CONSULTATION BY THE ACCC ON THE DIGITAL PLATFORM MANDATORY CODE OF CONDUCT

SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

June 2020

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 provide further input to the ACCC in relation to the development of a mandatory code of conduct to address current bargaining imbalances between Facebook/Google and Australian media organisations (**Digital Platform Code**).

This submission is intended to supplement the previous submissions made by CRA in relation to the digital platform inquiry and reports. CRA has considered the ACCC Concepts Paper dated 19 May 2020 (**Concepts Paper**) and addresses the issues raised in the Concepts Paper throughout this submission.

This submission takes a largely conceptual approach, assessing the relative merits of established valuation bases and royalty structures, which will underpin any detailed proposal. It is intended, in part, to inform the ACCC's consideration of specific remuneration proposals from other media stakeholders. CRA urges the ACCC to act speedily in establishing a mechanism to ensure that Australian media organisations are fairly compensated for the value derived by the digital platforms from use of their content without further delay or extensive debate.

Nine Entertainment Co (**Nine**), a member of the CRA, has provided the ACCC with a submission that reflects its view in relation to the Concepts Paper (**Nine submission**). Nine supports CRA's submission to the extent that it does not conflict with the Nine submission.

A. SUMMARY

Definition of news

- CRA does not support the application of a 'news media' qualifying threshold to commercial radio licensees. Such a threshold is likely to place commercial radio at a significant disadvantage when compared to other platforms. Accordingly, CRA submits that the Digital Platform Code should contain a provision exempting commercial radio licensees from compliance with the news threshold.

- CRA is aware that Nine has proposed a narrower definition of news and agrees that such a definition should be applied more generally, provided that radio licensees are covered by a specific exemption to reflect the nature of radio licensing, radio's contribution to local communities and radio's particularly integrated programming style.

- There are 218 regional commercial radio stations across Australia, many of which provide the only truly local source of content in the area. This includes news, entertainment and local voices in the form of news bulletins, interviews, competitions, talkback, emergency and community service announcements. This format is uniquely live, local and Australian and should be covered by the Digital Platform Code in order to protect its continued supply.

- The Digital Platform Code should govern relationships between designated digital platforms and all content published by commercial radio stations licensed under sections 36 and 39 of the BSA. Due to their unique status as providers of local content in Australian communities, such commercial radio stations should not be subject to any separate hurdle of proving that they are 'news media businesses'. Practically, it is difficult to disaggregate news content from the other content provided by commercial radio broadcasters, who frequently intersperse news and current affairs content into general programming and topical discussion across the day.

Digital platform services to be covered

- CRA submits that all businesses owned by Facebook and Google must be covered by the Digital Platform Code. Of particular relevance to radio are any voice activation services, such as Google Assistant and related services provided through Google Home hardware and home automation devices.

- The significant bargaining power that Google and Facebook hold in relation to online referral services means that all their products and services have the potential to distort the market. Facebook currently owns Instagram, Messenger and WhatsApp which play significant parts in Australian news media organisations' ecosystems, by providing additional channels through which to surface media content and drive revenue. The dominant video provider *YouTube* is owned by Google. These platforms act as a gateway to the surfacing and prominence of media content of all forms. It is vital that such platforms are covered by the Digital Platform Code.

- The acquisition and supply of data by Google and Facebook mean that even apparently discrete products and services can assist such platforms in completing the entire 'jigsaw' of user behaviour, in a way that media businesses are unable to match. Both organisations are heavily horizontally and/or and vertically integrated across the digital advertising supply chain, owning an array of tech stack providers that leverage the data collected across the chain.

- Threshold issues regarding the applicability of the Digital Platform Code to particular Google and Facebook products and services must not prevent or delay media organisations from accessing the Code. CRA urges the ACCC to ensure that the

application of the Digital Platform Code to all Google and Facebook products and services is clear and straight forward.

- Additionally, the Digital Platform Code should contain a set of principles that allows the inclusion of other dominant players, such as Amazon and Apple, as the need arises. For example, Amazon (Alexa) and Apple (Siri and iCar) have the potential to be significant players in the supply of audio content.

Monetisation and sharing of revenue from the use of news

- CRA is keen to see a remuneration mechanism established to ensure that media businesses are fairly compensated, particularly bearing in mind:
    - the value to the digital platforms of the content created by media businesses; and
    - the data flowing to the digital platforms from users' access to such content.
- CRA broadly supports a framework founded upon Option D in the Concepts Paper (collective licensing), while noting that this does not prevent the Digital Platform Code from also addressing the ACCC's approach to authorisations for individual collective bargaining arrangements (Option B - collective bargaining).
- CRA will resist any proposed framework that:
    - imposes too narrow a definition of 'news media organisation' as a threshold for accessing payment by commercial radio licensees;
    - has the potential to increase the level of mandatory reporting or other administrative burden on the commercial radio industry;
    - has the potential to become as costly, time consuming and complex as the current statutory copyright licensing regime under the *Copyright Act 1968*; or
    - relies too heavily on proof of loss of revenue by media organisations rather than the revenue gained by digital platforms through their use of radio content or related user data.

Assessment of an appropriate fee

- Commercial radio stations should be compensated by the digital platforms for the use of their content. The compensation should be based on the value derived from advertising revenue by Facebook and Google, which relates to the radio content. That revenue represents the cash flow from which a fee should be determined and to which a fee should be attached, at least for the purpose of determining an initial amount. The fee should also be augmented by a figure to reflect the value flowing to Google and Facebook from their collection and use of the data generated by user interaction with radio content.

- CRA considers that an income based approach is a reasonable approach to adopt as:
    - it is apparent that substantial advertising revenue is being earned by the digital platforms at the expense of Australian media businesses;
    - further undisclosed revenue may be generated from the use and sale of data;

- it is a simplified approach that does not require any additional reporting from radio stations; and
- the radio content used may be the primary contributor to the digital platforms' ability to generate a subset of advertising revenue. For example, advertising revenue earned by Facebook for advertisements placed on the Facebook page of a radio personality is directly tied to the content generated by that person.

