

News Corp Australia

**SUBMISSION TO THE
AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION**

**MANDATORY NEWS MEDIA
BARGAINING CODE**

28 August 2020

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News Corp Australia Submission

Draft Code of Conduct

1 Introduction

News Corp Australia welcomes the opportunity to provide comments on the Draft Code of Conduct (**Draft Code**) released by the Australian Competition and Consumer Commission (**ACCC**) on 31 July 2020.

News Corp Australia considers that the model adopted in the Draft Code is an important and significant step in addressing the bargaining imbalance between news media businesses and digital platforms. While News Corp Australia supports the Draft Code in principle, we take the opportunity in this submission to outline certain matters which we believe should be addressed in the final Code.

In particular, the final offer arbitration provisions regarding remuneration should apply to all digital platform services not just a subset of such being designated digital platform services. This change is essential to ensure the purpose of the Code is met, to address the significant imbalance in bargaining power between digital platforms and news media. If this change is not made, we are concerned that the purpose and outcome of the Code will be significantly undermined.

Where this submission suggests that provisions of the Draft Code require amendment, **Schedule 1** to this submission includes suggested drafting.

We also annex a report by Charles River Associates on the suitability of final offer arbitration for the Code (see **Annexure A**).

2 Definitions and parties to the Code

2.1 News content

A news business corporation can only register with the Australian Communications and Media Authority (**ACMA**) if it creates and publishes online content that is predominantly core news content.¹ The concept of core news content is defined as content that:²

- is created by a journalist; and
- records, investigates or explains issues that:
 - are of public significance for Australians; or
 - are relevant in engaging Australians in public debate and in informing democratic decision-making; or
 - relate to community and local events.

The Explanatory Materials clarify that the concept of 'core news content' includes:

¹ Draft Code, s 52E(1)(e)(i).

² Draft Code, s 52A.

- content relating directly to matters of public policy and government decision making at any level of government;³
- reporting on other matters of public importance, eg, the activities of private sector entities;⁴
- political, court and crime reporting;⁵ and
- editorial and opinion pieces, where written by a journalist.⁶

News Corp Australia considers that the concept of core news content should also capture sports news content such as (but not limited to) sport-related drugs and doping, domestic violence and other social issues, the business of sport such as infrastructure and investment, and salary cap breaches. Reporting on these types of issues are '*issues that are of public significance for Australians.*' This should be explicitly clarified in the Draft Code and Explanatory Materials.

2.2 Registration of a news business corporation

The Draft Code requires that a news business corporation must register with the ACMA, and that the ACMA can only register a news business corporation where the corporation and its news sources meet a series of tests. News Corp Australia makes the following comments about these tests:

- The **revenue test** requires that the applicant corporation's annual revenue exceeds \$150,000 in either the most recent financial year or in three out of the five most recent financial years. As the entities which house the news businesses may change, the revenue test should assess the annual revenue of the entity into which the news businesses are consolidated from time to time, rather than the accounts of the specific applicant corporation. We say this because consolidated businesses do not maintain separate sets of accounts, and entities can change head companies into whose consolidated accounts their revenues are consolidated.
- The **content test** requires that each news source creates, and publishes online, content that is predominantly core news content. There is no explanation in the Draft Code, nor in the Explanatory Materials, about the metric used to assess whether a news source publishes core news content which satisfies the threshold of '*predominantly*'. News Corp Australia considers that the content test should require that each news source '*has as a significant business activity the creation and supply online of core news content*'. Satisfying the content test should not involve cumbersome and time-consuming exercises such as counting and categorising individual articles in a news source. Instead, it should be a question of judgment on the part of the news business and the ACMA having regard to the totality of the news business' operations and content.
- The **editorial independence** limb of the **professional standards test** requires that each news source has editorial independence from the subjects of its news coverage.⁷ The

³ Explanatory Materials, [1.51].

⁴ Ibid.

⁵ Explanatory Materials, [1.52].

⁶ Explanatory Materials, [1.53].

⁷ Draft Code, s 52K(1)(b).

Explanatory Materials suggest that the editorial independence limb will be applied in a reasonably narrow way, however, this is not clear in the Draft Code, which means there is uncertainty about how the ACMA may apply this test. Relevantly, on its face, the editorial independence limb in the Draft Code imposes a much broader restriction than envisaged by the Explanatory Materials. According to the Explanatory Materials, s 52K(1)(b) would exclude news sources that:⁸

- are owned or controlled by a political advocacy organisation; or
- are owned or controlled by a party with a commercial interest in the coverage being produced.

This threshold of control or ownership is not clear in the Draft Code.

The resulting broad nature of the editorial independence limb of the professional standards test could lead to debate over whether publishing some proportion of news content, like special features or sponsored content, would render a news business ineligible. Similarly, the current wording captures situations where a journalist employed by a news business writes a story that concerns the news business. That is, any news business that published news content about itself would be ineligible. The issue with this is that journalists often publish stories that concern the news business at which they work. Recent examples include the ABC coverage of the AFP raid of their newsroom and the court proceedings that followed, and discussion and debate about the application of defamation laws to newspapers across the industry. If the final Code maintained this wording, minimal (if any) news businesses would satisfy this limb.

To avoid this, the final Code should include an amended s 52K(1)(b) which instead requires that the news source has editorial independence from the '*predominant subject matter* of its core news content'.

A final issue with the registration process is that it does not provide a method by which a news business corporation can amend the details of its registration where there is a change in the ownership of a news business or news source or the addition of a new news source. There is currently considerable change occurring in the news media industry, exacerbated by the COVID-19 pandemic. It is foreseeable that a registered news business corporation may need to add or remove a news business to the register maintained by ACMA, subject to s 52Y(5). To avoid confusion, there should be a clear process for such changes.

