

Required changes to AU News Media Bargaining Code

	Key changes	Commentary	Clean copy of wording
1.	<p>Designation</p> <ul style="list-style-type: none"> • Amend existing s52E (3) (Minister may make designation determination) <p>(3) In making the determination, the Minister must be <u>satisfied that consider whether</u> 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.</p> <ul style="list-style-type: none"> • Delete s52E(4) and replace with: <p><u>(4) A designated service will only be required to comply with Divisions 6 and 7 of this Code if:</u></p> <p>(a) <u>It has the primary purpose of making available news content; OR</u></p> <p>(b) <u>The responsible digital platform corporation has not made a standard offer with respect to a designated service which has the primary purpose of making available news content and the standard offer involves the licensing of a substantial amount of news content.</u></p>	<p>Designation</p> <p>Any requirement to pay for links and snippets in Search is fundamentally unworkable for Google.</p> <p>Google is prepared to pay publishers via News Showcase.</p> <p>The intention must be that News Showcase serves as the vehicle for payments to publishers. To meet the Government’s objectives, Search could remain relevant as a fallback provision only if reasonable payments are not offered under News Showcase. In that case, Search could then be employed for the purposes of bargaining and arbitration. This proposed wording for 52E(4) achieves that objective.</p> <p>Search would be designated in any event for the purposes of minimum standards under the Code.</p> <p>Problem:</p> <p>The designation of Google Search under the remuneration and arbitration provisions of the Code in effect requires Google to pay for links and snippets in Search and is fundamentally unworkable for Google. It sets a dangerous precedent that undermines the most basic principles of a free and open Internet — built on the ability to link between websites.</p> <p>Workable:</p> <p>A workable Code would guarantee remuneration of news media businesses via News Showcase — a new content licensing program that enables deals to be made with News Media Businesses for editorial curation, access to content beyond paywalls, and content licensing, that launched globally in October 2020. The Government’s concern of an imbalance of bargaining power would be</p>	<p>s52E(3) and s52E(4)</p> <p>(3) In making the determination, the Minister must be satisfied that 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.</p> <p>(4) A designated service will only be required to comply with Divisions 6 and 7 of this Code if:</p> <p>(a) It has the primary purpose of making available news content; OR</p> <p>(b) The responsible digital platform corporation has not made a standard offer with respect to a designated service which has the primary purpose of making available news content and the standard offer involves the licensing of a substantial amount of news content.</p>

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		<p>addressed through binding arbitration for News Showcase agreements and key minimum obligations that ensure a level playing field for good faith negotiations. Payment for News Showcase would operate to ensure payment to publishers, and arbitration is available to resolve disputes arising from News Showcase offers. If Google does not make standard offers under News Showcase, then Search would be subject to bargaining and arbitration.</p> <p>The Code could still apply Minimum Standards to Google Search to ensure that News Media Businesses have greater access to information (algorithm transparency, data sharing, point of contact etc).</p> <p>While the possibility of concluding News Showcase deals exists within or outside the tabled code, the fact that the arbitration is tied to Search without enabling payments via News Showcase would make the Code unworkable.</p>	

