

## Australian News Media Bargaining Code - a cautionary tale for UK legislation

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- The Australian News Media and Digital Platforms Mandatory Bargaining Code, introduced in March 2021, has inadvertently disadvantaged small, local news publishers while trying to address market imbalances between the news industry and tech giants like Google and Meta.
- The Code has not actually been implemented, allowing tech giants to avoid the checks and balances it introduced. Even if it were triggered, its provisions strongly favour large, corporate players at the expense of the independent publishers that have the most need for financial and structural support. A pro-competition UK Code must avoid these pitfalls and prioritise the small publishers that reach otherwise unrepresented communities all over the country.
- Despite the money funnelled into the news media sector through agreements with Google and Meta, the sector suffered an overall decline in journalism provision one year after the Code was introduced. Since the one-year mark, the sector has shrunk further.

### **The Australian News Media Bargaining Code: a flawed pioneer**

The news can be a profitable business, but profits have been lining the wrong pockets. News content shared on digital platforms generates considerable advertising revenue for tech companies but bypasses the publishers that produce it.

News providers have long protested their inability to negotiate for their share of the revenue with companies like Google and Meta, whose size, influence, and control over first party data result in a power imbalance skewed heavily in their favour.

In March 2021, the Australian government established a mandatory code of conduct that governs commercial relationships between tech companies and Australian news businesses to:

1. Address the bargaining power imbalances between the two, and
2. Help sustain public interest journalism in Australia.<sup>1</sup>

It set out to do this by introducing the threat of compulsory final-offer arbitration<sup>2</sup> to incentivise companies like Google and Meta to voluntarily negotiate agreements with news providers and

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<sup>1</sup> [Revised Explanatory Memorandum, Treasury Laws Amendment \(News Media and Digital Platforms Mandatory Bargaining Code\) Bill 2021](#), para 1.1, page 9

<sup>2</sup> [Revised Explanatory Memorandum, Treasury Laws Amendment \(News Media and Digital Platforms Mandatory Bargaining Code\) Bill 2021](#), para 1.8. page 10

ensure that the news businesses receive fair remuneration from digital platforms for the value their content generates.<sup>3</sup>

The Australian model was the first of its kind and may therefore be viewed as a benchmark in attempts to regulate big tech and support public interest journalism. However, analysis of the news media sector and of the Code in the two years since its introduction shows that it may have undermined its own goals by creating a new competition problem for small, independent publishers, while trying to solve the existing one between the news media sector as a whole and big tech.

### **Importing Australia's Code may hurt small UK publishers, make them less competitive**

With the forthcoming Digital Markets, Competition and Consumer Bill, the UK Government has an opportunity to create a competitive economy for the news media that rewards quality journalism and fosters democratic engagement from its citizens.

To do that, however, there are many lessons to learn — and pitfalls to avoid — from the Australian Code.

For one, the Code has not technically been triggered in Australia, despite passing into law, meaning the deals reached by tech companies:

1. Are negotiated behind closed doors and signed with airtight non-disclosure agreements, hiding their contents from the public and other providers who may benefit from that knowledge.<sup>4</sup>
2. Are reached only with news providers the tech companies choose to engage, maintaining the bargaining imbalance by allowing them to side-line certain providers at their discretion.
3. Eschew the checks and balances the law purports to implement, since the law itself has not been implemented.
4. Strongly favour large, corporate news providers that operate at the national level, leaving behind small, independent publishers that operate on the local and community levels.<sup>56</sup>
5. May automatically self-destruct if the Code were ever enacted.<sup>7</sup>

The Code's provisions themselves also leave much room for improvement before being adapted to the UK market. For example, if the Code were triggered, a news business would need:

1. To be registered with the Australian Communications and Media Authority (ACMA), an equivalent of which does not exist for print news providers in the UK.

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<sup>3</sup> [News Media and Digital Platforms Mandatory Bargaining Code, Executive Summary](#), page 1

<sup>4</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 2

<sup>5</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 13

<sup>6</sup> [Supplementary Submission to the Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 3

<sup>7</sup> [News Media and Digital Platforms Mandatory Bargaining Code: The Code's first year of operation](#), Australian Treasury, page 15

2. Pass, among others, a revenue test of AUS\$150k (c. £86k)<sup>8</sup>, automatically excluding the typical independent news publishers in the UK that report revenues of <£35k<sup>9</sup> and struggle to keep the lights on.

