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Australian Competition and Consumer Commission (ACCC)
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By email: bargainingcode@acc.gov.au

Draft news media bargaining code

Dear Commission

We welcome the opportunity to contribute to the public consultation in related to the draft news media bargaining code ('Code') released on 31 July 2020. We have focused on the issues flagged for feedback in the Code as well as the draft legislation, however we have also revisited the Concepts Paper for certain issues released on 19 May 2020. The views contained within this submission are our own and in no way seek to represent the opinions of our employers or the Australian National University (ANU).

We are aware of the advanced stage of the process, with draft legislation and Explanatory Memorandum already having been released. As such, we have focused on relatively small changes that can improve the Code and avoid unforeseen issues. Our recommendations are focused on key issues around eligibility and the bargaining process, areas which we feel we can provide guidance on based on our experiences and knowledge of the industry. We are broadly in agreement with areas not covered by this submission.

We are happy to clarify and elaborate on any of our recommendations.

Sincerely

Karan Dhamija

Surend Dayal

About Us

Karan Dhamija

Karan is an Associate at a leading strategy consulting firm and was formerly researching media and consumer technology industries. He has previously worked at Minter Ellison, Australian Mission to the UN, New York, and with multiple front bench parliamentarians.

Surend Dayal

Surend is a Senior Lecturer in IT Law and AI Law at the Australian National University and CEO of Magia Solutions. Prior to joining Magia, Surend was responsible for Oracle's Public Sector business in ANZ. He sold his previous company RuleBurst/Haley which came from research at the ANU to Oracle in 2009.

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List of Recommendations

Recommendation 1: Requirement that publications operate predominantly in Australia for the dominant purpose of serving Australians be removed or international publications with significant Australian audience be exempt.

Recommendation 2: The minimum revenue threshold of \$150,000 for eligibility be removed or reduced.

Recommendation 3: Special Broadcasting Service (SBS) be allowed to seek remuneration through bargaining. Consider including the Australian Broadcasting Corporation (ABC).

Recommendation 4: Minimum standards should not apply to content that is not 'core news' for eligible publications, or minimum standards be extended to publications that are primarily non-core news.

Recommendation 5: A basic set of terms be set by either an independent arbitrator, ACCC or ACMA for small publishers to opt into, with a hard revenue cap for eligibility. Alternatively, new publishers be allowed to enter into existing collective agreements.

Eligibility

International Publications

The Code also mandates the publication to be operating predominantly in Australia and with the dominant purpose of serving Australian audiences (EM 1.17). We believe this is inconsistent with current media habits and not reflective of the sources Australians seek for their news and information, especially world events.

We understand some organisations who have setup standalone publications—such as Guardian Australia—would satisfy the requirements. However, it would discount international publications which have cultivated large audiences in Australia, have invested resources in Australia, and cover issues in Australia. The most well-known example is The New York Times, which has permanent staff based in Australia and produces content for both Australians and international audiences. They have put on events with visiting journalists, have active interaction with Australian audiences, and while they have not disclosed subscribers and readers by country, promised to invest US\$50 million in priority international markets such as Canada, UK and Australia in 2017. Australia is currently their fastest growing market for subscribers, and the NYT is the fastest growing subscriber-based publication in the world.¹ They have also broken well-known stories in Australia and have an Australia-specific newsletter. If The New York Times is covering issues that are consistent with the aims—both coverage of local and international issues—there is no reason why they should not be able to benefit from their Australian audiences, which would be larger than most Australian publications themselves.

Similarly, other reputed global news outlets have considerable audiences in Australia and rely on digital advertising as part of their revenue mix. BBC News had just under 8 million unique visitors from Australia this past March (BBC has advertising outside the UK).² BBC Global listed the resources devoted to producing news content for Australian audiences extensively in their submission to the Concepts Paper consultation.³ There is no shortage of other similar examples.

We understand some international digital publications have Australian versions in partnership with domestic publishers. This includes G/O Media properties, such as Lifehacker and Gizmodo, and Business Insider with Pedestrian Group, a subsidiary of Nine. But it is unclear if this would leave publishers such as Verizon Media and their properties like The Huffington Post and Yahoo News outside the coverage.

¹ Shan Wang, 'As The New York Times extends its reach across countries (and languages and cultures), it looks to locals for guidance' on *Nieman Lab* (2 July 2018) <<https://www.niemanlab.org/2018/07/as-the-new-york-times-extends-its-reach-across-countries-and-languages-and-cultures-it-looks-to-locals-for-guidance/>>.

² BBC Global, Submission to ACCC, *News Media Bargaining Code Concepts Paper*, 4 June 2020, 1.

