



# **ABC Response to the ACCC Draft Mandatory News Bargaining Code**

**August 2020**



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## **1. Introduction**

The ABC welcomes the opportunity to provide feedback on the draft mandatory news media bargaining code (“Code”) developed by the Australian Competition and Consumer Commission (“ACCC”) — as outlined in the exposure draft bill (“draft legislation”) and the accompanying exposure draft explanatory materials (“draft EM”).

The Code stems from a recommendation of the ACCC’s Digital Platforms Inquiry (“Inquiry”). The Inquiry considered the impact of digital platforms on the provision of news and journalistic content, with a particular focus on protecting the incentives for the provision of public interest journalism because it delivers broad benefits to society.

The Inquiry Final Report recognised that one of the central ways in which the Government addresses the risk of under-provision of public interest journalism in Australia is through the direct funding of public broadcasters. In recognition of this, the ACCC recommended that stable and adequate funding be provided to the public broadcasters. The recent withdrawal of commercial media from regional Australia is further evidence that ensuring access to public interest journalism cannot be left to market forces alone.

The Government also directed the ACCC to develop a mandatory code of conduct to address bargaining imbalances between the major digital platforms and news media businesses as another policy tool to protect the incentives for the creation and provision of public interest journalism and news for Australians. It is important to keep this overarching rationale for the Code in mind as the draft legislation is evaluated.

This submission focuses on selected issues raised by the proposed design of the Code within three broad categories: (i) threshold issues (ii) bargaining framework (iii) minimum standards.

## **2. Threshold issues**

The draft legislation contains threshold definitions which will frame the practical scope of the Code—one being the definition of a “news business”.

The ABC is broadly supportive of the definition of “news business” set out under the proposed Code and the multi-faceted eligibility test that the Australian Communications and Media Authority (“the ACMA”) will administer. An important requirement is that, to participate, a news business (and the news sources it produces) must be covered by appropriate professional editorial standards and editorial independence from the subject of its news coverage. The Corporation submits that, while it is implicit that the ABC Editorial Policies (or the Editorial Policies applied by the national broadcasters) would meet the requirements of the professional standards test in ss.52K(1)(a)(iii) in the draft legislation, this could be made explicit for avoidance of doubt.

The Corporation also supports the ACMA’s ability to have ongoing oversight of whether news businesses continue to meet the eligibility requirements for participation in the Code, and the indication that the ACMA will regularly review these matters. This will assist to ensure that the Code is operating to advance the overarching objective of the Government’s intervention in this market: to protect the incentives for the provision of public interest journalism (broadly analogous to the concept of “core news content” in the draft legislation).

Section 52C of the draft legislation will permit the Treasurer to make a determination specifying which digital platforms are designated under the Code. Initially, the Government has signalled this will include Google and Facebook, and a subset of their products. The Corporation believes that it would be useful for the ACCC/Government to provide further guidance on how decisions to add or withdraw particular digital platforms or services would be made in the future.

### 3. Bargaining framework

#### 3.1 The exclusion of public broadcasters

In its June 2020 submission the ABC argued that, if the ACCC formed the view that there was value to third-party digital platforms in having news media content (including from the ABC) and established a mechanism for platforms to better share this value with news media organisations, then it should be part of this framework.

The Corporation put forward several arguments in support of this view, including that the Code would potentially operate more effectively across the news media industry if all major news organisations delivering public interest journalism were included.<sup>1</sup> It also noted that any additional revenue accruing to the ABC under the Code would likely be directed to further investment in public interest journalism at the local and regional level, consistent with the original motivations for the Government’s intervention and the ACCC’s Inquiry.

The proposed Code excludes both public broadcasters from the bargaining framework,<sup>2</sup> although both the ABC and SBS will benefit from the minimum standards in the Code. The ABC understands, however, that public broadcasters would still be free to enter into agreements with the designated digital platforms outside the Code’s bargaining and arbitration framework.

The draft EM states that the decision to exclude public broadcasters from the bargaining framework is based on the fact that “advertising revenue is not the principal source of funding for public broadcasters”.<sup>3</sup> The implication that arises is that a key purpose of the Code is to compensate commercial media companies for the significant declines in sources of traditional advertising revenue.

