



Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

18 January 2021

MEAA welcomes the opportunity to comment upon the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (the 'Code' and the 'Bill' respectively).

The Code reflected in the Bill contains several variations to the draft Code upon which MEAA made a submission in August 2020.¹ These variations are addressed below.

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:

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 seek 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.

As MEAA also stated in its December 2020 submission to the Parliament on Australian media diversity, "these funds should not be permitted to wash through an organisation and used for non-journalistic purposes".²

MEAA restates this request on the basis that the key benefit to be drawn from Code-related agreements (and those outside the Code) is the reliable provision of journalistic content.

A further significant concern is how little the Code appears to deal with the parlous economic and employment situation at regional media organisations. Although the Code commonly regulates all news companies, it remains the case that the Code offers little to regional news organisations. As MEAA has repeatedly illustrated to media inquiries conducted in the past five years, it is regional news providers that face the most dismal futures with respect to monetising their content, keeping the lights on and keeping communities informed.

¹ This submission is appended to this document

² See: MEAA submission to the Senate Standing Committees on Environment and Communications, Media Diversity in Australia, 11 December 2020, page 8

MEAA is gravely concerned that the Code's standard offer and collective bargaining mechanisms will not adequately address the situation. If this matter cannot be satisfactorily addressed through the Code (by quarantining a set proportion of funds obtained through all Code agreements), the one-year Public Interest News Gathering Program must be enhanced and extended by at least a further two years, in line with the Australian Consumer and Competition Commission's (ACCC's) initial digital platforms inquiry recommendation.

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 propose a halving of this amount, to \$75,000.00."

MEAA additionally commented that the revenue test (as it stands) and the lack of mandated use of Code-generated funds for the production of content will have a direct bearing on levels of content generated by freelance journalists.

MEAA also remains concerned by the exclusion from the definition of 'covered news content' of "journals and publications intended primarily for academic, rather than general, audiences".³ The policy basis for this is unclear. The maintenance of this provision may threaten the eligibility of content providers that regularly provide academic commentary on issues of public interest. It follows that if eligibility is frustrated, so too will the capacity of media providers to be remunerated for such content.

Variations to the Draft Code

MEAA notes that the Code reflected in the Bill differs from the Draft Code in several ways. The key changes are:

1. The inclusion of the ABC and SBS in all of the Code's apparatus;
2. The adoption of a two-way value exchange principle;
3. Excision of Instagram and YouTube from the Code's application; and
4. Reducing the notification period to news companies of significant algorithmic changes to 14 days.

MEAA supports the incorporation of the ABC and SBS in all of the Code's processes. The exclusion of public broadcast entities was anomalous and potentially exposed these organisations to having their content continually plundered by digital platforms.

MEAA is nonetheless mindful of the risk that any funds secured by public broadcasters under the Code may translate into cuts to core government funding. This would be an unacceptable situation. Given the patchy and regressive nature of current public broadcaster funding, MEAA seeks a commitment from the Government that the government will not disturb the ABC's stated commitment to direct any Code-related revenues into regional journalism.⁴

MEAA objects to the Code's incorporation of a two-way value exchange principle will diminish the Code's effective operation. It is an unreasonable concession by the Government.

³ See page 27 of Explanatory Note to the Bill

⁴ See Statement from ABC Managing Director, David Anderson, 9 December 2020

MEAA is unaware of any reliable means of rationally calculating the ‘benefits’ of Google and Facebook referring traffic to news company websites. It is an overly-elastic concept that is barely articulated or defined in the Bill⁵. In MEAA’s opinion, this measure will frustrate bargaining and resolution of disputes about the value of news content carried by Google and Facebook. MEAA submits that this concession be dispensed with, or at the very least, critically evaluated during the mandatory review scheduled within one year of the Code’s commencement.

MEAA has no comment concerning the exclusion of the nominated Google and Facebook subsidiaries. Any unintended and material consequence of this change should however be evaluated in the mandatory review.

Reducing the notification period for notification of significant algorithm changes to 14 days is not objected to, save that this reduction should be positively reviewed in news companies’ favour should evidence emerge that the originally foreshadowed 28 days would have better enabled news organisations to avoid any harmful consequences of such changes.

Conclusion

The Australian Parliament should not lose sight of the original bases for a mandatory news code:

1. To address the considerable bargaining imbalance between Google and Facebook and Australian news media providers; and
2. To meaningfully address the massive decline in the economic welfare of news media organisations throughout Australia caused by the cost-free carriage of news media content over the past decade.

