

1 October 2020

Manager  
Policy Framework Unit  
Treasury  
Langton Cres  
Parkes ACT 2600  
Via email: FIRBStakeholders@treasury.gov.au

## Submission - Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020

### Information about News

- 1 News Corp Australia Pty Limited (*News*) is a member of the News Corporation group of companies.
- 2 News Corporation, the US-domiciled head company of the News group, is a global diversified media and information services company with businesses across a range of media, including news and information services, digital real estate services, book publishing and subscription video services.
- 3 In Australia, News Corp subsidiary companies are publishers of Australian newspaper titles such as The Australian, The Daily Telegraph, The Herald Sun, The Courier Mail and The Advertiser as well as a number of regional and community newspapers. In addition, News Corp holds a 65% interest in NXE Australia Pty Limited, owner of the Foxtel group of companies.

### Proposed definition of 'Australian media business'

- 4 Media is a sensitive sector for FIRB purposes. Foreign investment of more than 5% in an Australian media business requires FIRB approval regardless of the monetary value.
- 5 'Australian media business' is currently defined under section 5 of the *Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (FATR)* as:  
*'an Australian business of publishing daily newspapers, or broadcasting television or radio, in Australia, including websites from which those newspapers or broadcasts may be accessed'.<sup>1</sup>*
- 6 Under the proposed legislation, an 'Australian media business' would be defined as:  
*'an Australian business of doing one or more of the following:*
  - (a) *publishing daily newspapers in Australia;*
  - (b) *broadcasting television or radio in Australia;*
  - (c) *operating an electronic service (including a service provided through the internet) accessible to persons in Australia that delivers, or allows access to, content that:*
    - (i) *is in the form of data, text, sounds, images or in any other form; and*
    - (ii) *is similar to a newspaper or radio or television broadcast;*
  - (d) *producing content described in paragraph (c), to be delivered, or made accessible, through a service described in paragraph (c).*

---

<sup>1</sup> *Foreign Acquisitions and Takeovers Regulation 2015 (Cth)*, s5.

- 7 The draft Explanatory Memorandum states that the purpose of the change is: 'updating the definition of "Australian media business" to better reflect the broader means of communication by which media is accessed'.
- 8 In fact, the proposed change has the potential to both:
- (a) significantly expand the concept of an Australian media business; and
  - (b) introduce a high degree of ambiguity and uncertainty, which is particularly undesirable given the very low trigger for FIRB notification for investment in an Australian media business (5% regardless of value) and the potentially criminal consequences of breaching the FIRB regime.

## **Issue 1 – paragraph (c) of the proposed definition**

- 9 Proposed paragraph (c) as currently framed could apply to almost any electronic service that shares information, including a large number of websites that are not "media" in the traditional sense of that term and not in any way sensitive from a national interest perspective.
- 10 The introductory words of paragraph (c) and sub-paragraph (i) are deliberately wide so as to seek to capture all forms of electronic services accessible to Australians. It is sub-paragraph (ii) that seeks to link those services back to "media".
- 11 Consistent with the stated objective of the amendments – being to better reflect the means of communication of media, News assumes the intention of the proposed amendments is to effectively replicate the tests that apply to "traditional" media across to these additional methods of communication. This has been done by referencing the content covered by traditional media. An electronic service will be caught if it delivers or allows access to content *similar* to a daily newspaper, or radio television broadcast.
- 12 News submits that there are two problems with this approach to the definition:
- (a) the "similar" test is unclear and ambiguous, particularly given the diverse range of content made available through daily newspapers, radio and television broadcasts; and
  - (b) content alone has never been the basis for singling out traditional media as a "sensitive sector".

## **Unclear and Ambiguous**

- 13 It is unclear in what respect an electronic service must provide access to content similar to a daily newspaper, radio or television broadcast in order to fall within the proposed definition. The content of daily newspapers, radio and television are all extremely broad. In the case of daily newspapers for example, it spans news (e.g. politics, business), art, editorials, weather forecasts, public notices, crosswords, movies, television series, sport events, cooking, astrology, classified advertising, birth, death and funeral notices, and games.

It is unclear in what respect the content of the relevant online service needs to resemble a daily newspaper. For example:

- (a) would a cooking website under which recipe content is made available be similar to a daily newspaper?
- (b) would a website that provides astrology charts be similar?

- (c) would a website through which people access weather updates be similar?
- (d) would a website which publishes puzzles, crosswords and other games be similar?
- (e) would a website that publishes birth and death notices be similar?

Each of these are electronic services that make available content similar to that which is included in a daily newspaper, but none of these examples ought to be captured as an 'Australian media business'.

- 14 News submits that in order to meet the requirement of being a publisher of content 'similar' to a daily newspaper or radio or television broadcast, the key content element is reporting of current events and events of public significance. News submits that the 'similar to' test should focus on this element.
- 15 News further submits that the basic elements of an appropriate test have already been formulated in the Exposure Draft of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020<sup>2</sup> (Mandatory Code Bill)* where core news content is defined as follows:

*'core news content means content that:*

*(a) is created by a journalist; and*

*(b) that records, investigates or explains issues that:*

*(i) are of public significance for Australians; or*

*(ii) are relevant in engaging Australians in public debate and in informing democratic decision-making; or*

*(iii) relate to community and local events.*

A service meets the content test under the Mandatory Code Bill if it is predominantly core news content.