- CRA considers that a fixed structure or flat fee approach would be most appropriate as:
  - it provides certainty both as to the costs that will be incurred by the users and the revenue that will be earned by the owners of the radio content;
  - it would be simple to administer, requires no additional reporting by radio stations and minimal reporting by the digital platforms; and
  - the current lack of information relating to the advertising revenue generated by the digital platforms specifically attributable to radio content renders it difficult to justify a percentage of revenue structure specific to radio.
- Given the high growth rates in advertising revenue enjoyed by Facebook and Google, any fixed fee should be escalated annually based on the growth in Australian advertising revenue generated by Facebook and Google.
- Further information is required for the purpose of assessing an appropriate fixed fee:
  - advertising revenue derived by Facebook and Google for the last 5 years, detailed by source of content;
  - revenue derived by Facebook and Google relating to the provision of data for the last 5 years;
  - any content statistics maintained by Facebook and Google; and
  - any agreements entered into by Facebook and Google for the purpose of using content on those platforms.

Sharing of user data

- Digital platforms have access to vast reserves of data collected from their users. This is a valuable commodity, particularly to advertisers. Radio stations need to understand what is being collected and be given better power to control and restrict use of data flowing from advertisements and other content on their platforms.

- Accordingly, the Digital Platform Code must address the current inability of media businesses to negotiate the extent of data access by:
  - requiring the digital platforms to disclose the extent and nature of the data they collect;
  - requiring digital platforms to request user consent for the sharing of data with specified media organisations;
  - placing restrictions on the digital platforms' use of data collected through radio content; and

- attaching a value to the digital platforms' use of user data when assessing the revenue that should flow from the digital platform to the media organisation for use of news content.

- Examples of additional data sets that radio would like digital platforms to supply are set out in the body of this submission.

Algorithms

- There is currently little transparency regarding the use of algorithms by the digital platforms. Google controls the order and content of search results, while Facebook controls the content directed at users, giving them growing collective control over what consumers see, do and think.

- The digital platforms generate revenue by requiring radio stations to pay for reach, as the opacity of algorithms makes it difficult for those stations to extend reach simply by adjusting their content. This is particularly unfair when the stations' content on Facebook pages engages consumers and allows Facebook to target advertisers around that user demographic and content, thus generating further revenue for Facebook.

- The protection of original content is a key concern for radio. It is not unusual for radio to create original content – such as a breakfast show interview with a politician, prominent personality, public figure (eg. sports players, politicians, celebrities) or other newsmaker – which is then substantially reproduced by another online provider without consent from the radio station.

- Google's search algorithms frequently push the infringing content above the original content, thus directing consumers to the site that has 'ripped off' the content. The infringing website is often a larger entity than the radio station that produced the content.

- The Digital Platform Code should require Google to give priority to original content in searches.

- CRA supports the inclusion in the Digital Platform Code of a requirement that notice be given to media publishers of algorithmic changes. In particular:
    - *Notice period*: 30 days' notice;
    - *Information required in the notice*: written notice of the type of content or posts that would be impacted by the changes, together with guidance on how best to format or publish following implementation of the changes;
    - *Trigger for notice*: any algorithm change that would impact organic content, post reach or engagement. Any substantive changes to Facebook Newsfeed and video products should automatically trigger a notice requirement.

- CRA has concerns regarding the potential for digital platforms to cease surfacing content produced by Australian media organisations in response to the imposition of a mandatory fee structure (i.e. replicating the action taken by Google in Spain). CRA is of the view that any reduction in circulation of content by Google, and other digital platforms of significance, which might arise in retaliation to remuneration requests from media organisations, could have an immense impact on the ability of Australian media

organisations (including commercial radio networks) to generate revenue across digital assets. CRA urges the ACCC to take this into account and to include anti-discrimination measures in the Digital Platform Code.

Open communication with digital platforms

- The existence of an open and direct line of communication with digital platforms would greatly assist in addressing the imbalance between media and the digital platforms.

- The commercial radio industry would like to see contact points to cover both commercial issues and infringement issues. This will enable a radio station properly to control the use of its content by the digital platforms.

Dispute resolution

- The Digital Platform Code must establish clear dispute resolution mechanisms, which are cost effective, timely and efficient.

- CRA supports a process involving alternative dispute resolution – for example, mediation or third party determination – but any such process must be carefully structured to make it clear and user friendly. Overly complex processes tend to favour the larger party and so will not achieve the objective of correcting the imbalance between digital platforms and media businesses.

- Any system of third party determination should be accompanied by clear and detailed procedural rules.

Review

- CRA supports a periodic review to ensure that the Digital Platform Code is working as intended. A three or five yearly review may be appropriate.
- The review should include consideration of whether the Digital Platform Code should be extended to new digital platforms, such as Apple or Amazon. It should also look at the issue of discrimination towards particular Australian media businesses.

B. DETAIL

1. Definition of news

CRA does not support the application of a 'news media' qualifying threshold to the commercial radio industry. Such a threshold is likely to place commercial radio at a significant disadvantage when compared to other platforms. Accordingly, CRA submits that the Digital Platform Code should contain a provision exempting radio from compliance with the news threshold.

News Media. The commercial radio industry has concerns regarding the application of the Digital Platform Code to a narrowly defined set of 'news media'. This has the potential to exclude much commercial radio content from the Code, leaving radio to fight the bargaining imbalance with the digital platforms unsupported by Government or regulators. Designated digital platforms would have no obligation to negotiate fairly with commercial radio stations. This would place radio - particularly the 218 stations in regional Australia - at a huge disadvantage when compared to digital platforms and other media operators.

CRA strongly submits that the Digital Platform Code should govern relationships between designated digital platforms and all content published by commercial radio stations licensed under sections 36 and 39 of the BSA. Such stations should not be subject to the hurdle of proving that they are 'news media businesses'. Practically, it is difficult to disaggregate news content from the other content provided by commercial radio broadcasters who frequently intersperse news and current affairs content into general programming and topical discussion across the day.

Commercial radio stations play a vital role in the community, through radio's interactive format, the provision of news, Australian music and local content, community service announcements, emergency information and participation in local events. It is often difficult to separate news elements from other elements in commercial radio station formats. Commercial radio programs are often 2 or 3 hours long and are usually broadcast live. News is necessarily intertwined with other content.

Commercial radio stations do not necessarily deliver news or community content in a traditional program format such as hourly bulletins, or separate news programs. It is common for radio broadcasts to be interwoven with discussion about topical issues of the day that are in the public interest.

For example:

- the Covid-19 pandemic;
- the bushfires earlier this year;
- the recent riots in the United States following the death of African American man George Floyd; and
- commentary on local events, such as school sports events or community gatherings.

