SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

ACCC Digital Platform Service Inquiry

Discussion Paper for Interim Report No 5: Updating competition and consumer law for digital platform services

April 2022

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 261 member stations and represent the entire Australian commercial radio industry.

CRA appreciates this opportunity to respond to the Australian Competition and Consumer Commission's Interim Report No. 5 in relation to the Digital Platform Services Inquiry.

CRA welcomes the ACCC's finding that the dominance of key digital platforms continues to have a negative impact on commercial relationships and competition amongst businesses. In particular, CRA shares the ACCC's concerns that:

- a few large digital platforms now hold very powerful positions, increasingly acting as gatekeepers between business and end users;
- digital platforms have an immense influence on the terms of trade and competitive dynamics in the relevant markets, society and the economy;
- digital platform services are subject to constant rapid change and evolution, making effective regulation more difficult; and
- these issues have created challenges for traditional competition and consumer protection law enforcement. [1]

The digital platforms' market power is entrenched and shows no signs of abating. To the contrary, it continues to expand. Acquisition strategies of key players have further enabled the platforms to extend their influence, such as Meta's acquisition of WhatsApp and Instagram.

There is little transparency regarding the digital platforms' use of data. This affects both consumers – who lack control over use of their own personal information – and businesses –

[1] Page 4 of the ACCC Discussion Paper for Interim Report No 5 (Feb 2022).

who are placed at a competitive disadvantage when data is concentrated in the hands of large digital platforms.

The *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (**Mandatory Bargaining Code**) was an important step in correcting the imbalance between digital platforms and news media businesses, as it established a framework under which news media and digital platforms businesses could more fairly negotiate, with an option for arbitration should such negotiations fail. However, to date, no digital platforms have been designated under section 52E of the Mandatory Bargaining Code, and its impact is therefore limited.

It is vital that Government maintains the momentum of these important reforms, by expanding the *Competition and Consumer Commission Act 2010* (**CCA**) to directly address the substantial competition and consumer harms that have been clearly identified in relation to digital platform services. This should take place in conjunction with designation of the digital platforms under section 52E of the Mandatory Bargaining Code.

The need for urgency cannot be overstated. News media businesses have already suffered significant harm due to the dominance of the digital platforms. A specific rules-based framework must be introduced as soon as possible, as, without such a framework, the existing recognised harms will continue to grow.

If these harms are not addressed without further delay, there is a real risk that the digital platforms will continue to expand their influence, the damage suffered by news media businesses may become irreparable, and a regulatory solution will prove much harder to find.

1. Recommendations

The ACCC's work since 2018 has demonstrated clearly that there is significant anti-competitive conduct – and associated harms to news media businesses – in the digital platform sector. The ACCC's report following its inquiry into markets for the supply of digital advertising technology services and digital advertising agency services (**AdTech**), published on 28 September 2021, concluded that:

> *New regulatory solutions are needed to address Google's dominance and to restore competition to the ad tech sector for the benefit of businesses and consumers. We recommend rules be considered to manage conflicts of interest, prevent anti-competitive self-preferencing, and ensure rival ad tech providers can compete on their merit*.[2]

It is now time for the ACCC to provide Government with clear recommendations for legislative change that will correct this conduct.

Accordingly, CRA asks the ACCC to recommend that the following steps are taken:

Recommendation 1. Government must take urgent regulatory action to address the harms caused by the digital platforms. Without such action, the damage suffered by news media businesses may become irreparable and a regulatory solution will prove much harder to find.

[2] Rod Sims - ACCC Media Release number: 149/21.

Recommendation 2. Mandatory codes applicable to digital platform products and services markets should be developed by the ACCC and registered under a new Part of the CCA (**Proposed CCA Code**). The relevant digital platform product and service markets should include digital search, social media, aggregation platforms, AdTech services and App marketplaces. These are all marketplaces that have been thoroughly analysed by the ACCC since 2018.

Recommendation 3. Google, Meta, Apple and Amazon should be registered under the Proposed CCA Code as digital platforms that are dominant in their respective markets, including smart speaker and voice assistant.

