SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

ACCC Digital Platforms Inquiry

February 2019

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, comprising 99% of the Australian commercial radio industry.

CRA welcomes this opportunity to respond to the ACCC's Digital Platform Inquiry Preliminary Report (**Report**).

This submission should be read in conjunction with CRA's submission of April 2018. CRA will not repeat points made in its previous submission but nevertheless maintains its position as previously outlined.

CRA thanks the Commission for its work so far and welcomes many of its recommendations. The Report comprehensively explores CRA's concerns, particularly regarding the ability of content creators to monetise their own content and the lack of transparency in digital platforms' operations, which impacts on advertisers, media businesses and consumers.

Summary

CRA seeks to assist the Commission by providing further information and recommendations on the key areas identified below.

- **Verification of digital advertising**

  - CRA does not accept Google and Facebook's claims that their audience measurement methodologies are objectively verifiable.[1]

  - CRA remains concerned that there is currently no regulatory means of holding such platforms to account nor of forcing transparency regarding claims of user engagement and audience size.

  - The mere existence of companies able to provide digital audience measurement services does not assist in creating consistency, accuracy and transparency and will allow misleading claims to continue to flourish.

[1] Report, page 78.

- CRA submits that a reliable digital audience measurement methodology should be imposed upon digital platforms by the Commission (as a condition of access) and must:
    - require that the collection and analysis of the data is conducted by an independent third party;
    - be accompanied by a clear, consistent and transparent explanation of the methodology used; and
    - be consistent across all suppliers of digital advert performance measurement services to enable fair and consistent comparison.

➢ **Regulatory imbalance**

- CRA broadly supports the Commission's preliminary recommendation for a separate review to design a framework capable of effectively and consistently regulating the conduct of entities that perform comparable functions.
- However, any such review is likely to take several years to complete and implement. CRA strongly urges the Commission to take immediate action to address the most glaring inequalities present in the current regulatory structure, which may threaten the viability of commercial radio broadcasting if not corrected without delay.
- A particular area of concern for radio broadcasters is the election blackout legislation, which bans political advertising by radio broadcasters from the Wednesday before polling day. No such ban applies to digital platforms. This imbalance has a significant financial impact on commercial radio broadcasters and must be removed.

➢ **Protection of content against aggregators**

- CRA urges the Commission to look further at the issue of digital aggregators of content, including sites set up by smaller market players. Radio aggregation sites have proliferated over the past few years.
- Commercial radio stations are increasingly directing their resources towards the removal of their intellectual property from third party aggregator sites and apps. Typically, such sites and apps provide 'listen live' links to the stations' broadcasts or enable consumers to access stations' podcasts. This diverts traffic – and ultimately advertising revenue - away from the stations' own websites and apps.
- We urge the Commission to address this issue in the proposed Mandatory Standard, by requiring digital platforms to remove hyperlinks to copyright protected content upon the request of the right holder.

➢ **News and digital platform regulatory oversight – automated journalism**

- CRA supports the Commission's preliminary recommendation that a new regulatory authority should monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.[2]

- Digital platforms should be independently monitored - with the Commission setting terms and conditions of access for large digital platforms - to ensure that they do not use their market power to divert consumers from the websites of content creators, thereby appropriating value and reducing competition in the supply of media content.

- The bargaining power differential between large digital platforms and content publishers should also be investigated and monitored to ensure that content creators are fairly compensated when reaching commercial deals with monopoly digital platforms.

➢ **Investment in quality content**

- CRA agrees with the Commission's observations that:

    - dominance of the digital platforms exposes consumers to the risk of filter bubbles and unreliable information;

    - digital platforms' decisions regarding 'trustworthiness' of content may simply reflect their own interests and may not serve consumers well.[3]

- CRA urges the Commission to address these issues by improving the ability of news media business to fund the production of quality news and journalism. This may be achieved through the:

    - extension of the *Regional and Small Publishers' Jobs and Innovation Package* beyond its current 3 year term, with extensions specifically to support regional commercial radio; and

    - introduction of tax subsidies for commercial radio broadcasters who provide news content, to assist in the production of such content.

1. <u>Verification of advertising</u>

Digital platforms do not properly measure the efficacy of online advertising. There is currently no regulatory means of holding such platforms to account nor of forcing transparency regarding claims of user engagement and audience size.

