Judith Neilson Institute for Journalism and Ideas

One year of the News Media Bargaining Code

Findings by the Judith Neilson Institute for Journalism's inaugural Alan Moorehead Journalist-in-Residence

Report by Bill Grueskin

Alan Moorehead is arguably Australia's greatest foreign correspondent. Perhaps even this country's greatest journalist. Yet he is largely forgotten.

Through our International Journalist-in-Residence program we hope to inspire this and future generations of Australian journalists to match, or even exceed, Moorehead's formidable record.

The Washington Post called Moorehead one of the finest writers in the English language. As a reporter, he witnessed many of the great historical events of the 20th century. He debated strategy with Churchill and Gandhi, fished with Hemingway and drank with Graham Greene.

He started on the Melbourne Herald but was a regular contributor to the great mastheads of his time – the New Yorker and the London Daily Express to mention just two. In his spare time, he wrote 25 books, many of them best-sellers.

His biographer, Thornton McCamish, said: "Perhaps Moorehead's most enduring legacy lies in those driven by his example to go out into the world in search of astonishing stories."

That is the sentiment that informs this program, and I'm delighted to say that our inaugural Alan Moorehead Journalist in Residence has more than exceeded our expectations during the six weeks he has spent with us here in Australia.

While in Australia Bill has undertaken an important and compelling piece of work – examining the genesis and implementation of the News Media Bargaining Code, one year on, and as a review of the Code gets underway.

It's been a privilege to watch a master craftsman at work.

Bill's conducted a plethora of interviews with many of the key players involved with the development and implementation of the Code, as well as those impacted by it in both the metro capitals, and regional Australia.

This article is an important step in understanding how the Code came to be, is working in practice, and how he believes other countries might use Australia's experience as a template for governing the relationship between the digital giants and the news media industry.

Mark Ryan

Executive Director
Judith Neilson Institute for Journalism and Ideas

Bill Grueskin is Professor of Professional Practice at Columbia University's Graduate School of Journalism in New York.

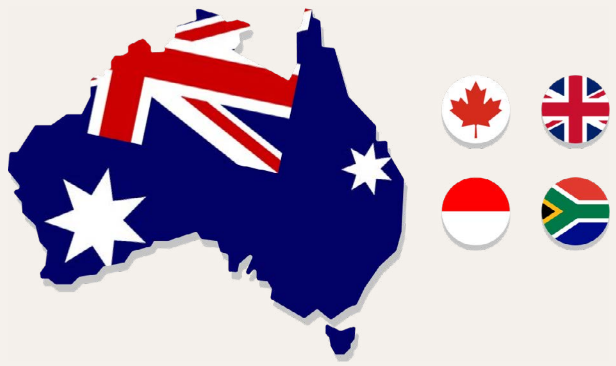
SYDNEY – More than a dozen years ago, the US Federal Trade Commission sponsored an ominously titled workshop, "How Will Journalism Survive the Internet Age?" The gathering included a number of dignitaries, but the marquee name was one familiar around the world: Rupert Murdoch.

He used the stage to launch a fusillade against his digital competitors: "Our customers are smart enough to know that you don't get something for nothing. That goes for some of our friends online, too. And yet there are those who think they have a right to take our news content and use it for their own purposes without contributing a penny to its production."

It took Murdoch more than a decade, but he finally got his way with some of his online "friends" – not in the US, where he had become a citizen, but in his native Australia. Media companies, including Murdoch's News Corp, helped convince the Australian parliament to pass a law that is now compelling Facebook and Google to pay substantial sums – sometimes in the tens of millions of dollars – to news organisations whose headlines frequently appear on platforms' pages.

The legislation, known as the News Media Bargaining Code, has enabled Australian news organisations to extract more than $200 million in the year since it went into effect. As a result, the public Australian Broadcasting Corporation can place at least 50 new journalists in underserved parts of the country, while the McPherson Media Group, which publishes such papers as the Yarrawonga Chronicle and the Deniliquin Pastoral Times, expects tech money to fund up to 30 percent of editorial salaries. Monica Attard, a journalism professor in Sydney, says she can't persuade most students to take internships these days because it's so easy for them to land full-time jobs – and she assumes the code deserves much of the credit: "I swear to God, I have not seen it like this in 20 years."

Now, Facebook and Google (whose parent companies are Meta Platforms Inc. and Alphabet Inc., respectively) are on the defensive as more countries consider their own versions of Australia's approach.



