

Hon Willie Jackson

Minister for Broadcasting and Media

Proactive release of Cabinet Material: Supporting commercial bargaining
for online news

9 December 2022

These documents have been proactively released by the Minister for Broadcasting and Media. This package includes the Cabinet paper, and other key decisions, as listed below:

DEV-22-MIN-0288 Minute Supporting Commercial Bargaining for Online News,
Cabinet Office

Cabinet Paper - Supporting Commercial bargaining for online news Cabinet Paper,
Office of Minister of Broadcasting and Media

Regulatory Impact Statement – Recognising news medias value in a digital
environment – August 2022, Ministry for Culture and Heritage

Some parts of this information release would not be appropriate to release and if requested would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Section 9(2)(f)(iv) To maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials.

9(2)(b)(ii) the release of the information: would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Supporting Commercial Bargaining for Online News

Portfolio **Broadcasting and Media**

On 23 November 2022, the Cabinet Economic Development Committee:

Background

- 1 **noted** that government funding to support public interest journalism is due to expire in mid-2023, leaving the sustainability of the New Zealand news media sector at risk;
- 2 **noted** that there is a bargaining power imbalance between the New Zealand news media and the global digital platforms that use news content to drive their revenues, which means only the largest news media companies are likely to reach commercial arrangements for that content;

Proposed legislation

- 3 **agreed** to the development of legislation to support news media organisations to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms;
- 4 **noted** that the likelihood of the legislation would encourage commercial arrangements to be agreed outside the formal bargaining framework between news media organisations and digital platforms over the use of, and payment for, news media content online;
- 5 **agreed** that the legislation will:
 - 5.1 include a mechanism for eligible news media companies to trigger formal bargaining with eligible digital platforms, followed by mediation and then arbitration if parties did not reach agreement within specified timeframes;
 - 5.2 be administered and monitored by an independent regulator;
 - 5.3 define eligible news media organisations by reference to their adherence to professional standards, and New Zealand content and audience;
 - 5.4 define eligible digital platforms as those which present or facilitate access to New Zealand news content, and which have a bargaining power imbalance in their favour with New Zealand news media;
 - 5.5 prescribe duties on parties bargaining to negotiate in good faith and comply with obligations in any code of conduct developed by the regulator;

- 5.6 prescribe when and how the regulator could exempt a digital platform from being subject to certain parts of the legislation, considering the size, nature, and diversity of coverage of deals it has struck with news media companies and its compliance with legislative and code of conduct requirements;
- 5.7 authorise the regulator to impose any conditions on an exemption the regulator considers appropriate;
- 5.8 prescribe the circumstances in which the regulator can vary or revoke an exemption it has granted a digital platform in respect of the legislation;
- 5.9 include requirements for eligible digital platforms and eligible news media organisations to disclose information to the regulator in certain circumstances to support the regulator's functions in respect of the legislation, subject to confidentiality requirements;
- 5.10 include a power for the regulator to develop a code of conduct, the purposes of which would be to support the bargaining process under the legislation. The code of conduct could create obligations on eligible news media organisations and eligible digital platforms subject to the framework;
- 5.11 prescribe the matters that may and/or must be covered in the code of conduct developed by the regulator;
- 5.12 impose civil penalties for non-compliance with the legislation;
- 6 **agreed** to permit news media companies who meet the eligibility criteria under the proposed legislation to collectively bargain with eligible digital platforms in relation to the terms on which the platforms feature their content, through an exemption from prohibitions in the Commerce Act 1986 relating to restrictive trade practices;
- 7 **agreed** that the Broadcasting Standards Authority (BSA) should be appointed as the independent regulator, provided further work does not identify any significant feasibility issues;
- 8 **noted** that detailed costings and a Budget bid will be developed to seek the funding required to implement the legislation;
- 9 **agreed** that the legislation will not come into force unless and until funding has been secured;
- 10 **authorised** the Minister for Broadcasting and Media to make further detailed policy decisions relating to the proposals in the paper under DEV-22-SUB-0288 as appropriate and in a matter not inconsistent with Cabinet decisions, including but not limited to:
 - 10.1 the specific functions and powers required of the independent regulator to administer and monitor the legislation;
 - 10.2 the procedural detail of the bargaining process, to ensure it is balanced and workable for platforms, news media, and the regulator;
 - 10.3 the information disclosure requirements appropriate to respect commercial sensitivities and ensure effective system monitoring;
 - 10.4 matters that may and/or must be covered in any code of conduct developed by the independent regulator;

- 10.5 the scale and enforcement mechanisms for penalties;
- 10.6 the precise parameters and terms of the legislative exemption to permit collective bargaining referenced in paragraph 6 above;
- 10.7 prescribing the circumstances in which an exemption granted by the regulator to a digital platform, as referenced in paragraph 5.6 above, can be granted, varied or revoked by a regulator;
- 10.8 the regulator’s reporting obligations in respect of the legislation;
- 10.9 any minor and technical details;

Legislative implications

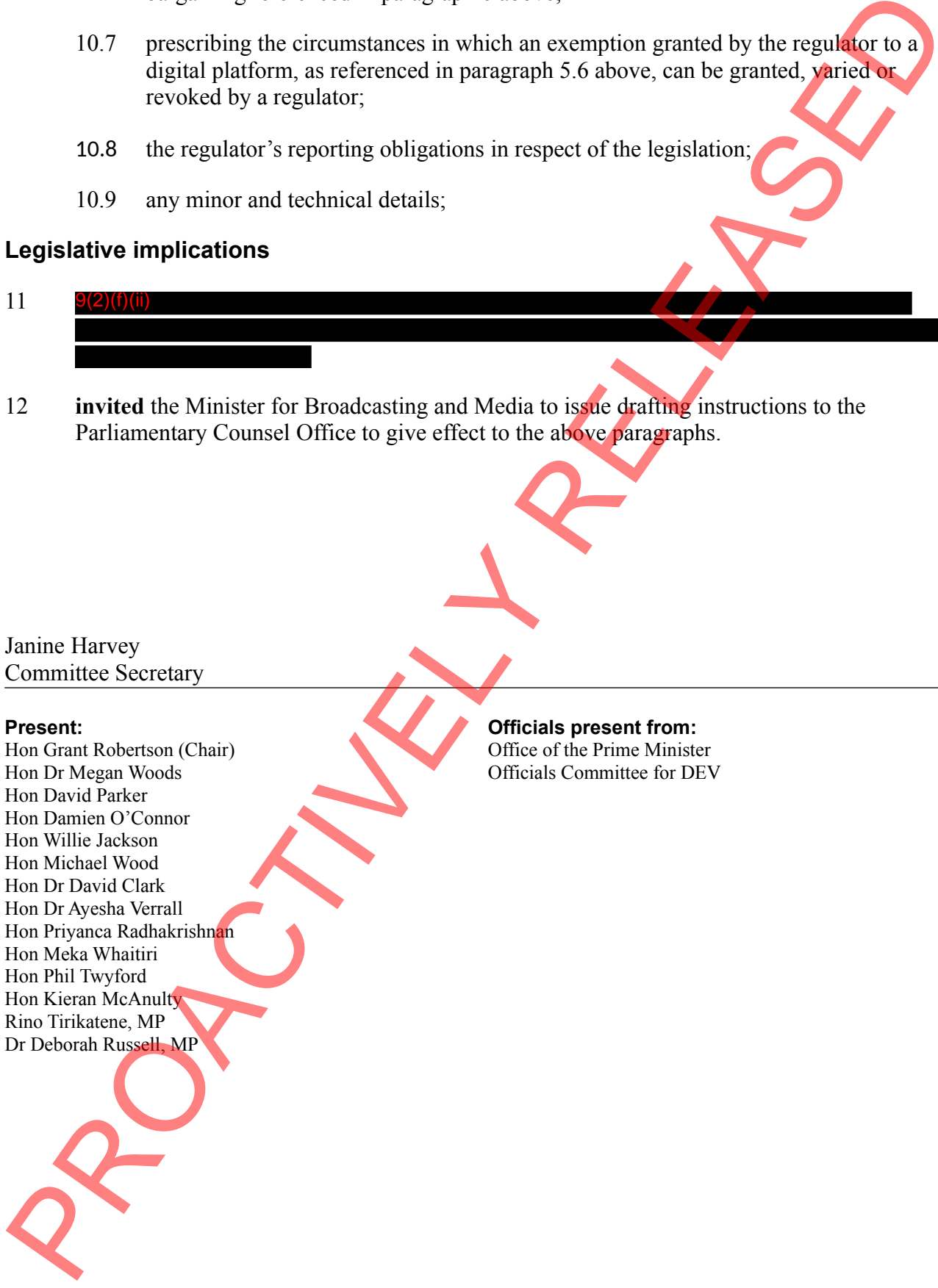
11 9(2)(f)(i) [Redacted]

12 **invited** the Minister for Broadcasting and Media to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs.

Janine Harvey
Committee Secretary

Present:
 Hon Grant Robertson (Chair)
 Hon Dr Megan Woods
 Hon David Parker
 Hon Damien O’Connor
 Hon Willie Jackson
 Hon Michael Wood
 Hon Dr David Clark
 Hon Dr Ayesha Verrall
 Hon Priyanca Radhakrishnan
 Hon Meka Whaitiri
 Hon Phil Twyford
 Hon Kieran McAnulty
 Rino Tirikatene, MP
 Dr Deborah Russell, MP

Officials present from:
 Office of the Prime Minister
 Officials Committee for DEV



In Confidence

Office of the Minister for Broadcasting and Media
Cabinet Economic Development Committee

Supporting commercial bargaining for online news

Proposal

- 1 This paper seeks agreement to:
 - 1.1 the development of legislation to support commercial bargaining over the use of, and payment for, news media content online;
 - 1.2 key design features to support commercial bargaining;
 - 1.3 delegated authority for the Minister for Broadcasting and Media, in consultation with other relevant Ministers as required, to make further detailed policy decisions that are consistent with the decisions sought in this paper, in advance of Cabinet's approval for legislation to be introduced to Parliament.

Relation to government priorities

- 2 This proposal supports the Government's priorities to secure our economic recovery from the COVID-19 pandemic and lay the foundations for the future.
- 3 A strong and sustainable news media sector in Aotearoa New Zealand contributes to wellbeing domains of the Treasury's Living Standards Framework, particularly in relation to civic engagement and governance, cultural identity, and social connections.
- 4 This proposal aligns with the Strategic Framework for a Sustainable Media System [DEV-20-MIN-0169 refers]. It also complements other work underway across Government such as the DIA-led review of content regulation, the establishment of a new public media entity, and the OECD-led agreement on taxation of multinational corporations.

Executive Summary

- 5 Changes in how people consume news, and corresponding shifts in advertising revenue, have disrupted traditional news revenue models. This has contributed to the halving of the number of journalists in New Zealand, and significantly reduced the production of public interest content, particularly local news and investigative journalism. Many local and regional publications are no longer viable.
- 6 Public interest journalism supports democracy, counters misinformation, and enhances social cohesion and ultimately the wellbeing of New Zealanders.

These outcomes are strengthened when there is a range of quality news media available to the public.

- 7 Government funding to support the media sector through the COVID-19 pandemic and transition to a more sustainable future has increased substantially, to \$105 million over the last three financial years, but is coming to an end.
- 8 News media organisations are attempting to reach commercial arrangements for the use of their content online, including headlines, short blurbs and images used on digital platforms, such as Google News and on Facebook or Instagram.
- 9 While some commercial agreements have been reached, overall progress has been slow, and the terms are weighted in favour of the digital platforms. Smaller regional, Māori, Pacific and ethnic publishers, which are important sources of information for local communities, are at risk of missing out on deals completely.
- 10 The News Publishers' Association (NPA) has been granted authorisation by the Commerce Commission to collectively bargain with Google and Meta. The Commission stated there is a bargaining power imbalance between news media companies and global digital platforms.
- 11 This view is widely shared by competition and industry watchdogs in the United Kingdom, the European Union (EU), Australia, and Canada, and the G7 has expressed some support for intervention. The EU is approaching the issue on the basis of copyright law, while other parts of the world (including Australia, Canada, the UK and the US) are using or considering legislation to support fair bargaining.
- 12 I am seeking Cabinet agreement to similar legislation, to aid the New Zealand news media sector in maximising the value of the news content that it produces. The legislation will aim to ensure fair revenue sharing between digital platforms and news media organisations by:
 - 12.1 promoting voluntary commercial agreements between digital platforms and news media organisations, with minimal government intervention;
 - 12.2 where agreement cannot be reached, establishing an arbitration process to determine commercial arrangements between digital platforms and news media organisations; and
 - 12.3 providing for collective bargaining with digital platforms by news media organisations.
- 13 In overseas jurisdictions, the threat of a compulsory bargaining regime has been sufficient to bring companies to the negotiating table. For example, in Australia the bargaining, mediation and arbitration provisions have not been used, with agreements reached outside of the framework. The legislation serves as a backstop encouraging companies to enter voluntary negotiations.
- 14 Legislation to support bargaining could net an extra \$30 to \$50 million annually for our news media companies if the impacts are proportionate to overseas

models. This would substantially contribute to the ongoing sustainability of news media in New Zealand.

- 15 The legislation will include eligibility criteria to ensure a broad coverage of New Zealand media companies, including smaller, rural/regional, Māori, Pacific, and ethnic news media. There will also be eligibility criteria for digital platforms, and a prescribed process to determine if a digital platform should be exempted from the legislation based on deals it has already struck.
- 16 Of the feasible options considered, support for commercial bargaining is the only one that would not require funding to be collected and allocated by Government. Accordingly, it will better maintain a trusted, independent news media, as well as enhancing the financial sustainability of the sector.
- 17 Some detailed elements of the bargaining and arbitration process require further analysis, including, for example, the quantum of civil penalties for non-compliance and the most appropriate entity to take enforcement action.
- 18 I am presenting this proposal now due to the urgency of our news media sector's financial situation, particularly considering the Public Interest Journalism Fund ends in June 2023.
- 19 I seek Cabinet's delegated authority to make further detailed policy decisions in a manner consistent with the recommendations in this paper. I will ask officials to work with news media and the digital platforms to ensure settings are balanced and workable and will seek Cabinet's final approval of those settings alongside a Bill for introduction.

