

SBS RESPONSE TO REVIEW OF THE NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE MAY 2022

Key Points

- SBS welcomes the clear benefits to its audiences arising from the enactment of the News Media and Digital Platforms Mandatory Bargaining Code (**the Code**).
- As a result of the incentives created by the Code, SBS has completed a deal with Google that has enhanced SBS's ability to produce and distribute content that aligns with its Charter, and which delivers clear public policy outcomes. Google approached these negotiations constructively and in good faith.
- In this way, the Code has operated as intended with respect to Google to strengthen the provision of public interest news and information in the Australian market.
- However, the Code has not created a sufficient incentive for Meta to enter into meaningful negotiations with SBS for remuneration for the use of SBS content on the Facebook platform. The Code should be amended to create a greater incentive for Meta to enter a commercial deal with SBS.
- This lack of incentive arises from the construction of the designation provisions in the Code, and could be addressed through targeted amendments to those provisions.
- In this way, and due to the fact SBS content still appears on Meta's platforms without remuneration, SBS is in the same bargaining position as it was prior to the enactment of the Code (as regards Meta). Overall however, SBS is worse off relative to its competitors, because other media organisations who do have agreements with Meta now have additional funding to invest in services and talent.
- The intention of the Code was: to address bargaining power imbalances; ensure digital platforms share the benefit of news media organisations' content on their platforms; provide an ability for organisations to trigger mandatory bargaining; and, support strong, independent media.
 - The current outcome as regards SBS and Meta is contrary to all four of these principal objectives.
 - This is despite SBS being purposely incorporated by the Parliament into the remuneration provisions of the Code.
- Given the value derived from SBS's deal with Google, and the value derived by other media organisations through deals with Meta, there is clear additional audience value



forgone as a result of Meta's decision not to negotiate with SBS. There is also significant value flowing to Meta as a result of its unremunerated use of SBS content on its platforms.

- This is a perverse outcome of the protracted and exhaustive policy and legislative processes undertaken to deliver the Code, and leads to identifiable public policy detriments. These negative public policy outcomes are amplified when SBS's particular remit to serve multicultural, multilingual and First Nations audiences is taken into account. These audiences often rely more heavily on SBS for trusted news and information.
- Given these circumstances, SBS has called for Meta's designation under the Code. However, as outlined in this submission, changes to the designation provisions of the Code are likely required to enable designation. SBS supports urgent amendments to the Code which would facilitate Meta's designation.
- Also of concern is the possibility that the voluntary commercial deals completed across the media sector contain provisions which would mean the deals are invalidated if a platform is designated under the Code.
- This could act as a substantial barrier to designation, even where the circumstances are those clearly contemplated by the Parliament as warranting designation. This requires further consideration by the Government and ACCC.
- To address concerns arising from the possibility that existing deals may be voided if a platform is designated, it may be appropriate to empower the Treasurer to designate platforms in relation to a specific subset of news media businesses. For example, the power could be amended to enable designation of a platform in relation to its dealings with publicly funded news media organisations, or news organisations with a certain reach or of a certain size.
- SBS is also concerned that the lack of transparency regarding the impact of the Code, and possible contract provisions designed to frustrate a designation decision, mean that the Treasurer is unable to make fully informed decisions under the Code.
- The lack of transparency means it may not be possible to definitively know if the Code is fulfilling its public policy objectives.

Recommendations

- To ensure the Code works as intended to support strong, independent public interest media, section 52E of the *Competition and Consumer Act 2010* (**the Act**) should be amended to enable the Treasurer to make a decision with regard to the impact of a platform's bargaining behaviour on **subsections** of the Australian media industry, as opposed to only considering the impact on the sector as a whole.
- If this option is not preferred, subsection 52(3)(b) should be removed from the Act.
- The review should consider the information the Treasurer would need to make a determination decision and whether this information is readily available, including in relation to voluntary arrangements.



Introduction

The Special Broadcasting Service Corporation (**SBS**) welcomes the opportunity to respond to the Review of the News Media and Digital Platforms Mandatory Bargaining Code Consultation Paper (the **Consultation Paper**).

SBS's role and function is unique in the broader Australian market for entertainment, news and information services.

SBS's principal function is to provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians, and in doing so, reflect Australia's multicultural society. SBS has been proudly serving Australia and our multicultural communities for more than 45 years. Along with our principal function, our purpose is to inspire all Australians to explore, respect and celebrate our diverse world, and in doing so, contribute to a cohesive society.

