



## Mandatory Bargaining Code of Conduct – Response to Concepts Paper

### 1. Introduction

Nine supports the establishment of a mechanism to compensate the creators of news content for the value which they have provided to digital platforms for many years, and continue to provide to those platforms. It is well recognised that:

- digital platforms, including Google and Facebook, generate significant traffic and significant value from the presence of news content;
- neither Google nor Facebook would be the ubiquitous platforms that they are without being embraced by domestic media publishers; and
- while the platforms may drive some traffic back to the creators of content, the value of this is not a sufficient reflection of the value which news content has created for the digital platforms and does not compensate the creators of this content for the substantial costs incurred in creating journalism.

The consequence of this is a real risk of under investment in journalism, which in turn will have significant negative impacts on all Australians, our institutions and our economy.

Nine is pleased that the Government has tasked the ACCC with developing a mandatory code for dealings between the digital platforms and Australian news businesses (**Code**), to address the bargaining power imbalances between those news businesses and digital platforms.

The outcome of this work by the ACCC should be a model which can be implemented immediately, which will result in a meaningful flow of revenue to the news businesses and so encourage investment in the creation of news content. This is achieved in the model proposed by implementing what is effectively a statutory licence to use short content such as snippets, headlines, links and thumbnails (**Short Content**) relating to relevant Australian News Content<sup>1</sup> in return for which the digital platforms bound by the Code (**Large Platforms**<sup>2</sup>) pay a fixed percentage of their advertising revenues. Those revenues are then distributed to relevant media organisations (**Eligible Media Organisations**<sup>3</sup>) by reference to the cost incurred by them in producing Australian News Content. A complementary negotiate/arbitrate structure is proposed in relation to longer extracts from, or full use of, Australian News Content (**Long Content**).

### 2. Consideration of options

In its Concepts Paper, the ACCC has proposed four different models for dealings between the platforms and media businesses. Nine prefers a combination of a collective licensing scheme and a negotiate/arbitrate, both effected through a mandatory code framework, to the other options discussed.

**Bilateral negotiations, mediation and arbitration** – as the ACCC has found that Facebook and Google have substantial bargaining power and substantial market power, it is inherently difficult for an Australian news business to negotiate with the platforms in a meaningful way. For that reason, it is important that any negotiations occur within a mandatory code framework which facilitates a fast and fair arbitration if agreement is not reached. Nine does not object to parties choosing to mediate, but is concerned to avoid this being a compulsory step in the process which could be used to delay and increase the cost of this process. Nine sees merit in the ACCC being the arbitrator given its grasp of

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<sup>1</sup> Defined in section 7

<sup>2</sup> Defined in section 4

<sup>3</sup> Defined in section 6

the underlying issues and proposed powers for the ACCC to obtain necessary information and documents to address information asymmetries.

**Collective bargaining** – Nine does not consider that a “pure” collective bargaining model would on its own be effective, but considers that collective bargaining may have a part to play in relation to the operation of the proposed negotiate/arbitrate framework. The interests of news businesses are diverse, as they span different modes of delivery (television, radio, print, digital), monetisation models (advertising supported, subscriber supported, publicly funded), content focus (national affairs, local affairs, business, entertainment, sport, celebrity), geographic regions (metropolitan and/or regional) and approach to journalism (in depth, investigative news and/or short, topical news). It may be challenging to find common ground to agree a basis for collective bargaining, given that diversity. There is also, still, the challenge of bargaining with the platforms, given the information asymmetry and substantial bargaining power of the platforms identified by the ACCC. The approach proposed allows flexibility to use collective bargaining where appropriate if Australian media businesses wish to do so, and to also apply a more individualised approach where this fits best.

**Collective boycott** – as identified by the ACCC, a collective boycott carries the real risk of damaging the news business and end users, thereby undermining the intended public policy outcome. This model would also open the way for the platforms to pick off individual news businesses through preferential terms, undermining any collective boycott. This approach is not endorsed by Nine.

**Collective licensing** – a collective licensing model, that provides a certain remuneration model for all news businesses and gives the digital platforms specific rights to use the news content, could be implemented promptly, giving all news businesses, regardless of their model of operations, certainty about their ability to receive fair remuneration for their work from the digital platforms. This could support the ability of Australian media businesses to continue investing in original news content and delivering the associated public benefits. Nine has embodied collective licensing concepts in the negotiate/arbitrate Code model below, consistently with the ACCC’s indication that it does not wish to change the Copyright Act.