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2.	<p>Arbitration</p> <ul style="list-style-type: none"> <p>Amend section 52ZM(8) (Arbitration panel):</p> <p>(8) If the bargaining parties cannot agree on the appointment of one or more of the members within that period, the ACMA must make that appointment or those appointments either party may request the <u>Australian Centre for International Arbitration (ACICA) appoint the panel in accordance with the rules of ACICA.</u></p> <p>Delete and Replace 52ZX (Final Offer Arbitration):</p> <p>52ZX (Standard Arbitration) (Proposed version)</p> <p><u>(1) The panel is to make a determination under this subsection about the terms for resolving the remuneration issue that sets out an amount (the remuneration amount), if any, for remunerating the registered news business or designated digital platform corporation for the licensing of the registered news business' core news content by the designated digital platform service for 2 years.</u></p> <p><u>(2) Each of the bargaining parties must submit to the panel a submission regarding what the remuneration amount should be no later than [10 business days] after the start of arbitration.</u></p> <p><u>(3) On the day after the panel has received both bargaining parties' submissions in accordance with subsection 2, the panel must provide a copy of each bargaining party's submission to the other bargaining party.</u></p> <p><u>(4) The submissions cannot be more than 30 pages in length.</u></p> 	<p>Arbitration</p> <p>Problem:</p> <p>The arbitration panel should be appointed by an approved independent arbitration organisation, such as ACICA, which is purpose-built with arbitrators that have the relevant skills and independence for conducting arbitrations.</p> <p>The arbitration should be done via standard commercial arbitration and not be based on final offer arbitration, which is inappropriate given the nature of the issues (which are not the narrowly framed and largely standardised discussions to which baseball arbitration traditionally applies).</p> <p>The factors to be taken into consideration in the arbitration should be based on fair market value which, regardless of imbalance of bargaining power, is the relevant rate to make payments in a commercial agreement.</p> <p>The proposed arbitration scheme, despite an appearance of concessions to digital platforms, remains inherently biased and unworkable - as such, it undermines fundamental principles of fairness in commercial negotiations and has already proven to obstruct good faith negotiations.</p> <p>The existing version incentivises both ambit claims and recourse to arbitration by encouraging news businesses to avoid good faith negotiations and 'roll the dice' in arbitration, providing no downside risk to news media businesses. This is not a position that incentivises good commercial negotiations between the parties, which is and should be an important goal of the Code.</p>	<p>s52ZM(8)</p> <p>(8) If the bargaining parties cannot agree on the appointment of one or more of the members within that period, either party may request the Australian Centre for International Arbitration (ACICA) appoint the panel in accordance with the rules of ACICA.</p> <p>s52ZX</p> <p>(1) The panel is to make a determination under this subsection about the terms for resolving the remuneration issue that sets out an amount (the remuneration amount), if any, for remunerating the registered news business or designated digital platform corporation for the licensing of the registered news business' core news content by the designated digital platform service for 2 years.</p> <p>(2) Each of the bargaining parties must submit to the panel a submission regarding what the remuneration amount should be no later than [10 business days] after the start of arbitration.</p> <p>(3) On the day after the panel has received both bargaining parties' submissions in accordance with subsection 2, the panel must provide a copy of each bargaining party's submission to the other bargaining party.</p> <p>(4) The submissions cannot be more than 30 pages in length.</p> <p>(5) Each arbitration regarding the remuneration issue must be conducted in accordance with the rules of the ACICA.</p>

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	<p><u>(5) Each arbitration regarding the remuneration issue must be conducted in accordance with the rules of the ACICA.</u></p> <p><u>(6) At least [10 business days] before making a determination, the panel must give a draft determination (including reasons that would be provided under paragraph (7) below) to the bargaining parties. The bargaining parties may make a final submission in response to the draft determination within [5 business days].</u></p> <p><u>(7) When the panel makes the determination, it must give the parties to the arbitration its reasons for making the determination in accordance with section 52ZZA.</u></p> <ul style="list-style-type: none"> • Delete and replace s52ZZ (Matters to consider in arbitration) with: <p>s52ZZ (Matters to consider in arbitration)</p> <p><u>In making a determination under subsection 52ZX(1), the panel must consider the following matters:</u></p> <p><u>(a) the value of comparable transactions.</u></p> <ul style="list-style-type: none"> • Delete section 52ZZC (Role of Commission) 	<p>Workable: The arbitration process must be made fair, and more consistent with normal commercial arbitration processes by amending as follows:</p> <ul style="list-style-type: none"> • the arbitrator be required to consider comparable transactions • delete references to any hypothetical absence of bargaining power • delete reference to publishers’ costs (or include digital platforms’ costs on the other side) • standard (not final offer) arbitration • ACCC should have no role in the process • independent panel (not ACMA appointed) 	<p>(6) At least [10 business days] before making a determination, the panel must give a draft determination (including reasons that would be provided under paragraph (7) below) to the bargaining parties. The bargaining parties may make a final submission in response to the draft determination within [5 business days].</p> <p>(7) When the panel makes the determination, it must give the parties to the arbitration its reasons for making the determination in accordance with section 52ZZA.</p> <p>s52ZZ</p> <p>In making a determination under subsection 52ZX(1), the panel must consider the value of comparable transactions.</p>
3.	<p>Algorithm</p> <ul style="list-style-type: none"> • Delete references to “internal practices” in sections 52S and 52T <p>52S Change to algorithm or practice to bring about identified alteration to distribution of content with significant effect on referral traffic</p>	<p>Algorithm</p> <p>Problem: The proposed system for sharing of algorithmic changes represents a misconception of the way in which our systems operate.</p> <ul style="list-style-type: none"> • First, most algorithmic changes are not entirely automated. Rather, the substance of human-initiated changes are tested and improved by use of machine 	<p>s52S and s52T subsections (1)(a)</p> <p>(1) Subsection (2) applies if:</p> <p>(a) a change is planned to be made to an algorithm of the designated digital platform service;</p>

