

Regulating the news – the battle across the ditch

Amy Ryburn, Allan Yeoman, Philip Wood, Renee Stiles, Damien Steel-Baker, Keri Johansson, Alex Chapman

2 March 2021

Something recently went missing from the News Feed of Australian Facebook users – the news. With the dust now settling, we've taken a closer look at the News Media and Digital Platforms Mandatory Bargaining Code that has sparked a lot of debate across the ditch and what it might mean for us on this side of the Tasman.

What is the code?

The Treasury Laws Amendment (News Media and Digital Platforms Media Bargaining Code) Bill 2021 (the code) has amended the Australian Competition and Consumer Act 2010 to require digital platforms to pay Australian news publishers for the use of news content on their platforms. The code, following last-minute amendments, passed the Senate on 25 February to become law in Australia.

The code requires designated digital platforms to bargain with eligible news publishers (either individually or collectively) over payment for inclusion of news on their platforms. The code empowers the Treasurer of the Australian government to designate which platforms need to comply with the code. In making a determination about which digital platforms to designate, the Treasurer must:

- Provide notice to the digital platform that it is intending to designate the digital platform
- Not designate the digital platform until 30 days after the notice is given
- Consider whether:
 - a significant bargaining power imbalance exists between the news publishers and the digital platform
 - the digital platform has made a significant contribution to the sustainability of the Australian news industry through agreements with Australian news publishers, including paying for their news content.

Initially the Treasurer indicated that a determination would be issued which would specify that the code would apply only to Facebook and Google (with the ability to designate other platforms in the future). However, after some reasonably heated debate between the Australian government, Facebook and Google, we understand that the code has ultimately not been designated to apply to either digital platform at the time of enactment. The Treasurer stated that he will wait for these tech giants to strike agreements with news publishers before deciding whether to compel them to do so under the new law.

Although the code does not initially apply to any digital platforms (as none have been designated), its passage through the legislative process has largely had the Australian government's desired effect. Both Facebook and Google have entered into agreements (or are negotiating agreements) with Australian news publishers for their content.

The code also introduces a mediation and arbitration process that will apply to the parties if they are unable (after bargaining for three months) to reach an agreement over core bargaining issues, such as the appropriate remuneration for news content. Arbitration will only commence if:

- The parties voluntarily submit themselves to arbitration
- Mediation has occurred and subsequently been terminated as no agreement has been reached around remuneration.

If arbitration occurs, an arbitration panel is formed to resolve the remuneration issue and the parties must submit a 'final offer' on what it thinks the appropriate remuneration should be. The arbitration panel must accept one of the final offers of remuneration (or if it doesn't accept one of the final offers it must determine the remuneration amount by adjusting the most reasonable offer in accordance with public interest) and the parties must comply with its final determination.

If a designated platform fails to comply with the arbitration award, a maximum penalty of 10 per cent of the platform's annual turnover in Australia in the last 12 months could be imposed.

What else is included in the code?

Importantly, the code also includes a set of 'minimum standards' for the treatment of news content on designated digital platforms.

The purpose of having minimum standards is to provide a minimum level of transparency so that all news publishers are aware of the types of information that is being provided to other news publishers. Examples of minimum standards introduced in the code include requiring the designated digital platforms to:

- Provide advance notice of algorithmic changes that will affect presentation and ranking of news
- Appropriately recognise "original" news and the effort involved in news publishers producing original news.

These potential obligations will give a digital platform a high incentive to reach agreements with news publishers if the Treasurer indicates a designation may be made in respect of such platform (as has occurred with Facebook and Google).

Why has a code been developed?