Recommendation 4. The Proposed CCA Code should seek to address the following issues, several of which were identified by the ACCC as part of its AdTech review:

(i) increased transparency and data portability;

(ii) data separation;

(iii) self preferencing and conflicts of interest by digital platforms;

(iv) use of data gathered by digital platforms being used in the supply of a different service operated by that digital platform, to the detriment of smaller players;

(v) restrictions on the imposition of unfair contract terms;

(vi) lack of transparency throughout the AdTech chain, particularly in relation to audience measurement metrics and claims; and

(vii) prominence rules and app marketplace protections to ensure free of charge prominence for broadcasters licensed under the *Broadcasting Services Act 1992*.

Recommendation 5. Government must build upon the ACCC's important work to date, by designating the digital platforms under section 52E of the Mandatory Bargaining Code. This will provide a clear framework for news media businesses and the digital platforms to negotiate reasonable compensation for the platforms' use of news media content.

2. Changes to the CCA – new Part and mandatory code

CRA agrees with the ACCC's view that:

> *Enforcement under existing competition and consumer protection legislation, the Competition and Consumer Act 2010 (CCA) and the Australian Consumer Law (ACL), which by its nature takes a long time and is directed towards very specific issues, is insufficient to address the breadth of concerns arising in relation to rapidly changing digital platform services.*

Part IVB of the CCA provides for the prescription of mandatory or voluntary industry codes. Section 51AE of the CCA allows industry codes to be prescribed in regulations proposed by the responsible Australian Government Minister.

Rather than creating a Code under the existing Part IVB, CRA submits that a mandatory code applicable to digital platforms should be developed under a new Part of the CCA. The

new Part would provide a quicker and more straight forward mechanism for establishing a mandatory code, for the following reasons.

(i) Under a new Part, unlike under the existing Part IVB, there would be no need to demonstrate that there are no existing laws capable of addressing competition or consumer protection issues. The ACCC has investigated these issues extensively over the past 4 years and has conclusively demonstrated the existence of a need for new regulation.

(ii) The ACCC, rather than a Government Department, should be responsible for developing the mandatory code under the new Part of the CCA. The ACCC has conducted extensive research and reported at length on the challenges accompanying the growth of the digital platforms. It has already considered and formed a view on the issues at stake. Tasking the ACCC with responsibility for developing the mandatory code is the most efficient approach.

(iii) The Proposed CCA Code must be implemented urgently. Media businesses have already suffered significant harm due to the dominance of the digital platforms. A specific rules-based framework must be introduced as soon as possible, as, without such a framework, the current, recognised harms will continue to grow. The ACCC will be able to formulate the Proposed CCA Code quickly, given its previous findings on the issues.

3. Content of the Proposed CCA Code

CRA urges the ACCC to build on the foundations laid by the Mandatory Bargaining Code. The Mandatory Bargaining Code provides a framework within which reasonable commercial bargains may be struck, despite the imbalance of bargaining power between news media businesses and the digital platforms.

Nevertheless, the Mandatory Bargaining Code does not address a substantial number of the challenges that have been identified by the ACCC since 2018, particularly in its AdTech and App marketplaces reports. The issues caused by the dominance of digital platforms are not going away. The platforms continue to expand across vertical and horizontal markets, with a corresponding distortion of competition across the media and advertising sectors.

The Proposed CCA Code should address issues that include the following:

(i) **The collection and use of data through the ad tech chain.** The digital platforms are increasingly monopolising the collection of data flowing from advertisements and other content on the audio industry's digital platforms. This does little to protect the privacy of consumers but instead concentrates data in the hands of few monopoly players.

(ii) **Data analytics services:** CRA maintains its position that a reliable digital audience measurement methodology should be imposed upon digital platforms by the ACCC. The digital platforms continue to publish unverified figures relating to the effectiveness of advertising on its platforms, often in 'walled gardens' which are not subject to scrutiny, such as Facebook client dashboards. There is currently no

regulatory means of holding digital platforms to account nor of forcing transparency regarding claims of user engagement and audience size.

(iii) **Transparency through the supply chain**. Media businesses should receive information that enables them to understand the way in which the services along the AdTech supply chain are priced. The current pricing model is unclear and obstructs competitive outcomes.

(iv) **Interoperability**. Digital platforms, particularly Google, impose restrictions on how their products interact with other services. The Proposed CCA Code should address interoperability to ensure that digital platforms do not lock users into using their products. This will ensure that consumers have choice.

(v) **Unfair contract terms**. While the Mandatory Bargaining Code assists in redressing the bargaining balance between digital platforms and media businesses, this must be accompanied by a generally applicable restriction on the imposition of unfair contract terms, particularly in relation to data collection and the monetisation of content.

