



# Submission by Free TV Australia

## **ACMA News media bargaining code eligibility guidelines for consultation**

February 2021

## Table of contents

<b>1. EXECUTIVE SUMMARY</b>	<b>3</b>
<b>2. INTRODUCTION</b>	<b>4</b>
<b>3. PROCESS AND TIMING FOR ASSESSMENT OF APPLICATIONS</b>	<b>4</b>
3.1 TIMEFRAME FOR ASSESSMENT AND REGISTRATION	4
3.2 CONCERNS IN RELATION TO ASSESSMENT OF APPLICATIONS	5
<b>4. CONTENT TEST</b>	<b>7</b>
4.1 REQUIREMENTS OF THE BILL	7
4.2 MATTERS SPECIFIED IN THE DRAFT GUIDELINES	7
4.3 EVIDENCE TO BE PROVIDED	9
<b>5. EVIDENCE GENERALLY</b>	<b>10</b>
5.1 EVIDENCE REQUIRED UNDER THE DRAFT GUIDELINES	10
5.2 REASONS FOR DETERMINATION	11
<b>6. OTHER ISSUES</b>	<b>12</b>
6.1 PRACTICAL OPERATION	12
6.2 OTHER DRAFTING ISSUES	13

## 1. Executive Summary

- Free TV thanks the ACMA for the opportunity to comment on the *News media bargaining code draft eligibility guidelines for consultation (Draft Guidelines)*.
- The guidelines should facilitate registration of broadcasters' news sources under the code as quickly and efficiently as possible, consistent with the legislative intent outlined in the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Bill)*.
- Free TV's primary concerns in relation to the Draft Guidelines, consistent with principles of procedural fairness, are that they should:
  - Enable registration of news sources without the need for multiple applications or unnecessary administrative delay.
  - more clearly, transparently and in sufficient detail state the evidence that the ACMA will require from broadcasters, as well as the processes for consideration of that evidence, in order to satisfy the relevant tests under the legislation (and to minimise delays).
  - not seek or consider evidence that is not necessary or not relevant for purposes of meeting the legislative requirements for registration.
- In line with these objectives, Free TV recommends:
  - clear timeframes for review and registration of applications should be provided. Assessment should occur within 14 days.
  - news sources that meet the legislative requirements for registration should be registered regardless of whether other news sources that form part of the same application do not.
  - the Draft Guidelines should set out the evidentiary requirements and processes of the ACMA as well as the factors it will consider in assessing whether a news source has met the requirements of the content eligibility test and other legislative tests. To ensure public interest journalism on broadcast television is captured, the content eligibility test should be considered met if the news source regularly includes a material amount of core news content.
  - Evidence and considerations which are not relevant or not necessary in determining whether legislative requirements have been satisfied (identified below) should be removed.
  - the Draft Guidelines should specify when the ACMA will consider external evidence. In our view, these circumstances should be limited, however where such evidence is considered, the relevant applicant should be provided with an opportunity to respond to that evidence prior to a decision being made by the ACMA.
- We have also identified other practical and drafting issues which we detail in the submission.
- For the purposes of commenting on the Draft Guidelines, Free TV has referred to the Bill in its current form. However, we note that Free TV is strongly of the view that the Bill requires further amendment and we have provided our comments in relation to those amendments to the Senate Economics Legislation Committee considering the Bill. We would welcome the opportunity to provide comments to the ACMA on a further draft of the guidelines in light of the final Bill and once the application and assessment processes and Draft Guidelines are further progressed.

## 2. Introduction

Free TV has strongly supported the introduction of a News Media Bargaining Code (**Code**) to support the sustainability of the Australian news media sector. The need for Australian news companies to be adequately compensated by the digital platforms for their use of news content is an urgent issue - the proposed Code is necessary to address the bargaining power imbalances between digital platforms and Australian news businesses and to ensure that compensation occurs without delay.

In light of this context, the Draft Guidelines should enable quick and efficient registration of news media sources in accordance with administrative requirements of procedural fairness and in line with the government's intention outlined in the Bill. They should provide sufficient detail in relation to assessment and registration processes and evidentiary requirements so that media organisations can comply, and application processes and administration can in turn be streamlined and minimised.

Free TV notes that, given the Bill is still before the Parliament and the Draft Guidelines will need to be updated in line with any changes that are incorporated prior to its passage as well as comments from the current consultation process, we would welcome the opportunity to provide comments on a further Draft. We would also welcome the opportunity to test the ACMA's online application portal.

We look forward to continuing to engage with the ACMA as it progresses development of the application and assessment processes and Draft Guidelines.