20 9(2)(f)(iv)

Background

- 21 There has been a significant shift in the way that people consume news and media. Traditional news content is now predominantly accessed online via digital platforms that act as content aggregators to sell advertising and other services around content.
- 22 The shift in audiences from traditional print and linear media to the online environment has altered traditional advertising markets. Commercial news producers that relied on revenue from advertising to fund the production of news content have seen revenues decline. Digital advertising products provide only a fraction of the revenue previously provided by traditional advertising.

Declining revenues risk the sustainability of New Zealand's news media sector

- 23 Between 2011 and 2020 newspaper advertising revenue in New Zealand fell from \$533 million to \$210 million. In contrast, all digital advertising revenue tripled to \$1.06 billion. Since 2003, New Zealand newspapers have generated \$1 in digital advertising for every \$4 that they have lost in print advertising.

24 The increasing cost to produce news content combined with reduced income has contributed to the halving of the number of journalists in New Zealand, and consequently reduced public interest journalism. Local and community news, investigative journalism, and international news have been particularly hard hit.

25 Census data reveals that the number of journalists employed in New Zealand fell from 4,284 in 2006 to 2,061 by 2018. More recently, the New Zealand Media Ownership Report estimates that during 2020, approximately 637 jobs disappeared from the New Zealand media industry. 9(2)(ba)(i)

[REDACTED]

26 This poses a risk to key Government objectives of countering misinformation and supporting democracy and social cohesion. A sustainable, local news media sector provides reliable, balanced information on which the public base choices as participants in political, economic, and social life, and acts as a watchdog on those in power. It also supports our broader social wellbeing, through for instance the use of te reo Māori and promoting the culture of New Zealand.

Public spending increases to support the commercial media sector are not sustainable

27 In the last three financial years public funding for media has risen substantially, including:

27.1 **The Public Interest Journalism Fund (PIJF):** \$55 million over three years to provide transitional support to media organisations to produce 'at risk' public journalism.

27.2 **The 2020 Media Support Package:** \$50 million to a broad range of media organisations to support companies through the first impacts of the COVID-19 pandemic. The support was focused on reducing cost and easing cashflow pressure for a wide range of media organisations, including news media.

28 The PIJF has provided short-term relief and supported 138 new journalist roles, and 25 million page views of more than 21,000 pieces of content (as of June 2022). Following the Fund's end in June 2023 these journalist roles are at risk.

29 It is not sustainable or desirable to continue to fund the media sector in this way. Continued financial support for the creation of public interest content through taxpayer funding increases risks around the perceived independence of, and public trust in, the media.

News media organisations are trying to adapt to a digital future

30 Online news readership in New Zealand is growing:

- 30.1 The most visited local website is stuff.co.nz, followed by the New Zealand Herald. Stuff increased its visits from 87 million in 2017 to 118 million in 2020, and the Herald increased its visits from 63 million in 2017 to 116 million in 2020.
- 30.2 New independents like Newsroom and The Spinoff are also growing the number of visits, and subscribers. Over the three years from 2017-2020, Newsroom went from 600,000 to 3.3 million visits, while The Spinoff went from 3.7 million to 5.2 million visits.

31 9(2)(ba)(i)
[Redacted text block]

32 Discussions with stakeholders indicate that many smaller, regional news outlets currently do not have the incentive to make the transition online as it is not profitable enough to justify. Even for news media organisations that are already online, the loss of advertising revenue means they are struggling to support regional and investigative journalism, which are cost intensive and difficult to monetise.

33 For news media companies to survive in an online environment, they are increasingly engaging in business relationships with large digital platforms, particularly Google and Meta, as the dominant players in online search and social media. News media organisations are attempting to reach commercial arrangements for the use of their content online, such as headlines, short blurbs and images used on Google News and on Facebook or Instagram.

Due to a bargaining power imbalance, progress has been slow despite news media being valuable to digital platforms

34 Recognising the strength of our relationships with digital platforms, which have been forged through collaborative work on initiatives like the Christchurch Call, I have been encouraging the digital platforms to enter into voluntary agreements with New Zealand news media organisations.

35 There have been a small number of arrangements reached. I am aware that Google has entered into commercial arrangements with BusinessDesk, Newsroom, RNZ, Pacific Media Network, Crux and NZME (the latter could potentially see a new revenue stream of \$2.5 – \$3.5 million per annum over the next five years, with scope for this to potentially increase towards \$5 million per annum). These arrangements are to supply Google News Showcase with content and receive financial compensation. Meta has not made any similar arrangements but has provided some companies with grants to assist with transition to the digital environment.

36 In recent years, other jurisdictions have investigated the role of digital platforms in the economy, for example the UK Competition and Markets Authority and the

Australian Competition and Consumer Commission. These studies have highlighted the major platforms' strong incumbency advantages, unavoidable gatekeeper role for access to consumers, and unmatched bargaining power that makes commercial deals difficult to reach and can often result in media businesses accepting terms of service that are less favourable.

- 37 In Australia and Canada, legislation has been introduced to address these issues. Australia's News Media Bargaining Code has been in force since February 2021, whilst the Online News Bill in Canada has passed its second reading. Both jurisdictions introduce similar legislative bargaining frameworks.
- 38 News media is valuable to digital platforms. As part of the process to authorise the NPA to collectively bargain with Google and Meta, the Commerce Commission found that despite a two-way value exchange between news media and digital platforms, individual news media companies are likely to be in a relatively weak bargaining position.
- 39 It also stated: "While media companies are dependent on the digital platforms for a relatively significant segment of news consumers, the digital platforms are less dependent on any given news media company for New Zealand news content. We consider that this in turn is likely to result in an imbalance of bargaining power in favour of the digital platforms".
- 40 The overwhelming feedback from the New Zealand media sector has been that in all aspects of their commercial dealings with Google and Meta, news media organisations must accept 'take it or leave it' terms that are weighted in favour of the platforms.
- 41 This inherently limits news media companies' ability to negotiate about what is a fair return for their investment in news content. It also means there is no opportunity to negotiate in relation to other concerns, including the lack of warning of changes to algorithms that impact directly on the distribution of content and therefore the number of views the content receives, or the lack of access to their customers' engagement data.
- 42 Since the Commerce Commission's provisional authorisation in May 2022 to allow collective bargaining, the NPA has indicated it has had little engagement from Google or Meta. This is consistent with overseas experience and suggests regulatory action is required to improve the quality of commercial deals. I consider that fair and appropriate commercial arrangements are unlikely without government intervention.

I propose news media and digital platforms bargaining legislation to support news media

- 43 Following the similar regulatory action in Australia and Canada and acknowledging proposals with similar aims in the US, UK and Europe, I propose to introduce legislation to support commercial negotiations between New Zealand news media organisations and digital platforms.

- 44 I am proposing some modifications to international models to improve transparency and futureproof the legislation. For example, I propose that objective criteria be developed and used by an independent regulator to identify the digital platforms that should be subject to the legislation. This differs from the Australian model where a Minister makes decisions about which digital platforms should be subject to their Code. A high-level description of the key differences across the Australian and Canadian models, and the model I am proposing, is included at Appendix 1.
- 45 Alongside the option of legislation to support bargaining, I also considered:
- 45.1 levying digital platforms to fund news content and allocating that funding to news organisations via a grants process, like the PIJF; and
 - 45.2 ring-fencing revenue raised through a multilateral OECD-led tax on multinational enterprises for news media, and distributing revenue via a grants process, like the PIJF.
- 46 I have considered the risks and benefits of each option (as well as the status quo) and experiences in other jurisdictions. It is my view that legislation to support bargaining is the most efficient and pragmatic option. It will support news media companies' commercial viability in a digital environment, without a direct subsidy or allocation from government – which is particularly important to maintain and enhance our news media's independence.
- 47 The collective bargaining provisions in the legislation will help to ensure the range of news media organisations in New Zealand can reach arrangements and maximise the value of their news content.
- 48 Estimates for the news media sector's remuneration in New Zealand with legislation in place is between \$30 and \$50 million net per year, based on our size compared to Australia and Canada.¹ The potential earnings can be compared to those from deals that could be reached under the status quo (experts have estimated approximately \$10 million per annum), and recent Government support for the news media sector, which reached an annual high of \$25 million in 2021/22 through the PIJF.
- 49 Legislation with the features outlined below could see smaller, rural/regional, Māori, Pacific and other ethnic publications receive similar benefits proportionate to their size and amount of digital content.
- 50 The legislation would not be focused on any one specific digital platform. The proposals are designed to be platform neutral to account for changes in market dynamics. While digital platforms may exit news, this will create an opportunity for other platforms. The legislation sets an expectation that platforms should negotiate in good faith over the terms for use of online news content.

¹ Commentators including Rod Sims (former ACCC chair) estimate that at least \$220 million (NZD) has been paid out to Australian news media since their legislation was enacted in 2021. Canadian media expect around \$240 million (NZD) as a result of their proposed legislation.

51 It is important to pass legislation to ensure deals are reached in the future as the landscape of digital platforms could shift (for example, Meta has signalled it could move away from prioritising news content) and new players will emerge. Legislation will future proof the ongoing sustainability and viability of the news media sector by providing on going commercial revenue for the use of news content online.

The proposals are in line with developments in other jurisdictions

52 This work will draw on the regimes developed in Australian and Canadian legislation, where commercial arrangements between news media and digital platforms have been reached voluntarily and outside of any legislative framework. The overseas experience suggests companies will do deals in advance of the legislation in order to avoid being subject to it. In Canada, Google has signed agreements with more than 150 publications ahead of the passage of the Online News Bill. I expect the same outcome in New Zealand.

53 International experience suggests that the model of final offer arbitration is likely to incentivise companies to reach agreements to avoid provisions related to information sharing and transparency, both of which are features of the proposed scheme. The legislation is intended to serve as a 'backstop' to encourage voluntary deals.

54 The financial value of any deals the platforms do with news media would be small in comparison to their overall revenue in New Zealand. There will still be ongoing commercial opportunities for digital platforms to make considerable profits in the New Zealand market. This means that companies will have incentives to continue commercial operations. There would also be significant reputational risks for the platforms of non-compliance.

55 This has been substantiated by the Commerce Commission which found that any increased funding provided by the digital platforms would not be of a sufficient magnitude to reduce their incentive to continue operating in New Zealand, nor to reduce the news content they host or link.

If agreed, I propose the following key features to support commercial bargaining for online news

Bargaining would be a stepped process overseen by an independent regulator

56 Given the commercial sensitivities at play in relation to digital platforms' use of and payment for news content, I expect the existence of legislation giving effect to my proposal would incentivise companies to reach arrangements outside the formal bargaining process it prescribes.

57 If private arrangements were not agreed within a certain timeframe after the legislation were passed (for example, six months), news media organisations could trigger a formal bargaining process. Unsuccessful bargaining within that process (for example, over a period of three months, or longer if agreed between parties) would lead to mediation to support parties to reach agreement. Arbitration would be used as a last resort, after a period of

unsuccessful mediation, to determine which party's final offer is most appropriate. This type of arbitration is to encourage reasonable engagement from both parties.

58 An independent regulator would administer and monitor the scheme and include information about the scheme in its annual reporting. I have considered a range of entities to take on the role of regulator, including the Commerce Commission, and establishing a new regulator. In keeping with the approach taken in Australia and Canada, where their existing media regulators have taken on this role, I consider the Broadcasting Standards Authority (BSA) is the most appropriate entity to administer and monitor the bargaining process.

59 I note that the BSA may be affected by reform following the review of content regulation currently being undertaken by DIA and Manatū Taonga. However, any new powers and functions of the BSA as a result of my proposal could be accommodated by any future media or content regulator. DIA has been consulted and supports this position.

60 The BSA has confirmed it would be open to the role. I have asked my officials to work with the BSA to determine what additional resourcing and capability would be required to administer the new requirements (potentially including procurement of mediation and arbitration services).

61 9(2)(f)(iv)
[Redacted text]

Eligibility criteria would apply for news media organisations and digital platforms

62 Eligibility criteria would capture the range of professional New Zealand news media organisations, including smaller, rural/regional, Māori, Pacific, or ethnic news media, while excluding amateur content creators and individuals or businesses that do not produce public interest journalism or core news content. This distinction is important because the rationale for government intervention rests on the public interest inherent in ensuring quality local news coverage.

63 To be eligible, news media organisations would need to:

63.1 meet professional standards, for example, through membership of the Media Council; and

63.2 produce news content aimed at New Zealand audiences.

64 Digital platforms would be subject to the legislation if they met a two-step test, like the Canadian approach. I consider it is a more objective, futureproof and transparent approach than the Australian code, which relies on a Minister designating which digital platforms are captured.

65 Firstly, the digital platform would need to meet an objective definition capturing the key features of hosting or facilitating online communications and access to news content to New Zealand audiences. This would be a broad definition,

capturing entities including Google, Facebook, Twitter, Yahoo News, Reddit, Tik Tok, Snapchat and any social media platform or internet browser that carries news.

- 66 The second step would require an assessment of whether there is a bargaining imbalance in the digital platform's favour, in negotiations with New Zealand news media relating to use of and payment for content. Factors relevant to this question would include the business' size and relevant market prominence, and the conditions of the market in which it operates. The requirement for a power imbalance is likely to limit the eligible platforms to Google and Meta, given their current market dominance, but over time other platforms may become eligible.
- 67 The regulator, applying the above criterion, would decide which organisations the legislation applies to and would have information-gathering powers to that effect. I have asked officials to consider whether it would minimise compliance costs to operate on an assumption that news media entities are eligible, with the regulator able to determine otherwise (for example, if there was a dispute around eligibility). If not, news media companies would apply to the regulator to determine they and the platform they propose to bargain with are eligible.

