



SUBMISSION BY MINDEROO FOUNDATION IN RESPONSE TO THE REVIEW OF THE NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE CONSULTATION PAPER

ABOUT MINDEROO FOUNDATION

Minderoo Foundation is a modern philanthropic organisation. We take on tough, persistent issues with the potential to drive massive change. We incubate ideas and accelerate impact. We push the limits of what is believed possible.

Minderoo Foundation is independent, forward thinking and seeks effective, scalable solutions. We are proudly Australian, and one of Asia's largest philanthropies, with AUD \$2 billion committed to a range of global initiatives.

Through a collaborative, evidence-based approach we strive to solve major global challenges through our key initiatives. We both support and fund early-stage innovation, develop major programs on the ground in communities, and advocate for change at domestic and international policy forums.

Everything we do is driven by a deep care for people and a mission to improve the world for future generations.

ABOUT FRONTIER TECHNOLOGY INITIATIVE

Minderoo Foundation's Frontier Technology initiative seeks to advance education on the societal impacts of new technologies and technological change, including through the provision of grants and donations to leading universities across the world. We also seek to drive policy reform to ensure accountability and transparency in the tech ecosystem and to protect rights for the benefit of the public.

RESPONSES TO TREASURY'S CONSULTATION PAPER

Introduction

Minderoo Foundation (**Minderoo**) thanks Treasury for providing this opportunity to respond to the Review of the News Media and Digital Platforms Mandatory Bargaining Code (**Code**) in accordance with s.52ZZS of the *Competition and Consumer Act 2010 (CCA)*.

Minderoo supports the Code and its framework. We have acknowledged publicly¹ that it is regarded as a world-leading micro-economic reform designed to:

- address bargaining power imbalances between Australian news media businesses and digital platforms; and
- support the sustainability of public interest journalism.

¹ <https://www.minderoo.org/frontier-technology/news/one-year-on-from-facebook-unfriending-australia-is-local-journalism-any-better-off/>



In November 2021, Minderoo’s Frontier Technology initiative agreed to support a group of 24 small, independent publishers by offering to collectively bargain on their behalf to help them negotiate deals with Google and Facebook. We did this based on our belief that these small publishers should be given the same opportunity as large publishers to negotiate with Google and Facebook for use of their content for the public benefit.

The small publishers formed an alliance, known as Public Interest Publishers Alliance (**PIPA**). They are publishers working in rural communities, outer urban areas, with multicultural and LGBTQI+ communities, and many cover public interest journalism from the point of view of the arts, science, and the environment. They provide a training ground for young journalists across Australia, and they are filling important gaps in the media market that helps promote diversity and consumer choice.

We have previously made the observation that the Code is – to some extent – delivering outcomes consistent with the government’s policy intent because most major Australian media outlets secured what appear to be lucrative deals with Google and Facebook. And we have said that if they are using those funds, estimated in total to be valued at close to \$200 million², to sustain public interest journalism, then that is a positive outcome for the Australian public and the Australian media market. This is particularly important because we know from the ACCC’s Digital Platforms Inquiry Final Report³ that the media industry has been experiencing structural decline in advertising revenues since the arrival of the digital platforms in the market.

However, we have also noted that many other Australian news publishers – mainly small businesses – who make valuable and meaningful contributions to their communities and to media diversity are yet to be remunerated for use of their news for the public benefit. We also note that in addition to PIPA members, other media outlets have not been able to secure deals, including several significant participants in the market: namely SBS and *The Conversation*, who do not have commercial arrangements with Facebook.

For small publishers, like the ones Minderoo represents under its collective bargaining exemption, managing the day-to-day operations of a small business meant that it was challenging for them to find the time, let alone a contact name locally, to progress opportunities with the digital platforms after the Code was first enacted in March 2021. They had to rely on advice and support from the ACCC to guide them towards the collective bargaining model after experiencing months of receiving no response from either Google or Facebook.

Many of the small publishers that Minderoo is representing have been accepted on the Australian Communications and Media Authority’s (**ACMA**) register of eligible news businesses, which recognises their legitimate contribution to public interest journalism under the legislation. But having gone through that administrative process they were then left wondering what to do next.

The Code was designed to help support the sustainability of public interest journalism in Australia, and in our view, journalism that serves a public interest function comes in all shapes and sizes.