The ABC had understood (from the Inquiry and ACCC’s Concepts Paper) that Code’s purpose is to address bargaining-power imbalances by ensuring that, where the major digital platforms obtain direct or indirect value from content produced by news media businesses, there is a framework in place to provide for fair negotiation/compensation.<sup>4</sup> The Concepts Paper also said:

The bargaining power imbalance between Australian news media businesses and each of Google and Facebook underlies all issues to be addressed by the mandatory bargaining code. In the context of the monetisation and revenue-sharing regarding the use of news by digital platforms, the aim of the code is to address the bargaining power imbalance by facilitating commercial negotiations that will allow news media businesses to achieve outcomes consistent with those that would be achieved in the absence of the bargaining power imbalance.<sup>5</sup>

If this is the rationale, it holds equally for public broadcasters as it does for commercial media. The ABC has traditionally raised revenue from licensing content that has already been paid for by the taxpayer. Obtaining fair market value for content on the digital platforms is entirely consistent with that approach and serves the taxpayer well.

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<sup>1</sup> ABC submission to ACCC Concepts Paper, June 2020, pp. 4-5.

<sup>2</sup> Draft news media bargaining code, Exposure draft explanatory materials, paragraph 1.13.

<sup>3</sup> Exposure draft explanatory materials, paragraph 1.13.

<sup>4</sup> ACCC Concepts Paper, May 2020, p. 7; ACCC Digital Platforms Inquiry - Final Report, July 2019, p. 256.

<sup>5</sup> ACCC Concepts Paper, p. 7.

Two other arguments have been raised as to why the ABC should be excluded from the bargaining framework within the Code:

- If the ABC becomes significantly funded by commercial platforms, it could change the nature of the ABC.<sup>6</sup>
- The ABC has only benefitted from having its content accessible via large digital platforms.<sup>7</sup>

In relation to the first argument, the Corporation notes that its commercial arm, ABC Commercial, has collaborated with ABC News to license ABC news and current affairs content to third parties in both the domestic and international markets for over 17 years. This is a standard business of many other public service broadcasters like SBS, the BBC and CBC/Radio-Canada. The ABC's news and current affairs content licensing activities are permitted under the *Australian Broadcasting Corporation Act 1983* ("ABC Act"), including the ABC Charter. They are closely regulated under the ABC's Editorial Policies.

ABC editorial decisions must not be influenced by political, sectional, commercial or personal interests, to protect the ABC's independence and integrity. For years now, the ABC has successfully managed relationships with third-party digital platforms and other providers that carry ABC content under licensing deals, without compromising editorial independence. The ABC's independence is safeguarded in the following ways:

- content is commissioned for broadcast and digital audiences on ABC platforms;
- any subsequent syndication and distribution deals are kept completely separate from editorial decision making and content commissioning;
- any content published and syndicated by the ABC must conform to its stringent Editorial Policies and the ABC Act;
- ABC content cannot be edited or changed by third-party platforms; and
- there are regular reviews and spot checks to ensure compliance.

On the second argument, the ABC faces many of the same challenges and opportunities as commercial news organisations in responding to the impact of news and information aggregator platforms. Opportunities in that it makes extensive use of social media and other third-party platforms to reach and engage with audiences in order to maximise the public benefits it delivers to Australians. Challenges in that the increased use of these platforms by audiences as gateways for their content choices, including for news, means that the ABC must adapt to ensure its content remains easy to find on these platforms, while continuing to encourage audiences to come its services and platforms directly.

The Corporation submits that the Government reconsider the decision to exclude public broadcasters from the bargaining framework. The ABC reiterates its commitment to reinvest any funds it receives as a result of its inclusion back into its public interest journalism. Given the rapid withdrawal of commercial media from regional Australia, the ABC would focus this

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<sup>6</sup> Zoe Samios and Fergus Hunter, "ABC, SBS exclusion from tech giants' payments a 'government' decision", Sydney Morning Herald, 3 August 2020.

<sup>7</sup> Nine Entertainment Co, "Mandatory Bargaining Code of Conduct – Response to (ACCC) Concepts Paper", May 2020, p.6.

reinvestment in public interest journalism at the local and regional level, including addressing coverage gaps and “news deserts” affecting regional communities.