2.3 Designated digital platform corporation

Section 52C(1)(a) of the Draft Code provides that:

The Treasurer may, by legislative instrument, make a determination that specifies a corporation that, either by itself or together with other corporations, operates or controls a digital platform, as a ***designated digital platform corporation***.

The wording of this section does not capture the possibility of a digital platform corporation changing its corporate structure (eg, merging, demerging or being split up). In News Corp

⁸ Explanatory Materials, [1.58]

Australia's view, the concept of a designated digital platform corporation should also capture successor entities of those corporations and related bodies corporate.

2.4 Digital platform services and designated digital platform services

The Draft Code distinguishes between:

- **digital platform services** – which is defined broadly in s 52B and applies to the minimum standards and to the pre-arbitration bargaining; and
- **designated digital platform services** – which is a digital platform service that must be designated by the Treasurer and applies to the final offer arbitration.

The Explanatory Materials outline that the Treasurer is expected to specify the following designated digital platform services:⁹

- Facebook News Feed;
- Facebook News Tab (if and when released in Australia);
- Instagram;
- Google Discover;
- Google News; and
- Google Search.

This list is very narrow, and does not adequately capture the services through which Google and Facebook obtain substantial value from news content, and in respect of which news businesses suffer relative weak bargaining power as against the platforms.

News Corp Australia understands from the ACCC's Q&A's document that this list is intended to exclude services which typically offer revenue-sharing arrangements to all news businesses.¹⁰ News Corp Australia does not understand the reason for the limitation and considers that all services of designated digital platforms which use news content should be subject to final offer arbitration by operation of the Code and not require the agreement of the parties.

Arbitrarily excluding this content is counterproductive to the overarching objectives of the Code. Failing to include the use by all digital platform services of covered news content in the arbitration process risks severely limiting the capacity of the Code to address the *'fundamental bargaining power imbalance between Australian news businesses and each of Google and Facebook'*.¹¹ There is a bargaining power imbalance in the commercial relationship between digital platforms and news media businesses with respect to *all* platform use of news content so the remedy is needed for *all* digital platform services. Given this, it is highly likely that the digital platform can use the news content at a price that does not reflect the cost of creating and supplying that news content, including by typically not offering remuneration arrangements. In our view the bargaining power of news media businesses is so severely constrained that revenue share proposals from the platforms are most likely to be cursory, with constraining strings attached.

⁹ Explanatory Materials, [1.34].

¹⁰ ACCC, 'Q&As: Draft news media and digital platforms mandatory bargaining code' (July 2020), p 8.

¹¹ Explanatory Materials, [1.2].

Accordingly, the Code's final offer arbitration process should include all services of the designated digital platforms (ie, should not require designation of particular digital platform services) by operation of the Code and not require the agreement of the parties. Iterative designation of individual services will take time and could be frustrated.

In the event the ACCC is not open to removing the concept of 'designated digital platform services' entirely from the final Code, the Treasurer's instrument should also specify at least the following as designated digital platform services:

- Google Images;
- Google Finance;
- YouTube;
- Google Groups;
- Google Assistant (also known as Google Home);
- Google Podcasts;
- Facebook Instant Articles; and
- Facebook Watch.

3 Minimum standards

News Corp Australia welcomes the inclusion of minimum standards and broadly agrees with the proposed drafting. However, at times the Draft Code uses ambiguous language which could be interpreted in a number of ways. While the Explanatory Materials (and any future ACCC guidelines) would provide some clarification as to the correct interpretation of certain aspects of the minimum standards, it would be preferable for the final Code to be clear in itself in order to avoid any scope for confusion, misinterpretation or contention. The clearer language of the Explanatory Materials in relation to the minimum standards should be incorporated in the final Code. We offer the following specific issues where this is essential.

3.1 Giving explanations about information and types of data collected

Section 52M of the Draft Code requires that the responsible digital platform corporation provide the registered news business corporation with information about the data it collects and provides to news businesses.

The Draft Code only requires digital platforms to provide to news businesses '*a list and explanation*' of engagement data collected through their news content. It does not require digital platforms to provide news businesses with particular data collected in connection with their news content. While News Corp Australia remains of the view that data collected about users' engagement with the news business' news content belongs to the news business and digital platforms should be required to provide news businesses with this data in an anonymised form, it does not press this requirement in the context of the Draft Code.

Rather, News Corp Australia hopes that digital platforms will negotiate voluntarily with news businesses to provide this data on an anonymised basis. To be clear, News Corp Australia does

not expect or want platforms to provide personal information, and would expect any data provided to be incapable of de-anonymisation.

As the data is also a key part of the value digital platforms obtain from the use of news businesses' content, digital platforms should also be required to provide news businesses with information about how the digital platform service *uses and creates value from* the data it collects about the news business' users through their engagement with news content on the digital platform service. This can then be taken into account in the remuneration bargaining and final offer arbitration.

3.2 Notice of algorithm changes

(a) The importance of notice of algorithmic changes and additions

News Corp Australia supports s 52N of the Draft Code. The ACCC's Concepts Paper recognised that the little to no notice provided about changes to and the introduction of algorithms (as part of wider algorithmic opacity) is likely '*a manifestation of the bargaining power imbalance*' between digital platforms and news businesses. Advance notice is critical in addressing this issue. In order for news businesses to best serve their readership and effectively monetise their news content, they need to be able to understand how their news content is being presented to users and, when relevant, how this is going to change.