Legislation would include duties for negotiating parties

- 68 Once bargaining is formally initiated, the process would impose certain obligations on both parties. Legislation would prescribe minimum obligations, including a duty to negotiate in good faith, the bargaining processes, the timeframes for each step and how mediators and arbitrators should be appointed. The regulator would also be empowered to develop a code of conduct specifying further duties and processes, for instance around re-negotiation toward a deal's end date. However, in keeping with the commercial nature of negotiations there would be flexibility for parties to agree on modifications. For legislative coherence and simplicity, arbitration processes will generally aim to align with those set out in the Arbitration Act 1996, with appropriate changes where necessary.²
- 69 Parties would be required to share information with the regulator about agreements. These requirements would ensure the regulator can effectively monitor compliance, support fairness and consistency across the sector, and appropriately determine exemption applications (discussed below). Confidentiality obligations would apply, which any reporting requirements for the regulator would need to respect.
- 70 To ensure digital platforms are responsive, both the Australian and Canadian models impose substantial penalties for non-compliance. The Australian model allows for fines of up to 10 percent of the platform's revenue (for example, based on Google's 2020 revenue, it could be fined up to AUD\$500 million), whilst the Canadian model allows for up to \$18.5 million (NZD) a day.
- 71 I am proposing a civil penalties approach in respect of any party's non-compliance with the framework, including legislated duties and code of conduct

² For example, the legislation would likely mirror the Arbitration Act's provision for the court to enforce an arbitral award as a judgment debt, but may need to deviate to ensure information disclose requirements are effective.

obligations. I have asked Manatū Taonga to engage with the Ministry of Justice to undertake further work on the detail, including the quantum of the penalty and how it is enforced.

- 72 In a global context, the proposals will not significantly impact digital platforms. There is a pattern of increasing regulation of digital platforms around the world. For example, after their increased copyright regime for news content was introduced, the French competition authority fined Google €600 million for not coming to arrangements for content, whilst elsewhere the EU imposed a €4 billion fine on Google for anticompetitive behaviour, and the Indian Competition Commission fined Google \$162 million. In the UK, the new digital regulator (the Digital Markets Unit) will be able to impose multibillion pound fines on digital platforms.
- 73 I am seeking Cabinet's delegated authority to determine, with regard to officials' further work with relevant agencies and external stakeholders as appropriate:
- 73.1 the procedural detail of the bargaining process, to ensure it is balanced and workable for platforms, news media, and the regulator;
- 73.2 the scale and enforcement mechanisms for penalties, to ensure their effectiveness in deterring non-compliance and their appropriateness within New Zealand's wider regulatory settings; and
- 73.3 the level of information disclosure required to support the regulator's functions, without unduly exposing commercially sensitive information.
- 74 I will seek Cabinet's final policy approval of those matters when I return with a Bill for introduction.
- 75 I have considered whether to include requirements for how news media could spend revenue from arrangements reached under the framework (for example, on public interest journalism or other areas that would support social cohesion and democracy). While I recognise the risks to broader social objectives of incentivising more 'shareable' content, I have concluded that allowing news media organisations to tailor investment in line with business needs will ultimately better support sector sustainability. It would also likely be difficult to monitor or enforce these requirements, so the additional compliance costs (and government intervention in a traditionally private sphere) are not justifiable.

Digital platforms could be exempted under certain circumstances

- 76 Digital platforms which are subject to the legislation could request an exemption from the independent regulator on the grounds of having made sufficient quality arrangements with a range of New Zealand news media.
- 77 The regulator would consider whether the digital platform has made a fair and proportionate contribution to the sustainability of New Zealand news media, considering both arrangements made outside and under the legislation. Factors to be assessed would include:
- 77.1 the platform's overall level of compensation for news content;

- 77.2 the range of news media organisations with which deals have been struck, in particular whether Māori, rural/regional, Pacific, ethnic and other smaller media businesses are supported;
- 77.3 the nature of any non-financial or reciprocal arrangements (including matters relating to algorithm changes and data collection), which would also help to ensure any corporate influence does not undermine journalistic independence and freedom of expression; and
- 77.4 compliance with relevant legislative and code of conduct requirements.
- 78 The regulator could grant exemptions with or without conditions, would review any exemption on a regular basis, and could vary or revoke an exemption in certain circumstances. Exemptions could be granted with a specified end date.

Collective bargaining would be allowed without Commerce Commission authorisation

- 79 As collective bargaining involves an arrangement between competitors, there is a risk that it may contravene provisions in the Commerce Act 1986 that prohibit cartel behaviour or agreements that have or are likely to have the effect of substantially lessening competition in a market. However, such arrangements can be authorised by the Commerce Commission where they are likely to be of net public benefit.
- 80 As part of the process to authorise the NPA to collectively bargain with Google and Meta, the Commission stated that collective bargaining could redress the bargaining imbalance and that potential benefits include lower transaction costs, more sophisticated contracts, and supporting the production of more or better news content. These potential benefits are particularly true for smaller media outlets.
- 81 Following the Commission's authorisation, and to increase the efficiency and effectiveness of the legislation, I propose to develop a carefully circumscribed exemption from certain provisions in Part 2 of the Commerce Act 1986 for news media organisations to collectively bargaining with eligible digital platforms. To apply the exemption, news media organisations will need to meet the eligibility criteria under the framework.
- 82 Authorising collective bargaining would further mitigate the imbalance in negotiations by enabling organisations to work together and pool resources. It would remove the (potentially repeated) costs involved in applying for and obtaining authorisation from the Commission, both for news media and for the Commission itself. These effects would benefit smaller, rural/regional, Māori, Pacific, ethnic and other media. While digital platforms have stated they do not consider collective bargaining is appropriate in this context, it should limit their operational costs by reducing the overall number of discrete negotiations.
- 83 I propose to exempt news media companies from prohibitions in the Commerce Act for the purpose of collectively negotiating terms for payment and use of, news content online. This exemption would apply whether or not formal bargaining had been triggered under the legislation.

84 In response to the Commerce Commission's market study into the grocery retail sector, the Government has recently agreed to exempt grocery suppliers from prohibitions in the Commerce Act for the purpose of collectively negotiating terms of supply with supermarkets. Manatū Taonga officials will work closely with the Ministry of Business, Innovation and Employment (MBIE) to ensure alignment, as and where appropriate, between these two proposals.

Financial Implications

85 9(2)(f)(iv)

86 If the proposal is agreed, more detailed costings will be undertaken as part of preparing a Budget bid. I intend to secure the necessary funding before implementing the legislation. Policy development and implementation of the legislation would be met from existing Manatū Taonga baseline funding.

Legislative Implications

87 9(2)(f)(iv)

88 If it is agreed that the framework will empower the regulator to make a code of conduct, this code would be secondary legislation.

89 A legislative exemption to provisions in the Commerce Act 1986 around restrictive trade practices would be required to allow eligible news media organisations to collectively bargain with digital platforms. Further work on the exemption's design will ensure it is no broader than necessary to achieve the policy objectives.

Impact Analysis

90 A Regulatory Impact Statement (RIS) has been prepared and attached to this Cabinet paper at Appendix 2.

91 A cross-agency panel has assessed the RIS and considers it partially meets the QA criteria. The panel made the following comments:

91.1 The analysis of the problem and preferred set of options is robust and convincing and the environmental context is well understood and outlined.

91.2 The RIS acknowledges limitations in relation to stakeholder consultation, in particular the limited consultation that has been undertaken on the preferred option, and the absence of consultation on the other options presented in the RIS. It is for this reason that the panel has determined

the RIS only partially meets the QA criteria. The panel is supportive of the intention to further engage stakeholders during the design and drafting of the legislation and considers this to be essential to ensure the preferred option achieves the desired objectives.

Population Implications

- 92 The proposals in this paper have been designed, as much as possible, to support the continued diversity of our news media sector and its content. This focus will help to ensure a wider range of voices are represented for communities who may be less served by larger or mainstream media organisations, particularly Māori, Pacific, ethnic and rural communities.
- 93 Te Puni Kōkiri, the Ministry for Pacific Peoples and the Ministry for Ethnic Communities have stated that this policy will help to support media in their respective communities.
- 94 Specific aspects of the legislation that support the diversity of our news media include the criteria digital platforms must meet to be exempt from the framework, including supporting a range of different communities when reaching commercial arrangements with news media.
- 95 The authorisation of collective bargaining will also assist these groups, by further reducing the power imbalance and allowing the otherwise potentially prohibitive costs of negotiation to be shared.

Human Rights

- 96 I consider the proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 and note in particular that they support democratic and civil rights including the freedom of expression. The detailed design of the proposed civil penalty regime will ensure rights to natural justice are observed.

Consultation

- 97 The following agencies and bodies were consulted for this Cabinet paper: the Ministry of Business, Innovation and Employment; the Ministry of Foreign Affairs and Trade; the Treasury; the Ministry of Justice; Te Puni Kōkiri; Inland Revenue Department; Department of the Prime Minister and Cabinet; the Ministry for Ethnic Communities; the Ministry for Pacific Peoples; Parliamentary Counsel Office; the Broadcasting Standards Authority, and the Commerce Commission.
- 98 The Department for Internal Affairs, the Public Service Commission and the Legislation Design and Advisory Committee were given the opportunity to comment.
- 99 Key stakeholders in the news media sector have expressed overwhelming support for a legislated bargaining framework, stating it would help mitigate the bargaining power imbalance and support fairer commercial arrangements.

- 100 Google and Meta are opposed to any legislative bargaining framework. They oppose collective bargaining, requirements to share commercial or operational information, and the final offer arbitration model. They state that the value exchange between news media and digital platforms is in the news media's favour. Meta states that news media and individuals freely post articles to their platforms, so there is no basis for requiring any payment.
- 101 New Zealand has a particularly strong relationship with digital and social media firms through the Christchurch Call and responding to issues around the ethical deployment of digital technology. Maintaining this relationship, and our reputation as a smart and effective player in the digital domain, is important. This is why I have been meeting regularly with the platforms and have written to both Google and Meta to outline the Government's position.
- 102 I have asked officials to continue to work with the platforms, including through potentially sharing an exposure draft of the legislation, to ensure the legislation's settings are workable and to mitigate any wider impact it could have on other Government priorities. If Cabinet agrees to this proposal, I will also write to the platforms to inform them in advance of any broader public announcement.

MBIE Departmental Comment

- 103 MBIE (Competition Policy) considers that the absence of commercial agreements with digital platforms over the inclusion of news extracts in search results or social media feeds is not of itself an indication of market failure. This relationship involves a two-way value exchange, as news media companies benefit from the 'free' promotion of their content and referral traffic as readers click through to their sites. MBIE's view is that any intervention should seek to promote the long-term interests of consumers, competitive neutrality, and innovation in delivering news according to changing consumer preferences. MBIE sees further policy development (including intervention logic) on a bargaining framework as necessary to ensure these objectives and the two-way value exchange are recognised both in arrangements negotiated outside the framework (based on exemption criteria) and arrangements negotiated within the framework (for example, through choice of arbitration principles).

Communications

- 104 Following Cabinet decisions, I intend to make an announcement regarding the introduction of legislation to support commercial bargaining.
- 105 Based on other countries' experiences, public announcement of a bargaining framework will likely encourage the digital platforms to enter into more commercial arrangements with news media organisations, in advance of the legislation.
- 106 There is a risk that an announcement could cause a reaction from the digital platforms. However, since the Australian legislation was passed, other jurisdictions have been announcing and developing similar legislation. In addition, the proposal includes an exemption regime whereby digital platforms

could request an exemption from the independent regulator on the grounds of having made sufficient quality arrangements with a range of news media. There are also considerable reputational and commercial risks associated with non-compliance or service denial that would go beyond commercial operations in New Zealand.

- 107 These risks can be managed by communications that emphasise and focus on the Government's commitment to supporting voluntary commercial arrangements and fair revenue sharing for the use of online news content.

Proactive Release

- 108 I intend to release this paper proactively, along with the Regulatory Impact Statement, following any public announcement. This proactive release would be subject to redaction as appropriate under the Official Information Act 1982.

Recommendations

- 109 The Minister for Broadcasting and Media recommends that the Committee:

- 1 **note** that Government funding to support public interest journalism is due to expire in mid-2023, leaving the sustainability of the New Zealand news media sector at risk;
- 2 **note** there is a bargaining power imbalance between New Zealand news media and the global digital platforms that use news content to drive their revenues, which means only the largest news media companies are likely to reach commercial arrangements for that content;
- 3 **agree** to the development of legislation to support news media organisations to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms;
- 4 **note** that the likelihood of the legislation would encourage commercial arrangements to be agreed outside the formal bargaining framework between news media organisations and digital platforms over the use of, and payment for, news media content online;
- 5 **agree** that the legislation will:
 - 5.1 include a mechanism for eligible news media companies to trigger formal bargaining with eligible digital platforms, followed by mediation and then arbitration if parties did not reach agreement within specified timeframes;
 - 5.2 be administered and monitored by an independent regulator;
 - 5.3 define eligible news media organisations by reference to their adherence to professional standards, and New Zealand content and audience;

- 5.4 define eligible digital platforms as those which present or facilitate access to New Zealand news content, and which have a bargaining power imbalance in their favour with New Zealand news media;
- 5.5 prescribe duties on parties bargaining to negotiate in good faith and comply with obligations in any code of conduct developed by the regulator;
- 5.6 prescribe when and how the regulator could exempt a digital platform from being subject to certain parts of the legislation, considering the size, nature, and diversity of coverage of deals it has struck with news media companies and its compliance with legislative and code of conduct requirements;
- 5.7 authorise the regulator to impose any conditions on an exemption the regulator considers appropriate;
- 5.8 prescribe the circumstances in which the regulator can vary or revoke an exemption it has granted a digital platform in respect of the legislation;
- 5.9 include requirements for eligible digital platforms and eligible news media organisations to disclose information to the regulator in certain circumstances to support the regulator's functions in respect of the legislation, subject to confidentiality requirements;
- 5.10 include a power for the regulator to develop a code of conduct, the purposes of which would be to support the bargaining process under the legislation. The code of conduct could create obligations on eligible news media organisations and eligible digital platforms subject to the framework;
- 5.11 prescribe the matters that may and/or must be covered in the code of conduct developed by the regulator;
- 5.12 impose civil penalties for non-compliance with the legislation;
- 6 **agree** to permit news media companies who meet the eligibility criteria under the proposed legislation to collectively bargain with eligible digital platforms in relation to the terms on which the platforms feature their content, through an exemption from prohibitions in the Commerce Act 1986 relating to restrictive trade practices;
- 7 **agree** that the Broadcasting Standards Authority (BSA) should be appointed as the independent regulator, provided further work does not identify any significant feasibility issues;
- 8 **note** detailed costings and a Budget bid will be developed to seek the funding required to implement the legislation;

- 9 **agree** that the legislation will not come into force unless and until funding has been secured;
- 10 **agree** to delegate to the Minister for Broadcasting and Media the ability to make further detailed policy decisions relating to the proposals in this paper as appropriate and in a matter not inconsistent with Cabinet decisions, including but not limited to:
- 10.1 the specific functions and powers required of the independent regulator to administer and monitor the legislation;
 - 10.2 the procedural detail of the bargaining process, to ensure it is balanced and workable for platforms, news media, and the regulator;
 - 10.3 the information disclosure requirements appropriate to respect commercial sensitivities and ensure effective system monitoring;
 - 10.4 matters that may and/or must be covered in any code of conduct developed by the independent regulator;
 - 10.5 the scale and enforcement mechanisms for penalties;
 - 10.6 the precise parameters and terms of the legislative exemption to permit collective bargaining referenced in recommendation 6;
 - 10.7 prescribing the circumstances in which an exemption granted by the regulator to a digital platform, as referenced in recommendation 5.6, can be granted, varied or revoked by a regulator;
 - 10.8 the regulator's reporting obligations in respect of the legislation; and
 - 10.9 any minor and technical details;
- 11 **9(2)(f)(iii)**
[REDACTED]
[REDACTED] and
- 12 **agree** to Manatū Taonga officials issuing instructions to the Parliamentary Counsel Office to give effect to these recommendations.

