



Australian Government
The Treasury



News Media and Digital Platforms Mandatory Bargaining Code

The Code's first year of operation

November 2022

© Commonwealth of Australia 2022

ISBN: 978-1-925832-61-7

This publication is available for your use under a [Creative Commons Attribution 3.0 Australia](http://creativecommons.org/licenses/by/3.0/au/legalcode) licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.



Use of Treasury material under a [Creative Commons Attribution 3.0 Australia](http://creativecommons.org/licenses/by/3.0/au/legalcode) licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

Treasury material used ‘as supplied’

Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics – then Treasury prefers the following attribution:

Source: The Australian Government the Treasury.

Derivative material

If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:

Based on The Australian Government the Treasury data.

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are set out on the Department of the Prime Minister and Cabinet website (see <http://www.pmc.gov.au/government/commonwealth-coat-arms>).

Other uses

Enquiries regarding this licence and any other use of this document are welcome at:

Manager
Media Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: media@treasury.gov.au

Table of contents

- Executive Summary 1
- Recommendations 2
- Chapter 1. Introduction 3
- Chapter 2. Commercial agreements 4
 - Assessing the Code’s performance 4
 - Other issues 10
- Chapter 3: Designating digital platforms 14
 - The future application of the Code 16
 - Other issues 16
- Chapter 4: Registration of news businesses 18
 - Revenue test 22
 - Operational issues 23
- Chapter 5. Future review of the Code 25
- Appendix 1: Outline of the Code 26
- Appendix 2: Submissions 27

Executive Summary

The News Media and Digital Platforms Mandatory Bargaining Code (the Code) was a world-first initiative and, as such, its prospects were uncertain when it took effect on 3 March 2021.

Looking back at its first year of operation, it is reasonable to conclude that the Code has been a success to date. Over 30 commercial agreements between digital platforms (Google and Meta) and a cross-section of Australian news businesses have been struck, agreements that were highly unlikely to have been made without the Code. The agreements were governed by confidentiality clauses and were not provided to the review by digital platforms or the relevant news businesses.

While some stakeholders raised concerns about the Code's impact on competition and media diversity, the objective of the Code is to address bargaining power imbalances so as to ensure news businesses receive fair remuneration from digital platforms for the value their content generates. It is not designed to redistribute resources across the news sector or to guarantee that all news businesses receive funding. Other policy and funding tools are available to achieve these objectives.

The review received several proposals for amending the criteria for designating digital platforms but considered they would have negative consequences.

The review finds that the Code lacks a formal mechanism to extend the Code to other platforms. To address this, the review suggests the Government consider directing the Australian Competition and Consumer Commission (ACCC) to prepare reports on this question. The review further suggests that the Government consider the need for additional ACCC information-gathering powers in the context of its response to the ACCC's recent proposed major reforms in relation to digital platforms, including on agreements between platforms and news businesses.

The review considered the Code's registration criteria and found that there was not a sufficiently strong case to amend them at this point in time. Registration outcomes should be closely monitored to ensure that the criteria are operating as intended.

While the Code has performed well in its first year against its objectives, it will be important to review the Code again in the future in light of commercial, technological, and regulatory developments (including those occurring overseas).



Recommendations

1. The Government should consider directing the ACCC to prepare reports on:
 - the extent to which digital platforms make available covered news content of Australian news businesses and
 - whether significant bargaining power imbalances exist between these digital platforms and Australian news businesses.
2. The Government should consider addressing, in its response to Interim Report No. 5 of the ACCC's Digital Platform Services Inquiry, whether ACCC information-gathering powers could be used to obtain information about commercial agreements between digital platforms and news businesses.
3. Treasury, in consultation with the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, should monitor registration outcomes for consistency with the policy objectives of the Code.
4. The Australian Communications and Media Authority should consider administrative issues arising in relation to the registration process.
5. The Government should consider reviewing the Code again after 4 years of its operation.

Chapter 1. Introduction

The News Media and Digital Platforms Mandatory Bargaining Code (the Code) aims to address bargaining power imbalances to ensure that digital platforms fairly remunerate news businesses for the content they generate, thereby helping to sustain public interest journalism in Australia.¹

The Code provides incentives for digital platforms and news businesses to reach commercial deals outside of the Code. If that is not possible, it provides a framework (following designation of a digital platform) for good faith negotiations and mediation between the parties. Where agreement cannot be reached, it sets out an arbitration process to determine remuneration payable by a digital platform.

The Code came into effect on 3 March 2021. The Code's governing legislation required that a review of its operation commence within 12 months of this date.² The then Treasurer asked Treasury to conduct this review, in consultation with the (now) Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA), the Australian Competition and Consumer Commission (ACCC), and the Australian Communications and Media Authority (ACMA).

Terms of Reference were published on 28 February 2022. They require the review to assess the extent to which the Code has, during its first year of operation, delivered outcomes consistent with its policy objective, and to identify potential improvements to the Code.³

Over the Code's first 12 months of operation, Google and Meta have reached commercial agreements outside the Code with a range of large and small news businesses serving metropolitan and regional areas. The ACMA has also registered 34 news businesses under Division 3 of the Code.⁴ To date, no digital platform has been designated under the Code.

Reflecting these developments, the Terms of Reference foreshadowed that the review would focus on:

- commercial agreements between digital platforms and Australian news businesses
- the designation provisions in Division 2 of the Code and
- the registration provisions in Division 3 of the Code.

On 1 April 2022, Treasury published a consultation paper and invited interested parties to provide written submissions in response to the paper by 6 May 2022.⁵ Treasury received 34 submissions (including one confidential submission) from digital platforms, news businesses, industry groups, academics, and think tanks. Treasury conducted a series of follow-up stakeholder roundtables and bilateral meetings in July, August, and September 2022.

1 Explanatory Memorandum, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, para 1.1.

2 Subsection 52ZZS(1), *Competition and Consumer Act 2010*.

3 The Treasury, [Terms of Reference](#), Review of the News Media and Digital Platforms Mandatory Bargaining Code; accessed, 31 October 2022.

4 Australian Communications and Media Authority, [Register of eligible news businesses](#), (accessed 31 October 2022).

5 The Treasury, [Consultation Paper](#), Review of the News Media and Digital Platforms Mandatory Bargaining Code, 1 April 2022; accessed 31 October 2022.

