

SBS RESPONSE TO SENATE COMMITTEE ON ECONOMICS INQUIRY INTO THE INFLUENCE OF INTERNATIONAL DIGITAL PLATFORMS 28 FEBRUARY 2023

Key Points

- The Special Broadcasting Service (**SBS**) welcomes the opportunity to submit to the Senate Committee on Economics inquiry into the Influence of international digital platforms.
- As a public interest media organisation, creating, publishing and distributing content and connecting with our audiences, SBS has a range of relationships with international digital platforms.
- Through a range of recent inquiries and consultations, SBS has raised a number of concerns arising from the business practices and consequential competitive impacts of international digital platforms and has welcomed regulatory interventions to date by Governments seeking to address some of these concerns.
- The primary intervention has been through the creation of the News Media Bargaining Code ('**NMBC**'), which seeks to address bargaining imbalances between local news organisations and the international digital platforms which are using local news content on their services.
- SBS acknowledges there have been clear benefits to audiences arising from the enactment of the NMBC and the incentive it has provided towards the striking of commercial deals between Australian news businesses and the digital platforms.
- As a result of the incentives created by the NMBC, SBS has completed a deal with Google for the use of SBS content on its platform.
- In this way, the Code has operated as intended with respect to Google to strengthen the provision of public interest news and information in the Australian market.
- Compliance with the letter and spirit of the Code is an important feature of the platforms' social licence to operate in Australia.
- However, the Code has not created a sufficient incentive for Meta to enter into meaningful negotiations with SBS for remuneration for the use of SBS content on the Facebook platform.
- SBS considers it likely that Meta has made a strategic assessment that the number of commercial deals it has struck with other Australian media organisations is sufficient to ensure the designation provisions of the NMBC will not be employed. SBS believes this reveals a flaw in the design of the NMBC.



- SBS supports the designation of Meta under the NMBC, but is also supportive of a range of targeted reforms which would remove potential barriers to a designation decision on the part of the decision-maker (the Treasurer).
- SBS is aware of suggestions that it should access the discretionary grants program established by Meta. However, these grants (under which there is a very high level of competition for a comparatively small pool of funds) are not comparable to the commercial agreements reached between Meta and other news organisations, which can invest with certainty and a guaranteed (and multiples higher) income stream.
- Despite the NMBC being a critical part of the media regulatory landscape and a key support to public interest journalism, it has not fully achieved its intended outcomes and there remains opacity about its effectiveness.
- Having now been implemented for two years, it is appropriate to consider what amendments can be made to ensure it operates effectively and as intended.
- Lack of algorithm transparency associated with quality journalism on the platforms remains an issue of significant concern.

Introduction

SBS appreciates the opportunity to respond to the Senate Committee on Economics inquiry into the Influence of international digital platforms.

SBS's role and function is unique in the broader Australian market for entertainment, news and information services.

SBS's principal function is to provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians, and in doing so, reflect Australia's multicultural society. SBS has been proudly serving Australia and our multicultural communities for more than 45 years. Along with our principal function, our purpose is to inspire all Australians to explore, respect and celebrate our diverse world, and in doing so, contribute to a cohesive society.

SBS's contribution to public interest journalism, and hence Australian democracy, is truly distinctive. SBS is one of Australia's most trusted broadcasters, evidenced by our commitment to independent, impartial and balanced news and current affairs. Trust is underwritten by authenticity, and in our case by our commitment to live our purpose as passionately within our organisation as we do externally as expressed through our content. SBS has rigorous editorial standards and a Code of Practice in place which underpin the delivery of all of its independent and balanced news, information and current affairs services.

SBS's unique connections and experience with multicultural, multilingual and Aboriginal and Torres Strait Islander communities enable SBS to cover news and tell the stories of those communities through the perspectives and unique voices of these communities. In particular, the news, current affairs and information services provided by SBS inform and promote understanding among all Australians of different cultures and maximise opportunities for people from diverse backgrounds to engage in social, political and cultural discourse.