² <https://www.afr.com/companies/media-and-marketing/media-code-review-won-t-examine-if-facebook-should-be-designated-20220403-p5aadu>

³ <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>



Engagement with the digital platforms

The Code has been in operation now for over 12 months. Facebook is yet to deal meaningfully with many small independent publishers, including those in PIPA through Minderoo's collective bargaining efforts. Therefore, we maintain our position that the Code has not done its job – yet, and this review by Treasury presents an opportunity to identify the challenges and look at what improvements could be made to address the shortfalls.

Minderoo lodged collective bargaining class exemption forms with the ACCC to negotiate with Meta (**Facebook**) and Alphabet (**Google**). Initial lodgment was on 21 November 2021, and updated forms were submitted on 24 January 2022. The class exemption was permitted on the basis that the members were all eligible small businesses, with an aggregated turnover of under \$10 million.

Summary of our dealings with Google:

Minderoo is presently in negotiations with Google. However, because there is a non-disclosure agreement in place, we are unable to provide specific details of the nature or quantum of the benefits – financial or non-financial – that are expected to be received by the members of the collective bargaining group.

Google has been proactive, responding promptly to our initial correspondence on 21 November 2021. It is pleasing to report that negotiations between Google and the PIPA members began shortly thereafter. Six months, however, have now passed, and while we can say that we have been having – and continue to have – positive and meaningful engagement with Google, we have not yet secured deals for all of the members of the collective bargaining group.

It is in the public domain that two members of the collective bargaining group have secured News Showcase deals directly with Google, namely *Australian Jewish News* (Polaris Media) and *Star Observer* (Out Publications). Minderoo is pleased to have played a role in facilitating those deals, but we are not privy to any further information about the terms.

As a general observation, Minderoo is confident that if an agreement is reached, we anticipate that there would be financial benefits flowing to all PIPA members. Minderoo expects that such benefits would provide opportunities for PIPA members to invest in their businesses and expand their reach, which would improve their long-term sustainability.

Summary of our dealings with Facebook:

Five members of PIPA have received grants from Facebook's Australian News Fund⁴. Minderoo is not aware of the specifics of these arrangements, but as set out in more detail below, these are grants, not commercial deals; they are capped at a *maximum* value of \$120,000 and \$250,000 respectively and are one-off payments. As a result, they do not, in our view, support long-term sustainability.

⁴ <https://www.walkleys.com/valuing-journalism/facebook-australian-news-fund/>



In terms of collective bargaining, Facebook's response was also prompt. However, their approach from that point has been in very different to the one taken by Google.

Facebook immediately directed us to the Australian News Fund, which comprises a Newsroom Sustainability Fund and the Public Interest Journalism Fund. They explained, in great detail, the mechanics of these funds. Their correspondence also noted that applications for grants under both funds closed the day after they sent their email to Minderoo (26 November 2021).

In a follow up meeting in December 2021, representatives from Facebook confirmed that:

- the Australian News Fund is the only means by which Facebook would consider engaging with PIPA members; and
- the grant program (the latest round for which had closed several weeks earlier) is run on an annual basis, with the next application round closing in November 2022. This meant that the earliest most members of the collective bargaining group could potentially receive funding from Facebook – if they are deemed eligible and their applications are successful – would be sometime in March 2023.

It was apparent from our discussion with Facebook that it has drawn a line in the sand. Facebook is not prepared to engage voluntarily in the collective bargaining process with Minderoo or enter commercial deals with members of PIPA and there is no mechanism for accountability for this course of action, except designation by the Treasurer under Division 2, s.52E.

What became apparent to Minderoo is that the Code provides limited leverage for publishers seeking to engage with Facebook to secure voluntary commercial agreements. Notwithstanding that we are one of Asia's largest philanthropies and we have permission from the ACCC to negotiate on behalf of a group of 24 eligible small publishers, this was insufficient to solicit a meaningful response, let alone engagement from Facebook. This demonstrates a persistence of a bargaining power imbalance identified by the ACCC in the Digital Platforms Inquiry final report⁵. It has resulted in Minderoo being unable to secure fair payment for news content created by these small publishers.

Market asymmetry

The commercial deals made by Google and Facebook to date, especially with larger news media organisations, creates a competition issue in the media market and it stands to reason that this outcome has an adverse commercial impact on any media businesses who are still without deals.

Country Press Association, representing smaller regional media organisations, has through its collective bargaining, secured deals with both Google and Facebook. Many of their members have also been beneficiaries of the Federal Government's 2020 Public Interest News Gathering (**PING**) funding during the COVID-19 pandemic⁶ and a \$10 million Journalists Fund for regional journalism⁷

⁵ Digital Platforms Inquiry Final Report, pp.206, 226, 255.

