



**NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY  
BARGAINING CODE**

**SUBMISSION OF AUSTRALIAN ASSOCIATED PRESS LIMITED**

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AAP thanks the ACCC for the opportunity to make a submission on the News Media and Digital Platforms Mandatory Bargaining Code.

AAP has been an integral part of the Australian media landscape for 85 years, providing the foundation of news content for newspapers, radio news and talkback programs, television news and more recently the digital versions of all of the above, as well as new market entrants.

AAP was facing closure back in March this year. Its closure would have resulted in the loss of tens of thousands of stories each year covering all aspects of Australian life. AAP has been saved from closure by a small group of philanthropists and, as a result, AAP is now a not-for-profit news organisation, owned by no-one, and dedicated entirely to covering news and sport around Australia and the globe for all Australians. AAP is still what it always has been, independent, trusted, reliable and accurate.

AAP's news comes in the form of words and images. AAP's news services are drawn from its own correspondents at home and abroad, as well as from some of the world's leading news agencies. This ensures a breadth of coverage which would not otherwise be available in Australia.

AAP currently offers more than 130 subscribers over 220 text stories a day across news, politics, finance and sport. AAP also offers over 400 domestic images and more than 10,000 images from international partner agencies each day. Historically, AAP has also produced approximately 20 pieces of news video content each day. All of this content requires a great deal of expensive human and technical resources.

AAP's content is licensed for publication on hundreds of websites in Australia, including half of the top news sites in the country, it is printed in major newspapers through metropolitan and regional areas, and it is broadcast across radio news bulletins around the country. AAP has a shared audience of millions of Australians who consume AAP's news daily in various formats.

Outside of AAP's control, its content also surfaces on digital search engines and digital news aggregator sites. AAP is not remunerated and does not benefit from this indexing of content, whereas the publishers can benefit from increased website traffic and associated consumer and advertising revenue.

Not only does AAP not benefit from the inclusion of its content on Digital Platforms, it has directly suffered revenue losses due to the indexing. Many of the nation's mainstream broadcasters who were once major subscribers now simply access the AAP content through the Digital Platforms without paying for it. For AAP the changing commercial dynamics have resulted in the destruction of its customer base, in particular broadcasters, who have cancelled AAP subscription services worth millions of dollars because in the words of one TV media executive: *"We just Google it"*.

In addition to specific broadcaster revenue loss, AAP has seen a decline in subscriber revenue due to deteriorating financial performance of the publishers. AAP recently lost its two largest subscribers, News Corp and Nine Fairfax as has been publicly documented. These organisations have suffered significant disruption to their business models from the Digital Platforms and AAP's wholesale subscription revenue has suffered disproportionately from the closure of many newsrooms and the shrinkage of content budgets.

Despite the fact that AAP's content appears on Digital Platforms without any compensation for that usage, the national newswire is currently by definition, excluded from the draft Code. Under the draft Code, media companies may only register in relation to "news businesses". A "news business" is one or a combination of the following news sources: a newspaper, a magazine, a TV or radio program, a website or a streaming or similar service. On the current drafting, whilst AAP meets much of the additional thresholds required for registration, AAP does not appear to fall within the concept of a "news business".

### **Code's failure to address AAP's unique position**

AAP satisfies most of the core conditions proposed in the draft Code, however, the delivery channels specified are proscriptive and potentially limit AAP's participation.

*Revenue of over \$150K + ✓		
Operating predominantly in Australia for the dominant purpose of servicing Australian audiences + ✓		
Subject to appropriate professional journalistic standards set out by an Australian professional body for media or an equivalent set of standards + ✓		
Newspaper X	+ news content ✓  (being content that is created by a journalist and records, investigates or explains issues that are of public significant to Australians, are relevant to public debate and democratic decision- making or relate to community and local events)	+ online ✓
magazine X		
TV or radio program X		
Website X?		
streaming or similar service X		

✓ = AAP satisfies the condition

AAP's newswire service arguably does not fall within the definition of "news sources". Whilst AAP operates a website, it is more in the nature of a marketing and promotional portal and gateway to some of AAP's services. It displays a handful of the hundreds of stories that AAP puts out across Australia on any given day. Whilst AAP's stories are made available to over 400 online sites across Australia through AAP's wholesale online web portal, the audience facing sites are owned and operated by AAP's subscriber customers. The unique position of the AAP Newswire as a true news source to over 400 platforms across Australia must be accommodated under the Code.

