

Draft Determination

News Publishers' Association of New Zealand Incorporated

The Commission:

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Summary of application:

The News Publishers' Association of New Zealand Incorporated has applied for authorisation, on behalf its members and other participating independent New Zealand news media companies, to collectively negotiate with Meta Platforms Inc and Alphabet Inc.

Draft determination:

The Commerce Commission's draft decision is to grant authorisation as it is satisfied that the proposed arrangements will in all the circumstances result, or be likely to result, in such a benefit to the public that the conduct should be permitted.

Date of draft determination:

20 June 2022

Confidential material in this report has been removed. Its location in the document is denoted by [].

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Introduction

1. On 25 November 2021, the Commission received an application from the News Publishers' Association of New Zealand Incorporated (**NPA**) seeking authorisation on behalf of itself, its current and future members, and selected independent New Zealand news media companies (**Participants**) to collectively negotiate with Alphabet Inc¹ (**Google**) and Meta Platforms Inc² (**Meta**) (collectively, the **Digital Platforms**) for a ten-year period (the **Authorisation**). As New Zealand was in an 'epidemic period'³ at the date of the application, NPA applied under section 65AA(2) and (3), and in the alternative section 58(1) and (2) of the Commerce Act 1986 (the **Act** or **Commerce Act**).
2. At the same time, NPA applied to the Commission seeking provisional authorisation for the same collective negotiations outlined above, under section 65AD(2) of the Act, until the Commission declines or grants the authorisation application (the **Provisional Authorisation**). The Commission granted provisional authorisation on 11 April 2022.
3. The proposed arrangement for which NPA seeks full authorisation is described at paragraph 29 below (the **Proposed Arrangement**).

Draft determination

4. The Commission's preliminary view is that authorising the Proposed Arrangement would result in such a benefit to the public that it should be permitted.
5. Our preliminary view is based on our assessment of the likely benefits and detriments on the evidence available to us at this time.
6. Accordingly, the Commission's draft determination is to authorise the Proposed Arrangement for a period of ten years.

Assessment procedure

7. In making this draft determination, we have reviewed a variety of evidence, including, the Provisional Authorisation and Authorisation applications; six submissions and one cross-submission regarding the Provisional Authorisation application; and nine submissions and two cross-submissions in response to the Commission's Statement of Preliminary Issues relating to the Authorisation application. Additionally, the Commission considered evidence received from interested parties by way of interview and in response to information requests.⁴

¹ The term "Google" is used in this draft determination to include any subsidiary of Alphabet Inc., related company of Alphabet Inc., or member of the Alphabet Inc. corporate group.

² The term "Meta" is used in this draft determination to include any subsidiary of Meta Platforms Inc., related company of Meta Platforms Inc., or member of the Meta Platforms Inc. corporate group.

³ As at the date of this draft determination, the epidemic period is expected to expire on 15 March 2023.

⁴ Public versions of NPA's application documents and parties' submissions can be accessed on our [case register](#).

8. Neither Digital Platform directly opposed authorisation of the Proposed Arrangement but they submitted that it was unnecessary. Some submitters, including Discovery NZ Limited (**Discovery**),⁵ Television New Zealand Limited (**TVNZ**) and Radio New Zealand Limited (**RNZ**), opposed authorisation of the Proposed Arrangement because they are excluded from participating in it.

Background

Participants

9. NPA is an industry association whose membership consists of a selection of national and regional New Zealand news media companies. NPA's stated purpose is to advocate on behalf of the news media industry of New Zealand, including representing members' interests in areas such as government affairs, media regulation and public funding of journalism.⁶
10. NPA applied for authorisation on behalf of news media companies including its members. The NPA's members include Stuff Limited (**Stuff**),⁷ Allied Press Limited (**Allied Press**),⁸ The Gisborne Herald Company Limited, Ashburton Guardian Company Limited, Greymouth Evening Star Co Limited, National Media Limited (owner of the Wairarapa Times-Age), The Westport News Limited, The Beacon Printing & Publishing Company Limited (owner of the Whakatane Beacon), and The Wairoa Star Limited.
11. NPA also applied for authorisation on behalf of non-member news media companies which choose to participate in the Proposed Arrangement, including independent media companies that produce New Zealand focused journalistic and news content that are listed on the NZX or otherwise ultimately owned by a non-overseas person (as defined in the Overseas Investment Act 2005 (**OIA**)).⁹ Under the terms of the Authorisation, news media companies that meet this definition will be able to become Participants at any time during the period during which the conduct is authorised.¹⁰

⁵ Parent company of Discovery, Discovery Inc, acquired WarnerMedia on 8 April 2022. The two companies merged into a new entity, Warner Bros. Discovery. See CNBC "WarnerMedia, Discovery complete merger, become Warner Bros. Discovery" (8 April 2022) <<https://www.cnbc.com/2022/04/08/warnermedia-discovery-complete-merger-become-warner-bros-discovery.html>>.