A tech product would additionally need to be ‘designated’ as a platform for the purposes of the Code, a decision made solely by the Minister for Communications based on opaque criteria which, whether they exist or not, have not been made public.

Crucially, even a fully functional Code may do little to achieve its second goal in regard to sustaining public interest news, a goal that UK legislation should absolutely prioritise. Remuneration deals in the Code are not required to invest that money in journalism production, meaning cash infusions could simply be paid to shareholders as dividends.

Few commitments have been made to use the money to produce news. It is therefore yet to be seen how the Code contributes to maintaining a sustainable business model for public interest journalism.<sup>10</sup>

Let’s take a closer look at the impact of the Australian Code two years in, as well as the ways in which a British model might more successfully include the news providers that need the most support to stay afloat.

### **Deals reached since the Code: potentially lucrative, definitely exclusionary**

In the first year after the Code passed, news publishers reached some 34 commercial deals with Google, Meta, or both, covering 146 business entities that represent 472 print and digital news outlets.<sup>11</sup>

With strictly confidential deals and no platforms designated under the Code, not all eligible news producers have secured deals, and Meta and Google have been given the power to decide not only which outlets to negotiate with, but whether to negotiate at all. Meta, for example, refused to engage with SBS, one of the most trusted news sources and producers of public interest journalism in Australia<sup>12</sup>, before ceasing negotiations with news businesses altogether in the second half of 2021.<sup>13</sup>

This has created a new status quo of haves and have nots within the news sector, with the publishers chosen by Google and Meta for negotiation gaining what we can only assume — since the deals are private — is a significant financial advantage over those with whom the companies refused to engage.

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<sup>8</sup> [Revised Explanatory Memorandum, Treasury Laws Amendment \(News Media and Digital Platforms Mandatory Bargaining Code\) Bill 2021](#), para 1.51. page 17

<sup>9</sup> [Public Interest News Foundation’s Index of Independent News Publishing, 2022](#)

<sup>10</sup> [Australia’s News Media Bargaining Code and the global turn towards platform regulation](#). *Policy & Internet*.

<sup>11</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 11

<sup>12</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 2

<sup>13</sup> [News Media and Digital Platforms Mandatory Bargaining Code: The Code’s first year of operation](#), Australian Treasury, page 5

Who are the new have nots? Of the estimated 296 outlets left without deals with either tech giant, 284 are local and regional in scale while 11 are national.<sup>14</sup> Only three out of 174 community outlets were covered by deals by October 2022.<sup>15</sup>

### **Two years since the Code: more money, less journalism**

Though the Code may have encouraged agreements that would not have been made otherwise<sup>16</sup>, and resulted ‘in the broadest terms’ in new investment in a sector facing material decline<sup>17</sup>, the news sector has suffered closures and reductions in service that have led to an overall contraction in its size since the Code was introduced.

This is in spite of some commitments made to increase journalism provision using funds secured since the Code. For example, the government-funded, billion-dollar Australian Broadcasting Company struck deals with Google and Meta and subsequently reported 57 new regional positions, including in 10 areas which did not previous have them.<sup>18</sup>

Meanwhile, since March 2021, the sector has seen almost twice as many permanent contractions (103) as expansions (52) a negative net change of 51. Contractions include closures, reductions in service (such as closure of print editions) and mergers.<sup>19</sup>

It is worth noting that those numbers reflect more severe contractions than had occurred at the time of PIJI’s initial review in May 2022, meaning the state of the sector has worsened in that time.

