

**Submission to the Press Recognition Panel on the Second Call for Information about
IMPRESS's Application for Recognition**

1. This submission is made in answer to the Response Paper dated 27 April 2016 filed by IMPRESS following the PRP's Call for Information about IMPRESS's original application for recognition.

The inadequacy of IMPRESS's response

2. IMPRESS has failed to deal with the deep-seated and overarching objections to its suitability as a press regulator, in particular the fact that it has no support from the mainstream press; it has no credibility; it has no standards code; and it depends for its funding on a man who is engaged in a personal campaign against the press. Instead of trying to prove its independence and viability as a regulator, IMPRESS has limited its response to points of detail on individual criteria.
3. In considering IMPRESS's application for recognition, the PRP is obliged to take a wider view: it cannot and should not view matters from the narrow perspective of the criteria, as IMPRESS invites it to do. While IMPRESS chooses to overlook the fact that there is currently in place a successful self-regulatory regime to which the overwhelming majority of the press subscribes, the PRP cannot ignore that fact – any more than it can or should ignore the true nature of IMPRESS, which is a faction of self-appointed and like-minded individuals with little or no industry knowledge or experience whose fees and expenses will be underwritten by a man with a mission to reform the press according to his own fashion. To recognise such a body as an effective and independent regulator would be a travesty.

This is not a box-ticking exercise

4. IMPRESS is encouraging the PRP to engage in a box-ticking exercise. The table attached to its Response Paper repeatedly says "The PRP is not empowered to do more than to check IMPRESS has satisfied this Criterion". It appears to be IMPRESS's case that the PRP must confer recognition if, on an item by item basis, IMPRESS fulfils the terms of each of the numbered criteria.

5. In the NMA's submission, this approach is wholly incorrect. In paragraph 6 of its 4 March submission the NMA reminded the PRP that a box-ticking exercise is insufficient. (Were this just a box-ticking exercise, there would hardly have been any need to establish the PRP: a junior civil servant could perfectly well perform a box-ticking exercise.) The Royal Charter specifies that in making its decision on whether the Regulator meets the recognition criteria,

"[the PRP] shall consider the concepts of effectiveness, fairness and objectivity of standards, independence and transparency of enforcement and compliance, credible powers and remedies, reliable funding and effective accountability, as articulated in the Leveson Report, Part K, Chapter 7, Section 4 ("Voluntary independent self-regulation")" (Emphasis added.)

The NMA submits in addition that the PRP must at all times act reasonably and fairly, consistent with its position as a public body exercising public functions, particularly given the potential consequences of recognition for the vast majority of publishers who have not signed up to IMPRESS. A failure by the PRP to act fairly and reasonably would be clearly susceptible to successful challenge in the courts.

6. The response by IMPRESS overlooks the need for a broader assessment of its application. Instead of tackling head-on the serious and principled objections to its application, it prefers to engage in the narrow exercise of attempting to demonstrate compliance with the wording of the individual criteria. This is not good enough. The PRP's assessment of the application must have regard to wider issues of (among other things) effectiveness, fairness and independence. (This is not to say that IMPRESS satisfies the box-ticking either: for the reasons set out in our 4 March submission, and below, it is clear that IMPRESS does not meet the criteria even on its own narrow approach.)
7. The PRP must also pay due regard to the consequences of recognition for other publishers (indeed the vast majority of UK publishers who have chosen not to join IMPRESS). Given that those publishers are almost all committed to the established self-regulatory regime operated by IPSO, it would be perverse and unfair if they were thereby to suffer disadvantage (including infringement of their article 10 rights) because a prospective regulator with almost no industry support were to satisfy a box-ticking exercise and thereby trigger the operation of a statutory regime that was never contemplated in these circumstances.

8. We address below some of the points raised by IMPRESS in its Response Paper. Where we have not addressed any specific points, the PRP is referred to our 4 March submission.