SBS's contribution to public interest journalism, and hence Australian democracy, is truly distinctive. SBS is one of Australia's most trusted broadcasters, evidenced by our commitment to independent, impartial and balanced news and current affairs. Trust is underwritten by authenticity, and in our case by our commitment to live our purpose as passionately within our organisation as we do externally as expressed through our content. SBS has rigorous editorial standards and a Code of Practice in place which underpin the delivery of all of its independent and balanced news, information and current affairs services.

SBS's unique connections and experience with multicultural, multilingual and Aboriginal and Torres Strait Islander communities enable SBS to cover news and tell the stories of those communities through the perspectives and unique voices of these communities. In particular, the news, current affairs and information services provided by SBS inform and promote understanding among all Australians of different cultures and maximise opportunities for people from diverse backgrounds to engage in social, political and cultural discourse.

Providing Australians with accurate and impartial information contributes to a successful functioning of democracy. A 2021 Reuters Institute study found SBS is the most trusted network when compared to Australia's commercial broadcasters.¹ An SBS-conducted survey in 2021 also indicated that SBS is the most trusted media organisation amongst Australia's multicultural audiences.²

These clear and evident public interest benefits are unique to the SBS platform and frame our submissions regarding the importance of ensuring the Code fulfils its objectives in safeguarding and enhancing public interest journalism.

The position of SBS as regards the extent to which the Code has fulfilled its public policy objectives is mixed. Whilst the Code has operated to effectively incentivise Google to negotiate and complete a deal with SBS, it has not provided sufficient incentive to Meta to engage constructively with us.

This submission outlines the impact of this outcome, and suggests amendments to the Code to address the clear public policy detriments which have arisen as a result.

¹ Reuters Institute Digital News Report 2021 available here:

https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf

² SBS information, online survey, 2021, n = 5405, all participants



Benefits arising from the enactment of the Code

As a result of the enactment of the Code, SBS has been able to reach an agreement with Google for remuneration in return for the use of SBS public interest journalism on Google's platforms.

The deal with Google increases SBS's capacity to tell more original stories to all Australians that are distinctive in the local media landscape, in particular stories of our multicultural and First Nations communities. Importantly, the agreement has enabled SBS to engage additional full time staff, aligning with one of the underlying policy rationales for the Code, namely to strengthen the employment of journalists.

The deal enables SBS to deliver additional accurate and impartial coverage—news, investigations, explainers—all content which is critical in countering misinformation across third-party platforms, including those owned and operated by Meta, especially during key moments such as the pandemic and the current federal election campaign.

Importantly, many of the stories produced —news and features—are shared with SBS's 60+ language services who translate or repurpose them for radio and/or podcasting.

This expands the reach and utility of the investment that Google is making in SBS services, in turn delivering positive outcomes for public interest journalism for a broader range of Australians, including those Australians for whom English is not their preferred language.

Over time, SBS is hoping to introduce new features enabling users to personalise their content list with the extended list of news and feature stories on offer. This would not have been possible without the additional news output that has been enabled by the agreement with Google.

Overall, SBS is satisfied with the terms of that agreement (including remuneration) and the presence that it will ensure on Google's relevant services.

The agreement reached with Google is evidence of the value of the Code, as this deal would not have been reached without the enactment of the Code's framework.

Meta's decision not to negotiate with SBS is leading to foregone audience benefit

Despite commencing preliminary discussions with SBS in February 2021, Meta advised SBS in July 2021 that it would not be entering negotiations for a commercial arrangement for news content.

SBS has not been provided with an explanation from Meta regarding its refusal to meaningfully engage with SBS in relation to a voluntary deal to remunerate SBS. We understand news publisher *The Conversation* had a similar experience. It is likely that Meta has made an assessment that it has completed a sufficient number of deals with news media organisations such that the Treasurer is unlikely to exercise discretion to designate Meta under the Code.

We base this assumption on the likely operation of subsection 52E(3) of the Act. That subsection requires the Treasurer, in making a decision as to whether to designate a platform, to have regard to:

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.

Having completed various deals across the media industry (primarily with larger organisations, but also including some smaller publishers such as Australian Community Media, Private



Media, Schwartz Media and Solstice Media³), it seems likely that Meta has made a strategic assessment that, notwithstanding the impacts on individual news businesses of its decision to strike no further deals, it has made sufficient deals to satisfy a decision-maker that it has made a 'significant contribution' to the industry as a whole.

