



12 May 2022

Secretariat
News Media and Digital Platforms Mandatory Bargaining Code Review
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: NMDPbargainingcodereview@treasury.gov.au

Review of the News Media and Digital Platforms Mandatory Bargaining Code

Nine welcomes the opportunity to offer its insights and experiences since the introduction of the News Media and Digital Platforms Bargaining Code (**NMBC**). Nine strongly supports the Free TV and CRA submissions in respect of this consultation.

1. Commitment to the future

Nine applauds the ACCC and Treasury's policy objective of keeping quality public interest journalism sustainable and local by introducing legislation which supports fair remuneration for news content. Without the ACCC and Treasury's ground-breaking findings and the introduction of this world first legislation, Nine does not believe that many (if any) commercial agreements between the digital platforms and Australian media companies would have been made.

Nine is committed to keeping Australians up to date with local and international news. More Australians turn to Nine's publishing, radio, television and digital news services than any other commercial news company to keep them informed. Nine is one of Australia's most trusted news sources due to the high journalistic standards that Nine adheres to internally, as well as in accordance with our various industry codes, principles and legislative requirements in broadcast TV and radio, and publishing.

Australians directly benefit from the content that Nine creates - having a local, impartial, accurate and trusted news source is vital to a functioning democracy. The principles underpinning Nine's business are best summarised as a commitment to:

- a. The production and sustainability of trusted Australian local, regional and national news;
- b. The production and sustainability of Australian stories and content;
- c. The broadcast/streaming of Australian sport;
- d. The accessibility of the above for all Australians (including regional, elderly and low income audiences); and
- e. The accessibility and availability of the above on Australian screens.
(together, the **Key Public Policy Outcomes**).

Nine's content is valuable - to Australians and to businesses which share our content. Nine is

of the view that without the unfair market power held by our unavoidable business partners, Nine would be capable of achieving a fair market price for that content. Nine believes that this important legislation must be maintained - and in some areas strengthened - to ensure that fair remuneration continues to be received for the content created.

Over the past twelve months, Nine has invested in its newsrooms - including new journalist hires and product investments to enhance the impact of our public interest journalism for our audiences. Investment decisions for these initiatives were made using Nine's standard return on investment framework, which included a contribution from the digital platforms deals. It is important to note that Nine views the agreed payments from the digital platforms as an allocation of value generated by the platforms from Nine's own content - it is a right-sizing of revenue. As such, it is essential to keep the NMBC in place and regularly reviewed in order to ensure the longevity of public interest journalism into the future.

2. The NMBC must remain and be strengthened

Nine agrees that the NMBC has made a contribution to a more sustainable future for public interest journalism and its newsrooms. However, to ensure that Australian news media companies can continue to get fairly remunerated, the NMBC needs to be maintained, new powers added and new digital platforms and services recognised as holding significant and unfair market power - which has continued to grow since the commencement of the Digital Platforms Inquiry.

2.1 Registration Process

Nine has not yet been able to register its news assets for TV, radio, publishing or digital with the ACMA. Nine notes that whilst the ACMA has been very helpful in assisting us with the registration process, it is the drafting of the NMBC that is presenting the ACMA with difficulty with registering our news assets.

For example, one particular issue that Nine is facing (in addition to the examples provided by Free TV and CRA), is in relation to content that is broadcast but then placed online with the commercials removed. Instead of being assessed as one program, each snippet of the program (or each program segment) would be assessed individually as each has a different URL. It is our understanding from our communications with the ACMA that offering one central URL for where the content is posted is not going to meet the test. It would also mean separate registrations for each URL where the content is located - this is impracticable given the amount of programs that contain news content that meets the standards of registration under the NMBC. Further examples can be provided upon request.

While Nine has negotiated commercial agreements without needing to be registered, Nine is concerned that if it cannot register its content with the ACMA, its position will be further undermined when trying to negotiate extensions of those agreements with the digital platforms - in the context of those digital platforms and services already holding substantial unfair market power.

2.2 Designation Powers

Nine maintains its support of the ACCC's findings that there is a significant imbalance of market power in favour of the digital platforms and services.

Nine supports the Free TV proposition that the Government should publish a clear statement of expectation under which it would seek to exercise its designation power - making it clear that it is willing to designate the digital platforms and services that are not willing to enter into genuine contract negotiations for the fair remuneration of Australian news content. Nine believes that by signaling this intent in respect of the below services, this will provide incentive for those platforms and services to enter into commercial agreements with Australian news

media businesses.