Authorised for lodgement

Hon Willie Jackson
Minister for Broadcasting and Media

Appendix 1: Key differences across international models

	Australian News Media Bargaining Code	Canadian Online News Bill	Potential New Zealand model
Designation	<p>Digital platforms are not subject to the Code until they are ‘designated’ by the Treasurer.</p> <p>The Treasurer must consider whether there is a significant bargaining imbalance, and the contribution the platform has made to the news industry.</p>	<p>Digital platforms are subject to the legislation until they can demonstrate they should be exempt.</p> <p>A definition is used to capture relevant digital news intermediaries with a significant bargaining power imbalance.</p> <p>Criteria are used to assess which digital platforms are exempted from application of the Bill due to the sufficiency of commercial arrangements.</p>	<p>Digital platforms are subject to the legislation until they can demonstrate they should be exempt.</p> <p>An objective definition would be used to capture relevant digital platforms, followed by an assessment of a bargaining power imbalance.</p> <p>Digital platforms could request an exemption from the independent regulator on the grounds of having made sufficient quality arrangements with a range of news media.</p>
Decision making powers	<p>A Minister (the Treasurer) makes designation decisions.</p> <p>An independent regulator makes lower-level decisions (for example, decisions around the registration of news media businesses).</p>	<p>An independent regulator makes decisions under the legislation.</p>	<p>An independent regulator would make decisions under the legislation.</p>
Transparency requirements	<p>Few</p> <p>The terms of the deals do not need to be revealed.</p>	<p>Many</p> <p>The regulator may require news businesses to provide it with any information that it requires. This includes information around commercial arrangements.</p>	<p>Some</p> <p>The regulator could require information on arrangements reached under the legislation. Deals outside of the legislative framework would not need to be revealed.</p>

PROACTIVELY REVIEWED

Appendix 2: Regulatory Impact Statement

PROACTIVELY RELEASED

Regulatory Impact Statement: Recognising news media’s value in a digital environment

Coversheet

Purpose of Document	
Decision sought:	Analysis produced to support final Cabinet decisions.
Advising agencies:	Manatū Taonga – Ministry for Culture and Heritage
Proposing Ministers:	Minister for Broadcasting and Media
Date finalised:	17 August 2022
Problem Definition	
<p>There is a power imbalance between news media organisations and digital platforms, such as Google and Facebook. This imbalance is inhibiting the ability for news media organisations to negotiate payment for the aggregation and display of links to their content in search results and social media feeds.</p>	
Executive Summary	
<p>The news media sector is under pressure. Newspaper advertising revenue, and the journalism workforce, have halved in recent years. Ensuring access to accurate and trusted news content is critical to supporting the free flow of information that underpins thriving communities and functioning democracy.</p> <p>The Government has invested \$105 million over the last three financial years to ensure news media remain viable, and to support the industry’s transition to more sustainable ways of working. Alongside this investment, news media are seeking to diversify and stabilise their revenue streams, including methods to monetise others’ use of their content.</p> <p>Digital platforms like Google and Meta are entering into negotiations with some news media organisations to pay for or licence news content. A handful of deals with larger New Zealand media companies have been agreed.</p> <p>However, international experiences have shown that commercial agreements struck against the backdrop of legislation requiring fair deals appear to be more numerous and of a higher value to news companies than those struck voluntarily. This presents both an opportunity to better support the sustainability of local news media, and arguably a problem (in that deals without legislation may not reflect the true value of news media output).</p> <p>Without intervention to support optimal deals, there will be pressure on the Government to continue to fund the creation of public interest news content. The contestable nature of both the annual budget process and content funding processes, combined with the uncertainty inherent in any unregulated, voluntary deals with digital platforms, means that a significant proportion of news media organisations’ funding will not be guaranteed or foreseeable. This outcome does not support long term planning, innovation, or sustainability.</p>	

This regulatory impact analysis has been undertaken on the basis that there is a power imbalance between digital platforms and news media organisations, and that this appears to inhibit optimal revenue sharing and arguably represents at least a partial market failure. Options (other than the counterfactual) have been confined to those which would see a transfer of value from digital platforms to news media organisations, with the overarching objective of supporting a sustainable, high quality news media sector. Options include:

- **Levy on digital platforms**, which would be collected from digital platforms and distributed to news media organisations by a central authority.
- **News media and digital platforms bargaining framework**, which would establish a three-step process in legislation, enabling news media organisations to initiate formal negotiations with digital platforms for payment to use or link news content. Negotiations would be followed by mediation and arbitration processes as required, if commercial agreements with platforms are unable to be reached following a defined period.
- **Ring-fencing revenue raised through a tax on multinational enterprises for news media**, which would rest on an Inland Revenue-led work programme as part of an OECD multilateral process. A proportion of income from the OECD tax process in New Zealand could potentially be ringfenced and used to support news media organisations.

A news media and digital platforms bargaining framework (referred to throughout as a bargaining framework) emerges as the preferred option in the analysis.

While this option would represent intervention in a market relationship, competition issues and the power imbalance between digital platforms and news media suggest intervention is warranted. Of the options, the bargaining framework best supports the independence of New Zealand news media (as the financial support would not require collection and allocation by Government), as well as enhancing media entities' financial sustainability. Experiences in Australia suggest a bargaining framework will likely encourage a market solution, whereby platforms and news media organisations reach agreements independently of the legislation.

While the scheme will have some associated costs to government, these costs are likely to be minor compared with the benefits that would fall on the news media sector (and therefore, compared to the cost of equivalent taxpayer funding). It is also likely to create less of a compliance burden than a levy, and produce revenue for media organisations more quickly than ringfencing a portion of the yet-to-be-implemented tax on multinational enterprises.

This RIS also considers design options for the bargaining framework. The preferred design of the framework:

- includes requirements to share some information about agreements reached under the framework with an independent regulator, so the scheme can be monitored effectively.
- does not include any requirements for news media organisations to spend revenue derived from agreements reached under the framework in any specific way. Such requirements would add to compliance costs, are ultimately unlikely to create a noticeable increase in public interest outcomes, and
- authorises media organisations to collectively bargain with digital platforms without having to obtain approval from the Commerce Commission. This could support equity of participation, particularly for smaller rural/regional, Māori and ethnic media organisations.

The key stakeholders (New Zealand media organisations and digital platforms) have divergent views on the nature of the problem and the need for policy intervention.

News media state that digital platforms have free access to quality journalism and content, which they use to benefit their own business models. News media consider there is a significant disparity in bargaining power, given their relative size and their reliance on digital platforms. News media are also highly aware of legislative action being taken internationally and have been publicly calling on the New Zealand Government to follow suit.

Digital platforms consider that there is already a substantial two-way value exchange, where news businesses derive substantial value from referral traffic. Google says it does not advertise around news search results and therefore does not directly profit from content. Meta states that news appears on its platforms because publishers create pages and post links to their own content. Users also post links, often at the publishers' encouragement.

Key risks of the preferred option include:

- Digital platforms withdraw some services from New Zealand, as when Meta blocked news to Australians on its platform for several days when the Australian legislation was first announced in 2021. International developments and legislative refinements may mean such an extreme reaction is less likely, but the risk of a reduction in other types of support the platforms currently provide to news media (for example, grants and training programmes) cannot be discounted.
- There is heavier reliance on the framework than is expected. This scenario would play out if arrangements were unable to be reached outside of the framework. Manatū Taonga considers this outcome is unlikely as the Australian and Canadian experiences suggest that the threat of legislation is sufficient to bring the digital platforms to the negotiating table. In any case, budget planning is likely to account for this risk in determining the funding model.

Limitations and Constraints on Analysis

Following Ministerial direction, the analysis informing this RIS has been undertaken in a short timeframe, and with limited stakeholder engagement (and only on the digital bargaining framework option). These decisions were taken on the basis that key stakeholders' views have been well-canvassed both publicly and with Government, and that there is some urgency in progressing a solution in advance of existing Government funding for public interest journalism coming to an end in July 2023.

Ministerial direction indicated further Crown funding is not a feasible option, so it has been excluded from this analysis. The range of options considered in this RIS is specifically focused on the exchange of value between digital platforms and news media organisations, in relation to links and snippets of news content. Wider issues and options for supporting the sustainability of the news media sector are considered in other workstreams.

Manatū Taonga does not hold trade and commercial information that could contribute to a more fulsome understanding of the problem definition in the New Zealand context, substantiate stakeholder views, and support options analysis. Much of this information is held by digital platforms and/or news media organisations and is unlikely to be shared voluntarily (for example, the value digital platforms accrue from news media content; the value news media gain from digital platforms linking to their content; and the value and content of existing arrangements between news media organisations and digital platforms).

This RIS therefore relies on anecdotes and estimates from industry commentators, and overseas experience and evidence, to quantify the problem and the costs and benefits of the preferred option.

Assumptions underpinning this analysis include that:

- the power imbalance between digital platforms and news media organisations is inhibiting optimal revenue sharing, and that platforms benefit at the expense of, or at least more from the relationship than, news media organisations. This assumption is based on international experience;
- increased revenue for news media organisations (in combination with other workstreams, such as those set out in Manatū Taonga's strategic framework for a sustainable media sector) will lead to more public interest content creation. News media organisations in stronger, sustainable financial positions will have greater capacity to retain journalists and invest in content that is more expensive to produce; and
- the preferred option will provide sustainable revenue streams for at least a portion of the New Zealand news media sector in the short term, and that any arrangements reached with digital platforms either under the framework, or because of the framework's existence, will be renegotiated over the longer term. This will be supported by provisions for renegotiation of agreements in the legislation establishing the framework.

Responsible Manager(s) (completed by relevant manager)

Carl Olive. Manager, Media Policy, Manatū Taonga – Ministry for Culture and Heritage

17 August 2022

Quality Assurance (completed by QA panel)

Reviewing Agency: Manatū Taonga and DIA.

Panel Assessment & Comment: A cross-agency panel has assessed the RIS and considers it partially meets the QA criteria. The analysis of the problem and preferred set of options is robust and convincing and the environmental context is well understood and outlined.

The RIS acknowledges limitations in relation to stakeholder consultation, in particular the limited consultation that has been undertaken on the preferred option, and the absence of consultation on the other options presented in the RIS. It is for this reason that the panel has determined the RIS only partially meets the QA criteria. The panel is supportive of the intention to further engage stakeholders during the design and drafting of the legislation and considers this to be essential to ensure the preferred option achieves the desired objectives.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

A sustainable news media sector is critical to supporting a healthy democracy and countering misinformation

- 1 An economically vibrant news media sector is critical for supporting democracy and social cohesion, and ultimately the wellbeing of New Zealanders. An independent, well-functioning and healthy news media sector is a critical component of an open, participative democracy. It provides information, informs and engages debate, holds political and business players to account and contributes to social cohesion.
- 2 The diversity and plurality of the New Zealand news media sector also provides important news content and information for specific communities, for example Māori news media, news media for a range of ethnic communities (for example, content targeted towards Pacific, Chinese and Indian communities), and reporting on issues of significance for particular local and regional communities.
- 3 A strong media sector leaves less space for misinformation and disinformation. Te Pūnaha Matatini (a centre of research excellence hosted by the University of Auckland) states that “there has been a sharp increase in the popularity and intensity of COVID-19-specific disinformation and other forms of ‘dangerous speech’ and disinformation, related to far-right ideologies.”¹

Digital platforms have changed the way news is accessed

- 4 The rapid rise of global digital platforms such as Google and Facebook has fundamentally changed the way audiences access and consume content, including news content.
- 5 Digital platforms aggregate content produced by others and present hyperlinks to that content (often with previews, such as headlines and thumbnails) in search results or social media feeds. Digital platforms use, and regularly alter, proprietary algorithms to govern the ordering of links as they appear to users.
- 6 Links to content, and their tailored ordering, enhance the experience for users of digital platforms. Digital platforms monetise consumer attention on their platforms through digital advertising and collection of consumer data. On the other hand, platforms’ links to media content direct significant consumer traffic to that content, which enhances media companies’ ability to charge more for digital advertising on their digital products and convert readers into paying subscribers.
- 7 A very small number of digital platforms are dominant providers of search, social media services and digital advertising, and are therefore both unavoidable partners and vital distribution channels for news media businesses.

The sustainability of the New Zealand news media sector is at risk

- 8 The shift in audiences from traditional print and linear broadcast media to the online environment has altered advertising markets. Traditional commercial news producers which relied on revenue from advertising to fund the production of news content have seen revenues decline.

¹ Working Paper: Mis- and disinformation in Aotearoa New Zealand from 17 August to 5 November 2021, The Disinformation Project, Te Pūnaha Matatini (2021).

- 9 Between 2011 and 2020 newspaper advertising revenue in New Zealand fell from \$533 million to \$210 million, while digital advertising revenue tripled to \$1.06 billion.² However, digital advertising generates only a fraction of the revenue for news media organisations that traditional advertising produced in the past, both because it can be sold in more discrete units (and therefore more cheaply) and because multinational digital platforms provide greater and more targeted reach to advertisers. Since 2003, New Zealand newspapers have generated \$1 in digital advertising for every \$4 lost in print advertising.³
- 10 The cost to produce news content, combined with reduced advertising and sales income, has contributed to the halving of the number of journalists in New Zealand. Census data reveals the number of journalists employed in New Zealand fell from 4,284 in 2006 to 2,061 by 2018.⁴ More recently, the New Zealand Media Ownership Report estimated that during 2020, approximately 637 jobs disappeared from the New Zealand media industry.⁵
- 11 The reduction in journalists has contributed to a decline in public interest journalism.⁶
9(2)(f)(v)
Local and community news, investigative journalism, and international news have been particularly hard hit. The Government's Public Interest Journalism Fund has provided short-term relief and supported 149 roles (as of August 2022), but this funding ends in July 2023.
- 12 News media organisations have reported in conversations with Manatū Taonga that further restructures are likely and that following the end of the Public Interest Journalism Fund, news content from programmes such as Local Democracy Reporting and other journalist roles are at risk.