**The remaining focus of this submission is made on the basis that the ABC will be excluded from the payment bargaining framework under the Code, but it would still be able to register as a “registered news business” under the Code in order to receive the benefit of the minimum standards.**

### **3.2 The ACCC’s role in the arbitration process**

The ACCC will be permitted to make written submissions to assist the arbitral panel.<sup>8</sup> Presumably, this will include assisting the panel to evaluate the merits of two different offers in an arbitration. In these circumstances, it would be beneficial for more guidance (if not in the legislation, then in further guidance material) on what criteria the ACCC would apply in these circumstances, including whether it would take into account how the structure of different payment offers (whether they be lump-sum or volume-based) could impact the incentives for news media businesses in their provision of news and public interest journalism into the future.

The terms of any agreement reached between designated digital platforms and news businesses on a commercial basis will understandably remain confidential. There is a case, however, that the ACCC should be able to request access to the key terms of these agreements, at least those negotiated in the first 12 months. This would better enable the ACCC to provide broad guidance if requested by an arbitral panel. It would also be a mechanism for the ACCC to satisfy itself that the Code process is generating outcomes consistent with the overarching objective of protecting the incentives for the provision of public interest journalism.

### **3.3 Non-discrimination provisions**

Given the introduction of the Code and bilateral bargaining framework, the ABC understands the need for the accompanying non-discrimination mechanisms administered by the ACCC. It will be important, however, to ensure that they do not lead to unintended consequences.

The Corporation understands that the primary motivation for the non-discrimination provisions is to ensure that news media businesses are not disadvantaged (or advantaged) with respect to the ranking/presentation/display of news content because of their participation in the Code—including because of any payments that are negotiated or mandated. The clearest example provided by the ACCC is a potential circumstance where a digital platform artificially lowers the ranking of the content of a news media business that participates in the Code (or stops showing that content altogether) in favour of that of a news business that does not, to prioritise content from international news businesses.<sup>9</sup>

However, it is also understood—based on subsection 52W(a) of the draft legislation—that the non-discrimination requirements will also apply to discrimination between “registered news businesses” under the Code, including those that do and do not have access to the bargaining framework (as currently proposed, this would include public broadcasters in the latter case).

On its face, determining which conduct will potentially fall into the category of discrimination between “registered news businesses” would appear a more challenging task for the ACCC—particularly given that, at some level, digital platforms (and the products they provide, whether based on search results or news feeds) are inherently in the business of ranking and prioritising news content based on a range of factors which remain commercial-in-confidence to them. For example, it may be difficult to disentangle whether the news content of a registered business

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<sup>8</sup> Draft news media bargaining code – exposure draft bill, section 52ZS; Exposure draft explanatory materials, paragraphs 1.146-1.149.

<sup>9</sup> Exposure draft explanatory materials, paragraphs 1.98-1.101; Section 6 of the ACCC’s Q&A document on its website.

has been disadvantaged in comparison to the news of another registered business as a result of discrimination as defined under the Code, rather than some other legitimate cause, such as changes to an algorithm to better prioritise original news content, which happens to benefit some news organisations compared to others.

An additional uncertainty arises because the proposed Code (section 52W of the draft legislation) says the non-discrimination provisions apply “in relation to crawling, indexing, ranking, displaying or presenting” of news content, while the draft EM says the provisions are not intended to interfere with a digital platform’s proprietary algorithms.<sup>10</sup> It is unclear how the provisions could influence a digital platform’s decisions relating to crawling, indexing, ranking, displaying or presenting without changing, or interfering with, decisions related to its proprietary algorithm.

A lack of clarity *ex ante* about how these provisions will be interpreted by the ACCC in different scenarios could also risk having a “chilling effect” on the willingness of designated digital platforms to consider partnerships with parties outside the bargaining framework.

The ABC would be concerned if, not only is it excluded from the ability to bargain under the framework under the Code but in addition, the non-discrimination provisions would have the direct or indirect effect of preventing it from entering into voluntary partnerships/deals with Google and Facebook outside this framework as opportunities arose—whether because of the intended operation of the provisions themselves, or an effective “chilling effect” on the activities of these digital platforms engaging with public broadcasters out of a concern that any legitimate changes to search algorithms might be mis-interpreted as having been impacted by such arrangements. As noted above, in the modern media environment, effective use of these platforms through collaborations with third parties helps the ABC to maximise the public benefits it delivers to Australians.

