

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



Submission by the Media Entertainment and Arts Alliance

May 2022

The Media Entertainment and Arts Alliance (MEAA) is the trade union representing over 5000 working journalists throughout Australia. MEAA welcomes the opportunity to contribute to the review of the News Media and Digital Platforms Mandatory Bargaining Code (the Code).

The review will assess the extent to which the Code has achieved results consistent with its policy objective and identify potential improvements to the Code. Where possible, the review 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.

MEAA acknowledges the injection of funds that have flowed into the Australian media sector since the Code's commencement in 2021. We note that this funding has been made possible because of the Code's existence, not through it, via voluntary agreements between Google and Meta and Australian news media organisations.

The Code has, to date, functioned as a 'Sword of Damocles' for the digital platforms. No digital platform has yet been designated under the Code, with designation being a pre-condition to being bound by the Code's provisions.

The Federal Government's February 2022 Media Policy Statement observed that since the Code commenced in March 2021, Google has entered into deals with 19 news businesses, while Facebook has 11 such arrangements.<sup>1</sup> These deals have been reached across platform types and agreed to by media companies with national, state and regional footprints.

A recent ACCC briefing paper stated that:

*Public reports suggest that, in total, deals with Google and Meta total several hundreds of millions of dollars per annum and have resulted in strong hiring environments for Australian journalists. Significant Australian news businesses have also committed increased investment in journalism and regional news.<sup>2</sup>*

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<sup>1</sup> *Media Policy Statement: Green Paper Response and Next Steps*, February 2022, Australian Government, pg 30

<sup>2</sup> See: <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>

There is, with respect, no meaningful way for MEAA or other interested stakeholders to test the veracity of the ACCC's assertion. Although the union has no doubt that important new funding has been provided to Australian news media companies since the Code commenced, the quantum of such funds and the purposes for which they are being deployed by news media organisations are not known to the public. This plainly inhibits any assessment of the Code's effectiveness.

Notwithstanding the absence of critical data, MEAA's journalist members are concerned that there is little evidence that the tide of retrenchments and service cuts that have persisted in the Australian news media over the past decade have been arrested or reversed at companies that have received funding from Google and Meta. This is especially the case in regional areas, which is the new frontline in the ongoing attrition of the Australian media sector.<sup>3</sup>

These issues are central to MEAA's concerns about the Code's architecture and effectiveness.

Accordingly, this submission focuses on the following matters:

- Transparency of arrangements struck as a result of the Code's operation
- The use of funds obtained through these arrangements
- Designation processes
- Revenue Thresholds for Registration as a news media provider

### **Transparency of arrangements**

Important details about deals struck as a result of the Code are not known for two reasons. Firstly, there is no mechanism in the Code requiring disclosure; secondly, all of the voluntary agreements thus far struck under the guise of the Code are subject to apparently extensive confidentiality provisions.

The absence of meaningful data concerning Code-related deals was not an objective (or consequence) of the Code as it was originally conceived.

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<sup>3</sup> The University of Canberra's News Media Research Centre submitted to the recent regional newspapers inquiry: *On the face of it, [the Code] appears to be a good thing, but these deals cover only a fraction of the hundreds of regional and rural titles across Australia. ... In the case of News Corp and ACM, there have been announcements of reductions in print services and staff losses from regional mastheads despite having signed deals with the digital platforms. See: The Future of Regional Newspapers in a Digital World, Inquiry into Australia's regional newspapers, House of Representatives Standing Committee on Communications and the Arts, at paragraph 4.42 of Inquiry report, 23 March 2022*

MEAA notes the ACCC's evidence to the recently concluded House of Representatives Standing Committee on Communications and the Arts' inquiry into regional newspaper (regional newspaper inquiry) that 'transparency would be improved if the Code had operated as originally intended:

*Had someone been designated under the Code – for example, Meta – and had they engaged in arbitration, the ACCC would have participated in the arbitration process. We could make submissions to the arbitrators. We could see the offers that were being made as part of that process, so we would be able to contribute. We would see a broad range of deals and contribute to that arbitration process in terms of determining the outcome. Obviously, that hasn't happened, because no-one's been designated and we don't have any visibility of the commercial deals. So what was envisaged under the legislation hasn't eventuated'.<sup>4</sup>*

The absence of disclosure requirements in the Code and the subsumption of disclosure arrangements in voluntary agreements seriously constrains an assessment of the Code's success. It also runs counter to the view that the public should be informed of the scope of agreements meant to halt the decline in public interest journalism.

