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Where to next with Australia's News Media and Digital Platforms Mandatory Bargaining Code?

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Abstract: Taken at face value the introduction in 2021 of Australia's News Media and Digital Platforms Mandatory Bargaining Code ("the Code") may appear "world leading," innovative, and, in general, a productive and strategic intervention to reverse the decline of public interest journalism. It is claimed that in the Australian news industry context, an annual transfer of around $200 million between two platform companies – Google and Meta – and news businesses has now been put in place (Sims, 2022). All major news media companies in Australia, if not smaller more independent ones, have greatly benefitted from the new Code, and anecdotally it appears that the funding has resulted in the creation of significant numbers of new journalists being hired. Yet the exact investment destination and ultimate beneficiaries of the funding are not known beyond the corporate walls of the recipients. The article points to the transparency and sustainability problems inherent to the new Code, arguing that an alternative approach to funding public interest journalism might be a levy funded by the platforms.

Keywords: platform governance, regulation, codes of practice, transparency

1 Introduction

The introduction in 2021 of Australia's News Media and Digital Platforms Mandatory Bargaining Code (NMBC or "the Code") has been seen by many as being "world leading," innovative and a productive and strategic intervention to reverse the decline of public interest journalism (e. g., Turvill, 2021). Building upon the recommendations of the *Digital Platforms Inquiry*, whose Final Report was released by the

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Australian Competition and Consumer Commission (ACCC) in 2019, the NMBC was intended to address the fundamental power imbalance between digital platforms and news media businesses (ACCC, 2019). It has been argued that, in the Australian news industry context, an annual transfer of around $200 million between two platform companies – Google and Meta – and news businesses has now been put in place (Sims, 2022). All major news media companies in Australia have greatly benefitted from the new Code, and it appears – at least anecdotally – that the funding has resulted in significant numbers of new journalism positions being created. Yet the exact destination and ultimate beneficiaries of the funding are not known beyond the corporate walls of the recipients (Grueskin, 2022). Similarly, there is currently no answer to the question: How long will the benefits to these news media publishers last?

In the European Union, after unsuccessful earlier initiatives in Germany and Spain, a new copyright directive in 2019 introduced a right for digital uses of press publications by "information society service providers" such as digital platforms along with a right to fair compensation. As with other European law, it needs to be transposed by member states, and after publishers – reliant on the distribution channel of internet search – agreed to licence content to Google for free, France became the first state to pass its own, local laws to give effect to the directive. At this stage, the deployment of copyright law gave way to competition law as several publishers lodged complaints with the French Competition Authority over the use of unfair trading conditions and the abuse of a dominant position (Wilding, 2022). By contrast, both Australia and Canada have favoured an approach based on competition law.

In this Research-In-Brief, we suggest that there are significant flaws in this new Australian law. One key problem has been that small, regional, and independent news organisations have little bargaining power compared with major media companies, and many have not secured deals (Australian Parliament, 2022). A second problem is that there is no requirement to spend funds transferred to news publishers that have negotiated successful deals. The funding arrangements are secret, which is unusual for such a key piece of public interest law, and arguably inappropriate in terms of democratic accountability. It has also been noted that the Code exists only as a threat that is yet to be activated. As we explain below, it is directed at two corporations, Google and Meta, but it will not actually apply to them (or to other platform services) unless they are formally "designated" – an outcome seen by some as unlikely (Bossio et. al., 2022). However, we will explore whether there any circumstances under which the threat will be used, and ask what are the "implied criteria" for such a designation?

The fact that the existing deals between the two platforms and Australian news organisations were made outside of the legislative scheme means there is little

transparency over the commitments made by platforms and the benefits flowing to news businesses able to secure a deal. It has become apparent that small independent news organisations were arbitrarily excluded from these deals and have subsequently launched campaigns to lobby government and garner support. *The Conversation* announced in an editorial that "on 22 March 30 media outlets did not publish any news articles as part of a coordinated protest" which was "not ideal in a country that already has a huge problem with highly concentrated media ownership" (Ketchell, 2022). They announced that their campaign included a website and hashtag #WaitingOnZuck. At the same time, it has been documented by the Public Interest Journalism Initiative (PIJI) that over 150 local and regional news outlets were closed during the pandemic. This relationship between "news deserts," various funding and grant schemes run by both platforms and the federal government, and the long-term sustainability of the sector calls out for further investigation (PIJI, 2022).

