

## **Learning from the approach of the Australian Competition and Consumer Commission and the Australian government to reducing the harmful impact of global digital platform power on local economies and local news ecosystems**

Is the Australian Competition and Consumer Commission's (ACCC) Digital platforms inquiry, and the resultant instrument of a compulsory 'bargaining code' aimed at Google and Facebook's unfair competitive advantages, the 'playing field levelling', 'game-changer' that many are hailing it as? That is certainly what Google and Facebook fear -- one year after implementation, the Australia approach is widely seen to be 'working', and multiple jurisdictions are actively exploring the Australian approach.

How is this playing out - and what might South Africa and indeed African countries more generally -- glean from this type of competition authority-led intervention? What might be fruitfully adapted and applied from the Australian experience?

Confronted by the closure of dozens of rural and regional newspapers and the retrenchment of thousands of journalists from about 2011 onwards<sup>1</sup>, the ACCC began an enquiry in 2017, releasing an interim and then a final 'Digital Platforms' report in July 2019<sup>2</sup>. The ACCC report determined that that large US based multinational digital 'platform' companies, and particularly Facebook and Google, had developed business models and operating practices that created a 'significant power imbalance' between themselves and the providers of news in Australia.<sup>3</sup>

Significantly, the ACCC identified and conceptually delineated three inter-related 'markets' that make up news industry's 'multi-sided' business model, even though the Commission's focused mostly on the selling of

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<sup>1</sup> Zion, Lawrie & Sherwood, Merryn & O'Donnell, Penny & Marjoribanks, Tim & Ricketson, Matthew & Dodd, Andrew & Winarnita, Monika. (2018). New Beats report: Mass redundancies and career change in Australian journalism.

<sup>2</sup> ACCC. 2019. ACCC Digital Platforms Inquiry final report. Sydney: ACCC. Accessed Feb 27, 2020. <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>.

<sup>3</sup> ACCC. 2019. ACCC Digital Platforms Inquiry final report. Sydney: ACCC. Accessed Feb 27, 2022. <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>.

advertising space, i.e. the monetisation of the audience's attention.<sup>4</sup> Much of the commercial news industry rely on advertising for the bulk of their revenues, much more so than they do on the portion of income they receive from 'audience revenues' such as subscriptions fees.

As Australian audiences moved online, and as digital advertising started to become a significant part of organisational marketing strategies, news organisations simply found themselves unable to compete with the networking power and business models of the main American platforms<sup>5</sup>. By 2018, with 'traditional' advertising revenues plummeting, out of every \$100 spent on online advertising spending, excluding classifieds, in Australia, Google was taking in \$47, and Facebook taking a further \$24 dollars --leaving only \$29 for all the other players in the Australian online advertising ecosystem<sup>6</sup>.

Making a formal finding that these incredible revenue disparities was because these companies had developed 'substantial market power' and thus created detrimental imbalances in commercial relationships -- both with advertisers seeking to place ads, and news organisations offering online space to display advertising - led the ACCC to setting out an unusual resolution mechanism: an imposed arbitration process styled as a 'bargaining code' requiring the parties to negotiate payments for, it seemed, 'using' the journalism content created by news organisations.

But in what many regard as a shrewd strategic manoeuvre, this imposed negotiation/arbitration process would only be invoked and imposed on companies that the Treasurer (the Australian equivalent of the 'Minister of Finance', even though Australia also has a Minister of Finance, although one playing a more administrative role) deems a company one of the 'designated

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<sup>4</sup> ACCC. 2019. ACCC Digital Platforms Inquiry final report. Sydney: ACCC. Accessed Feb 27, 2022. <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>.

<sup>5</sup> Dugmore, Harry, Thinking globally, acting locally: Reviving and sustaining South African journalism in a post-Covid world, Report, Rhodes University/USC March 2021

<sup>6</sup> Australian Competition & Consumer Commission (ACCC) Digital Platforms Inquiry Final Report June 2019, p122. The report also notes, also on page 122, that Google and Facebook's share of digital advertising revenues is increasing "The ACCC estimates that over the past three years, Google" <https://www.theguardian.com/technology/2021/feb/16/google-and-facebook-the-landmark-australian-law-that-will-make-them-pay-for-news-content> retrieved 17 February 2022

platforms' subject to code. Such a designation, the government announced, would only be imposed if a given company has not made "a significant contribution to the sustainability of the Australian news industry, including through agreements to remunerate those businesses for their news content".<sup>7</sup>

The strategy reflects the current right-of-centre Australia government preference for commercial solutions and for low levels of regulatory encroachment in the economy. The 'designated platform' threat strongly encouraged multinational platform companies to work out private deals with their clients/competitors in the news industry. Only if those fail, could the Treasurer invoke the designation provisions, and trigger the ACCC-supervised process of arbitration, with the added possible imposition of potentially less favourable financial settlements to go with the additional sanction of fines of various levels of severity.<sup>8</sup> Such settlements, handily enough, if imposed, would be unenforceable.

