

## PUBLIC VERSION

### NPA CROSS-SUBMISSION IN RELATION TO ITS APPLICATION FOR AUTHORISATION FOR COLLECTIVE BARGAINING WITH GOOGLE AND FACEBOOK

8 MARCH 2022

#### EXECUTIVE SUMMARY

1. NPA has reviewed the submissions on its application for authorisation of collective bargaining (the "**Arrangement**") with Google and Meta (referred to as "Facebook") (together, the "**Digital Platforms**").
2. NPA considers that it is notable that a number of key industry stakeholders, representing a number of different key industry participants (including Manatū Taonga | Ministry for Culture & Heritage ("**Manatū Taonga**"), the Association of New Zealand Advertisers ("**ANZA**"), and the Commercial Communications Council) have provided the Commission with submissions that support the perspectives of NPA, including the views that high quality New Zealand news content is a public benefit, and that assisting New Zealand news publishers to negotiate fair remuneration for their content will assist the creation of such content and enhance competition. From NPA's perspective, those submissions provide further evidence of the significant public benefits that would arise from authorisation of the Arrangement.
3. In relation to the submissions from Google and Facebook, NPA considers that their respective submissions again:<sup>1</sup>
  - (a) underplay the way in which their platforms benefit from access to news content; and
  - (b) reflect attempts to avoid and delay any changes to the status quo in which the Digital Platforms benefit from a significant imbalance in bargaining power in their dealings with New Zealand news publishers.
4. Further evidence supporting NPA's views are outlined as follows.

#### SUBMISSIONS THAT SUPPORT THE PERSPECTIVE OF NPA

5. The Commission would have noted that a number of key industry stakeholders, representing a number of different key industry participants, provided submissions that supported the perspectives of NPA. That includes submissions from:
  - (a) Manatū Taonga, which submitted that:
    - (i) "[h]igh quality media is a fundamental public good and a vital component of New Zealand's democracy";
    - (ii) it considers that the "same bargaining imbalance exists in New Zealand [as in Australia] and is evident by the limited number of New Zealand media companies that have been able to enter into commercial discussions";
    - (iii) the "advent of commercial arrangements in other jurisdictions shows that news content has financial value to digital platforms. New Zealand media

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<sup>1</sup> With reference to each of Facebook and Google's previous submissions dated 8 December 2021.

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companies should therefore be remunerated for the use of news content via commercial arrangements, as is the case in similar markets"; and

- (iv) if commercial arrangements are not reached with the Digital Platforms, then government regulation would likely be necessary, but that there would be delays and public costs from requiring such regulation ("[t]he development of government regulation is time consuming and requires considerable public funding and resources").
- (b) ANZA (a representative of advertisers in New Zealand), which submitted in support of the Arrangement on the basis that:
- (i) the Arrangement will "better secure competition in the advertising market in the longer term"; and
  - (ii) "[a] sustainable local media ecosystem is recognised as important for civil society and the representative democratic principles that underpin New Zealand's governance."
- (c) The Commercial Communications Council (a representative of the advertising industry and its agencies), which submitted in support of the Arrangement on the basis that:
- (i) the Arrangement will "further ensure ongoing competition between New Zealand news media outlets and Meta and Google which supports on-going fair pricing and consumer choice"; and
  - (ii) "a strong local media industry is essential to New Zealand, ensuring on-going provision of factual news content, holding power to account, and enriching public debate. We believe that supporting the NPA's application serves these goals."
6. The fact that a number of key industry stakeholders, representing a number of different key industry participants, have provided submissions that supported the perspectives of NPA, provides further evidence of the significant public benefits that would arise from authorisation of the Arrangement, including:
- (a) securing better competition in the advertising market, by better positioning New Zealand news publishers to compete against the Digital Platforms that are understood to consume the majority of available digital advertising spend in New Zealand;
  - (b) better positioning New Zealand news publishers to invest in the production and dissemination of news, which is widely accepted as being of critical importance to the public interest and contributing to a well-functioning democracy;
  - (c) better positioning New Zealand news publishers to invest in the creation of commentary, analysis, and information for New Zealand communities that is designed to counter the spread of misinformation and disinformation that is proliferating on global technology platforms; and
  - (d) facilitating commercial negotiations that would avoid the need of government to draw on scarce public funding to enact specific legislation / regulation to achieve a fairer remuneration model with the Digital Platforms.

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**RESPONSE TO THE GOOGLE AND FACEBOOK SUBMISSIONS**

7. We have reviewed the February 2022 submissions of Google and Facebook. From our perspective, similar to their initial December 2021 submissions, these further submissions from each of Google and Facebook again do not present a full or accurate portrayal of the relevant dynamics, by:
  - (a) underplaying the way in which their platforms benefit from news content;
  - (b) underestimating the impact that their businesses have on news publishers; and
  - (c) overstating the ability of news publishers to choose whether or not to have their content on the Digital Platforms.
  
8. We consider that both Google and Facebook's submissions contain a number of assertions that are not supported by evidence. As outlined in Google's submission, we agree "it's important to take an evidence based approach",<sup>2</sup> and we provide the following further evidence to enable the Commission to apply an evidence-based approach to those submissions.

**Response to Google submission**

<b>Assertion in the Google submission</b>	<b>NPA's response to the Google submission</b>
<p>(a) Google asserted that it "is actively pursuing commercial solutions" with New Zealand news media and, therefore, that collective bargaining is not necessary.</p>	<p>NPA does not agree that collective bargaining is unnecessary. The significant bargaining imbalance, as identified by the ACCC,<sup>3</sup> means individual publishers face significant difficulties in being able to negotiate a fair and reasonable remuneration for the value that their news content delivers to those Digital Platforms.</p> <p>That is reflected in the fact that it is now 2022, and both Google and Facebook have been profitably using news publishers' content without remuneration for years, and each still has not entered into fair and reasonable remuneration arrangements with news publishers that reflect the value of their content (not only in New Zealand, but elsewhere around the world where specific regulation has not been enacted to facilitate fair and reasonable negotiations). It was publicly reported as far back as March 2021 that the Broadcasting Minister Kris Faafoi wanted to see the Digital Platforms "speed up their conversations with New Zealand media players about "commercial arrangements"<sup>4</sup> for fair and reasonable remuneration. However, such arrangements still have not been reached.</p> <p>This reflects that it is necessary to overcome the significant imbalance in bargaining power to achieve fair and reasonable commercial arrangements. As Australia's communications minister, Paul Fletcher, has said (in explaining the rationale for the Australian news media bargaining code): "What we're trying to do is replicate the ordinary commercial dealings that would occur in a market where there wasn't a huge imbalance of bargaining power".<sup>5</sup></p>

<sup>2</sup> Page 1 of Google's 10 February 2022 submission.

<sup>3</sup> Digital Platforms Inquiry. Final Report. ACCC. Page 8 and 9.

<sup>4</sup> (31 March 2021). 'A bit more speed.' Social media giants under pressure by the Government to work with media. NZ Herald. Retrieved from: <https://www.nzherald.co.nz/nz/a-bit-more-speed-social-media-giants-under-pressure-by-the-government-to-work-with-media/BJN74UR3GBKAC2EOAWUNUHKVW4/>

<sup>5</sup> 28 February 2022. Australia's standoff against Google and Facebook worked – sort of. Wired.com. Retrieved from: <https://www.wired.co.uk/article/australia-media-code-facebook-google>

The Cairncross Review in the UK similarly observed that this bargaining imbalance makes it difficult for news publishers to achieve fair and reasonable remuneration through ordinary commercial negotiations:<sup>6</sup>

although the major platforms undoubtedly benefit from carrying news content, which brings them significant volumes of traffic, data and thereby advertising revenues, they could likely afford to exclude any particular publisher from their website without seeing much negative impact. The evidence from Spain and Germany certainly suggests that publishers have a lot more to lose than the major platforms from the removal of their content.

... what is clear is that it is increasingly difficult for publishers credibly to threaten to remove their content – and without that threat, they cannot easily negotiate terms for the distribution of their content.

It is this bargaining imbalance that the application for collective bargaining is seeking to address, by better enabling the participants to negotiate fair and reasonable remuneration. Reflecting the need for collective bargaining:

- [ ].
- [ ].
- [ ].

Google's conduct overseas also indicates that, unless required to do so by regulation / legislation or other measures such as collective bargaining, it will seek to avoid entering into commercial arrangements that provide for remuneration that truly reflects the value of the content it uses. For example, in July 2021, the French Autorité de la Concurrence found that Google had sought to improperly reduce the scope of its commercial negotiations with French news publishers, and that was part of a "more global strategy":<sup>7</sup>

The Autorité thus noted that while the complainants have consistently requested that the negotiations relate in a specific and transparent manner to the remuneration due for the current use of content protected by related rights, **Google has systematically imposed a global discussion focusing on the subscription of publishers and news agencies to a new global partnership**, called Publisher Curated News, or PCN, which focused, in particular, on a new service called Showcase...

