SUBMISSION TO THE ACCC

Draft news media bargaining code

Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, across metropolitan and regional Australia.

CRA is appreciates the opportunity to comment on the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (**Digital Platform Code**), which amends the *Competition and Consumer Act 2010*. This submission also refers to the related Exposure Draft Explanatory Materials (**Explanatory Memorandum**).

CRA strongly supports the ACCC's aim of redressing the fundamental bargaining power imbalance between Australian news media businesses and major digital platforms. The principles of compensation, collective and individual bargaining options, provision of data, algorithmic transparency and final arbitration dispute resolution will all greatly assist in achieving this goal.

CRA appreciates the efforts made by the ACCC to balance the interests of a wide range of stakeholders. Accordingly, CRA has limited its comments to those that are fundamental in ensuring that the Digital Platform Code allows for non-discriminatory access for media stakeholders and is capable of embracing commercial radio stations alongside other, often larger, media businesses.

CRA's key priorities are:

(i) Ensuring that commercial radio stations are able to register under the Digital Platform Code. This will require amendment of the content test to remove the requirement that programs contain 'predominantly core news content' together with the limitation that content must be produced by a 'journalist' (**Recommendations 1, 2, 3 and 5**).

(ii) The Minimum Standards must be maintained in close to their current form. This is vitally important for commercial radio stations, as the Minimum Standards provide information and data that will redress the bargaining imbalance even where stations, particularly smaller ones, may not have the resources to conduct extended commercial negotiations or to enter the arbitration process (**Recommendations 6, 7 and 8**).

(iii) The arbitration process should be refined to provide clarity and transparency on the apportionment and limitation of costs, the appointment of arbitrators, the arbitrator's limited discretion to amend the parties' final offers and clarity regarding the evidence on which the arbitrator may rely. There must be as few areas as possible in relation to which parties can raise disputes or create delay, as this is likely to favour the larger parties who are regularly arbitrating under the Code. (**Recommendations 9 to 14**).

CRA is particularly concerned that the Digital Platform Code may inadvertently exclude many commercial radio stations. This is due largely to the program-based registration system, the requirement that core news be created by a 'journalist', and the core news content 'predominance' test that is difficult to apply to the long, diverse and dynamic programming style common to commercial radio.

CRA would like the ACCC to amend the Digital Platform Code to reflect the comments below and to ensure that commercial radio stations are able to benefit from the Code alongside other media businesses.

1. Recommendations

(i) Eligibility criteria and participation in the Digital Platform Code

Recommendation 1: The Explanatory Memorandum (paras 1.50 to 1.53) should be amended to reflect a broader interpretation of *core news content* consistent with section 52A(1) of the Digital Platform Code. The Explanatory Memorandum should expressly state that core news content will not be *limited* to public interest journalism but will include coverage of community and local events, as well as talk back radio programs that discuss matters covered by the definition of *core news content*.

Additionally, the reference to talk back radio discussions should be removed from paragraph 1.67 of the Explanatory Memorandum. There is no justification for a blanket exclusion of talk back formats, particularly when such discussions frequently cover content that falls within the definition of both *core news content* and *covered news content*.

Recommendation 2: 'Journalist' should be removed from para (a) of the definition of '*core news content'* and replaced with '*is created by one or more persons or other entities in the employment of, or engaged by, a corporation that applies rules of the type referred to in section 52K(1)(a)*.'

Commercial Radio broadcasters are regulated by the Commercial Radio Code of Practice, or in the case of online only content, have equivalent internal standards which apply to the content they produce. These regulations and internal standards should be sufficient safeguards to ensure that whilst technical qualifications such as journalism may not be held, a high degree of professionalism and standards are maintained.

Recommendation 3: Registration should not be subject to a requirement that the program is 'predominantly core news content', as this is likely to exclude most radio content. The predominance test should be removed from section 52H(1) and all programs that 'regularly contain material amounts of core news content' should be registrable.

