

SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

Review of the News Media and Digital Platforms Mandatory Bargaining Code

Consultation Paper

May 2022

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

CRA appreciates this opportunity to respond to Treasury's *Review of the News Media and Digital Platforms Mandatory Bargaining Code* (**Mandatory Bargaining Code**).

CRA welcomes the Government's continuing focus on the dominance of key digital platforms and its acknowledgement of the negative impact that such dominance has on commercial relationships and competition amongst businesses. The Mandatory Bargaining Code must operate effectively to equip the commercial radio industry for a commercially sustainable future.

CRA's view is that the Mandatory Bargaining Code is not achieving its objectives in relation to the commercial radio industry.

Much of the commercial radio industry has experienced significant difficulties in engaging Meta and Google in commercial negotiations. Few benefits have been received as a result of the Mandatory Bargaining Code:

- 90% of commercial radio networks have been unable to strike a deal with Google; and
- 95% of commercial radio networks have been unable to strike a deal with Meta.

The digital platforms' behaviour is inconsistent with the policy objectives underlying the Mandatory Bargaining Code.

The absence of designation under the Mandatory Bargaining Code means that Meta and Google have been able to choose with which media businesses they wish to bargain. This heightens the inequities experienced by some members of the commercial radio industry, who are now in a worse competitive position than before implementation of the Code.

The professional standards test must be altered to allow commercial radio stations to register their online content without developing a new set of content standards.

The registration process should be streamlined to allow a single application where possible, particularly in relation to (i) all of a station's registrable website content; and (ii) identical content that is placed on different platforms.

1. Recommendations

1. Government must establish a mechanism to require Google and Facebook to negotiate with news media businesses. Currently, the digital platforms are negotiating only with media businesses of their choice. This does not address the harms identified by the ACCC and worsens the competitive position of those media businesses excluded from negotiations.
2. CRA notes that the Review will not consider calls for designation but nonetheless reiterates that the designation of Google and Meta under the Mandatory Bargaining Code would provide a much needed mechanism to force engagement.
3. If Government is unwilling to designate Google and Meta under the Mandatory Bargaining Code then it must consider alternative mechanisms for forcing engagement by the digital platforms.
4. The professional standards test must be altered to allow commercial radio stations to register their online content without developing a new set of content standards.
5. The ACMA's registration process should permit a single application in relation to (i) identical content that is placed on different platforms; and (ii) all of the station's registrable website content (e.g. text, podcasts, Apps etc).

2. The nature and quantum of benefits received by news businesses from commercial deals with the digital platforms (Questions 1 to 5)

The commercial radio industry has experienced significant difficulties in engaging Meta and Google in any commercial negotiations, so few benefits have been received as a result of the Mandatory Bargaining Code.

Only two of CRA's 20 member networks have managed to reach deals with Google and only one network has struck a deal with Meta. This means that:

- 90% of commercial radio networks have been unable to strike a deal with Google; and
- 95% of commercial radio networks have been unable to strike a deal with Meta.

Most concerningly, the vast majority of member networks have been unable even to persuade Google and Meta to engage with them.

CRA is not privy to any confidential detail regarding the deals that have been negotiated between its members and the digital platforms. However, CRA understands from publicly released information that one of the Google deals involved participation in Google Showcase rather than any material financial payment.

Following the grant of an ACCC Authorisation, CRA has approached Meta and Google to discuss potential commercial deals with the 90-95% of its member networks that have not reached deals. Despite the commercial radio industry's best efforts, these discussions did not progress:

- Meta did not engage substantively with CRA in the negotiations. It stated in a meeting in September 2021 that it was “not in a position to strike new deals” with Australian publishers and said “that door has now closed”. It mentioned future opportunities might be available via Facebook News and its Australian News Fund;
- Google mentioned its Google News Showcase product but placed high barriers to entry which small commercial radio stations were not able to fulfil:
 - it is based purely on text based content and does not cover audio news, which is a major part of the online news content published by radio stations via online simulcasts;
 - stations must have a dedicated ‘News’ tab which must have been active on the network / station’s website for at least 9 months; and
 - stations must publish a minimum of 6 news articles per day and must have done so for the preceding 9 months.

Importantly, Showcase does not bring revenue to publishers. This means that radio stations would spend money fulfilling the Showcase acceptance obligations with no revenue stream available.

Showcase may work for large operators who already have significant established news content production, but it does not work to compensate smaller operators. Nor will it encourage operators to invest in news production, as there is no revenue stream available arising from participation in Showcase.

The reluctance of Google and Meta to engage constructively with the vast majority of members of the commercial radio industry is contrary to the underlying objective of the Mandatory Bargaining Code, which was to help sustain public interest journalism in Australia.¹

¹ Page 5, Treasury Consultation Paper dated April 2022.

3. Digital platforms' behaviour is inconsistent with the policy objectives underlying the Mandatory Bargaining Code (Questions 1 to 5)

Part IVBA of the *Competition and Consumer Act 2010* sets out the NMB Code. Section 52A defines a *news source* as:

Any of the following, if it produces, and publishes online, news content:

...

(d) a radio program or channel.