Subject to the concerns detailed in section 3.2(b) below, News Corp Australia believes that this provision strikes the right balance. It is flexible enough to account for circumstances where urgent public interest necessitates algorithmic changes or additions without notice. Changes required to fix glitches and respond to harmful practices (like fraud) or situations of great disruption (like the COVID-19 pandemic of 2019/2020 bushfires) would likely fall under this exception.¹² News Corp Australia thinks this is an important safeguard in the public interest.

Further, s 52N merely extends on the digital platforms' espoused dedication to '*transparency about significant changes made by digital platforms to their central algorithms used to rank (ie, order) content, including news content*'.¹³ It does not require the provision of anything other than information about the extent to which the digital platforms' planned algorithm changes or additions will affect referral traffic for news businesses. It also does not amount to special treatment of registered news businesses, nor does it give news businesses an opportunity to 'game' algorithms. The algorithms themselves are not being provided, only notice of how it may impact referral traffic and how to minimise this disruption. Nevertheless, if the digital platforms are concerned that providing information about how to minimise negative effects of algorithmic changes or additions provides an unfair advantage to registered news businesses, it is open to them to make this information available to all users and businesses. News Corp Australia has no objections to this information being publicly available.

¹² Draft Code, s 52N(2)(b)(ii).

¹³ Facebook, Submission: Response to the Australian mandatory news media bargaining code concepts paper (5 June 2020), 4.

(b) Proposed amendments to s 52N

News Corp Australia proposes four amendments to s 52N of the Draft Code.

First, s 52N only requires notice be given of '*changes...planned to be made to an algorithm*'. While the ACCC may intend for this to cover changes caused due to the introduction of new practices and the introduction of new conditions on algorithms, it is not clear in the current drafting. The risk associated with limiting s 52N to algorithmic 'changes' is that it leaves scope for digital platforms to avoid giving news businesses advance notice by excluding the addition of new algorithms or the introduction of new features or conditions from its interpretation of 'changes'. It would be preferable for the final Code to clearly preclude any such option.

Second, the Draft Code envisages no consultation about the implementation of algorithmic changes. There is no opportunity for news businesses to raise concerns with the digital platform about the planned addition or change to their algorithmic practices. In relation to the display of news content, the Explanatory Materials state that the final Code will include requirements about '*genuinely considering reasonable proposals from registered news business corporations to ensure that the display and presentation of news on platforms' services provides appropriate prominence to their content*'.¹⁴ An equivalent requirement should be applied to s 52N in relation to the notice of planned algorithmic changes, to ensure that the digital platforms must 'genuinely consider reasonable proposals' in relation to planned changes to algorithmic practices. This would provide news businesses with the opportunity to raise concerns about changes to algorithmic practices, after the digital platform provides notice and prior to implementation.

Our **third** concern relates to the proposed test to determine what constitutes a 'significant effect' on the ranking of the registered news business' covered news content. There is inconsistency between the language used in s 52N ('ranking') and in the Explanatory Materials ('referral traffic').¹⁵ Although closely related, with referral traffic highly influenced by a search result's ranking, these are distinct concepts. The final Code and any explanatory materials (including any ACCC guidelines) should be clear that s 52N refers to 'referral traffic'. This is the preferable metric, as it is a metric applicable to both Google and Facebook and reflects the practical effect of algorithmic changes or additions.

Even once this is clarified, there is uncertainty about what would constitute a 'significant effect'. The Explanatory Materials indicate that an algorithmic change will have a 'significant effect' on referrals if they '*are likely to result in a 15% or greater change in referral traffic for at least 25% of registered news businesses*'.¹⁶ News Corp Australia understands that this percentage threshold will be added to the final Code, replacing the concept of 'significant effect'. While News Corp Australia agrees with the imposition of a more testable threshold, the 15/25 threshold would benefit from further precision.

¹⁴ Explanatory Materials, [1.85].

¹⁵ Explanatory Materials, [1.77]-[1.79].

¹⁶ Explanatory Materials, [1.79].

- *Month-to-month referral traffic:* It should be clear that the 15% or greater change in referral traffic is to be measured as a change in month-to-month referral traffic. This is a more accurate metric than a point-in-time measurement of referral traffic.
- *News sources:* The test should relate to news sources rather news businesses. The eligibility for registration concerns each news source's content, audience and professional standards. This recognises that news sources within a news business will often have different focuses. It follows that each news source within a news business will be impacted differently by an algorithm change. If the test applies to news businesses as a whole, it would dilute the impact of changes substantial to a particular type of news source.

Finally, it also appears that the digital platforms will be able to self-assess the impact of an algorithmic change, which could lead to this minimum standard being easily gamed by the digital platforms. A regulator could not be expected to check that every algorithm change complies with this provision. If a matter of suspected non-compliance were pursued by the ACCC in court, the ACCC's ability to show that the change had in fact met the threshold would rely on how forthcoming the digital platform service was with its internal information. Accordingly, the onus of proof should be reversed as in sections 45AO and 44AABF of the *Competition and Consumer Act 2010* (Cth). If the ACCC commences enforcement proceedings against a responsible digital platform corporation on the basis of complaints about an unnotified change contravening s 52N, the legal burden of showing that the change had not met the required threshold should fall to the responsible digital platform corporation.

3.3 Original news content

The consultative nature of s 52T of the Draft Code is a positive step toward developing appropriate recognition of original news content. However, News Corp Australia considers that the concept of 'original' content should be replaced with a concept such as the news articles containing the most recent previously unpublished material information on a news content topic. News Corp Australia is concerned that the concept of 'original' may be confused with the concept as it is understood under Australian copyright and defamation laws, and may be interpreted to mean a new reproduction of previous content in a slightly different form, even if there is no new information contained in the publication. The definition should capture the news content that is the first in time to be published on a particular topic and any materially new or novel news content on that topic, not simply re-writes.

