



**CENTRE FOR MEDIA TRANSITION**

**Review of the News Media and Digital Platforms Mandatory  
Bargaining Code  
Consultation Paper, April 2022**

**Submission to the Treasury**

6 May 2022

## About the Centre for Media Transition

The Centre (CMT) was established in 2017 as an applied research unit based at the University of Technology Sydney (UTS). It is an interdisciplinary initiative of the Faculty of Arts and Social Sciences and the Faculty of Law, sitting at the intersection of media, journalism, technology, ethics, regulation, and business.

Working with industry, academia, government and others, the CMT aims to understand media transition and digital disruption, with a view to recommending legal reform and other measures that promote the public interest. In addition, the CMT aims to assist news media to adapt for a digital environment, including by identifying potentially sustainable business models, develop suitable ethical and regulatory frameworks for a fast-changing digital ecosystem, foster quality journalism, and develop a diverse media environment that embraces local/regional, international and transnational issues and debate.

The CMT is also home to the APAC bureau of the global verification organisation First Draft, which aims to combat misinformation.

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# Introduction

Thank you for the opportunity to make this submission on the review of the News Media Bargaining Code ('the code'). Our submission responds only to specific consultation questions that arise in relation to issues 1 (deals made as a result of the code), 2 (designation of digital platforms) and 3 (registration of news businesses). The recommendations that arise from our responses are as follows.

## Recommendations

### *Issue 1: Deals made as a result of the code*

1. Reporting and oversight obligations should be introduced to provide transparency into the impact of deals made as a result of the code upon quality, original public interest journalism.

### *Issue 2: Designation of digital platforms*

2. The authority to designate a digital platform under s 52E of the code should be removed from the Treasurer and given to the ACCC.
3. The authority to assess the contribution of a digital platform to the sustainability of the news environment should be removed from the Treasurer and given to the ACCC.
4. Reporting and oversight obligations should be introduced to provide transparency into the designation process.

### *Issue 3: Registration of news businesses*

Given the policy objectives of the code, the code should direct support towards news sources producing quality, original public interest journalism, which are often most impacted by the migration of advertising money to digital platforms. Therefore:

5. An originality provision should be incorporated into the code, either through amending the s 52N content test or including an additional consideration for the assessment of primary purpose contained within s 52N(3) of the code.
6. The s 52P professional standards test should be amended so that news businesses are only able to register under the code if they are subject to external standards schemes and complaints processes. Internal schemes should not suffice.
7. The assessment of editorial independence should examine the content produced by the news source in addition to the broader affiliations of the business. A definition of, or assessment criteria for, editorial independence should be included within the second limb of the professional standards test in s 52P(b) of the code.
8. Reporting and oversight obligations should be introduced to provide transparency into the registration process.

## The code's objectives

In accordance with the review's terms of reference, our submission considers whether the code has delivered outcomes consistent with its policy objectives. We identify several areas for improvement and recommend changes that are likely to deliver outcomes closer to these policy objectives than those achieved by the code in its current form.

To assess whether the code is achieving its policy objectives, these need first to be identified. The policy objectives are not set out in the code itself. However, the review's terms of reference express the objective of the code as follows:

*The Code aims to address bargaining power imbalances to ensure that digital platforms fairly remunerate news businesses for the content they generate, thereby helping to sustain public interest journalism in Australia.<sup>1</sup>*

This objective derives from the findings of the ACCC's Digital Platforms Inquiry (DPI), which identified both a bargaining power imbalance and a reduction in the sustainability of public interest journalism to be among the effects of the rise of digital platforms on the choice and quality of news and journalism in Australia.

Our submission does not examine the question of whether the code succeeds in addressing bargaining power imbalances between digital platforms and news businesses. Rather, our focus is on the last element of the objective, namely whether the code helps to sustain public interest journalism in Australia.

In addition, we consider the suitability of the legislative framework, particularly with respect to designation decisions and matters of transparency.

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<sup>1</sup> Australian Government Treasury, Parliament of Australia, *Review of the News Media and Digital Platforms Mandatory Bargaining Code* (Consultation paper, April 2022) 9.

# Consultation Response

Issue 1: The impact of commercial deals made between digital platforms and news media businesses as a result of the code.

**Consultation Question 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.*

**Consultation Question 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.*

Unfortunately, the code operates behind a veil of opacity, and its impacts are largely unknown. The scant details we have come from journalists' investigations, or from ex-ACCC chair Rod Sims revealing that deals made are worth more than \$250million annually.<sup>2</sup> In the absence of designation, the deals made as a result of the code contain confidentiality provisions, which prohibit details being made public by news media businesses and digital platforms. Such provisions may benefit the parties involved, but they do not serve the public interest. It is also likely that such confidentiality provisions tend to serve the interests of some news media businesses but work against the interests of others, such as smaller businesses with already limited bargaining power who are, as a result of these provisions, deprived of information that may help them bargain. Such lack of transparency is unfair. It also creates the real possibility that deals are being done that do not serve the public interest.

We propose that a degree of transparency into the deals being made as a result of the code ought to be made mandatory, including where the deal is made outside the bargaining framework of the code. As described above, the policy objectives of the code are not just to correct a market imbalance following the migration of advertising dollars, but also specifically to foster public interest journalism. Indeed, we submit that the code's role is to foster *quality, original* public interest journalism.

Below, we provide several avenues in which the code might be amended to this end. However, one clear way of achieving this goal is to mandate a degree of transparency around the deals made as a result of the code. We propose that this mandatory transparency should pertain specifically to the provision of quality, original public interest journalism. That is, news media businesses that make deals under the code ought to be required to report annually on how they have, as a result of those deals, contributed to the provision of quality, original public interest journalism. This ought to apply irrespective of designation. In other words, such mandatory transparency ought to apply for deals made in

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<sup>2</sup> Bill Grueskin, 'Millions of dollars for news, shrouded in mysterious deals', *Columbia Journalism Review* (online, 10 March 2022) <<https://jcinstitute.org/news/millions-of-dollars-for-news-shrouded-in-mysterious-deals/>>.

the shadow of the code (as they have been to date), or directly under the code (if designation were to occur).