This code made Google and Facebook extremely unhappy. But it was additional aspects of proposed negotiating framework, and possible regulation, forcing these companies to open up about and share details about their algorithm-driven backend ads auctioning system, and offer greater transparency to news organisations (and advertisers) about how and where ads are placed and priced, as well as independent verification that advertisers actually get what they've paid for, that really enraged the platforms. This stance derived partly from the will to protect what both companies regard as their treasured proprietary information -- how their automated 'actions' work to make prices for every advertising order, how ads are placed in what spaces, how their search engines rank some ads higher than others (in Google's case)

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<sup>7</sup> The *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (the code) is a mandatory code of conduct which governs commercial relationships between Australian news businesses and 'designated' digital platforms who benefit from a significant bargaining power imbalance. <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>

<sup>8</sup> Additionally, once in the system, and 'designated', if that were to happen, the companies could, if deals could still not be hammered out, and settlements had to be imposed, firms could face fines of \$10m or the equivalent of 10% of annual turnover in Australia (REF) if found to be negotiating in bad faith (REF)

or show some news 'first' in Newsfeeds, in Facebook's case, which were at the very heart of their business models. Both companies were under intense shareholder pressure to enter into the 'voluntary' negotiation, a situation that is now playing out all over the world where a similar competition authority, regulatory policy approach is being considered.

Despite the headlines about the code's preventing and stopping the 'stealing' of news content, the ACCC's approach is not about the misuse of propriety content, nor it is about preventing infringements of copyright, as per the strategies of imposing a 'snippet tax' pursued by Spain and France and the by the European Union more generally. Rather the code forces these companies to monetarily (and in other ways) compensate the news industry for the *effect* of the power imbalances that the ACCC found were directly to blame for the steep declines in revenues -- and profits- across the commercial and public news sectors.

Google and Facebook were determined to ensure that any of these 'voluntary' deals done to prevent being 'designated' and that any monies paid be explicitly for the 'licencing' of news content, i.e, for the intellectual property inherent in a given news product. Such licencing, ironically, is exactly what multinationals had opposed in the European proposals – any imposed mechanism for paying for 'content'.

The corporations were on slightly stronger ground here, making the case to the ACCC that by making news searchable, and/or sharable, they in fact drove audiences and revenue to news organisations for 'free', and were, as such, a great boon for the news industry. Google and Facebook of course didn't deny that their 'compensation' for these benevolent 'free services' is the mountain of data they gather from individual searcher/sharers, which the platforms then aggregate and package into micro-targeted audience segments that they sell to advertisers. This is indeed the heart of their business model, and how they earn them the vast bulk of their revenues.

But the ACCC never entirely bought these counterarguments, suggesting instead that the platforms' operational practices, *taken as a whole*, directly and indirectly significantly reduced the revenues of the news

operators. Rod Simms, the ACCC's redoubtable chair, was at pains to make clear:

“being big is not a sin. Australian competition law does not prohibit a business from possessing substantial market power or using its efficiencies or skills to outperform its rivals. But the dominance held by each of Google and Facebook in certain markets does mean their conduct should be subject to particular scrutiny to identify whether it is creating competitive or consumer harm. This is particularly the case when the dominant businesses are vertically integrated, that is, present at multiple levels of the same supply chain”<sup>9</sup>

To avoid even more scrutiny of exactly how this ‘vertical integration’ worked in their business, Google quickly introduced a new product “News Showcase” and entered into raft of ‘deals’ with the publishers where they supposedly pay large sums to licence news that appears on this ‘showcase’. Facebook put in place similar deals with a similar new news-featuring, news-sharing product, ‘Facebook news’.

Throughout the regulatory processes and the commission hearings, Google and Facebook pushed back forcefully with Google threatening to prevent Australian news from being searched at all - as Google had implemented in Spain from 2014 onwards. Facebook went further and effected, in February 2021, a total prohibition on content from Australian news producers being shared on Facebook by Facebook’s own users - anywhere in the world. This included banning news media from posting news.

Public outrage in Australia and high-level political pressure forced Facebook to drop this news sharing ban in less than a week, but not before Facebook was able extract major concessions from the somewhat spooked

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<sup>9</sup> Speech by Commission Rod Sims “Examining the impact of digital platforms on competition in media and advertising markets” to ThinkTV & ANAA Top 50 CMO Event 27 February 2019 <https://www.accc.gov.au/speech/examining-the-impact-of-digital-platforms-on-competition-in-media-and-advertising-markets>

Australian government. These concessions were mostly to be allowed to keep their 'Blackbox' algorithms private, and the removal of a clause compelling them to give news industry producers advanced notice of any intent to change, for example, page ranking search algorithms. As Google had already conceded to, and started doing, Facebook began negotiating with dozens of news organisations so as to avoid becoming a 'designated organisation'.

