

Canberra (and Rupert) v big tech: can the government rein in Facebook and Google?

The government's plan to rectify the power imbalance between news publishers and big tech makes no sense. But then again, we shouldn't be surprised.

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In the back of your brain, you may have registered that, among the fights contrary to Australia's national interest which Scott Morrison has decided to pick, is a big one with Facebook and Google. Why? The short answer to that is Donald and Rupert.

What's Scott done this time?

Under instructions, the Australian Competition and Consumer Commission (ACCC) has issued a draft News Media Bargaining Code, designed to regulate the commercial relationship between the digital giants and the legacy mainstream media. It's already triggered a war of words between Google and the ACCC.

Why the code?

The code reflects the ACCC's attempt to rectify a power imbalance between news publishers and the two big digital platforms. Google search results and Facebook news feeds each provide links to news publishers' stories. These are the source of large volumes of traffic to news publishers' websites. That traffic generates advertising revenue which is precious to the news publishers, and for many their primary source of income.

In contrast, Facebook and Google derive relatively little benefit from the ability to link to news content compared to the overall value of their business.

Neither side pays any money to the other for this traffic.

What the code aims to do

The code proposes a complicated system whereby news publishers can register with the Australian Communications and Media Authority (ACMA) in order to obtain rights against Google and Facebook, enabling them to find out what information is collected about their audience and be notified of algorithm changes.

The news publishers can also require Google or Facebook to bargain with them, in good faith, including about remuneration Google and Facebook should pay to them for being allowed to “make available” their news content. If they can’t agree, there is mandatory arbitration. Non-compliance triggers pecuniary penalties, with the maximum going up to 10% of annual turnover.

Wait, the tech companies pay the publishers? Didn’t you say it’s not actually valuable to them?

Yeah, we did. This is the central stupidity; News Corp and Nine want the digital giants to underwrite their failing revenue model by paying for something Google and Facebook don’t need, and the government has bought in. It makes no logical sense, will warp the market artificially and won’t save them in the long run anyway.

Why the code is flawed (and why Google is all huffy)

The code will force Google and Facebook to pay for the opportunity to “make available” the news publishers’ content.

“Make available” isn’t defined. Is it the mere publication of a hyperlink? A headline? A snippet? The whole story? Why would they have to pay to publish a hyperlink? If Google or Facebook reproduces a substantial part of a news story, then they might logically pay for a copyright licence. But the code is not about copyright. (As a sidenote, the EU has used copyright law to require Google to pay for news snippets.)

As a result, the code essentially makes it unlawful for Google and Facebook to do something which is (a) very unclear and (b) probably lawful for anyone else to do; that is, “make available” news content without paying for it.

Next, the code will apply to Google and Facebook indeterminately. There’s no scheduled review of their designation, no opportunity for submissions, no criteria which must be applied before they (or any other business) are designated as having the code apply. The code also ignores the possibility of Google or Facebook ceasing to “make available” news content altogether. That’s a huge area to leave grey, especially where attempts to make Google pay for news in other jurisdictions have resulted in Google withdrawing supply.

Then we get to price. The code doesn’t say how much Google and Facebook have to pay for this right to do something that everyone else can (probably) do for free. It talks about the value that the digital platforms derive and the cost of producing the news. It ignores the value of the audience that the digital platforms deliver to news

publishers, which by Google's calculations is about 20 times greater than the value Google receives from its news function.

The practical effect of this solution to the wrong problem is that it will only make the news publishers *more* reliant on their relationship with Google and Facebook. It won't fix the power imbalance. And it will make the news outlets less interested in dealing with any other digital platforms which aren't subject to such rigorous bargaining and remuneration obligations. Again, this delivers more power to Google and Facebook; this time against their competitors.

It's a classic Coalition government irony: in its ham-fisted attempt to rein in the digital monopolists, its main impact will be to further entrench their monopolies. Good one, party of the free market.

Can it work at all?

Interesting question — there is an inbuilt impossibility to all this. For Google and Facebook, and especially their boards, how exactly are they supposed to live with a mandatory bargaining code that exposes them to open-ended financial liability for something they don't actually value? Reconciling that with their duties to their shareholders is not something we'd like to attempt.

That's one of the direct consequences of the brutal illogic of the proposed code.

What's next?

The government will steam ahead with the code regardless of its flaws and anything Google says. It has built the David and Goliath narrative and now it needs to get the code through parliament and claim victory.

The argument will move then to the courts, who will have the unenviable job of trying to make some sense of this latest exemplar of compromised, irrational policy-making from the laziest government we've ever had.