**Google also unjustifiably reduced the scope of the negotiation with regard to the scope of income derived from the display of protected content:** according to Google, only advertising revenue from Google Search pages displaying

<sup>6</sup> Page 71. The Cairncross Review. A Sustainable Future for Journalism. 12 February 2019. Retrieved from: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779882/021919\\_DCMS\\_Cairncross\\_Review\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf)

<sup>7</sup> (13 July 2021). Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions. Retrieved from: <https://www.autoritedelaconcurrence.fr/en/press-release/remuneration-related-rights-press-publishers-and-agencies-autorite-fines-google-500>

	<p>content should be taken into account to establish the remuneration due. The Autorité considered that this position, leading to the exclusion of income derived from other Google services and all indirect income related to such content, was contrary to the Law and to the Decision; This is all the more so since the Decision noted the importance of press content for Google, which plays a role in triggering Internet users' visits and in extending consultation times, thus strengthening Google's position and the data available to it...</p> <p>It thus appears that the negotiation strategy implemented by Google with regard to the negotiations conducted within the framework of the Decision was <b>part of a more global strategy, implemented at a more global level, and aimed at avoiding or limiting as much as possible payment of remuneration to publishers</b>, to use the <i>Showcase</i> service in order to resolve the basic debate on the allocation of specific rights to publishers and agencies for the reproduction of press content, and, finally, to use negotiations on related rights to obtain the production of new content by press publishers, via Showcase, and subscription by the latter to the SwG service, which allows Google to collect additional income from subscriptions to press titles. [Emphasis added]</p> <p>Furthermore, Google's voluntary funding / education initiatives are no substitute for the ability of news publishers to engage in meaningful negotiations with the Digital Platforms for fair and commercial remuneration. This point has been well summarised by the News Media Alliance:<sup>8</sup></p> <p>While Google, through the Google News Initiative, has donated grant funding to the news media industry and provided some useful advice, none of this is sufficient given the benefit to Google from news content and Google's substitutive nature. In short, the legal system gave Google protection on the theory that it was engaged in good faith, fair uses of third-party content. Now, the facts underlying that original assumption have changed dramatically and upset the balance between Google and publishers, leading to industry and societal ramifications. In the process, the system has allowed Google to establish and entrench its market power at the expense of publishers and other content creators.</p> <p>In light of the above, NPA remains of the view that in the absence of collective bargaining individual publishers face significant difficulties in being able to negotiate fair and reasonable remuneration for the value that their news content delivers to those Digital Platforms.</p>
<p>(b) Google asserted that "it is not correct to suggest that "news content draws</p>	<p>It is difficult to reconcile Google's submissions that news content does not draw consumers to Google Search with its observed in-market commercial practices.</p>

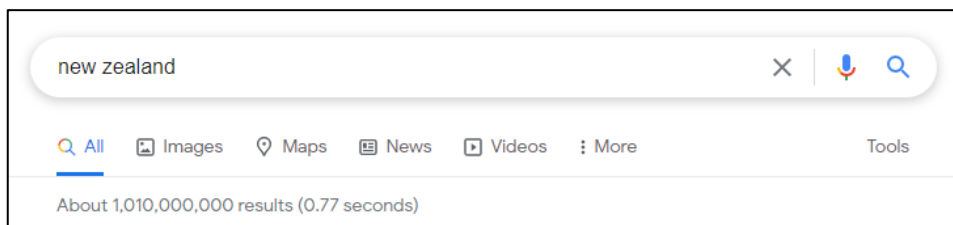
<sup>8</sup> (June 2020). News Media Alliance. How Google Abuses Its Position as a Market Dominant Platform to Strong- Arm News Publishers and Hurt Journalism. Retrieved from: <http://www.newsmediaalliance.org/wp-content/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf>

consumers to" Google Search", or that news generates revenue for Google because:

- ads do not typically appear in response to news-related queries on Search;
- in 2020, news-related queries made up less than 2% of total queries on Google Search in New Zealand; and
- "Top Stories" is not a proxy for news-related searches (as it is a type of Search result that is displayed when a user may be searching for results where recency is important).

Indeed, "News" is one of the key five icons under the search bar in Google Search – as shown in Figure [1] below. If "News" was not of value to Google's Search offering, it is difficult to understand why Google would use such valuable "real estate" by including that icon.

Figure [1] – Screenshot of the Google Search page



Furthermore, as noted in our December submission, the mere existence of Google News, which appears in a similar form to what one would see on the front page of a major newspaper website (but with content that is sourced from multiple New Zealand publishers without any production cost to Google), further underscores the value that Google sees in news content to its offering to consumers.

Google's submission that news content is not of value to it because "ads do not typically appear in response to news-related queries on Search" does not accurately reflect Google's business model. Google derives enormous financial benefits from the news that it uses on its sites. Google uses news to draw consumers to its platforms (by making a visit to Google part of the online "habit") and by presenting trustworthy content produced through publishers' investment in journalism (which contributes to consumers' trust in Google as a source of accurate information), with that in turn leading consumers to spend more time within Google's eco-system, enabling Google to gather additional data about users that it can monetise in other ways. As has been reported: "with consumers' shift toward Google for news consumption, news is becoming increasingly important to Google to keep consumers within its digital domain."<sup>9</sup>

That has been recognised by a number of competition regulators, and other third parties. For example:

- **ACCC:** "The ACCC notes that the value of consumers to digital platforms comes from both the time spent on the platform (attention) and the data obtained which enables the platforms to sell targeted advertising opportunities. ... it is clear that user data forms a significant value to digital platforms (as it is highly valued by advertisers), so a significant portion of the value of consumers to digital platforms is likely to come from their user data."<sup>10</sup>
- **The French Autorité de la Concurrence:** "[T]he Decision noted the importance of press content for Google, which plays a role in triggering Internet

<sup>9</sup> (10 June 2019). Google made \$4.7bn from news sites in 2018, study claims. The Guardian. Retrieved from <https://www.theguardian.com/technology/2019/jun/10/google-news-revenue-2018-new-study#:~:text=Google%20made%20%244.7bn%20in,a%20study%20released%20on%20Monday>.

<sup>10</sup> (June 2019). Digital Platforms Inquiry. Final Report. ACCC. Retrieved from: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

users' visits and in extending consultation times, thus strengthening Google's position and the data available to it...."<sup>11</sup>

- **The News Media Alliance:** "News content provides significant value to Google by enabling Google Search to drive greater user engagement. News content from news publishers not only contributes to Google Search's freshness and quality of the search results, but also helps inform the emerging keywords that were not previously searched on Google. As new search queries continue to emerge, Google continuously improves its Search to return fresher and more relevant search results in response to the trending queries. News content plays an irreplaceable role in informing improvement areas for Google Search, which ultimately helps Google build trust in its products from users and thus keep users within Google's ecosystem of products."<sup>12</sup>

Furthermore, the suggestion that news-related queries made up less than 2% of total queries on Google Search in New Zealand in 2020 also does not reflect the commercial value of news to Google. In particular, while Google does not publish its search volume data, "it's estimated Google processes approximately 63,000 search queries every second, translating to 5.6 billion searches per day and approximately 2 trillion global searches per year. The average person conducts between three and four searches each day".<sup>13</sup> Even assuming that 2% is the correct estimate of the number of news-related queries, at that volume of searches, it demonstrates that Google receives a significant volume of news-related queries. For example, on the basis that there are 4,154,000 New Zealanders aged 15 or over,<sup>14</sup> assuming each such person made four Google Searches per day, with 2% of those being news-related searches, then Google Search would receive 121,296,800 news-related searches in New Zealand per year. This number is plainly significant.

Furthermore, while NPA is unclear how Google has determined what is a "news-related" search, it expects that Google's 2% figure is a significant underestimate of the amount of traffic on Google's platform that is actually news-related. For example:

- According to research by the News Media Alliance, on Google Search:<sup>15</sup>
  - "~39% of results and ~40% of clicks on trending queries are news results";
  - "~16% of results and ~16% of clicks on the "most-searched" queries are news results";
- As noted in our December submission, Google's own data indicates that the top five overall "trending" searches on Google in New Zealand in a given year are searches that would surface news content. For example, in 2021 the top five

<sup>11</sup> (13 July 2021). Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions. Retrieved from: <https://www.autoritedelaconcurrence.fr/en/press-release/remuneration-related-rights-press-publishers-and-agencies-autorite-fines-google-500>

<sup>12</sup> (June 2019). Google Benefit from News Content. Economic Study by News Media Alliance. Retrieved from: <https://www.newsmediaalliance.org/wp-content/uploads/2019/06/Google-Benefit-from-News-Content.pdf>

<sup>13</sup> 25 Google Search Statistics to Bookmark ASAP. By Meg Prater. Retrieved from: <https://blog.hubspot.com/marketing/google-search-statistics#:~:text=Google%20doesn't%20share%20its,and%20four%20searches%20each%20day>.

<sup>14</sup> (17 August 2021). National population estimates: At 30 June 2021. Statistics NZ. Retrieved from: <https://www.stats.govt.nz/information-releases/national-population-estimates-at-30-june-2021#:~:text=At%2030%20June%202021%3A,36.7%20and%2038.7%20years%2C%20respectively>.

<sup>15</sup> (June 2019). Google Benefit from News Content. Economic Study by News Media Alliance. Retrieved from: <https://www.newsmediaalliance.org/wp-content/uploads/2019/06/Google-Benefit-from-News-Content.pdf>

"trending" searches were: "COVID-19 NZ", "NBA", "Stuff NZ", "Australia vs India" and "NRL".<sup>16</sup>

In addition, Google's submission that its "Top Stories" feature "is not a proxy for news-related searches" does not reflect the reality of the type of content that is surfaced through that feature, with that feature almost always seeming to surface news content – as reflected in Figures [2] and [3] below.