Providing Australians with accurate and impartial information contributes to a successful functioning of democracy. A 2021 Reuters Institute study found SBS is the most trusted network



when compared to Australia's commercial broadcasters.¹ An SBS-conducted survey in 2021 also indicated that SBS is the most trusted media organisation amongst Australia's multicultural audiences.²

In relation to digital platforms, SBS is a

- **user**—it uses multiple digital platforms to connect, inform and interact with audiences, and gain insights into audiences/consumers across Australia. It also uses ad tech services, principally those offered by Google—the dominant ad tech platform. SBS participates in the ad tech market as both an advertiser (see the third dot point below) and an inventory provider, for advertisers who wish to place digital advertising on SBS's online services;
- **publisher**—it publishes and provides its content on social media digital platforms, and its apps in app marketplaces owned by digital platforms;
- **advertiser**—it advertises its content, services, and activities on multiple digital platforms; and
- **competitor**—as outlined above, SBS provides digital advertising services on its online offerings (websites and apps) including SBS On Demand; this is in competition with those offered by digital platforms.

SBS has been engaging on an ongoing basis with the series of consultations and reports issued by the Australian Competition and Consumer Commission (**ACCC**) as part of the Digital Platforms Inquiry, raising concerns regarding anti-competitive behaviours and harmful business practices. SBS has also submitted to relevant Parliamentary inquiries.

These can be found on the SBS website and include:

- [Submission](#) to the ACCC's Digital Platforms Inquiry Issues Paper (May 2018)
- [Submission](#) to the ACCC's Digital Platforms Inquiry's Preliminary Report (February 2019)
- [Submission](#) to the Treasury's consultation on the ACCC's Digital Platforms Inquiry Final Report (September 2019)
- [Submission](#) to the Select Committee on Foreign Interference through Social Media Inquiry into the risk posed to Australia's democracy by foreign interference through social media (March 2020)
- [Submission](#) to the ACCC's Advertising Services (Ad Tech) Inquiry Issues Paper (May 2020)
- [Submission](#) to the ACCC's Mandatory News Media Bargaining Code concepts paper (June 2020)
- [Submission](#) to the ACCC's draft legislation for the News Media Bargaining Code (August 2020)
- [Submission](#) to the ACCC's March 2021 Report on App Marketplaces (October 2020)
- [Submission](#) to the Senate Standing Legislation Committee on Economics' Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 inquiry (January 2021)
- [Submission](#) to the ACCC's *Digital Advertising Services Inquiry* (March 2021)

¹ Reuters Institute Digital News Report 2021 available here: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf

² SBS information, online survey, 2021, n = 5405, all participants



- [Submission](#) to the Treasury's Review of the News Media and Digital Platforms Mandatory Bargaining Code (May 2022)
- [Submission](#) to the ACCC's *March 2023 Report on Social Media Services Issues Paper* (September 2022)
- [Submission](#) to the Senate Select Committee's Inquiry into Foreign interference through social media (February 2023)

In addition, SBS has recently made a submission to the Treasury's consultation on digital platforms regulatory reform (the submission is yet to be made public). In this submission SBS is supportive of additional regulatory powers to address consumer and business concerns regarding the digital platforms.

We refer to the exploration of problematic market behaviours and business practices outlined in those submissions (and do not seek to replicate them in this submission). We also note that the Inquiry's *Issues Paper* also addressed many of these problematic behaviours and practices. In this submission SBS's primary concern is the operation of the key regulatory intervention in this field, the NMBC.

Existing attempts to regulate the platforms – News Media Bargaining Code

The most prominent example of regulatory measures affecting the platforms is the NMBC. The NMBC was enacted to safeguard and enhance public interest journalism by providing a framework under which agreements could be reached between news media organisations and platforms for the use of news media content. As outlined in the submission below, notwithstanding some beneficial outcomes, the NMBC is not fully delivering on its intended outcomes. Whilst many commercial deals have been completed, there continues to be a substantial lack of transparency about the real outcomes of this regulatory intervention.

Recent Treasury Review

The NMBC has recently been the subject of review, and SBS included in its submissions to the review a range of observations and recommendations to improve the efficacy of the NMBC.