It is well documented that digital platforms such as Google and Facebook have greatly disrupted the media market by disintermediating the traditional relationship between content production, audiences and advertisers. This disruption is system wide and, in radio's case, should not be confined to news media.

Regional commercial radio stations also contribute significantly to regional economies in Australia, by providing employment to local people and support for local businesses. The availability of an affordable advertising platform, which penetrates deep into the local community, is vital for local businesses.

CRA urges the ACCC to ensure that commercial radio stations are covered by the Digital Platform Code by virtue of their status as licence holders under sections 36 and 39 of the BSA. The application of any further qualification thresholds – such as the provision of news – is likely to place commercial radio stations at a significant disadvantage when compared with the larger media operations against which commercial radio stations compete for listeners and advertising revenue.

Accordingly, CRA submits that the Digital Platform Code should contain a provision exempting commercial radio stations licensed under sections 36 and 39 of the *Broadcasting Services Act 1992* from compliance with the news threshold.

2. Digital platform services to be covered

The Concepts Paper addresses the issue of which digital platform services should be captured by the bargaining code.

CRA's view is that all businesses owned by Facebook and Google must be covered by the Digital Platform Code. Of particular relevance to radio are any voice activation services, such as Google Assistant and related services provided through **Google Home** hardware and home automation devices.

The significant bargaining power that Google and Facebook hold in relation to online referral services means that all products and services that they own have the potential to distort the market. Facebook currently owns **Instagram**, **Messenger** and **WhatsApp** which play significant parts in Australian news media organisations' ecosystems, by providing additional channels through which to surface media content and drive revenue. The dominant video provider *YouTube* is owned by Google. It is vital that such platforms are covered by the Digital Platform Code.

The acquisition and supply of data by Google and Facebook mean that even apparently discrete products and services can assist such platforms in completing the entire 'jigsaw' of consumer behaviour, in a way that media businesses are unable to match.

Both organisations are heavily horizontally and/or and vertically integrated across the digital advertising supply chain, owning an array of tech stack providers that leverage the data collected across the chain and have a supercharged ability across multiple platforms to monetise content and data without sharing the costs of content production that are borne by other media participants.

The Digital Platform Code must be future proof, and, accordingly, should not set out an exhaustive list of services. Such an approach would require frequent updating and reliance on the Code would frequently be preceded by a discussion as to whether a particular service owned by Google or Facebook were covered by the Code.

The threshold issue of whether a service is covered is likely to work as a practical barrier to access or reliance on the Digital Platform Code by media organisations.

Further, it is vital that the Digital Platform Code can be easily applied to other digital platforms, if issues arise in the future.

The Digital Platform Code should contain a set of principles that allows the inclusion of other dominant players, such as Amazon and Apple, as the need arises. For example, Amazon (Alexa) and Apple (Siri and iCar) have the potential to be significant players in the supply of audio content.

3. Monetisation and sharing of revenue from the use of news

CRA is keen to see a remuneration mechanism established to ensure that media businesses are fairly compensated, particularly bearing in mind:

a. the value to the digital platforms of the content created by media businesses; and
b. the data flowing from users' access to such content.

CRA broadly supports a framework founded upon Option D in the Concepts Paper (collective licensing), while noting that this does not prevent the Digital Platform Code from also addressing the ACCC's approach to authorisations for individual collective bargaining arrangements (Option B - collective bargaining).

It is imperative that any such framework rebalance the remuneration structure for the monetisation of content and address current bargaining power disparities between CRA's members and the digital platforms. CRA will resist any proposed framework that:

(i) imposes too narrow a definition of 'news media organisation' on commercial radio as a threshold for accessing payment (see section 1 above);

(ii) has the potential to increase the level of mandatory reporting or other administrative burden on the commercial radio industry. CRA has outlined in previous submissions to the ACCC the extensive reporting obligations on commercial radio – particularly in regional areas – and would be pleased to provide further detail on this if required by the ACCC;

(iii) has the potential to become as costly, time consuming and complex as the current collective licensing regime under the *Copyright Act 1968*. CRA urges the ACCC to consider carefully the defects in the current copyright licensing regime and to seek to avoid replicating those complexities and impracticalities in any collective licensing framework applicable to news media and digital platforms. CRA would be pleased to provide further information regarding its recent experience in the Copyright Tribunal if required; and

(iv) relies too heavily on proof of loss of revenue by media organisations rather than assessing the revenue gained by digital platforms as a result of radio content or user data. The gain made by the digital platforms should be the key determinant in assessing the fee that should be paid to media organisations, as reductions in revenue may be attributable in part to other causes. While lost revenue may be one of several relevant factors in calculating the feel payable by the digital platforms to media businesses, a focus solely on lost revenue will not reflect the gain made by digital platforms and may impose too heavy a reporting burden on radio.

4. Assessment of an appropriate fee[1]

CRA restricts its comments in this submission to conceptual frameworks rather than specific fee proposals. This is due to the lack of data regarding:

- the radio specific revenue derived by Facebook and Google; and
- the revenue derived by Facebook and Google relating to the provision of data.

(a) Use of radio content by Facebook and Google

Facebook and Google use content created by commercial radio stations. This content includes:

- Australian radio content (including news and community information) placed on Facebook pages; and
- extracts of or hyperlinks to content (including news and community information) on Google.

Facebook and Google obtain value from the use of Australian radio content from:

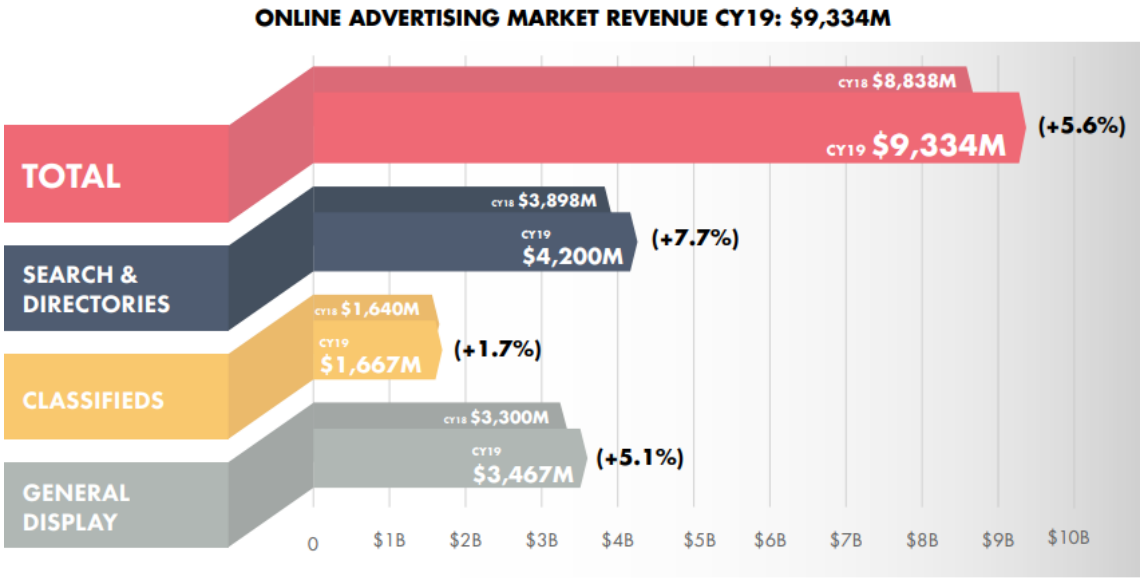
- the generation of advertising revenue. For example:
    - Google ad exchange for display, video via radio websites or AMP pages;
    - Google search adverts that display around radio content in organic Google search listings;
    - video advertising pre/mid content published by radio stations on Facebook; and
    - Facebook advertising around its Newsfeed content;
- the creation of valuable customer data sets that can then be either:
    - sold to other businesses;
    - used to generate more targeted advertising revenue; or

[1] CRA has engaged the assistance of an external valuation expert in establishing the proposed fee mechanism.

- create value in some other way, for example, by attracting advertisers by claims of unique data sets (frequently within 'walled gardens' so not subject to external impartial review), by the improvement of the user experience across Google and Facebook platforms, or by using data to augment and drive usage of their ad tech infrastructure for which they receive fees. These issues were recently raised by CRA in its Adtech submission to the ACCC.

(b) <u>Advertising revenue derived by Facebook and Google</u>

The advertising revenue generated by the digital platforms has been increasing at the expense of other media businesses. A report from PwC Australia[2] recorded that the Internet Advertising market increased from $4.6 billion in 2014 to $9.3 billion in calendar year 2019 split in 2019 as follows:



Of the above categories, it is likely that the search and directories category as well as the general display category relate to the advertising that would be placed around radio content rather than classifieds. These categories total $7.667 billion.

The 2019 PwC outlook report forecast the increase in revenue earned by the internet advertising market to continue as follows:

[2] Source: IAB Australia/PwC Online Advertising Expenditure Report, Qtr Ended Dec 31 2019, CY2019

Internet Advertising market (A$ million)

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2019-2023 CAGR
Search	2,223	2,539	3,103	3,294	3,567	3,884	4,253	4,687	5,198	5,775	
% change		14.2%	22.2%	6.2%	8.3%	8.9%	9.5%	10.2%	10.9%	11.1%	10.1%
Display	1,453	2,120	2,687	2,848	3,300	3,847	4,513	5,321	6,284	7,440	
% change		45.9%	26.7%	6.0%	15.8%	16.6%	17.3%	17.9%	18.1%	18.4%	17.7%
Classifieds	929	1,135	1,300	1,500	1,640	1,802	1,988	2,203	2,445	2,719	
% change		22.1%	14.6%	15.4%	9.3%	9.9%	10.3%	10.8%	11.0%	11.2%	10.6%
Total	4,605	5,794	7,090	7,642	8,506	9,534	10,754	12,210	13,926	15,933	
% change		25.8%	22.4%	7.8%	11.3%	12.1%	12.8%	13.5%	14.1%	14.4%	13.4%

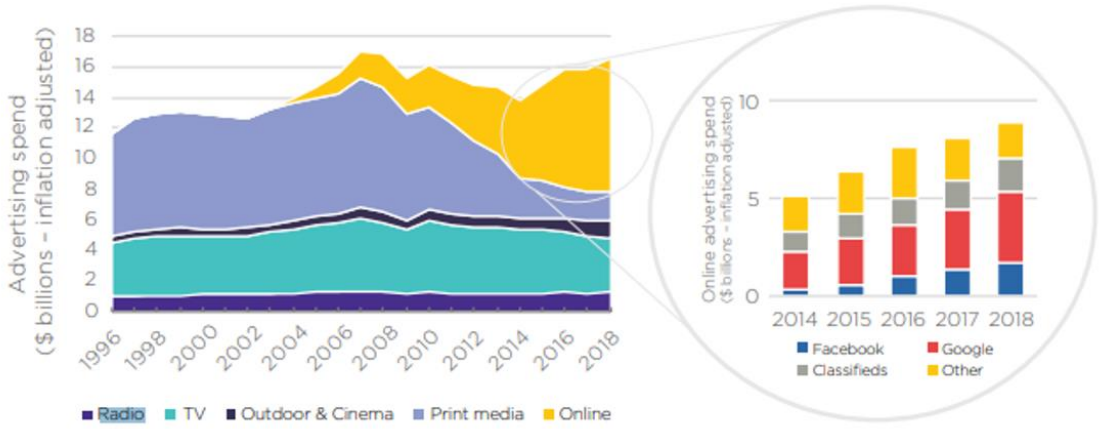
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2019-2023 CAGR
Video	276	484	766	1,100	1,375	1,716	2,199	2,685	3,198	3,783	
% change		75.2%	58.2%	43.6%	25.0%	24.8%	28.2%	22.1%	19.1%	18.3%	22.4%

Video is a subset of Display and therefore has been excluded from the total
Source: IAB Australia, PwC analysis

Given the historical trends, some of this increase is likely to be at the continued expense of Australian media businesses, including commercial radio stations.

Whilst the advertising revenue generated by the digital platforms has increased significantly, the advertising revenue earned by Australian commercial radio stations has suffered a decline in real terms. The nominal revenue is depicted in Figure 3 of the Digital Platforms Inquiry Final Report:

Figure 3 Australian advertising expenditure by media format and digital platform



Source: ACCC estimates of spend relating to Australian customers based on CEASA data and information provided by market participants. Amounts are shown in 2018 Australian dollars[7]

The above graph shows that Australian advertising revenue earned by commercial radio stations has remained relatively flat in nominal terms over the past ten years, which means that it has declined in real terms. At this time, it is difficult to say with any precision how much advertising revenue has been lost by CRA members to Facebook and Google.

