RPC

Dr David Wolfe QC
Chairman
Press Recognition Panel
Mappin House
4 Winsley Street
London
W1W 8HF

D: +44 20 3060 6435
F: +44 20 3060 7435
E: geraldine.elliott@rpc.co.uk

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Dear Sirs,

Judicial Review Letter before Claim

1. We act for the proposed claimant in this matter, the News Media Association (**"NMA"**). The NMA is the voice of national, regional and local news media organisations in the UK: a £5 billion sector read by 48 million adults every month in print and online. Its members are the biggest investors in news, accounting for two-thirds of the total spent on news provision in the UK, with most of the remainder spent by broadcasters including the BBC.

2. You will recall that we wrote to you on 31 October 2016, following the announcement on 25 October 2016 of the decision of the Press Regulation Panel (**"PRP"**) to grant recognition to IMPRESS, purportedly pursuant to the terms of the Royal Charter on Self-Regulation of the Press (**"the Charter"**, **"the Decision**"). We noted that no information had, at that stage, been provided about the grounds on which the Decision was made and requested urgent sight of the full reasons for the Decision as well as the information on which it was based. We observed that there was a serious risk of prejudice in the event that the NMA had to wait the full 30 days that the PRP had indicated it would take to provide this material. This was because, based on such information as had been made available, we considered that the Decision was likely to be capable of challenge on public law grounds. We stated that we expected to be writing to you with a formal pre-action letter once we had received the documentation and information requested.

3. Regrettably, it was not until 21 November 2016 that you published the reasons for the Decision on your website, in a document that runs to 190 pages entitled "*PRP Board decision in respect of the application for recognition from IMPRESS: The Independent Monitor of the Press CIC*" (**"the Reasons"**).

4. This letter is written in accordance with the Pre-Action Protocol for Judicial Review. It sets out the grounds on which the NMA considers the PRP to have acted unlawfully and the action it expects the PRP to take as a result.

The proposed claimant

5. The News Media Association 292 Vauxhall Bridge Road, London, SW1V 1AE.

The proposed defendant

6. The Press Recognition Panel of Mappin House, 4 Winsley Street, London, W1W 8HF.

Details of the matter being challenged

7. The PRP's decision dated 25 October 2016 (with reasons given on 21 November 2016) to grant recognition to IMPRESS (**"Decision"**).

The issue

8. The Charter expressly states that the functions of the PRP shall be public functions (Article 4.3) and there is no doubt that the Decision to recognise IMPRESS is amenable to judicial review. The issue is whether the PRP has misinterpreted and misapplied the Charter such that its Decision is vitiated by an error of law, in particular because: (1) IMPRESS cannot be considered a "Regulator" within the meaning of the Charter and hence cannot be eligible for recognition; and (2) IMPRESS's application failed to meet certain specific recognition criteria.

Background

9. The PRP was established by the Charter (Article 1) with the function (Article 4.1) of determining applications for recognition from a "Regulator", defined at Schedule 4 as meaning an independent body formed by or on behalf of relevant publishers for the purpose of conducting regulatory activities in relation to their publications. In determining applications, the PRP must apply the 29 "recognition criteria" set out at Schedule 3 to the Charter, which were formulated in light of recommendations made by Lord Justice Leveson in his Report "An Inquiry into the Culture, Practices and Ethics of the Press", November 2012 (**"Leveson Report"**).

10. Post-Leveson, many newspapers (including members of the NMA) have established a press regulator, the Independent Press Standards Organisation (**"IPSO"**), which uses as its code of standards the long-standing Editors' Code of Practice. The newspapers that formed IPSO do not intend to apply for it to be recognised by the PRP, because in their view it is inconsistent with the freedom of the press from executive interference for a State body, such as the PRP, to have a role in "recognising" or "approving" self-regulatory press bodies. Indeed, the press has been unwavering in its objection to state interference in the regulation of the press. The Charter unacceptably was drawn up by politicians and members of the Hacked Off lobby group without representation from the press and can only be amended by a two-thirds majority in both Houses of Parliament. This is an insurmountable hurdle for any changes initiated by the press, however damaging the Charter might prove to be to the industry and to freedom of expression. Parliament, on the other hand, can remove the underpinning legislation by a simple majority at any time it chooses.

11. However, another organisation, IMPRESS, applied to the PRP for recognition on 20 January 2016. In response to the PRP's first "call for information", the NMA made submissions dated 4 March 2016 opposing the application. IMPRESS reacted by providing further information and documents in April 2016. The PRP made a second "call for information" in May 2016, to which the NMA responded on 1 June 2016, and IMPRESS again provided further information and documents.

12. On 15 July 2016, the PRP published on its website an additional section 5 of its "*Guidance for Applicants*" comprising the PRP's "*interpretation of some terms and elements in the Royal Charter*". Although it was presented as being separate from the particular application made by IMPRESS, the new section 5 in substance responded to points raised by the NMA as a basis for opposing that application, and indicated that the PRP was not minded to accept the NMA's points. On 15 August 2016, the NMA made a further submission in relation to the PRP's proposed interpretation. At that stage the PRP moved that new section of the Guidance to a separate section immediately following the Guidance, describing it as the PRP "*Board's indicative view on some elements of the Royal Charter*" (**the "Indicative View"**).

