Regulating News and Disinformation on Digital Platforms:

Self-Regulation or Prevarication?

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Abstract: In February 2021 two initiatives for regulating digital platforms in Australia were implemented. The News Media Bargaining Code ("News Code") attracted international attention as a legislative means of forcing platforms to pay for news content, while the Australian Voluntary Disinformation and Misinformation Code ("Disinformation Code") was modelled on an international initiative. Both were developed to meet Government policy formulated in response to Australia's Digital Platforms Inquiry. Whereas the Inquiry recommended the use of co-regulation, Government policy switched to voluntary codes for both, then to a legislative scheme for the News Code. This article examines the schemes and critiques the policy on which they are based. It applies a conceptual framework to assess the optimum conditions for the use of co-regulation and self-regulation. It finds that a self-regulatory scheme of voluntary codes was never a suitable approach for the News Code, and that the close involvement of the regulator on the Disinformation Code — without a suitable remit or enforcement powers — distorts the self-regulatory model. This can in part be explained by the failure to address well-recognised flaws in the co-regulatory framework for telecommunications and broadcasting, the consequences of which are now being seen in attempts to regulate digital platforms.

Keywords: Digital platforms, communications, media, co-regulation, self-regulation.

Introduction

For a short time in early 2021, global attention turned to Australia as our Parliament grappled with the challenge of regulating digital platforms. The heightened level of international interest was prompted mostly by the public drama surrounding Facebook's sudden decision to remove news (and, temporarily, a number of non-news information services) from its

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newsfeed. In an international context, as Lindsay (in print) has shown, Australia's initiative attracted attention for its use of competition law, rather than copyright law, to force platforms to pay publishers for news. While flawed, the scheme appears to have succeeded at least to some extent and for at least some publishers, with deals worth up to $250 million annually for news media businesses (Pash, 2021).

Despite its high profile, the News Media Bargaining Code (now Part IVBA, News Media and Digital Platforms Mandatory Bargaining Code, of the *Competition and Consumer Act 2010* (Cth)) (referred to below as "the News Code") is not the only attempt at regulation of digital platforms in Australia; instead, it can be seen as one of several initiatives aimed at bringing digital platforms within the regulatory framework. This article contrasts the approach taken in the News Code and in the new Australian Code of Practice on Disinformation and Misinformation ("the Disinformation Code"), both of which were developed in response to Government policy that aimed to

> deliver a regulatory framework that is fit for purpose and better protects and informs Australian consumers, addresses bargaining power imbalances between digital platforms and media companies, and ensures privacy settings remains [sic] appropriate in the digital age (Australian Government, 2019, p. 3).

The extent to which the regulatory framework can be described as "fit for purpose" is questionable. In particular, there is a level of uncertainty around the use of co-regulation in the communications sector, with previous policy reviews having shown some fundamental problems in the way it has been applied. As this article shows, the uncertainty surrounding *co-regulation* might in turn explain the inconsistency in how *self-regulation* has been applied to digital platforms.

Evolving government policy

Regarding the News Code and the Disinformation Code as two products of the same policy is important because it shows the variety of regulatory methods and tools currently being employed to tackle platforms. While they are both described as "codes", the first is an example of direct (or government) regulation, while the second constitutes industry self-regulation, albeit with a new level of government guidance. Neither can be described as "co-regulation" which, as explained below, combines industry-based rule-making with enforcement by a government regulator. The development of two new codes, neither of which is co-regulatory, is an interesting development in two respects. First, co-regulation has now been in place for almost 30 years in the communications sector, most notably in the form of codes such as the *Telecommunications Consumer Protections Code* ("the TCP Code") and the *Commercial Television Industry Code of Practice*. As Lee (2018, pp. 26-33) has explained, the regulatory

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framework in Part 6 of the *Telecommunications Act 1997* (Cth) – under which the TCP Code is registered – was designed both to facilitate market liberalisation in a technologically complex and fast-changing environment, while also addressing problems that had arisen in relation to consumer protection. Second, co-regulation was the approach the Australian Competition and Consumer Commission (ACCC) recommended for both news remuneration and disinformation in the Final Report of its Digital Platforms Inquiry (ACCC, 2019). The Government policy underlying both the News Code and the Disinformation Code (Australian Government, 2019; referred to below as "the Implementation Roadmap") was a direct response to the ACCC's recommendations. However, in declining to pursue a co-regulatory approach, the Government first opted for two voluntary or self-regulatory schemes, then changed course six months later and converted the News Code to legislation while keeping the Disinformation Code as self-regulation.

The Government's initial decision to use self-regulation for the two schemes was a curious move, especially in view of the increasingly common trend internationally away from platform self-regulation and towards government intervention (Gorwa, 2019, p. 2), albeit with lingering concerns for protection of freedom of speech and expression when addressing mis- and disinformation. In a broader sense, regulation of digital platforms needs to be seen in the context of the patchwork approach to regulation of the Internet that has been informed by: late 20th century enthusiasm for cyberspace as an "unregulated anarchy of open communication" (Riordan, 2016, pp. 4-5); early gains made by corporate first movers, including the emergence of s. 230 of the *Communications Decency Act of 1996* in the US and the *EU e-Commerce Directive*, limiting the liability of Internet intermediaries (Suzor, 2019, pp. 43-45); the gradual and pragmatic responses and incursions into regulation which now make the Internet "a curious, unprecedented hybrid of decentralised international organisational structures, informal voluntary contributions and governmental influence" (Oster, 2017, p. 214); and the more recent attempts to bring digital platforms within national legal frameworks, exposing what Gillespie (2018, p. 25) sees as "the myth of the neutral platform".

Evolving approaches to platform governance

Just as the *Communications Decency Act* is now being reconsidered in the US, the role of these intermediaries is being reconsidered here in Australia in spheres ranging from adult cyber abuse (in the Online Safety Bill 2020 (Cth)) to classification of content (Department of Communications and the Arts, 2020), data privacy (Attorney-General's Department, 2020), and defamation (Attorneys-General, 2021). The environment that gives rise to these policy challenges has been described by media and communications scholars as the "platformisation"

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of the Internet (see, for example: Flew, 2019; Van Dijck, 2018). In legal and regulatory terms, these issues are being approached in a relatively siloed manner: there is no unifying concept of "digital platform service", for example, to connect the matters dealt with under the Online Safety Bill with those covered by the Disinformation Code and the News Code. In this respect, the Australian regulatory approach runs counter to that being developed in scholarly work on digital platforms, in which the concept of "platform governance" (e.g., Gillespie, 2018; Gorwa, 2019; Helberger, Pierson & Poll, 2018; cf. Picard, 2020) is evolving to cover the range of different domains, actors and tools that will be called into operation by public policy.

The thinking involved in this scholarly work has informed, but is not the subject of, this article, which analyses two new schemes and considers how these contrasting attempts to regulate digital platforms conform with or depart from established regulatory practice. It begins by relating the origins of these schemes in the Digital Platforms Inquiry, followed by a description of the operation of each scheme. It then assesses the two schemes against a framework for determining when self- and co-regulation are appropriate regulatory approaches, finding that remuneration for news content was never a subject for self-regulation but that, on balance, a self-regulatory scheme was an appropriate approach for disinformation. The article concludes that these two attempts to regulate digital platforms can be seen as part of a haphazard approach to the use of self- and co-regulation in the communications sector in Australia. This in turn can be largely attributed to well-recognised flaws in the statutory frameworks for co-regulation. The effects of the failure to confront these problems is seen in the ill-fated attempt to use a voluntary code for news remuneration and the version of self-regulation used to address disinformation.

How the Digital Platforms Inquiry Shaped the Two Schemes

The Digital Platforms Inquiry (DPI) commenced in December 2017 with the issuing of terms of reference by the Government and ended in July 2019 with the publication of the ACCC's Final Report. As Flew & Wilding (2020, p. 52) have explained, it resulted from a commitment made by the Government to independent senators in return for agreement to media law changes in 2017, most significantly the repeal of the remaining cross-media ownership rules. These reforms were explained in terms of the profound effects on news media in Australia of digitisation and the arrival of foreign news services, but also the rise of digital platforms as key distributors of news and information. Accordingly, the ACCC was directed under s. 95H(1) of the *Competition and Consumer Act* to investigate various aspects of the role of digital platforms, including their impact on media advertising markets and the extent to which they exercise market power in commercial dealings with creators of journalistic content and advertisers. The ACCC's findings were substantial and varied, covering recommendations for

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changes to competition law, consumer law, privacy law, copyright law and media regulation. The critical outcomes that provided the basis for the new laws embodied in the News Code, the most significant outcome of the DPI to date, were the findings (ACCC, 2019, p. 58) that Google and Facebook have substantial market power in, respectively, the markets for Internet search and Internet search advertising and the markets for social media services and display advertising. Equivalent findings were not made in relation to the other products and services offered by these two platforms (for example, YouTube and Instagram) nor in relation to other digital platforms, with the ACCC preferring to monitor developments more generally. The ACCC also said that there was likely to be a market for news referral services, but did not go as far as making a finding to that effect; instead, it found that there was a substantial imbalance in negotiating power on the part of the platforms and news providers (ACCC, 2019, p. 99).

Focus on news remuneration and disinformation

In its Final Report, these findings on market power are the foundations for further inquiry by the ACCC into specific practices by digital platforms and their impact on other sectors of the Australian economy and on the community. In Chapter 5 of its report, the ACCC considered the commercial relationships between Australian news media businesses; in Chapter 6, it addressed the effects of platforms on the quality of choice of news and journalism available to Australians. It is these two chapters that led to recommendations for codes of conduct governing the commercial relationship between news providers and digital platforms (Recommendation 7, p. 257) and for a Digital Platforms Code to counter disinformation (Recommendation 15, p. 370), as well as for monitoring by the ACMA of platforms' voluntary initiatives at identifying to their users more reliable sources of news and other content, known as "credibility signalling" (Recommendation 14, p. 369). On the first of these, the ACCC concluded there was a significant bargaining imbalance between Australian news businesses on the one hand, and Google and Facebook on the other. It observed:

> The critical factor creating this imbalance is that for many media businesses, Google and Facebook are 'must have' platforms … media businesses cannot afford not to be on the Google and Facebook platforms and therefore, Google and Facebook have become unavoidable trading partners for many media businesses (ACCC 2019, p. 253).