It is passing strange that the key government agencies guiding this review process can only implore news media companies to share key data about how much funding has been received and whether this funding has been used to, inter alia, 'employ more journalists', 'expand the reach of news businesses' or improve the long-term sustainability of news businesses'.<sup>5</sup> The Government should not have to plead for this information.

The regional newspapers inquiry acknowledged these (and related) shortcomings and said:

*... the Committee is concerned that a statutory review is the only impetus for the sharing of this information, noting that the confidential nature of the agreements does not allow ongoing assessment of whether the provisions are appropriately addressing the power imbalance between digital platforms and news providers. Therefore, the Committee recommends that the Department of Infrastructure, Transport, Regional Development,*

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<sup>4</sup> Ibid., paragraph 4.25

<sup>5</sup> See: *Review of the News Media and Digital Platforms Mandatory Bargaining Code*, Consultation paper, April 2022, questions 1 and 2, page 5

*and Communications and the ACMA work with Meta, Google and news providers to encourage more transparency in commercial deals.<sup>6</sup>*

It is insufficient for this data to be in the realm of rumour and speculation and provided to this review only where the parties to such agreements permit disclosure. It should be published and known to the community.

Any assessment of the Code's effectiveness must be informed by: **(i)** verifiable data concerning the amount of funding directed to each news media company; **(ii)** the duration for which funding will be made available; and **(iii)** the purposes for which the funding will be used.

Funds derived by media organisations through or adjacent to the Code should be published on an individual company basis. Should this not be possible, these funds should be identified on an aggregated basis and include specific reference to the distribution of funds by news media sub-sector – i.e. television broadcasting, radio broadcasting, online/print. The amount of funding made available for the production of news in regional communities should also be separately disclosed.

### **Use of funds**

It is equally unclear how Code-generated funds are being used. This is a serious deficiency in the Code's operation.

As a recent *P&I* paper articulated, while the amount of funding generated for media companies since the Code came into force has been 'impressive':

*there has not yet been any indication that this funding will be used to directly fund journalism. The [Code] does not legally ensure that any funding obtained is directed towards public interest journalism, which is at odds with the government's publicly stated intention.<sup>7</sup>*

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<sup>6</sup> *The Future of Regional Newspapers in a Digital World, Inquiry into Australia's regional newspapers*, House of Representatives Standing Committee on Communications and the Arts, at paragraph 4.75 of Inquiry Report

<sup>7</sup> *Australia's News Media Bargaining Code and the global turn towards platform regulation*, Bossio, D, Flew, T., Meese, J., Leaver, T. and Barnett, B, Policy and Internet, 23 February 2022

As the prominent Australian media academic, Andrea Carson remarked: ‘The key question for Australians is whether the Code will result in more journalists being hired to undertake reporting that strengthens democratic accountability’.<sup>8</sup>

Witnesses to the regional newspapers inquiry were probed on how funds received from Google and Meta had been spent; in response, most witnesses spoke in unhelpful generalities about how this new money had been put to use.

The chief exception to this position was the Australian Broadcasting Corporation (ABC). The ABC’s Head of Regional, Rural and Emergency informed the Inquiry that the ABC is:

*adding something in the order of 50 new roles in regional Australia, with a focus on public interest journalism, as a result of the income that the ABC has received through this news media bargaining deal. They’re direct, new roles added to the reporting efforts that we have under way in regional Australia. Some of those roles have been added to some of our smaller bureaus—for example, Burnie in northern Tasmania and Horsham in western Victoria—but many of those roles are going into new locations where we’ve previously never had ABC reporting.*<sup>9</sup>

It is not clear to MEAA why all organisations in receipt of Code-related funding cannot, with reasonable precision, declare how these funds are being used.

During the Code’s development, MEAA consistently called for a requirement that funds generated through the Code should be used for the production of public interest journalism.