The Australian government, with the aim of better understanding the market power of these technology giants, directed the Australian Competition and Consumer Commission (ACCC) to launch the Digital Platforms Inquiry (see our commentary on the recommendations from this Inquiry here). One recommendation from this Inquiry was that the ACCC develop a code of conduct to address power imbalances between news publishers and digital platforms. The Chair of the ACCC, Rod Sims, said that the code "evens out the bargaining positions so that fair commercial deals can be made. Without the code as a backup, that power imbalance will remain. There will not be commercial deals; instead the platforms will be free to continue to offer terms on a take-it-or-leave-it basis". The code was initially proposed to be voluntary, however, would become mandatory for digital platforms (if designated by the Treasurer) following advice from the ACCC that it would be unlikely that any voluntary agreement would be reached in respect of the key issue of payment for news content.

Imbalances identified by news publishers and the ACCC as the rationale for the mandatory code include:

- The growth of digital platforms and their ability to deploy advertising techniques that target individual users through complicated algorithms has been diverting traditional advertising revenue away from news publishers
- A changing media landscape with the majority of the Australian public now using digital platforms to obtain their news (the news produced by news publishers gives users a reason to use and spend time on these platforms to obtain reliable fact-checked information), however, these news publishers are not being adequately compensated
- A sharp decline in advertising revenue available to news publishers as a result of the COVID-19 pandemic
- News publishers accepting less favourable terms for the inclusion of news on digital platforms than they would otherwise agree to due to these power imbalances.

The Australian government views an independent media landscape as essential to a well-functioning democracy and that public interest journalism should be protected and properly funded. The Treasurer of the Australian government has hailed the code as a historic step in keeping Australia's media ecosystem sustainable.

What has been the response?

Perhaps unsurprisingly, since the draft code for public consultation was released last year, both Facebook and Google were vocal in their opposition. Each platform took a different response to the proposed code (although both are now negotiating directly with news publishers and in some cases have entered in agreements), specifically:

- **Facebook:** In a statement released on 18 February, Facebook stated that the law "fundamentally misunderstands the relationship between our platform and publishers who use it to share news content" and proceeded to restrict publishers and users in Australia from sharing or viewing news content. Following intensive negotiations, in an updated statement released on 22 February, it announced that it was satisfied that the Australian government had agreed to a number of amendments to the code and restored the ability of users in Australia to view and access news content on Facebook. It has also renewed discussions (and in some instances agreed to enter into agreements) with news publishers for payment for the ability to use its news content.
- **Google:** In an open letter, Google initially described the code as "unworkable" and threatened to remove the search engine from Australia. However, it has since entered into a flurry of multimillion-dollar commercial agreements with several major Australian news publishers (such as Nine Entertainment Co) for the ability to use their news content.

What does this mean for New Zealand and the rest of the world?

The regulatory tides in the field of internet governance are changing and the Australian government is not alone in its actions to rein in these technology giants. Early last year, France's competition regulator, the Autorité de la concurrence, ordered Google to negotiate in good faith with news publishers on the remuneration for the re-use of their news.

The Australian approach is the first mandatory code of conduct of its nature to come into force. It has had the desired effect of requiring both Google and Facebook to enter into agreements with news publishers for payment to access original news content. News publishers around the world have praised the code. David Chavern, president and chief executive of America's News Media Alliance (which includes such publications as The Wall Street Journal and The New York Times) said that his organisation was quite pleased with the outcome in Australia and thinks that the legislation "sets a key precedent that will benefit publishers around

the world".

With the rest of the world watching closely, it is possible that other jurisdictions could follow with a similar approach to require these technology giants to pay for use of news content on their platforms - although we are not aware of any similar moves in New Zealand.

Auckland

**188 Quay Street
Auckland 1010**

**PO Box 1433
Auckland 1140
New Zealand**

**P: +64 9 358 2555
F: +64 9 358 2055**

Wellington

**Aon Centre
1 Willis Street
Wellington 6011**

**PO Box 2694
Wellington 6140
New Zealand**

**P: +64 4 499 4242
F: +64 4 499 4141**

Christchurch

**83 Victoria Street
Christchurch 8013**

**PO Box 322
Christchurch 8140
New Zealand**

**P: +64 3 379 1747
F: +64 3 379 5659**