A concept that underpinned this approach but which received more explicit expression in a subsequent ACCC paper (ACCC, 2020, p. 11) is the "indirect value" that platforms receive from consumers being attracted to use the platform on account of the news content.

On the second issue, the ACCC observed:

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> International examples and growing public concern about the presence of highly inaccurate and misleading content surfaced to Australian consumers present a compelling case for the Australian Government to address these issues (ACCC 2019, p. 369, footnoted omitted).

A review of the evidence and rationale underpinning these recommendations is beyond the scope of this article, but the recommendations themselves are explained further in the section below. A review of submissions made by industry participants, government actors and civil society is provided by Flew *et al.* (2021).

How the ACCC recommendations were reshaped in government policy

Although the ACCC gave more coverage to news remuneration than disinformation, both were subsequently incorporated into government policy. After consultation by Treasury and the Department of Communications and the Arts on the Final Report, the Government responded in late 2019 with its Implementation Roadmap, supporting in principle most of the ACCC's findings. These included Recommendations 7, 14 and 15, mentioned above. The Government said it would ask the ACCC to work with platforms to develop voluntary codes "to address bargaining power imbalances between digital platforms and news media businesses" (Australian Government, 2019, p. 15) and that the ACMA would oversee the development of "a voluntary code (or codes) of conduct for disinformation and news quality" (Australian Government, 2019, p. 16). The ACCC was to report on progress with the News Code by May 2020, with the codes to be finalised by November that year, while the ACMA was to report on the adequacy of the disinformation code by June 2021. While the ACCC's recommendations were the starting point for both initiatives, the Government said that work on the Disinformation Code should also be informed by "learnings of international examples, such as the European Union Code of Practice on Disinformation ['the EU Code']" (Australian Government, 2019, p. 7).

In addition, advertising arrangements – closely related to the news media bargaining issues – were to become the subject of a new Digital Platforms Branch of the ACCC charged with monitoring "ad tech" arrangements (Recommendation 5 in Chapter 3, p. 157).

The release of the Implementation Roadmap was followed by the ACCC issuing guidance to Google and Facebook in January 2020 on the development of voluntary codes of conduct. However, in April 2020 the Government announced that progress on the News Code was too slow, and that this Code would now be mandatory, not voluntary. In May 2020, the ACCC released a Concepts Paper (ACCC, 2020) on the design of a legislative scheme for the News Code. In July 2020, after receiving submissions on the Concepts Paper, the ACCC issued an

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Exposure Draft of proposed legislation, before a bill for the News Code was tabled in November: the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020.

In contrast to the formality in the development of this scheme, the development of the Disinformation Code was marked mainly by discussions between the ACMA and the industry association representing the platforms, DIGI, throughout 2020, and by the ACMA issuing a Position Paper (ACMA, 2020) in May of that year, ahead of DIGI releasing a draft code for consultation in October.

It will already be evident that between the point of the ACCC's recommendations and the enactment of the News Code and publication of the Disinformation Code – both in the week of 22 February 2021 – there were some major twists in the development of these two schemes. These variations, explained in the next section, reveal something of the difficulties of regulating dominant, global businesses, and something of the compromises made in doing so.

The News Media Bargaining Code

Despite its short life, the News Code has already been the subject of some critique (Caffarra & Crawford, 2020; Lindsay (in print); Leonard, 2021). Here, as the aim is to compare it to other communications regulation, a brief overview of the scheme will be followed by a closer examination of the *form* of regulation.

How the Code works

In principle, the News Code could be applied to any digital platform service that is designated in an act of the Treasurer (as the responsible Government Minister) under s. 52E of the *Competition and Consumer Act*. The scheme does not name any company or service, nor does it give a functional definition of "digital platform service"; instead, it relies on the designation of specific companies and the services they provide. By introducing (in s. 52A) the concept of "responsible digital platform corporation" as well as "designated digital platform corporation", it employs a mechanism for ensuring that the local Australian subsidiaries of Google and Facebook will be involved in responding to requirements imposed under the scheme, including the conduct of the negotiation, mediation and arbitration components.

Two further comments on its application to these companies are needed. First, the underpinning premise is that the prospect of the scheme coming into effect would be enough to force the platforms into separate agreements with news providers as, by doing so, they might escape formal designation under the Code (see the report of the Senate Economics Legislation Committee ["Senate Committee"], 2021, p. 27). This explains the negotiation of amendments to the Bill and the introduction of an explicit requirement (explained below) for

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the Treasurer to take these deals into account before designating a platform. Second, despite the fact that these side deals might mean that the scheme never actually comes into effect, some of the heat in the early 2021 negotiations between the Australian Government on the one hand and the two platforms on the other came from the proposition, set out in the Explanatory Memorandum to the Exposure Draft (p. 9), that it could apply to several of their services including Google Search and Facebook News Feed, both of which would have far-reaching impact for the platforms' business models, here and overseas. In the end, it appeared that the Code – if it is ever triggered – would more likely apply to Google's News Showcase service and Facebook's News service. The narrowing of its application was part of the compromise that saw both platforms retreat from earlier threats to leave the Australian market.

Returning to how the code works, the overall design of the scheme can perhaps be best explained by recognising that the starting point is bargaining and the end point is arbitration – but only if the bargaining does not work. The bargaining takes place between the local entities of Google and Facebook as the "responsible digital platform corporations" and any "registered news businesses". There are limits on what counts as a news business, but a business will qualify providing (s. 52G): it meets a revenue threshold (s. 52M); it operates predominantly in Australia for the dominant purpose of serving Australian audiences (s. 52O); and it can point to some professional standards (s. 52P). In addition (s. 52N), it must be able to assert that the primary purpose of the mastheads or other news sources it seeks to register is to produce democracy-enhancing, public interest journalism (known as "core news", s. 52A). The news business can then bargain for remuneration for the use of *all* its news content, including sports, entertainment and other news ("covered news", s. 52A). There is a legislated requirement to conduct the bargaining negotiations in good faith (s. 52ZH).

If the bargaining stage is unsuccessful, a mediation stage (s. 52ZIA) with a mediator appointed by the ACMA must precede the arbitration stage, which is initiated (s. 52ZL) via a notice from the news business to the ACCC and the formation of an arbitration panel by the ACMA. At this point the "final offer arbitration" system comes into effect (see Subdivision C of Division 7) which, apart from permitted information requests, involves only one submission and response from each of the parties and a submission on limited factual grounds from the ACCC. The panel must choose one of the submitted offers unless it considers each offer is not in the public interest, but, in that case, it is limited to an adjustment of one of the offers rather than reaching a new amount based on further inquiry (s. 52ZX). There is no review available for these determinations. Although the Act does not provide a formula or methodology for assessing remuneration, it says that the panel must take into account certain matters: the benefit of the content to the platform and the benefit to the news business of having the content made available by the platform; the reasonable costs of the news business in producing the content

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and the reasonable costs of the platform in making it available; whether there is an undue burden placed on the commercial interests of the platform; and the bargaining power imbalance between news businesses and platforms (s. 52ZZ).

In addition to the remuneration aspects, there is an important "non-differentiation" rule (s. 52ZC) that means platforms, in making available news content as well as in crawling (which, in this context, refers to web data extraction) and indexing it, cannot differentiate: between registered news businesses; between these businesses and those that are not registered; or between unregistered news businesses. The effect of this provision (subject to an exception noted in relation to "points of contention" below) is thought to be that the platform must either be prepared to remunerate all news businesses that qualify under the scheme or offer no news content on the services designated by the Treasurer. There are also some specific obligations (known as the "minimum standards", see Subdivision B of Division 4), the most significant of which is that the digital platform must give registered news media businesses 14 days' notice of a change to its algorithms where the change is likely to have "a significant effect" on referral traffic to the news business (s. 52S). Digital platforms can make standard offers and registered news businesses can bargain collectively (as might occur for groups of smaller publishers), and agreements between platforms and news businesses can result in the parties contracting out of the legislative requirements (see Division 9). Finally, there are enforcement powers given to both the ACMA and the ACCC, with the most significant being the penalties that can be sought by the ACCC under the *Competition and Consumer Act* in the event of a breach of the requirements for non-differentiation and good-faith bargaining and for failure to comply with an arbitral determination (Division 8). Consistent with existing penalties under this Act, they amount to the greater of $10 million, three times the value of the benefit obtained, or (if the value of the benefit cannot be obtained) 10% of annual turnover in the previous 12 months.

Points of contention

While there were several contentious aspects in the design and implementation of the scheme, the platforms strongly opposed the "final offer arbitration model" in the exposure draft, with the mediation provisions seen to be an amelioration of the original design under which platforms could be made to enter arbitration if initial bargaining was unsuccessful. Google described the final offer arbitration model as "completely unreasonable and unprecedented" (Google, 2020a, p. 43), with Facebook describing it as "highly unusual" and "an entirely untested experiment" (Facebook, 2020a, p. 12).

Another aspect they objected to was the criteria for arbitration presented in the version of the scheme presented in the ACCC's exposure draft (Google, 2020a, p. 46; Facebook, 2020a,

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p. 16). This required arbitrators to take account of the benefits news provides to platforms but not the benefits news businesses obtain from platform referrals. As is evident from the description of the scheme above, this was remedied so that the two-way value exchange must be taken into account, with amendments requiring recognition of the reasonable costs of producing news *and* of making it available on digital platforms, even though there is still no mechanism for ascertaining the value of news content. The principal remaining objections put by Google and Facebook after the Bill had been tabled and before amendments were made in the final weeks are recorded in the report of the Senate Committee (2021, pp. 22-24).