The ABC appreciates the ACCC/Government cannot anticipate every possible scenario. However, further clarification in the legislative drafting and / or guidance on how the ACCC would interpret these provisions in different scenarios would provide more certainty to all parties on how they will likely operate in practice. Such further clarification or guidance could include an explicit statement that only actions which expressly or directly discriminate between registered news businesses based on the fact that they have or have not entered into a commercial agreement to which Part IVBA applies would be prohibited.

## **4. Minimum standards**

### **4.1 Data**

In its June 2020 submission, the ABC acknowledged that both Google and Facebook already provide the ABC with a range of data which informs its understanding and activities. The Corporation argued that the Code framework could recognise opportunities for future data-sharing opportunities as a source of value exchange between the parties.

The type of data in prospect for sharing in such a circumstance would not be the personal information of individual users, but rather aggregated data about how news media organisations’ content performs on these third-party platforms, provided on a non-identifiable, anonymised basis. These data could provide the ABC and other news organisations with greater insights and intelligence on how their content is consumed on these platforms to inform their

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<sup>10</sup> Exposure draft explanatory materials, paragraph 1.101.

future activities.<sup>11</sup> It would also enable the Corporation to more accurately and completely demonstrate the value it provides taxpayers over and above the activity on its own platforms.

As currently drafted, the Code would require designated digital platforms to provide more transparency around the types of data they collect in relation to users' interactions with news content on the platforms of registered news media businesses—the Corporation understands that it would not include any positive obligations on digital platforms to provide any data to news media businesses.

If this is the case, it appears to strike an appropriate balance between providing additional transparency, while not compromising the confidentiality and intellectual property of data collected by digital platforms. These requirements should aim to provide a basis to facilitate further constructive conversations about opportunities for further data sharing on a voluntary basis, subject to relevant data protection and privacy laws.

#### **4.2 Algorithmic ranking of news**

In its June 2020 submission, the ABC observed that, as a result of the market dominance of Facebook and Google, the proprietary algorithms those platforms use to determine the content shown to users has a considerable effect on the audiences of news and other content organisations. It further noted that sudden and significant changes to those algorithms can greatly change content organisations' audiences and have a detrimental impact on complementary investments. The Corporation therefore welcomed steps that Google and Facebook have recently taken, or signalled that they intend to take, to provide greater transparency, notice and explanation about significant changes to their algorithms.<sup>12</sup>

Section 52N of the draft legislation attempts to formalise the advance provision of such warnings by obliging designated digital platform services to provide advance notice of changes that are likely to have a significant effect on the ranking of news media organisations' content on those platforms. As this obligation would only extend to changes likely to have a significant impact, the ABC assumes that it is unlikely to apply to the overwhelming majority of algorithm adjustments made by the platforms.

The draft legislation does not define what constitutes a “significant effect” and there may be an advantage in it doing so. Paragraph 1.79 of draft EM suggests that any algorithm change that is likely to result in at least a 15% variation in referral traffic for at least 25% of registered news organisations would be deemed to be significant. It is unclear how that threshold was derived or how it would be assessed ahead of time by a digital platform contemplating a change to its algorithm. Nonetheless, the Corporation acknowledges that an audience change of that magnitude would likely be significant.

Given the importance of such algorithms to the experience of users of digital platforms, the Corporation would see value in the Government giving further consideration to an alternative threshold or mechanism for determining the type of changes that would require notification. Such alternatives could be explored through a consultation process involving digital platforms, media organisations and any other relevant stakeholders. Further consultation on this issue could help to avoid concerns the digital platforms have expressed in relation to this provision and to ensure they can effectively combat attempts to inappropriately misuse their algorithms and continue to prioritise content that is of relevance and interest to end users.

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<sup>11</sup> For further explanation, refer to ABC submission to ACCC Concepts Paper, June 2020.

<sup>12</sup> ACCC Concepts Paper, p. 20.

### **4.3 Prioritisation of original news content**

In its June 2020 submission, the ABC supported a provision in the Code to help ensure that the ranking algorithms used by Google and Facebook to surface and prioritise journalistic content give significant weight to original versions of such content and prioritise it over “rewrites” of the same content.