Nine believes that the statement of expectations should identify the following digital platforms and services as those which should be designated if commercial agreements are not entered into and maintained:

- a. Facebook - News Feed
- b. Youtube
- c. TikTok
- d. Twitter

[REDACTED]

[REDACTED] For example, the US is currently reviewing its media laws - in Google's recent submission to the US Copyright Office it indicated that it does not believe that the NMBC should be replicated in the US:

"While no digital platform has been designated under the code at this stage, we believe that it should not be replicated,"

...

"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.

"In addition, the primary benefactors of such a code would be a small number of incumbent media providers - stifling further media diversity."

[REDACTED]

[REDACTED] *The Sydney Morning Herald* (a Nine publication) has recently published an article¹ outlining this behaviour and has obtained the below quote from former ACCC chairman Rod Sims:

"It's amazing to me that [the company] would so deliberately lie," he said. "What's more amazing though is that [it] would deliberately put lives at risk."

[REDACTED]

Nine believes that if the above platforms and services are signaled by the Government as those which should be designated then Nine and other Australian news media businesses will

¹<https://www.smh.com.au/world/north-america/facebook-deliberately-blocked-australian-government-and-health-care-sites-last-year-report-20220506-p5aj0u.html>

have the appropriate protections in place and help secure the ongoing sustainability of Australian journalism.

2.3 Other concerns

Nine notes that it is still experiencing difficulties with some aspects of its relationship with the digital platforms and services.

Deep fake ads using our talent are highly detrimental to Australian consumers, as well as to our brand and to our talent. Despite repeated requests, we are still facing roadblocks with the effective takedown of these advertisements. While we recognise the advances which have been made in restricting comments and providing better moderation tools for current content, there are still issues with turning off historical user comments and user comments generally, which means significant risk remains with Nine from a defamation and litigation perspective.

Whilst not strictly within the ambit of the NMBC, [REDACTED]

[REDACTED] there are also other business critical issues that the platforms and services are not addressing and not working with us to resolve. These are just some of many examples of ongoing issues which have a cumulative effect on the sustainability of Australian news media businesses.

Furthermore, the sheer size and scale of the digital platforms presents a possible existential risk for the sovereignty of Australia's news content. As of 10 May 2022, the combined market capitalisation of Alphabet, Meta, Amazon and Apple is almost US\$6 trillion². Each of these platforms dominate with unmatched market power in the markets that they operate and have successfully exploited content created by others for significant financial gain. If any of these platforms decided to put colossal financial weight behind the creation of news content, rather than leveraging existing content, the sustainability of Australian-based public interest news could be at risk. Although these platforms have generally stayed clear of news content creation to date, there are some examples of encroachment into market segments beyond their core business - e.g. Meta's Bulletin product.

3. Ongoing review process critical

Overall, the NMBC was critical in providing the right incentive for the digital platforms and services to negotiate with Australian media companies. Nine recognises that it is now receiving substantial remuneration from Facebook and Google, which would not have been possible without the NMBC being enacted, and that that remuneration is contributing to Nine's ability to continue to provide news content which is incredibly valuable to all Australians, particularly as we continue through the pandemic and an election year, when trusted news content is so important. However, Nine notes that this has not been every Australian media company's experience.

Nine's concern is that without frequent review and attention given to this process, large digital platforms may not be as incentivised to enter into commercial negotiations or may engage in conduct that significantly devalues the content right before a contract review. Similarly, frequent review of those entities and services which should be captured by the NMBC, should be essential to the review process.

It is Nine's view that 2 yearly reviews are critical - this is a time of change - new and existing digital platforms and services are displaying new and concerning ways of demonstrating and exercising market power in areas and in ways which were previously not contemplated by the initial review.

² As per NASDAQ. Meta \$0.5T, Alphabet\$1.5T, Apple \$2.7T, Amazon \$1.1T

At the time the NMBC was introduced, we were not facing the same issues as we are now, and over the past 2 years new platforms and services have entered the market. Notwithstanding this, there is a common theme with the development and emergence of these platforms and services - unfair market power - the consequences of which can be unpredictable and create long term damage. Nine is concerned that in 2 years from now new platforms and services will enter the market, and that existing platforms and services will expand in ways that we currently cannot foresee. It is critical that frequent and timely reviews take place to stop any further unfair marketplace power entrenchment - whether from new or existing platforms and services.

This ongoing threatened power dynamic needs continual management and review otherwise the ongoing sustainability of Australian news media businesses and the content that they create for Australian audiences will be at stake.

Please do not hesitate to contact me if you would like any further information or would like to discuss this matter.

Yours sincerely

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