



# Q&As: Draft news media and digital platforms mandatory bargaining code

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# 1. General

## 1.1. What is the news media and digital platforms bargaining code?

On 20 April 2020, the Australian Government asked the ACCC to develop a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Google and Facebook. The ACCC released a draft code for public consultation on 31 July 2020.

The draft code would allow news media businesses to bargain individually or collectively with Google and Facebook over payment for the inclusion of news on their services.

The code also includes a set of 'minimum standards' for the treatment of news on digital platform services, addressing issues such as:

- providing advance notice of changes to algorithmic ranking and presentation of news;
- appropriately recognising original news content; and
- providing information about how and when Google and Facebook make available user data collected through users' interactions with news content.

## 1.2. Which digital platforms would be covered by the code?

Digital platforms must participate in the code if the Treasurer makes a determination specifying that the code would apply to them. The Government has announced that the code would initially apply only to Facebook and Google. Other digital platforms may be added to the code if they hold a significant bargaining power imbalance with Australian news media businesses in the future.

## 1.3. Why is this code necessary?

The code seeks to address the fundamental bargaining power imbalances between Australian news media businesses and major digital platforms. This imbalance has resulted in news media businesses accepting less favourable terms for the inclusion of news on digital platform services than they would otherwise agree to.

While bargaining power imbalances exist in other areas, the bargaining power imbalance between news media businesses and major digital platforms is being addressed as a strong and independent media landscape is essential to a well-functioning democracy.

## 1.4. When would the code commence?

The code would commence following the introduction and passage of relevant legislation in the Australian Parliament. The ACCC released an exposure draft of this legislation on 31 July 2020, with consultation on the draft due to conclude on 28 August 2020. Final legislation is expected to be introduced to Parliament shortly after conclusion of this consultation process.

## 1.5. Who is responsible for this code?

The draft code has been developed by the ACCC in close consultation with the Department of the Treasury and the Department of Infrastructure, Transport, Regional Development and Communications.

The ACCC would be responsible for administering and enforcing the code, and would have a role in providing submissions as part of compulsory arbitrations conducted under the code.

The Australian Communications and Media Authority (ACMA) would be responsible for determining eligibility of news media businesses to participate in the code.

## 1.6. Did the ACCC consider other models for the code?

The draft code addresses the bargaining power imbalances between Australian news media businesses and major digital platforms through a framework based on negotiation, mediation and arbitration; and which also allows news media businesses to bargain collectively with digital platforms.

As set out in the concepts paper released on 19 May 2020, the ACCC sought and considered a range of stakeholder views on a number of potential bargaining frameworks. These frameworks were based on collective boycott of digital platforms by news media businesses, and on 'collective fee arrangements', a subset of which could have required digital platforms to pay fixed fees into a funding 'pool' to be shared between news media businesses. During consultation on the code, stakeholders expressed a range of views on these potential frameworks.

The draft code adopts a model based on negotiation, mediation and arbitration, to best facilitate genuine commercial bargaining between parties, allowing commercially negotiated outcomes suited to different business models used by Australian news media businesses.

Further, the outcomes of negotiations conducted between a digital platform and one news media business (or a collective of news media businesses) under this model would not affect the outcomes secured by other news media businesses – which is not the case for a 'zero sum' or 'one-size-fits-all' framework such as a collective funding 'pool'.

We also note that the implementation of any 'funding pool' arrangement would require the government to make complex upfront decisions on value of news content, and on the distribution of funds between news media businesses; such decisions are best left to the parties themselves.

Should news media businesses not reach commercial agreement with a digital platform within three months of commencing bargaining, the code provides for compulsory arbitration on payment within reasonable timeframes, and a set of minimum standards that improve on the status quo currently available to Australian news media businesses.