The scope and location of outlets that reduced service or closed entirely are crucial. Every single outlet that decreased its service and 97 percent of outlets that shut down were in regional areas. Regional and rural areas had nearly 3 times as many outlets closing as new outlets opening, while the capital cities gained five times more outlets than they lost.<sup>20</sup>

### **Small, independent publishers: excluded even if Code were triggered**

The Australian Treasury acknowledged in its review of the Code that not only do small news businesses face ‘significant challenges’ negotiating with the tech companies without any being designated a digital platform, but that were the Code triggered by designating a platform, the small players would still face those challenges.<sup>21</sup> It explains this away by asserting that the Code is not

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<sup>14</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 13

<sup>15</sup> [Supplementary Submission to the Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 3

<sup>16</sup> [News Media and Digital Platforms Mandatory Bargaining Code: The Code’s first year of operation](#), Australian Treasury, page 4

<sup>17</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 2

<sup>18</sup> [News Media and Digital Platforms Mandatory Bargaining Code: The Code’s first year of operation](#), Australian Treasury, page 8

<sup>19</sup> [Australian News Mapping Project](#), Public Interest Journalism Initiative

<sup>20</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 7

<sup>21</sup> [News Media and Digital Platforms Mandatory Bargaining Code: The Code’s first year of operation](#), Australian Treasury, page 11

designed to redistribute resources across the news sector or guarantee that all news businesses receive funding.<sup>22</sup>

In practice, this means that the Code designed to level the playing field between digital platforms and the news industry has inadvertently left the news providers unable to secure deals with Google and Meta, particularly smaller publishers, at a distinct competitive disadvantage against those that struck deals with one or, worse still, both, companies.<sup>23</sup>

### **Is it too late to enforce the Code?**

In practice, it's complicated. The Treasury relayed in its one-year review of the Code suggestions from stakeholders that existing commercial agreements may self-destruct if a platform were designated and forced into arbitration, triggering the Code in earnest. This means that funds committed under the agreements may no longer be paid.<sup>24</sup>

Put simply, if a publisher tried using the law to get a slice of the advertising pie, it may jeopardise the slice that others in the sector painstakingly negotiated for themselves.

Without being designated under the Code, the companies are not required to negotiate in good faith, recognise and promote original news content, meet minimum standards like algorithmic notification and data sharing or provide a standard offer to registered news businesses.<sup>25</sup>

### **British legislation stands to be transformative for public interest news**

As the Government drafts its plan to regulate the relationship between news publishers and tech companies in the forthcoming Digital Markets, Consumer and Competition Bill, the UK should view the Australian model as a cautionary tale.

The recommendations made by the then Department for Digital, Culture, Media and Sports' Select Committee January 2023 report offer clear guidance on how the Government can legislate with the intention of improving the sustainability of local news journalism in the country.

To start, the UK's competition bill should ensure that it facilitates competition between news publishers and tech companies and, unlike in Australia, between news publishers within the sector. This means regulating with the disadvantaged small, local publishers at the forefront.

This may take many forms. To start, the Government must ensure that UK legislation is binding to tech companies to maximise the benefit of such legislation and properly regulate the relationships covered in it. It should give the Digital Markets Unit compulsory information-gathering powers to allow proper oversight of the commercial deals and enable comprehensive review of the legislation once enacted.

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<sup>22</sup> [News Media and Digital Platforms Mandatory Bargaining Code: The Code's first year of operation](#), Australian Treasury, page 1

<sup>23</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 15

<sup>24</sup> [News Media and Digital Platforms Mandatory Bargaining Code: The Code's first year of operation](#), Australian Treasury, page 15

<sup>25</sup> [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 15

## Public Interest News Foundation (PINF)

A UK model should do away with the Australian revenue threshold of AUS\$150k (c.£86k) as that may automatically exclude most independent news providers in the UK. It should also adopt a holistic approach, calculating the value of news not only by web traffic or advertising revenue, but by considering the overall value of independent news publishing to tech platforms and the British public.

The Government may also consider allowing small publishers with minimal staffing, resources and legal expertise to opt out of negotiating with the tech giants. While the large players continue to bargain directly, the legislation could establish a journalism fund into which the companies can pay a lump sum annually. A fund governing body can then dispense core funding to small publishers to keep them afloat while also introducing innovation grants and capacity-building which they can receive to transform their news production and business models and facilitate long-term sustainability for the entire sector.

### **The Public Interest News Foundation (PINF)**

PINF is the first charity in the UK with a remit to promote public interest news. Through the News for All campaign, we are working with a growing coalition of news providers and others to ensure that everyone in the UK can benefit from sustainable independent news.

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