

# **News media bargaining code**

## Guidelines for expressions of interest for mediation and arbitration professionals

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# Introduction

## The code

The [News Media and Digital Platforms Mandatory Bargaining Code](#)<sup>1</sup> (the code) is a mandatory code to help support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses.

The code establishes 4 key sets of requirements to guide bargaining between news media businesses and designated digital platform corporations. These are:

- > bargaining rules, which require designated digital platform corporations and registered news business corporations to bargain in good faith
- > compulsory arbitration and mediation rules, which apply where bargaining parties are unable to negotiate an agreement about remuneration for the making available of covered news content by the designated digital platform service
- > general requirements, which include a number of 'minimum standards' for the treatment of news content by designated platforms' services under the code
- > non-differentiation requirements, which prevent a digital platform service from differentiating between registered news businesses and unregistered news businesses (or differentiating between different registered news businesses) in relation to crawling, indexing, distributing or making available covered content because of matters that arise in relation to their participation or otherwise in the code.

As at time of publication, no digital platform corporations have been designated under the code.

The Treasurer may designate a digital platform corporation and its digital platform services to participate in the code. In making the designation, the Treasurer must consider whether there is a significant bargaining power imbalance between Australian news businesses and the digital platform corporation and whether that digital platform corporation has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses. Mediations or arbitrations under the code can only occur following the designation of at least one digital platform corporation.

### Further information about the code

- > Access the full text of the [code](#) and accompanying [explanatory memoranda](#).
- > The [Australian Competition and Consumer Commission \(ACCC\) website](#) also has information on the development and origins of the code.

## The ACMA's role

The ACMA fulfills 3 roles under the code. We:

- > assess the eligibility of news businesses that want to participate in the code
- > appoint mediators to assist bargaining parties
- > register and appoint arbitrators if bargaining parties cannot agree on the make-up and membership of an arbitral panel.

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<sup>1</sup> Refer to Part IVBA of the [Competition and Consumer Act 2010](#).

A news business must apply to the ACMA for registration to participate in bargaining in accordance with the framework provided in the code. We assess an applicant's eligibility against the criteria set out in Division 3 of the code and register news businesses that meet the eligibility requirements.

The ACMA maintains the register of eligible news businesses on our [website](#).

## Purpose of these guidelines

These guidelines provide assistance for mediation and arbitration professionals who are interested in a potential appointment under the code to deal with:

1. the mediation of bargaining issues between a registered news business and a designated digital platform corporation; and/or
2. the final offer arbitration processes related to remuneration issues under the code if mediation is unsuccessful.

These guidelines provide information about:

- > completing the expression of interest (EOI) forms, including what information the ACMA requires to make appointments
- > when the ACMA will select mediators and arbitrators to assist with the mediation and arbitration processes under the code
- > how the mediation and arbitration schemes under the code will function.

Definitions for key terms are provided in the code. Terms of relevance to these guidelines are included in the Glossary in this document.

If these guidelines are inconsistent with the provisions of the code or any other applicable Act or legislative instrument, the relevant Act or instrument will prevail.

These guidelines are advisory only and do not constitute or replace legal advice on obligations under the relevant legislation, in relation to which applicants should seek their own independent advice.

## Enquiries

For enquiries about the EOI process, please email the ACMA on [bargainingcode@acma.gov.au](mailto:bargainingcode@acma.gov.au) or call 1300 850 115.

# About the EOI

To express interest in being appointed as a **mediator** under the code, applicants should complete the [News media bargaining code: List of mediators – Expression of interest form](#) (the Mediator EOI form).

To express interest in being appointed as an **arbitrator** to the register of bargaining code arbitrators, applicants should complete the [News media bargaining code: Register of bargaining code arbitrators – Expression of interest form](#) (the Arbitrator EOI form).

If an applicant wishes to express interest both in being appointed as a mediator and being appointed to the register of bargaining code arbitrators, both the Mediator EOI form and the Arbitrator EOI form should be completed.

## Filling in the EOI form(s)

Each EOI form details the information the ACMA needs to assess, and the type of professional experience required of mediators and arbitrators appointed under the code.

Applicants must provide relevant documentation to support their EOI. The amount and type of documentation needed to demonstrate an applicant's suitability may vary. CVs should be included with the EOI form, provided in .docx or .pdf, formats.

## Application timeline

The ACMA is currently accepting EOI forms from interested applicants. EOI applications will take approximately 4 weeks<sup>2</sup> to assess, from the time an EOI is received unless otherwise advised.

