

"While Facebook and Google need journalism, they don't need any particular media company... All the media companies need Facebook and Google. What they've done is intermedicate themselves between journalists and people who want to view the content, for their own financial advantage, obviously... Many market failures you don't have to address. But this one is really important because it affects journalism, and therefore it affects society. Journalism is the classic public good: We all benefit from it."

- Rod Sims AO, Chair of the ACCC (2011 – 2022)

NPA CROSS-SUBMISSION IN RESPONSE TO META'S 12 SEPTEMBER 2022 SUBMISSION

4 OCTOBER 2022

EXECUTIVE SUMMARY

1. NPA has reviewed the 12 September 2022 submission from Meta (the "**Meta Submission**") in relation to the Commission's draft determination ("**Draft Determination**") to grant authorisation for collective bargaining by independent New Zealand news publishers (the "**Arrangement**") with Google and Meta (together, the "**Digital Platforms**").
2. As with Meta's previous submissions, NPA considers that Meta's latest submission once again seeks to mischaracterise the way in which its platforms benefit from access to news content, as well as misstating the legal test before the Commission.
3. NPA further considers that both content of Meta's submission, and Meta's delay in submitting it to the Commission, reflect further attempts by Meta to avoid and delay any changes to the status quo in which Meta benefits from a significant imbalance in bargaining power in its dealings with New Zealand news publishers.
4. NPA considers that all the evidence, and the legal precedent, demonstrates both:
 - (a) that Meta's submissions are not valid; and
 - (b) that the approach adopted by the Commission in its Draft Determination was correct, both from a factual and legal perspective.
5. Accordingly, NPA reiterates that it is confident that the public benefits of the Arrangement significantly outweigh any potential detriments and, therefore, that the Arrangement should be authorised.

INTRODUCTION

6. While the Meta Submission is lengthy, in essence what that submission amounts to is an attempt by Meta to undermine the Commission's Draft Determination by presenting alternative views on:
 - (a) the relevant legal framework for assessing authorisation;
 - (b) the relevant industry facts.
7. NPA submits the alternative views put forward in the Meta Submission are not valid. Meta's submissions reflect both a misunderstanding of the Commission's authorisation framework (as set out in the Commerce Act, stipulated by the Court of Appeal, and summarised in the Commission's Authorisation Guidelines), and a mischaracterisation of the relevant industry dynamics.
8. NPA considers that Meta has made such a submission as a further attempt to seek to avoid and delay any changes to the status quo in which Meta benefits from a significant imbalance in bargaining power in their dealings with New Zealand news publishers by not paying them fair and reasonable remuneration for their news content. NPA also does not consider that the Meta Submission raises any new facts that have not already been considered by the Commission.

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9. NPA expects that the Commission will see Meta's mischaracterisations of both the legal test and the facts in their proper context, but nonetheless provides this cross-submission to the Commission to assist it as it works towards its Final Determination.
10. NPA is available to discuss any questions that the Commission may have in relation to this cross-submission.

(A) META'S SUBMISSIONS IN RELATION TO THE RELEVANT LEGAL FRAMEWORK

11. Meta's submissions in relation to the relevant legal framework for assessing authorisation boil down to submissions that:
 - (a) because collective bargaining contains a "cartel" provision it needs to be assumed it is capable of resulting in anti-competitive detriments;¹
 - (b) there needs to be a full quantification of potential benefits and potential detriments;²
 - (c) the factual that the Commission adopts needs to take into account a scenario in which collective bargaining is not successful;³
 - (d) the counterfactual that the Commission adopts needs to take into account "Meta's engagement with New Zealand news publishers and investment in the New Zealand news ecosystem to date";⁴
 - (e) that the Draft Determination does not contain the necessary economic analysis of a "beneficial wealth transfer" resulting from "functionless economic rents",⁵ and that there is no basis for the finding of "functionless economic rents".
12. NPA disagrees with Meta's submissions on each of these points for the following reasons.

(a) Meta's submission that the presence of a "cartel" provision needs to be assumed to result in detriments

13. Meta's submission seeks to make much of the fact that the NPA is seeking authorisation for an Arrangement what would otherwise contain a "cartel" provision. However, that does not necessarily mean it is detrimental to competition or society.
14. Rather, the fact that section 30 of the Commerce Act is a "*per se*" provision (i.e. that section 30 makes certain arrangements a *prima facie* breach, irrespective of whether or not they have any anti-competitive purpose or effect), demonstrates that, in applying the authorisation test, no particular weight can (or need) be given to the fact that an arrangement would otherwise engage section 30.
15. Demonstrating this:
 - (a) it is recognised that the section 30 "*per se*" prohibition necessarily results in "over-reach" by capturing pro-competitive initiatives. That is why exceptions to section

¹ Meta's submission on Draft Determination, page 2, 10, and 12.

² Meta's submission on Draft Determination, page 13.

³ Meta's submission on Draft Determination, page 14.

⁴ Meta's submission on Draft Determination, page 2 and 18.

⁵ Meta's submission on Draft Determination, page 2.

30 are provided for in the Commerce Act (including the "collaborative activities", "vertical supply contract" and "joint buying" exceptions). In this respect, Meta's quotation of the Commission's *Competitor Collaboration Guidelines*⁶ was a misleading and selective quotation given it omitted the sentences immediately before and after. Those sentences are:⁷

"we have had regard to the fact that the role of the exceptions is to **mitigate the potential for overreach** by the cartel prohibition."

...

"Since **the inevitable consequence of such a per se rule is that it may capture some conduct that is in fact pro-competitive or competitively neutral**, it is reasonable to have exceptions to mitigate any overreach". [Emphasis added]

- (b) the Commission has previously found in the authorisation context that "*per se*" illegal conduct can result in "no detriments";⁸ and
- (c) the authorisation process exists for the very reason of allowing beneficial collective bargaining:⁹

"the authorisation and notification processes **have been established to create transparent mechanisms for businesses to pursue collective bargaining** in those cases where the benefits outweigh the detriment." [Emphasis added]

- 16. Accordingly, there is no prima facie weight or detriment that the Commission need apply as a result of the fact that collective bargaining would otherwise engage section 30. That does not in any way change the benefit and detriment analysis that the Commission has conducted in its Draft Determination.
- 17. NPA, therefore, submits that Meta's submission on this point is incorrect, and that the approach adopted by the Commission in its Draft Determination was correct.
- 18. Furthermore, any likely detriment relevant to the Commission's assessment must also be specific to the Arrangement in question. It is not sufficient to make a generalised allegation that a provision that would otherwise engage section 30 would give rise to "harm". Not only is such a generalised allegation not specific to the proposed Arrangement, Meta has not provided evidence of any detriment that could be categorised as "likely". For example:
 - (a) Meta argues that the Proposed Arrangement "appears to have a real chance of detrimentally affecting competition between the Participants" but has provided no new evidence to support its position.
 - (i) Meta incorrectly focuses on a loss of competition amongst the Participants to supply content to Google and Meta, noting that agreed

⁶ The sentence that Meta quoted from the Competitor Collaboration Guidelines was: "The cartel prohibition itself reflects a policy decision that cartel conduct is so likely to damage competition that it should be condemned without further enquiry into its actual competitive effects."

⁷ Commerce Commission Competitor Collaboration Guidelines, page 3.

⁸ *HP New Zealand Limited* [2021] NZCC 14 at [73.1].

⁹ King, S.P. (2013). *Collective Bargaining by Business: Economic and Legal Implications*. UNSW Law Journal, volume 36(1), 107 – 138, page 115.

prices and non-price terms would "replace the relevant dimensions of competition among the Participants to supply content to Google and Meta".¹⁰ The Commission has correctly focussed on the (lack of) impact on competition in the supply of New Zealand news content generally. See paragraphs 101 to 104 below.

- (ii) Meta criticises the Commission's consideration of the position in Australia (because it says the Commission does not explain why it is an appropriate comparison) and the Commission's observation that it is "not aware of observable impacts on competition between news media companies in Australia since agreements between Digital Platforms and Australian news media companies have been struck". The NPA submits it is appropriate for the Commission to consider the impacts of similar arrangements in Australia as analogous evidence but that, in any event, it is clear the Commission obtained its own evidence in relation to New Zealand.¹¹ See paragraphs 57 to 64 below.
- (iii) The Commission received evidence from media companies (both in and out of the Collective) that "it was highly unlikely that funding secured from the Digital Platforms would obviate the need for other sources of income".¹² The Commission received evidence that in the context of online revenue, "the primary source of such income was through the advertising revenue achieved from competing in the supply of news content".¹³ The Commission has properly considered the evidence before it, and Meta does not put forward new evidence which requires it to reconsider its analysis. See paragraphs 101 to 104 below.

- (b) Meta submits that collective bargaining reduces its "incentive to invest and reduces competition because it restricts the ability to reach bespoke arrangements with innovative publishers". Again, it is not clear why this should be treated as a likely detriment. NPA maintains that collective bargaining will enable a more level playing field for negotiations with the Digital Platforms which will enhance the efficiency of commercial arrangements compared to the status quo, and cannot see any way in which the possibility of Meta negotiating better (more innovative or bespoke) arrangements with certain publishers could be compromised compared to the status quo given (i) collective bargaining does not necessarily require a "one size fits all" outcome [], and (ii) the Arrangement is in any event voluntary and does not include any ability to engage in collective boycott behaviour (and Meta has not put forward any evidence to suggest otherwise).

(b) Meta's submission that there needs to be a full quantification of potential benefits and detriments

- 19. Meta's submission that the Commission should have engaged in greater quantification than it did in its Draft Determination reflects a misunderstanding of the authorisation regime, and a misunderstanding of the decisions of the Court of Appeal in relation to that regime.

¹⁰ Meta's submission on Draft Determination, page 10.

¹¹ Draft Determination at [169].

¹² Draft Determination at [165].

¹³ Draft Determination at [165].

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20. First, section 61(6) of the Commerce Act enables the Commission to grant authorisation where it considers "in all the circumstances [that an arrangement would] result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result therefrom".