Two further points are worth noting. First, confidentiality provisions and non-disclosure agreements do not stand in the way of such mandatory transparency. Parliament can enact laws that require disclosure even in the face of such provisions and agreements; parliament can also render such provisions and agreements void. Private contracts, including those made as a result of the code, are subject to the law of the land. And second, Canada's proposed Online News Act promotes greater transparency than the Australian code, with an independent auditor required to issue an annual report that assesses the impact of the Act on the Canadian digital news marketplace. This approach is discussed further below with reference to the significant contribution test.

**Recommendation 1:** Reporting and oversight obligations should be introduced to provide transparency into the impact of deals made as a result of the code upon quality, original public interest journalism.

## Issue 2: The extent to which designation provisions in Division 2 of the Code have delivered outcomes consistent with the policy objectives of the Code.

**Consultation Question 6:** *Did the designation criteria operate to deliver outcomes consistent with the policy objectives of the Code?*

**Consultation Question 7:** *If not, which designation criteria could be improved, and how, to ensure consistency with the policy objectives of the code?*

**Consultation Question 8:** *Are additional designation Criteria needed, or are some criteria unnecessary, to meet the policy objectives of the code?*

In a strict sense, the answer to question 6 is 'no', since the designation criteria were not used and key components of the code were not applied to agreements negotiated in response to the threat of designation (e.g., the minimum standards and the professional standards test). Nevertheless, we recognise that risk of the code coming into effect resulted in the negotiation of these agreements with significant benefits apparently flowing to some news organisations.

Accordingly, we confine our comments on this set of questions to two aspects of the designation criteria that we think can be improved:

- The nomination of the Treasurer as the decision-maker in relation to designation
- The ambiguity in the 'significant contribution' test.

### **Nomination of the Treasurer as decision-maker**

We acknowledge the position set out in the consultation paper that the government does not want to revisit the underlying policy objectives of the code. With respect to this particular issue, we take this to mean that the approach whereby the code does not formally come into operation until it is triggered by the designation of one or more digital platforms is not open to review. Accordingly, we do not comment here on this aspect of the scheme; instead, we discuss the narrower aspect of how designation occurs and how, in our view, it could be improved.

Our first point is that it would be preferable for the decision on designation to be made by an independent authority such as the ACCC, rather than the Treasurer.

Section 52E of the code confers upon the minister (in this case, the Treasurer) the authority to designate a digital platform service or corporation. As this is an administrative decision,

albeit subject to disallowance of the legislative instrument via which the decision is made and ultimately to judicial review, the threshold for impartiality is different from that which applies to a body such as the ACMA or the ACCC, and fewer constraints exist than would be the case for the judiciary or an independent regulator.<sup>3</sup> While this is appropriate, the appointment of the Treasurer as the decision-maker introduces a risk that could be avoided by giving the role of decision-maker to an independent regulator.

The authority given to ministers has been regarded as 'broad and unfettered' in comparison to other administrative bodies, raising potential questions of integrity, public trust and quality in relation to their decisions.<sup>4</sup> This is not to say that the person holding this office now or in the future will make ill-founded decisions, but this form of accountability has led some to perceive the executive as prioritising the elected government and its policies over the duty owed to the public.<sup>5</sup> In *Minister for Immigration and Multicultural Affairs v Jia Le Geng*<sup>6</sup> it was acknowledged that the authority of a minister can be distinguished from that of other officials, such as a departmental head, as ministers function in an 'arena of public debate, political controversy and democratic accountability.'

In practice, this means that a broad range of factors may be considered by, or not considered by, the Treasurer when deciding whether a digital platform corporation is to be designated. For example, the Treasurer may disregard ACCC recommendations. Section 52E does not help this situation because it does not specify factors that *cannot* be considered by the Treasurer. Political policy considerations, such as the perceived need to take a hard line on 'tech giants' or to provide assistance to influential news outlets, could conceivably play into the decision of a politician in a way they might not for an independent regulator. Indeed, this is the rationale behind the longstanding policy for media mergers to be assessed by the ACMA under clearly articulated media ownership rules and by the ACCC under a standard competition test that applies across industries.

In the UK, where the *Enterprise Act 2002* (UK)<sup>7</sup> includes a more effective public interest test for media mergers but the trigger for an inquiry is dependent on a decision of the Secretary of State, there has been criticism of this role being given to a government minister.<sup>8</sup> In a similar context in the banking sector, Martin McElwee notes that the exercise of this power has often resulted in a collision between politics (or in this case, industrial policy) and competition law.<sup>9</sup> Jacob Rowbottom has noted that a failure by the Conservative government to intervene when Rupert Murdoch acquired the *Times* and the *Sunday Times* and a failure by the Labour Party to refer Richard Desmond's acquisition of the *Daily Express* to the competition regulator aroused suspicion that political motives influence ministerial action in cases involving the media.<sup>10</sup> If the political interests of the Treasurer were to supersede competition concerns and this was evident in a decision to designate, the integrity and legitimacy of the Bargaining Code scheme would be undermined.

In contrast, an attempt to reduce ministerial intervention and instead privilege the role of independent regulators can be observed in Canada's approach, where they have

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<sup>3</sup> John Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) 38(3) *Federal Law Review* 383, 355.

<sup>4</sup> Peter Billings, 'Getting rid of Risky Foreigners: Promoting Community Protection at the Expense of Administrative Justice?' 47(2) *Federal Law Review* 231, 237.

<sup>5</sup> Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action: Text Cases and Commentary* (LexisNexis, 5th ed, 2018) 19.

<sup>6</sup> (2001) 65 ALD 1 [61]-[63] (Gleeson CJ and Gummow CJ).

<sup>7</sup> *Enterprise Act 2002* (UK) s 58(2C)(a).

<sup>8</sup> Peter Humphreys, 'Transferable Media Pluralism Policies from Europe', in Steven Barnett & Judith Townend (eds) *Media Pluralism and Plurality, From Hyperlocal to High-Level Policy* (Palgrave MacMillan, 1st ed, 2015) 163; Lesley Hitchens, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Hart Publishing, 1st ed, 2006) 211; Justin Schlosberg and Des Freedman, 'Opening the Gates: Plurality Regulation and the Public Interest' (2020) 11(2) *Journal of Digital Media & Policy* 115, 120; Rachel Craufurd Smith, Submission to Ofcom, *The Future of Media Plurality in the UK Including Ofcom's Consultation on the Media Ownership Rules Review* (2021) 6.