Summary

9. The NMA recognises that IMPRESS has improved its application in some respects and dealt with some of the points raised by the NMA in its 4 March submission. However, the changes to its original application are minor, and do not overcome the principled, overarching concerns raised by the NMA. Specifically, IMPRESS has done nothing to address the following concerns raised by the NMA:

- 9.1 IMPRESS is wholly dependent for its funding on a single rich donor.
- 9.2 There is no evidence that IMPRESS will ever be able to support itself financially.
- 9.3 Even in the short term, its funding is vulnerable as the AMCT may simply decide to stop funding it and there will be little or nothing IMPRESS will be able to do about that.
- 9.4 IMPRESS has failed to explain why its original application was so conspicuously lacking in transparency about the nature of its funding. Its financial dependence on Max Mosley was never mentioned in its original application and IMPRESS has admitted to it only after being forced to do so by those responding to the PRP's Call for Information.
- 9.5 IMPRESS is not a credible regulator. It is the creature of a small body of self-appointed individuals on a mission to reform the press. It does not owe its existence, as a self-regulatory body should, to a desire for self-regulation by any significant part of the industry.
- 9.6 Among the individuals who aspire to regulate the industry through IMPRESS, none has the status or experience of the industry such as to win the respect or confidence of those they would be regulating.
- 9.7 The fees to be charged by IMPRESS for large publishers are in any event too high to attract any such publishers. Without attracting large publishers, IMPRESS will be financially unsustainable as the fees smaller publishers will be willing to pay will come nowhere near to covering its costs.
- 9.8 IMPRESS has no authority or control over the Code it intends to adopt. Its plans for its own code are unknown and appear to depend on a vaguely-termed consultation. If IMPRESS were to be recognised by the PRP at this stage, the PRP can have no idea what IMPRESS's

own code of conduct would require of its members. That should be a fundamental obstacle to recognition.

- 9.9 The recognition of IMPRESS would confer recognition on a wholly ineffective regulator while simultaneously imposing on the majority of the press a system of penalties that was never intended to apply in a situation such as this.

Funding (1)

10. IMPRESS has attached two "new" documents: the AMCT IPRT Funding Agreement and a letter from the IPRT dated 26 April 2016. In fact only the letter is a new document. The AMCT IPRT Funding Agreement is dated 30 October 2015 and should plainly have been included with the original application. That it was not seems to the NMA to raise concerns about a lack of transparency over IMPRESS's funding arrangements. We note that IMPRESS is declining to provide to the PRP any correspondence between the Board of IMPRESS and relevant publishers concerning its funding or any correspondence between IMPRESS and AMCT and/or Max Mosley concerning funding. Such documents could shed valuable light on the real sustainability and security of IMPRESS's funding arrangements and the true relationship between Max Mosley/AMCT, the IPRT and IMPRESS.
11. According to IMPRESS, these two documents show that "the trustees of the IPRT are entirely independent of the AMCT, which has entered into a binding agreement to provide the IPRT with sufficient funds to meet its obligations to IMPRESS". This appears to the NMA to be a highly dubious assertion. The reality is that the AMCT agreed on 30 October 2015 to make funds available to the IPRT. We do not know for sure who is behind the IPRT (and IMPRESS has declined to provide a copy of its Trust Deed), but it clearly appears to be a vehicle set up by Max Mosley and/or IMPRESS whereby the AMCT could channel funds to IMPRESS¹. In the meantime, the IPRT has "decided" to fund IMPRESS using money derived from AMCT. Yet IMPRESS asks the PRP to accept that the trustees of the IPRT are "independent of the AMCT". The trustees of the IPRT are expected to act in accordance with the wishes of the AMCT: see clause 2.5 of the Grant Agreement which says the Trustees of IPRT "may have regard to any wishes or expectations that may be expressed by [AMCT]". It is the AMCT that is controlling IMPRESS. They fund it and they call the shots. As the NMA said in its 4 March submission, it is simply not credible that three professional trustees should have

¹ The AMCT IPRT Funding Agreement was drafted by Hunters, who must have been acting on the instructions of the AMCT all of whose trustees are Mosley family members or associates. Hunters also drafted the Funding Agreement between IPRT and IMPRESS. One of the trustees of IPRT is a partner of Hunters. It therefore appears that Hunters act on the instructions of both AMCT and IPRT.

spontaneously alighted on IMPRESS as the beneficiary of IPRT's largesse – this is quite obviously a choice that has been imposed on them by Max Mosley/AMCT.

