

**SBS SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
(ACCC)
NEWS MEDIA BARGAINING CODE – DRAFT LEGISLATION
AUGUST 2020**

Key Points

- The Special Broadcasting Service Corporation (**SBS**) provides vital public interest journalism to Australian audiences, across television, radio and digital services.
- This content is unique, exploring and representing contemporary Australia through its multicultural, Indigenous, and multilingual communities, as well as providing insight and analysis of international news.
- SBS has provided essential news, information and analysis throughout the COVID-19 crisis, and will continue to ensure that its news and journalistic content responds to change during the next stages of recovery; promoting social cohesion among our many communities, supporting economic and cultural participation for non-English speakers, and by fostering Australia's multilingual capacity.
- SBS is not fully funded by Government. Current operations and service levels are dependent on additional revenue sources.
- Consequently, SBS is commercially exposed to the advertising market and should be remunerated for the use of its news content on digital platforms, including through negotiations facilitated by the Mandatory Bargaining Code for News Media and Digital Platforms (the **Code**). The participation of SBS in the remuneration aspects of the Code will support the production of quality, trusted, public interest journalism for Australians.
- The 'minimum standards' provided under the draft Code provide significant advancements for news media businesses and their relationships with the digital platforms.
- Further opportunities exist for enhancement of these minimum standards, including: more detailed information to be provided during notice of algorithm changes, changes to news display, and changes to advertising display; as well as moderation tools which provide greater flexibility to news media businesses to manage their legal risk.
- Further consideration and detail should be provided regarding legal requirements on news media businesses; non-discrimination requirements, and the definition of news content.
- In assessing the eligibility for news media businesses to register under the Code, the SBS Codes of Practice should be explicitly noted as meeting the 'Professional Standards Test'.

Introduction

The Special Broadcasting Service Corporation (**SBS**) appreciates the opportunity to comment on the draft Code as set out in the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (the **Bill**). This follows extensive engagement with the ACCC throughout the Digital Platforms Inquiry Process, and in relation to the ACCC's Concepts Paper released in advance of the Bill.

The SBS Charter, contained in Section 6 of the *Special Broadcasting Service Act 1991*, states that '[t]he principal function of the SBS is to provide multilingual and multicultural broadcasting and digital media services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society.'¹

In 2020, SBS television marks 40 years of broadcasts and SBS Radio 45 years. SBS has a long legacy of ensuring that news and information is available to Australia's multicultural, Indigenous and multilingual communities. These services are more relevant now than ever before.

For example, SBS is playing a critical role in reaching all Australians with vital public health information during the COVID-19 crisis, through multiplatform services in English and in more than 60 other languages.

SBS television and digital news services, including programs such as *SBS World News* and NITV's *News Nula*, provide daily comprehensive coverage on the impact of the crisis in Australia and across the globe—including numerous live crosses to countries most heavily impacted by the virus—particularly focussing on the home territories of many of our largest migrant communities.

This news is extensively shared and accessed by audiences online through the services provided by major digital platforms, as is the news in languages other than English generated by SBS Radio. In an era of concern about the proliferation of misinformation and other unreliable news online, SBS's high quality news and information outputs, provided in a broad range of languages, deliver significant value to the major digital platforms by providing their users with news they can trust.

SBS has seen significant increases in audiences across its radio and online audio services, television news and On Demand services, particularly during the peak of the COVID-19 crisis in April this year. This demonstrates the need for, and the value placed on, SBS services by Australian audiences, both during COVID-19, and as the country recovers from the crisis.

Eligibility for remuneration under the Draft Code

The *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 – Exposure Draft Explanatory Materials* (the **Explanatory Memorandum**) states that the Bill '...excludes [ABC and SBS] from accessing the bargaining provisions in relation to remuneration under the Code. This is appropriate because advertising revenue is not the principal source of funding for public broadcasters'.²

As a hybrid funded public broadcaster, SBS is commercially exposed, generating income from advertising and other commercial activities, in contrast to the ABC which does not carry advertising.

While not SBS's principal source of funding, the levels of commercial revenue (and exposure) are material, and essential to the services that SBS currently provides to the Australian community. Should the Code seek to address the loss by commercial media organisations of advertising revenue to less regulated digital platforms which do not

¹ <https://www.sbs.com.au/aboutus/sbs-charter>

² Explanatory Memorandum, page 5

provide public interest journalism, there is a clear argument to also include SBS in the remuneration framework established under the Code on this basis.³

However, the better view is that SBS should be included in the remuneration framework in recognition of the value to the digital platforms of the trusted news content it provides. To the extent that SBS does receive public funding, the exclusion of SBS from the remuneration aspects of the Code will effectively result in the Australian public subsidising Facebook and Google, by providing these digital platforms with highly valued SBS news content at no cost.

SBS should be fully included in the remuneration framework, not just to the extent of its commercial exposure.⁴ That is, the current commercial exposure of SBS should not be a limiting factor under the Code – SBS should be fully included in remuneration bargaining under the Code, in recognition of the value of its news and other journalistic content.

