



Draft Determination and interim authorisation

Application for authorisation

lodged by

Commercial Radio 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: AA1000565

10 September 2021

Commissioners: Sims
Keogh
Rickard
Ridgeway
Crone
Brakey

Summary

The ACCC proposes to grant authorisation to enable Commercial Radio Australia (CRA) and its current and future members (excluding Nine Entertainment) 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 contribution 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 CRA members in the creation and provision of news content to the digital platforms and more generally.

The ACCC has also granted interim authorisation to enable CRA and its members 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 30 September 2021 before making its final decision.

1. The application for authorisation

- 1.1. On 16 August 2021, Commercial Radio Australia (**CRA**) lodged application for authorisation AA1000565 with the Australian Competition and Consumer Commission (the **ACCC**) on behalf of itself and its current and future members (excluding Nine Entertainment).
- 1.2. CRA is seeking authorisation to collectively bargain with each of Facebook and Google for a period of 10 years. This application for authorisation 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. CRA is seeking authorisation on behalf of itself and its current and future members (excluding Nine Entertainment) 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 CRA members and the Proposed Conduct does not involve any collective boycott conduct.

Interim authorisation

- 1.6. CRA also requested interim authorisation to enable it and its members to commence the Proposed Conduct as soon as possible.
- 1.7. The request for interim authorisation is considered further in section 6.

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.¹
- 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.

Commercial Radio Australia

- 2.5. CRA is an industry association representing the Australian commercial radio industry. Currently, CRA has 261 member stations.
- 2.6. CRA advises that each of its current members is engaged in the provision of commercial radio broadcasting and audio content, which includes the provision of local news and information to communities across Australia on analogue and digital radio and online platforms. CRA notes the vast majority of radio broadcasts are simulcast online.

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

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from potentially interested parties and received no submissions in relation to the application or request for interim authorisation.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. CRA 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 competition within the meaning of section 45 of the Act.
- 4.3. 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

- 4.4. The ACCC identifies the relevant areas of competition to assess the likely effect of the Proposed Conduct.
- 4.5. The ACCC considers that the relevant area of competition likely to be impacted by the Proposed Conduct is between CRA members for the supply of news content.
- 4.6. CRA's member stations are licensed under the *Broadcasting Services Act 1992 (BSA)* to broadcast within particular licence areas. Radio licence areas are planned by the Australian Communications and Media Authority, and CRA advises that there are currently 105 analogue radio licence areas in Australia.
- 4.7. CRA advises that its members all provide news bulletins as part of their commercial radio station broadcasts, and regional stations have additional mandatory news and local content obligations. CRA advises that, under the BSA, 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.
- 4.8. CRA notes that commercial radio stations compete with each other for audience share and advertising revenue in their respective licence areas and are funded entirely by advertising revenue. CRA advises that most licence areas are occupied by several commercial radio broadcasters that compete with each other and are owned by unrelated corporate entities. Under the BSA, commercial radios can hold up to two licences in each licence area.
- 4.9. The ACCC notes that while CRA members may compete directly within their licence areas for audience share and advertising revenue, member stations are likely to compete to a lesser extent to have their news surfaced by Facebook and Google because news typically makes up a relatively small proportion of the overall content produced by commercial radio stations.

Future with and without the Proposed Conduct

- 4.10. 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.
- 4.11. Without the Proposed Conduct, CRA and its members would risk breaching the competition provisions in the Act to the extent CRA 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 under the Code from the Act for registered news businesses to collectively bargain with digital platforms such as Facebook and Google.
- 4.12. The ACCC therefore considers that, in the future without the Proposed Conduct, members of CRA would be left to individually negotiate with Facebook and/or Google concerning payment for any content they produce and that features on those platforms.

Public benefits

- 4.13. 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.²

- 4.14. The ACCC has considered the following public benefits:

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

Reduced transaction costs

- 4.15. The ACCC considers that individual CRA members would likely 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 CRA members, would also incur costs for each separate negotiation.
- 4.16. 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 CRA, are likely to arise through sharing the costs of negotiation across multiple parties and enabling CRA to negotiate comprehensively to reach agreements at a lower cost than multiple individual negotiations.

² 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.

Improved input into negotiations

- 4.17. Small businesses are often at a disadvantage when negotiating with larger businesses due to fewer resources, access to information and less negotiating experience.
- 4.18. The ACCC considers information sharing and collective discussions by CRA 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 CRA member would benefit from CRA negotiating contractual issues on their behalf at a lower cost and in many cases from the greater levels of resourcing and expertise available to CRA.
- 4.19. The ACCC considers the Proposed Conduct is likely to provide increased opportunities for CRA 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 CRA members and the relevant digital platform.
- 4.20. The ACCC therefore considers that the Proposed Conduct is likely to result in a public benefit from improving the input CRA members have in negotiations with Facebook and Google, which is likely to provide more efficient contracts.