But before we turn to broader considerations and criticisms, we will consider in more detail the mechanics of the new Code.

2 How the Code was designed to operate

For a relatively recent piece of legislation, having been introduced in March 2021, the Code has already been the subject of considerable academic and industry commentary and critique (Bossio et al., 2022; Caffarra and Crawford, 2020; Flew and Wilding, 2021; Lee and Molitorisz, 2021; Lindsay, 2022; Leonard, 2021). Our brief overview of the legislative scheme will be followed by a closer examination of the type of regulation used. In principle, the News Code could be applied to any digital platform service that is designated in an act of the Treasurer (as the responsible Government Minister) under s. 52E of the *Competition and Consumer Act* (Wilding, 2021).

The legislation does not name any company or service, nor does it give a functional definition of "digital platform service." Instead, it relies on the *designation* of specific companies and the services they provide. By introducing the concept of "responsible digital platform corporation" as well as "designated digital platform corporation," it employs a mechanism for ensuring that the local Australian subsidiaries of Google and Meta will be involved in responding to requirements imposed under the scheme, including the conduct of the negotiation, mediation, and arbitration components. Two further comments on its application to these companies are needed. First, the underlying premise is that the prospect of the scheme coming into effect would be enough to force the platforms into separate

agreements with news providers since, by doing so, they can escape formal designation under the Code (see the report of the Senate Economics Legislation Committee ["Senate Committee"], 2021, p. 27). This explains the negotiation of amendments to the Bill and the introduction of an explicit requirement (explained below) for the Treasurer to take these deals into account before designating a platform. Second, despite the fact that these side deals might mean that the legislative scheme never actually comes into effect, some of the heat in the early 2021 negotiations between the Australian Government on the one hand and the two platforms on the other came from the proposition, set out in the Explanatory Memorandum to the Exposure Draft (p. 9), that it could apply to several of their services including Google Search and Facebook News Feed, both of which would a have far-reaching impact for the platforms' business models, here and overseas. In the end, it appeared that the Code – if it is triggered – would more likely apply to Google's News Showcase service and Facebook's News Service. The narrowing of its application was part of the compromise that saw both platforms retreat from earlier threats to leave the Australian market.

Returning to how the Code works, the overall design of the scheme can perhaps be best explained by recognising that the starting point is *bargaining*, and the end point is *arbitration* – but only if the bargaining does not work. The bargaining takes place between the local entities of Google and Meta as the "responsible digital platform corporations" and any "registered news businesses." There are limits on what counts as a news business, but a business will qualify providing it meets certain tests, including that the primary purpose of the mastheads or other news sources it seeks to register is to produce democracy-enhancing, public interest journalism (known as "core news"). The news business can then bargain for remuneration for the use of all its news content, including sports, entertainment and other news ("covered news").

There is a legislated requirement to conduct the bargaining negotiations in good faith. If the bargaining stage is unsuccessful, a mediation stage (with a mediator appointed by the Australian Communications and Media Authority (ACMA) must precede the arbitration stage, which is initiated via a notice from the news business to the Australian Competition and Consumer Commissioner (ACCC) and the formation of an arbitration panel by the ACMA. At this point the "final offer arbitration" system comes into effect which, apart from permitted information requests, involves only one submission and response from each of the parties, and a submission on limited factual grounds from the ACCC. The panel must choose one of the submitted offers unless it considers each offer is not in the public interest, but, in that case, it is limited to an adjustment of one of the offers rather than reaching a new amount based on further inquiry. There is no review available for these determinations.

