasurer, the Hon Scott Morrison, did so with a wide Terms of Reference. This covered competition, consumer, media and advertising issues associated with digital platforms, particularly those involved in search, social media and news content aggregation.

The ACCC is responsible for enforcing Australia's competition laws, with the Australian States and Territories it is responsible for enforcing Australia's consumer laws including for product safety, and it has important roles in the regulation of telecommunications, transport and other infrastructure. Relevantly, the ACCC is the enforcer of Part IIIA under the Competition and Consumer Act (CCA), which allows in certain circumstances for the ACCC to arbitrate pricing disputes when users seek access to essentially monopoly infrastructure. The ACCC also has the power to authorise, and so exempt from prosecution, competitors getting together to collectively bargain when this passes a net public benefit test which often boils down to an economic cost-benefit test.

The ACCC's final report of the Digital Platforms Inquiry⁽⁴⁾ was handed to the Australian Government in June 2019 and released publicly a month later. It contained 23 recommendations covering competition (e.g. change merger factors), consumer (e.g. introduce an unfair practices provision into consumer law), privacy (e.g. have a comprehensive review of Australia's outdated privacy laws) and other issues, of which nine can be seen as linked to media and journalism, as follows.

Recommendation 6 – A new regulatory framework be developed to create a level playing field between media businesses, broadcasters and digital platforms. As one of many examples, currently there is a “blackout” two days out from an election on political advertising on conventional media but advertising can still occur on digital platforms.

Recommendation 7 – A code of conduct be implemented to govern the relationship between news media businesses and digital platforms, with nine months given to develop a voluntary code and, if this fails to come up with an acceptable outcome, a mandatory code be imposed.

Recommendation 9 - Stable and adequate funding should be provided to the government owned Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) in recognition of their role in addressing the risk of under-provision of public interest journalism that generates broad benefits to society.

Recommendation 10 – Grants be given to support original and local journalism

that would otherwise be under provided, administered at arm's length from government.

Recommendation 11 – Allow tax deductible gifts to be made to encourage philanthropic support for journalism.

Recommendations 12, 13 – Government programs be established to promote digital literacy in the community, and in schools. These recommendations were aimed at helping people identify low quality or unreliable news encountered through digital platforms.

Recommendation 14 – An independent regulator monitor the initiatives of the digital platforms to enable their users to identify the reliability of news content shown on their platforms.

Recommendation 15 – Digital platforms should implement a Code to govern complaints about disinformation. This should initially be voluntary but, if an appropriate code is not submitted within nine months, a mandatory code be imposed.

The ACCC's initial Digital Platforms Report made it clear that public interest journalism provides a considerable positive externality, in the sense that the benefits to society extend beyond those who are willing to pay for it, or even access it. This is because such journalism holds the powerful to account, it provides a vital journal of record, it provides a forum for ideas, and it can campaign for wider society goals. While you benefit more if you directly access such journalism, all in society benefit to some extent whether they access it or not.

With all such externalities there is a certainty that public interest journalism will be underprovided from a social welfare perspective if left to the commercial sector alone. Therefore, many nations provide some level of public funding for journalism.

With this logic the ACCC recommended, as indicated above, that stable and adequate funding should be provided to the ABC and SBS, and that grants in the order of \$50m per year be made available to support specific areas where journalism is under provided.

Recommendation 7 should therefore be seen in the context of the other recommendations and targeted at a quite specific issue. This was the imbalance of bargaining power of the news media businesses when dealing with the large digital platforms. Google and Facebook were found to have substantial market or bargaining power in several markets from search, social media, and search and display advertising markets. In their dealings with news media businesses platforms were seen as 'unavoidable trading partners', effectively providing necessary news referral services.

The Inquiry found that while the platforms needed news media in general to attract and retain user attention to their services, they did not need the content of any specific media company. However, the news media businesses needed Google and Facebook to get traffic to their media businesses sites. The news referral services provided by Google and Facebook were effectively 'must have' services which provided them with substantial bargaining power.

The Inquiry found that in the absence of the bargaining power imbalance the platforms and media businesses would bargain over the value created by the media companies from the use of their news content by the platforms, and the referral by the platforms of audience traffic to the news media businesses, and reach a commercial arrangement. This was not possible in this instance, however, because the platforms had significant bargaining power and so could unilaterally set the terms of any such arrangement. This was clearly shown by the platforms refusal to even begin negotiations; they refused to countenance any payment for the content they benefitted from. They asserted, without compelling evidence, that they provided more benefit to the news media businesses than they received in return, and in their view that was the end of the matter.

To the Inquiry this significant bargaining power imbalance represented a clear market failure that needed to be addressed. While there are many market failures in our economy, and not all need to be addressed, this one mattered given the importance of journalism. As already stated, the restriction of the remuneration for public interest journalism by the significant bargaining power imbalance led to an under provision which harms our society.