## 3. Process and timing for assessment of applications

### Summary

- The Guidelines should provide a streamlined, efficient and fast process for applications to be considered. Applications should be assessed within 14 days.
- If an application contains multiple news sources, only those news sources that have not been successful should be rejected. Applicants should not be required to submit new applications in respect of news sources that have met the requirements for registration.
- The Guidelines should be clear and transparent in relation to the factors that the ACMA will take into consideration in assessing applications and the evidence that should be provided by applicants.

### 3.1 Timeframe for assessment and registration

As the ACMA is aware, it is not possible for a media company to take advantage of the benefits of the Code unless that media company is first registered as a news business corporation in respect of one or more registered news businesses. A timely registration process is therefore critical for our members, particularly when the Code is first implemented and the ACMA is likely to receive many applications in a short period of time.

The ACMA should provide a clear timeframe for assessment and registration of applications which should be no longer than 14 days (or an even shorter period in the case of straightforward applications) or, in the case of applications where further information is sought from the applicant, not more than 14 days after the final additional information is provided by the applicant.

In addition, if there are a significant number of applications made to the ACMA for registration, the ACMA will need to determine how applications will be prioritised and advise applicants of this. For example, will applications be assessed in order of lodgement or will another process be adopted?

We note that this submission raises a number of concerns in relation to the evidence that the ACMA will take into account in assessing applications. In the remainder of this submission below we set out a number of areas where we consider the ACMA should streamline and better target evidence processes to ensure that applications are not unduly delayed.

## 3.2 Concerns in relation to assessment of applications

### 3.2.1 Minimising multiple applications – successful news sources should be registered

We have concerns with a number of general statements in the Draft Guidelines which suggest the need for multiple applications in relation to news sources which have been assessed as meeting the requirements for registration.

For example, under the heading “Nominating a news business” on page 5: *If any nominated news source fails any of the eligibility tests, the news business will be found ineligible and the applicant will be advised that their application was unsuccessful.* Similar statements are made elsewhere in the Draft Guidelines.

Free TV is concerned with the proposed approach as it will lead to unnecessary delays and may result in media companies submitting multiple applications for different news businesses if there is a concern that any one news source in an application may not meet all of the necessary tests.

Our view is that it would be consistent with the requirements of the Bill for the ACMA to simply assess an application on the basis of each individual news source and then determine the application. This may mean that one or more news sources put forward in the application may not be included in the registered news business for the registered news business corporation but would avoid the need for multiple applications and also the need to resubmit an application in full.

Consider an example where 3 news sources in an application met the tests but one or more other news sources did not. In that example, our view is that the ACMA should determine to register the relevant news media business corporation and register the 3 news sources that meet the tests as the registered news business and only reject the news sources that did not meet the tests.

### 3.2.2 Transparency in relation to evidentiary requirements

Under the heading “Application assessment” on page 7: *The ACMA will make its assessment on the basis of the information provided by the applicant in their application, the accompanying documentation provided by the applicant with their application, and any other relevant material. The ACMA may request further information from applicants or other parties at its discretion.*

Free TV is concerned that this statement, and other similar statements in the Draft Guidelines, undermine the intent of the Draft Guidelines to provide clear and transparent guidance as to the criteria that will be applied to assess an application.

It is not clear whether the above statement means that the ACMA may, even if the evidence expressly requested in the Draft Guidelines is provided, request that further information is provided. It is also not clear when the ACMA would ask for information from other parties (or how an assessment would be made as to whether the other party or parties from whom evidence is sought would be qualified to provide it) or whether an applicant would be provided with an opportunity to respond to such third-party evidence.

In addition, the process for seeking further information either from the applicant or third parties is likely to significantly slow down the process for the assessment of applications, which is of concern as this has the potential to delay implementation of the Code.

It is requested that further clarity is provided on each of these points. We have provided more detail of our concerns with the evidence requests specified in the Draft Guidelines later in this submission.

## 4. Content test

### Summary

- The Guidelines should provide guidance in relation to how the ACMA will assess programs under the content test rather than re-stating the legislation or explanatory memorandum.
- Factors that are not relevant in the consideration of what constitutes ‘core news content’ should not be included.
- Example 2, which suggests that morning television shows will not satisfy the content test but gives not guidance in relation to what factors a morning show would need to satisfy to meet the content test, should be removed.
- The Draft Guidelines should comprehensively state the evidence that the ACMA considers is required to meet the content test (and which applicants should therefore provide) and at what stage of the process ACMA will seek more information (which applicants should be afforded an opportunity to provide).