21. However, in this instance the Commission found that no lessening of competition (or detriment) is likely to arise.¹⁴ Furthermore, as outlined at paragraphs 13 to 16 above, no such lessening or detriments can (or should) be inferred simply because an arrangement would otherwise engage section 30.

22. Therefore:

- (a) there is no lessening in competition or detriments for the Commission to balance (or quantify) in this instance; and
- (b) the Commission's approach in the Draft Determination is consistent with the Court of Appeal's decision in *NZME*, as reflected in the Commission's authorisation guidelines that:¹⁵

"unless a benefit or detriment is thought "likely" it should not be considered as part of the Commission's balancing exercise".

23. Furthermore, the approach that Meta is advocating for in its submission is directly contrary to the decisions of the Court of Appeal in both *NZME* and *Godfrey Hirst* that there are "dangers of "false scientism""¹⁶ in seeking to place too much emphasis on quantification. Those judgments outlined that:

- (a) "the Act itself does not prescribe a methodology for identifying and evaluating benefits and detriments... It leaves the Commission to choose a methodology that seems best suited to the circumstances";¹⁷
- (b) "The statute does not allow for imposition of an artificial construct or gloss on what is a deliberately broad and evaluative test";¹⁸
- (c) "the Commission and the courts cannot be compelled to perform a quantitative analysis of qualitative variables";¹⁹ and
- (d) the Commission is "not required to chase down every conceivable possibility, irrespective of whether it has been considered by the applicant or identified by any other party".²⁰

24. Reflecting the above, the Court of Appeal has made clear that ultimately the Commission is expected to exercise:²¹

"a qualitative judgment in reaching its final determination. The Commission is a specialist body whose members are appointed for their particular expertise

¹⁴ Draft Determination at [144].

¹⁵ Commerce Commission Authorisation Guidelines at footnote [38], citing *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 at [92].

¹⁶ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 at [37].

¹⁷ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 at [101].

¹⁸ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 at [41].

¹⁹ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 at [36].

²⁰ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZHC 1262 at [64].

²¹ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 at [35].

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across a range of disciplines and who are expected to exercise their collective knowledge, skill, and experience in making what is an essentially evaluative judgment on any application"

25. NPA considers that the Commission has applied the authorisation test consistently with the decisions of the Court of Appeal and its own Authorisation Guidelines. That is particularly so given:

- (a) the Commission found no likely lessening of competition (or detriment).
- (b) the economic benefits of collective bargaining (especially in circumstances of an imbalance of bargaining power) are well understood and recognised in the relevant legal and economic literature:²²

In summary, the authorisation of a collective bargaining group can enhance economic efficiency in two ways:

1. Authorisation permits bargaining group members to **share the costs of negotiation** without making them liable for prosecution under the CCA. By sharing negotiation and contracting costs between group members, the collective bargaining group helps parties to negotiate past inefficient take-it-or-leave-it contracts in order to **design more complex, mutually beneficial contracts that have fewer economic imperfections**. The gains created by more efficient bargaining arise from the economies of scale in negotiations and can be shared by both the collective bargaining group and the counterparty. In other words, both sides to the negotiations can become better off if collective bargaining occurs.

2. Collective bargaining can change the incentives in the contracting process in ways that **enhance the ability of parties to undertake non-contractible investments that increase economic surplus**. We discussed two channels for this improvement. First, collective bargaining can make delegation desirable where delegation to the group overcomes issues of individual incentives. Second, collective bargaining may alter bargaining power and this can alter incentives to engage in non-contractible investments. [Emphasis added]

- (c) the benefits of collective bargaining are likely to be particularly manifest in the context of the Arrangement given:
 - (i) it is well recognised that the Digital Platforms' existing bargaining imbalance is giving rise to significant detriments to news publishers, including by undermining news publishers' ability to invest in the

²² King, S.P. (2013). *Collective Bargaining by Business: Economic and Legal Implications*. UNSW Law Journal, volume 36(1), 107 – 138, page 119.

production of news content,²³ and by resulting in the Digital Platforms being able to retain "the majority of joint value" (see paragraph 68(b) below).

- (ii) it is well recognised that collective bargaining is particularly beneficial when the counterparty has significant bargaining power:²⁴

"it may be in the public interest to enable small business to negotiate more effectively with big business" [emphasis added]

- (iii) NPA's approach to collective bargaining includes the factors that the Commission has previously identified as limiting the possibility of any detriments from collective bargaining, including making participation in the bargaining group voluntary and excluding any collective boycotts.²⁵

"However, we consider that collective bargaining is more likely to result in a net benefit from overall efficiency than individual bargaining in the counterfactual. This is because of several reasons, including the fact that Tegel would not be compelled to negotiate with the TGA, and growers would not be permitted to arrange a boycott. This would limit the ability of growers to exercise collective bargaining power that is detrimental to efficiency".

- (iv) the negotiators appointed by NPA are highly experienced in dealing with the Digital Platforms and will, therefore, be able to bring significantly greater experience and expertise to the negotiations with the Digital Platforms than the news publishers could access if each was acting alone:²⁶

"Both Janz and Eisman have extensive experience in the Australian market, where a bargaining code led to more than NZ\$200 million in annual payments from digital platforms to the news media. Janz was previously Nine's chief digital and publishing officer, with responsibility for The Sydney Morning Herald, The Age, and The Australian Financial Review. Eisman was Nine's director of subscriptions and growth, leading strategy and new initiatives for those mastheads, including their partnerships with digital platforms."

26. Accordingly, the evidence demonstrates that there are clear and likely benefits of collective bargaining and no likely detriments and, therefore, it is appropriate for the Commission (as it

²³ (3 December 2021). OECD. Competition issues concerning news media and digital platforms. Background note by the Secretariat at [81].

²⁴ Committee of Inquiry for the Review of the Trade Practices Act, Parliament of Australia, Review of the Competition Provisions of the Trade Practices Act (2003) 115.

²⁵ *New Zealand Tegel Growers Association Incorporated* [2022] NZCC 30 at [238].

²⁶ (20 June 2022). Former Nine executives will lead Big Tech negotiations in New Zealand. Digital Platform Initiative Blog. International News Media Association. Retrieved from: <https://www.inma.org/blogs/Digital-Platform-Initiative/post.cfm/former-nine-executives-will-lead-big-tech-negotiations-in-new-zealand>

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did in the *New Zealand Tegel Growers Association Incorporated* decision) to have "relied more on our qualitative assessment of the evidence in our determination".²⁷

27. Moreover, not only does NPA consider that the Commission took the appropriate approach to weighing the benefits and detriments, if anything the Draft Determination underweights the likely benefits that will arise from the Arrangement given that:
- (a) while the Commission found that "there are likely to be public benefits associated with improved production of news content as a result of addressing the imbalance of bargaining power";²⁸
 - (b) the Commission did not (beyond those content quality benefits) attribute additional benefits from the likely improvement in media plurality that would also result.
28. NPA submits that, while not necessary for the Commission to grant authorisation (given the Commission was in any event satisfied that the benefits outweighed the detriments), the benefits to media plurality could also be treated as an additional and likely significant benefit given:
- (a) the Court of Appeal in *NZME* said that:
 - (i) "[w]e agree with the High Court and the Commission that plurality is a characteristic of media markets that is vitally important to the community";²⁹
 - (ii) "plurality affects all New Zealanders whether or not they consume news content";³⁰
 - (b) the Court of Appeal in *Godfrey Hirst* said that "[q]ualitative factors can be given independent and, where appropriate, decisive weight";³¹ and
 - (c) the Commission's Authorisation Guidelines (citing both *NZME* and the Australian Competition Tribunal's decision in *Qantas Airways Ltd*),³² set out that "we may give more weight to benefits that are realised by the wider community".³³
29. Given the well-recognised significant benefits of enhanced media plurality, and the fact that such benefits would be realised widely across all New Zealanders, NPA submits that the Commission's decision could have also treated the likely benefits to media plurality as a decisive benefit in its qualitative assessment. If the Commission were to take those media plurality benefits into account, that would further demonstrate that authorisation of the Arrangement is the correct outcome.

²⁷ *New Zealand Tegel Growers Association Incorporated* [2022] NZCC 30 at 276.

²⁸ Draft Determination at [137].

²⁹ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 at [135].

³⁰ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 at [27].

³¹ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 at [38].

³² Re *Qantas Airways Limited* [2004] ACompT 9; (2005) ATPR 42-065.

³³ Commerce Commission Authorisation Guidelines at [82].

(c) Meta's submission that the factual needs to take into account a scenario in which collective bargaining is not successful

30. Meta has submitted that the benefits assessed by the Commission should be "adjusted for the risk that neither Digital Platform enters into an arrangement even if collective bargaining is authorised".³⁴
31. However, the Commission is not required to consider all possible scenarios that might occur with the agreement - it is required to consider what is *likely* to occur with the Arrangement. NPA does not consider that not entering into a collective agreement with Google and Meta is a likely outcome. NPA considers that if authorised, it is likely that the Arrangement will successfully result in commercial arrangements being reached with Google and Meta.
32. That is because, in circumstances where the Commission authorises the Arrangement:
- (a) The intention and incentives of the news publishers that choose to participate in the collective will be to achieve successful commercially negotiated remuneration arrangements.
 - (b) The collective would have access to highly experienced negotiators (Chris Janz and David Eisman), who have experience in reaching successful commercial arrangements with the Digital Platforms – see paragraphs 25(c)(iv) above and 96 below.
 - (c) The mere fact of the Commission authorising the Arrangement (being a decision that would reflect the bargaining imbalance and the public benefits of collective bargaining) would result in increased social licence expectations on each of Google and Meta to reach fair commercial outcomes with the New Zealand news publishers (whereas, by contrast, a failure to authorise the application would undermine such social licence expectations, thereby entrenching the current adverse outcomes that are resulting from the significant bargaining imbalance).
 - (d) The Government would also have expectations that the Digital Platforms would engage in constructive negotiations with such a collective, with, for example, the Broadcasting Minister having indicated that regulation is a possibility if commercial arrangements are not forthcoming.³⁵

"Another area I'm actively exploring is how the Government can support news media to realise the value of the content they produce,

³⁴ Meta's submission on Draft Determination, page 13.

