THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS

Dear Attorney General Garland,

I have the honour to refer to your letter dated 15 December 2021, regarding the Agreement between the Government of Australia and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime ("the Agreement"), signed today, which reads as follows:

> *I have the honor to refer to the Agreement between the Government of the United States of America and the Government of Australia on Access to Electronic Data for the Purpose of Countering Serious Crime ("the Agreement"), signed today, and to propose that Article 9(4) of the Agreement be interpreted and applied according to the following understandings.*
>
> *The United States declares that its essential interests under the Agreement may be implicated by the introduction of data received pursuant to Legal Process, as defined by the Agreement, as evidence in the prosecution's case in Australia in a manner that raises freedom of speech concerns for the United States, as further described in this letter. Accordingly, in the event that authorities in Australia receive data pursuant to such Legal Process and intend to introduce such data as evidence in the prosecution's case in a manner that may raise those freedom of speech concerns, the Designated Authority of Australia is required to obtain permission from the Designated Authority of the United States prior to any use of the data in a manner that is or could be contrary to those essential interests, as described in Article 9(4).*
>
> *The United States declares that the introduction of data received pursuant to Legal Process, as defined by the Agreement, as evidence in an Australian prosecution for certain offenses may raise freedom of speech concerns for the United States, depending on the facts of the case. Therefore, the Designated Authority of Australia should consult with and obtain permission from the Designated Authority of the United States prior to introducing such data as evidence in the prosecution's case for any offense as to which conduct constituting any of the following is part of the basis for the offense charged:*

- *Advocating terrorism or genocide.*
- *Membership in a terrorist organization.*
- *Associating with a terrorist organization in the context of conduct that does not involve the provision of material support or resources.*
- *Advocating or inciting violence in circumstances not involving imminent or actual harm.*
- *Racial vilification or harassment.*
- *Defamation.*
- *Using a service to menace, harass or cause offence, in the context of both the making or publishing of statements.*
- *Unauthorized disclosure of information in the context of activities that are journalistic in nature.*
- *Failing to remove, or ceasing to host, abhorrent violent material.*

Any other federal, state or territory offenses analogous to the above categories, including those that relate to anticipatory offenses, should also be treated as though they have been included in the list.

In addition to offenses listed above, prosecutions for other offenses also may raise freedom of speech concerns for the United States, depending on the facts of the case, such as prosecutions for conduct involving news gathering and publication, or public protest. The Designated Authority of Australia should thus consult with the Designated Authority of the United States when Australian officials intend to introduce data received pursuant to Legal Process, as defined by the Agreement, as evidence in the prosecution's case in relation to an offense category not listed above and such officials have reason to believe, based on the context of the case and their understanding of U.S. views—including Australia's experience with U.S. views expressed in the mutual legal assistance process—that the introduction of the data as evidence in the prosecution's case may raise freedom of speech concerns for the United States. As set out in Article 9(4), if the Designated Authority of the United States confirms that there are freedom of speech concerns that cannot be resolved by the imposition of conditions, such data will not be introduced as evidence in the prosecution's case.

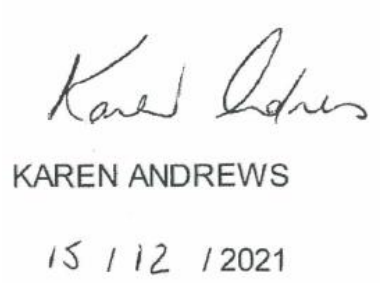
In addition to the prosecutions described above that may raise freedom of speech concerns for the United States, prosecutions under Australia's control order and extended supervision order regimes also may implicate the same concerns and, therefore, should be dealt with in the same manner. Accordingly, when authorities in Australia intend to introduce data obtained pursuant to Legal Process, as defined by the Agreement, as evidence in the prosecution's case for the violation of such orders, where that violation is based in substantial part on speech, the Designated Authority of Australia should consult with the Designated Authority of the United States. As set out in Article 9(4), if the Designated Authority of the United States confirms that there are freedom of speech concerns that cannot be resolved by the imposition of conditions, such data will not be introduced as evidence in the prosecution's case.

The United States may unilaterally supplement the categories of offenses set forth above if offenses in other Australian federal, state or territory statutes, either applied currently or those that may be enacted in future, merit inclusion. Any such supplement to this letter is effective on the date of a written notification from the Designated Authority of the United States to the Designated Authority of Australia notifying it thereof.

If the foregoing is acceptable to your Government, I have the honor to propose that this letter and your affirmative letter in reply would constitute an understanding between our two Governments as to the interpretation and application of the Agreement, which would be operative on the date of entry into force of the Agreement.

On behalf of the Government of Australia, I am pleased to convey that your proposal is acceptable. Your letter and this reply constitute an understanding of our two Governments as to the interpretation and application of the Agreement, which would be operative on the date of entry into force of the Agreement.

Sincerely,



KAREN ANDREWS

15 / 12 / 2021