Recommendation 4: All digital platform services operated by Facebook and Google must be covered by the Digital Platform Code. The services listed in the Explanatory Memorandum are incomplete, omitting services such as WhatsApp, YouTube, Google Assistant and Google Home, all of which generate revenue and increase market dominance for Google and Facebook.

***Recommendation 5*:** The ACCC should review the application of the professional standards test in light of the Full Federal Court decision that online simulcasts by commercial radio stations are not broadcasts and therefore not subject to the Commercial Radio Code of Practice.[1] CRA would like clarification that section 52K(1)(a)(iii) covers content that is created for an online only audience, or, which appears online after being broadcast.

Alternatively, CRA suggests that the professional standards test be replaced, in relation to commercial radio, by a requirement that the content is communicated – whether in broadcast or online format - by a licensee under section 36 or 39 of the *Broadcasting Services Act 1992*.

As a final resort, the ACCC may prefer to clarify the Explanatory Memorandum to ensure that online commercial radio content is not excluded – in circumstances where it would otherwise be included – because it is not covered by the Commercial Radio Code of Practice.

(ii) Minimum Standards

***Recommendation 6*:** The timescale for the provision of updated information by the digital platform corporation to the news business corporation under section 52M(3) should be reduced from 12 months to 28 days from the date of the change. This will ensure that information provided to news media businesses is always current and will achieve consistency between sections 52M(1) and 52M(3).

***Recommendation 7*:** A provision should be added to section 52N(1)(b) to make it clear that the requirement to give notice of significant algorithmic changes applies to any *'change or series of changes*' that are planned to be made to an algorithm. The Explanatory Memorandum should then record that the significance of a series of changes will be considered by reference to their cumulative effect.

***Recommendation 8*:** Section 52N(2)(ii) addresses the notice to be given where a digital platform makes an urgent algorithmic change in response to a public crisis. CRA suggests that the provision should be clarified by replacing '*relates to*' with '*directly addresses*'. Accordingly, the provision would apply where '*the change directly addresses a matter of urgent public interest*'.

(iii) Final Offer Arbitration

Recommendation 9: The Digital Platform Code should contain detail on the mechanism by which the ACMA will select arbitrators. This will ensure a fair range of expertise is represented both across the panel as a whole as well as in each particular arbitration case.

[1] *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd* [2013]

***Recommendation 10*:** The division of costs between the parties must be set out clearly and transparently in the Digital Platform Code. Currently, the Explanatory Memorandum states that under section 52ZG 'bargaining parties will bear equally shared responsibility for the arbitration costs'.[2] However, there appears to be no reference in section 52ZG to the apportionment of costs. This is a key point that must be expressly addressed in the Digital Platform Code, particularly in the context of collective negotiations in which multiple stakeholders may be represented by an industry body, and require more specific guidance in the Code on permitted protocols to facilitate collective bargaining.

***Recommendation 11*:** The Code should include limitations on costs that can be charged by arbitrators appointed either by the ACMA or by the parties. It should also limit the costs to be spent on experts whose evidence is presented to the arbitration panel, including those used by the arbitration panel under section 52ZP.

***Recommendation 12*:** The reference to '*making available*' in section 52ZO(1) should be defined to reflect the current ways in which the digital platforms make use of and benefit from the registered news businesses' content. The news media business creates the content which the digital platform then uses. No express permission is given by the media business for such use.

Accordingly, the reference to '*making available*' in section 52ZO(1) should be defined to reflect the platforms current use of content as follows:

> *52[XX] Meaning of making available news content*
>
> *In this Part, the making available of news content means:*
>
> *a. displaying news content [including headlines, text, images, audio or video];*
> *b. making a snippet of news content;*
> *c. showing search results for news content;*
> *d. creating and publishing a short summary of news content; or*
> *e. if regulations made for the purposes of this paragraph specify any other acts, any of those acts.*

***Recommendation 13*:** Section 52ZO(6) should be amended to make it clear that arbitrators will only be permitted to adjust a party's offer only in clearly delineated and exceptional circumstances.

