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МЕДИАПРАВО АВСТРАЛИЙСКОГО СОЮЗА: СОВРЕМЕННЫЕ ТЕНДЕНЦИИ РАЗВИТИЯ

MEDIA LAW IN THE COMMONWEALTH OF AUSTRALIA: CURRENT TRENDS IN DEVELOPMENT

Мария Егоровна БОЧАРОВА
Национальный исследовательский университет «Высшая школа экономики», Москва, Российская Федерация,
maria.bocharova00@gmail.com,
ORCID: 0009-0008-5542-5096

Виктор Николаевич МОНАХОВ
Национальный исследовательский университет «Высшая школа экономики», Москва, Российская Федерация,
vm@48.org,
SPIN-код: 6768-4790

Информация об авторах
М.Е. Бочарова — выпускница бакалавриата факультета права НИУ ВШЭ
В.Н. Монахов — профессор департамента права цифровых технологий и биоправа факультета права НИУ «Высшая школа экономики», ассоциированный член Кафедры ЮНЕСКО НИУ ВШЭ, кандидат юридических наук, доцент

Аннотация. В современную эпоху сентенция о том, что миром правит информация, получает новое, на этот раз «цифроплатформенное», подтверждение своей истинности. С появлением в 1990-х годах глобальных интернет-платформ категории «свобода слова», «свобода массовой информации» и «свобода самовыражения», постепенно меняя технологические форматы своего воплощения и реализации, сохраняют неизменными свою демократическую сущность и роль в процессах личностного, общественного и государственного развития.

По мере вступления человечества в очередной информационный цикл, охватывающий ориентировочно первые десятилетия XXI в., постепенно формируется, набирает институциональный и регулятивный потенциал исторически самая «молодая» информационно-коммуникационная свобода — свобода сетевой (онлайновой) информации и коммуникации. Как и ее предшественники (свобода слова, печати, радио- и телевещания), она требует определенного обновления механизмов социального регулирования по мере своего «созревания» и вхождения в жизнь глобальных, национальных и региональных обществ.

Именно контекст реализации такого рода инноваций на примере конкретной страны — Австралии — определяет основной предмет данной статьи, ее сущностную составляющую. Конкретные и актуальные проявления этой сущности анализируются авторами статьи на примерах систем правового и иного регулирования в австралийской медиасфере. Так, одним из предметов анализа является вопрос о том, как Австралия справляется с задачей обновления механизмов социального регулирования в медиасфере. Логическим следствием этого вопроса является другой: есть ли в соответствующем опыте Австралии позиции, достойные рецепции в иных правовых и этических порядках?

Акцентируя внимание на этих вопросах, авторы рассматривают некоторые наиболее интересные решения, принятые правительством Австралии за последнее десятилетие. Они также анализируют действующее в Австралии законодательство и другие нормативные механизмы и инструменты, направленные на регулирование связей со СМИ в этой стране, а также основные тенденции их развития. В частности, такие, как пионерские (Австралия — признанный пионер в этой сфере правового регулирования) изменения в регулировании деятельности цифровых медиаплатформ на примере Google и Facebook[1] и вполне конкретные модификации австралийского национального законодательства о диффамации.

Ключевые слова: Австралия, Австралийский Союз, Европейский Союз, цифровые платформы, цифровые сервисы, массовые коммуникации, право массовых

[1] С 28 октября 2021 г. Meta Platforms, Inc. в России признана Тверским судом г. Москвы экстремистской организацией.

коммуникаций, законодательство в сфере массовых коммуникаций, российское право массовых коммуникаций, ASMA

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Maria E. BOCHAROVA
National Research University Higher School of Economics, Moscow, Russian Federation,
maria.bocharova00@gmail.com,
ORCID: 0009-0008-5542-5096

Victor N. MONAKHOV
National Research University Higher School of Economics, Moscow, Russian Federation,
vnmonakhov@hse.ru,
SPIN-code: 6768-4790

Information about the authors
M.E. Bocharova— Graduate of the Bachelor's Degree of the Faculty of Law of the Higher School of Economics

V.N. Monakhov— Professor of the Department of the Digital Technologies Law and Bio Law of the Faculty of Law of the Higher School of Economics, Associate Fellow of the UNESCO Chair at HSE University, Candidate of Legal Sciences, Associate Professor

Abstract. In the modern era, the not at all new maxim that information rules the world is getting a new, this time "digital-platform" confirmation of its truth. With the emergence of global online platforms in the 1990s, the categories of "freedom of speech", "freedom of mass information" and "freedom of self-expression", while gradually changing the technological formats of their embodiment and implementation, keep their democratic essence and role in the processes of personal, public and state development unchanged.