In the Exposure Draft Explanatory Materials (EDEM), addressing the exclusion of ABC and SBS from the bargaining provisions relating to remuneration under the draft Code, it states (at paragraph 1.14) "[t]his is appropriate because advertising revenue is not the principal source of funding for public broadcasters". This statement implies that participation in the remuneration provisions of the draft Code is only appropriate to news businesses that operate on the basis of an advertising model.

The draft Code excludes both SBS and ABC because they are the beneficiaries of significant Government funding. AAP is also, by definition, excluded from the draft Code and yet it has received **not \$1 of funding from the Government**. The effective exclusion of AAP from the Code discriminates against AAP and places it in a worse competitive position than any other news media organisation in Australia.

This is a significant flaw in the draft Code and should be compared to the Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market (the **DSM Directive**) in Europe where it is clear that the remuneration flowing from the creation of the Publishers Right under Article 15<sup>1</sup> - which compensates both publishers and news agencies for "online use" - does not relate to specific business models.<sup>2</sup>

As a wholesale supplier of news, AAP's business model does not include advertising or end-user subscription revenue. AAP receives revenue from customers for certain permitted uses of its content. Where the permitted use is for display on a website, that display and the licence fees associated with it are for single-instance display. The licence does not include a right to on-supply AAP's content via designated services such as Google Search. Even though AAP's content is displayed on Digital Platforms, AAP receives no remuneration for the inclusion of its content as part of their services. AAP should be entitled to fair and direct remuneration for the downstream display of its content as part of a Digital Platform service.

<sup>1</sup> Discussed further below.

<sup>2</sup> "Directive (EU) 2019/790 on copyrights and related rights in the Digital Single Market - An implementation guide to Article 15". Dr Ole Jani.

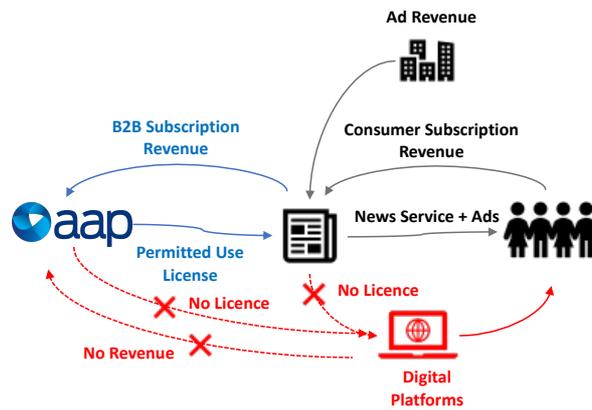


Diagram 1: AAP wholesale revenue and rights model

There is already a working example of downstream remuneration in AAP's author membership of the Copyright Agency Limited. Under the voluntary and statutory media monitoring schemes administered by CAL, AAP receives a royalty for any downstream use of its content by third parties even though that content was included in a customer's masthead or website. For example, AAP licenses a story to its customer for display on its website. The licence does not include an ability to allow Media Monitoring Organisations (MMOs) to copy that story and supply it as part of a monitoring service. An AAP story appearing on a customer website is clipped by a Media Monitoring Organisation (MMO) and supplied to a customer of that MMO. The MMO charges the customer a royalty to receive a copy or link to that clip. CAL attributes that royalty to AAP, as the originator of the work and the owner of the downstream right, and not to the customer.

In a similar fashion, AAP should be entitled to receive remuneration for any display of its content as part of a Digital Platform service.

AAP's position is potentially further weakened under the draft Code as a result of Schedule 1, item 1, section 52 E which states that a news source cannot be included twice. The EDEM states, at paragraph 1.45, that *"the news source set out in the news business corporation's application cannot form part of another news business already registered"*. The intent and extent of this provision of this is not clear – would it operate to stop AAP from claiming remuneration for display of its stories on a Digital Platform where the customer has also been given remuneration under its news source? This would seem to be inconsistent with the intent of the draft Code.