³⁵ (6 July 2022). Govt could yet force tech giants to pay NZ media. Newsroom. Retrieved from: <https://www.newsroom.co.nz/govt-could-yet-force-tech-giants-to-pay-media>. NPA's negotiators have also noted:

"We are hopeful Google and Facebook will engage with the collective and deliver a fair outcome that sustains New Zealand journalism without legislative intervention.

We are encouraged that the New Zealand Ministry for Culture and Heritage has said it is considering options to support commercial arrangements with platforms should financial compensation not materialise through these negotiations."

(20 June 2022). Former Nine executives will lead Big Tech negotiations in New Zealand. Digital Platform Initiative Blog. International News Media Association. Retrieved from: <https://www.inma.org/blogs/Digital-Platform-Initiative/post.cfm/former-nine-executives-will-lead-big-tech-negotiations-in-new-zealand>

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particularly in relation to the use of that content by digital platforms like Google and Facebook.

"The bargaining imbalance between these platforms and our news media does not lend itself to fair negotiation or payment. While some commercial arrangements have been reached with larger news media companies, I am considering how the Government can support the whole sector so that fair recognition is given. Too many businesses are hurting and something must be done to rectify the situation."

- (e) A refusal to constructively engage with such a collective would risk a request to the Commission that it conduct an assessment as to whether Part 4 of the Commerce Act ought to apply to the Digital Platform's dealings with news publishers.³⁶ There are examples of where the prospect of such a Part 4 inquiry by the Commission has itself been sufficient to encourage a "commercial resolution".³⁷
33. Accordingly, in circumstances where the Commission authorises the Arrangement, NPA considers that both Google and Meta will be incentivised to engage in constructive bargaining with the collective and, therefore, NPA is confident that the collective bargaining initiative will be able to successfully result in arrangements being reached with Google and Meta.
34. In addition, even if unsuccessful negotiations with both Google and Meta could be considered a likely factual (which NPA does not consider is the case):
- (a) It is not possible to see how a collective bargaining initiative that never materialised could give rise to any possible detriments; and
- (b) Therefore, the likely benefits of successful collective bargaining would still outweigh the non-existent detriments of unsuccessful collective bargaining given the Court of Appeal has made clear that:³⁸
- "effects need not be provided on the balance of probabilities, and the weight assigned to a given effect may reflect not only its extent or impact but also its likelihood. To decide where the balance lies, then, is to compare one future state of affairs – or an hypothesis, to use French J's term in *Australian Gas Light Co v Australian Competition and Consumer Commission* – in which benefits outweigh detriments with another in which they do not."
35. Accordingly, reflecting the approach of the Court of Appeal, in applying its "qualitative judgment" it is correct and appropriate for the Commission to give more weight to the more likely, and more substantive benefits, of successful collective bargaining than the less likely, and non-existent, detriments of unsuccessful collective bargaining.

³⁶ For example, see: (25 October 2012). Commerce Commission. Preliminary assessment of whether to initiate a Part 4 Inquiry into post services provided by Eastland Port. Retrieved from: https://comcom.govt.nz/_data/assets/pdf_file/0023/61664/Draft-report-Preliminary-assessment-of-whether-to-initiate-a-Part-4-inquiry-into-port-services-provided-by-Eastland-Port-25-October-2012.pdf

³⁷ (25 November 2012). Commerce Commission. Media Release: Eastland Port preliminary assessment. Retrieved from: <https://comcom.govt.nz/news-and-media/media-releases/2015/commission-welcomes-commercial-resolution-at-eastland-port>

³⁸ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 at [88].

(d) Meta's submission that the counterfactual needs to take into account Meta's current approach to publishers

36. Meta submits that the counterfactual that the Commission should use to assess the Arrangement is one in which Meta provides investments to New Zealand news media (via the Accelerator or otherwise), with Meta referring to the fact that it has concluded "commercial deals" with NZME, Newsroom, and The Spinoff.
37. From NPA's perspective, the counterfactual that Meta is advocating for is consistent with the Commission's counterfactual (as the Commission acknowledged the "limited support" provided by the Digital Platforms) and is, in fact, simply the "status quo" - i.e. the approach that Meta has adopted to date of using its significant bargaining power to seek offer New Zealand news publishers the bare minimum (via Accelerator type support), [] (rather than providing fair commercial remuneration that reflects the value of news content to its platforms).
38. NPA's view is that the Commission's Draft Determination has already appropriately treated the "status quo" as the relevant counterfactual.³⁹ In relation to that "status quo" counterfactual, NPA repeats the following observations (as set out in more detail at paragraphs 87 to 91 below):
- (a) such discretionary programmes (such as Accelerator type support) operated by Meta do not reflect the provision of fair or sustainable remuneration for Meta's use of New Zealand journalism content, nor reflect a sustainable solution for the news publishing industry. Such programmes are very short-lived and on Meta's terms, and do not enable news publishers to plan with certainty around such programmes, nor engage in any long-term forecasting about likely future revenues from the Digital Platforms;
 - (b) []; and
 - (c) Any funding or programmes that Meta has provided to date are very limited compared to the benefit it generates from New Zealand news content.
39. Accordingly, it is the continuation of the "status quo" (i.e. Meta's claimed counterfactual) that is NPA's concern, and is the outcome that NPA is seeking to avoid via its application for collective bargaining (given its significant concerns about the approach that Meta has taken to date).
40. The concerns that Meta would continue with the "status quo" in the absence of authorisation are reinforced by the observed behaviour of Meta in other jurisdictions, for example:
- (a) In Australia, where it is observed that Meta has sought to enter into the minimum number of commercial arrangements with news publishers to avoid being designated. As Rod Sims AO has noted:⁴⁰

³⁹ I.e. the Commission said that: "on the evidence, we have obtained, we consider it likely that smaller, regional news media companies would be unable to meaningfully negotiate and reach agreements with one or both Digital Platforms on an individual, bilateral basis for the display of news content." Draft Determination, at [60].

⁴⁰ (22 May 2022). Rod Sims says Facebook should be forced to negotiate with SBS under news media bargaining code. The Guardian. Retrieved from <https://www.theguardian.com/media/2022/may/23/rod-sims-says-facebook-should-be-forced-to-negotiate-with-sbs-under-news-media-bargaining-code>

“Google has basically come up with a deal with just about everybody and Facebook, by contrast, have already been way short of that, particularly with SBS and the Conversation”

- (b) In the US, it is reported that Meta is indicating it will not be renewing commercial arrangements with publishers:⁴¹

The \$US458.4 billion (\$AU658.9) billion company, which runs Facebook and Instagram, has recently become critical of the deals it has struck across the world. It began telling US publishers last week it had no intention of renewing contracts for use of their articles in its dedicated news tab.

41. Accordingly, Meta's observed behaviour in both New Zealand and overseas, means no weight should be given to its submissions that in the counterfactual it will look to enter into fair commercial remuneration arrangements with New Zealand news publishers. The relevant counterfactual vis-à-vis New Zealand news publishers is, in fact, the "status quo".

(e) Meta's submission that the Draft Determination does not contain economic analysis of a beneficial wealth transfer

42. Meta has submitted that the Draft Determination erred by "not contain[ing] any economic analysis to support the existence of "functionless economic rents" (i.e. supra-normal profits)" being received by the Digital Platforms.⁴²

43. However, it was not necessary for the Commission to have conducted that analysis given it expressly noted that its assessment did not hinge on whether the Digital Platforms receive functionless economic rents.⁴³

44. Furthermore, while not necessary for the Commission's analysis, NPA notes that if such economic analysis were to be performed, it would likely demonstrate that Meta is generating functionless economic rents. Demonstrating this:

- (a) Meta's Return on Capital Employed ("**ROCE**") is 27% to 31%.⁴⁴ But Meta's Weighted Average Cost of Capital ("**WACC**") has been estimated at ~8%.⁴⁵

- (b) It has been reported by analysts:⁴⁶

⁴¹ (7 August 2022). Meta missing in action at crucial Treasury talks. SMH. Retrieved from:

<https://www.smh.com.au/business/companies/meta-missing-in-action-at-crucial-treasury-talks-20220805-p5b7mb.html>

⁴² Meta's submission on Draft Determination, page 17.

⁴³ Draft Determination at [140] and [141].

⁴⁴ See:

- (12 August 2022). The Trend of High Returns At Meta Platforms (NASDAQ:META) Has Us Very Interested. Simply Wall St. Retrieved from: <https://simplywall.st/stocks/us/media/nasdaq-meta/meta-platforms/news/the-trend-of-high-returns-at-meta-platforms-nasdaqmeta-has-u>
- (29 July 2022). Meta Platforms (NASDAQ:META) Knows How To Allocate Capital Effectively. Nasdaq. Retrieved from: <https://www.nasdaq.com/articles/meta-platforms-nasdaq-meta-knows-how-to-allocate-capital-effectively>
- (31 May 2022). Simply Wall Street. Investors Should Be Encouraged By Meta Platforms' (NASDAQ:FB) Returns on Capital. Yahoo! Finance. Retrieved from: https://nz.finance.yahoo.com/news/investors-encouraged-meta-platforms-nasdaq-144433309.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAALHB6LIRIG180KRQC7_APUKExPulinboKIQsFsl4zqbGIGa4oN-RZFbZthxqflQY5aZD5FYqSp116sdQYhhwbbZjoC5-pG_igulyr7XQHD6LNc3x0vvd4dsLPtcByEi3qj7yN0HiwSHn3l9FWt-3EFfAn1_CRTp24o851jNHtMB5

⁴⁵ See:

- <https://valueinvesting.io/META/valuation/wacc>
- <https://www.alphaspread.com/security/nasdaq/meta/discount-rate>

⁴⁶ See <https://www.gurufocus.com/term/wacc/FRA:FB2A/WACC-Percentage/Meta%20Platforms>

"As of today (2022-09-20), Meta Platforms's weighted average cost of capital is 7.74%. Meta Platforms's ROIC % is 31.93% (calculated using TTM income statement data). Meta Platforms generates higher returns on investment than it costs the company to raise the capital needed for that investment. **It is earning excess returns.**" [Emphasis added]

(c) Economists have observed that:⁴⁷

"because the [social network] market is characterized by strong network effects, barriers to entry are high already. Without antitrust or regulatory intervention, it is unlikely that anything is going to change. **Facebook can collect monopoly rents**, manage the flow of information to most of the nation, and engage in virtually unlimited surveillance into the foreseeable future." [Emphasis added]

(d) In April 2022 the CMA said in its "The State of UK Competition" report that:⁴⁸

"Google, Meta and Apple are highly profitable and have a very high market share in the markets in which they operate, a situation that has endured for many years. On both static and dynamic measures of competition, these markets therefore appear to perform poorly.

