

Submission to the Consultation Paper - News Media Assistance Program by the Digital Publishers Alliance.

21 February 2024

1. What is the Digital Publishers Alliance?

- 1.1. The Digital Publishers Alliance (DPA) is a non-profit member association supporting, connecting and protecting the interests of digital-first Australian publishers and their audiences. We represent over 120 leading media titles from over 50 of the leading independent digital publishers in Australia. The members of the DPA have a combined annual revenue over AU\$250 million and directly employ over 2200 Australians in full-time and contractor roles. The DPA has a keen interest in keeping Australian media as diverse as possible.
- 1.2. The DPA's members range from digital publishers with a minimum of 3 full-time staff, up to larger independent publishers like Mamamia and Private Media that employ around 100 full-time staff each.
- 1.3. The DPA was officially set up in 2021. Funding to help establish the DPA came from a variety of sources, including membership fees paid by all members as well as from industry partners who see the benefit in a healthy digital industry. Both Meta and Google are among the industry partners who have contributed funds to cover some of the cost of the DPA. A clear condition of accepting the funds from Meta and Google was that they would have no say over the actions that the DPA makes, and is reflective of the deep and symbiotic relationship that the digital platforms and the digital media industry have with each other.

2. The DPA's interest in News Media Assistance Program

- 2.1. The DPA's goal is to connect, support and protect independent digital publishers in Australia.
- 2.2. A successful industry requires a diversity of voices. Independent digital publishers are critical in order for journalism to serve its broader social purpose. We firmly believe that a diverse and sustainable news media sector, producing quality news and journalism, is critical to a well-functioning democracy and informed society. The long-term success of all of our members is a critical factor in maintaining a diversity of media operators.
- 2.3. The business models of our members of independent digital publishers is being fundamentally disrupted by technological, social and economic change.

We advocate for government policy interventions that support public interest journalism and safeguard media diversity.

2.4. The rankings of Ipsos Iris Online Audience Measurement Service of the most visited Australian digital news media titles regularly shows that the top 10 destinations are almost exclusively dominated by large media companies who have extended their reach from their traditional mediums like TV and newspapers into digital. They are also the same media companies that have disproportionately benefited from previous government interventions like the *News Media and Digital Platforms Mandatory Bargaining Code* and other policies.

3. The DPA's response to News Media Assistance Program Consultation Paper

3.1. The DPA applauds the government's decision to publish the Consultation Paper in December 2023 to guide policies that support public interest journalism and safeguard media diversity, particularly around the four key outcomes of access, diversity, quality and engagement.

3.2. The DPA can add value and insights around the following discussion questions raised in the Consultation Paper. This submission has been created by the DPA, building on previous work done with the assistance of Marquee Lawyers.

Discussion Questions

Q3.1: Is media diversity the right objective?

Q3.2: How should the media diversity objective be understood? How might the media diversity objective be promoted in the contemporary media environment?

Q3.3: What are the appropriate roles for government and industry in pursuing various elements of this objective? For example, is it the role of government to monitor media diversity and regulate ownership and control?

3.3. When there is discussion of media diversity, the DPA firmly believes that the primary consideration to this question should be diversity of ownership. This is ultimately the most important factor when it comes to having a diverse spread of voices, opinions and revenue across multiple operators, and should one of the guiding principles of the government's work around the News Media Assistance Program. It is of vital importance that media ownership in Australia is spread out evenly and fairly with a wide variety of media owners, large and small, who are all able to compete on a level playing field.

3.4. At the moment this is not the case. The Australian media news industry is dominated by two major publishers, News Corp and Nine. These two

publishers account for around 70% of the market share of the newspaper industry alone, meaning that smaller, independent publishers all have to compete just to receive a small fraction of advertising market share to survive. As the Consultation Paper concluded: “The majority of reviews examining media diversity and ownership have concluded that Australia’s news media sector is one of the most concentrated among democratic states.”