13. The PRP was due to announce its decision on IMPRESS' application on 23 August 2016, but instead indicated that it would be making a third "call for information". The NMA made submissions dated 20 and 23 September 2016. The call for information ended on 23 September 2016, after which IMPRESS was given an opportunity to respond to information provided to the PRP. The PRP convened a meeting on 25 October 2016 at which it made its Decision to grant recognition to IMPRESS. As noted above, the PRP did not publish the reasons for its Decision until 21 November 2016.

14. The consequences of recognition of a regulator by the PRP are significant, in particular as a result of section 40 of the Crime and Courts Act 2013. The Government is currently consulting on whether to bring section 40 into force. Section 40 has effect in relation to any "relevant claim" (defined in s. 42(4) as libel, slander, breach of confidence, misuse of private information, malicious falsehood and harassment) relating to publication of news-related material that is made against a "relevant publisher" (defined in s. 41(1)). In summary, if the defendant was a member of an approved regulator at the time when the claim was commenced, the court generally must not award costs against the defendant (s. 40(2)). By contrast, if the defendant was <u>not</u> a member of an approved regulator, the court generally <u>must</u> award costs against it – even if the claim is unsuccessful (s. 40(3)). Further, under section 34, a defendant who was a member of an approved regulator at the material time (defined in s. 42) is generally excluded from liability for exemplary damages. Under section 42(2)-(3), an "approved regulator" means a body recognised as a regulator of relevant publishers by any body established by Royal Charter with the purpose of carrying on activities relating to the recognition of independent regulators of relevant publishers – i.e. the PRP.

<u>Ground 1: misinterpretation and misapplication of the concept of "Regulator" and the Criterion 1 requirement of being an "independent self-regulatory body"</u>

15. In summary, the PRP erred in law in interpreting the term "Regulator" as including a body such as IMPRESS and in concluding that IMPRESS met the Criterion 1 requirement of being an "independent self-regulatory body".

16. Paragraph 1 of Schedule 2 to the Charter provides:

> *"The Board of the Recognition Panel shall grant recognition to a Regulator if the Board is satisfied that the Regulator meets the recognition criteria numbered 1 to 23 in Schedule 3, and in making its decision on whether the Regulator meets those criteria it 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")."*

17. Two important consequences follow from this provision.

18. First, the PRP's power to grant recognition only applies in respect of a "Regulator". That term is defined at Schedule 4 to the Charter, as follows:

> *""Regulator" means an independent body formed by or on behalf of relevant publishers for the purpose of conducting regulatory activities in relation to their publications."*

19. Schedule 4 further provides that "*relevant publisher*" has the meaning given in section 41 of the Crime and Courts Act 2013, namely "*a person who, in the course of a business (whether or not carried on with a view to profit), publishes news-related material (a) which is written by different authors, and (b) which is to any extent subject to editorial control*" (as per s. 41(1), which is subject to exclusions at s. 41(5)-(6) and Schedule 15). It is worth noting that there is nothing to suggest that the PRP has sought any confirmation or comfort that putative members of IMPRESS will be "relevant publishers"; it seems likely that they will not be.

20. Secondly, the mandatory language of paragraph 1 of Schedule 2 ("*shall consider*") is such that, in making its decision on whether a body meets the recognition criteria, the PRP must consider the concepts articulated in the Leveson Report. The Charter thus requires the PRP to adopt a purposive approach when applying the criteria and deprecates an unduly narrow or literal ("box-ticking") approach. A contrast can be drawn with the different approach taken in Schedule 2 to other relevant factors. Paragraph 4 of Schedule 2 identifies other recommendations of the Leveson Report which the PRP "*may but need not take into account*" in determining an application for recognition and provides that where the PRP is "*satisfied*" that a Regulator meets the recognition criteria, "*it shall not refuse*" to grant recognition by reason of a failure to comply with these specified recommendations. Thus, it is for the PRP to decide whether or not to take the paragraph 4 recommendations into account. By contrast, the paragraph 1 concepts are mandatory relevant considerations, which infuse and colour the interpretation of the recognition criteria themselves.

21. Recognition Criterion 1 provides (emphasis added):

> "*An independent self-regulatory body should be governed by an independent Board. In order to ensure the independence of the body, the Chair and members of the Board must be appointed in a genuinely open, transparent and independent way, without any influence from industry or Government. For the avoidance of doubt, the industry's activities in establishing a self-regulatory body, and its participation in making appointments to the Board in accordance with criteria 2 to 5; or its financing of the self-regulatory body, shall not constitute influence by the industry in breach of this criterion.*"

22. In the Reasons (page 10), the PRP rightly identified that in order to be eligible to apply for recognition, IMPRESS needed to meet the definition of "Regulator" at Schedule 4 to the Charter. However, the PRP erred in law in concluding that IMPRESS met that definition. While the precise circumstances of IMPRESS' formation remain opaque – in particular the role played by the well-known privacy campaigner Max Mosley, who as set out below is the main source of IMPRESS' funding – what is clear is that IMPRESS was not formed by relevant publishers: see the factual background at pages 5, 15 and 16 of the August report referred to in the Reasons (page 10). Nor was IMPRESS formed "on behalf of" relevant publishers. Indeed, at the time of its application IMPRESS could only point to 11 very small publishers as members, none of which had played any role in its formation. By the time of the Decision, IMPRESS' membership remained minimal: 27 very small publishers according to its own website, counting print and online editions twice in some cases (see http://www.impress.press/complaints/regulated-publishers.html, referred to at page 6 of the August report).

