

6 May 2022

## Submission from the Digital Publishers Alliance to the Review of the News Media and Digital Platforms Mandatory Bargaining Code.

### 1. What is the Digital Publishers Alliance?

- 1.1 The Digital Publishers Alliance (DPA) is a non-profit member association supporting, connecting and protecting the interests of digital-first Australian publishers and their audiences. It represents over 120 leading media titles from over 40 of the leading independent digital publishers in Australia. The members of the DPA have a combined annual revenue over \$200 million and they directly employ over 2000 Australians in full-time and contractor roles. The DPA has a keen interest in making sure the News Media Bargaining Code (**News Code**) is fair and reasonable for digital publishers.
- 1.2 The Digital Publishers Alliance includes membership from over 40 digital publishers, including some of who have successfully negotiated funding deals with Meta and Google, like Schwartz Media, Private Media, Junkee Media and others, and many other publishers that haven't. The DPA's members range from digital publishers with a minimum of 3 full-time staff, up to larger independent publishers like Mamamia and Private Media that employ around 100 full-time staff each.
- 1.3 The DPA was officially set up in 2021. Funding to help establish the DPA came from a variety of sources, including membership fees paid by all members as well as from industry partners who see the benefit in a healthy digital industry. Both Meta and Google are among the industry partners who have contributed funds in its first year to cover some of the cost of the DPA. A clear condition of accepting the funds from Meta and Google was that they would have no say over the actions that the DPA makes, and is reflective of the deep and symbiotic relationship that the digital platforms and the digital media industry have with each other.

### 2. The DPA's interest in the News Code

- 2.1 The DPA's goal is to connect, support and protect the digital news industry in Australia.
- 2.2 A successful industry requires diversity of voices. Independent digital publishers are critical in order for journalism to serve its broader social purpose.
- 2.3 The DPA represents a wide breadth of publishers, and by this submission advocates for the full spectrum of news publishers in Australia having access to the benefits flowing from the News Code.
- 2.4 One of the DPA's aims is for more independent digital publishers to receive funding from Meta and Google to:
  - a) level the playing-field between independent digital publishers who have and haven't currently received funding, and
  - b) ensure there is a diversity of voices in the Australian media landscape beyond just the well-funded larger players.

### 3. The DPA's observations on the operation of the News Code

- 3.1 The News Code has stimulated agreements with the digital platforms which offer vital funding for Australian journalism (**Platform Agreements**).
- 3.2 Compared to larger publishers, when an independent publisher receives funding from Meta or Google, it can have an oversized impact on their work. Given most independent publishers work with smaller budgets, funding agreements can help them improve the quality of their journalism, create jobs, provide stability and fund important programs to help grow their audience, revenue and impact. There is a noticeable positive effect for publishers when they receive funding, with the funds used to employ additional journalists and create content in areas they wouldn't have before.
- 3.3 The threat of designation has been a key driver in the platforms offering deals to publishers.
- 3.4 Based on information received from members, the DPA understands that publishers have received widely varying treatment from the platforms:
- a) There is no clear formula for the amount of remuneration which may be offered. There are likely factors other than the publisher's value to the platform impacting whether an offer is made and if so for what amount.
  - b) No transparency of commercial terms is offered, creating inconsistent outcomes and difficulty for individual publishers seeking to negotiate.
  - c) Some publishers have received no funding at all. For others negotiations have either stalled, received offers they have deemed unsatisfactory, or were never begun.
- 3.5 Inconsistent access to the benefits of the News Code may have the following negative impacts:
- a) There may be a concentration in the industry of publishers who have been able to enter agreements for remuneration with the platforms. Those who have not are at a substantial competitive disadvantage.
  - b) Newer and smaller publishers are most at risk. DPA's review of which members have and have not publicly confirmed entering Platform Agreements indicates that it is the newer and smaller publishers who are being left out at the moment. This means that the News Code may have the effect of creating a barrier to entry for new publishers.
  - c) There is little transparency or control over whether the platforms offer remuneration or for what amount. This is left entirely in the hands of the platforms. This has the (presumably unintended) consequence of giving them more power over the news industry. By choosing who they fund, they can impact which publishers flourish and which may struggle to remain viable.
  - d) If left unchecked, these outcomes will result in the News Code failing to deliver on its policy objectives of addressing the bargaining power imbalance between publishers and platforms, and ensuring that platforms fairly remunerate news businesses for news content.