As noted above, the final version of the scheme also included a last-minute amendment to the designation provisions that encourages platforms to develop agreements with news media businesses as a means of avoiding the operation of the scheme altogether. Paragraph 52E(3)(b) now states that, in deciding whether to designate a company and its applicable services, the Treasurer must consider whether the company has made

> a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).

Finally, changes to the non-differentiation rule now exclude the operation of that provision in situations including where "the differentiation arises solely from the amount of that remuneration" (s. 52ZC(4)). The combined operation of the new "significant contribution" test and the allowance in the non-differentiation rule for different ways of assessing payments to publishers was seen to address some of the most serious concerns expressed by the platforms with the original version of the legislation.

The Disinformation Code

Although the timeline for the development of the Disinformation Code was almost the same as that of the News Code – and although the two platforms that are the target of that scheme are also two of the eight signatories to the Disinformation Code – the schemes themselves are very different.

How the Code works

The Disinformation Code is published by Digital Industry Group Inc (DIGI), an incorporated association representing digital industry participants in Australia. DIGI's eight members comprise: the major "content platforms", Google, Facebook and Twitter; marketplace platforms, eBay and Redbubble; campaigning and fundraising platforms, Change.org and Gofundme; and Verizon Media, which provides businesses with services such as video

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streaming and cyber security. The eight Code signatories comprise four of the DIGI members (Google, Facebook, Twitter and Redbubble) along with Microsoft, TikTok, Adobe and Apple.

The Disinformation Code is designed to apply to digital platforms, but that term is not defined in the Code. Instead, the scope of the Code is prescribed in relation to two categories of services and products (see s. 4.1): "user-generated (including sponsored and shared) content" and "content that is returned and ranked by Search Engines in response to user queries" (with an additional definition of "search engine").

Instead of offering a series of specific rules, the Code is "outcomes based", presenting seven objectives and 10 outcomes arranged under the objectives, with more specific commitments presented under each outcome. An outcomes-based approach was advocated by the ACMA in its Position Paper of May 2021, where it set out a series of expectations for the code, in some detail:

> Outcomes-based regulatory frameworks are particularly well suited to complex, dynamic and fragmented markets, where more traditional rules-based regulation is less able to keep pace with the rate of technological change (ACMA, 2020, p. 23).

At the core of the Code is an opt-in mechanism that allows signatories to nominate one or more specified commitments (beyond a common commitment attached to Objective 1). Transparency Reports published by DIGI (2021) show that four of the signatories (Google, Facebook, Microsoft and TikTok) opted in to all obligations, while other signatories opted in to selected commitments. For example, Adobe did not opt in to the political advertising commitments, as they were not applicable to its products. As Twitter does not accept political advertising, it too elected not to opt in to these commitments.

The Code is designed to encourage actions that anticipate and respond directly to offending content and behaviour as well as strategies to promote the availability of reliable or authentic content. These actions and strategies are best explained by briefly describing the seven principal undertakings of the Code, set out in Objectives 1 to 7.

- Objective 1 ("provide safeguards against harms that might arise from Disinformation and Misinformation") includes a commitment to develop measures to reduce the propagation of disinformation and misinformation, for example through labelling and through demoting and removing certain content, as well as prioritising credible news content (s. 5.9). It also includes a commitment to implement procedures to enable users to report problematic behaviours and content (s. 5.11) and to publish aggregated reports on the removal of content (s. 5.13).

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- Objective 2 ("disrupt advertising and monetisation incentives for disinformation") includes commitments to implement policies that might include restricting the availability of advertising services and placements on sites that propagate disinformation as well as other measures such as providing brand safety and verification tools (s. 5.15).
- Objective 3 ("work to ensure the integrity and security of services and products delivered by digital platforms") involves measures to prohibit the use of fake accounts and bots that propagate disinformation (s. 5.17).
- Objective 4 ("empower consumers to make better informed choices of digital content") provides examples of commitments platforms could take, such as using technological means to signal the credibility of news sources, or prioritising or ranking content to enable users to "easily find diverse perspectives on matters of public interest", as well as promotion of digital literacy and support for fact-checking organisations (s. 5.20).
- Objective 5 ("improve public awareness of the source of political advertising carried on digital platforms") is aimed at providing greater transparency, even though political advertising is not regarded as "disinformation" or "misinformation" under the Code. The examples of measures that could be taken include requiring advertisers to verify and/or identify the source, and requiring political advertisements that appear in "a medium containing news or editorial content" to be presented in a way that makes them readily distinguishable as paid-for content (s. 5.22).
- Objective 6 ("strengthen public understanding of disinformation and misinformation through support of strategic research") involves commitments both to support research (s. 5.24) and to not prohibit or discourage "good faith research" (s. 5.26).
- Objective 7 ("strengthen public understanding of disinformation and misinformation through support of strategic research") includes a commitment to publish an annual report (s. 5.28), with a template for the first report provided in an appendix.

In addition to these objectives, s. 6 presents a list of matters that can be taken into account in ensuring the proportionality of measures adopted under the Code (e.g., s. 6.1G, "the proximity and severity of the harm that is reasonably likely to result from the propagation of the content"). Aspects of code administration, including the commitment to develop an escalated code complaint facility, are set out in s. 7.

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Points of contention

To date, while there has been some criticism (noted above) of the Code itself and the nature of the commitments made by signatories, there has also been criticism of the decision to adopt a self-regulatory model. Criticisms of the self-regulatory approach include: the use of the opt-in mechanism; the arrangements for reporting; and the arrangements for code administration. Several submitters were critical of the opt-in approach; for example, the Australian Muslim Advocacy Network (AMAN) (2002, p. 3) suggested there should be an *opt-out* mechanism where the code administrator scrutinises arguments for exclusion presented by platforms on grounds such as products and services offered.

While acknowledging these criticisms, it should be noted that the Australian code does go beyond its predecessor, the EU Code, in the following respects: extending the scope of the Code to include misinformation as well as disinformation; providing a general core commitment that applies to all signatories (i.e., a signatory cannot opt out of Objective 1); and its provisions on political advertising in Objective 5.

Variations in Regulatory Design

Having examined how the findings of the Digital Platforms Inquiry were encapsulated in Government policy and how both the News Code and the Disinformation Code operate, we can begin to see the challenge involved in making the regulatory framework "fit for purpose". Part of the challenge concerns the choice of regulatory method. The following analysis draws on a well-established typology of direct (government) regulation, co-regulation and self-regulation, adopting the approach of Lee & Wilding (2020, p. 2), itself an adaptation of the approach set out by the Department of Communications (2014, p. 6, p. 15). "Direct regulation" encompasses legislation, regulations and any regulatory instruments issued under delegation by government ministers or regulators. "Co-regulation" covers arrangements where industry participants, usually through their intermediary bodies, develop the rules set out in a code of practice or other instrument which is then registered with a regulator under a statutory power and enforced by the regulator. "Self-regulation" covers industry-based schemes where industry is responsible for rule-making as well as any enforcement (i.e., there is no formal role for a government regulator).

From co-regulation to voluntary codes and on to direct regulation

Unequivocally, the ACCC recommended a *co-regulatory* model overseen by the ACMA for both codes. The co-regulatory nature of the arrangements is evident from the ACCC's requirements that, although the platforms themselves would devise the codes, the ACMA would approve them and enforce them and, if acceptable codes were not submitted within nine

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months, develop its own mandatory standard (ACCC, 2019, p. 257). When the ACCC published its Final Report in July 2019, a self-regulatory approach was off the table, with the ACCC saying that, for the News Code, it "does not consider it likely that digital platforms and media businesses will resolve these issues in a timely fashion absent any form of intervention" (2019, p. 255).

The ACCC recommended a similar co-regulatory approach for disinformation, with "an independent regulator, such as the ACMA" registering and enforcing the code (ACCC, 2019, p. 370). And as with the News Code, the ACCC recommended that, if an acceptable code was not submitted within nine months, or if a code was developed but "the regulator believes the code is not operating efficiently", the regulator should develop a mandatory standard (ACCC, 2019, p. 372). In Recommendation 15, the ACCC stressed the need for the regulator to be able to "impose sufficiently large sanctions to act as an effective deterrent against code breaches". Importantly, though, it explicitly endorsed the use of co-regulation over direct regulation, citing a Government guide to the use of regulation (Council of Australian Governments, 2007, pp. 7-9):

> Co-regulation through an industry-drafted code is preferable in this case to direct government regulation, and is expected to better ensure stakeholder concerns and practical considerations such as cost of compliance are managed (ACCC, 2019, p. 372).

Despite the recommendations from the ACCC, the Government's policy decision to use voluntary codes, noted above, was not explained when the Implementation Roadmap was released in late 2019. Neither was there an explanation for what was meant by "voluntary" codes. For both schemes, however, the policy statement provided a fall-back in case these strategies did not work: if agreement on the voluntary news codes was not reached, the Government would "develop alternative options … and this may include the development of a mandatory code", while, if the platforms did "not sufficiently respond" with voluntary disinformation codes, the Government would "consider the need for further measures" (Australian Government, 2019, p. 15, p. 16).

The final version of the News Media Bargaining Code, however, was different from both its earlier conceptions. As noted above, the scheme is mandatory in the sense that it applies to those businesses designated by the Treasurer. Like the earlier voluntary version proposed by the Government, it is overseen by the ACCC. Unlike both its predecessors, it is a fully statutory solution.