## 2. Eligibility of news media businesses

### 2.1. Which news media businesses can participate in the code and how would they apply?

Under the draft code, news media businesses wishing to participate would apply to the ACMA. News media businesses would nominate which of their 'news sources' they would like included in the code. These can include news websites, newspapers and other print publications, television programs, radio programs, and other audio or video content made available online.

Based on the news sources they nominate, news media businesses can participate in the code if:

- **They *predominantly* produce 'core news', and publish this online:** The draft code defines 'core news' as journalism on publicly significant issues; journalism that engages Australians in public debate and informs democratic decision making; and journalism relating to community and local events. Some examples of this kind of journalism are political reporting, court, and crime reporting.
- **They adhere to appropriate professional editorial standards:** These can include editorial standards set by the Press Council or the Independent Media Council; editorial standards set in relevant media industry codes; or equivalent internal editorial standards.
- **They maintain editorial independence from the subjects of their news coverage.** News sources are unlikely to meet this test if they are owned or controlled by a party that has a direct commercial interest in the coverage they produce – such as a magazine that mainly produces sponsored or 'advertorial' content, or a publication reporting on a local council owned by that council. News sources are also unlikely to meet this test if they are owned or controlled by a political advocacy organisation, such as a political party or a union.
- **They operate primarily in Australia for the purpose of serving Australian audiences.**

In addition to the criteria above, an eligible news media business's annual revenue must exceed \$150,000, in either the most recent financial year or in three out of the five most recent financial years.

### 2.2. What type of news is covered by the code?

In order to be eligible to participate in the draft code, a news media business must nominate one or more of its news sources that mainly produces 'core news'. The draft code defines 'core news' to include journalism about publicly significant issues; journalism that engages Australians in public debate and informs democratic decision making; and journalism relating to community and local events. Some examples are political reporting; court reporting and reporting on crime.

Once a news media business is eligible to participate in the code, they would be able to negotiate with digital platforms over *all news* produced by their nominated news sources—not just the 'core news' described above. The code's minimum standards for dealing with news on digital platform services would apply to all news on participants' news sources, rather than just 'core news'. Some examples of content that is not 'core news' but would still be covered by the code when reported by an eligible news media business include:

- reporting about sport, such as interviews with coaches and players or investigative journalism focused on sports administration
- reporting about entertainment and the entertainment industry, such as news about new film releases or television shows.

The code is not intended to capture any non-news media content, such as:

- broadcasts of sports games or printing of sports results and scores;
- entertainment content such as drama or reality television programming;
- product reviews;
- talkback radio;
- academic publications; and
- documentary films.

### 2.3. How would the code benefit smaller, regional and rural news media businesses?

The bargaining power imbalance between news media businesses and the digital platforms is particularly acute for smaller, regional and rural news media businesses. The draft code would allow news media businesses to bargain with a digital platforms either individually or (more likely) as part of a collective. Bargaining as part of a collective would allow smaller news media businesses to negotiate from a stronger position than negotiating individually. Collective bargaining is likely to also reduce costs for individual news media businesses, and allow groups to pool resources and expertise during the negotiation process.

The draft code would see smaller news media businesses benefit from minimum standards applying to their dealings with digital platforms. For example, these minimum standards would require digital platforms to provide news media businesses with clear information about the nature and availability of user data collected through users' interactions with their content on their services. This would particularly benefit smaller news media businesses who may not be aware of the type of information currently available to them, and how they can seek to use this data to better serve their audiences online.

The minimum standards would also require digital platforms to give news media businesses at least 28 days' notice of algorithm changes likely to materially affect referral traffic, to affect ranking of news behind paywalls, or to result in substantial changes to the display and presentation of news, and advertising directly associated with news, on their services. This advanced notice would give all news media businesses the opportunity to implement strategies to maintain or increase audience reach and engagement with their news on digital platform services.

## 3. Bargaining under the draft code

### 3.1. How would the code encourage bargaining between news media businesses and the major digital platforms?

The draft code would require major digital platforms and news media businesses to negotiate in good faith over all issues relevant to news on digital platform services.

