August 27, 2020
Mr. Rod Sims, Chair
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Re: Mandatory Bargaining Code for News Media and Digital Platforms

Dear Chair Sims,

The Information Technology and Innovation Foundation (ITIF) is pleased to submit these comments in response to the Australian Competition and Consumer Commission's (ACCC) request for public comment concerning the draft Mandatory Bargaining Code for News Media and Digital Platforms.[1] ITIF is a nonprofit, non-partisan public policy think tank based in Washington, D.C., committed to articulating and advancing pro-productivity, pro-innovation, and pro-technology public policy agendas around the world that spur growth, prosperity, and progress.

The digital revolution has left an impact on virtually every sector of the economy, forcing industries to transform and adapt to a new environment. Many industries, including the news industry, have faced challenges adapting to the changes brought about by the Internet. News aggregating websites and apps like Google News, Apple News, Yahoo News, and Flipboard have proven instrumental in getting publishers' content in front of an audience, generating billions of clicks that lead to millions of dollars in advertising and subscription revenue. Not only is this relationship mutually beneficial for publishers and aggregators, it also benefits users, who get access to an unprecedented amount of diverse viewpoints and quality reporting, which, as the ACCC correctly asserts, is vital for a well-functioning democracy.

The draft Mandatory Bargaining Code for News Media and Digital Platforms is predicated around the false idea that news aggregators take advantage of news publishers. For example, in its explanatory materials, the ACCC states that there is a "fundamental bargaining power imbalance between Australian businesses and each of Google and Facebook" that is "undermining the ability and incentives for Australian news businesses

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[1] "News media bargaining code," Australian Competition and Consumer Commission, last modified July 31, 2020, https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation.

to produce news content." These statements suggest the ACCC does not correctly recognize the enormous benefit publishers derive from aggregators' services.

In recent years, other countries have tried to force aggregators to pay for news content, and these attempts have revealed the fatal flaws and backward logic of such a system. When governments impose a new cost on aggregators, this changes the incentives for those aggregators to continue providing their services, or to provide them in the same way they used to. For example, in Germany, Google responded to an addendum to copyright law that would require news aggregators to pay news publishers for using certain content by requiring publishers to proactively opt-in to Google News, instead of its usual opt-out system, meaning publishers' content would not automatically show up on Google News and would therefore receive far fewer clicks. Google also stopped displaying news snippets and preview images in the country. As a result, traffic from Google search results for articles published by Germany's largest publishers decreased by 40 percent and traffic from Google News decreased by 80 percent.[2] After Spain passed a similar law requiring aggregators to pay publishers for linking to their content, Google decided to stop offering Google News, causing traffic to Spanish publishers to fall by approximately 6 percent, and traffic to smaller publishers to fall 14 percent.[3] Research by Harvard's Niemen Lab has found that attempts to make news aggregators pay for content reduce overall news consumption and traffic for news publishers when those aggregators stop providing or start limiting their services.[4] Publishers see decreased revenue, and, as in Spain, this disproportionately impacts small publishers. Consumers also get less variety in the types of news they read.

In addition to ignoring the benefits publishers derive from news aggregators and the drawbacks of changing a system that works, the draft Code also relies on false ideas of the importance of original news content to digital platforms like Google and Facebook. The ACCC insists that, with their large Australian audiences, Google and Facebook derive a significant benefit from making Australian news content available to their users. But, while many Australians do use Google and Facebook's various services, news alone is an insignificant source of revenue for both platforms. Only about 4 percent of Facebook's News Feed is content

[2] Harro Ten Wolde and Eric Auchard, "Germany's top publisher bows to Google in news licensing row," Reuters, November 5, 2014, https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105.
[3] Anna Solana, "The Google News effect: Spain reveals the winners and losers from a 'link tax,'" ZDNet, August 14, 2015, https://www.zdnet.com/article/the-google-news-effect-spain-reveals-the-winners-and-losers-from-a-link-tax/.
[4] Joshua Benton, "Google is threatening to kill Google News in Europe if Google goes ahead with its 'snippet tax,'" Nieman Lab, January 22, 2019, https://www.niemanlab.org/2019/01/google-is-threatening-to-kill-google-news-in-europe-if-the-eu-goes-ahead-with-its-snippet-tax/.

from news publishers.[5] Meanwhile, despite claims that news content accounts for 10 percent of queries and generates about 10 percent of Google's gross revenues in Australia, in reality, Google only generated around AU$10 million in revenue—not profit—from advertising on news-related queries in Australia in 2019.[6] Far more of Google's revenue comes from commercial queries: users searching for products they want to buy and clicking an ad. And in the last year, only 1 percent of total Google Search queries in Australia were news-related.