### 4.1 Requirements of the Bill

For a news source to be included in a registered news business, amongst other tests, the news source must meet the “content test” set out in section 52N(1) of the Bill. This requires that the primary purpose of the news source is to create content that is “core news content” which is a defined term in the Bill. Section 52N(3) sets out the elements that must be considered in determining whether this test is satisfied, namely:

- the amount of core news content created by the news source;
- the frequency with which the news source creates core news content;
- 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; and
- “any other relevant matter”.

### 4.2 Matters specified in the Draft Guidelines

#### 4.2.1 Further guidance on practical application of s 52N(1) and (3)

Many of the statements in the Draft Guidelines repeat the requirements of the Bill and statements in the Explanatory Memorandum for the Bill, for example, the “Overview” on page 11, the first paragraph under “Primary purpose” on the same page and most of the content under the heading “Core news content” on the same page. These statements do not provide any guidance as to how the ACMA will, in a practical sense, apply the requirements of sections 52N(1) and (3) of the Bill.

It would be appropriate for the ACMA to identify these requirements as arising from the legislation and then further specify an indicative level of core news content that would be necessary to satisfy the “primary” requirement of section 52N(1). In determining whether the ‘primary purpose’ of a news source is to create content that is ‘core news content’, the ACMA should consider that the requirement is met **if the news source regularly includes a material amount of core news content**. This is necessary to ensure that public interest journalism on broadcast television is captured as intended.

To take another example, the comments on “pure opinion or commentary” under the heading “Core news content” in the Draft Guidelines are on substantially the same terms as statements in the

Explanatory Memorandum for the Bill but do not address how the ACMA would approach this consideration in a practical sense, which means Free TV's members face uncertainty as to how the ACMA will assess programs such as current affairs programs which do include commentary.

It is requested that further clarity is provided in the Draft Guidelines on the practical application of the criteria that are set out in sections 52N(1) and (3) of the Bill.

#### 4.2.2 Irrelevant considerations

The second paragraph under the heading "Primary purpose" on page 11 lists a number of additional factors that the ACMA will take into consideration under the "any other relevant matter" category in section 52N(3) of the Bill. For the reasons explained below, these factors are not ones that should reasonably be considered by the ACMA and it is requested that these should be deleted:

- "the typical presentation of news content in comparable news sources": Whether a particular news source adopts the same format as another news source is not a relevant consideration to determine whether the primary purpose of the news source is the creation of core news content. In effect, this criteria would mean that media businesses would be marked down and risk non-registration if they adopted an innovative approach in their presentation of core news content.
- "how the news source is promoted": It is assumed that this refers to advertisements for the relevant news source. Section 52N(3) requires the degree of prominence given to news content to be considered, but this is within the news source itself. While this may be a factor that shows that a particular news source meets the test, how a media company chooses to attract an audience to its news source is not necessarily determinative of the actual content of that news source. It should therefore not be a factor that weighs against a news source meeting the test just because the program is marketed in a particular way designed to attract a greater audience.
- "the source's publication and distribution of news content online": Free TV is unsure what is meant by this reference. Although the "news source" definition in the Bill requires that production and publication occurs online, this is not a factor that is to be taken into account under the section 52N test, which is required to consider "primary purpose" and the nature of the content. This criterion should therefore be deleted.

#### 4.2.3 Misleading suggestion in relation to morning programs

"Example 2" on page 6 of the Draft Guidelines, which is based in part on the Explanatory Memorandum for the Bill, suggests that daily morning TV shows will not satisfy the content test. This is not a correct suggestion. Whether or not a program will satisfy the test will depend on whether a particular news source satisfies the relevant tests. The Guidelines should set out factors that will determine whether or not a news sources will satisfy those tests. The example provided gives no consideration to the amount of news content provided by the theoretical daily morning TV show, it simply classifies it as "infotainment". The example should be removed as it prejudices a category of TV program (in a manner that no other media format is prejudged) with no factual basis to support the conclusion reached. In relation to any examples that are included in the Guidelines in relation to 'morning shows', the Guidelines should make clear whether they are referring to news-based morning shows or other morning shows.



### 4.3 Evidence to be provided

---

The evidence required for the section 52N test, as set out on page 12 of the Draft Guidelines, is:

- links to the online channels where the news source normally publishes or distributes its content, including websites, social media pages, and news aggregation platforms.
- a broadcast or publication schedule, if relevant (for example, advising of daily, weekly or monthly publication).

