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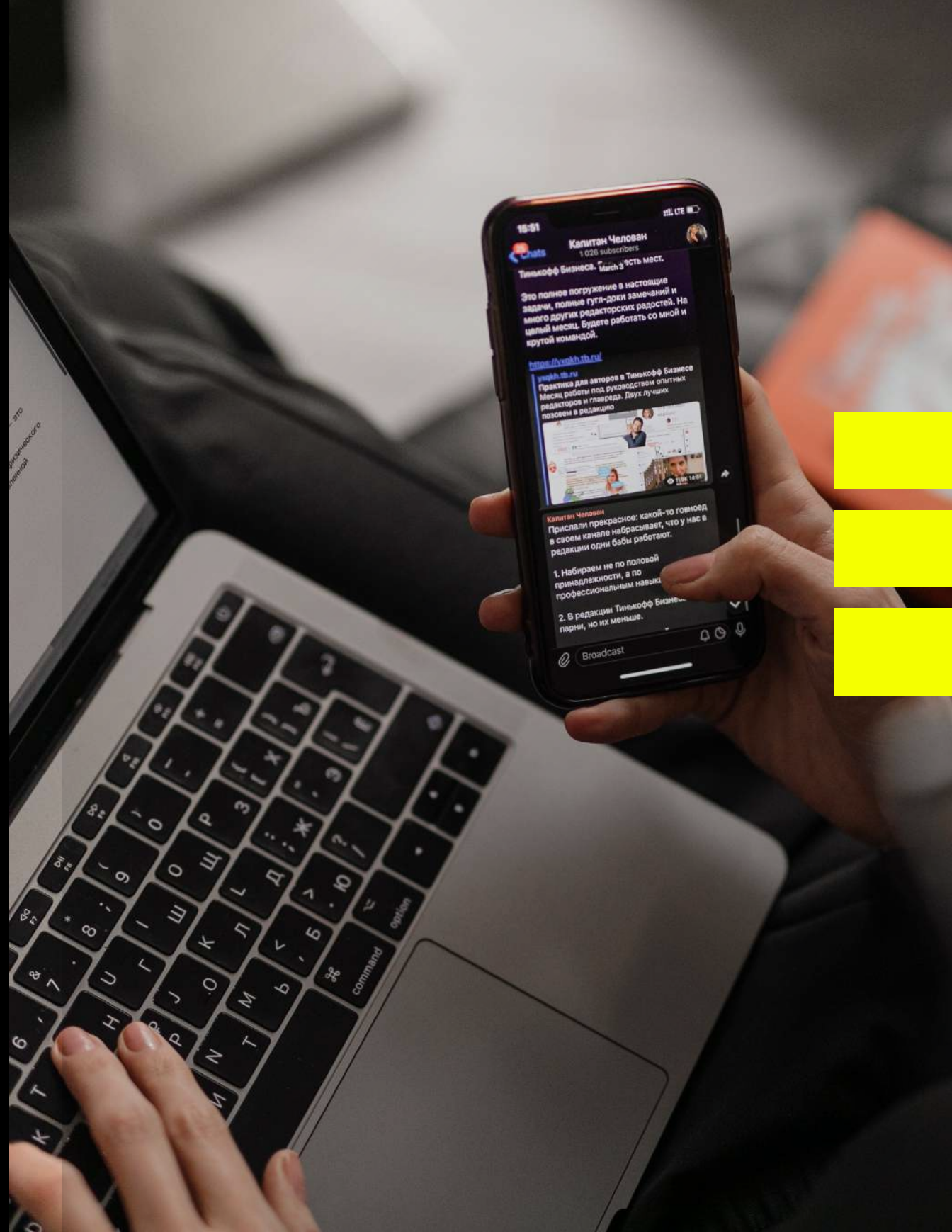
SUMMARY REPORT

Australia's News Media Bargaining Code: One Year On

ITS IMPACT AND MISSED
OPPORTUNITIES

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AUSTRALIA



Executive Summary

The News Media and Digital Platform Mandatory Bargaining Code (the 'Code') was a world-first introduction of laws compelling digital platforms to pay publishers hosting their content.