(c) Value of data to Facebook and Google

To the extent that user data is utilised to generate further advertising revenue, and improve its advertising targeting across all of its advertiser facing services, then its value is captured in the advertising revenue referred to above.

However, the additional value derived from the sale of data or the use of data for other purposes (for example the improvement of the user experience across all of Google and Facebook's consumer-facing services) will not be captured in the advertising revenue recorded above. The revenue generated from these activities is not currently reported by Facebook or Google, but its value is believed to be substantial.

Commercial radio stations should be compensated by the digital platforms for the use of their content. The compensation should be based on the value derived from advertising revenue by Facebook and Google, relating to the radio content. That revenue represents the cash flow from which a fee should be determined and to which a fee should be attached, at least for the purpose of determining an initial amount. The fee should also be augmented by a figure to reflect the value flowing to Google and Facebook from their use of the data generated by user interaction with radio content.

(d) Methodologies for the estimation of reasonable royalty rates

REASONABLE ROYALTY

A reasonable royalty may be defined as the sum which would be agreed between a willing licensor and a willing licensee in an arm's length negotiation with both parties acting knowledgably and without compulsion as at the date the licence is granted.

The most frequently used approaches for determining a reasonable royalty, whether for the purpose of entering into a licence, or for valuing IP in the context of a transaction, tax, transfer pricing or a dispute, are:

(i) a **cost approach**, which has regard to the costs of creating an asset of equal utility.

(ii) a **market approach**, which considers the royalty by reference to other transactions in the market;

(iii) an **income approach**, which has regard to the incremental cash flows to be derived from the IP and, in some circumstances, the profitability of the licensee; and

The last two approaches are also recognised as acceptable methods of determining a reasonable royalty in the context of valuing intangible assets in International Valuation Standards 210 Intangible Assets (**IVS 210**), which states:

> Two methods can be used to derive a hypothetical royalty rate. The first is based on market royalty rates for comparable or similar transactions. A prerequisite for this method is the existence of comparable intangible assets that are licensed at arm's length on a regular basis. The second method is based on a split of profits that would hypothetically be paid in an arm's length transaction by a willing licensee to a willing licensor for the rights to use the subject intangible asset.

Each approach is explained in more detail below.

(i) The cost or "design around" approach

The cost or "design around" approach is based on the principle that the amount a licensee is prepared to pay would be capped by the cost of designing around the relevant IP rights in order to acquire an asset of equal utility to the asset being offered for licence.

Although IVS 210 does not specifically identify the cost approach as a methodology for determining a royalty rate, it does identify the cost approach as a methodology for valuing intangible assets. It states that under the cost approach, the value of an intangible asset is determined based on a replacement cost of a similar asset or one providing similar service potential or utility.[3]

(ii) Market approach

The market approach is a commonly accepted method for valuing any asset. In the context of determining a reasonable royalty rate, it is applied by considering licences comparable to the licence being determined. The comparability of a licence to the licence being determined depends primarily on the extent to which the following factors differ from the licence being considered:

- the nature of the rights being licensed;
- the parties to the licence. In other words, licences entered into by the actual licensor and actual licensee would be more relevant as comparables than licences entered into by other parties, as it may demonstrate a willingness to enter into licences on those terms;
- the benefits (or incremental cash flows) likely to be derived. For example, assuming the licence under consideration is for a product which earns a profit margin of 50%, then a licence for a product which earns a profit margin of 30% will be less comparable than a licence for a product which earns a margin of 45%;
- the date of the licence. For example, a licence entered into 10 years ago is likely to be less comparable than a licence entered into 1 year ago;
- the territory. For example, if the licence under consideration is concerned with exploitation in Australia, then a licence entered into for exploitation in Japan is likely to be less relevant than a licence entered into for exploitation in Australia. The primary reason why territory is relevant is that the economics of different territories may be different, with the resulting incremental cash flows tending to be different;
- exclusivity. If the licence under consideration is for non-exclusive rights, then a licence for non-exclusive rights is likely to be more comparable than a licence for exclusive rights;
- ability of different parties to monetise or utilise the rights. For example, it may be more efficient for a particular party that does not incur production costs, or if a party is horizontally or vertically integrated.

The above list is not intended to be exhaustive. Other factors may be relevant, depending on the circumstances.

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[3] IVS 210, paragraphs 70.1 and 70.3

(iii) Income approach

The income approach is a commonly accepted method for valuing any asset. In the context of determining a reasonable royalty rate, it would be applied by considering:

- the incremental cash flow benefits to be derived from the use of the asset. This is sometimes referred to as the "available profits" approach. The theoretical premise for this approach is that a licensee would be prepared to pay a portion of its incremental cash flow benefits to the licensor in order to generate and keep the remaining cash flow benefits; and
- the extent to which the asset being licensed contributes to the licensee's profits. For example, the licensed asset may be the primary contributor to the underlying product (as with a patented pharmaceutical compound, or the copyright in a book) or may be only a minor contributor to the underlying product (as with a licence for only one patent in a motor vehicle engine, for which there are many hundreds of patents as well as trademarks and copyright).

The income approach assumes that a willing licensee would be prepared to forego a portion of its anticipated incremental cash flow benefits (or profit) from the use of IP rights by way of a royalty in return for the ability to earn the remainder of those benefits. In using this approach it is therefore necessary to identify the benefits foregone and obtained by the parties as a result of the licensing agreement. This in turn requires:

- the identification and quantification of the incremental cash flow benefits arising from the use of the IP; and
- the appropriate allocation of those benefits between licensor and licensee.

An important aspect of the income approach is the underlying fundamental valuation concept that the value of any asset is the value of the future cash flows which will be derived from its use. **In simple terms, this concept is that the amount a willing buyer (or willing licensee) will pay to acquire an asset from a willing seller (or willing licensor) is dependent on the cash flows the willing buyer (or willing licensee) can derive from the use of that asset.**

A common starting point for allocating profits is to attribute a 25% share of the profit to the licensor. As an example of the application of this common starting point, if a licensed product had a profit margin (as a percentage of sales) of 40%, the appropriate starting point would be the 25% share of profit multiplied by the profit margin of 40%, or a royalty rate of 10% of sales. In other words, conceptually, a licensee would be prepared to pay a royalty of 10% of sales (being 25% of its profit margin) in order to retain its remaining profit (equal to 30% of sales).