Canada and the United Kingdom are moving to enact similar codes, while officials in Indonesia and South Africa have voiced plans to do the same. In the US, Congress is looking for ways to make Google and Facebook pay for content, though legislation to support local journalism has stalled in Congress.

Australia looks like a success story to those who've long yearned to force big tech to prop up suffering newsrooms. But it's a murky deal, with details guarded like they're the launch codes for nuclear missiles.

If you want to know how much money the platforms have paid to Australian news organisations, you're out of luck. If you want to learn whether those newsrooms are spending that money to bolster journalism, rather than pad executives' salaries, you're also out of luck. I've been talking to newsroom managers most of my adult life, and I've never seen a group so reticent to share details of anything related to their business – thanks to iron-clad secrecy agreements insisted upon by the tech companies.

The riches aren't spread equally. SBS, one of Australia's two major public broadcasters, got money from Google but was inexplicably shut out by Facebook. Croakey Health Media, a not-for-profit site that provides valuable information on COVID and Indigenous medical issues, got the back of hand from both companies – without an explanation.

In the words of one Sydney media executive, "It's like a brown paper bag gets stuffed with money, is shoved across the table, and then the platforms can say, 'Now just shut the f— up.'"

Still, Australia – with a population just over 25 million – has managed to force tech companies to do something they've long fought: provide financial support to the news business under government coercion. For years, the tech platforms have managed to forestall such regulations by donating to noble-sounding initiatives and mounting extensive PR and lobbying efforts. But Australia found a work-around for that, for a variety of reasons – ranging from a wily competition czar named Rod Sims, to the heavily concentrated nature of the country's media market.

At the heart of the code is the argument Murdoch made at the workshop back in 2009, that digital companies profit when they surface journalists' headlines and news snippets. And yes, it's true that if you search on either platform for "Ukraine" or "COVID," you'll see a slew of links and bits from news organisations.

Tech's retort has been twofold: First, journalists ought to benefit from the visitors sent their way, and it's not Silicon Valley's problem if they can't turn that traffic into meaningful advertising or subscription revenue. And second, as Google notes, a newsroom that wants to withhold its content from search can easily do so.

For years, Australia's media companies have suffered from the same trends plaguing newsrooms around the world – declining ad revenue, shrinking staffs, shuttering publications. Into the breach stepped the Australian Competition and Consumer Commission, which regulates everything from false advertising to grocery prices. After months of study, and reams of submissions from news organisations and citizens, the ACCC

determined what journalists already knew: American tech companies were vacuuming up hundreds of millions of ad dollars that once went to news companies. And, there was a gaping imbalance of power between the tech and journalism businesses.

To push their argument, media companies were happy to trumpet their own weakness. In mid-2020, News Corp Australia complained that "digital platforms have become a default conduit for many consumers" and added that the snippets that accompany headlines in search "are more likely to result in a user remaining within the digital platform, and not reading the publisher's full content."

The efforts made strange bedfellows, with the progressive Guardian, which established a beachhead in Australia in 2013, on largely the same side as Murdoch. "We had to make sure we were part of this; we could not afford to be excluded," Lenore Taylor, editor of the Guardian Australia, told me. Her colleague, Managing Director Dan Stinton, added that "the Guardian, News Corp, Nine (a large broadcaster/publisher) – anyone that runs a traditional advertising business is both dependent on Google and Facebook for traffic, and competes with them in the digital advertising market. We're dependent on these platforms to give us more than half our traffic."

Newsrooms found a powerful ally in Sims, the longest-serving chair of the ACCC. As he said in a recent interview, "While Facebook and Google need journalism, they don't need any particular media company." Meanwhile, he noted, "All the media companies need Facebook and Google. What they've done is intermediate themselves between journalists and people who want to view the content, for their own financial advantage, obviously."

"Many market failures you don't have to address," says Sims, an economist by training. "But this one is really important because it affects journalism, and therefore it affects society. Journalism is the classic public good: We all benefit from it."

The Australian solution was clever. Rather than try to tax the tech companies, or impose a fee based on copyright infringement, regulators decided to let media companies bargain with Google and Facebook – albeit with a Damoclean sword over the process. If Facebook or Google refused to negotiate, they could face stiff penalties. Or if a news organisation couldn't work out a deal, it could appeal to the Australian treasurer, who could "designate" one of the tech companies, setting in motion an unusual process that could end with each company submitting offers, and an arbitrator accepting one of them. So if, say, The Sydney Morning Herald thought it deserved $5 million a year while Google thought it should pay $100,000, the arbitrator would have to choose one of those two numbers. No compromise, no splitting the difference.