- 3.5. The DPA represents over 50 independent digital publishers. Our publisher members are the long tail of the Australian media, providing important diverse opinions and news journalism outside the establish traditional media owners. However the business model of our members is under immense pressure due to digital platforms, unbalanced government policies and technological threats like Artificial Intelligence (AI).
- 3.6. Independent digital publishers are an extremely important part of a healthy media eco-system and generally rely on a combination of advertising, partnerships and reader revenue. Creating original content is expensive and time-consuming, and most content is publicly accessible on the internet and through social platforms. To help pay for the cost of producing this content, like editorial salaries, web hosting and other costs, publishers sell advertising and sponsorship around the content they produce. The current model used by search engines like Google and Microsoft’s Bing provides links, or referral traffic, to a publisher’s website that can then be monetised to compensate for the cost of creating the content.
- 3.7. Digital news publishers typically source revenue from either or both of advertising and paid subscriptions. Advertising revenue is generally calculated by reference to the volume of viewers on each news story on the publishers’ website. Subscription revenue depends on audiences having the opportunity to access and evaluate a publisher’s content as being desirable for an ongoing subscription.

Discussion Questions relating to support for business models

Q6.1: What are the key barriers or challenges faced by news media organisations in adopting innovative business models or pursuing new revenue streams? How can these barriers be addressed through policy, regulation, or industry-led initiatives?

Q6.2: How can government and regulators encourage and support innovation and the development of sustainable business models in the news media sector? Are there any examples from Australia or internationally that could be adapted to serve this purpose?

Q6.3: How are news organisations reacting to, or leveraging, the development of more sophisticated artificial intelligence services? What are the likely consequences for news and journalism resulting from existing and novel artificial

intelligence services over the coming years and decades? What opportunities and challenges are likely to emerge?

3.8 The DPA can answer these through twin lenses of two of the most pressing issue for Australian digital publishers at the moment, Artificial Intelligence (AI) and the business challenges faced by publishers that has been attempted to be addressed by government intervention of the *News Media and Digital Platforms Mandatory Bargaining Code* (the Code).

4. Artificial Intelligence (AI)

- 4.1. Members of the DPA create engaging, original content like news and features written by journalists that are regularly crawled and likely scraped by AI Models. None of this content scraping is done with the permission of the publishers.
- 4.2. The manner in which AI Models such as ChatGPT, LLaMA and Bard engage in crawling and scraping remains unclear, due to the lack of transparency proffered on the part of the entities which build and commercialise the AI Models.
- 4.3. News publishers like the DPA's members invest significantly in producing quality public interest journalism. There is a clear policy basis which favours both attribution and remuneration where commercial entities, like the providers of AI Models, use that content to improve the quality of their own service. At present, AI Models such as Open AI's ChatGPT, Meta's LLaMA, Google's Bard and others are ingesting an undetermined amount of copyright protected works and those works are being used to train the AI Models and inform their output to varying degrees. ChatGPT, LLaMA and Bard are profiting at the expense of news publishers (and other content creators) without any remuneration being paid to the creators of the work that ChatGPT, LLaMA and Bard need to function.
- 4.4. AI Models place each of these revenue streams at risk, in the following ways.
 - (a) Where news audiences access news information via an AI Model, the underlying news source may not be attributed or linked.
 - (b) As a consequence, the audience member cannot click through to the news source, and the news publisher will not receive advertising revenue flowing from that audience.
 - (c) Similarly, without attribution or linking, that audience cannot evaluate the news publisher and decide to take up a subscription.
- 4.5. In these scenarios, the AI Model gains the value of the audience visiting their platform instead of the news publishers' platform. The AI Model has the

opportunity to place advertisements and earn advertising revenue from that audience, or sell subscriptions to the audience to use its services. It also has the opportunity to drive audience loyalty towards its own platform instead of news publishers' platforms. Where the AI Model is trained using news publishers' content, the above analysis shows how AI Models may:

- (a) deprive news publishers of revenue; and
- (b) instead commercialise information based on news publishers' content for their own benefit, without providing any remuneration.

4.6. In an industry which is already operating on fine margins, the potential impact of AI Models is significant. If AI Model Providers fail to provide fair remuneration, attribution and linking of Australian news publishers' content, there may be a resulting reduction in competition and diversity in the news industry, particularly where small and independent news publishers cannot grow or survive in light of the impact of AI Models.