Weak competition in search and social media markets risks leading to reduced innovation and choice, as well as to consumers giving up more data than they would like. Google and Meta's (Facebook's) strong position also means **that businesses are more likely to pay more for digital advertising than they would in a more competitive market**, a cost that we would expect ultimately be reflected in higher prices for consumers." [Emphasis added]

(e) The OECD, citing the US Congress Subcommittee's view that "Facebook has **monopoly power** in online advertising in the social networking market",⁴⁹ has similarly observed the findings that "Facebook has **considerable market power** in relation to digital advertising services (and social networking services)"⁵⁰ [emphasis added].

45. Accordingly, while NPA reiterates that such economic analysis was not necessary given the existence (or not) of functionless economic rents was not determinative to the Commission's Draft Determination, if such economic analysis were to be performed it would likely demonstrate that Meta is in fact generating functionless economic rents (and, therefore, that there are in fact beneficial wealth transfers that are likely to result from authorisation of the Arrangement).

⁴⁷ (June 2020). Roadmap for an Antitrust Case Against Facebook. Omidyar Network. Retrieved from: <https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf>

⁴⁸ (April 2022). CMA. The State of UK Competition. Retrieved from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1075230/State_of_Competition.pdf

⁴⁹ (3 December 2021). OECD. Competition issues concerning news media and digital platforms. Background note by the Secretariat at endnote [28], citing US House of Representatives, 2020, p 170.

⁵⁰ (3 December 2021). OECD. Competition issues concerning news media and digital platforms. Background note by the Secretariat at [43].

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46. The relevance of such beneficial wealth transfers to New Zealand news publishers would also be heightened by the fact it is reported that Meta structures its affairs in New Zealand to pay very little tax in New Zealand, despite the inevitably significant revenues it generates from its operations in New Zealand, which means that any transfers from Meta to New Zealand news publishers would be transfers from Meta to entities that pay New Zealand tax (providing a further benefit to New Zealand). (It is reported, for example, that Google and Meta "both still report revenue [in New Zealand] well below the size of the local online ad market, which they dominate").⁵¹

Concluding comments on Meta's submission in relation to the legal framework

47. NPA submits that the above demonstrates that the Meta Submission reflects a misunderstanding of the Commission's authorisation framework. NPA, therefore, submits that nothing in the Meta Submission undermines the approach that the Commission took in its Draft Determination.

(B) META'S SUBMISSIONS IN RELATION TO THE RELEVANT INDUSTRY FACTS

48. Having explained in detail why the Commission's Draft Determination is legally robust, the NPA wishes to address (and correct) Meta's submissions in relation to the relevant industry facts. Meta's submissions boil down to submissions that:
- (a) there is no imbalance in bargaining power between publishers and Meta;
 - (b) the issues facing the New Zealand news publishing sector are self-inflicted;
 - (c) the circumstances in New Zealand are unique;
 - (d) any value exchange between Meta and news publishers favours the publishers;
 - (e) the Sapere paper contains some relevant findings that need to be taken into account;
 - (f) the role Meta plays in providing news is diminishing;
 - (g) any additional funds received from collective bargaining will not be used to produce more journalism;
 - (h) Meta already provides meaningful remuneration to publishers through its Accelerator programme;
 - (i) collective bargaining will not deliver the benefits found by the Commission; and
 - (j) the Arrangement will undermine competition between New Zealand news publishers.
49. NPA disagrees with Meta's submissions on each of these points for the following reasons.

⁵¹ (24 June 2022). Tax: Facebook NZ triples payments to Ireland, Google NZ pays more to US Parent. NZ Herald. Retrieved from: <https://www.nzherald.co.nz/business/tax-facebook-nz-triples-payments-to-ireland-google-nz-pays-more-to-us-parent/UM2U65ZXELMCW4XWNEX4WPC5UE/>

(a) Meta's submission there is no imbalance in bargaining power

50. Meta's submission repeats that its "view is that it is far from clear there is an imbalance of bargaining power".⁵²
51. In continuing to make that submission, Meta is continuing to argue that "night is day" by repeating a view that is contrary to the analysis of numerous competition specialists, regulators, and policy makers around the world. That includes the examples set out in Figure 1 **below** (emphasis added). We trust this wealth of evidence puts Meta's submission on the bargaining imbalance in its proper context.

Figure 1 – Extracts from competition specialists, regulators, and policy makers identifying the significant bargaining imbalance between the Digital Platforms and news publishers

<p>New Zealand Broadcasting Minister, Willie Jackson (2022)</p>	<p>"The bargaining imbalance between these platforms and our news media does not lend itself to fair negotiation or payment. While some commercial arrangements have been reached with larger news media companies, I am considering how the Government can support the whole sector so that fair recognition is given. Too many businesses are hurting and something must be done to rectify the situation."</p>
<p>New Zealand Manatū Taonga – Ministry for Culture & Heritage (2022)</p>	<p>"The Australian Competition and Consumer Commission (ACCC) has found that Google and Facebook have substantial bargaining power in dealings with news media businesses in Australia. We consider that this same bargaining imbalance exists in New Zealand and is evident by the limited number of New Zealand media companies that have been able to enter into commercial discussions."⁵³</p>
<p>New Zealand Commerce Commission (2022)</p>	<p>"While media companies are dependent on the Digital Platforms for a relatively significant segment of news consumers, the Digital Platforms are less dependent on any given news media company for New Zealand news content. We consider that this in turn is likely to result in an imbalance of bargaining power in favour of the Digital Platforms."⁵⁴</p>
<p>UK Ofcom and CMA advice to the Department for Digital, Culture, Media & Sport (2021)</p>	<p>"The challenge facing the government and regulators is to ensure that the benefits from the relationship are shared fairly and this division is not distorted by the bargaining power of the platforms. Large platforms are 'must have' partners for individual publishers in a way that individual publishers cannot be to the platforms."⁵⁵</p> <p>A small number of online platforms have become key gateways for the online world, and therefore also for news consumption in the UK. The findings of the Cairncross Review and CMA's market study into online platforms and digital advertising suggest that this position gives them significant power over news publishers. In particular, Google and Facebook were identified in the Cairncross Review and the CMA's market study as being by far the most important digital platforms for publishers.⁵⁶</p>

⁵² Meta's submission on Draft Determination, page 14.

⁵³ Ministry for Culture and Heritage's submission on Statement of Preliminary Issues, page 1.

⁵⁴ Draft Determination at [123].

⁵⁵ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [11].

⁵⁶ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [1.2].

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	<p>"There is an imbalance in bargaining power between large platforms and content providers, including news publishers. Each publisher needs Google and Facebook more than the platforms need them".⁵⁷</p> <p>"Overall, it is clear that publishers receive a significant proportion of their traffic from Google and Facebook. Where publishers rely on a platform for access to a significant share of viewers/customers, this can give the platform significant bargaining power".⁵⁸</p>
<p>UK Cairncross Review (2019)</p>	<p>"The way in which news stories are disseminated and ranked by online platforms not only affects the way people engage with news content, as described in Chapter 2, but also affects the financial sustainability of news publishers. The bargaining power of the two sides is notably unequal."⁵⁹</p>
<p>UK CMA Online platforms and digital advertising market study (2020)</p>	<p>"Publishers of online content rely on Google and Facebook to host content or for referrals of traffic to their online properties, which they can then monetise by displaying advertising to these visitors. However, online publishers face an imbalance of bargaining power with Google and Facebook, which disadvantages their businesses in a number of ways"⁶⁰</p> <p>"As a consequence of this reliance on Google and Facebook for traffic, publishers told us that they suffer from an imbalance of bargaining power when dealing with these platforms. This was an issue that was also raised as part of the Cairncross Review, which concluded that 'Google and Facebook also increasingly control the distribution of publishers' content online' and that as a consequence 'these platforms can impose terms on publishers without needing to consult or negotiate with them'"⁶¹</p> <p>"We consider that the last two examples indicate that Google and Facebook are able to use their bargaining power to extract terms in relation to content and data sharing which have the effect of reinforcing their market power. Although publishers are entering into a commercial relationship with the platforms and benefit from the user traffic that is generated through sharing their content on Google and Facebook's platform, we nevertheless agree with the publishers that they have very little choice but to accept the terms offered by these platforms, given their market power."⁶²</p> <p>"Publishers, including national and regional newspapers, have expressed a number of specific concerns to us about how this imbalance of bargaining power can manifest itself. One concern we have heard is that Google and Facebook are effectively able to 'free-ride' on publishers' content to draw in consumers and catch their attention, then monetising by serving those consumers adverts. This has the effect of reducing the incentive of publishers to invest in producing quality content in the future."⁶³</p>
<p>OECD Competition Committee's Competition issues concerning news media and digital platforms (2021)</p>	<p>"Across jurisdictions, governments have been urged to intervene. Some are concerned that the competitive dynamics of online markets and, more specifically, the commercial relationships between news publishers and large digital platforms heavily affect the sustainability of public interest journalism. More specifically, digital platforms' market power and the imbalance of bargaining power between news publishers and digital platforms seem to heavily</p>

⁵⁷ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [2.17].

⁵⁸ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [2.27].

⁵⁹ (12 February 2019). The Cairncross Review. A Sustainable Future for Journalism, page 57.

⁶⁰ (1 July 2020). CMA. Online platforms and digital advertising: Market study final report at [5.358].