***Recommendation 14*:** the Digital Platform Code should make it clear that the benefits assessed under section 52ZP(2) must be calculated by reference to a competitive market and not the existing market.

The correct benchmark would be a competitive market in which news media businesses would be able to choose their digital platform partners and in which a digital platform may have no access to news content.

[2] Para 128 Explanatory Memorandum.

Accordingly, an amendment should be made to the effect of inserting a new section 52ZP(4):

> *(4) in considering value in accordance with section 52ZO(1), the panel must take into account the position that the digital platform would be in a competitive market if it did not have access to any Australian news content and its competitors did".*

In addition to the above recommendations, CRA suggests a number of more minor adjustments to provisions in the Digital Platform Code that it otherwise strongly supports. These are set out below in section 10 of this submission.

2. Core news content definition

Subject to our comments in paragraph 3 below regarding the journalist threshold, the definition of core news content appears broad enough to cover news content broadcast by commercial radio stations, including regional stations broadcasting local news and events. However, the explanation in the Explanatory Memorandum appears much more limited and must be amended to reflect the drafting of the Digital Platform Code.

Section 52A(1) defines core news content as content that:

> *(a) is created by a journalist; and*
>
> *(b) that records, investigates or explains issues that:*
>
> *(i) are of public significance for Australians; or*
>
> *(ii) are relevant in engaging Australians in public debate and in informing democratic decision making; or*
>
> *(iii) relate to community and local events.*

This appears to be broad enough to cover the content areas that are key to commercial radio:

- talk back radio discussions where such discussions cover issues caught by the definition of core news content;
- news relating to community and local events. This is particularly relevant to regional radio stations; and
- news segments within entertainment programs, such as scheduled news bulletins, emergency announcements and discussions relating to matters of public significance or debate.

However, the commentary in the Explanatory Memorandum does not appear to reflect the broader drafting of Section 52A(1) and provides a far more limited interpretation of *core news content*.

Core News Content is defined under s52A(1) to cover content that records, investigates or explains issues that, relevantly, are of public significance for Australians; or relate to community and local events. This definition appears reasonably broad yet is interpreted in an extremely limited manner in the Explanatory Memorandum.

The Explanatory Memorandum appears to impose a 'public interest' test on the definition of core news content, which is not consistent with the drafting of the provision. It describes core news content as relating to '*matters of public policy and government decision making'* or '*other matters of public importance'*.[3] The Explanatory Memorandum further states that the broader definition of '*covered news content'* is intended to exclude talk back radio discussions.[4]

CRA submits that talk back radio discussions should be considered to be *core news content* if they cover content that comes within the *core news content* definition at section 52A(1) of the Digital Platform Code.

Talk back is a format that many Australians use to investigate and explain issues of public significance. There are few formats more effective in engaging Australians in public debate. Accordingly, talk back falls squarely within the definition of *core news content*.

Recommendation 1: **The Explanatory Memorandum (paras 1.50 to 1.53) should be amended to reflect a broader interpretation of *core news content* consistent with section 52A(1) of the Digital Platform Code. The Explanatory Memorandum should expressly state that core news content will not be *limited* to public interest journalism but will include coverage of community and local events, as well as talk back radio programs that discuss matters covered by the definition of *core news content*.**

Additionally, the reference to talk back radio discussions should be removed from paragraph 1.67 of the Explanatory Memorandum. There is no justification for a blanket exclusion of talk back formats, particularly when such discussions frequently cover content that falls within the definition of both *core news content* and *covered news content*.

3. Journalist threshold

Under section 52A(1), content must be '*created by a journalist*' in order to qualify as *core news content*. The meaning of *journalist* is unclear and excludes significant amounts of news content created by commercial radio stations.