4.7. The potential for AI Models to negatively impact the news industry is immense. Given the role of public interest journalism in democracy, this risk requires attention in industry-specific regulation. However, the following should be addressed when creating any industry-specific regulation:

- (a) The mechanism should reflect an underlying policy which values and protects public interest journalism and professionally produced digital content creation against exploitation by other commercial operations like ChatGPT, LLaMA or Bard. This favours fair remuneration for digital publishers where the content they create is used by the AI Models for their commercial benefit.
- (b) Attribution and a link to the source news content should be provided in any relevant AI Model output, where the news content was used to train the AI Model. This recognises the critical value for the news industry in driving traffic through to digital news publishers' websites. Many publishers rely on audience numbers to drive advertising revenue as a means of commercial viability. If AI Models are using digital publishers' content for training, providing news information to consumers based on digital publishers' content, and then providing no means for their audience to click through to the original news source, then that presents an obvious power imbalance and threat to digital news publishers. This risk is only exacerbated for smaller and independent publishers.
- (c) For the mechanism to operate effectively, it should apply sector-specific 'ex ante' or upfront regulation to address the potential harms to Australian digital news publishers discussed throughout this paper. By clearly establishing the conduct that is required and requiring the AI Model Providers to modify their behaviour in advance of any breaches,

ex ante regulation has greater potential than ex post enforcement to address problems before harm occurs.

(d) The regulation should not entrench an inequality that benefits larger news content creators and disadvantages smaller participants. This is the practical outcome that was sought to be achieved with the News Media Bargaining Code, where the threat of designation is the main driver in digital platforms offering deals to publishers. In practice, this has resulted in negotiation with larger publishers but inconsistent outcomes for smaller publishers and in many cases no funding at all. Regulation of the use of news content to train AI Models can only operate effectively, and to the benefit of all digital publishers, where it creates meaningful obligations that can be immediately implemented and relied upon.

(e) Any mechanism will need to balance the competing needs of certainty and flexibility:

(i) The dynamic and evolving nature of AI technology means that flexibility will be required, and the regulation should not be linked to specific technical practices (e.g. crawling or scraping). This is for two reasons. Firstly, to ensure the regime has continuing utility as the technology develops. Secondly, to avoid AI Model Providers creating the same impact but being able to slightly alter their practices to avoid regulation.

(ii) However, for the reasons outlined above, greater certainty and specificity is required than in the existing broad, principles-based regulation in competition law. Clear and specific regulation is required, which allows AI Model Providers to easily comply and provides certainty that small publishers will also receive the intended benefits of the regime.

(f) Use can be made of the existing collective bargaining class exemption for small businesses, to allow smaller digital publishers to come together to negotiate with the AI Model Providers. The benefits of this approach are outlined in the Collective Bargaining Guidelines, including more opportunity to negotiate terms of supply that better reflect the group's needs, better access to information, and reducing the time / cost of negotiating separate arrangements. Where there is a requirement for AI Model Providers to remunerate publishers for news content it uses to train its AI Models, the existing class exemption could be used in conjunction or even reflected in the regulatory framework itself.

4.8. Such new and evolving technology, which has the potential to create a significant and lasting impact on the supply of, and access to Australian public interest journalism, needs to be directly contemplated and intentionally regulated rather than proceeding by hoping that it is captured in existing

regulatory frameworks that are not designed to address it. Failure to address the regulation gap swiftly presents a clear risk to the Australian news industry, especially smaller, independent digital publishers.