News media businesses can bargain either individually or collectively with a digital platform as part of these negotiations. The code allows collective bargaining by news media businesses in order to help address the existing significant imbalance in bargaining power between those businesses and the digital platforms.

The draft code also encourages parties to participate in mediation in order to facilitate commercial agreements on these issues.

Where an agreement cannot be reached within three months, the code provides a mechanism for binding arbitration. Unlike negotiation and mediation, which can include any issues related to the inclusion of news on *all* relevant digital platform services, this arbitration would be limited to the issue of payment, and would be limited to particular services offered by the digital platform. This limited scope of arbitration provides an incentive to negotiate commercial agreements acceptable to both parties without the need for arbitration, and would also help provide a more manageable and quicker resolution of the arbitration.

### 3.2. How would the draft code's time limits for negotiation and mediation work? What happens if parties can't agree?

News media businesses can notify Google or Facebook that they wish to bargain in relation to one or more issues relating to the inclusion of their news on the platform's services.

Following this notification, the parties have three months to negotiate. Within the first 11 weeks, the parties are required to arrange and attend mediation. Like negotiation, mediation may cover any or all services supplied by the digital platforms and any issues relating to news content about which the parties wish to negotiate, including payment.

If negotiation and mediation does not result in an agreement within three months, news media businesses can elect to bring the dispute to compulsory arbitration, which would only consider payment on a limited number of digital platform services.

## 4. Final offer arbitration

### 4.1. How and when would the code require compulsory arbitration?

If the parties have not reached an agreement for the inclusion of news on digital platform services within three months of negotiation, and the parties have attended at least one day of mediation, news media businesses can elect to commence arbitration.

Alternatively, if the parties wish to enter arbitration sooner, they can commence arbitration if they both agree to do so after 10 business days of negotiation, and after attending at least one day of mediation.

Once arbitration has been triggered through either of the methods above, it is compulsory for the digital platforms to participate in the arbitration. The outcomes of arbitration would be considered binding on both parties.



## 4.2. How would an arbitrator be chosen?

As part of its responsibilities under the draft code, the ACMA would appoint a register of arbitrators to resolve disputes under the code. This register would consist of at least ten individuals, each with experience in either legal, economic or industry matters.

When arbitration is required, the parties have the option to agree to a single arbitrator or to a panel of three individuals, who may or may not be from the register set up by the ACMA. If the parties cannot agree, the ACMA would appoint a panel of three individuals from the register with an appropriate mix of legal, economic and industry expertise.

## 4.3. Who would pay for the arbitration?

The parties would split the costs of the arbitration equally.

The daily fees set out in the Remuneration Tribunal's *Judicial and Related Offices* determination, which are generally between \$800 and \$2,000 may be useful guidance as to the likely fees of a single arbitrator on the ACMA-appointed register. The fees of a Copyright Tribunal Member, which are \$1,103 per day, may also be useful guide.

## 4.4. What news content would be considered in arbitration?

All news produced by a participating news media business's news sources would be considered as part of arbitration.

## 4.5. Which digital platform services would be included in arbitration? Why does the code's final offer arbitration only apply to these services?

By default, arbitration under the draft code would only consider the inclusion of news on the following digital platform services:

### **Facebook**

- Facebook News Feed (including Facebook Groups and Facebook Pages);
- Instagram; and
- Facebook News Tab (when launched in Australia).

### **Google**

- Google Search;
- Google News; and
- Google Discover.

These services have been selected on the basis that they display Australian news, without typically offering revenue-sharing arrangements to all news media businesses that produce this content.

However, should both parties agree, arbitration under the draft code can include other relevant digital platform services.

## 4.6. What is ‘final offer arbitration’ and how does it work?

Arbitration under the code would be performed through ‘final offer arbitration’. The digital platform and news media business (or a collective of news media businesses) must each submit a final offer on the remuneration to be paid by the digital platform within 10 days of the commencement of arbitration. Parties would then have a further 5 business days to provide comments on each other’s offer.