CRA appreciates the ACCC's goal of excluding non-professional 'bloggers' but submits that the current definition is unduly restrictive and will inadvertently exclude content created by media outlets that would otherwise be covered. The 'journalist threshold' requirement is confusing and may lead to exclusions of equally deserving content. It is the wrong yardstick to use.

[3] Para 1.51 Explanatory Memorandum.

[4] Op cit, para 1.67.

CRA further notes that the revenue test in section 52G, and the professional standards test in section 52K, may better assist the ACCC in excluding certain players, rather than use of a restrictive definition of journalist.

Radio programs are diverse and dynamic, and many include informative and educational discussion of current affairs which may cycle through factual accounts of current affairs, editorial analysis, interview material and reporting on matters of community significance, including through audience engagement formats such as talk back radio. Many regional commercial radio stations may not have dedicated news journalists due to budgetary and staffing limitations. News items are created by a range of individuals who work for the station. This could include producers, presenters and other managers.

To address this threshold issue, whilst still ensuring that the content is created to a high standard, we suggest that 'Journalist' should be removed from para (a) of the definition of '*core news content'* and replaced with '*is created by one or more persons or other entities in the employment of, or engaged by, a corporation that applies rules of the type referred to in section 52K(1)(a)*.' Commercial Radio broadcasters are regulated by the Commercial Radio Code of Practice, or in the case of online only content, have equivalent internal standards which apply to the content they produce. These regulations and internal standards should be sufficient safeguards to ensure that whilst technical qualifications such as journalist may not be held, a high degree of professionalism and standards are maintained. An equivalent change would also be made in the definition of '*covered news content*'.

***Recommendation 2:* '*Journalist*' should be removed from para (a) of the definition of '*core news content'* and replaced with '*is created by one or more persons or other entities in the employment of, or engaged by, a corporation that applies rules of the type referred to in section 52K(1)(a)*.'**

4. Content test

Under section 52D of the Digital Platform Code, the news business must apply to register by a written application that must '*set out every news source that comprises the news business*' (s52D). News source is defined, relevantly, as a *radio program*.

News media businesses must meet the '*content test*' set out in s52H in order to register under section 52E. The test requires that each *news source* (i.e. radio program) creates content that is '*predominantly core news content'*.

Radio programs can be as long as 3 hours and comprise a range of content, including news, discussion, music and entertainment. Program format is dynamic and may change regularly. It would be difficult for commercial radio to satisfy the content test, even in relation to discrete news segments within a much longer program.

Accordingly, the content test in its current form tends to favour the more structured and discrete programs and publications of other media stakeholders. The content test in the Digital Platform Code should allow for non-discriminatory access across media stakeholders, and requires amendment in order to be capable of embracing the distinctive format of commercial radio stations alongside other, often larger, media businesses.

Recommendation 3: **Registration should not be subject to a requirement that the program is '*predominantly core news content*', as this is likely to exclude most radio content. The predominance test should be removed from section 52H(1) and programs or stations that '*regularly contain material amounts of core news content*' should be registrable.**

5. Application to digital platform services

A digital platform must participate in the Digital Platform Code if the Treasurer has made a determination specifying a designated digital platform corporation. The Treasurer may further specify designated digital platform services operated by the digital platform corporation as being subject to the code (section 52C).

The EM lists the following designated digital platform services that are expected to be specified in the Treasurer's instrument:

- Facebook News Feed
- Facebook News Tab
- Instagram
- Google Discover
- Google News; and
- Google Search.[5]

This omits several key services. CRA's view is that all digital platform services operated 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 *Messenger* and *WhatsApp* (as well as *Instagram*) which play significant parts in Australian news media organisations' ecosystems by providing additional channels through which to surface media content and drive revenue. 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.

Google and Facebook generate revenue from these additional services, which all add to their market dominance, and therefore there is no valid basis for their exclusion.

[5] Para 1.34, Explanatory Memorandum.