⁶¹ (1 July 2020). CMA. Online platforms and digital advertising: Market study final report at [5.364].

⁶² (1 July 2020). CMA. Online platforms and digital advertising: Market study final report at [5.366].

⁶³ (1 July 2020). CMA. Online platforms and digital advertising: Market study final report at [6.37].

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	<p>affect the online monetisation of news content and threaten the viability of news businesses. This may have consequences reducing quality and coverage of news as well as exacerbating social harms caused by mis-information (i.e. false or inaccurate information not disseminated with the intention of deceiving the public) and dis-information (i.e. false, inaccurate, or misleading information deliberately created, presented and disseminated to deceive the public). In addition, concerns have been raised on the indirect impact on pluralism and increasing concentration in news media."⁶⁴</p>
<p>Rod Sims AO, Chair of the ACCC (2011 – 2022)</p>	<p>"While Facebook and Google need journalism, they don't need any particular media company... All the media companies need Facebook and Google. What they've done is intermediate themselves between journalists and people who want to view the content, for their own financial advantage, obviously... Many market failures you don't have to address. But this one is really important because it affects journalism, and therefore it affects society. Journalism is the classic public good: We all benefit from it."⁶⁵</p>
<p>Australian Competition & Consumer Commission Digital Platforms Inquiry (2019)</p>	<p>The ACCC's key finding in the ACCC Report was that there is an "imbalance of bargaining power between Google and media businesses, and between Facebook and media businesses, in relation to news referral services" because:</p> <ul style="list-style-type: none"> - "Google and Facebook are 'must have' platforms", which mean that "media businesses cannot afford not to be on the Google and Facebook platforms and therefore, Google and Facebook have become unavoidable trading partners for many media businesses";⁶⁶ - "Google and Facebook are the gateways to online news media for many consumers. The amount of referral traffic that a news media website receives is influenced by the way in which Google and Facebook rank and display news content";⁶⁷ - "Google and Facebook each appear to be more important to the major news media businesses than any one news media business is to Google or Facebook";⁶⁸ and - "Individual news media businesses require Google and Facebook referrals more than each platform requires an individual media business's content."⁶⁹
<p>The Government of Australia explanatory memorandum to the "News Media and Digital Platforms Bargaining Code" (2021)</p>	<p>The ACCC found in its Digital Platform Inquiry (July 2019) that there is a bargaining power imbalance between digital platforms and news media businesses so that news media businesses are not able to negotiate for a share of the revenue generated by the digital platforms and to which the news content created by the news media businesses contributes. Government intervention is necessary because of the public benefit provided by the production</p>

⁶⁴ (3 December 2021). OECD. Competition issues concerning news media and digital platforms. Background note by the Secretariat at [2].

⁶⁵ (10 March 2022). Millions of dollars for news, shrouded in mysterious deals. Judith Neilson Institute. Retrieved from: <https://jinstitute.org/news/millions-of-dollars-for-news-shrouded-in-mysterious-deals/>

⁶⁶ (June 2019). ACCC. Digital Platforms Inquiry. Final Report, page 253.

⁶⁷ (June 2019). ACCC. Digital Platforms Inquiry. Final Report, page 206.

⁶⁸ (June 2019). ACCC. Digital Platforms Inquiry. Final Report, page 16.

⁶⁹ (June 2019). ACCC. Digital Platforms Inquiry. Final Report, page 16.

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	<p>and dissemination of news, and the importance of a strong independent media in a well-functioning democracy.⁷⁰</p>
<p>The Government of Canada in its "engagement of fair revenue sharing between digital platforms and news media" (2022)</p>	<p>"Canadians are increasingly accessing news online via digital platforms. Platforms act as intermediaries and gatekeepers to the information available to Canadians. They aggregate, package and offer news to Canadians in ways that are efficient and innovative, and derive significant financial benefit from their operations in Canada. Some also operate other critical digital business segments, such as the ad tech that supports the digital advertising market. The concentration of online advertising has resulted in 80% of advertising revenues going to a small number of platforms.⁷¹</p> <p>"Overall, a large majority of submissions stressed the importance for action regarding declining revenues in the news sector and advanced that a significant imbalance in bargaining power exists in the market."⁷²</p>
<p>The US House Committee on the Judiciary and led by the Subcommittee on Antitrust, Commercial and Administrative Law (2020)</p>	<p>"The Subcommittee has also received evidence that the dominance of several online platforms has created a significant imbalance of bargaining power. In several submissions, news publishers note that dominant firms can impose unilateral terms on publishers, such as take-it-or-leave-it revenue sharing agreements. A prominent publisher described this relationship as platforms having a "finger on the scales" with the ability to suppress publishers that do not "appease platforms' business terms."</p> <p>During the Subcommittee's hearing on the effects of market power on journalism, several witnesses also testified about the lack of equal bargaining power between news publishers and dominant platforms. At the Subcommittee's hearing on market power and the free and diverse press, Sally Hubbard, Director of Enforcement Strategy at the Open Markets Institute, testified that the lack of competition online has led to diminished bargaining power among news publishers. Consequently, in response to changing terms and algorithmic treatment by platforms, "publishers have little choice but to adapt and accommodate regardless of how the changes may negatively affect their own profitability." David Chavern, President of the News Media Alliance, similarly testified that publishers have a "collective action problem," stating that "no news organization on its own can stand up to the platforms. The risk of demotion or exclusion from the platforms is simply too great."⁷³</p>
<p>The US Antitrust Division of the Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC), submission to the OECD's News Media and Digital Platforms committee</p>	<p>"The U.S., like other jurisdictions, is considering whether and how the competition laws may be useful in protecting the press from the challenges posed by the rise of the digital platforms. A recent Congressional report highlighted a number of concerns regarding the imbalance of power between the dominant digital platforms and the press. This has prompted some to call for consideration of a new antitrust exemption for the news media to allow for collective negotiation."⁷⁴</p>

⁷⁰ The Parliament of the Commonwealth of Australia. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021. Revised Explanatory Memorandum. Retrieved from: <https://www.accc.gov.au/system/files/Revised%20explanatory%20memorandum.pdf>

⁷¹ Government of Canada. Stakeholder engagement on fair revenue sharing between digital platforms and news media. Retrieved from: <https://www.canada.ca/en/canadian-heritage/campaigns/fair-revenue-sharing/stakeholder-engagement.html>

⁷² Government of Canada. Stakeholder engagement on fair revenue sharing between digital platforms and news media.

⁷³ Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary of the House of Representatives. Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations. Retrieved from: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

⁷⁴ (3 December 2021). OECD. News Media and Digital Platforms – Note by the United States. Retrieved from: [https://one.oecd.org/document/DAF/COMP/WD\(2021\)72/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)72/en/pdf)

(b) Meta's submission that the issues facing the New Zealand news publishing sector are self-inflicted

52. Meta seeks to submit that somehow the significant challenges facing the New Zealand news publishing sector is a result of New Zealand news publishers being "slow to transition to a sustainable digital business model" or that "adaptation, strategic direction, digital expertise development and investment have been lacking".⁷⁵
53. That is not correct. The issues facing the news publishing sector are being experienced all around the world and it is recognised that, irrespective of news publishers adapting their business models, the significant bargaining imbalance with the Digital Platforms is undermining news publishers' ability to "gain a return from content" that they produce.
54. The recent joint Ofcom and CMA advice to the UK Department for Digital, Culture, Media & Sport ("**DCMS**") (which was published on 6 May 2022)⁷⁶ made this clear. Namely, that advice to DCMS set out that while news publishers have changed their business practices, a "key element" in dealing with the challenges facing news publishers is enabling fairer bargaining between news publishers and the digital platforms:⁷⁷

The traditional business model of news media, particularly print media, has been substantially disrupted by the growth of digital. Longstanding revenue sources such as advertising and direct sales have significantly declined as consumers and news consumption have moved online. As a consequence, the advertising industry has also been transformed.

Publishers have responded by changing their approaches, engaging directly with consumers, and consequently their approaches to distribution, subscriptions and advertising have changed too.

There is no single solution to the challenges facing news publishers, but **a key element is ensuring that the relationship between the major digital platforms and publishers is fair for both sides** in terms of access to consumers and the opportunity to gain a return from content provided to them... [Emphasis added]

55. Various data points evidence the significant impact that the business models of the Digital Platforms have had on New Zealand news publishers:⁷⁸

"Google and Facebook dominate – [they] accounted for over 70 per cent of New Zealand's digital advertising revenue in the first half of 2021, according to the Interactive Advertising Bureau. The same survey put the news media's display advertising share at just over 11 per cent. This disparity has seen New Zealand's media shrink markedly, with less than half as many journalists employed here as there were just 15 years ago."

56. Meta's submission ignores that the Digital Platforms (including Meta) are the beneficiaries of the significant bargaining imbalance that enables them to continue to use news content to

⁷⁵ Meta's submission on Draft Determination, page 5.

⁷⁶ (6 May 2022). CMA. Press release: CMA published code of conduct advice for platforms and publishers. Retrieved from: <https://www.gov.uk/government/news/cma-publishes-code-of-conduct-advice-for-platforms-and-publishers>

⁷⁷ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [6] – [8].

⁷⁸ (26 November 2021). Why the media are banding together to bargain with Google and Facebook. Stuff. Retrieved from: <https://www.stuff.co.nz/opinion/300463831/why-the-media-are-banding-together-to-bargain-with-google-and-facebook>

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monetise their own platforms without fair compensation to the creators of such content, which undermines the ability of those creators to achieve a return on their investment in creating that content.

(c) Meta's submission that New Zealand is unique

57. Meta seeks to suggest that the New Zealand context is unique and, therefore, that the concerns, perspectives, and findings of other competition regulators around the world are not relevant to the Commission's assessment. For example:

- (a) in seeking to question the Commission's finding that it is "not aware of observable impacts on competition between news media companies in Australia since agreements between Digital Platforms and Australian news media companies have been struck",⁷⁹ Meta has submitted that the "Draft Determination nowhere contains an explanation on the basis on which the position in Australia is an appropriate comparison";⁸⁰ and
- (b) in seeking to question the relevance of the ACCC deciding to authorise Country Press Association's current and future members to collective bargain with Google and Facebook, Meta has submitted that this is precedent from a "jurisdiction with very different market dynamics".⁸¹

58. However, Meta does not provide any evidence as to how or why any differences are material to the Commission's assessment of the implications of Digital Platforms' bargaining power to their dealings with news publishers.