5. News Media and Digital Platforms Mandatory Bargaining Code (the Code)

- 5.1. The News Media Code has stimulated agreements with the digital platforms which offer vital funding for Australian journalists. The news media publications that have received funding are able to strengthen their businesses. However, the vast majority of that value so far has gone to the very large and established media publishers. The effect of this is that independent digital publishers have been treated inconsistently and with the unintended effect of creating a tiered system where some have received more benefits than others.
- 5.2. Compared to larger publishers, when an independent publisher receives funding from Meta or Google, it can have an oversized impact on their work. Given most independent publishers work with smaller budgets, funding agreements can help them improve the quality of their journalism, create jobs, provide stability and fund important programs to help grow their audience, revenue and impact. There is a noticeable positive effect for publishers when they receive funding, with the funds used to employ additional journalists and create content in areas they wouldn't have before.
- 5.3. The threat of designation has been a key driver in the platforms offering deals to publishers.
- 5.4. Based on information received from members, the DPA understands that publishers have received widely varying treatment from the platforms:
 - a) There is no clear formula for the amount of remuneration which may be offered. There are likely factors other than the publisher's value to the platform impacting whether an offer is made and if so for what amount.
 - b) No transparency of commercial terms is offered, creating inconsistent outcomes and difficulty for individual publishers seeking to negotiate.
 - c) Some publishers have received no funding at all. For others negotiations have either stalled, received offers they have deemed unsatisfactory, or were never begun.
- 5.5. Inconsistent access to the benefits of the News Code may have the following negative impacts:
 - a) There may be a concentration in the industry of publishers who have been able to enter agreements for remuneration with the platforms. Those who have not are at a substantial competitive disadvantage.

- b) Newer and smaller publishers are most at risk. DPA's review of which members have and have not publicly confirmed entering Platform Agreements indicates that it is the newer and smaller publishers who are being left out at the moment. This means that the News Code may have the effect of creating a barrier to entry for new publishers.
- c) There is little transparency or control over whether the platforms offer remuneration or for what amount. This is left entirely in the hands of the platforms. This has the (presumably unintended) consequence of giving them more power over the news industry. By choosing who they fund, they can impact which publishers flourish and which may struggle to remain viable.
- d) If left unchecked, these outcomes will result in the News Code failing to deliver on its policy objectives of addressing the bargaining power imbalance between publishers and platforms, and ensuring that platforms fairly remunerate news businesses for news content.

5.6. The threat of designation has been perhaps the most important outcome of the News Code, as it has caused the platforms to entertain Platform Agreements. Logically, contemplation of the criteria for designation must be central to the platforms' decision-making about when, with whom, and on what terms they will enter Platform Agreements.

5.7. The DPA proposes that the criteria for designation be expanded with the aim of increasing the availability of Platform Agreements to a wider range of publishers. So long as the platforms seek to avoid designation, expanding the designation criteria may have the most direct impact on their behaviour.

5.8. The Digital Publishers Alliance believes a tightening of the designation criteria to include a more broad definition of what a "significant contribution" is, supported by clarification of information gathering powers, would go a long way towards making it a more fair, equitable and balanced News Code that reflects the diversity of the entire Australian media ecosystem.

Discussion Questions relating to government advertising

Q8.1: What are key advantages and disadvantages of government advertising to support public interest journalism?

Q8.2: Is government advertising preferable to other mechanisms, such as grants?

6. Government advertising

- 6.1. The 25-year average of taxpayer-funded government advertising campaigns is around AUD\$200 million a year, yet small and independent publishers are often not included in these advertising spends, despite reaching a combined vast proportion of the Australian population. The effect of this is that government advertising spend goes primarily to a small number of the same large media companies repeatedly. To address this, the DPA proposes that the government mandate a proportion be spent across small publishers. This change can be made at no cost to the government, and will help to ensure the long-term viability of smaller, independent media publishers and maintain diversity of media ownership and views in Australia.
- 6.2. The DPA proposes that 20% of government advertising be mandated to be spent with publishers with less than AU\$35 in annual revenue. This one change will direct around AU\$40M of additional annual revenue directly into small publishers, and have a notable impact on the long-term viability of the industry that will be spread across potentially hundreds of different publishers.
- 6.3. The wide reach of the long-tail of smaller publishers means that audience and consumer objectives will still be able to be met to communicate government advertising with the right audiences. The additional outcome is that the advertising revenue will be able to be used by smaller publishers to maintain offices, hire journalists and continue reporting on a diverse range of topics.
- 6.4. The DPA firmly believes that mandating 20% of government advertising be spent on small publishers with less than AU\$35 million annual revenue is one of the simplest and most effective ways of achieving several of the outcomes of the News Media Assistance Program with one policy change.