23. The PRP's approach was based on its views that (1) "*a regulator is not required to have had members at the time of its creation"*, (2) "*the Charter anticipated the possibility of multiple regulators and the assertion that a regulator should have the support of a 'significant proportion of relevant publishers' would rule out that idea*" and (3) "*there was nothing in the Charter that precluded an organisation forming and then having members who subsequently join*". The PRP cross-referred to "PRP52(16) Annex C, Section A1", which is a document entitled "*Additional briefing notes for the PRP Board in its assessment of the application for recognition from IMPRESS*" (7 October 2016). That document states as follows:

> "*6. Use of the term "by or on behalf of" in this context implies the regulator should either be formed by "relevant publishers", or for the benefit of "relevant publishers". As the Charter provides a framework for self-regulation, there is no statutory body with the power to create a regulator or regulators, and so the initiative to do so needs to come from somewhere. In these circumstances relevant publishers would either need to get together to create a regulator (or regulators), or another body would need to do so on their behalf (or both could happen). The wording can be interpreted as meaning the initiative to create a regulator may be publishers' or another body's, but that either approach is acceptable provided that the regulator is created in order to regulate "relevant publishers".*
>
> …
>
> ***Indicative view***
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> - *The PRP does not consider that the Charter's definition of a regulator in Schedule 4 precludes a body from being eligible for consideration for recognition on the basis of the number and size of its members whether at the time of formation, or application or determination of that application.*
> - *A regulator being formed 'by or on behalf of' relevant publishers could include a situation where the regulator is formed on behalf of any publishers that might later choose to join.*
> - *Given that the costs protections afforded by Section 40 of the Crime and Courts Act only arise if the publisher is a member of an approved regulator, publishers may choose to wait for a regulator to be approved before joining. The PRP does not interpret the Charter criteria as requiring the regulator to have current members in order to be eligible for consideration for recognition*.
> - *However, an applicant regulator will need to show that they have the relevant procedures in place and that they are ready and able to operate those procedures…*"

24. The PRP's analysis is wrong in law. The Leveson Report and the Charter clearly contemplate that the body applying for recognition by the PRP will already have support from the industry, which is embodied in the Schedule 4 requirement that the body must be "*formed by or on behalf of relevant publishers*" and in the Criterion 1 requirement that the body must be "*self-regulatory*". Further, the Leveson concepts under the heading "*Voluntary independent self-regulation*" – which as set out above are mandatory relevant considerations for the PRP – include the following (original emphasis in bold, additional emphasis underlined):

> *"4.1 I now turn to what is required in order to build a genuinely effective independent self-regulatory system. … What is required is independent self-regulation. By far the best solution to press standards would be a body, **established and organised by the industry**, which would provide genuinely independent and effective regulation of its members and would be durable. If such a body were to be established, and were to*

command the support of all key players in the market, there would be no need for further intervention…

4.3 In summary, I envisage that the industry should come together to create, and adequately fund, an independent regulatory body, headed by an independent Board…

4.9 … It is critically important that the industry, in a fair and open way, get together to identify independently minded people in whom the public can have confidence to make up the appointing panel. It will then be the task of that body to find and appoint a Chair who demonstrably meets the criteria of fair minded and balanced independence to which I have referred. In doing so, the industry will be committing itself to organising independent regulation.

4.11 Ideally the body would attract membership from all news and periodical publishers, including news publishers online. It is important for the credibility of the system, as well as for the promotion of high standards of journalism and the protection of individual rights, that the body should have the widest possible membership among news providers. Clearly this will be unlikely to include broadcasters who are already covered by the Broadcasting Code. It has been accepted that, although I am very anxious that it remain voluntary, it must involve all the major players in the industry, that is to say, all national newspaper publishers and their online activities, and as many regional and local newspaper publishers, and magazine publishers, as possible. This is not meant to be prescriptive at the very small end of the market: I would not necessarily expect very small publishers to join the body, though it should be open to them to do so on appropriate terms. Having said that, however, I have no doubt that there would be advantages in doing so. Ideally it would also include those who provide news and comment online to UK audiences.

4.14 The industry, through Lord Black, has made a principled point that the industry should fund self-regulation without requiring input from the public purse. Certainly, I agree that any industry established independent regulatory body must be funded by its members…

4.16 I recognise that it is not appropriate that the regulator should have a blank cheque, anymore than that the industry should have a strangle-hold on the regulator's budget. In practice, if the regulator is too expensive, publishers will not join.

I recommend that funding for the system should be settled in agreement between the industry and the Board, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry (which are not as great for a number of the larger publishers as they are for the smaller, regional press). There should be an indicative budget that the Board certifies is adequate for the purpose. Funding settlements should cover a four or five year period and should be negotiated well in advance."

25. It is not difficult to see why Leveson made these clear recommendations or why they are embodied in the Charter. The whole point was that the system of regulation would be self-regulation, to ensure that it is effective. A body such as IMPRESS which is neither formed by nor on behalf of industry (and indeed which the majority of the industry has expressly said it will not join) will not be an effective regulator. Leveson was clear that effectiveness meant that the majority of the press should be behind this body and specifically recommended: "*a new system of regulation should not be considered sufficiently effective if it does not cover all significant news publishers. The challenge, then, is to find a way of achieving that result*".[1] The "incentives" envisaged by Leveson were intended to respond to the exit of Northern & Shell from the PCC in or around January 2011; Leveson was concerned to prevent a small

[1] Paragraph 3.14 on page 1754 of the Leveson Report (Chapter 7, Part K).

number of publishers from sitting outside a regulatory system agreed by the rest of the industry. In recognising IMPRESS, the PRP has thus ridden rough shod over Leveson's intentions.