59. Rather, the commercial reality is that the same issues and dynamics in dealing with the Digital Platforms are being faced by news publishers all over the world and, therefore, the experience from Australia and the analysis of the ACCC is equally applicable in New Zealand.

60. That the same issues are being experienced all over the world was recognised by the Commission in its Draft Determination, where it noted that "[m]any of the trends and concerns that news media companies face are not unique to New Zealand, but also apply to news media companies around the world."⁸² That fact has also been recognised by other regulators. For example in their joint advice to the DCMS, Ofcom and the CMA recognised that the same the issues and dynamics being faced in different jurisdictions and, therefore, that it is relevant to draw on the work undertaken by competition regulators in other jurisdictions.⁸³

The CMA and Ofcom have engaged with UK media publishers and the major platforms and drawn on the recent work undertaken in other jurisdictions, in particular Australia and France.

61. Furthermore, Meta's submission that the New Zealand media industry is "concentrated" and, therefore, that ought to impact the Commission's assessment is an inconsistent and irrelevant argument. In particular:

⁷⁹ Draft Determination at [168].

⁸⁰ Meta's submission on Draft Determination, page 11.

⁸¹ Meta's submission on Draft Determination, page 11.

⁸² Draft Determination at [28].

⁸³ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [15].

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- (a) In one breath, Meta seeks to submit that the Country Press Australia authorisation is not relevant because NPA's application will "involve a much greater proportion of the total market";⁸⁴ and
- (b) Yet in another breath, Meta seeks to say that NZME's withdrawal from NPA's application should be relevant given "NZME represents around half the digital print media in New Zealand".⁸⁵
62. As the Commission will readily appreciate, to the extent Meta has any (misplaced) concerns about the number of New Zealand media entities that would form part of NPA's collective bargaining initiative, the commercial reality is that:
- (a) NPA's application only includes one media company that the Commission classified as "large" in its Draft Determination.⁸⁶
- (b) In the context of the bargaining imbalance that means that the Digital Platforms are "must have" trading partners with "dominance" (see paragraph 50 above), it is not possible to see how any concerns could arise from a collective bargaining initiative even if NPA's application included a greater number of New Zealand media businesses.
63. Accordingly:
- (a) Meta's (misplaced) submissions about New Zealand's media market being uniquely concentrated, or that NPA's application is fundamentally different to Country Press Australia's application, are without foundation; and
- (b) the Commission can dismiss Meta's unfounded submissions that there are any relevant differences between New Zealand and Australia.
64. Furthermore, in in any event, it is clear from the Draft Determination that the Commission obtained its own evidence on how the dynamics in New Zealand might be impacted.⁸⁷
- (d) Meta's submission that the value exchange favours new publishers**
65. Meta continues to assert that the value exchange between it and news publishers is in favour of the news publishers.
66. However, that is a significant mischaracterisation of commercial reality. In particular, while Meta estimates that during the last 12 months it has "sent around 390 million clicks to registered publishers – additional traffic worth more than US\$20million (NZ \$33 million) in estimated value",⁸⁸ as the joint Ofcom / CMA advice to DCMS outlines, that is not the correct way to estimate the number of clicks sent to news publishers as:⁸⁹

it is only revenue derived from clicks that are **truly incremental** due the use of content by the SMS firm that would be relevant. This is not the same as all

⁸⁴ Meta's submission on Draft Determination, page 11.

⁸⁵ Meta's submission on Draft Determination, page 6.

⁸⁶ Draft Determination at [61].

⁸⁷ Draft Determination at [169].

⁸⁸ Meta's submission on Draft Determination, page 5.

⁸⁹ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [5.23].

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clicks through to content providers properties from the content used by the SMS firm. The assessment of what are genuinely incremental clicks needs to consider that, if the content were not used by the SMS firm, then many of these clicks might occur anyway as users would find alternative ways to access the content (such as going direct to a website). [Emphasis added]

67. Meta has not provided any evidence that the "clicks" it provides to New Zealand news publishers are "incremental" to those publishers, as opposed to being "clicks" that the publishers would otherwise have received directly in the absence of Meta's business model that uses news publishers' content to benefit itself.

68. Furthermore:

(a) Meta's continued view that it does not obtain benefits for its business through its use of publishers' content also reflects what is termed an incorrectly "narrow view" of the benefits of content, and is an approach that has been expressly rejected by the recent joint Ofcom and CMA advice:⁹⁰

"Our starting point in drafting guidance would be that **a wider view of these benefits should be adopted**. Although there are practical challenges in estimating the wider value, it forms an important part of the benefit to the platforms in hosting publishers' content, and thus to ignore these wider benefits might significantly underestimate the value of content to the platforms. We note that the French Competition Authority recently endorsed the view that levels of compensation for use of content should reflect value derived by Google from its use of content beyond revenues solely related to advertising displayed alongside the content." [Emphasis added]

(b) while Meta states that "all evidence indicates the value exchange favours publishers",⁹¹ that is not reflected in the analysis of overseas regulators. Indeed, it is well recognised that the significant bargaining imbalance means that the Digital Platforms "capture a large proportion of this joint value".⁹² This was well articulated by the recent joint Ofcom and CMA advice:⁹³

"Where platforms have strong bargaining power it is likely that they will capture a large proportion of this joint value. Indeed, if many content providers view the services of platforms as being must have, it is possible that the platforms could capture almost all of this joint surplus. **Accordingly, although the value creation is two-way, the publisher may have to accept current terms based on little or no financial remuneration for content even if the consequence is that the majority of joint value is retained by the platforms.**

The bargaining power of platforms may also affect the total joint value created when compared to what would happen in a more

⁹⁰ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [5.28].

⁹¹ Meta's submission on Draft Determination, page 15.

⁹² (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [5.8].

⁹³ (November 2021). CMA. Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct at [5.7] – [5.10].

competitive market without such buyer power. This is because low prices for content may lead to a reduction in investment in content. This may well be profitable for an SMS platform because, although low prices reduce the size of the joint surplus, as the buyer, the SMS firm captures a greater share with a low price.

...Fair and reasonable compensation for content should ensure that content providers receive a fair share of the joint value that is created by the use of their content by an SMS firm."

69. Accordingly, the objective analysis and evidence is clear that the value exchange significantly favours the Digital Platforms.

(e) Meta's submission in relation to the Sapere paper

70. Meta has sought to cite the Sapere paper as supporting its perspective. In particular Meta referred to the statement in the Sapere paper that "if news firms considers that the negative impact that Facebook and Google are having on businesses outweigh the benefits they receive then they can opt-out from having links to their news content or snippets displayed on either platform".⁹⁴

71. However, with respect to Sapere, that statement reflects an incorrect assessment and internal inconsistencies within the Sapere paper. In particular, it is simply not plausible to state that news publishers can simply "opt-out" from having links to their content displayed on either platform when:

(a) publishers cannot prevent users sharing their journalistic content on Facebook. Therefore, the use of journalistic content on Facebook, and the benefit to Meta's ecosystem of that, is not voluntary in the manner that Sapere's paper suggests; and

(b) it is well recognised that those platforms are "must have", which mean (as the ACCC found) that "media businesses cannot afford not to be on the Google and Facebook platforms and therefore, Google and Facebook have become **unavoidable trading partners** for many media businesses".⁹⁵ This fact is reflected elsewhere in Sapere's own paper:

(i) "News firms all around the world have become increasingly **reliant** on search engines and social media to generate web traffic to their online news sites – and New Zealand appears to be no exception."

(ii) "We agree with the position put forward by many news firms that they are to a greater or lesser degree **reliant** on both Google and Facebook for the distribution of their content and that those digital platforms derive commercial benefit from making news content – and other forms of content available on the internet – easily accessible to their users."

72. In circumstances where Sapere itself found that news publishers are reliant on the Digital Platforms, it does not make sense for it to state that news publishers can "opt-out" from

⁹⁴ Meta's submission on Draft Determination, page 15.

⁹⁵ (June 2019). ACCC. Digital Platforms Inquiry. Final Report, page 253.

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dealing with them (and that statement reflects the internal inconsistencies within the Sapere paper).

73. In addition, Meta's submission that Sapere said that commercial negotiations "would only benefit larger firms and that smaller start-ups would miss out",⁹⁶ is not a relevant concern in relation to NPA's proposed collective bargaining initiative. In particular, as the Commission is aware, NPA has deliberately framed its application so that it is open to small independent New Zealand publishers, as reflected in its current list of likely participants: "Twenty-eight publishers representing more than 100 titles have joined, representing national media through to small local publications"⁹⁷ ([]). Accordingly, the benefits of collective bargaining with the Digital Platforms will be available to smaller New Zealand news publishers and start-ups.

74. Finally, NPA agrees with the Commission's view in its Draft Determination that the Sapere paper is not relevant to the Commission's assessment. Reflecting this, while the Sapere paper expressly observed that there "is an imbalance of power between an individual New Zealand news firm and Google and Facebook", it then went on to say that:

"whether an inability of news firms to negotiate over how their freely-available content is promoted by digital platforms is problematic or not raises complex public policy considerations **beyond the scope of this paper.**" [Emphasis added]

75. Accordingly, the Sapere paper was expressly clear that it did not consider whether or not there would be public benefits from enabling news publishers to better address the bargaining imbalance with Digital Platforms (whereas that is a key point that the Commission has assessed in its Draft Determination).

(f) Meta's submission that the role Facebook plays in providing news is diminishing

76. Meta's submission seeks to assert that "the role that Facebook plays in providing news has continued to shrink",⁹⁸ including by making reference to Facebook and Instagram users increasingly watching video content.