#### 4. The DPA's proposals for the News Code

- 4.1 The threat of designation has been perhaps the most important outcome of the News Code, as it has caused the platforms to entertain Platform Agreements. Logically, contemplation of the criteria for designation must be central to the platforms' decision-making about when, with whom, and on what terms they will enter Platform Agreements.
- 4.2 The DPA proposes that the criteria for designation be expanded with the aim of increasing the availability of Platform Agreements to a wider range of publishers. So long as the platforms seek to avoid designation, expanding the designation criteria may have the most direct impact on their behaviour.
- 4.3 The News Code currently specifies the following designation criteria in CCA s 52(e)(3):
- a) whether there is a significant bargaining power imbalance between Australian news businesses and [the digital platform];
  - b) whether [the digital platform] has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).
- 4.4 DPA submits that the second criterion be expanded to provide more clarity as to the relevant considerations for designation (or what is required to avoid designation). It proposes that subsection (b) be amended as follows.
- (b) *whether [the digital platform] has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content) including without limitation:*
- i. *the extent to which [the digital platform] has declined to enter into agreements with news businesses;*
  - ii. *the proportion of news businesses which have entered into an agreement with [the digital platform];*
  - iii. *the overall volume of agreements that [the digital platform] has entered; and*
  - iv. *the extent to which [the digital platform] has offered standard or consistent terms to news businesses for agreements.*
- 4.5 The purpose of these amendments is to create further incentive for the platforms to consider the full breadth of the news industry as potential parties to Platform Agreements. Presently, they may rely on the total value supplied or the number of agreements entered. With the above amendments, they would also be forced to consider who is left out and what impact that has on the broader journalistic landscape.
- 4.6 To support the expanded designation criteria proposed above, the DPA also suggests that there be a clarification to the Commission's information gathering powers. This would ensure that it can access sufficient information to assess, and report on, Google and Meta's behaviour against the designation criteria.
- 4.7 As part of the News Code amendments to the CCA, the Commission acquired information gathering powers relating to 'designated digital platform matters' (CCA s155(2)(b)(ib)). This includes information relating to the performance of a function conferred on the Commission under the News Code (CCA s 155(9AB)). In order to use its information gathering powers in relation to

the designation criteria, the Commission would need to be performing a function under the News Code.

- 4.8** Any designation determination is made by the Minister rather than the Commission. However, the Minister may consider any report or advice of the Commission when contemplating designation (CCA s 52E(4)). On one view, the Commission already 'performs a function' in relation to designation decisions where it provides '[a] report or advice' to the Minister in respect of a designation determination. This report or advice may be characterised as the performance of a function conferred by the News Code.
- 4.9** However, on another view Section 52E(4) operates to specify Ministerial considerations; i.e. it confers power on the Minister, and the Commission providing advice is incidental and non-mandatory. In that case, the section 155 powers regarding 'designated digital platform matters' would not allow the ACCC to gather information to support it providing advice or a report on a designation determination.
- 4.10** Further, this function may not be triggered unless the Minister intends making designation determination. It would not create any positive obligation on the Commission to report on the operation of the News Code and whether designation is appropriate in other circumstances.
- 4.11** To improve and clarify the Commission's section 155 powers, the DPA recommends that CCA s 52E(4) (concerning designation determinations) be amended to enhance and clarify the Commission's functions in relation to designation as follows:
- i. require the Commission to report to the Minister periodically on whether designation may be appropriate in respect of any relevant digital platforms, by reference to the designation criteria;
  - ii. expressly require the Commission to advise the Minister in respect of any designation determination, with reference to the designation criteria; and
  - iii. provide that the consideration of the Commission's advice is mandatory rather than discretionary; i.e. that the Minister *must* consider the report or advice of the Commission.
- 4.12** The underlying purpose of these amendments is to:
- a) enable the Commission to gather information from the digital platforms to better assess whether there is a basis for designation, and to support the Ministerial designation function more meaningfully with its advice;
  - b) create a stronger sense of accountability on the digital platforms' part, where they are aware that they may be required to provide information to the Commission about their Platform Agreements;
  - c) add force to the expanded designation criteria, where platforms are aware that the Commission may gather information for the purpose of considering whether to advise the Minister that designation is required;
  - d) allow digital platforms to otherwise preserve the confidentiality of their Platform Agreement terms.

## 5. Conclusion

- 5.1 The News Media Bargaining Code has been a somewhat successful policy so far in transferring value from the digital platforms to the Australian media industry. The news media publications that have received funding are able to strengthen their businesses. However, the vast majority of that value has gone disproportionately to the very large and established media publishers.
- 5.2 The effect of this is that independent digital publishers have been treated inconsistently and with the unintended effect of creating a tiered system where some have received more benefits than others.
- 5.3 The Digital Publishers Alliance believes a tightening of the designation criteria to include a more broad definition of what a “significant contribution” is, supported by clarification of information gathering powers, would go a long way towards making it a more fair, equitable and balanced News Code that reflects the diversity of the entire Australian media ecosystem.