Some argued in response, using Schumpeter's line, that this situation represented "creative destruction" as new business models replaced old ones. While the platforms may have invented a superior advertising model, however, they were not producing journalism. All that was happening was less journalism, not better journalism.

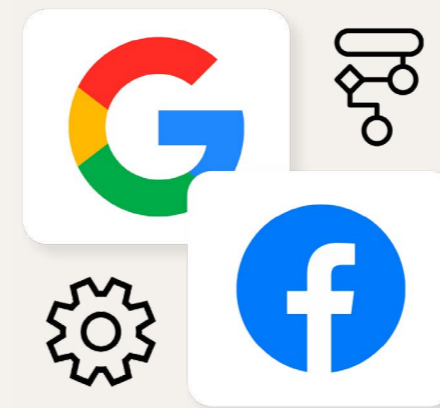
Another argument was that the platforms were not responsible for what was happening; they simply provided the billboard or phone lines. This, of course, is incorrect; their algorithms determine what is shown, often based on who pays them the most, they have placed themselves between the media businesses and their readers, and they profit enormously from all this.

To sum up, the NMBC was not meant to solve all the problems of the media and journalism. It was targeted at a specific problem, the imbalance of bargaining power between dominant digital platforms and news media businesses; it was part of a suite of recommendations; and it came from an Inquiry with a wide term of reference which did not include providing all the answers to the problems facing journalism.

The key provisions of the NMBC

There were many provisions discussed and debated. These included advance notice of algorithm changes with a significant effect on how content was delivered, provisions relating to what data is collected by the platforms, information that could be requested from the platforms, and the like. Some made it into the NMBC that was ultimately legislated, others did not.

The ACCC and the Government, however, saw that there were three key provisions that lay at the heart of the NMBC; without each of them the NMBC would fail to meet its objective.



First, there was to be good faith negotiations between the platforms and news media businesses over the payment for content and the direction of traffic. If, after a certain period, those negotiations were not successful then recourse to arbitration was allowed, which would be binding on the parties. A panel of arbitrators would be set up by the Australian Communications and Media Authority (ACMA), involving people with legal, economic and/or industry experience.

Negotiations without ultimate recourse to arbitration would fail. Without recourse to arbitration the fundamental market failure, being the imbalance of bargaining power, would not be addressed. Importantly, therefore, each news media business registered under the NMBC had the right to negotiate and then, if the negotiations were not in their view successful, seek arbitration.

Arbitration was to be of a "final offer" or "baseball" arbitration. Final-Offer Arbitration (FOA) is a form of arbitration that limits the available decisions of the arbitrator. Under conventional arbitration, arbitrators have the power to impose their own outcome even though parties can make submissions to the arbitrator. Under FOA, the arbitrator is

unable to impose their own outcome. They must choose one of the "final offers" presented by the parties.⁽⁵⁾

This method was chosen over more conventional arbitration models because it would force sensible offers to be put to the arbitrators. Without this it was felt that both sides would put in extreme ambit claims and so force the arbitrators to decide the outcome based on very little helpful information from the parties.

In the early days of discussion data was sought from Google and Facebook to understand the two-way value flow; the value to the platforms of the content from the media businesses, and the value to the news businesses of the flow of audiences from the platforms. Little useful information was forthcoming, so quantification was going to be very difficult by other than Google and Facebook. It was felt, therefore, that the arbitration could only succeed if it was based on arbitrators deciding between reasonable offers; put in an ambit claim and see the other sides more reasonable offer accepted in full.

It is important to stress that arbitration was not a goal in itself. Instead, it was a forcing device. The Australian experience, in different contexts, such as with Part IIIA referred to above, was that both parties did not want an arbitrated outcome; they wanted more control of the outcome. Instead, the threat of arbitration gave considerable bargaining power to the weaker party; it largely evened up the bargaining power. What is important is the threat of arbitration. It did not need to be triggered to be effective.

Second, there was to be a non-differentiation provision. The essence of this was that the platforms are not allowed to replace the news content of the media businesses that were registered under the NMBC with news content from news businesses not registered under the NMBC, which included international news sources. In that way the platforms had to choose; they could show no news content at all, from anywhere, or they could choose to negotiate with news media businesses in accordance with the NMBC provisions. If they placed very little or no value on having quality journalism on their sites then the former option was an easy choice; but this, of course, is not the case.

The combination of the first two provisions outlined above was that every eligible news media business was empowered to negotiate in a commercial and realistic fashion, with the threat of arbitration ensuring this. No eligible media business could be excluded. There were, however, some very small media businesses that would still struggle because they could not bring the necessary resources to bargain properly. This situation was the logic for the third necessary provision.

Third, the NMBC allowed for collective bargaining by media businesses. This was an easy provision to include because Australian competition law already allows for this, as mentioned above. For example, dairy producers will often apply to the ACCC to be allowed to collectively bargain with large dairy processors to make the bargaining more efficient and to get a more appropriate outcome.

