

Australian Outlook

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Tech Giants Threaten to Block Search Engines in Australia: A Case for State Responsibility?

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In response to the Australian government's media bargaining legislation proposal, Google and Facebook have threatened to cut off Australia from their search engines. This has prompted questions regarding the scope for international law to protect Australia from these threats.

The proposed Australian Government News Media and Digital Platforms Mandatory Bargaining Code aims to effectively force digital platform providers to remunerate local news outlets for featuring and linking their news content. The primary considerations of the code are commercial in nature – addressing the bargaining power imbalance between digital platforms and news companies. Ultimately, however, the code is intended to serve the public good by strengthening the weaker side – the media, thus protecting journalism. Its underlying vision is a society in which the interest of citizens involves not only news content that they could and would access as consumers, but also the content they should access as informed citizens in a vibrant democracy.

Given their market power, the code is intended to apply to both the Google search engine and the Facebook Newsfeed, forcing these tech giants to share a slice of their profit with news agencies. For both Google and Facebook, the code is cause for concern, introducing fears that forthcoming legislation could open a Pandora's box of similar government regulation of the Internet in other countries. In response, Google has threatened to make its search engine unavailable in Australia, while Facebook said it would block users in Australia from posting or sharing links to news.

Corporations can cease their activities as they wish. In these kinds of situations, corporation lawyers are primarily concerned with contract and competition law issues, such as abuse of dominant position issues. However, in light of search engines' contemporary relevance for national security, the question arises whether the tech giants' threats to block search functions in Australia could give rise to public law issues beyond the commercial interests of Google and Facebook. Against this background, it is appropriate to consider whether there could be a potential case of international responsibility for the United States, the home country of Google and Facebook.

The natural reaction to this proposition would be to dismiss such an idea as extravagant. The landmark principle in international public law, enshrined in 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, is clear: states are never responsible for the wrongful acts of private persons since these acts cannot be attributable to public authorities. As Google and Facebook are not state bodies, their acts cannot attract the responsibility of the state in which they are incorporated. However, state responsibility issues are somewhat more intricate.

Under customary international law, binding both the United States and Australia, a state might be responsible for a wrongful act if it could be attributable to the state under international law and if it constitutes a breach of an international obligation of the state. This begs the question whether the activities of the two private digital platforms could be attributable to the US given that their activities abroad are controlled by US federal agencies.

The two companies fall under close scrutiny of the National Security Agency (NSA) and the Federal Bureau of Investigation (FBI). After all, these security agencies have a vested interest, as US security laws frequently require Google and Facebook to transfer to them relevant personal data collected online. In particular, the NSA program PRISM, also known as SIGAD US-984XN, collects stored Internet communications based upon the agency's requests made to Internet companies such as Facebook to assist in the prevention of acts of terrorism.

The next question is whether the two companies should be considered as acting on behalf of the United States. In other words, it involves asking whether Google or Facebook's conduct constitutes an "act of the State" for the purposes of state responsibility. In this sense, the relevance is that an act of the state can be active or passive. Thus, an omission from public authorities could also constitute an internationally wrongful act of a state. Accordingly, could the US government's abstention from acting to prevent disruption to major internet providers in Australia amount to a wrongful act? And if so, is the US under any international obligation to prevent such a disruption, knowing it could arguably jeopardise the national security of Australia? If the answer is affirmative, the US could be held accountable for omitting to act in accordance with international law.

To answer this question, we need to assess whether the US is under a specific international obligation to prevent an action by private companies whose activities are under its control, given that the omission to intervene could jeopardise the security of a foreign state, in this case, Australia. For this assessment, it is appropriate to consider international treaty obligations, particularly those in the sphere of security cooperation.

Australia and the US are bound by specific obligations stemming from the 1951 ANZUS Treaty concluded between Australia, New Zealand, and the US. The treaty establishes avenues for cooperation and defence against security threats, including terrorism. In accordance with this treaty, the parties are obliged "separately and jointly by means of continuous and effective self-help and mutual aid" to "maintain and develop their individual and collective capacity to resist armed attack." Further, the ANZUS parties have agreed to consult each other whenever – in the opinion of any of them – the territorial integrity, political independence, or security of any party is threatened in the Pacific.

In a nutshell, the ANZUS treaty places emphasis on cooperation between party states to enhance their military security. However, the question remains whether Australian authorities would face major security hurdles if Google and Facebook suspend their search functions in Australia. History, let alone 9/11, has taught us that Internet services have been widely used by terrorist networks in order to threaten Western states. Is there a real risk that surveillance of terrorist activities through the Internet would be undermined by the abrupt suspension of search engines? US authorities could claim that there are alternatives to Google and Facebook, as indeed, their services are not unique in the world. However, it is clear the other providers aren't as efficient as Google and Facebook, with the Australian Competition and Consumer Commission reporting Google is used for around 95 percent of internet searches in Australia.

It occurs that whenever a major disruption of internet services provided by US companies could jeopardise the security of the Australian Commonwealth against terrorism, the US government would be obliged under customary international law as well as the ANZUS Treaty to prevent such risk. On this basis, under such circumstances, the omission of due diligence by the US authorities towards their internet providers could entail their international responsibility. It is therefore clear that the proposed media bargaining code has repercussions beyond merely market imbalance considerations between digital platforms and media outlets in Australia.

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