Measures to encourage platforms to prioritise original news content are arguably even more important – particularly where there are clear/unambiguous examples of “rewrites” – given that the Code could establish an environment where some news media organisations end up being monetarily compensated for content they did not create themselves.

The Code puts the onus on the designated digital platforms to consult with the media sector before publishing a proposal on how they will appropriately recognise original news content through their rankings. Meaningful engagement on this issue between the digital platforms and news business will be an important first step, including discussions about policies that could be put in place to identify original news content and/or other solutions explored, such as the platforms providing links to original related articles on a particular topic, much as Facebook has begun directing users to alternative, accurate news sources when they view related articles that have been independently fact-checked and found to have inaccuracies.

In addition, the ABC submits that the Code would benefit from some level of regulatory oversight, whether by the ACCC or the ACMA, to ensure the published proposals will likely result in effective outcomes. Likewise, the Code should include scope for notification and a complaints-handling process where a news business can demonstrate systemic issues in relation to use of its original journalistic content.

### **4.4 Display of news content**

The ABC strongly supports measures in the Code to address this issue. In the modern digital media landscape, the source of the journalistic content should be easy for the user to clearly identify when reviewing search results or consuming news via digital platforms’ services. This is an important aspect for consumers of news, because it enables them to understand the source, relative authority and level of trust to place in the content.

As noted in its June 2020 submission, the ABC has concerns about the current low level of control that news businesses have in terms of the display and presentation of their news on some third-party digital platforms. The risk remains that in a crowded online setting, users are not able to easily identify the source of news articles, and there is brand dilution for the news organisation that created the content.

The Corporation notes that the proposed Code will require digital platforms to provide advanced notice of any significant changes to the display and presentation of a news business’ covered content but does not introduce any positive obligations to improve the status quo. The ABC submits that the Code should go further in this area to require digital platforms to enter into good-faith negotiations with news media businesses on more effective branding and prominence for news sources. As such, the ABC welcomes indications in the draft EM (paragraph 1.85) that the final Code will also include a requirement for digital platforms to genuinely consider reasonable proposals from registered news businesses on the display and presentation of their news content.

### **4.5 Display of advertising**

As noted in its June 2020 submission, while the Corporation is restricted under the ABC Act from advertising on its own platforms, it can enter into commercial arrangements with digital



platforms on which its content appears whereby advertising appears alongside ABC content. In such circumstances, it is important that the Corporation has the capacity to have input into what is (and is not) advertised adjacent to ABC news content on third-party platforms.

The ABC supports the proposed provisions in the Code (section 52Q of the draft legislation) that would require digital platforms to provide advanced notice to registered news businesses of any changes that are likely to have a significant effect on the display and advertising directly associated with news on the digital platform. This will add to the already constructive relationships that the ABC has with digital platforms on these matters.

#### **4.6 User comments**

The ABC welcomes the inclusion of provisions in the proposed Code that will enable registered news media businesses to better manage “user comments” with respect to content they post within third-party digital platform products.

As noted in its June 2020 submission, at present some digital platform products, such as Facebook pages, do not allow news organisations to effectively moderate or disable harmful user-generated comments. In the absence of improved tools in this area, news media organisations may be forced to withdraw from the use of some of these products; and/or increase moderation resourcing in order to mitigate legal risks incurred as a result of being on the platform.

The proposed Code provisions would, on written request by a registered news business, require the digital platforms to ensure that a registered news business can do the following in relation to the covered news content that news business has posted (itself) on its part of a digital platform service—remove or filter user comments, disable entirely the making of user comments; and block user comments by particular users and accounts in particular circumstances.

The ABC submits that the final Code should clarify whether this requirement will apply at the publisher/account, or individual content/post level. Further, publishers should be granted access to these controls at a publisher level, covering all pages within their Facebook presence which, in main or in part, include news content.

The ABC also notes that, because these matters are often time-sensitive, it will be important once a news media business has made the request for it to have access to these tools going forward on a business-as-usual basis, rather than having to make a request in each instance where issues arise.

The ABC also seeks clarification on the rationale for subsection 52S(3) in the draft legislation and the types of instances in which it is envisaged these provisions would be used.