

News Media Bargaining Code: Australia now has its own version of the press publisher's right

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As reported in a previous [blog post](#), the Australian government has been intensively negotiating the Australian version of the press publishers' right, the News Media Bargaining Code. The legislation was initially proposed in July 2020 and, following tough negotiations with industry stakeholders, the slightly amended News Media Bargaining Code was eventually passed by the Australian Parliament on 25 February.

Tough negotiations

The legislative process was a tough one, with Google and Facebook exercising immense pressure on the Government to abandon the Code. Google, after initially [warning](#) that the Code would decrease the quality of Google search services in Australia, later [threatened](#) to leave the Australian market entirely if the Code was adopted. Similarly, Facebook stated that if the Code was adopted, it would prohibit its users from sharing Australian news on Facebook – and it did so. On 19 February, all news media companies – and many more websites – were not accessible and could not be shared by Australians on Facebook.

After a few days of intensive negotiations between the Australian Government, Google and Facebook, the Government agreed to make some concessions and introduce a [few changes](#) to the proposed Code. Another few days passed, and on 23 February Facebook [announced](#) that Australian news would be available on Facebook again and promised that it will start negotiations with Australian news publishers.

Google meanwhile, despite its general dissatisfaction with the proposed Code but feeling the increasing pressure, started negotiating with Australian news publishers. Even before Facebook's news 'block out', Google announced that it had struck [deals](#) with a few Australian media companies, including large publishers such as News Corp, Nine and Seven West Media. Deals with smaller regional media companies, such as Junkee and Private Media, soon followed. While details of the deals are confidential, they are said to be worth millions of dollars. After allowing Australian news on its platform, Facebook [pledged](#) to follow Google's suit and invest USD 1 billion into the news industry.

Finally, after both Google and Facebook started voluntary negotiations with media companies and began entering deals, on 25 February the [News Media Bargaining Code](#) was passed by the Australian Parliament.

What does the final News Media Bargaining Code contain?

Despite huge pressure from Google and Facebook, the Australian Government did not change the main principles on how the Code will function. Namely, the Code, now adopted, still suggests that news media companies might request negotiation with online platforms such as Google and Facebook. Upon being designated by the Government, online platforms are obliged to enter into good faith negotiations with news publishers and have one month to reach a deal. If no deal is reached, a compulsory final offer arbitration kicks in.

The changes that were introduced mainly concern the procedure for how the negotiations are to be run. According to the Australian Government, four main changes were introduced:

- a decision to designate a platform under the Code must take into account whether a digital platform has made a significant contribution to the sustainability of the Australian news industry through reaching commercial agreements with news media businesses;
- a digital platform will be notified of the Government's intention to designate prior to any final decision - noting that a final decision on whether or not to designate a digital platform would be made no sooner than one month from the date of notification;
- non-differentiation provisions will not be triggered because commercial agreements resulted in different remuneration amounts or commercial outcomes that arose in the course of usual business practices; and
- final offer arbitration is a last resort where commercial deals cannot be reached by requiring mediation, in good faith, to occur prior to arbitration for no longer than two months.

The first change essentially means that when press publishers make a request to start negotiations under the Code the Government will still have to make a decision as to what platforms should be designated for negotiation. If, for example, Facebook or Google prove that they have reached enough agreements with media companies, the Government might decide not to force them to negotiate under the process envisaged in the Code.

The second change means that even if the Government decides to designate a particular platform to negotiate under the rules set in the Code, it should warn the platform one month in advance. This would allow a platform to make a decision whether to enter negotiation or, for example, exit the market. Some commentators argue that this allows Facebook to block Australian news again, if they decide they do not want to enter into negotiations prescribed by the Code.

Third, the changes also allow platforms to strike different deals with publishers. That is, while the Code prohibits discrimination among different news media companies generally, it does not prevent Google or Facebook from striking different deals with different news media publishers.

Finally, the Code introduces mediation of a maximum of two months before mandatory arbitration kicks in.

Overall, while these changes appear to have been important for Facebook to come back to the Australian market, they seem to be more 'cosmetic' rather than deal-breaking ones.

What is next?

There is a great deal of speculation as to what is coming up next. Apparently, the Government has already achieved its goal – Google and Facebook have started reaching deals with the Australian news media industry. Publishers [acknowledged](#) that this would not have happened if the News Media Bargaining Code had not been proposed in the first place. It remains to be seen how voluntary negotiations evolve and whether there is any need to invoke the recently adopted legislation.