This reveals a flaw in the construction of the Code. The focus of decision-making regarding designation is framed in terms of the broader news industry. Whilst this may appear on a surface level to be a sound public policy framing, in practice, it has resulted in an outcome which stands to harm a sub-section of the broader industry.

It has permitted Meta to strategically assess a threshold number of deals beyond which they have judged deals are not necessary to avoid designation. That is, the focus for Meta has not been on striking deals with news media organisations whose content appears on their platform (the intention of the Code), but rather on doing what is minimally necessary to avoid designation under the Code.

What remains is a clear illustration of the kind of bargaining imbalance which was one of the key public policy problems the Code sought to address—Australian news media businesses producing local public interest journalism being unable to match the bargaining power of a global digital giant to come to the negotiating table and agree a fair deal.

Impact of Meta's refusal to negotiate with SBS

Without speculating on the possible terms of a deal with Meta, it is difficult to quantify the opportunity cost of Meta's refusal to negotiate with SBS, as it has with other news media organisations.

However, it is evident from the value derived from SBS's deal with Google, that there is a lost potential for the engagement of significant additional content-creation resources and a lost potential to create and deliver innovative, Charter-led content to the specific audiences SBS serves.

This is a particular loss to the Australian media ecosystem as a whole, given the unique role SBS plays in serving multilingual, multicultural and Indigenous audiences as part of its Charter duties. That is, the content forgone as a result of the failure of Meta to reach terms with SBS is not replicated elsewhere in the Australian media landscape in any meaningful way.

The outcomes arising from other media organisations' deals with Meta assist to scope the likely loss to SBS's audiences from Meta's failure to remunerate SBS through a commercial deal. For example, the ABC has indicated that as a result of its Google and Meta deals combined, it will be able to substantially expand its regional presence and its output of Charter-relevant content.⁴

As a result of the ABC's deals, over 50 journalists will be placed in 20 state and territory locations, starting in 2022, including new specialist rounds covering water, mining, social affairs and health. There will be trials of new, small bureaus in a range of regional areas and remote locations will see short term placements of dedicated correspondents. The intention is to introduce resources into locations which have previously suffered from an absence of news and newsgathering opportunities.

³ <https://mumbrella.com.au/facebook-signs-deals-with-private-media-schwartz-media-and-solstice-media-670915>

⁴ <https://www.abc.net.au/news/2021-12-03/abc-to-add-more-than-50-journalists-in-regional-australia/100673862>



Guardian Australia has also indicated that its deals with Google and Meta have helped bring forward a substantial expansion in operations, bringing in around 50 additional people to the organisation over 12 months.⁵

These ABC and Guardian Australia outcomes, benefits arising from Meta's deal with commercial news businesses^{6, 7, 8}, and the benefits arising from SBS's deal with Google, are ample demonstration of the kinds of strong public interest outcomes which are possible as a result of deals struck with digital platforms. We anticipate therefore that the refusal of Meta to negotiate a deal with SBS has impacts in terms of a clear loss of opportunity for SBS to substantially increase and enrich its offering of Charter content, and that this loss is felt most significantly by the potential Australian audiences for that content.

Further, the current situation now actively disadvantages SBS relative to other media providers. Other media organisations have the competitive advantage of the additional investment by Meta, which enables them to employ additional resources, enhance services and sharpen their competitive edge. In addition, depending on the nature of the deals reached with the platforms, those organisations with deals may also have the additional advantage of increased prominence on Facebook and Google services, which enhances their reach and the ease of finding their content.

We note that Facebook Australia has publicly emphasised that commercial deals are not the only way that it seeks to support Australian journalism,⁹ citing its Facebook Australia News Fund, which will invest \$15 million over 3 years and is available to news organisations which do not have standalone deals with Meta.¹⁰ It is reported that 169 organisations applied for funding in the first year. The high level of competition for a comparatively very small pool of funds further highlights the impact on SBS of the absence of a deal with Meta. Whereas other media organisations are able to invest with certainty as a result of direct commercial agreements which guarantee an income stream, organisations which have not completed a deal must compete with over 150 other news organisations for only \$5 million each year, for a maximum of three years.