Various factors will impact whether the share should be higher or lower than the starting point of 25%.

Factors which would tend to increase the royalty are:

- the licensee being a competitor with the licensor in the relevant market;
- the licensee providing limited or no added value to the licensed product;

- the licensee having to make little or no capital investment in order to manufacture the product;
- the licensee having to make little or no marketing investment in order to sell the product; and
- the licensee benefiting from the sale of other products sold in tandem with the licensed product.

Factors which would tend to decrease the royalty are:

- the licensee providing access to a market that the licensor could not otherwise access;
- the licensee providing substantial added value to the licensed product;
- a high level of investment by the licensee in order to manufacture the licensed product;
- a requirement for the licensee to make a large marketing investment in order to sell the licensed product; and
- the licensee not benefiting from the sale of other products in tandem with the licensed product.

In the context of this Inquiry:

- there is available data on the advertising revenue earned by Facebook and Google;
- there is limited data on the profit that is earned from the advertising revenue and it is likely that profit resides in companies outside Australia;
- there is limited information on the intangible or indirect benefits to Facebook and Google, such as the ability to leverage data from across the range of Google and Facebook's platforms; and
- it appears that Facebook and Google make a very small contribution to the investment when using the radio content. The majority of the investment is incurred by the Australian radio stations and therefore any licence fees payable for use of the content should be towards the higher end of a reasonable range (applied to either profit or revenue).

ROYALTY STRUCTURES

IP rights can be acquired either by outright purchase or by licence. The two are closely related as the value of IP for outright purchase is often (and most commonly) determined by capitalising the royalty charges that would have applied under a licence.[4]

[4] IVS 210, paragraph 60.18

As explained above, a royalty determined in commercial circumstances should be linked to the benefits derived from the use of the rights to which it relates. In other words, the greater (or lesser) the benefit derived from its use, the higher (or lower) the quantum of royalty paid. For licences, the royalty payable is typically determined by one, or a combination of, the following bases:

(i) a percentage of revenue;

(ii) a price per unit sold or made;

(iii) a fixed amount or a fixed amount per annum; and

(iv) a minimum amount plus one of the above.

(i) A percentage of revenue structure

A percentage of revenue structure links the licensor's return to both the volume and price of the sales of the licensee's product or service.

An example of this structure is in publishing, in which an author will typically receive a copyright royalty of 10% or 15% of the sales price of the relevant book, regardless of whether it is sold for its recommended retail price (say $30) or at a knock down sale price (say $3).

In this circumstance, the licensor will receive a royalty based on both:

- the volume sold. Each sale will generate a royalty; and
- the price of each sale. The licensor's royalty will increase or decrease as the retail price increases or decreases.

In other words, the licensor shares the licensee's risks as to both volume and sales price.

A percentage or revenue structure usually recognises that the relevant asset being licensed is a significant (if not primary) contributor to the product being sold, and therefore contributes to the generation of revenue. For example, this would be an appropriate structure for an author's copyright in a novel, as the copyright is clearly a contributor to the generation of revenue from the sale of the product. However, it would not be an appropriate structure for the copyright in an instruction manual for manufacturing equipment. Whilst the instruction manual may be essential for use of the manufacturing equipment, the copyright is not a contributor to the income generating capability of the equipment.

(ii) A price per unit structure

A price per unit structure links the licensor's return to the volume of the product either sold or manufactured, but not to the price.

An example of this structure was the manufacturing of CDs and DVDs, which (whilst still subject to patent) attracted a royalty based on the number of units manufactured.

Under this structure, the licensor would receive a royalty based on the volume manufactured or sold only. The royalty the licensor receives will not increase or decrease with changes in sales price.

A price per unit structure might apply when the relevant asset being licensed is a contributor to the income generating capability of the product being sold. Although the royalty is no longer based on sales price, the price per unit approach would provide more certainty as to the amount of royalty to be paid, and can protect the licensor from retail market competition driving the sales price of the relevant product downwards. For example, as CDs and DVDs were manufactured under non-exclusive licences worldwide, the price per unit approach ensured a predictable royalty stream for licensors and a level playing field for the licensees.

(iii) A fixed amount structure or flat fee

A fixed amount structure (or flat fee) provides the licensor with a guaranteed amount regardless of the licensee's sales.

An example of this approach is in early stage biotechnology, where lump sum royalties are paid whilst the technology continues to be developed and income is not being generated.

A fixed amount may also apply for non-commercial licensees who will not generate income from the use of the licensed asset. Clearly, in such circumstances, a link to revenue would be inappropriate.

(iv) A minimum amount structure

Minimum amount structures are typically included either to cover the licensor's licensing administration costs or to dissuade licensees that are not seriously inclined towards investing in the success of the licensor's IP. The latter example applied on occasion in the licensing of brands and trademarks, thereby incentivising the licensee to focus on selling the licensed product instead of alternative brands, thereby maximising the benefit from the minimum amount paid.

(e) Appropriate methodology and fee structure for the digital platforms

Income based approach to reasonable royalty

- **CRA considers that an income based approach is a reasonable approach to adopt as:**
    - **it is apparent that substantial advertising revenue is being earned by the digital platforms at the expense of Australian media businesses;**
    - **further undisclosed revenue may be generated from the use and sale of data;**
    - **it is a simplified approach that does not require any additional reporting from commercial radio stations; and**
    - **the radio content used may be the primary contributor to the digital platforms' ability to generate a subset of advertising income. For example, advertising revenue earned by Facebook for advertisements placed on the Facebook page of a radio personality is directly tied to the content generated by that person.**

- a cost or “design around” approach is not appropriate as:
    - the content being used by the digital platforms cannot (in effect) be recreated or acquired from any source other than CRA’s members; and
    - it is not commercially feasible to design around the market share currently enjoyed by either Facebook or Google;
- a price per unit approach is not appropriate because there is no relevant volume data to which a price could be applied. A price per unit approach might be possible if relevant data is provided, for example data that identifies the number of clicks on pages containing radio content. However, this approach would be data intensive, difficult to audit and difficult to apply in practice;
- a market approach is not appropriate as there are few comparable licences. An analysis of cases in the Copyright Tribunal show the limited assistance given by valuation on the basis of comparable licences.