The commercial radio industry wholly rejects Facebook and Google's claims that their advertisements are objectively verifiable. [4]

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[2] Report, page 12 (preliminary recommendation 6).

[3] Report, pages 14 and 15.

[4] Report, pages 78 and 79.

***Facebook and Google's claims that their advertisements are verifiable are not supported by the evidence of competitors, clients or consumers*.**

There is widespread concern amongst media companies, advertisers and consumers regarding Facebook and Google's claims that their advertising metrics are verifiable and accurate.

Without a truly independent intermediary - tasked with collecting and analysing the data according to a transparent and consistent methodology - the existing opacity and consequent potential for the distortion of advertising metrics will remain.

Marc Pritchard, Chief Brand Officer, Proctor & Gamble, said at the 2017 IAB Annual Leadership Summit:

> *Regardless of how much we respect the people from whom we buy our media, we need an objective, impartial judge to perform the measurement. Too many players are self reporting, and incredibly, we as clients, are still tolerating it, accepting excuses like "we have a walled garden" or "technology won't allow it". This is like letting a fox guard the henhouse. It's a bad idea putting someone in charge of a job where there's a conflict of interest.*

Similarly, Keith Weed, Chief Marketing Officer at Unilever, said at the 2018 IAB conference:

> *As one of the largest advertisers in the world, we cannot have an environment where our consumers don't trust what they see online. We cannot continue to prop up a digital supply chain—one that delivers over a quarter of our advertising to our consumers—which at times is little better than a swamp in terms of its transparency.*

The mere existence of external verifiers does not create transparency

Facebook and Google point to seven suppliers who provide digital advert verification services in Australia.[5]

The mere existence of companies able to provide digital audience measurement services does not assist in creating consistency, accuracy and transparency and will allow misleading claims to continue to flourish. Key difficulties are as follows:

- different suppliers use different methodologies, leading to results that are difficult to compare and which may be easily manipulated;
- the methodologies are not transparent and clearly explained;
- there is no external auditing process to verify the legitimacy of elemental data, methodology, adherence to such methodologies and the accurate communication of results;
- most importantly, **Facebook and Google continue to control access to the data.** No data is independently gathered by third parties.

[5] Report, page 78.

The current mechanisms – under which the digital platforms gather and control their own data without third party oversight – does not enable transparency or accuracy of measurement.

Contrast with commercial radio audience measurement system

The lack of rigour applied by the digital platforms in measuring advertisement reach contrasts starkly with the robust independent data collection and measurement undertaken to verify the reach of advertising on radio.

The commercial radio industry has **third party operated processes and additional independent auditing in place** to give advertisers comfort in terms of the audience reach of advertising on radio. This includes independent research providers – GfK and Xtra. The industry also provides a Gold Standard for audience ratings which is also managed independently and in consultation with key industry stakeholders.

All of this work is funded by the industry, even though the industry cannot influence the outcome of the reporting or auditing. Advertisers do not need to pay for their own verification of advertising reach.

The GfK Radio Ratings system used by the commercial radio industry is reliable, consistent and accurate.

GfK recruits over 50,000 respondents every year across the five metropolitan and three main regional markets[6]. Using data from the ABS, GfK ensures that each sample is placed in line with the population, to provide a representative sample of the market on which it is reporting.

GfK uses a 'Probability Proportional to Size' sampling model to establish the individual sampling points within each of the predefined survey areas. Minimum quotas are set for each market's statistical area based on nationally representative demographic targets. Interviewer briefings are conducted bi-annually in every market to inform and update workers in-field on methodology, survey content and the interview process.

GfK also use a multi-mode recruitment methodology which gives access to a diverse range of respondents. In the metropolitan markets, 70% of the sample is recruited via door-knock recruitment for the paper diary and 30% via online panels using an electronic diary. For the regional markets, 20% of the paper diary respondents are recruited using telephone recruitment (CATI), the remaining 50% from door to door and 30% via online.

The **GfK Radio Ratings system is also independently audited** across many aspects of the survey, including the training of interviewers, placement of the sample, tools used to collect the ratings information and the ratings results themselves. GfK is open and transparent about all aspects of its methodology and works closely with the independent auditor.