As humankind enters its next information cycle, roughly covering the first decades of the 21st century, institutional and regulatory potential of the historically "youngest" information and communication freedom — the freedom of web-based (online) information and communication — is gradually taking shape, gaining institutional and regulatory potential. Like its antecedents (freedom of speech, press, radio and television broadcasting), it requires a certain upgrade of its social regulatory mechanisms as it "matures" and enters into the life of global, national and regional societies.

It is the context of the implementation of this kind of innovation on the example of a specific country — Australia — that determines the basic subject of this article, its main essential component. Specific and topical manifestations of this essence are analyzed by the authors of this article using examples of legal and other regulatory systems in the Australian media sphere. For example, one of the subjects of analysis is the question of how is Australia coping with the challenge of updating its social regulatory mechanisms in the media sphere. And, as a logical consequence of the former, is there any position in Australia's relevant experience that is worthy of reception in other legal and ethical orders?

Focusing on these issues the authors review some of the most interesting decisions taken by the Australian government over the past decade. The authors also analyse the current law and other regulatory mechanisms and instruments in Australia aimed at regulating the mass media public relations in this country as well as the main trends of their development. In particular, such as pioneer (Australia is a recognised pioneer in this sphere of legal regulation!) changes in the regulation of digital media platforms on the example of Google and Facebook (from October 28, 2021 — Meta Platforms, Inc. in Russia, admitted as extremist organization by the Moscow Tverskoi Court), and quite specific modifications of Australian national defamation law.

Keywords: Australia, Commonwealth of Australia, European Union, digital platforms, digital services, media, media law, media legislation, Russian Media Law, ASMA

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Potest lectiones ad urbem et mundum[2]

THE COMMONWEALTH OF AUSTRALIA AS A SUBJECT OF ANALYSIS

Australia's media legal system was chosen as the focus of our study for a number of reasons. *The first* of these was Bloomberg's assessment [1] that Australia has become the world's 'testing ground for digital platform regulation' between 2017 and 2021. Although the News Media and Digital Platforms Mandatory Bargaining Code 2021 amendments to Australia's Competition and Consumer Protection Act, which incorporate the main supporting elements of Australia's model of legal regulation of the interaction between modern Australian digital journalism and the IT giants over the years, have yet to be fully tested in practice and, according to Australian university professor Curtin Tama Leaver, remain "an untested gun in the desk of the Australian federal exchequer", other countries have for some years now been keeping abreast in order to learn from its pioneering attempts to regulate certain areas of the world's IT giants.

The second reason is a certain exotic factor of this country, or more precisely, the fact that its legal system is little known to the majority of Russian readers. In particular, it can be seen as belonging to a different legal system than the domestic one (Anglo-Saxon) and a different historical development of the legal and political systems [2]. *Finally*, an important circumstance of our choice was the availability of legal information on the regulation of mass media relations in this country, which was already revealed at the very beginning of the research. It turned out that the Australian authorities are very responsible about the availability of their national legal information, which is quite abundant in the public domain on official sources.

THE STRUCTURE OF THE COMMONWEALTH OF AUSTRALIA

Before examining how the media sector is regulated in Australia, it is worth saying a few words about the state structure of the Commonwealth of Australia, as this is what determines the specifics of the legal system. Australia is a federal state comprising 6 states and 2 territories and the model of Australian federalism is very developed and both states and territories have significant law-making and law-enforcement powers as well as their own legal interests that do not always coincide with the interests of the federal authority. Because of this, and also because Australia is a member of the common law family, a bilevel legal system has been developed, combining federal and state and territory laws. Moreover, laws and regulations may regulate the same area of social relations in different territories in varying ways. At the same time, we should note that the sphere of mass communications in Australia is regulated by law at the federal level.

