EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

January 15, 2021

Senator Alex Gallacher
Chair
Senate Standing Committee on Economics
Parliament House
Canberra ACT 2600

Dear Senator Gallacher:

On behalf of the Office of the U.S. Trade Representative, we want to thank the Australian Senate Standing Committee on Economics for conducting an inquiry into the "News Media and Digital Platforms Mandatory Bargaining Code" Treasury Laws Amendment Bill 2020, and providing stakeholders an opportunity to participate in the consultative process. We appreciate the Australian Government's efforts to engage stakeholders to understand and address concerns.

As part of this legislative consultative process, we would like to share with you the U.S. Government's comments on the draft legislation. The U.S. Government previously submitted these comments as part of the public consultation conducted by the Australian Competition and Consumer Commission (ACCC). As set forth in these comments, the U.S. Government is concerned that an attempt, through legislation, to regulate the competitive positions of specific players in a fast-evolving digital market, to the clear detriment of two U.S. firms, may result in harmful outcomes. There may also be long-lasting negative consequences for U.S. and Australian firms, as well as Australian consumers. While the revised draft has partially addressed some U.S. concerns—including an effort to move towards a more balanced evaluation of the value news businesses and platforms offer each other in the context of mandatory arbitration—significant issues remain. As you will see from the comments attached to this letter, the revised draft legislation does not substantially address key U.S. concerns. We would like to highlight three of these outstanding concerns:

- Broad discretion initially targeting only two U.S. companies: Article52E (previously 52C) still grants the responsible Minister broad discretion to designate a company, and specific services that the company offers, as being subject to a highly prescriptive, burdensome code without having first established a violation of existing Australian law or a market failure, and is designed to exclusively target (as an initial matter) two U.S. companies.

- Fundamental imbalance of factors for arbiter consideration: The revisions to Article 52ZZ (previously 52ZP) removed some, but not all, of the imbalance in mandatory arbitrations between news businesses and platforms by directing arbiters to consider the benefit that a news business gains by being carried on a platform. However, the process remains fundamentally unbalanced, for example, given that an arbiter must consider the cost of news production, but need not address the corresponding costs incurred by a platform in storing, processing and transmitting content, and in developing software to

index and rank that content. In addition, the revision added a mandate to consider bargaining imbalances, a factor that appears designed to ensure preferential treatment of designated news businesses by assuming that such imbalance exists, even absent a specific finding with respect to a specific news business.

- Enforcing a broadly defined non-discrimination rule: Article 52ZC (previously 52W) retains the prohibitions against differentiating between registered news businesses and news businesses that are not registered—whether Australian or foreign—in the context of carrying covered news content. While we understand why advocates for the code might seek to prevent such differentiation within the domestic Australian news market, sweeping in international news as well (which 52ZC(2)(b), read in conjunction with the broad definition of "covered news content," appears to do) would be a disproportionately punitive response to a commercial decision to exit the Australian domestic news market. If the price of withdrawing from the Australian domestic news market is essentially a requirement to forego making any news-related content available in Australia, that price appears both unreasonable and impractical. It is unreasonable, in that denying Australian consumers access to international news would significantly harm Australian consumers, as well as foreign news businesses and platforms. It is impractical because "news," in the international context, is not a defined term and thus a platform would have no obvious way to identify what search results or social media feeds constitute "news" that they may (or may not) make available in Australia. As we noted in our earlier comments, we urge Australia to either drop Article 52ZC entirely, or ensure, at a minimum, that it applies only to differentiation between Australian news businesses.

In closing, we reiterate that the above points are only examples of outstanding U.S. concerns, which are set forth in more detail in the attached comments. Given the United States' significant outstanding concerns, we urge Australia not to rush the passage of this legislative proposal. The United States respectfully requests that Australia further revise the draft legislation to address the outstanding concerns identified above and in the attached comments and provide the opportunity for significant further stakeholder engagement on the basis of such a revised proposal.

Thank you for your attention to our concerns.

Sincerely,

[redacted]

Daniel Bahar
Assistant U.S. Trade Representative for
Services and Investment

[redacted]

Karl Ehlers
Assistant U.S. Trade Representative for
Southeast Asia and the Pacific

Attachment: U.S. Comments on Australia's Draft Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

United States Comments on Australia's Draft Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

The United States appreciates the opportunity to comment on the draft legislation, "News Media and Digital Platforms Mandatory Bargaining Code" Treasury Laws Amendment Bill 2020," submitted by the Australian Competition and Consumer Commission for public comment on July 31, 2020.

Introduction and Summary of Concerns

The Australian Competition and Consumer Commission (ACCC) proposal to institute a mandatory bargaining code of conduct (hereinafter, "the Code") between designated digital platforms and eligible Australia news media businesses is an unusual and highly intrusive intervention in the commercial arrangements between specific participants in the digital marketplace. The United States has serious concerns with respect to both the process and substance relating to this proposal.

Given the intended impact and important precedent of such an action, any such measure should be subject to more extensive stakeholder consultation to explore more fully the rationale and consequences of action, prior to being submitted to a legislative process. The current 28-day comment process does not meet that goal.