Chapter 2. Commercial agreements

The Code aims to address bargaining power imbalances to ensure that news businesses receive fair remuneration from digital platforms for the value generated from their content.

In broad terms, the Code therefore aims to ensure that digital platforms remunerate news businesses where they generate more value from news content than the business creating this content obtains from its distribution via the platform.

The Code is not intended to go beyond this objective and require digital platforms to, for example, remunerate news businesses that serve particular community interests or promote media diversity more generally, as important as these policy objectives may be.⁶

This does not mean that these other policy objectives are not important in their own right. Rather, it means that other types of Government assistance may be better able to achieve them. This is discussed further at pages 11 and 12 below.

Assessing the Code's performance

While views may differ, 2 criteria for assessing the performance of the Code suggest themselves:

- What would have happened in the absence of the Code?
- What is the range of agreements that have been struck, and what benefits have they delivered to the sector?

What would have happened in the absence of the Code?

The evidence before the review strongly suggests that the Code has encouraged digital platforms to reach a substantial number of agreements with news businesses that would not have been made without the Code. While some agreements were made before the Code formally commenced, it seems clear they were made in anticipation of the Code taking effect.

For example, Nine Entertainment submitted that:

Without the ACCC and Treasury's ground-breaking findings and the introduction of this world first legislation, Nine does not believe that many (if any) commercial agreements between the digital platforms and Australian media companies would have been made.⁷

6 This would be the case even if digital platforms were designated. In this situation, the amount of remuneration paid by digital platforms to registered news businesses would be determined via arbitration, with arbitrators choosing between 'final offers' made by each party taking into account factors such as the benefit each party receives from the other. It is possible that some news businesses would receive minimal, if any, remuneration. For this reason, the Code was carefully designed to prevent arbitration outcomes requiring news businesses to make payments to digital platforms: see subsection 52ZX(1)(b).

7 Nine Entertainment, p 1.

Guardian Australia submitted that:

...while the NMBC has not been formally enacted in Australia, the impact has been to bring about positive and meaningful licensing negotiations between platforms and publishers for the first time in many years. At a high level, the NMBC has served to rebalance the relations between unavoidable trading partners and the news publishers that rely on them to distribute journalism to millions of Australians every single day.⁸

Range of commercial agreements and the benefits provided

Google and Meta have reached over 30 agreements with a broad range of news businesses, both large and small, and in metropolitan and regional areas.

We understand that Google has reached 23 commercial agreements.⁹ It continued to negotiate agreements after the commencement of the review, reaching an agreement with Minderoo Foundation on behalf of 24 publishers on 31 May 2022.¹⁰

Google's agreements with Nine Entertainment and Seven West Media run for 5 years, and its global agreement with News Corporation runs for 3 years.¹¹ Google did not provide information on the terms of its agreements with other news businesses.

Meta submitted that it has reached commercial agreements with 13 news businesses, but did not provide a list of these agreements.¹² Unlike Google, it has not reached agreements with news businesses such as Special Broadcasting Service Corporation (SBS) or The Conversation. Meta appeared to cease negotiations during the second half of 2021. It submitted that:

The budget to support content agreements for these products was limited and it was therefore inevitable that some news businesses would not receive a deal.¹³

Meta submitted that its agreements run for 3 years.¹⁴

8 Guardian Australia, p 1.

9 Google submitted that, since June 2020, it has reached 60 commercial agreements representing 183 mastheads (Google, p 16). We understand this separately counts a substantial number of agreements reached with Country Press Australia members via collective negotiation. The figure of 23 agreements counts Country Press Australia once.

10 Minderoo Foundation, Minderoo Foundation and Google sign agreement for Google to support 24 digital publishers, May 2022.

11 Google, p 6.

12 Meta, p 12.

13 Meta, p 12.

14 Meta, p 18.

Commercial agreements

News business	Google ¹⁵	Meta ¹⁶
Major news businesses		
ABC	Yes	Yes
Australian Community Media	Yes	Yes
Guardian Australia	Yes	Yes
Network Ten	No	Yes
News Corporation	Yes	Yes
Nine Entertainment	Yes	Yes
SBS	Yes	No
Southern Cross Austereo	Yes	No
Seven West Media	Yes	Yes
Smaller News Businesses		
Independent Media	Yes	No
Junkee Media	Yes	Yes
Mamamia	Yes	Yes
Out Publications Pty Ltd	Yes	No
Polaris Media Group Pty Ltd	Yes	No
Private Media	Yes	Yes
Public Interest Publishers Alliance ¹⁷	Yes	No
Region Group	Yes	No
Schwartz Media	Yes	Yes
Solstice Media	Yes	Yes
Starts at 60 Pty Ltd	Yes	No
The Conversation	Yes	No
Yahoo Australia	Yes	No
Women's Agenda	Yes	No
Regional News Businesses		
Country Press Australia ¹⁸	Yes	Yes

15 Google, pp 16–17. The list includes deals signed since June 2020 in anticipation of the Code. Google's submission also included Australian Associated Press, a news wholesaler, which is not eligible to be registered under the Code as a news business.

News businesses which have not secured deals with one or both of Meta and Google were critical of the Code. For example, SBS submitted that:

Whilst the Code has operated to effectively incentivise Google to negotiate and complete a deal with SBS, it has not provided sufficient incentive to Meta to engage constructively with us...¹⁹

Further:

Despite commencing preliminary discussions with SBS in February 2021, Meta advised SBS in July 2021 that it would not be entering negotiations for a commercial arrangement for news content. SBS has not been provided with an explanation...²⁰

The Conversation stated that:

Google engaged in bargaining with The Conversation in good faith and agreed to fund The Conversation under the Code. Without providing a reason, Facebook declined to negotiate with The Conversation and SBS, as well as many other quality media companies otherwise eligible under the Code.²¹

Commercial Radio Australia considered that:

the Mandatory Bargaining Code is not achieving its objectives in relation to the commercial radio industry. Much of the commercial radio industry has experienced significant difficulties in engaging Meta and Google in commercial negotiations. Few benefits have been received as a result of the Mandatory Bargaining Code: 90% of commercial radio networks have been unable to strike a deal with Google; and 95% of commercial radio networks have been unable to strike a deal with Meta...²²

16 This list has been compiled from news business submissions received by the review and a list of agreements compiled by the ACCC that was published in the consultation paper released on 1 April 2022.