SBS acknowledged the clear benefits to audiences arising from the enactment of the NMBC and the incentive it has provided towards the striking of commercial deals between Australian news businesses and the digital platforms.

As a result of the incentives created by the NMBC, SBS has completed a deal with Google that has enhanced SBS's ability to produce and distribute content that aligns with its Charter, and which delivers clear public policy outcomes. Google approached these negotiations constructively and in good faith.

In this way, the Code has operated as intended with respect to Google to strengthen the provision of public interest news and information in the Australian market.

However, the Code has not created a sufficient incentive for Meta to enter into meaningful negotiations with SBS for remuneration for the use of SBS content on the Facebook platform.

Meta's refusal to engage with SBS

This lack of incentive arises from the construction of the designation provisions in the Code, and could be addressed through targeted amendments to those provisions.

SBS has not been provided with an explanation from Meta regarding its refusal to meaningfully engage with SBS in relation to a voluntary deal to remunerate SBS. We understand news publisher *The Conversation* had a similar experience. It is likely that Meta has made an



assessment that it has completed a sufficient number of deals with news media organisations such that the Treasurer is unlikely to exercise discretion to designate Meta under the Code.

We base this assumption on the likely operation of subsection 52E(3) of the *Competition and Consumer Act 2010 (the Act)*. That subsection requires the Treasurer, in making a decision as to whether to designate a platform, to have regard to:

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.

Having completed various deals across the media industry (primarily with larger organisations, but also including some smaller publishers such as Australian Community Media, Private Media, Schwartz Media and Solstice Media³), it seems likely that Meta has made a strategic assessment that, notwithstanding the impacts on individual news businesses of its decision to strike no further deals, it has made sufficient deals to satisfy a decision-maker that it has made a 'significant contribution' to the industry as a whole.

This provision reveals two flaws in the construction of the Code. First, the focus of decision-making regarding designation is framed in terms of the broader news industry. Whilst this may appear on a surface level to be a sound public policy framing, in practice, it has resulted in an outcome which stands to harm a sub-section of the broader industry.

It has permitted Meta to strategically assess a threshold number of deals beyond which they have judged deals are not necessary to avoid designation. That is, the focus for Meta has not been on striking deals with news media organisations whose content appears on their platform (the intention of the Code), but rather on doing what is minimally necessary to avoid designation under the Code.

The second major flaw is that due to the confidentiality of the commercial arrangements that have been made, and the absence of aggregated data or reporting, there is no way for the Treasurer to accurately ascertain whether a "significant contribution" has been made.

Impact on SBS and its audiences

Due to the fact SBS content still appears on Meta's platforms without remuneration, SBS is in the same bargaining position as it was prior to the enactment of the Code (as regards Meta). Overall however, SBS is worse off relative to its competitors, because of other media organisations who do have agreements with Meta now have additional funding to invest in services and talent.

The intention of the NMBC was: to address bargaining power imbalances; ensure digital platforms share the benefit of news media organisations' content on their platforms; provide an ability for organisations to trigger mandatory bargaining; and, support strong, independent media.

The current outcome as regards SBS and Meta is contrary to all four of these principal objectives. This is despite SBS being purposely incorporated by the Parliament into the remuneration provisions of the Code.

Given the value derived from SBS's deal with Google, and the value derived by other media organisations through deals with Meta, there is clear additional audience value forgone as a

³ <https://mumbrella.com.au/facebook-signs-deals-with-private-media-schwartz-media-and-solstice-media-670915>



result of Meta's decision not to negotiate with SBS. There is also significant value flowing to Meta as a result of its unremunerated use of SBS content on its platforms.

This is a perverse outcome of the protracted and exhaustive policy and legislative processes undertaken to deliver the NMBC, and leads to identifiable public policy detriments. These negative public policy outcomes are amplified when SBS's particular remit to serve multicultural, multilingual and First Nations audiences is taken into account. These audiences often rely more heavily on SBS for trusted news and information, and use Meta platform Facebook at a proportionally higher level than the general Australian population.⁴ For many Australians, these digital platforms are a form of virtual 'town square' and are a primary source of news and information.