The reasons for the second switch on the News Code have been documented in public comments from both the Treasurer and the Minister for Communications, as well as in the Explanatory Memorandum to the Bill and associated second reading speeches, and in a report

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of the Senate Committee (2021, p. 3). In short, there had been insufficient progress on the development of the voluntary codes of conduct that were proposed in the Implementation Roadmap. As the Treasurer (Frydenberg, 2020, p. 10) explained at the time:

> On the fundamental issue of payment for content, which the code was seeking to resolve, there was no meaningful progress and, in the words of the ACCC, 'no expectation of any even being made'.

While Google and Facebook may have been disappointed by the Government's decision to move from voluntary codes to mandatory codes, once this took place, criticism focussed on its provisions rather than the choice of direct regulation. Forty-three published submissions were made to the ACCC's Concepts Paper and 72 published submissions were made to its exposure draft of the proposed new Part IVBA of the *Competition and Consumer Act*. Some of the main points are noted by the Senate Committee in its report on the Bill, including the overwhelming support offered by Australia's major news organisations (Senate Committee, 2021, pp. 19-22). However, one consequence of the move to direct regulation was the prospect of enforcement actions, and in their submissions to the ACCC's initial Concepts Paper, both platforms suggested it was inappropriate to include pecuniary penalties as part of the enforcement mechanisms (Google, 2020b, pp. 55-56; Facebook, 2020b, pp. 54-56) or, as Facebook (p. 54) put it, "the imposition of monetary penalties as a means of governing commercial relationships".

In contrast, the main criticism levelled at the Disinformation Code was the decision to adopt a self-regulatory code rather than direct regulation. In some respects, this criticism is unfairly directed at the signatories and the code administrator, DIGI. The decision to shift from a co-regulatory approach recommended by the ACCC to a voluntary, self-regulatory approach was one made by Government (in the Implementation Roadmap). Nevertheless, comments from several of the community and academic (and some media company) submitters to the consultation draft released by DIGI in October 2020 reveal deep concern about this move, with the Centre for Responsible Technology (2020, p. 2) saying: "Self-regulation and self-reporting are not sufficient to ensure technology companies act on disinformation". Similarly, Reset Australia (2020, p. 9) said:

> We strongly believe that a self-regulatory code will be insufficient in addressing the harms that arise through disinformation …
>
> International precedent paints a bleak picture of the impact that an opt-in, buffet-style Code with no enforcement measures will have on driving the change necessary to serve Australians.

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Despite significant changes from the consultation draft to the final draft, Reset was even more forthright in its comments on the publication of the Disinformation Code (Reset Australia, 2021):

> It's ludicrous to have the peak body for Big Tech regulating itself … What we need is an independent public regulator, with the ability to issue fines, notices, and other civil penalties.

Perhaps not surprisingly, these criticisms of the use of self-regulation are not unlike those offered by a number (although not all) of Australian industry and civil society contributors to the DPI, as Flew *et al.* (2021, pp. 138-139) observe.

Assessment: Choice of Regulation

It is important to note that, in departing from the recommendations of the ACCC, the Government spoke of the use of voluntary codes, not of self-regulation; hence, the regulatory choice was presented as between a voluntary and a mandatory code, not between self-regulation and co-regulation. However, it was never clear whether the voluntary codes for news would be self-regulatory or statutory. Although voluntary codes would usually be self-regulatory, a voluntary code can be registered under Part IVB of the *Competition and Consumer Act* and enforced by the ACCC: it is "voluntary" in the sense that it only applies to the businesses that sign up to it. In contrast, as the ACMA does not have any powers to enforce voluntary codes of practice, it was apparent that the Disinformation Code would be self-regulatory.

In this way, it is possible that the approach to the News Code anticipated by the Government was not self-regulatory in the sense that the Disinformation Code was always to be developed by industry without being registered with, and enforced by, the ACMA. However, even a voluntary code enforced by the ACCC would allow participants to remain outside the regulatory framework, meaning the leverage built into the final News Code – where side deals are encouraged as a means of avoiding the application of the legislation – would not exist. Either approach seems at odds with the recommendations of the ACCC.

Further, the slippage in the concepts of "voluntary" and "self-regulatory" is perhaps hardly surprising given that the code-making process under Part 6 of the Telecommunications Act 1997 (Cth) is described as "self-regulation" and s. 106 of that Act says: "Compliance with an industry code is voluntary unless the ACMA directs a particular participant … to comply with the code". While it is true that not all service providers sign up to these codes as members of Communications Alliance (the body that develops them), the fact that they are enforceable

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against any participant in the industry makes it a stretch to describe them either as voluntary or self-regulatory.

This confusion over terminology – explored in more detail below – should be viewed alongside the different approaches within the same sector to the use of self-regulation, co-regulation and direct regulation. The approach to the News Code also stands in contrast to the approach in the Online Safety Bill, in which the Government has proposed a consolidated piece of legislation – bringing the online content regulation scheme into a single Act with protections against cyber-bullying, adult cyber abuse, image-based abuse and abhorrent violent material – that *does* embrace co-regulation and even sees an enhanced role for it. The discussion paper issued by the Department of Communications and the Arts (DOCA) in 2019 noted that "codes should be developed by a wider range of service providers than the current codes, reflecting the range of services that Australians now use to access online content" (DOCA, 2019, p. 40). In a departure from usual communications sector regulation, the current online content codes, as well as those anticipated under the reformed scheme, are voluntary (in the sense that they only apply to signatories) but then enforceable by the regulator (the eSafety Commissioner) once a service provider becomes a signatory.

As there appears to be some inconsistency here, it is useful to review the policy literature on self- and co-regulation in the communications sector in Australia.

When should self- and co-regulation be used?

One explanation for the reluctance to use co-regulation in the context of the News Code and the Disinformation Code might be found in the move away from co-regulation flagged (at least as a possibility, if not the preferred position) in the third stage of the telecommunications Consumer Safeguards Review being conducted by the Department of Infrastructure, Transport, Regional Development and Communications ("DITRDC").

"Sub-optimal": Self-regulation in telecommunications consumer protection

The consultation paper (DITRDC, 2020) issued by the Department for Part C of this review, "Choice and Fairness", echoed doubts about the efficacy of self-regulation – at least in the context of telecommunications consumer protection – that have emerged over recent years. (As explained above, the term "self-regulation" is used in the *Telecommunications Act 1997* (Cth) to describe what is generally understood in the communications sector and the regulatory literature as "co-regulation".) One of its proposals is for co-regulation to be "confined to second order safeguards or situations where Minister or regulator developed rules could usefully be supported by technical or process requirements" (DITRDC, 2020, p. 25). Its assessment of co-regulation is as follows:

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> The code development process has appeared to suit matters that require cooperation across industry (e.g., technical matters), rather than consumer issues that may create an impost on industry. There is an inherent tension in a process that requires industry to formulate its own consumer protection rules (DITRDC, 2020, p. 15).

This rather critical view of co-regulation has been brewing for the past decade. The Department had made a similar point in a 2014 report, *Regulating Harms in the Communications Sector* (DOC, 2014), but at that time attributed them to an earlier paper by the ACMA, *Optimal Conditions for Self- and Co-Regulation* (ACMA, 2011). As noted below, the Department reprised this sentiment in its *Final Report of the Review of the ACMA* (DOCA, 2016). However, the original ACMA report and the Review of the ACMA present these points in different ways.

The ACMA's comments in the 2011 version of *Optimal Conditions for Self- and Co-Regulation* (neither an earlier version in 2010 nor a later version in 2015 includes this analysis) were forthright. Using a case study based on its Reconnecting the Customer Inquiry, it concluded "few factors are present for effective co- and self-regulatory arrangements in the area of telecommunications customer care" (ACMA, 2011, p. 9). These observations about the telecommunications sector, while interesting, are not directly relevant to the current environment for digital platforms – for example, there is a large number of carriage service providers and a small number of digital platforms – but the ACMA did give some preliminary consideration to what, at the time, it called "video-sharing websites" such as YouTube. It took into account factors such as the rapid pace of change and the fact that existing company policies and guidelines for use of content suggested some willingness to address online content issues (p. 30). It concluded as follows:

> The preliminary analysis in this case study indicates that some of the conditions for effective self-regulation may be present for video-sharing websites. However, it also highlights the significant regulatory challenges posed by the online environment (ACMA, 2011, p. 31).

"Reinvigoration" of self-regulation: role of the ACMA

The potential problem with co-regulation was again considered by the Department in its Review of the ACMA; however, the rigour evident in the ACMA's own framework for assessing the use of co-regulation and self-regulation is absent. The Review noted the Department's earlier observations in *Regulating Harms in the Communications Sector* (DOC, 2014) but placed more emphasis on the movement towards self-regulation than on the need to bring some aspects of consumer protection back to direct regulation. It said the earlier work "suggests that a reform process should aim to reinvigorate the use of self-regulation" (DOCA,

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2016, p. 78). In addition, one of its five "regulatory design principles" for the ACMA was that "regulation should promote the greatest practical use of co-regulation and self-regulation" (p. 76), a position that does not indicate a retreat from co-regulation. Interestingly, though, it did suggest two areas where this might occur:

> … in areas where strong competition has emerged, or industry has sufficiently matured its practices over time, the regulator should assume the initiative to explore the conditions under which regulatory interventions could transition from rules-based regulation to co-regulation and from co-regulation to self-regulation. (DOCA, 2016, p. 97)

Specifically in relation to self-regulation, the review identified two factors that would be required for this to be effective (DOCA, 2016, p. 79):

- "a strong commitment from industry so that it will remain responsive to consumer needs and will support codes through high levels of voluntary compliance", and
- "effective compliance processes, with those processes being supported by the establishment of independent industry bodies to implement complaint handling procedures."

There is some similarity here with the policy articulated in *The Australian Government Guide to Regulatory Impact Analysis* (Australian Government, 2020), which recommends self-regulation as a good option where "industry participants understand and appreciate the need for self-regulation". But it also says it is appropriate where "the consequences of market failure are low", unlike situations where, for example, public concern might arise from a perceived conflict that threatens public safety. The guide describes self-regulation as "not a viable option" in such circumstances, providing the examples of food-handling, healthcare and aviation (p. 30).