<sup>9</sup> Martin McElwee, 'Politics and the UK Merger Process: The Public Interest Exceptions and Other Collision Points' (2010) 9(1) *Competition Law Journal* 77, 88.

<sup>10</sup> Select Committee on Communications, *Memorandum by Jacob Rowbottom*, (House of Lords Written Evidence, 8 February 2008) 11.

distinguished their analogous ‘Online News Bill’ from Australia’s code by diminishing the role of ministers in the designation process. A stakeholder engagement conducted by Canadian Heritage when drafting the bill revealed a prevailing desire by participants to have an oversight body that was at arms-length from the government to avoid compromising press independence.<sup>11</sup> Pablo Rodriguez, the Canadian Heritage Minister, noted that this arms-length approach would be achieved through conferring the authority to designate upon their media regulator, the Canadian Radio-television and Telecommunications Commission (CRTC). Further, he noted that this would be enhanced by the use of neutral criteria to assess whether there is an imbalance-in bargaining power rather than leaving this to the discretion of the Treasurer, resulting in a more transparent system.<sup>12</sup> This modification has been welcomed by Canadians, who have praised its ability to create a ‘shield’ against political interference.<sup>13</sup> Taking all this into account, we think it would be preferable for the authority to designate a digital platform corporation under s 52E of the Act to be removed from the Treasurer and given to the ACCC.

**Recommendation 2:** The authority to designate a digital platform under s 52E should be removed from the Treasurer and given to the ACCC.

### Ambiguity in the ‘significant contribution test’

Among the criteria for the Treasurer to make a designation decision is the following (s52E(3)(b)):

Whether that group has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).

The meaning of a ‘significant contribution to the sustainability of the Australian news industry’ is so far untested but has been subject to much debate. Even if there were some guidance as to what the ‘contribution’ might be or how it might be judged to be ‘significant’, the Treasurer may not possess the data or resources to make a valid assessment of whether an online intermediary has made a significant contribution to the sustainability of the Australian news industry. It has been widely reported that digital platforms such as Facebook have been increasingly restrictive in enabling access to data on their operations, and that governments lack the regulatory tools to oversee new forms of media such as social media platforms.<sup>14</sup>

This contrasts with the approach of the Canadian Online News Bill. Once the Act has come into effect, the onus is on the operator of the digital intermediary to notify the CRTC that the Act applies to them. The criteria used to make that decision are as follows (s 6):

This Act applies in respect of a digital news intermediary if, having regard to the following factors, there is a significant bargaining power imbalance between its operator and news businesses:

- (a) the size of the intermediary or the operator;
- (b) whether the market for the intermediary gives the operator a strategic advantage over news businesses; and
- (c) whether the intermediary occupies a prominent market position.

<sup>11</sup> ‘Stakeholder engagement on fair revenue sharing between digital platforms and news media’, *Government of Canada* (Web Page, 9 February 2022) <<https://www.canada.ca/en/canadian-heritage/campaigns/fair-revenue-sharing/stakeholder-engagement.html>>.

<sup>12</sup> Canada 2020, ‘The Future of News’ (Youtube, 24 February 2022) <<https://www.youtube.com/watch?v=5F0ZINDlauQ>>.

<sup>13</sup> Dwayne Winseck, ‘Bad news: Liberals’ proposed Online News Act misses the mark’, *TVOntario Today* (online, 19 April 2022) <<https://www.tvo.org/article/bad-news-liberals-proposed-online-news-act-misses-the-mark>>.

<sup>14</sup> Diana Bossio, Terry Flew, James Meese, Tama Leaver and Belinda Barnet, ‘Australia’s News Media Bargaining Code and the global turn towards platform regulation’ (2022) 14(1) *Policy & Internet* 136, 139.



Exemption orders may be granted to a digital intermediary if requested by its operator. The effect of an exemption order is that the digital intermediary may be exempted from the duty to bargain, from certain regulations made by the CRTC relating to this duty, and from charges payable for the purpose of administrative cost recovery. The CRTC will assess eligibility for an exemption order against the following conditions (Online News Bill s 11):

- (a) the operator has entered into agreements with news businesses that operate news outlets that produce news content primarily for the Canadian news marketplace and the Commission is of the opinion that, taken as a whole, the agreements satisfy the following criteria:
  - i. they provide for fair compensation to the news businesses for the news content that is made available by the intermediary,
  - ii. they ensure that an appropriate portion of the compensation will be used by the news businesses to support the production of local, regional and national news content,
  - iii. they do not allow corporate influence to undermine the freedom of expression and journalistic independence enjoyed by news outlets,
  - iv. they contribute to the sustainability of the Canadian news marketplace,
  - v. they ensure a significant portion of independent local news businesses benefit from them, they contribute to the sustainability of those businesses, and they encourage innovative business models in the Canadian news marketplace, and
  - vi. they involve a range of news outlets that reflect the diversity of the Canadian news marketplace, including diversity with respect to language, racialized groups, Indigenous communities, local news and business models; and
- (b) any condition set out in regulations made by the Governor in Council.

In addition, we note that the CRTC will actively monitor compliance with the notification requirements imposed upon digital intermediaries. The Act confers on the CRTC the power to request information from a platform within the time and in the manner that it specifies for the purpose of verifying compliance or preventing non-compliance with reporting obligations. An annual report by an independent auditor is also required which assesses the impact of the Act on the Canadian digital news marketplace. This must include information on the commercial value and effect of the deals and on the distribution of that value among eligible news businesses, as well as any other elements which, in the opinion of the auditor, support the transparency of the impact of the Act.

We do not fully endorse the Canadian exemption order test because some elements (e.g., ‘contribute to the sustainability of the Canadian news marketplace’; publishing information on commercial value without undermining the viability of the deal) may be difficult to apply, but we do want to commend:

- the inclusion of explicit criteria for making exemption decisions
- granting the power to make the decision to the regulator instead of the minister
- the increased transparency provided through reporting and oversight obligations.