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	<p>(1) Subsection (2) applies if:</p> <p>(a) a change is planned to be made to an algorithm or internal practice of the designated digital platform service; and</p> <p>(b) the dominant purpose of the change is to bring about an identified alteration to the ways in which the designated digital platform service distributes content that is made available by the service; and</p> <p>(c) the change is likely to have a significant effect on the referral traffic from the designated digital platform service to the covered news content of registered news businesses (considered as a whole) that the service makes available.</p> <ul style="list-style-type: none"> • In section 52T (Paywalled content) (1)(a) as above • In Section 52T(1)(b), add at end of paragraph: (b) the dominant purpose of the change is to bring about an identified alteration to the ways in which the designated digital platform service distributes content that is made available by the service <u>on the basis of its status behind a paywall</u>; • Delete section 52U (Change to algorithm or practice to bring about identified alteration to distribution of content with significant effect on distribution of advertising) • Amend existing paragraph (b) in section 52V: (b) a change to an algorithm with the dominant purpose of ensuring that the algorithm operates more quickly, efficiently <u>or effectively</u>. 	<p>learning algorithms. The exceptions in this regard do not go far enough.</p> <ul style="list-style-type: none"> • Second, there is simply less content behind paywalls, making it much more difficult to predict “significant” effects, and more likely that unexpected fluctuations could trip this threshold. If the goal is to alert paywall operators to important changes, a purpose-based requirement makes more sense. • The “significance” threshold for changes affecting the distribution of advertising is undefined, and Google is not in a position to measure the impressions or clicks on third-party ads on third-party pages. Google <i>cannot</i> operationalize this requirement as written. • Third, the clauses now apply to changes to any 'internal practice', which is unworkably broad. <p>Workable: To make the algorithm provisions workable, we would seek the following amendments:</p> <ul style="list-style-type: none"> • There should be no requirement in relation to “internal practices”. • The obligation in relation to paywalled content should be deleted or at least limited to changes made on the basis of the paywall, not just those having an incidental effect on paywalled content. • The obligation in relation to the distribution of advertising should be deleted, since Google will not have knowledge of particular news businesses’ distribution of advertising, or whether changes it makes to its Search algorithms will have an effect on such distribution. • The exceptions must include changes with the dominant purpose of ensuring the algorithm operates more effectively. 	<p>s52T (1)(b)</p> <p>(1)(b) the dominant purpose of the change is to bring about an identified alteration to the ways in which the designated digital platform service distributes content that is made available by the service on the basis of its status behind a paywall;</p> <p>s52V</p> <p>(b) a change to an algorithm with the dominant purpose of ensuring that the algorithm operates more quickly, efficiently or effectively.</p>