Google and Facebook thus entered into a long series of separate confidential negotiations with a range of news organisations. Eligibility – to qualify as a news organisation – is also outlined by the code and marked by specific levels of turnover and/or through the production of various kinds of new content<sup>10</sup>.

By the end of 2021, about 30 such 'deals' had been struck, no 'designation' and enforced arbitration has been evoked - yet - leaving the big stick of turnover based fines still hovering above the multinationals but, yet, unused. These deals are believed to have injected between \$100m (R1.1b) and \$200m (R2.2b) of revenues to the beleaguered Australian news industry. (REF)

Whether all this will 'save journalism' in Australia is a more complex question: there is some evidence that a least a portion of this new 'windfall' income is going straight to some companies' profit line and shareholder dividends, which hinders the ACCC's intentions. But on the upside, for public interest journalism, and Australian democracy, by Feb 2022, a year after the Facebook news shut-down, commentators have noticed that many once-

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<sup>10</sup> News media businesses can participate in the code if they:

- *predominantly* produce 'core news', and publish this online. The draft code defines 'core news' as journalism on publicly significant issues, journalism that engages Australians in public debate and informs democratic decision making, and journalism relating to community and local events.
- They adhere to appropriate professional editorial standards.
- They maintain editorial independence from the subjects of their news coverage.
- They operate primarily in Australia for the purpose of serving Australian audiences. In addition news media business's annual revenue must exceed \$150,000, in either the most recent financial year or in three out of the five most recent financial years. <https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code> Retrieved 1 March 2022

shrinking news organisation in Australia, large and small, are hiring again: journalist job ads have proliferated in late 2021 and 2022.<sup>11</sup>

Somewhat surprisingly, none of the more than 30 ‘voluntary’ deals concluded thus far have been made public (or have yet leaked!), including those with the state funded Public Service Media, i.e. the ABC and SBS. The Guardian news website in Australia (which is self-funded globally via the Scott Trust and by reader donations) has also done a confidential million-dollar compensation package with the American giants.

Multiple jurisdictions around the world, just as Facebook and Google had feared, are now keenly exploring how to implement similar competition authority mandated/managed media bargain code processes. Canada announced in early February 2022 that it would be legislated a nearly identical bargaining code, backed by the very similar arbitration mechanisms and sanctions, and to be enacted in 2022. Deals in Canada, the news industry says based on what they know of the extend of what Google and Facebook are paying over in their Australian deals, are expected to be worth in total in excess of \$100m (R1.1b)<sup>12</sup>, and would include, as Australia has done, some compensation for even relatively small and local news outlets.

The UK too is, in February 2022, also ramping up for similar but possibly even more coercive legislation.<sup>13</sup> As a recent report notes, “While the Australian news media bargaining code was a standalone piece of legislation, the UK’s code of conduct is due to be part of a wider Digital Competition Bill.” The British rules might eliminate the possibility of prior, private, individual deals and may have a “wider scope than the Australian code, Google and Meta are highly likely to be “designated” in the UK. They would therefore be subject to *all* rules of the code.”<sup>14</sup>

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<sup>11</sup> <https://about.abc.net.au/press-releases/abc-to-add-more-than-50-journalists-in-regional-australia/> retrieved 4 March 2022.

<sup>12</sup> <https://pressgazette.co.uk/uk-government-force-google-meta-pay-for-news/> retrieved 20 Feb 2022.

<sup>13</sup> <https://www.wired.com/story/australia-media-code-facebook-google/> retrieved 3 March 2022

<sup>14</sup> <https://pressgazette.co.uk/uk-government-force-google-meta-pay-for-news/> retrieved 29 March 2022

Both Google and Facebook are opposing the Canadian and British proposals vigorously, with Google saying in a recent statement “We are committed to building on that work and collaborating with the government to create a ‘Canada made’ solution that will ensure a robust future for news in Canada and enable innovation. The Australian approach doesn’t do that and it doesn’t provide a sustainable model for the future of journalism.”<sup>15</sup>

The Australian approach is not focussed only on news media, or even on just Google and Facebook. The Digital platforms enquiry is complemented by investigations into the digital advertising market, digital commerce, and other areas, with the commission claiming that the “breadth of coverage” – including looking at linkages across the economy “differentiates the work we've done from others that have occurred around the world.”<sup>16</sup> Many authorities, like the UK, are also situating their response in the broader ambit of digital commerce and competition.