Contributing to the sustainability of Australian news businesses

- 4.21. 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.³ This report expressed concern about declining levels of 'public interest journalism' such as regional and local reporting. The ACCC notes that commercial radio stations including those operated by CRA's members play an important role in providing regional and local reporting.
- 4.22. Research conducted by the Public Interest Journalism Institute's Australian Newsroom Mapping Project demonstrates that the availability of Australian news has continued to decline since the publication of the DPI Final Report, with a net reduction of 106 in newspaper mastheads, news websites and broadcast news stations between January 2019 and August 2021.⁴
- 4.23. 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.'⁵
- 4.24. CRA submits that negotiated outcomes made available through this authorisation would help sustain commercial radio stations in Australia, many of which service small and local communities that have no other source of local news and information.
- 4.25. The ACCC therefore considers that to the extent that it enables CRA 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, including in regional and rural areas.

³ See generally [Digital Platforms Inquiry Final Report](#) Chapter 6.

⁴ See Public Interest Journalism Initiative, [Australian Newsroom Mapping Project](#).

⁵ [Explanatory Memorandum](#) to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021.

Public detriments

4.26. 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.⁶

4.27. The ACCC has considered whether the impact on competition between participating CRA members to have their news surfaced by Facebook and Google's platforms and more generally constitutes a potential public detriment.

Impact on competition between participating CRA members to have their news surfaced by Facebook and Google and more generally

4.28. Generally, collective bargaining has the potential to lessen competition compared to a situation where individual suppliers compete to supply common buyers.

4.29. In this instance, CRA members may compete to have their news surfaced by Facebook and Google and also more generally.

4.30. CRA submits that there are few, if any, instances of substantially overlapping products among its member stations, as all stations compete with each other for audience share and advertising revenue within their respective markets. CRA notes that stations attract audience and revenue by producing services that have a point of difference from others in the market.

4.31. CRA submits, therefore, that the Proposed Conduct would not limit or prevent its members from competing vigorously, and would not enable CRA members to raise prices, reduce quality or choice, reduce innovation or coordinate in the creation and provision of content.

4.32. The ACCC considers the Proposed Conduct is unlikely to significantly impact competition between CRA members for the supply of news generally because the Proposed Conduct is limited to news surfaced by Facebook and Google.

4.33. The ACCC considers the Proposed Conduct may impact competition between CRA members to have their news surfaced by Facebook and Google. However, the Proposed Conduct is unlikely to result in significant public detriments including as a result of any lessening of competition.

4.34. While CRA members may compete to have their news surfaced by Facebook and Google, the Proposed Conduct is unlikely to significantly reduce competition between CRA members or result in any significant public detriment because the main area of competition between commercial radio stations remains competition for advertisers and audiences within commercial radio licence areas.

4.35. The ACCC also notes that news typically makes up a relatively small proportion of the overall content produced by commercial radio stations, and that a much broader range of news providers would also be competing with CRA to have their news surfaced by Facebook and Google.

4.36. Accordingly, the ACCC does not consider that the Proposed Conduct is likely to lessen competition in any meaningful way between participating CRA members to have their

⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

news surfaced by Facebook and Google or more generally or result in any significant public detriment as a result of the impact on competition.

Balance of public benefit and detriment

4.37. 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
- contribution to the sustainability of Australian news businesses.

4.38. 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 CRA members to provide news content.

4.39. 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

4.40. The Act allows the ACCC to grant authorisation for a limited period of time.⁷ 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.

4.41. In this instance, CRA seeks authorisation for 10 years.

4.42. 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 CRA 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.

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

5. Draft determination

The application

5.1. On 16 August 2021, CRA lodged application AA1000565 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.

⁷ Subsection 91(1).

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 AA1000565 to enable CRA 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 AA1000565 for 10 years.
- 5.9. This draft determination is made on 10 September 2021.

6. Interim authorisation

- 6.1. The ACCC has decided to grant interim authorisation.
- 6.2. At the time of lodging the application, CRA requested interim authorisation to commence the Proposed Conduct as soon as possible while the ACCC considers the substantive application for authorisation.
- 6.3. In granting interim authorisation, the ACCC notes:
 - The Proposed Conduct is likely to result in public benefits from transaction cost savings resulting from a single negotiation process conducted by CRA with each of Facebook and Google, relative to a situation where multiple individual negotiations occur with each member.
 - The Proposed Conduct is likely to provide a greater ability for CRA members to have input into negotiations with Facebook and Google. CRA members are likely to be at a disadvantage when negotiating with Facebook and Google due to fewer resources, access to information and less negotiating experience. Collective bargaining may enable individual members of the group to become more informed and engaged participants in negotiations and improve their input into contracts. This may lead to terms of supply that are more comprehensive and that better

reflect the circumstances of the group and the platforms, resulting in more efficient outcomes.

- To the extent that the negotiations provide CRA members with certainty around the terms and remuneration for their content on the platforms, the Proposed Conduct may contribute to the longer-term viability of their stations. The value of collective bargaining to regional/small businesses was recognised in the development of the Code.
- The Proposed Conduct is unlikely to significantly reduce competition between CRA members to have their news surfaced by Facebook and Google.
- The Proposed Conduct does not enable CRA members to compete less vigorously in the creation and provision of content.
- Participation in the Proposed Conduct is voluntary for both CRA members and Facebook and Google.

6.4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for re-authorisation is withdrawn.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination by 30 September 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.