Public spending has increased to address the challenges faced by the media sector

- 13 Recognising the importance of media in supporting democracy and social cohesion, the Government has supported the media sector and the creation of public interest journalism. This includes the \$55 million Public Interest Journalism Fund, which is intended to provide transitional support to media organisations to assist the sector to evolve in a way that ensures the longer-term sustainability.⁸ While elements of the Fund have been a success, particularly support for training and industry development, news media organisations report that they are not in a position to retain many of the journalist roles created by the Fund.
- 14 This investment is temporary, and the Government does not intend to continue funding the media sector in this way over the long term. New business models and market relationships are required to ensure the sustainability of the news media sector.

² *How much Google and Facebook made in New Zealand in 2018*, Damien Venuto, NZ Herald (2019); *Advertising Turnover Report 2020*, Advertising Standards Authority (2021).

³ *The implications of competition and market trends for media plurality in New Zealand: A report for the Ministry for Culture and Heritage*, Sapere (2021).

⁴ In 2006 the employment category was described as reporters, editors, subeditors. In 2018 the category captured print, radio or TV journalists or other writers. *Options to Improve the Environment For New Zealand Journalism*, Patrick Smellie (2019).

⁵ *Media Ownership in New Zealand from 2011 to 2020*, Saing Te, AUT Research Centre for Journalism, Media and Democracy (2020).

⁶ Public interest journalism can be understood as 'journalism that contributes to a person's ability to function as a valued and informed member of the communities in which they live and/or work' (*Investing in Sustainable Journalism: Drawdown of tagged contingency*, Minister for Media and Broadcasting, 2021).

9(2)(f)(iv)

⁸ In 2020, the Government's Media Support Package provided \$50 million to support companies through COVID-19. The support was focused on reducing costs and easing cashflow pressures for media organisation (beyond news media).

The future for news media organisations will involve a mix of revenue streams

- 15 In New Zealand, the most visited local website is stuff.co.nz, followed by the NZ Herald. Stuff increased its visits from 87 million in 2017 to 118 million in 2020, and the Herald increased its visits from 63 million in 2017 to 116 million in 2020. New independents like Newsroom and The Spinoff are also growing the number of visits, and subscribers. Over the three years from 2017-2020, Newsroom went from 600,000 visits to 3.3 million, while The Spinoff went from 3.7 million to 5.2 million visits.⁹
- 16 However, as indicated above this shift online has not translated into the same level of advertising revenue seen in the past. To obtain revenue in the current online environment, news media organisations must use an increasingly complex mixture of funding sources, including subscriptions, membership fees, sponsorships, donations, advertising, and public funding.
- 17 Some news media have successfully transitioned to these new models. However, readers and consumers in New Zealand have largely been reluctant to pay for access to news content after years of being able to access it for free.¹⁰
- 18 New Zealand news media companies are struggling to support certain types of content, particularly regional and investigative journalism, which is cost intensive to produce and difficult to monetise. Even if digital advertising and subscription-based models become more profitable, they are unlikely to cover the cost of developing investigative or local news, which is crucial to a cohesive, informed, and democratic society.
- 19 The Government is therefore likely to continue to be called on to provide financial support for the creation of public interest content through taxpayer funding, which also increases risks around the perceived independence of and public trust in the media.

Other jurisdictions have found issues with the market behaviour of digital platforms

- 20 In recent years, other jurisdictions have investigated the role of digital platforms in the economy. Several investigations have found that though digital intermediaries provide a valuable service to consumers, there are significant competition and consumer questions raised by the positions they have established in digital markets and by their operating models, which can impact adjacent markets (for example, news media) and consumers.
- 21 For example, in its 2020 report, the UK Competition and Markets Authority (CMA) found that digital intermediaries are protected by strong incumbency advantages including economies of scale and unmatched access to user data, and that rivals can no longer compete on equal terms.¹¹
- 22 Because of the lack of competition, media companies have little choice outside the dominant digital platforms (Meta and Google) and limited leverage in their dealings with platforms. In its 2019 digital platforms inquiry, the Australian Competition and Consumer Commission (ACCC) found an imbalance in the bargaining relationship between leading digital platforms and news media that results in businesses accepting terms of service that are less favourable.¹² Officials consider these findings are broadly applicable to the New Zealand news media market.

⁹ *Media Ownership in New Zealand from 2011 to 2020*, above n 7.

¹⁰ *The implications of competition and market trends for media plurality in New Zealand*, above n 5.

¹¹ *Online Platforms and Digital Advertising: Market Study Final Report*, Competition and Markets Authority (2020)

¹² *Digital Platforms Inquiry – Final Report*, Australian Competition and Consumer Commission (2019).

- 23 In relation to journalism, the CMA's report referenced concerns raised by news media:
- Google and Meta are effectively able to use publishers' content free of charge to draw in consumers, then monetise consumer attention via advertising.
 - Because digital intermediaries effectively select what content consumers see, and in which order, the amount of traffic (and ultimately revenue) that each publisher receives is therefore heavily influenced by judgements made by the platforms. These judgements are not transparent. News media companies complain that they are exposed to sudden, dramatic changes in traffic from Google search due to changes to algorithms for which there is no forewarning or explanation.
 - New media businesses rely on digital advertising, and a lack of transparency about how the supply chain operates makes it difficult to compete for advertising revenue.
- 24 The ACCC also found that, like in the UK, the lack of notice of changes to key algorithms and lack of transparency presented significant challenges to news media organisations.
- 25 The Organisation for Economic Co-operation and Development (OECD) is also looking at the complex competitive dynamics between news publishers and digital platforms, including consideration of how digital platforms have transformed the distribution and consumption of news content. The OECD has found that the practices employed by digital platforms, in some instances, could qualify as an overall exclusionary and exploitative strategy against news publishers.¹³ It also suggests that, while international inquiries are contributing to a better understanding of digital markets, more detailed analysis of news media markets is required.

These investigations have resulted in international regulatory action

- 26 The Australian Government has implemented a News Media and Digital Platforms Mandatory Bargaining Code, which incentivised commercial agreements between Meta and Google and Australian news media businesses. These agreements involve new content produced by Australian media being licenced and reproduced on news products operated by Meta (Facebook News) and Google (News Showcase).
- 27 In early 2022, Canada introduced the Online News Bill which, like the Australian Code, aims to encourage 'digital news intermediaries' to agree licensing deals with news publishers. News organisations will be given collective bargaining rights to enable them to negotiate more effectively with the digital platforms. The Bill was read a second time in the Canadian House of Commons at the end of May 2022, and referred to the Standing Committee on Canadian Heritage.
- 28 In the UK, a dedicated Digital Markets Unit has been set up to introduce and enforce a new code of conduct to govern the behaviour of digital platforms that dominate the digital advertising market, like Meta and Google. The Digital Markets Unit is considering how codes of conduct could work to govern the relationship between digital platforms and third parties, including the news media sector.

Digital platforms are supporting the New Zealand news media

- 29 News media organisations derive significant non-financial value from digital platforms, including access to audience data and insights, and products and services. Google and Meta also provide grants and funding to support the news media, including:
- *The Meta Aotearoa Audience Development Accelerator*, which has brought together 13 publishers from regional, digital and culturally-diverse publications to innovate,

¹³ *Competition issues concerning news media and digital platforms*, OECD Competition Committee (2021).

learn from experts, and collaborate on new strategies to improve their business both on and off Facebook. When the programme ends, publishers will be eligible for grant funding to implement lessons learned in the program over the following six months.

- *The Google News Initiative* was launched in March 2018 and is focused on three broad goals: strengthening quality journalism, supporting sustainable business models and empowering newsrooms through technological innovation. This has included funding for projects such as Stuff's 'The Whole Truth: COVID-19 Vaccination' in partnership with Māori TV and the Pacific Media Network.

New Zealand news media organisations are seeking commercial arrangements with digital platforms for the use of news content online

- 30 New Zealand news media organisations told Manatū Taonga that they are in conversation with the digital platforms about payment for content, but they are finding meaningful engagement difficult and that commercial discussions have been inflexible.
- 31 Manatū Taonga understands that BusinessDesk and Newsroom have reached agreements with Google, and the Spinoff has an agreement with Meta. New Zealand Media and Entertainment (NZME) recently announced it has agreed a five-year deal with Google for the supply of content for Google's New Showcase and a number of digital transformation initiatives.¹⁴ NZME has also reached a commercial arrangement with Meta.
- 32 To increase their bargaining power, the News Publishers' Association (NPA) has applied for Commerce Commission authorisation to collectively bargain with Google and Meta.¹⁵ The NPA consists of print publishers including NZME, Stuff and other independent community publishers. In April 2022, the Commerce Commission granted provisional authorisation for the NPA's application.¹⁶
- 33 On 30 May 2022, the Commerce Commission published its provisional determination, which set out the Commission's decision and reasoning for granting provisional authorisation. The Commission found evidence of a bargaining power imbalance between digital platforms and news media organisations, stating that the value created when a link to news content is used on a digital platform may be largely accruing to the digital platforms.¹⁷ The Commission's final determination of the NPA's application for authorisation is expected in October 2022.

Other media system reforms are underway

- 34 Through the Strong Public Media programme, the Government is creating a new public media entity to future-proof public media for New Zealanders. While focused on TVNZ and RNZ, the new entity will also collaborate with and support the wider New Zealand media sector where appropriate (for example, through sharing content, infrastructure and capability building). This is to support a diverse, capable, and resilient media ecosystem, including in the face of challenges presented by the dominance of digital platforms.
- 35 Manatū Taonga has developed a Strategic Framework to provides alignment for our work in the media sector, including specific actions to grow New Zealand media organisations'

¹⁴ NZME confirms Google agreements to support digital transformation, NZME (2022).

¹⁵ Collective bargaining applications require Commerce Commission authorisation under the Commerce Act 1986 to prevent cartel behaviour and ensure that collective bargaining would not substantially lessen competition in the market.

¹⁶ NZME withdrew from the NPA's application prior to the Commerce Commission's preliminary authorisation.

¹⁷ *Provisional Determination: News Publisher' Association of New Zealand Incorporated [2022] NZCC 11*, Commerce Commission (2022).

revenues and improve trust and diversity in the sector. Sector feedback will underpin the framework and guide further work to support a vibrant, trusted and diverse media sector.

- 36 Te Puni Kōkiri is leading a programme of work to strengthen the Māori media sector for the future. This work is to strengthen and ensure a sustainable Māori media sector through increased funding and work to modernise Māori media legislation and policy, as well as establishing more coordinated settings with mainstream public media. It will ensure that Māori media can operate sustainably and meet the increasing cost pressures faced by media businesses to keep up with audience needs, increasing industry costs, and changing preferences in a rapidly evolving digital environment.

Other Government work would also have financial implications for digital platforms

- 37 In October 2021, it was announced that 136 countries (including New Zealand) have signed up to support an OECD-led multilateral process to combat tax challenges arising from the digitalisation of the global economy. This would include re-allocating some rights to tax multinational enterprises' profits, from their home countries to the markets where they have business activities and earn profit. Inland Revenue is yet to accurately estimate how much the approach will bring in domestically but considers it is not expected to be significant in terms of our overall corporate tax take.¹⁸ Commentary suggests tens of millions rather than hundreds. In addition, this revenue is not necessarily earmarked for journalism. Ringfencing is rare for tax revenue in New Zealand, and is strongly discouraged by Inland Revenue and the Treasury.

What is the policy problem or opportunity?

- 38 There is a power imbalance between news media organisations and digital platforms, such as Google and Facebook. This imbalance is inhibiting the ability for news media organisations to negotiate payment for the aggregation and display of links to their content in search results and social media feeds.
- 39 The power imbalance between digital platforms and New Zealand news media has been substantiated by the Commerce Commission and international competition authorities:
- The Commerce Commission found that the value created when a link to a news article is used on a digital platform may be largely accruing to the digital platforms at present. Maintaining the status quo would maintain the power imbalance.¹⁹
 - The ACCC found that there is an imbalance in the bargaining relationship between leading digital platforms and news media that results in news media businesses accepting terms of service from digital platforms that are less favourable.²⁰
- 40 The power imbalance means only a few of New Zealand's largest news media companies are able to negotiate with digital platforms. This could see smaller news media organisations excluded from negotiations with digital platforms, propping up traditional larger players in the sector. Commercial agreements for content reached in the absence of Government intervention could also be one-off, or have insufficient terms of renegotiation, undermining long term sustainability outcomes.
- 41 International experiences have shown that commercial agreements for content struck against the backdrop of legislation aimed at supporting optimal deals appear to be of a higher value to news companies than those struck voluntarily. This presents both a

¹⁸ Inland Revenue conversation with Manatū Taonga officials, 2021.

¹⁹ *Provisional Determination: News Publisher' Association of New Zealand Incorporated*, above n 17.

²⁰ *Digital Platforms Inquiry – Final Report*, above n 14.

problem (in that deals without legislation may not reflect the true value of news media output), and an opportunity to better support the sustainability of local news media.

- 42 Without intervention to support optimal deals, there will be pressure on the Government to fund the creation of public interest news content from general tax revenue because it is expensive to create and can be less monetisable than other types of content. This will require prioritisation alongside other Government objectives. The contestable nature of the annual budget process and content funding processes means that a significant proportion of media organisations' funding will not be certain, consistent, or foreseeable. This would be exacerbated by the uncertainty inherent in unregulated, voluntary deals with digital platforms, inhibiting long term planning, innovation, and sustainability.
- 43 High quality media is a public good and a vital component of New Zealand's democracy. Ensuring New Zealanders can access accurate, trusted and relevant news content is critical to countering misinformation and supporting the free flow of information that underpins thriving communities and functioning democracy.

