Computer & Communications Industry Association
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Computer & Communications Industry Association (CCIA) Comments to the Australian Parliament's Inquiry on the News Media and Digital Platforms Mandatory Bargaining Code

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1. Introduction

The Computer & Communications Industry Association (CCIA)[1] welcomes the opportunity to submit comments in response to the News Media and Digital Platforms Mandatory Bargaining Code, Bill 2020 No. , 2020 (Treasury), consisting of a Bill for an Act to amend the Competition and Consumer Act 2010 in relation to digital platforms (the Bill).[2]

CCIA has publicly encouraged policy options that would provide appropriate support for producers of public interest news content.[3] The Association understands and supports the efforts to preserve news diversity and local news producers as these represent an essential part of any democracy. However, CCIA believes that the Bill represents a draft regulation to protect an industry, including very large players, to the detriment of the Australian digital economy and its consumers.

As currently drafted, the Bill raises multiple concerns. On the one hand, it leaves the application of a regulation that imposes wealth transfers from different stakeholders to the discretion of the Executive without establishing objective, evidence-based principles or standards to select the affected companies. Instead, it grants poorly bounded rights to news media producers that will certainly make compliance with the Bill challenging. On the other hand, the discretionary power fails to grant sufficient safeguards to foreign companies to conduct business in Australia, fails to prevent market distortions and does not provide legal certainty, disincentivizing the private sector from investing in innovation to the benefit of Australian consumers.

[1] CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. For more, visit www.ccianet.org.
[2] Referred to herein as the "Bill", available at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_first-reps/toc_pdf/20177b01.pdf.
[3] Statement of Matt Schruers, Vice President for Law and Policy, Computer & Communications Industry Association, "Online Platforms and Market Power, Part 1: The Free and Diverse Press", Committee on the Judiciary, U.S. House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law, June 11, 2019, https://www.ccianet.org/wp-content/uploads/2019/06/MSchruers-6-11-19-Written-Testimony.pdf.

Therefore, it is imperative that the Australian Parliament reconsider its proposed text of the Bill and explore alternatives that would encourage voluntary cooperation between stakeholders rather than engaging in industrial policy that would negatively impact the Australian digital economy.

2. The Executive's Discretionary Powers

The current Bill grants full discretion to the Executive to designate which companies will be bound by the proposed regulation without establishing any principles to follow when making such a designation. The Executive will determine which companies are obligated to pay news media companies with the only obligation to consider whether they have a "significant bargaining power imbalance between Australian news businesses."

This broad discretionary power granted to the Executive is particularly concerning because the Bill imposes wealth transfer obligations from the designated companies to national news media producers. The Bill validates government expropriation of revenue from selected foreign companies. While CCIA does not support this type of industrial policy intervention that fails to correctly assess market dynamics, the Bill should at a minimum include strict standards that ensure transparency, proportionality, and certainty in the enforcement of this legal framework.

Failure by the Australian Parliament to reconsider the broad powers granted to the Executive to designate which companies will have to subsidize the Australian news media industry without setting clear standards for such a designation will open a dangerous path for political intervention. This discretionary use of power also has the potential to disincentivize future foreign investments in the Australian economy for risk of being regulated in a discriminatory manner. Eventually, Australia will lag behind in terms of digitization to the detriment of its citizens.

Therefore, CCIA encourages the Australian Parliament to revisit the Bill to include clear standards to determine where there is imbalance in the bargaining power that the Executive must follow when designating the companies to which to apply the Bill.

3. Unreasonable Notification Obligations

The Bill imposes an obligation on designated "Digital Platform Services" to notify registered news businesses of any change in the algorithm that may have a significant impact on their referral traffic. This notice must be of a minimum of 14 days prior to the implementation of such a change in the algorithm.

While the idea behind this notification obligation is to grant news media businesses sufficient time to adjust and counterbalance any negative effect in their referral traffic that may arise as a consequence of the changes to the algorithm, such a provision fails to account for the business reality of digital services and the relative importance of news producers in the day-to-day business development.

In fact, the obligation to notify news media businesses grants a preferential treatment to news producers *vis-à-vis* other important stakeholders including other digital firms that represent important business partners for "Digital Platform Services". In other words, the Bill obliges digital services providers to treat differently some of its partners against others based on a purely governmental decision. This notification obligation also distorts competition as it prevents designated digital platform services from introducing timely updates to their algorithms while their competitors can do so without having to wait 14 days.

In view of the above, CCIA suggests that the Bill introduces different notification requirements that are reasonable based on business realities and day to day developments.

4. Encouragement of Good Faith Negotiations as opposed to Arbitration

The Bill imposes a negotiated-arbitrate model, such that mandatory final offer arbitration is required, in the event that affected parties fail to reach an agreement with respect to the money "Digital Platform Services" will have to pay to news media businesses. The current Bill allows arbitrators to solve disputes using hypothetical transactions as opposed to comparable transactions. In other words, arbitrators are not bound to make decisions based on commercial realities. Furthermore, the proposed arbitration model imposes on the parties a final offer arbitration based on criteria that does not necessarily reflect business realities. Consequently the proposed negotiated arbitration model could undermine good faith negotiations among parties as it would encourage news media producers to take the disputes before arbitrators to their benefit.