26. The PRP's approach to the definition of "Regulator" at Schedule 4 to the Charter denudes the words "*by or on behalf of*" of any real content by treating it as sufficient that a regulator has been established in the hope that relevant publishers will in future (after the body has been recognised) decide to become members. There is no sense in which a body such as IMPRESS has been formed "by" relevant publishers, nor even "on behalf of" them. As the PRP noted in its letter dated 15 August 2016, the meaning of "on behalf of" "*does not include acting independently of, and indeed despite the objections of, those it purports to represent*".

27. Against this background, it can readily be seen that the three points made by the PRP at page 10 of the Reasons are wrong in law. First, the suggestion that "*a regulator is not required to have had members at the time of its creation"* misses the point that a Regulator must have been formed by or on behalf of the industry in the sense set out above. Secondly, the possibility of multiple regulators is not precluded by requiring that any Regulator must have the support of a significant proportion of relevant publishers. Wherever the boundary may be drawn to demarcate the minimum proportion of publishers whose support is needed, it is clear that IMPRESS falls well short of the line. As the NMA has observed, the handful of publishers who have joined IMPRESS form "*a tiny and rather specialised part of the news media in the UK*" (letter dated 4 March 2016, paragraph 21) and IMPRESS "*does not owe its existence, as a self-regulatory body should, to a desire for self-regulation by any significant part of the industry*" (letter dated 1 June 2016, paragraph 9.5). Thirdly, the Charter does preclude an organisation being recognised in circumstances where it has no or only minimal support from the industry: in the definition of "Regulator", and in the Criterion 1 requirement that the body must be a "self-regulatory" body, and in the Leveson concept of effectiveness to which the PRP is expressly required to give effect.

28. For essentially the same reasons, the PRP further erred in law in concluding that IMPRESS satisfied Recognition Criterion 1. Indeed, it is striking that the PRP's analysis in relation to Criterion 1 (Reasons pages 11-33) contained no reference whatsoever to the express requirement that the body must be "self-regulatory". The PRP instead focused exclusively on the separate issue of whether the body is "independent", in particular by reference to the source and reliability of its funding. The PRP has misconstrued Criterion 1 by ignoring an important requirement.

Ground 2: misinterpretation and misapplication of Criterion 6

29. In summary, the PRP erred in law in interpreting Criterion 6 as permitting a regulator to be funded other than by the news industry itself, and further erred in law in its approach to the issue of whether the particular source of funding for IMPRESS was such as to compromise IMPRESS' independence and effectiveness.

30. Recognition Criterion 6 provides:

> "*Funding for the system should be settled in agreement between the industry and the Board, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry…*"

"Settled in agreement between the industry and the Board"

31. In the Reasons (page 77), the PRP concluded that IMPRESS satisfied Criterion 6, notwithstanding that it "*relies overwhelmingly on the funding from the IPRT [Independent Press Regulation Trust] and will continue to do so over the next few years*" (page 71). The PRP took the view that the requirement that funding should be settled in agreement between the industry and the Board "*could not reasonably be deemed to be the whole Industry*" and that the NMA was "*seeking to introduce a threshold of 'substantial proportion' or 'reasonable proportion' – a test which was not in the Charter*". The PRP further referred to the fact that IMPRESS had undertaken a consultation on its funding scheme that led to changes to its initial proposals, and concluded that "*the process followed by IMPRESS had been sufficient to result in a funding and charging scheme which met the requirements of Criterion 6*".

32. The PRP again cross-referred to the document entitled "*Additional briefing notes for the PRP Board in its assessment of the application for recognition from IMPRESS*" (7 October 2016), specifically Section A2, which states:

> "***Indicative view***
>
> - *In relation to criterion 6, we do not interpret the provision for funding for the system 'being settled in agreement between the industry and the Board' as requiring positive agreement to the funding arrangements with the whole of (or any particular minimum threshold of) the news publishing industry (whatever that means). This is because:*
>   - *The Charter envisages that there can be more than one regulator,*
>   - *Such a requirement could allow publishers an effective veto over the recognition of a regulator when they have no wish to become a member of that (or any recognised) regulator, which is plainly not contemplated; and*
>   - *Given the sheer scale and diversity of 'relevant publishers' it would be impracticable to identify or even contact all the relevant publishers that could or might be affected.*
> - *However, we bear in mind that the regulator has to 'take into account the … commercial pressures on the industry' and is required by criterion 23 to ensure that membership is open to all publishers on fair, reasonable and non-discriminatory terms….'. In those circumstances we consider that criterion 6 does, as a minimum, require some form of consultation that the wider industry could respond to if it wished.*
> - *We also consider that criterion 6 requires the regulator to provide a rationale for the decisions taken following the consultation including for example, how the regulator will ensure that certain types or sizes of publishers are not precluded from joining at a later stage (and therefore excluded from cost protection) because the fees do not sufficiently reflect the commercial pressures on the industry.*
> - *Given that criterion 6 refers to 'funding for the system' being agreed and not just the 'regulatory fees', we also consider that consultation should be on the whole of the funding arrangements, including any proposals to take funding from third parties.*
> - *There is nothing in the criteria or the Charter which precludes funding for the regulator being provided via or from a third party …*"