Although the Code does not provide a formula or methodology for assessing remuneration, it says that the panel must take into account certain matters: the benefit of the content to the platform and the benefit to the news business of having the content made available by the platform (a late compromise amendment introduced to acknowledge the so-called "two-way value exchange" of news content), the reasonable costs of the news business in producing the content and the reasonable costs of the platform in making it available, whether there is an undue burden placed on the commercial interests of the platform, and the bargaining power imbalance between news businesses and platforms. In addition to the remuneration aspects, there is an important "non-differentiation" rule, that means platforms, in making available news content as well as in crawling (which, in this context, refers to web data extraction) and indexing it, cannot differentiate: between registered news businesses, between these businesses and those that are not registered, or between unregistered news businesses. The effect of this provision (see *Points of disagreement* below) is thought to be that the platform must either be prepared to remunerate all news businesses that qualify under the scheme or offer no news content on the services designated by the Treasurer.

There are also some specific obligations, the most significant of which is that the digital platform must give registered news media businesses a 14-day notice of a change to its algorithms where the change is likely to have "a significant effect" on referral traffic to the news business. Digital platforms can make standard offers, and registered news businesses can bargain collectively (as has occurred for groups of smaller publishers), and agreements between platforms and news businesses can result in the parties contracting out of the legislative requirements. Finally, there are enforcement powers given to both the ACMA and the ACCC, with the most significant being the penalties that can be sought by the ACCC under the Competition and Consumer Act in the event of a breach of the requirements for non-differentiation and good-faith bargaining, and for failure to comply with an arbitral determination. Consistent with existing penalties under this Act, they amount to the greater of $AUD 10 million, three times the value of the benefit obtained, or (if the value of the benefit cannot be obtained),10 % of annual turnover in the previous 12 months.

3 Points of disagreement

While there were a number of contentious aspects in the design and implementation of the scheme, the platforms strongly opposed the "final offer arbitration model" in the exposure draft. Yet, with amendments, the mediation provisions were generally seen to be an amelioration of the original design under which plat-

forms could be made to enter arbitration if initial bargaining was unsuccessful. Google described the final offer arbitration model as "completely unreasonable and unprecedented" (Google, 2020, p. 43), with Facebook (Meta) describing it as "highly unusual" and "an entirely untested experiment" (Facebook, 2020, p. 12). Another aspect these companies objected to were the criteria for arbitration in the version of the scheme presented in the ACCC's exposure draft (Google, 2020, p. 46; Facebook, 2020). This required arbitrators to take account of the benefits news provides to platforms, but not the benefits news businesses obtain from platform referrals. As is evident from the description of the scheme above, this was remedied so that the so-called two-way value exchange must be considered: Amendments require recognition of the reasonable costs of producing news and of making it available on digital platforms, even though there is still no mechanism for ascertaining the value of news content.

The principal remaining objection put by Google and Meta after the Bill had been tabled and before amendments were made in the final weeks are recorded in the report of the Senate Committee (2021, pp. 22–24). As noted above, the final version of the Code also included a last-minute amendment to the designation provisions that encourages platforms to develop agreements with news media businesses as a means of avoiding the operation of the scheme altogether. Paragraph 52E(3)(b) now states that, in deciding whether to designate a company and its applicable services, the Treasurer must consider whether the company 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)." Finally, changes to the non-differentiation rule now exclude the operation of that provision in situations including where "the differentiation arises solely from the amount of that remuneration" (s.52ZC(4)). The combined operation of the new "significant contribution" test and the allowance in the non-differentiation rule for different ways of assessing payments to publishers was seen to address some of the most serious concerns expressed by the platforms with the original version of the legislation (Wilding, 2021).

4 Significance of the local policy context

The key context for this new law is that it emerged from a very well-resourced and comprehensive inquiry by the competition regulator, the ACCC. They were tasked in 2017 to undertake this investigation by the then Morrison Government. Their final report and recommendations came out in July 2019 (see Figure 1).

It was originally intended to be a voluntary Code of Practice, but the government then asked the ACCC to develop a mandatory Code of Practice (enshrined in legislation) after delays, and to "address bargaining power imbalances" between news publishers and the platforms – Meta and Google. The draft Code was released in July 2020, and then there was the much publicised and very dramatic push-back from the platforms: Google threatened to withdraw search from Australia in January 2021, and Meta (Facebook) did actually shut down access to news for one week in February 2021.