(vi) **Data separation arrangements**. Digital platforms hold vast reserves of data, which afford them substantial commercial advantage over their competitors. Data separation arrangements must be imposed on the digital platforms to redress this balance.

(vii) **Prohibitions on self-preferencing and management of conflicts of interest**. There is potential for the digital platforms to favour suppliers with whom they have a commercial relationship, whether that is based on shared corporate ownership – for example, where the digital platforms are vertically integrated across both sides of the supply chain – or where there is an undisclosed commission structure between unrelated parties, such as digital platforms and media buyers. These self-preferencing structures should be prohibited and frameworks put in place to manage conflicts of interest.

(viii) **Prominence rules**. A code is required to ensure free of charge prominence for broadcasters licensed under the *Broadcasting Services Act 1992*. It is vital that Australians are given the opportunity to continue to access local free to air broadcast content, despite the dominance of the digital platforms.

4. Application of the Proposed CCA Code

Markets

The Proposed CCA Code should apply to a broad range of digital product and services markets.

It is vital that the CCA Code is 'future-proof' and has the ability to adapt to the rapid evolution of digital products and services. The ACCC should have a continuing discretion to add to any list of markets.

Nevertheless, there are particular product and service markets that should be expressly listed as being included. These markets are all ones that have been the subject of ACCC

inquiry since 2018, in which dominance and distortion of competitive behaviour have been demonstrated. They include:

- search engines, social media and content aggregation platforms;
- AdTech services; and
- App marketplace services.

These specific markets should be accompanied by a broad discretion on the part of the ACCC to designate particular services and products, as the digital industry continues to evolve.

Designation of digital platforms by the ACCC

The CCA should contain a mechanism to allow designation by the ACCC of digital platforms as is needed. This will ensure that the Proposed CCA Code is agile and capable of being applied to digital platforms as soon as the ACCC considers it necessary.

The ACCC should be responsible for designation as it has deep knowledge and understanding of issues in the marketplace related to competition.

CRA urges the ACCC to recommend that Google, Meta, Apple and Amazon are all designated under the Proposed CCA Code. These digital platforms are dominant in their respective markets.

The smart speaker and voice assistant markets are of particular concern to the radio industry, and CRA urges the ACCC to look at digital platform dominance within those market sectors:

- Apple's Siri dominates the voice assistant market, with 70% of Australian consumers of voice operated personal assistants (on smartphone, smart speaker or other device) using Apple's Siri.[3]
- Google dominates the smart speaker market, with 92% of smart speaker users owning a Google smart speaker.[4]

5. Designation of digital platforms under the Mandatory Bargaining Code

CRA appreciates the input of the ACCC into establishing the internationally ground breaking Mandatory Bargaining Code.

However, the passage of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*, without an accompanying determination that Google and Facebook are *designated*, means that Facebook and Google have been able to choose

[3] Smart Audio Report 2021, Edison Research.

[4] Infinite Dial Australia 2021 Study, Edison Research.

with which media businesses they wish to bargain. This heightens the inequities experienced by some members of the commercial radio industry.

Section 52E(3)(b) of the NMB Code provides that, in making a designation determination, the Minister must consider:

> *whether that group has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).*

Without designation under section 52E, rather than levelling the playing field between media organisations and Facebook and Google, the Code has had the effect of:

- increasing the disparity of bargaining power between smaller media organisations – including much of the commercial radio industry - and the digital platforms. The digital platforms are not subject to the Code and have no incentive to behave reasonably in relation to the media organisations with whom they do not yet have commercial relationships; and

- inadvertently providing some media organisations with a competitive advantage over others. This means that those media organisations effectively receive the benefit of the Code provisions during the negotiations – as the Code would operate as a 'stick' to encourage the digital platforms to agree reasonable terms – but other media organisations do not.

CRA urges the ACCC to recommend that Government to build upon the ACCC's important work to date, by urgently designating the digital platforms under section 52E of the Mandatory Bargaining Code. This will provide a clear framework for news media businesses and the digital platforms to negotiate reasonable compensation for the platforms' use of news media content.

CRA would be pleased to elaborate on any aspect of the above points, if this would assist the ACCC.

Please contact Commercial Radio Australia's Chief Executive Officer, on [redacted], for clarification on any aspect of this submission.

Commercial Radio Australia