12. It is notable that in the Funding Agreement between IPRT and IMPRESS the 'Purpose' of the Grant from IPRT is expressed to be ensuring the establishment of IMPRESS as a press regulator. The only reference to the Grant Amount being used to fund the operation of IMPRESS, as opposed to funding its establishment, is at Recital (D). Recitals (C) and (E) talk of its establishment only, as does clause 2.3 in the operative part of the Deed. It appears that the intention of this wording is to permit IPRT to withdraw funding if it (or more accurately the AMCT) doesn't like the way IMPRESS is being operated (or just wants to get out of the arrangement).
13. The NMA reminded the PRP in its 4 March submission that the benefactor of IMPRESS, Max Mosley, without whom IMPRESS's application could never have got off the ground, is a privacy campaigner who began his campaign against the press following his successful legal action over the publication of aspects of his private life. Mr Mosley has considerable ambitions for press reform: see, for example, his (unsuccessful) attempt to persuade the European Court of Human Rights to impose a legal duty of prior notification on publishers², a step which had it succeeded would have had obvious and serious chilling effects on article 10 rights. There can be absolutely no doubt that Mr Mosley sees the recognition of IMPRESS as a further step in his campaign to impose further restrictions on the press and freedom of expression. It would be a most extraordinary development if the PRP, by conferring recognition on IMPRESS, were to lend its support to Mr Mosley's personal (and controversial) conception of press freedom. Moreover, as we have pointed out at paragraph 62 of our 4 March submission, it would not just be IMPRESS but the PRP itself that would in due course be financially beholden to Mr Mosley.
14. IMPRESS never mentioned Mr Mosley in its original application and it scarcely mentions him in its Response Paper. The NMA invites the PRP to draw its own conclusions about IMPRESS's reticence: the NMA suggests it is, or should be, an embarrassment to IMPRESS that the only person willing to provide its organisation with the funds it needs is a campaigner whose agenda was formed as a result of an infringement of personal privacy rights of the sort that IMPRESS itself seeks to regulate. The right to regulate the press (and

² *Mosley v United Kingdom* [2011] 53 EHRR 30

thereby impose sanctions on those sections of the press who do not care to subscribe) is not something to be awarded to a private individual.

Appointment panel

15. The criterion requires the appointment panel to include at least one person with a "current understanding of the press". It seems to the NMA to be stretching that definition to breaking point to suggest that it is fulfilled by a relatively unknown former journalist who has never occupied a senior editorial post.

Board

16. The NMA remains sceptical of the credentials of the three "journalist" members of the Board and with the Board in general, which seems to consist of a group of like-minded people with little hands-on experience of the press. This is an important point. In order to be credible and effective, a regulator needs diversity and it needs to include at least some individuals with reputations in the industry who can demonstrate deep knowledge and weighty experience of the industry they seek to regulate.

Funding (2)

17. The NMA has never suggested that "the entire industry must agree to the means by which the regulator is to be funded". What it has suggested, consistently with the Leveson Report, is that the regulator should be funded by the industry. It was never envisaged by Sir Brian Leveson that a private individual would fund the regulator, but that is the system the PRP is being asked to approve (albeit through vehicles intended to neutralise its source).
18. IMPRESS says that its funding comes from "both the IPRT and from participating publishers." This is highly misleading. Income from participating publishers would not even fund its stationery bill. As IMPRESS well knows, it is entirely dependent on the AMCT (not IPRT) for funding and to suggest otherwise does it no credit whatever.
19. IMPRESS also says that "Information regarding IMPRESS's funding from the IPRT is publicly available on the IMPRESS website and is clear to any publishers who agree to be regulated by IMPRESS". In fact the information on the website is incomplete as it does not, for example, explain the various circumstances in which the funding from IPRT can be withdrawn: see paragraphs 50 to 59 of the NMA's 4 March submission.