DEGREE OF REPRESENTATION OF THE SUBJECT MATTER OF THE ARTICLE IN GLOBAL ACADEMIC DISCOURSE

There are a number of studies of Australian media law in the legal scholarship. The most detailed analysis of the Australian media law and related problems can be found in the foreign legal scholarship. For example, Butler and Rodrick [3] analysed the case law, legislation and regulations governing media practices in various fields, such as journalism, advertising, multimedia and broadcasting in Australia. In addition to traditional forms of media, which include television, radio, film, and newspapers, the newest forms of media, such as the internet, online forums, and various digital technologies, are also analysed. Rolf analysed the basic principles of media law as well as the laws which regulate defamation, invasion of privacy, and freedom of information [4]. Fernandez also analysed defamation law, privacy and secrecy, invasion of privacy, freedom of information is also examined and, more than that, highlights some aspects of lawmaking in this area and initiatives to reform media regulation [5]. There are also some articles narrower in subject of analysis, for instance, Dent and Kenyon analyse defamation law in australia through a comparative content analysis of Australian and US newspaper articles [6], and Flew examined the Australian media law through the perspective of new issues arising from increasing concentration of ownership and control over the internet by a limited number of giant digital corporations [7].

[2] Possible lessons for the city and the world (*latin*).

There are considerably fewer studies of Australian media law in the Russian legal scholarship. Certain and quite interesting aspects of Aboriginal copyright regulation in Australia are covered in Richter, A.G. "International standards and foreign practices of journalistic regulation" [8]. There are also few articles that analyse narrower aspects of media legislation in several states. For example, Nadirova analysed the Australian antimonopoly law in the media sphere through researching the practice and effectiveness of prohibiting cross-ownership of the media in Australia, the United Kingdom, and the United States [9]. She examined deals for the purchase of print and broadcast media from the point of view of their compliance with current legislation, as well as their impact on the level of media concentration, availability of information services and their diversification. Chikishev analysed the Australian law practice of redistribution of income at the mass media market [10]. Thus, we see that in the foreign legal scholarship there is a comprehensive study of the Australian media law, while in the Russian legal scholarship there is no such study.

CURRENT MEDIA LEGISLATION: THE AUSTRALIAN AND RUSSIAN MODELS

Australia does not have a specific media law identical to the Russian one [11]. However, the media legislation of this country comprises a system of federal laws regulating a more extensive sphere of social relations than the Russian media law. For example, telecommunications in Australia refer to communications by telephone, radio and the internet. Accordingly, telecommunications operators are regulated by the same law that regulates the media. The centerpiece of this system is the Australian Communications and Media Authority Act of 2005 [12] that regulates the establishment, functions, powers and responsibilities of the Australian Communications and Media Authority (hereafter ACMA). It is the ACMA that carries out the broadcasting, content and data transmission, spectrum management (radio broadcasting) and telecommunications functions within Australia.

Broadcasters are regulated in more detail by the Law on Broadcasting Services [13, 14]. The Australian Broadcasting Services Act is similar to the Russian Law of 27 December 1991 No 2124-1 "On the Mass Media" (it is almost the same age as the Russian law which took effect on February 8, 1992) but the system of support for its relevance and the pinpoint nature of its impact on the social relations which need to be regulated by its standards is in our opinion different from the similar system in Russia. The main difference is that while both Australia and the Russian Federation have a purely legislative subsystem to support the relevance of the above legislation, the Australian Broadcasting Services Act, like other media legislation, has a developed practice of upgrading its regulatory framework in the form of so-called Codes of Practice? Which explain in detail the narrower aspects of the application of the "main" law in relation to them and establishing "best practices". In relation to the Law on Broadcasting Services, there is currently a Code of Practice for Commercial Television [15]. It contains basic rules for the placement of content for television broadcasters. The code also contains rules regarding advertising time and placement on television advertisements, gambling advertisements, program classifications, and rules for news reporting that require accuracy, fairness, and respect for privacy.