The ACMA also states that it may take into account “other content” published by the news source (which presumably the ACMA will gather itself) and may ask for further information. Free TV has a number of concerns with the evidence being sought:

- The ACMA should advise in a comprehensive way the evidence that it will consider in determining if this test is satisfied so that this evidence may be provided by an applicant. As this part is drafted, it is not clear to applicants what the ACMA will consider other than that it is likely to be more than the information that applicants are requested to provide. The ACMA also does not indicate that it will provide an opportunity to applicants to respond to other material that the ACMA may consider.
- The evidence requested does not link to all of the criteria that the ACMA has stated that it will consider in determining whether the section 52N test is satisfied. For example, the test requires that the primary purpose of the news source must be to “create” core news content, though the ACMA has not asked for evidence of how content is created by an applicant. To take another example, the Draft Guidelines state that variations in content that reflect external changes such as holiday periods and election cycles will not cause an applicant to fail the test but the ACMA has not asked for information on such variations. The ACMA has instead requested evidence only of the content provided at a particular point in time, that is, when the ACMA considers the link that is required to be provided.

In order to provide clarity and transparency to applicants, the Draft Guidelines should clearly specify the requirements that applicants should meet for a news source to satisfy the requirements of the content test in section 52N and also clearly set out the evidence that the ACMA will consider and which applicants should therefore provide. If the ACMA requests more information from applicants, the Guidelines should set out the process for affording applicants the opportunity to provide that information.

## 5. Evidence generally

### Summary

- Throughout the Draft Guidelines, there should be clarity and transparency in relation to the evidence that is required to be provided to the ACMA, how evidence will be considered by the ACMA, at what point further evidence will be sought by the ACMA and any inferences that will be drawn throughout the process.
- Consistent with principles of procedural fairness, reasons for rejecting applications should be provided.

### 5.1 Evidence required under the Draft Guidelines

---

Free TV has general concerns in relation to the evidence that has been requested to be provided by applicants under many of the tests set out in the Draft Guidelines. In particular, it is not clear whether the evidence provided by an applicant will be the only evidence considered by the ACMA, what additional evidence the ACMA may take into consideration, when it will seek that additional evidence and whether it will provide applicants with an opportunity to respond to any additional evidence that the ACMA independently gathers.

In addition to the examples that we have given in relation to the section 52N content test, we also note the following concerns regarding evidence requested to satisfy other tests:

- One of the forms of evidence that could be provided to satisfy the connection test in section 52L is a statutory declaration (see page 7 of the Draft Guidelines). However, no information is provided by the ACMA as to when it would determine to, in effect, not accept that statutory declaration and seek further information either from the applicant or third parties.
- In relation to the second limb of the professional standards test in section 52P (related to editorial independence) the Draft Guidelines state on page 10 that the ACMA will consider “any public campaigns run by the news source” and that the ACMA “may also consider content published by each news source to assess whether any political or advocacy campaigns run by an applicant are linked to the primary news content delivered”. It is not clear what a public campaign or political or advocacy campaign is (or what time period will be taken into consideration) or why this is a relevant consideration that the ACMA should take into account. In addition, these statements suggests that whatever evidence is provided (including a statutory declaration, which is one of the forms of evidence that the ACMA has stated that it will accept), the ACMA will conduct its own investigations – noting that the Draft Guidelines do not request any evidence in relation to campaigns that may be run or evidence of ownership structures.<sup>1</sup>
- On the top of page 13 the Draft Guidelines provide, ‘Examples of other evidence an applicant may wish to supply include the name of the source, the use of Australian domain names, or the use of geo-blocking’. It would assist if the Guidelines specified exactly how such evidence

---

<sup>1</sup> The Draft Guidelines refer to considering information on ownership structures provided for the section 52L connection test, but it is not necessary for that type of evidence to be provided in relation to section 52L. The Draft Guidelines provide for that as only one of a number of options.

would be used by the ACMA. We note in relation to geo-blocking, if applicants do not provide evidence of geo-blocking, that should not be considered adversely under the audience test.

To ensure clarity and transparency, the ACMA should set out in the Draft Guidelines clear statements as to the evidence that it requires to satisfy each of the tests in the Bill. The ACMA should also confirm whether it will accept the evidence provided or, if not, the circumstances where it will independently undertake further investigations as well as making clear that the ACMA will provide an opportunity to an applicant to respond to evidence that the ACMA obtains from another source. Applicants should be notified if insufficient evidence has been provided and the inferences that will be drawn by the ACMA.

## 5.2 Reasons for determination

---

As a final point in this section Free TV notes that the Draft Guidelines do not require the ACMA to notify applicants of the ACMA's reasons for rejecting an application, whether in relation to the registration of a news business corporation or a news business. Again, to ensure clarity and transparency, the ACMA should advise unsuccessful applicants of those reasons.

