News media bargaining code: Register of bargaining code arbitrators – Expressions of interest

Australian Government

acma Australian Communications and Media Authority

INTRODUCTION

The Australian Communications and Media Authority (ACMA) is inviting expressions of interest (EOI) from suitably qualified and experienced people for inclusion on the ACMA's register of bargaining code arbitrators.

This form and any attachments should be emailed to bargainingcode@acma.gov.au once completed.

Overview of role

The ACMA is establishing a register of bargaining code arbitrators, to support the arbitration process in Division 7 of the News Media and Digital Platforms Mandatory Bargaining Code (the code).

Arbitrators who are on the register may be appointed to assist registered news businesses and designated digital platform corporations to reach agreement on the remuneration issues related to a business's news content being made available online.

The ACMA is required to establish and keep the register under the code. Keeping the register is a core part of the arbitration scheme mandated by the code (refer to section 52ZK). How the arbitration scheme will operate is detailed in sections 52ZK – 52ZZE of the code.

The arbitration of remuneration issues is available to parties if mediation is unsuccessful or has been terminated and there remains a lack of agreement on the remuneration to be paid to the registered news business. The bargaining parties may also proceed to arbitration instead of mediation by mutual agreement (refer to paragraph 52ZL(2)(b)).

The code establishes a 'final offer' arbitration model and the ACMA will appoint an arbitrator or arbitral panel from the register if a news business and designated digital platform corporation cannot themselves agree to the appointment of an arbitrator or arbitrators.

The ACMA will ensure that the register of bargaining code arbitrators is current and reflects the availability of arbitrators, their skills and their capacity. Arbitrators should advise the ACMA in writing if they are no longer available to act as an arbitrator, cease to have relevant experience or expertise to be appointed to an arbitral panel or no longer wish to remain on the register of bargaining code arbitrators.

Applicants should familiarise themselves with the accompanying ACMA document *News media bargaining code: Guidelines for expressions of interest for mediation and arbitration professionals* available on the ACMA website before submitting an EOI.

Assessment process

Unless otherwise advised, the ACMA's assessment process will take approximately 4 weeks to complete from the time an EOI is received.

APPLICANT DETAILS

Please note: these details may be published on the ACMA website as part of the register.

All fields marked with an asterisk (*) are mandatory. Failure to complete a mandatory field may delay the processing of your application.

Name(*):

Organisation(*):

Position(*):

Work email(*):

Work phone(*):

Work address(*):

Professional experience

The ACMA is seeking individuals with commercial arbitration experience to be placed on the register and to be appointed to an arbitral panel in the circumstances described in section 52ZM of the code.

Individuals do not need to be formally recognised as ‘arbitrators’ to be registered and appointed but must have experience in legal, economic or industry matters. We will consider individuals from a range of backgrounds, including legal practitioners, consultants, academics, advisors, and industry executives.

Please provide information about your suitability to be a member of an arbitral panel who determines the remuneration to be paid to a registered news business for making their news content available on a designated digital platform in an attached CV (*). The CV must include:

- whether you are accredited or recognised as an arbitrator, and if so, please indicate the date and source of your accreditation or recognition
- the range and subject matter of the commercial arbitrations you have been involved in, including any that took place 'on the papers' or used the final offer arbitration model
- the period of time you have been working in this field
- contact details for at least 2 referees.

Please detail any additional experience, skills or knowledge that demonstrate your understanding of news media and/or digital platform business models. Use the space below or attach a separate document if you need more space.

Remuneration

Please stipulate your daily rate(*) for arbitration work you currently undertake, or would expect to charge, for sitting on a news media bargaining arbitral panel. Under the code, the bargaining parties will each be responsible for payment of half of your costs (refer to section 52ZO).

Conflicts of interest

Conflicts of interest in the arbitration process are governed by section 52ZN of the code. This section defines a conflict of interest as 'any interest, pecuniary or otherwise, that could conflict with the proper performance' of an arbitrator's function. The code provides that where the ACMA appoints an arbitrator to an arbitral panel, the ACMA must give the arbitrator a reasonable opportunity to declare any actual or potential conflicts of interest. The code gives the ACMA power to remove an arbitrator from an arbitral panel if it has reason to consider that the arbitrator has any actual or potential conflicts of interest in relation to the arbitration.