It is noteworthy that the Commonwealth of Australia also has standards for children's television, enshrined in a specific law [16]. Their purpose is, firstly, to promote Australian programs to develop children's sense of belonging to the Australian people [16, art. 6 (a)], and, secondly, to protect children from the possible harmful effects of television [16, art. 6 (b)]. The first goal is achieved by establishing quotas for different genres of television programs (including those based on the production budget of the programs). The standards also regulate advertising content on children's television, and the bans contained there are identical to those in Russia, the only difference of which is that in Russia these bans are enshrined in the Federal Law on Advertising [17, art. 6]. For example, both Russian [17, art. 6, p. 4] and Australian [16, art. 20, p. 2] legislation contains a ban on advertising that gives children the impression that possession of the advertised product puts them in a preferential position compared to other children, as well as a ban on advertising that encourages children to persuade parents or others to purchase the advertised product [16, art. 20, p. 1; 17, art. 6 p. 2]. However, there are differences in the legislative regulation of "children's" advertising: for example, the Children's Television Standards contain rules about the proper representation of the advertised product. Thus, if the size of the advertised product is not clear, the advertiser must indicate it by means of comparison with something that a child can easily recognize [16, art. 21, p. 4], and if the advertised product requires accessories to use, the advertiser must clearly distinguish between the price of the product and the price of any accessories [16, art. 21, p. 5].

Broadcasters are regulated in a similar way, by the Broadcasting Act which contains basic rules concerning content [18].

COMPLAINTS MECHANISM FOR MEDIA LAW VIOLATIONS

It is noteworthy that if any media licensee (ranging from television and radio broadcasting to the internet) violates established standards, an appeal can be drafted that will

be investigated for a possible violation of media law [19]. ASMA reviews all complaints claiming a violation of broadcasting rules if the complainant has contacted the broadcaster and is not satisfied with the response, or if the complainant has not received a response. ASMA also considers all complaints alleging violations of licensing conditions, standards, and rules for providing online content. This tool for filing complaints is quite popular — in 2022 alone the Australian Communications and Media Authority has published 16 results of investigations [20], but the number of appeals is much higher — so, according to statistics [21], in April — June 2022 ACMA registered 64 appeals only. The largest number of complaints (25) was filed against commercial TV and radio broadcasters and 16 complaints were filed against state TV and radio broadcasters. However, as a result of investigating the complaints, violations were found only in the activities of commercial TV and radio broadcasters.

ACTUALISATION MECHANISMS

Thus, we see that the core of Australian media legislation was created in the 1990s and 2000s, approximately a quarter of a century ago. However, it is constantly being updated in order to ensure the necessary social and legal compliance of its norms with technological change. This is achieved, firstly, by regular amendments to the existing laws and, secondly, by passing codes of practice. In addition, new laws are being passed in areas related to the media, such as, for example, the Internet Safety Act 2021 [22]. Despite this, according to the Australian lawmaker, such measures do not fully cover the changes rapidly occurring in the media field, making 2019 an unprecedented year of review of Australian legislation in this area. Governments (Australia has both Federal and State and Territory governments) have admitted that the "media landscape" is now highly globalised, and have responded by seeking to ensure the relevance of Australian media laws in the digital age through reforming Australian media laws in two ways. *The first* area of reform was a change in the regulation of digital platforms, which includes Google and Meta Platforms, Inc., and *the second* was a change in national defamation law.

DIGITAL PLATFORMS AND COMPETITION PROTECTION ON MEDIA MARKETS

Let's take a closer look at the changing regulation of digital platforms. The Australian anti-monopoly regulator, the Australian Competition and Consumer Commission (ACCC), conducted an investigation that examined the impact of digital platforms (particularly Google and Meta Platforms, Inc.) on competition in the media and advertising markets in general and the impact of digital platforms on journalistic content in particular. As a result of the investigation, the ACCC published a report [23] with 23 recommendations concerning issues such as competition, the relationship between digital platforms and traditional media, digital literacy, privacy law reform, taxation and unfair contract terms. The most important of these were recommendations to develop and implement a new regulatory framework to ensure effective supervision of all organisations involved in producing or providing content in Australia, with the aim of creating a level playing field that promotes competition in Australia's media and advertising markets. To achieve this goal, it was proposed that digital platforms appointed by the Australian Communications and Media Authority (ACMA) be required to implement a code of conduct to govern their relationships with news media businesses, which ACMA would oversee. Following ACMA recommendations, Australia drafted and passed new law in 2021 [24], requiring digital platforms such as Meta Platforms, Inc. and Google to pay local media and publishers for links to their content in news feeds or search results, sparking a broad public and national response [25]. According to Australian Communications Minister Paul Fletcher, "The code will ensure that news media businesses are fairly rewarded for the content they produce, which will help support journalism of public interest in Australia" [26]. The same purposes are intended to be achieved by the Canadian Act of June 22, 2023 [27]. This act is close in content to its Australian predecessor of 2021. However, in several aspects the Canadian act offers a more advanced response to the challenges which prompted the creation of these laws. This Act has been strongly opposed by Meta and Google [28].

