



Australian Government  
The Treasury

TSY/AU

# Review of the News Media and Digital Platforms Mandatory Bargaining Code

Consultation paper

April 2022



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# Consultation Process

## Request for feedback and comments

Interested stakeholders are invited to comment on the issues raised in this paper by 6 May 2022. Submissions may be lodged electronically or by post, however electronic lodgement is preferred via email to [NMDPbargainingcodereview@treasury.gov.au](mailto:NMDPbargainingcodereview@treasury.gov.au). For accessibility reasons, please submit responses via email in a Word, RTF or PDF format.

Submissions will be shared with other Commonwealth agencies where necessary for the purposes of this review. All information (including name and address details) contained in submissions may be made publicly available on the Australian Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose.

If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment. Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

### Closing date for submissions: 06 May 2022

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# Review of the News Media and Digital Platforms Mandatory Bargaining Code

## 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 news content, thereby helping to sustain public interest journalism in Australia. The legislation governing the Code requires that a review of it commence within 12 months of it coming into effect; that is, by 3 March 2022.

On 28 February 2022, the Treasurer and Minister for Communications, Urban Infrastructure, Cities and the Arts issued a press statement launching the review<sup>1</sup> and published the Terms of Reference ([Attachment A](#)).<sup>2</sup> They confirmed that Treasury would conduct the review in consultation with relevant government agencies.

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 between the parties. Where agreement cannot be reached, it sets out a mediation and arbitration process to determine remuneration payable by a digital platform. Remuneration in these cases is determined by reference to statutory criteria, including the benefit that digital platforms derive from news content and the benefit that news businesses derive from digital platforms.

The Code came into effect on 3 March 2021. During its period of operation, digital platforms have reached commercial agreements outside the Code with a range of large and small news businesses serving metropolitan and regional areas. The Australian Communications and Media Authority (ACMA) has also registered a number of news businesses under Division 3 of the Code. To date, no digital platform has been designated under the Code. Further details of developments under the Code are provided at [Attachment B](#).

As its Terms of Reference make clear, the review will assess the extent to which the Code, during its first year of operation, has achieved results consistent with its policy objective. Initially, and subject to the results of consultation, it will examine the commercial agreements between platforms and news businesses and the Code's designation and registration provisions. The review will not revisit the policy objectives of the Code.

There have been calls for digital platforms to be designated under the Code.<sup>3</sup> This review is, however, separate to the process in the Code for designating digital platforms. The review is governed by different legislative provisions and will consider the total contribution of digital platforms to the sustainability of the Australian news media sector through commercial agreements outside of the Code and the scope for structural improvements to the Code's design. It will not consider whether individual digital platforms should be designated. The Treasurer retains the power

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<sup>1</sup> Available at: <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/review-news-media-and-digital-platforms-mandatory>

<sup>2</sup> See: <https://treasury.gov.au/review/news-media-digital-platforms-mandatory-bargaining-code/tor>.

<sup>3</sup> For example, The Conversation launched an online petition in October 2021 calling for Meta to be designated after it declined to make agreements with The Conversation and other news businesses, see: <https://theconversation.com/sign-our-petition-and-hold-facebook-to-account-170372>.

to initiate the designation process at any time, independently of the review, should developments warrant it.

## Background

The possible need for the Code was highlighted in the Final Report of the Australian Competition and Consumer Commission's (ACCC) inquiry into the impact of digital platform services on the state of competition in media and advertising services markets, released in July 2019.<sup>4</sup>

The ACCC found a significant imbalance of bargaining power between digital platforms and Australian news businesses. In December 2019, the Government directed the ACCC to work with Google and Meta<sup>5</sup> and media companies to develop voluntary codes to address bargaining power imbalances. The Government indicated at the time that if voluntary codes could not be agreed, it would develop alternative options potentially including a mandatory code. In April 2020, the Government instructed the ACCC to develop a mandatory code, given the ACCC's advice that the parties were unlikely to reach agreement on the key issue of payment for news content.

An overview of the Code's key provisions is below.

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<sup>4</sup> ACCC Digital Platforms Inquiry Final Report, July 2019: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

<sup>5</sup> For convenience, this paper generally refers to Meta, rather than its previous name, Facebook.

## The Code

- News businesses may be registered by the Australian Communications and Media Authority (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.<sup>6</sup>
  - Registration enables news businesses to, for example, participate in the bargaining, mediation and arbitration processes in the Code with designated digital platforms.
- The Treasurer 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 three 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;
  - 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.

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<sup>6</sup>Section 52L also requires the news business corporation to operate or control, either singly or together with other corporations, the news business named in the application.