Collective bargaining was felt to be necessary because there would be

numerous small news media businesses that would struggle to effectively bargain on their own. Amusingly, Facebook argued that this provision facilitated cartels which put a technical interpretation above what competition law seeks to achieve in relation to market power. Allowing companies with, say, less than \$500,000 revenue to get together to bargain with a company valued at well over \$1 trillion would encourage competition; it could not harm it.

Negotiating the NMBC

Negotiations over the NMBC took place through 2020 and up until late February 2021 when the legislation was passed. While there is much to be said about this, and some fascinating stories, this article will focus only on issues relevant to an assessment of the NMBC's effectiveness in achieving its objectives.

The broad timeline was as follows. The Government received the report in June 2019 and formally responded to it in December 2019. Most of the 23 recommendations were accepted in large part. Recommendation 7, relating to the NMBC, was accepted in full and Google and to a much lesser extent Facebook began engaging with the news media businesses.

Google held many meetings; Facebook did not but publicly set out the approach it would take with a voluntary code. The media businesses, and increasingly the Government, began to get the sense that, whatever efforts were being made, the platforms were not ultimately going to respond to the media businesses issues in a way that was consistent with Recommendation 7.

The Government in April 2020 asked the ACCC for its view and the ACCC said that the payment for content issues in particular did not seem capable of being addressed through the voluntary process.

The Government with this and its own view then asked the ACCC, working with the Departments of the Treasury and Infrastructure, Transport, Regional Development and Communications (DITRDC), to draft a mandatory code. The ACCC consulted widely getting written and oral submissions in response to an Initial Concepts Paper and released a draft NMBC in July 2020 as a basis for further consultation and discussion.

This started a long process of discussion and negotiation, and strong public campaigns by the platforms against the NMBC and many news media businesses in support of it. Some issues raised reflected genuine issues with the Draft NMBC. For example, the draft only allowed the arbitrators to recognise the value the news businesses provided the platforms, with no reference to the value provided by the platforms to the media businesses. The ACCC structured the draft this way to make the arbitrator's job more manageable, but this position was not defensible. The ACCC recommended, and the Government accepted, that the arbitrator had to consider the value flowing both ways.

With this issue out of the way Google's focus shifted. They argued publicly, and generated a campaign, to the effect that the NMBC would allow large companies to control the internet. This argument often drew amazement as the "large company" Google had in mind was

News Corp, which is less than 1 per cent of the market value of Google; further, many see Google itself as the large company that controls the internet.

In a recent submission to the USA Copyright Office, voicing concern that the NMBC might be replicated in the USA, Google made arguments it often used when lobbying in Australia, as follows.

"The ability to link freely is a key feature of the free and open web. Changing that would not only negatively impact the economic model that stems from it, it would force information to be consumed in a particular manner, favouring a narrow range of sources for the diffusion of knowledge, and thereby undermining democratic discourse and media diversity."⁽⁶⁾

These arguments, of course, raise many wider issues. Should the platforms be able to freely gather content created at a cost by others to reinforce their own lucrative advertising business model? Google through its algorithm decides what people see, increasingly it would seem to many through sponsored rather than organic links. Further, Google would appear to want sources of information going to its users from other than that provided by established news media businesses who they likely see as competition for the attention of users.

Other arguments run by Google were, in the ACCC's and the Government's view, misleading, but seemed capable of gaining some traction. Google argued that the NMBC's requirement that the platforms disclose to media companies what data they collect from the users of their site would somehow mean that media companies could gain access to

people's data. This was a misinterpretation, and not intended. This measure was in fact aimed at benefitting smaller news media businesses who may not be aware of the type of information Google collects and already makes available to all media businesses that use Google services. To avoid the distraction of this issue the ACCC advised, and the Government accepted, that this provision be dropped.

Likewise, there was a provision that required the platforms to give notice of algorithm changes that could affect how media content was shown. Some past changes had radically affected news media businesses and it was felt that some warning of such events in the future would be helpful. This was, however, portrayed by Google as an attempt by others to control what was seen on the internet. This seemed farfetched, but again the provision was watered down in the interests of keeping the arguments concerning the NMBC as simple as possible.

In January 2021 Google, for the first time publicly, said that if the NMBC were to become law Google would remove Search from Australia. This statement drew enormous attention in Australia and around the world. There were many reactions. Most saw this as Google using its muscle against the Government of Australia and resented this. Then Microsoft stepped in and said it would invest further so that its search engine Bing could take the place of Google's then 94 per cent share of the Australian search market. The Australian Prime Minister met with Microsoft's CEO to discuss this ⁽⁷⁾.