³ *Ibid.*

We believe there is no valid reason why international news publications which are used by Australians as part of their news appetite and satisfy all other requirements should not be covered. They should be able to benefit from both the minimum platform requirements and remuneration if they choose to when their content is accessed on these platforms from Australia.

Recommendation 1: Requirement that publications operate predominantly in Australia for the dominant purpose of serving Australians be removed or international publications with significant Australian audience be exempt.

Revenue Threshold

We understand the impetus behind a revenue threshold of \$150,000 (EM 1.18) as the key focus of this initiative is to support professional news organisations producing journalism on significant public issues. However, the availability of affordable, off-the-shelf publishing tools, and the flourishing of single-person publications means it is not inherently guaranteed that all publications the Code is directed at would easily meet this threshold. While we have not seen the rise of independent newsletter-based community and single-issue journalism in Australia flourish to the same degree as overseas yet, there are ample examples in the US and Canada with those characteristics. Furthermore, initiatives such as Indiegaf in Canada mean small regional communities can have weekly or fortnightly digital publications running on small budgets, usually run by journalists with previous experience in local communities.⁴

Similarly, the proliferation of single-issue publications based on platforms such as Substack means the cost of publishing is remarkably low and have allowed single-issue publications to flourish. Often, these are writers whose subjects are too specialised for general-interest publications, but with an audience large enough to fund a publication. Popular examples of this include Bill Bishop and Andrew Sullivan with global audiences, and there are Australian publications focused on migration issues, energy industry and government transparency. It is not hard to imagine a journalist running a single-issue or community-focused publication easily for revenue below the threshold.

Furthermore, the revenue threshold would also stop new publications from being able to benefit from an audience straight away and would put them at a competitive disadvantage to larger publishers establishing new verticals or brands. It is common in Australia for major publishers to establish new verticals and digital-only regional news sites,⁵ with both News Corp and Nine being publishers for multiple brands. Encouraging media diversity is

⁴ Sarah Scire, 'Indiegaf aims to reimagine the newspaper chain for digital news outlets' on *Nieman Lab* (27 May 2020) <<https://www.niemanlab.org/2020/05/indiegaf-a-new-network-for-indie-publications-wants-to-make-it-easy-to-launch-self-sustaining-digital-news-outlets/>>.

⁵ Lily Vitorovich 'News Corp to launch 50 digital-only local titles over three years', *The Australia* (online), 13 July 2020 <<https://www.theaustralian.com.au/business/media/news-corp-to-launch-50-digital-only-local-titles-over-three-years/news-story/16af84cd02cb5b0aa3d80ffb9fa9e1a2>>.

an aim of this Code and it would be unfortunate if an inadvertent effect of the Code would be to entrench the current concentration in the media industry. We further explore how new publications can be included in the bargaining process in the Bargaining section.

The revenue requirement also disadvantages volunteer publications that meet all other requirements. Numerous student-run publications around Australia have significant audiences and cover issues and communities lacking other forms of coverage. They also teach digital publication skills that those students later use at established and upstart publications. From our previous experience in relation to student publication budgets, only one or two publications would have revenues over the \$150,000 threshold. Even those publications would only be marginally above it. If they have the audiences that other publications have, and cover valuable topics, there is no reason to stop them from benefiting from this initiative.

We believe the other requirements for eligibility in the draft code, such as ‘core news’, editorial standards, and independence adequately delineate the types of publications that should be part of the Code and satisfy the aims without disadvantaging small, new, and student publications. A revenue threshold—especially one that does not represent how much it costs to run a digital publication—could have unintended consequences of discouraging media diversity and innovation. At best, it would give a significant advantage to large publishers who might want to launch brands catering to those niche communities over upstarts.

Recommendation 2: The minimum revenue threshold of \$150,000 for eligibility be removed or reduced.

Public Broadcaster Exemption

The Code does not allow ABC and SBS to be remunerated—though still benefiting from minimum requirements on platforms—on the basis that they do not seek advertising revenue and are primarily government funded. While this may be the case for the ABC, advertising revenue makes up approximately 25% of SBS’ revenue, and it has itself talked about the effect of digital platforms on its advertising revenue in a previous submission to the ACCC.⁶ The SBS On Demand platform is especially susceptible for the same forces that impact other news organisations. The reasons why the Code is being established and the negative effects on revenue that other publishers have are equally applicable to SBS. There is no reason why it should be excluded. While it does receive government funding, advertising comprises of a significant share of its revenue mix which goes onto fund news coverage.

Furthermore, digital platforms have the same benefit from ABC content as they do with all the other news publishers—benefits which have been detailed in ACCC digital platforms

⁶ Special Broadcasting Service, Submission to ACCC, *Digital Platforms Inquiry – Issues Paper*, April 2018.

enquiry and subsequent reports. Arguably, the ABC should be remunerated for that commercial benefit even if it does not have the same negative impact due to lack of advertising revenue.