### 3. Nine’s Proposal

#### a. Rationale

Nine has selected elements of the models canvassed by the ACCC in the Concepts Paper to reflect the key public policy objectives. Within the Code proposed by Nine:

- a fee referable to advertising revenues is obtained from Large Platforms in relation to Short Content, and is distributed by reference to investment in journalism to address the public interest concern to ensure that the Australian public receives quality news content. This is supported by value considerations as well, in that use of such Short Content is the means by which platforms typically extract advertising revenues which would otherwise go (and in the past did go) to the producers of original news content. As noted in the ACCC’s Concepts Paper, copyright law does not adequately cover use by platforms of such content; and
- a value based negotiate/arbitrate licensing model is used in relation to Long Content (in which copyright plainly subsists and for which a licence is required) in order to address the bargaining power and information imbalances which would otherwise produce unfair results (which would also be contrary to the public interest in ensuring ongoing adequate production of quality news content). This would be available only where an Eligible News Organisation wishes to negotiate terms with a Large Platform (but not where the Eligible News Organisation does not wish to licence Long Content to the Large Platform, given the relative bargaining positions of each party).

This approach has been taken for reasons including that:

- Access to Short Content by the Large Platforms has been, and continues to be, a substantial driver of business value for the Large Platforms. The quality of content which they have displayed, and so their acceptance in the market, has been enhanced by use of Short Content, for which they have incurred no costs. At the same time, the producers of that content have received little or no remuneration for the use of their content by the Large Platforms, while incurring the substantial costs required to produce this content; and

- Long Content interactions are generally more discretionary and bespoke. It is appropriate that there be latitude for negotiation and arbitration of results tailored to specific situations. Such content is also already the subject of copyright protection, which means that there is a clearer existing legal framework for payment of remuneration (albeit one which requires involvement of the ACCC to protect against anti-competitive behaviours).

## b. Core elements of the model

### Short Content

- Use of Short Content by a Large Platform should be governed by concepts similar to existing collective licensing models applicable to statutory licences. Large Platforms would receive a statutory entitlement to use Short Content associated with such Australian News Content (which would operate as a copyright licence if and to the extent one is required) (the **Australian Content Right**);
- Large Platforms would contribute a fixed amount based on a percentage of their advertising revenues to a fund in return for the Australian Content Right (the **Australian News Fund**);
- The Australian News Fund would then be distributed amongst Eligible Media Organisations using the approach described in section 9;
- This reflects the value of the content (original content is more valuable, and the ideas from it can readily be replicated elsewhere at a much lower cost), and also the positive externalities and public importance of ensuring that the Australian public has access to the results of genuine first-person reporting (which is expensive to produce);
- Disputes relating to the contributions to the fund or distributions from it would be resolved by way of arbitration by the ACCC.

### Long Content

- To avoid a “take it or leave it” situation for rights to display Long Content, there should be a negotiate/arbitrate model available to resolve an impasse as to licensing terms and ensure fair terms will apply, where an Eligible Media Organisation seeks to negotiate terms with a Large Platform.
- For example, in 2015 Apple launched its News app, which for the first time aggregated news content natively within the Apple operating system rather than linking directly to publishers’ own websites. The choice presented to publishers was to either participate in this environment on Apple’s terms, or lose exposure within the standard Apple operating system . The further introduction of Apple News+ in 2019 was also offered to publishers on “take it or leave it” standard global terms.

### General Provisions

- Anti-avoidance and non-discrimination provisions should be introduced to ensure that the public policy objective of giving Australians access to quality journalistic content is met. The Code should sit within a legislative framework that allows for swift and effective enforcement action to be taken by the ACCC or any media organisation that suffers loss or damage as a result of a contravention.
- There should be a positive duty for Large Platforms to provide reasonable access to Australian News Content from Eligible Media Organisations, as a way of avoiding Large Platforms reducing their use of Australian News Content and to achieve the public policy objectives of the Code.

## c. Collective Licensing model

Nine considers that appropriate remuneration for the Short Content should in the first instance be stipulated in the regulations enacting the Code so as to enable the Code to start operation quickly and effectively, given the challenging economic environment and a pressing need for the continuation of high quality, original journalism. There is precedent for this in other parts of the Competition and

Consumer Act 2010 (Cth) (**CCA**) where declarations and pricing for essential services under the telecommunications regime were set out prior to its inception.