Figure [2] – Google Search's "Top Stories" in response to the search term "New Zealand" on a desktop browser

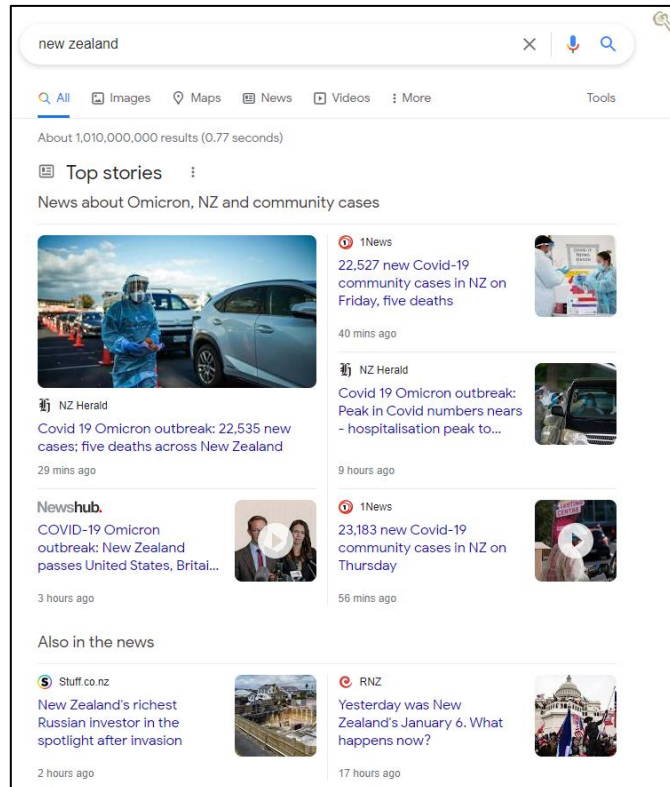
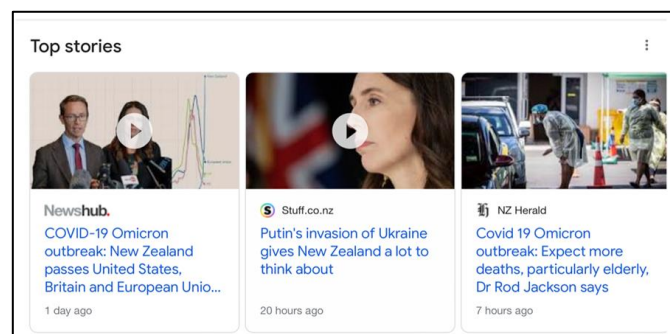


Figure [3] – Google Search's "Top Stories" in response to the search term "New Zealand" on a mobile browser



(c) In relation to Google's use of news snippets on

Google's argument that it is not aware of any other search engines in New Zealand that pay for showing news links and snippets is not in any way supportive of an argument that

<sup>16</sup> <https://trends.google.co.nz/trends/vis/2021/NZ/>



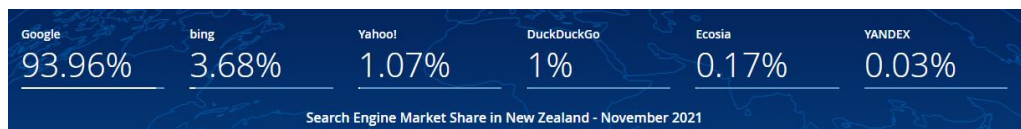
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Google Search, Google asserted that:

- other search engines in New Zealand do not pay news media for showing news links and snippets;
- "Google does not pay any Australian news publishers for links and snippets of news content in Google Search", with the terms of its agreements strictly confidential;
- "there is no jurisprudential basis in New Zealand law to require payment for snippets";
- Google's use of news snippets "are a net benefit to news businesses", and so is "not indicative of "free-riding" or "a wealth transfer from New Zealand-owned news media companies" to Google"; and
- the Cairncross Review in the UK concluded that "overall, the snippets of publishers' content included on platforms' websites

news links and snippets do not have value to Google, or that Google does not have significant market power. To the contrary, it is reflective of the fact that Google is the only search engine of any scale and audience in New Zealand (as represented in Figure [4]) and, therefore, that Google is the search engine that derives the significant commercial benefit from including news links and snippets in its search results in New Zealand.

Figure [4] – Google search engine market share in New Zealand



Furthermore, Google's argument that it "does not pay any Australian news publishers for links and snippets" is also not supportive of an argument that news links and snippets do not have value to Google. Indeed, irrespective of what Google has (confidentially) agreed that its payments are for (or not for) in Australia, the arrangements that Google has reached with news media in Australia are in relation to the totality of benefits that news publishers deliver to Google (which inevitably include Google's use of publishers' content in its links and snippets), and demonstrate that Google recognises the significant value that news content delivers to its platforms when the right frameworks are in place to encourage fair negotiations for remuneration. For example, with:

- News Corp said to have struck deals to receive "significant payments";<sup>17</sup>
- Nine stating "it expected growth in publishing earnings before interest, tax, depreciation and amortisation to be between \$30 to \$40 million this financial year" following it reaching agreements with each of Google and Facebook for use of Nine's content on their platforms;<sup>18</sup> and
- those deals in total having been estimated by some "as being worth A\$100m ([USD]\$77m) annually to journalism" in Australia,<sup>19</sup> while others have estimated the total value in Australia as being significantly higher again.<sup>20</sup> Rod Sims, the outgoing ACCC chair, has estimated that, in total, the arrangements that Google and Facebook have reached with Australian news media businesses have "reaped more than \$200m a year for publishers" in Australia.<sup>21</sup> [            ].

In addition, while Google says there is no "jurisprudential basis in New Zealand law to require payment" for snippets, that simply reflects a legal and/or market failure in New Zealand's regulations, which prevent commercial parties from being able to negotiate fair remuneration for the delivery of commercial value. Indeed, with the right structures in place, there is commercial precedent that demonstrates that the use of news links and snippets delivers commercial value to Google, with it reported as recently as March 2022

<sup>17</sup> (17 February 2021). News Corp agrees deal with Google over payments for journalism. The Guardian. Retrieved from: <https://www.theguardian.com/media/2021/feb/17/news-corp-agrees-deal-with-google-over-payments-for-journalism>

<sup>18</sup> (1 June 2021). Nine formalises deals with Google and Facebook. The Sydney Morning Herald. Retrieved from: <https://www.smh.com.au/business/companies/nine-formalises-deals-with-google-and-facebook-20210601-p57wxq.html>

<sup>19</sup> Reuters Institute Digital News Report 2021. Retrieved from: [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital\\_News\\_Report\\_2021\\_FINAL.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf)

<sup>20</sup> (16 March 2021). What Facebook's big deals in Australia tell us. INMA. Retrieved from: <https://www.inma.org/blogs/Digital-Platform-Initiative/post.cfm/what-facebook-s-big-deals-in-australia-tell-us>

<sup>21</sup> (25 February 2022). Reining in the digital giants: Rod Sims on the trials and triumphs of a decade as head of the consumer watchdog. The Guardian. Retrieved from: <https://www.theguardian.com/australia-news/2022/feb/26/reining-in-the-digital-giants-rod-sims-on-the-trials-and-triumphs-of-a-decade-as-head-of-the-consumer-watchdog>

encourage more readers to go to publishers' website, rather than discourage them".

that "France Google has agreed to pay "[USD]\$76 million over three years to a group of 121 French news publishers... to provide compensation for news snippets used in search results".<sup>22</sup>

In relation to Google's assertion that its use of news links and snippets is of "net benefit" to news publishers and, therefore, not indicative of a wealth transfer, it is not denied that Google's market dominance in the search engine market means that Google has become a gatekeeper to content on the Internet – including journalistic content and, therefore, that news publishers are reliant on having their content surfaced on Google. However, the current commercial arrangements whereby Google has free and unfettered access to such content does not reflect the significant value that Google generates for its platforms through use of such content. As the News Media Alliance has observed:<sup>23</sup>

Google's use of news publishers' content does send substantial traffic to news publishers, but Google is not fairly or appropriately compensating news publishers for the value of their material, or properly treating the news industry as an important strategic partner.

The same is true in the New Zealand context. [ ].

Finally, in relation to Google's assertion that the Cairncross Review in the UK concluded that "overall, the snippets of publishers' content included on platforms' websites encourage more readers to go to publishers' websites, rather than discourage them", with respect, we note that this submission reflects a mis-reading of the Cairncross Review's conclusions by not reproducing the quote in its entirety. Google's submission failed to include the second half of the paragraph that it quoted from in the Cairncross Review, which reads as follows:<sup>24</sup>

Put more succinctly, a platform's aggregation service is complementary to a news publisher's direct provision, rather than a substitute. But while this may be true in general, it may not always be. There is evidence that the longer a snippet is, the more likely it is to be a substitute for the full article, and actually to discourage users from clicking through.