Fixed fee structure or flat fee

CRA considers that a fixed structure or flat fee approach would be most appropriate as:

- **it provides certainty both as to the costs that will be incurred by the users and the revenue that will be earned by the owners of the radio content;**
- **it would be simple to administer, requires no additional reporting by radio stations and minimal reporting by the digital platforms; and**
- **the current lack of information relating to the advertising revenue generated by the digital platforms specifically attributable to radio content renders it difficult to justify a percentage of revenue structure specific to radio.**

Given the high growth rates in advertising revenue enjoyed by Facebook and Google, any fixed fee should be escalated annually based on the growth in Australian advertising revenue generated by the relevant digital platforms (currently Facebook and Google).

(f) Additional information required

Facebook and Google have not disclosed any detailed breakdown of either their advertising revenue or the content on which they rely to generate that revenue. This makes the task of determining a reasonable royalty difficult because the full value achieved by the digital platforms from the use of radio stations’ content is currently unknown.

In order to determine a reasonable royalty or compensation amount, additional information from Facebook and Google is necessary.

In particular, it would be necessary to identify the total revenue generated from the advertising specifically placed around radio generated content. In addition, it would be necessary to identify any other cash flow streams or value generated using the consumer data collected from customer interactions with Australian radio content.

It is clear that Facebook and Google have collected extensive data. Whilst other data is likely to be relevant to determining the value derived by those entities, it would be appropriate, as a starting point, to focus on the revenue streams that are generated from the use of CRA members' content.

The essential information required for the purpose of assessing an appropriate fixed fee is as follows:

- Advertising revenue derived by Facebook and Google for the last 5 years, detailed by source of content;
- Any content statistics maintained by Facebook and Google; and
- Any agreements entered into by Facebook and Google for the purpose of using content on those platforms.

- Further information is required for the purpose of assessing an appropriate fixed fee:
    - advertising revenue derived by Facebook and Google for the last 5 years, detailed by source of content;
    - revenue derived by Facebook and Google relating to the provision of data for the last 5 years;
    - any content statistics maintained by Facebook and Google; and
    - any agreements entered into by Facebook and Google for the purpose of using content on those platforms.

5. Sharing of user data

Digital platforms have access to vast reserves of data collected from their users. This is a valuable commodity, particularly to advertisers. Data is the currency on which the digital platforms have been built, enabling the creation of algorithms that direct and control the content and advertising that is visible to users.

There is little transparency over questions of how data is harvested, used and traded by digital platforms. Radio stations need to understand what is being collected and be given better power to control and restrict use of data flowing from advertisements and other content on their platforms. This remains the case, notwithstanding that the radio platforms may have been accessed through Google or Facebook.

CRA appreciates that there are privacy concerns around the sharing of data between media and the digital platforms. However, the commercial radio industry questions whether the digital platforms are the best gatekeepers of such a comprehensive array of user data.

Accordingly, the Digital Platform Code must address the current inability of media businesses to negotiate the extent of data access by:

- requiring the digital platforms to disclose the extent and nature of the data they collect;
- requiring digital platforms to request user consent for the sharing of data with specified media organisations;

- placing restrictions on the digital platforms' use of data collected through radio content; and
- attaching a value to the digital platforms' use of user data when assessing the revenue that should flow from the digital platform to the media organisation for use of news content.

Additional data that should be disclosed by digital platforms – Facebook Link Embed

CRA's members have reviewed the data summary provided by Facebook and consider it broadly accurate. However, the commercial radio industry would like to see further data provided as follows:

Advertising revenue

- Facebook and Google should provide data on advertising revenue generated as a result of radio station content on their platforms (reflecting user time on site and user engagement).

Voice activation data

- Google should provide data relating to voice queries that could potentially activate the station. This would enable stations to build solutions for voice commands.

WhatsApp, Instagram and Messenger

- Facebook should provide data relating to WhatsApp, Instagram and Messenger as these form key parts of the news media ecosystem.

Link Embed

- Link Embed posts are posts that see a website URL inputted to Facebook. Facebook then scrapes different components from the URL (e.g. H1, image, body copy) and builds a Link Embed post. The creator of the post can then add copy to the top of this post (commonly known as a "social sell", "social copy" or "caption") and update the components Facebook scraped from the page so long as the page itself is associated with the website through domain verification before posting.
- This style of post is traditionally the most commonly used by news media organisations on Facebook Newsfeed because of resourcing, revenue and the dissemination of information.
- In terms of resourcing, news media organisations face pressure to output a higher volume of content with fewer staff as past revenue streams dry up. Further, the median wage of someone who can produce a video or build an infographic is higher than that of a journalist. Subsequently, text-based content has become the core output of media organisations' digital departments. The most time and cost-effective way of then sharing that text-based content on Facebook is through Link Embed posts.
- In terms of revenue, website visits are vital to news media organisations. For example:
    - serving on-site display advertising, either "direct sold" or programmatically filled, to those website visitors; and

    - marketing themselves based on audience size. For instance, a publisher citing their Unique Audience size from Nielsen Digital Content Ratings to a potential advertiser.

- Link Embed posts are the most effective way of driving website visits to assist with the generation of revenue.
- News media organisations have a responsibility to provide the Australian public with timely, detailed and accurate reporting on news and current affairs. A Link Embed post is the most effective way of then sharing that information with their Facebook audience.
- Facebook currently provides a large amount of in-depth data and insights for video content. Examples of this in the *'Facebook Available Data'* list include: Distribution Scores (Section 2), Performance Insights (Section 3), Detailed Video Insights (Section 3), Reference File Insights (Section 9), Audience Insights (Section 12), Video (Section 12), Loyalty Tab (Section 12), Retention Insights (Section 12).
- However, the data provided for Link Embed posts is nowhere near as thorough or insightful. This means that journalists are forced to rely on assumptions. These assumptions can then lead to click-bait and engagement-bait practices in order to increase the performance of text-based content.
- Clearer and more digestible data on why and how Facebook's algorithm did or did not surface a Link Embed post would enable journalists to use real data rather than assumptions and would enable them to move away from click-bait and engagement-bait practices.
- Ads Manager's "Quality Score" could be a model to use for this – giving journalists insight into how the algorithm has perceived the quality of the content and what role engagement has played in surfacing or not surfacing that content to a broader audience.
- Facebook's "Page Quality" is not sufficient. Post-level quality data would prevent unethical tactics from being used rather than Page Quality penalising a Facebook Page after the unethical tactic has been used.