33. The PRP's analysis is wrong in law. Properly construed, Criterion 6 requires that the funding for a Regulator must come from (or at least be sanctioned by) the news industry itself, and

not come from third parties who are unconnected with the industry. Criterion 6 must be interpreted and applied in light of the concepts set out in the section of the Leveson Report headed "*Voluntary independent self-regulation*", in particular the concepts of "effectiveness" and "reliable funding". As Leveson stated at paragraph 4.14: "*any industry established independent regulatory body must be funded by its members"*. That led to the specific recommendation at paragraph 4.16 that "*funding for the system should be settled in agreement between the industry and the Board*", which is reproduced verbatim in the Charter at Criterion 6. These provisions reinforce the point made above, that the Leveson Report and the Charter clearly contemplate that the body applying for recognition by the PRP will already have support from the industry. Whilst Leveson recognised that there might be additional sources of funding to cover "*start-up costs*" (paragraph 4.17), he plainly contemplated that the costs for the ongoing functioning of the body would be paid by the industry itself, as is implicit in a system of "*self-regulation*". What Leveson did not contemplate, and what the terms of Criterion 6 do not permit, is a body which "*relies overwhelmingly on the funding from [a third party] and will continue to do so over the next few years*", as the PRP acknowledges to be the case regarding IMPRESS.

34. The PRP's interpretation of Criterion 6 reduces the words "*settled in agreement between the industry and the Board*" to a mere requirement for a body to consult generally on its financial arrangements and the fees that it proposes to charge. That is not what Leveson or those drafting the Charter intended. As the NMA has noted, the PRP's approach "*negates the plain meaning of the words that have been specified in the Charter and in the Leveson Report, which requires the funding to be from, or at the very least sanctioned by, a substantial proportion of the industry*" (letter dated 15 August 2016, paragraph 9b); *"It is clear that there needs to be a reasonable proportion of relevant publishers in agreement to satisfy this requirement*" (letter dated 22 August 2016, paragraph 4); and "*there has been no agreement with any industry member on the IMPRESS funding arrangements*" (letter dated 20 September 2016, paragraph 12).

35. The PRP wrongly placed emphasis on the absence of specific provision in the Charter as to what particular proportion of the industry needs to agree to the regulator's funding arrangements. Plainly the PRP has an evaluative role under the Charter in deciding whether the threshold has been crossed. What the PRP cannot lawfully do is abdicate that responsibility and grant recognition to a body which has not secured agreement from any meaningful proportion of the industry. Contrary to the PRP's reasoning, this is not to give any particular publisher a "veto" over recognition of a body by the PRP, or to preclude the possibility of more than one body being recognised, but simply to recognise and give effect to the clear intention of Leveson and the Charter that a body must already have support from the industry before being recognised. The practical problems prayed in aid by the PRP equally take it nowhere. An applicant for recognition need not exhaustively trawl the country for all conceivable relevant publishers, but must merely show that it has secured agreement to its funding arrangements from a reasonable proportion of publishers, having regard to factors such as size, circulation and market share. As above, wherever the boundary may be drawn to demarcate the minimum proportion of publishers whose support is needed, it is clear that IMPRESS falls well short of the line. Indeed, it is revealing that even when IMPRESS purported to consult the entire industry on fees, only 12 responses were received (Reasons page 69).

Lack of adequate safeguards

36. A separate point arises if, contrary to the above submissions, the PRP's approach of countenancing third party funding of a regulator is correct. Section A2 of the document entitled "*Additional briefing notes for the PRP Board in its assessment of the application for recognition from IMPRESS*" (7 October 2016) further stated:

"*25. If a regulator subsidised its membership fees with external funding, it would also be necessary to ensure such a funding model could not pose a challenge to the independence of the regulator. The concept of independence in the context of the definition of a regulator is discussed above, and is interpreted as mainly meaning independence from industry and from government. However, in the context of the regulator's funding a wider interpretation is needed, i.e. independence from anything which might inappropriately influence or distort the decisions of the regulator. There would be clear risks if a funder could exert influence over the decisions of the regulator. There would also be risks if a funder could compromise the credibility or effectiveness of the regulator by withdrawing or reducing funding. These risks would need to be addressed by ensuring appropriate governance and control structures were put in place.*

…

Indicative view

- *There is nothing in the criteria or the Charter which precludes funding for the regulator being provided via or from a third party and such funding does not mean that a regulator is automatically not 'independent'. It would be possible for third party funding to compromise the independence of a regulator, but whether it does so will be a question of fact and will depend on the safeguards that were put in place to protect independence, such as the terms of the agreement between the funder and the regulator and the regulator's governance arrangements.*"

37. However, having recognised the possibility that third party funding may compromise the independence of a regulator, the PRP then failed to reach a view as to whether adequate "safeguards" were in place in the case of IMPRESS.

38. The section of the Reasons recording the PRP Board's discussion and conclusions (page 77) does not include any analysis in relation to the issue of safeguards on independence. The discussion solely addresses the issue regarding what is meant by "*settled in agreement between the industry and the Board*" (first paragraph), the adequacy of IMPRESS' consultation (paragraph 2), the adequacy of IMPRESS' indicative budget (paragraph 3) and the period for which IMPRESS had funding in place (paragraph 4). None of this touches on the issue of whether IMPRESS' funding is sufficiently secure from withdrawal as to allow the PRP to conclude that IMPRESS can properly be considered "independent". The PRP Board thus failed to engage with or take a decision on a matter which, on its own construction of Criterion 6, was "*a question of fact*" and an important matter for it to decide.