Applicants may access an EOI form from the ACMA website. Once completed, the EOI form and any attachments should be submitted via email to [bargainingcode@acma.gov.au](mailto:bargainingcode@acma.gov.au).

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<sup>2</sup> The 4-week period is a guide only. For example, the assessment of EOIs may take longer over the Christmas and New Year period.

# Selection of mediators and arbitrators

The ACMA will establish a list of mediators and register of arbitrators from individuals suitably qualified to provide mediation and arbitration services according to the requirements of the code.

Once an EOI is submitted, the ACMA will consider the relevant qualifications and experience of the person submitting the EOI. We will also manage and anticipate any conflicts of interest issues that may arise.<sup>3</sup>

The Mediator EOI form requires all mediators expressing an interest in being on the ACMA's list of mediators to:

1. provide a CV demonstrating their suitability to mediate potential matters between registered news businesses and designated digital platforms (for example, experience with prior commercial mediations)
2. be accredited under the National Mediator Accreditation System (NMAS).

The Arbitrator EOI form requires a person expressing an interest in being placed on the register of bargaining code arbitrators to:

1. provide a CV demonstrating their experience in legal, economic or industry matters; or
2. provide details of their experience that demonstrates their suitability to be a member of an arbitral panel (for example, the ACMA could register individuals from a range of backgrounds, including legal practitioners, consultants, academics, advisors, or industry executives who we consider have appropriate experience to be a member of an arbitral panel).<sup>4</sup>

Rather than requiring formal recognition or accreditation as an 'arbitrator', the code requires that the register of bargaining code arbitrators has people experienced in (at least one of) legal, economic or industry matters (relevant to digital platforms and/or news media) or considered by the ACMA to have appropriate experience to be a member of the arbitral panel.<sup>5</sup>

The rules for mediation and arbitration, and the costs related to providing mediation and arbitration services, may be the subject of regulations made under sections 52ZIB and 52ZK of the code. If regulations are made, these will be proposed and progressed by Treasury.

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<sup>3</sup> For example, there is a process at section 52ZN which seeks to manage any conflicts of interest arising in a sitting arbitral panel.

<sup>4</sup> Section 52ZK.

<sup>5</sup> Section 52ZK.



## Notification of EOI outcome

The ACMA will advise EOI respondents in writing of the result of their application within approximately 4 weeks of their receipt, unless otherwise advised.

EOI respondents should ensure their contact details are correct. If contact details need to be updated after the EOI has been submitted, this can be done by emailing [bargainingcode@acma.gov.au](mailto:bargainingcode@acma.gov.au).

If an EOI is unsuccessful, the ACMA will notify the applicant as soon as practicable.

Unsuccessful applicants may contact the ACMA on [bargainingcode@acma.gov.au](mailto:bargainingcode@acma.gov.au) to discuss why their application was unsuccessful.

## Listing and registration

Where your EOI is successful, the ACMA will include the following details on the list of mediators or register of bargaining code arbitrators. We will publish the following details on the ACMA's website:

- > the name of the listed/registered professional
- > the position held by or organisational details of the professional
- > the contact phone, email and address of the person.

# Overview of the mediation and arbitration scheme

## News media bargaining mediation

### Commencement of mediation

Under the code<sup>6</sup>, bargaining parties who are unable to reach an agreement 3 months after bargaining begins, will proceed to mediation.<sup>7</sup> Mediation can also be agreed to between the parties before the 3 months has elapsed.<sup>8</sup>

In either event, the code specifies that the mediator is to be appointed by the ACMA.<sup>9</sup> For consistency, we have aligned our approach to listing mediators with our approach to establishing and keeping the register of bargaining code arbitrators.<sup>10</sup>

Once mediation has begun, the bargaining parties have 2 months to reach an agreement.<sup>11</sup> If an agreement has not been reached at the end of 2 months, the bargaining parties may agree to extend mediation for a further 2 months, for a maximum of 4 months in total.<sup>12</sup>

### Termination of mediation

If an agreement is not reached after this time, the mediation terminates, and the bargaining parties move onto arbitration.<sup>13</sup> Mediation may also be terminated by the agreement of the parties<sup>14</sup> or at the decision of the mediator.<sup>15</sup>

### Rules for the conduct of mediation

The code provides that regulations may be made to establish rules for the conduct of mediations taking place under the code.<sup>16</sup> As yet, no regulations have been made.