All licence holders of the radio ratings data must use an accredited software package which complies with the industry Gold Standard and follow the rules of permitted use

[6] Newcastle. Canberra and the Gold Coast.

and sourcing requirements. The Gold Standard accreditation program is **overseen by an independent third party** and allows all users to process the data in a uniform way to ensure consistent results regardless of the software platform being used.

Advertisers can also access data and results via a selection of third party software platforms, allowing them to make their own informed advertising planning and buying decisions.

Over many years there has been an on-going feedback process between the radio industry, third party measurement providers and advertisers to ensure transparency and accountability in the radio ratings system. There are also regular briefing sessions each year conducted by GfK and the radio industry for advertisers to ensure advertising planners and buyers are acquainted with the methodology of radio ratings and are comfortable with the transparency of the measurement and reporting processes. **This comes at no expense to advertisers**.

Recommendation 1

The mere existence of companies able to provide digital audience measurement services does not assist in creating consistency, accuracy and transparency and will allow misleading claims to continue to flourish.

CRA submits that a reliable digital audience measurement methodology should be imposed upon digital platforms by the Commission as a condition of access and must:

- **require that the collection and analysis of the data is conducted by an independent third party;**
- **be accompanied by a clear, consistent and transparent explanation of the methodology used; and**
- **be consistent across all suppliers of digital advert performance measurement services to enable fair and consistent comparison.**

2. Regulatory imbalance

There is currently a gaping inequality between the regulations applicable to traditional broadcasters compared with digital platforms.

This places commercial radio at a significant disadvantage in terms of the content it is permitted to produce and the advertising it may broadcast. In addition to restricting content, radio is forced to divert significant portions of its resources into compliance with the regulatory framework.

This contrasts with digital platforms, which are able freely to meet new audience demands and direct almost all resources towards the creation of further revenue.

CRA welcomes the Commission's focus on the existing regulatory imbalance:

'…virtually no media regulation applies no digital platforms. This creates regulatory disparity between some digital platforms and some more heavily regulated media businesses that perform comparable functions, which could provide digital platforms with an unfair advantage in attracting advertising expenditure because they operate under fewer regulatory restraints and have lower regulatory compliance costs'.[7]

CRA broadly supports the Commission's preliminary recommendation for a separate review to design a framework capable of effectively and consistently regulating the conduct of entities that perform comparable functions.[8]

However, any such review is likely to take several years to complete and implement. Immediate action is required to save the commercial radio industry from being further undermined by the current imbalance. Irrevocable damage may otherwise be inflicted before the conclusion of a further review.

Advertising regulation

The current inequality of advertising regulations means that digital platforms are frequently given an advantage when it comes to seeking advertising, escaping significant restrictions that apply to commercial radio.

Advertising revenue is frequently diverted from traditional to new platforms as a result of uneven regulation.

For example, clause 3A of Schedule 2 to the BSA requires that a broadcaster must not broadcast an election advertisement from the end of the Wednesday before polling day until the close of the poll on polling day, where an election is to be held in an area which relates to a licence area, or an area where a broadcast can normally be received.

The 'blackout' was introduced many years ago, as a means of preventing broadcasters from influencing voters immediately prior to election. In a world where so much information is provided from other sources there is no logic for maintaining a blackout in relation to traditional broadcasters while online platforms are free to advertise as they like.

The online platforms are not subject to an election advertising blackout but may continue to advertise without restriction. This means that valuable advertising, placed shortly before voters are due to vote, is entirely diverted to digital platforms.

Online platforms are also creating new presences in the audio space, via products such as music streaming services, podcasts, voice assistants and smart speakers. All of these products include the opportunity to provide audio advertising to consumers.

The 'blackout' rule means that radio stations have restrictions in place regarding elections, whereas these new audio services provided by online platforms, which attempt to offer an experience similar to radio, do not have such restrictions. They could feasibly broadcast an

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[7] Report, page 7.

[8] Preliminary Recommendation 6 (Report, page 12).

audio commercial made for radio on their platforms where a radio station is not permitted to do so. This creates strong limitations for commercial radio broadcasters and gives an unfair advantage to digital platforms.