We do not believe that funding programs such as these are adequate substitutes (in terms of the public policy aims of the Code) for individual commercial agreements between media organisations and digital platforms. We also note that the quantum of funding for discrete programs such as these is considerably less than the likely value of any standalone deals Meta may have completed were it properly incentivised to do so (noting some have estimated that

⁵ <https://www.afr.com/companies/media-and-marketing/guardian-australia-expands-coverage-after-funding-from-tech-giants-20220311-p5a3rn>

⁶ For example, News Corporation recently indicated it would be hiring for an additional 100 editorial roles which at least partly appear to be funded by deals with Google and Facebook:
<https://www.smh.com.au/business/companies/news-corp-formalises-google-and-facebook-deals-announces-hiring-spree-20210509-p57q8d.html>

⁷ Nine Entertainment Co is reported as securing \$30 million from its deal with Google:
<https://www.smh.com.au/business/companies/google-nine-agree-commercial-terms-for-news-content-20210217-p5736c.html>

⁸ Seven West Media is reported as securing \$30 million from its deal with Google:
<https://www.abc.net.au/news/2021-02-23/seven-west-media-news-agreement-facebook-media-bargaining-code/13185008>

⁹ <https://mumbrella.com.au/sbs-the-brag-and-the-conversation-respond-to-facebooks-snub-on-media-deal-704667>

¹⁰ <https://australia.fb.com/post/54-newsrooms-and-independent-journalists-receive-funds-from-aud-15m-facebook-australia-news-fund/>



the total of deals done by digital platforms to date is at least \$200 million).¹¹ This outcome enhances the competitive disadvantage of news organisations who have not completed a deal as regards larger publishers who now have the advantage of significant additional resourcing and product enhancement.

We note the views of other publishers regarding the inadequacy of the fund and its likely strategic purpose in avoiding formal designation. There are reports of independent publishers who were not offered a deal by Facebook being encouraged to apply for the Facebook fund and committing substantial resources into preparing a bid, only to miss out entirely on funding.

This outcome is contrary to the clear public policy objectives of the Code

An outcome whereby one of the major digital platforms that has been identified by the ACCC and Government as having substantial market power is able to decline to negotiate with significant elements of the Australian media landscape (and in particular, a public broadcaster) is clearly contrary to the public policy objectives which underpin the Code.¹²

In introducing the Code into Parliament,¹³ the Treasurer noted the following:

- The intention of the Code was to “address the bargaining power imbalances that exist between digital platforms and Australian news media businesses”.
- The Code was designed to ensure “that digital platforms share the benefit they obtain from using Australian sourced news content with the news media businesses who create that content”.
- If a news media business cannot reach an acceptable agreement outside of the Code, it will have the option to trigger aspects of the Code to address the bargaining power imbalance.

In the Explanatory Materials for the Code, the overall importance of a strong independent media in a well-functioning democracy was also highlighted.¹⁴

If we consider the current position of SBS as regards Meta, it is evident the current circumstances are out of alignment with these four key policy objectives.

Persistent imbalance in bargaining power

Firstly, SBS remains in a position of inferior bargaining power as regards Meta. The operation of subsection 52E(3) of the Act (see above) and Meta’s probable assessment of the unlikely prospects of designation have created circumstances in which there is insufficient incentive for Meta to negotiate in good faith with SBS and other media organisations. In practical terms, SBS is in the same position as it was before the Code was enacted in terms of being unable to exert negotiating power to bring Meta to the negotiating table.

Given the extensive policy work, multiple exhaustive ACCC reviews and the passage of legislation, all of which were on the basis of seeking to identify, quantify and address an underlying imbalance of bargaining power, it is significant to note that this objective appears not to have been met for significant parts of the media sector. In particular, we note that a

¹¹ <https://jinstitute.org/news/millions-of-dollars-for-news-shrouded-in-mysterious-deals/>

¹² This has been noted by outgoing ACCC Chair Rod Sims and Minister for Communications, Urban Infrastructure, Cities and the Arts: <https://www.smh.com.au/politics/federal/forcing-facebook-to-negotiate-with-publishers-must-be-an-option-acc-20220224-p59ze7.html>

¹³ Treasurer’s Second Reading Speech, *Hansard*, 9 December 2020

¹⁴ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 – Explanatory Memorandum, page 7.



discrete and purposeful decision was made to bring SBS (and the ABC) into the Code's remuneration framework, reflecting a recognition of the importance of addressing the imbalance of bargaining power to public interest media organisations. A result whereby SBS is unable to leverage deals with one of the key digital platforms runs counter to Parliament's express desire to have SBS included in the benefits of the Code framework.