## Consultation Questions

### Commercial agreements outside the Code

Consistent with the policy objectives of the Code, Google and Meta reached agreements with a range of large, small and regional news businesses during the Code's first year of operation (see [Attachment A](#)). Understanding the nature and size of the benefits obtained by Australian news businesses from these deals, both financial and non-financial, will be critical for assessing the extent to which the Code has achieved its policy objectives.

While we appreciate that these deals may contain commercially sensitive details and be subject to confidentiality requirements, we encourage their signatories to provide the review with as much information on them as possible. For the digital platforms, this might include aggregated and de-identified information. The review acknowledges that transparency has been an issue in public debate about the Code, for example, during the recent parliamentary inquiry into the future of regional newspapers in a digital world.<sup>7</sup> Confidentiality arrangements for submissions are set out on page one above.

1. The review seeks information from platforms in particular on the nature and quantum of the benefits, both financial and non-financial, received by news businesses in metropolitan and regional areas from commercial deals with digital platforms.

An underlying objective of the Code is to help sustain public interest journalism in Australia.<sup>8</sup> The Code therefore focuses on news businesses comprising news sources whose primary purpose is to create 'core news content'.<sup>9</sup> A focus for the review will be the extent to which commercial deals have promoted the creation of core news content by Australian news businesses in metropolitan and regional areas.

2. The review requests that news businesses provide as many examples as possible of where funding from commercial deals has been used to, for example:
  - employ more journalists;
  - invest in professional development for journalists and other staff;
  - invest in premises, websites, equipment, software, and data collection and use;
  - expand the reach of news businesses;
  - improve the long-term sustainability of news businesses;
  - avoid having to downsize or close news businesses; or
  - invest in any other way that increases the amount, quality and distribution of core news content.

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<sup>7</sup> Report on the Future of Regional Newspapers in a Digital World, House of Representatives Standing Committee on Communications and the Arts, 23 March 2022, Chapter 4.

<sup>8</sup> Treasurer's press release, 25 February 2021.

<sup>9</sup> 'Core news content' means content that reports, investigates or explains issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or current issues or events of public significance for Australians at a local, regional or national level: Section 52A.

As noted above, not all news businesses have been able to reach a commercial deal with Google and/or Meta. The digital platforms are also making contributions to Australian journalism outside of commercial agreements, for example:

- In August 2021, Meta announced the Facebook Australian News Fund, a \$15 million fund to invest in public interest journalism, and support regional and digital newsroom innovation and economic sustainability.<sup>10</sup> In March 2022, Meta announced 54 news publishers and independent journalists would be awarded \$5 million in total from the Fund.<sup>11</sup>
- Also in August 2021, Google announced the Digital News Academy, a program created by Google and News Corp Australia to provide digital skills training to 750 local and regional journalists and fund 60 new 12-month journalism traineeships in regional Australia over three years.<sup>12</sup>

3. The review seeks stakeholder views on cases where digital platforms and news businesses have not been able to reach commercial deals.
4. The review seeks stakeholder views on any other impacts of commercial deals on the Australian news sector (for example, on competition in media markets).
5. The review seeks stakeholder views on the other forms of support made available by digital platforms to individual news businesses and the Australian news sector more broadly.

## Designation of digital platforms

The Treasurer 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.<sup>13</sup>

The first criterion reflects the finding in the Final Report of the ACCC’s Digital Platforms Inquiry that Google and Meta each have substantial bargaining power in their dealings with news businesses in Australia.<sup>14</sup>

The second criterion reflects the Government’s policy intention that the Code create incentives for digital platforms and news businesses to reach commercial deals outside of the Code.

<sup>10</sup> <https://australia.fb.com/post/facebook-au15-million-news-fund/>

<sup>11</sup> <https://australia.fb.com/post/54-newsrooms-and-independent-journalists-receive-funds-from-aud-15m-facebook-australia-news-fund/>

<sup>12</sup> <https://blog.google/around-the-globe/google-asia/australia/new-program-helps-regional-journalists-develop-digital-skills/>

<sup>13</sup> Section 52E(3).

<sup>14</sup> ACCC Digital Platforms Report, Final Report, June 2019, pp8-10.

The Code requires the Treasurer to provide digital platforms with a notice of intent to designate, and that a decision on whether to designate not be made until 30 days after this notice has been provided.<sup>15</sup> The Treasurer may consider reports of the ACCC in making designation decisions.<sup>16</sup>

Designated digital platforms are subject to a range of requirements, including the negotiation, mediation and arbitration provisions of the Code, when dealing with registered news businesses.

6. Did the designation criteria operate to deliver outcomes consistent with the policy objectives of the Code?
7. If not, which of the designation criteria could be improved, and how, to ensure consistency with the policy objectives of the Code?
8. Are additional designation criteria needed, or are some criteria unnecessary, to meet the policy objectives of the Code?