Those further conclusions in the Cairncross Review reflect the evidence provided to the Commission in our December submission, namely that a significant proportion of consumers use snippets on search engines instead of visiting news publishers' websites. As referenced in our December submission:

- a survey in the US by Outsell showed that 44% of visitors to Google News scan headlines without clicking and accessing publishers' sites;<sup>25</sup> and

<sup>22</sup> (13 February 2021). Exclusive: Googles \$76 million deal with French publishers leaves many outlets infuriated. Reuters. Retrieved from: <https://www.reuters.com/article/us-google-france-copyright-exclusive-idUSKBN2AC27N>

<sup>23</sup> (June 2020). How Google Abuses Its Position as a Market Dominant Platform to Strong- Arm News Publishers and Hurt Journalism. News Media Alliance. Retrieved from: <http://www.newsmediaalliance.org/wp-content/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf>

<sup>24</sup> Page 70. The Cairncross Review. A Sustainable Future for Journalism. 12 February 2019. Retrieved from: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779882/021919\\_DCMS\\_Cairncross\\_Review\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf)

<sup>25</sup>(20 January 2010). 44% of Google News Visitors Scan Headlines, Don't Click Through. Tech Crunch. Retrieved from: <https://techcrunch.com/2010/01/19/outsell-google-news/>

- a study by the European Commission ("**EC**") found that 47% of surveyed users browse and read headlines and snippets without accessing the whole article when accessing news via aggregators, social media or search engines.<sup>26</sup>

As the News Media Alliance has noted: <sup>27</sup>

For many years, Google Search results consisted of simple blue links with only a headline and very short snippet from an article. Today, Google Search makes heavy use of premier news content, including high quality news photos. Google uses this content to enhance its own brand – especially in an era plagued by fake news – and earns substantial advertising revenues for aggregating content it did not create or fund. Moreover, news publishers worry that Google Search is increasingly becoming more of a publisher than a search engine, supplying sufficient content to substitute for their publications.

As illustrated by the examples and screenshots detailed below, a second, broader concern is the format and wide range of content presented by Google on today’s search results pages, usually above the traditional headlines and links to news articles – changes which undoubtedly decrease the chances that a user will click on a news link. Many have quoted the stunning statistic that, “In June of 2019, for the first time, a majority of all browser-based searches on Google.com resulted in zero clicks. We’ve passed a milestone in Google’s evolution from search engine to walled-garden.”

That Google Search's presentation of snippets will provide a material proportion of consumers with sufficient information without needing to visit the news publishers' website directly, makes intuitive sense when one looks at the level of detail included in those news snippets – as illustrated in Figure [5] below.

<sup>26</sup> News Corp Australia, Submission to the Digital Platforms Inquiry – Response to Report by Henry Ergas et al, August 2018, page 6.

<sup>27</sup> (June 2020). How Google Abuses Its Position as a Market Dominant Platform to Strong- Arm News Publishers and Hurt Journalism. News Media Alliance. Retrieved from: <http://www.newsmediaalliance.org/wp-content/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf>

Figure [5] – Example of Google Search results in response to the search "fijian drua"



(d) Google asserted that it is "one of many ways that users access news", and that its analysis shows that "New Zealand news websites receive more than 85% of their traffic from sources other than Google".

Google also submitted that the data included in NPA's December submission from the Reuters Institute should be ignored as "the data does not include New Zealand - either individually

While it is true that New Zealand news publishers receive traffic from sources other than Google, Google's submission vastly underplays the importance of Google as a gatekeeper for audiences to access journalistic content.

For example, even assuming that Google's estimate is correct that it accounts for 15% of traffic to New Zealand news websites, that estimate ignores the fact (as outlined above) that a number of consumers will access New Zealand news and journalistic content directly via Google, without clicking-through to a New Zealand news website. Google's 15% estimate does not take these consumers into account. For example, assuming it is the case that approximately half of visitors to Google News scan headlines without clicking and accessing publishers' sites, then the true estimate of the number of consumers that are accessing news via Google News would be much larger than that 15% estimate.

Furthermore, for a number of NPA members, that 15% seems far too low. For example:

- [ ].

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<p>or as part of the global statistics."</p>	<ul style="list-style-type: none"> <li>• [ ]:<sup>28</sup> <ul style="list-style-type: none"> <li>○ [ ]</li> <li>○ [ ]</li> <li>○ [ ]</li> <li>○ [ ]; and</li> <li>○ [ ].</li> </ul> </li> <li>• [ ]<sup>29</sup> <p>Furthermore, the suggestion in the Google and Facebook submissions that somehow (without explanation) the dynamics in New Zealand are different to, say, Australia also do not withstand scrutiny. For example, [ ]</p> <table border="1" data-bbox="464 813 1458 1028"> <tr> <td></td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> </tr> <tr> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> </tr> <tr> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> </tr> <tr> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> </tr> <tr> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> <td>[ ]</td> </tr> </table> <p>The above demonstrates that Google is a far more important gatekeeper for audiences' access to journalistic news content than suggested in Google's submission. The reality is that whether Google referrals account for 15% of traffic to a news publisher's website, or a larger figure, Google's role as gatekeeper means the role it plays is of critical importance to the viability of New Zealand news media – and that flows through to the imbalance in bargaining power (discussed further below).</p> <p>Finally, in relation to Google's submission that the Commission should not take into account data from the Reuters Institute Digital News Report 2021 on the basis that "the data does not include New Zealand - either individually or as part of the global statistics", NPA notes that Google provides no evidence as to why New Zealanders' use of search and social to access news content should be considered any different to the rest of the world (indeed, NPA's perspective is that the data described above shows that New Zealand faces similar dynamics to the rest of the world). Furthermore, the Commission itself cited the same Reuters Institute Digital News Reports in analysing trends applicable to New Zealand in reaching its determination on the <i>NZME / Fairfax</i> authorisation.<sup>30</sup></p> </li> </ul>		[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
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<p>(e) Google asserted that if "publishers do not want their content to be indexed in Google Search or Google News, they can easily and simply opt out."</p>	<p>Google's assertion that publishers could simply "opt-out" of providing snippets does not reflect the commercial reality of the importance of Google, and audience referrals from Google. Google's near-monopoly position in the search engine market means that if news publishers elect to opt out, the only impact is to the publisher (and consumers that cannot discover that journalistic content) rather than to Google. This has been recognised the world over, for example:</p>																																			

<sup>28</sup> [ ]

<sup>29</sup> [ ]

<sup>30</sup> For example at [757]. NZME Limited and Fairfax New Zealand Limited [2017] NZCC 8.

- In Australia, the **ACCC** found that Google is "an unavoidable trading partner... having links to their websites on Google is a necessity".<sup>31</sup>
- In France, the **Autorité de la Concurrence** considered that:<sup>32</sup>

Google is likely to hold a dominant position on the French market for general search services. Indeed, its market share is around 90% at the end of 2019. In addition, there are strong barriers to entry and expansion on this market, linked to significant investments necessary to develop a search engine technology, and to the effects of networks and experience such as to make Google's position even more difficult to contest by competitive engines wishing to develop

These practices are made possible by the dominant position that Google is likely to hold in the market of general search services. This position leads Google to bring significant traffic to the websites of publishers and news agencies. Thus... the search engines - and therefore Google for a large part - represent, according to the sites, between 26% and 90% of the redirected traffic to their pages. This traffic is also very important and crucial for publishers and news agencies who cannot afford to lose any share of their digital readership due to their economic difficulties.

Under these conditions, publishers and news agencies are placed in a situation where they have no other choice than to comply with Google's display policy without financial counterpart. Indeed, the threat of downgrading from the display is synonymous for each press publisher with the loss of traffic and therefore of income, both if it is the only one affected by this downgrading and if this downgrading targets all the publishers.

- In the UK, the **Cairncross Review** considered that:<sup>33</sup>

The problem, from the publishers' point of view, is that they have very little say in the way and the extent to which their content is replicated. Once they agree to be indexed, they have little choice but to accept the platforms' terms. As the German and Spanish cases illustrate, almost all publishers will accept, because virtually all of them depend on these platforms to reach a significant proportion of their readers. For each individual publisher then, the inclusion of their content on the biggest online platforms – in particular Google and Facebook – brings significant benefits which they can ill afford to forgo, whilst exclusion would mean losing access to a large pool of potential

<sup>31</sup> Digital Platforms Inquiry. Final Report. ACCC. Page 8.

<sup>32</sup> (9 April 2020). Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news agency AFP (Agence France Presse). Retrieved from: <https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-has-granted-requests-urgent-interim-measures-presented-press>

<sup>33</sup> Page 70. The Cairncross Review. A Sustainable Future for Journalism. 12 February 2019. Retrieved from: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779882/021919\\_DCMS\\_Cairncross\\_Review\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf)

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	<p>readers, even if some more loyal readers may choose to continue to go to their site directly.</p> <p>A "real world" experiment from Germany in 2014 demonstrates that it is simply not commercially realistic for news publishers to "easily and simply opt out" of Google Search and Google News – as described in the Cairncross Review:<sup>34</sup></p> <p>a consortium of about 200 publishers, led by Axel Springer, told Google News that the company could no longer publish snippets of text and images from their publications. Google complied and ran only headlines of articles to limit its liability. Over the next two weeks, Axel Springer saw a 40% reduction in website traffic from Google and an 80% drop in traffic from Google News – and so agreed to be indexed once again by Google News</p> <p>Accordingly, the reality is that if a news publisher were to "simply opt out" of Google Search and Google News, doing so would mean that a publisher's content would not appear in search results and, therefore, their content would not be able to contribute to the "national conversation", enrich public debate, or be discoverable to many consumers that require access to such important content (such as fact-checked information about COVID-19 vaccines, for example). Therefore, a news publisher (as a matter of commercial reality) has no choice but to permit Google to scrape its content to ensure the discoverability of its news content, and the terms for doing so are dictated by Google with currently no real opportunity for bilateral negotiation for fair and commercial terms and compensation.</p>
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**Response to the Facebook submission**

Assertion in the Facebook submission	NPA's response to Facebook submission
<p>(a) Facebook's submission asserts that the challenges facing the news industry predate Facebook.</p>	<p>NPA does not deny that some of the challenges facing the news industry commenced prior to the entry of Facebook. However, the entry of Facebook, the way it conducts its business, and the significance of its presence – in terms of the vast proportion of online advertising revenue that it accounts for, its role as a gatekeeper to audiences on its platform, and its use of news content on its platforms, have significantly accelerated and exacerbated those issues.</p> <p>This was recognised by:</p> <ul style="list-style-type: none"> <li>• The Canadian <b><u>Public Policy Forum</u></b>.<sup>35</sup></li> </ul> <p>It may not be the "fault" of Google and Meta that a necessary element of a healthy democracy has been compromised, but they clearly have been free riders on content produced elsewhere and should be summoned to participate in addressing the reinvigoration of news.</p>

<sup>34</sup> Page 69.