We think these aspects of the approach adopted in Canada, rather than the specific provisions themselves, should be considered for application in Australia. In our view, the code generally requires a greater degree of transparency to meet its objectives and to encourage fairness. This includes the need for more transparency into the designation process, irrespective of who holds the authority to designate.

**Recommendation 3:** The authority to assess the contribution of a digital platform to the sustainability of the news environment should be removed from the Treasurer and given to the ACCC.

**Recommendation 4:** Reporting and oversight obligations should be introduced to provide transparency into the designation process.

### Issue 3: The extent to which registration provisions in Division 3 of the Code have delivered outcomes consistent with the policy objectives of the Code.

**Consultation Question 9:** *Did the registration tests operate to ensure news businesses were registered where, and only where, this was consistent with the policy objectives of the code?*

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

**Consultation Question 11:** *Are additional registration criteria needed, or are some registration criteria unnecessary, to meet the policy objectives of the code?*

In our view, the registration tests have not always operated consistently with the policy objectives. In particular, we believe the code is not adequately directing support towards sustaining public interest journalism in Australia. Below we address this in relation to the content and professional standards tests and suggest the addition of another element to the content test.

#### Content test

Relevant excerpts from the code are set out below.

##### s 52A Definitions

**core news content** means content that reports, investigates or explains:

- (a) issues or events that are relevant in engaging Australians in public debate and in informing democratic decision making; or
- (b) current issues or events of public significance for Australians at a local, regional or national level.

**covered news content** means content that is any of the following:

- (a) core news content;
- (b) content that reports, investigates or explains current issues or events of interest to Australians.

**news source** means any of the following, if it produces, and publishes online, news content:

- (a) a newspaper masthead;
- (b) a magazine;
- (c) a television program or channel;
- (d) a radio program or channel;
- (e) a website or part of a website;
- (f) a program of audio or video content designed to be distributed over the internet.

##### s 52N Content test

- (1) The requirement in this subsection is met in relation to a news business if the primary purpose of each news source covered by subsection (2) is to create content that is core news content.
- (2) This subsection covers a news source if it comprises, whether by itself or together with other news sources, the news business.
- (3) For the purposes of subsection (1), in determining whether the primary purpose of a news source is to create content that is core news content, take into account the following matters:
  - (a) the amount of core news content created by the news source;
  - (b) the frequency with which the news source creates core news content;

- (c) the degree of prominence given to core news content created by the news source compared with the degree of prominence given to other content created by the news source
- (d) any other relevant matter.

### *Primary purpose*

Several news sources have been registered by the ACMA that provide some core news content as part of a larger offering that could not be considered core news.

This is permitted by the definition of news source in 52(A), which allows a news business to restrict a nominated news source to only part of its published content. This is particularly apparent in the case of websites. Looking at the news sources registered by the ACMA, we can see that this has allowed Broadsheet, for example, to nominate only the 'city file' sections of its website. These sections comprise primarily core news, while the remaining parts of the website include a broad range of non-news content.

It could be argued that, as a result, the content test is too permissive. In our view, however, this is a minor issue. Bargaining can only take place over the covered news content of a business's registered news source. This means, for example, that only the content of Broadsheet's city file section is relevant to bargaining. Further, keeping this test relatively permissive allows the code to cover a broader range of news businesses. This contributes to, rather than threatens, the achievement of the code's objectives.

Other news sources registered by the ACMA appear to be what could be considered single-interest or niche publications, such as the Australian Property Journal. This appears to be in tension with the policy intentions expressed in paragraphs 1.80 – 1.82 of the Explanatory Memorandum (EM) and reflected in ACMA's eligibility guidelines.<sup>15</sup> Canada's proposed Online News Act requires sources not to produce content 'primarily focused on a particular topic such as industry-specific news, sports, recreation, arts, lifestyle or entertainment' (27(1)(b)(iii)). Once again, however, we believe it is in keeping with the objectives of the code to keep eligibility open to a wide range of sources that publish core news, even those that may focus on a narrow range of issues. Narrow-interest sources have proliferated in the digital media environment and those that produce core news should be eligible under the code.

In our view, strengthening the professional standards test to exclude internal standards would be a better solution to the permissibility of the eligibility criteria than narrowing the content test. This would help promote quality, original, public interest journalism of the sort identified as most in need of support in the DPI. We address this point further under 'professional standards' below.

### *Original content and reporting*

A more significant issue is that the content test currently allows sources that largely recycle or repackage content produced by other news sources. The ACMA has, for example, registered News Cop, which has been reported as repackaging content from elsewhere and, it has been reported, misrepresented the identities of journalists on its website.<sup>16</sup>

**Our strong view is that the code should not direct money to sites such as News Cop, but to businesses that invest in and produce original public interest journalism as reflected in the objectives of the code set out in the review's terms of reference.**

In our view, the policy objectives of the code, which derive from the findings of the DPI, should direct support to the types of news source which have been hardest hit by the

<sup>15</sup> Australian Communications and Media Authority, *News Media Bargaining Code Eligibility Guidelines* (March 2021) 14 ('ACMA NMBC Guidelines').

<sup>16</sup> Byron Kaye, 'Exclusive: Australia puts site accused of fake journalists on register for payment', *Reuters* (online, 24 December 2021) <<https://www.reuters.com/world/asia-pacific/exclusive-australia-puts-website-accused-fake-journalists-register-payment-by-2021-12-23/>>.

migration of advertising money to digital platforms. Low-cost, digital-only sources such as content repackagers are perhaps the least affected by this migration.

Conversely, traditional news sources, particularly those in regional and outer-metropolitan areas, have been most affected, and it is the original public interest journalism provided by these sources that, due to its high cost of production, was identified by the DPI as most in need of external support. Importantly, the originality of the journalism such sources produce is both a cause of its high cost and an intrinsic part of its public interest value. It contributes to its high cost because it requires the employment of reporters to engage in newsgathering, research and production. It is an intrinsic part of its public interest value because the public interest functions of journalism, such as recording, investigating and explaining public policy and issues of public interest or significance, cannot be fulfilled without original newsgathering and research. Moreover, while repackaging original journalism might increase accessibility to news, it adds very little to its public interest value over and above the contribution made by the original source.

