



THE HON JOSH FRYDENBERG MP
Treasurer

THE HON PAUL FLETCHER MP
Minister for Communications, Cyber Safety and the Arts

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DRAFT MANDATORY CODE OF CONDUCT GOVERNING DIGITAL PLATFORMS AND MEDIA BUSINESSES RELEASED FOR PUBLIC CONSULTATION

The Australian Competition and Consumer Commission (ACCC) has released a draft mandatory code of conduct to address bargaining power imbalances between digital platforms and media companies for four weeks of public consultation.

This follows the Government's announcement on 20 April 2020 that the ACCC had been directed to develop a mandatory code of conduct, with a draft to be released for consultation by 31 July 2020.

The development of a mandatory code of conduct is part of the Government's response to the ACCC's Digital Platforms Inquiry final report to promote competition, enhance consumer protection and support a sustainable Australian media landscape in the digital age.

In its final report the ACCC identified that Facebook and Google have each become unavoidable trading partners for Australian news media businesses in reaching audiences online, resulting in an imbalance in bargaining power.

The draft mandatory code outlines requirements covering bargaining arrangements between the parties, minimum standards relating to the presentation of news and a penalty regime.

Under the proposed bargaining arrangements, commercial media organisations will be able to enter into negotiations with relevant digital platforms to determine an appropriate payment for news content, with binding arbitration to follow should they be unable to reach agreement.

These bargaining arrangements will not be available to public broadcasters as they are principally funded by Government and not through advertising revenue. Public broadcasters will, however, benefit from the minimum standards for non-remuneration matters set out in the draft mandatory code.

The Government is delivering a regulatory framework that is fit for purpose and better protects and informs Australian consumers, addresses bargaining power imbalances between digital platforms and media companies, and ensures privacy settings remain appropriate in the digital age.

Information on the public consultation process will be available via www.accc.gov.au

Ends.

Media contact: Kane Silom — Office of the Hon Josh Frydenberg MP — 02 6277 7340
Brad Hatch – Office of the Hon Paul Fletcher – 0448 162 679
The Hon Josh Frydenberg MP | Treasurer | MELBOURNE
The Hon Paul Fletcher MP | Minister for Communications, Cyber Safety and the Arts | SYDNEY



Summary

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Draft Mandatory Code Governing Commercial Relations between Digital Platforms and Australian News Media Companies

Eligibility of Australian news media businesses (NMBs)

The draft code provides that an NMB assessed by the Australian Communications and Media Authority (ACMA) as satisfying the following criteria will be covered by the code:

- individual publications or programs predominantly create and publish news;
- operates predominantly in Australia serving a largely Australian audience;
- is subject to a professional editorial standards regime (or appropriate internal standards) and has substantial editorial independence from the subject of its news coverage (which excludes e.g. trade publications); and
- earns revenue exceeding \$150,000 per year.

Application to digital platforms (Google and Facebook)

The draft code provides that the Treasurer may, via legislative instrument, determine that a digital platform is subject to the code, having regard to whether a substantial bargaining imbalance exists and to ACCC advice or reports.

Bargaining

An NMB covered by the code will be able to notify a digital platform that it wishes to bargain over remuneration, the minimum conditions set by the code (see below) or other matters relating to Australian news content on any service provided on the digital platform.

NMBs may negotiate individually or collectively.

The code requires that each party must negotiate in good faith.

Mediation will be available to assist negotiations.

As public broadcasters, the ABC and SBS would not be subject to the bargaining provisions in relation to remuneration under the Code.

Arbitration

Compulsory arbitration will only be available for disputes about remuneration.

Arbitration will be triggered if agreement is not reached within three months (including participation in mediation), or if both parties agree to move to arbitration before three months expires.

The parties can agree on the appointment of an arbitrator. If they cannot agree, the Australian Communications and Media Authority (ACMA) will appoint a panel of three arbitrators drawn from a register of ten members with experience in legal, economic or industry matters.

The parties will bear the cost of the arbitration.

An NMB (or group of NMBs) and a digital platform will each submit a final remuneration offer to the panel, who will be required to accept one of the offers.

- In determining which offer to accept, the panel will be required to take account of the direct and indirect benefits of Australian news to digital platforms, the costs incurred by NMBs in producing news, and whether an undue burden would be imposed on the digital platform.
- Strict time limits will apply to the arbitration process.
- The panel may only reject both parties' offers if each offer raises significant public interest concerns. In this circumstance, the panel may adjust one of the offers.

The ACCC would have access to the parties' offers made to the arbitration panel, and would be able to make submissions to the panel. It would also be able to issue public guidelines about the operation of the arbitration process.

Minimum standards

As a minimum, the draft code would require that each digital platform:

- provide a clear explanation of the type of data it collects on users' interactions with Australian news content;
- publish a proposal, in consultation with NMBs, to recognise original Australian news content;
- provide 28 days' advance notice to NMBs of algorithm changes :
 - that will likely materially affect the ranking of NMBs' news content;
 - that are specifically aimed at affecting the ranking and display of paywalled news content;
- provide 28 days' advance notice of changes to internal policies and practices that are likely to significantly affect the display of news content;
- provide 28 days' advance notice of changes to algorithms, and internal policies and practices, that are likely to affect the display of advertising associated with news content;
- provide NMBs the ability to 'opt out' of having their news content included on any individual digital platform service;
- provide a point of contact for NMBs; and
- enable NMBs to prevent or remove comments on individual news content stories that they post on digital platforms.

Non-discrimination requirements

The draft code will prohibit digital platforms discriminating:

- between NMBs subject to the code; and
- between NMBs subject to the code and NMBs not subject to the code (for example, overseas NMBs).

Broadly, discrimination would occur if a digital platform disadvantaged the content of a NMB relative to others, for example, via an artificially lower ranking in search results or a social media feed. This extends to digital platforms ceasing to carry news from Australian NMBs but continuing to carry news from international NMBs.

Penalties

The maximum penalties applying for breaching the *Competition and Consumer Act 2010* and the Australian Consumer Law will apply to digital platforms who are found to breach the code by a court, that is, \$10 million per breach, or three times the benefit obtained, or 10 per cent of annual turnover, whichever is the greater.

The ACCC would be able to issue infringement notices for code breaches, accompanied by commensurately smaller penalties.

Review

A review of the code would be legislatively required to commence within two years.