Lack of remuneration for use of SBS content

Secondly, Meta is in no way 'sharing the benefit' with SBS of the value it is obtaining from the use of SBS's original news content. As above, SBS is in the same position as it was prior to the commencement of the Digital Platforms Inquiry and the subsequent enactment of the Code. Indeed, it is likely SBS is in a worse competitive position following the completion of deals between Facebook and other media organisations, given the increased resources that enable those other organisations to enhance their consumer offering and the increased prominence of their services on the digital platforms.

Inability to trigger designation

Thirdly, SBS is not in a position to "trigger aspects of the Code to address the bargaining power imbalance." The power to trigger the Code (via designation) resides with the Treasurer, and as outlined elsewhere in this submission, SBS is concerned that the construction of the designation power is such that the Treasurer is confined to having regard to the overall impact of Meta's deal-making on the Australian industry as a whole, with insufficient consideration required of the impact on individual elements of the industry, particular audience or community interests, or key news media organisations.

Impact on strong, independent media organisations

Finally, the current situation is out of step with the policy objective of supporting strong independent media, given the revenue forgone by SBS and lost opportunities to expand and strengthen its offering of vibrant, independent and trustworthy news and information services. SBS has a hybrid funding model, comprised partly of direct Government funding and partly of funding from commercial activities – ie, it is explicitly contemplated that SBS must secure commercial revenue to fund its operations. SBS's offering of multicultural, multilingual and Indigenous content is truly unique in the Australian landscape and is not substitutable with other services, and so the potential enhancement of our services which could arise from a deal from Meta, will not be offset by the offerings of any other media provider.

Meta's rationale for not entering into an agreement with SBS

Meta has not made any specific statements regarding its rationale for not commencing meaningful negotiations with SBS, but it has made general statements which confirm the view that it has taken a risk-management approach to deal-making. For example, Meta Australia is reported as saying the company's commercial deals were based on a range of factors including content type, reach and engagement.¹⁵ Given the wide range of publications that Meta has reportedly reached an agreement with (from *MammaMia* and *Solstice Media* to *Nine Entertainment Co*) it is not clear how this framework is constructed.

In this regard, SBS notes that it supplies extensive public interest news content with relevance to a wide range of diverse audiences. SBS also notes it delivers near universal reach, with

¹⁵ <https://www.smh.com.au/politics/federal/forcing-facebook-to-negotiate-with-publishers-must-be-an-option-acc-20220224-p59ze7.html>



services available via traditional broadcast television and radio platforms, digital radio, satellite and online.

SBS therefore notes that it would appear to meet the criteria Meta itself has set out for entering into a voluntary agreement.

SBS supports designation of Meta under the Code

It would be strongly consistent with the policy objectives underlying the Code for Meta to be designated under section 52E of the Act, given that it has chosen not to pursue agreements outside of the Code with a significant group of media providers, including SBS.

As noted earlier in this submission, it appears likely that Meta has assessed that the cumulative impact of the deals it has concluded makes designation unlikely, and for this reason, it has calculated that there is no incentive to pursue further voluntary deals with media organisations such as SBS and others.

In this way, the construction of the designation power in the Code has had the practical impact of delivering SBS back into a position of inferior bargaining power, such that SBS is unable to incentivise Meta to participate in meaningful negotiation.

Hence, in the current scenario, all the indicators which justified the creation of the Code are still in effect as regards SBS:

- An unequal balance of negotiating power in the market resulting in an absence of voluntary agreements for the use of SBS content.
- Unremunerated use of SBS content on the digital platform.
- Revenue forgone which would otherwise be used to support the creation and distribution of news content with extremely strong public interest value.

Recommended amendments to the designation provisions

As noted above, the construction of the designation power in the Act may prevent the designation of Meta, given it has completed deals with other media providers. SBS is concerned this would be factored into a consideration of whether Meta has “made a significant contribution to the sustainability of the Australian news industry”—a factor the Treasurer must consider in deciding whether to designate a platform.

Focussing of the decision-making power at such a broad level leaves open the prospect of substantial harm accruing to some sub-sections of the industry, notwithstanding that “significant contributions” may be being made across a larger cross-section of the media sector. In turn, that leads to harmful outcomes for certain subsections of Australian audiences and public interest journalism.