It is clear that a digital platform designated under the Mandatory Bargaining Code is obliged to bargain with radio news media businesses within the parameters set out under the Code.

The behaviour of Google and Meta is wholly inconsistent with this obligation:

- Google's Showcase offering does not cover audio content, even when such content is streamed online; and
- Meta has not offered any deal but has told CRA that the "door has now closed".

It is not acceptable for either Meta or Google simply to state that they are not prepared to reach any more deals. Radio must be considered carefully and separately from other news sources with which Meta and Google have negotiated.

4. Impact of non-designation of digital platforms on commercial deals (Questions 4 to 8)

CRA notes that the Review is not intended to consider calls for designation of the digital platforms.

Government should nevertheless consider the impact of non-designation as part of its review of the impact of commercial deals on the Australian news sector.

The absence of designation means that Meta and Google have been able to choose with which media businesses they wish to bargain. This heightens the inequities experienced by some members of the commercial radio industry.

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

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

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

- increasing the disparity of bargaining power between smaller media organisations – including much of the commercial radio industry - and the digital platforms. The digital platforms are not subject to the Mandatory Bargaining Code and have no incentive to behave reasonably in relation to the media organisations with whom they do not yet have commercial relationships; and
- inadvertently providing some media organisations with a competitive advantage over others. This means that those media organisations effectively receive the benefit of the Mandatory Bargaining Code provisions during the negotiations – as the Mandatory Bargaining Code would operate as a ‘stick’ to encourage the digital platforms to agree reasonable terms – but other media organisations do not.

The absence of designation means that the Mandatory Bargaining Code has had the effect of increasing the disparity between news media platforms. This is contrary to the intended effect and needs immediate remedy.

5. Registration of news businesses (Questions 9 to 14)

CRA has raised with the ACMA a number of issues relating to registration under the Mandatory Bargaining Code. The ACMA has addressed some of these issues but its ability to make extensive changes may be confined by the legislation.

The Mandatory Bargaining Code must be applied in a way that accommodates commercial radio programs and channels, as contemplated by section 52A of the Code.

Currently, the Mandatory Bargaining Code, perhaps inadvertently, creates obstacles for commercial radio stations during the registration process. CRA would like the Government to consider changes to the Code to address the following issues.

(i) Professional Standards Test

The professional standards test requires that each news source is subject to external professional standards as listed in section 52P(1)(a). The professional standards applicable to radio are those set out in the Commercial Radio Code of Practice (section 52P(1)(a)(ii)).

However, this test does not work for radio’s online content and therefore is misguided in a Code that deals solely with online content. The Full Federal Court held in 2013 that online simulcasts by commercial radio stations are not broadcasts and therefore not subject to the Commercial Radio Code of Practice.² Similarly, text online content produced by commercial radio broadcasters is not subject to the Commercial Radio Code of Practice.

This has created significant practical difficulties for commercial radio stations. Simulcasts transmit identical content to that broadcast on AM/FM and DAB+ platforms. This means that the content is in practice governed by the Commercial Radio Code of Practice, yet the Mandatory Bargaining Code requires an additional set of professional standards.

² *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd* [2013]

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*.

(ii) Website content

The ACMA’s registration process should permit a single application in relation to all of the station’s registrable website content (e.g. text, podcasts, Apps etc).

This would mean that a station could register all online content that is placed on its website(s) in a single application.

The application would need to identify the content that is the subject of the application (e.g. references to tabs, identifiers, branding, location on site or other descriptors on each website).

(iii) Content taken from the broadcast that is placed across a number of different online platforms (e.g. website text, podcasts, snippets, drop box)

The ACMA’s registration process should permit a single application in relation to identical content that is placed on different platforms.

This would mean that a broadcaster could make a single application to register a particular piece of content that will be transmitted across a number of different formats – e.g. identical content across several websites, live stream and podcasts.

It would be helpful if there were some guidance in the ACMA Code Guidelines to assist members about how to register their audio news bulletins that appear in broadcasts streamed online. One member network had difficulties in registering this and after many discussions with ACMA, eventually registered “radio programs” which consisted of the collective of news bulletins broadcast across the day for each station online as one news source.

Another practical challenge that one member network encountered was seeking to register smart speaker news. As this news is only accessible when requested by a user via smart speaker, there is no “URL link” to the news in a written format (this news is updated at regular intervals via an RSS feed and is then triggered when someone asks to hear the update via smart speaker). It would therefore be beneficial if the registration process could be improved to allow applicants to submit other instructions to access the news content rather than just URL links, which may not apply to some audio based news sources. This would enable a broader range of news content to fall within the remit of the Code and further the policy objectives of the legislation.

Unless the current registration process is significantly streamlined, commercial radio stations are likely to continue to face difficulties in registering under the Mandatory Bargaining Code. This is contrary to the policy underlying the Code’s development and implementation. It will place the commercial radio industry at a substantial disadvantage when compared to other media industry participants when negotiating with the digital platforms.

CRA would be pleased to provide additional information on any of the above points if this would assist Government.

Please contact Ford Ennals or Sarah Kruger at Commercial Radio Australia for clarification on any aspect of this submission.

Commercial Radio Australia