Recommendation 4: **All digital platform services operated by Facebook and Google must be covered by the Digital Platform Code. The services listed in the Explanatory Memorandum are incomplete, omitting services such as WhatsApp, YouTube, Google Assistant and Google Home, all of which generate revenue and increase market dominance for Google and Facebook.**

6. Professional Standards requirement

The Digital Platform Code provides that news sources must be subject to a '*professional standards test*' in order to be capable of registration under section 52E. The professional standards test is set out at section 52K and, relevantly, states that every news source must be subject to the *Commercial Radio Code of Practice*.

The Full Court of the Federal Court concluded in *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd* [2013] FCAFC 11 that online simulcasts of radio programs are not 'broadcasts'. This means that radio programs communicated online – whether simulcast or not – are not subject to the *Commercial Radio Code of Practice*.

Program content on AM, FM and DAB+ platforms will be covered by the Commercial Radio Code of Practice and it may therefore be arguable that adherence to the Commercial Radio Code of Practice in relation to those platforms satisfies the requirements under section 52E once such content is communicated online.

However, CRA is keen to avoid any argument that online radio content – whether simulcast or not – is not subject to the Commercial Radio Code of Practice and therefore not registrable under section 52E. CRA would like clarification that section 52K(1)(a)(iii) covers content that is created for an online only audience or which appears online after being broadcast.

Furthermore online only content created by commercial radio licensees will not be subject to the Commercial Radio Code of Practice and therefore will not be registrable as a *news source*, even where the content is clearly connected to the primary broadcast.

For example, a current affairs program could do an online only spin off exploring news issues in more detail. CRA submits that such content should be protected under the Digital Platform Code. However, as currently drafted, such content would not satisfy the Professional Standards Test and would not be considered a *news source*, unless section 52K(1)(a)(iii) covers content that is created for an online only audience where the content is subject to the same internal standards as content which is broadcast and covered by the Commercial Radio Code of Practice.

Recommendation 5**: The ACCC should review the application of the professional standards test in light of the Full Federal Court decision that online simulcasts by commercial radio stations are not broadcasts and therefore not subject to the Commercial Radio Code of Practice.[6] CRA would like clarification that section 52K(1)(a)(iii) covers content that is created for an online only audience, or which appears online after being broadcast.**

[6] *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd* [2013]

Alternatively, CRA suggests that the professional standards test be replaced, in relation to commercial radio, by a requirement that the content is communicated – whether in broadcast or online format - by a licensee under section 36 or 39 of the *Broadcasting Services Act 1992*.

As a final resort, the ACCC may prefer to clarify the Explanatory Memorandum to ensure that online commercial radio content is not excluded – in circumstances where it would otherwise be included – because it is not covered by the Commercial Radio Code of Practice.

7. Provision of information to news media companies

CRA strongly supports the provisions in section 52M of the Digital Platform Code, which oblige digital platform corporations to provide specified data in relation to each digital platform service.

CRA considers the 28 day period for provision of the information to be reasonable but would like a shorter time period for updates provided under section 52M(3).

The information set out in section 52M(2) is of value only if it is current. As currently drafted the information could be 11 months out of date.

Recommendation 6: **The timescale for the provision of updated information by the digital platform corporation to the news business corporation under section 52M(3) should be reduced from 12 months to 28 days from the date of the change. This will ensure that information provided to news media businesses is always current and will achieve consistency between sections 52M(1) and 52M(3).**

8. Notice of algorithmic changes

CRA strongly supports the provisions in section 52N, which govern the notice of algorithmic changes that must be given by digital platform corporations to news businesses.

However, there are two areas in relation to which CRA would like to see more clarity:

- the meaning of 'significant effect' in section 52N(1)(b); and
- the scope of the exemption in section 52N(2)(ii).

The notice provisions apply to algorithmic changes where such changes are '*likely to have a significant effect on the ranking of the registered news business' covered news content made available by the digital platform service*'.