39. For its part, the PRP Executive had at least considered this issue, recognising that IMPRESS "*relies overwhelmingly on the funding from the IPRT and will continue to do so over the next few years*" (page 71) and that "*the question of the reliability of IMPRESS' funding arises given its reliance on IPRT and the terms of the funding deed with IPRT*" (page 72). The Executive suggested that measures taken by IMPRESS after applying for recognition "*go a significant way to reducing any risk in relation to reliability of funding from IPRT*" and "*given that the clear intention appears to be to fund IMPRESS for the purposes set out in the funding agreement we have no reason to believe that IPRT would exercise [its] powers in an arbitrary or unnecessary way*" (page 72). Ultimately, however, the Executive felt unable to make any recommendation as to whether Criterion 6 was met (page 77).

40. Insofar as the PRP Board may rely on its analysis of independence in relation to Criterion 1, that analysis is itself flawed and unsustainable.

41. As the PRP acknowledges, IMPRESS "*relies overwhelmingly*" on funding from IPRT, which "*was set up primarily if not exclusively as a vehicle for IMPRESS to receive funds from AMCT*" (page 31). AMCT is the Alexander Mosley Charitable Trust, a charitable trust set up and apparently funded by Max Mosley, a majority of whose trustees are himself and other Mosley family members (page 13). The concern that IMPRESS' independence may be compromised by its dependence on a particular source of funding is particularly acute in circumstances where in substance it is wholly or substantially funded by one individual, particularly when that individual is a well-known privacy campaigner with strong views on the regulation of the press.

42. Moreover, IMPRESS' funding agreements and governance arrangements do not allay that concern. In its discussion of Criterion 1, the PRP Board expressed the view that "*the legal agreements in place were are* [sic] *now sufficiently robust to protect against any material influence*", that "*the deed of variation between IPRT and IMPRESS had closed an earlier concern about this*", and that "*the confirmation that there were formal processes in place to prevent influence provides a sufficient degree of confidence*" (Reasons page 33). However, it remains open to Max Mosley to engineer a situation whereby IMPRESS' funding is terminated, by ensuring that the circumstances for funding are no longer satisfied. The deed of variation relied on by the PRP – which provides that the IPRT's "*catchall*" power (Reasons page 20) to terminate, reduce or withhold funding shall only be exercised if IPRT does not itself have sufficient funds to meet its commitments to IMPRESS – is no answer. As the NMA has observed, "*the ongoing continuity of IMPRESS from a funding perspective is still at the mercy of AMCT; [IPRT] can be put into a position where there is "insufficiency of funds" at the whim of AMCT*" (letter dated 20 September 2016, paragraph 11).

43. For example, AMCT is entitled under clause 3.2(a) of the Grant Agreement to terminate or decrease funding to IPRT on 15 business days' notice if AMCT's trustees reasonably consider that the funding is not reasonably required to advance IPRT's purposes. AMCT is not contractually obliged to inform IPRT of its grounds for invoking clause 3.2(a). Even if AMCT does inform IPRT of its grounds, clause 3.2(a) gives AMCT a wide margin of discretion: there could be no challenge to a decision by AMCT to cease payment if the ground on which it was based was one that AMCT, acting reasonably, could reasonably regard as showing that funding was no longer reasonably required for IPRT's purposes. Even if AMCT states grounds for invoking clause 3.2(a) which are capable of falling within the scope of that clause, it may be impossible for IPRT to know whether those grounds are the true reason for AMCT invoking the clause or whether AMCT has some other, improper, motive. To give an obvious example, AMCT may state that it is invoking clause 3.2(a) on the ground that IMPRESS has attracted too few subscribers and is doomed to fail (which might be a permissible ground), but AMCT might have as its true motive dissatisfaction with the low level of sanctions imposed by IMPRESS for invasions of privacy (which would not be a permissible ground).

Ground 3: misinterpretation and misapplication of Criteria 7 and 8

44. In summary, the PRP erred in law in interpreting Criteria 7 and 8 as permitting a regulator purportedly to "adopt" a code in whose formulation and maintenance it played no part, and further erred in law in concluding that the requirement that "*serving editors have an important part to play*" was satisfied in IMPRESS' case.

45. Criteria 7 and 8 provide as follows:

> "*7. The standards code must ultimately be the responsibility of, and adopted by, the Board, advised by a Code Committee which may comprise both independent members*

of the Board and serving editors. Serving editors have an important part to play although not one that is decisive."

"*8. The code must take into account the importance of freedom of speech, the interests of the public (including but not limited to the public interest in detecting or exposing crime or serious impropriety, protecting public health and safety and preventing the public from being seriously misled), the need for journalists to protect confidential sources of information, and the rights of individuals. Specifically, it must cover standards of:*

(a) conduct, especially in relation to the treatment of other people in the process of obtaining material;

(b) appropriate respect for privacy where there is no sufficient public interest justification for breach; and

(c) accuracy, and the need to avoid misrepresentation."

Standards code

46. In the Reasons (pages 84-85), the PRP concluded that IMPRESS satisfied Criterion 7, notwithstanding that IMPRESS is still consulting on its own standards code and in the meantime has merely purported to "adopt" IPSO's Editors' Code of Practice. The PRP took the view that IMPRESS had "*adopted and in that sense taken responsibility for the Editors' Code for the purposes of making its application*" and that the concept of "responsibility" "*related to the board of the regulator alone being responsible for deciding the rules it intends to apply*". The PRP further took the view that "*the question of who owns the legal rights to the code was not an issue for the Board, provided that IMPRESS could in practice use the Code as contemplated*", and noted that "*advice from IMPRESS confirmed through the Executive that there were no legal proceedings actioned or threatened to try and prevent IMPRESS using the Editors' Code, nor any injunction or other formal prohibition against IMPRESS in this respect*".