When discussing why the current model was proposed by the ACCC, paragraph 1.6 of the Questions and Answers July 2020 states that *"...the outcomes of negotiations conducted between a Digital Platform and one news media business (or a collective of news media businesses) under this model would not affect the outcomes secured by other news media businesses – which is not the case for a 'zero sum' or 'one-size-fits-all' framework such as a collective funding 'pool'"*. Indeed, the exclusion of the newswires, whether deliberate or inadvertent, appears to be due to the fact that they do not fit within the draft Code framework which appears to be predicated on extending coverage only to news businesses who operate on an advertising and consumer subscription model.

If AAP is not included in the Code and able to receive fair and direct remuneration from the Digital Platforms, the long-term viability of the Newswire will be at risk. AAP would not be able to continue to invest in journalism which would mean that the wholesale service may be discontinued - this would be a terrible outcome for all Australians. The news and media industry would be adversely impacted by the discontinuance of the Newswire and would be unlikely to replace the lost content and information with original content and journalism because of the cost. When AAP was thought to be closing in March, a group of news and media businesses, including the public broadcasters, convened to consider if they could pool resources in the absence of an independent national newswire. Syndicating wholesale news content is critical to the news and media industry and grave concerns were made public if the AAP service was lost. It was quickly determined by this industry group that a large investment would be required which none of the participants were prepared to fund. The loss of the AAP Newswire would disproportionately impact smaller news and media businesses who rely heavily on syndicated content and would make

market entry particularly difficult. The challenges faced by an industry without a vibrant AAP was captured by The Guardian Australia editor, Lenore Taylor, who stated that their publication, “*relied heavily on the AAP service to launch*” and that “[w]ithout AAP, it will be far more difficult for any more “other players” to grow big enough to have influence – yet another for media diversity”.<sup>3</sup>

AAP needs to participate directly in the Code because we believe the publishers, AAPs subscribers, are unlikely to pass through any remuneration received from the Digital Platforms. Despite AAP being the only national newswire service, its pricing power over the last 5 years has deteriorated because of market concentration and closure of so many media businesses. This lack of pricing power has meant that AAP has been unable to increase prices to achieve cost recovery. Our experience is that media proprietors have been willing to accept less information and see a reduction in content and news rather than accept higher fees. This poor market dynamic and ongoing collapse of newsrooms, content budgets and increased market concentration supports that unless AAP is able to participate in the Code directly, it and the entire news and media industry will miss out.

## European Precedent

The European Parliament has grappled with the uneven bargaining power of the European publishers and the Digital Platforms and has attempted to address the matter through the passage of the DSM Directive.

It was clear there, as it has become here, that “*the entrepreneurial spirit and endeavour of the press publishers requires a level playing field but in the digital world such a level playing field has been elusive. The platform economy of the internet with its network effects results in a change of paradigm: Online companies become monopolies by design, and the online world is a winner-takes-all-world. These network effects draw audiences and resources to very few market players which are exploiting the press publishers’ investments without proper negotiation on terms and conditions let alone equitable payment through lack of bargaining power. If the publishers receive anything at all it is at the platforms’ discretion. Online companies argue this is a win-win-situation because they create traffic for online news to the immediate benefit of the press publishers. However, figures show that this is not true. Instead, we see that online services are preying on press publications to create the basic value proposition for their own business model which needs interesting content, and large data sets about who is reading it in order to attract the large audiences which in turn create an attractive proposition for advertisers. The content created by press publishers and journalists thereby becomes the fuel on which the large online services run their engines*”.<sup>4</sup>

The DSM Directive contained a provision, Article 15, which introduced a new right for the benefit of press publishers in relation to the online use of their publications, known as the Publishers Right. The justification for the new right was based on an acknowledgment that the re-use of press publications was a core part of the business model of certain information society providers, like online news aggregators, yet publishers had great difficulty in commercially licensing their rights to these providers. As a result, publishers were unable to recoup their investment – namely the organisational and financial contribution required to produce press publications.<sup>5</sup>

The European Parliament acknowledged that ongoing investment of the publishing industry was essential to “*ensure the sustainability of the publishing industry and thereby foster the availability of*