17 This covers 24 agreements with members of the Public Interest Publishers Alliance.

18 This covers a substantial number of agreements with Country Press Australia members.

19 SBS, p 3.

20 SBS, p 4.

21 The Conversation, p 4.

22 Commercial Radio Australia, p1. See also: Broadsheet Media, p 5; Chinese News and Media Group, p 1; Community Broadcasting Association of Australia, First Nations Media Australia, Local & Independent News Association, p 3; Concrete Playground, p 1; Croakey Health Media, p 3; Digital Publishers Alliance, p 2; Man of Many, p 4; Pro Bono, p 4; Urban List, pp 3–4; Western Sydney Publishing Group, p 1.

Meta and Google suggested that some news businesses have unrealistic expectations about receiving remuneration. For example, Google submitted that it:

*has been approached by a number of smaller and independent publishers of niche lifestyle publications and city guides, seeking commercial deals. Google has engaged with those publishers over the course of several months to identify potential opportunities for mutually beneficial commercial partnerships. In some instances, despite Google's best efforts to put flexible offers on the table based on comparable market deals underpinned by fair value exchange, the publishers' commercially unreasonable expectations have prevented these negotiations from progressing further.*²³

On the benefits provided by commercial agreements, the review has not been provided with the details of these agreements by either digital platforms or the relevant news businesses, despite highlighting the importance of this information in the consultation paper released in April 2022.²⁴

While this limits the assessment of the Code's performance, it needs to be acknowledged that a fundamental choice was made when the Code was enacted. This was that it would address bargaining power imbalances by encouraging parties to reach private commercial agreements. Consistent with standard commercial practice, these agreements typically contain strict confidentiality clauses.²⁵ In the course of consultations undertaken during the review, news businesses with agreements with the digital platforms highlighted the commercial importance they attach to these clauses.

Some news businesses did, however, provide details about how they have used the remuneration received from commercial agreements with Google and/or Meta. The Australian Broadcasting Corporation (ABC) submitted that it had:

*committed that any net revenues resulting from an agreement with Google and Facebook would be invested in supporting regional and rural public interest journalism. The ABC has followed through on this commitment, using the net revenue earned under these deals to significantly expand its regional and rural coverage and network of regionally based journalists.*²⁶

Specifically, the ABC had (by the date of its submission) appointed 57 regional positions, including reporters in 19 locations, 10 of which did not previously have them.²⁷

23 Google, p 13. See also Meta, p 4.

24 In a [report](#) for the Judith Neilson Institute in May 2022, the former Chair of the ACCC, Rod Sims, estimated that commercial agreements have provided over \$200 million to news businesses.

25 Google, p 5; Guardian Australia, p 3; Country Press Australia, p 1; NewsCorp Australia, p 1; ABC, p 1; Minderoo Foundation, p 3.

26 ABC, p 2.

27 Ibid.

Guardian Australia submitted that it:

*underwent a significant expansion since the agreements were completed. Our newsroom has grown by over 40 journalists, while our commercial and operations team has expanded by over 10 FTEs. Not all of these roles were a direct result of the funding from Google and Facebook, but the financial security of these contracts gave management the confidence to bring forward investments that would otherwise have been made in subsequent years.*²⁸

Solstice Media submitted that, as a result of commercial agreements with Google and Meta, it had: employed 3 journalists; invested in professional development for journalists and other staff; upgraded content management platforms and its video player; expanded into Queensland; entered into a partnership with a news broadcaster to obtain video content; and provided additional health updates during COVID.²⁹

Nine Entertainment submitted that it:

*has invested in its newsrooms – including new journalist hires and product investments to enhance the impact of our public interest journalism for our audiences. Investment decisions for these initiatives were made using Nine’s standard return on investment framework, which included a contribution from the digital platforms deals.*³⁰

SBS submitted that its:

*deal with Google increases SBS’s capacity to tell more original stories ... in particular stories of our multicultural and First Nations communities ... the agreement has enabled SBS to engage additional full time staff ... The deal enables SBS to deliver additional accurate and impartial coverage.*³¹

Conclusion

The Code was a world-first initiative and, as such, its prospects were uncertain when it took effect on 3 March 2021. During the development of the Code, Meta had temporarily withdrawn news from its Facebook platform and Google had suggested that the continued provision of its services in Australia could not be guaranteed.

Yet, by the end of its first year of operation, the Code had brought Google and Meta to the negotiating table with news businesses for the first time over remuneration for content. Over 30 commercial agreements had been struck, agreements that were highly unlikely to have been made without the Code. On the evidence available to the review, at least some of these agreements have enabled news businesses to, in particular, employ additional journalists and make other valuable investments to assist their operations.

While views on the success or otherwise of the Code will invariably differ, we consider it is reasonable to conclude that the Code has been a success to date.

28 Guardian Australia, p 3.

29 Solstice Media, pp 1–2.

30 Nine Entertainment, p2.

31 SBS, p4. See also Google, p4 and Attachment 2.

Other issues

A number of other issues relating to commercial agreements were raised during the review, including:

- that the Code has created resource disparities between news businesses, particularly those with and without deals, which has left the latter at a competitive disadvantage, for example, in attracting staff and investing in technology³²
- that the lack of transparency about commercial agreements undermines the ability to assess whether the Code has achieved its policy objectives³³
- that the Code should oblige news businesses to spend remuneration received from digital platforms on public interest journalism, or at least publicly report how they spend this remuneration³⁴ and
- that smaller news businesses face particular challenges under the Code.³⁵

As discussed at the start of the chapter, the objective of the Code is to address bargaining power imbalances so as to ensure news businesses receive fair remuneration from digital platforms for the value their content generates. It is not designed to redistribute resources across the news sector or to guarantee that all news businesses receive funding. Other policy and funding tools are available to achieve these objectives, should the Government wish to pursue them.

A number of news businesses without commercial agreements argued that resource disparities were a consequence of the non-designation of one or both digital platforms. However, as discussed in Chapter 3, the review is not considering whether digital platforms should be designated or not.