While this aspect of when it might be practical to deploy self-regulation is not the same as the question of why self-regulation might be used, some of these elements have long been identified in the literature of regulatory theory as reasons for employing self-regulation: Gunningham & Rees (1997, p. 366), for example, identified "speed, flexibility, sensitivity to market circumstances and lower cost". Knowledge is also a factor here (see Coglianese & Mendelson, 2010, p. 153) and, in the case of disinformation, knowledge of developing practices and how best to address the problem clearly puts industry participants in a better position than regulators. However, the most developed approach evident in the Australian policy literature for assessing the use of self- and co-regulation in the communications sector is the framework provided by the ACMA in its *Optimal Conditions* reports.

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Identifying "optimal conditions": Applying the ACMA framework

In its 2011 report, the ACMA presented a framework for assessing the conditions which lead to effective – and not-so-effective – outcomes in the development, implementation and operation of co-regulatory and self-regulatory schemes. The framework incorporates seven aspects of environmental conditions (number of players in the market and coverage of the industry; whether it is a competitive market with few barriers to entry; homogeneity of products — whether they are essentially alike and comparable; common industry interest — whether there is a collective will or genuine industry incentive to address the problem or enhance existing provisions; incentives for industry to participate and comply; the degree of consumer detriment; and whether the environment is stable or rapidly changing). It also incorporates five aspects of the applicable regulatory scheme (whether the objectives are clearly defined by the government, legislation or the regulator; role of the regulator; the existence and operation of accountability and transparency mechanisms; consumer and other stakeholder participation in the development of the scheme; and whether the scheme is promoted to consumers). In applying this framework to telecommunications consumer protection, the ACMA identified five aspects of the environmental conditions and five features of the regulatory scheme that led to the conclusion that co-regulation was likely not suited to customer care in the telecommunications sector and that it was arguably necessary to augment these arrangements with direct regulation (ACMA, 2011, pp. 20-22).

A number of the ACMA's criteria are similar to, or the same as, criteria cited in cross-industry sources (see, for example, Freiberg, 2017, pp. 111-14), but the ACMA's guide has the advantage of criteria designed more specifically for a communications context. However, even the latest version of the framework used here (ACMA, 2015) predates the ACCC's work in the Digital Platforms Inquiry. As the analysis below shows, criteria suitable for application to telecommunications and broadcasting are not necessarily adaptable to digital platforms. (Although the 2011 analysis of telecommunications consumer protection is not included in the later version, the framework is largely the same.)

Usefulness of the ACMA framework

In applying the ACMA framework to the News Code and the Disinformation Code, it can be seen that two of the seven *environmental criteria* clearly support the use of self-regulation for news remuneration, while additional criteria likely support its use for disinformation. For news remuneration, these are "number of players in the market and coverage of the industry" and "whether the environment is stable or rapidly changing". In its explanation of the framework, the ACMA (2015, p. 12; p. 14) noted that "a small number of players with wide industry coverage will facilitate effective self-or co-regulatory arrangements", and that "self-

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regulation can be suited to fast-changing environments that may be hindered by static systems of direct regulation". The small number of content-based digital platforms and the fast pace of change therefore suggest that self-regulation is suited to this environment. In addition, for disinformation, "common industry interest" is likely to apply because the industry association, DIGI, was prepared to take the lead and open its forum to participation from non-members, and because platforms' own interests might be served by being a signatory to a disinformation code that could offer value in attempts to build trust among users.

The framework is also useful in indicating environmental factors that are likely to work against the success of a self-regulatory model: lack of competition in the market and the great variation in products and services offered by platforms – within their own businesses, as well as across different providers – were documented at length by the ACCC in the Digital Platforms Inquiry.

In addition, application of the ACMA's five *features of the regulatory scheme* results in clear indications of the problems that could be encountered when using self-regulation for news remuneration. In part, this is because the regulatory objectives and the role of the regulator were uncertain, as the Government adapted the ACCC recommendations and then switched from voluntary codes to a legislative scheme. It is also because of the resistance presented by the platforms to recognition of the value news provides them and their unwillingness to consider a formalised remuneration scheme. In contrast, the industry association managing the development of the Disinformation Code was prepared to design a program for consultation through round tables and written submissions, along with indirect input through academic advisors, and there would be opportunities for promotion of the code through internal platform policies as well as the association. In terms of clarity in the policy objectives for disinformation, Government policy did at least note the precedent of the EU Code, although its suitability was later questioned in the ACMA Position Paper.

Limitations of the framework

While the analysis above shows that the ACMA framework can provide some useful guidance in deciding on regulatory strategies for digital platforms, the analysis also reveals some aspects of the framework that are difficult to apply to digital platforms.

In relation to the *environment criteria*, the category of "amount of consumer detriment" is difficult to assess for either scheme. For news remuneration, there may be significant detriment to news businesses and possibly, in the longer term, to citizens and society, but there is less direct consumer detriment and it does not concern aspects such as public health and safety, which is the example provided by ACMA (2015, p. 13) for where direct regulation may be more appropriate. For disinformation, there could conceivably be a serious impact in terms

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of public health and safety (e.g., from vaccine conspiracies) or harm to democratic institutions, but actual harm of this kind has not been seen in Australia so far.

In relation to *features of the regulatory scheme*, accountability and transparency are hard to judge for disinformation. Experience with the EU Code might have suggested that a lack of specific commitments and uniform reporting obligations, if replicated in Australia, may make it difficult to assess compliance; in the end, the reporting framework and complaints handling facility were still being developed at the time the code was finalised. Even more difficult to apply for news remuneration are the categories of "consumer and other stakeholder participation in the development of the scheme" and "whether the scheme is promoted to consumers", since the scheme is one that involves news businesses and digital platforms, without involvement of consumers.

Beyond these specific aspects relating to the two schemes, there are some more general difficulties in applying the framework to digital platforms. In relation to disinformation, for example, the variety of products and services offered by the relatively small number of signatories to the code makes the assessment of incentives to comply difficult to assess. In addition, some criteria such as the rapidly changing environment might need to be given more weight than other criteria when the framework is applied in the digital platform environment, compared to the broadcasting environment. It can also be difficult simply comparing one form of digital platform regulation to another (for example, the importance of consumer detriment resulting from disinformation versus harm to news businesses in the case of news remuneration). This is not helped by a lack of clear delineation in the ACMA framework for the use of self-regulation and co-regulation: the framework seems to apply more generally to self-regulation, with additional commentary on co-regulation where applicable.

While some of the aspects noted above might be new to the digital platform environment, some of the challenges are not unlike the situation described by the Australian Law Reform Commission (ALRC) when it considered the use of self-regulation for classification of media content. The ALRC (2012, p. 196) observed:

> While in some areas there may be market incentives for content providers to classify—for example, because distributors and consumers of some products want and expect advice about content—these incentives do not exist in other areas.

Nevertheless, some meaningful conclusions can be drawn from the application of the ACMA framework.

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What the framework reveals about the digital platform schemes

The News Media Bargaining Code

The first overall finding from applying the ACMA framework is that direct regulation was more suitable than self-regulation for news remuneration. This means that the change from co-regulation to voluntary codes and then to direct regulation was likely to have confused the line of policy development. It allowed less time for development and consultation on the legislative model and, at the point of switching to direct regulation, provoked a foreseeable backlash from industry. Admittedly, the recommendation for co-regulation was not part of Government policy, and while the ACMA framework would benefit from some additional commentary to differentiate the application of self-regulation from co-regulation, it is likely that – had it been applied – it would have highlighted the benefits of accounting for the changing environment while also providing some reassurance in terms of enforcement. As Lee & Wilding (2021, p. 7) have observed, flaws in the current arrangements for developing telecommunications and broadcasting co-regulatory codes do not, in themselves, present an irrefutable argument for abandoning co-regulation; instead, there could be an argument for reforming key aspects of co-regulation in order to retain the benefits of industry knowledge in rule-making while injecting enhanced consumer consultation and regulatory oversight (Lee & Wilding, 2021, p. 11).

The Disinformation Code

It is still more productive to apply the ACMA framework to the Disinformation Code, as this scheme remained a self-regulatory model from the announcement of Government policy in late 2019 to implementation of the Code in early 2021. The decision to use self-regulation for this initiative is, on balance, in the author's opinion, supported by the application of the framework, and also fits with the ACMA's initial assessment back in 2011 that there was some potential for video-sharing websites to be subject to effective self-regulatory arrangements.

However, there are reasons for caution raised by the application of the framework. In the environmental conditions, these include: the lack of a competitive market where consumer choices are likely to act as a brake on unreasonable practices; the great variety in products and services, which makes them hard to compare; and the potential for consumer detriment in contexts such as health disinformation and electoral disinformation. While these are significant issues, it is possible that they are outweighed by the other environmental elements, such as the small number of players and the changing aspects of technology, products and consumer practice. Of more interest to the present analysis are the relevant features of the regulatory schemes, as these are more within the control of policy-makers and regulators. These relate to items 8, 9 and 10 in the ACMA framework: the clear definition of objectives;

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the role of the regulator; and the existence and operation of accountability and transparency mechanisms.

In relation to the clear definition of objectives, the Government policy guidance issued in late 2019 was scant and provided for great variation in approach and content. Most importantly, it anticipated one or more codes that would deal with "disinformation and news quality" and that would "address concerns regarding disinformation and credibility signalling" (Australian Government, 2019, p. 16, p. 7). It also referred specifically to the precedent of the EU Code.

