SUBMISSION BY COMMERCIAL RADIO & AUDIO IN RESPONSE TO NEW ACMA POWERS TO COMBAT MISINFORMATION AND DISINFORMATION

A. Overview of submission

- Commercial Radio & Audio (**CRA**) appreciates the opportunity provided by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (**Department**) to comment on the exposure draft of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (**Draft Bill**).

- The Draft Bill is intended to provide powers to the Australian Communications and Media Authority (**ACMA**) to combat misinformation and disinformation disseminated on digital platforms.

- While CRA and its members understand the risks that the dissemination of this type of content (particularly disinformation) has, our concern is that the Draft Bill goes beyond reasonable measures and would provide an additional layer of regulation for media companies and their content, which is not appropriate.

- The Draft Bill, in its current form, will inevitably apply to some of the online services of our members notwithstanding that, in providing those online services, our members are subject to Australian laws, as they are in relation to all of their broadcasting and other offline activities. As the professionally produced services and content of our members are clearly identified, complaints may be made, or regulatory action taken, against a commercial radio station if there are any breaches of law in relation to its services or content.

- Equally concerningly, in its current form the Draft Bill will give powers to other digital platform service providers to determine whether the content of our members that appears on their platforms is misinformation or disinformation. We believe that would be an unreasonable interference with media freedoms.

- For these reasons**, our primary submission is that all of the online services of commercial radio licensees, as well as all of the content of commercial radio licensees that may be made available online, should be excluded from the potential operation of the Draft Bill. The same position should be applied in relation to the online services and content of other Australian media companies**.

- Detailed recommendations are set out at the end of this submission.

B. About CRA

CRA is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 261 member stations and represent the entire Australian commercial radio industry. 220 of CRA's member stations are based in regional and rural areas.

While our members compete against other streaming services, commercial radio continues to dominate commercial listening:

- 88% of Australians aged 10 to 24 tune in weekly to commercial radio, for an average of 10 hours and 15 minutes per week;

- breakfast radio attracts nearly 8.62 million listeners; and

- 3.29 million listeners stream commercial radio weekly.[1]

The Deloitte Access Economics 2023 Connecting Communities Report[2] highlights the important economic and social contribution that our members make to Australia, through the provision of radio and audio services. Our members deliver trusted, local content to Australians all over the country.

As highlighted in the 2023 Connecting Communities Report, every year, our members:

- contribute $1 billion to GDP;
- provide a $320 million boost to regional Australia;
- produce 1.1 million hours of local content, across broadcast, streaming and podcasts;
- play 160,000 hours of Australian music, or 2.7 million Australian songs – providing an unrivalled platform for the promotion of Australian musicians;
- broadcast 42,000 hours of news and 2,200 hours of emergency service content; and
- provide 251,000 hours of locally significant content in regional communities.

Our members support 6,600 full time jobs – 38% of those roles are in regional Australia.

As set out on the 2023 Connecting Communities Report:

> *74% of Australians believe commercial radio and audio build a sense of community.*
>
> *59% of Australians believe radio is a trusted source of news and current affairs.*

The commercial radio industry has been at the forefront of app development, creating station and industry specific audio apps, which reinforce the uniquely personal relationship between station and listener. Many commercial radio stations now have station apps. There are also aggregation apps, such as RadioApp, that provide access to a range of different commercial radio stations as well as podcasts. The ability to develop, promote and build audience for commercial radio apps is vital in maintaining the agility and viability of commercial radio into the future.

C. Definitions are key

The definitions used in the Draft Bill are key to understanding how the proposed Schedule 9 of the *Broadcasting Services Act 1992* (Cth) (**BSA**), to be introduced via the Draft Bill, applies. Therefore, it is useful to start with a consideration of the key defined terms and how these would apply to the online services provided by CRA's members.

C.1 Regulated digital platform services

The services that are regulated under the Draft Bill are **digital platform services** that are not **excluded services for misinformation purposes**.

[1] CRA data available here: https://www.commercialradio.com.au/Industry-Resources/Media-Releases/2023/2023-07-12-Commercial-radio-listening-surges-54-mi

[2] Available here: https://www.commercialradio.com.au/RA/media/General/Documents/CRA-Deloitte-Connecting-Communities-2023-Report.pdf?ext=.pdf

A digital platform service, in so far as it is relevant to CRA's members, is:

- a **digital service**, that is, a **service** that delivers content to persons having equipment appropriate for receiving that content, where the delivery is over the internet or which allows end users to access content using an internet carriage service, in any case where the service has a link to Australia and excluding broadcasting services. Service is not exhaustively defined, but is stated to "include" a website and therefore that term would be given its common law meaning; and
- a **content aggregation service**, a **connective media service**, a **media sharing service** or a service specified by the Minister, subject to a number of exclusions.