The lack of transparency of commercial agreements is discussed above at page 8.

We do not consider there is a persuasive case for regulating how news businesses use funding. In a hypothetical world without bargaining power imbalances, there would be no justification for requiring news businesses to spend remuneration received from digital platforms on public interest journalism, or publicly report how they spend these funds. The Code, in addressing bargaining power imbalances, does not transform remuneration paid by digital platforms into the equivalent of, for example, grant payments from taxpayer-funded government programs (where it may be appropriate to place restrictions on how payments are spent and require public reporting).

A requirement to spend remuneration on core news content could also have unintended consequences. For example, it could prevent a news business placing itself on a more secure footing

-
- 32 Broadsheet Media, pp 2,7–8; Commercial Radio Australia, pp 1,5; Digital Publishers Alliance, pp 2,5; Free TV, p 17; Guardian Australia, p 4; Man of Many, pp 4–5; Meta, pp 3,19; Minderoo Foundation, pp 4–5; Pro Bono Australia, p 3; Public Interest Journalism Initiative, p 15; SBS, pp 1,8; The Conversation, p 4.
- 33 Australian Associated Press, pp 4–5; Centre for Media Transition, p 5; Media Entertainment and Arts Alliance, pp 3–5; News & Media Research Centre, p 3; Public Interest Journalism Initiative, p 2; The Conversation, p 5.
- 34 Centre for Media Transition, pp 5–6; Media Entertainment and Arts Alliance, p 7; Meta, pp 4–5; Reset Australia, p 16.
- 35 Community Broadcasting Association of Australia, First Nations Media Australia, Local & Independent News Association, pp 4–5; Croakey Health Media, p 8; Digital Publishers Alliance, p 2; Meta, p 14; The Conversation, p4.

over the medium term by reducing debt, with implications for its ability to produce core news content into the future. Flexibility was welcomed by, for example, Guardian Australia, who submitted that:

*The benefit of the licensing agreements struck as a result of the NMBC process is that we can use the monies made available through those agreements as we determine is best for our business.*³⁶

It is acknowledged that many smaller news businesses would face significant challenges in participating in negotiations with digital platforms. Indeed, they would likely face similar challenges in participating in negotiation, mediation, and arbitration processes under the Code were a digital platform to be designated.

Collective bargaining provides one way to manage the costs involved with negotiations, as illustrated by Country Press Australia's agreements on behalf of its members with Google and Meta,³⁷ and Minderoo Foundation's agreement with Google on behalf of a group of small news businesses.³⁸

Google and Meta also highlighted that they offer other support to news businesses such as:

- the Google News Initiative³⁹ and
- the Facebook Australian News Fund (administered by the Walkley Foundation) and Newsroom Sustainability and Digital Transformation Fund (partnering with Country Press Australia).⁴⁰

While recipients were appreciative of this assistance, some stakeholders considered that they were not substitutes for commercial agreements.⁴¹

Ultimately, as noted earlier, small news businesses may be better assisted by other types of Government support (outlined in the following Box).

36 Guardian Australia, p 3.

37 On 5 August 2021, the ACCC granted [authorisation](#) to Country Press Australia and its members to collectively bargain with Meta and Google; accessed 31 October 2022.

38 The ACCC published 2 [collective bargaining class exemption notices](#) lodged by the Minderoo Foundation on 24 January 2022 on behalf of several small publishers which allows them to collectively bargain with each of Google and Meta; accessed 31 October 2022.

39 Google, p 8.

40 Meta, pp 14–15.

41 Pro Bono Australia, pp 5–6; SBS, p 6; Broadsheet, p 8. See also; Country Press Australia, pp 2–3; Australian Associated Press, p 4; Community Broadcasting Association of Australia, First Nations Media Australia, Local & Independent News Association, p 5.

Government support for media businesses

On 13 May 2022, the Australian Government announced a total of \$15 million in grants to support regional, independent suburban, First Nations and multicultural print publishers. Funding will be delivered to eligible applicants under 2 streams with Stream 1 providing \$10 million funding for regional print publishers producing core news content and Stream 2 providing \$5 million funding for independent suburban, First Nations and multicultural print publishers producing core news content. On 28 September 2022, Minister Rowland announced that 208 applicants were deemed eligible to receive funding.

The Government's additional investment of \$12 million over 3 years from 2023–24 in community broadcasting (bringing total funding to around \$20 million annually) will continue to foster the development of local content, training for workers and volunteers, enhanced news services, transmission infrastructure, and online services. The funding also supports the production of content for First Nations and multicultural channels and for Australians living with a print disability.

The Government also provides \$21 million to Indigenous Broadcasting through the National Indigenous Association of Australia, which includes funding for 26 First Nations radio stations, a national news service providing content for broadcasters, and Remote Indigenous Media Organisations.

The national broadcasters make an important contribution to media diversity in Australia. The Government has committed to providing the ABC and SBS with 5-year funding terms, restoring \$83.7 million in funding to the ABC, and reviewing options for delivering greater financial sustainability and certainty to the national broadcasters.

On 13 May 2022, the Australian Government announced it would develop a News Media Assistance Program (News MAP) to secure the evidence base needed to inform long term media policy interventions and to develop measures to support public interest journalism and media diversity. The Government is providing \$4 million in 2022–23 to the News MAP for investment in early initiatives that help build an evidence base on the state of the news media sector as it adjusts to a changing media environment. These initiatives will include improved measurement of media diversity to guide the design, delivery and targeting of measures supporting the sector, including in regional areas.

Key findings

- The Code was a world-first initiative and, as such, its prospects were uncertain when it took effect on 3 March 2021.
- Looking back at its first year of operation, it is reasonable to conclude that the Code has been a success to date. Over 30 commercial agreements between digital platforms (Google and Meta) and a cross-section of Australian news businesses have been struck, agreements that were highly unlikely to have been made without the Code. The agreements were governed by confidentiality clauses and were not provided to the review by digital platforms or the relevant news businesses.
- While some stakeholders raised concerns about the Code's impact on competition and media diversity, the objective of the Code is to address bargaining power imbalances so as to ensure news businesses receive fair remuneration from digital platforms for the value their content generates. It is not designed to redistribute resources across the news sector or to guarantee that all news businesses receive funding. Other policy and funding tools are available to achieve these objectives.