Nine considers that this should result in an initial \$600m annual pool from contributions by Google and Facebook, based on 10% of revenue <sup>4</sup> (with that amount fixed as a floor for the initial term of the Code). This amount has been determined as a percentage of revenue of the platforms. This would then be revisited after 5 years in a review process to be conducted by the ACCC in accordance with criteria to be set out in the Code. If there are any concerns about the initial percentage figure remaining appropriate, there could be a subsequent adjustment process.

#### **d. Negotiate/Arbitrate model**

Nine favours the negotiate - arbitrate model for the Code, with the modifications required to enable the immediate establishment of a pool of funding to be distributed to Eligible Media Organisations for Short Content. This is an established methodology within the Australian competition law framework and one which appropriately balances commercial incentives with the need for certainty.

The objectives of the Code are to address the bargaining power and information imbalances that exist between Eligible News Organisations and Large Platforms. The negotiate-arbitrate model mitigates these risks while also promoting economically efficient outcomes by allowing the parties to initially engage in negotiations to reach a market outcome while also providing some leverage that there is an ultimate backstop should the parties be unable to agree.

### **4. Platforms and products**

Nine’s position is that any digital search platform, social media platform or other content aggregation platform with at least one million monthly active users in Australia should be covered by the Code (excluding any such entities which operate on an explicit not for profit basis) as a “Large Platform”. This is consistent with the threshold outlined in the ACCC’s Digital Platform Enquiry report (see eg pages 38, 41).

Consistent with the findings of the Digital Platforms Inquiry report, Nine agrees that initially at a minimum Google, Facebook and their relevant platform subsidiaries (including Instagram) should be captured by the Code. It will be important for group structures to be considered holistically to ensure that the Code cannot be avoided by way of particular entity structure models.

Once a new platform meets the threshold, the Code should specify how that platform then comes into the collective licensing regime set by the Code. This could include, for example, having the Code Administrator (or potentially the ACCC) determine the appropriate percentage of revenue to be contributed by that Code participant, in accordance with principles in the Code (assuming there is no better alternative way of measuring value at that time).

An alternative considered by Nine would be to have a revenue threshold for inclusion in the Code. However it is typical for technology businesses to rapidly grow their audience and market valuation prior to establishing large-scale revenue streams. Application of the Code to a new Large Platform should not be delayed until a minimum level of revenue is generated, as the platform is deriving value from the news content it uses, whether or not the platform is directly generating revenue from that.

Of the products and platforms listed in the Concepts Paper, Nine would allocate them as follows:

<b>Short Content</b>	<b>Long Content</b>
Google search results Google News Facebook News Feed Instagram Whatsapp	YouTube Facebook Watch Google AMP Articles in Facebook Instant Articles Google Assistant

<sup>4</sup> See section 8

## 5. Legal framework

The CCA has a number of existing provisions which can facilitate implementation and administration of Nine's proposal.

The existing Mandatory Code provisions in Part IVB of the CCA could be utilised for this purpose.

A new mandatory code could be given effect by way of a regulation under section 51AE of the CCA. This provides a broad scope of remedies for loss or damage similar to those available in respect of contraventions of Part IV (anti-competitive conduct) of the CCA with the exception of the criminal sanctions for hard core cartel conduct. In particular, in addition to an action by someone (such as an Eligible News Organisation) who has suffered loss or damage as a result of a contravention, the ACCC may seek an order for compensation of affected parties under s87 as well as injunctions under s80. The ACCC may also issue infringement notices (s51ACC) for less serious contraventions of industry codes, orders to redress loss or damage suffered by non-parties as a result of a contravention (s51ADB) and, importantly, has wide ranging investigative powers under s51ADD. These powers would apply in addition to the ACCC's s155 powers.

Nine proposes that the mandatory Code would contain the following key provisions:

- An overall objectives provision focussed on the public interest in ensuring that consumers receive Australian News Content from Eligible Media Organisations and on the positive externalities of supply of such content, together with other important public policy objectives such as ensuring participation in digital trade;
- A framework for declaring particular digital platforms or technology businesses to be subject to the Code, or to be no longer subject to it. This could be accomplished by including relevant criteria (such as number of users and advertising sales involvement) and a mechanism in the Code for the ACCC to make a declaration that a platform is included. The immediate inclusion of Google and Facebook (and their associated businesses) could be effected by way of a deeming provision in the regulation made by the Minister;
- The framework for payment of remuneration by the Large Platforms for use of Short Content and distribution of that remuneration as described in this submission;
- Power for the ACCC (or a Code Administrator) to determine the share received by each Eligible Media Organisation of the Australian News Fund into which licence fees are paid;
- A framework for periodic review of the remuneration payable by the Large Platforms and other terms of the collective licensing scheme;
- An obligation for Large Platforms to negotiate in good faith with Eligible Media Organisations for a specified period of time, for licences for Long Content (which is outside the collective licensing model); and
- Power for the ACCC to determine the terms of the licence of Long Content if the terms are not agreed within the negotiating period as specified above. In order to produce effective outcomes, any arbitrator will need to be both well-resourced and well-informed. Nine believes that the ACCC would be best able to perform this function, particularly given its previous experience with using this model. Part IIIA of the CCA, at Divisions II and III, already provides for a negotiate-arbitrate model in respect of declared services with the ACCC serving as arbitrator in respect of access disputes. In addition, the former provisions of Part XIC of the CCA also adopted this model within the telecommunications sector. The model has been successful in the electricity and gas sectors with the Australian Economic Regulator (**AER**) providing arbitration, as well as in the Rail and Airports industries.

Nine suggests that any negotiate-arbitrate model should provide:

- a mechanism for joinder of disputes or multilateral agreements where the Eligible News Organisations consent to this. This would maximize efficiency and minimise the costs for all parties to the action;
- decisions of the ACCC as arbitrator should not be subject to merits reviews (as is the case for the AER under s.44AIA of the CCA).

- strict timelines for submissions and decision making should be included;
- a set of criteria to guide the parties' negotiations and the arbitral decision making should be set out in the Code; and
- for an overarching policy objective much like the 'long term interests of end-users' test in the CCA but tailored to the particular objectives here of ensuring the provision of quality news and journalism.

Specific elements of the obligation to negotiate in good faith (derived from section 228 of the Fair Work Act) might include requirements in relation to authorised representatives of the parties:

- attending, and participating in, meetings at reasonable times;
- disclosing relevant information in a timely manner;
- responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- refraining from capricious or unfair conduct that undermines bargaining; and
- recognising and bargaining with the other bargaining representatives for the agreement.

## 6. What is an Eligible Media Organisation?

The ACCC identified in the Digital Platforms Inquiry Final Report (s6.3.1) that journalism must meet at least minimum levels of quality to be valuable to the public in Australia. Nine proposes that eligibility for funding should be restricted to organisations that submit themselves to public oversight of adherence to those minimum standards. This would include:

1. Members of the Australian Press Council;
2. Holders of a commercial TV broadcasting licence issued by the ACMA;
3. Holders of a commercial radio broadcasting licence issued by the ACMA;
4. Holders of a subscription TV broadcast licence issued by the ACMA;
5. Other organisations who are approved to participate by the ACCC, ACMA or the Code Administrator on the basis that they fulfil all of the following criteria:
  - a. Operate under the direction of Australian-based management;
  - b. Employ professional journalists (people with tertiary education or sufficient practical training in the field of news gathering/reporting) to create content primarily directed to an Australian audience;
  - c. Have demonstrated a commitment to presenting factual matters accurately, correcting material errors, presenting news fairly and impartially, and clearly distinguishing reporting from commentary and analysis; and
  - d. Are subject to an open and transparent system of oversight and responsibility for responding to complaints which is substantially equivalent to that of the ACMA or Press Council.
6. Ultimate parent companies of any of the above.

Nine does not consider that the ABC should be an Eligible Media Organisation, as it is entirely publicly funded, and so only benefits from having its content accessible via the Large Platforms. As SBS is partially publicly funded and partially funded through advertising, it should be treated as an Eligible Media Organisation, but its participation in the Australian News Fund should be pro rated according to the amount of revenue it generates from its commercial television and radio broadcast activities related to news compared to public funding received by SBS for news generation for television and radio broadcast.

## 7. What is “Australian News Content”?

Short Content includes:

- Headlines of news articles
- Hyperlinks to news content hosted on news’ media businesses’ own websites
- Short extracts or ‘snippets’ extracted from news content (which may be text, audio or video)
- Thumbnails (but not full sized copies) of images

Long Content includes substantial extracts from, and full copies of, Australian News Content (including articles, full-sized images, videos and other material).

Eligibility for funding for Short Content would be restricted to the elements of publications or programs of Eligible News Organisations that are:

- Governed by the standards and regulators which apply to Eligible News Organisations; and
- Produced primarily for an Australian audience.