There are two points worth noting about this guidance. First, while the policy statement clearly targeted "disinformation", it soon became apparent that the ACMA, which was charged with overseeing the process, required that it deal with both disinformation and misinformation. As this was not apparent from the policy statement and differed from the precedent of the EU Code – to which several of the industry participants were already signatories – it caused confusion and delay and a level of complexity in the Code itself which could have been avoided. Second, while news quality was ultimately addressed in the code, there was uncertainty over how it should be addressed and the extent to which it was appropriate for platforms to engage in credibility signalling. Furthermore, there was an overlap here with the News Code. Despite the ACCC stating clearly in its Concepts Paper in May 2020 that "flagging quality journalism" was a matter for the Disinformation Code not the News Code (ACCC, 2020, p. 27), Part IVBA of the *Competition and Consumer Act* now includes a requirement in s. 52X (related to, but not part of, the "minimum standards") which requires responsible digital platform corporations to ensure that "a proposal is developed for the designated digital platform service to recognise original covered news content when it makes available and distributes that content".

In relation to the role of the regulator, the policy decision for the ACMA to "have oversight of the codes and report to Government on the adequacy of the platforms' measures and the broader impacts of disinformation" (Australian Government, 2019, p. 7) always sat oddly with the explicit warning that: "Should the actions and responses of the platforms be found to not sufficiently respond to the concerns identified by the ACCC, the Government will consider the need for future measures" (p. 16). This is because the ACMA has no remit to regulate digital platforms under the *Australian Communications and Media Authority Act 2005* (Cth) ("ACMA Act") and no powers under the *Broadcasting Services Act 1992* (Cth) ("BSA") to make rules concerning disinformation. Amendments to both Acts could address these shortcomings, and in the meantime the ACMA's reporting function would appear to be covered by s. 10(1)(q) of the ACMA Act: "to report to, and advise, the Minister in relation to the broadcasting industry, internet industry and datacasting industry". However, in the event of code failure, there is no immediate solution. Legislative change would be required to give the ACMA powers

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to create its own standards or service provider rules to address the problem. Given the rapidly-changing environment and the possibility that harm could arise at short notice (for example, at election time), it would be preferable for the ACMA's reserve powers to be in place now.

In relation to accountability and transparency mechanisms, there are two concerns. The first is the lack of specificity in many of the commitments under the code, with only four of them (5.11, 5.26, 5.27, 5.28) being obligations to take specific action (e.g., 5.11 is a commitment to implement a facility for users to report certain behaviours). The more usual approach is for a commitment to be met by implementing policies designed to achieve an end (e.g., 5.14: "Signatories will implement policies and processes that aim to disrupt advertising and/or monetisation incentives for Disinformation"), followed by a list of examples of such policies that could be pursued (e.g., "restricting the availability of advertising services and paid placements on accounts and websites that propagate Disinformation"). This can be seen, at least in part, as a result of the outcomes-based approach to the design of the code which was proposed by the ACMA (ACMA, 2020, p. 24). As noted above, there were reasons for taking this approach, including the difficulty of prescribing rules in a fast-changing environment. However, Freiberg (2017, p. 491) has cautioned that, while this kind of approach gives the regulated companies flexibility in finding the most appropriate, and sometimes the lowest cost, means of addressing complying with the code, "there may be uncertainty about what constitutes acceptable compliance".

A second problem concerns the reporting arrangements. Most if not all submitters to the public consultation on the code were critical of the reporting arrangements set out in the draft Code. For example, Jacob Wallis (2020, p. 2) from the International Cyber Policy Centre at the Australian Strategic Policy Institute noted the absence of relevant key performance indicators (KPIs), while the Australian Communications Consumers Action Network (ACCAN) (2020, p. 3) suggested more specificity in articulating annual reporting commitments and that reporting ought to be standardised. Similar comments were made by Reset Australia (2020, p. 8) and AMAN (2020, p. 6). The Law Society of New South Wales Young Lawyers ("NSW Young Lawyers") (2020, p. 5) recommended:

> that a format be adopted for the substantive components of the annual reports provided by signatory Digital Platforms, that would allow for analysis of the efficacy of the measures taken, and to allow for future benchmarking.

Some of these observations draw on similar criticism of the EU Code and the resulting recommendations in a report for the European Commission (Plasilova *et al.*, 2020, pp. 89-95) for two classes of KPIs: "service level indicators" and "structural indicators". Administration of the EU Code has been complicated as a result of the signatories reporting on Code

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commitments in different ways without any common baseline, such as through the use of raw numbers of actions compared to, say, a proportion of overall actions. (See, for example, the independent assessment of the EU Code conducted by the European Regulators Group for Audio-visual Media Services, 2020). In a briefing note for the European Commission, James Pamment (2020, p. 2) said there was a lack of detail of data in the signatories' reports and success metrics for their efforts, and an inconsistency of approaches. Lack of uniformity in reporting was also noted in the EC's own staff assessment of reporting obligations in 2020, with a report noting, for example, that data on manipulative techniques was provided at an aggregated and global level (European Commission, 2020, p. 9).

The problems for transparency and accountability of a lack of specificity in both the commitments and the reporting requirements can be seen as connected to the failure to specify objectives. Freiberg has noted the need for precision in spelling out the objectives or requirements, and that the risks of information asymmetry between the regulator and the regulatee can leave the regulator compromised (Freiberg, 2017, p. 124). At the time of writing, the signatories to the Australian Disinformation Code had just published their initial three-month reports on implementation of the Code. These will be important sources for the ACMA's assessment of "the adequacy of the platforms' measures" (Australian Government, 2019, p. 7).

The international dimension

Finally, for both the News Code and the Disinformation Code, the international dimension of regulating digital platforms adds a level of complication not experienced when considering the use of self- or co-regulation for Australian telecommunications and broadcasting services. Feick & Werle (2011, p. 524) note that differences across jurisdictions in attitudes to free speech as well as to the criminality that should attach to some activities can make it difficult to forge international legal solutions, but that "international agreements among firms and associations are not necessarily easier to achieve than intergovernmental treaties". While, as noted above, the ACMA's framework would suggest that the small number of players in the digital platform environment provides support for the use of self-regulation, the need for local Australian subsidiaries to take advice, if not direction, from parent companies in other jurisdictions can, at the very least, affect timeliness of rule development and response, and, at worst, create adverse outcomes.

Conclusions

The shifting ground on the form of regulation considered appropriate for digital platforms – self-regulation, co-regulation, direct regulation – indicates the difficulties of finding solutions for a sector characterised by rapidly developing technologies and business and consumer practices (an argument for using self- or co-regulation) when also dealing with very powerful

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international players. These international firms, while prepared to introduce measures to deal with growing state and community concern over the spread of disinformation, did not have a great incentive to share revenue with local industry participants – and even less to create an international precedent by doing so. It is perhaps this quandary that leads to the irony in the outcome: a fiercely contested statutory scheme may be averted by the striking of private agreements that are not even the subject of a formal industry-based self-regulatory code.

In regulatory terms, this article has shown that a rigorous analysis of the best forms of regulation for these two issues was missing from the policy development phase. This is despite almost three decades of experimentation with co- and self-regulation; several policy reviews and reports over the last decade that can assist in the task; and the availability of a conceptual framework developed by the communications regulator for applying these forms of regulation. While that framework gives only a partial result when applied to the two schemes, it does show that self-regulation was never an appropriate tool for regulating news remuneration, but that it is at least a viable option for disinformation. Accordingly, it is difficult to see why the Government moved the News Code from the ACCC's recommendation of co-regulation to voluntary codes instead of straight to direct regulation, where it ended up.

This rather haphazard approach bears out the call by Lee & Wilding (2021, pp. 10-11) for a more holistic review of the regulation of telecommunications, broadcasting and online services in a way that might facilitate the incorporation of digital platforms. They point to flaws in the arrangements for developing broadcasting codes that remain unaddressed almost 30 years after they were introduced (2021, p. 12). Similarly, Flew & Wilding (2020, p. 61) referred to "the 'unfinished business' of reforming media regulation", with the current policy questions seeing a re-run of attempts in the early part of the last decade (through the Convergence Review) to find a new framework for the regulation of convergent communications – this time through the concept of "harmonisation" of laws applying to media and to digital platforms.

This is not to say, however, that the Australian Government is somehow recalcitrant by international standards, or that it has not faced some difficult conceptual as well as practical difficulties. Writing over a decade ago on the regulation of cyberspace, Feick & Werle (2010, p. 524) predicted that "Internet regulation will remain a patchwork of different regulatory approaches in continuous flux, no model being superior to any other". And while the ACMA's framework may give an incomplete picture on when to use self- and co-regulation for digital platforms, it does offer useful guidance, informed by extensive experience in other forms of communications regulation. It also allows for the preliminary comparative analysis presented above, prompting reflection on the need to rethink the role of co-regulation and its relationship to self-regulation, and the role of the regulator in both.

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The avoidance of co-regulation

Under the Disinformation Code regime, the ACMA looms over DIGI, setting out its expectations in code development and positioning itself (at the direction of government) as monitor of progress in implementation, auditor of annual reports, and checkpoint for the continued operation of self-regulation. This approaches the form of "meta-regulation" characterised by Coglianese & Mendelson (2010, pp. 156-157) where governments guide and oversee self-regulation, for example in requirements to develop detailed pollution prevention plans. In applying this to Australia, Freiberg (2017, pp. 120-25) noted the presence of such arrangements as early as the late 19th century and referred to various recent arrangements in Victoria, including in relation to drug and poison safety. Similarly, Tambini, Leonardi & Marsden (2008, p. 43), in sketching out forms of self- and co-regulation used in media content, noted what Schulz & Held (2001) (in relation to Germany) described as "regulated self-regulation", one form of which was "audited self-regulation".