INNOVATIONS IN THE SEARCH SYSTEM LIABILITY REGULATION

Next, let us discuss the reform of national defamation law. Although each of Australia's states and territories has its own defamation laws, these laws are largely similar in terms of containing a set of typical defamation provisions under which a defamation plaintiff must establish: a) the fact of publication (which can be done through any means of communication); b) the defamatory significance of publication, which is defined as such significance as to make the ordinary reasonable reader think badly of or avoid the plaintiff; c) the fact of identification (i.e., some or all readers will consider the message in question to be related to the plaintiff). However, there are defences to defamation charges, which include fair protected report defences, justification (truth) defences, a contextual truth defence, an honest opinion defence,

innocent dissemination and a triviality defence. If the defendant's actions could be qualified as acting under any of these defences, the defendant will not be liable for defamation [29]. The following defamation cases, involving the previously mentioned Meta Platforms, Inc. and Google corporations, have gained prominence in Australia over the past two years and resulted in significant changes in the regulation of liability of search systems in 2022. In *Google LLC v. Defteros, J.* Defteros won a lawsuit against Google after the company failed to remove an article that he claimed defamed him, but Google appealed the case to the High Court. The High Court, however, ruled that Google was not the publisher of the link to the defamatory third-party content displayed as part of the search result, because Google, by providing the search result in a form that includes a hyperlink, does not direct, entice or induce the user to click on the hyperlink [30]. For this reason the fact of publication was found innocent and, therefore, Google was immune from liability.

In *Fairfax Media Publications Pty Ltd; Nationwide News Pty Limited; Australian News Channel Pty Ltd v Voller* [31] plaintiff Dylan Voller sued Fairfax Media, Australian News Channel and Nationwide News for allegedly defamatory comments published at Meta Platforms, Inc. in response to articles posted on the pages of the Sydney Morning Herald, The Australian, Sky News, The Bolt Report and The Centralian Advocate from July 2016 to June 2017. These media organisations were found by the High Court to be the primary publishers of third-party comments made on their public pages at Meta Platforms, Inc. The court ruled that a person's liability as a publisher depends on whether that person, by aiding and abetting the message in question, participated in the transmission of the defamatory information to a third party. The court found that each media company, by creating a public page on Meta Platforms, Inc. and posting content on it, aided, contributed to, encouraged, and thereby promoted the publication of third-party comments.

As it can be seen from the court decisions cited, defamation in the Australian media sphere is an issue that has already led to a number of amendments to defamation legislation came into force in Australia in 2022. For example, a *serious harm test* has been introduced, modelled on the UK test but with significant differences in wording (for example, the Australian serious harm test operates independently of the defamation test). What is more, a single publication rule applied for limitation period purposes, so that the one-year limitation period will not be renewed in certain circumstances where there are multiple publications of substantially the same issue in substantially the same way. Also amendments to enforce the defence of contextual truth come into force. In addition, some amendments are expected to come into effect from in 2024, such as third-party content defamation immunity for fully passive digital intermediaries providing channels, caching and storage services (especially internet service providers, cloud service providers and email providers), and defamation immunity for search systems that are automated tools for searching the internet [32].

CONCLUSION

Thus, as a result of the analysis of Australian media legislation, it is reasonable to draw the following conclusions.

First of all, there is no special law on the media in Australia identical to the law of the Russian Federation [9]. Its place is taken by a complex system of laws that regulate in detail the operation of social networks and the activities of the internet and mobile telephone service providers in addition to the activities of the media.

Despite the fact that the regulation of the media is combined with the regulation of other social relations, the activities of the media themselves are regulated in sufficient detail. There are many specialised standards for each form of media, including standards for children's television, as well as a mechanism for investigating complaints about violations of these standards and other media legislation, which makes Australian media law more effective.