<sup>35</sup> (3 March 2022). The Shattered Mirror: 5 Years On. Platforms, Innovation and Local News. Public Policy Forum. Retrieved from: <https://ppforum.ca/publications/shattered-mirror-5-years-on/>

	<ul style="list-style-type: none"> <li>• The UK <b>Cairncross Review</b>:<sup>36</sup></li> </ul> <p>For now, the unbalanced relationship between parties has allowed the platforms to make decisions with a significant impact on publishers, with little need for consultation. This has further added to publishers’ difficulties in building business strategies which will generate sustainable revenues online. It is particularly notable in two areas: in Google’s and Facebook’s foray into hosting articles through AMP and Instant Articles, and in the ways in which platforms choose to rank publishers’ content...</p> <p>One news publisher criticised the opacity of social media platforms thus: “Facebook say one thing and then change their mind and they do something else and all the preparation and money you have spent is wasted. You don’t know where you are with them or what they will do next.”...</p> <p>Overall, the unbalanced nature of the relationship between platforms and news publishers is a cause for concern, especially when combined with their larger market shares in the online advertising market. The overall position online of Google and Facebook appears to be directly impeding the ability of news publishers to develop successful business strategies. Whether or not the current monetary exchange between platforms and publishers is fair, the platforms’ position allows them to take decisions with significant impact on publishers, but with little to no engagement with them</p> <p>Accordingly, contrary to Facebook's submissions, NPA is clear that it is not a "misguided focus" to consider that Facebook's business model has had a significant role in exacerbating the challenges facing news publishers around the world – including in New Zealand.</p>
<p>(b) Facebook asserts that:</p> <ul style="list-style-type: none"> <li>• it is not on "an essential distribution channel for news publishers";</li> <li>• just 7.05% of news referrals come from social media; and</li> <li>• news publishers choose to post their content on Facebook.</li> </ul>	<p>From NPA's perspective, Facebook's submission significantly and incorrectly understates Facebook's significant market power as a social media platform, its use of news content on its platforms to benefit its own business model, and its role as a gatekeeper to consumers' access to content on the Internet. For example (as noted at (d) in the table responding to Google's submission above):</p> <ul style="list-style-type: none"> <li>• [ ].<sup>37</sup></li> <li>• [ ].<sup>38</sup></li> <li>• [ ].</li> </ul>

<sup>36</sup> Page 71. The Cairncross Review. A Sustainable Future for Journalism. 12 February 2019. Retrieved from: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779882/021919\\_DCMS\\_Cairncross\\_Review\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf)

<sup>37</sup> [ ]

<sup>38</sup> [ ]



Similarly, the UK Competition and Markets Authority ("CMA") has observed:<sup>39</sup>

Based on publisher submissions, in 2018 and 2019 (up until June) the average proportion of traffic to their websites that was referred via Google properties was 26% and 25% respectively (for 2019, the lowest proportion across publishers was 8% and highest was 57%). Referrals from Facebook properties were responsible on average for 10% of website visits in 2018 and 13% in 2019 (for 2019, the proportion ranged between 2% and 47% among publishers). Direct website visits were the most important source of traffic, with 44% of visits being direct in 2018 and 43% being direct in 2019 (ranging, in 2019, between 6% and 57%). Other visits come from what are termed 'other third-party referrals', for example referrals from Snapchat or Instagram.

In its response to our interim report, Google stated that 'this data shows that news publishers are not dependent on Google for Traffic. Less than a third of their traffic comes from Google Search.' **However, it is clear that, for the most part, the publishers from whom we received data are dependent on Google and Facebook for a significant part of their traffic.** [Emphasis added]

The fact that Facebook's market power means that it is a key gatekeeper to content on the Internet, including news content that it uses to benefit its own business model, is demonstrated by:

- the statistic cited in Facebook's own submission, namely that "in 2020 alone, Facebook sent around 180 billion clicks to news publishers around the world"; and
- the results of the "real world" experiment, when in February 2021 Facebook removed all news links in Australia off its platform:<sup>40</sup>

Facebook also lobbied hard against the code, arguing that news makes up less than 4 percent of the content people see in their news feed. On February 17, Australians woke up to discover that all news links had been wiped off the platform, leaving the Facebook pages of the country's biggest media companies completely blank. **Traffic to news websites sank 13 percent, illustrating exactly what the government said it was worried about.** Facebook's actions "confirm for all Australians [the] immense market power of these media digital giants," Frydenberg said at the time. [Emphasis added]

In the context of Facebook being such an essential gatekeeper for news content, it is irrelevant for Facebook to assert that news publishers "choose to post their content on

<sup>39</sup> (1 July 2020). Online platforms and digital advertising. Market study final report. CMA. Retrieved from: [https://assets.publishing.service.gov.uk/media/5efb22fbd3bf7f768fcdcfae/Appendix\\_S\\_-\\_the\\_relationship\\_between\\_large\\_digital\\_platforms\\_and\\_publishers.pdf](https://assets.publishing.service.gov.uk/media/5efb22fbd3bf7f768fcdcfae/Appendix_S_-_the_relationship_between_large_digital_platforms_and_publishers.pdf)

<sup>40</sup> 28 February 2022. Australia's standoff against Google and Facebook worked – sort of. Wired.com. Retrieved from: <https://www.wired.co.uk/article/australia-media-code-facebook-google>

	<p>Facebook". In such a context, the commercial reality is that most publishers have little choice but to post their content on Facebook. Demonstrating this, [ ]</p> <p>Furthermore, in relation to Facebook's assertion that New Zealand publishers "regularly exercise their choice" whether to use Facebook's services (referring to Stuff ceasing to publish links on Facebook), the reality is that publishers, including Stuff, have not (and cannot) prevent users sharing their journalistic content on Facebook [ ]. Therefore, the use of journalistic content on Facebook, and the benefit to Facebook's ecosystem of that, is not voluntary in the manner that Facebook's submission suggests – that content is used, circulated, and engaged with on Facebook by its users, with that use and engagement contributing value to Facebook. In addition, given Facebook's role as an essential gatekeeper for news content on the Internet, [ ] In August 2021 it was reported:<sup>41</sup></p> <p style="padding-left: 40px;">Stuff has returned to social media platform Facebook, more than a year after pausing activity on the site for ethical reasons. The news publisher reappeared on Facebook on August 18 after more than 14 months, in the wake of this week's covid-19 outbreak...</p> <p style="padding-left: 40px;">A spokeswoman said: "We are posting vital lockdown and covid-19 information and stories from our newsroom. We decided that given the seriousness of the current situation and the level of response required, it was important for us to ensure we made good, accurate information available as widely as possible. "This includes our anti-misinformation project The Whole Truth, as it is clear that false information and rumour about covid-19 and vaccines continues to be a real issue on platforms like Facebook."</p>
<p>(c) Facebook asserts that it has already made investments into New Zealand journalism, and that this should be considered the baseline "counterfactual" against which collective bargaining is assessed.</p>	<p>In Facebook's submission, it says that its approach to date "is the best evidence of how Meta will continue to support and work with New Zealand publishers in the future". That Facebook will continue its approach to date (of bargaining only on terms that it dictates, and of not providing fair or sustainable remuneration for use of journalism content) is the concern. Facebook's submission, therefore, simply further underscores the need for collective bargaining to assist in reaching a fairer, more commercial, and sustainable outcome for New Zealand news publishers.</p> <p>Public statements about Facebook's approach to date illustrate that its current approach is insufficient, and will continue to exacerbate the lack of sustainable remuneration for journalistic content in New Zealand – for example:</p> <ul style="list-style-type: none"> <li>● <b>Mike Hosking</b>, Newstalk ZB radio host, has commented that Facebook's journalism support programmes are "training days . . . with cups of tea and biscuits", with him noting: "Who would you rather be - News Corp, Channel 7, Channel 10 and the ABC banking millions? Or would you rather be in New Zealand where they are launching a training and grants programme?"<sup>42</sup></li> </ul>

<sup>41</sup> (20 August 2021). Stuff returns to Facebook. BusinessDesk. Retrieved from: <https://businessdesk.co.nz/article/media/stuff-returns-to-facebook#:~:text=Stuff%20has%20returned%20to%20social,this%20week's%20covid%2D19%20outbreak>.