The union’s January 2021 submission concerning the Draft Code stated:

*MEAA’s major concern with the Code remains its failure to specify that funds generated through the bargaining arrangements must be directed to production of journalistic content. MEAA believe this is a dangerous omission. As MEAA stated in its 28 August 2020 submission on the draft Code:*

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<sup>8</sup> *ibid*

<sup>9</sup> Regional Newspapers Inquiry Report, paragraph 4.43

*Although it appears logical that funds raised under the Code will be devoted to the production of content, there is an evident risk that funds may not be directed to such purposes in the absence of an explicit requirement in the Code.*

*It would be a perverse consequence of the years-long digital platforms inquiry and code development process if funds raised via the Code were directed to purposes other than sustaining and increasing news content that serves the public interest.*

*MEAA therefore seeks the inclusion of text in the Code that articulates that the primary purpose for funds attained through the Code will be for the purposes of sustaining and increasing levels of covered news content.*

A requirement that funds generated under or due through the Code must be devoted to journalistic resources is the most critical means by which the public can have confidence that the Code is making a positive contribution to a sustainable and viable Australian media landscape.

### **Designation process**

MEAA notes that no digital platform has been designated under the Code. MEAA further notes that designation may only occur following the Minister's consideration of:

*(a) whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate; and*

*(b) whether that group 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).<sup>10</sup>*

The provision in (a) is sound; the requirement in (b) is not.

The provision in (b) permits a digital platform to escape designation in instances where it has made a significant contribution to the sustainability of the Australian news industry *as a whole*.

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<sup>10</sup> See section 52E of the Act

It enables a digital platform to marginalise smaller independent publishers and broadcasters, a case in point being Facebook’s intransigence in dealing with both SBS and *The Conversation*.

Google and Meta can refuse to negotiate with news media organisations even in circumstances where they are registered as an eligible media entity by the Australian Communications and Media Authority (ACMA). This caused Professor Alan Fels to comment in evidence to the regional newspapers inquiry:

*It is unclear what the purpose of the ACMA register is if Google and Facebook do not accept that businesses on the list are Public Interest Publishers and are in no way compelled to negotiate with accredited publishers.<sup>11</sup>*

The designation test should be revised to explicitly require that designation of a digital platform will occur where it has unreasonably refused to engage in good faith negotiations with a registered news business.

Without a revision of this type, digital platforms will not be subject to the Code’s provisions and important sources of public interest journalism will continue to be subject to capricious and prejudicial decision-making by the digital platforms.

### **Revenue threshold**

To become registered<sup>12</sup> as a news business corporation under the Code, the news business must have recorded annual revenue of at least \$150,000 in the most recently completed financial year, or in three of the past five financial years.<sup>13</sup>

MEAA’s January 2021 submission on the then draft Code expressed concern about the \$150,000 revenue threshold. The submission stated:

*MEAA maintains its concern with the \$150,000 per annum revenue test for eligible media organisations. As MEAA said in its August 2020 submission, this figure is “too high and would prevent new and very small news businesses from participating in and being remunerated under the Code. MEAA proposes a halving of this amount, to \$75,000.00.”*

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<sup>11</sup> Regional Newspapers Inquiry Report, paragraph 4.57

<sup>12</sup> by ACMA, the body charged with determining eligibility for registration

<sup>13</sup> See section 52M of the Act

This view has been supported in the regional newspapers inquiry, which heard and received evidence from multiple small regional and rural news organisations that the threshold was too high and an arbitrary barrier to coverage under the Code. The Inquiry's report acknowledged evidence from smaller publishers that the revenue threshold 'was the only factor preventing them from registering under the Code'.<sup>14</sup>

The Inquiry noted that it considered that 'the value provided by small regional newspapers, and the impact that digital platforms have on their ongoing viability warrants the review of the revenue threshold to ensure news providers are not being unnecessarily precluded.' This, it was said, 'is especially true when the impact of COVID-19 and the subsequent loss in advertising revenue is considered ...'.<sup>15</sup>

The Inquiry was persuaded that lowering the threshold would encourage a higher degree of participation by news media in the Code. Accordingly, it recommended that the revenue threshold be lowered to \$75,000 per annum.<sup>16</sup>

MEAA maintains the view that the revenue test for eligibility be halved to \$75,000 per annum.

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<sup>14</sup> Regional Newspapers Inquiry Report, paragraph 4.79

<sup>15</sup> Ibid, paragraph 4.79

<sup>16</sup> Ibid, Recommendation 12, at paragraph of 4.81