As is possibly the case with News Cop (which was registered as a company four days before the code passed into law), the code provides an incentive for the launch of low-cost news repackagers to take advantage of the remuneration they could receive through bargaining with digital platforms. We believe this is not the intention of the code and does not contribute to the achievement of its objectives.

By admitting content repackagers, the code essentially leaves the protection of original news to the market. But the code is itself a substantial market intervention, and we should beware of reinforcing existing market failures by:

- supporting businesses whose business models are already favoured in the digital market but which do not invest in the production of core news
- inadequately supporting those businesses which do invest in the production of core news and which were identified in the DPI as most in need of support.

Under the code, some support for original news production is provided by section 52X. This requires a designated platform to develop, in consultation with registered news businesses, a proposal for how the platform will recognise original news content on its services.

However, s 52X is currently not in effect given no digital platform has been designated, and it is unknown whether the deals that news businesses have reached with digital platforms contain anything relating to the recognition of original news. It is therefore unknown whether these parts of the code have contributed to achieving the code's objectives. Further, if a digital platform were to be designated, there is no guarantee that the proposal it would be required to produce under section 52X would satisfy news businesses or contribute to the sustainability of original news production.

**This problem could be addressed by including an originality provision in the content test or in the considerations for assessing primary purpose.**

If such a provision were included, the ACMA may need to obtain advice from a professional body on whether a nominated news source satisfies the test.

Canada's proposed Online News Act takes this approach, including in s 31(2) an eligibility requirement for the content of news sources to consist 'primarily of original news content'. This requirement is activated only where a digital platform asks for a determination on the eligibility of a news source.

Apart from the specific criterion of original news, we also regard the code as a missed opportunity to promote quality news. We argue elsewhere that more comprehensive reforms are needed to promote quality news specifically.<sup>17</sup> These would involve a degree of algorithmic oversight, and perhaps have elements in common with the EU's proposed

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<sup>17</sup> Chrisanthi Giotis, Derek Wilding and Sacha Molitorisz, 'How Australia's competition regulator is supporting news, but not quality', in Phil Napoli and Regina Lawrence (eds), *News Quality in the Digital Age* (Routledge, forthcoming).

Digital Services Act, which mandates that digital platforms set out 'in a clear, accessible and easily comprehensible manner, the main parameters used in their recommender systems'.<sup>18</sup> Academic Natali Helberger has argued that the proposed law should go further to actively encourage digital platforms to build recommender systems that optimize for public values such as diversity.<sup>19</sup> Similarly, it has been argued that algorithms generally ought to 'incorporate signals of source quality in their recommendations'.<sup>20</sup> It is beyond the scope of this review to define quality, and to prescribe a means to regulate algorithms to promote quality; however, to ensure that the code is not working against quality, it is important not to promote news that is inaccurate, unfair, and otherwise of poor quality. We return to this point below.

**Recommendation 5:** An originality provision should be incorporated into the code, either through amending the s 52N content test or including an additional consideration for the assessment of primary purpose contained within s 52N(3).

### Professional standards test 52P

As noted above, we think some of the problems with the application of the content test could be addressed by strengthening the professional standards test.

Beginning with our original research for the ACCC as part of the Digital Platforms Inquiry through submissions to various inquiries and policy reviews, we have consistently put the argument that Australia's media standards schemes need overhauling in two ways:

- First, the disparate codes of practice that apply across various media platforms should be brought under the one independent cross-media standards scheme that includes an effective complaints-handling function.
- Second, there is an opportunity for digital platforms to contribute to this scheme (and also to be brought under the scheme) as associate members who help to fund the scheme and take other action such as promoting the content produced by its publisher members.

In the context of the News Media Bargaining Code, we have argued that there was a missed opportunity to require – as part of this significant intervention by the state into the news media sector – that the beneficiaries of the Bargaining Code should participate in an overhauled and enhanced media standards scheme.

Below we explain the problems that have arisen from the design of the professional standards test and how they can be rectified. Perhaps most significantly, we argue that a **requirement of registration by ACMA ought to be membership of an external standards scheme.**

### First limb - Professional standards aspect

S 52P(2) provides that the professional standards test will be met if the news source

- (i) is subject to the rules of the Australian Press Council Standards of Practice or the Independent Media Council Code of Conduct; or
- (ii) is subject to the rules of the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice; or

<sup>18</sup> *Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC* [2020] art 29(1).

<sup>19</sup> Natali Helberger, Max van Drunen, Sanne Vrijenhoek, and Judith Möller, 'Regulation of news recommenders in the Digital Services Act: Empowering David against the Very Large Online Goliath' (2021) *Internet Policy Review*.

<sup>20</sup> Sandra González-Bailón, 'Transparency in the Algorithmic Society,' (2021) 13(2) *Policy & Internet* 162, 171.

- (iii) is subject to the rules of a code of practice mentioned in paragraph 8(1)(e) of the *Australian Broadcasting Corporation Act 1983* or paragraph 10(1)(j) of the *Special Broadcasting Service Act 1991*; or
- (iv) is subject to internal editorial standards that are analogous to the rules mentioned in subparagraph (i), (ii) or (iii) to the extent that they relate to the provision of quality journalism; or
- (v) is subject to rules specified in the regulations that replace those mentioned in subparagraph (i), (ii) or (iii); or
- (vi) is subject to other rules specified in the regulations; ...

We take the view that, in keeping with its objectives, the code should, above all, support public interest journalism and quality journalism, rather than simply journalism *per se*. It should support and foster journalism that is accurate and fair, and not journalism that is inaccurate and unfair and that has the capacity to harm individuals and society. In its current form, however, the code makes limited provision for benefits to flow specifically to public interest journalism, and very little provision for benefits to flow specifically to quality journalism. Strengthening the professional standards test to require participation in an external standards scheme would help support and foster journalism that is accurate and fair.

As background, it is important to note that the notion of quality journalism was not a specific focus of the Digital Platforms Inquiry and is largely absent from the code.<sup>21</sup> As noted earlier ('the code's objectives'), the notion of public interest journalism, by contrast, was a focus of the Digital Platforms Inquiry. The ACCC conducted its own research and found 'a significant reduction in provision of multiple categories of reporting related to public interest journalism; that is, journalism that performs a critical role in the effective functioning of democracy at all levels of government and society'.<sup>22</sup> It thus identified a market failure regarding public interest journalism,<sup>23</sup> which its recommendations sought to address.

