

# Decoding the code: a law that may never be used on its intended targets

After all the controversy, it seems likely that the end result of the news media bargaining code is a law that will never be used.



The late amendments to the media bargaining code can be read in different ways, but should be interpreted with an eye on the reason they emerged at all: to persuade Facebook to give the boomers back their free news.

Since Facebook has said yes, it will, we can be sure that a deal has been done which isn't necessarily what you'd discern from reading the amended law.

The key amendments change the rules around both designation of digital platforms by the treasurer (which is what makes them subject to the code), and the ways in which a designated platform will be permissibly able to discriminate between news providers in how it ranks and displays their links and content.

The treasurer already had a wide and vague discretion for designation, now made even more so by the addition of an extra consideration — whether the platform “has made a significant contribution to the sustainability of the Australian news industry” through deals it has signed up. That's code for no designation if News and Nine have a deal.

On “differentiation”, which is the term used to describe the platforms giving preferential deals to some media over others (or no deals at all for some), Google and Facebook now have much wider latitude.

They can lawfully give special deals on how much money they will pay and on preferential ranking of results, without triggering any consequences under the code.

That seems to me to be just more camouflage for the real game, because I don't believe that anyone is going to be designated, ever. However, if Facebook were designated, it could now still do pretty sweet deals for News and others and not risk punishment for wielding its market power preferentially.

For small media players, there is still protection available from being monstered by the giants, but only if the platforms are designated and brought under the code. If designated, Facebook would be prevented from de-platforming small media organisations' content because of the remaining non-differentiation rules. But I don't think that'll ever happen. What I think will happen is that Facebook, like Google has already done, will sign up special deals with News, Nine and Seven. It may be prepared to negotiate with the small players — but it won't have to.

The key is the escape hatch. Given that Facebook has made it so clear that it is only interested in either being out of the code or out of Australia, the logical consequence is that it will ensure that it can't be wedged into the code by the deals it does (that is, contractually prevented from kicking everyone off again to avoid designation).

So I expect that Facebook's agreements will be made conditional on it never being designated, meaning that, if it ever is, all deals are off and it can retreat back to California without consequences.

I also expect that this has been made explicitly clear to the government, and that the government has given its nod and wink to affirm Facebook's confidence that, having paid a modest cash price for continuing to do business here, it will be left unregulated.

The code will remain on the statute books, unused. Nobody will be designated. Deals between the major players will be quickly done, Google and Facebook will pay the extorted tax that is their ticket to play, and the legacy media companies will add that tax to their bottom lines with no obligation to spend it on the supposed object of all this fuss, actual journalism. The middle man — the government — will be cut out.

The deckchairs having been rearranged and legacy media's demise somewhat postponed, we can all get back to paying the income tax that Facebook and News will continue to avoid.

*Private Media, the publisher of Crikey, receives funds from Google's News Showcase.*

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