Local content

The regional commercial radio industry is subject to the most onerous local content requirements in the broadcast sector. *Local content* means content local to the station's licence area.

Under section 43C of the *Broadcasting Services Act 1992* (**BSA**) and the *Broadcasting Services (Regional Commercial Radio – Material of Local Significance) Licence Condition 2014* all regional commercial radio stations must broadcast specified levels of material of local significance.

Small commercial radio licensees must broadcast **30 minutes** of material of local significance each day, and all other licensees must broadcast **three hours** each day[9] during peak listening times.

Further local content obligations apply to stations that have experienced a 'trigger event'. A trigger event is, broadly, a change in control of the licensee or registrable media group.[10]

Following a trigger event, licensees must:

- meet 'minimum standards' for local news, local weather, local community service announcements, emergency warnings and, where applicable, designated local content programs; and
- maintain the existing level of local presence (defined by reference to staffing levels and studios and other production facilities) for a period of 24 months after the trigger event.

Digital platforms have no local content obligations.

CRA urges the Commission to review the way in which local content obligations are spread across various platforms as part of its separate regulatory review.

Australian music

The obligation to play Australian music is set out in section 5 of the Commercial Radio Code of Practice. In summary, this provides that:

- licensees must play the applicable proportion of music performed by Australians during the Australian Performance Period (section 5.1);

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[9] Excluding remote area, section 40 and racing radio stations.

[10] Section 43B of the *Broadcasting Services Act 1992* and *Broadcasting Services (Regional Commercial Radio – Local Presence) Licence Condition 2014*.

- Australian Performance Period means the total period of 126 hours occurring in each week between the hours of 6.00am and 12.00 midnight daily (see Definitions section);

- the applicable portion of total time is determined based upon the predominant format of the licensee's service and ranges from 0 (e.g. talk stations) to 25% (e.g. Top 40 stations). This is set out in a table at section 5.2 of the Code;

- there are additional obligations for some categories of station (A, B and C) to play New Australian Performances as a proportion of their total Australian performances (section 5.3).

Digital platforms have no obligation to communicate Australian music. For example, it is possible that an Australian user of a digital music streaming service such as Spotify does not consume any Australian music at all.

CRA urges the Commission to review the way in which Australian music obligations are spread across various platforms as part of its separate regulatory review.

Recommendation 2

(a) CRA strongly urges the Commission to take immediate action to address the most glaring inequalities present in the current regulatory structure, particularly the election blackout legislation, which bans political advertising by radio broadcasters from the Wednesday before polling day.

(b) CRA broadly supports the Commission's proposal to conduct a comprehensive review to design a framework capable of consistently regulating the conduct of entities that perform comparable functions.

(c) CRA urges the Commission to include a focus on local content and Australian music regulations as part of its separate review.

3. Protection of content against aggregators

Digital platforms can no longer legitimately be considered mere 'conduits' through which content passes. Instead, they heavily monetise such content, without investing in that content or creating any of their own.

Digital platforms must take responsibility for the way in which they use third party content by assuming direct liability for copyright infringement, including where they include hyperlinks to content owners' websites on their platforms.

Mandatory Standard

CRA supports the imposition of a Mandatory Standard regarding digital platforms' take down procedures for copyright infringing content (subject to appropriate consultation on any proposed legislative amendments).

CRA strongly believes that content creators must profit from the content they create, so that revenue can go back into creating more live and local content, to the benefit of all Australians.

Aggregators and hyperlinks

Commercial radio stations are increasingly directing their resources towards the removal of their intellectual property from third party aggregator sites and mobile apps.

Typically, such sites and apps provide 'listen live' links to the stations' broadcasts. This diverts traffic – and ultimately advertising revenue - away from the stations' own websites and apps.

The courts may support the removal of hyperlinks linking to infringing or unauthorised material, primarily on the basis of authorisation of an infringement (*GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15[11] and *Universal Music Australia Pty Ltd v Cooper* (14 July 2005) - [2005] FCA 972[12]).

However, under the existing legal framework, it can be difficult to require the removal of such hyperlinks to legitimate websites. This is the case even where aggregators are generating revenue by placing advertisements on the aggregation sites.