The sense was that the reaction to Google's announcement about leaving Australia was not going as Google wanted or expected. Then detailed discussions occurred between the Australian Treasurer, Josh Frydenberg, and Alphabet's CEO, Alphabet being the owner of Google. The Treasurer approached the task with complete focus and many discussions were held. After each discussion the Treasurer would debrief with myself and Treasury Deputy Secretary Meghan Quinn, and new positions would be formulated ⁽⁸⁾. Eventually a deal was done after some complex adjustments to what factors the arbitrators would consider and some other issues. The changes made were meaningful, but not ones that could not be defended.

In contrast to Google, Facebook largely had not been engaging on the issues throughout the whole process. They continued to reject the idea of the NMBC itself. In a stunning move, and without notice to the Government, in February 2021 Facebook took down all news and much else from their site. We in Australia woke up to discover what Facebook had done.

The move did not play well for Facebook ⁽⁹⁾. Not only did Facebook block all news from their platform, but they also deleted a lot else, such as news about how residents should deal with a bushfire in their area and important health advice in a range of areas, made all the more concerning given we were in the midst of the COVID 19 pandemic. In running such a campaign it is never wise to overplay your hand; Facebook did this in a big way.

Further, it would be strange to have your Facebook Newsfeed without any news from news media businesses. It is interesting that in February of this year

Facebook stopped using the term "News Feed" and renamed it just "Feed". In announcing the change Facebook said that the term "News Feed" suggested to some that the feed was only news rather than also including posts from friends.

The result again was negotiations between the Treasurer and the CEO of Facebook, now Meta. Changes were again made, largely to the timing of key steps on the way to any arbitration, but also to some definitions for clarification.

An important change for Facebook was that the Treasurer now had to give 30 days' notice before designating a platform. A clause was also inserted that in considering designating a platform the Treasurer had to consider whether that platform had made a "significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses" ⁽¹⁰⁾.

Both platforms took this as a signal that if they did not want to be designated, they should go out and do deals with the media businesses quickly. Designation would mean various obligations including the need to negotiate and then potentially be subject to arbitration according to clear rules.

While this surprised some, it was of no concern to the ACCC or myself. The objective of the legislation was sound commercial deals between the platforms and the news media businesses. The threat of arbitration was replaced with the threat of designation and seemed more powerful. This will be discussed in section 5 below.



Results so far achieved under the NMBC

Once the legislation was passed the platforms started serious commercial negotiations with the news media businesses. Google first, then after a lag, Facebook.

The deals were complex and often took a long time to negotiate. Some saw the time taken as the platforms not negotiating in good faith but the ACCC's constant contact with the news media businesses revealed the depth and frequency of the discussions.

Table 1 below provides the publicly available list of the deals done as at end October 2021. On the list are very large and very small media businesses, and all in between. Some argue that only large media businesses were able to get deals; this is simply untrue. Country Press Australia represents around 180 publications and 60 owners; many are very small indeed with only a couple of journalists employed. Around half of the businesses listed in Table 1 are quite small players.

Table 1

Publicly disclosed Google and Meta content remuneration deals

Google

- Agenda Media
- Australian Broadcasting Corporation
- Australian Community Media
- Australian Associated Press
- Country Press Australia
- Independent Australia
- Junkee Media
- News Corp
- Nine Entertainment Co
- Out Publications
- Private Media
- Schwartz Media
- Scott Trust (Guardian)
- Seven West Media
- Special Broadcasting Service
- Solstice Media
- The Conversation
- Times News Group
- Verizon Media

Meta

- Australian Broadcasting Corporation
- Australian Community Media
- Country Press Australia
- Junkee Media
- Mamamia
- News Corp
- Network Ten
- Nine Entertainment Co
- Private Media
- Seven West Media
- Schwartz Media
- Scott Trust (Guardian)
- Solstice Media

When Chair of the ACCC I mentioned that Google and Facebook had deals with media businesses that likely employed well more than 90 per cent of Australian journalists⁽¹¹⁾. This is likely a significant underestimate, but it is hard to tell as accurate and comprehensive numbers of journalists employed are not available. That said, I was then close enough to a range of data and people in news media businesses to be confident enough to make the statement. And no one has attempted to contradict it.

Further, Google is still talking to news businesses and more deals may be announced soon.

From Table 1 it can be seen that Meta has done less deals than Google. Inexplicably Facebook, now Meta, let it be known that they have now stopped doing more commercial deals with news businesses of the type envisaged by the NMBC⁽¹²⁾.

There are marginal cases where it can be difficult to know where to draw the line between an eligible news media business and a business that it not eligible under the NMBC. When preparing the NMBC, and defining which media businesses would be eligible, the focus was on media that predominantly produced “core” news. That is, content that reports, investigates or explains:

- issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or
- current issues or events of public significance for Australians at a local, regional or national level.

Some examples of this kind of journalism are political reporting, court reporting, and reporting on crime.

Whether or not a media business was involved in activities that predominantly produced core news is decided by the Australian Communications and Media Authority (ACMA). It can occasionally, however, be a difficult judgement and some news businesses will argue they are eligible while other people will argue they are not.

