Reset.
AUSTRALIA

Response to ACCC Review of the News Media & Digital Platforms Mandatory Bargaining Code

Reset Australia
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Contents

1. About Reset Australia & this submission

Reset Australia is an independent, non-partisan policy think tank committed to driving public policy advocacy, research, and civic engagement to strengthen our democracy within the context of technology. We are the Australian affiliate of Reset, a global initiative working to counter digital threats to democracy.

This submission has been prepared in response to the ACCC's Review of the News Media and Digital Platforms Mandatory Bargaining Code. It outlines Reset Australia's broader thinking around the News Media Bargaining Code, and responds to some of the Terms of Reference as published by the Committee.

2. Problematic features of the News Media Bargaining Code

1. DIVISION 2 SECTION 52E 3 - DESIGNATION OF DIGITAL PLATFORMS

One of the most problematic features of the Code is the discrepancy between deciding which digital platforms and news media businesses are subject to the Code.

Digital Platforms	News Media Businesses
Ministerial (the Treasurer) designation, but must 'take into account': i) if there is a significant bargaining power imbalance ii) whether the group has made a significant contribution to the Australian news industry (through agreements relating to news content including agreements to remunerate for their content)	A corporation may apply to the ACMA and must satisfy the: i) content test (produce core news content) ii) Australian audience test (serves predominantly an Australian audience) iii) professional standards test (satisfies professional editorial standards, includes provisions for ABC and SBS inclusion) iv) revenue test (greater than $150k)

Requirements for designation under the NMBC

As the Code only applies to parties which fulfil these criteria, these provisions hold significant influence.

How digital platforms are designated changed significantly over the course of the Code's policy development (see table below). The requirement for the Minister to additionally consider 'whether the platform has made significant contributions to the Australian news industry' was the result of last-minute negotiations between Facebook (now Meta) and the Government (see section 3 for a discussion around this timeline).

VERSION	PAPER	DEFINITION OF WHICH PLATFORM SHOULD BE DESIGNATED UNDER THE CODE
First Iteration	ACCC - DPI[1]	ACMA should be empowered to designate which digital platform should develop individual voluntary codes
Second Iteration	ACCC - Concepts paper	The concepts paper indicated that the ACCC had always intended to have criteria around digital platform designation. It also indicated that Google and Facebook was always to be considered applicable. *The digital platform services to be included in the bargaining code could be defined through a set of principles, or by setting out a list of currently available services, supplemented by a process to determine how to include additional services in the future. A combination of a list of current services supported by a set of principles to guide future additions is also an option.* *Would a principles-based, or list-based approach be preferable in determining which digital platform services are captured by the bargaining code?* From ACCC NMBC Concepts Paper, 20 May 2020 This Concepts Paper kicked of consultation for the mandatory Code
Third Iteration	ACCC - draft exposure Bill	Treasurer designation that must consider whether there is a significant bargaining power imbalance
Fourth Iteration	Parliament - First Reading	Ministerial designation that must consider whether there is a significant bargaining power imbalance
Fifth Iteration	Parliament - as passed	Ministerial designation that must consider bargaining imbalance and (the addition of) whether the platform has made significant contributions to news industry

How determining which digital platforms are to be included on the Code has changed over the course of the policy development period

The reliance on Ministerial designation, particularly with the additional consideration around platforms general contributions, weakens the Code. It allows platforms that make deals with some larger news publishers to avoid engaging with all other Australian news publishers (as per the legislation's original intent). This is economically advantageous for Facebook and other platforms, and deprives many news publishers (particularly small to medium sized businesses) of the economic advantages that would have flowed to them.

Tellingly, a year after the Code was passed, no digital platform has been designed.

As the Code stands, it's generally accepted that the 'threat of designation' has been the mechanism that has compelled the platforms to negotiate deals with the majority of news media players. Whether we would have seen the same outcomes via the Code's mediation/arbitration process is unknown. Unfortunately, relying on this 'threat' ultimately contradicts the spirit of and diminishes the policy for three main reasons;

[1] This is prior to Government direction to develop a mandatory code

i. It opens up the application of this law to corporate capture and political posturing
ii. It doesn't ensure consistent and equitable application
iii. It provides a mechanism for digital platforms to evade true accountability and rectification of unbalanced bargaining power, by entrenching more power with the platforms

How this could be improved

Removing Government involvement in designation is key to making the Code equitable and consistent. Harmonisation with how news media businesses are registered under the Code (i.e. independent regulatory assessment on the basis of certain 'tests') is the appropriate way forward.