Meta has been able to decline to even commence a negotiated-outcome discussion with a public broadcaster that serves some of Australia's most vulnerable communities, and indeed communities that over-index on their consumption of Facebook compared to the average Australian.

It can be argued that the digital platforms, because of their size, scale and social/political impact must hold a social licence to operate. The introduction of the NMBC reflects this, and recognises the importance of ensuring quality news is prominent on these platforms—this is critical in a democratic society to help counter disinformation and misinformation (both of which are prolific on these platforms).

Regulatory interventions to protect the availability of reliable, trusted and impartial news and information are particularly important in contexts in which distribution platforms (such as Meta) hold monopolistic, or near monopolistic, positions as regards markets and audiences.

Designation of Meta under the NMBC

It would be strongly consistent with the policy objectives underlying the NMBC for Meta to be designated under section 52E of the Act, given that it has chosen not to pursue agreements outside of the NMBC with a significant group of media providers, including SBS. 'Designation' refers to the power held by the Treasurer to enliven the provisions in the NMBC relating to mandatory bargaining and arbitration which would compel Meta to come to the negotiating table.

As noted earlier in this submission, it appears likely that Meta has assessed that the cumulative impact of the deals it has concluded makes designation unlikely, and for this reason, it has calculated that there is no incentive to pursue further voluntary deals with media organisations such as SBS and others.

In this way, the construction of the designation power in the Code has had the practical impact of delivering SBS back into a position of inferior bargaining power, such that SBS is unable to incentivise Meta to participate in meaningful negotiation, and placing SBS at a competitive disadvantage relative to other media organisations such as the Australian Broadcasting Corporation, The Guardian, and Nine.

Hence, in the current scenario, all the indicators which justified the creation of the Code are still in effect as regards SBS:

⁴ Historically, language audiences have trusted the SBS Network more than the rest of the nation, with a gap of +3pp with the rest of the population across FY22. Trust in most SBS brands is also higher with multilingual Australian Audiences. Source SBS Brand Pulse, April 2022



- An unequal balance of negotiating power in the market resulting in an absence of voluntary agreements for the use of SBS content.
- Unremunerated use of SBS content on the digital platform.
- Revenue forgone which would otherwise be used to support the creation and distribution of news content with extremely strong public interest value.

However, changes to the designation provisions of the NMBC are likely required to enable designation. SBS supports urgent amendments to the NMBC which would facilitate Meta's designation:

- To ensure the Code works as intended to support strong, independent public interest media, section 52E of the Act should be amended to enable the Treasurer to make a designation decision with regard to the impact of a platform's bargaining behaviour on **subsections** of the Australian media industry, as opposed to only considering the impact on the sector as a whole.
- Also, factors should be added to the designation provisions to which the Treasurer must have regard when determining if the scope of the commercial deals made is sufficient (for example, whether the deals were with news media organisations which were trusted news sources, had content safeguards (enforceable Codes of Practice which safeguard the quality of public interest journalism provided) or served underserved communities (such as multilingual, multicultural and First Nations audiences)).
- The designation power be amended to permit the designation of a platform in relation to dealings with a subset of news media organisations.
- If these proposals are not preferred, subsection 52(3)(b) should be removed from the Act.

Related amendments and issues

Also of concern is the possibility that the voluntary commercial deals completed across the media sector contain provisions which would mean the deals are invalidated if a platform is designated under the NMBC.

This could act as a substantial barrier to designation, even where the circumstances are those clearly contemplated by the Parliament as warranting designation. This requires further consideration by the Government and ACCC.

To address concerns arising from the possibility that existing deals may be voided if a platform is designated, it may be appropriate to empower the Treasurer to designate platforms in relation to a specific subset of news media businesses. For example, the power could be amended to enable designation of a platform in relation to its dealings with publicly funded news media organisations, or news organisations with a certain reach or of a certain size.

SBS is also concerned that the lack of transparency regarding the impact of the Code, and possible contract provisions designed to frustrate a designation decision, mean that the Treasurer is unable to make fully informed decisions under the Code.