The impact of digital platforms on the traditional news sector are well known, and previous efforts to rebalance this issue using different regulatory mechanisms had not yielded significant deals for publishers. The most successful attempt previous to the Australian Code was in France back in February 2020 which saw Google sign an agreement with Alliance de la presse d'information générale (APIG) - a group of 121 French news publishers, based on copyright infringement. That resulted in a total US \$76m deal to resource all 121 publishers.

In 2019, the groundbreaking ACCC Digital Platforms Inquiry released its final report. The inquiry established the consequences of the platforms' business models on consumers, content creators, advertisers, news businesses and journalists. The report makes a series of recommendations to address competition, consumer and privacy issues, outlining the need for the government to consider new levels of oversight of the platforms. The bargaining code was the first step in ACCC's focus on digital platforms.

While the Code goes some way to addressing the bargaining imbalance between major news media and the platforms, specifically Facebook and Google, the ambition laid out in the Digital Platforms Inquiry, and early drafts of the Code, appears to have been significantly weakened by the time it was finally adopted.

This report sets out seven recommendations for how the Code could have matched its original ambition, in summary:

1. Specified criteria for digital platform designation that results in automatic inclusion under the Code
2. Amendments to the registration of news businesses
3. Expanding the matters considered by the arbitration panel
4. Establishment of an audit authority to oversee data shared, and undertake verification and algorithmic audits
5. Stipulations for funds obtained via the Code by news media businesses to be spent on the provision of public interest journalism
6. Transparency requirements about Standard Offers, arbitration results, and reporting of use of funds
7. The inclusion of annual reporting requirements for both digital platforms and news media businesses,

Had these recommendations been incorporated into the Code it would have made Australia a world leader in securing a fair and competitive internet, and would have required the platforms to be transparent about their opaque markets.

This was a missed opportunity. The final Code that emerged lacked significant bargaining power, rather it simply secured the transfer of money from one monopoly to a few select media organisations, with no guardrails on how those funds should be spent.

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1.0 Context

The [Treasury Laws Amendment \(News Media and Digital Platforms Mandatory Bargaining Code\) Act 2021](#) (hereafter referred to as the ‘Code’) was a law [passed by the Australian Parliament](#) and came into effect in the early months of 2021.

This world-first approach was the culmination of over 4 years of deliberation and consultation, starting late 2017 when then-Treasurer Scott Morrison [directed](#) the Australian Competition and Consumer Commission (ACCC) to conduct the Digital Platforms Inquiry (DPI), which amongst other things, looked particularly into the impact of these platforms on the supply and implications of news and journalistic content. The [final report](#) was released by the ACCC in July 2019 with 23 recommendations, 5 months later the Government released their [response and implementation roadmap](#). Within this roadmap, the Government signalled for immediate action of DPI Recommendation 7 - that *‘designated digital platforms are to provide codes of conduct governing relationships between digital platforms and media businesses to the Australian Communications Media Authority (ACMA).*

However, this roadmap indicated that the ACCC would be leading the process to development and implement *voluntary codes* with relevant parties. The roadmap stipulated that a progress report on code negotiations would be due May 2020 and finalised November 2020. If agreements weren’t forthcoming, the Government stated that they may consider other measures, such as a mandatory Code.

With the impact on the news media sector from the pandemic taking its toll — News Corp Australia posted a \$60.7m loss in its 2020-2021 report showing a \$167m decline in advertising revenue¹ — there was renewed energy for regulation that could support legacy news media organisations with revenue recovery.

A [press release](#) on the 20th of April 2020 upended these original deadlines, stating that ‘a sharp decline in advertising revenue driven by coronavirus’ along with recent advice from the ACCC who considers it ‘unlikely that any voluntary agreement would be reached’ meant that a mandatory Code was to be developed. This was met with fierce opposition from the digital platforms, including narratives that sought to devalue the Australian news market to their business, in term signalling to the Government and the public that the outcome of public interest journalism was not of significance.