This view is supported by the Explanatory Memorandum, which outlines the factors which the arbitration panel established under the Code must consider in deciding on which of the bargaining offers made by a news media organisation and a digital platform to accept. These factors do not include the advertising revenue of news media businesses – instead, they emphasise benefit or value provided to digital platforms by news content. They cover:

- The direct benefit (whether monetary or otherwise) of the registered news business' covered news content to the digital platform service;
- The indirect benefit (whether monetary or otherwise) of the registered news business' covered news content to the digital platform service;
- The cost to the registered news business of producing covered news content; and
- Whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform service.⁵

SBS should therefore be able to engage and participate fully in the remuneration aspects of the Code, using the above factors as guidance on bargaining with the digital platforms.

Support for public broadcasting

The participation of SBS in the remuneration aspects of the Code will support the production of quality, trusted, public interest journalism by SBS. In the *Digital Platforms Inquiry – Final Report*, the ACCC recommended '...stable and adequate funding for the public broadcasters...in recognition of their role in addressing the risk of under-provision of public interest journalism that generates broad benefits to society'.⁶ Providing SBS with the ability to negotiate, and participate in arbitration, on remuneration within the Code framework would support the financial viability of SBS, and its ability to continue to provide distinctive, high quality news, information and analysis for Australian audiences.

³ Indeed, some support has been given for SBS to be eligible for remuneration under the Draft Code to the extent of its commercial exposure.

⁴ Section 57(e) of the *Special Broadcasting Service Act 1991* (the **SBS Act**) notes that '[t]he money of the SBS consists of...the proceeds of the sale or other disposition of any property of the SBS (including programs and rights or interests in programs)'. SBS is therefore able to earn revenue from the sale or licensing of its content and should not be precluded doing so under the Code.

⁵ Explanatory Memorandum, page 25

⁶ Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report*, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>, page 33

Non-discrimination requirements

Exclusion of public broadcasters from the Code may result in unintended consequences where the digital platforms prioritise news content from the ABC and SBS. This is because the absence of remuneration requirements for public broadcasters will incentivise the platforms to make that content more prominent and accessible than the content of commercial news businesses. This would in turn, limit commercial news media businesses' capacity to generate revenue.

Notwithstanding the non-discrimination requirements of the Code, which are designed to prevent this outcome, there are significant challenges in assessing the reasons behind algorithm changes. It may not be practicable to judge digital platforms' news prioritisation decisions under the non-discrimination requirements. Inclusion of the public broadcasters within the remuneration aspects of the Code would therefore create a more level playing field among Australian news media businesses.

Impacts of exclusion on agreements outside of the Code framework

SBS has previously entered into commercial agreements with the digital platforms for the provision of content.

Should SBS be excluded from the remuneration aspects of the Code, it is likely that digital platforms would be disinclined to make similar agreements in future. Should this occur, SBS will effectively lose revenue which it was previously able to negotiate as part of bi-lateral arrangements with the digital platforms.

Expansion of minimum standards

The minimum standards identified under the Code are of particular importance to SBS's ongoing arrangements with the digital platforms, and its ability to effectively manage its content and engagement with audiences. These minimum standards should apply to all services of the digital platforms, including YouTube, which is not listed as a designated digital platform service under the Code.⁷

Algorithmic ranking of news

The requirement for digital platforms to provide 28 days' advance notice of changes to algorithms is a positive development. The Explanatory Memorandum states that 'It]his notice must describe the change and effect on referral traffic in a way that is readily comprehensible and must describe how a registered news business can minimise the effects of the change on the ranking of its news content.'⁸

Additionally, it would be important for news media businesses to also be informed of the intent of the change, which will assist the assessment of potential responses to the change. A similar provision should be applied to the display of news content and display of advertising.

Where significant changes to SBS services and platforms would need to be made in order to manage the change, a longer notification period (90 days) would be preferred. At minimum, the notice should be sufficiently detailed to enable news media businesses to re-engineer their services and platforms to address the change, if required.

It may be appropriate for the Code to provide for consultation between digital platforms and news media organisations on the development of guidelines for the content of notices, and materiality thresholds for notices. This consultation mechanism would be

⁷ Explanatory Memorandum, page 9

⁸ Explanatory Memorandum, page 16

consistent with the requirement for digital platforms to consult with news media organisations on proposals to appropriately recognise original news content. The ACMA could be given a role in overseeing both processes.

Display of news content

The Explanatory Memorandum states that '[t]he final code will also 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 (for example, displaying clear branding of mastheads).⁹

This requirement should also include responsibility for marking and removing misuse of news media business' brands – where these purport to be a genuine use of the brand, but are created by unofficial accounts.

User comments

News media organisations have recently become subject to increased legal risk regarding user generated content (for example, comments on social media posts)¹⁰, which means the ability to manage these features is increasingly important.