The Australian media ecosystem has between 4000 and 5000 fewer editorial roles (i.e. journalists and other editorial contributors) than it did in 2010. The thousands of redundancies at news organisations of all scales, private and public, have not just stunned and damaged the media workforce; they have left the Australian media greatly weakened.

The foremost consequence of the damage wrought upon the Australian media, particularly as a result of cost- and consequence-free provision of content by digital platforms, is that the media’s efforts to fully scrutinise and comment upon matters of considerable public interest – from local council decisions to major state and federal government and business misadventures – have been seriously compromised.

MEAA is ultimately concerned that the Code’s failure to mandate the use of funds for journalistic content portrayed and its adoption of the two-way value exchange principle substantially weaken its force and ability to improve the lot of news companies and working journalists.

⁵ See section 52ZZ of the Bill

MEAA ACCC Mandatory Code Comment

28 August 2020

General

The Media Entertainment and Arts Alliance (MEAA) welcome the draft Mandatory Code's (the Code's) development and acknowledge it followed an exhaustive inquiry.

In our 5 June, 2020 submission to the Australian Competition and Consumer Commission's (ACCC) Options Paper, MEAA stated that its members supported the following key elements

1. News providers should set a common *valuation* of news content;
2. Agreement should be reached among news providers on mechanisms to measure this content's *use* on Google and Facebook platforms and services; and
3. Payments under the Code should be collected and disbursed through an 'honest broker' such as a collection agency.

MEAA submitted that these features would assist in the timely commencement of the Code and the equitable distribution of funds collected from Google and Facebook.

Notwithstanding MEAA's 5 June position and the Code's facilitation of bilateral (as well as collective) negotiations, the most important aspect of this Code is that it be implemented as soon as possible.

Google and Facebook have enjoyed very substantial direct⁶ and indirect⁷ benefits through the cost-free carriage of Australian news content.

The Code is a sound starting point for commercial negotiations about the value and scope of news media carried by Google and Facebook.

Although it is not a direct function of the Code, MEAA believe the Code should play a critical role addressing Australia's very low levels of media diversity. In this sense, the Code must be attractive (and adaptable) to news content providers of all scales – including those in regional areas - whether they use the services of the few or the many in producing news content.

MEAA's comments below address elements of the draft Code as published by the ACCC on 31 July, 2020.

Use of code-related funds

The Code states that intervention is necessary to address the bargaining power imbalance 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.⁸

⁶ E.g. news being carried and/or available on their platforms

⁷ E.g. consumers can satisfy all content needs through Google and Facebook – i.e. they know they can find news on these sites. Being a one-stop content shop appeals to advertisers, as evidenced by the migration of advertising away from newspapers and allied websites towards digital platforms over the past decade.

⁸ Paragraph 1.5

The Code is also directed, inter alia, at ‘support[ing] a sustainable Australian media landscape in the digital age.’⁹

These inarguable propositions are, however, not accompanied by any requirement that the funds derived by media organisations under the Code will be used for the production of news content – i.e. to fund employee and freelance/contract providers of journalistic content.

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 seek 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.

Regional News Organisations

Facilitating fund transfers to regional news outlets should be a clear facet of the Code’s operation.

In our 5 June, 2020 submission on the ACCC’s Options Paper, MEAA contended that, ‘given the escalating decline of Australia’s regional and rural media sector, special consideration should be given to diverting a proportion of funds to maintaining these invaluable local news providers’. (This position was put in the context that a collection agency would receive and distribute all funds collected under the Code and preserve a portion of funds for transfer to regional news providers.)

Apportioning a set proportion of funds to regional titles and newsrooms is more difficult to achieve where major news organisations avail themselves of bilateral negotiations and all of the funds collected are retained by these organisations.

To counter the risk that negligible funding will be devoted to regional news outlets under the Code, MEAA submit that a ‘tithe’ type arrangement be incorporated in the Code, whereby a fixed proportion of funds received would be directed to a pool of funding to be distributed to regional news providers.

Exclusion of Public Broadcasters

The Code provides that ‘The ABC and SBS are able to register with ACMA and participate in the code in all respects and benefit from the minimum standards, however, they will not be able to bargain about remuneration or participate in compulsory arbitration about remuneration’.¹⁰

⁹ Paragraph 1.7

¹⁰ Paragraph 1.13

MEAA assume that this position has been arrived at for political reasons¹¹ outside the control (and remit) of the ACCC. The exclusion of public broadcasters from receiving remuneration for their content is short-sighted and may lead to Google and Facebook plundering these entities' news media content at zero cost. The only apparent remedies to this scenario would be through the Code's discrimination provisions – which may be extensively and lengthily contested, or public broadcasters exercising their rights under the Opt-out Rule – in which case, none of their content would be carried by Google and Facebook.¹²

MEAA submit, perhaps counter-intuitively, that the ability of public broadcasters to be remunerated under the Code would have acted as a clear obstacle to the above risk.