Scale of the problem

- 44 To recap the figures discussed above:
- between 2011 and 2020 newspaper advertising revenue in New Zealand fell from \$533 million to \$210 million;²¹
 - since 2003, New Zealand newspapers have generated \$1 in digital advertising for every \$4 that they have lost in print advertising;²²
 - the increasing cost to produce news combined with reduced income has contributed to the halving of the number of journalists in New Zealand from 2006 to 2018;²³ and
 - the Government's \$55 million Public Interest Journalism Fund represents 10-20 percent of all direct news costs per annum in New Zealand.²⁴
- 45 Government has an opportunity to help ensure more of the total financial value derived from news media content accrues to the news media sector, supporting its sustainability and protecting journalist jobs and the production of public interest journalism.
- 46 For the options of a levy and ringfenced tax revenue, the Government would determine the amount of revenue collected from digital platforms, while a bargaining framework would leave this matter up to news media organisations and digital platforms. The value of any tax revenue ringfenced for news media would likely be less than the other two options for change, given the wider overall purposes of such a tax.
- 47 Should the Government introduce a news media and digital platforms bargaining framework, the expected scale of the revenue that could flow from digital platforms to New Zealand news media organisations could be between \$40 and \$60 million per annum (about one-fifth of what is estimated to have been agreed in Australia).²⁵ This represents a small (approximately five percent) but critically important amount of the digital advertising revenue generated from search and social media in New Zealand,

²¹ *How much Google and Facebook made in New Zealand in 2018; Advertising Turnover Report 2020*, above n 4.

²² *The implications of competition and market trends for media plurality in New Zealand*, above n 5.

²³ *Options to Improve the Environment For New Zealand Journalism*, above n 6.

²⁴ *The PIJF Assessment Report*, Hal Crawford, Crawford Media Consulting (2021).

²⁵ Former Chief News Officer at MediaWorks NZ Hal Crawford proposed this estimate in discussions with the Ministry (2021). Chief Executive of Stuff.co.nz Sinead Boucher expressed a similar figure (\$40 million per annum) in *NZ publishers recruit former Nine execs to lead tech talks*, The Sydney Morning Herald (2022).

which Google and Meta respectively dominate (estimated to be approximately \$996 million in 2020 of the \$1.34 billion in digital advertising revenue).²⁶

- 48 Without Government intervention, this amount is likely to be lower. For example, the Australian experience suggests that its code has delivered significantly greater value compared to major deals reached between digital platforms and news media organisations in the UK, France, or Germany.²⁷

Stakeholder perspectives on the problem

- 49 The key stakeholders (New Zealand media organisations and digital platforms) have divergent views on the nature of the problem and the need for policy intervention.
- 50 News media state that digital platforms have free access to quality journalism and content, which they use to benefit their own business models. News media consider there is a significant disparity in bargaining power, given their relative size and their reliance on digital platforms.
- 51 News media are highly aware of the international landscape where Canada, the UK, Australia and Europe are taking action. For example, Sinead Boucher, CEO of Stuff, states that schemes that look to compensate media organisations for the use of their content such as Google News Showcase and Facebook News will only become a mechanism for “fair payment” if the Government follows Australia by forcing the issue under threat of regulation.²⁸
- 52 Digital platforms consider that there is already a substantial two-way value exchange. Google states there is no “free-riding”, or a wealth transfer from the media to Google, noting it does not place advertising around news search results and therefore does not directly profit from content. It states that search engines use links, snippets, and thumbnails to generate free referral traffic to publishers, which creates a non-monetary value exchange between search engines, publishers and users. News businesses derive substantial value from this referral traffic.²⁹
- 53 Meta states it does not index and copy content. News appears on the Facebook platform because publishers voluntarily create pages on Facebook and post links to their own content. Users may also post links to these articles and do so at the encouragement of publishers who often prompt their readers to share. They do this because they find it valuable to do so.³⁰
- 54 Both platforms note their investment in programmes to support local news content, and also argue that news only represents a very small portion of content on their platforms.
- 55 Google and Meta do not support the NPA application for approval to collectively bargain. They consider that the ACCC findings (which led to the Australian mandatory bargaining code) are not applicable to the New Zealand context, stating that it is inappropriate to apply the findings to different markets. In addition, the platforms claim that many of the statements made by the NPA in its application to the Commerce Commission are false and not evidence based. Meta has indicated in conversations with Ministry officials that it does not think collective bargaining is an effective tool in this context. This is because

²⁶ Q4 2020 and FY 2020 Quarterly Digital Advertising Revenue Report, Interactive Advertising Bureau New Zealand (2020)

²⁷ Big Tech opens wallet for publishers as Australian news code looms, Financial Times (2021).
Google News Shh-owcase: Publishers break silence over secret deals behind \$1bn scheme, Press Gazette (2021).

²⁸ Stuff chief executive Sinead Boucher taking time over big decisions, Stuff (2021)

²⁹ Google submission in response to authorisation application by the News Publishers' Association of New Zealand, Google (2021).

³⁰ Meta submission to the New Zealand Commerce Commission on NPA's provisional authorisation application, Meta (2021).

of the different nature of the organisations participating in the collective, in particular the extent to which they have a digital strategy and use digital products.

What objectives are sought in relation to the policy problem?

- 56 To support news media organisations to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms, in order to support a sustainable and diverse news media sector that continues to produce high quality content.

Section 2: Deciding how to address the policy problem

57 This section includes analysis of:

- the primary options to address the policy problem, including design elements considered inherent to the preferred option (Part A), and
- options for the design features of the preferred primary option (Part B), in relation to:
 - information disclosure requirements;
 - constraints around how revenue is invested; and
 - collective bargaining.

What criteria will be used to compare options to the status quo?

58 We have assessed options in this RIS against the following key criteria:

- **Effectiveness:** Does the option meet the overarching policy objective (supporting news media organisations to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms, in order to support a sustainable and diverse news media sector that continues to produce high quality content)?
- **Ease of implementation:** Does the option carry minimal financial cost and compliance burden for affected parties and government? Is the option able to be implemented, and in a timely way?
- **Promotion of sector diversity:** Does the option equitably support the breadth of diversity in the news media sector, including smaller and rural/regional media organisations, Māori media organisations and ethnic media organisations, and the content they produce?
- **Respect for market settings:** Does the option support fairness in the market and respect the relationship between market participants?

What scope will options be considered within?

59 Any revenue sharing between digital platforms and news media organisations should not be the only solution for a sustainable media sector. As discussed at paragraph 35, Manatū Taonga has developed a Strategic Framework that provides strategic alignment to our work in the media sector, including specific actions to support media organisations to realise the value of their content in a digital environment, grow revenues of New Zealand media organisations, and improve trust and diversity in the media sector.

60 The options analysis has been undertaken on the basis that there is a power imbalance between digital platforms and news media organisations. This imbalance appears to inhibit optimal revenue sharing and arguably represents at least a partial market failure. While market failures may be present in other parts of the economy, intervention is

warranted in this case given the importance of the media sector to societal cohesion and the functioning of a strong democracy.

- 61 Options have been confined to those which would see a transfer of revenue from digital platforms to news media organisations. Analysis therefore excludes other options that could support the financial sustainability of the media sector but are not under consideration at this time (for example, tax breaks, charitable status for news media organisations, and Crown funding).
- 62 Further Crown funding would be out of scope anyway due to Ministerial preferences, including a desire to create policy settings that will support the news media sector to transition to business models that support long-term financial sustainability. Similarly, the analysis discounts working with the digital platforms to expand, continue or create new funds or programmes to support local news media as these initiatives rely on operational decisions taken by individual platforms, undermining longer term sustainability objectives. It could also create a reliance of news media companies on particular products or services offered by platforms.
- 63 Changes to copyright law, as have been adopted overseas in part as a response to this problem, would not be a feasible option so are also outside the scope of this analysis.³¹

Part A: Primary options to address the policy problem

What options are being considered?

- 64 This impact analysis considers four options:
- Counterfactual
 - Levy on digital platforms
 - Digital bargaining framework
 - Ring-fencing revenue raised through an OECD tax on multinational enterprises for news media.

Option One – Counterfactual

- 65 In the absence of any intervention, we are likely to see further New Zealand news media organisations enter into arrangements with digital platforms, including commercial agreements for content and other support (for example, support for digital transformation and other grants and training), like those described at paragraph 29. This could include but not be limited to the organisations covered by the NPA's collective bargaining application, should authorisation be granted by the Commerce Commission.

Effectiveness

- 66 The counterfactual will see revenue and support flow to New Zealand media organisations from digital platforms in the form of commercial arrangements for content, and other support such as grants and training. This will go some way to supporting the policy objective. However, there is a risk that these arrangements will not support sustainability (for example, agreements could be one-off or have insufficient renegotiation terms).

9(2)(f)(iv)

³¹ In 2019, an EU directive on copyright law created a "neighbouring right" so digital platforms cannot use news extracts without a licence from the publishers of the original news content. Taking a similar approach in New Zealand would not be feasible given New Zealand's broader competition and copyright settings. Under current settings, a neighbouring right is not a requirement to license and would not be infringed by digital platforms opting not to purchase licenses from press publishers.

Ease of implementation

68 While leaving the market to determine a solution would not cost the Government any extra, resource is still likely to be required to manage associated processes (such as the Commerce Commission's consideration of the NPA's application to collectively bargain). The media sector is also likely to continue to call on the Government for financial support. Costs for digital platforms and news media organisations could be higher than necessary given the generally protracted nature of voluntary negotiations. This is likely to affect news media organisations more than digital platforms.

Promotion of sector diversity

69 Given the bargaining power imbalance between digital platforms and news media organisations, larger media companies are more likely to benefit. Smaller regional, rural, Māori and ethnic media organisations, particularly those that fall outside of the NPA's collective bargaining process, are most likely to be excluded. If the NPA collective bargaining application to the Commerce Commission is not successful, then it is very unlikely that smaller media organisations will be able to negotiate with digital platforms.

Respects market settings

70 Allowing market participants to determine a solution respects the independent relationship between market participants and does not prioritise one sector (news media) over others. However, it is arguable whether the outcome supports market fairness within that sector, given the dominance of the two digital platforms and the power imbalance.

Option Two – Levy on digital platforms

71 A levy on digital platforms could be used to support New Zealand news media organisations, recognising the benefits that digital platforms derive from hosting news content on their platforms, and that they are unavoidable partners for New Zealand news media organisations. Digital platforms would be required to pay a levy, which would then be distributed to eligible news media organisations.

72 This option would include the following features:

- A means of identifying the amount digital platforms would be required to pay (for example, a fixed rate based on earnings in the New Zealand market, or a formula that recognises the volume of New Zealand-based views, content or attention paid to respective qualifying digital platforms).
- An entity to collect and distribute the levy (for example, New Zealand on Air).
- A framework to determine how the levy could be distributed. This could involve for example a contestable funding model similar to the Public Interest Journalism Fund administered by New Zealand on Air with associated application and assessment criteria, or a mechanism to deliver funding directly to news media organisations via a formula that could take into account the size of media organisations and extent to which their content is used on digital platforms.

Effectiveness

- 73 A levy on digital platforms could provide an ongoing, sustainable funding source for news media organisations. However, it is difficult to determine how much revenue could be raised through a levy given the low evidence base around the financial position and New Zealand-based income of digital platforms.

Ease of implementation

- 74 A levy would require legislative change. However, it could be implemented relatively easily and quickly, as there are other domestic models to draw from. The framework to determine how the levy could be distributed would need to be developed. A levy would have higher compliance costs compared to the counterfactual given the ongoing management required to collect and distribute the revenue. This would be a new function for the administering body and would require appropriate resourcing.
- 75 The levy option would have to be carefully implemented in a manner consistent with New Zealand's existing trade obligations. The option may be regarded as akin to a digital services tax (DST). The US is not supportive of countries implementing or enforcing DSTs, particularly while the OECD multilateral tax process is ongoing (see further option 4), which may have implications for its implementation.

Promotion of sector diversity

- 76 Given the levy would be collected by an independent body and distributed using a framework, it could be distributed equitably throughout the New Zealand news media sector to qualifying organisations in a way that would support diversity of organisations and content. For example, New Zealand on Air has significant experience distributing funding to the news media sector.

Respect for market settings

- 77 A levy would be more interventionist than the counterfactual and would change market dynamics, but would arguably meet the standard user-pays rationale for a levy.

Option Three – News media and digital platforms bargaining framework

- 78 This option would enable news media organisations to initiate formal bargaining with digital platforms to reach commercial arrangements, recognising the value news content presents to digital platforms. Bargaining would be followed by mediation and arbitration processes as required to enable deals to be settled.
- 79 The framework could be administered by an independent regulator, which could have functions such as determining which companies the framework applies to, implementing and overseeing the bargaining process and intervening as required, and monitoring agreements to determine suitability and support fairness.
- 80 A framework could be established in legislation, with the following features:
- A mechanism for news media organisations to formally initiate bargaining with digital platforms under the framework following an appropriate stand down period if arrangements are not reached independently of the framework.
 - A mediation process that could be triggered if bargaining is not successful, followed by arbitration if mediation is not successful.
 - A requirement for the regulator to establish a code of conduct to govern negotiations under the framework, including features such as good faith obligations, information sharing and non-discrimination clauses.

- Enforcement and penalties if agreements were not adhered to, or one or both parties did not engage with the process as required. Setting a pecuniary penalty with payment to the Crown could be appropriate.
 - Settings to support re-negotiation of commercial arrangements.
- 81 The legislation would also allow a digital platform to apply to the regulator to be exempted from the framework, if it could demonstrate sufficient quality and substance of deals with the news media sector. Exemptions would be regularly reviewed. This feature would recognise the other ways platforms support the sector, and help avoid issues with service provision that have been seen in response to other jurisdictions' legislation in this area. Service interruptions would have flow on impacts for consumers, other parts of the economy, and other Government work programmes involving digital platforms (such as the Christchurch Call to address terrorist and violent extremist content online).
- 82 The Australian experience suggests that a bargaining framework will likely encourage digital platforms and news media organisations to reach agreements independently (albeit in the shadow) of the legislation. The bargaining framework would therefore act as a 'backstop,' only used if a news media organisation could not reach a commercial arrangement with a platform following a defined period (for example, six months).

Effectiveness

- 83 A bargaining framework would allow commercial arrangements between news media companies and digital platforms to be settled, and renegotiated once lapsed. This would support the financial sustainability of New Zealand news media organisations.