Use of aggregated hyperlinks has the potential to divert listeners from the legitimate stations' websites – in which stations invest a considerable amount of money – to aggregator sites over which stations have no control and no entitlement to request payment.

The digital platforms' use of data and algorithms mean that their use of content is highly controlled. Digital platforms have shown themselves capable of controlling, directing and monetising third party content in an extremely sophisticated manner.

It seems likely that the use of hyperlinks leading to legitimate station websites will escalate following the imposition of a Mandatory Standard, unless such Standard expressly covers hyperlinks.

Mobile apps are now increasingly being used by aggregators. In terms of mobile apps, third party aggregators derive revenue on multiple fronts:

- by serving advertising to listeners in the form of display or audio advertising that is delivered 'on top' of a radio station's audio stream;
- encouraging users to 'log in' and supply their personal details. This is in turn used to sell more targeted advertising to users;

[11] In this case, hyperlinks to unpublished photographs were made available without consent of the right holder.

[12] In this case, linking to a site containing infringing material was considered to be an 'authorisation' of copyright infringement.

- encouraging users to purchase a more premium version of the app that contain additional features.

All of this revenue appropriated by unauthorised third party aggregators comes at the expense of local commercial radio broadcasters.

Recommendation 3

We urge the Commission to address this issue in the proposed Mandatory Standard, by requiring digital platforms to remove hyperlinks to copyright protected content upon the request of the right holder.

Many digital platform aggregators are smaller players and the Mandatory Standard must therefore cover digital platforms of all sizes. Its application should not be limited to the larger platforms.

This issue is particularly important to the commercial radio industry and CRA would be pleased to provide the Commission with further detail if required.

4. News and digital platform regulatory oversight – automated journalism

CRA supports the Commission's preliminary recommendation that a new regulatory authority should monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.[13]

CRA agrees with the Commission's conclusion that the market dominance of the large digital platforms give them the potential to behave in a discriminatory manner, by favouring their own business interests above those of advertisers or competing businesses.[14]

The bargaining power differential between large digital platforms and content publishers should also be investigated and monitored to ensure that content creators are fairly compensated when reaching commercial deals with digital platforms.

CRA notes the Commission's findings that:

> *Digital platforms are the gateways to online news media for many consumers.*[15]
>
> *There is a bargaining power imbalance between large digital platforms and news publishers.*[16]

CRA submits that large digital platforms should be independently monitored – with the Commission setting terms and conditions of access - to ensure that they do not use their market power to favour their own businesses or to divert consumers from the websites of

[13] Report, page 12 (preliminary recommendation 5).

[14] Report, page 11.

[15]Report, Part 4.2, page 98.

[16] Report, Part 4.3, page 108.

content creators, thus appropriating revenue and reducing competition in the supply of media content.

Terms of access set by the Commission for large digital platforms should include obligations relating to:

- adherence to a transparent, independently verified and audited audience measurement methodology;
- local content; and
- fair compensation for right holders in commercial deals.

Facebook, Google and Apple are currently trialling or preparing to announce new news aggregation sites. The radio industry is open to the possibility of becoming involved in such projects but only if they are carefully monitored and regulated to ensure fair compensation for right holders, responsible use of market power and the protection of content creators.

- Facebook Australia is currently undertaking its *TodayIn* trial, in which users are provided with local and immediate content.
    - CRA regional stations have provided links to their Facebook profiles as part of this trial.
    - This is not without risk. *TodayIn* keeps people using Facebook more and for longer periods, allowing Facebook to make more money from advertising.
    - This type of aggregated content site may divert traffic away from the stations' own online presence, reducing their ability to generate revenue themselves.
    - The question facing radio broadcasters is how to get the balance right. Facebook's market power makes it difficult for content creators simply to dismiss these projects. However, there are significant commercial risks in allowing Facebook to act as the interface between a radio station and its listeners, potentially diverting consumer attention and vital revenue away from those stations.
- Google is running a U.S. trial for a spoken news service, for use on their Google Assistant and Google Home products, with participation from the NY Times, NBC and the Washington Post. Content creators are being asked to prepare podcasts, news briefings and radio broadcasts into stories that Google's algorithms can turn into a customised audio newsfeed for individual users, which could replicate a radio news service.
    - Any such scheme should be carefully monitored to ensure that Google does not use its market dominance to erode the commercial business model of commercial radio stations, which ultimately would result in less original content, less choice for consumers and less revenue for content creators.