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<sup>3</sup> Lenore Taylor, 2020, ‘We relied on AAP when Guardian Australia launched. Holding power to account just got a whole lot harder’, *The Guardian Australia* (online), 5 March 2020

<sup>4</sup> Ibid. See also Attachment A, 1 “In terms of information, free education is a myth”, *Le Monde*, 13 December 2017 by Emmanuel Hoog (CEO of Agence France-Presse), Peter Kropsch (CEO of the German agency DPA), Clive Marshall (CEO of the British Press Association), Jose Antonio Vera (CEO of the Spanish agency EFE), Giuseppe Cerbone (CEO of the Italian Ansa agency), Jonas Eriksson (CEO of the Swedish TT Agency and President of the European Alliance of news agencies), Clemens Pig (CEO of the Austrian APA Agency), Marcel Van Lingem (CEO of the Dutch agency ANP) and Patrick Lacroix (CEO of the Belgian agency Belga).

<sup>5</sup> Recital 54 in the Preamble to the DSM Directive states: “*A free and pluralist press is essential to ensure quality journalism and citizens’ access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. The wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue. Publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments. In the absence of recognition of publishers of press publications as rightholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient*”.

*reliable information*” (Recital 55 to the DSM Directive). The Publishers Right was designed to protect the publishers’ investment and facilitate licensing and enforcement against Digital Platforms.

Most importantly, the Publishers Right benefits not just news publishers but also newswire agencies in EU member states.

Recital 55 expressly referred to news agencies noting that “...*the concept of publisher of press publications should be understood as covering service providers, such as news publishers or news agencies, when they publish press publications within the meaning of this Directive.*” The right is described as a “neighbouring right” or an “ancillary right” in respect of works by other rights holders (such as journalists) that are incorporated in press publications.

France implemented Article 15 via the Neighbouring Rights Act which took effect on 24 October 2019. This was the first implementation of a part of the Copyright Directive into a Member State’s national laws. The French law includes a new Chapter VIII titled “Press publishers’ and news agencies rights’. Article L.218-1. II defines a “news agency” as any company mentioned in Article 1 of Ordinance No. 45-2646 of 2 November 1945 regulating press agencies, whose main activity is the collection, processing and formatting, under its own responsibility, of journalistic contents”.

AAP contends that just as news agencies (newswires) were contemplated and included under Article 15 of the DSM Directive in the EU, so too they should be expressly referenced and covered by the Code.

### **Specific amendments required to the draft Code to cover AAP**

It is essential that AAP is covered by the Code and able to directly negotiate with the Digital Platforms for fair remuneration for the use of its content. If changes are not made to ensure AAP is covered, AAP will be at a competitive disadvantage compared to other news publishers including the recently launched NCA Newswire, AAP’s most recent competitor.

We make the following amendment suggestions to ensure that the Code is fair and so AAP is covered:

1. Broaden the definition of “news source” to “news agency” or “news wire service”.
2. Amend paragraph 1.14 to remove the words “*[t]his is appropriate because advertising revenue is not the principal source of funding for public broadcasters*”. If the removal of these words is not possible, we suggest alternative wording, “*[t]his is appropriate because Government funding is the principal source of funding for public broadcasters*”.
3. Address the ambiguity of Schedule 1, item 1, section 52E by removing or creating an exemption for a newswire service or news agency.

## ANNEXURE A

Open letter from the heads of European news agencies:

“In terms of information, free education is a myth”, Le Monde, 13 December 2017 by Emmanuel Hoog (CEO of Agence France-Presse), Peter Kropsch (CEO of the German agency DPA), Clive Marshall (CEO of the British Press Association), Jose Antonio Vera (CEO of the Spanish agency EFE), Giuseppe Cerbone (CEO of the Italian Ansa agency), Jonas Eriksson (CEO of the Swedish TT Agency and President of the European Alliance of news agencies), Clemens Pig (CEO of the Austrian APA Agency), Marcel Van Lingen (CEO of the Dutch agency ANP) and Patrick Lacroix (CEO of the Belgian agency Belga).

Free news has a cost.

An apparently technical debate has been under way for several months in European capitals and in Brussels over a planned European Union directive on copyright. The outcome of the battle will have far-reaching consequences for Europeans and their access to a diverse, reliable news media. For our democracy, the stakes are high.