Specified criteria needs to be developed for **digital platform designation** that results in automatic inclusion onto the Code to mitigate the impact of replying on Ministerial Discretion.

For example, the ACMA with guidance from the ACCC could determine which digital platforms are to be designated on the Code. This determination could take into account a number of tests, such as:

- Bargaining power tests - if there is a significant bargaining power imbalance
- Market penetration tests - if a certain % of the Australian population are active users of the digital platform
- Revenue tests - if the digital platform makes $X within the Australian market each year
- News content tests - if the platform is used to share, distribute or facilitate engagement with covered news content

2. DIVISION 2 SECTION 52E 5&6 – REQUIREMENT TO PROVIDE NOTICE IN WRITING THAT THE MINISTER INTENDS TO MAKE A DETERMINATION

Before making a determination about a digital platform, the Minister must give at least 30 days' notice of intent to make a designation decision (section 52E(5)-(6)). This provides platforms with an excessively long window in which it can engage in subversive tactics, providing a severe deterrent to designation.

Large digital platforms have significant lobbying powers, and this expansive window provides extensive opportunities for them to resist designation.

How this could be improved

- Removing section 52E(5)-(6) from the Code

The requirement to provide notice in advance should be removed

3. DIVISION 3 – REGISTRATION OF NEWS BUSINESSES

There are concerns that the tests used to register news media businesses, in particular the revenue test of $150k. These are potentially too onerous for small and independent publishers.

This is somewhat alleviated as smaller publishers are able to apply for collective bargaining class exemptions to the ACCC, allowing them to negotiate as a bloc without breaching competition laws. In the past year, the Minderoo Foundation has facilitated collective bargaining class exemptions for 18 smaller publishers.

However, this is a less than ideal 'work around'.

How this could be improved

To further increase the accessibility of the Code to small and independent news organisations, some additional alternative eligibility tests could be considered. These include:

- 'Tests' which specifically single out public-interest journalism. This could take the form of a 'non-profit test' - i.e. if a News Business is structured as a not-for-profit/charity, it would be eligible.

- In addition to the revenue test, an 'employment test' (i.e. does this news media business employ 3.0FTE journalists or editors) may provide an alternative qualification route that is less onerous for small and independent publishers.

The registration of news businesses needs to be amended to:

- Include a business has a revenue of over $150k, or employs 3.0 FTE journalists and/or editors
- Include businesses that may not have a revenue of over $150k or 3.0 FTE journalists and/or editors, but where their main objectives is to provide public interest journalism (i.e. if they are structured as a not-for-profit)

4. DIVISION 4, SUBDIVISION B, SECTION 52R & 52S DATA & ALGORITHMS

Section 52R (Giving list and explanation of data provided to registered news businesses) states that where digital platform provides data about user interactions to one or more registered news business, it must inform the other registered news businesses about the types of data it has provided. It does not create an obligation to share any user data, nor is there a requirement to share the same data to the other news businesses, just an explanation of the 'types' of data.

Section 52S (Change to algorithm to bring about identified alteration to distribution of content with significant effect on referral traffic) outlines how designated digital platforms are required to provide information to registered news businesses about potential changes to algorithms that may affect their online traffic, and that these must be in advance unless there is an urgent public interest override.

These two provisions seek to unpack the information asymmetry that exists between the digital platforms and news businesses, which is in line with the aims of the Code, but fails to account for extractive nature of digital platforms data collection practices, and whether the expansion of these through data sharing with news businesses is desirable.

Firstly, questions should be asked as to why digital platforms are providing data on user interactions to select news business in the first place, and if this is in line with best practice data protection principles such as purpose limitation. Section 52R assumes that this sharing is already happening between digital

platforms and news businesses, so it's only ‘fair’ that all other news businesses should know what’s going on. This is not necessarily true.

Secondly, the reasons why digital platforms are altering recommender systems should be investigated. The Act states that if the dominant purpose that would ‘bring about an identified alteration to the distribution of content’ advance notice to news business should be given. If this change is large enough to alter referral traffic, it has the high possibility that it would meaningfully impact the information consumption dynamics of Australians - which may or may not be harmful to the public interest.

