



# Draft Determination

Application for authorisation

lodged by

Country Press Australia on behalf of itself and its current and future members

in respect of

collective negotiations with each of Facebook and Google concerning payment for content produced by those members and featuring on those platforms

Authorisation number: AA1000551

1 July 2021

Commissioners:

Sims

Keogh

Rickard

Ridgeway

Crone

Brakey

## Summary

The ACCC proposes to grant authorisation to enable Country Press Australia (CPA) and its current and future members to

- collectively bargain with each of Facebook and Google concerning payment for content produced by those members and featuring on those platforms
- make and give effect to agreements arising from the collective negotiations, and
- engage in discussions and exchange information regarding those negotiations.

The ACCC considers that the conduct is likely to result in public benefits through reduced transaction costs, improved input into negotiations and contributing to the sustainability of Australian news businesses.

The ACCC also considers that the conduct is unlikely to result in any significant public detriments, including as a result of any lessening of competition between CPA members in the creation and provision of news content to the digital platforms and more generally.

On 29 April 2021, the ACCC granted interim authorisation to allow CPA to engage in the conduct while the ACCC considers the substantive application for authorisation.

The ACCC proposes to grant authorisation for 10 years.

The ACCC invites submissions in relation to this draft determination by 21 July 2021 before making its final decision.

## 1. The application for authorisation

- 1.1. On 22 April 2021, Country Press Australia (**CPA**) lodged application for authorisation AA1000551 with the Australian Competition and Consumer Commission (the **ACCC**) on behalf of itself and its current and future members.
- 1.2. CPA is seeking authorisation to collectively bargain with each of Facebook and Google for a period of 10 years. This application for authorisation AA1000551 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition provisions in Part IV of the Act but are not harmful to competition and/or are likely to result in overall public benefits.

## The Proposed Conduct

- 1.4. CPA is seeking authorisation on behalf of itself and its current and future members to:
  - collectively bargain with each of Facebook and Google concerning payment for content produced by those members and featuring on those platforms;
  - make and give effect to agreements arising from the collective negotiations; and
  - engage in discussions and exchange information regarding those negotiations (the **Proposed Conduct**).
- 1.5. Participation in the Proposed Conduct is voluntary for CPA members and the Proposed Conduct does not involve any collective boycott conduct.

## Interim authorisation

- 1.6. CPA requested urgent interim authorisation to enable it and its members to commence the Proposed Conduct as soon as possible.
- 1.7. On 29 April 2021, the ACCC granted interim authorisation allowing CPA to engage in the Proposed Conduct while the ACCC considers the substantive application for authorisation.

## 2. Background

### News Media and Digital Platforms Mandatory Bargaining Code

- 2.1. In July 2019, the ACCC released its Digital Platforms Inquiry Final Report. The inquiry looked at the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers. One of the 23 recommendations made by the ACCC was that a code of conduct be developed to address the imbalance in bargaining power between leading digital platforms and Australian news businesses.
- 2.2. In April 2020, the Government asked the ACCC to develop a mandatory code. On 25 February 2021, the Government enacted legislation for the News Media and Digital Platforms Mandatory Bargaining Code (the **Code**). The Code allows news media businesses to bargain individually or collectively with designated digital platforms over payment for the inclusion of news on their services. Designated platforms can make deals outside of the Code and can also make 'standard offers' available to news media businesses.
- 2.3. The Explanatory Memorandum for the Code recognises the bargaining power imbalances between digital platforms and Australian news businesses and that the Code is designed to help address this imbalance.<sup>1</sup>
- 2.4. While legislation enacting the Code commenced on 3 March 2021, most of its provisions have not yet come into substantial effect as the Treasurer has not designated any digital platforms for the purpose of the Code. This includes the provision providing an exemption from the Act for registered news businesses to collectively bargain with a designated digital platform.

## Country Press Australia

- 2.5. CPA is an industry body that represents the interests of independent regional and local newspapers throughout Australia. CPA currently represents 81 members and 160 regional newspapers.
- 2.6. The members of CPA are predominantly small businesses and they provide news services in regional and local communities published in print and online. CPA submits that instances of overlapping products are rare.

## 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

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<sup>1</sup> [Explanatory Memorandum](#) to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, pp 7-8.