4 Non-discrimination

News Corp Australia welcomes the inclusion of a non-discrimination provision in s 52W of the Draft Code. However, the language of this provision needs refining to ensure it can effectively prevent instances of discrimination.

The Explanatory Materials make clear that s 52W:

- prevents discrimination on the basis of:

- the registered news business relying on or proposing to rely on any of its rights or entitlements under the Code or under a Code Agreement;¹⁷
- the registered news business' decision to participate in the Code;¹⁸
- the registered news business' eligibility to participate in the Code;¹⁹
- applies in relation to all – not just core or covered – news content;²⁰ and
- is not limited to specified types of treatment of this news content ie, applies to 'other process[es]' undertaken by the digital platform.²¹

In light of the above, News Corp Australia suggests that s 52W be amended to more accurately reflect the application explained in the Explanatory Materials.

5 Trade secrets

The Draft Code includes a trade secrets exception in two sections:

- **first**, the minimum standards are subject to a trade secrets exception in s 52V; and
- **second**, the information the bargaining parties can request from each other are subject to a trade secrets exception (s 52ZC(7)).

What would constitute a 'trade secret' in these contexts has not been defined in the Draft Code or the Explanatory Materials. News Corp Australia is concerned that the digital platforms will seek to rely on the trade secrets exception to justify not providing news businesses with information required by the minimum standards and the information request provisions or simply frustrate the process. It is particularly problematic that there will be no oversight of these provisions. Digital platforms could seek to characterise the information they would otherwise be required to provide as a 'trade secret' and elect not to provide it to news businesses on that basis.

News Corp Australia submits that it is not necessary to include a trade secret carveout. It is highly unlikely that the minimum standards or the information request provisions of the Draft Code would require digital platforms or news businesses to provide 'trade secrets' as that phrase is usually understood, but the intent of the Code could be frustrated by an expansive interpretation of 'trade secrets'. The Code legislation would not be invalidated for failure to include a carve out for trade secrets. This carveout may have been included because of a concern that the Draft Code could result in an acquisition of property (ie, trade secrets) otherwise than on just terms. However, News Corp Australia submits that there is no basis on which the legislation could be said to do this (because media organisations are not acquiring any property) and the legislation would in any case be read down to avoid invalidating the legislation in its entirety.

For these reasons, News Corp Australia proposes that the 'trade secrets' exceptions (ie, ss 52V and 52ZC(7)) be removed from the Draft Code.

¹⁷ Explanatory Materials, [1.99].

¹⁸ Explanatory Materials, [1.100].

¹⁹ Explanatory Materials, [1.100].

²⁰ Explanatory Materials, [1.102].

²¹ Explanatory Materials, [1.100].

6 Negotiation & final offer arbitration

6.1 Mediation

The Explanatory Materials state that the final Code will include a requirement for pre-arbitration mediation within the three-month bargaining period.²² This is alluded to in the Draft Code's requirement that the parties attend at least one day of mediation on the remuneration issue prior to commencing arbitration.²³ News Corp Australia believes this pre-FOA mediation is unnecessary and is likely to be counterproductive.

The Chair of the arbitral panel already has the power to order mediation on remuneration during the arbitration under s 52ZM of the Draft Code.

Including an additional pre-FOA mediation would be to mandate up to two sets of mediation on the same issue: remuneration for news content available on a designated digital platform service. This imposes an unnecessary expenditure of party resources.

The final Code should also make it clear that any mediation undertaken, either pursuant to the Code or voluntarily, must not result in an extension of the timeframes within which an agreement is to be entered, including the final offer arbitration process.

6.2 Notification of arbitration

The ACCC has indicated that it intends the final offer arbitration to only apply to current uses of news content by the digital platform services. While News Corp Australia is still of the view that it is possible for the final offer arbitration process to also deal with any disputed scope of current or future use of content requiring a copyright licence, it does not press this issue. Instead, News Corp Australia seeks explicit clarification in s 52ZF of the final Code that, absent agreement between the parties, the use of news content in relation to which final offers on remuneration are submitted is the *current use* of covered news content by the digital platform service.

- *Making available*: At its core, the final offer arbitration process seeks to ensure that digital platforms pay for use of news content. Accordingly, 'use' should replace 'making available' in the final Code. Not only is it clear and well-understood language in the news context, but it is also a more accurate representation of the value of news content to digital platforms. The potential scope of 'use' is the same for every news business, and is a broad term capturing the variety of ways in which digital platforms use news content in practice. By way of example, the Google News Publisher Agreement allows Google to 'use, copy, reproduce, store, display, distribute, adapt, communicate and make copies available' of news content.²⁴ This allows Google to make new content available to users, but also to use it in other ways, both for users (eg, snippets, headlines, images, caching) and for itself (eg, data mining and the training of algorithms). It is important that the final Code reflect these varied uses. This adjustment in language should be implemented wherever reference is made to the digital platform service 'making available' news

²² Explanatory Materials, [1.121].

²³ Draft Code, s 52ZF(2)(a).

²⁴ Google News Publisher Agreement as at 1 August 2019, available at <<https://www.google.com/producer/tos>>.

content: sub-ss 52M(2)(a)-(c), 52N(b), 52N(d), 52P(1)(b), 52Q(1)(b), 52R(d), 52U(d), 52Y(1), 52Y(6), 52ZF(1)(c), and 52ZO(1)(b).