Chapter 3: Designating digital platforms

The Minister may bring individual digital platforms under the Code – that is, ‘designate’ them – after considering:

- whether there is a significant bargaining power imbalance between the digital platform and Australian news businesses and
- whether the platform has made a significant contribution to the sustainability of the Australian news industry through agreements relating to the news content of Australian news businesses, including agreements about remuneration.⁴²

The first criterion originates in the finding, in the Final Report of the ACCC’s 2019 Digital Platforms Inquiry, that Google and Meta each have substantial bargaining power in their dealings with news businesses in Australia.

The second criterion is intended to expressly recognise a key objective of the Code, that is, to provide incentives for digital platforms and news businesses to resolve remuneration issues via private commercial deals concluded outside the Code. It is broadly expressed, thereby providing the Minister with discretion in determining whether or not a digital platform has met the criterion.

No digital platforms have been designated under the Code to date.

A number of stakeholders believe one or both digital platforms should be designated under the Code.⁴³ However, as foreshadowed in the consultation paper released on 1 April 2022, the review is separate to the process in the Code for designating digital platforms and has not therefore considered whether individual digital platform services should be designated. The Minister may make public statements about potential designations⁴⁴ or initiate the designation process at any time, independently of the review, should developments warrant it.

Stakeholder comments on designation focused on the second designation criterion.⁴⁵ Some stakeholders, particularly those without commercial agreements, were concerned that the level of discretion provided by the second criterion creates uncertainty about the range of news businesses

42 Section 52E(3), *Competition and Consumer Act 2010*.

43 The Conversation, p 4; SBS, pp 2, 9; Commercial Radio Australia, p2; Broadsheet, p1. Guardian Australia supported designating Apple ‘as a matter of priority’ and suggested that other digital platform services could also be considered, such as YouTube, Instagram, Snapchat, and Twitter (Guardian Australia, pp 5–6); Free TV considered YouTube was an unavoidable trading partner to television news services (Free TV, p 16) and suggested that Tik Tok, Twitter and Apple should be considered for designation in the future (Free TV, p 14).

44 Free TV and Nine Entertainment proposed that the Government issue a Statement of Expectations (Free TV, p14; Nine Entertainment pp 2–3). Free TV suggested such a Statement should cover Google Search, Facebook News and YouTube. Nine suggested a Statement could cover Facebook NewsFeed, Tik Tok, Twitter and YouTube. The Public Interest Journalism Initiative suggested the Government issue guidelines about when it will consider designation (Public Interest Journalism Initiative, p 3).

45 An exception was the News & Media Research Centre which suggested that adding criteria from the proposed Canadian legislation to the first criterion ‘might be useful’. The Canadian criteria are: the size of the intermediary or the operator; whether the market for the intermediary gives the operator a strategic advantage over news businesses; and whether the intermediary occupies a prominent market position: News & Media Research Centre, p 5.

with which digital platforms should reach agreements, and that digital platforms have taken advantage of this by limiting the range of deals they have made.⁴⁶

Suggestions included removing the second criterion altogether⁴⁷ or amending it by requiring the Minister to consider (in addition to the existing criterion):

- whether a digital platform has engaged in good faith negotiations with all registered news businesses⁴⁸
- the range of news businesses with which the digital platform has not done a deal⁴⁹ or
- the extent to which a digital platform has made commercial deals with particular types of news businesses, for example, news businesses that serve particular communities in Australian society.⁵⁰

A further suggestion was to allow designation of a digital platform in relation to a group of news businesses.⁵¹

In our view, these proposals would, if implemented, likely have negative consequences.

Removing the criterion would publicly signal that the significant number of agreements that Google and Meta have reached since the Code came into force should be excluded from consideration in designation decisions. The sole criterion would be whether a significant bargaining power imbalance exists between Google and Meta and Australian news businesses which in 2019 the ACCC found to be the case.⁵²

Were the Minister then to designate them, a number of stakeholders have suggested that existing commercial agreements contain provisions that would then terminate these agreements.⁵³ This could mean that funds committed under the agreements may no longer be paid. Remuneration issues for many news businesses would then need to be resolved – in at least some cases, starting afresh – through the Code’s negotiation, mediation, and arbitration processes. These would not necessarily result in all registered news businesses obtaining remuneration, nor would they guarantee that those currently with agreements would receive the same funding they do today.

While enabling designation in relation to a group of news businesses could avoid this potential outcome, it would raise other difficulties in practice; for example, it would require the Minister to make potentially contentious choices about which news businesses were in the group and which were excluded. Choices made by the Minister could also raise concerns about government infringing the independence of the media.

As regards amending the criterion, the Minister can already take the proposed additional considerations into account under the existing provision. Amending the criterion to favour particular groups of news businesses would again raise contentious issues about which types of news businesses

46 Broadsheet Media, p 5; Chinese News and Media Group, p 1; SBS, p 5; Urban List, pp 3–4; Public Interest Journalism Initiative, p 3.

47 Free TV pp 3, 17. SBS recommended removing the criterion if its proposed amendments to the criterion were not implemented (SBS, pp 10–11).

48 Broadsheet Media, p 10; Media Entertainment and Arts Alliance, p 8.

49 Digital Publishers Alliance, p 3; SBS, p 10.

50 SBS, p 10.

51 Broadsheet Media, p 9; SBS, p 10.

52 Australian Competition and Consumer Commission, *Digital Platforms Inquiry report*, July 2019, pp 206, 226, 255–257.

53 Broadsheet Media, p 10; SBS, pp 10, 11.

should be in the group. Adding greater specificity to the criterion could also have consequences, including focussing the platforms' attention on particular parts of the news media sector. In addition, the broad construction of the second criterion may have encouraged digital platforms to keep reaching agreements beyond what they think is strictly required by the criterion, so as to minimise the risk of designation.

The future application of the Code

The Code does not have a formal mechanism to assess whether digital platforms should be subject to it.⁵⁴ It currently provides that, when making a designation determination, the Minister may consider any ACCC reports or advice, but does not provide for the ACCC to prepare reports in the future.⁵⁵ To address this, the Government should consider directing the ACCC to prepare periodic reports (for example, every 3 years) on:

- the extent to which digital platforms make available covered news content of Australian news businesses and
- whether significant bargaining power imbalances exist between these digital platforms and Australian news businesses.