- 3.2. The ACCC invited submissions from potentially interested parties and received one submission, from Facebook.
- 3.3. Facebook submits that:<sup>2</sup>
- (a) Collective bargaining authorisation is not required for Facebook to negotiate with CPA. Facebook also notes commercial negotiations between Facebook and CPA have been occurring irrespective of the status of the Code and since before CPA lodged its application for authorisation. Facebook notes that negotiations with CPA are ongoing and CPA's application for authorisation has no bearing on these discussions.
  - (b) It is inappropriate for CPA to seek, and the ACCC to grant, authorisation for all CPA members because it is not possible for Facebook to negotiate with all CPA members. Facebook notes that many publishers who are members of CPA do not use Facebook's services or have an extremely limited presence on Facebook.
  - (c) There appears to be no circumstances in CPA's application that provide any compelling case for authorisation to be granted for 10 years. Facebook notes that authorisations with a 10 year duration are relatively uncommon and typically only granted for conduct involving long-term investments. Facebook notes the news media industry is highly dynamic and the Australian Government is reviewing laws impacting the media sector.
  - (d) Any authorisation should require CPA to inform Facebook of any new members of the collective bargaining group in advance. Facebook notes it is important that both Facebook and the ACCC have certainty about the identity of any members of CPA to which any authorisation should apply.
- 3.4. CPA submits in response that:
- (a) CPA is seeking authorisation to avoid being at risk of breaching competition laws.
  - (b) The early meetings it has had with Facebook would be characterised as discussions rather than negotiations. These discussions were constructive.
  - (c) The dynamic nature of the news media industry does not diminish the need for a longer authorisation period, and Facebook has not provided a sound case for a shorter period.
  - (d) It is unnecessary for CPA to advise of each new member in circumstances where this does not directly impact either Facebook or the ACCC. CPA notes it maintains a list of current members that would be made available to the ACCC and relevant digital platforms as required.
- 3.5. Facebook's submission and CPA's response are available on the Public Register for this matter, available [here](#).

## 4. ACCC assessment

### The authorisation test

- 4.1. The ACCC has assessed the Proposed Conduct in accordance with the relevant authorisation test contained in the Act.
- 4.2. CPA seeks authorisation for conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen

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<sup>2</sup> [Facebook submission regarding CPA application for authorisation](#), 26 May 2021, pp 8-9.

competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

## Relevant areas of Competition

- 4.3. The ACCC identifies the relevant areas of competition to assess the likely effect of the Proposed Conduct.
- 4.4. The ACCC considers that the relevant area of competition likely to be impacted by the Proposed Conduct is between CPA members for the supply of news content.

## Future with and without the Proposed Conduct

- 4.5. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.6. Without the Proposed Conduct, CPA and its members would risk breaching the competition provisions in the Act to the extent CPA engages in collective negotiations with Facebook and/or Google on behalf of its members. As the Treasurer has not designated any digital platforms under the Code, there are currently no exemptions from the Act for registered news businesses to collectively bargain with digital platforms such as Facebook and Google.
- 4.7. The ACCC therefore considers that, in the future without the Proposed Conduct, members of CPA would be left to individually negotiate with Facebook and/or Google concerning payment for any content they produce and that features on those platforms.
- 4.8. The ACCC notes Facebook's submission that collective bargaining authorisation is not required for Facebook to negotiate with CPA. The ACCC also notes Facebook's advice that it had already commenced discussions with CPA on behalf of its members irrespective of Facebook's status under the Code, and that Facebook is conducting these discussions voluntarily regardless of the application for authorisation.
- 4.9. The ACCC considers that as Facebook and Google are not designated under the Code, CPA has applied for authorisation to manage the risk that, by negotiating collectively, CPA and its members would be in breach of the competition provisions in the Act. The ACCC notes that had Facebook and Google been designated under the Code, registered news businesses would have been provided legal protection under the Act for certain collective bargaining arrangements without the need for authorisation. The ACCC further notes the interim authorisation provides protection to CPA and its members from legal action under the Act for such negotiations.

## Public benefits

- 4.10. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>3</sup>

4.11. The ACCC has considered the following public benefits:

- reduced transaction costs
- improved input into negotiations, and
- contributing to the sustainability of Australian news businesses.

### **Reduced transaction costs**

4.12. CPA submits that it is generally prohibitive for each of its members to negotiate individually with Facebook and Google, from a cost and practical perspective.