Recommendation 3: Special Broadcasting Service (SBS) be allowed to seek remuneration through bargaining. Consider including the Australian Broadcasting Corporation (ABC).

Non-Core News Coverage

While it is understandable why the Code and remuneration are limited to sources that produce mainly 'core news' and not areas such as sports and entertainment reporting, the distinction that allows those outlets to then include other areas products creates an artificial advantage in the market. Numerous publishers compete with specialist publications and blogs in areas of sports and entertainment reporting. Many of those specialist publications are primarily advertiser funded. In the sports field, independent websites such The Roar and broadcaster-linked ones such FoxSports.com.au and ESPN Australia compete with the sports sections of the major news websites published by Nine and News Corp—and new brands they have launched—but would have a structural disadvantage under the Code. Internationally, publications such Bleacher Reports, Barstool Sports and Deadline have established themselves as credible digital publishers in the sports and entertainment fields. The larger publishers would have access to minimum requirements from the digital platforms while the specialist publications would not.

Due to the nature of sports and entertainment reporting, it is an area which has benefited from new outlets. The costs of reporting are lower, and the quantity of readers makes the advertising business model more plausible. For the same reasons, large publishers have invested in new brands and verticals based on the same business model. While the Code is not aimed at benefiting these areas of journalism, it would be unfortunate if we deter competition in this area.

There might be logistical and administrative issues around including certain parts of a publication and not others, it should at least be something explored. At least, separate verticals that are not focused on 'core news' but operated by primarily 'core news' publishers such as Pedestrian Group (owned by Nine) should not be included to avoid competitive disadvantages. Alternatively, these publications could be made eligible for minimum standards that digital platforms must comply with. The issues those standards seek to rectify also apply to these publications, arguably at an even higher level as search ranks as they exclusively or primarily rely on advertising.

Recommendation 4: Minimum standards should not apply to content that is not 'core news' for eligible publications, or minimum standards be extended to publications that are primarily non-core news.

Bargaining Process

Small Publishers

We agree with the ACCC that a final offer arbitration system would be the most suitable method of reaching agreement in situations envisioned by the Code, but only for major media publishers and publishers with existing networks. Final offer arbitrations offer clear benefits and have been used extensively in the industrial relations field overseas and are often proposed in Australia. It incentivises voluntary agreement as an arbitration looms while also encouraging the final offers to be as reasonable as possible, so the likelihood of their acceptance increases. Industrial relations area is comparable to the power dynamics between digital platforms and publishers as well. While final-offer arbitrations mitigate the negotiating imbalance significantly, they still require well-resourced parties with administrative and legal know-how.

While the ACCC envisions small publishers collectively bargaining, this might only be possible for older publications with established networks and industry groups. As previously notes, numerous small digital-first publications have been forming because of the small barriers to entry, and many of these are aiming to plug gaps in coverage. While it is possible that these may form their own industry groups and networks, the nature of small, possibly single-person publications, mean it will not be a priority. While not always the case, there are cultural differences between new, digital publications and older small publications which make up most of the existing small and rural publication network. Furthermore, small publications now form and close at fluid timeframes and it is possible many of them would not be aligned to the starts of the multi-year agreements the code proposes. Similarly, this might block new publications from being able to access the minimum standards and remuneration unless they want to individually go into the process, which brings the bargaining imbalance back into place. Supporting innovation and media diversity is a priority of this Code, and cultural attitudes might not support a collective bargaining system envisioned in the medium term.

An informal survey run by us overwhelmingly supported a basic terms provision for small publishers. While a system would have to be thought through in detail, thinking through the industrial relations analogy again might be a possible solution. A system analogous to minimum wage and conditions can probably be worked out once a number of agreements have been struck. A basic set of terms that list that guarantee the minimum requirements and remuneration at a low, basic level would solve the issue and be administratively feasible for small publishers. It would only be open to small publishers, with a strict revenue limit, and publishers over it having to take part in the bargaining process. We understand the ACCC and the government does not want to be involved in setting the commercial terms of these agreements, but without some sort of accessible pathway for small publishers, it might be impossible for them to benefit from this.

Alternatively, another option might be for small publishers to have the option of becoming part of existing collective agreements. Theoretically, it would require permission from all parties, but the ACCC could encourage, and original parties could agree to let new parties join the agreement and be covered it. In one way, it would be similar to new employees joining an existing collective enterprise agreement with an employer.

Recommendation 5: A basic set of terms be set by either an independent arbitrator, ACCC or ACMA for small publishers to opt into, with a hard revenue cap for eligibility. Alternatively, new publishers be allowed to enter into existing collective agreements.