- *Current use:* In order to reflect the ACCC's intention to restrict the remuneration issue to current use, the provision should specify that, for the purposes of determining the remuneration issue, 'use' is the digital platform service's current use of any registered news businesses' covered news content. The issue subject to negotiation/arbitration should be the current use by Google of any registered news business' covered news content, not merely the current use Google makes of a particular registered news business' covered news content at the time of negotiation/arbitration. Say a new or growing news business is seeking to begin supplying news online or expand its online offering. If s 52ZF(1) requires that the remuneration issue concern the digital platform's current use of that particular news business' content, it could unfairly limit that news business' ability to enter or grow its online presence.
- *Bargaining parties' flexibility:* Finally, to avoid doubt and give the bargaining parties appropriate flexibility, the provision should specify that nothing prevents the parties from agreeing to another or varied use of a registered news business' covered news content.

An amended s 52ZF(1)(c) is included in **Schedule 1**.

This proposed amendment simplifies the arbitral panel's task. If the bargaining parties disagree on the use of a news business' covered news content, their final offers will be presented on differing premises and will not be comparable. For the panel to choose one of the remuneration offers would inevitably involve a determination of which underlying usage is appropriate in any case. Absent any interlocutory steps,²⁵ the constraint of current use (unless the parties can agree otherwise) is the best alternative enabling the arbitral panel to properly compare the final offers.

6.3 Role of the ACCC and other parties

While the Draft Code does not appoint the ACCC as the arbitrator, News Corp Australia welcomes the ability of the ACCC to make submissions to the arbitral panel on the final offers of the bargaining parties.²⁶ However, in News Corp Australia's view, it would be preferable if the ACCC were *required* by the final Code to make submissions on both final offers (rather than it being optional for the ACCC to do so). The ACCC is best positioned to provide guidance to the arbitral panel based on its experience and knowledge of the news media and digital platform industries, and the bargaining imbalance that exists between news businesses and digital platforms.

Further, third-party input sought by the arbitral panel should be limited to the ACCC. The Explanatory Materials foreshadow the introduction of a provision that would allow the arbitral panel to seek input from '*any other party*' on the appropriateness of the final offers.²⁷ Such a

²⁵ As proposed in News Corp Australia's submissions dated 5 June 2020.

²⁶ Draft Code, s 52ZS.

²⁷ Explanatory Materials, [1.149].

provision would be contrary to the purpose of final offer arbitration, which tries to simplify the arbitration process as much as possible.

To allow any third-party submissions on the final offers, additional to the ACCC's, would likely also extend the process unnecessarily and jeopardise the speed and simplicity which would otherwise characterise the FOA process. The bargaining parties would need a right of reply, similar to the right extended to the parties to reply to the ACCC's submissions.²⁸ If this process were repeated for an uncertain and unlimited number of other third-party inputs requested by the arbitral panel, a time- and resource-consuming back-and-forth of submissions would arise. It would threaten to undermine what would otherwise be a very simple and fast arbitration process and create one more closely resembling conventional arbitration.

6.4 Matters to consider in arbitration

There is currently no express requirement for the arbitral panel to properly take into consideration the submissions of the bargaining parties and the ACCC as part of deciding on the remuneration issue. This should be added to the list of matters to consider in the arbitration in s 52ZP(2) of the Draft Code.

News Corp Australia also proposes some further changes to s 52ZP of the Draft Code, which are detailed in section 6.6 below.

6.5 Confidentiality of the negotiations, final offer and final offer arbitration

Since the Draft Code envisages bilateral negotiations between each of the platforms and the individual news businesses, we understand that the negotiations envisaged to take place under the Code, the agreement ultimately reached between the parties and the FOA process will be confidential as between the parties, the arbitrator(s) and the ACCC unless the parties otherwise agree. Since the arbitrator is required to decide between the final offers on the basis of matters which may be considered highly commercially and competitively sensitive to each party (eg, the costs of producing news, the indirect/direct benefit of news to the digital platform and the burden on commercial interests of digital platforms), it follows that the negotiation process, arbitration and ultimate agreement resulting from the negotiation or arbitration process will be confidential between the parties and there will be no obligations to make any component public. However, the Draft Code and the Explanatory Materials are currently silent in this regard. News Corp Australia therefore recommends that this should be explicitly outlined in the final Code. The narrow circumstances in which the arbitrator would apply 'public interest' considerations would not be sufficient in our view to force the process open or otherwise publicise aspects of the negotiation, agreement or arbitration under the Code.

6.6 Consistency and clarity

There are some provisions in Divisions 6 and 7 which would benefit from clarification.

First, the information and data required to be provided under s 52ZC(1)(a) of the Draft Code should be consistent with the arbitral panel's decision-making criteria under s 52ZP, specifying that the benefit is the direct and indirect benefit (whether monetary or otherwise), consistent

²⁸ Draft Code, s 52ZS(4)-(5).

with the decision-making criteria in s 52ZP. Consistency between the information request and the decision-making criteria will ensure that the bargaining parties' submissions to the arbitral panel can address these criteria, which may assist the arbitral panel in deciding between the parties' final offers.

Second, it should also be made clear in the criteria that the direct and indirect value or benefit to the digital platform is the *share of the collective* direct and indirect value or benefit, not just the *marginal* direct and indirect value or benefit, of the content of the individual news business that is negotiating or in arbitration with the digital platform. That is, the direct and indirect value or benefit is not the direct and indirect value to the digital platform of News Business A's content *in addition to* other news content from News Business B, C, etc. The economic concept of marginal value is not appropriate to apply in the news context, because to do so would re-introduce the bargaining leverage imbalance that the Code is designed to counter.