The code is less explicitly concerned with public interest journalism than was the ACCC's DPI. Most obviously, the code carried through this commitment to public interest journalism in the definition of 'core news' in s 52A, under which news businesses qualify to be registered under the code. Quoted above, this definition largely retains the essence of the ACCC's definition of public interest journalism from its final report, including above all in the phrase 'informing democratic decision-making' (2019, 283). The final report also noted the distinction between public interest journalism and quality journalism, finding:

It is important to distinguish 'high quality journalism' from 'public interest journalism' ... journalism may be produced with the purpose of examining matters of public significance, meeting the definition of 'public interest journalism', without meeting minimum quality standards – for example by failing to be accurate or failing to clearly distinguish reporting from the presentation of opinion (ACCC, 2019, 287).

The one place where public interest journalism and quality journalism are both reflected in the code is in s 52P, which contains a 'professional standards test' and refers - albeit somewhat obtusely in s 52P(1)(a)(iv) - to 'the provision of quality journalism'. Section 52P provides that, to be registered under the code as a 'registered news business', a news organisation needs to establish that each of its participating news outlets is subject to:

- one of two industry schemes established by the print/online news sector;
- one of two statutory codes of practice drafted by industry but enforced by the ACMA; or

<sup>21</sup> Giotis, Wilding and Molitorisz (n 17).

<sup>22</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 19.

<sup>23</sup> *Ibid* 28.

- ‘rules substantially equivalent to those mentioned [above] regarding internal editorial standards that relate to the provision of quality journalism’.

The professional standards test is important because – in theory at least – it means that, to be eligible for benefits under the scheme, news businesses must adhere to professional standards. As the ACCC noted, such standards almost universally require that journalism:

- presents factual material accurately
- corrects significant or material factual errors
- presents news fairly and impartially
- clearly distinguishes reporting from commentary and analysis.<sup>24</sup>

Unfortunately, as we argue elsewhere,<sup>25</sup> s 52P is a major missed opportunity, for two reasons: it allows ‘internal editorial standards’; and it doesn’t seek in any way to remedy the current fragmented and largely ineffective system of news media standards schemes in Australia.

On the first point, we take the view that internal editorial standards should not be enough for a news business to register. This can be seen from Appendix 2, which shows how businesses currently registered with the ACMA have been found to have satisfied s 52P. As Appendix 2 shows: News Cop abides by ‘internal editorial standards which appear to be based on the Australian Press Council (APC) Professional Standards’; Broadsheet Media was initially rejected for an inaccessible and misleading complaints mechanism, before adjusting its ‘internal editorial standards [to] reference and reflect the APC professional standards’; and Primer Media’s ‘internal editorial standards appear to be based on the APC standards’.

News Cop, Broadsheet Media and Primer Media were all registered on this basis, which we suggest should be insufficient. By contrast, Pro Bono and Australian Property Journal are members of the APC. Our view is that a requirement of registration ought to be membership of an external standards scheme.

As noted above, we also take the view that Australia’s news media oversight system needs reform, and the continuing refinement of the Code is a perfect opportunity to undertake such reform. Currently, Australia has 14 standards schemes, creating a system that is confusing and flawed.<sup>26</sup> Elsewhere, we argue for a coherent cross-platform standards scheme.<sup>27</sup> The review of the code presents a perfect moment to re-evaluate news media oversight, with a view to streamlining standards schemes while also including digital platforms in their role as distributors of news.

News businesses are already gaining major benefits from the code. These benefits ought to come with an increased responsibility to create quality journalism and public interest journalism, rather than, say, journalism that is inaccurate and unfair. The professional standards test, by mandating external oversight, would go some way towards promoting quality journalism and public interest journalism. Meanwhile, this should prompt a review of the current, flawed oversight of news media.

**Recommendation 6:** The s 52P professional standards test should be amended so that news businesses are only able to register under the code if they are subject to external standards schemes and complaints processes. Internal schemes should not suffice.

<sup>24</sup> Ibid 286.

<sup>25</sup> Giotis, Wilding and Molitorisz (n 17); Derek Wilding and Sacha Molitorisz, ‘Holding Tomorrow’s News Accountable: Repairing Australia’s Torn Patchwork of News Media Oversight Schemes’ 44(1) *Australian Journalism Review* 19.

<sup>26</sup> Derek Wilding, Peter Fray, Sacha Molitorisz and Elaine McKewon, *The Impact of Digital Platforms on News and Journalistic Content* (Report, 2018) 88 < <https://www.uts.edu.au/sites/default/files/2018-12/CMT%20News%20Report.pdf> >.

<sup>27</sup> Wilding and Molitorisz (n 25).

## Second limb – editorial independence

S 52P provides that the professional standards test will be met if

(b) every news source covered by subsection (2) has editorial independence from the subjects of its news coverage.

There is no definition or assessment criteria for editorial independence included in the legislation. However, the explanatory memorandum includes the following clarifications:

- 1.80 A news source has editorial independence from the subject of its news coverage if it is:
- not owned or controlled by a political or advocacy organisation (such as a political party, lobby group or a union); and
  - not owned or controlled by a party that has a commercial interest in the coverage being produced (for example, a publication that covers a sport that is owned or controlled by the sport's governing body).
- 1.81 The editorial independence requirement is not intended to exclude a news source that otherwise qualifies on all the tests, and occasionally includes reporting about itself or a related business, or about an issue affecting itself or a related business.
- 1.82 However, an advocacy body that mainly publishes news about its own sector will not meet the professional standards test.

Clause 1.80 of the EM provides only negative criteria for the test: a source has editorial independence if it is not owned or controlled by a political or advocacy organisation or by a party that has a commercial interest in the coverage being produced. It does not specify what happens if a source is owned or controlled by such an entity. The ACMA eligibility guidelines thus require applicants who are so owned or controlled to provide evidence that their news sources have editorial independence from these owners or controlling parties.<sup>28</sup> This applies also in the case of news sources that are partly owned or controlled by a political or advocacy group.