## News media bargaining arbitration

Section 52ZZD permits the ACCC to make guidelines relating to the conduct of arbitration that would assist bargaining parties and arbitral panel members to understand the arbitration process under the code.

Once these guidelines are made, the code requires them to be published on the ACCC's website.

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<sup>6</sup> Section 52ZIA.

<sup>7</sup> Section 52ZIA(1)(a).

<sup>8</sup> Section 52ZIA(1)(b).

<sup>9</sup> Section 52ZIA(4).

<sup>10</sup> Section 52ZIA(4) empowers the ACMA to appoint a mediator under the code. The provision does not provide details as to the qualifications or experience of mediators. To provide bargaining parties with consistency, the ACMA's mediator EOI form seeks similar information to that sought from potential arbitrators in section 52ZK. In addition, we have applied a consistent approach to managing potential conflicts of interest for both mediators and arbitrators as part of the EOI and appointment processes adopted by the ACMA.

<sup>11</sup> Section 52ZIC(1)(a).

<sup>12</sup> Section 52ZIC(1)(b), (2).

<sup>13</sup> Section 52ZL(2)(a)(i).

<sup>14</sup> Section 52ZIC(1)(d).

<sup>15</sup> Section 52ZIC(1)(c), (3), (4).

<sup>16</sup> Section 52ZIB(1).

## **Commencement of arbitration**

If the mediation between the bargaining parties does not result in an agreement about remuneration, the next step is arbitration.<sup>17</sup> Alternatively, arbitration can begin earlier if agreed by both parties, but not before 10 business days have elapsed since a notice to bargain has been given to a designated platform under section 52ZE of the code.<sup>18</sup>

Whenever bargaining parties proceed to arbitration, an arbitral panel will be appointed. Panels can consist of 3 members (the Chair and 2 other members) or a single member, where the bargaining parties agree.<sup>19</sup>

The arbitral panel is appointed by agreement of bargaining parties.<sup>20</sup> If the bargaining parties cannot agree on one or more of the appointments to the panel, the ACMA will make those appointments.<sup>21</sup>

Before an ACMA appointment, potential appointees must give a conflict of interest declaration to the ACMA that they do not have any actual or potential conflicts of interest in relation to the arbitration.<sup>22</sup>

The code requires the ACMA to keep a register of bargaining code arbitrators.<sup>23</sup> Those registered will be experienced in legal, economic or industry matters<sup>24</sup> or will be someone whom the ACMA considers has appropriate experience.<sup>25</sup> Where the ACMA makes appointments to an arbitral panel, those appointments will be made from the register of bargaining code arbitrators.<sup>26</sup>

After the panel has been appointed, the Chair of the arbitral panel must provide written notice to the bargaining parties of the date on which the arbitration will begin.<sup>27</sup> The code specifies that the arbitration must begin within 5 days of the Chair being appointed.<sup>28</sup>

The bargaining parties are to each pay half the costs of the arbitration, regardless of how they are appointed.<sup>29</sup>

## **Termination of arbitration**

The termination of an arbitration process is limited under the code. An arbitration will terminate if both bargaining parties fail to submit final offers to the arbitral panel within the timeframes provided in the code.<sup>30</sup>

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<sup>17</sup> Section 52ZL(2)(a)(i).

<sup>18</sup> Section 52ZL(2)(b).

<sup>19</sup> Section 52ZM(3).

<sup>20</sup> Section 52ZM(4).

<sup>21</sup> Section 52ZM(8).

<sup>22</sup> Section 52ZN(2).

<sup>23</sup> Section 52ZK(1).

<sup>24</sup> Section 52ZK(2)(a).

<sup>25</sup> Section 52ZK(2)(b).

<sup>26</sup> Section 52ZM(9).

<sup>27</sup> Section 52ZP(1) – (2).

<sup>28</sup> Section 52ZP(1).

<sup>29</sup> Section 52ZO(1).

<sup>30</sup> Section 52ZY.

### **Rules for the conduct of arbitration**

Information on how the arbitration scheme will operate under the code is detailed in Division 7 (sections 52ZK – 52ZZE) of the code. The rules established by the code relate to arbitration time limits, the procedures for final offer arbitration and the matters a panel is to consider in determining remuneration issues between the parties.