The Code’s development started with a concepts paper and consultation period from May 2020 and lasted until the legislation was passed on the 25th of February 2021. This period saw significant revisions to the original ACCC recommendation, concerted public affairs and lobbying efforts from the digital platforms and the injection of over \$200m per year of otherwise absent funding into the journalism sector. This summary paper (full paper can be accessed [here](#)) assesses the impact of this Code on the sector in Australia and provides recommendations on potential improvements.

¹ [News Corp to suspend print editions of 60 local newspapers as advertising revenue slumps](#)

2.0 Timeline of the Code's Development

Below is a full timeline of the development of the Code including the various developments of the Code itself and government action to support it, as well as the ongoing responses from the platforms and affiliated actors over time. This allows for a comparison of how both Google and Facebook responded in different ways, sought out deals

with publishers in the process, and pushed narratives that the Code would break the internet, often through invasive popups on Google Search and YouTube - claims that the ACCC said were misinformation.



DATE	GOVERNMENT / POLICY DEVELOPMENTS	FACEBOOK DEVELOPMENTS	GOOGLE DEVELOPMENTS
Dec 2017	4 Dec Then Treasurer Scott Morrison directs the ACCC to conduct an inquiry into digital platforms		
Dec 2018	10 Dec ACCC hands down its preliminary report. It contains 11 preliminary recommendations and eight areas for further analysis as the inquiry continues (link)		
Mar 2019	15 Mar ACCC holds Future of Journalism Roundtable (link)		
Jul 2019	26 July ACCC releases its final report with 23 recommendations including the technology platforms (i.e Facebook and Google) developing voluntary codes of conduct		
Dec 2019	12 Dec Government Response to DPI + Implementation Roadmap	<i>“Addressing bargaining power imbalances between digital platforms and news media businesses by asking the ACCC to work with the relevant parties to develop and implement voluntary codes to address these concerns. The ACCC will provide a progress report to Government on the code negotiations in May 2020, with the code to be finalised no later than November 2020. If an agreement is not forthcoming, the Government will develop alternative options which may include the creation of a mandatory code”</i>	
Apr 2020	20th Apr Government instructs ACCC to develop a mandatory code	<i>“The Australian media sector was already under significant pressure; that has now been exacerbated by a sharp decline in advertising revenue driven by coronavirus. At the same time, while discussions between the parties have been taking place, progress on a voluntary code has been limited according to recent advice provided by the ACCC following a request by the Government for an update. The ACCC considers it is unlikely that any voluntary agreement would be reached with respect to the key issue of payment for content.”</i>	
May 2020	19th May ACCC Begins Development of NMBC	Platforms begin devaluing news market publicly Google pushes ‘pay for links’ messaging	
Jun 2020		15 Jun Facebook’s director of public policy writes an opinion piece about the	25 Jun Google strikes deals with Schwartz Media and Solstice Media

		Code in the Sydney Morning Herald calling for acknowledgement of the value platforms offer news media	
Jul 2020	31 Jul ACCC releases draft legislation of the code and calls for public submissions	31 Jul Google strikes deal with The Guardian In Facebook's submission, it said it was confident there would be no significant impact on the company's revenue or "community metrics" if there were no news content available. (link , link)	31 Jul <i>In a statement, Google Australia managing director Mel Silva described the code as "the Government's heavy-handed intervention".</i> <i>"Our hope was that the code would be forward-thinking and the process would create incentives for both publishers and digital platforms to negotiate and innovate for a better future, [...] so we are deeply disappointed and concerned the draft code does not achieve this. Instead, the Government's heavy-handed intervention threatens to impede Australia's digital economy and impacts the services we can deliver to Australians."</i> (link)
Aug 2020		31 Aug Facebook threatens to block news from being shared - prompts ACCC response	17 Aug Google uses invasive pop ups on Search and YouTube to make the claim that the Code would make Google products worse. The pop ups said: "We need to let you know about new government regulation that will hurt how Australians use Google Search and YouTube. A proposed law, the News Media Bargaining Code, would force us to provide you with a dramatically worse Google Search and YouTube, could lead to your data being handed over to big news businesses, and would put the free services you use at risk in Australia." (link) The ACCC responds saying that this is misinformation.
Dec 2020	7 Dec Government announces amendments to the draft Code and converts to a bill		
	9 Dec NMBC Introduced in the House		
	Referred to Senate Economics Legislation Committee		13 Jan Google experiments with blocking Australian news sites, hiding news content from 1% of users. (link + link)