Figure 1: Timeline for the NMBC.

In his book *Regulating Platforms*, Flew (2021) uses six case studies of regulatory initiatives to illustrate his taxonomy of platform regulation: Netz DG, GDPR, ACCC's News Media Bargaining Code, the Facebook Oversight Board, the Christchurch Call and the Contract for the Web (2021).

Flew classifies the ACCC's News Media Bargaining Code as an instrument produced by way of "co-regulation," noting the regulatory supervision by the two main agencies, the ACMA and the ACCC, as well as the ACCC's recommendation in the Digital Platforms Inquiry (DPI) for a co-regulatory model. This illustrates the hybrid nature of the NMBC: Although formally part of competition legislation, all payments made by platforms to news organisations have been made without the scheme itself being brought into operation through designation of either Meta or Google. As such, it can perhaps be seen as sitting between rule-based regulation and soft law.

The shifting ground on the legal form of regulation considered appropriate for digital platforms – self-regulation, co-regulation, direct regulation, or a hybrid such

		Netz DG	GDPR	ACCC News Bargaining Code	Facebook Oversight Board	Christ-church Call	Contract for the Web
Regulatory initiative	State-led	*	*	*		*	
	Corporate-led				*		
	NGO-led						*
Type of regulation	Direct reg.	*	*				
	Self-reg.				*	*	*
	Co-reg.			*			
Enforcement	Legal Sanctions	*	*	*			
	Soft law				*	*	*
Jurisdictional reach	National	*		*			
	Regional		*				
	Global				*	*	*

Figure 2: Flew's taxonomy of regulation.

as the NMBC – indicates the difficulties of finding solutions for a sector characterised by rapidly developing technologies, and business and consumer practices (an argument for using self- or co-regulation), when also dealing with very powerful transnational corporations. These international firms, while prepared to introduce measures to deal with growing state and community concern over the spread of disinformation, did not have any major incentive to share revenue with local industry participants – and even less to create an international precedent by doing so. It is perhaps this quandary that leads to the irony in the outcome: A fiercely contested statutory scheme was averted by the striking of private agreements that are not even the subject of a formal industry-based self-regulatory code. Yet self-regulation was never an appropriate tool for regulating news remuneration; and it is difficult to see why the Government moved the News Code from the ACCC's recommendation of co-regulation to voluntary codes.

5 How does this fit with other regulation?

In this context it is worth providing a brief overview of the fragmented domains of internet/media regulation in Australia.

Competition law is overseen by the ACCC under the *Competition and Consumer Act 2010* (CCA). This was the source of the ACCC's findings on the market power of

Google and Facebook as part of the Digital Platforms Inquiry (DPI). The News Media Bargaining Code was inserted into the CCA. Since the DPI concluded in 2019, the ACCC has maintained its focus on platforms, including through the current Digital Platform Services Inquiry (DPSI) (2020–2025) which combines elements of the EU's Digital Markets Act and Digital Services Act. The Department of Treasury is currently consulting on the ACCC's latest recommendation for additional powers to require formal notification of mergers and acquisitions, self-preferencing etc.

Consumer laws are also administered by the ACCC under the Australian Consumer Law (a schedule to the CCA). The ACCC has given considerable attention to addressing online scams, and – as part of the DPSI – is also looking at emerging consumer protection issues such as dark patterns and problems with platform complaint handling.

Online Safety is regulated via a dedicated online safety regulator – the eSafety Commissioner – who oversees the *Online Safety Act* passed in 2021, bringing together rules around image-based abuse, cyber-bullying and adult cyber abuse, "violent abhorrent material," and the formation of codes dealing with classification of online content.

Media regulation is undertaken by the ACMA via informal oversight (reporting to government) of the voluntary Disinformation and Misinformation Code. In early 2023 the Government announced an intention to legislative to give the ACMA formal powers and to allow for registration of the code, meaning the current self-regulatory model will be replaced by co-regulation. Other relevant responsibilities include regulation of online gaming and gambling ads and spam.