<sup>42</sup> (7 November 2021). Meta's moves to boost our media underwhelms observers. RNZ. Retrieved from: <https://www.rnz.co.nz/national/programmes/mediawatch/audio/2018819284/meta-s-moves-to-boost-our-media-underwhelms-observers>

- **Sinead Boucher**, Stuff's CEO, has said of Facebook's support programmes that "[t]hey are designed to bind news media more tightly to their platforms, to increase publishers' reliance on Facebook and therefore ensure a supply of high-quality content for Facebook for free."<sup>43</sup>
- **Greg Fleming**, a freelance writer, has commented that "[i]n New Zealand, we get a few teaching sessions and some dosh to make some content Meta can use on its platform. Yes; insulting is one way to describe it."<sup>44</sup>

Furthermore, experience overseas demonstrates that, in the absence of a changed regulatory or bargaining landscape, Facebook will not readily reach commercial relationships that deliver fair and reasonable remuneration for its use of journalistic content. For example:

- The October 2021 announcement that Facebook had agreed to pay French publishers for its use of their news content was only following a change in the regulatory framework: "Facebook's largesse in France is not voluntary: The development relates to EU law that was updated to reform digital copyright rules back in 2019 to, among other tweaks, extend neighboring rights to snippets of publishers' content in response to criticism from the newspaper industry that adtech giants were freeloading off quality journalism that users of their platforms share."<sup>45</sup>
- In Australia, Misha Ketchell, editor at The Conversation Media Group, has noted that, when the outlet approached Facebook for a content remuneration arrangement, Facebook "refused to negotiate, even though The Conversation says it fits the criteria set out in the code"... "I think Facebook made a decision about the minimum number of deals they could do to stop the government from designating them under the code."<sup>46</sup>
- In Australia, in relation to the recent allocations of the "Facebook Australian News Fund", Broadsheet publisher Nick Shelton has expressed "frustration" at dealings with Facebook: "I don't want to detract from the many worthy recipients of the fund. There are many great publishers and journalists included. But Facebook's duplicity and manipulation of publishers has been outrageous... Andrew Hunter, Facebook's news partnerships lead, requested a meeting with us in August where he first spoke about the Facebook News Fund. Broadsheet had been seeking to negotiate a publisher deal since March but had not been making any meaningful progress. Each time we spoke, Andrew would deflect and tell me that there were new products coming that might suit us... It has been a colossal waste of time. Not to mention lost months where we should have been negotiating in good faith with Facebook..."

<sup>43</sup> (17 November 2021). Now Meta wants to teach our news organisations to "develop better business models". The Bit. Retrieved from: <https://www.thebit.nz/opinion/now-meta-wants-to-teach-our-news-organisations-to-develop-better-business-models/>

<sup>44</sup> (17 November 2021). Now Meta wants to teach our news organisations to "develop better business models". The Bit. Retrieved from: <https://www.thebit.nz/opinion/now-meta-wants-to-teach-our-news-organisations-to-develop-better-business-models/>

<sup>45</sup> (22 October 2021). Facebook agrees to pay French publishers for news reuse. TechCrunch. Retrieved from: <https://techcrunch.com/2021/10/21/facebook-agrees-terms-to-pay-french-publishers-for-news-reuse/>

<sup>46</sup> 28 February 2022. Australia's standoff against Google and Facebook worked – sort of. Wired.com. Retrieved from: <https://www.wired.co.uk/article/australia-media-code-facebook-google>

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	<p>It is clear to us that the fund was always designed to distract from commercial negotiations and to limit Facebook’s exposure to the code outside of the small handful of deals it was compelled to complete in order to avoid designation. It looks like the fund has been successful on that front to date."<sup>47</sup></p> <p>[ ]</p> <p>[ ]<sup>48</sup> [ ]<sup>49</sup> [ ]</p> <p>Accordingly, NPA is clear that the authorisation of collective bargaining is the step-change that is required to enable negotiations that have the potential to achieve fairer, more commercial, and sustainable commercial outcomes with Facebook.</p>
<p>(d) Facebook's assertion that it "has already entered into a bespoke commercial deal with The Spinoff".</p>	<p>[ ]<sup>50</sup> [ ]</p>
<p>(e) Facebook's assertion that authorisation of collective bargaining could harm "competition in relation to the production and supply of news".</p>	<p>Contrary to Facebook's submission, NPA is confident that authorisation of collective bargaining with the Digital Platforms will not result in any likely risk of a substantial lessening of competition in the production and supply of news content in New Zealand. The commercial reality, as outlined in NPA's authorisation application, is that:</p> <ul style="list-style-type: none"> <li>• the Arrangement for which NPA seeks authorisation only relates to one aspect of the participants' respective businesses, namely collectively bargaining with the Digital Platforms for remuneration from those Digital Platforms in the context of negotiations where there is a significant imbalance in bargaining power; and</li> <li>• beyond those collective negotiations, the participants will still all be highly incentivised to maximise the volume and attractiveness of their respective content to maximise revenue from other sources (such as advertising sales, digital subscriptions, and print subscriptions). Further, participants would be able to opt out of the collective bargaining, so those who considered they could negotiate a better arrangement with the Digital Platforms (by, for example, being more productive, efficient, or innovative) would be able to do so.</li> </ul> <p>As the Commission will readily appreciate, there is an inherent inconsistency between Facebook's submission that allowing collective bargaining with it will lead to a substantial lessening of competition in the production of news (suggesting that Facebook's use of journalistic content on its platforms is the key aspect of competition in the production of news content in New Zealand), and Facebook's submission that it is "just one of the many channels that publishers can choose to distribute their content and reach new audiences." The commercial reality is that while achieving fair and reasonable remuneration from Facebook for its use of journalistic content is a critical pillar towards supporting the sustainability of journalistic production in New Zealand, that is just one of a number of pillars. New Zealand's news media will all be highly</p>

<sup>47</sup> (3 March 2022). Publishers balk at outcome of Facebook Australian News Fund. Mumbrella. Retrieved from: <https://mumbrella.com.au/publishers-criticise-outcome-of-facebook-australian-news-fund-726861>

<sup>48</sup> [ ]

<sup>49</sup> [ ]

<sup>50</sup> [ ]

	<p>incentivised to continue to compete in terms of both price and quality in all other aspects to maximise their commercial footing.</p> <p>Moreover, contrary to Facebook's submission, NPA considers that authorisation of the Arrangement will be pro-competitive, both in:</p> <ul style="list-style-type: none"> <li>• the production of news / journalistic content, by enabling New Zealand news publishers to better invest in the sustainable production of such content; and</li> <li>• the provision of advertising, by better ensuring long-term competition between New Zealand news media outlets and Facebook and Google in the New Zealand advertising markets (as recognised in the submissions from both ANZA and the Commercial Communications Council).</li> </ul>
<p>(f) Facebook's assertion that "it is not appropriate to simply import conclusions reached by the ACCC in an Australian context into the New Zealand media landscape".</p>	<p>Facebook's submission seeks to assert that the Commission should not rely on conclusions drawn by the ACCC in Australia, without Facebook providing any credible evidence as to why there are any reasons that the dynamics in New Zealand could be considered any different from the dynamics observed in Australia. The reality is that the dynamics observed in Australia are being experienced all around the world. They are equally applicable in New Zealand as they are in Australia and the numerous other countries where governments / regulators are grappling with this significant imbalance in bargaining power and the implications that is having on the production of journalistic content. Just taking a small sample of English-speaking countries as examples:</p> <ul style="list-style-type: none"> <li>• <b>UK:</b> As recently as 24 February 2022 it has been reported that that the UK's Culture Minister Nadine Dorries<sup>51</sup> intends to "introduce a law forcing tech companies like Meta and Google to pay media outlets for featuring their stories in content feeds or search results", with the UK's Culture Minister calling plans "Australia plus plus" and "Australian with bolts on". This demonstrates that the same dynamics observed by the ACCC in Australia are also being experienced in the UK: "Three news industry sources spoken to by Press Gazette this week were confident that the UK code, like the Australian code, will include a requirement for designated platforms to agree cash-for-content deals with publishers or face the prospect of arbitration... Three sources, all from different news organisations, said they expect the code to allow them <b>to collectively negotiate deals with Google and Meta if they choose to do so.</b>" [Emphasis added]<sup>52</sup></li> <li>• <b>Canada:</b> As recently as 25 February 2022, it has been reported that "Canada's government has pledged to create a "more transparent" version of Australia's media bargaining code as the North American country seeks to force Google and Meta to pay for news... As in Australia, news companies will be <b>given collective bargaining rights to allow them to negotiate with Google and Meta in groups.</b>" [Emphasis added]<sup>53</sup></li> </ul>

<sup>51</sup>(24 February 2022). Big Tech will pay for news under UK culture minister Nadine Dorries' 'Australia plus plus' plans. EuroNews. Retrieved from: <https://www.pressreader.com/france/euronews-english-edition/20220224/282011855803164>

<sup>52</sup> (24 February 2022). Big Tech will pay for news under UK culture minister Nadine Dorries' 'Australia plus plus' plans. EuroNews. Retrieved from: <https://www.pressreader.com/france/euronews-english-edition/20220224/282011855803164>

<sup>53</sup> (25 February 2022). How Canada's Online News Act will differ from Australia's news media bargaining code. Press Gazette. Retrieved from: <https://pressgazette.co.uk/canada-online-news-act-google-meta-facebook/>

