



QUAY INSIGHTS

March 2024

Meta & Australia's News Media Bargaining Code

On 29 February 2024 Meta announced it would turn off Facebook News on its ubiquitous social media site in Australia and that it would not be renewing deals with Australian media businesses, put in place three years ago, to pay those businesses for their news content. The Australian Government has reacted strongly to Meta's announcements. The core question is: can Australia's regulation force Meta to pay for news content?

A. Meta's agreements with Australian media companies to pay for news content

One of the recommendations from the Australian Competition & Consumer Commission's (ACCC) world leading 2017 – 2019 Digital Platforms Inquiry was that codes of practice should be implemented to address the bargaining power imbalance between digital platform behemoths such as Meta and Australian news media businesses. In the view of the ACCC, the bargaining power imbalance between these entities had resulted in the platforms freely using the content of news media businesses, without payment, to attract users. As advertising revenues moved from media businesses to the platforms, this situation imperilled the production of quality journalism in Australia.

The end result of the ACCC's recommendation was the implementation of a mandatory news media bargaining code, incorporated in a new Part IVBA of the Competition and Consumer Act 2010 (Cth) (CCA), which commenced in March 2021.

The code operates in relation to designated digital platforms, requiring them to (amongst other things) negotiate with Australian news media businesses to pay those businesses for relevant news content made available by designated digital platform services. If negotiation fails, the code contains an arbitration process that may be triggered by the media business. Unless a platform and its services are designated, they cannot be *compelled* to enter into negotiations or to submit to arbitration.

No platforms or services have been designated to date. It was the threat of designation that caused Meta, in 2021, to enter into agreements with Australian media companies to pay them for their news content. Many commentators argue that Meta in fact entered into only the

This publication is not intended to be comprehensive on the topics with which it deals. It is not intended to be relied upon or provide legal advice on the topic. Specific professional advice should be sought.

www.quaylaw.com

Level 32, 180 George Street, Sydney NSW 2000, Australia

LIABILITY LIMITED BY A SCHEME APPROVED UNDER PROFESSIONAL STANDARDS LEGISLATION

bare minimum number of agreements to avoid such designation, given numerous notable media outlets such as the public broadcaster, SBS missed out on deals with Meta.

B. What is Meta saying now?

The agreements that Meta signed with media businesses in early 2021 were typically for three years and those deals are now coming to an end. As well as announcing on 29 February 2024 that Facebook News would no longer be available in Australia from early April 2024, Meta has said that it will not renew any of those agreements.

While Meta says its decision to end the availability of Facebook News has been made as there has been a drop of more than 80% in the number of people using that service in the past 12 months, this decision is inexorably linked to its decision not to renew its agreements with Australian media businesses. Meta's view appears to be that it does not want to pay for news content and therefore it will not offer a news service.

The Meta announcement should have come as no surprise to either the Australian Government or Australian media companies given the small number of agreements Meta entered into in 2021 and also the approach Meta has taken in Canada.¹ When Canada introduced its own version of Australia's code in 2023, Meta refused to make any payments to Canadian publishers and blocked news on Facebook (and Instagram) in Canada. The ban implemented by Meta applied to news links and content posted by news publishers and broadcasters in Canada, though links and posts from media companies outside Canada were not impacted. Matters appear to remain at an impasse between Meta and the Canadian government.

C. The potential for designation under the code

The Australian Government's reaction to Meta's announcement has been negative and the Government has threatened that it will take action to designate Meta and Facebook (and potentially also Instagram) under the code.

The question must be asked whether designation under the code would have the desired effect of requiring Meta to make payments to Australian media businesses for their news content.

There seems little doubt that Meta could be designated under Part IVBA of the CCA, as the criteria for designation primarily consider the issues of bargaining power imbalance with Australian media companies and whether the particular platform has made a significant contribution to the sustainability of the Australian news industry, including by paying Australian media companies for their content.

But there is a question of what happens after designation. Australian media businesses that are registered with the Australian Communications & Media Authority are able to trigger the commencement of a bargaining process with a designated platform. If a good faith negotiation process is unsuccessful within 3 months, then the parties will move to mediation.

Mediation may continue for up to four months, though may be terminated earlier if the mediator considers that the process is unlikely to reach an outcome. Where mediation is

¹ Which we predicted would be replicated in Australia in our earlier Insight, see: [Canstralia: What Australia can learn from Canada's regulation of digital platforms](#).

unsuccessful, it is only then that a media business would be able to access the arbitration provisions under Part IVBA. Importantly, the arbitration provisions may only be accessed for remuneration disputes. These are defined as disputes about the remuneration to be paid to the news business for the “making available” of news content by the designated service or services.

The arbitration provisions are unique, in that the arbitration process will result in (other than the most unusual circumstances) the final offer put forward by one of the parties being adopted by the arbitration panel – in most circumstances there will be no room for a compromise solution to be adopted.

As a consequence, there are significant risks to Australian media companies that they will receive no remuneration at all from Meta through an arbitration process. It seems clear that Meta would argue that, as it no longer provides any services that promote the sharing to news content on Facebook, there would be no basis for it to make any payment.

The outcome of any arbitration process may depend on the interpretation of the term “making available” in Part IVBA. Section 52B of the CCA defines making available for the purposes of the code provisions to include (but will not be limited to) where the content is made available on the service or is otherwise placed on the service, a link to the content is provided on the service or an extract of the content is provided on the service.

The question will be, if Meta has removed its Facebook News service, could it really be said Meta is “making available” any of the relevant news content which its users might choose to share on the social media platform or that Australian media companies themselves voluntarily include on their Facebook pages or through other Facebook services? Australian media companies would need to argue that this type of sharing, which will continue to be permitted by Meta, though would not occur as a result of any actions of Meta itself, amounts to Meta “making available” news content. There is no guarantee that an arbitration panel will accept such an approach.

D. Where to from here?

At the beginning of February 2024, Meta announced its fourth quarter and full year results for 2023. For the fourth quarter, it generated revenue of US\$40 billion and its 2023 annual revenue was US\$135 billion. The amount that it is reported to have paid under the agreements it entered into with Australian media businesses is Australian \$70 million per annum. Therefore, Meta is not resisting entering into new agreements because of the impact the payments for news content will have on its bottom line.

It appears likely the reason Meta has chosen to adopt its current approach, which has deeply antagonised the Australian Government and the Australian media sector, comes down to precedent. In other words, Meta does not want to pay media organisations in *any* jurisdiction and therefore does not want to continue the payment agreements that it has entered into with Australian media companies in an attempt to discourage other jurisdictions from seeking to follow the Australian regulatory model.

The Australian Government's perspective is that they will be able to change Meta's view by forcing it to the bargaining table through designation under the code. Whether that will be effective remains to be seen.

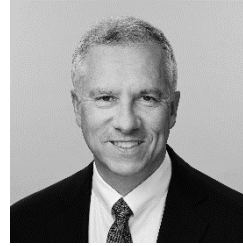
Contacts



Angela Flannery

Partner

Quay Law Partners
Level 32, 180 George Street,
Sydney NSW 2000
T +61 419 489 093
E angela@quaylaw.com
www.quaylaw.com



Dave Poddar

Partner

Quay Law Partners
Level 32, 180 George Street,
Sydney NSW 2000
T +61 422 800 415
E dave@quaylaw.com
www.quaylaw.com