Tech companies went on the attack. Google threatened to withdraw its search engine from the country altogether, and surfaced popups with a yellow sign warning, "The way Aussies use Google is at risk. Your search experience will be hurt by new regulation."

Facebook went further, pulling all news off its platform for Australians. But they bungled the job so badly that they also managed to remove public-service information about bush fires and COVID-19, and even support pages for victims of sexual violence. "It was the worst calculation they could ever have done," recalls Bruce Ellen, general manager of the weekly Latrobe Valley Express and leader of a regional-newspaper association. "It galvanized not just the media but the general public."

The backlash was immediate in Australia and beyond. Tech had lost the PR battle, even as it did extract some important concessions — particularly in pushing back against sharing information about its algorithms and data. "We've stood up to the digital giants," said Australia's treasurer, Josh Frydenberg. "We didn't budge. We want the rules of the digital world to replicate the rules of the physical world."

That's one way of looking at it. Andrew Jaspan, a Melbourne journalist with a long career in Australia and the UK, had a more acerbic take: The tech companies, he said, made "a Faustian pact to just get it off the table. If they didn't put the fire out here, it could spread across the world. So they wanted to shut it down and get these people off their backs."

The Money Flows In

Tech and media started negotiating even before the legislation was passed. Google agreed to pay Nine Entertainment Co., which owns a major television channel, multiple radio stations and The Sydney Morning Herald and The Age in Melbourne, a reported $30 million or more annually for five years; one source estimates the total value of Nine's deal with the two tech companies at more than $50 million a year. The tech companies also agreed to pay News Corp Australia at least $70 million as part of a larger arrangement that includes advertising and other business, according to two media sources with knowledge of the terms. Revenue from the Code was "a significant factor" in the Guardian building its Australia newsroom from 70 to more than 100 journalists in just the past year, its executives say; the UK's PressGazette estimated the Guardian's take at around $5 million.

Smaller publishers snagged their own deals. Country Press Australia, a trade group that represents about 160 regional newspapers, got permission from the government to bargain collectively with both platforms.

I've reviewed their Google contract, which is loaded with confidentiality requirements, and it shows that the company will pay local newspapers roughly $31,000 to $62,000 per year, depending on their size and how many stories they generate.

Sims estimates the total paid out since the code passed at more than $200 million, based on what publishers have told him. Neither Facebook nor Google has been "designated" by the Treasurer, so no one has gone to arbitration.

But since there is no public accounting of who's getting what, news organisations aren't sure how much they should ask for or expect. There is no published set of metrics – such as page views or number of reporters – that tech companies use to determine what they'll pay.

Google says its payments are based on scale. The company looks at "how many news articles" sites are producing, says Richard Gingras, vice president for news, as well as their "existing audiences, the size of the market they are serving."

Such ambiguity leads to "massive information asymmetry," says Stinton of the Guardian. "I've done lots of commercial deals in media over the last 20 years, and it's very rare that you come to a position of negotiation with virtually no information as to the basis for determining payment."

Misha Ketchell is editor of The Conversation, a popular nonprofit site founded in 2011 that teams up with academics to address topics in the news. He's one of the few newsroom managers willing to talk publicly about how his negotiations went.

Both Facebook and Google started with a "charm offensive," he says, "lots of discussion about user values and ways they can help us and how they're experts, blah, blah, blah." But when it came time to talk numbers, he went "into the discussion knowing absolutely nothing … no sense of where the market is, where it's anchored, what previous deals were worth."

Google eventually offered The Conversation enough to fund one to two journalists on a staff of around 30. "We were like, is that a lot? Is that a little? I don't know, because the whole thing's entirely opaque. There's no anchoring in the market, there's no history." He cut his deal, then heard some similarly sized news organisations did better, so he tried to renegotiate – and got a modest increase.

Tough as that was, it went much better than Facebook negotiations. Those talks also started off on an upbeat note, Ketchell remembers: "They said 'We love the Conversation, we see it's really valuable.' And then, at a certain point, they just said, 'No, we're not going to do anything.'
No explanation. It's just the calculation that they've paid enough people now, and it should be enough." (Gina Murphy, a Facebook spokesperson, did not address individual cases. She did state that the percentage of users who say they get their news from Facebook has been dropping since 2016.)