The ACCC may on occasion make a submission to the arbitrator to assist with consideration of the parties’ submissions or to provide guidance on the application and interpretation of the code. The arbitrator has discretion on whether to consider the ACCC’s submission.

After receiving submissions and comments from the parties and the ACCC, the arbitrator would have 30 business days to choose one or the other of the parties’ ‘final offers’, which would form a binding agreement between the parties.

If the arbitrator forms the view that both offers raise significant public interest concerns related to consumer welfare or the provision of public interest journalism, they may adjust the more reasonable of the two offers. However, this mechanism is expected to be used rarely.

Parties may continue to negotiate during the arbitration process. If they reach a commercial agreement any time before the arbitrator makes a decision, the arbitration would cease.

## 4.7. How would the arbitrator decide between the parties’ final offers?

The draft code requires that in deciding between the two parties’ final offers, the arbitrator must consider:

- the direct and indirect benefit that the content of the news business (or news businesses’) provides to the digital platform’s service;
- the cost to the news business (or news businesses) of producing news content; and
- whether a particular payment amount would place an undue burden on the commercial interests of the digital platform.

## 4.8. Why does the draft code propose final offer arbitration rather than conventional commercial arbitration?

The code’s use of final offer arbitration recognises the significant challenges involved in setting a price for the inclusion of Australian news on digital platforms services. While digital platform services such as Google Search and Facebook News Feed do derive some direct monetary value from showing advertising alongside news, much of the benefit that these services derive from Australian news is indirect. Such indirect benefits include: the public perception benefits of being known as a provider of Australian news; the ability to attract and retain digital platform users on the basis of featuring Australian news; and the value of user data collected through the presence of Australian news, which can be used to improve the services digital platforms provide to users and advertisers.

Given these challenges, final offer arbitration leaves it to the parties to determine a suitable price through their final offers. The fact that the arbitrator or arbitration panel would be choosing from one of two offers rather than attempting to determine a price would discourage ambit claims and provide a strong incentive for both parties to submit their most ‘reasonable’ offers.

Final offer arbitration would also provide much quicker outcomes than conventional commercial arbitration would allow, with the arbitrator required to make a decision within

30 business days of receiving offers and comments from the parties—a maximum of 45 business days after arbitration commences.

## 5. Minimum standards

### 5.1. What are the minimum standards under the code and why are they necessary?

In addition to the obligation to bargain in good faith, the draft code introduces a series of ‘minimum standards’ for digital platforms to meet in their dealings with news media businesses. These would require digital platforms to:

- give news media businesses at least 28 days’ notice of:
  - algorithm changes likely to materially affect referral traffic to news;
  - algorithm changes designed to affect ranking of news behind paywalls; and
  - substantial changes to display and presentation of news, and advertising directly associated with news, on digital platform services;
- give news media businesses clear information about the nature and availability of user data collected through users’ interactions with news on their services;
- publish proposals to appropriately recognise original news on their services;
- provide flexible user comment moderation tools for news media businesses; and
- allow news media businesses to prevent their news being included on any individual digital platform service.

These minimum standards reflect terms that Australian news media businesses may have been able to secure in commercial negotiations with major digital platforms in the absence of the existing significant bargaining power imbalance.

The minimum standards would apply to all news content covered by the code, whether or not a news media business elects to commence bargaining with a digital platform. While news media businesses and digital platforms can negotiate to provide commercial terms that improve on the minimum standards, news media businesses would not be able to accept commercial terms that breach (or go below) these standards.

### 5.2. Does the code affect the privacy of digital platform users?

The draft code’s minimum standards require digital platforms to provide clear information about the data they currently collect through news content. However, the code does not include any requirements for digital platforms to increase sharing of user data with news media businesses. Accordingly, the code does not have an impact on the privacy protections currently applicable to digital platform users.