⁶ <https://minister.infrastructure.gov.au/fletcher/media-release/50-million-flow-support-regional-news>

⁷ <https://www.paulfletcher.com.au/media-releases/media-sector-reform-process-the-way-forward>



and will benefit from the more recently announced PING grants, worth \$10 million⁸ to support increasing costs of newsprint.

This situation leaves smaller, independent publications, many of whom serve important stakeholders, including our multicultural and LGBTQI+ communities across the nation, and support underserved urban, outer-urban and regional areas across Australia in an increasingly challenging, and in some cases precarious, market environment with little to no recourse.

We now have a situation where:

- most larger publishers have received a capital injection because of the deals they have secured, and are able to spend more on employing journalists⁹ to cover niche topics (arts, science, etc.) and areas¹⁰ they may have previously been unable to service; and
- regional publishers, who have been extremely well supported by successive governments, are also beneficiaries of commercial arrangements from both the digital platforms.

Although it is, without doubt, a positive outcome that more journalists are employed because of the implementation of the Code and these government funded grant arrangements, the result has created market asymmetry because fair value for news content is flowing to some publishers – based, it seems on size and location – but not others. This situation creates a competitive disadvantage and poses a risk to small independent publishers like PIPA members who could be left to wither on the vine.

The designation criteria

As Treasury is aware, the designation power has not been activated by the Treasurer.

Minderoo believes that to some extent the mere existence of designation criteria operates to deliver outcomes consistent with the policy objectives of the Code because it, and the final offer arbitration model, has led to commercial arrangements being reached. However, in Minderoo's view, one criterion is problematic.

Significant contribution to the sustainability of the Australian news industry

Properly identifying and defining a “significant contribution to the sustainability of the Australian news industry”¹¹ is highly contestable, subjective, and open to a plethora of interpretations. Therefore, this could ultimately fail many Australian publishers, especially smaller independent media outlets.

For example, Facebook's Australian News Fund, administered by the Walkley Foundation, is probably viewed by Facebook as them demonstrating that they are making a “significant contribution to the

⁸ <https://www.paulfletcher.com.au/media-releases/supporting-local-news-and-jobs-in-regional-australia>

⁹ <https://www.afr.com/companies/media-and-marketing/guardian-australia-expands-coverage-after-funding-from-tech-giants-20220311-p5a3rn>

¹⁰ <https://www.abc.net.au/news/2021-12-03/abc-to-add-more-than-50-journalists-in-regional-australia/100673862>

¹¹ s.52E(3)(b)



sustainability of the Australian news industry”. However, for the hundreds of publishers reportedly seeking to access these grants, it is an opaque, discretionary, and limited program and even if publishers are successful, we understand that the funding comes with significant conditions attached. In our view, this “cherry-picking” approach by Facebook provides what can, at best, be described as provision of temporary relief in the form of a very controlled 12-month “sugar hit” to support approved “projects”. All it does is serve to entrench the power of Facebook because the grant process is devoid of any commercial negotiation and in our view, it does not contribute meaningfully to the sustainability of the news industry.

Furthermore, it is worth pointing out that the inclusion of this particular designation criterion was only added into the bill after Facebook blocked about 17,000 pages in Australia on 18 February 2021¹². According to a recent *Wall Street Journal* article¹³, whistleblowers allege that this action by Facebook was calculated, and designed to “exert maximum negotiating leverage”. The emails written by Mark Zuckerberg, Sheryl Sandberg and Campbell Brown cited in the article reveal the strategic thinking and intent reached the highest level of the corporation, with Mr Zuckerberg expressing the view that through their actions Facebook achieved “what might be the best possible outcome”.

Reports and Advice

The designation criteria could also benefit from an amendment that makes specific reference to the Minister for Communications and the ACMA. The Minister for Communications is the stakeholder minister with executive responsibility for the media industry and the digital platforms¹⁴, and the ACMA is responsible for regulating certain elements of those sectors. In addition to considering “any reports or advice of the Commission [ACCC]”, as contemplated by s.52E(4), before a determination is made, reports or advice on whether a digital platform should be designated should be sought from both the ACMA and the Minister for Communications, taking into account advice provided by the Department of Infrastructure, Transport, Regional Development and Communications (or equivalent).