Practically, that means:

- Most local editorial investment in print and digital publications would be covered, as they submit all non-advertising material to Press Council (or equivalent) oversight, but Australian-based correspondents or production desks producing content primarily for an overseas audience and overseas based news rooms which provide content for the Australian arm of a foreign owned publication would not;
- Programs considered to be News or Current Affairs by the relevant Code of Practice, as enforced by the ACMA, for television and radio would be covered; and
- Where a program has a mixed genre, such as *Today*, the broadcaster would need to determine the percentage of the program considered News/Current Affairs and covered by the relevant Code and that percentage of costs would be eligible. Alternatively, such programs could only claim for the costs which are directly attributable to news and current affairs.

## 8. Contributions to the Australian News Fund

### a. How is value measured?

The starting point for determining remuneration would quite commonly be a consideration of the value which the platforms obtain from use of the news content of news businesses. Nine recognises that there is a value exchange between the Large Platforms and Eligible News Organisations, that includes all of the elements considered by the ACCC in pages 11 to 13 of the Concepts Paper, including:

- Advertising revenue derived by Large Platforms (and the level of control over advertising which the platforms exercise is recognised by Nine as part of the value which the platform receives);
- Indirect value of advertising from increased use of the platform’s services due to the presence of news content;
- Collection of user data that can improve the platform’s targeting of advertising and the user experience;
- The traffic driven to the Eligible News Organisations as a result of being found via search or a news feed service; and
- The user data obtained by the Eligible News Organisations from the platforms.

Nine agrees with the ACCC that many of the direct and indirect benefits received by Large Platforms from running news content (including data, network effects, and brand benefits) and the negative consequences for Eligible News Organisations (including loss of data, adverse brand consequences, and loss of control over data) are difficult to measure and would require knowledge of a significant amount of information which is currently only held by the platforms.

Nine considers that appropriate remuneration should be determined simply by reference to a fixed percentage of revenue of each Large Platform. The revenue of the platforms should be based on objectively verifiable data relating to direct and indirect revenue of the platforms.

Determining the percentage to apply is less straightforward, given the lack of objective or verifiable information about the platform's use of news. However, it should take into account the potential impact on Eligible News Organisations of the Large Platforms' level of control. This applies to issues such as access to further data, control over advertising on the platforms, control over placement and prioritisation of news content, and different treatment of paywalled and free news content by the platforms.

## b. Basis for 10% of revenue contribution

Nine considers that its proposal of 10% of revenue is conservative. Nine estimates that combined annual advertising revenue for Google and Facebook in Australia is approximately \$6b, using data provided in the ACCC's Digital Platforms Inquiry report, the PwC Outlook 2019 market growth rates for internet advertising and Google Australia Pty Ltd's FY19 financial statements. This is set out in more detail below

### Nine's calculation of \$6bn Google and Facebook advertising revenue

\$b	2018	2019	2020	CY18 notes	CY19 notes	CY20 notes
Google total ad revenue	3.7	4.3	NQ	P62	Google Australia Pty Ltd FY19 financial statements	NA
Less: YouTube ad revenue	-0.2	NQ	NQ	Assumed 5% (P98: no firm other than FB has a market share >5%) of \$3.3m display market (P65)	NA	
Less: advertising provisional services	-0.4	NQ	NQ	Assumed 10% (P62: <10% ad revenue is from ad provisional services) of Google total ad revenue	NA	
<b>Google search and display (ex YT)</b>	<b>3.2</b>	<b>3.7</b>	<b>4.0</b>	<b>Calculation (sum of three rows above)</b>	<b>Calculation (sum of two rows below)</b>	
<i>Of which: Google display</i>	0.2	0.2	0.3	<i>Calculation (Google search and display (ex YT) less Google search)</i>	<i>Growth at Google Australia's ad revenue FY19 growth rate</i>	<i>Growth at PWC's CY20 display-non-video growth rate</i>
<i>Of which: Google search</i>	3.0	3.4	3.8	<i>80% * \$3.7b P62: ~80% of ad revenue from search ads</i>		
Facebook display	1.7	2.0	2.3	P62	Growth at PWC's CY19 and CY20 total display growth rates (includes video and non-video)	
<b>Total Google and Facebook search and display (ex YT)</b>	<b>4.9</b>	<b>5.7</b>	<b>6.4</b>	<b>Calculation (sum of Google search and Display (ex YT) and Facebook display)</b>		