Ease of implementation

- 84 A digital bargaining framework would require legislative change but could be implemented relatively easily and quickly, drawing on experiences from the Australian and Canadian models.
- 85 The cost of administering the regime would be relatively low. A regulator would need to develop the capability and capacity to manage the regime. However, given the framework is intended to encourage commercial arrangements independently of the framework, maximum levels of resourcing are unlikely to be required at all times. The framework could also include a cost sharing element, whereby digital platforms and/or news media organisations contribute a fee to access parts of the framework if they are unable to settle arrangements voluntarily.
- 86 Other compliance costs would also fall on digital platforms and news media organisations that access the framework. For digital platforms these costs would not be voluntary because news media organisations would have the right to trigger the process, unless the digital platform had been granted an exemption. If arrangements were reached outside the framework, as primarily intended, compliance costs would be broadly the same as the counterfactual option.

Promotion of sector diversity

- 87 The ability for news media organisations to trigger compulsory bargaining will make it more likely that smaller regional/rural, Māori and ethnic news media organisations can effectively bargain with digital platforms. Depending on how the exemption process works, there is a risk that smaller, fringe, or new media organisations could miss out, but exemption criteria could support the sector's diversity (by requiring deals to be made with a range of news media).

Respect for market settings

- 88 The policy intent of the framework is to encourage digital platforms and news media organisations to reach commercial arrangements outside the framework. Digital platforms and news media organisations would have a period of time to make arrangements outside of the framework before bargaining under the framework would commence (for example, six months following the legislation's Royal assent). In addition, the exemption process would provide a means to exclude digital platforms from being subject to the framework if they can demonstrate they have made arrangements with news media organisations that are of sufficient quality and substance.

Option Four – Ringfencing revenue raised through an OECD tax on multinational enterprises for news media

- 89 Inland Revenue is leading work on a tax on multinational enterprises as part of an OECD multilateral process. This will re-allocate some taxing rights over multinational enterprises from their home countries to the markets where they have business activities and earn profits, regardless of whether firms have a physical presence there. This will ensure a fairer distribution of profits and taxing rights among countries for around 100 of the world's largest and most profitable multinational enterprises. Meta has indicated in conversations with officials that it is supportive of this work to ensure fair taxation.
- 90 A proportion of income from the OECD tax process in New Zealand could potentially be ringfenced and used to support news media organisations. While it is not common for tax revenues to be ringfenced for specific purposes, there are examples including the fuel tax system which goes into the National Land Transport Programme to support infrastructure and maintenance.

Effectiveness

- 91 Ringfencing any revenue could contribute to the sustainability of New Zealand news media organisations, however, the revenue raised is not expected to be significant, and will vary with the economic cycle. Further, the option's effectiveness in relation to the overarching objective of supporting sector sustainability will be affected by the delay in implementation (see further below). We also note that public money ring-fenced for news media is public money not spent on other Government priorities.

Ease of implementation

- 92 This option would require legislative change and some costs would be associated with distributing the revenue raised across the news media sector (similar to the levy option). New Zealand has indicated a commitment to the OECD tax process, so the revenue is likely to be collected anyway (and if not through the OECD process, potentially through a unilateral digital services tax). However, it is not likely to be implemented in the short-medium term as it will take some time before the tax is being collected.

Promotion of sector diversity

- 93 The revenue would be centrally collected and could be distributed equitably throughout the New Zealand news media sector to qualifying organisations, supporting the breadth of diversity in the media sector.

Respect for market settings

- 94 The tax's intent is to ensure multinational enterprises are paying their fair share of tax in the economies they operate in. However, ringfencing tax revenue to support specific sub-sectors is not common in New Zealand. The Treasury and Inland Revenue standard procedure is for tax revenue to go into the general tax pool and spending decisions made

across the breadth of government priorities. In addition, the purpose of the tax means revenue would be collected from a broader range of companies than digital platforms.

How do the options compare to the counterfactual?

95 The table below compares the options for change against the counterfactual.

Key for qualitative judgements, compared to the status quo/counterfactual:

++	much better	0	about the same	-	worse
+	better			--	much worse

	Option One – Counterfactual	Option Two – Levy on digital platforms	Option Three – Bargaining framework	Option Four – Ringfence tax revenue
Effective	Could see some revenue flow to news media organisations that are either large or part of the NPA, but unlikely to be sustainable.	++ Could support news media organisations' sustainability, as government effectively can choose how much revenue is raised.	++ Could see sustainable commercial arrangements reached and re-negotiated over time.	+ Would create an ongoing revenue stream, but not likely to be significant, consistent, or in place quickly enough to support the sustainability of some news media businesses.
Easy to implement	Agreements determined by market with no government intervention. Compliance costs would fall on digital platforms and news media organisations (negotiation costs, plus costs of paying news media for digital platforms).	-- Would require body to administer scheme (collect and distribute revenue) on an ongoing basis. May encounter difficulties given its similarity to a digital services tax, which are opposed by the US.	- Body to administer scheme required on an on-demand basis but costs likely low, with a co-payment element. Could ideally force market solution.	-- Tax likely being collected anyway. However would require body to administer and distribute revenue. Not likely to be operational in short-medium term.
Promotes diversity	Could see smaller, rural/regional, Māori and ethnic media organisations excluded given bargaining power imbalance. Traditional larger media companies would likely be better off.	++ Revenue could be distributed equitably across the news media sector through a framework, overseen by an independent body (for example, NZ On Air).	+ Would require platforms to bargain with news media organisations triggering the framework, irrespective of their size, makeup, or location. Exemption criteria could encourage deals with a wider range of news media.	++ Revenue could be distributed equitably across the news media sector (similar to approach outlined in option 2).
Respects market	Would leave market to determine solution.	-- Would interfere in market dynamics but arguably meets standard user-pays rationale for levies.	- Interfering in market relationships, but encouraging private commercial arrangements.	- Tax being collected regardless, however ringfencing tax revenue not very common and not clear rationale for using it for the media sector (tax designed to target different problem).

	Option One – Counterfactual	Option Two – Levy on digital platforms	Option Three – Bargaining framework	Option Four – Ringfence tax revenue
Overall assessment	Could see some revenue flow to news media organisations, but not likely to contribute to sustainability or ensure equity across the sector. Would be an efficient solution and minimise market interference.	+	++	+
	Could see some revenue flow to news media organisations, but not likely to contribute to sustainability or ensure equity across the sector. Would be an efficient solution and minimise market interference.	Could raise significant revenue to support news media sustainability, and distribution could ensure equitable support. However, the scheme would be unpopular with international partners, and expensive and burdensome to administer.	Could contribute to news media sustainability, and the exemption criteria would support participation of smaller players. Scheme would require some oversight and management but not expected to be significant, particularly given that expectation is that arrangements are reached outside of the framework.	Could provide an ongoing revenue stream, however income not likely to be significant or available quickly enough. Revenue likely to be collected in any case, but ringfencing tax revenue not common and no clear rationale for using this revenue for the media sector (targeting different problem).

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

- 96 The analysis above suggests that a news media and digital platforms bargaining framework is the preferred option. Compared to the counterfactual, this option is more likely to support the benefits that news media organisations receive from the content they create, supporting a sustainable news media sector. Overseas experience suggests that commercial arrangements between digital platforms and news media organisations, even when reached voluntarily, are more significant when there are regulatory settings in place. For example, the Australian experience suggests that its code has delivered significantly greater value compared to major deals in the UK, France or Germany.³³
- 97 While the scheme could have some associated costs to Government, these are likely to be minor compared with the benefits that would fall on the news media sector, and could be further off-set by requiring parties to contribute to the cost of accessing the scheme.
- 98 While this option would represent intervention in a market relationship, the bargaining imbalance between digital platforms and news media organisations suggests intervention is warranted to achieve the policy objective and address the issues.
- 99 The Australian experience suggests that a bargaining framework will likely encourage a market solution, whereby digital platforms and news media organisations reach agreements independently of the legislative framework. This would further minimise the costs to Government, and arguably the extent of Government intervention. Importantly, the bargaining framework option also best supports the independence of news media from Government, because the financial support it provides would not be collected or distributed by Government.
- 100 A bargaining approach could also provide benefits beyond remuneration, including for example providing for the development of a code of conduct to support fairness and transparency in the relationship between digital platforms and news media organisations.
- 101 While the levy option scores the same in terms of the effectiveness criterion, the comparably high and ongoing compliance costs for the government to administer the levy and distribute the revenue raised make this option less favourable. For example, if a contestable funding distribution model was pursued, funding criteria would need to be developed, application forms submitted by news media organisations, and an assessment process undertaken against an agreed framework. A levy would also

³³ Big Tech opens wallet for publishers as Australian news code looms, above n 29. Google News Shh-owcase: Publishers break silence over secret deals behind \$1bn scheme, Press Gazette (2021).

represent an arguably greater degree of government interference in the market relationship between digital platforms and news media. It would involve an active, ongoing role for government to collect and distribute the levy, whereas the bargaining framework is designed to incentivise private commercial arrangements.

- 102 The OECD tax process is not expected to be in place in the short-medium term given the design and implementation work required, as well as reaching international agreement (including through the US Congress and Senate, which is expected to be difficult). The tax is also designed to address a separate problem of multinational enterprises earning significant revenue in a jurisdiction without paying a proportional amount of tax there, and would capture a broader range of companies operating in New Zealand than digital platforms. It would therefore be difficult to justify ringfencing revenue for the news media sector. In any case, the tax is not expected to raise enough revenue to justify ringfencing the same levels of funding as the other options would provide, and therefore would be a less effective option.

Part B: The design of the preferred option

- 103 This section considers design features of the preferred option (a news media and digital platforms bargaining framework) that are not considered inherent to the option. For the purposes of this analysis, the counterfactual for each set of options is the default, bare minimum approach to regulation.
- 104 The same criteria have been used to assess the design options as in Part A. The 'effectiveness' criterion applies in respect of:
- the extent to which the design option is consistent with, or furthers, the overarching policy objective (supporting a sustainable and diverse news media sector that continues to produce high quality content); and
 - where relevant, further specific policy opportunities (identified below for B.1 and B.2).

B.1 Information disclosure requirements

- 105 We have considered options for requiring parties to agreements reached under the framework to disclose information on the nature of arrangements (for example, the size of the arrangement, length of its term, and nature of any non-pecuniary benefits).
- 106 The policy opportunity is to support the regulator to carry out its functions and duties under the legislation, particularly around monitoring and reviewing the framework's effectiveness. More generally information disclosure requirements could support fairness across the sector and an understanding of the true value of content.

What options are being considered?

Option 1: Counterfactual

- 107 The counterfactual in this scenario is that no information disclosure is required, and the detail of commercial arrangements would remain confidential to the parties (as would occur with any arrangements reached outside of the digital bargaining framework). Parties could voluntarily disclose information to the regulator if contracts permitted.

Option 2: Information disclosure to regulator

- 108 This option would require parties to share some information about deals reached under the framework with the regulator on a confidential basis. This could include, for example, the value of a commercial arrangement between a digital platform and a news media

organisation, its length, and any other notable features. Parties to deals struck outside the framework could voluntarily disclose information if contracts permitted.

- 109 The regulator would be permitted to use the information disclosed for specified purposes related to its functions (for example, monitoring the effectiveness of the framework). Any wider reporting by the regulator would not include confidential information in an identifiable or prejudicial form.

Option 3: Public disclosure

- 110 This option would effectively build on option two by requiring a level of public disclosure of information about arrangements reached under the framework, unless the regulator determines that disclosure is not in the public interest. This could include, for example, a list of which news media had reached commercial arrangements, and with whom.

	Option One – Counterfactual	Option Two – Disclosure to regulator	Option Three – Public disclosure
Effective	No impact on likelihood or content of arrangements. Confidential nature of arrangements likely to maintain current lack of understanding of true value of content and the trend of ad hoc arrangements with no broad oversight.	++ May further encourage deals outside framework, and likely to support fairer deals, ultimately supporting sustainability of news media. Would support deeper understanding of market and effectiveness of regulatory intervention.	++ As for option 2. No evidence to suggest impacts of disclosure to the public (relating to the objectives) would substantially differ to those of disclosure to the regulator.
Easy to implement	No additional compliance costs for parties to the arrangements. Likely to require the regulator to work to fill information gaps to perform its functions effectively.	0 Would create additional compliance costs for parties to the arrangements, but not likely significant. Likely to have similar costs to regulator as the counterfactual in the short term, may create efficiencies once systems are established.	- Would create additional compliance costs for all parties. Planning for and management of public awareness may require significant resource.
Promotes diversity	Likely no further impact on diversity as supported through legislative permission for collective bargaining.	+ Could have additional benefits for diversity as fairer and higher value deals encouraged through disclosure.	+ Could have additional benefits for diversity as fairer and higher value deals encouraged through disclosure.
Respects market	Maintains confidentiality of agreements, respecting that arrangements are commercial agreements between private companies.	- Would represent intervention in commercial relationship and market dynamics.	-- Would represent significant intervention in commercial relationship and market dynamics.
Overall assessment	Details of arrangements would remain confidential unless parties wished to disclose information. Minimal additional compliance costs however would not support understanding of value of content and what is considered 'sufficient'.	++ Disclosure to regulator would likely support fairer and more sustainable deals. Some additional compliance costs but not significant.	0 Public disclosure would likely support fairer and more sustainable deals, but would create significant additional compliance costs, and represent intervention into commercial relationship.

111 The preferred option is option two (disclosure to regulator):

- It balances the confidentiality of commercial arrangements with a pragmatic degree of oversight for the regulator, to support the effectiveness of the framework. It would support an understanding of the value of news content to digital platforms, and likely result in fairer deals, supporting the sustainability of news media organisations.
- Public disclosure would have additional significant compliance costs, and it is unclear whether any correspondingly significant additional benefit would be gained through disclosure to the public, as opposed to the regulator.

112 We note that both change options could risk increasing the incentive for digital platforms to settle low-value deals with one or two news media organisations that become the benchmark for further arrangements, undermining effectiveness and diversity objectives. However, this risk is more pronounced with option three (public disclosure) than option two because of the additional visibility and scrutiny that come with public disclosure.

B.2 Constraints around how revenue is invested

113 We have considered options to ensure the proposed government intervention in a traditionally private sphere (the digital bargaining framework) results in outcomes that are in the public interest, rather than simply 'lining the pockets of executives'.³⁴ Requiring news media organisations that reach agreements with digital platforms under the framework to spend revenue on particular types of content could provide an opportunity to support the creation of public interest journalism, and associated policy objectives for social cohesion and democracy (longer-term outcomes that align with the underlying policy intent of the intervention).