20. According to IMPRESS: "Funding is also secure, as demonstrated by the IPRT IMPRESS Funding Agreement". This is a matter of serious contention: see paragraphs 50 to 59 just cited. Moreover, it does not seem to the NMA that the "new" documents it has produced establish security of funding any more than they establish that IMPRESS is independent of the AMCT. Pursuant to clause 3.1 of the Grant Agreement the AMCT may terminate the grant to the IPRT upon the occurrence of certain "Notice Events". Those Notice Events are sufficiently broadly defined to enable the grant to be withdrawn in all kinds of circumstances. Even if the grant were to be withdrawn contrary to the terms of the Grant Agreement, what guarantee would IMPRESS have that the IPRT would or could do anything about it? Ultimately the grant is only as secure as the AMCT chooses to make it: it holds the purse strings and if it should decide that it no longer wishes to support IMPRESS because it is not fulfilling a useful function, it is hard to see what IMPRESS (or IPRT) can do about it.

Code

21. IMPRESS says it is "drafting a new standards code which will be consulted on and adopted by IMPRESS's participants in the course of 2016". This statement lacks illumination. In what ways will the new code differ from the Editors' Code? Why is IMPRESS only doing this now? In the absence of clarity on these issues, the NMA suggests that it is premature for the PRP to be contemplating recognition of IMPRESS when IMPRESS is unable to tell it anything about the nature of the code by which it will seek to regulate publishers.
22. This is a fundamental omission and should of itself debar IMPRESS from recognition. How can the PRP recognise a regulator without knowing what code of standards it will be expecting its members to observe? It is apparent that not even the handful of IMPRESS "members" can possibly know what code of standards they may have signed up to. It may be that as and when IMPRESS completes its consultation those members do not like what they see. What then? The PRP, should it approve IMPRESS, may find that it has approved a regulator that has no members at all.

Examples of IMPRESS's box-ticking approach and unfitness to regulate the press

23. A good example of the box-ticking approach preferred by IMPRESS is its response to Criterion 8C. That criterion requires the regulator to issue guidance on the public interest. The NMA has made the point that a new entrant to the regulatory sphere cannot plausibly offer guidance on a code over which it has no authority or responsibility. IMPRESS purports to answer that by saying the PRP "is not empowered to do more than to check IMPRESS has

satisfied this criterion" and "to make decisions based on the detail of the guidance would be to exceed its remit". This is to take far too narrow a view of the recognition criteria. It is the NMA's submission that the PRP needs to take a rounded view of IMPRESS's suitability as a regulator. In relation to this criterion, that necessarily involves some examination of the extent to which the guidance to be offered by IMPRESS will be helpful or accurate.

24. Similarly, in relation to criterion 11, it appears to be IMPRESS's view that as long as it can show it has the power to hear and decide on complaints, it has "ticked the box" and it is no concern of the PRP just how they intend to go about it. This is a perverse way of looking at the matter: a regulator should not be recognised (with all the consequences that recognition entails, including those for non-regulated publishers) merely because it has ticked a box. It needs to demonstrate that it deserves recognition as an effective, credible and independent body with all the necessary structures in place for performing its functions in accordance with the requirements of the Royal Charter.
25. In its response concerning criterion 18 IMPRESS demonstrates its lack of understanding of the financial and other consequences of investigating a publisher (irrespective of any potential financial sanction). Such a lack of understanding demonstrates in turn IMPRESS's unfitness to regulate the press.

Arbitration

26. It remains unclear to the NMA if the changes to IMPRESS's arbitration scheme by the introduction of an "administrative" test overcome the concerns that the NMA expressed in its 4 March submission.
27. In particular, IMPRESS has failed to make it clear that its new "administrative criteria" address the criticism that it will be making a subjective assessment of an application for arbitration. The fifth criterion requires that: "(v) the claimant explains why the complaint is not suitable for resolution by the IMPRESS complaints procedure". If this is used to (a) require claimants that IMPRESS deems to have unsatisfactory answers to this question to first use the IMPRESS complaints procedure, or (b) is used to preclude or delay access to the arbitration scheme in another way, it falls foul of the requirement to provide speedy access to justice and so does not meet the requirements of Article 6.
28. Save for the imposition of an administration fee, IMPRESS does not appear to have done anything to address the serious concerns about cost that are set out at paragraphs 126 to

129 of the NMA's 4 March submission. Although IMPRESS has stated that arbitration costs will be underwritten for smaller publishers, this is not further explained and it is unclear what financial provision has been made for this. While this might potentially cover IMPRESS's current micro-publishers, it is unlikely that it will cover all small publishers who are likely to find these arbitration costs intimidating.

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