### **Obligations of listed/registered professionals**

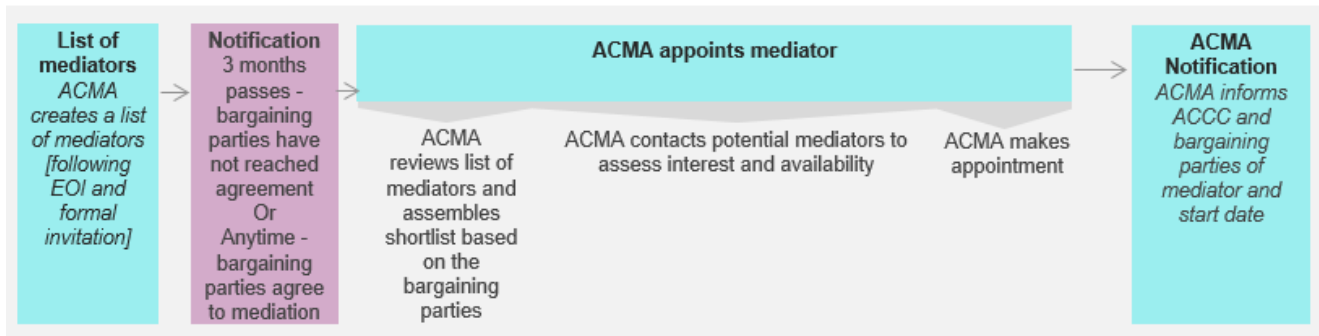
We note that mediators and arbitrators who are listed or registered will be subject to existing professional obligations under the NMAS or the rules/codes of professional groups in Australia or internationally representing commercial arbitrators.

As noted in the EOI forms, those appointed to the list of mediators, or the register of bargaining code arbitrators, are obliged to inform the ACMA as soon as practicable if a conflict of interest arises between the mediator or arbitrator and the matter being mediated or arbitrated.

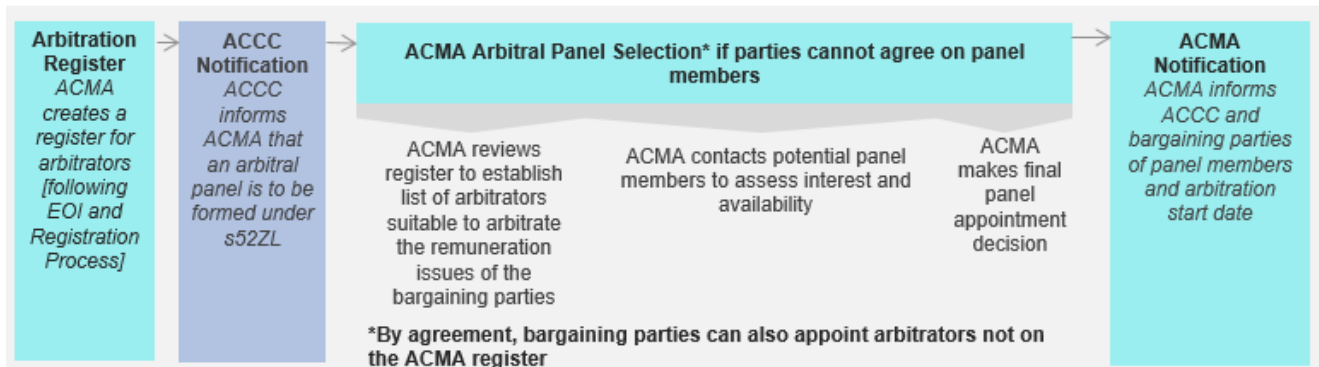
# The ACMA appointment process

The figures below show the process for appointment of mediators and arbitrators from the list of mediators or register of bargaining code arbitrators (as appropriate) during the bargaining resolution process.

**Figure 1: ACMA mediation list and appointment process for mediation**



**Figure 2: ACMA register of bargaining code arbitrators and appointment process for arbitral panels**



# Important information

## Provision of information

Applicants must declare that the information in their application and accompanying documentation or otherwise provided to the ACMA is true and correct. Giving false or misleading information is a serious offence under sections 137.1 and 137.2 of the schedule to the [Criminal Code Act 1995](#). This includes information that is misleading due to omission. The penalty for that offence is imprisonment for 12 months.

## Privacy

The [Privacy Act 1988](#) imposes obligations on the ACMA in relation to the collection, security, quality, access, use and disclosure of personal information. These obligations are detailed in the [Australian Privacy Principles](#), which are found in Schedule 1 to the Privacy Act.

Find out more about the [Privacy Act](#) and the [ACMA's privacy policy](#).