The **third** inconsistency similarly relates to the interplay between s 52ZC and s 52ZP. Section 52ZC(4) refers to the costs incurred in *creating* covered news content. In contrast, s 52ZP(2)(c) requires that the arbitral panel consider, among other things, the cost to the registered news business of *producing* covered news content.²⁹ The Explanatory Materials, in explaining s 52ZC, refer to the costs incurred in *providing* covered news content.

Reference to 'creation' in one provision and 'production' in another causes confusion and may result in the arbitral panel not having the information before it necessary to fulfil its mandate. In News Corp Australia's view, 'creation' is the better choice, as it focuses on those who create news content. However, even 'creation' does not encapsulate the entire process. Accordingly, the final Code should *also* take into account the costs of supplying covered news content. A considerable portion of the ACCC's DPI Final Report discussed the supply of news and journalistic content online, and the active participation of the digital platforms in this news ecosystem. This is a separate step from the creation of news content, and involves costs additional to the creation of news content. The ACCC should not refer only to 'supply' though, as such language would exclude the primary costs of creating news content.

Referring to both the *creation and supply* of news content reflects the true costs of news media production, and the extent to which news businesses and digital platforms interact.

Sections 52ZC and 52ZP should be consistent. To do this, reference should be made in both ss 52ZC and 52ZP to the costs of *creating and supplying* covered news content. This will ensure that the bargaining parties and arbitral panel have the same information on these costs, and that this information provides a holistic picture of the costs incurred by news media businesses in researching, writing, editing, producing and providing covered news content to digital platforms.

Fourth, sub-ss 52ZC(4) and (5) allow the digital platform to request information and data that is relevant to assessing the costs incurred by each represented registered news business in creating covered news content. However, this language appears to allow the platform to frame the information to be provided, and so is open to abuse by the digital platforms. This is because

²⁹ At para 1.2.

the request is not confined or limited by the language in the Draft Code, nor the Explanatory Materials. It seems open to the digital platform to make a very broad request, seeking information and data on various specific questions and issues. Not only would such requests impose undue costs on news businesses, they are not required for the digital platform to negotiate effectively.

To remedy this gap, News Corp Australia suggests that these two provisions be amended to instead require that news businesses '*must provide information and data that is relevant to assessing the costs incurred by each represented registered news business in creating and supplying covered news content, if requested by the digital platform.*' The aim should be that the platform does not frame what must be provided, but can simply request what the Code frames should be provided if requested. The ACCC may implement similar amendments to s52ZC(1)-(3), which relate to information requests made of the digital platforms.

Fifth, the Draft Code has relatively clear timeframes for compliance with the minimum standards and during the final offer arbitration. However, there is no timeframe imposed upon the bargaining parties in relation to information provided under s 52ZC. The final Code should include timeframes within which this information and data must be provided. News Corp considers 28 days to be a reasonable timeframe, considering the three month bargaining period. If the provision of information under s 52ZC is delayed, it risks frustrating the final offer arbitration process.

Sixth, News Corp Australia understands and accepts the need for the arbitral panel to choose an outcome that is in the public interest under sub-s 52ZO(5). However, it should be clearer that the application of s 52ZO(6), which specifies the manner in which the remuneration amount can be adjusted, is contingent only on the application of s 52ZO(5). The related nature of these two provisions is likely to be the intention of the current provisions, but should be drafted in a more explicit manner in the final version of the Code.

The **seventh** clarification issue also relates to the arbitral panel's adjustment of remuneration offers. Section 52ZO(6) of the Draft Code states that the arbitral panel may ascertain a final remuneration amount by adjusting one of the offers '*in a manner that results in that offer being in the public interest.*' The Explanatory Materials provide more detail on this public interest consideration, expressly stating that the adjustment must take into account '*the benefit that the digital platform service receives in relation to the news media content.*'³⁰ In News Corp Australia's view, this clarification of a core element of the arbitral panel's public interest consideration should be explicitly incorporated into the final Code, with reference to both direct and indirect benefits. This can be done by amending s 52ZO(6) to clarify the scope of the public interest consideration, and then tying this provision to s 52ZO(5).

Finally, the Draft Code provides little guidance on how an agreement is going to be entered into by the bargaining parties once the arbitral panel has made its determination. Section 52ZP(1) of the Draft Code requires that the arbitral panel ensure the terms for resolving the remuneration issue are compatible with the parties' obligations under sub-sections 52ZT(3) and (4). These sub-sections require that the bargaining parties make a written agreement incorporating the arbitral

³⁰ Explanatory Materials, [1.143].

panel's remuneration determination within 30 business days of the determination being delivered, and that this agreement provide the particular method in which this payment will be made. They provide guidance to the parties as to the timeframe and form of the agreement on remuneration. However, it is unclear how the arbitral panel is to take this into account, when making its determination. These sections would benefit from clarification.

7 Conclusion

The Draft Code is a significant step towards addressing the bargaining imbalance between news businesses and digital platforms. Adoption of the changes proposed in this submission would enable the final Code to better address this bargaining power imbalance.

News Corp Australia hopes that the submissions outlined above (and associated legislative proposals in **Schedule 1** below) help bolster the practical efficacy and workability of the final Code. In addition to clarifying and harmonising the provisions of the Draft Code, News Corp Australia's submissions reflect a recurring concern about whether some of the provisions actually address this core bargaining power imbalance. One change that is critical to the efficacy of the final Code is the application of the final offer arbitration provisions to all digital platform services. The final Code must include all digital platform services that use covered news content in the final offer arbitration process, otherwise the Code's capacity to address this bargaining imbalance will be severely constrained.