Privacy Regulation is the domain of the Office of the Australian Privacy Commissioner (OAIC). The Privacy Act 1988 is being reviewed along with the role of the OAIC in order to adapt this area of law and regulation to the digital platform environment – driven in part by problems such as the Cambridge Analytica scandal. Co-regulatory codes of practice are proposed, along with a direct right of action for individuals to apply to the courts for relief in relation to an interference with privacy (Australian Government, 2023). It is expected that a Bill will be introduced to Parliament by the end of 2023.

It is fair to say, therefore, that the operation of the Code is legitimately part of the wider debate calling for reforms in the way that digital platforms are regulated globally (Flew, 2021; Flew and Su, 2022; Moore and Tambini, 2021; Napoli, 2021). The Digital Markets Act, the Digital Services Act, and the proposed European Media Freedom Act are leading examples of more holistic approaches to digital media governance. In contrast to the more fragmented Australian approach evident from the outline above, these EU frameworks combine action on aspects such as market contestability, unfair practices and online safety, editorial independence and beneficial ownership transparency (European Commission, 2022a, 2022b). An inter-

esting element of these new approaches – in light of Flew's (2021) taxonomy discussed above – is the renewed interest in co-regulation. For example, the European Strengthened Code on Disinformation is set to move to a co-regulatory instrument governed by the risk-based approach that imposes duties of care but leaves rules to be developed by industry. While in Australia industry groups are also developing new codes of practice under OSA (eSafety Commissioner, 2021), the Act is more prescriptive in its content, with no equivalent of the high-level duty of care adopted in Europe; as a result, the form of the new Australian codes may be closer to those developed under the *Broadcasting Services Act 1992* and the *Telecommunications Act 1997*.

6 Reviewing the Operation of the News Media Bargaining Code

In their assessment of the early operation of the Code, Bossio et al. (2022) concluded that, while the Code was highly innovative and "a leading example of a global trajectory towards regulatory change," it nonetheless has its pitfalls and shortcomings. After reviewing the implementation and impact of the Code they inquire "whether the reform is an effective regulatory model for other national governments to emulate."

The Australian Government's Department of Treasury has completed a scheduled review under Section 52ZZS of the *Competition and Consumer Act 2010 (the Act*). It was required to conduct a review after the first 12 months of operation of the Code in March 2022. The review itself explicitly notes that "the review will not revisit the policy objectives of the Code" (Treasury, 2022). The terms of reference state the purpose of the review was to: (a) assess the extent to which the Code, during its first year of operation, has delivered outcomes consistent with its policy objective; and (b) identify potential improvements to the Code.

The review was tasked to sift the views from the stakeholder consultation and then "assess the extent to which commercial agreements between digital platforms and Australian news businesses, and whether their designation and the registration provisions have delivered outcomes consistent with the policy objectives of the Code." Many observers of this legislated code review tended to reduce this policy rhetoric to the binary options of "to designate" or "not to designate."

The reality is, though, that the new law remains an idle threat until one or other of the US-based platforms is designated. The principal architect of the new laws and former ACCC chair Rod Sims believes the time has arrived for designation of Meta (Sims, 2022).

When the review became public in December, some deft manoeuvring saw the Treasury make the point regarding this expectation of designation among some stakeholders that:

> As foreshadowed in the consultation paper released on 1 April 2022, the review is separate to the process in the Code for designating digital platforms and has not therefore considered whether individual digital platform services should be designated. The Minister may make public statements about potential designations or initiate the designation process at any time, independently of the review, should developments warrant it. (Treasury, 2022, p. 14)

They also note that negative consequences may flow if designation was structured according to certain groups of news businesses whereby it

> … could mean that funds committed under the agreements may no longer be paid. Remuneration issues for many news businesses would then need to be resolved – in at least some cases, starting afresh – through the Code's negotiation, mediation, and arbitration processes. These would not necessarily result in all registered news businesses obtaining remuneration, nor would they guarantee that those currently with agreements would receive the same funding they do today. (idem, p. 15)

Instead, the review recommends that the Government should consider directing the ACCC to prepare reports on how platforms are performing in terms of news delivery, and the ongoing power imbalance between platforms and news businesses. It also recommends "whether ACCC information-gathering powers could be used to obtain information about commercial agreements between digital platforms and news businesses" (idem, p. 17).