Facebook, now Meta, did deals with many media companies involving large sums of money. Having outlaid this it is puzzling that they stopped negotiating without completing deals with, for example, SBS and The Conversation, who clearly produce significant “core” news.

SBS, or the Special Broadcasting Service, is a hybrid-funded public broadcaster, with around two thirds of its funding coming from the Australian Government. It has 5 TV channels, 7 radio stations and SBS online. Its role is to be a multicultural and multilingual broadcaster.

The Conversation is a unique collaboration between academics and journalists publishing research-based news and analysis.

Not doing deals with such organisations would not seem to align with the criteria for avoiding designation. Indeed, Facebook are clearly risking future designation under the NMBC.

In February the Treasurer announced a review of the NMBC, which its legislation required after 12 months operation of the NMBC. The Review is to be conducted by the Commonwealth Treasury and is to involve wide consultation. Table 2 outlines the key part of the Reviews Terms of reference.

Table 2⁽¹³⁾

“The review will:

- assess the extent to which the Code, during its first year of operation, has delivered outcomes consistent with its policy objective; and

- identify potential improvements to the Code.

The review will not revisit the policy objectives of the Code.

Initially, and subject to the results of consultation, the review will assess the extent to which:

- commercial agreements between digital platforms and Australian news businesses;
- the designation provisions in Division 2 of the Code; and
- the registration provisions in Division 3 of the Code;

have delivered outcomes consistent with the policy objectives of the Code”.

Despite SBS and The Conversation not getting deals with Facebook, and some others not getting deals at all, the NMBC must be seen as a success, albeit with some room for improvement. Certainly, the Review will consider such improvements, and Facebook may well face future designation, but in my very long public policy history there are few new policies that so closely achieve their objective.

The objective was to even up the bargaining position of the news media businesses in their dealings with the digital platforms, as set down in the ACCC's final report of June 2019. This objective was repeated in the Treasurers statement announcing the Review of the NMBC on 28 February 2022, as follows.

"The Code aims to address bargaining power imbalances to ensure that digital platforms fairly remunerate news businesses for the content they generate, thereby helping to sustain public interest journalism in Australia. The Code provides incentives for digital platforms and news businesses to reach commercial deals outside of the Code. If that is not possible, it provides a framework (following designation of a digital platform) for good faith negotiations and mediation between the parties. Where agreement cannot be reached, it sets out an arbitration process to determine remuneration payable by a digital platform."⁽¹⁴⁾

I and the ACCC stayed in close contact with most of the news media businesses during and after their negotiations with the digital platforms. They were all largely satisfied with the deals reached. This is in stark contrast to their inability to negotiate with Google and Facebook prior to the NMBC legislation. On this basis alone success must be declared.

As ACCC Chair I stated on many occasions that the NMBC deals delivered over A\$200 per annum to news media businesses. I derived this sum from many discussions with the news media businesses. I did not, however, get the numbers from all news businesses. For example, News Corp did not disclose

the result of their negotiation, but many others did at least in broad terms or they made public comments. I simply assumed that News Corp received the average of other similarly sized news media companies.

While I, therefore, do not know the precise amount it is clear that the annual payments are well over A\$200m.

Prior to the negotiations I was asked where I thought the level of payments would be. I said that it would seem reasonable that the payments would be considerably more than 5 per cent of the cost of journalists to a business, but likely no more than 30 per cent. At A\$200m the payments are around 20 per cent of what is the cost of journalist's salaries in Australia, based on what broad data is available, so the over A\$200m was not a surprising number to me.

Also based on approximate calculations, A\$200m is likely more than 20 per cent of the news media businesses combined EBITDA, so the amount is significant.

Addressing the criticisms of the NMBC: not achieving objectives it was never targeted at

There have been many comments on and criticisms of the NMBC. Some are easy to respond to, others require more explanation.

The most considered critique of the NMBC that I am aware of was written by Bill Grueskin in his article "Australia pressured Google and Facebook to pay for journalism. Is America next?"⁽¹⁵⁾

Bill, a very experienced US journalist, came to Australia sponsored by the Judith Neilson Institute, a journalism-focused thinktank based in Sydney. Bill's article quotes a range of people who have criticised the NMBC. He makes the most thoughtful criticisms of the NMBC, and I will quote him when appropriate. Most of the other criticisms have come from statements in seminars or conferences, or are from people being quoted in media commentary.

(a) The NMBC does not address all the issues facing journalism

It was, of course, not meant to. It was one of nine recommendations directed at media and journalism issues, and was targeted at a particular issue, being the imbalance of bargaining power with the dominant digital platforms. Further, the Inquiry's Terms of Reference were broad and not specifically directed to solving all the issues facing journalism.

(b) News Corp dominates media in Australia and should be big enough to look after itself.