ACMA guidelines

Based on Minderoo’s engagement with PIPA members, we have observed several issues with the ACMA guidelines:

1. There is a frustrating disconnect between registration of a news media business by the ACMA and engagement with the platforms. Some members of PIPA had assumed that inclusion on the ACMA register would provide them with an automatic “gateway” to start commercial negotiations with Google and Facebook. It isn’t, but it should be. Minderoo submits that registration by ACMA should trigger the commencement of meaningful commercial engagement, collectively or individually by the digital platforms with those publishers.

¹² See second Supplementary Explanatory Memorandum:

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6652

¹³ <https://www.wsj.com/articles/facebook-deliberately-caused-havoc-in-australia-to-influence-new-law-whistleblowers-say-11651768302>

¹⁴ See p.27 <https://www.naa.gov.au/sites/default/files/2020-03/aao-20200201.pdf>



2. We are aware that the definition of “public interest journalism” is contested. However, in our view if the public is interested in reading a journal of record that is devoted to sport, music, science, the environment, or property news, then it is arguable that is in the public interest. If a publication meets the tests set out in the Code¹⁵, in Minderoo’s view a generalist publication that covers a range of subjects and a publisher, who decides it is in the best interests of the community that they serve, invests in and produces content covering one or several niche news topics or indeed a local area should be treated equally. Both types of publications should have the same rights of access to commercial arrangements with the digital platforms if they are presenting news which is of interest to the public. This has been the position taken by the ACMA to date, and Minderoo supports that approach to and interpretation of this element of the Code.
3. All publishers that have secured deals or are eligible to obtain commercial agreements with the digital platforms should be compelled to register with the ACMA. It presents an opportunity for the public have access to a transparent database that sheds a light on media diversity in Australia and identifies all the credible public interest publishers that meet the legislated registration tests in the Code. This would promote accountability and integrity and could serve as a means of countering misinformation and disinformation because the public would be able to determine the quality sources of news available in the market.

Other issues relating to the Code, not covered by the consultation questions

1. Because publishers are compelled to enter into non-disclosure agreements with the digital platforms as part of the negotiation process, they can’t disclose contributions they receive. It is therefore difficult to see how the Treasurer could make a designation determination under s.52E(3)(b) when even the basic information about contributions being made by the digital platforms to publishers is not readily available.
2. The Administrative Arrangement Orders¹⁶ formally allocate executive responsibility among ministers and set out what matters and what legislation are administered by particular departments and portfolios.

It has been a long-standing practice that the Minister for Communications has administrative responsibility for issues pertaining to the telecommunications sector under Parts XIB (*The Telecommunications Industry: Anti-competitive conduct and record-keeping rule*) and XIC (*Telecommunications access regime*) of the CCA.

The benefit of such an arrangement is that it enables the ACCC’s deep experience and knowledge of competition policy matters to be considered as part of broader, sector specific

¹⁵ subsections 52N(1) (the content test); 52O(1) (the Australian audience test); 52P(1) (the professional standards test); 52M(1) (the revenue test); and 52L (connection between corporation and news business).

¹⁶ <https://www.naa.gov.au/information-management/disposing-information/transferring-information/machinery-government-changes/administrative-arrangements-orders#morrison>



policy deliberations. This reflects the importance of aligning policy responses, and avoiding unintended consequences, which can arise when responsibilities are split across portfolios and ministers.

Minderoo believes that, given the policy objectives of the Code, which include supporting the sustainability of public interest journalism, there is a policy rationale for the Minister for Communications to be given responsibility administration of the Code (Part IVBA¹⁷ of the CCA), because many of the policy levers needed to achieve the key objectives of the Code sit best with that Minister.

Conclusion

Minderoo's experience detailed above on behalf of 24 publishers is an example of where news media businesses have not been able to reach commercial deals with digital platforms. In summary, the reasons for that are as follows:

- 1 For the Code to be an effective mechanism to encourage or compel engagement, it relies on good faith participation in the process by the digital platforms.
- 2 The designation and dispute resolution procedures remain untested so one can only speculate whether they can or will achieve their intended purpose.
- 3 Market asymmetry continues to exist.

Thank you very much for considering our submission.

Minderoo would welcome the opportunity to continue to participate in the Treasury review process.

If you have any questions, please do not hesitate to contact Emma McDonald.

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13 May 2022

¹⁷ <https://www.legislation.gov.au/Details/C2021A00021>