47. The PRP again cross-referred to the document entitled "*Additional briefing notes for the PRP Board in its assessment of the application for recognition from IMPRESS*" (7 October 2016), specifically Section A4, which states:

"***Indicative View***

- *The Board has considered the interaction between the wording of the preamble to the Charter which states that 'the independent regulatory body which is intended to be the successor to the Press Complaints Commission should put forward the Editors' Code of Practice as its initial code of standards' and criterion 8 which requires the PRP to assess the regulator's code. We bear in mind that the criteria are legally operative whereas the preamble simply explains the Charter's background (providing, at most, an aid to interpretation). Whilst there is nothing in the Charter to prevent a regulator from putting forward the text of the current Editors' Code as its own code, we would still need to assess that submitted code against criterion 8 (even the preamble only talks of 'putting forward').*
- *We do not consider it part of the PRP's role to determine any dispute over ownership of the Editors' Code (or any other code which an applicant submits) provided that that the criteria are met in relation to the standards code which an applicant regulator has properly adopted.*

- *What matters is whether the Code which is submitted by an applicant regulator complies with the requirements of the Criteria."*

48. The PRP's analysis is wrong in law. Properly construed, Criterion 7 requires that the body applying for recognition by the PRP must have formulated and adopted its own standards code, which the PRP must then assess by reference to the matters identified in Criterion 8. The concept of a body having "responsibility" for a particular code is left without any meaningful content if it can be satisfied simply by the body "*deciding*" that someone else's code contains "*the rules it intends to apply*". There is no getting round the fact that "responsibility" for the Editors' Code lies with the existing Editors' Code Committee, not with IMPRESS.

49. The PRP further erred in placing emphasis on the fact that no legal proceedings have been taken to prevent IMPRESS from using the Editors' Code. The issue of "responsibility" cannot properly turn on the presence or absence of litigation of that nature (and in any event, there has been no such action because IMPRESS has not (so far) made any use of the Editors' Code beyond publishing a link to it on its website; we understand that it has received no complaints and carried out no investigations). As the NMA has noted, the PRP's interpretation of Criterion 7 "*is an artificial construct which appears to try to side step both the ownership of the Editors' Code and the failure of IMPRESS to meet the requirement under Criterion 7 that the code be their responsibility … even if IMPRESS was licensed to use the Editors' Code, it is not IMPRESS's code and it has no responsibility for it*" (letter dated 15 August 2016, paragraphs 10-11). As a matter of fact, it remains the case that IMPRESS does not even have a licence to reproduce the Code, so cannot circulate it to its members or license them in turn to promulgate it on their websites.

50. Criterion 7 was based on a clear recommendation in the Leveson Report, Part K, Chapter 7, Section 4 ("*Voluntary independent self-regulation*"), as follows:

> *"4.18 … My role is to make recommendations for an effective and independent structure for setting and enforcing standards, not to set those standards. That is properly a role for the independent regulatory body, in consultation with the industry and with the wider public…*
>
> *4.20 … In structural terms, whilst it is of course essential that editors should take pride in their Code, and that it should be thoroughly grounded in real world current experience of the industry, it cannot be right that the standards to which the industry are to be held are set without independent oversight.*
>
> *4.21 In order for the new regulatory regime to have the independence required to secure public trust and confidence, it is essential that it should be the regulator who approves a code of standards to which members must adhere. The Board could well be advised by a Code Committee including serving editors and journalists, but with independent members as well: indeed, I can see no reason why the Code Committee in the amended form as proposed by Lord Black should not be constituted as a formal advisory body to the Board.*
>
> ***I recommend that the standards code must ultimately be the responsibility of, and adopted by, the Board advised by a Code Committee which may comprise both independent members of the Board and serving editors.***
>
> *4.22 As a further step to secure public confidence, it appears to me that it would be valuable if the Board was to satisfy itself that the proposed Code had been subjected to public consultation, albeit on the basis that the Code Committee would then analyse the result of any consultation and provide the Board with the benefit of its experience*

on issues that might have arisen. Thus the Code would command the confidence of both the public and the industry."

51. Leveson plainly contemplated that it would be the new regulator itself which formulated the standards code, hence his observation that to "*set those standards*" was "*properly a role for the independent regulatory body*", it being "*essential*" that the regulator itself "*approves a code of standards to which members must adhere*". Further, Leveson envisaged that the new regulator would formulate its code having first carried out "*consultation*" on a "*proposed code*", with the regulator's Code Committee then being required to "*analyse the result*" and "*provide … the benefit of its experience on issues that might have arisen*" – i.e. the proposed code might be amended in light of the consultation responses. None of this has happened in the case of IMPRESS and the Editors' Code.

52. Whilst the Preamble to the Charter stated that the new regulatory body which was intended to be the successor to the Press Complaints Commission "*should put forward the Editors' Code of Practice as its initial code of standards*", this envisaged a new regulatory body making a prompt application for recognition after the Charter came into effect. By contrast, IMPRESS delayed its application and had had ample time to devise its own standards code. Further, the Charter evidently did not envisage a situation where a successor body to the PCC that has responsibility for and applies the Editors' Code (i.e. IPSO) was already successfully established prior to an application being made by some other body for recognition by the PRP.