It would therefore be far easier than the Australian government and Australian news publishers might expect for Google and Facebook to remove Australian news content if they decide providing that content on their platforms is not worth the added cost of paying news publishers millions of dollars a year. This would benefit no one and would remove a key source of publishers' revenue in the form of clicks and advertising dollars and limit the quality and diversity of news that the Australian public can easily access online. News publishers already can opt out of Google News if they do not want to be included, and Facebook News Pages is an opt-in service for which publishers must actively apply.

Beyond the fundamental flaws of forcing news aggregators to pay for content, the draft Code contains several provisions that seem counterintuitive or would hinder the way news aggregators operate.

First, the Code unfairly targets just two news aggregators: Google and Facebook. The ACCC says "a digital platform must participate in the code if the Treasurer has made a determination specifying a designated digital platform corporation." The Australian government has already announced that the Code would apply to Google and Facebook, and according to the ACCC, the Treasurer is expected to specify several of Google and Facebook's services—including Facebook News Feed, Facebook News Tab, Instagram, Google Discover, Google News, and Google Search—as "digital platform services," which means the Code's requirement to pay publishers for news content would apply. But if the ACCC is concerned about the role of news aggregator, there is no reason to apply rules only to these two platforms. Applying rules to only these two, and not others, would distort the market.

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[5] Editorial Board, "Facebook Shouldn't Have to Pay Publishers for News," Bloomberg, August 14, 2020, https://www.bloomberg.com/opinion/articles/2020-08-14/australia-shouldn-t-make-facebook-and-google-pay-publishers-for-news.

[6] "A fact-based discussion about news online," Google Australia Blog, May 31, 2020, https://australia.googleblog.com/2020/05/a-fact-based-discussion-about-news.html.

Second, the Code requires platforms to turn over data about the news publishers' own users. Clause 52M requires digital platforms to annually share the following information with news publishers: the data the platform collects about the publisher's users, the platform's products and services that collect data about the publisher's users, the data the platform makes available to news publishers, how the data available to publishers differs from the data the platform collects on its users, and how the publisher can gain access to the data collected on its users and the data the platform makes available to news publishers. Nothing prevents news publishers from collecting their own data about their users, so it makes little sense for them to get that data instead from Google and Facebook. Moreover, from a tech neutrality standpoint, this also doesn't make sense; newsstands aren't required to collect and share data about their customers, so why should online news aggregators?

Third, Clauses 52N through Q require digital platforms to give notice of changes to their algorithms to news publishers 28 days before the change is made, or no later than 48 hours after the change is made if the change relates to a matter of urgent public interest. The 28-day notice period would slow down innovation and the responsiveness of these algorithms. Aggregators refrain from sharing certain information about their algorithms for a good reason: to prevent any individual or organization from gaming the system.

By forcing aggregators to share this information with news publishers, the draft Code would give an unfair advantage to existing news businesses. The qualifications a publisher must meet to become a "registered news business" exclude smaller websites, websites that do not predominately publish "core news content" but that may publish some news among other forms of content, and websites that do not operate predominately in Australia but that may include a significant number of Australian users among their global audience. Publishers that do meet the Code's qualifications of annual revenue exceeding AU$150,000, operating primarily in Australia, and serving a predominately Australian audience would have an advantage over all other websites and publishers because they would be able to adjust more quickly to a change in Google search ranking or placement on Facebook's News Feed—artificially inflating their ranking—even when other websites may provide a better search result or when other content might better suit a Facebook user's interests.

The purpose of news aggregators is to serve users content that is most relevant to their interests. But the draft Code would force platforms to give unfair advantages to certain news publishers, prioritizing them over all other websites and content creators. Because of the obligations it places on digital platforms, the Code would stifle news aggregators' ability to continue to innovate and develop the many services they offer Australian

users, in the best interests of those users. This is especially risky considering how much value users get from news aggregators' services on a daily basis, including the ability to search the Internet, stay up to date with the news, watch videos, share content, and communicate with friends and family, among other things.

Ultimately, these rules would hurt many Australian news publishers and consumers. In addition, by giving larger news publishers an unfair advantage over others, the draft Code would stifle competition in the news market. It would also hinder the growth of new and innovative forms of media that could potentially transform the way the public consumes news. The ACCC correctly recognizes the importance of news, but the draft Code contains numerous provisions that would threaten the future of online news in Australia, with negative consequences for news aggregators, news publishers, and Australian readers.

Sincerely,

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Ashley Johnson
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