

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

SEAN HEATHER  
SENIOR VICE PRESIDENT  
INTERNATIONAL REGULATORY AFFAIRS

1615 H STREET, N.W.  
WASHINGTON, D.C. 20062-2000

August 27, 2020

Australian Competition & Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

RE: Submission on News Media Bargaining Code

The U.S. Chamber of Commerce writes to express our concern as part of the open consultation on Australia Competition and Consumer Commission's (ACCC) proposed News Media and Digital Platforms Bargaining Code (Code of Conduct). As drafted, the Code of Conduct violates obligations the government of Australia has undertaken in the Australia-United States Free Trade Agreement and the World Trade Organization's General Agreement on Trade in Services.

Back in December 2017, the Australian Treasurer directed the ACCC to conduct a broad and sweeping platform inquiry that culminated in a report that contained numerous recommendations, which has led to the development of the Code of Conduct. While there are many policy arguments surrounding the Code of Conduct, the Chamber is focused in these comments on the discriminatory nature of the code as it sets out to exclusively target foreign companies in violation of Australia's national treatment obligations. In addition, it violates commitments made to guarantee investors a minimum standard of treatment and avoid the imposition of certain performance requirements on foreign direct investment.

The Code of Conduct does not apply broadly to all digital players in the market that have connections to Australian news media services. If the goal of the Code of Conduct is to advance some democratically-agreed social objective in support of journalism, the Code of Conduct should govern the relationship between all digital platforms and news media services operating in Australia.

Instead, the entire process that has led to up to the drafting of the Code of Conduct has repeatedly singled out by name two leading American firms. National treatment obligations in binding international trade agreements are designed specifically to counter such discriminatory approaches.

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In announcing the Code of Conduct the ACCC on its website states:

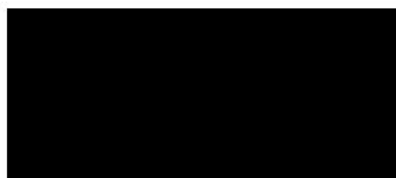
“Digital platforms must participate in the code if the Treasurer makes a determination specifying that the code would apply to them. The Government has announced that the code would initially apply only to Facebook and Google. Other digital platforms may be added to the code if they hold a significant bargaining power imbalance with Australian news media businesses in the future.”

However, the Code of Conduct does not lay out any objective criteria by which additional digital platforms might be added, nor is there any objective determination in the code with regard to the evaluation of “significant bargaining power” through either a well-defined regulatory or competition process. Instead, two American firms have been politically singled out. This discriminatory approach, combined with the fact that the Code of Conduct does not contain any objective standard or process to evaluate which digital platforms are captured by the code, breaches Australia’s trade obligations.

National treatment is the most significant but not the only likely trade agreement violation as a result of the current draft of the Code of Conduct. Australia’s trade obligations ensure U.S. investors a minimum standard of treatment. The process that produced the code raises potentially serious questions as to whether Australia has met its obligations for fair and equitable treatment. Further, the bilateral trade agreement prohibits a government from constructing certain performance requirements on foreign investors. Here too the Code of Conduct raises serious concerns.

In closing, the government of Australia is not prohibited by its trade commitments from introducing a code; however, it is bound to do so in a manner that does not breach national treatment obligations as well as its other trade commitments. The Chamber respectfully requests that the Code of Conduct be revisited and revised to uphold obligations Australia has undertaken in its trade agreements. We appreciate your consideration and attention to our concerns.

Sincerely,



cc: The Hon. Simon Birmingham, Minister of Trade  
The Hon. Arthur Sinodinos, Ambassador to the United States  
The Hon. Arthur Culvahouse, Ambassador to Australia