Content aggregation services are digital services that have a primary function to collate and present to end-users content from a range of online sources, including sources other than that service. Media sharing services include those that have a primary function to provide audio. In each case, the services must also satisfy any conditions set out in the digital platform rules which presumably will be minimal.

This means that, while commercial radio stations are, when broadcast, excluded from digital platform services, when those services are streamed, those services are media sharing services. Further, services such as RadioApp, Listnr, Nova Player, and iHeart may be considered to be both media sharing services, that is, with a primary function of providing audio, these would also be content aggregation services, because a primary function of those services is to collate and present to end-users content (namely, radio stations, as well as podcasts created by our members) from a range of different sources.

Therefore, while the broadcast services of our members are not digital platform services all of the apps of our members, as well as aggregation apps that showcase the services of our members, would be digital platform services.

Accordingly, the definition of excluded services for misinformation purposes is critical because, if it does not capture the online services, particularly apps, of the commercial radio sector, those services will fall within the regime of the Draft Bill. The only category of services specified as a category of excluded services for misinformation purposes that is relevant to the commercial radio sector is a media sharing service that does not have an **interactive feature**. Interactive feature is defined as feature of a digital service that:

- allows end-users to post content on that service;
- allows the sharing of content by end-users with other end-users through the service; and/or
- allows interaction between end-users with other end-users, or with content, to be observed by other end-users.

The Guidance Note for the Draft Bill states that this category of excluded services for misinformation purposes is intended to exclude from the regime services such as broadcast video on demand services and subscription video on demand services, with no consideration given to online commercial radio services.

Content, as discussed below, is broadly defined to include even very minimal forms of content, such as "likes", emojis or similar. Therefore, if a commercial radio app allows an end-

user to, for example, “like” episodes of podcasts that are available through that app, even if end-users cannot make text comments on the app and cannot interact in any other way with the professionally produced content available through the app, that would mean this exemption does not apply and the service is a regulated service. On the other hand, an equivalent service offered by another commercial radio station offering similar types of content but without the ability to use a like function, meaning it would not have an interactive feature, would be an excluded service.

Further, this category of excluded services applies only to media sharing services. While a service such as RadioApp or LiSTNR, which makes available a range of different stations and podcasts of the commercial radio sector, is a media sharing service it would also be likely to be a content aggregation service. No exemptions apply for content aggregation services. This would mean that such apps would be regulated digital platform services. This would be the case irrespective of whether the apps that may be accessed through such an aggregation service were digital platform services or excluded services.

And a final issue is how the channels and accounts of our members on other digital platform services are to be characterised. It would be possible for commercial radio stations to have channels or accounts on other digital platform services that will fall within the scope of the regime set out in the Draft Bill, for example on TikTok or YouTube. Looking at the definition of both service and digital service in the Draft Bill, it would appear that these separate channels or accounts would themselves be digital services, as these allow end users to access content using an internet carriage service and would also be media sharing services. These separate channels and accounts would therefore be digital platform services.

Such channels and accounts on such other platforms would not be able to take advantage of the excluded services definition because of the interactive features of the platforms on which the services are accessed. Therefore, these services would be regulated services even though the content on the services would likely be substantially the same as the content that is available on broadcast services, which are not regulated, or other commercial radio online services which might be excluded services.

If the separate channels or accounts on any other digital platform service are not considered, of themselves, to be digital platform services, then those channels and accounts would be content on the other digital platform service and the digital platform provider (for example, Meta in the case of Facebook) would be considered to have responsibility for that content under the regime established by the Draft Bill. This is an equally problematic outcome for the reasons discussed below.

C.2 Regulated content

All content made available on a digital platform service will be subject to the regime in the Draft Bill unless it is **excluded content for misinformation purposes**. This is because it is content that is potentially misinformation or disinformation.

Even if all of the services of our members – and online aggregation services such as RadioApp, iHeart and LiSTNR – were exempt services, the content of our members when it is available on services that are regulated will be subject to the Draft Bill regime. For example, the content of our members appears on news aggregation platforms, which would fall within the definition of digital platform services as these are content aggregation services for the purposes of the Draft Bill. In addition, content of our members that is shared by end-users on different digital

platform services, such as Facebook, WeChat, TikTok or similar, would be regulated if the digital platform service is regulated.

Content is, as mentioned earlier in this submission, broadly defined. It includes but is not limited to text, data, speech, music, sounds or any form of visual image. Therefore, the audio content of commercial radio made available online, whether it is news reports, podcasts or any other type of material will be content for the purposes of the Draft Bill.

Again, it will be necessary to consider the exemptions to the definition of content to determine whether the content that our members make available online will be regulated under the Draft Bill. As relevant to our members, excluded content includes:

- **professional news content**; and
- content produced in good faith for the purposes of entertainment, parody or satire.