**In our view, a definition of, or assessment criteria for, editorial independence should be included in the legislation rather than left to the EM, where it has no real power to determine regulatory settings.**

In addition, the examples of political or advocacy organisations listed in parentheses should, for the sake of clarity, include industry organisations.

Canada's proposed Online News Act applies in the first instance to 'qualified Canadian journalism organizations', which are defined in s 248(1) of the Canadian Income Tax Act. As well as including a primary purpose test roughly equivalent to that in the Australian code, this definition requires such organisations not to be 'significantly engaged in the production of content (a) to promote the interests or report on the activities of an organization, an association of its members, or (b) for a government, Crown corporation or government agency.'

Importantly, this provision ties the editorial independence test to the content produced by the organisation in a way that is not achieved by the Australian code. Including a similar provision in the latter may provide a decision-making process that is both simpler and more closely tied to the objectives of the code than one which requires the ACMA to assess independence with reference to business structure. It would provide a robust criterion for excluding sources which produce a significant amount of content designed to promote their own interests or those they represent. It would also provide the discretion to include

<sup>28</sup> ACMA NMBC Guidelines (n 15) 7.



sources that are operated or owned by industry or advocacy groups, but which produce a wide range of core news and therefore qualify under the primary purpose test (e.g. the New Daily).

**Recommendation 7:** The assessment of editorial independence should examine the content produced by the news source in addition to the broader affiliations of the business. A definition of, or assessment criteria for, editorial independence should be included within the second limb of the professional standards test contained within s52P(b).

### **Transparency of registration decisions**

In our view, the current code fails to provide sufficient transparency over ACMA's registration decisions. Section 52G (3) requires the ACMA only to publish details of each registered news business on its website, including details of the applicant corporation's point of contact. There is no requirement for the ACMA to publish the details of its decision-making.

Given the discretion that the ACMA has in assessing the eligibility tests, the code should require the ACMA to publish details of its eligibility decisions, with the redaction, where appropriate, of confidential information. The ACMA should also be required to report annually on registrations. This would allow public oversight of ACMA's decisions and promote consistency and fairness in the application of the code.

**Recommendation 8:** Reporting and oversight obligations should be introduced to provide transparency into the registration process.

# Appendix 1

Content Test			
Applicant	Stated Purpose	Pass/Fail	Justification
<u>News Cop Pty Ltd</u>	Impartial but critical reflections on trending or important topics	Pass (failed in the preliminary review)	<ul style="list-style-type: none"> <li>Unsuccessful in preliminary review due to:               <ol style="list-style-type: none"> <li>a failure of the news source to meet definition of core news content</li> <li>Frequency and prominence of news content (most recent article had been published four months prior to the final assessment)</li> </ol> </li> <li>Core news content was the most prominent feature upon an update to the website which increased visibility of core news content and included an updated ribbon of links.</li> </ul>
<u>Broadsheet Media</u>	Breaking news, features, event guides and insight from industry experts with the objective of providing insight into cultural life.	Pass	<ul style="list-style-type: none"> <li>Majority of articles focus on COVID-19 issues and other articles meeting the core news definition which engages Australians in public debate and reports on current issues and events of public significance.</li> <li>Cautioned that the majority of news related to COVID-19 and would be required to maintain the degree and prominence of core news content to sustain their eligibility once the pandemic dissipates.</li> <li>Links at the top of the page redirecting users to specialised content sections of Art and Design, Entertainment, Fashion and Style, Food and Drink, Things to do, Travel and City File also contain minimal core news content.</li> </ul>
<u>Pro Bono Australia</u>	Social enterprise group producing news, careers and resources to assist organisations in expanding their impact	Pass (failed in preliminary review)	<ul style="list-style-type: none"> <li>Unsuccessful in preliminary review due to:               <ol style="list-style-type: none"> <li>a failure of the news source to meet the definition of core news content.</li> </ol> </li> <li>A change in the news source from <a href="http://www.probonoaustralia.com.au">www.probonoaustralia.com.au</a> to <a href="http://www.probonoaustralia.com.au/news">www.probonoaustralia.com.au/news</a>.</li> <li>News page comprises of a number of links and articles which meet the definition of core news content.</li> <li>News page contains a link to other news pages.</li> <li>Content features matters of public significance at a local, regional, and</li> </ul>

			national level, and investigates and explains issues relevant in engaging Australians in public debate.
<u>Australian Property Journal</u>	Reporting on property related matters, including residential, retail, industry, office, hotel, and tourism. Publishes research and property reviews.	Pass	<ul style="list-style-type: none"> <li>News source creates a large amount of core news content for the website, which is the most prominent feature of the news source.</li> <li>Core news content is created and published on a regular basis.</li> <li>The core news content is given primary prominence for the news source and the intent of the website in creating core news is clear to the reader over other content.</li> </ul>
<u>Primer Media</u>	Beauty and fashion content, as well as essays, first-person pieces and photographic stories on women's issues.	Pass (failed in preliminary review)	<ul style="list-style-type: none"> <li>Unsuccessful in preliminary review due to: <ul style="list-style-type: none"> <li>Primary purpose of the news source is not to create core news content (primarily produced fashion and beauty content)</li> </ul> </li> <li>News source revised from <a href="https://primer.com.au">https://primer.com.au</a> to <a href="https://primer.com.au/categories/stories/">https://primer.com.au/categories/stories/</a></li> <li>Link provided articles focusing on issues of public significance and public interest, mostly relating to women.</li> <li>Core news content is the most prominent news content presented on the news source, and is published frequently.</li> </ul>
<u>Daily Mail</u>	News content in a tabloid type format.	Pass	<ul style="list-style-type: none"> <li>Displays a predominant amount of core news content accessible via the news link on the homepage and sublinks.</li> <li>The majority of content on the homepage is held to be "unlikely" to satisfy the core news content test.</li> </ul>
<u>Purple Sneakers / Country Town</u>	Features, news, gig guides reviews relating to independent music and country music respectively	Fail	<ul style="list-style-type: none"> <li>Primary purpose is the promotion of indie/alternative and country music respectively which does not satisfy the core news content test.</li> <li>12 out of 40 articles on the homepage for purple sneakers were marked as news.</li> </ul>
<u>Australian Mining Monthly</u>	Mining and Technology News	Fail	<ul style="list-style-type: none"> <li>Failed to consider issues of broader public interest beyond the mining industry.</li> <li>Primary purpose of the website was not the publication of core news.</li> <li>Paywall restrictions would impinge on the finding of core news.</li> </ul>