			Google pushes 'break the internet' messaging, and publishes economic value report
Jan 2021	19 Jan US Government asks Australia to scrap proposed laws to make Facebook, Google pay for news (link)	25 Jan Facebook launches Facebook News in UK (link)	22 Jan Google threatens to pull Search in Senate hearing (link)
			29 Jan Google re-deploys pop ups across Search and Youtube with Google's AUNZ managing director Mel Silva claiming that the company is willing to pay for news without the Code (link)
Feb 2021			5 Feb Google launches Showcase in Aus and announces deal with Australian Community Media and The Conversation
	14 Feb Treasurer Frydenburg speaks with Zuckerberg (link)		15 Feb Google strikes deal with Seven West Media (\$30m per year) and Private Media
	16 Feb Amendments tabled		
	17 Feb ACCC vows to pursue Google's ad dominance (link)	17 Feb Facebook bans Australian news on its platform (link)	17 Feb Google strikes deal with Nine (\$45m per year) and Junkee
		18 Feb Tim Berners-Lee claims NMBC is threat to free and open internet (link)	
		<p>18 Feb Facebook ban revealed to impact the Bureau of Meteorology, state health departments, the Western Australian opposition leader (during election), charities and Facebook itself. As Australia prepares to begin the rollout of Covid-19 vaccines, state health departments, including SA Health and Queensland Health, were unable to post. A Facebook spokeswoman said the blocks on non-news organisations had been a mistake.</p> <p>"The actions we're taking are focused on restricting publishers and people in Australia from sharing or viewing Australian and international news content," she said.</p> <p>"As the law does not provide clear guidance on the</p>	<p>18 Feb Google strikes deal with News Corp</p> <p>20 Feb Google strikes deal with The Guardian</p>

		<p>definition of news content, we have taken a broad definition in order to respect the law as drafted. However, we will reverse any pages that are inadvertently impacted.” (link)</p>	
	<p>22 Feb Emergency Facebook and government talks resolve the ban on Australian news. Facebook wins concessions to the Code:</p> <ul style="list-style-type: none"> • Made it highly unlikely platforms will be designated by the Code and officially subject to the law, provided they make a ‘significant contribution’ to Australian publishers; • Provides extensive advance notice if platforms are being considered for designation; • Allows platforms to ignore non-discrimination protections and negotiate differently with different news businesses; and • Delays arbitration by adding a mandatory mediation stage after unsuccessful negotiations. 		
		<p>23 Feb Facebook reverses Australia news ban after government makes media code amendments (link)</p> <p>Announces deal with Seven West Media</p>	
		<p>24 Feb FB Statement claims removing news: “wasn’t a decision taken lightly. But when it came, we had to take action quickly because it was legally necessary to do so before the new law came into force, and so we erred on the side of over-enforcement. In doing so, some content was blocked inadvertently. Much of this was, thankfully, reversed quickly.” (link)</p>	
		<p>26 Feb Facebook strikes deal with Schwartz Media</p>	
	<p>25 Feb Bill passes both houses of parliament to become law</p>		
Mar 2021	<p>3 Mar Legislation commences</p>	<p>3 Mar Analysis reveals that after Facebook instituted the news ban, it spent time stamping out attempts by some users to evade its news ban. This work continued while the Australian Government and Facebook negotiated an agreement, and then after Facebook announced it would lift the ban (link)</p>	