Secondly, the analysis of the Australian media laws revealed important and useful nuances of legal technique that are only partially used in Russian media law. For example, a detailed list of the basic terms used in the law is given at the beginning of each of the laws mentioned, which immediately eliminates questions about their interpretation. A table of contents is placed at the beginning of each law, making it easier to read and search for information, and the most modern laws are preceded by a brief statement of the law's purpose and key issues.

Thirdly, *codes of practice* play an important role in enforcing media legislation by completing and explaining federal laws, as well as by establishing "best practices".

Fourthly, Australia was found to be thoroughly monitoring changes in media-related information technology and reflecting these changes in legislation in a proactive and up-to-date manner.

Finally, in the fifth place, the possible lessons of the Australian experience of regulating media activities in relation to the digital environment for Russia.

In the Russian Federation, there is no legislation to regulate "platform activity" in relation to the media sphere so far, although its formation is only a matter of time, since the globalisation processes in the economy and other spheres of life inevitably involve the globalisation of the law as well.

Global social, service, content and communication platforms play an arena of emergence, change and termi-

nation of a variety of cross-border private and public legal relations. The establishment of sustainable and harmonious relationships between their subjects, along the lines of the already relatively balanced relationship between the well-known IT giants and the Australian news industry, working for the common good of all subjects of the global information society, is the most important task of the emerging global law and global ethics.

Since the process of digital transformation of social relations in the media sphere is global in nature, Russian legislation and other social regulators of this sphere of social relations should be created with due regard to relevant foreign experience. In our opinion, as of today, the basic legal positions of such experience are most vividly represented in the following legislative and other regulatory acts: The Australian IT Giant Media Negotiation Code 2021 (News Media and Digital Platforms Mandatory Bargaining Code); Bill C-18: An Act respecting online communications platforms that make news content available to persons in Canada 2023; the EU Digital Copyright Directive 2021; and Regulation (EC) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Competitive and Fair Markets in the Digital Sector and amending Directives (EC) 2019/1937 and (EC) 2020/1828 (Digital Markets Act); as well as the Council of Europe Committee of Ministers Declaration on the Protection of Freedom of Expression and Freedom of Association in Relation to Private Internet Platforms and Internet Service Providers, adopted on 7 December 2011 at the 1129th meeting [34].

The Council of Europe Committee of Ministers Declaration on the Protection of Freedom of Expression...2011 contains a position of principle, in one form or another of terminology, which is common to almost all of the aforementioned acts. According to this position, interference with content that is created for the public domain through Internet media or attempts to make Internet sites inaccessible must be considered in accordance with international standards designed to protect freedom of opinion and the right to impart and receive information, in particular the provision of Article 10 of the European Convention on Human Rights of 1950 and the relevant case law of the ECtHR.

Such an approach will help to form a system of national legal and ethical norms to facilitate the accelerated development of digital innovations, media-platform law as a separate set of normative-legal regulators of media relations in their digital environment, which, in turn, will ensure the successful formation and application of advanced socially significant innovations in the Russian Federation.

In this context, in our view, the legal and other regulatory potential contained in the Concept of technological development until 2030 [35] has a certain positive perspective. In particular, the norms of this Concept recognise digital platforms and information services for networking of technological development entities as fundamentally new types of technological development entities, whose effective functioning, in turn, requires a qualitatively new institutional environment and new regimes of legal and other social regulation.

It is clear that so far this governmental regulatory initiative contains only initial guidelines for further search of directions for optimal development of national legislation and other regulatory mechanisms to regulate various forms of digital "platform activities" within the framework of the clearly evident global trend of scientific and technological development towards platformization.

The development of appropriate world-class legislation and other social regulators and their adoption in modern societies and states is not a swift process, it will take much time, but for our country even now it is essential to choose the right direction of development in order not to stray from the global course. We see as such a compass the synchronous and harmonious comprehension and assimilation of both technological aspects proper of the forthcoming modernization of Russian science [36] and economy and the solution of social, political, socio-economic and socio-cultural side effects of this modernization, which are already arising (although not yet in our country) [37].

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37. Recall the US Twitter Incident of January 2021 and the practice described in the article of Australia and other countries of helping national newspapers in their efforts to retain their share of the total amount of funds allocated by corporations to advertise their products.