	<ul style="list-style-type: none"> <li>• <b>USA:</b> As recently as 4 February 2022, it was reported that the Senate is currently considering the "Journalism Competition and Preservation Act" ("<b>JCPA</b>"), being a proposed law that would provide protection from antitrust laws to enable "publishers of online content <b>to collectively negotiate with dominant online platforms regarding the terms on which content may be distributed</b>" [Emphasis added].<sup>54</sup> Further information about the JCPA is included at <b>Appendix One</b>.</li> </ul> <p>That all these countries are grappling with the same issues that form the key thesis of NPA's application for authorisation of collective bargaining demonstrates that the issues identified by the ACCC are not unique to Australia and are being experienced the world over, including in New Zealand.</p> <p>[ ]<sup>55</sup></p>
<p>(g) Facebook's assertion that "news does not drive significant long term value for our business", and that it instead drives commercial value for news publishers.</p>	<p>Facebook's assertion that journalistic content does not drive significant long-term value for its business is not credible. As we outlined in our December submission, the inclusion of journalistic content on Facebook's platforms drives significant value for Facebook (whether that is posted to Facebook by news publishers or organically by Facebook users), by drawing consumers into Facebook's ecosystem to access news content, increasing consumer engagement and generating further consumer content on the Facebook platform through comments underneath news links. That in turn further maximises Facebook's access to "consumer attention" and enhances their ability to collect further consumer data, predict consumer behaviour and target advertisements to highly stratified audience segments (irrespective of whether those advertisements themselves are served alongside news content). In particular, through the use of tags, login tools, plug-ins and interaction buttons, Facebook can collect valuable data from users consuming content and interacting on news publishers' links on its platform. As a result, Facebook can use those tracking tools to profile users and better target further advertisements to monetise the value of publishers' content (without remunerating those publishers).</p> <p>We have already provided the Commission, in our December submission, evidence that Facebook's own statements demonstrate that users of its platforms value access to news content:<sup>56</sup></p> <ul style="list-style-type: none"> <li>• "In 2019 we surveyed people on Facebook, and found they wanted a wider range of news to see more from entertainment, sports, business, tech and other topics outside of the day's top headlines"; and</li> <li>• "In research, people tell us that in addition to personalized news, they want to make sure they see the biggest headlines of the other day, in order to better understand what other people are reading and talking about".</li> </ul> <p>Furthermore, it is simply not the case that Facebook's changes to its algorithm in January 2018 "to prioritise user-created content" is evidence that news content does not deliver value to Facebook. For example, even since that change was made, it has been estimated in Canada that media pages account for 8.9% of Canadian content on Facebook pages, with 5.3% of interactions being triggered by journalistic content,</p>

<sup>54</sup> (4 February 2022). US publishers fight for Australia-style legislation to force Google and Meta to pay for news. Press Gazette. Retrieved from: <https://pressgazette.co.uk/journalism-competition-and-preservation-act/>

<sup>55</sup> [ ]

<sup>56</sup> <https://www.facebook.com/news/howitworks>

	<p>therefore enabling "Facebook to raise nearly a third of a billion dollars over the past two and a half years" from content produced by Canadian media:<sup>57</sup></p> <p style="padding-left: 40px;">"media pages have accounted for 8.9 per cent of the Canadian content on Facebook pages. This proportion of the company's Canadian sales represents more than half-a-billion dollars since 2018... Having said that, we must take into account the fact that Facebook does not generate revenue simply when a post is published, but when people interact with this content by sharing it, liking it or commenting on it. So let's take a look at how interactions are distributed by language and page type since Jan. 1, 2018... Out of more than 7.6 billion interactions, more than 400,000 were triggered by journalistic content. That's 5.3 per cent of the total... This way of calculating, which weighs the place of journalistic content by the lowest number of interactions it generates, still means that the Canadian media have enabled Facebook to raise nearly a third of a billion dollars over the past two and a half years."</p> <p>If that Canadian analysis were to be transposed to the New Zealand context, it would illustrate that New Zealand journalistic content delivers far more value to Facebook's business than is delivered by initiatives that Facebook unilaterally seeks to impose on publishers.</p> <p>Furthermore, at the same time that Facebook is generating that revenue from news publishers' content, it is often the case that news publishers themselves need to spend significant money with Facebook in order to advertise their businesses and content [ ].<sup>58</sup></p>
<p>(h) Facebook's assertion that many of New Zealand news publishers "have reported strong growth across their businesses all within the COVID-19 epidemic period".</p>	<p>Facebook's submission that many of New Zealand news publishers "have reported strong growth across their businesses" demonstrates that it does not understand the challenges facing the production of journalistic content in this country. [ ]:<sup>59</sup></p> <ul style="list-style-type: none"> <li>• [ ];</li> <li>• [ ]:             <ul style="list-style-type: none"> <li>○ [ ]</li> <li>○ [ ]</li> <li>○ [ ]</li> </ul> </li> <li>• [ ]:<sup>60</sup> <ul style="list-style-type: none"> <li>○ [ ];</li> <li>○ [ ].</li> </ul> </li> </ul>

<sup>57</sup> (2 October 2020). Facebook profits from Canadian media content, but gives little in return. The Conversation. Retrieved from: <https://theconversation.com/facebook-profits-from-canadian-media-content-but-gives-little-in-return-146385>

<sup>58</sup> [ ]

<sup>59</sup> [ ]

<sup>60</sup> [ ]

	<p>Such reductions in journalistic head-count can obviously not be sustained whilst still producing the same quantity and quality of journalistic output that is critical to societal communication, debate, education, and democracy. Accordingly, Facebook's submission that there are not any issues that require addressing is demonstrably false.</p> <p>[ ] Facebook's submission also ignores that the challenges to funding viable and sustainable journalism are particularly acute in smaller local / regional areas, where the ongoing provision of news operations is becoming increasingly unsustainable.</p>
<p>(h) Facebook's submissions about the steps it takes to "combat harmful misinformation".</p>	<p>The issue of misinformation is recognised as a significant problem facing democracy, social cohesion, and health measures (such as vaccination roll-outs) across a number of countries – including New Zealand. It has been reported that "two thirds of Kiwis are worried about the extent of misinformation being peddled online."<sup>61</sup></p> <p>Moreover, [ ] "Disinformation in relation to the role of 'mainstream media' distributed on social media platforms is undermining the trust in the mainstream media in favour of alternative content shared on social platforms. This further undermines the viability of professional journalism, and creates an unsafe environment for journalists to operate within. [ ]"</p> <p>Given this context, Facebook's submissions about the "remove", "reduce", and "inform"<sup>62</sup> steps it takes to "combat harmful misinformation" on its platforms are welcome, and can be seen as a complement to the efforts that New Zealand news publishers take to produce journalist content that counters misinformation.<sup>63</sup> Furthermore, those steps that Facebook takes would presumably be the same between the factual and the counterfactual.</p> <p>However, the steps that Facebook can take are only part of the solution. <i>Removing</i> and <i>reducing</i> problematic content is not enough - having an informed population also requires the positive <i>creation</i> of journalistic content that is created to high ethical and editorial standards. That is the critical role that New Zealand news publishers play, and why it is so essential that New Zealand news publishers receive fair remuneration for the use of their content in order to assist the viability and sustainability of their business, and the production of such content.</p>

**Response to the Pacific Media Network submission**

- 9. We note that the submission from Pacific Media Network ("**PMN**") appeared to be premised on an incorrect assumption that only members of NPA are invited to participate in the

<sup>61</sup> (2 March 2022). Propaganda isn't new, what's different is how social media weaponises misinformation. Stuff. Retrieved from: <https://www.stuff.co.nz/national/politics/opinion/300527226/propaganda-isnt-new-whats-different-is-how-social-media-weaponises-misinformation>

<sup>62</sup> i.e. "promot[ing] authoritative information and develop[ing] tools to inform our users".

<sup>63</sup> However, even with those processes in place, there are often concerns about the time it takes Facebook to remove misinformation. For example, see (2 March 2022). Kate Hawkesby: I'm the latest victim of scamming. Newstalk ZB. Retrieved from: <https://www.newstalkzb.co.nz/on-air/early-edition/opinion/kate-hawkesby-im-the-latest-victim-of-scamming/>

"Here's the really awful bit. Facebook won't believe me that it's a scam.

My boss contacted our security team here at NZME, he contacted the digital people, he reported the fake account and the scam to Facebook itself and included proof of the real me page versus the fake me page.

Seems like enough good evidence to me. But not for Zuckerberg. His Facebook bots or support team - whoever they may be – came back to us hours later declaring in all their wisdom, that upon investigating, they'd discovered that the scammer was in fact me. I kid you not."

[ ]



## **PUBLIC VERSION**

proposed collective bargaining if authorised. That is not correct – the collective bargaining (if authorised) will also be open to any other New Zealand news media producers, including non-NPA members, that are not owned or controlled by the Government or other overseas persons. In essence, the Arrangement is open for participation by independent New Zealand news media producers – regardless of whether they are NPA members or not.