		<p>15 Mar Facebook strikes deal with News Corp</p> <p>16 Mar Facebook strikes deal with Nine</p>	
May 2021		<p>4 May Facebook strikes deal with Australian Community Media</p> <p>12 May Facebook strikes deal with Solstice Media</p> <p>26 May Facebook strikes deal with ABC</p>	<p>3 May Google strikes deal with Times New Group</p> <p>26 May Google strikes deal with ABC</p>
July 2021		<p>2 Jul Facebook strikes deal with The Guardian and Country Press Australia</p>	
Oct 2021			<p>12 Oct Google strikes deal with AAP, Independent Australia, SBS, Women's Agenda</p>
Mar 2022	<p>Over 30 small / medium news publishers run 24-hour news blackout campaign to demand Treasurer Frydenberg delegate Meta and Google under the Code. (link)</p>		

3.0 Platform Responses

The policy development process, particularly in the aftermath of the Government's shift to a mandatory Code (20 April 2020), saw significant attempts from the digital platforms and News Businesses to influence provisions. Some of this was to be expected as part of healthy consultation (briefings/meetings with parliamentarians, submissions, providing evidence to relevant committees), however some of the actions taken by the digital platforms epit

These actions utilised a spectrum of tactics ranging from commissioned reports to mobilising influencers on YouTube, directly appealing to the Australian public to keep the status quo. The culmination of efforts was a week-long 'news ban', where Facebook shut down access to 'news content' for Australians.

Ironically, as Facebook and Google's public affairs narratives about how the Code would 'break a free and open internet', were juxtaposed with their own efforts that limited access to information in the middle of a pandemic, bushfire season and a State election.

What this shows is the range of tools the digital platforms have at their disposal to achieve their policy aims, and their willingness to utilise them when needed.

3.1 Google's Response

Google's public affairs efforts were originally much more vocal and diverse than that of Facebook, ramping up mid-2020 and peaking early 2021.

Threats to remove and charge for services

Thinly veiled statements (which included charging for, limiting the quality of and completely removing) concerning its services, one of Google's main public affairs levers. This came across in a wide range of channels, from Senate Committee hearings to YouTube ads.

In an open letter from Mel Silva, Managing Director of Google Australia released August 2020 claimed the Code would 'force google to provide you with a dramatically worse Google Search and YouTube', and puts its provisions of these 'free services' at risk.

In a rare public statement (particularly as the Bill was in parliamentary scrutiny and not with policy development anymore) ACCC Chair Rod Simms denounced Silva's open letter as spreading 'misinformation'.

"Google will not be required to charge Australians for the use of its free services such as Google Search and YouTube, unless it chooses

to do so. Google will not be required to share any additional user data with Australian news businesses unless it chooses to do so."

Pop ups and advertising

Google used a range of invasive design tactics to directly funnel Australian users of its products to various open letters, videos and statements that illustrated the platform's position. An ACCC report found that Google controls [94% of the search market](#) in Australia, with some estimates revealing Australians performing 250 000 – 300 000 searches a day.

- The August open letter was pinned to Google Search's homepage, and pop-up ads which said 'the way Aussies use Google is at risk' were regularly promoted to users
- A prior open letter which was released alongside a video of Silva was disseminated widely on YouTube as an advertisement.

Mobilisation of influencers

On the same day as the August Open Letter, Google sent out a note to Australian content creators on YouTube warning that they could receive fewer views and earn less under the Code. Using the flawed rationale of the letter, that platforms would have to hand over user data to the news publishers and that the platforms could force the platforms to prioritise news media content, it pitched traditional media businesses and influencers exploiting classic tensions.

Whilst some concern over the data sharing provisions in the Bill are appropriate (especially at the time in the absence of a fit-for-purpose Privacy Act), the extrapolation that Google presented to influencers co-opted existing fears to further Google's public affairs aims.