Schedule 1

Proposed changes to Code legislation

Section	Proposed changes
52A	<p>Core news content means content that:</p> <ul style="list-style-type: none"> (a) is created by a journalist; and (b) that records, investigates or explains issues that: <ul style="list-style-type: none"> (i) are of public significance for Australians; or (ii) are relevant in engaging Australians in public debate and in informing democratic decision-making; or (iii) relate to community and local events, including but not limited to sports news content. <p>...</p> <p>Designated digital platform service means a service that is specified as a designated digital platform service in a determination under section 52C.</p>
52C	<p>(1) The Treasurer may, by legislative instrument, make a determination that -(a) specifies a corporation that, either by itself or together with other corporations, operates or controls a digital platform, as a designated digital platform corporation. ; and</p> <p>(b) specifies one or more digital platform services of that designated digital platform corporation as designated digital platform services of the corporation.</p> <p>(2) In making the determination, the Treasurer must consider whether there is a significant bargaining imbalance between Australian news providers and the group comprised of the corporation and all of its related bodies corporate.</p> <p>(3) The determination is not invalid merely because of a failure by the Treasurer to comply with subsection (2).</p> <p>(4) In making the determination, the Treasurer may consider any reports or advice of the Commission.</p> <p>(5) The designation of a designated digital platform corporation includes all its related bodies corporate and successor entities.</p>
52E(1)	<p>(1) A corporation (the applicant corporation) may apply to the ACMA for:</p> <ul style="list-style-type: none"> (a) the registration of a news business; and (b) the de-registration of a news business; (c) the registration of the corporation as the registered news business corporation for the news business; and (d) the amendment of the registration of a registered news business.
52G	<p>For the purposes of paragraph 52E(1)(d), the requirement is that the annual revenue of the applicant corporation's annual revenue of the applicant corporation's (or if relevant, the entity into which the news business is consolidated) annual revenue, as set out in its annual accounts prepared in accordance with generally accepted accounting principles, exceeds {\$150,000}:</p> <ul style="list-style-type: none"> (a) for the most recent year for which there are such accounts; or (b) for at least 3 of the 5 most recent years for which there are such accounts.
52H	<p>(1) For the purposes of subparagraph 52E(1)(e)(i), the requirement is that each news source covered by subsection (2) has as a significant business activity the creation and supply online of creates, and publishes online, content that is predominantly core news content.</p> <p>(2) This subsection covers a news source if it is set out in the application (in accordance with paragraph 52D(2)(b)).</p>
52K(1)(b)	<p>(1) For the purposes of subparagraph 52E(1)(e)(iii), the requirement is that:</p> <p>...</p> <ul style="list-style-type: none"> (b) every news source covered by subsection (2) has editorial independence from the predominant subject matter subjects of its news coverage.

52M(2)(a)	<p>(2) This subsection covers the following information:</p> <p>(a) a list and explanation of the data that the digital platform service collects (whether or not it shares the data with the registered news business) about the registered news business' users through their engagement with covered news content used made available by the digital platform service;</p> <p>(aa) an explanation of how the digital platform service uses and creates value from the data referred to in subsection (1)(a);</p> <p>...</p>
52N	<p>(1) Subsection (2) applies if:</p> <p>(a) changes are planned to be made to an algorithm of the digital platform service or a new algorithm is planned to be introduced to a digital platform service; and</p> <p>(b) the changes or new additions are likely to result in a 15% or greater change in month-to-month referral traffic for at least 25% of news sources that are or form part of a registered news business have a significant effect on the ranking of the registered news business' in respect of covered news content used made available by the digital platform service.</p> <p>(2) The responsible digital platform corporation for the digital platform service must ensure that:</p> <p>(a) notice of the change is given to the registered news business corporation for the registered news business; and</p> <p>(b) the notice is given:</p> <p style="padding-left: 40px;">(i) unless subparagraph (ii) applies—at least 28 days before 32 the change is made; or</p> <p style="padding-left: 40px;">(ii) if the change relates to a matter of urgent public interest—no later than 48 hours after the change is made; and</p> <p>(c) the notice describes the change, and the effect mentioned in paragraph (1)(b), in terms that are readily comprehensible; and</p> <p>(d) the notice describes how the registered news business can minimise negative effects of the change on the ranking of its covered news content made available by the digital platform service.</p> <p>(3) In complying with subsection (2), the responsible digital platform corporation for the digital platform service must genuinely consider reasonable proposals from registered news business corporations in respect of the planned changes or new additions.</p> <p>Note: A defendant bears a legal burden in relation to proving the matters in this section (see section 13.4 of the Criminal Code).</p>
52T	<p>(1) The responsible digital platform corporation for the digital platform service must ensure that:</p> <p>(a) a proposal is developed to recognise the news articles containing the most recent previously unpublished material information on a news content topic original covered news content when ranking and displaying news content on the digital platform service; and</p> <p>(b) every registered news business corporation is consulted in developing that proposal; and</p> <p>(c) the proposal is published no later than 6 months after the first registration of a news business under section 52E.</p> <p>(2) The responsible digital platform corporation for the digital platform service must ensure that:</p> <p>(a) an annual updated proposal is developed to recognise the news articles containing the most recent previously unpublished material information on a news content topic original covered news content when ranking and displaying news content on the digital platform service; and</p> <p>(b) every registered news business corporation is consulted in developing that updated proposal before it is published; and</p> <p>(c) the updated proposal is published no later than 12 months after the later of:</p> <p style="padding-left: 40px;">(i) the day on which a proposal was published in accordance with subsection (1); or</p> <p style="padding-left: 40px;">(ii) the most recent day on which an updated proposal was 1 previously published in accordance with this subsection.</p>

