



## ACCC Mandatory Code Comment

28 August 2020

### *General*

The Media Entertainment and Arts Alliance (MEAA) welcome the draft Mandatory Code's (the Code's) development and acknowledge it followed an exhaustive inquiry.

In our 5 June, 2020 submission to the Australian Competition and Consumer Commission's (ACCC) Options Paper, MEAA stated that its members supported the following key elements

1. News providers should set a common *valuation* of news content;
2. Agreement should be reached among news providers on mechanisms to measure this content's *use* on Google and Facebook platforms and services; and
3. Payments under the Code should be collected and disbursed through an 'honest broker' such as a collection agency.

MEAA submitted that these features would assist in the timely commencement of the Code and the equitable distribution of funds collected from Google and Facebook.

Notwithstanding MEAA's 5 June position and the Code's facilitation of bilateral (as well as collective) negotiations, the most important aspect of this Code is that it be implemented as soon as possible.

Google and Facebook have enjoyed very substantial direct<sup>1</sup> and indirect<sup>2</sup> benefits through the cost-free carriage of Australian news content.

The Code is a sound starting point for commercial negotiations about the value and scope of news media carried by Google and Facebook.

Although it is not a direct function of the Code, MEAA believe the Code should play a critical role addressing Australia's very low levels of media diversity. In this sense, the Code must be attractive (and adaptable) to news content providers of all scales – including those in regional areas - whether they use the services of the few or the many in producing news content.

MEAA's comments below address elements of the draft Code as published by the ACCC on 31 July, 2020.

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<sup>1</sup> E.g. news being carried and/or available on their platforms

<sup>2</sup> E.g. consumers can satisfy all content needs through Google and Facebook – i.e. they know they can find news on these sites. Being a one-stop content shop appeals to advertisers, as evidenced by the migration of advertising away from newspapers and allied websites towards digital platforms over the past decade.

### *Use of code-related funds*

The Code states that intervention is necessary to address the bargaining power imbalance because of the public benefit provided by the production and dissemination of news and the importance of a strong independent media in a well-functioning democracy.<sup>3</sup>

The Code is also directed, inter alia, at 'support[ing] a sustainable Australian media landscape in the digital age.'<sup>4</sup>

These inarguable propositions are, however, not accompanied by any requirement that the funds derived by media organisations under the Code will be used for the production of news content – i.e. to fund employee and freelance/contract providers of journalistic content.

Although it appears logical that funds raised under the Code will be devoted to the production of content, there is an evident risk that funds may not be directed to such purposes in the absence of an explicit requirement in the Code.

It would be a perverse consequence of the years-long digital platforms inquiry and code development process if funds raised via the Code were directed to purposes other than sustaining and increasing news content that serves the public interest.

MEAA therefore seek the inclusion of text in the Code that articulates that the primary purpose for funds attained through the Code will be for the purposes of sustaining and increasing levels of covered news content.

### *Regional News Organisations*

Facilitating fund transfers to regional news outlets should be a clear facet of the Code's operation.

In our 5 June, 2020 submission on the ACCC's Options Paper, MEAA contended that, 'given the escalating decline of Australia's regional and rural media sector, special consideration should be given to diverting a proportion of funds to maintaining these invaluable local news providers'. (This position was put in the context that a collection agency would receive and distribute all funds collected under the Code and preserve a portion of funds for transfer to regional news providers.)

Apportioning a set proportion of funds to regional titles and newsrooms is more difficult to achieve where major news organisations avail themselves of bilateral negotiations and all of the funds collected are retained by these organisations.

To counter the risk that negligible funding will be devoted to regional news outlets under the Code, MEAA submit that a 'tithe' type arrangement be incorporated in the Code, whereby a fixed proportion of funds received would be directed to a pool of funding to be distributed to regional news providers.

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<sup>3</sup> Paragraph 1.5

<sup>4</sup> Paragraph 1.7

### *Exclusion of Public Broadcasters*

The Code provides that 'The ABC and SBS are able to register with ACMA and participate in the code in all respects and benefit from the minimum standards, however, they will not be able to bargain about remuneration or participate in compulsory arbitration about remuneration'.<sup>5</sup>

MEAA assume that this position has been arrived at for political reasons<sup>6</sup> outside the control (and remit) of the ACCC. The exclusion of public broadcasters from receiving remuneration for their content is short-sighted and may lead to Google and Facebook plundering these entities' news media content at zero cost. The only apparent remedies to this scenario would be through the Code's discrimination provisions – which may be extensively and lengthily contested, or public broadcasters exercising their rights under the Opt-out Rule – in which case, none of their content would be carried by Google and Facebook.<sup>7</sup>

MEAA submit, perhaps counter-intuitively, that the ability of public broadcasters to be remunerated under the Code would have acted as a clear obstacle to the above risk.

