Comments of
INTERNET ASSOCIATION
before the
Australian Competition and Consumer Commission (ACCC)
Canberra, Australia

Internet Association (IA) appreciates the opportunity to submit comments in response to the Draft News Media Bargaining Code (hereafter referred to as the "Code") that was released by the Australian Competition and Consumer Commission (ACCC) on July 31, 2020.

IA represents over 40 of the world's leading internet companies.[1] IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. The internet creates unprecedented benefits for society, and as the voice of the world's leading internet companies, we ensure stakeholders understand these benefits.

The internet industry has strong concerns that the Code violates Australia's trade obligations and unfairly discriminates against U.S. companies. IA is expressly concerned that the Code targets two U.S. digital companies to assist a class of domestic players in a way that runs counter to Australia's international trade commitments. The ACCC's proposed Code would improperly require proprietary information sharing by U.S. digital platforms without transparent standards or safeguards, and would set a dangerous precedent of political interference in Australia's digital economy. Finally, the Code presents an unfair and arbitrary treatment of foreign investors. Given the wide ramifications, we believe the ACCC should reconsider its proposed legislation and pursue a balanced solution for Australia's digital economy and consumers.

IA is concerned about the lack of transparency and stakeholder consultation during the development process. The Australian government had organized a process for digital platforms and local Australian news publishers to develop a voluntary code in late 2019. But on April 20, 2020, the Australian Treasurer suddenly announced that it was abandoning the voluntary process in favor of a Mandatory Code to be developed by the ACCC in an extraordinarily accelerated time frame – which is supposed to conclude in November 2020. This announcement was made even before the first deadline for the parties to provide a "substantive progress report." The affected companies were not afforded an opportunity to update the ACCC on the progress of their consultations, or development of a draft Voluntary Code, prior to this announcement.

The Code requires U.S. digital companies to transfer revenue to Australian competitors and disclose proprietary information related to private user data and algorithms. The "must carry" revenue transfer aspect of this legislation is particularly troubling. Despite the Australian competitors being able to choose whether to include their news content on the digital platforms, the U.S. digital companies, by contrast, have no choice whether to be subjected to the Code. The U.S. digital companies are therefore forced to channel revenue and sensitive commercial information to Australian publishers. Further, numerous services operated by the impacted companies are subject to the onerous obligations set by the code – and otherwise, they risk steep fines to preserve their users' privacy and proprietary information.

The Code grants unfettered discretionary powers to the Treasurer without proscribing clear standards or principles for designating which companies the Code will apply to. This broad discretionary power raises particular concerns because the Code validates the government's ability to expropriate revenue from

[1] https://internetassociation.org/our-members/

selected foreign companies and raises significant national treatment concerns. It also allows for political intervention in the development of Australia's digital economy, which would disincentivize foreign tech investments.

The Code does not limit the scope of the established obligations for designated "Digital Platform Services" and will, therefore, hinder the ability of these companies to establish regular business operations as they face legal uncertainty and potential abuse. The extent of these limitless and excessively burdensome obligations enshrined in the proposal includes several particularly notable issues: 1) Unrealistic and onerous obligations for providing pre-notification of any change in the algorithm that may affect a local Australian news outlet's ranking with very limited exceptions – even if the change is completely unconnected to the Australian news outlet and is made, for example, to important integrity efforts; 2) No limitations to the rights granted to Australian news business producers to make broad and burdensome complaints against the "Digital Platform Services"; and 3) No limitations to the amount of revenue that news media businesses can demand during binding arbitration procedures. Furthermore, the threshold for becoming a Registered News Businesses (RNB) is not high, and the number of Registered News Businesses is unknown but potentially significant. By extending the application of the Draft Code to "covered news content" ("content that is created by a journalist and is relevant in recording, investigating or explaining issues of interest to Australians"), it goes well beyond the expressed principle of preserving the production of public interest news. The definition easily could capture news of broader public interest such as sports and entertainment news.

The Code has the potential to interfere with legitimate business decisions. It not only requires digital platforms to carry domestic Australian news content; it also requires them to allow domestic Australian news businesses to participate in comment moderation, including removing or filtering user comments. It would, therefore, undermine the platform's services, with no conceivable relationship to the original intent of the platform's inquiry. It would also create a host of security and privacy challenges as digital platforms would potentially need to allow access to tools necessary to perform content moderation.

The draft code, if enacted in its current form, runs counter to Australia's trade obligations in the over fifteen-year-old Australia-U.S. Free Trade Agreement (AUSFTA) as well as the WTO General Agreement on Trade in Services (GATS). It is also at odds with Australia's history of leadership in promoting cross-border digital trade.

National Treatment and Most-Favored Nation (MFN): The Code violates fundamental trade principles of National Treatment and MFN in both the WTO General Agreement on Trade in Services (GATS) and the Cross-border Trade in Services Chapter and the Investment Chapter of the AUSFTA by unfairly discriminating against U.S. digital service suppliers and providing preferential treatment to digital service suppliers from Australia (and third countries, like China).

Performance requirements: AUSFTA forbids Australia from imposing local content requirements or other specified "performance requirements" on U.S. investments – such as requiring forced transfer of proprietary information. The Draft Code violates these AUSFTA provisions, which are intended to protect the investment environment for all investors.

- The non-discrimination clause in the Draft Code would require certain U.S. digital investors to purchase Australian goods and maintain Australian local content on their platforms.
- The Draft Code would require U.S. investors to transfer proprietary knowledge to Australian publishers.

Minimum standard of treatment: The Draft Code violates the minimum standard of treatment provision in the investment chapter of the AUSFTA, which obliges Australia "to accord to covered investments

treatment in accordance with the customary international law minimum standard of treatment of aliens," including fair and equitable treatment (FET).

- The Draft Code provides limited to no due process to U.S. investors, and could result in manifestly arbitrary outcomes.
- The arbitration process appears to violate the FET threshold.

Conclusion:
The internet industry has strong concerns that the Draft News Media Bargaining Code violates Australia's trade obligations and unfairly discriminates against U.S. companies. While the Draft Code only applies to two companies, it sets a concerning precedent. The Draft Code requires U.S. digital companies to disclose proprietary information related to private user data and algorithms, as well as raises significant national treatment concerns. These requirements violate obligations in U.S. trade agreements, including national treatment and MFN, performance requirements, and the minimum standard of treatment. They pose a fundamental threat to digital companies' ability to thrive in foreign markets. Given the wide ramifications, we believe the ACCC should reconsider its proposed legislation and pursue a balanced solution for Australia's digital economy and consumers.