Professional news content is given a meaning that is loosely based on the definition of news content under Part IVB of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), which sets out the regime for the News Media and Digital Platforms Bargaining Code. In short it is online content produced by a news source (that would include a "radio program or channel" or "a program of audio or video content designed to be distributed over the internet") that is subject to some form of editorial standards and which has editorial independence from the subjects of the news coverage.

While this definition is intended to include news content made available by CRA's members, there are problems with the definition. This includes the requirement that the relevant news content must be produced by the news source. This would exclude, for example, news content that any of our members made available online that had been produced by a third party which does not itself meet the definition of being a news source. There is also the question, which we return to below, of who will determine whether the content meets the definition.

The second category of excluded content is very narrow. While it would be expected that most of the content of our members would be produced for purposes of entertainment, there is no guidance as to how the requirement of "good faith" is to be interpreted, which is very subjective.

This leads to the final key concern that CRA has with the definition of excluded content for misinformation purposes, which is that it is the provider of the regulated service (referred to in the Draft Bill as a **digital platform provider**) who makes the determination of whether content is or is not excluded content for misinformation purposes. Audio content of a commercial radio broadcaster that has been broadcast and then streamed on an excluded service, will be outside the scope of the Draft Bill. But if that same content is then shared by one of that broadcaster's listeners on a regulated service or, for example, made available on a news aggregator website such as Google News or Apple News, it would then be regulated on that platform with the digital platform provider left to determine whether it considers it to be excluded content or, if not, potentially misinformation or disinformation.

D. Changes that should be made

Recommendations

1. Commercial radio station services should be expressly excluded from the scope of the Draft Bill

Under the Draft Bill:

- *Part 2 provides for the ACMA to make record keeping and reporting rules and enables the ACMA to require digital platform providers and others to provide information to it;*
- *Part 3 provides for the ACMA to require digital platform providers to make industry codes under a co-regulatory regime. The ACMA would register these codes and compliance would be compulsory for those digital platform providers in the digital platform sector to which the code applied; and*
- *Part 3 also provides for the ACMA to have the power to make enforceable standards in particular circumstances, including where co-regulatory codes had not been effective.*

The analysis in the previous section of this submission demonstrates that both some services, as well as the content, of commercial radio broadcasters will be subject to the regime in the Draft Bill. As discussed in detail in this section, that is not an appropriate outcome.

Our members make significant investments in producing the content that they make available to Australians. That content is broadcast and made available online. As well as the significant investments made in news, including local news for stations in regional and remote areas, our members invest heavily in other forms of audio content, such as podcasts.

Our members are subject to a comprehensive regulatory regime, which imposes strict requirements in relation to the content that our members broadcast for Australian audiences. Commercial radio stations operate under licences issued by the ACMA under the BSA. In addition to complying with the BSA and the conditions in their licences, commercial radio stations must comply with the Commercial Radio Code of Practice (**Code**), a co-regulatory code that is registered with the ACMA. The ACMA monitors compliance with the Code.

The Code includes important requirements for the broadcast content of commercial radio stations. For example, it requires news to be presented accurately and impartially and requires clear distinctions to be made between news and commentary or comment. Other content is also regulated under the Code, for example, restrictions are imposed on content that is likely to incite hatred, serious contempt or ridicule and advertising must be identifiable.

Even where content is provided by our members only for online services and therefore the broadcasting laws and regulations outlined above do not apply, our members are nonetheless required to comply with all Australian laws in making that content available through those services, including the Australian Consumer Law, anti-discrimination laws and the like.

The aim of the Draft Bill is to combat the serious harms that may arise from misinformation and disinformation. The services of our members, whether broadcast or available online, are not the types of services that produce, or assist in the spread of, online misinformation and disinformation.

Further, when individuals or Australian regulators have concerns in relation to the services of our members, it is very easy for those concerns to be raised with, or complaints made to, those members. In the event that any content on those services breaches an Australian law, it is also a straightforward process for legal action to be taken against a commercial radio station. Another layer of regulation applying to these services and content will not assist in achieving the policy intent of the Draft Bill.

Accordingly, **all of the online services of commercial radio licensees, including aggregator services, should be completely excluded from the application of the Draft Bill**.

2. Content made available by commercial radio stations should also be expressly excluded from the scope of the Draft Bill

It is not sufficient simply for the services of our members (including accounts or channels on the digital platforms of third parties), and for aggregation apps that only make available the services of our members, to be expressly excluded from the regime proposed in the Draft Bill. If only that change was made, the content of our members that is available from other digital platform services would remain subject to the Draft Bill.