How these could be improved

In order to minimise the information asymmetry between digital platforms and news businesses, more transparency levers should be implemented, in particular throughout the mediation and arbitration process and independent commercial deals. Further research on how to meaningfully reduce this information asymmetry, whilst respecting best practice data privacy is needed.

Public interest would be better served if an independent public body was included or established that oversaw the provision of data and algorithmic information.

This would entail significantly expanding the data sharing provisions, firstly by including sharing with an independent regulator, but ultimately by ensuring the independent regulator has algorithmic audit powers, to assess how digital platform monopolies impact the supply and distribution of quality information and journalism.

What would this ‘algorithmic audit’ authority do?

An audit authority under an independent regulator (most likely the ACCC) must have the tools and powers to verify the actions of the digital platforms, test the operation of algorithms and to undertake inspections themselves.

Its responsibilities with respect to this Code would be two fold:

- Verification. This authority must be empowered to oversee and verify that the obligations of the digital platforms under this Code are being met. Its expanded responsibilities would be the holistic investigation of how algorithmic curation systems impact our society.

- Algorithmic Audits. An algorithmic audit is a review process by which the outputs of algorithmic systems (in this case the curation systems of the digital platforms which display news media content) can be assessed for risky or harmful results. In addition to assessing if design decisions within the digital platform algorithms are actively anti-competitive, this process can also be used to assess numerous online harms to wider society and democracy - such as disinformation.

How would an audit authority work?

The authority must have the ability to carry out an algorithm inspection with the consent of the digital platform company; or if the company doesn’t provide consent, and there are reasonable grounds to suspect they are failing to comply with requirements, to use compulsory audit powers. The resourcing to carry out these investigations could sit within the ACCC, but they should also have the power to instruct independent experts to undertake an audit on their behalf. Examples for how this process can be structured can be taken from various industries such as aviation, drug therapeutics, and others.

An audit authority needs to be established and empowered to oversee data shared, undertake verification and algorithmic audits.

5. DIVISION 5 SECTION 52ZC – DIGITAL SERVICE TO BE SUPPLIED WITHOUT DIFFERENTIATING IN RELATION TO REGISTERED NEWS BUSINESSES

Under section 52ZC (4-6) digital platforms are able to differentiate (i.e. discriminate) how they treat news businesses — in terms of crawling, indexing and distributing their news content —depending on the amount of remuneration they negotiate between the platform and the publisher.

Specifically, different commercial agreements with different news publishers allow platforms to "differentiate" treatment between them. This means that platforms can discriminate through commercial deals, and also empower digital platforms throughout the negotiation process, handing them both a 'carrot' and a 'stick' to bully news businesses to agree to deals.

How this could be improved

- Removing section 52ZC(5)-(6) from the Code

The ability for platforms to differentiate treatment between news business on the basis of commercial deals should be prevented

6. DIVISION 6 SUBDIVISION BA – MEDIATION

The Code requires a mandatory process of two months of mediation, which has to fail before arbitration can commence. This delays the economic opportunity for news businesses, and imposes a further stage that disadvantages small news businesses and start-ups whose resources do not match those of platforms. Forced mediation presents a barrier for news businesses to access the arbitration remedies made available by the Code, thus weakening the negotiating position of news businesses.

How this could be improved

- Removing subdivision BA - mediation from the Code, and allowing news businesses to notify the Commission that arbitration about the remuneration issue should start after three months of negotiations had failed (without the additional step of mediation).

The requirements for mediation should be removed

7. DIVISION 7 SECTION 52ZZ – MATTERS TO CONSIDER IN ARBITRATION

In the final rendition of the Code, a 'two-way value exchange' was included so that during the final offer arbitration process, the independent arbitration panel must consider both the costs of producing original news content, and the benefits accrued to the news media businesses of having their content accessed

on the digital platforms. Ensuring that the panel also considers the impact on public interest journalism at-large would improve the arbitration process further.

This could include specific considerations regarding public interest news provision that the arbitration panel should take into account, such as;

- If the News Business is a non-profit, independent and/or regional publishers
- If the News Business comes from under-serviced areas or serves under-serviced communities
- If a significant proportion of the News Business is directed at producing public interest journalism, such as science, public health, local government and/or local community reporting

How this could be improved

To strengthen the two-way value exchange concept, the addition of considerations that specifically address strengthening public interest journalism should be included.