### *Core news content and covered news content*

MEAA note that a news media provider must produce 'core news content' in order to acquire ACMA registration, which is a prerequisite to bargaining under the Code. Core news content is described as content produced by a journalist that records, investigates or explains:

- issues of public significance to Australians;
- issues relevant to engaging Australians in public debate and in informing democratic decision making; or
- content which relates to community and local events.<sup>8</sup>

MEAA's key concern with the definition of 'core news content' is the requirement that it be produced by a 'journalist'. The term 'journalist' is not defined in the Code.

Requiring content to be produced by a journalist may frustrate Code eligibility and disqualify significant levels of content from coverage under the Code. The term 'journalist' is and has never been defined in a way that is universally agreed.

In some quarters, the term journalist connotes someone who possesses academic credentials, such as a Communications degree. In other fora, journalists can be self-taught or subject to formal or semi-formal on the job training, including cadetships. The range of content providers is diffuse: it includes, but is not limited to: journalists, video journalists, writers, columnists, contributors, photographers, bloggers, content creators.

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<sup>5</sup> Paragraph 1.13

<sup>6</sup> MEAA also acknowledge that the Code is directed at arresting the challenges faced by commercial media organisations, especially in terms of foregone ad revenues.

<sup>7</sup> See paragraph 1.97 of the Code

<sup>8</sup> See paragraphs 1.49 to 1.53

These personnel may also be employed on a full time, part time or casual basis, or as independent contractors or freelancers.

MEAA submit that the breadth of job titles and the bases upon which these content makers are employed should be accommodated in the Code.

A solution may be to refer to 'forms of journalism' rather than journalists. A further possibility is to make reference to 'persons engaged and active in the publication of news'.

Although MEAA do not fully comprehend the basis for making distinctions between *core* content and *covered* news content for the registration and bargaining phases, MEAA do not object to the registration test setting a higher bar than that imposed for the type of content that will be covered (and subject to payments) by the Code.

It is nonetheless MEAA's preference that core news content should include, inter alia, matters of public *interest* rather than public *significance*.

With respect to covered news content, MEAA does not support the exclusion of sports results and sporting events from Code coverage.

MEAA's default position is that content requiring the investment of news media resources that is then made available through Google and Facebook should be covered under the Code. In this respect, it is not clear why, for example, some sport-related content is not covered by the Code.<sup>9</sup> For clarity, MEAA submit that all sport, arts, lifestyle and entertainment content involving the use of journalistic (or equivalent) resources be considered covered news content under the Code.

MEAA is also concerned by the Code's reference to excluding content produced by academics. MEAA raised this issue in direct consultations with the ACCC and were assured that the exclusion was directed at ensuring materials such as academic journals were not subject to the Code's operations.

With this assurance in mind, MEAA trusts that the ACCC will move to clarify this exclusion so that it cannot be interpreted as a barrier to quality publications such as *The Conversation*, which routinely draws on expert and academic commentary for its publications - being able to avail itself of the Code's benefits.

#### *Revenue Test*

MEAA do not support the annual revenue requirement of an entity having revenue above \$150,000 in the most recent year or in three of the five most recent years. MEAA submit this figure is too high and would prevent new and very small news businesses from participating in and being remunerated under the Code. MEAA propose a halving of this amount, to \$75,000.00.

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<sup>9</sup> See paragraph 1.66

### *Freelancers*

The revenue test (as it stands) and the lack of mandated use of Code-generated funds for the production of content will have a direct bearing on levels of content generated by freelance journalists.

As a result of ongoing structural changes in the Australian news media sector over more than a decade, many journalists (and their equivalents) have remained in the profession as independent contractors. They often endure sub-Award levels of payment for their work and the level of work they are engaged to perform is directly linked to the economic health of the entire media ecosystem.

There is a clear case for the Code to expressly recognise the role of freelancers (as distinct from 'news businesses' or 'news business corporations'<sup>10</sup>) in providing quality content and in being fairly remunerated for their work when their content is accessed through Google and Facebook.<sup>11</sup> Ideally, the Code would mandate that accepted rates of payment for such work be observed by the Code. If this is feasible, MEAA would provide information as to these rates.

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<sup>10</sup> The terms used in the Code

<sup>11</sup> Where this content is otherwise not provided under contract to a news organisation already subject to the Code