CRA notes the explanation provided in paragraph 1.79 of the Explanatory Memorandum, which provides that changes '*are likely to significantly affect the referrals to a registered news business corporation's covered news content if they:*

- *are likely to result in a 15% or greater change in referral traffic for at least 25% of registered news businesses; or*
- *are otherwise likely to significantly affect the performance of a registered news business' covered news content on a digital platform service*'.

CRA would like an acknowledgement that a series of planned lower level changes over a relatively short space of time may cumulatively produce a change that should be considered 'significant'.

For example, the digital platform must not be permitted to implement 3 changes over 3 weeks, which each reduce referral traffic by 5%, without providing notice to news media organisations.

***Recommendation 7*: a provision should be added to section 52N(1)(b) to make it clear that the requirement to give notice of significant algorithmic changes applies to any *'change or series of changes'* that are planned to be made to an algorithm. The Explanatory Memorandum should then record that a series of changes will be considered by reference to their cumulative effect.**

CRA broadly supports the timing for notice of the algorithmic changes, being 28 days before the change occurs in most cases, or within 48 hours of the change in cases of urgently required algorithmic changes. However, CRA suggests that further detail is added to the drafting to remove any lack of clarity surrounding these provisions.

Currently, the digital platforms are permitted to provide notice of change no later than 48 hours after the change is made where the change '*relates to a matter of urgent public interest*'[7]. CRA accepts the reasoning given in the Explanatory Memorandum that this exception '*recognises urgent algorithmic changes such as those that might be required in relation to information about a public health crisis*'.[8] However, the drafting of section 52N(2)(ii) is ambiguous and may lead to protracted discussions about whether a change is caught by the exemption.

CRA suggests that section 52N(2)(ii) is amended to replace '*relates to*' by '*directly addresses*'. Accordingly, the provision would apply where '*the change directly addresses a matter of urgent public interest*'. This requires a more direct link between the matter of public interest (e.g. the Christchurch massacre) and the action taken by the digital platform (e.g. restricting live streaming by Facebook).

***Recommendation 8*: Section 52N(2)9ii) addresses the notice to be given where a digital platform makes an urgent algorithmic change in response to a public crisis. CRA suggests that the provision should be clarified by replacing '*relates to*' with '*directly addresses*'. Accordingly, the provision would apply where '*the change directly addresses a matter of urgent public interest*'.**

[7] Section 52N(2)(ii) Draft Mandatory Code.

[8] Para 1.80, Explanatory Memorandum.

9. Arbitration process

CRA broadly supports the final arbitration model set out in Division 7 of the Digital Platform Code. Properly implemented, it will be a quick, straightforward and cost-effective process.

CRA supports the ACCC's attempt to eliminate, so far as possible, points at which parties may argue discrete points at the expense of the speed and efficiency of the process. Such procedural tricks typically benefit the larger party which will almost invariably be the digital platform.

However, a number of aspects may warrant the ACCC's further attention.

(i) Section 52ZE contains little information regarding the way in which arbitrators will be selected by the ACMA for inclusion on its register.

***Recommendation 9*: The Digital Platform Code should contain detail on the mechanism by which the ACMA will select arbitrators. This will ensure a fair range of expertise is represented both across the panel as a whole as well as in each particular arbitration case.**

(ii) The Explanatory Memorandum states that under section 52ZG 'bargaining parties will bear equally shared responsibility for the arbitration costs'.[9] However, there appears to be no reference in section 52ZG to the apportionment of costs. The cost of arbitration will be a significant factor for commercial radio stations in deciding whether to proceed to arbitration.

***Recommendation 10*: The division of costs between the parties must be set out clearly and transparently in the Digital Platform Code. Currently, the Explanatory Memorandum states that under section 52ZG 'bargaining parties will bear equally shared responsibility for the arbitration costs'.[10] However, there appears to be no reference in section 52ZG to the apportionment of costs. This is a key point that must be expressly addressed in the Digital Platform Code**.