Source: ACCC Digital Platforms Inquiry - final report; PwC Outlook 2019; Google Australia Pty Ltd FY19 financial statements

### PwC Outlook 2019 – internet advertising market growth rates

Growth %	2019	2020
Search	9%	10%
Display - video	25%	28%
Display - non video	11%	9%
Display	17%	17%
Classifieds	12%	13%
<b>Total</b>	<b>12%</b>	<b>13%</b>

Source: <https://www.pwc.com.au/industry/entertainment-and-media-trends-analysis/outlook/internet-advertising.html>

News content (broadly defined) supports roughly 10% of engagement in Google Search and Facebook Newsfeed.

- Google: 8-14% of search results (from the ACCC's Digital Platform Inquiry report). While not directly monetised, these contribute to the utility of Google's service which leads to direct monetisation opportunities.
- Facebook: Difficult to estimate precisely, but limited publicly available information suggests 4-10% which is directly monetised via News Feed advertising.

The ACCC (in the Digital Platform Inquiry report s5.2.2) cited a public post by Facebook from January 2018, which estimated that 4% of News Feed content is news. This should be treated with caution as there is no explanation of the methodology (including how news is defined), and it is a global estimate, with no reference to how Australia compares.

The 10% upper end of the range is based on an experiment by Harvard's Nieman Journalism Lab (<https://www.niemanlab.org/2017/12/how-much-news-makes-it-into-peoples-facebook-feeds-our-experiment-suggests-not-much/>). It is based on a 2017 sample of the proportion of News Feed content in the first 10 posts seen by 402 US adults. It is likely an under-estimate as news content also features beyond the first 10 posts.

Nine believes that the value of professionally produced news to Facebook is greater than its proportional presence in News Feed (justifying using the 10% upper end of the range) because:

- It is directly monetised by Facebook, in that it attracts people to News Feed and encourages them to spend more time there
- It delivers valuable data signals, which support Facebook's broader business model (e.g. indicates people's interests in travel / cars / entertainment)
- It supports perceptions of News Feed as a high-quality environment, which increases its appeal to premium advertisers

Based on this information, Nine proposes that 10% of revenue be contributed to the Australian News Fund initially by each Large News Platform. Care will need to be taken when formulating the wording of this formula to protect against avoidance and to ensure that direct and indirect revenue received within a relevant corporate group which is referable to advertising to Australian users (wherever in the world that advertising revenue is booked) is taken into account. Setting a fixed dollar amount (proposed as \$600 million) for the initial period as a floor on the contributions is a way of ensuring that the contributions cannot be gamed in the short to medium term.

## **9. Allocation of funding between Eligible News Organisations**

Nine proposes dividing the Australian News Fund into two pools to support different objectives:

1. Large commercial media (\$20m+ annual revenue driven by news) – 85% of funds
  - Recognises that these business create most nationally and locally significant news content.
  - Revenue includes advertising, subscriptions, retail circulation and retail contributions.
2. Community fund – 15% of funds
  - Designed to disproportionately support small local / regional publishers
  - Encourages news start-ups, by providing a base of funding which is calculated to reward investment in original journalism.

Individual Eligible News Organisations could opt out of participating in the Australian News Fund and pursue bilateral negotiations with the Large Platforms. The size of the Australian News Fund will then

need to be adjusted to reflect the share that would have gone to an Eligible News Organisations which has opted out.

Within those two pools, Nine supports allocation of funding according to investment in journalism, measured by expenditure on core journalism activities (see section 10).

Alternative allocation metrics (e.g. clicks or presence in search and Newsfeed; or total audience) are open to manipulation and incentivise the wrong investment (see table below).