Ironically in all of this, the one entity that actually does have control over all these factors (how the algorithm prioritises content, how much people get monetised, what user data to collect and share) is Google.

This mobilised prominent Australian influencers (primarily YouTube channel 'Economics Explained') to launch a response including a [change.org](#) petition that received [over 80 000 signatures](#).

Google Ad Experiments

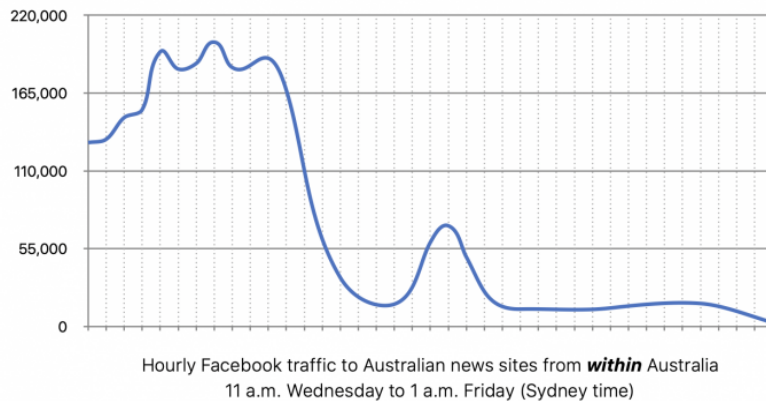
Over the course of January 2021, Google ran experiments which restricted news from Australian media publications appearing in search results to around 1% of Australian users. The stated reasons were to measure the impacts of news businesses and Google search on each other.

At the time, many critics spoke to how these 'experiments' demonstrated the potential influence Google had over the information landscape in Australia. Retrospectively in the shadow of the Facebook News Ban, these criticisms progress from conjecture to reality.

3.2 Facebook’s Response

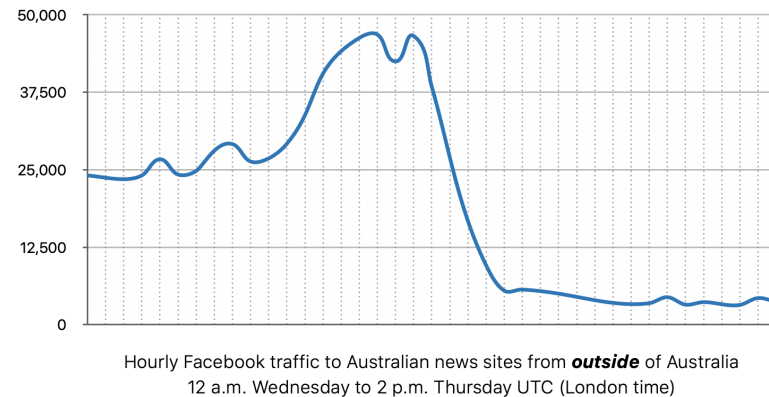
On the morning of the 18th of February 2021, Australians woke up to Facebook restricting publishers and people in Australia from sharing or viewing local and international news content.² The shutdown also resulted in international Facebook users unable to view and share Australian news content. It was announced the day before by the Managing Director of Facebook ANZ as a ‘response to Australia’s proposed new Media Bargaining law.’³

Without the referrals from Facebook, overall traffic to Australian news sites within the country [fell by 13% over this period](#).



The Facebook News Shutdown impacted more than just news in Australia. Facebook pages of key government agencies, public health bodies, domestic violence support services, unions, not-for-profits, political parties, and candidates.

In a move that sparked the widest condemnation from medical and public health officials, the Facebook News Ban shut down pages of key public health agencies just three days before the planned vaccine rollout.