Instead, CCIA suggests introducing a standard commercial arbitration model where good faith negotiations fail where arbitrations are obliged to base their decisions on comparable transactions as opposed to hypotheticals. This way, parties will more likely negotiate in good faith instead of being forced to enter into arbitration dispute resolutions.

5. Violation of International Trade Obligations

The framework proposed in the Bill imposing subsidization obligations on designated digital services raises numerous concerns, including breaches of international trade commitments included in the Australia-U.S. Free Trade Agreement (AUSFTA).

The Bill singles out two specific U.S. companies for a raft of severe performance requirements based only on a discretionary finding of a "bargaining imbalance," and does not apply similar requirements to other suppliers of news referrals, including domestic digital and non-digital media companies. As previously explained, the designated digital services will be obliged to carry content from Australian publishers and make payments for that content under an arbitration framework that is not tethered to any standards of commercial reasonableness. Because these obligations are expected to be imposed only on two U.S. companies per the Executive's decision, the Bill would not only violate AUSFTA commitments on national treatment (AUSFTA Arts. 10.2 and 11.3) and most favored nation requirements (AUSFTA Arts. 10.3 and 11.4), but also analogous provisions in the WTO General Agreement on Trade in Services (GATS), including Article XVII and II.

In addition, the Bill compels participation in a one-sided arbitration process that violates AUSFTA commitments on minimum standards of treatment (Art. 11.5); requires designated digital services to disclose and transfer commercially sensitive information regarding business operations and algorithms in violation of AUSFTA commitments on performance requirements (Art. 11.9.1(f)); and provides no practical way for companies to avoid these harms, short of exiting the Australian market altogether.

The revenue transfer obligations included in the Bill can also be classified as a snippet tax. In essence, the Code of Conduct imposes an obligation on digital services to pay an undesignated amount to news businesses for including news snippets in their websites. Such snippet taxes or ancillary rights both serve as a trade barrier and violate international copyright commitments that prohibit nations from restricting quotation of published works.[4]

[4] See, e.g., CCIA Post-Hearing Written Comments, Docket No. USTR-2017-0024 (Mar. 14, 2018), https://www.ccianet.org/wp-content/uploads/2018/03/CCIA_2018-Special-301_Review_Post-Hearing-Submission.pdf ; CCIA Comments, Docket No. USTR-2012-0022 (Feb. 8, 2013), https://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf; CCIA, The Ancillary Copyright For News Publishers: Why It's Unjustified And Harmful (May 2016), https://www.ccianet.org/wp-content/uploads/2016/05/CCIA_AncillaryCopyright_Paper_A4-1.pdf; CCIA Comments, Docket No. USTR-2019-0023 (Feb. 6, 2020), https://www.ccianet.org/wp-content/uploads/2020/03/CCIA_2020-Special-301_Review_Comments.pdf.

Consequently, the Bill risks being incompatible with Berne Convention Article 10(1)'s mandate that "quotations from a work . . . lawfully made available to be public" shall be permissible.[5] As TRIPS incorporates this Berne mandate, compliance is not optional for WTO members; non-compliance is a TRIPS violation. While this potential framework may not be structured in the same way as previously implemented "snippet taxes", this proposal may still run afoul of the same international commitments, and Australia can be held liable for non-compliance with its international obligations.

Any Bill considered by the Australian Parliament must be consistent with Australia's international commitments. For these reasons, CCIA strongly urges the Australian Parliament to reconsider the compulsory framework included in the Bill and bring the Bill into compliance with Australia's trade commitments.

6. Conclusion

Australia is at the crossroads regarding the adoption of cutting-edge policy tools that would provide for flexible frameworks that facilitate implementing reasonable solutions to preserve news content producers without undermining innovation and the advancement of the digital economy.

The Bill as it currently stands represents a government interventionist approach to the Australian digital economy. Whereas the effort and regulatory experiment to preserve public interest news producers is important, adopting a broad regulation that includes limitless rights to practically any news media business in Australia does not represent the right path forward.

For the reasons outlined in this submission, failure by the Australian Parliament to reconsider the current text of the Bill risks undermining the development of the Australian digital economy. The lack of legal certainty and discriminatory approach reflected in the current text will disincentivize investment in the provision of digital services in Australia, as companies risk onerous obligations and the possibility of discrimination from the Executive. In the long term, the current Bill will only harm Australia's economy and its consumers.

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[5] Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, art. 10(1), amended Oct. 2, 1979 (emphasis supplied). Moreover, if the function of quotations in this context – driving millions of ad-revenue generating Internet users to the websites of domestic news producers – cannot satisfy "fair practice", then the term "fair practice" has little meaning. Imposing a levy on quotation similarly renders meaningless the use of the word "free" in the title of Article 10(1). The impairment of the mandatory quotation right represents a TRIPS violation, because Berne Article 10 is incorporated into TRIPS Article 9. *See* TRIPS Agreement, art. 9 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971)."). TRIPS compliance, in turn, is a WTO obligation.