Accordingly, there is nothing new or ground-breaking in the way the ACMA shadows DIGI, although it is not the norm for self-regulation in the communications sector. It also needs to be seen in the context of the well-established idea in regulatory theory about the need for an independent third party – usually governmental in some capacity, even in the background – to maintain pressure on participants. It should be recognised, however, that these ideas about the shadowy role of the state are usually articulated in relation to enforcement, which Gunningham & Rees (1997, p. 389) pinpointed as the main weakness of self-regulation. Similarly, it was on the aspect of enforcement that Ayres & Braithwaite (1992, p. 19) saw the state operating in the background of self-regulation as a "benign big gun". In the case of the Disinformation Code, however, it is reasonable to ask: how benign is the ACMA and how big is its gun? The Government has actively inserted the ACMA into the self-regulatory rule-making stage and given it some monitoring and assessment functions without an explicit remit, any formal compliance role, or any enforcement powers. Although the ACMA's "optimal conditions" framework suggests there is at least an arguable case for self-regulation, the approach evident in addressing disinformation may in fact be closer to co-regulation, while lacking the elements that would make a co-regulatory model effective.

Given these departures from established practices in communications regulation – specifically, the enhanced role of the state in self-regulation of disinformation and the development of a legislative scheme for news remuneration that was designed never to apply – and that the regulated entities are the same, and that, further, both schemes relate to information of one kind or another, how can we understand the place of these two schemes in our regulatory framework? Are these new forms of regulation?

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Making sense of the two schemes

Lee & Wilding (2020, p. 11) have described the involvement of ACMA in the Disinformation Code as "guided self-regulation", but it can also be characterised in the terms used by Bartle & Vass (2005) over 15 years ago. In reviewing the use of and potential for self-regulation and co-regulation – and in the process, noting the more advanced adoption of these forms of regulation in the Australian communications sector – the authors noted the importance of recognising the place of self-regulation within the modern regulatory state:

> The context of self-regulation today is therefore one of 'enclosure' by the regulatory state. Where self-regulation operates, it operates with the sanction, or support or threat of the regulatory state (Bartle & Vass, 2005, p. 44).

They depicted the relationship in the following figure (Bartle & Vass, 2005, p. 45):

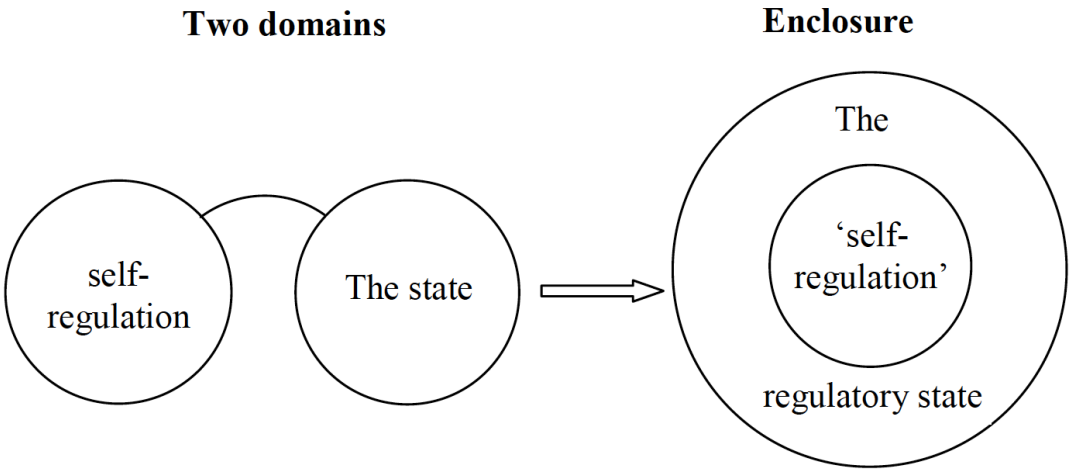

Figure 1. Bartle & Vass [2005, Figure 10], 'Two Worlds Become Enclosed'

Interestingly – and as a result of the unusual outcome where Google and Facebook have avoided the application of Part IVBA of the *Competition and Consumer Act* through the development of side agreements with publishers – this figure can perhaps be seen to apply to *both* the Disinformation Code (actual self-regulation) and the News Code (direct regulation that is not triggered).

A more recent and perhaps more developed way of viewing it is set out by Robert Gorwa (2019), who argues that a conception of the "platform governance triangle" – drawing on the idea of a "governance triangle" proposed by Abbott & Snidel (2009) as a means of representing corporate governance – that features firms, state actors and NGOs – can be applied to, among other things, the EU Code of Practice on Disinformation. Drawing on the observation that there can be difficulties in ensuring acceptable levels of governance among industry participants based in different jurisdictions, Gorwa (2019, p. 4) notes the development of

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international agreements, collaborations and standards setting bodies ("transnational governance initiatives") that attempt to overcome the obstacles facing black letter law solutions. He identifies various permutations of the three categories of actors applicable in the Internet environment (firms, NGOs and governments) and provides the EU Code as an example of a State-Firm initiative, under which: "The state role, when compared with traditional command-and-control legislation, is relatively limited to more of an informal oversight and steering role" (Gorwa, 2019, p. 10).

Interestingly, Flew *et al.* (2021, pp. 140-41) take issue with this analysis, citing the approach to news remuneration demonstrated in the Digital Platforms Inquiry and the News Code. Just as the analysis of the ACMA framework above noted the need to better account for interactions between different companies rather than between companies and consumers, Flew *et al.* point out that the chief actors in the Inquiry and the News Code were the technology firms and the news businesses (led by News Corp), although they also observe the activism of the ACCC, and in particular its Chair, Rod Sims. They say that this degree of "regulatory activism" on a domestic level was accompanied by "a new era of transnational cooperation among regulatory authorities" (p. 141) as these jurisdictions face similar attempts to grapple with platform regulation. Flew *et al.* in fact use the language of "co-regulation" to describe the relationship:

> [the Code], which will be overseen by the Australian Communications and Media Authority (ACMA) in a co-regulatory framework …, would sit between the state and the firm, as the state would be involved in brokering relations between competing corporate interests. (Flew *et al.*, 2021, pp. 134-135)

There is a certain logic here, and the authors were writing before the final version of the legislation was settled, but in some ways the News Code is distinctively *not* co-regulation, at least in the conventional Australian form described above. In the absence of agreement on remuneration, the scheme involves an independent party deciding the amount of remuneration, with other "minimum standards" also applying. And if the scheme is not triggered because the Treasurer believes there is sufficient contribution towards the news industry, in a sense there is no regulation.

This uncertainty surrounding *co-regulation* might help explain the inconsistency in how we approach *self-regulation*. Co-regulation is firmly established in the communications sector in Australia, but as the Consumer Safeguards Review and other preceding policy work have shown, there are fundamental problems with the way in which it has been applied. This seems to have affected its potential application in the sphere of digital platforms. There may be good reasons for not using co-regulation, but there may also be ways of fixing the problems experienced in telecommunications and broadcasting. This might help avoid the misplaced

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deployment of voluntary codes in contexts such as news remuneration, as well as the form of maladapted self-regulation devised to address disinformation.

In the meantime, perhaps the concept of "enclosure" used by Bartle & Vass (2005) is the most suitable way of depicting the anticipated outcome from Australia's recent attempts to regulate digital platforms. In the wake of Parliament passing the News Code legislation, there was much speculation as to who "won". The Government? Facebook and Google? News businesses? It is not yet entirely clear. And in relation to disinformation, self-regulation still needs to prove it can overcome some major flaws. With the development of both Codes, existing principles of regulatory design have taken quite a beating and may themselves need some reconsideration to cope with the emerging, international environment. A new version of the ACMA framework, capable of more nuanced application to the digital platform environment and offering more specificity on the distinctions between self- and co-regulation, would be a useful resource. Meanwhile, the digital platforms have, at least temporarily, been corralled. But it would be overstating the outcome to say they have been enclosed.

Declaration

The author was part of a team commissioned by the Australian Competition and Consumer Commission to conduct research for the Preliminary Report of the Digital Platforms Inquiry. He was also part of a team commissioned by DIGI to provide research and to assist in the development of the Disinformation Code. He made policy submissions on the development of the News Media Bargaining Code and the Consumer Safeguards Review.

References

Abbott, K., & Snidal, D. (2009). The governance triangle: Regulatory standards institutions and the shadow of the state. In W. Mattli & N. Woods (Eds.). *The politics of global regulation* (pp. 44–88). Princeton University Press.

Attorney-General's Department. (2020). *Privacy Act review: Issues paper*. https://www.ag.gov.au/integrity/publications/review-privacy-act-1988-cth-issues-paper

Attorneys-General (Defamation Working Party). (2021). *Review of Model Defamation Provisions – Stage 2: Discussion paper*. https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/review-model-defamation-provisions.aspx

Australian Communications and Media Authority (ACMA). (2020). *Misinformation and news quality on digital platforms in Australia: A position paper to guide code development*. https://www.acma.gov.au/australian-voluntary-codes-practice-online-disinformation

Australian Communications and Media Authority (ACMA). (2015). *Optimal conditions for effective self- and co-regulatory arrangements*: *Occasional paper*.

http://doi.org/10.18080/jtde.v9n2.415

https://www.acma.gov.au/publications/2015-06/report/optimal-conditions-effective-self-and-co-regulatory-arrangements-2015-edition

Australian Communications and Media Authority (ACMA). (2011). *Optimal conditions for effective self- and co-regulatory arrangements. Occasional paper*. https://www.acma.gov.au/publications/2015-06/report/optimal-conditions-effective-self-and-co-regulatory-arrangements-2015-edition

Australian Communications and Media Authority Act 2005 (Cth)

Australian Communications Consumers Action Network (ACCAN). (2020). *Submission to Digital Industry Group Inc: Australian Code of Practice on Disinformation*. https://digi.org.au/submissions/

Australian Competition and Consumer Commission (ACCC). (2020). *Mandatory News Media Bargaining Code: Concepts paper*. https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/concepts-paper

Australian Competition and Consumer Commission (ACCC). (2019). *Digital Platforms Inquiry: Final report*. https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report