What must be declared to the ACMA

The ACMA is proposing to manage conflicts of interest according to the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration*. Applicants seeking to be included on the register are asked to provide an initial declaration of any perceived or real conflicts of interest of which they may be aware. This initial declaration will assist the ACMA in identifying any conflict-of-interest issues when appointing an arbitrator from the register to an arbitral panel in relation to a dispute between specific bargaining parties under subsection 52ZM(8) of the code.

Before being appointed to an arbitral panel by the ACMA, an arbitrator will be required to sign a second conflict of interest declaration (refer to subsection 52ZN(1)). This is so the ACMA can establish whether any conflict-of-interest matters have arisen since the original EOI and can confirm that an arbitrators' personal interests do not conflict with, or create the perception of a conflict with, their official responsibilities as an arbitrator.

Do you believe you have a conflict of interest?(*) ☐ Yes ☐ No

If the answer to the above question is yes, please detail any possible conflicts of interest with potential parties of which you are aware. Your declaration of conflicts may be informed by the list of the news businesses registered on the ACMA register of eligible news businesses and any digital platforms operating in Australia (particularly platforms that may be designated by the Treasurer under section 52E of the code).

Use the space below or attach a separate document if you need more space.

What to do if a conflict arises

If an actual or potential conflict of interest arises when an arbitration has or is about to commence, it is the duty of the arbitrator to inform the ACMA and the parties to the arbitration, as soon as possible. The ACMA will then determine whether the arbitrator should be replaced. If the ACMA determines that the arbitrator should be replaced, it will notify the bargaining parties and appoint a new arbitrator from the register. This notification and appointment must be given as soon as practicable.

The information you provide under this section will not be made available to bargaining parties and will not preclude you from appointment as an arbitrator.

Brief description of the arbitration process

Arbitration will occur if one of the core issues is the remuneration to be paid by the designated digital platform corporation to the registered news business, and mediation has not been successful, or the bargaining parties have agreed to refer the remuneration issue to arbitration.

The code obliges parties to participate in the arbitration in good faith.

Because the bargaining parties will usually engage in mediation first, arbitration will likely arise around 5 to 7 months from the time bargaining is first notified between a registered news business and a designated digital platform corporation. It may start earlier if both parties agree to move directly to arbitration before attending mediation.

Once the arbitration process has begun, each of the bargaining parties must submit to the panel a final offer (expressed as a lump sum). This amount reflects the remuneration amount to be paid by the responsible digital platform corporation to the registered news business corporation for making available the registered news business corporation's covered news content. It relates to covered news content appearing on the designated digital platform service for 2 years (refer to subsection 52ZX(1)(b)).

When a 'final offer' arbitration determination is made, the arbitral panel will have accepted one of the final offers , which will then become binding on the parties. However, if the arbitral panel forms the view that neither offer is in the public interest, an ascertained renumeration amount will be derived from the most reasonable offer before the panel. When deciding whether to make an adjustment, the arbitrator or arbitral panel may have regard to submissions provided by the news business, the digital platform corporation or the Australian Competition and Consumer Commission.

Under the code, the panel is expected to provide its ruling between 45 and 85 days after the arbitration starts, depending on a number of factors such as additional submissions and requests for information. Timelines for the 45-to-85-day arbitration variants are to be published by the Australian Competition and Consumer Commission.

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 of the Privacy Act.

Access more information about the Privacy Act.

Access 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 News Media Bargaining 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 of the ACMA Act).

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 this form, your attached CV or any other attached documents may be used by the ACMA for the following purposes:

1. evaluating your suitability to be appointed as an arbitrator under the code
2. preparing statistical reports regarding the number of 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 application 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 this form may be used by the ACMA to advise relevant government agencies involved with the operation of the News Media Bargaining Code, and for preparing data and advice as part of the review of Part IVBA of the *Competition and Consumer Act 2010*.

Do you consent to the use of your application information for these purposes?(*) ☐ Yes ☐ No

If you do not give your consent as described above, we will discuss the scope of your consent with you.

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. The ACMA will endeavour to inform applicants before making any disclosure of confidential information.

Instructions for finalising this form

This form and any attachments should be emailed to bargainingcode@acma.gov.au once completed.

Attachments will only be accepted in .docx and .pdf formats. The maximum file size for applications is 20 megabytes.

If you have any questions about the form, please email us at bargainingcode@acma.gov.au.

Declaration

In submitting this application, I declare that the information in this application and accompanying documentation or otherwise provided to the ACMA is true and correct. I acknowledge that 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.

SIGNATURE	DATE
PRINT NAME	