Substantively, the proposal raises a number of serious concerns, including that:

- it explicitly and exclusively (as an initial matter) targets two U.S. companies through legislation without first having established a violation of existing Australian law or a market failure;
- it institutes a process for determining compensation to news businesses by assessing value solely on the cost of production to the news business and the ostensible value of content to the platform, without reference to the value that news media concerns realize as a result of the platform's carriage of the information and without a clear standard as to how to determine value;
- it appears to prevent a platform, through inclusion of a vague principle of non-discrimination, from choosing to forego participation in the Australian news market, to the extent that platforms carry any news content; and
- it envisages authorizing collective bargaining on the part of news businesses, a practice generally eschewed under standard competition principles.

Accordingly, we respectfully request the Government of Australia suspend its consideration of a legislative solution to the identified concerns, to allow further time for efforts to further study the markets and, if appropriate, develop a voluntary code, backed up as necessary by regulations subject to public notice and comment.

Specific Concerns

Process

The ACCC has engaged in an examination of the competitive dynamics of the digital marketplace, with a particular focus on the impact of certain market dynamics on Australian news providers, and the challenges they face as advertising, a key source of their revenue, migrates to digital platforms. That examination, which ended in 2019, provided no specific proposals to remedy problems the inquiry identified in the news sector, notably asymmetries in bargaining power. The subsequent "Concepts Paper" issued by the ACCC on May 19 provided more detail, but a concrete proposal was not published until July 31.

This proposal, consisting of draft legislation creating a set of minimum standards and a mandatory bargaining code of conduct, took many stakeholders by surprise, given the substantial work industry participants had devoted to developing a voluntary code of conduct. In past practice,[1] the ACCC has taken an iterative approach to address bargaining power asymmetries, starting with the development of voluntary industry codes, to prescribing such voluntary codes under the authority of the ACCC, and only transitioning to mandatory codes upon evaluation of a record of how other approaches functioned. The standard the ACCC has identified for considering prescribing a code of conduct under the Competition Act is that "a range of self-regulatory options and 'light-handed' quasi regulatory options have been examined and demonstrated to be ineffective."[2] Where mandatory codes have been introduced, we understand that most have been introduced as regulation by the ACCC, based on existing legislation.

The proposed approach, bypassing a more incremental approach to regulation, is based on a perceived urgency in the need to address the impact on the news business as advertisers direct their placement of advertising away from traditional media (print, broadcasting) to digital platforms. However, this type of direct intervention in the market to distribute advertising revenue is a significant step that needs to be carefully thought through and justified. In the view of the United States, it would be preferable to pursue additional market study and consultation to identify a specific market failure that might be addressed first though a voluntary code, and if demonstrably ineffective, through Australia's regulatory rulemaking process where stakeholders can participate by weighing in on options and providing evidence in support of or opposition to specific proposals. Accordingly, we respectfully request that Australia reconsider whether legislation is needed and instead work to support efforts on further consultation and, if necessary, work to develop a voluntary code to address issues identified by the ACCC, supported as appropriate with necessary regulation.

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[1] *See, e.g.*, the Dairy Industry Code of Conduct, *available at* https://www.accc.gov.au/business/industry-codes/dairy-code-of-conduct, and the Food and Grocery Code of Conduct, *available at* https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct.

[2] *See* ACCC's *Guidelines for developing effective voluntary industry codes of conduct*, p. 26, *available at* https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf.

Substantive Concerns

Articles 52X-ZV: Bargaining, Arbitration, and Non-Discrimination

Although stakeholders have been working in good faith for months to develop a voluntary code for bargaining, with a target for completion this year, the heart of this legislative proposal replaces free market principles with a compulsory code that ultimately allows arbitrators to mandate remuneration. Compounding the concerns with this approach is the lack of any credible, substantive methodology for assigning value, and the explicitly one-sided terms of reference guiding the arbitrators in their evaluation of the value the bargaining participants bring to the table, which forms the basis for setting remuneration amounts.

Expanding the scope of matters arbitrators should take into consideration to determine fair compensation would more accurately reflect market reality. Digital platform businesses may provide value to news organizations, which may need to be considered in addition to other factors. The United States also urges Australia to consider whether this process provides mechanisms for correction of errors in agency actions, as envisaged in Article 20.5 (Review and Appeal) of the Australia – United States Free Trade Agreement.

Finally, the authorization of collective bargaining further undermines any attempt of an arbiter to settle on a compensation amount reflecting the disparate commercial interests of competing news businesses. Such a departure from broadly accepted competition principles, which aim at eschewing collusion among market participants, is inappropriate.

Article 52W is a vaguely drafted and confusing provision that obligates designated platforms to "not discriminate between registered news businesses and businesses that are not registered news businesses." This obligation brings to the fore a key defect of the entire approach contemplated – namely, that in this market, innovative deals between suppliers are the norm and should be encouraged, as participants test the market to better grasp consumer preferences and develop the most efficient and effective products. By freezing commercial relationships through a prescriptive set of rules (and preventing competition between registered and unregistered news businesses), the ACCC risks hobbling Australian news businesses in their ability to adapt to the digital marketplace.

