



QUAY INSIGHTS

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The future of Australia’s “world leading” news media bargaining code

Just before Christmas 2023 the Australian Government released its response to Treasury’s 2022 review of the mandatory news media bargaining code. The Treasury’s review finding that the code has been a success is questionable. It is not clear how the Government will respond to future media sector challenges, not only if the digital platforms refuse to renegotiate deals entered into under the shadow of the code but the more complex issues arising from the increasing use of generative AI.

In 2021, a mandatory news media bargaining code was incorporated in Australia’s Competition and Consumer Act to require the largest digital platforms to pay Australian media organisations for news content. While the law was passed, it has never taken effect, given that it only applies to digital platforms designated by the Treasurer, and no designations have ever been made.

Nonetheless, the code has been hailed as a success, including in a review undertaken by the Treasury in 2022. The code is seen as successful because it pushed Google and Meta to the bargaining table, and deals were ultimately done with Australian media companies estimated to be worth approximately \$200 million.

This “success” however ignores many uncomfortable truths, particularly that by not designating the platforms, each of Google and Meta were able to select the media companies they would enter into agreements with. Effectively, that gave the platforms a direct ability to pick media company “winners” in Australia. It remains the case that many Australian media outlets have been unable to strike deals, to their significant financial disadvantage.

The code is back in the news. The Australian Government, more than twelve months after Treasury published the report from its review and just before Christmas 2023, responded to the limited recommendations contained in that report. But the primary reason the code is back in the spotlight is that many of the voluntary agreements entered into between the platforms and media companies have only a three year term and so will expire in early 2024. Questions are being asked as to whether Google and Meta will renew those deals.

Assistant Treasurer Stephen Jones has said that the Government would not hesitate to designate platforms if they do not renew these deals. Recent experience in Canada with its equivalent legislation, the Online News Act, demonstrates this is likely to be an empty threat.

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Canada provides a perfect illustration of the most likely outcome if Australia does designate any platforms. In the case of Meta, the result appears clear – it will stop making Australian news available on its platforms. This is what it has done in Canada to date, refusing to negotiate with the Canadian government to make any payments. It has used the same arguments it used to oppose the code, namely, that media organisations benefit from their content appearing on its platforms more than Meta benefits. Designation under Australia's mandatory news media bargaining code would be meaningless if Meta took that step, as the code does not impose any obligations unless news content is made available by the designated service.

The outcome with Google may well be different though also problematic. In Canada, Google has, albeit seemingly reluctantly, reached agreement with the Canadian government. However, the Google deal is reported to be for a total of only Canadian \$73.5 million a year, for all Canadian media outlets *in aggregate*. There is no doubt that Google would use this precedent to argue that its payments under any new Australian deals should be significantly less than the amounts agreed in 2021. As there is no certainty as to what media organisations would be paid if they did negotiate under the novel provisions contained in the code, many media organisations may feel they will be forced to accept lower amounts rather than take their chances under the code regime.

In light of this, there is a real risk that the code may be seen as only a short term success in facilitating agreements only of a limited duration. In the longer term, the code may have little impact on the ingrained behaviour of the largest platforms and may not address bargaining power imbalances between Australian media companies and these platforms – which was the stated objective of the code.

A troubling aspect of this potential outcome is that media companies (as well as other content creators) may soon be at loggerheads with the largest digital platforms on another front. That is the use of news and other content to train the models used for generative AI tools such as the ubiquitous ChatGPT, without the consent of those content creators being obtained. There also seems to be a troubling trend for such chatbots to use that content, with little or no changes, in responding to user questions. The New York Times has recently sued Open AI and Microsoft for copyright breaches in relation to these issues, indicating that this is a global problem.

In late December 2023, with Australians slipping into holiday mode, the Attorney-General's Department released an outcomes paper on AI and copyright. That outcomes paper does little more than acknowledge that this area is "complex" and further discussion is required. Given the rapid developments in AI, which show no signs of slowing, there is little time for a slow moving consultation process. Government must move quickly to determine what protections are required for Australian media and other content providers and decisively take that action. It is hoped such action provides for a long term solution.

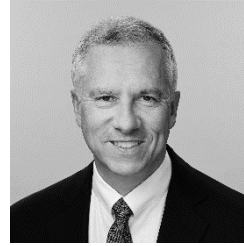
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