### **Response to the Discovery submission**

10. NPA notes that Discovery's submission states that it "supports the need for collective bargaining with the Digital Platforms, as it would benefit the news journalism industry as a whole and is important to address the significant power imbalance between news content producers and the Digital Platforms".
11. Accordingly, in summary, Discovery's perspective on the significant bargaining imbalance between the Digital Platforms and news producers is aligned with NPA's.
12. Beyond that, Discovery's main submission is that it would like to participate in NPA's collective bargaining Arrangement, if authorised. As outlined previously to the Commission, NPA had sought to frame its proposed Arrangement in the way that it did to minimise any complexity for its application, and because it expected broadcasters would be able to seek authorisation (if they wished to) to form their own collective bargaining group to address the significant power imbalance. [ ]

### **CONCLUDING COMMENTS**

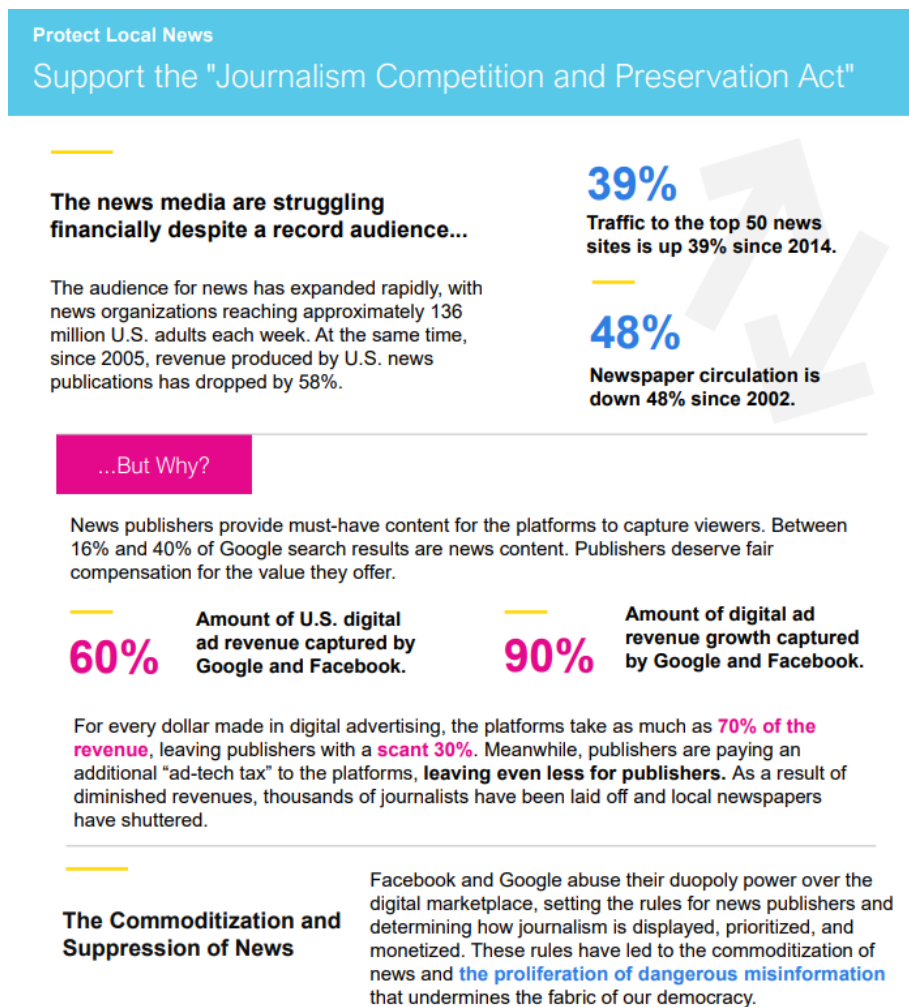
13. As outlined previously to the Commission, NPA, and the proposed participants in its collective bargaining group, are not seeking an unfair advantage or uncommercial terms from the Digital Platforms. Rather, they are simply seeking the opportunity to counter the significant imbalance in bargaining power to negotiate for fair payment for use of content that is currently used by the Digital Platforms for free.
14. For the reasons set out in its application, NPA remains confident that the Arrangement would result in a number of public benefits without resulting in any public detriment. Accordingly, NPA is confident that the public benefits of the Arrangement significantly outweigh any potential detriments and, therefore, that the Arrangement should be authorised.

APPENDIX ONE

The US's Journalism Competition and Preservation Act (JCPA)

- 15. To assist the Commission to understand that the issues identified in NPA's submission are issues being faced in a number of countries around the world (and, therefore, cannot be said to be unique to the ACCC's inquiry in Australia), we considered that it would be helpful to provide the Commission with further information that has been prepared in the USA in relation to the JCPA (being a proposed law that would allow news publishers to collectively negotiate with the Digital Platforms for fair compensation for use of their content).
- 16. That additional content includes the following statistics from the US context, outlined in Figure [6].

Figure [6] – Statistics produced in relation to the JCPA<sup>64</sup>



<sup>64</sup> [http://www.newsmediaalliance.org/wp-content/uploads/2018/08/Safe-Harbor-JCPA-Fact-Sheet\\_4-26-21.pdf](http://www.newsmediaalliance.org/wp-content/uploads/2018/08/Safe-Harbor-JCPA-Fact-Sheet_4-26-21.pdf)

**A free and diverse press is the backbone of a healthy and vibrant democracy.**

News publishers have been suffering because of lost revenue. Today, nearly half of the counties in the country have only one newspaper, while almost 200 counties have no local newspaper at all. (The Expanding News Desert, UNC Hussman School of Media and Journalism, 2018)

Lower-income communities are disproportionately affected by the closure of local newspapers, which serve as a check on the local, state, and federal governments. They also incentivize people to take part in our political system, with local newspapers helping to increase voter turnout.



17. We also provide the following sample of statements, outlined in Figure [7], that have been made in support of the JCPA.

Figure [7] – Sample of statements that have been made in support of the JCPA<sup>65</sup>

Submitter	Submission
The Lenfest Institute for Journalism	<i>"Millions of people around the United States access news and information from digital platforms every single day. The platforms rely on quality publishers to fill their feeds and search results to provide factual information and to stop the spread of dis-and-misinformation. To ensure a fair playing field, The Lenfest Institute for Journalism believes news publishers should be able to negotiate fairly with companies that depend on their journalism."</i>
Nancy Barnes President, American Society of News Editors (ASNE)	<i>"News media have struggled for several years with the impact social media has had on the distribution of our content. While providing our members with the potential to reach more readers, the opacity surrounding the inner workings of major platforms means we are never able to truly maximize that potential. We are at a competitive disadvantage, beholden to the platforms and their rules. This bill will help us level the playing field."</i>
Molly Willmott President, Association of Alternative Newsmedia (AAM)	<i>"The journalism industry has a tenuous relationship with major content platforms such as Google and Facebook. We need them to distribute our content but we are also beholden to the rules they set, with no ability to meaningfully negotiate policies or practices which will actually benefit our members. This bill is necessary to ensuring we control how our content is distributed; it therefore benefits not only AAN members but our readers."</i>
John Neely Kennedy Senator (R-LA)	<i>"At the heart of this bill is helping newspapers survive amid shrinking circulations and massive layoffs. Google and Facebook now control the news kingdom. They've pitted themselves against newspapers in a David-and-Goliath battle in which newspapers don't have a stone to throw much less a slingshot to put it in. The readers are the true losers as newsrooms empty out across this country. Google and Facebook aren't just companies. They're countries. We can't allow them to bully newspapers out of business."</i>

<sup>65</sup> <https://www.newsmediaalliance.org/digital-programs-and-advocacy/jcpa-supporters/>

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<p>Amy Klobuchar Senator (D-MN)</p>	<p><i>“Without honest and trusted journalists reporting around the world and here at home, what is out of sight truly becomes out of mind — but we’re seeing more and more independent and local news outlets close as ‘fake news’ rises. It’s more important than ever that we protect the free press and establish an even playing field for negotiation with online platforms. Our bipartisan legislation will improve the quality and accessibility of reporting and ensure that journalists are able to continue their critical work.”</i></p>
<p>Cory Booker Senator (D-NJ)</p>	<p><i>“This bipartisan legislation will even the playing field, strengthen competition, and give news outlets the tools they need to negotiate for equitable treatment with our nation’s largest online platforms. Local journalism plays a vital role in keeping communities informed and holding public officials accountable, and this bill will help newspapers continue those important efforts.”</i></p>
<p>Joanne Lipman Former Editor-in-Chief, USA TODAY and Chief Content Officer, Gannett</p>	<p><i>“News organizations have been at the beck and call of these behemoths, to no avail. As a longtime news executive, I have been in the room too many times to count with Google, Facebook, YouTube, Snapchat and others as they have lectured us on exactly what we need to do to save our business. Virtually always, it’s to bend our news practices — at our own expense — to their latest algorithm or experimental venture. ... That’s why Congress must pass the Journalism Competition and Preservation Act. It is in the interest of all of us who believe in a fair and unfettered press, no matter what your political affiliation, to ensure that the media survives financially. Let’s get to that essential place where the industry is secure and sustainable so that journalists can focus all of our attention and energy where it belongs: on our mission, as news professionals.”</i></p>
<p>Dean Ridings President, America’s Newspapers</p>	<p><i>“Here’s why this patently unfair situation should concern you and your community: It now threatens the existence of some local newspapers, the source of news and information that underpins democracy and civic life itself. It’s long past time for Google and Facebook to do what newspapers and their subscribers do: Pay for the local news that benefits them so richly.”</i></p>