Core news content and covered news content

MEAA note that a news media provider must produce 'core news content' in order to acquire ACMA registration, which is a prerequisite to bargaining under the Code. Core news content is described as content produced by a journalist that records, investigates or explains:

- issues of public significance to Australians;
- issues relevant to engaging Australians in public debate and in informing democratic decision making; or
- content which relates to community and local events.¹³

MEAA's key concern with the definition of 'core news content' is the requirement that it be produced by a 'journalist'. The term 'journalist' is not defined in the Code.

Requiring content to be produced by a journalist may frustrate Code eligibility and disqualify significant levels of content from coverage under the Code. The term 'journalist' is and has never been defined in a way that is universally agreed.

In some quarters, the term journalist connotes someone who possesses academic credentials, such as a Communications degree. In other fora, journalists can be self-taught or subject to formal or semi-formal on the job training, including cadetships. The range of content providers is diffuse: it includes, but is not limited to: journalists, video journalists, writers, columnists, contributors, photographers, bloggers, content creators. These personnel may also be employed on a full time, part time or casual basis, or as independent contractors or freelancers.

MEAA submit that the breadth of job titles and the bases upon which these content makers are employed should be accommodated in the Code.

A solution may be to refer to 'forms of journalism' rather than journalists. A further possibility is to make reference to 'persons engaged and active in the publication of news'.

Although MEAA do not fully comprehend the basis for making distinctions between *core* content and *covered* news content for the registration and bargaining phases, MEAA do not

¹¹ MEAA also acknowledge that the Code is directed at arresting the challenges faced by commercial media organisations, especially in terms of foregone ad revenues.

¹² See paragraph 1.97 of the Code

¹³ See paragraphs 1.49 to 1.53

object to the registration test setting a higher bar than that imposed for the type of content that will be covered (and subject to payments) by the Code.

It is nonetheless MEAA's preference that core news content should include, inter alia, matters of public *interest* rather than public *significance*.

With respect to covered news content, MEAA does not support the exclusion of sports results and sporting events from Code coverage.

MEAA's default position is that content requiring the investment of news media resources that is then made available through Google and Facebook should be covered under the Code. In this respect, it is not clear why, for example, some sport-related content is not covered by the Code.¹⁴ For clarity, MEAA submit that all sport, arts, lifestyle and entertainment content involving the use of journalistic (or equivalent) resources be considered covered news content under the Code.

MEAA is also concerned by the Code's reference to excluding content produced by academics. MEAA raised this issue in direct consultations with the ACCC and were assured that the exclusion was directed at ensuring materials such as academic journals were not subject to the Code's operations.

With this assurance in mind, MEAA trusts that the ACCC will move to clarify this exclusion so that it cannot be interpreted as a barrier to quality publications such as *The Conversation*, which routinely draws on expert and academic commentary for its publications - being able to avail itself of the Code's benefits.

Revenue Test

MEAA do not support the annual revenue requirement of an entity having revenue above \$150,000 in the most recent year or in three of the five most recent years. MEAA submit this figure is too high and would prevent new and very small news businesses from participating in and being remunerated under the Code. MEAA propose a halving of this amount, to \$75,000.00.

Freelancers

The revenue test (as it stands) and the lack of mandated use of Code-generated funds for the production of content will have a direct bearing on levels of content generated by freelance journalists.

As a result of ongoing structural changes in the Australian news media sector over more than a decade, many journalists (and their equivalents) have remained in the profession as independent contractors. They often endure sub-Award levels of payment for their work and the level of work they are engaged to perform is directly linked to the economic health of the entire media ecosystem.

There is a clear case for the Code to expressly recognise the role of freelancers (as distinct from 'news businesses' or 'news business corporations'¹⁵) in providing quality content and in being fairly remunerated for their work when their content is accessed through Google

¹⁴ See paragraph 1.66

¹⁵ The terms used in the Code

and Facebook.¹⁶ Ideally, the Code would mandate that accepted rates of payment for such work be observed by the Code. If this is feasible, MEAA would provide information as to these rates.

¹⁶ Where this content is otherwise not provided under contract to a news organisation already subject to the Code