Although not explicit, the apparent intent of this provision is to prevent designated digital platforms from declining to carry Australian news businesses content if negotiations over remuneration for that content fails. This results in a Hobson's choice for designated platforms—they can withhold all news content from Australia, or submit to prescriptive rules and mandatory remuneration for content Australian news businesses choose to distribute through their platforms.

Article 52C: Designation of Digital Platforms and Services

Although the ACCC has focused on two specific U.S. digital platforms as contributing to bargaining imbalances in the digital marketplace, the criteria for choosing specific services offered by these platforms for highly prescriptive obligations remain unclear. Further, notwithstanding ACCC's findings, the designation of a digital platform and specific services it offers as subject to the proposed mandatory bargaining code appears entirely at the discretion of the Treasurer, who is charged with implementing the vague standard of determining "whether

there is a significant bargaining imbalance between Australian news providers and the group comprised of the [designated digital platform] corporation and all of its related bodies corporate." Since significant bargaining imbalances exist in many commercial interactions, and do not, *per se*, warrant regulatory intervention, we question whether the extraordinary intervention proposed through this draft legislation is truly justified.

The ACCC's focus on specific services covered by the Code also warrants further scrutiny: Some of the services identified were not covered by the original inquiry and are not even yet offered in Australia, and other services are not news-focused services. Nevertheless, the ACCC appears to seek to include advertising revenue such services generate in the base of revenue allocable to a registered news business through compulsory arbitration. The lengthy ACCC examination of the digital marketplace neither focused on nor made any findings with respect to these services, and thus we question whether they should be subject to the Code. If Australia continues to pursue the development of such a measure, then we would ask that Australia establish a transparent, objective, and nondiscriminatory process for designating specific platforms and specific services that are subject to any mandatory requirement, and that such process is subject to a public comment process and includes a meaningful appeal mechanism.

Article 52J: Registered News Business—Australian Audience Test

Mandatory compensation subject to binding arbitration is obviously a tremendous advantage for a news business. To qualify for this advantage, a news business must "operate predominantly in Australia for the dominant business of serving Australian audiences." This unambiguous preference for one category of news provider in Australia acts to the detriment of competing news businesses, especially given that nothing in this provision limits the scope of news for which such suppliers are eligible to claim and obtain remuneration. As such, a platform would be required to compensate Australian news businesses for coverage of global business or foreign political news while foreign news businesses covering the identical matters would receive nothing, despite the fact that they compete for the same Australian audience. We urge Australia to consider whether such discrimination in favor of one subset of market participants, based on its nexus to the Australian market, could raise concerns with respect to Australia's international trade obligations.

Article 52M: Minimum Standards—Provision of Information

Assuming these obligations apply only to designated digital platforms, they remain highly prescriptive and likely encroach on proprietary and commercially sensitive information to the benefit of news businesses and detriment of digital platforms. Problematic aspects of this part of the Code include obligations that the platforms disclose and explain to registered news businesses data they obtain from users relating to access to news content and associated advertising, under a 28-day time limit. This provision appears to overlap with Article 52ZC, which seeks to mandate the provision of information "relevant to assessing the benefit that the designated platform service receives from news content." Although the Code contains an exception for trade secrets, we urge Australia to consider whether the potential breadth of the obligation imposed on designated platforms is consistent with Article 11.9.1(f) of AUSFTA, which constrains Parties with respect to performance requirements, specifically requirements to "transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory."

Article 52N: Minimum Standards—Algorithmic Ranking of News Content

Since the design of an algorithm is often highly proprietary, the obligations in Articles 52N and 52Q could be problematic. We urge Australia to consider whether these provisions are consistent with the performance requirements obligations in Article 11.9.1(f) of AUSFTA.

Article 52S: Minimum Standard—User Comments

Article 52S requires a designated platform to honor requests by registered news businesses to facilitate deleting specific comments made by the platform's users regarding covered news content, or prohibiting commenting generally, among other things. While platforms typically have terms of service allowing for moderation, requiring platforms to extend such a right to third-party suppliers who chose to make content available on a platform, without any limits on the exercise of this right, appears to be mandating a right that could easily be abused. To the extent that a news business determines that specific comments should be deleted to avoid potential legal liability, a narrower provision addressing such cases would be more appropriate.

Article 52T: Minimum Standards—Recognition of Original Content

Article 52T requires designated digital platforms to develop a proposal within six months to recognize original news content when ranking and displaying such content. What would qualify as "original" is not defined, and, such a standard could diminish the accuracy and relevance of search results, which may not relate to the "originality" of the content.

Conclusion

Given the numerous concerns identified above, the United States respectfully requests that Australia suspend any plans to finalize this legislative proposal. Broad reform calling for government intervention in the markets is a significant step. While it may be appropriate to investigate large technology platforms for specific violations of the law, including the antitrust and consumer protection laws, such a sweeping regulatory change seems premature without further study and input. Australia should again consider promoting a voluntary code of conduct supported by, as appropriate, targeted regulations developed in an open and transparent process, allowing participation by all relevant stakeholders.