Division 6	<p>A new section should be inserted specifying:</p> <p>Subject to an agreement between the bargaining parties to the contrary, all information shared between the parties and with the arbitral panel for the purposes of the bargaining process, arbitration, and any agreement(s) resulting from the bargaining or arbitration will be confidential between the parties.</p>
52V	<p>Nothing in this Division requires the giving of information the publication of which would reveal a trade secret.</p>
52W	<p>(1) The responsible digital platform corporation for a digital platform service must ensure that the supply of the digital platform service does not: in relation to crawling, indexing, ranking, displaying or presenting registered news businesses' news content:</p> <ul style="list-style-type: none"> (a) discriminate between registered news businesses, in relation to the application of this Part; or (b) discriminate between registered news businesses and news businesses that are not registered news businesses, (including news businesses that are ineligible or have chosen not to participate in parts or all of the Code), in relation to the application of this Part. <p>on the basis of their reliance or proposed reliance on any right or entitlement arising under the Code or their Code Agreement.</p> <p>(2) Subsection (1) applies to the crawling, indexing, ranking, display, presentation or any other process undertaken by the responsible digital platform corporation in relation to the registered news businesses' news content.</p>
52ZC	<p>(1) The bargaining news business corporation may request The responsible digital platform corporation must provide information and data relating to the digital platform service that is relevant to assessing the direct and indirect benefits (whether monetary or otherwise, and not limited to the marginal value) that the digital platform service receives from: to give it:</p> <ul style="list-style-type: none"> (a) covered news content of each represented registered news business; and (b) news content of every Australian news business. <p>(a) information and data relating to the digital platform service that is relevant to assessing the benefit that the digital platform service receives from covered news content of each represented registered news business; and</p> <p>(b) information and data relating to the digital platform service that is relevant to assessing the benefit that the digital platform service receives from news content of every Australian news business.</p> <p>(2) The bargaining news business corporation may request The responsible digital platform corporation must provide to give it information and data relating to the digital platform service that is relevant to assessing whether a payment in respect of the digital platform service in relation to the bargaining issues would place an undue burden on the commercial interests of the digital platform service.</p> <p>(3) The responsible digital platform corporation must comply with a request under subsection (1) or (2).</p> <p>(34) The responsible digital platform corporation may request The bargaining news business corporation must provide to give it information and data that is relevant to assessing the costs incurred by each represented registered news business in creating and supplying covered news content.</p> <p>(5) The bargaining news business corporation must comply with a request under subsection (4).</p> <p>(6) Information and data provided A request under subsection (1), (2) or (4) must:</p> <ul style="list-style-type: none"> (a) be made in writing; and (b) be provided within [28] days; and (c) if regulations made for the purposes of this paragraph specify other requirements—comply with those requirements. <p>(7) Nothing in this section requires the giving of information the publication of which would reveal a trade secret.</p>

52ZF(1)	<p>(1) This section applies if:</p> <p>(a) a notification has been made for the purposes of subsection 52Y(1); and</p> <p>(b) the digital platform service is a designated digital platform service; and</p> <p>(be) one of the bargaining issues (the remuneration issue) concerns the remuneration for the making available use of the registered news business' covered news content by the digital platform service.</p> <p>(i) 'Use' under subsection (1)(b) is the current use of any registered news businesses' covered news content by the digital platform service, including but not limited to the copying, reproducing, storing, displaying, distributing, adapting, communicating, caching, data mining and making copies available of covered news content.</p> <p>(ii) Nothing in subsection (1)(b) prevents the bargaining parties from agreeing to another use of the registered news business' covered news content by the digital platform service.</p>
52ZF(2)	<p>(2) Either of the bargaining parties may give a notice to the Commission that arbitration about the remuneration issue should start, if:</p> <p>(a) the bargaining parties have attended at least one day of mediation in relation to the remuneration issue; and</p> <p>(b) either:</p> <p>(a) the bargaining parties have not reached an agreement about terms for resolving the remuneration issue within 3 months after bargaining starts; or</p> <p>(b) the bargaining parties have agreed to arbitration about terms for resolving the remuneration issue no earlier than 10 business days after bargaining starts.</p>
52ZM	<p>(1) The Chair may direct the bargaining parties to attend mediation about the remuneration issue at any time after the arbitration starts. The bargaining parties must comply with the direction.</p> <p>(2) Nothing in this section allows the arbitration to extend beyond the timeframe specified in section 52ZQ(1).</p>
52ZO(6)	<p>(6) If the panel does not accept one of those final offers in accordance with subsection (5):</p> <p>(a) the panel # must ascertain the remuneration amount by adjusting one of those offers in a manner that results in that offer being in the public interest; and</p> <p>(b) the public interest test must include consideration of the direct and indirect benefits (whether monetary or otherwise) of the registered news business' covered news content to the digital platform service.</p>
52ZP(2)	<p>(2) In complying with subsection 52ZO(1), the panel must consider the following matters:</p> <p>(a) the direct benefit (whether monetary or otherwise, and not limited to the marginal value) of the registered news business' covered news content to the digital platform service;</p> <p>(b) the indirect benefit (whether monetary or otherwise, and not limited to the marginal value) of the registered news business' covered news content to the digital platform service;</p> <p>(c) the cost to the registered news business of producing creating and supplying covered news content;</p> <p>(d) whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform service;</p> <p>(e) the submissions of the bargaining parties made in accordance with section 52ZR; and</p> <p>(f) the submissions of the ACCC and any responding submissions of the bargaining parties made in accordance with section 52ZS.</p>
52ZS(1)	<p>(1) The Commission may must give to the panel a submission about both final offers, no later than 10 business days after the Commission has received both final offers (in accordance with paragraph 52ZO(2)(c)).</p>