Outside observers of this process may note that such recommendations are very likely to be overtaken by the usual warp speed developments in this space. This can be seen, to take just one example, in the case of Twitter, when the platform's ownership recently changed hands to Elon Musk. Under Musk Twitter as a company has largely stripped out the departments and personnel that dealt with compliance issues. However, as researchers we can see that a number of areas invite further reforms in relation to designation, decision-making and reporting, and the definition of the news businesses subject to the new law.

First, the role of assessing the contribution of a digital platform to the sustainability of the news environment and the decision to designate a digital platform should be removed from the government minister and given to the regulator (the ACCC). Second, reporting and oversight obligations should be introduced to provide transparency into the impact of deals made as a result of the code upon quality, original public interest journalism. Third, as a matter of public policy, we say the fundamental issue is whether the full range of provisions in the Code should be implemented, and then subsequently whether the government has available to it

the full range of enforcement actions. The ongoing policy question, in other words, is: Should Meta and Google be designated?

In addition, in the area of the treatment of news businesses a number of matters need to be addressed following the first 12 months of operation. In our view, for a more effective contribution to public interest journalism, the Code should explicitly support news sources producing quality, original public interest journalism, which are often most impacted by the migration of advertising money to digital platforms. Second, an originality provision should be incorporated into the Code, as this would assist the sustainability of news businesses. Other initiatives that could be implemented include:

– The professional standards test should be amended so that news businesses are only able to register under the code if they are subject to external standards schemes and complaints processes.
– The assessment of editorial independence should examine the content produced by the news source in addition to the broader affiliations of the business.

An important concomitant policy question to be asked is: Should the class of news businesses supported by the scheme be further restricted? Some of the news businesses that have been accepted onto the ACMA's register (as a precursor requirement to mandatory bargaining, should the Code be brought into effect) are niche operations that offer specialised industry-focused news, and some are non-profits, advocacy groups, or other businesses that have added a "news" dimension to their operations, seemingly in response to the potential revenue stream from the Code. It is doubtful whether these businesses offer the kind of journalistic model that the ACCC, in the DPI, marked out as a public good.

The new Canadian law has explicitly drawn on the best aspects of the Australian law, and sought to improve on perceived weaknesses (Carson et al., 2022; Turvill, 2022). It has been reported that the Canadian government has pledged to enact "a more transparent" version of the Australian law and code. The new rules which will seek to make Meta and Google pay for news will be administered by the media regulator, the Canadian Radio-television and Telecommunications Commission (CRTC). Platforms meeting certain criteria will be covered by the scheme but can apply for exemption from the mandatory bargaining and arbitration elements on the basis of deals struck with news businesses. This is a reversal of the Australian Code where platforms stay outside of the legislative scheme unless they are found to have not made an adequate contribution to the sustainability of the Australian news industry. As they will be subject to an active statutory scheme (albeit without the mandatory bargaining and arbitration elements), they will need to comply with certain reporting obligations – another element absent from the Australian

arrangements. In addition, decisions on which platforms are subject to the scheme and whether they will be exempted from the formal bargaining obligations will be made by the CRTC on criteria set out in the legislation rather than by a Minister, as is the case with Australia's Treasurer (Turvill, 2022). The assertion is of course that in taking this decision away from the Minister and handing it to the regulator, the whole process becomes less overtly politicised.

7 Is this form of funding for public interest journalism sustainable?

In conclusion, for an international community keen to rein in the excessive market power of the digital giants a key question regarding the News Media Bargain Code is: What was uniquely Australian in the law/code and unlikely to be reproduced in other countries, and what was useful for more general international application?

The case of the NMBC in Australia is indeed nationally specific in several aspects. In principle it is a piece of standard government regulation, and the framework setting the legislation is competition law (or anti-trust as it is called in the US), not media regulation. There are two regulators involved in its operationalisation – a media regulator for registration of news providers, and a competition regulator to oversee bargaining and arbitration.

