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
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.

Executive Summary

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.

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.

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.

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).

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.

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)(iv) [redacted] 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).

[redacted] 9(2)(f)(iv) [redacted]

[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 unmatchable 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.

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[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'

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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

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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) [redacted]

[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.

[redacted]

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.

[redacted]

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 administrating 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 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).

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[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.

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			

News media	Likely revenue that will flow into the sector from digital platforms.	Between $30 and $50 million per annum ($40 – $60 million gross).	Medium (as above for corresponding cost).
Government	Less likely to need to further fund media sector.	Medium.	High. Sector has said end of PIJF concerning.
New Zealanders	Broader benefits for wellbeing and democracy from a strong media sector.	Medium.	High.
Total monetised benefits		$30 – $50 million per annum.	
Non-monetised benefits		Medium.	

Section 3: Delivering an option

How will the new arrangements be implemented?

127 Subject to Cabinet decisions, the preferred option would be implemented through legislative change.

128 Manatū Taonga will lead the development and implementation of the digital bargaining framework, in partnership with the regulator which would ultimately administer and monitor the framework on an ongoing basis. The regulator would also be responsible for developing the bargaining code of conduct, within the bounds of the legislation.

129 Manatū Taonga has provided advice to the Minister for Broadcasting and Media on a range of entities that could 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, officials consider that the Broadcasting Standards Authority (BSA) is the most appropriate entity to administer and monitor the bargaining process. This would require legislation to provide for the BSA's new functions and powers in respect of the bargaining framework, possibly through amending the Broadcasting Act 1989.

130 Manatū Taonga has had early conversations with the BSA, which is open to taking on the role of regulator. Manatū Taonga would monitor the regulator's performance of these duties (and already performs this role in respect of the BSA).

131 Some detailed matters still to be determined will have implications for how arrangements are implemented. For example, the nature and size of penalties for non-compliance under the framework will need to be sufficient to act as a deterrent to platforms, but not so extreme that they are unjustifiably inconsistent with our wider penalty regime and/or lead to platforms exiting the New Zealand market. The penalties settled on may also mean another entity needs to be involved from an enforcement perspective. These matters will be resolved prior to legislation being introduced.

132 9(2)(f)(iv) [redacted] our analysis suggests the benefits will considerably outweigh any financial implications for the Crown. This initial cost estimate is proportional to the funding that the Australian Communications and Media Authority received in 2021 to administer the Australian scheme ($4.2 million over three years).

133 Manatū Taonga has been engaging with a number of stakeholders in the sector on the merits of a digital bargaining approach. This engagement will continue through the

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.