I was at an OECD Competition Conference late last year and it was said that News Corp controls 65% of Australia media. Before the digital era this statement may have been directionally right if only newspapers were counted. Pre the digital era News Corp owned the tabloid newspaper in each capital city, except Canberra, and some regional papers. Another company, Fairfax, owned the broadsheets in Melbourne and Sydney, Australia's two largest cities by far, it owned Australia's only national financial newspaper and some regional papers also.

Besides News Corp and Fairfax there were suburban and regional newspapers owned by other players.



According to research data most people aged under 55 primarily consume their news online (either accessing the news media business website, or via Search/social media referral). For those aged over 55, TV remains the primary source of news. Few people report print only or radio as being the primary source of news. This is consistent across all generations. Across Australia, TV remains the most popular main source of news (51 per cent, an increase from 39 per cent pre-pandemic). Online news is the second most popular (22 per cent, down from 27 per cent pre-pandemic) and social media is third at 18 per cent (up from 21 per cent before the pandemic)⁽¹⁶⁾.

From Table 3 below we can see that the news website of the ABC, an organisation funded by the Australian government, has the dominant website. The Nine Entertainment Group has not only the second largest site, but also other sites marked with an *. News Corp's site is third but it has other sites marked with an **. Note that outside the top ten sites News Corp would have other sites, but so would other organisations.

Table 3

Top 10 Current Events and Global News - DECEMBER 2020 ⁽¹⁷⁾

RANK	NAME	UNIQUE AUDIENCE
1	ABC News Websites	11,410,639
2	*nine.com.au	10,649,674
3	**news.com.au	10,428,199
4	7NEWS	9,438,706
5	*smh.com.au	9,107,971
6	Daily Mail Australia	8,831,641
7	The Guardian	6,389,142
8	*The Age	4,543,427
9	Australian Community Media Network	3,653,122
10	**Herald Sun	3,246,409

More broadly, the ABC has the most read online news site in Australia, the most listened to radio news, and the third most watched television news. The Nine Entertainment Group has the second most watched television news, three of the top eight online news sites, and a number of radio stations (including 2GB, 3AW, 4BC) that would make up most of the commercial AM radio stations. News Corp owns only Sky News on television with a quite small audience and Nova in radio news, owned by Lachlan Murdoch, but it is Australia's biggest newspaper owner. Seven West has the country's most popular television news program, the fourth most popular online news

site, and extensive newspaper interests in Western Australia.

While it is difficult to get a precise reading on the different news companies' reach across online, television, radio and print, it can be said that Nine, News Corp and the ABC are the big three. While Seven West is a little behind the big three, it has the most watched television news through its evening news and Sunrise program. Combined with the reach of Seven News online and The West Australian, it is the fourth large player.

Behind these four are The Guardian, SBS, Australian Community Media which owns the Canberra Times and many

other regional newspapers, and a very wide range of smaller players.

It is hard to combine all of the above into news market shares, but News Corp's share could be seen to be, say, 15-20 per cent based on the number of journalists employed and other criteria; it is certainly nowhere near 65 per cent.

Some will argue that the print/online news category should be ranked higher because it generates the stories and television and radio merely repeat them. While there is some validity to this it is now much less the case. For example, in their book on the ABC Ricketson and Mullins argue that while once the ABC generated few of its own stories it now, in the digital age, generates many ⁽¹⁸⁾. In the digital age journalists must be able to write as well as speak, and there is a serious premium on original content.

(c) Only the large media businesses benefitted.

This is easily dealt with. As shown above this is simply not true. The Guardian is small in Australia, and it is joined by many other digital natives such as The New Daily, Crikey, and so many more. They all employ well known journalists who used to work for one of the four big players mentioned above.

It is true that some small players do not have a deal with either Google or Facebook, and the SBS and The Conversation do not have a deal with Facebook, but from Section 4 above it can be seen that this headline criticism is wrong.

(d) Only the existing players benefit; there is no increase in media diversity.

The need for the NMBC came from the lack of bargaining power of the existing media organisations to get commercially remunerated for their content that so benefits the platforms. The NMBC may, of course, increase diversity if it encourages new media businesses to enter.

To foster new media directly, however, requires a different policy instrument, possibly such as government cash grants and/or tax deductibility for donations to media businesses, both recommended in the ACCC's Inquiry as mentioned in Section 1 above.

It is not at all clear why Google or Facebook should be required to fund new media, unless they see this as in their interest. They do have an interest in many small media companies that rely on their platforms, so they keep users engaged with them. Larger established media businesses are competitors to them.

It should also be said that while Australia's media sector is concentrated, with three to four large players, it is a lot more diverse than it used to be and becoming more so. The arrival of many digital natives has helped a lot, as has the ability of the ABC and other former pure broadcasters to now provide their content print online. We even have a new printed paper, The Saturday Paper, that I now receive on my driveway every Saturday.