The Guidance Note states that Parts 2 (dealing with the ACMA's information powers) and 3 (dealing with co-regulatory codes and standards) do not apply to excluded content for misinformation purposes.[3] CRA's view is that this is not strictly correct. The correct interpretation of the Draft Bill is that Parts 2 and 3 do not apply to content which the relevant digital platform provider determines is excluded content for misinformation purposes. This is a very important qualification, given that – as demonstrated above – the definition of excluded content for misinformation purposes is very subjective. Whether content is, or is not, excluded content is generally a question of discretion.

The Draft Bill has been deliberately structured so that it is the digital platform provider who will determine whether content is misinformation, disinformation or is excluded from the scope of the regime. This is clear in the Guidance Note, but is also clear in separate statements of the Department. For example, in appearing before the Senate Select Committee on Foreign Interference Through Social Media on 12 July 2023, a representative of the Department commented:[4]

> *the judgement or the determination of disinformation and misinformation on a digital platform is a responsibility that is being quite intentionally left in the hands of the digital platforms to manage themselves.*

There are no processes mandated in the Draft Bill that would provide for any transparency as to how such determinations are made by different platforms. The examples of matters that may be dealt with in codes or standards (if these were put in place), as set out in section 33 of the proposed Schedule 9, do not contemplate that regulated providers would provide information as to how content was assessed to determine whether it is excluded content, misinformation or disinformation. While codes would be required to include policies and

[3] Pages 13 and 17.

[4] https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/27023/toc_pdf/Foreign%20Interference%20through%20Social%20Media%E2%80%94Select%20Committee_2023_07_12.pdf;fileType=application%2Fpdf#search=%22committees/commsen/27023/0000%22 see page 27.

procedures for responding to complaints, there are no provisions that appear to address requirements for regulated providers to be required to make content available – effectively meaning our members would have no recourse if that content was removed from a digital platform service.

Further, third party digital platform providers may not have enough information to determine whether content is excluded content. For example, how would a third party digital platform provider determine whether content produced by a commercial radio station was produced in "good faith"?

CRA hopes that there would be no dispute that digital service providers such as Alphabet, Amazon, Meta, TikTok and others, should not act as gatekeepers in determining whether Australian end-users are able to view and listen to the valuable and trusted content of our members, by having the legislated obligation to assess whether that content is, or is not, excluded content. Nonetheless, the Draft Bill currently contemplates that digital service providers will have such a gatekeeper role.

3. There should be a broader exclusion for broadcast media

For the same reasons that the services and content of commercial radio stations should be entirely excluded from the scope of the Draft Bill, **CRA would support the services and content of other media also being excluded, such as content of other broadcasters regulated under the BSA**.

The appropriate way to achieve this outcome is likely to be by reconsidering the definitions in the Draft Bill. That is, instead of seeking to define digital services and content broadly and then providing for exclusions from regulation, the Draft Bill should define with greater clarity the types of services and content that should, in fact, be regulated. Regulated content should be end-user generated content, that may be created without attribution and without transparency as to the origins of the content. The services that should be regulated are the services that allow for such content to be posted and that promote its dissemination.

4. Additional concerns in relation to Part 2 of proposed Schedule 9

CRA has a number of concerns with the ACMA's information gathering powers under Part 2 of the proposed Schedule 9, which will apply even where CRA's members, and the content that they make available online, are excluded from the scope of the regime, as outlined above. These concerns remain as it may still be the case that our members are involved in the exercise of these information gathering powers, which are expressed very broadly.

(a) Self-incrimination

Under the proposed Part 2, an individual is not excluded from providing information, evidence or documents, even if to do so might incriminate them. The Guidance Note states this is for two reasons: [5]

- Individuals would only be required to provide evidence and the like where they were a digital platform provider and, as there will be very few such individuals, the restriction on exercising the privilege against self-incrimination would be very limited. This justification is not correct, as individuals who are employees of digital platform

[5] Guidance Note, page 16.

providers as well as other individuals who may have relevant information may be required to provide information and the like (see proposed section 19). Therefore, this justification should be discounted.

- Allowing the exercise of this privilege may undermine the efficacy of the proposed regime. This may well be the case, but that would always be the case, whenever an individual invoked this privilege in any other context**. In the same way that individuals may invoke this privilege against self-incrimination under Part 13 of the BSA (which contains other ACMA information gathering powers) individuals should be able to invoke this privilege under the proposed Schedule 9**.

(b) Protection of confidentiality of journalistic sources

Part 13 of the BSA protects the confidentiality of journalistic sources, by excusing journalists from any requirement to reveal those sources. **No justification is given in the Guidance Note as to why this very important protection is not provided, and CRA strongly recommends its inclusion in the proposed Schedule 9**.

Commercial Radio & Audio

August 2023