## 6. Other issues

### 6.1 Practical operation

---

Free TV has a number of concerns with the practical operation of certain elements of the Draft Guidelines. For example:

#### 6.1.1 Transferring registration of a news source

The statements under “Where the news source is already registered to a registered news business” on page 17 may create practical difficulties, as these assume that there would be one application process to remove a news source from a transferor corporation and then a separate new application to register it for the transferee corporation. Our recommendation is:

- Where a news source is already registered to a registered news business corporation and is sold to another registered news business corporation, the ACMA’s process should allow for a practical “transfer” of registration of that news source (ie, simultaneous deregistration and new registration) by considering a joint application by the transferor and transferee. This will ensure that there will not be a gap in time between when the news source is removed from one registered news business and then added to another because of the need to consider two separate applications.
- The Draft Guidelines state the ACMA has the discretion to request further evidence to demonstrate that the news source continues to satisfy the eligibility criteria. If at the time of transfer the ACMA has accepted that the news source is eligible for registration, then there appears to be no basis for all of the relevant tests to be re-assessed (other than of course the connection test in section 52L).

#### 6.1.2 Connection test in s 52L

Under the Bill, to meet the connection test in section 52L, the proposed news business corporation needs to establish that it operates or controls the news business – either solely or with one or more other entities. In order to establish this, the only evidence that should be required relates to the applicant, not to other entities that might also operate or control the news business, but which are not seeking registration. In our view, the Draft Guidelines go beyond what is required under the legislation in a number of respects:

- The Draft Guidelines suggest that evidence is sought relating to all corporations that operate or control each news business. For example, in seeking corporate structure charts, it appears the Draft Guidelines are requiring evidence to understand how corporate groups operate and manage their businesses – this goes beyond the Bill requirements.
- As another example, any statutory declaration provided as evidence is required to specify each corporation that operates or controls the source. This extended evidence requirement goes beyond the requirements of section 52L.
- The statements on page 7 of the Draft Guidelines that the ACMA may seek “additional assurance that there is agreement to register a news source” in circumstances where there is joint ownership are unnecessary and go beyond the Bill requirements. There is no basis in the Bill on which ACMA could reject a registration if such an agreement could not be produced, provided that there was no existing registration of the news business.

We therefore suggest that these requirements are reformulated so that evidentiary requirements do not go beyond what is required in order to satisfy the legislative provisions.

## 6.2 Other drafting issues

---

We also raise the following drafting issues for consideration:

- The statement on page 7 that ‘There will be no internal or merits review of a decision by the ACMA to approve or not to approve an application’ seems to be misleading given that the rejection of an application would be an administrative decision subject to the ADJR Act and potentially common law administrative law appeal rights. The sentence should be removed, or the correct appeal rights should be stated.
- The statement at the bottom of page 15 of the Draft Guidelines that registered news business corporations **must** inform the ACMA of ongoing changes to “content, format or presentation of a news source that **may** affect its eligibility” does not correctly reflect the Bill requirements. Under section 52J of the Bill, a registered news business corporation is only required to notify the ACMA when a news business actually ceases to satisfy any registration requirements and therefore it is recommended that this statement should be updated. The implication from the current drafting is that failure to notify of minor changes to form or presentation of a news source may result in a penalty of \$133,200.
- There are various references to penalties under the Criminal Code Act 1995 in the Draft Guidelines (for example, see page 4, page 16). These penalties are for individuals, not corporations. If these references are retained the penalties for corporations, which would be applicable in the circumstances considered here, should be referenced.
- The paragraph on page 20 of the Draft Guidelines relating to “standing offers” goes beyond the scope of the matters to be addressed in the Draft Guidelines and we recommend that it is removed.
- “Example 1” on page 5 appears to suggest that an “offline” newspaper could be registered. This would not be possible and therefore to avoid confusion the example should either be clarified or deleted.
- Free TV assumes the paragraph numbered 3 on page 1 of the Draft Guidelines is intended to refer to the “minimum standards” in the Bill. However, the description is not an accurate characterisation and should be updated.
- There are various references to the obligations on registered news business corporations throughout the Draft Guidelines, for example, on page 2. These should be amended to make clear that these obligations relate only to the registration process and the Draft Guidelines do not provide general guidance as to the obligations registered news business corporations will have under the Code.
- The Draft Guidelines contain a section dealing with “Feedback and complaints” but does not provide an explanation of an applicant’s rights of appeal from decisions of the ACMA to register or not register a corporation or a business. A section on those appeal rights is recommended.