This would ensure that the Minister has ongoing access to advice on bargaining power imbalances comparable to that provided in the Final Report of the ACCC's 2018–19 Digital Platforms Inquiry.

The ACCC should have compulsory information-gathering powers to assist its preparation of these reports. Directions to the ACCC should be able to specify procedural matters such as reporting dates. These reports should be required to be made public within a specified period (for example, 28 days) after being provided to the Minister.

The question of how the Minister accesses information on other aspects of the operation of the Code, including agreements reached between digital platforms and news businesses, should be considered as part of the Government response to the ACCC digital platforms report provided to the Treasurer on 30 September 2022.⁵⁶

Other issues

Various stakeholders raised other matters relevant to designation, suggesting, for example, that the Communications Minister and/or the ACMA be required to be consulted on designation decisions;⁵⁷ that the ACCC or ACMA should make designation decisions, not a Minister;⁵⁸ that the requirement to give a platform 30 days' notice of potential designation be removed;⁵⁹ and that any clauses in commercial agreements between digital platforms and news businesses that terminate the agreement

54 Guardian, p5; Meta, pp 23–25; Broadsheet Media, pp 11–12; Digital Publishers Alliance p 4.

55 Section 52E(4), *Competition and Consumer Act 2010*.

56 Australian Competition and Consumer Commission, *Interim Report No. 5*, Digital Platform Services Inquiry, September 2022. A key element of the ACCC's proposed reforms is that compulsory information-gathering powers be able to be applied effectively to digital platforms.

57 Minderoo Foundation, p 6; SBS, p 12.

58 Centre for Media Transition, pp 6, 8; Reset Australia, p 3.

59 Reset Australia, p3.

if a digital platform is designated be void.⁶⁰ Generally, the review does not consider that there is currently a case for making changes of this nature, but notes these matters could be re-examined by the review recommended in Chapter 5.

Key findings

The review received several proposals for amending the criteria for designating digital platforms but considered they would have negative consequences.

The review finds that the Code lacks a formal mechanism to extend the Code to other platforms. To address this, the review suggests the Government consider directing the ACCC to prepare reports on this question. The review further suggests that the Government consider the need for additional ACCC information-gathering powers in the context of its response to the ACCC's recent proposed major reforms in relation to digital platforms, including on agreements between platforms and news businesses.

Recommendations

1. The Government should consider directing the ACCC to prepare reports on:
 - the extent to which digital platforms make available covered news content of Australian news businesses and
 - whether significant bargaining power imbalances exist between these digital platforms and Australian news businesses.
2. The Government should consider addressing, in its response to Interim Report No. 5 of the ACCC's Digital Platform Services Inquiry, whether ACCC information-gathering powers could be used to obtain information about commercial agreements between digital platforms and news businesses.

60 Broadsheet Media, p 10; SBS, pp 2, 10, 11.

Chapter 4: Registration of news businesses

Broadly, news businesses may be registered under the Code where they meet certain tests (set out below). Registration does not, in and of itself, grant any rights or entitlements to news businesses, nor does it place any obligations on digital platforms that have not been designated. However, if a digital platform is designated, a registered news business may, in particular, trigger the negotiation, mediation, and arbitration provisions of the Code.

Registration tests

The registration tests apply to ‘news sources’ or, in one case, to the corporation applying for registration.

Under the Code, a news business comprises a news source or combination of news sources. News sources comprise, for example, websites and, where they produce online content, newspapers, television and radio programs, and magazines.⁶¹

The Code provides for a corporation to apply to the ACMA to register itself and its news businesses, and for endorsement of itself as the registered corporation for these news businesses.⁶²

There are 4 registration tests.

- The content test requires that the primary purpose of each news source is to create and publish core news content.⁶³
- The professional standards test requires that news sources have editorial independence from the subjects of their coverage, and be subject to one of the professional codes of practice listed in the Code or in regulations, or analogous internal editorial standards.⁶⁴
- The revenue test requires that the annual revenue of the news business corporation exceeds \$150,000 in the preceding year, or in at least 3 of the 5 preceding years.⁶⁵
- The Australian audience test requires that news sources operate predominantly in Australia for the predominant purpose of serving Australian audiences.⁶⁶

A key question for the review is whether the registration tests, as currently drafted, accurately identify the range of news businesses that were intended to be able to take advantage of, in particular, the Code’s negotiation, mediation, and arbitration processes (were a digital platform to be designated).

61 Section 52A, *Competition and Consumer Act 2010* (CCA).

62 Section 52F, CCA.

63 Section 52N, CCA.

64 Section 52P, CCA.

65 Section 52M, CCA.

66 Section 52O, CCA.

This question goes to the heart of why the Code was introduced. The Explanatory Memorandum for the legislation implementing the Code states that:

The ACCC found in its Digital Platform Inquiry (July 2019) that there is a bargaining power imbalance between digital platforms and news media businesses so that news media businesses are not able to negotiate for a share of the revenue generated by the digital platforms and to which the news content created by the news media businesses contributes. Government intervention is necessary because of the public benefit provided by the production and dissemination of news, and the importance of a strong independent media in a well-functioning democracy.⁶⁷

The Explanatory Memorandum elaborated on the type of news that news businesses covered by the Code should produce, known as ‘core news content’.

Core news content can relate directly to matters of public policy and government decision making at any level of government. However, it can also include other matters of public significance, such as reporting on law and order, health, education, environmental issues, science, industrial relations and business.

It also includes coverage of current issues or events where these are of public significance at a local, regional or national level. Reporting on community issues or events is considered core news content if they are of public significance. Matters that are principally private or special interest are not intended to be included.