Yet, in practice, the non-discrimination rule means that there is no choice: If you are designated and offer news, you must bargain. This means mandatory bargaining, mandatory mediation, and mandatory arbitration; there is no appeal or review of the arbitrator's decision, and heavy penalties for non-compliance. It is also the reality with the first 12 months of application of the NMBC that, in practice, there is technically no such scheme. This is because no platform has been designated, and therefore the legislative scheme has not been triggered. As noted previously, deals struck in the shadow of the scheme have redirected a substantial quantum of revenue from platforms to publishers. Google News Showcase and the Facebook "news" tab were nominally the vehicles for remuneration, but, again, this has not been widely advertised. Meta's publicly announced decision to wind back its commitment to news in favour of friends and family signals a longer-term trajectory that it wishes to avoid these controversial relations with news organisations (Fischer, 2022).

Some important news outlets have missed out on the platform largesse – notably, *The Conversation* and the public broadcaster, the Special Broadcasting Service (SBS), which has a unique multicultural and indigenous agenda in the Australian media sphere. Broadly speaking, there is no clear picture of the value or

benefits of the deals apart from anecdotal accounts of a spate of hirings by the recipients of the revenue.

Given this broader reality, it seems dubious to expect that this process will lead to any necessary amendments to the law to ensure that its operation is sustainable in the years ahead, and achieves the intended aims of the architects. It has the appearance of a temporary "band aid" solution to achieve political objectives. (And as there is now a new Labor government in place from May 2022 these political objectives are likely to be different from those of the previous conservative Morrison government.)

In the intensely political circumstances that gave rise to the Code, whether we have confidence in the process itself is a moot point. In that regard Flew writes: "When, in February 2021, Facebook withdrew the access of Australian news media sites to its global news feed, as part of a bargaining strategy designed to influence the federal government's proposed News Media and Digital Platforms Bargaining Code, it made explicit forms of power that had long been tacit in the media environment" (Flew, 2021, p. 13). One experienced industry commentator likened the review process to "marking your own homework" (Crawford, 2022). Yet the alternatives are not clear-cut. In submissions to a Parliamentary committee's inquiry into the operation of the proposed new law C18, which has fine-tuned the Australian model, Google representatives suggested – as an alternative to a scheme based on mandatory bargaining and arbitration – a funding model based on a government-run industry fund (Google Canada, 2022) for eligible news media outlets, using a levy "in accordance with a predictable and transparent formula" to be paid by intermediaries (Wilding, 2022, p. 23). As Wilding has argued, this approach could offer a viable longer-term alternative for the news industry (Wilding, 2022, p. 23). Further, he argues that: "Uncertainty over the long-term future of current platform-publisher agreements offers at least one reason for exploring this alternative approach."

Some researchers have argued that various funding and grant schemes initiated by the digital platforms recognise the decline of tradition news media businesses, and that these forms of funding are part of strategies involving "platformization, path dependence, and lock-in mechanisms" (Nielsen and Ganter, 2022; Meta Blog, 2022).

The new Communications Minister, Michelle Rowland, has previously signalled her government's intention to take a more interventionist approach to regulation of the US media-tech corporations, including in the context of the Department of Treasury review of the Code (Baird, 2022). In effect, the new law remains an idle threat until one or other of the US-based platforms is designated. As Sims notes, since its introduction around $AUD200 million has been channelled to major news publishers in Australia from Meta and Google. But there is little understanding of where this money has been invested or how long it will flow for, with some sug-

gesting it has been used to pay down debt, rather than resource, as it was hoped, public interest journalism. Given the planned exodus of Meta from their supply agreements with major news publishers in the US, it is very possible that this will happen in other markets. There is speculation that any decision to trigger forced arbitration under the NMBC in Australia by designating Meta will lead to their withdrawal from news in the Australian market. Longer-term approaches for addressing the market failure of public interest journalism will require innovative thinking for structural corrections by governments and their regulatory agencies. In this context the proposal for a government-operated industry fund levied on platform intermediaries is a potentially sustainable development.

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