As outlined in the Explanatory Memorandum, the following minimum standards in relation to user comments will apply: 'remove or filter user comments; disable entirely the making of user comments; block user comments by particular users and accounts, in particular circumstances'.¹¹ These tools will make a significant difference to news media organisations, however, they should be further expanded by including in section 52S of the Bill:

- the ability to switch to pre-moderation, so page owners can go through a queue of unpublished comments and approve what goes live;
- the ability to set a specified timeframe after publication for users' comments, before closing the comments;
- the ability to moderate fragments of posts; and
- the ability to pause live video comments.

Consideration should also be given to managing offensive or inappropriate comments that are made through images or memes. These cannot currently be detected by algorithms, which leaves news media businesses at risk.

The Code should make provision for future specification of other moderation tools that news media organisations can request so that the framework can keep pace with changes to the digital platforms' services over time.

This could be achieved by providing a power to make regulations to specify further tools (by extension of the power in subsection 52S(3) of the Bill to make regulations, which is currently limited to the power to specify requirements for a request from a news media organisation to a digital platform).

⁹ Explanatory Memorandum, page 17

¹⁰ <https://www.sbs.com.au/news/australian-media-companies-lose-dylan-voller-facebook-defamation-appeal>

¹¹ Explanatory Memorandum, page 18

Legal requirements

Further to the legal risks noted in relation to user comments, and as noted in SBS's submission to the Concepts Paper¹², news media businesses are exposed to a number of legal risks related to the publication and removal of content on their platforms as well as on third party platforms on which their content is available. Where this content is made available on third party digital platforms, such as those operated by Facebook and Google, these platforms should commit to the enforcement of content removal for legal reasons, and the Code should provide a framework to require such removal. This may include, but is not limited to:

- defamatory content;
- content that may be considered in contempt of court; or
- content that is subject to suppression orders.

This requirement may be amended where undertakings and contractual commitments have been made under separate agreement.

Non-discrimination requirements

As outlined in the Code, the non-discrimination requirements aim to ensure that a digital platform does not '...discriminate in relation to the application of the code between registered news businesses; or registered news businesses and non-registered news businesses'.¹³ It is recommended that 'stress testing' be undertaken of these requirements, to ensure that there are no unintended consequences which unreasonably impact legitimate agreements reached between digital platforms and news media businesses.

For example, it would be important to have clarity on how commercial agreements made between news media businesses and digital platforms outside of the Code would be impacted by these requirements.

Registering with the Australian Communications and Media Authority (ACMA)

Under the Code, SBS will be required to register with the ACMA as a news media business to benefit from its minimum standards (and, as set out above, in order to benefit from the remuneration framework in which SBS should also be included).

The 'professional standards test', which SBS must meet, in order to be registered, includes the requirement to have '...editorial independence from the subjects of its news coverage and is subject to a professional standard or code'¹⁴.

The professional standards/codes listed in the Draft Code include: rules of the Australian Press Council or the Independent Media Council; the rules of the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice; or 'substantially equivalent internal editorial standards relating to the provision of quality journalism'¹⁵. The SBS Codes of Practice should be added to this list in section 52K of the Bill, given these codes are central to maintaining the high levels of trust and value placed in SBS's news and journalistic content and are enforceable by the ACMA.

¹² SBS submission to the Australian Competition and Consumer Commission Mandatory News Bargaining Code – Concepts Paper (June 2020)

https://www.sbs.com.au/aboutus/sites/sbs.com.au/aboutus/files/sbs_submission_-_mandatory_news_bargaining_code_-_june_2020.pdf page 11

¹³ Explanatory Memorandum, page 20

¹⁴ Explanatory Memorandum, page 12

¹⁵ Explanatory Memorandum, page 12

Definition of news content

The definition of 'core news content'¹⁶ and 'covered news content'¹⁷, should be interpreted sufficiently broadly to include content which examine issues of public significance to Australians, but may not be produced by a journalist (noting the evolution of news content production).

Additionally, it would be important to ensure that content which provides information and analysis to assist civic participation, such as the SBS Settlement Guide – which assists new migrants settling in Australia with trusted information in 63 languages–would be included under the definition of 'news content'. Content which is provided by contributors, exploring current topics of interest to Australian audiences, such as *SBS Voices*, should also be covered by this definition.

'Covered news content' should be defined by the news source, not by each individual content piece. This will allow flexibility in application of the minimum standards. The definition of 'news content' should capture English, as well as language other than English content, in all cases.

Should the identification of 'news content' for the purposes of the Code continue to be by reference to its 'creation by a journalist', then the definition of 'journalist' should be appropriately flexible, noting that there are a number of avenues which people may come to the profession, including through cadetships, on the job training, and in the case of many SBS employees, overseas qualifications or experience. It is recommended that a measure such as adherence to professional standards/codes should be the key factor in considering the definition of 'journalist' (for example in a manner similar to the exemption at subs 7B(4) of the *Privacy Act 1988* (Cth)).

¹⁶ Explanatory Memorandum, page 11

¹⁷ Explanatory Memorandum, page 14