The arbitration panel must consider;

- Whether a particular remuneration amount would significantly improve capacity for the provision of public interest journalism.
- If proposals come from non-profit, independent and/or regional publishers
- If proposals come from publishers in under-serviced areas or serve under-serviced communities
- If proposal specifically involve public interest journalism, such as science, public health, local government and/or local community reporting

8. BROADER CONCERNS AROUND SHARING USER DATA

User's data plays a significant part of the business model of both Digital Platforms and News Businesses. As the ACCC's Ad Tech Inquiry outlined:

> *Data about consumers, and their online activity, and in some cases offline activity, is critical to ad tech, as it enables one of the key features of the open display channel, the targeting of ads to specific consumers. Targeted advertising is seen to benefit both publishers and advertisers. Better targeting allows advertisers to potentially earn a higher return on their advertising investment, and publishers to earn more revenue from their ad inventory.*

Despite the central role to both business models, research shows that over half of Australians are uncomfortable, or very uncomfortable, with targeted advertising based on what they have said and done online.

It is important to recognise that the Australian data protection framework is still under concurrent development and must be updated to answer some of these questions that are out of scope of the Code.

How this could be improved

Conduct further research on how to meaningfully reduce this information asymmetry, whilst respecting best practice data privacy

9. BROADER CONCERNS WITH A LACK OF SPECIFICITY ABOUT THE PURPOSE OF FUNDS RECEIVED UNDER THE CODE

This Code exists so that news media businesses have a pathway to receive fair compensation for the content that they provide, however there is no specific obligation in the current legislation that these funds must be used for public interest journalism.

How this could be improved

Restrictions need to be placed on how additional revenue raised via either external commercial deals or Code arbitration can be deployed.

Specific provisions should be incorporated into the Code that create obligations on money received via this Code to be spent on the active support of public interest journalism. This should be annually reported to an independent regulatory body and with accurate records kept for future audits.

Limitations on where additional revenue raised might be directed could include:

- Salaries and costs towards maintaining existing public interest journalism positions and reporting
- Salaries and costs towards the creation of new public interest journalism positions and reporting
- Costs involved in promoting, marketing and disseminating public interest journalism
- Costs involved in running professional development, educational, and other initiatives related to driving public interest journalism
- Investment into regional, minority and local journalism

Place restrictions stipulating that a significant proportion of additional funds obtained via the Code by news media businesses must be spent on the provision public interest journalism

Currently, there are no requirements for transparency around Standard Offers or Arbitration Results, nor transparency from news businesses about how funding is spent. Specifically, annual reporting requirements for both digital platforms and news media businesses should be incorporated into the Code, to ensure that this Code is actively contributing towards ensuring a sustainable media sector and contributing to public interest journalism in Australia.

The Code be amended to include requirements for:

- Transparency and public disclosure about Standard Offers and Arbitration Results
- Transparency about the ‘intended’ spends, or reporting around actual spends, towards public-interest journalism from news businesses

The Code be amended to include annual reporting requirements for both digital platforms and news media businesses, to ensure that this Code is actively contributing towards ensuring a sustainable media sector and contributing to public interest journalism.

3. Issues with how the News Media Bargaining Code was developed, and their ongoing effects

The code was negotiated in a climate of extreme hostility by major digital platforms, and these appear to have influenced and weakened the Code itself. We unpack Google and Facebook's (now Meta) response below.

1. GOOGLE

Google's public affairs efforts ramped up in mid-2020 and peaked early 2021, involving four major efforts:

1. **Threats to remove and charge for services.** Thinly veiled statements (which included charging for, limiting the quality of and completely removing) concerning its services, was one of Google's main public affairs levers. This came across in a wide range of channels, from Senate Committee hearings to YouTube ads.

   In an open letter from Mel Silva, Managing Director of Google Australia released August 2020 claimed the Code would 'force google to provide you with a dramatically worse Google Search and YouTube', and puts its provisions of these 'free services' at risk.