(iii) There does not appear to be a limit on the costs charged by the arbitrators. Excessive costs have the potential to operate as a practical bar to use of the Digital Platform Code by media businesses**.**

***Recommendation 11*: The Code should include limitations on costs that can be charged by arbitrators appointed either by the ACMA or by the parties. It should also limit the costs to be spent on experts whose evidence is presented to the arbitration panel including those used by the arbitration panel under section 52ZP.**

[9] Para 128 Explanatory Memorandum.

[10] Para 128 Explanatory Memorandum.

(iv) Section 52ZO of the Code requires the panel to set a '*remuneration amount'* in relation to '*the making available of the registered news business' covered news content*'. CRA would prefer the reference to '*making available'* to be defined to capture current use of content by the platforms.

The phrase is significant because it goes to the fundamental issue of consent by the news media business and value obtained by the digital platforms from the content. '*Making available*' suggests that the news media business has knowingly provided the news content to the digital platform. This is not the case. Rather, the news media business creates the content, which the digital platform then uses. No express permission is given by the media business for such use.

The absence of control exercised by the media business in relation to the digital platform's use of its content – giving the digital platform an unrestricted licence of use – may upwardly affect the remuneration payable to the news media business. This absence of specific consent for use must be accurately reflected in the drafting of the Digital Platform Code.

***Recommendation 12*: The reference to '*making available*' in section 52ZO(1) should be defined to reflect the current ways in which the digital platforms make use of and benefit from the registered news businesses' content. The news media business creates the content, which the digital platform then uses. No express permission is given by the media business for such use.**

Accordingly, the reference to '*making available*' in section 52ZO(1) should be defined to reflect the platforms current use of content as follows:

> *52[XX] Meaning of making available news content*
>
> *In this Part, the making available of news content means:*
>
> *a. displaying news content [including headlines, text, images, audio or video];*
> *b. making a snippet of news content;*
> *c. showing search results for news content;*
> *d. creating and publishing a short summary of news content; or*
> *e. if regulations made for the purposes of this paragraph specify any other acts, any of those acts.*

(v) Section 52ZO allows the arbitration panel to adjust either of the offers '*in a manner that results in that offer being in the public interest*'. The Explanatory Memorandum contains no further detail regarding the circumstances in which this power will be exercised.[11]

The final offer arbitration model works quickly, efficiently and cost effectively only where the parties know that failure to submit a reasonable offer will make the arbitrators likely to accept the offer made by the other party.

[11] Para 1.138 Explanatory Memorandum.

If the arbitrators prove willing to repeatedly adjust offers then this benefit is quickly lost. Arbitrators must only adjust a party's offer in clearly delineated and exceptional circumstances.

***Recommendation 13*: Section 52ZO(6) should be amended to make it clear that arbitrators will only be permitted to adjust a party's offer only in clearly delineated and exceptional circumstances.**

(vi) Section 52ZP sets out the matters that the arbitration panel must consider in determining which remuneration offer to accept. CRA broadly agrees with the matters set out in section 52ZP(2). However, the Code should make it clear that the benefits must be assessed by reference to a competitive market and not the existing monopoly market.

The Digital Platform Code is intended to address the imbalance of power between news media businesses and the digital platforms. It is therefore vital that the arbitration panel does not reinforce the imbalance by considering the bargain in the context of the existing market. The correct benchmark would be a competitive market in which news media businesses would be able to choose their digital platform partners and in which a digital platform may have no access to news content.