Approach	Pros	Cons
By dollar investment in journalism	<ul style="list-style-type: none"> <li>● Incentivises large media businesses with established processes to extend coverage</li> <li>● Greatest support for companies investing in Public Interest Journalism, which is expensive</li> <li>● Difficult for publishers to game and cannot be gamed by platforms</li> </ul>	<ul style="list-style-type: none"> <li>● Relies on reporting of expenditure by publishers</li> <li>● Potential risk of rewarding 'wasteful' investment</li> </ul>
By clicks (or impressions) in search results and News Feed	<ul style="list-style-type: none"> <li>● Directly links to a measure of scale within digital platforms</li> </ul>	<ul style="list-style-type: none"> <li>● This method is most open to gaming</li> <li>● Incentivises investment in 'distribution optimisers' rather than journalists</li> <li>● Open to manipulation by platforms to favour particular publishers</li> </ul>
By overall audience	<ul style="list-style-type: none"> <li>● Links to a measure of scale in news</li> </ul>	<ul style="list-style-type: none"> <li>● Any measure of audience is open to gaming, e.g. through 'clickable' headlines and buying audience</li> <li>● Penalises publishers with business models not focused on scale (e.g. SMH/Age/AFR/The Australian) relative to those primarily focused on scale with less focus on quality output.</li> <li>● The most read / watched journalism is not necessarily the most valuable (based on ACCC's indicators of value)</li> </ul>
By advertising revenue	<ul style="list-style-type: none"> <li>● Links to presence in the market disrupted by Digital</li> </ul>	<ul style="list-style-type: none"> <li>● Advertising is linked to a number of factors unrelated to</li> </ul>

	Platforms	<p>the quality of journalism</p> <ul style="list-style-type: none"> <li>• Favours particular media over others (i.e. digital-only would be worst-off)</li> <li>• Unreasonably penalises media businesses pursuing non-advertising revenue streams linked directly to journalism (e.g. subscriptions)</li> </ul>
By volume of articles / videos	<ul style="list-style-type: none"> <li>• Used by ACCC to quantify impacts of cost-cutting in print media</li> </ul>	<ul style="list-style-type: none"> <li>• Quantity does not equate to quality - it is possible to 'churn' a large number of commodity stories while contributing little original knowledge</li> <li>• Open to gaming</li> <li>• Difficult to assess relative value of a text article vs video, also varying lengths and topics</li> </ul>

## 10. Investment in journalism

Nine proposes the following expenses be considered eligible investment for the purposes of participating in the Australian News Fund:

- The employment cost (comprising salaries, compulsory superannuation and other compulsory on-costs for full-time, part-time or casual employees, or the invoiced amount for contractors and commissioned contributors) of:
  - Journalists, content creators and producers such as camera operators, chiefs of staff, columnists, correspondents, data journalists, designers, editorial cartoonists, editors, illustrators, news directors, photographers, producers, reporters, sound recordists, sub-editors and writers;
  - Roles primarily employed to provide audience-facing design and development of eligible digital products or editorial tools for the production of journalism; and
  - Editorial counsel (internal or external) primarily employed to provide pre-publication legal advice and facilitate journalism (eg. by challenging suppression orders/ making freedom of information applications etc).

The following expenses are not included as eligible investment:

- Third-party news services;
- Post-publication legal costs;
- Travel and entertainment;
- Occupancy costs;
- Equipment costs;

- Studio, playout or transmission;
- Printing, distribution or hosting;
- Advertising, commercial or marketing;
- Payments for interviews; and
- Hair and make-up.

Each participant in the Australian News Fund would need to submit data to the administrator of the Code to substantiate their claim for participation on an annual basis.

Any Eligible News Organisation which has opted out of the Code in favour of bilateral negotiations will need to provide the same information to the Code Administrator to allow determination of the share they would have received, and so the consequential reduction in the size of the Australian News Fund.

## **11. Administration of the Code**

Nine envisages two levels of administration of the Code. The first is for an administrator, similar to a collecting society, to assess claims for participation in the Australian News Fund from Eligible News Organisations, gather data to verify funding to be contributed, receive funds payable by the Large Platforms, and determine the distribution of funds to the Eligible News Organisations. The Administrator could be the ACCC, but this may be more appropriate for an external body given the function would be largely data collection and administration.

The second role is for the ACCC. This will include:

- Carrying out a periodic review of the metrics in the collective licensing part of the Code, having regard to criteria to be set in the Code. This should include matters such as those which Nine has considered in reaching its proposal of 10% of revenue. Nine suggests that the 10% threshold be reviewed every 5 years. This time period has been selected to give all participants a fair period of time to see how the Code operates and to give Eligible News Organisations some level of assurance about funding being received;
- Carrying out periodic reviews of the Code to ensure it is still meeting the policy objectives for which it was established;
- Arbitration of disputes relating to licensing terms for Long Content; and
- Enforcement of the Code.