This is a perverse outcome of the protracted and exhaustive policy and legislative processes undertaken to deliver the Code, and leads to identifiable public policy detriments. It is relevant to note that this particular clause of the legislation was introduced following the withdrawal of certain Facebook services in Australia. It has been alleged that this action by Meta intentionally involved the removal of critical health and safety information in order to exert pressure on the Government to amend the Bill in a way that was favourable to Meta.¹⁶ These alleged actions by

¹⁶ <https://www.wsj.com/articles/facebook-deliberately-caused-havoc-in-australia-to-influence-new-law-whistleblowers-say-11651768302>



Meta are consistent with a pattern of behaviour that undermines the public policy objectives of the Code, including Meta refusing to negotiate with SBS and providers like *The Conversation*.

To ensure the Code works as intended to support strong, independent public interest media, targeted amendments should be made to the designation provision which would enable the Treasurer to make a decision with regard to the impact of the platform's bargaining behaviour on discrete elements of the Australian media industry.

The Treasurer should be empowered to have regard to the impact of platforms on those news outlets with which they have chosen not to enter deals with, rather than the broader industry as a whole.

Also, factors should be added to the designation provisions to which the Treasurer must have regard when determining if the scope of the commercial deals made is sufficient (for example, whether the deals were with news media organisations which were trusted news sources, had content safeguards (enforceable Codes of Practice which safeguard the quality of public interest journalism provided) or served underserved communities (such as multilingual, multicultural and First Nations audiences)).

Additional barrier to designation

There is an additional barrier to designation which arises not from the construction of the Code but rather from the nature of the deals and agreements which have been completed in the context of the Code. Whilst SBS does not have knowledge of the detailed provisions of the commercial deals agreed between the platforms and other news media organisations, it would be concerning if they contained provisions which void the agreement if a platform is designated under the Code.

If this is the case, this would clearly incentivise media organisations who have benefited from voluntary commercial deals to strongly oppose designation of a platform under the Code, notwithstanding that designation may be warranted by the platform's behaviour in relation to other media organisations. This would be contrary to the public policy objectives of the Code and warrants close consideration by Government.

The Treasurer should be empowered to designate platforms in relation to a **specific subset** of news media businesses. For example, the power could be amended to enable designation of a platform in relation to its dealings with publicly funded news media organisations, or news organisations with a certain reach or of a certain size. This would seem appropriate, given the decision-making power in the Code is in relation to particular digital platforms, and not digital platforms as a whole class of entities.

Recommendation:

- **Amend s 52E to enable the Treasurer to base a designation decision on the impact of a platform's bargaining behaviour on discrete segments of the Australian media industry.**
- **Add factors to the matters to which the Treasurer must have regard when determining if the scope of deals made is sufficient.**
- **Government and ACCC to consider the impact of provisions in commercial deals which result in invalidation if a platform is designated.**



- **The designation power be amended to permit the designation of a platform in relation to dealings with a subset of news media organisations.**

If these amendments are not preferred, subsection 52E(3)(b) should be removed from the Act. As outlined in this submission, this subsection has had the perverse impact of ensuring SBS (and other media publishers) remains in a position that is largely the same as it occupied prior to the enactment of the Code. That is, in a position of significant disadvantage as regards bargaining with digital platforms, and in a position whereby it is not sharing in the benefits arising from the use of its content on digital platforms.

Additional considerations

Lack of transparency in the scheme

SBS is concerned about the lack of transparency regarding the operation of the Code to date, and the impact that has on policy-makers' ability to judge its effectiveness. There is also a perceived impact on the Treasurer's ability to make informed decisions regarding designation.

SBS understands that most, if not all, voluntary commercial arrangements contain strict and exhaustive confidentiality requirements. Whilst this is not unusual for commercial agreements, the effect is to prevent the disclosure of information (such as quantum of remuneration, product enhancements, etc) which would enable an assessment of the impact of the deals on the sustainability of public interest journalism.

There is also no transparency regarding the existence of 'poison pill' provisions (which would void agreements in a platform is designated under the Act), which we have noted above could act as a very significant factor in the dynamics of securing a designation decision.

It is not clear whether the Treasurer could make a fully informed decision regarding designation under s 52E of the Act if he or she is unable to properly assess the impact of commercial deals already completed, and is not informed regarding the potential for 'poison pill' provisions. That is, the Treasurer is required to assess the impact of commercial agreements he or she does not have detailed knowledge of.