6. Algorithms

There is currently little transparency regarding the use of algorithms by digital platforms. Google controls the order and content of search results, while Facebook controls the reach of content created by radio stations, giving them growing collective control over what consumers see, do and think.

Google and Facebook's respective monopoly positions mean that they are able profoundly to affect the content available to users. Both platforms act as a gateway to the surfacing and prominence of media content of all forms.

This has the potential significantly to limit diversity, reduce quality and create 'filter bubbles' of restricted content, often with no regard for originality, factual accuracy, balance or diversity of content.

The quality content produced by traditional media organisations, such as radio, could potentially be pushed lower in rankings by digital platforms' algorithms, as they seek material that will engage users' attention, with no regard for the authenticity or quality of such content.

Algorithms should be more transparent

The digital platforms generate revenue by requiring radio stations to pay for reach, as the opacity of algorithms makes it difficult for those stations to extend reach simply by adjusting their content.

This is particularly unfair when the stations' content on Facebook pages engages consumers and allows Facebook to target advertisers around that user demographic and content.

For example:

- A radio station may have a Facebook page with 700,000 followers. However, Facebook's algorithms ensure that each post reaches only a fraction of those followers. Facebook requires payment per post to reach a greater proportion of followers.
- Accordingly, stations are forced to pay Facebook to ensure their posts reach their own followers. Greater transparency of Facebook algorithms would enable radio stations to adjust their posts so that they would reach more followers and would prevent Facebook from taking this additional slice of revenue from media publishers.
- Stations would like to see greater transparency on why the algorithm did or did not surface 'Link Embed' posts (see *Use of Data* section above).

Algorithms should protect original content

The protection of original content is a key concern for radio. It is not unusual for radio to create original content – such as a breakfast show interview with a politician, prominent personality, public figure or other newsmaker – which is then substantially reproduced by another online provider without consent from the radio station.

Google's search algorithms sometimes push the infringing content above the original content, thus directing consumers to the site that has 'ripped off' the content. The infringing website is often a larger entity than the radio station that produced the content.

The Digital Platform Code should require digital platforms – particularly Google - to give priority to original content in searches. A straight forward and speedy take down process should exist alongside, to enable original content creators to request immediate take down of infringing material.

Changes in algorithms

Commercial radio stations have previously been placed at a disadvantage when Google and Facebook have altered their algorithms without adequate notice.

For example:

- In 2018, Facebook started preferencing community posts over commercial posts. This meant that radio stations started supplementing public Facebook pages with private

groups on particular topics. This required sudden and new investment, which can be difficult to manage with no notice;

- After the Christchurch shooting in 2019, Facebook deprioritised its live Facebook videos and preferenced Facebook Premiere. The reasons for doing so were absolutely understandable but radio was informed of these changes – which affected its legitimate content – only through general media releases, rather than through a formal notice to publishers containing technical detail and optimisation assistance.

CRA supports the inclusion in the Digital Platform Code of provisions requiring that notice be given of algorithmic changes. In particular:

- *Notice period*: 30 days' notice (in the absence of exceptional circumstances);
- *Information required in the notice*: written notice of the type of content or posts that would be impacted by the changes, together with guidance on how best to format or publish following implementation of the changes;
- *Trigger for notice*: any algorithm change that would impact organic content, post reach or engagement. Any substantive changes to Facebook Newsfeed and video products should automatically trigger a notice requirement.

Non Discrimination

- CRA has concerns regarding the potential for digital platforms to cease surfacing content produced by Australian media organisations in response to the imposition of a mandatory fee structure (i.e. replicating the action taken by Google in Spain). CRA is of the view that any reduction in circulation of content by Google, and other digital platforms of significance, which might arise in retaliation to remuneration requests from media organisations, could have an immense impact on the ability of Australian media organisations (including commercial radio networks) to generate revenue across digital assets. CRA urges the ACCC to take this into account and to include anti-discrimination measures in the Digital Platform Code.

7. Open communication with digital platforms

The existence of an open and direct line of communication with digital platforms would greatly assist in addressing the imbalance between media and the digital platforms.

The commercial radio industry would like to see contact points to cover both commercial issues and infringement issues. This will enable a radio station properly to control the use of its content by the digital platforms.

Of particular concern is the current difficulty encountered by media publishers in requesting the takedown of infringing material. Radio stations create original content, such as an interview of a politician or other newsmaker by an FM breakfast team. This content is then substantially reproduced, without authorisation, by an online publisher in breach of the *Copyright Act 1968*. It is extremely difficult for the radio station to achieve the takedown of the infringing material.

In Google's case, this is made more problematic by opaque search algorithms, which mean that the infringing publisher may appear above the original publisher in the search results. This means that the infringer obtains more online traffic than the content creator. The absence of a clear communication channel or take down process means that the content creator has no straight forward means of preventing this from happening.

8. Dispute resolution

The Digital Platform Code must establish clear dispute resolution mechanisms, which are cost effective, timely and efficient.

A process involving alternative dispute resolution – for example, mediation or third party determination – merits consideration but must be carefully structured to make it clear and user friendly. Overly complex processes tend to favour the larger party and so will not achieve the objective of correcting the imbalance between digital platforms and media businesses.

Any system of third party determination should be accompanied by clear and detailed procedural rules.

Sanctions

The ACCC must be empowered with a range of appropriate and effective sanctions should the designated digital platform fail to meet its obligations under the Digital Platform Code.

The sanctions for breaches of the Digital Platform Code must be sufficiently large to act as an effective deterrent, rather than simply a cost of doing business for the digital platforms. Sanctions must extend beyond the determination of reasonable remuneration in order to have a deterrent effect.

9. Review

CRA supports a periodic review to ensure that the Digital Platform Code is working as intended. A three or five yearly review may be appropriate.

The review should include consideration of whether the Digital Platform Code should be extended to new digital platforms, such as Apple or Amazon. It should also look closely at whether the digital platforms are discriminating against particular Australian media businesses.

Please contact Joan Warner, on [redacted] for clarification on any aspect of this submission.

Commercial Radio Australia