Under the code, digital platforms must give news media businesses clear information that explains what data they collect on users’ interactions with news content on their services. This requirement is intended to resolve an information asymmetry between digital platforms and news media businesses. Generally, news media businesses are not aware of the extent of data collected by the digital platforms using news content, or how digital platforms use and collect this data. This requirement would address this issue, particularly for smaller news media businesses so they can better understand what data is collected by and what data is available to them.

If news media businesses elect to negotiate with the digital platforms for more user data, they may only do so in accordance with Australian privacy laws.

### 5.3. Why is 28 days the appropriate notice period for algorithmic change?

The ACCC considers that 28 days is a reasonable and appropriate notice period for significant algorithm changes that would allow news media businesses to adapt to these changes, without putting an unnecessary burden on digital platforms.

The code would also allow flexibility for digital platforms to implement urgent algorithm changes in a shorter timeframe under certain exceptional circumstances (e.g. to remove misinformation about COVID-19 or in response to events such as the 2019 Christchurch terror attack).

### 5.4. Does the code require digital platforms to disclose the content or source code of their proprietary algorithms?

No. The code's minimum standards would simply require digital platforms to provide news media businesses with 28 days' advance of algorithm changes that are likely to affect their business models. The code does not prevent digital platforms from making these changes.

### 5.5. Would the code give news media businesses more control over news content and advertising?

The code would give news media businesses more control over their content and advertising to a certain extent.

News media businesses would be able to 'opt out' of having their news content featured on individual digital platform services against their will. News media businesses would also have more control over user comments made against stories they post or publish to digital platform services, with digital platforms required to provide flexible moderation tools that allow:

- removing or filtering user comments;
- disabling user comments against individual news items; and
- blocking user comments or accounts.

## 6. Non-discrimination requirements

### 6.1. What do the non-discrimination requirements mean?

The draft code would prohibit digital platforms discriminating against the news content of news media businesses on the basis of their participation in the code.

Broadly, such discrimination would occur if a digital platform disadvantaged the content of a news media business that participated in the code when compared to another news media business that did not. For example, this may occur by a digital platform artificially lowering the ranking of a news media business's content in search results or a social media feed.

A decision by digital platforms to place more reliance on international news and lower the ranking of, or cease carrying, Australian news content on the basis of participation in the code would also be considered discrimination.

## 7. Enforcement of the code

### 7.1. What are the penalties for non-compliance with the code?

The ACCC may decide to take enforcement action for non-compliance with certain aspects of the draft code, including:

- not bargaining in good faith during negotiations, including refusing to participate in negotiation, mediation or arbitration;
- breaching minimum commitments; and
- breaching non-discrimination provisions.

The ACCC can issue infringement notices of 600 penalty units (\$133 200) where it has reasonable grounds to believe a party that has contravened the code. Should the ACCC commence court proceedings, the maximum penalties would be the greater of either:

- \$10 000 000;
- three times the benefit obtained from the conduct (if calculable); or
- 10 per cent of a digital platform's annual turnover in Australia in the last 12 months.

These penalties are consistent with the maximum penalties that apply under the Australian Consumer Law. The fact that the maximum penalties apply does not mean the ACCC would seek the maximum penalty for all contraventions of the code, particularly if they relate to less serious contraventions.

For example, if a digital platform only gave 27 days' advance notice of an algorithm change instead of 28 days, the ACCC would be unlikely to seek the maximum penalty. However, if a digital platform refused to provide any advance notice of algorithm changes, and continually refused to do so, then the ACCC may seek higher penalties to effectively deter this type of conduct.

The ACCC would consider the principles in its [Compliance and Enforcement Policy](#) when deciding what enforcement action is appropriate.

### 7.2. Which companies would the penalties apply to under the code?

The penalties would apply to the digital platforms for all contraventions of the code, and also apply to news media businesses if they are found to have not acted in good faith in their negotiations with the digital platforms.