For the first time in the digital age, the planned directive would oblige the big internet players to pay compensation to the news media for the millions of stories on their platforms that are visited by people seeking news.

Today, most people, especially the young, have lost the habit of paying to get the news. Now they see it as a right. Checking social networks on a mobile or desktop computer, people enjoy instant access to the big media, real-time alerts on breaking news as well as analyses and in-depth investigations.

That free access to the news is one of the great supposed victories of the internet, which many members of the European Parliament will strenuously defend in the name of noble democratic principles. However, in reality the concept of free news is a myth.

At one end of the chain, actually reporting to inform the public costs a lot of money. At the other end, news consumers are highly valued as an audience that generates advertising revenues. Between the two, some players have won. And some have lost heavily.

A glance at the profits being made by internet giants, social networks, search engines and content aggregators is instructive. Facebook tripled its profits in 2016 to \$10 billion. After friends and family, news is the next biggest driver of traffic to Facebook. Google has posted profits of \$20 billion on sales of \$90 billion. Its advertising revenues leapt 20 percent in a year.

There, again, news was a key driver. Facebook has said on numerous occasions its goal is to be the world's biggest media provider.

And yet neither Facebook nor Google has a newsroom. They have no reporting or production networks, national or international. They have no teams of reporters in Syria risking their lives to show the true face of war. No permanent bureau in Zimbabwe to tell the story of Mugabe's departure. No journalists in Cameroon. Nor Myanmar. No video reporters. No photographers. No editing teams to plan, edit, check and double-check the accuracy and impartiality of the stories sent in by reporters on the ground.

Even if they undeniably play a crucial democratic role by spreading news worldwide, reporting the news is not their business. They offer internet users the work done by others, the news media, by freely publishing hypertext links to their stories.

And their profits from the news business are booming while those of the media are collapsing. In a few years, Google and Facebook have captured the bulk of all advertising available online. Their share is estimated at 60-70 percent depending on the region.

Conversely, media have seen dramatic falls in their online advertisements revenues.

A disaster for the news industry. As a result, national and international news agencies across the world face an unenviable outlook because their health depends directly on that of their customers: the media. Yet these agencies are at the heart of the business of reporting the news.

The few attempts led by the media industry in Spain, Germany and France in 2013 and 2014 to get internet giants to pay anything more than a few symbolic crumbs all failed to fundamentally change the situation.

Years have passed and today the very business of credible, free reporting is threatened. Quite simply because soon the news media will be unable to finance it.

The diversity and quality of news, a pillar of any democracy, may be at risk. Solutions must be found. But who should pay? Must it always be the taxpayer as it is already in some European countries? Or isn't it time for some of the internet giants to give back a fair contribution to those who actually report the news, including the news agencies?

In the United States, American media are calling on the authorities to make an exception to anti-trust laws so as to allow them to join forces in the face of the internet duopoly.

The European Union could decide on an innovative solution by introducing so-called neighbouring rights over news content that would benefit the news publishers and news agencies that invest in reporting the news. It would help to correct the current imbalance that is damaging the news industry.

And it would offer a durable future for a reliable, diverse news industry without asking tax payers to pay. Some in the European Parliament are concerned about the planned directive. They fear the public right to "free news" may be at risk.

But we should be clear about who is being targeted. People browsing the internet will not be affected. They will pay no more than they do today. Rather, those who have benefitted disproportionately from advertising revenues should repatriate a meaningful share of these revenues to the media which funds content origination.

If there is no rebalancing of the market, the consequences are inevitable. News media will continue to disappear. Either citizens will be deprived of easy access to a diverse reliable news media or in some countries the state will have to make up the shortfall with taxpayers' money.

It has long been accepted in many countries, given the democratic stakes, that the state may help the news business, from the BBC to AFP, and newspapers in all their diversity. But is it acceptable that the taxpayer should make up a shortfall in advertising revenue that has been siphoned off by internet giants?

The irony is that those who oppose the European Commission's proposal on the pretext of defending consumers and access to free news could well succeed, and end up making them pay more through their taxes.

We strongly urge our governments, the European parliament and the commission to proceed with this directive. It is key for the media industry, the consumer's future access to news, and ultimately a healthy democracy.