The lack of transparency means it may not be possible to definitively know if the Code is fulfilling its public policy objectives.

This opacity is a significant challenge and should be urgently addressed.



Facebook's grant programs

SBS is aware of funding programs created by Meta and is also aware of suggestions these should be accessed as by SBS as a substitute for a commercial agreement.

We do not believe the funding programs created by Meta are adequate substitutes for individual commercial agreements between media organisations and digital platforms.

For example, the Facebook Australian News Fund will invest \$15 million over 3 years and is available to news organisations which do not have standalone deals. We understand 169 organisations applied in the first year.

This very high level of competition for a comparatively small pool of funds highlights the impact of the lack of a deal between SBS and Meta. Whereas other media organisations are able to invest with certainty as a result of direct commercial agreements which guarantee an income stream, organisations which have not completed a deal must compete with over 150 other news organisations for only \$5 million each year, for a maximum of three years.

The quantum of funding for discrete programs such as these is considerably less than the likely value of any standalone deals Meta may have completed were it properly incentivised to do so (noting some have estimated that the total of deals done by digital platforms to date is at least \$200 million).⁵

Our understanding is that the Facebook Australian News Fund was intended for smaller, community-based organisations, whereas SBS is more appropriately compared to the larger commercial organisations who have secured deals with Facebook.

Outcome of the recent Treasury review of the NMBC

SBS notes that the Treasury's review did not engage with the question of designation and that there was no support for the enhancements SBS proposed which designed to improve the efficacy of the scheme.

SBS will continue to advocate for these changes and looks forward to discussing these issues with the Parliament as a whole and with the Government as it considers its response to the review.

Other examples of concerning market behaviour

As noted above, SBS has submitted to a wide range other inquiries and reviews regarding a range of market behaviours undertaken by the platforms which are of concern.

These include:

- Self-preferencing behaviours:
 - Includes conduct whereby platforms such as Apple and Google use market power to favour their own first-party apps at the expense of rival third-party apps. This includes pre-installation, default setting and superior integration.
- Lack of transparency regarding algorithms and algorithm changes
 - Includes opacity to consumers and businesses in how algorithms preference certain content, manipulate users and user responses and contribute to greater concentrations of market power.

⁵ <https://institute.org/news/millions-of-dollars-for-news-shrouded-in-mysterious-deals/>



- In practical terms, this means SBS is unable to properly understand how it can boost the prominence of quality journalism via the algorithm. It is reasonable to assume that paying for prominence is the only available option (an option that is open to those who seek to spread disinformation and misinformation). Such an outcome is clearly not in the interests of audiences.
- Opaque and anti-competitive practices in the market for online advertising (ad tech):
 - Concerns regarding Google's dominance in the ad tech supply chain and the problems this creates for competition, advertisers and publishers.
- Misinformation and disinformation on social media:
 - SBS's provision of high-quality content on social media in English and more than 60 languages (with dedicated social media presence) is extremely important in countering misinformation and disinformation on social media—including that which arises from foreign interference.

These practices and behaviours continue to create issues of concern, both in terms of impacts on SBS's business operations, and the effective delivery of SBS services to the Australian community. Further detail regarding SBS's position on these issues can be found in the submissions for which links are provided earlier in this submission.

Conclusion

SBS welcomes the ongoing attention of policy-makers and the Parliament on the impact that international digital platforms have had and continue to have on Australian businesses, consumers and society.

Whilst there are a range of policy issues and problems that warrant a regulatory response, the primary focus for SBS is the unfulfilled potential of the NMBC and, in particular, the failure of the NMBC as currently constituted to incentivise Meta to negotiate meaningfully or productively with SBS.

There are a range of improvements and refinements that SBS has put forward in a number of fora which would benefit from the Inquiry's consideration, primarily relating to the Treasurer's decision-making power to designate platforms under the NMBC.

Such reforms would help ensure the NMBC more fully achieves its intended effects and would deliver strong benefits to SBS's audiences and public interest media more broadly.