<p><u>Chinese News and Media Group</u></p>	<p>Current events/news about Australia or Australia/Chinese matters of interests</p>	<p>Pass</p> <p>Note: failed as a registered news business on other criteria</p>	<ul style="list-style-type: none"> <li>• Two stories were reviewed in making this assessment, as well as the links provided at the top of the webpage.</li> <li>• News Source creates a large amount of core news content. It is by far the most prominent feature of the news source.</li> <li>• Core news content is created and published on a regular basis.</li> <li>• The core news content is given primary prominence for the news source and the intent of the website in creating core news is clear to the reader over other content (such as advertising and sponsored materials).</li> </ul>
<p><u>CMMA Print Digital Pty Ltd (Australian Golf Digest)</u></p>	<p>Magazine which provides player profiles, instructional advice, equipment news, and lifestyle content for golfers.</p>	<p>Fail</p>	<ul style="list-style-type: none"> <li>• No news content could be located on the links provided. All materials centred around golf.</li> <li>• Rejected argument that golf is the 10<sup>th</sup> most physical sport played in Australia – core news content on the basis of popularity is not supported.</li> <li>• Articles on issues of public significance were limited and infrequent.</li> </ul>

## Appendix 2

Professional Standards Test			
Applicant	Stated purpose	Pass/Fail	Justification
<u>News Cop Pty Ltd</u>	Impartial but critical reflections on trending or important topics	Pass	<ul style="list-style-type: none"> <li>Internal editorial standards which appear to be based on the Australian Press Council (APC) Professional Standards.</li> <li>Complaints handling mechanism meets the eligibility requirements.</li> <li>Applicant states that it is not be owned or controlled by a party with a political or commercial interest.</li> </ul>
<u>Broadsheet Media</u>	Breaking news, features, event guides and insight from industry experts with the objective of providing insight into cultural life.	Pass (failed in preliminary review)	<ul style="list-style-type: none"> <li>Unsuccessful in preliminary review due to:               <ol style="list-style-type: none"> <li>Complaints mechanism was inaccessible to users.</li> <li>Users were incorrectly advised to escalate matters to the APC despite not being an APC members.</li> </ol> </li> <li>An updated link and changes to the editorial standards containing complaints handling mechanisms satisfied the eligibility requirements.</li> <li>Internal editorial standards reference and reflect the APC professional standards.</li> </ul>
<u>Pro Bono Australia</u>	Social enterprise group producing news, careers and resources to assist organisations in expanding their impact	Pass (failed in preliminary review)	<ul style="list-style-type: none"> <li>Unsuccessful in preliminary review due to:               <ol style="list-style-type: none"> <li>Lack of APC membership despite stating it is subject to the standards. Entity of Pro Bono Pty Ltd is a constituent of the APC however possesses a different ACN and ABN to Pro Bono Australia.</li> <li>Complaints mechanism did not meet professional standards test</li> </ol> </li> <li>Confirmed to be an APC member despite administrative name error.</li> <li>Complaints handling mechanisms added following the preliminary review meet the eligibility criteria.</li> <li>Applicant states that it is not owned or controlled by a party with a political or commercial interest.</li> </ul>
<u>Australian Property Journal</u>	Reporting on property related matters, including residential, retail, industry, office, hotel, and tourism. Publishes research	Pass	<ul style="list-style-type: none"> <li>Membership with the APC.</li> </ul>

	and property reviews.		
<u>Primer Media</u>	Beauty and fashion content, as well as essays, first-person pieces and photographic stories on women's issues.	Pass	<ul style="list-style-type: none"> <li>• Internal editorial standards appear to be based on the APC standards.</li> <li>• Adequate complaints handling mechanisms.</li> <li>• Applicant states that it is not owned or controlled by a party with a political or commercial interest.</li> </ul>
<u>Daily Mail</u>	News content in a tabloid type format.	Pass	<ul style="list-style-type: none"> <li>• Membership with the APC.</li> <li>• Applicant states that it is not owned or controlled by a party with a political or commercial interest.</li> </ul>
<u>Purple Sneakers / Country Town</u>	Features, news, gig guides reviews relating to independent music and country music respectively	Fail	<ul style="list-style-type: none"> <li>• Internal editorial standards could not be considered as based on external professional standards regimes due to the absence of accuracy and impartiality provisions</li> <li>• Ownership by SCG Group, a publicity firm for the music industry, compromises editorial independence.</li> </ul>
<u>Australian Mining Monthly</u>	Mining and Technology News	Fail	<ul style="list-style-type: none"> <li>• The editorial policy does not contain a standard related to impartiality.</li> <li>• Internal editorial standards are inaccessible to users.</li> <li>• Inadequate complaints handling mechanism (fails to include information for users about how a complaint will be adjudicated and does not explain how complainants will be notified of the outcome of their complaint).</li> </ul>
<u>Chinese News and Media Group</u>	Current events/news about Australia or Australia/Chinese matters of interests	Fail	<ul style="list-style-type: none"> <li>• Lack of APC membership despite stating it is subject to the standards.</li> <li>• Internal editorial standards are inaccessible to users.</li> <li>• Absence of mechanism for adjudicating and notifying complainants of the outcome of the complaints about news content.</li> </ul>
<u>CMMA Print Digital Pty Ltd (Australian Golf Digest)</u>	Magazine which provides player profiles, instructional advice, equipment news, and lifestyle content for golfers.	Pass (failed in preliminary review)	<p>Unsuccessful in preliminary review due to:</p> <ol style="list-style-type: none"> <li>Lack of APC membership despite stating it is subject to the standards.</li> </ol> <ul style="list-style-type: none"> <li>• Internal editorial standards appear to be based on the APC standards.</li> <li>• Complaints handling mechanism meets the eligibility requirements.</li> <li>• Stated to be not owned or controlled by a party with a political and commercial interest.</li> </ul>