This is a delicate issue, given the importance of confidentiality in the context of the agreements.

There is also a competitive impact resulting from this situation, whereby the mechanisms in incumbents' deals with platforms (as anecdotally understood to exist) which discourage the Treasurer to designate platforms would act to discourage smaller players from entering the market (given the poor prospects of securing a deal/designation). This has flow on effects to diversity and sustainability in the sector.

The lack of information flowing into the market regarding voluntary deals already done also disadvantages news media organisations in negotiations with digital platforms.¹⁷

Recommendation:

- **The review should consider the information the Treasurer would need to make a determination decision, including in relation to voluntary arrangements.**

Additional consultation requirements

¹⁷ <https://jninstitute.org/news/millions-of-dollars-for-news-shrouded-in-mysterious-deals/>



There may be merit in amending the designation provisions to include a requirement for consultation with the Minister with portfolio responsibility for public interest journalism.

Given the underlying policy intent of the Code relates to the sustainability of public interest journalism, it would seem appropriate for the Minister responsible for that public policy area to be consulted as a part of decision-making. There are precedents for cross-portfolio consultation requirements in communications portfolio matters (for example, see s 60(13A) of the *Radiocommunications Act 1992*, which requires the ACMA to consult with the ACCC when issuing spectrum licences).



ATTACHMENT A

Consultation questions

- 1. The review seeks information from platforms in particular on the nature and quantum of the benefits, both financial and non-financial, received by news businesses in metropolitan and regional areas from commercial deals with digital platforms.**

There have been clear benefits for SBS's audiences arising from the enactment of the Code. SBS has negotiated a commercial deal with Google for remuneration in return for the use of SBS content on Google's platforms (including Google Showcase) which we believe would not have been possible without the presence of the Code framework.

The agreement with Google Showcase enables SBS to expand and enhance our original and distinctive storytelling, in particular stories of our multicultural and First Nations communities.

SBS is also expanding delivery of accurate and impartial news and information in an environment in which trustworthy reporting is more important than ever (in the context of global instability and the upcoming Australian federal election).

The cumulative impact is an overall enhancement of SBS's ability to fulfill its Charter obligations and serve audiences with distinctive and innovative content, with clear public service benefits in terms of free and ubiquitous access to news and information, including in language.

- 2. The review requests that news businesses provide as many examples as possible of where funding from commercial deals has been used to, for example:**
 - **employ more journalists;**
 - **invest in professional development for journalists and other staff;**
 - **invest in premises, websites, equipment, software, and data collection and use;**
 - **expand the reach of news businesses;**
 - **improve the long-term sustainability of news businesses;**
 - **avoid having to downsize or close news businesses; or**
 - **invest in any other way that increases the amount, quality and distribution of core news content.**

We refer to the answer to question 1 above, and note that SBS has been able to recruit additional roles as a result of the agreement with Google.

- 3. The review seeks stakeholder views on cases where digital platforms and news businesses have not been able to reach commercial deals.**

SBS is disappointed that Meta has declined to enter negotiations to seek a commercial agreement with SBS in relation to its news content.

We are concerned about the impact on our audiences and discoverability of SBS in enhanced Facebook offerings, noting that many of our audiences access SBS through Facebook.



SBS has a unique role in Australia's news media landscape providing trusted, accurate and impartial Australian news and information in more than 60 languages, including essential services to multicultural and First Nations Australians. SBS plays an important role in countering misinformation.

This outcome is at odds with the Government's intention of supporting public interest journalism, and in particular Parliament including the public service broadcasters in the Code framework with respect to remuneration.

4. The review seeks stakeholder views on any other impacts of commercial deals on the Australian news sector (for example, on competition in media markets).

As noted elsewhere in this submission, the fact that commercial deals have been concluded with some, but not all, news media organisations, leaves those without deals (such as SBS, as regards Meta) at a competitive disadvantage. The additional revenue flowing through to companies which have done deals, and the enhanced availability of their services on the digital platforms, provides a clear competitive advantage over those who are not realising these benefits, but who compete for largely the same audiences. This also impacts ability to hire and retain staff to deliver these services.