## Registration of news businesses

News businesses may apply to the ACMA to be registered under the Code. Registration enables news businesses to, for example, participate in the bargaining, mediation and arbitration processes in the Code with designated digital platforms.

To be registered, a news business must satisfy tests in the Code relating to the type of news content they publish, annual revenue, professional standards, and having a predominantly Australian audience (see [Attachment C](#)).

As of 31 March 2022, the ACMA has registered 28 news business corporations including large, small and regional news businesses covering a range of news sources.

The ACMA maintains a register of eligible news businesses at: <https://www.acma.gov.au/register-eligible-news-businesses>. It has also published guidelines on the registration process.<sup>17</sup>

## Assessment by the ACMA

The ACMA undertakes a two-phase assessment of registration applications.

- In Phase 1, the ACMA reviews applications to check that they have been properly completed with appropriate supporting documentation. This includes checking that there is an adequate connection between the applicant and the news business and that each nominated news source complies with Code definitions.
- In Phase 2, ACMA assesses applications against the eligibility criteria, particularly the revenue test,<sup>18</sup> the content test,<sup>19</sup> the Australian audience test,<sup>20</sup> and the professional standards test.<sup>21</sup>

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<sup>15</sup> Section 52E(5), (6).

<sup>16</sup> Section 52E(4).

<sup>17</sup> Available at: <https://www.acma.gov.au/news-media-bargaining-code>.

<sup>18</sup> Section 52M.

<sup>19</sup> Section 52N.

<sup>20</sup> Section 52O.

<sup>21</sup> Section 52P.

The review seeks stakeholder views on the following questions.

9. Did the registration tests operate to ensure that news businesses were registered where, and only where, this was consistent with the policy objectives of the Code?
10. If not, which of the registration tests could be improved, and how, to ensure consistency with the policy objectives of the Code?
11. Are additional registration criteria needed, or are some registration criteria unnecessary, to meet the policy objectives of the Code?

### Application for registration

An authorised representative of the applicant news business must complete and lodge an application for registration in accordance with the ACMA Guidelines.

12. Did the ACMA guidelines help applicants understand the registration criteria and the process the ACMA would follow to make a decision on individual applications?
13. Are there any improvements that could be made to the ACMA's guidelines?
14. Are there any improvements that could be made to how the ACMA administers the application and assessment process generally?

### Other issues

15. Are there any issues relating to the Code, not covered by the consultation questions above, that stakeholders wish to bring to the attention of the review?

## Attachment A: Terms of reference

Section 52ZZS of the *Competition and Consumer Act 2010* (the Act) requires a review of the operation of the News Media and Digital Platforms Mandatory Bargaining Code (the Code), as contained in Part IVBA of the Act, to commence within 12 months after the Code takes effect.

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.

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. During its period of operation, digital platforms have reached commercial agreements outside the Code with a range of large and small news businesses serving metropolitan and regional areas. The Australian Communications and Media Authority (ACMA) also registered a number of news businesses under Division 3 of the Code. To date, no digital platform has been designated under the Code.

The review will:

- assess the extent to which the Code, during its first year of operation, has delivered outcomes consistent with its policy objective; and
- identify potential improvements to the Code.

The review will not revisit the policy objectives of the Code.

Initially, and subject to the results of consultation, the review will assess the extent to which:

- 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;

have delivered outcomes consistent with the policy objectives of the Code.

### **Process and timing**

The review is to be undertaken by the Department of the Treasury, in consultation with the Department of Infrastructure, Transport, Regional Development and Communications (DITRDC), the Australian Competition and Consumer Commission (ACCC) and the ACMA.

The review will consult news businesses (including small and regional businesses), digital platforms and other relevant stakeholders, including by inviting written submissions.

Following stakeholder consultation, the Treasury will prepare a report containing the review's findings and recommendations, in consultation with DITRDC, the ACCC and ACMA.

The report will be provided to the Treasurer and the Minister for Communications, Urban Infrastructure, Cities and the Arts in September 2022.

In accordance with section 52ZZS of the Act, the report will be published as soon as practicable after 28 days have passed after being provided to the Ministers.