Most curious of all, Facebook stiffed SBS, a large public broadcaster that operates TV, radio and digital operations throughout Australia, geared largely to the country's multilingual and multicultural audiences. SBS depends heavily on government funding, as does the ABC, which did pull off a deal with Facebook. So why has SBS gotten nothing? Managing Director James Taylor has no idea. As he told a parliamentary committee last year, "Facebook has not provided us with clarity as to their rationale for not entering into an arrangement with us. We've attempted to elicit a response from Facebook about their rationale. We're still a little in the dark." (Facebook did not respond to my request for comment on SBS or The Conversation.)

Frydenberg, Australia's treasurer, doesn't appear eager to force designation over the SBS denial: "While I retain the power to initiate the designation process should developments warrant it, I would urge both platforms to continue negotiating in good faith," he told me in a written response to questions.

Facebook did not respond when asked to address individual cases. Gina Murphy, a spokesperson, did state in an email that since Facebook hasn't been designated, "the law does not apply to Meta." She also pointed to a three-year, $15 million AUD ($11 million USD) investment in Australian journalism, separate from the code.

The refusal by tech companies to pay or negotiate with some sites means that the country's treasurer will have to decide whether to push through designation, and possibly arbitration. Melissa Sweet, editor-in-chief of Croakey Health, says she's going to ask regulators "to compel them to negotiate with us." But she's not optimistic. "We don't have that political power."

When Google and Facebook do deals, they're careful to ensure they aren't framed as payment for links or clicks. To get around that, they've often positioned these as compensation for participating in the Facebook News section, or something called "Google News Showcase," which is a collection of three-story modules that news sites' editors assemble, often twice a day.

The Showcase is an odd vehicle. Many Australians have never heard of it. Publishers give mixed reviews on the amount of traffic it drives. A Google spokesperson says the Showcase isn't so much about page views; it's "about driving engagement and deepening that relationship with readers."

And for small news organisations, posting multiple stories a day, seven days a week is a big ask. "That's just an impossible task, unless you're putting absolute rubbish on your website," says Matt Nicholls, who edits – and writes most of the stories for – the Cape York Weekly in Queensland. "We don't work in that sort of cycle. I've noticed other papers are putting up stories that they would never ever put in their print publication." Nicholls has a point.
Among the articles recently posted on Showcase by a paper in Victoria is a piece of sponsored content, "All Smiles at KND Dentures."

For companies that did a deal, though, the Showcase is a minor inconvenience, given the cash flowing in. It "is far from ideal," says Stinton of the Guardian. "But it was a pragmatic outcome. We were satisfied with the headline number that we got from them. And so we went 'OK, well, we can do it on these terms.'" Taylor, the Guardian editor, says tech funds have "made a huge, huge difference to our newsroom" – enabling the site to double its audio offerings and bolster coverage beyond Australia's large metro areas.

Bruce Ellen, from Country Press Australia, said there had to be some mechanism for payment. Several papers "wanted to approach on the basis that they should give us money for nothing. That was never going to happen. There's got to be commercial negotiation where they get benefit, we get benefit." In the case of Facebook, that meant an "innovation fund" for his members, of undisclosed length and amount.

There's no doubt that the threat of arbitration, where a newsroom could demand an extraordinarily high number, brought the tech companies to the table. Facebook is so concerned about designation that, according to several newsroom managers, the company told them that their deal will have to be renegotiated if they're designated by the Treasurer. A Facebook representative did not respond to a request for comment.

The Platforms Face a Changed World

The Australian government is about to begin a review of the Code. Meanwhile, Sims is stepping down, and the new head of the competition commission is expected to be Gina Cass-Gottlieb, a highly regarded attorney who has worked for Lachlan Murdoch, Rupert's son, and as a director of the Murdoch family trust. She also has "done an enormous amount of work" for Nine, another Australian media giant.
Cass-Gottlieb said recently that she plans to "cease private practice and relinquish any positions that may impact on my ability to perform the role," according to The Australian Financial Review. Treasurer Frydenberg told me he's sure that Cass-Gotlieb "will comply with her statutory obligations and discharge her duties in a fair and impartial manner."

Australian Government

As he prepares to leave office, Sims is taking calls from legislators and regulators around the world – including Capitol Hill. He says the benefits of the Code far outweigh any negatives, and estimates that companies employing at least 90% of Australia's journalists have done deals. He isn't concerned about the opacity of Australia's system. "The objective was never transparency. The code is being criticized for not achieving things it never intended to achieve. The simple thing was evening out the bargaining power. If deals are done that the media companies are happy with, then it's a success."