Pure opinion or commentary on news content will generally not be considered core news. Applicant corporations seeking to include opinion based or editorial content will need to demonstrate how the content plays a significant role in reporting, investigating or explaining issues that are relevant in engaging Australians in public debate and in informing democratic decision making.⁶⁸

The Explanatory Memorandum clarified that:

It is intended that a news source can be considered to have created content even if it commissions or otherwise obtains the content externally.⁶⁹

The policy intent was not that every news source producing at least some online ‘core news content’ would be able to be registered. The history of the development of the Code indicates that the intent was that news sources would need to mostly or substantially produce core news content. The draft Code released by the ACCC in July 2020 required that news outlets ‘predominantly’ produce core news content.⁷⁰ The Code ultimately required that the ‘primary purpose’ of the news source be to create and publish core news content.⁷¹


67 Explanatory Memorandum, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, p 7.

68 Ibid, paras 1.71–1.73.

69 Ibid, para 1.69. Some stakeholders proposed requiring news businesses to produce original content to be registered: Centre for Media Transition, pp 12–13; News & Media Research Centre, p 6.

70 Clause 52H, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 Exposure Draft, July 2020.

71 Section 52N, *Competition and Consumer Act 2010*.



Even then, not every news source whose primary purpose is to produce core news content was intended to be covered. Rather, the Code was limited to those news sources that produce core news content in accordance with recognised professional standards of practice. This was intended to limit the Code to those news sources which produce content subject to rules governing, for example, accuracy, fairness, impartiality, privacy and conflicts of interests, and whose content might therefore reasonably be said to be important for a ‘a well-functioning democracy’.⁷²

Finally, a minimum revenue requirement was included consistent with grants programs in place at the time the Code was being developed.⁷³

As at the time this report was provided to Ministers, 34 applications to the ACMA had been successful and 12 applications were unsuccessful.

72 Explanatory Memorandum, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, p 7.

73 The \$150,000 threshold adopted is the same as that used for the 2018–2020 Regional and Small Publishers Innovation Fund.

Registered news businesses

ACE Radio
Ausbiz
Australian Property Journal
Broadsheet
Chinese News and Media Group.
City Hub Sydney; Inner West Independent; cityhubsydney.com.au
Coastal Broadcasters Pty Ltd Trading as 4KZ, KOOL-FM & 4AM
Croakey Health Media.
Daily Mail Australia
Fassifern Guardian & Tribune
Hills to Hawkesbury Community Newspapers
Inside Story
Junkee
Man of Many
Mareeba Express
MyCity Media
News Cop Pty Ltd
Post Newspapers
Primer
Pro Bono Australia
Region Media Group
Southern Cross Austereo Pty Ltd
Special Broadcasting Service Corporation (SBS)
Sports Entertainment Network Pty Ltd
Star Observer; Sydney Star Observer; starobserver.com.au
Starts at 60 Pty Ltd
The Australian Jewish News
The Conversation Media Group Limited
The Royal Institution of Australia
Time Out
Urban List
Valetta Media Pty Ltd
West Coast Radio Pty Ltd
Western Sydney Publishing Group

Overall, we consider that the registration provisions have worked effectively and the list of registered news businesses (and their registered news sources) is broadly consistent with the policy objectives of the Code. There appear, however, to be a small number of cases where the registration tests, as currently drafted, have not delivered outcomes that are consistent with these objectives. A number of submissions raised similar concerns, particularly about ‘opportunistic’ registrations, and suggested amendments to address these concerns.⁷⁴

⁷⁴ Centre for Media Transition, p 12; Country Press Australia, p 3; Google, pp 11–13, 15; Meta, pp 26–27; News & Media Research Centre, p 6; Guardian Australia p 6; Country Press Australia, p 3.

As the number of registrations viewed by some stakeholders as ‘opportunistic’ is small, we are not persuaded that there is a sufficiently strong case to amend the registration tests at this point in time to address this issue (subject to the discussion of the revenue test below). However, registration outcomes should be closely monitored and if similar registrations continue to occur, the question of amending the registration provisions should be revisited. The future review proposed in Chapter 5 could also reconsider this issue.

We also note that some of the amendments proposed by stakeholders are likely to have unintended consequences. For example, one proposal is to amend the professional standards test so that news businesses are not able to rely on internal standards analogous to one of the standards expressly listed in the Code, such as the Australian Press Council Standards of Practice. The Australian Press Council submitted that:

it is not clear that high standards of practice will always result in cases where rules are only applied via an internal process, or via a body whose complaints-handling process is not entirely independent... The Press Council understands that some news bodies that have been granted eligibility status under the Code have relied on internal editorial standards that are an exact replica of select standards of the Press Council. The ease with which a body can merely copy and paste the Press Council’s standards without demonstrating adherence to them is of concern.⁷⁵

We understand that certain significant news businesses – such as Guardian Australia – have historically operated subject to internal professional standards and therefore needed, once the Code commenced, to rely on the ‘analogous internal standards’ provision to satisfy the professional standards test. We also understand that many television and radio stations need to rely on internal standards to meet this test, an issue which is discussed further below.

Revenue test

A number of submissions proposed reducing the current \$150,000 revenue test threshold.⁷⁶ On the other hand, Country Press Australia, whose members include a large number of small regional newspapers, submitted that:

any legitimate news organisation with professionally trained journalists could not possibly operate with revenue below \$150,000.⁷⁷

On 23 March 2022, the House of Representatives Standing Committee on Communications and the Arts released its report on the Future of Regional Newspapers in a Digital World. This report recommended that the revenue threshold be reduced to \$75,000.⁷⁸

As the Government has not yet responded to this report, this review refrains from further comment on the issue.

75 Australian Press Council, p 4. See also Centre for Media Transition, p 11.

76 Community Broadcasting Association of Australia, First Nations Media Australia, Local & Independent News Association, p 4; Media Entertainment and Arts Alliance, p 9; News & Media Research Centre, p 6.

77 Country Press Australia, p 3.

78 *The Future of Regional Newspapers in a Digital World*, House of Representatives Standing Committee on Communications and the Arts, March 2022, recommendation 12.

Operational issues

A number of submissions raised operational issues with the professional standards test, including that:

- existing professional standards for radio and television do not apply to online content.⁷⁹

Commercial Radio Australia submitted that:

The professional standards applicable to radio are those set out in the Commercial Radio Code of Practice (section 52P(1)(a)(ii)). However, this test does not work for radio's online content and therefore is misguided in a Code that deals solely with online content. The Full Federal Court held in 2013 that online simulcasts by commercial radio stations are not broadcasts and therefore not subject to the Commercial Radio Code of Practice... This has created significant practical difficulties for commercial radio stations. Simulcasts transmit identical content to that broadcast on AM/FM and DAB+ platforms. This means that the content is in practice governed by the Commercial Radio Code of Practice, yet the Mandatory Bargaining Code requires an additional set of professional standards.