A separate consideration of value should be applied by the arbitrator which reflects both the benefits to digital platforms as well as the costs to registered news businesses, to be considered in light of the position that the digital platform would be in if it did not have any access to any covered news content and its competitors did. An amendment should be made to the effect of inserting a new section 52ZP(4):

> *(4) in considering value in accordance with section 52ZO(1), the panel must take into account the position that the digital platform would be in a competitive market if it did not have access to any Australian news content and its competitors did"*

***Recommendation 14*: The Digital Platform Code should make it clear that the benefits assessed under section 52ZP(2) must be calculated by reference to a competitive market and not the existing market. The correct benchmark would be a competitive market in which news media businesses would be able to choose their digital platform partners, and in which a digital platform may have no access to news content.**

Accordingly, an amendment should be made to the effect of inserting a new section 52ZP(4):

> ***(4) in considering value in accordance with section 52ZO(1), the panel must take into account the position that the digital platform would be in a competitive market if it did not have access to any Australian news content and its competitors did"***

10. Support for other proposals

CRA strongly supports the following elements of the Digital Platform Code subject to the adjustments suggested below:

(i) *Open communication*: Sections 52R and 52U contain communication obligations for news media businesses and digital platforms. This will assist in addressing the difficulties that currently hamper communication with Facebook and Google.

CRA notes that under section 52U(e) of the Digital Platform Code additional regulations may be made by the Governor-General to specify requirements for the acknowledgement.

CRA submits that additional requirements should be imposed under such regulations if the 'acknowledgements' sent by the digital platforms repeatedly fail to address the substance of the issue raised by the news media business.

(ii) *User comments*: CRA supports the requirement in section 52S that content moderation tools be provided to allow news media businesses to remove or filter comments made using the digital platform service, which relate to the news content. This includes the ability to disable the making and blocking of such comments.

This is particularly important, not only in relation to defamation – particularly following the Dylan Voller case – but also in relation to liability for the news media business relating to copyright, contempt of court and suppression orders.

CRA notes that the Explanatory Memorandum contemplates '*regulations which contain additional requirements before a responsible digital platform corporation is required to comply with requests from a registered news business to provide them with the above tools*'.[12]

CRA would appreciate further information from the ACCC regarding the proposed content of such regulations together with an assurance that such regulations will not hinder news businesses' ability to rely upon section 52S of the Digital Platform Code.

The fundamental right of news media companies to remove, filter, disable and block user comments must remain absolute.

(iii) *Recognition of original covered news content*: CRA supports the recognition of the need to acknowledge original news content as proposed in section 52T.

CRA will make further submissions when the proposal contemplated under section 52T is developed. Any proposal must be flexible, administratively simple and should take account of the broad range of content published by news media organisations.

[12] Para 1.90, Explanatory Memorandum.

(iv) *Non-discrimination*: CRA supports the non-discrimination provisions set out in section 52W. This is a hugely significant provision for news media companies.

CRA agrees that the non-discrimination requirements should apply in relation to all news *content*, rather than only core or covered news content. This will assist in ensuring that digital platforms do not discriminate in favour of news organisations who do not participate in the Digital Platform Code. News media organisations' experience in Spain shows that this is a real possibility.

The non-discrimination provisions are of key importance in ensuring that the digital platforms do not penalise news media organisations that rely upon the Digital Platform Code.

(v) *Collective bargaining*: CRA supports the provision expressly permitting collective *bargaining* under section 52X(4) and 52Y. The ability to bargain collectively will assist smaller players, such as regional radio stations, who may not have the resources to bargain independently.

It is possible that some or all radio stations may wish to bargain through CRA as happens in relation to copyright licensing.

More guidance could be provided in the Code as to how collective bargaining should take place, and particularly to give guidance to the parties as to what activities in preparing for arbitration or sharing of information would be permitted within the constraints of the *Competition and Consumer Act.*

The Digital Platform Code should make it expressly clear that groups of news media businesses may bargain collectively through industry associations. More guidance to be provided as to allowable collaboration between multiple industry stakeholders in the context of preparing for collective bargaining.

(vi) Information requests during the bargaining process: CRA supports the provisions in section 52ZC *regarding* the information and data relevant to assessing the benefit that digital platforms receive from covered news content together with evidence of any relevant burden.

CRA would be pleased to assist the ACCC by elaborating on any of the above points if required.

Commercial Radio Australia

28 August 2020