There is also a competitive impact which arises from the concentration of voluntary agreements towards larger incumbents whereby new players are disincentivised from entering the market. This is compounded by the disincentives in play which constrain the Treasurer from making a designation decision (as outlined in this submission). The cumulative impact is a brake on new market entrants and a resulting negative impact on diversity and sustainability in news media (which were some of the primary public policy drivers behind the Code).

5. The review seeks stakeholder views on the other forms of support made available by digital platforms to individual news businesses and the Australian news sector more broadly

In principle, SBS supports the engagement and support provided voluntarily by the digital platforms into news and information publishing in Australia. However, it seems likely that these contributions were incentivised by the existence of the Code framework and is further evidence of the value of the Government's regulatory intervention.

We also note, as outlined above, there have been criticisms of some of the support programs made available by the platforms, in particular, Facebook. The pool of available funds is small when compared to the estimated value of commercial agreements, is limited in time, and is shared across a large number of media organisations. The fact of the platforms being the gatekeeper to these funds further entrenches the power they hold in the market.

6. Did the designation criteria operate to deliver outcomes consistent with the policy objectives of the Code?

In relation to Google, yes; in relation to Meta, no. As outlined above, the designation criteria in the Act operates in such a way as to disincentivise platforms from completing deals with the full range of media organisations.

This is due to the construction of s 52E(3) of the Act, which requires the Treasurer to consider whether a platform has "made a significant contribution to the sustainability of the Australian news industry". This drafting means that an overly high-level and



insufficiently granular assessment will be made of a platform's voluntary engagement with news media businesses.

For example, if a platform has completed deals with a majority of the larger media businesses in Australia, this may be deemed a 'significant contribution', notwithstanding the fact that deals have not been concluded with a larger number of smaller organisations.

This drives outcomes inconsistent with the policy objectives of the Code, leaving smaller organisations in an increasingly vulnerable position—still subject to the economic and competitive challenges to viability with the ACCC identified as cause for strong concern throughout its review process. In addition, they are competing with larger news organisations who, as a result of deals with the platforms, are in an enhanced competitive position.

7. If not, which of the designation criteria could be improved, and how, to ensure consistency with the policy objectives of the Code?

Amendments to the designation criteria which improve its operation and its ability to deliver on the public policy objectives of the Code should be considered.

Section 52E of the Act should be amended so as to enable the Treasurer to make a decision with regard to the impact of a platform's bargaining behaviour on subsections of the Australian media industry, as opposed to only considering the impact on the sector as a whole.

For example, the Treasurer should be empowered to assess the impact of a platform's behaviour on news organisations it has not sought to deal with. This would help address the current outcomes whereby a platform's impact on smaller broadcasters and publishers is overshadowed by the impact of deals with numerous larger news media businesses.

As outlined above, SBS supports factors being added to the designation provisions to which the Treasurer must have regard when considering if the scope of commercial deals made is sufficient. These could be in line with policy objectives, and could include whether the deals were:

- with news media organisations which are trusted news sources;
- with news media organisations which have comprehensive content safeguards, such as Codes of Practice; or
- with news media organisations which serve underserved communities, such as multilingual communities or regional and remote communities.

Also, SBS notes concerns outlined above that additional barriers to designation exist in the form of provisions in commercial deals which would see those deals invalidated if a platform is designated under the Code.

The Treasurer should be empowered to designate platforms in relation to a specific subset of news media businesses. For example, the power could be amended to enable designation of a platform in relation to its dealings with publicly funded news media organisations, or news organisations with a certain reach or of a certain size.



8. Are additional designation criteria needed, or are some criteria unnecessary, to meet the policy objectives of the Code?

See answer to question 7 above.

9. Did the registration tests operate to ensure that news businesses were registered where, and only where, this was consistent with the policy objectives of the Code?

SBS was satisfied with its experience of the registration process.

10. If not, which of the registration tests could be improved, and how, to ensure consistency with the policy objectives of the Code?

Nil comment.

11. Are additional registration criteria needed, or are some registration criteria unnecessary, to meet the policy objectives of the Code?

Nil comment.

12. Did the ACMA guidelines help applicants understand the registration criteria and the process the ACMA would follow to make a decision on individual applications?

Nil comment.

13. Are there any improvements that could be made to the ACMA's guidelines?

Nil comment.

14. Are there any improvements that could be made to how the ACMA administers the application and assessment process generally?

Nil comment.

15. Are there any issues relating to the Code, not covered by the consultation questions above, that stakeholders wish to bring to the attention of the review?

Nil comment.