77. However, while Meta's submission seeks to attribute this to the revealed preferences of audiences, NPA considers that is highly disingenuous, given it is understood that Meta has in fact re-engineered its algorithm to focus on these formats for its own strategic reasons (i.e. any change is not necessarily reflective of shifting consumer preferences, but rather reflects Meta's ability to exercise its market power to dictate the display of content to consumers).

78. Irrespective of those changes by Meta, as NPA has submitted previously, Meta's own statements demonstrate that users of its platforms value access to news content:⁹⁹

(a) "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

⁹⁶ Meta's submission on Draft Determination, page 16.

⁹⁷ (20 June 2022). Former Nine executives will lead Big Tech negotiations in New Zealand. Digital Platform Initiative Blog. International News Media Association. Retrieved from: <https://www.inma.org/blogs/Digital-Platform-Initiative/post.cfm/former-nine-executives-will-lead-big-tech-negotiations-in-new-zealand>

⁹⁸ Meta's submission on Draft Determination, page 19.

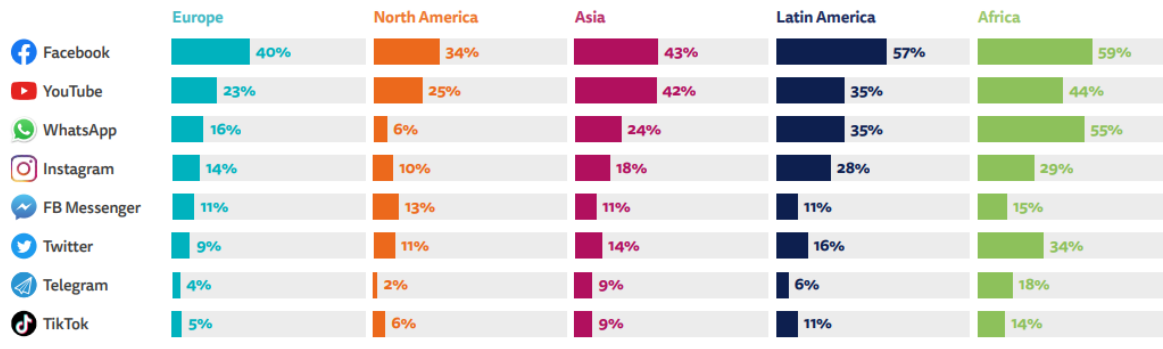
⁹⁹ How Facebook News Works. <https://www.facebook.com/news/howitworks>

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(b) "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".

79. Research by Reuters also shows that a significant proportion of users worldwide use Meta's social media platforms to access news – see Figure 2 below.

Figure 2 – Proportion that used each social network for news in the last week – selected regions¹⁰⁰



Q12B. Which, if any, of the following have you used for news in the last week? Base: Total sample in each region. Europe = 48,836, North America = 4048, Asia = 20,349, Latin America = 12,104, Africa = 6057. Note: Africa average is Kenya, South Africa, and Nigeria only (English speakers in South Africa and Nigeria).

80. This ability of Meta to unilaterally change its algorithms, in ways that impact news publishers, demonstrates:

- (a) the lack of bargaining power that news publishers have in dealing with Meta individually;
- (b) publishers' inability to put confidence in their arrangements with Meta in the absence of fair and reasonable remuneration negotiations; and
- (c) that Meta could reverse such changes to its algorithms in the future (it is possible that Meta's changes to its algorithms reflect efforts to avoid the current regulatory and political focus on its lack of fair remuneration to news publishers).

81. In addition, as noted at paragraph 91(c) below, it needs to be emphasised that it is not the case that Facebook's changes to its algorithm "to prioritise user-created content" is evidence that news content does not deliver value to Facebook. In particular, as noted above a significant proportion of users worldwide use Meta's social media platforms to access news, and it is estimated (in the Canadian context) that even since Meta first made that change it has raised "nearly a third of a billion dollars over the past two and a half years" from content produced by Canadian media.¹⁰¹

(g) Meta's submission that additional funds will not be used to produce more journalism

82. Meta submits that it disagrees with the Commission's draft finding that "there is a real chance that some proportion of any additional funding achieved under the Proposed

¹⁰⁰ Reuters Institute Digital News Report 2022. Retrieved from: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-06/Digital_News-Report_2022.pdf

¹⁰¹ (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>

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Arrangement would be used to fund the production of news content."¹⁰² Meta does not provide any evidence as to why it disagrees with the Commission's finding, except to cite the Sapere paper. In response, NPA notes that:

- (a) that Sapere paper is internally inconsistent (as outlined at paragraph 71 above); and
- (b) unlike the Commission, Sapere did not engage in market testing with news publishers about their incentives and intentions if additional funding through collective bargaining was forthcoming.

83. In contrast to Meta's (unfounded) submission, the evidence obtained by the Commission in fact demonstrates that if additional funding is forthcoming, the participants within the collective bargaining initiative would have strong incentives to employ additional journalists, and therefore produce additional journalistic content, given the production of journalistic content is the "lifblood" of their businesses that attracts audiences and, therefore, enables the generation of revenue, as was noted by the Commission:¹⁰³

In particular, we consider that the existing incentives on news media companies to grow their audiences (and therefore advertising revenues) by producing more or better news content will remain if the Proposed Arrangement is allowed to proceed.

84. NPA submits that the direct evidence the Commission obtained carries more weight than any assertions in the Sapere paper (which was commissioned for an entirely different purpose).

85. There is also further evidence that demonstrates that additional funding from the Digital Platforms is likely to lead to additional and better news content, including:

- (a) the fact journalist head counts in New Zealand have been decreasing¹⁰⁴ as news publishers' revenues have been decreasing is prima facie evidence that the ability to negotiate for additional revenue from the Digital Platforms would assist in arresting and reversing that decline in journalist numbers in New Zealand; and
- (b) the strong real-life evidence from Australia that the receipt of additional funding from the Digital Platforms has been used to fund additional journalistic roles and the production of additional news content. For example, the Poynter Institute has observed:¹⁰⁵

"On a recent trip to Australia, meetings and interviews with journalists, journalism professors and government officials showed widespread enthusiasm for the monetary boost to Australian journalism. Outlets throughout Australia are hiring new reporters. *The Guardian* added 50 journalists, bringing their newsroom total up to 150. Journalism professors say their students are getting hired and that there are too many job vacancies to fill."

¹⁰² Meta's submission on Draft Determination, page 16.

¹⁰³ Draft Determination at [136].

¹⁰⁴ For example, the Sapere paper states that: "between 2000 and 2018 the number of journalists in New Zealand fell by 52 per cent." See (November 2021). Sapere. The implications of competition and market trends for media plurality in New Zealand: A report for the Ministry for Culture and Heritage, page iv.

¹⁰⁵ (16 August 2022). Australia's news media bargaining code pries \$1140 million from Google and Facebook. Poynter. Retrieved from: <https://www.poynter.org/business-work/2022/australias-news-media-bargaining-code-pries-140-million-from-google-and-facebook/>

The Hon Paul Fletcher MP (former Australian Minister for Communications, Urban Infrastructure, Cities and the Arts) has similarly observed:¹⁰⁶

"Last month, News Corp announced it was joining with Google to establish a Digital News Academy at Melbourne Business School, to provide digital skills training for Australian journalists.

In December last year, the ABC announced it was hiring more than 50 extra journalists in regional and remote Australia.

The Australian Financial Review announced that it would hire an additional 18 journalists; similarly the Sydney Morning Herald and The Age have been hiring trainees.

After a decade or more in which we've heard the steady drumbeat of redundancies and closures across the Australian media sector, it has been a refreshing change.

And there is a common factor here. These jobs in the media sector are the result of deals done by Australian news media businesses with the giant global digital platforms Google and Facebook."

86. Accordingly, the evidence and commercial incentives demonstrate that the receipt of fair remuneration from the Digital Platforms is likely to result in the funding and production of additional news content in New Zealand.

(h) Meta's submission that it provides meaningful remuneration to publishers through its accelerator programme

87. Meta seeks to challenge the Commission's view that the programmes it has operated to date (such as the Audience Development Accelerator) reflect "limited support".¹⁰⁷
88. However, such discretionary programmes operated by Meta do not reflect the provision of fair or sustainable remuneration for Meta's use of New Zealand journalism content, nor do they reflect a sustainable solution for industry. Rather they reflect unilateral determination by Meta of what funding it is willing to provide and who to, in the nature of a one-off payment or training initiative ([], or for self-serving reasons to further bind publishers to Meta's platforms (see paragraph 92 below)). Such programmes are very short-lived and on Meta's terms, and do not enable a news publisher to determine what that funding is best used for or to plan with certainty around such programmes, nor engage in any long-term forecasting about likely future revenues from the Digital Platforms.

89. []¹⁰⁸ [].

90. []:

[]

¹⁰⁶ (3 March 2022). News Media Bargaining Code: One year old and working. Paul Fletcher MP. Retrieved from: <https://www.paulfletcher.com.au/pauls-blog/news-media-bargaining-code-one-year-old-and-working>

¹⁰⁷ Meta's submission on Draft Determination, page 18.

¹⁰⁸ []

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91. Further evidence of the "limited" nature of that support can be seen by critically evaluating the grant funds that Meta has advised the Commission it has provided in New Zealand as part of its Accelerator programme, being an investment (including Meta's own administrative and training costs) that Meta says totals NZ\$2.5 million and that has been "shared across 13 regional, Māori, culturally-diverse and digital first media entities".¹⁰⁹ The Commission can critically evaluate whether Meta's support to date is "limited" compared to:

- (a) Meta's annual revenue of USD\$118 billion,¹¹⁰ and estimates (while not disclosed) of Meta's annual revenue in New Zealand. For example, it has been noted that:¹¹¹

"The ACCC estimates Google generated around A\$3.7 billion (NZ\$3.9 billion) from ads placed on its own search pages and on third parties' websites. Facebook's ad revenue was around A\$1.7 billion (NZ\$1.8 billion).

Based on this data and the similarities between Australia and New Zealand, it is reasonable to conclude that in 2018 Google might have earned about NZ\$720 million in New Zealand, and Facebook about NZ\$349 million from targeted advertising only."