The ACMA will only use personal information for the purpose for which it has been provided. Any personal information collected in relation to the code will be used for the administration of the ACMA's functions under the code. The ACMA will not use personal information for any other purpose, nor will the ACMA disclose it, unless permitted to do so under the Privacy Act.

## Disclosure of certain information

Part 7A of the [Australian Communications and Media Authority Act 2005](#) empowers the ACMA to share authorised disclosure information (defined in section 3 of that Act) in certain circumstances (see Part 7A).

The definition of authorised disclosure information encompasses information given in confidence to the ACMA in connection with the performance of any of its functions or the exercise of any of its powers. The ACMA may make a disclosure on request or of its own volition. The decision to disclose will be made in light of the facts.

For more information, see the ACMA's [Regulatory Guide No. 3 – Information sharing under Part 7A of the ACMA Act 2005](#).

Please note that any information you provide to the ACMA (whether personal or otherwise) in the EOI form(s) or attached CV(s) may be used by the ACMA for the following purposes:

1. evaluating your suitability to be appointed as a mediator or arbitrator under the code
2. preparing statistical reports regarding the number of mediators or arbitrators registered under the code
3. reporting to ministers under Part 7A of the *Australian Communications and Media Authority Act 2005*.

The ACMA is committed to the continual improvement of the News Media Bargaining Code. The ACMA may disclose certain information about your EOI to relevant government agencies directly involved with the operation of the News Media Bargaining Code.

In addition to disclosures permitted under Part 7A of the Act, please note that the information you provide to the ACMA (whether personal or otherwise) in your EOI may be used by the ACMA to advise relevant government agencies involved with the operation of the News Media Bargaining Code and preparing data and advice to as part of the review of Part IVBA of the *Competition and Consumer Act 2010*.

## **Confidentiality**

The ACMA will consider all claims of confidentiality before making any decisions regarding disclosure. Confidential information will not be published or otherwise released unless required or authorised by law or unless it is disclosed in accordance with consent given by you. The ACMA will endeavour to inform applicants before making any disclosure of confidential information.

## **Review of ACMA decisions**

ACMA decisions relating to an EOI are not subject to internal or merits review.

Applicants may have recourse to other review mechanisms, such as those set out in the [Administrative Decisions \(Judicial Review\) Act 1977](#) or appeal rights available under the common law.

# Feedback and complaints

Complaints about the selection process for mediators and arbitrators may be made to the ACMA's Customer Service Centre by:

- > phone 1300 850 115
- > email [info@acma.gov.au](mailto:info@acma.gov.au)
- > [online complaints and feedback form](#).

We will keep all complainants informed of the progress of their complaints.

If the complainant does not agree with the way the ACMA has handled their complaint, they may complain to the [Commonwealth Ombudsman](#). The Ombudsman will not usually look into a complaint unless the matter has first been raised directly with the ACMA.

The Commonwealth Ombudsman can be contacted on:

Phone (toll free): 1300 362 072

Email: [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

Website: [www.ombudsman.gov.au](http://www.ombudsman.gov.au)



# Glossary

Many of the terms in this glossary are defined in the code and clarified in the explanatory memorandum. Nothing in this glossary alters the definitions in the code.

## ***Designated digital platform corporation***

A digital platform corporation designated by the Treasurer under section 52E of the code.

## ***News business***

A news business means:

- a) a news source; or
- b) a combination of news sources.

## ***News source***

A news source is defined in the code as any of the following, if it produces and publishes news content online:

- 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.

## ***Register of eligible news businesses***

The register of eligible news businesses on the ACMA website that shows:

- > the list of registered news business corporations
- > the registered news businesses that have been endorsed by the ACMA for each registered news business corporation
- > the point of contact for each registered news business corporation.

## ***Registered news business***

A registered news business is a news business that has been registered by the ACMA for the purposes of the code. Each registered news business is linked to a registered news business corporation via the ACMA's endorsement.

## ***Registered news business corporation***

A registered news business corporation is a corporation that has been registered by the ACMA for the purposes of the code.

## ***Register of bargaining code arbitrators***

The register of bargaining code arbitrators is the register established under section 52ZK of the code by the ACMA for the purposes of the code.

## ***Remuneration issue***

A remuneration issue is a core bargaining issue concerning the remuneration to be paid to a registered news business for the making available of the registered news businesses' covered news content by the designated digital platform service and has the meaning given by subsection 52ZL(1) of the code.