## **12. Enforcement and anti-avoidance**

Overseas experience shows that Large Platforms may take steps to avoid having to make payments under any new law. In particular:

- When a new publisher's right was introduced in France in similar terms to that proposed, Google responded by announcing just before the law was due to come into force (on 24 October 2019) that it would no longer display an overview of the content in France for European press publishers unless the publisher has made arrangements to indicate that it wanted this to occur. French publishers accepted Google's condition and granted free licences of their content to Google. This was found on 9 April 2020 by the French Competition Authority to be an abuse by Google of a dominant position in the relevant market.

- When a publisher’s right was introduced in Spain in 2014, Google withdrew their Google News product from that market. A study found that this resulted in a reduction in consumption of news content in that market.<sup>5</sup>

In the above circumstances, the following measures are recommended to ensure the policy objectives are met and to prevent Large Platforms from avoiding payment of licence fees in Australia:

- Introducing a positive obligation for Large Platforms to provide Australian users of their services with reasonable access to Australian News Content produced by Eligible Media Organisations. This obligation would sit most neatly in the Broadcasting Services Act 1992 (Cth) which already regulates the internet (Schedules 5 and 7), and is the means by which local content and news requirements and standards are imposed on broadcasters. That Act also already contains provisions directed at ensuring the quality and diversity of media content (see for example Schedule 1, which has traditionally had this role). Alternatively, this obligation could be included in the Code;
- Introducing strict obligations regarding the generation and retention of information that will allow regulators to properly assess compliance with the licensing scheme and with the Code and detect any attempt at avoidance;
- Introducing a prohibition on the Large Platforms taking any steps to improperly discriminate against any Eligible Media Organisation including by way of any algorithm. Improper discrimination would include discrimination based on the conduct of any Eligible Media Organisation in any negotiation or proceeding concerning any statutory licence or mandatory Code process, or participation in the Australian News Fund;
- Putting in place means to prevent Large Platforms from diverting Australian advertising revenues out of Australia so as to avoid compliance with the scheme or to minimise the cost of participating. Mechanisms to consider include:
  - (a) ensuring advertising revenues can be garnisheed or otherwise put towards payment of licence fees payable under the scheme; and/or
  - (b) identifying revenue generated outside Australia by a Large Platform which is referable to advertising placed by Australian businesses or directed to Australian audiences.

This could be implemented by way of drafting similar to the drafting of section 177DA of the *Income Tax Assessment Act 1936* (Cth).

## 13. Other issues

### a. Rights to access data

Nine does not consider that the Code needs to deal with a right to access data in a substantial way. Access to data is a relevant factor taken into account in setting the percentage of revenue which should be given to the Australian News Fund, but the precise value attributed to the data obtained by the Large Platforms or obtained by Eligible News Organisations from the Large Platforms cannot be determined given the lack of transparency about such matters.

Nine can generally access a reasonable amount of data about content consumption from the digital platforms. However, certain issues remain in relation to the use of data for advertising purposes. While this could be addressed in a Code, Nine does not want that issue to become a distraction to the core issue of equitable remuneration for Eligible News Organisations, and proposes that these issues be addressed through the ACCC’s Ad Tech Inquiry.

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<sup>5</sup> See *The Impact of Aggregators on Internet News Consumption* by Susan Athey, Markus Mobius and Jenő Pal, dated 11 January 2018, available on the Stanford Graduate School of Business website at <https://www.gsb.stanford.edu/faculty-research/working-papers/impact-news-aggregators-internet-news-consumption-case-localization>.

## **b. Algorithm changes**

Nine has concerns around the provision of notice of changes to algorithms by Large Platforms. While this is a worthy area to address, it is of secondary concern to the core issue of remuneration for Australian News Content. If it were to form part of a Code, it would be appropriate to include a materiality threshold around the likely impact of changes which require advance notification to Eligible News Organisations.

## **c. Prioritisation of news**

Under the remuneration structure proposed by Nine, all news content production by commercial news entities is treated equally, regardless of the business model which underpins it.

Google and Facebook's model is based on engagement, and therefore if certain media business models (e.g. paywalls) lead to less user engagement, it is not unreasonable for them to be less prominent in Google search results and Facebook News Feed. This is a factor publishers take into consideration in determining their business models.

Notwithstanding that, Google and Facebook should not be permitted to introduce mechanisms (e.g. mandatory first-click-free) that directly penalise subscription funded publishers.

The one requirement relating to prioritisation which Nine requests is that original content should be prioritised to avoid a scenario where free publishers copy the work of paywalled publishers and subsequently out-rank them in search results. This does not recognise or respect the investment in original journalism which the publisher has made, and which is the focus of the ACCC's inquiry.