   In a rare public statement (particularly as the Bill was in parliamentary scrutiny and not with policy development anymore) ACCC Chair Rod Simms denounced Silva's open letter as spreading 'misinformation': "*Google will not be required to charge Australians for the use of its free services such as Google Search and YouTube, unless it chooses to do so. Google will not be required to share any additional user data with Australian news businesses unless it chooses to do so.*"

2. **Pop ups and advertising.** Google used a range of invasive design tactics to directly funnel Australian users of its products to various open letters, videos and statements that illustrated the platform's position. An ACCC report found that Google controls 94% of the search market in Australia, with some estimates revealing Australians performing 250,000 – 300,000 searches a day. The August open letter was pinned to Google Search's homepage, and pop-up ads which said 'the way Aussies use Google is at risk' were regularly promoted to users, and a prior open letter which was released alongside a video of Silva was disseminated widely on YouTube as an advertisement.

3. **Mobilisation of influencers.** On the same day as the August Open Letter, Google sent out a note to Australian content creators on YouTube warning that they could receive fewer views and earn less under the Code. Using the flawed rationale of the letter, that platforms would have to hand over user data to the news publishers and that the platforms could force the platforms to prioritise news media content, it pitched traditional media businesses and influencers exploiting classic tensions.

   Whilst some concern over the data sharing provisions in the Bill are appropriate (especially at the time in the absence of a fit-for-purpose Privacy Act), the extrapolation that Google presented to influencers co-opted existing fears to further Google's public affairs aims.

The entity that does have control over these factors (how the algorithm prioritises content, how much people get monetised, what user data to collect and share) is in fact Google.

This mobilised prominent Australian influencers (primarily YouTube channel 'Economics Explained') to launch a response including a change.org petition that received over 80,000 signatures.

4. **Google Ad Experiments.** Over the course of January 2021, Google ran experiments which restricted news from Australian media publications appearing in search results to around 1% of Australian users. The stated reasons were to measure the impacts of news businesses and Google search on each other. At the time, many critics spoke to how these 'experiments' demonstrated the potential influence Google had over the information landscape in Australia.

2. FACEBOOK

Facebook's response was more dramatic, and may have unduly influenced the code. On February 17th 2021, Facebook 'blacked out' news services and a range of other non news related services. At the time, the wide reach of the blackout was described as accidental, but recent revelations suggest that Facebook intended to cause havoc as a negotiating tactic. Specifically, recent whistleblowers suggest that:

- Facebook had planned their response and 'black out' seven months in advance, Facebook created an 'ACCC response team' in August 2020. The team was put together with the sole purpose of countering the impact of the NMBC. By Feb 17 2021, when Facebook announced they would be shutting down the websites, they had 7 months to plan their actions.
- Facebook chose the widest possible 'news blackout'. The ACCC response team had modelled for different options of what a take down could look like. Facebook enacted the most extreme version, knowing that it may impact services such as emergency and health services.
- Facebook could have reversed the widespread, damaging news blackout but chose not to, by not following their usual checks and balances. Facebook has many automated checks and balances to ensure that any website takedown won't have adverse effects or be 'over moderated'. These include cross checks with sensitive pages and Xcheck list. These were not undertaken.
- Facebook turned off safety features that would have prevented a widespread, damaging blackout. There are automatic triggers inside Facebook's systems that detect 'over blocking' and instigate a 50% or 25% roll back in the 'blockage'. In this case they were changed to stay at a 100% blockage.
- Facebook did not offer an appeals process. Facebook normally offers an appeals process when they block a site but did not in this case - leaving emergency services, government health pages and civil society with no recourse. Nor did they plan or develop one despite 7 months of preparation.
- There was no pre-roll out trial of the news blackout to test potential damage or harm to non-news pages, despite having 7 months of preparation.

The timing of Facebook's news blackout and the last round of amendments to the Code strongly suggest Facebook's strong arm negotiation tactics were successful in achieving four significant concessions.

- 17 February 2021 – Bill passed through the House of Representatives, Facebook blacks out news and many non-news pages

- 22 February 2021 – Amended bill introduced to the Senate, with the four concessions described below
- 23 February 2021 – Facebook turns back on the news
- 24 February 2021 – Bill passed through the Senate
- 25 February 2021 – Bill passed both Houses

The four concessions negotiated during the news blackout are significant, and hand more power to platforms. They include:

- **Concession 1: Making It Harder To Be Designated Under The Code By Including Requirements Around Considering The 'Significant Contribution' Platforms Otherwise Make**

Platforms are only subject to the code if they are "designated" by the responsible Minister. More than a year into the code's existence, no platform has been designated.