- (b) The estimate by Rod Sims, the former ACCC chair, 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.¹¹²

- (c) The estimates from Canada that (even after Facebook's changes to its algorithm in January 2018 "to prioritise user-created content") media pages account for 8.9% of Canadian content on Facebook pages, with 5.3% of interactions being triggered by journalistic content, 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:¹¹³

"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

¹⁰⁹ Meta's submission on Draft Determination, page 2 and 3.

¹¹⁰ See <https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Fourth-Quarter-and-Full-Year-2021-Results/default.aspx>

¹¹¹ (13 May 2020). Google and Facebook pay way less tax in New Zealand than in Australia – and we're paying the price. The Conversation. Retrieved from: <https://theconversation.com/google-and-facebook-pay-way-less-tax-in-new-zealand-than-in-australia-and-were-paying-the-price-137075>

¹¹² (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>

¹¹³ (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>

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Canadian media have enabled Facebook to raise nearly a third of a billion dollars over the past two and a half years."

If that Canadian analysis were to be transposed to the New Zealand context (i.e. divided by eight to reflect the difference in population between Canada and New Zealand), it would illustrate that New Zealand journalistic content delivers far more value to Meta's business than is delivered by initiatives that Meta has unilaterally offered to publishers, typically on non-negotiable terms.

92. In addition, NPA notes that:

(a) while Meta's submission seeks to advocate that its current programmes are providing "valuable" tools to publishers to have access to Meta's services,¹¹⁴ as Stuff's CEO has previously said of Meta's support programmes, that is not the case: "[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."¹¹⁵ Such tools are in no way a substitute for fair and reasonable remuneration, and the commercial certainty that would be provided from a commercially negotiated arrangement.

(b) While []

93. Accordingly, NPA submits that contrary to the assertions of Meta, the evidence demonstrates that any funding or programmes that Meta has provided to date is in fact "limited".

(i) Meta's submissions that collective bargaining will not deliver the benefits found by the Commission

94. Meta's submissions sought to undermine the benefits that the Commission found would arise from collective bargaining by saying that:

(a) given the range of news publishers participating in the collective bargaining, the Arrangement could "even result in increased transaction costs";¹¹⁶

(b) collectively bargaining could "send inefficient signals";¹¹⁷

(c) it is concerned that "collective bargaining is unlikely to treat all publishers equally, or "fairly"¹¹⁸ and there is a risk that "smaller start-ups would miss out".

95. NPA does not consider that any of these are valid concerns.

96. First, in relation to the range of news publishers participating in the collective bargaining Arrangement (currently []), NPA is confident that its experienced negotiators will be able to efficiently and effectively negotiate across the Arrangements' participants. In particular, [] therefore does not see any material risk of increased transaction costs as a result of the

¹¹⁴ Meta's submission on Draft Determination, page 8.

¹¹⁵ (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/>

¹¹⁶ Meta's submission on Draft Determination, page 15.

¹¹⁷ Meta's submission on Draft Determination, page 12.

¹¹⁸ Meta's submission on Draft Determination, page 12.

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range of participants. To the contrary, NPA considers that transaction costs savings are very likely, and are very likely to be material. This is because, not only will the collective be able to streamline multiple negotiations into a single negotiating vehicle, the negotiators appointed by the NPA also have significant experience in the media industry, in negotiating with the Digital Platforms, and in working with a range of different types and sizes of media entity. For example:

- (a) Chris Janz led Nine's negotiations with Google and Meta in Australia,¹¹⁹ and was previously Nine's chief digital and publishing officer, with responsibility for The Sydney Morning Herald, The Age, and The Australian Financial Review,¹²⁰ as well as previously being the CEO of HuffPost Australia.¹²¹
- (b) David Eisman was "Nine's director of subscriptions and growth, leading strategy and new initiatives for those mastheads, including their partnerships with digital platforms",¹²² and worked with Chris Janz on negotiations with Google and Meta in Australia.

97. Accordingly, not only does NPA's collective bargaining arrangement provide New Zealand news publishers with access to negotiators to negotiate on their behalf that have expertise and experience beyond which any could access (or even hope to access) by themselves, they will be able to use that expertise to streamline negotiations across [] New Zealand news publishers simultaneously.
98. In those circumstances, NPA considers that transaction costs savings are likely to be significant.
99. NPA also cannot see any potential for the collective bargaining to "send inefficient signals, or set inefficient incentives", nor any risk of the collective bargaining treating smaller publishers unfairly. In particular:
- (a) It is the current imbalance of bargaining power that is sending inefficient market signals – namely, that the Digital Platforms are able to benefit from valuable journalist content without paying fair and reasonable remuneration. It is those significant inefficient market signals ("market failure" in the words of Rod Sims AO) that NPA is seeking to address through the collective bargaining Arrangement by negotiating for remuneration that better reflects a fair and reasonable market-based price;
 - (b) those efficiency benefits are likely to be even further enhanced given the expertise and experience of the negotiators that NPA is appointing (see paragraph 97 above);
 - (c) there is no prospect of smaller publishers being treated "unfairly" as a result of the collective bargaining Arrangement given:

¹¹⁹ (1 June 2021). Nine formalises deals with Google and Facebook. SMH. Retrieved from:

<https://www.smh.com.au/business/companies/nine-formalises-deals-with-google-and-facebook-20210601-p57wxq.html>

¹²⁰ (20 June 2022). Former Nine executives will lead Big Tech negotiations in New Zealand. Digital Platform Initiative Blog. International News Media Association. Retrieved from: <https://www.inma.org/blogs/Digital-Platform-Initiative/post.cfm/former-nine-executives-will-lead-big-tech-negotiations-in-new-zealand>

¹²¹ See <https://mumbrella.com.au/how-chris-janzs-blue-team-saved-the-age-and-the-smh-692352>

¹²² (20 June 2022). Former Nine executives will lead Big Tech negotiations in New Zealand. Digital Platform Initiative Blog. International News Media Association. Retrieved from: <https://www.inma.org/blogs/Digital-Platform-Initiative/post.cfm/former-nine-executives-will-lead-big-tech-negotiations-in-new-zealand>

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- (i) first, the Commission found "on the evidence we have obtained, we consider it likely that smaller, regional news media companies would be unable to meaningfully negotiate and reach agreements with one or both Digital Platforms on an individual, bilateral basis for the display of news content";¹²³
- (ii) second, as outlined at paragraph 73 above, NPA has deliberately framed its application so that it is open to small independent New Zealand publishers to participate;
- (iii) third, as outlined at paragraph 97 above, the Arrangement enables those smaller publishers to benefit from negotiating expertise and experience beyond what they could hope to access in the absence of the Arrangement; and
- (iv) fourth, what is in fact "unfair" for smaller publishers is the current approach of the Digital Platforms of using journalist content without any fair and reasonable remuneration (and it is that lack of fairness that NPA is seeking to address through the Arrangement).

100. Accordingly, NPA considers that the evidence is clear that collective bargaining is likely to result in a number of significant benefits from transaction cost savings, more efficient contract terms, and more fair and reasonable remuneration for New Zealand news publishers – including smaller publishers.

(j) Meta's submission in relation to the incentives to compete

101. Meta's submission seeks to assert that:

- (a) "[t]here is a real chance of considerable harm from reduction in incentives to compete";¹²⁴ and
- (b) collective bargaining with the Digital Platforms "...would replace the relevant dimensions of competition among the Participants to supply content to Google and Meta".

102. However, as outlined previously, NPA is confident that authorisation of collective bargaining with the Digital Platforms will not result in any possible risk of a 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:

- (a) the arrangement for which NPA seeks authorisation only relates to one aspect of the participants' respective businesses, namely collective 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. As the Commission's Draft Determination noted:¹²⁵

"any funding likely to result from commercial agreements is likely to constitute only a relatively small proportion of news media companies' overall income"

¹²³ Draft Determination at [60].

¹²⁴ Meta's submission on Draft Determination, page 10.

¹²⁵ Draft Determination at [169].

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- (b) 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), in the context of markets that are recognised as being highly competitive.¹²⁶ As the Commission's Draft Determination noted:¹²⁷

"the Participants would still retain a strong incentive to compete in the supply of news content and we do not consider that any material detriments to competition would be likely to arise"

- (c) 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.

103. Furthermore, while Meta submitted that the Arrangement could "affect competition among the Participants to supply content to Google and Meta",¹²⁸ the reality is there is no way in which any such competition could be lessened given:

- (a) the Digital Platforms are unavoidable "must have" channels (there is no ability to choose one Digital Platform over the other, and currently no ability to negotiate fair and reasonable remuneration with them); and
- (b) in many instances, the use of journalistic content on Facebook, and the benefit to Meta's ecosystem of that, is not voluntary – that content is used, circulated, and engaged with on Facebook by its users, with that use and engagement contributing value to Meta without any action by the news publisher.

104. Accordingly, in light of the factors described above, NPA cannot see any way in which collective bargaining could give rise to any material lessening of competition between news publishers, and it notes that Meta has not provided any evidence or explanation as to how it considers that there could be such a lessening of competition, or how it could manifest itself. Accordingly, NPA agrees with the Commission's view in its Draft Determination that no such concerns or detriments are likely.

CONCLUDING COMMENTS

105. For the reasons set out in this cross-submission, NPA considers that all the evidence, and the legal framework, demonstrates that:

- (a) Meta's submissions are not valid; and
- (b) the approach adopted by the Commission in its Draft Determination was correct, both from a factual and legal perspective.

¹²⁶ As Sapere noted: "The level of competition for readers/viewers/listeners was variously described as 'robust' and 'fierce'." See (November 2021). Sapere. The implications of competition and market trends for media plurality in New Zealand: A report for the Ministry for Culture and Heritage, page 18.

¹²⁷ Draft Determination at [169].

¹²⁸ Meta's submission on Draft Determination, page 10.

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106. Accordingly, NPA reiterates that it is confident that the public benefits of the Arrangement significantly outweigh any potential detriments and, therefore, that the Arrangement should be authorised.