Further, the internet allows access to international media in Australia. Many Australians now have digital subscriptions to the London FT, the BBC, The New York Times, and so on.

(e) Why not simply tax Google and

Facebook to fund journalism.

There seems no logic to this. By all means ensure that Google and Facebook pay their fair share of taxes in Australia, which of course the platforms make very difficult. But once this is achieved there is no need for them to pay more taxes. Further, how will the rate be determined, and how will the proceeds be distributed?

There are sound arguments for governments funding particular gaps in journalism, but the money should come from general taxation.

(f) Why not let the new business model replace the old?

As mentioned already there is no Schumpeterian “creative destruction” going on here. While the platforms may have created a better advertising model they have not replaced journalism; they instead are a threat to it because they use and greatly benefit from the output without hitherto paying for it.

(g) No platform has been designated.

This does not matter except for the issue raised in (h) below. That is, the objective was to support the sustainability of news and journalism by evening up the bargaining power so that commercial deals could get done. This has essentially been achieved. It cannot matter whether the result is attributed to an arbitration outcome, the threat of arbitration or the threat of designation.

To put this another way, the aim was not a series of arbitrated outcomes. To focus on a lack of these is to misunderstand the objective of the NMBC.

(h) Not every eligible news media business has got a deal.

This is a serious issue, and of concern. But some context is needed. Six months or so after the legislation was passed the vast bulk of Australian media had achieved commercial deals in effect under the NMBC. Imagine an alternative world where few deals had been done because all were needing an uncertain arbitrated outcome. There is no doubt which outcome the vast bulk of Australian media would prefer.

Further, some say the NMBC has failed because some media businesses have not got a deal. A policy that sees media businesses that employ well over 90 per cent of journalists achieve a commercial deal cannot be called a failure. Government policies that achieve well over 90 per cent of their objective are usually hailed as an outstanding success.

This is not to deny that there are issues to be addressed. As mentioned already, both SBS and The Conversation have a deal with Google but not with Facebook. Some others that have been declared by ACMA as eligible for deals do not have them, although negotiations between many of them and Google are continuing.

There are two issues to address. First, the Treasury Review will consider whether the criteria under the NMBC that ACMA uses to qualify news media businesses has stood the test of time. Google argue that not all those declared eligible by ACMA should be found to be eligible. This will be tested in the Review. If Treasury were to align with the Google view then Google may well, at the conclusion of the currently

continuing negotiations, have done deals with or close to 100 per cent of eligible businesses. If Treasury backs the status quo, then Google may need to do more deals.

Second, as things stand Facebook should likely be designated so the remaining deals that should be done get done.

Yes, these are important issues to be addressed but they should not determine whether or not the NMBC can be classified as a success at this very early stage; it clearly can be.

(i) Doesn't the NMBC encourage cartels.

This issue is included for completeness, but it is easy to deal with.

Under Australian competition law the ACCC can authorise collective bargaining amongst competitors provided a net public benefit test is met, as mentioned above. It is a small step for the ACCC to allow collective bargaining under the NMBC.

With no platforms designated under the NMBC media businesses could not rely on it to sanction their collective bargaining. They, therefore, came to the ACCC under the standard competition laws and gained approval. There would appear to be no detriment so any benefits at all would see such collective bargaining approved by the ACCC. For example, the news businesses within Country Press Australia, some of which would be the smallest media businesses in Australia, were authorised to collectively bargain under general competition law and so achieved a deal.

(j) The NMBC will encourage more “clickbait”.

Some have argued that the NMBC will encourage payment “per click” and that this will encourage media companies to create and post attractive articles seeking users to click on them rather than producing serious news. In response the NMBC specifies that payments must be lump sum, not per click, and every deal I have encountered as been entered into as a lump sum payment.

(k) The deals that have been done are not transparent.

This is of key concern to many. In his article mentioned above Bill Grueskin says: “Given the government’s role, citizens have a right to know how much tech companies are paying...”

I do not agree for a range of reasons.

First, if the bargaining imbalance did not exist and the parties were able to reach commercial deals without the NMBC the public would not have any detail on the deals struck. Second, if the deals were to be determined by arbitration the NMBC made clear that the deals were to remain confidential. Third, under Part IIIA of the current competition law in Australia if the parties do a deal without resort to arbitration the details of such a deal are also not disclosed.

There are good reasons why transparency was not sought under the NMBC. First, the platforms could do a quick deal with a weaker party and then use that as a benchmark that it insists all others adhere to. Second, there is a strong chance that the deal that most meets the needs of both parties will

contain provisions that both parties will want to remain confidential for their own commercial reasons; transparency risks sub optimal deals.

It is understood that many media businesses would want to know about other deals to guide what they ask for but each media business is quite different and, I suspect, each media business would prefer that its deal remain confidential.

I can understand why people take a different view and want transparency. I am just pointing out that the lack of transparency was by deliberate design and for good reasons, particularly at the urging of many news media businesses. There is a risk to the quality of the deals done if transparency is forced on them.