[Source](#)

² [In Australia, Facebook’s ban on sharing news stories has sent publishers’ traffic tumbling](#), Nieman Lab Feb 18 2021

³ [Changes to Sharing and Viewing News on Facebook in Australia](#), Facebook, Feb 17 2021

These pages included:

- [South Australia Health](#)
- [Queensland Health](#)
- [Western Sydney Health](#)
- [Sydney Local Health District](#) ⁴

As official channels were shut prominent misinformation pages were left up and running, these included;⁵

- Australia's biggest and longest running anti-vax group
- Infowars (an American far-right, conspiracy and fake news website)
- Rebel News (A Canadian far-right political and social commentary media website)

Many experts stated that the ban had enabled the greater spread of vaccine misinformation at one of the most critical moments in Australia's pandemic response, with the Federal Health Minister stating the move was 'dangerous and irresponsible'.

Other instances of pages being shut down during key moments were;

- The Western Australian Opposition Leader during the campaign for the State Election
- The Bureau of Meteorology when bushfire and flooding season alerts

⁴ [Facebook slammed over news takedown ahead of vaccine rollout](#), RACGP, 19 Feb 2021

⁵ [Fake News Is Still On Facebook In Australia](#), Gizmodo, Feb 18 2021

In a statement, Facebook said that these pages were 'inadvertently blocked'. During this period, some of the most significant deals (between News Businesses and the platforms) and concessions (between Government and the platforms) were made. Two days after Facebook restored news content, the Bill was passed in both Houses and became law.

4.0 Recommendations

The main objective of the Code was to address bargaining imbalances in commercial relationships between Australian news businesses and designated digital platforms. It is important to note that the Code was just one of many Recommendations proposed within the DPI, and that the Code was intended to specifically address bargaining power only. The ACCC [states](#) that *'addressing this imbalance is necessary to support the sustainability of the Australian news media sector, which is essential to a well-functioning democracy.'*

These recommendations have been developed based upon an assessment of the Code against its broader intention, evaluating how it has fared based upon two key questions:

- a) Were the mechanisms within the Code adequate in addressing the bargaining imbalances between news and platforms?
- b) Did the passing of the Code contribute towards a more sustainable and plural journalism sector?

Recommendation 1

Specified criteria needs to be developed for digital platform designation that results in automatic inclusion onto the Code to mitigate the impact of relying on Ministerial Discretion.

For example, the ACMA with guidance from the ACCC will determine which digital platforms are to be designated and must take into account:

- Bargaining power test - If there is a significant bargaining power imbalance
- Market Penetration test - if a certain % of the Australian population are active users of the digital platform
- Revenue test - if the digital platform makes significant \$X within the Australian market each year
- News Content test - If the platform is used to share, distribute or facilitate engagement with covered news content

Recommendation 2

The registration of news businesses needs to be amended to:

- Include businesses that have a revenue of over \$150k, or employs 3.0 FTE journalists and/or editors
 - Include businesses that do not have a revenue of over \$150k or 3.0 FTE journalists and/or editors, where their main objectives is to provide public interest journalism (i.e. if they are structured as a not-for-profit)
-

Recommendation 3

The matters considered by the arbitration panel in weighting their decisions should be expanded to include:

- Whether a particular remuneration amount would significantly improve capacity for the provision of public interest journalism.
 - If proposals come from non-profit, independent and/or regional publishers
 - If proposals come from publishers in under-served areas or serve under-served communities
 - If proposal specifically involve public interest journalism, such as science, public health, local government and/or local community reporting
-

Recommendation 4

An audit authority needs to be established and empowered to oversee data shared, and undertake verification and algorithmic audits

Recommendation 5

Place restrictions stipulating that a significant proportion of additional funds obtained via the Code by news media businesses must be spent on the provision of public interest journalism

Recommendation 6

The Code be amended to include transparency requirements around:

- Transparency and public disclosure about Standard Offers and Arbitration results
 - Transparency about the ‘intended’ spends, or reporting around actual spends, towards public-interest journalism from News Businesses
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Recommendation 7

The Code be amended to include annual reporting requirements for both digital platforms and news media businesses, to ensure that this Code is actively contributing towards ensuring a sustainable media sector and increased media diversity in Australia.



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