Before the blackout the Minister only needed to consider "whether there a significant bargaining power imbalance" between the platform and Australian news businesses. (section 52E(3))

After the blackout the Minister *also* had to take into account whether the platform "has made a *significant contribution to the sustainability of the Australian news industry*", such as by making agreements outside the code's final-offer arbitration process. (section 52E(3), our emphasis)

The net effect of this change is that, provided platforms *do enough* with the big news publishers, they never have to worry about the code's reach across all publishers. This change deprived many news publishers of the economic opportunities that would otherwise have flowed to them. And it gave Facebook and other platforms the economic advantage of not having to worry about all Australian news publishers.

- **Concession 2: Providing An Extensive Notice Period To Platforms If They Are Being Considered For Designation Under The Code**

Before the blackout, no notice of designation was required.

After the blackout the Minister must give at least 30 days' notice of intent to make a designation decision. (section 52E(5)-(6)).

The net effect of this change is that Facebook has a long window in which it can engage in subversive tactics, providing a severe deterrent to designation.

- **Concession 3: Allowing Digital Platforms To 'differentiate' Their Treatment Of News, If News Businesses Pay Up**

Platforms are able to differentiate (i.e. discriminate) how they treat news businesses — in terms of crawling, indexing and distributing their news content —depending on the amount of remuneration they negotiate between the platform and the publisher.

Before the blackout, a platform could not "differentiate" its treatment of different news media businesses (section 52ZC).

After the blackout, new subsections excluded the making of different commercial agreements with different news publishers from the protections against "differentiation" (section 52ZC(4-6)).

The net effect of this change is that rather than the commitment to non-differentiation between different publishers, platforms can discriminate through commercial deals. This empowers digital platforms throughout the negotiation process, handing them both a 'carrot' and a 'stick' to bully news business to agree to deals.

The government has described this change under the supplementary explanatory memorandum as a 'clarification' .

- **Concession 4: Forcing A Long Process Of Mediation Into The Negotiations, Before Arbitration Can Begin**

Changes were made to introduce a mandatory process of two months of mediation which would have to fail before arbitration could even commence.

Before the blackout, platforms and news businesses had to bargain in good faith for three months before entering mandatory arbitration if an agreement wasn't reached. There were no requirements for mediation and news businesses could notify the Commission that arbitration about the remuneration issue should start after three months of negotiations had failed, or if they and the digital platform agreed arbitration was necessary after 10 days (sec 52ZL(2) of second draft).

After the blackout, if agreement isn't reached during three months of bargaining, the parties must enter into mediation (an additional stage) before they can enter an arbitration. (Subdivision BA – Mediation)

The net effect of this change is to further delay the economic opportunity for news businesses. This imposes further stages disadvantage for small news businesses and start-ups whose resources will not match those of platforms. Force mediation presents a significant barrier for news businesses to access the arbitration remedies laid out in the Code, thus weakening the negotiating position of news businesses.

Former ACCC Chairman dismissed this change as relatively minor, saying 'fine' when interviewed on 6 May 2022.

Our recommendations above describe ways to roll back some of the damaging impacts of these concessions.

4. Response to the ACCC's specific questions

QUESTIONS 1 - 5: REQUESTS FOR INFORMATION ABOUT DEALS MADE, NOT MADE, USE OF FUNDS TOWARDS PUBLIC INTEREST JOURNALISM, THE IMPACT OF OTHER DEALS OR OTHER EVIDENCE

It is somewhat worrying that the ACCC has to seek a public inquiry to uncover information about deals made between digital platforms and news businesses as a result of the Code. Updating the Code to require transparency about deals made, and including requirements to document how funds are spent towards public-interest journalism would prevent this in the future.

The Code be amended to include requirements for:

- **Transparency and public disclosure** about Standard offers and Arbitration results
- **Transparency about the 'intended' spends,** or reporting around actual spends, towards public-interest journalism from News Businesses

The Code be amended to include annual reporting requirements for both digital platforms and news media businesses, to ensure that this Code is actively contributing towards ensuring a sustainable media sector and contributing to **public interest journalism**

QUESTIONS 6 - 8: DESIGNATION CRITERIA

The reliance on Ministerial designation, where the Minister must consider both:

(a) whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate; and
(b) whether that group has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content)

significantly weakens the Code.

It allows platforms that make deals with some larger news publishers to avoid engaging with all other Australian news publishers (as per the legislation's original intent). This is economically advantageous for Facebook and other platforms, and deprives many news publishers (particularly small to medium sized businesses) of the economic advantages that would have flowed to them.