- the list of professional standards in the test is incomplete⁸⁰
- multi-platform news businesses should be able to be registered⁸¹
- that URLs required by the ACMA are not available in some circumstances, for example, for live streams⁸² and smart speakers⁸³ and
- that the registration process could be made less onerous by, for example:
 - not requiring the provision of individual URLs to the ACMA for each snippet of broadcast television and radio shows placed online⁸⁴
 - allowing a single application for all of a station's registrable website content.⁸⁵

To date, many affected news businesses have addressed the problem that existing codes of conduct do not apply to online content by developing 'analogous' internal standards, thereby enabling them to satisfy the professional standards test. Ideally, this issue would be resolved by the development of professional standards applying to online content, and we recognise that the ACMA is undertaking work to modernise the television and radio industry codes of practice, including because they do not currently apply to online content.⁸⁶ However, if this is not possible, then the proposed future review of the Code proposed in Chapter 5 should consider whether the amendments to the registration provisions could address the issue.

79 Commercial Radio Australia, p 5.

80 Community Broadcasting Association of Australia, First Nations Media Australia, Local & Independent News Association, p 4; Public Interest Journalism Initiative, p 4.

81 Free TV, p 18.

82 Ibid, p 19.

83 Commercial Radio Australia, p 6.

84 Nine Entertainment, p 2.

85 Commercial Radio Australia, p 6.

86 Australian Communications and Media Authority, *What audiences want – Audience expectations for content safeguards*; accessed 31 October 2022.

Professional standards can be added to the test at any time via regulation.⁸⁷ However, there may be a question about whether some of the codes not listed in the registration provisions apply to online content, and therefore whether it would be worthwhile adding them to the Code at this time.

Of the remaining issues, we do not consider there is a sufficiently strong case to make changes to the Code at this point in time. However, where issues are of an administrative nature, then these should be considered by the ACMA as the independent regulator administering this part of the Code.

Findings

The review considered the Code's registration criteria and found that there was not a sufficiently strong case to amend them at this point in time. Registration outcomes should be closely monitored to ensure that the criteria are operating as intended.

Recommendations

3. Treasury, in consultation with the DITRDCA, should monitor registration outcomes for consistency with the policy objectives of the Code.
4. The ACMA should consider administrative issues arising in relation to the registration process.

⁸⁷ Section 52P(1)(a)(vi), CCA. This provision was included in the Code to enable standards independently developed within the news industry to be added to the Code over time, without the need for legislative amendments.

Chapter 5. Future review of the Code

It will be important for the Code to be reviewed again in the future.

While this review finds that, overall, the Code has performed well against its objectives in its first year, the commercial and technological environment in which news businesses and digital platforms operate is evolving quickly.

Further, should a new regulatory regime be established for digital platforms, the tools available to government are likely to expand, as will the information regulators will be able to assess.

We also understand that most, if not all, commercial agreements will expire over the next 2–3 years. Arguably, a critical test of the Code’s effectiveness will be the extent to which a new round of agreements is made.

Finally, other countries are moving to address similar concerns to those the Code seeks to address. For example, legislation was introduced into the Canadian Parliament on 5 April 2022 that would establish a broadly similar framework to the Code to ensure fair revenue sharing between digital platforms and news businesses.⁸⁸ A future review should examine the experience of overseas jurisdictions to identify potential improvements to the Code.

Findings

While the Code has performed well in its first year against its objectives, it will be important to review the Code again in the future in light of commercial, technological, and regulatory developments (including those occurring overseas).

Recommendation

5. The Government should consider reviewing the Code again after 4 years of its operation.

⁸⁸ See [Bill C-18](#), Online News Act: accessed 31 October 2022.

Appendix 1: Outline of the Code

The Code

- News businesses may be registered by the ACMA if they satisfy tests relating to annual revenue, the type of news content they publish, having a predominantly Australian audience, and professional and editorial standards.
 - Registration enables news businesses to, for example, participate in the bargaining, mediation, and arbitration processes in the Code with designated digital platforms.
- The Minister may designate a digital platform – making them subject to the Code – after considering whether there is a significant bargaining power imbalance between the platform and Australian news businesses; and whether the platform has made a significant contribution to the sustainability of the Australian news industry through commercial agreements with news businesses.
- Where registered news businesses are not satisfied with the outcome of negotiations with designated digital platforms, they can trigger provisions in the Code, including:
 - requiring designated digital platforms to engage in good faith bargaining for up to 3 months followed by mediation and
 - if a commercial deal still cannot be reached, registered news businesses may initiate a compulsory arbitration process to determine the amount of remuneration that designated digital platforms must pay them.
- The Code imposes obligations on designated digital platforms to meet minimum standards on matters such as providing advance notice when they make major algorithm changes.
- The Code also:
 - provides for commercial agreements reached outside the Code to include provisions precluding the parties from utilising the Code’s minimum standards negotiation, mediation, and arbitration processes and
 - provides for designated digital platforms to make ‘standard offers’ to registered news businesses and
 - enables registered news businesses to bargain collectively under the Code’s negotiation processes.

Appendix 2: Submissions

Prof Andrew Podger AO, Crawford School of Public Policy, Australian National University
Australian Associated Press
Australian Broadcasting Corporation
Australian Press Council
Broadsheet Media
Community Broadcasting Association of Australia/First Nations Media Australia/Local & Independent News Association
Centre for Media Transition, University of Technology Sydney
Chinese News and Media Group
Commercial Radio Australia
Concrete Playground
Country Press Australia
Croakey Health Media
Digital Publishers Alliance
Free TV
Google
Guardian Australia
Man of Many
Media Entertainment and Arts Alliance
Meta
Minderoo Foundation
Minderoo Tech & Policy Lab, The University of Western Australia
News Corp Australia
News & Media Research Centre, University of Canberra
Nine Entertainment
Pro Bono Australia
Public interest Journalism Initiative
Public Interest Publishers Alliance
Reset Australia
Special Broadcasting Service
Solstice Media
The Conversation Media Group
Urban List
Western Sydney Publishing Group