(l) We do not know the money will be spent on extra journalism.

Again, it must be said that the objective was to even up the bargaining position as much as possible so that commercial deals could be achieved. Once evened up it is for the parties to decide how to spend the proceeds. That is, this supposed lack of oversight of the spend was from deliberate design. Further, "additional" spending is extremely hard to police; what would have happened anyway? Without the extra funding would more journalists have lost their jobs which the additional remuneration has avoided? How much of the additional remuneration is needed to supply the agreed content or do other things agreed to with the platforms?

Bill Grueskin points out in his article that: "Revenue from the Code was a 'significant factor' in the Guardian building its Australian newsroom from

70 to more than 100 journalists in just the past year, its executives say". The ABC also explicitly linked its extra funding to more personnel and facilities in regional areas. Anecdotally there have been several journalists saying that post the NMBC is the best time they can remember to be a journalist given the number of jobs now available.

(m) The NMBC deals will simply entrench the importance of Google and Facebook to journalism and make the news media businesses less likely to criticise them.

Again, this would be the outcome with bargains struck with the equal bargaining power the NMBC is seeking to provide. That said, due to the NMBC the news media businesses in Australia have now learnt that they can stand up to the giant platforms and succeed. Further, there seems admittedly from mere observation to be no diminution in Australian media articles critical of the platforms. (n) What happens in two to four years when all the current deals expire.

My sense is that new deals will be done or designation will quickly occur. The NMBC, understandably, has support from all news media businesses and from all political parties. The latter seldom occurs in Australia or, I suspect, in other countries.

Further, I suspect other countries by then will have similar arrangements in place, such as Canada, the UK and the USA.



Concluding comment

The NMBC has been successful by any measure. It has almost completely met the objective set for it, and more quickly than initially hoped for. Few other government measures can claim the same.

Those wishing to replicate but improve it need to think carefully about whether what they are seeking to do will make good commercial deals between the news media businesses and the platforms more or less likely.

As indicated, two important issues remain, and will be dealt with in or after the current Treasury Review referred to above.

First, is the criteria for eligibility used by the ACMA appropriate and has it been drafted correctly, or does Google have a point that more businesses have been registered with the ACMA than should be to achieve the NMBC's objectives?

Second, should Facebook now be designated if it does not do further deals?

An interesting year ahead.

Notes

(1) Rod Sims was ACCC Chair when the NMBC was conceived and implemented. The views expressed here are his own and not necessarily those of the ACCC or current Commissioners.

(2) I have heard a Google representative say that my estimate of \$200m was mere speculation. This is not so. I had contact with most leaders of news media businesses after they had completed their deals with the digital platforms and discussed ranges of the sums paid with them so I am confident that the amounts paid were over \$200m.

(3) "A note on the Tingeren rule", by Peter V Schaeffer, West Virginia University Division of Resource Economics and Regional Research Institute.

(4) "Digital Platforms Inquiry", Final Report, June 2019, Australian Competition and Consumer Commission.

(5) Tulis B.A., (2010), "Final Offer 'Baseball' Arbitration: Contexts, Mechanics & Applications", Seton Hall Journal of Sports and Entertainment Law, Vol. 20, No. 1, pp. 85-130 at 91.

https://scholarship.shu.edu/cgi/view-content.cgi?referer=&httpsredir=1&article=1002&context=sports_entertainment

(6) "Google hits out at Australian media code as US reviews laws", Zoe Samios, Sydney Morning Herald, 7 February, 2022.

(7) "Microsoft tells the PM it can fill the void", Phil Coorey, Australian Financial Review, January 31, 2012.

(8) "Inside the 11th hour deal with Google and Facebook", Paul Kelly, The Australian, February 26, 2021.

(9) "What Facebook's Australian news ban could mean for its future in the US", Kari Paul, The Guardian, 27 February, 2021.

(10) Treasury Laws Amendment (News Media and Digital Platforms mandatory Bargaining Code) Act, No. 21, 2021.

(11) "Australia pressured Google and Facebook to pay for journalism. Is America next?", by Bill Grueskin, Columbia Journalism Review, March 9, 2022.

(12) "Facebook snubs SBS, The Conversation on media deals", Zoe Samios, Sydney Morning Herald, September 22, 2021.

(13) Review of the News Media and Digital Platforms Mandatory Bargaining Code, 28 February 2022. Joint media release The Treasurer and The Hon Paul Fletcher MP Minister for Communications, Urban Infrastructure, Cities and the Arts.

(14) See footnote 13.

(15) See footnote 11.

(16) Reuters Institute 2021 Digital News Report.

(17) Nielson Online News Rankings, December 2020.

(18) Who needs the ABC, By Matthew Ricketson and Patrick Mullins, Scribe Publications, 2022, pages 11-21.

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