- Google must be required to compensate fairly any content providers participating in the service. It should not be allowed to use its market dominance to persuade right holders to provide content for less than its real value.

- There are currently industry reports that Apple plans to announce a new print news subscription service, giving publishers only 50% of revenue.[17] This does not directly affect radio but is a further example of an attempt by a digital platform to claim revenue by jumping between consumers and content creators.

Recommendation 4

The commercial radio industry recognises that these initiatives may have potential value for consumers and media organisations.

However, there must be regulatory oversight – with the Commission setting terms and conditions of access for large digital platforms (including audience measurement verification, local content obligations and fair compensation for right holders) – to ensure that development by monopoly companies does not occur at the expense of other industries, consumer choice and diversity of content.

5. Investment in quality content

CRA agrees with the Commission's observations that:

- dominance of the digital platforms exposes consumers to the risk of filter bubbles and unreliable information;

- digital platforms' decisions regarding 'trustworthiness' of content may simply reflect their own interests and may not serve consumers well.[18]

These issues may be addressed in part by strengthening the offerings of other media companies, so that consumers have a broad choice of quality content to access. This helps to maintain diversity and prevent news consumption being controlled by the large digital platforms.

CRA urges the Commission to support media companies in continuing to produce quality news journalism, by offering financial assistance to support the production of news and local content.

Recommendation 5

Support for news and local content production by the commercial radio industry may be achieved through the:

[17] https://www.recode.net/2019/2/13/18224013/apple-news-publishers-50-percent-subscription-explained-new-york-times-washington-post-texture

[18] Report, pages 14 and 15.

- **extension of the *Regional and Small Publishers' Jobs and Innovation Package* beyond its current 3 year term, with extensions specifically to support regional commercial radio;**

- **introduction of tax subsidies for commercial radio broadcasters who provide news content, to assist in the production of such content**.

6. Summary of Recommendations

Recommendation 1 – Verification of Advertising

CRA submits that a reliable digital audience measurement methodology should be imposed upon digital platforms by the Commission (as a condition of access) and must:

- **require that the collection and analysis of the data is conducted by an independent third party;**

- **be accompanied by a clear, consistent and transparent explanation of the methodology used; and**

- **be consistent across all suppliers of digital advert performance measurement services to enable fair and consistent comparison.**

Recommendation 2 – Regulatory Imbalance

CRA strongly urges the Commission to take immediate action to address the most glaring inequalities present in the current regulatory structure, particularly the election blackout legislation, which bans political advertising by radio broadcasters from the Wednesday before polling day.

CRA broadly supports the Commission's proposal to conduct a comprehensive review to design a framework capable of consistently regulating the conduct of entities that perform comparable functions.

CRA urges the Commission to include a focus on local content and Australian music regulations as part of its separate review.

Recommendation 3 – Protection of Content against Aggregators

We urge the Commission to address this issue in the proposed Mandatory Standard, by requiring digital platforms to remove hyperlinks to copyright protected content upon the request of the right holder.

Many digital platform aggregators are smaller players and the Mandatory Standard must therefore cover digital platforms of all sizes. Its application should not be limited to the larger platforms.

This issue is particularly important to the commercial radio industry and CRA would be pleased to provide the Commission with further detail if required.

Recommendation 4 – Automated Journalism

The commercial radio industry recognises that automated journalism initiatives may have potential value for consumers and media organisations.

However, there must be regulatory oversight – with the Commission setting terms and conditions of access for large digital platforms (including audience measurement verification, local content obligations and fair compensation for right holders) – to ensure that development by monopoly companies does not occur at the expense of other industries, consumer choice and diversity of content.

Recommendation 5 – Investment in quality content

Support for news and local content production by the commercial radio industry may be achieved through the:

- **extension of the *Regional and Small Publishers' Jobs and Innovation Package* beyond its current 3 year term, with extensions specifically to support regional commercial radio;**
- **introduction of tax subsidies for commercial radio broadcasters who provide news content, to assist in the production of such content**.

Please contact Joan Warner, on 02 9281 6577, for clarification on any aspect of this submission.

Commercial Radio Australia