- 16 This definition was formulated in response to the recent Digital Platforms Inquiry by the ACCC and the EM notes that the Bill was proposed because of the need to support a sustainable Australian media landscape. given the importance of a strong and well-functioning media in the context of a well-functioning democracy<sup>3</sup>.
- 17 News would submit that the predominantly core news content definition is an appropriate basis for testing when a business is sensitive from an Australian national interest perspective and therefore appropriately subject to scrutiny as operating in a sensitive sector.
- 18 To ensure that the relevant business has an appropriate link to Australia and appropriately aligns with the 'traditional media' requirements, the proposed definition should also:
- (a) be limited to electronic services that target Australian audiences. Availability in Australia is not a sufficient limitation given the ubiquity of the internet and other

---

<sup>2</sup> Exposure Draft - Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Cth), section 52A.

<sup>3</sup> Explanatory Materials to the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Cth) paragraphs 1.5 to 1.7.

electronic services; rather, the relevant criteria should be that the relevant service is targeted at Australians (e.g. the mere fact that a New Zealand newspaper, covering New Zealand news and directed primarily at New Zealand readers is published by an Australian business and is generally available online should not make that newspaper an Australian media business); and

- (b) require that a significant proportion of the content on the electronic service be changed at least daily (this element of the test mirrors the constantly changing nature of daily newspapers and broadcast television and radio).

## **Content is not the only test**

- 19 In order for the proposed definition to be workable, it is submitted that the focus should be on capturing the elements of traditional media that make it sensitive to foreign investment. Above, News has considered the core elements of content that go to that assessment.
- 20 However, the test should not be limited only to content. News submits that the existing FATR definition is deliberately directed at only the most influential media and communications enterprises, thus permitting meaningful foreign investment in other areas not captured by the definition so as to facilitate new capital, foreign expertise and innovation in those other areas. It is the significance presence, reach and ability to influence that marks out the businesses that are Australian media businesses (and therefore sensitive) for FIRB purposes.
- 21 News submits that it cannot be the case that every electronic service with similar content to a daily newspaper, or radio or television broadcast is sufficiently sensitive to justify being treated as sensitive for foreign investment purposes. Blogs and citizen journalist websites for example should continue to fall outside the 'Australian media business' definition. As such, the electronic service test should be linked to a metric that recognises its importance or significance.
- 22 As noted above, that element is implicitly present in the current definition through the limitation to 'daily' newspapers and the requirement to hold a licence in order to operate a radio or television broadcast business, as well as the significant capital commitment involved in the establishment of such businesses.
- 23 News submits that a media business is of an appropriate size to be caught by the definition is one that generates annual revenue of at least \$1,000,000 in the most recent year or in three of the five most recent years. This provides an appropriate proxy for the materiality of traditional media businesses. It is also a clear test with a well understood metric in revenue, and the relevant revenue thresholds can be relatively easily indexed over time.
- 24 **Recommendation** - Amend paragraph (c) to require that to be classified as an Australian media business an electronic service must:
  - (a) produce or make available content that is predominantly core news content, where core news content means:

**core news content** means content that:

(a) is created by a journalist; and

(b) that records, investigates or explains issues that:

(i) are of public significance for Australians; or

(ii) are relevant in engaging Australians in public debate and in informing democratic decision-making; or

(iii) relate to community and local events;

(b) be directed at Australian audiences;

(c) contain content, a significant portion of which is changed daily; and

(d) have generated at least \$1,000,000 in annual revenue in the most recent year or in three of the five most recent years.

## Issue 2 – paragraph (d) of the proposed definition

- 25 It is submitted that paragraph (d) of the proposed definition be deleted as it has no policy basis and is unworkable.
- 26 The current definition of 'Australian media business' does not capture producers of content. There is no policy basis for extending the definition to these businesses.
- 27 As noted above, it is submitted that the rationale for media regulation is in regulating the most significant media enterprises – those with reach and the ability to influence. The producers of content have neither of these characteristics. For example, if a content producer produces content which the electronic service decides not to share, where is the national interest concern? Nevertheless, FIRB approval will be required for the acquisition of 5% or more of such businesses with a zero dollar threshold.
- 28 It is also unclear what businesses are intended to be captured by paragraph (d)? On current drafting arguably it would capture:
- (a) content for electronic services which can be user-generated, such as by citizen or freelance journalists;
  - (b) a drama series produced for an online streaming service. On current drafting, a drama produced to be shown on a streaming service would arguably be captured, whereas the same series produced to be shown on a free to air broadcast television channel would not. News submits that such a confusing outcome cannot be the intention of the proposed definition;
  - (c) businesses that produce content specifically for inclusion in online newspapers such as form guides, weather updates, tv listings, crosswords and puzzles.

- 29 News submits that foreign ownership tests should be limited to the operator of the electronic service, being the person with the capacity to influence and not the entities from whom it may source content.
- 30 **Recommendation** - Delete paragraph (d) of the definition of 'Australian Media Business'.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Ian Philip', with a long horizontal flourish extending to the right.

Ian Philip  
Chief General Counsel