## Attachment B: Development of the Code

### Key steps

20 April 2020	The Government directs the ACCC to develop a mandatory bargaining code: see <a href="https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accc-mandatory-code-conduct-govern-commercial">https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accc-mandatory-code-conduct-govern-commercial</a>
31 July 2020	Draft legislation released by the ACCC for stakeholder consultation: <a href="https://www.accc.gov.au/media-release/australian-news-media-to-negotiate-payment-with-major-digital-platforms">Australian news medi...~https://www.accc.gov.au/media-release/australian-news-media-to-negotiate-payment-with-major-digital-platforms</a>
9 December 2020	Legislation introduced into the Parliament to implement the Code
25 February 2020	Legislation passed by the Parliament: <a href="https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/parliament-passes-news-media-and-digital-platforms">https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/parliament-passes-news-media-and-digital-platforms</a>
3 March 2020	Legislation commences

### Commercial deals

The ACCC has provided a list in the table below of commercial deals reached between each of Google and Meta and news businesses.<sup>22</sup>

The information was compiled in the fourth quarter of 2021 from publicly available material and represents the ACCC's best understanding of deals reached at that time, noting the ACCC does not have a monitoring role in relation to these deals.

Google	Meta
Agenda Media	Australian Broadcasting Corporation
Australian Broadcasting Corporation	Australian Community Media
Australian Community Media	Country Press Australia
Australian Associated Press	Industry Super Holdings
Country Press Australia	Junkee Media
Independent Australia	Mamamia
Industry Super Holdings	News Corp
Junkee Media	Network Ten
News Corp	Nine Entertainment Co
Nine Entertainment Co	Private Media
Out Publications	Seven West Media
Private Media	Schwartz Media
Schwartz Media	Scott Trust
Scott Trust	Solstice Media
Seven West Media	
Special Broadcasting Service	
Solstice Media	
The Conversation	
Times News Group	
Verizon Media	

<sup>22</sup> See: [Appendix | ACCC...~https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/appendix](https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/appendix).

## Registrations of news businesses

A list of registered news businesses is available on the ACMA website:

<https://www.acma.gov.au/register-eligible-news-businesses>

## Collective bargaining authorisation

The *Competition and Consumer Act 2010* (CCA) provides that the ACCC may grant authorisation for conduct that may breach a prohibition on anti-competitive conduct. The ACCC may grant authorisation if it is satisfied that either:

- the proposed conduct would not be likely to substantially lessen competition; or
- the likely public benefit from the conduct outweighs the likely public detriment.

If the ACCC is satisfied that the relevant legal test is met and grants authorisation, this removes the risk of legal action under the competition provisions of the CCA.

These provisions apply economy wide and are independent of the operation of the Code.

On 5 August 2021, the ACCC granted authorisation to Country Press Australia and its members to collectively bargain with Meta and Google about payments for their news content featured on the platforms.<sup>23</sup>

On 29 October 2021, the ACCC granted authorisation to Commercial Radio Australia to bargain collectively with Meta and Google about payment for content produced by its members (excluding Nine Entertainment) and featuring on those platforms.<sup>24</sup>

The ACCC has also published two collective bargaining class exemption notices lodged by the Minderoo Foundation on 24 January 2022 on behalf of 23 small publishers which allows them to collectively bargain with each of Google and Meta for remuneration for news content featured on those platforms without breaching Australian competition laws.<sup>25</sup>

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<sup>23</sup> See ACCC media release available at: <https://www.accc.gov.au/media-release/country-press-australia-can-collectively-bargain-with-google-and-facebook>

<sup>24</sup> See ACCC media release available at: <https://www.accc.gov.au/media-release/commercial-radio-australia-to-collectively-bargain-with-google-and-facebook>

<sup>25</sup> <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>

## Attachment C: Registration tests<sup>26</sup>

### Revenue Test

The revenue test requires that the news business corporation's revenue exceeded A\$150,000 in the most recent year for which there are such accounts, or in 3 of the 5 most recent years for which there are such accounts. This test is applied at the corporation level. A news business corporation does not need to show that the revenue was generated by, or relates to, the operations of its news sources.

### Content test

The content test requires that the primary purpose of each news source is to create core news content. Under section 52A, *core news content* is content that reports, investigates or explains issues or events that are:

- relevant in engaging Australians in public debate and in informing democratic decision-making; or
- current issues or events of public significance for Australians at a local, regional or national level.

Under subsection 52N(3), in determining whether the primary purpose of a news source is to create core news content, matters to be taken into account include the amount of core news content created by the news source, the frequency with which it is created, and the degree of prominence it is given compared to other content created by the news source.

### Australian audience test

The Australian audience test requires that each news source operates predominantly in Australia for the purpose of serving Australian audiences.

### Professional standards test

The Professional standards test requires that each news source is subject to external professional standards as applicable, as listed in paragraph 52P(1)(a).

The test also requires that each news source has editorial independence from the subjects of its news coverage.

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<sup>26</sup> Section 52L also requires the news business corporation to operate or control, either singly or together with other corporations, the news business named in the application.