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Australian Competition & Consumer Commission
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via e-mail: bargainingcode@accg.gov.au

Comments of Americans for Tax Reform & Digital Liberty

RE: The Australian Competition & Consumer Commission Draft News Media and Digital Platforms Mandatory Bargaining Code

The Americans for Tax Reform (ATR) is an organization dedicated to the education and protection of American taxpayers in the United States and around the world. Digital Liberty is a sister organization of Americans for Tax Reform that advocates for free market technology and telecommunications policies in the United States and internationally.

We appreciate the opportunity to provide comments on ACCC's draft version of the news media bargaining code. The following comments summarize our position of the draft news media and digital platforms mandatory bargaining code (the Draft Code).

Perhaps no industry in history is as dynamic and as innovative as today's tech industry. Digital markets are constantly evolving to deliver products and services to consumers—often at no cost to users. In the current global pandemic, users are relying on these products and services even more to stay informed and stay connected to colleagues, family, and friends.

Like digital taxation proposals and efforts to “reform” antitrust laws, the Draft Code exclusively targets and discriminates against American companies. These efforts are part of an increasingly global campaign to tax American technology companies and erect barriers to free markets.

The ACCC's mandate is to protect and promote competition not to protect and promote favored competitors.

The Draft Code looks past the successful innovation of digital companies that enhanced and democratized the proliferation of access to sources that provide news and information. These success stories that allow both search and the quantities of available news and information to all rise together should not be punished for their innovation by forcing them to subsidize less successful media platforms.

For instance, currently Google does not discriminate between “news content” in search results. The Draft Code would have the company, and any other the Treasurer determines with little oversight, to provide “registered news businesses” with special treatment to game search results. No government should be given control over which news companies are more available to its citizens. Democratic governments engaging in this level of control over who and what is newsworthy is a dangerous game.

The Draft Code is premised on the faulty assumption that there exists a “bargaining imbalance” between the digital platforms and certain news outlets. The Draft Code attempts to remedy this “unfairness” by creating two discriminatory groups, one for certain news outlets and one for certain digital platforms and requiring them to “negotiate.”

Of course, the “bargaining imbalance” is hardly demonstrable. For instance, Google doesn't monetize Google News searches and many clicks to news links in Australia from Google Search aren't from

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advertisements. Google estimates that in 2018 Google Search “accounted for 3.44 billion visits to large and small Australian news publishers for free.”

If the specific news outlets and targeted platforms don't reach an agreement on how much more the platforms should offer them in remuneration compared to all other sites they enter “final offer arbitration.” Each side makes one proposal and an arbitrator replaces the free market to become judge, jury, executioner of market decisions.

Clearly, a digital presence and digital ads have allowed especially small and medium sized businesses access to a much wider audience at significantly lower costs. This top-down management of the digital marketplace for news will dial back the competitiveness and innovation that have allowed news sites to succeed.

Ultimately, whether it's through a settlement that requires the targeted platforms to offer greater remuneration to specific news outlets or through the unprecedented fines for non-compliance to the ambiguous Draft Code, these measures will result in the opposite of their intention: a decrease in the visibility and access to Australian news sites. That has been the result in Germany and Spain after they imposed similar measures - traffic to news sites reduced drastically and especially harmed smaller publishers.

The ACCC's Draft Code forces digital companies to subsidize traditional Australian media outlets, and Australia's small and medium-sized businesses, along with their readers will suffer for it in terms of access and visibility of available news services.

Small and medium sized local businesses will bear the brunt of the financial costs as the retailer that advertises on Google or the family restaurant that advertises on Facebook will face higher advertising costs to subsidize an industry that refuses to compete on the same playing field as its direct competitors, and every other business that appears in Google search or in Facebook news feeds.

The Draft Code forces some platforms, not all, to give preferential treatment to some news outlets, not all, and invites the government to replace the marketplace by choosing winners and losers at a very arm-in-arm transaction.

Today the Draft Code is limited to creating discriminatory classes in the news industry and between digital platforms. It is easy to see how, based on the same faulty assumptions, the government may in the future target specific digital platforms to negotiate remuneration terms with online marketplaces, entertainment streaming platforms, or websites related to tourism, sports, or other interests. Perhaps Australian websites that provide information on Koalas feel they should be paid by Google and Twitter more their foreign and more successful competitors. Quickly online search and advertising may be determined by onerous government rulemaking rather than the market.

Furthermore, **the ACCC draft significantly erodes the national treatment obligation in the General Agreement on Trade in Services with an unworkable regulatory scheme with unforeseeable consequences. It is clearly intended to target American companies, Google and Facebook.** The Draft Code applies only to Facebook and Google—creating a precedent that regulators have a role in choosing winners and losers in the economy. Antitrust and competition policy should protect the competitive process, not pick winners and losers – protect competition; not competitors. With the Draft Code, the ACCC has sent a clear message that aggressive competition and disruptive innovation will later be punished by government overreach, all at the expense of consumers.

By replacing competition with a burdensome regulatory regime, the Draft Code would reduce innovation and growth in the digital sector, all while creating an enormous bureaucratic burden for two politically

disfavored companies. And by discriminating against American companies, the ACCC risks a spiral of retaliation in trade and a worsening of the relationship with the United States.

The arbitrary nature with which the Government identified U.S. based Google and Facebook to be subject to the Draft Code, along with the text of the code requiring the Treasurer to “make a determination” as to which platforms have a “significant bargaining imbalance” significantly erodes the national treatment obligation in the General Agreement on Trade in Services. Australia must provide all foreign service suppliers the same opportunity to compete in Australia as their Australian competitors enjoy. Australia is clearly creating separate rules for successful foreign tech companies that are onerous and designed to limit their competitiveness.

The ACCC’s Draft Code is misguided and dangerous. The costs of getting this wrong are too high, and we ask the ACCC to reevaluate their draft and consider the arguments presented in this paper.

Respectfully Submitted,

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