What options are being considered?

Option 1 – Counterfactual

114 The counterfactual in this scenario is that no constraints are placed on how news media organisations can spend revenue received from digital platforms via deals under the bargaining framework (as is case with arrangements reached outside the framework).

Option 2 – Requirement to invest revenue into public interest content

115 This option would require news media organisations to invest any revenue received through bargaining with digital platforms under the framework into producing public interest content. Public interest content could be defined, for example using the definition Cabinet agreed to for the Public Interest Journalism Fund ('journalism that contributes to a person's ability to function as a valued and informed member of the communities in which they live and/or work').

Option 3 – Requirement to contribute to high level outcomes

116 This option would involve the legislation setting out high level outcomes that news media organisations who reach agreements under the framework would be expected to contribute to, in a way that is commensurate with the size of their individual arrangement. These outcomes could be developed by the regulator in partnership with the sector, and could include a focus on broad outcomes aligned with the sector's strategic objectives (for example, ensuring a diverse, vibrant and highly trusted news media sector).

³⁴ *Diversity hit between the eyes as old media pockets about 90% of big tech cash*, Crikey (2021). This critique has been levelled at the Australian legislation, while the proposed Canadian legislation attempts to resolve it by including qualitative requirements within its exemption criteria for digital platforms.

117 The regulator could monitor and report publicly on progress towards the outcomes through its statutory monitoring role.

	Option One – Counterfactual	Option Two – Public interest content	Option Three – High level outcomes
Effective	No impact on likelihood or content of arrangements. Would allow news media organisations the flexibility to invest any revenue received in alignment with business requirements. This would ultimately support the sustainability of individual businesses.	0 Would support the creation of public interest content and associated benefits, however likely to be content that is less able to be monetised, undermining the ability to earn revenue. Moreover, businesses could re-allocate existing budgets to other parts of the business, meaning content outcomes remain static. Would further encourage deals outside framework (to avoid being subject to investment requirements).	+ Outcomes would be broad enough to allow for a range of content to be produced and still allow choice around how to invest to meet individual news media business requirements. Depending on the requirements' framing and monitoring, news companies may be able to satisfy requirements without making any significant positive changes. Would further encourage deals outside framework (to avoid being subject to investment requirements).
Easy to implement	Would not place any additional compliance costs on any party.	- Would have additional compliance costs for news media and the regulator as it would require additional monitoring and reporting to provide oversight of how funding spent.	-- Would have significant additional compliance costs for news media and the regulator as both monitoring and reporting and a system of measurement would be needed to measure outcomes.
Promotes diversity	Provides news media flexibility to choose how they invest revenue to meet business needs. However, incentives are to invest in content that is more easily monetisable, which largely excludes content designed for minority audiences.	++ On face value, would support the creation of public interest content, which is often content produced for audiences that would otherwise not be created (due to difficulty monetising it).	+ On face value, would support the creation of content that may not be created otherwise. Setting high level outcomes would give news media sufficient flexibility to invest in content that supports diversity but also meets the needs of the organisation.
Respects market	Would respect that revenue received by news media is the result of a commercial arrangement and therefore should be used at the discretion of the receiving news media organisation.	-- Would involve directing a private company how to spend revenue received from another private company.	- Would see some requirements around how revenue can be invested. The outcomes would be sufficiently high level to give news media some flexibility as to how revenue is spent, therefore respects discretion of businesses.
Overall assessment	Provides the maximum flexibility to news media organisations to have discretion over how they spend revenue, and does not impose any additional cost.	- While it would support the creation of public interest journalism and support diversity, there would be additional compliance costs for likely limited and potentially non-existent additional benefits.	- Could have positive impacts on the diversity of content, but would place significant additional compliance costs on news media and the regulator. Measuring contributions towards the outcomes would be difficult.

118 Option one (the counterfactual) emerges as the preferred option.

- It provides news media organisations with the ultimate flexibility and discretion to decide how they spend any revenue they receive from digital platforms. This would allow news media organisations to make investments in line with business needs, ultimately supporting sustainability.
- Requiring any revenue received from digital platforms to be invested in a particular way may not be effective; news media organisations could simply re-arrange internal budgets so that money that was previously earmarked for content is spent elsewhere, in line with business needs and pressures. This would result in broadly the same amount and type of content being produced, but with additional compliance costs.
- Both change options would also be difficult to defend, as in most cases they would involve the government instructing a private company how to spend revenue received from a private source.

B.3 Collective bargaining provisions

119 Under the Commerce Act 1986, it is prohibited for a person to enter into an arrangement that contains a provision that has the purpose, effect or likely effect of substantially lessening competition in a market, or contains or gives effect to a cartel provision. This means that if parties wish to enter into a collective bargaining arrangement, but that arrangement contains a provision that has the purpose, effect or likely effect of substantially lessening competition in a market, those parties must first seek authorisation from the Commerce Commission to do so. Similarly, if the arrangement contains a cartel provision, parties will need to seek authorisation from the Commission if the provision does not fall within the exceptions and where clearance is unavailable.

120 As noted above, separately to this work, the NPA (on behalf of 28 news media organisations) has applied to the Commerce Commission for authorisation to collectively bargain with Google and Meta. The Commerce Commission has granted provisional authorisation to do so, based on the potential benefits of the Proposed Arrangement, and that any potential detriments from provisional authorisation were unlikely to result.

121 For the options below, effectiveness is assessed only in respect of the framework's overarching objective (to support news media to maximise the benefits they receive from the content they create that platforms aggregate and display, to support a sustainable and diverse news media sector that continues to produce high quality content).

What options are being considered?

Option 1 – Counterfactual

122 The counterfactual in this scenario is any news media organisations that would like to negotiate with digital platforms as part of a collective would need to seek necessary authorisation from the Commerce Commission under the Commerce Act 1986.

Option 2 – Collective bargaining permitted under framework

123 This option would permit news media organisations bargaining with a digital platform under the framework to do so as part of a collective with one or more qualifying news media organisations. These news media organisations would not be required to seek authorisation under the Commerce Act 1986 to bargain in accordance with the legislative exemption. The collective could also set further conditions on its own operations.

Option 3 – Collective bargaining permitted independently of, and under, framework

124 This option effectively builds on option two above, however would also permit collective bargaining for negotiations conducted outside of the framework. Collective bargaining by news media organisations (whether inside or outside the framework) would not require authorisation under the Commerce Act 1986.

	Option One – Counterfactual	Option Two – Collective bargaining under framework	Option Three – Collective bargaining in and outside framework
Effective	Risk that applications to the Commerce Commission are declined, which would mean only the largest of New Zealand's news media organisations will be in a position to negotiate with digital platforms, leaving much of the sector excluded.	+	++
Collective bargaining under the framework is likely to enable news media organisations to secure higher value and better deals than they would negotiating individually, and is more likely to see benefits distributed over the sector (rather than confined to a few bigger companies).	As for option 2, but for organisations outside the framework as well (including new organisations and/or any others who do not or cannot manage to reach deals before digital platforms become exempt from the framework).		
Easy to implement	Likelihood of repeated applications to the Commerce Commission of substantially the same nature as the NPA's, both from different groups and over time as deals reach end of term. Applying for authorisation is a costly and lengthy process. If applications are declined, requiring individual negotiations is less efficient.	+	++
Supports efficiencies for all parties operating within the framework. Digital platforms would have to engage with fewer parties, and news media could share negotiating costs that would likely be prohibitive for smaller outlets. The Commerce Commission could focus on other areas of work rather than repeating processes.	As for option 2, except it supports efficiencies for parties operating outside the framework too.		
Promotes diversity	Given the cost of applying for authorisation, smaller and/or emerging news media may be discouraged from participating. If they don't, or if approval is declined, these organisations are very unlikely to secure deals with digital platforms on their own.	+	++
Permitting collective bargaining within the framework would make it easier for smaller news media organisations (including rural, Māori, ethnic media), where the bargaining imbalance with digital platforms is most pronounced, to reach commercial arrangements.	As for option 2. It also wouldn't disadvantage organisations that are created after digital platforms begin to be exempted, or those which did not or could not act beforehand.		
Respects market	Retains market settings and only allows interference (i.e. collective bargaining) where demonstrably warranted on a case-by-case basis.	-	-
Intervenes in market relationships by strengthening one side's bargaining power. While the Commerce Commission has provisionally authorised collective bargaining for a relatively large block of news media, that decision was made without a framework requiring digital platforms to negotiate (which remedies some of the bargaining imbalance).	As for option 2. However, if platforms have entered into sufficient deals to become exempt from the framework, permitting collective bargaining outside that framework may be harder to justify.		

Overall assessment	Respects market settings but likely to mean inefficiencies for all parties and the Commerce Commission. Favours the bigger and more resourced news media organisations, and may mean others (particularly smaller and/or emerging ones) miss out on deals.	+	Supports primary and overarching objectives of the bargaining framework by mitigating bargaining imbalances. Supports a more diverse range of news media organisations to obtain benefits of deals, and creates efficiencies for parties and the relevant regulator.	++	As for option 2, and mitigates risks to smaller and emerging organisations of the 'race' to get deals before digital platforms are exempted from the framework.
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125 The preferred option is option three (collective bargaining in and outside the framework):

- It furthers the primary and overarching objectives of the bargaining framework, in a way that is particularly likely to benefit smaller, local, and emerging news media organisations (supporting a diverse news media sector).
- It will create efficiencies for the Commerce Commission and parties who would otherwise have been required to submit, resubmit, and respond to authorisation applications, and is likely to result in fewer negotiations overall. However, there is a risk that the cost of participating in a collective could still be prohibitive for very small news media organisations. The Government could potentially consider providing financial support to enable these organisations to participate.
- While it intervenes in market settings, the Commerce Commission's provisional authorisation for the NPA to collectively bargain supports the rationale and provides a precedent for this impact.

What are the marginal costs and benefits of the preferred option?

126 The below table considers the marginal costs and benefits of all preferred options taken together as one proposal.

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Digital platforms	Ongoing compliance costs of engaging with news media to reach deals, including as agreements end.	Low in terms of overall scale of digital platform revenue.	Medium.
	Cost of paying news media organisations for content.	Between \$30 and \$50 million per annum (\$40 – \$60 million gross).	Medium. Estimate based on Australian experience. Commercial sensitivities mean information difficult to obtain.
News media	Ongoing costs of engaging with platforms to reach deals, and as agreements end.	Medium but collective bargaining should mitigate for smaller organisations.	Medium.
Government	Ongoing costs of administering scheme.	~\$0.250 – 0.500 million per annum; lower if market solution forced and/or co-payment element.	Low. Difficult to know if scheme will be required. In Australia, hasn't been used at all.
Total monetised costs		~\$30.250 – \$50.500 million per annum.	
Non-monetised costs		Low.	
Additional benefits of the preferred option compared to taking no action			

detailed design and legislative drafting process, to ensure the legislation is fit for purpose. As is standard, stakeholders will also have an opportunity to feed into the Bill at Select Committee stage.

134 Implementation risks include:

- Digital platforms minimise the prominence of news content on their platforms, withdraw services from New Zealand, and/or scale back their involvement in other Government work programmes (for example, the Christchurch Call). This has been the reaction from digital platforms in response to regulation in other jurisdictions. As noted above in relation to the scope of the options analysed, Meta blocked news to Australians on its platform for several days when the Australian legislation was first announced in 2021, because it initially appeared to Meta that platforms would automatically be subject to forced negotiation.³⁵

However, given some of the assurances that led to Facebook News being reinstated are reflected in this RIS's preferred option, the generally negative international reaction to Meta's actions, and the fact other jurisdictions have also been announcing and developing similar legislation since the Australian legislation was passed, such an extreme reaction may be less likely. Officials will also be engaging with the digital platforms as the legislation is developed, which will provide an opportunity to hear and proactively address significant concerns held by the platforms.

- There is heavier reliance on the framework than expected. This scenario would play out if arrangements were unable to be reached outside of the framework. Manatū Taonga considers this outcome is unlikely as the Australian and Canadian experiences suggest that the threat of legislation, or at least of having negotiations subject to the framework, is sufficient to bring the digital platforms to the negotiating table. In any case, Budget planning is likely to take into account this risk in determining the funding model and quantum.
- News media companies delay negotiations with platforms outside the bargaining framework, with the intention of securing higher value arrangements through negotiations conducted under the framework. This would maximise costs for the Government. However, international experiences suggest this behaviour is unlikely.
- News media companies becoming increasingly reliant on the revenue received from digital platforms, with associated implications for perceptions of reporting bias. However, this risk is present in the counterfactual and to a certain extent in the other change options. Officials consider New Zealand news media has sufficiently strong practice and traditions of editorial independence for the risk of bias to be negligible.

How will the new arrangements be monitored, evaluated, and reviewed?

135 The regulator would be required to monitor arrangements that are reached under the framework. Information disclosure requirements would provide the regulator with the necessary information and oversight to enable effective monitoring, including on:

- the total value of agreements reached under the framework;
- the distribution of value of agreements reached under the framework across the news media sector;
- the impact of commercial arrangements reached under the framework on newsroom expenditure; and

³⁵ *Changes to Sharing and Viewing News on Facebook in Australia*, Meta (2021)

- any other matters considered appropriate by the regulator for supporting an understanding the effectiveness of the framework (potentially including comparative analysis of deals reached outside the framework, where information flows allow).

136 Detailed policy design work, and consultation with the proposed regulator, would consider whether further information-gathering powers are required to ensure outcome and system monitoring is fully contextualised (for example, in relation to deals reached outside the framework).

137 Manatū Taonga would monitor the regulator's performance and the operation of the overall regulatory system. The legislation establishing the framework would also require the legislation to be reviewed within a certain time period, including consideration of:

- stakeholder interaction and views of the framework's effectiveness;
- the extent to which the framework meets the policy objectives;
- comparative impacts in overseas jurisdictions;
- any potential changes or improvements to the framework; and
- broader media outcomes reached through commercial arrangements between news media organisations and digital platforms outside of the framework (in line with the policy intent), including:
 - the nature and scale of benefits received by news media organisations through arrangements with digital platforms; and
 - how funding from commercial arrangements with digital platforms has been spent.

PROACTIVELY PREPARED