Removing Ministerial involvement in designation is key to making the Code equitable and consistent. Harmonisation with how news media businesses are registered under the Code (i.e. independent regulatory assessment on the basis of certain 'tests') a more appropriate way forward.

Specified criteria needs to be developed for digital platform designation that results in automatic inclusion onto the Code to mitigate the impact of replying on Ministerial Discretion.

For example, the ACMA with guidance from the ACCC will determine which digital platforms are to be designated on the Code. In their determination, they must take into account:

- Bargaining power test - If there is a significant bargaining power imbalance
- Market Penetration test - if a certain % of the Australian population are active users of the digital platform
- Revenue test - if the digital platform makes $X within the Australian market each year
- News Content test - If the platform is used to share, distribute or facilitate engagement with covered news content

QUESTIONS 9 - 11: ABOUT REGISTRATION OF NEWS BUSINESSES

There are concerns that the tests used to register news media businesses, in particular the revenue test of $150k. These are potentially too onerous for small and independent publishers. This is somewhat alleviated as smaller publishers are able to apply for collective bargaining class exemptions to the ACCC, allowing them to negotiate as a bloc without breaching competition laws.

This is a less than ideal 'work around', and to further increase the accessibility of the Code to small and independent news organisations, some additional alternative eligibility tests could be considered, such as:

- 'Tests' which specifically single out public-interest journalism. This could take the form of a 'non-profit test' - i.e. if a News Business is structured as a not-for-profit/charity, it would be eligible.

- In addition to the revenue test, an 'employment test' (i.e. does this news media business employ 3.0FTE journalists and/or editors) may provide an alternative qualification route that is less onerous for small and independent publishers.

The registration of news businesses needs to be amended to:

- Include a business has a revenue of over $150k, or employs 3.0 FTE journalists and/or editors
- Include businesses that do not have a revenue of over $150k or 3.0 FTE journalists and/or editors, where their main objectives is to provide public interest journalism (i.e. if they are structured as a not-for-profit)

4. Recommendations

Specified criteria needs to be developed for **digital platform designation** that results in automatic inclusion into the Code to mitigate the impact of replying on Ministerial Discretion.

For example, the ACMA with guidance from the ACCC could determine which digital platforms are to be designated on the Code. This determination could take into account a number of tests, such as:

- Bargaining power tests - If there is a significant bargaining power imbalance
- Market Penetration tests - if a certain % of the Australian population are active users of the digital platform
- Revenue tests - if the digital platform makes $X within the Australian market each year
- News Content tests - If the platform is used to share, distribute or facilitate engagement with covered news content

The requirement to **provide written notice that the minister intends to make a determination** advance should be removed

The **registration of news businesses** needs to be amended to:

- Include a business has a revenue of over $150k, or employs 3.0 FTE journalists and/or editors
- Include businesses that do not have a revenue of over $150k or 3.0 FTE journalists and/or editors, where their main objectives is to provide public interest journalism (i.e. if they are structured as a not-for-profit)

An **audit authority** needs to be established and empowered to oversee and data shared, undertake verification and algorithmic audits

The ability for **platforms to differentiate treatment** between news businesses on the basis of commercial deals should be revoked

The **requirements for mediation should be removed**

The **arbitration panel must** consider;

- Whether a particular remuneration amount would significantly improve capacity for the provision of public interest journalism.
- If proposals come from non-profit, independent and/or regional publishers
- If proposals come from publishers in under-serviced areas or serve under-serviced communities

- If proposal specifically involve public interest journalism, such as science, public health, local government and/or local community reporting

Conduct **further research on how to meaningfully reduce the information asymmetry between news businesses and digital platforms,** whilst respecting best practice data privacy

Place restrictions **stipulating that a significant proportion of additional funds obtained via the Code by news media businesses must be spent on the provision of public interest journalism.**

The Code be amended to include requirements for:

- **Transparency and public disclosure** about Standard offers and Arbitration results
- **Transparency about the 'intended' spends,** or reporting around actual spends, towards public-interest journalism from News Businesses

The Code be amended to include annual reporting requirements for both digital platforms and news media businesses, to ensure that this Code is actively contributing towards ensuring a sustainable media sector and contributing to **public interest journalism.**