Maybe. But it's also possible that officials and executives underestimate the problems with the code's secrecy. This isn't a simple commercial deal. Government is deeply involved, and Sims is the first to note that these deals wouldn't be happening without the code's enforcement provisions. Given the government's role, citizens have a right to know how much tech companies are paying, and how they're deciding which media companies to pay or ignore. News companies' reticence isn't especially noble, either. Journalists, who expect openness from others, are taking buckets of money from Google and Facebook, in a way that helps tech avoid tougher regulation. Yet they also agree to keep these deals secret.

Meanwhile, Google and Facebook face a much bigger question: Now that they've opened the door in Australia, how can they avoid conducting countless negotiations, and making multimillion-dollar payments to companies, in markets around the world?

Canada is set to introduce similar legislation "as soon as possible," according to Heritage Minister Pablo Rodriguez. The framework is expected to closely resemble Australia's code, but Rodriguez promises it will be "more transparent." Paul Deegan, CEO of News Media Canada which represents almost 600 print and digital news publishers, says there is "unanimity amongst our membership in terms of the need for legislation modeled on what has been done in Australia."

In the UK, authorities are developing a code that would regulate the relationship between platforms like Google and Facebook, and third parties, including news publishers. The European Union extended copyright protections for news publishers, requiring tech platforms to pay for displaying anything beyond a basic URL. The law was first put to the test in France, where Google is appealing a fine of 500 million euros for failing to negotiate a deal with publishers in good faith.

In the US, efforts to level the playing field have been led by Sen. Amy Klobuchar, a Minnesota Democrat. Her bill would allow publishers to negotiate collectively with tech platforms but it lacks the arbitration feature – and, thus, the hammer – of the Australian model. But Australia's system has its critics in the US. One is Hal Singer, managing director of Econ One Research, who testified last month before a Senate subcommittee on the future of local news. The code gave too much to big media companies, he said in an interview. "You weakened the coalition and you thereby left the 'smalls' in a more vulnerable bargaining position vis-a-vis the platforms."
A Google spokesperson told me that "by and large, the solution that we find in Australia is definitely one that works for us" – in large part because no company has been designated or been forced into arbitration. Still, Google has made clear it doesn't want to see Australian-style intervention in its home market. In a filing disclosed by The Sydney Morning Herald, the company told US regulators that Australia's code "should not be replicated." The tech giant also warned that "the primary benefactors of such a code would be a small number of incumbent media providers - stifling further media diversity."

But tech companies face a problem: They haven't come up with a reason why they have managed to adjust to Australian regulations but would fight a similar arrangement in the US or the EU. They know, though, that if the idea spreads, their burden will become far more complex and expensive.

Australia is not a big market, yet Facebook and Google have found themselves negotiating with dozens of news sites. Imagine attempting that in the US, whose population is 13 times greater and whose media market is far more intricate. If you extrapolate the tech companies' experience to the US, they would wind up paying nearly $2 billion US ($2.6 billion AUD) a year to American news organisations.

There are other complications. Suppose a repressive country demands that tech firms pay up; how would those companies respond? Or what will Google and Facebook do if they're asked to write checks to state-owned news outlets subject to leaders' whims and fancies?

Alternative scenarios for diverting money from tech to news have their own problems. Nieman Lab's Joshua Benton, among others, has advocated for a tax on big tech's revenue. That would generate billions of dollars. It would also open the difficult question of how that money would be disbursed, and who would decide. Having a government agency or committee picking winners and losers among news organisations would raise difficult issues around fairness and independence.

And some worry that the new revenue will build a troubling dependency for news organisations on tech dollars. "What if Google decides it's a bad deal for them?" asks Nicholls, the weekly editor. "If you need Google funding to prop up your journalism, to keep your journalists employed, that's not sustainable."

Bill Grueskin is Professor of Professional Practice at Columbia University's Graduate School of Journalism in New York.

He has held senior editorial roles including: executive editor at Bloomberg, overseeing efforts to train the global news staff on maximising the benefits of digital platforms; deputy managing editor of The Wall Street Journal and managing editor of WSJ.com; city editor of The Miami Herald; and founding editor of a newspaper on the Standing Rock Sioux Indian Reservation.

He has degrees in Classics from Stanford University and in international economics and US foreign policy from Johns Hopkins' School of Advanced International Studies.

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