Elsewhere in their public statements the Australian ACCC suggests the “holistic approach that takes into account the close links between competition, consumer, and privacy issues” as an essential tactic to deal with the ubiquity of digital platforms’ impact on everyday life and the market imbalances they - and giant companies like Amazon, Airbnb, Uber, Apple -- cause when they enter domestic markets.

There is much to be said for this holistic approach, but a key question remains how countries less significant to Google and Facebook’s global revenues, including countries in Africa, can emulate this approach and heed the ACCC’s clarion call that the “pace of technological change needs to be matched by the pace of policy review”?<sup>17</sup> This may be very difficult to do at a

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<sup>15</sup> <https://pressgazette.co.uk/canada-media-bargaining-code/> retrieved 29 March 2022

<sup>16</sup> <https://www.lexology.com/library/detail.aspx?g=48ef5c3d-ecef-474c-9426-bc264257171e>, retrieved 26 Feb 2022.

<sup>17</sup> <https://www.lexology.com/library/detail.aspx?g=48ef5c3d-ecef-474c-9426-bc264257171e>, retrieved 26 Feb 2022.



national level and might require trans-national pan-African or regional collaborations.

In addition, can other countries match the fortitude and determination of a centre-right Australian government which is in general astonishingly beholden to Rupert Murdoch's News Corp, and which demonstrated the unexpected resolve to get this innovative legislative and policy mix through, despite furious lobbying by two of the most powerful companies in the world? Plus, both companies were backed, at points, by a Trump government that had already threatened France's proposal digital tax with threats of retaliatory tariffs and worse<sup>18</sup>.

And do the UK, Canada, and South Africa, for example, have the principled and incorruptible focus of 'Iron Rod' Simmons<sup>19</sup>, the ACCC commissioner, who's commitment to the ACCC's mantra of "making markets work" is widely admired in global regulatory, anti-trust circles?

Moreover, it should be noted, that there might be much less of an appetite for creating mechanisms which might wean some news media off their reliance of government advertising, which, in many African countries, can make up more than 80% of news organisations' revenues<sup>20</sup>. In many African countries, Public Service Media are effectively state broadcasters, with little critical journalistic capacity, and much of the commercial media in all mediums appears cowed by governments' commercial and coercive power. Increasing the reviews of news organisations and thereby reducing their dependency on government funding is unappealing for many 'hybrid democracies' in Africa.<sup>21</sup>

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<sup>18</sup> <https://taxfoundation.org/trump-administration-proposes-retaliatory-tariffs-france-digital-services-tax/> retrieved 16 February 2022

<sup>19</sup> <https://www.smh.com.au/business/the-economy/iron-rod-why-the-accc-s-top-dog-isn-t-for-turning-20211104-p595yx.html>, retrieved 18 February 2022.

<sup>20</sup> Ogola, G. (2017). How African governments use advertising as a weapon against media freedom. The Conversation. Ogola, G. (2017). How African governments use advertising as a weapon against media freedom. The Conversation. <https://theconversation.com/how-african-governments-use-advertising-as-a-weapon-against-media-freedom-75702> retrieved 12 March 2021

<sup>21</sup> <sup>21</sup> Dugmore, Harry, Thinking globally, acting locally: Reviving and sustaining South African journalism in a post-Covid world, Report, Rhodes University/USC March 2021

It may be more fruitful, and potentially beneficial for society (and journalism) as I argued in a recent report<sup>22</sup>, to rather focus on containing and inhibiting the externalisation of profits through international taxation schemes and structures. Some studies suggest Facebook, Google and Microsoft have avoided \$3bn in tax in poorer nations in the past few years.<sup>23</sup>

Getting these large global companies to pay more in tax – through better law enforcement and campaigns of moral suasion - may be a more fruitful strategy to generate funds for the fiscus, with hopefully some of that able to be earmarked -- if the right arms-length distribution mechanism can be developed - for journalism.

Additionally, my report recommends that South Africa considers working “closely with SADC countries, other regional groupings and the African Union to investigate an African-wide response to multinational platform power and that South Africa (and other countries) change tax laws to enforce a fairer taxation of profits that are clearly made from local advertising in particular, including the possible introduction of special transaction levies.”<sup>24</sup>

Whatever routes are explored by developing countries, there is an ongoing need to study global competition policy in this space carefully and ensure African countries are less subject to the kinds of digital and data ‘recolonisation’, and externalisation of much needed revenue, that has the demonstrated potential to disempower both peoples and governments.

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March 2022

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<sup>22</sup> Dugmore, Harry, Thinking globally, acting locally: Reviving and sustaining South African journalism in a post-Covid world, Report, Rhodes University/USC March 2021

<sup>23</sup> <https://www.bbc.com/news/business-54691572> retrieved 3 March 2022

<sup>24</sup> Dugmore, Harry, Thinking globally, acting locally: Reviving and sustaining South African journalism in a post-Covid world, Report, Rhodes University/USC March 2021