Australian Government. (2020). *Australian Government guide to regulatory impact analysis*. (2nd ed.). https://pmc.gov.au/resource-centre/regulation/australian-government-guide-regulatory-impact-analysis

Australian Government. (2019). *Regulating in the digital age: Government response and implementation roadmap for the Digital Platforms Inquiry*. https://treasury.gov.au/publication/p2019-41708

Australian Law Reform Commission (ALRC). (2012). *Classification—content regulation and convergent media: Final report*. (ALRC report 118). https://www.alrc.gov.au/publication/classification-content-regulation-and-convergent-media-alrc-report-118/

Australian Muslim Advocacy Network (AMAN). (2020). *Policy submission to DIGI on the Australian Code of Practice on Disinformation*. https://digi.org.au/submissions/

Ayres, I., & Braithwaite, J. (1992). *Responsive regulation: Transcending the deregulation debate*. Oxford University Press

Bartle, I., & Vass, P. (2005). *Self-regulation and the regulatory state: A survey of policy and practice*. (Centre for the Study of Regulated Industries research report 17). https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.553.3190&rep=rep1&type=pdf

Broadcasting Services Act 1992 (Cth)

Caffarra, C., & Crawford, G. (2020, September 25). The ACCC's News Media Bargaining Code: Experimenting with "decentralized regulation" of dominant digital platforms. *ProMarket*. https://promarket.org/2020/09/25/the-acccs-news-media-bargaining-code-experimenting-with-decentralized-regulation-of-dominant-digital-platforms/

Centre for Responsible Technology. (2020). *Ensuring a strong and meaningful code on disinformation: Submission to the Australian Code of Practice on Disinformation*. https://digi.org.au/submissions/

Coglianese, C., & Mendelson, E. (2010). Meta-regulation and self-regulation. In R. Baldwin, M. Cave, & M. Lodge (Eds.). *The Oxford handbook of regulation* (pp. 146-168). Oxford University Press.

Communications Alliance. (2019). *Telecommunications Consumer Protections Code*. Industry Code C628:2019. https://www.commsalliance.com.au/Documents/all/codes/c628

Communications Decency Act of 1996 47 USC §§ 230

Competition and Consumer Act 2010 (Cth)

Council of Australian Governments. (2007). *Best practice regulation: A guide for ministerial councils and national standard setting bodies*. https://pmc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf

Department of Communications (DOC). (2014). *Regulating harms in the Australian communications sector: Observations on current arrangements*. (Policy background paper no. 2). https://www.communications.gov.au/publications/regulating-harms-australian-communications-sector-policy-background-paper-no2

Department of Communications and the Arts (DOCA). (2020). *Review of Australian classification regulation*. https://www.communications.gov.au/have-your-say/review-australian-classification-regulation

Department of Communications and the Arts (DOCA). (2019). *Online safety legislation reform: Discussion paper*. https://www.communications.gov.au/have-your-say/consultation-online-safety-reforms

Department of Communications and the Arts (DOCA). (2016, October). *Review of the Australian Communications and Media Authority: Final report*. https://www.communications.gov.au/documents/review-australian-communications-and-media-authority-final-report

Department of Infrastructure, Transport, Regional Development and Communications (DITRDC). (2020). *Consumer Safeguards Review—part C—choice and fairness: Consultation paper*. https://www.communications.gov.au/have-your-say/consumer-safeguards-review-consultation-part-c-choice-and-fairness

Digital Industry Group Inc. (DIGI). (2021). *Australian Code of Practice on Disinformation and Misinformation 2021*. Available at https://digi.org.au/wp-content/uploads/2021/02/Australian-Code-of-Practice-on-Disinformation-and-Misinformation-FINAL-PDF-Feb-22-2021.pdf

Digital Industry Group Inc. (2020, May). Disinformation Code. https://digi.org.au/disinformation-code/

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (e-Commerce Directive) (entered into force 8 June 2000)

European Commission. (2018). *EU Code of Practice on Disinformation*

European Commission. (2020). *Commission staff working document: Assessment of the code of practice on disinformation - achievements and areas for further improvement*.

http://doi.org/10.18080/jtde.v9n2.415

https://digital-strategy.ec.europa.eu/en/library/assessment-code-practice-disinformation-achievements-and-areas-further-improvement

European Regulators Group for Audiovisual Media Services (ERGA). (2019). *ERGA report on disinformation: Assessment of the implementation of the Code of Practice*. https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf

Explanatory Materials to the Exposure Draft Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020. https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation

Exposure Draft Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Cth). https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation

Facebook. (2020a). *Facebook response to the Australian Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*. https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/submissions-to-exposure-draft

Facebook. (2020b). *Response to the Australian Mandatory News Media Bargaining Code concepts paper*. https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/submissions-to-concepts-paper

Feick, J., & Werle, R. (2010). Regulation of cyberspace. In R. Baldwin, M. Cave, & M. Lodge (Eds.). *The Oxford handbook of regulation* (pp. 523-547). Oxford University Press.

Flew, T. (2019). The platformized Internet: Issues for Internet law and policy. *Journal of Internet Law*, *22*(11), 3-16.

Flew, T. & Wilding, D. (2021). The turn to regulation in digital communication: the ACCC's Digital Platforms Inquiry and Australian media policy. *Media, Culture & Society*, *43*(1), 48-65. https://doi.org/10.1177/F0163443720926044

Flew, T., Gillet, R., Martin, M., & Sunman, L. (2021). *Return of the regulatory state: A stakeholder analysis of Australia's Digital Platforms Inquiry and online news policy*. *The Information Society*, *37*(2), 128-145. https://doi.org/10.1080/01972243.2020.1870597

Free TV Australia. (2015). *Commercial Television Industry Code of Practice*. https://www.freetv.com.au/resources/code-of-practice/

Freiberg, A. (2017). *Regulation in Australia*. The Federation Press.

Frydenberg, J. (2020). Here's news: We'll hold digital giants to account. *The Australian*, 20 April 2020, p. 10.

Gillespie, T. (2018). *Custodians of the Internet: Platforms, content moderation, and the hidden decisions that shape social media*. Harvard University Press.

Google. (2020a). *Draft News Media and Digital Platforms Mandatory Bargaining Code: Submissions in response*. https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/submissions-to-exposure-draft

Google. (2020b). *Mandatory News Media Bargaining Code: Response to the ACCC's concepts paper*. https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/submissions-to-concepts-paper

Gorwa, R. (2019). The platform governance triangle: Conceptualising the informal regulation of online content. *Internet Policy Review*, *8*(2), 1-22.

Gunningham, N., & Reese, J. (1997). Industry self-regulation: An institutional perspective. *Law and Policy*, *19*(4), 363-414.

Helberger, N., Pierson, J. & Poll, T. (2018). Governing online platforms: From contested to cooperative responsibility. *The Information Society*, *34*(1), 1-14. https://doi.org/10.1080/01972243.2017.1391913

Law Society of New South Wales Young Lawyers, The. (2020). *Submission on the Digital Industry Group Inc's Draft Australian Code of Practice on Disinformation*. https://digi.org.au/submissions/

Lee, K. (2018). *The legitimacy and responsiveness of industry rule-making*. Hart Publishing.

Lee, K., & Wilding, D. (2021). The case for reviewing broadcasting co-regulation. *Media International Australia*. https://doi.org/10.1177%2F1329878X211005524

Leonard, P. (2021, March 12). The battles between Google, Facebook, and news media proprietors over fair value exchange for news content. *Competition Policy International*. https://www.competitionpolicyinternational.com/the-battles-between-google-facebook-and-news-media-proprietors-over-fair-value-exchange-for-news-content/

Lindsay, D. (in press). Australia and EU policy responses to algorithmic news distribution: A comparative analysis. In J. Meese and S. Bannerman (Eds). *The algorithmic distribution of news*. Palgrave Macmillan.

Online Safety Bill 2020 (Cth)

Oster, J. (2016). *European and international media law*. Cambridge University Press.

Pamment, J. (2020). *EU Code of Practice on Disinformation: Briefing note for the new European Commission*. Carnegie Endowment for International Peace. https://carnegieendowment.org/2020/03/03/eu-code-of-practice-on-disinformation-briefing-note-for-new-european-commission-pub-81187

Pash, C. (2021, May 6). How much are Google and Facebook paying for news in Australia? *AdNews*. https://www.adnews.com.au/news/exclusive-how-much-are-google-and-facebook-paying-for-news-in-australia

Picard, R. (2020). *Media and communications policy making: Processes, dynamics and international variations*. Palgrave Macmillan.

Plasilova, I., Hill, J., Carlberg, M., Goubet, M., & Procee, R. (2020). *Study for the "Assessment of the implementation of the Code of Practice on Disinformation": Final report*. European Commission. https://digital-strategy.ec.europa.eu/en/library/study-assessment-implementation-code-practice-disinformation

Reset Australia. (2020). *Submission on the Australian Code of Practice on Disinformation*. https://digi.org.au/submissions/

Riordan, J. (2016). *The liability of Internet intermediaries*. Oxford University Press.

Senate Economics Legislation Committee. (2021). *Report on Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 [Provisions]*. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia

Shultz, W. & Held, T. (2001). *Regulated self-regulation as a form of modern government*. Verlag Hans Bredow Institut.

Suzor, N. (2019). *Lawless: The secret rules that govern our digital lives*. Cambridge University Press.

Tambini, D., Leonardi, D., & Marsden, C. (2008). *Codifying cyberspace: Communications self-regulation in the age of Internet convergence*. Routledge.

Telecommunications Act 1997 (Cth)

Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Cth)

Van Dijck, J., Poell, T., & De Wall, M. (2018). The platform society: Public values in a connective world. Oxford University Press.

Wallis, J. (2020). *Submission to the UTS Centre for Media Transition's consultation process on the DIGI Group's Australian Code of Practice on Disinformation*. https://digi.org.au/submissions/

http://doi.org/10.18080/jtde.v9n2.415