4.13. The ACCC considers that individual CPA members would incur transaction costs in the form of obtaining professional advice and incurring management time when negotiating with Facebook and Google for payment for news content featuring on those platforms. Facebook and Google, to the extent they choose to negotiate with individual CPA members, would also incur costs for each separate negotiation.

4.14. The ACCC therefore considers that the Proposed Conduct is likely to result in a public benefit in the form of reduced transaction costs relative to a situation where there are individual negotiations. Reduced transaction costs, particularly for the members of CPA, are likely to arise through sharing the costs of negotiation across multiple parties and enabling CPA to negotiate comprehensively to reach more beneficial and efficient agreements at a lower cost than multiple individual negotiations.

### **Improved input into negotiations**

4.15. Small businesses are often at a disadvantage when negotiating with larger businesses due to fewer resources, access to information and less negotiating experience.

4.16. The ACCC acknowledges Facebook's submission that Facebook has worked directly with CPA in recognition of the challenges for both Facebook and member publishers of negotiating individually.

4.17. The ACCC considers information sharing and collective discussions by CPA members for the purpose of collective negotiations with Facebook and Google may enable members to become more informed and improve their input into contracts than individual negotiations. In particular, each CPA member would benefit from CPA negotiating contractual issues on their behalf at a lower cost and in many cases from the greater levels of resourcing and expertise available to CPA.

4.18. The ACCC considers the Proposed Conduct is likely to provide increased opportunities for CPA members to provide input into the negotiated terms of agreements made with the relevant platforms than may be the case if those members negotiated individually. This may lead to terms that are more comprehensive and that better reflect the circumstances of CPA members and the relevant digital platform.

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<sup>3</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

4.19. The ACCC therefore considers that the Proposed Conduct is likely to result in a public benefit from improving the input CPA members have in negotiations with Facebook and Google, which is likely to provide more efficient contracts.

### **Contributing to the sustainability of Australian news businesses**

4.20. As identified in the ACCC's 2019 Digital Platforms Inquiry (DPI) Final Report, the availability of a wide range of high quality news and journalism provides significant benefits to Australian society and is important for the healthy functioning of democracy.<sup>4</sup> Further, this report found that local coverage was a category of coverage at significant risk of under-provision; between 2008-09 and 2017-18, the net total of local and regional newspaper titles published in Australia declined by 15 per cent, representing the closure of 106 newspapers in the period and leaving 21 local government areas without any coverage from a single local newspaper, including 16 local government areas in regional Australia.<sup>5</sup>

4.21. Research conducted by the Public Interest Journalism Institute's Australian Newsroom Mapping Project demonstrates that this trend has continued since the publication of the DPI Final Report, with a net reduction of 101 in newspaper mastheads, news websites and broadcast news stations between January 2019 and May 2021.<sup>6</sup>

4.22. The public benefit provided by journalism has been further highlighted by the introduction of the Code, which is intended to 'support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses.'<sup>7</sup>

4.23. CPA notes that the Australian Government is encouraging agreements to be formed outside the provisions of the Code, and submits that negotiated outcomes made available through this authorisation will provide a degree of assistance to sustain independent and diverse media across its membership, which provide local coverage in areas of regional and rural Australia.

4.24. The ACCC therefore considers, to the extent that it enables CPA and its members to reach agreements relating to news content with Facebook and Google that will support the commercial viability of its members, the Proposed Conduct is likely to result in a public benefit in the form of contributing to the sustainability of Australian news businesses in regional and rural areas.

### **Public detriments**

4.25. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*<sup>8</sup>

4.26. The ACCC has considered the following potential public detriments:

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<sup>4</sup> See generally [Digital Platforms Inquiry Final Report](#) Chapter 6.

<sup>5</sup> See [Digital Platforms Inquiry Final Report](#), pp 321-322 and Appendix F.

<sup>6</sup> See Public Interest Journalism Initiative, [Australian Newsroom Mapping Project](#).

<sup>7</sup> [Explanatory Memorandum](#) to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021.

<sup>8</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- impact on competition between participating CPA members in supplying news content for display on Facebook and Google's platforms and more generally; and
- reduced negotiating efficiency due to an overly broad and indeterminate bargaining group.