53. In its analysis in relation to Criterion 8, the PRP Executive stated that it had "*not assessed IMPRESS's new draft Code, as it has not yet adopted it and relies on the Editors' Code for the purposes of this application. When and if IMPRESS decides to adopt a new Code, the PRP will review it at that time*" (page 93). This highlights the vice of the PRP's approach. The PRP has in effect purported to recognise a regulator without knowing the standards against which the regulator will be exercising its powers. However, Criterion 8 requires the PRP to make a judgment on the adequacy of the applicant regulator's standards code, which cannot properly occur whilst that code remains in draft form and thus subject to amendment. It is no answer to say that the PRP can review the content of IMPRESS' code once that code has actually be finalised – the point is that the review must occur before recognition is granted, as an important aspect of the decision on recognition.

54. It is inconsistent with Criterion 8 for the PRP to recognise a body which is "adopting" an external Code as a temporary expedient while it consults on its own draft Code which it intends to apply, with the consequence that the PRP is unable to assess the adequacy of that draft and intended Code.

Serving editors

55. The PRP Board's discussion on Criterion 7 made only passing reference to the requirement in relation to "serving editors", stating that "*the sentence in question was not referring only to the regulator's code committee but to the process taken overall of formulating and adopting a Code*" (page 85). This was evidently an afterthought which post-dated the PRP's main analysis on the issue of serving editors, as set out in its Indicative View in August 2016 and maintained at Section A3 of the document entitled "*Additional briefing notes for the PRP Board in its assessment of the application for recognition from IMPRESS*" (7 October 2016):

> "***Indicative view***
>
> - *We consider criterion 7 as permitting serving editors to be part of the Code Committee and, if they are, to play an important (but not decisive) role in such a committee. However, we do not interpret the criterion as requiring such*

participation in light of the words 'may comprise both independent members of the board and serving editors' in the first sentence. If the criterion had intended a minimum requirement for serving editors this would have been stated more clearly, and we bear in mind our general approach of not implying additional restrictions into the criteria."

56. The PRP's analysis is wrong in law. Properly construed, Criterion 7 requires that there must be at least one serving editor on a regulator's Code Committee. As the PRP notes, the first sentence of Criterion 7 is permissive: it makes clear that the Code Committee may (not must) comprise both independent members of the Board and serving editors. However, the second sentence states in terms that serving editors "*have an important part to play*". It is impossible to see how serving editors can properly be said to be playing an important (or indeed any) part in the work of the Code Committee if no serving editors are members of that committee.

57. As the NMA has observed: "*[Criterion 7] is very clear in dictating that serving editors have not only a role to play, but an important role, on the Code Committee of any regulator that is to be recognised. … There is no room to interpret Criterion 7 as not requiring at least one serving editor to be on the Code Committee*" (letter dated 22 August 2016, paragraph 5). "*The clear meaning was that serving editors would be involved. The PRP's interpretation stretches the meaning of "an important part to play" beyond all logic to include having no part to play at all*" (letter dated 15 August 2016, paragraph 9c).

58. The PRP's new suggestion that the relevant sentence in Criterion 7 "*was not referring only to the regulator's code committee but to the process taken overall of formulating and adopting a Code*" appears to imply that it is enough that serving editors who have no link to IMPRESS were involved in formulating the Editors' Code which IMPRESS has now purported to adopt. That is a clear misreading of Criterion 7, which was based on the Leveson recommendation set out above. The recommendation referred in terms to it being the "*Code Committee*" which "*may comprise both independent members of the Board and serving editors*" (paragraph 4.21). Criterion 7 carefully strikes the balance identified by Leveson at paragraph 4.20, where he noted that it was "*of course essential that editors should take pride in their Code, and that it should be thoroughly grounded in real world current experience of the industry*" – hence there should be at least one serving editor on the Code Committee – but that "*it cannot be right that the standards to which the industry are to be held are set without independent oversight*" – hence Criterion 7 makes clear that serving editors are not to have a "*decisive*" role.

Details of the action that the defendant is expected to take

59. For the reasons set out above, the PRP has acted unlawfully in purporting to grant recognition to IMPRESS. The NMA accordingly invites the PRP to confirm that it accepts the position in law as set out above and that it will withdraw its purported Decision. Absent such action, the NMA will commence judicial review proceedings seeking relief to the same effect from the Court.

Information and documents sought

60. So that the NMA may properly understand the factual basis underlying the PRP's Decision, and having regard to a defendant's duty of candour in judicial review proceedings, please provide us with confirmation that all correspondence, meetings and calls between IMPRESS and the PRP and indeed between either of them and any other potentially relevant parties such as Mr Mosley and the related trusts have been disclosed. If they have not been disclosed, please provide such documents by return.

The legal advisors dealing with the claim and the address for reply and service of court documents

61. RPC of Tower Bridge House, St Katharine's Way, London, E1W 1AA.

62. Please ensure that all correspondence in this matter is marked with the reference above and addressed to Geraldine Elliott.

Interested parties

63. IMPRESS would be an interested party for the purposes of the proposed judicial review challenge.

ADR proposals

64. The NMA is willing to enter into discussions with the PRP regarding this matter.

Proposed reply date

65. Please reply within 14 days of the date of this letter, namely no later than close of business on **19 December 2016**.

Yours faithfully

RPC

c.c. IMPRESS