### **Impact on competition between participating CPA members in supplying news content for display on Facebook and Google's platforms and more generally**

- 4.27. Generally, collective bargaining has the potential to lessen competition compared to a situation where individual suppliers compete to supply common buyers.
- 4.28. In this instance, CPA members may compete to supply news content for display on Facebook and Google's platforms and also more generally.
- 4.29. However, CPA submits that instances of overlapping products supplied by CPA members are rare. CPA notes its members provide for the news and information needs of the communities where the information is published and provide coverage of news, events and activities within the particular communities serviced.
- 4.30. CPA submits, therefore, that the Proposed Conduct does not limit or prevent CPA members from competing vigorously and does not enable CPA members to raise prices, reduce quality, choice or innovation or to co-ordinate in the creation and provision of content.
- 4.31. The ACCC considers the Proposed Conduct is unlikely to significantly impact competition between CPA members due to their geographic dispersion and location-specific content.
- 4.32. Accordingly, the ACCC does not consider that the Proposed Conduct is likely to lessen competition in any meaningful way between participating CPA members in supplying news content for display on Facebook and Google's platforms or more generally.

### **Reduced negotiating efficiency due to an overly broad and indeterminate bargaining group**

- 4.33. Facebook submits that it is inappropriate for CPA to seek, and the ACCC to grant, authorisation for all CPA members because it is not possible for Facebook to negotiate with all CPA members as many do not use Facebook's services.
- 4.34. Facebook further submits that any authorisation should require CPA to inform Facebook of any new members of the collective bargaining group in advance.
- 4.35. The ACCC acknowledges Facebook's submission that Facebook offers direct investments for CPA to distribute to its members, or to support CPA's members in undertaking digital skills training, in recognition that many CPA members do not use Facebook's services. The ACCC notes that any ACCC authorisation does not limit Facebook from continuing to work with CPA and making investment offers outside of the Proposed Conduct.
- 4.36. The ACCC considers that it is unnecessary to require CPA, as a condition of authorisation, to inform the platforms or the ACCC of any new member that wishes to join the collective bargaining group in advance.
- 4.37. The ACCC considers that CPA membership is a sufficiently certain criterion for the purposes of identifying the news businesses covered by the authorisation. The ACCC notes that CPA maintains a list of current CPA members on its website, and further



notes that participation by the platforms in collective bargaining negotiations with CPA remains voluntary.

4.38. The ACCC accepts that the platforms may request CPA to identify changes to its membership in order to have certainty and considers this is a matter appropriately dealt with between CPA and the platforms during the course of their negotiations.

### Balance of public benefit and detriment

4.39. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- reduced transaction costs
- improved input into negotiations, and
- contributing to the sustainability of Australian news businesses.

4.40. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment, including in the form of a lessening of competition among CPA members to provide news content.

4.41. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

### Length of authorisation

4.42. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>9</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.43. In this instance, CPA seeks authorisation for 10 years. CPA accepts the dynamic nature of the industry but does not consider that this diminishes the need for a longer authorisation.

4.44. Facebook submits that CPA has not provided a compelling case for authorisation to be granted for 10 years. Facebook notes that authorisations with a 10 year duration are relatively uncommon and typically only granted for conduct involving long-term investments. Facebook notes the news media industry is highly dynamic and the Australian Government is reviewing laws impacting the media sector.

4.45. The ACCC considers a 10 year authorisation is appropriate given that the assessment of public benefits and detriments is unlikely to change substantially over time. The ACCC notes that it is not uncommon for the ACCC to grant collective bargaining authorisations for 10 years and that the Code is not time-limited and the rationale for the Proposed Conduct will continue for as long as CPA and the digital platforms have reason to negotiate outside the provisions of the Code. The ACCC further notes that it may review and, if appropriate, revoke the authorisation following any material change in circumstances at any point during the authorisation period.

4.46. The ACCC therefore proposes to grant authorisation for 10 years.

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<sup>9</sup> Subsection 91(1).

## 5. Draft determination

### The application

- 5.1. On 22 April 2021, CPA lodged application AA1000551 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000551 to enable CPA and its current and future members to:
  - collectively bargain with each of Facebook and Google concerning payment for content produced by those members and featuring on those platforms;
  - make and give effect to agreements arising from the collective negotiations; and
  - engage in discussions and exchange information regarding those negotiations.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000551 for 10 years.
- 5.9. This draft determination is made on 1 July 2021.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 21 July 2021. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.