⁶ NPA "Notice seeking authorisation of a restrictive trade practice pursuant to sections 65AA(2) and 65AA(3) of the Commerce Act 1986" (application to the Commerce Commission, 23 November 2021) (**NPA Authorisation application**) at [2.4].

⁷ Stuff is a privately-owned print and digital news media company with a range of newspapers and magazine in addition to its website Stuff.co.nz.

⁸ Allied Press is a South Island owned media company with various interests including daily and community newspapers such as the Otago Daily Times.

⁹ NPA Authorisation application at [3.1(b)] and [3.1(c)].

¹⁰ NPA clarified that its application is intended to cover news "publishers" (as opposed to broadcasters), being media businesses whose primary business is to publish news primarily in written form for the purposes of a newspaper masthead, magazine, or online news website. See NPA "NPA Cross-submission in relation to its application for authorisation for collective bargaining with Google and Facebook" (**NPA SOPI cross-submission**) (8 March 2022) at page 14.

12. Hex Work Limited (**The Spinoff**) was listed in NPA’s application as having indicated an interest in participating in the Proposed Arrangement should it be authorised.¹¹ We understand that [] news media companies have chosen to participate, including The Spinoff.¹²
13. NZME Limited (**NZME**) is an NPA member and was listed as a Participant in the Authorisation application. NZME withdrew from the Authorisation application vis-à-vis Google after signing a Letter of Intent with Google on 25 March 2022.¹³ NZME also executed a commercial agreement with Meta on 13 April 2022 [].¹⁴
14. News media companies named in NPA’s Authorisation application as being expressly excluded from the scope of the Proposed Arrangement include state-owned public broadcasters TVNZ, Māori Television Service (**Māori TV**) and RNZ, and Discovery, which is a foreign-owned entity that operates various television channels in NZ as well as the *Newshub* multi-platform news service (collectively, the **Broadcasters**).¹⁵

Digital Platforms

15. Google¹⁶ is an American multinational technology company that provides a wide range of internet-related products and services. Google’s key relevant products are Google Search, Google News and Google Discover (including News Showcase, a collection of related articles alongside a timeline of events or key bullets), and Google AdSense and DoubleClick (which enable publishers and web content producers to earn revenue through digital advertising). Advertising revenue makes up nearly 80% of Google’s total income.¹⁷
16. Meta is an American multinational technology company that offers a number of social media products including Facebook, Instagram, Messenger, and WhatsApp. Meta’s key relevant product is Facebook. Meta makes almost all of its revenue through digital advertising on its platforms.¹⁸

¹¹ NPA Authorisation application at [3.1(c)].

¹² News Publishers’ Association “28 Publishers join NPA’s Collective Bargaining with Google and Facebook” (23 May 2022) <<https://npa.co.nz/news/28-publishers-join-npas-collective/>>.

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¹³ NZX Announcement “NZME Signs Letter of Intent with Google and Updates Outlook” (25 March 2022) <<https://www.nzx.com/announcements/389459>>.

¹⁴ NZX Announcement “NZME inks agreement with Meta” (13 April 2022) <<https://www.nzx.com/announcements/390515>>.

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¹⁵ NPA Authorisation application at [3.3].

¹⁶ Google’s interests in New Zealand are represented by Google New Zealand Limited.

¹⁷ Alphabet Inc “Form 10-Q Quarterly Report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 for the quarterly period ended June 30, 2021” <https://abc.xyz/investor/static/pdf/20210728_alphabet_10Q.pdf?cache=28df405> at page 35.

¹⁸ Meta Inc “Form 10-Q Quarterly Report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 for the quarterly period ended September 30, 2021” <<https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/0eeab029-1733-4296-acf8-fe5823d68872.pdf>> at page 37.

Industry background

17. The news media companies and Digital Platforms operate multi-sided platforms where they facilitate interactions between different groups of customers, for example, users or viewers, advertisers, and content creators.

Operations of the Digital Platforms

18. The Australian Competition and Consumer Commission’s (**ACCC**) Digital Platforms Inquiry Report (**DPI Report**) described how Google and Meta facilitate interactions between content creators, consumers, and advertisers:¹⁹
- 18.1 Content creators (including news media companies) produce content that the Digital Platforms host or link to, or that they post themselves, and as a result of this the content creators obtain a greater audience (for example, through referrals or brand exposure).
- 18.2 Users consume content (or referrals to that content), and in exchange provide their attention and user data which allows the Digital Platforms to improve the quality of their advertising product, amongst other things.²⁰
- 18.3 Advertisers pay the Digital Platforms to show advertisements to users.
19. The Digital Platforms do not produce content. Instead, the Digital Platforms display content produced by end-users or third party web pages.
20. Google Search is a web-based search engine. It is the largest general search engine internationally, with an estimated 92.09% global market share as at April 2022.²¹ Google Search’s automated systems identify and display information through its Search index to find the most relevant, useful results for search queries.²² Google Search results can include ads that link to an advertiser’s website. Ads appear if Google’s systems identify that they are relevant to the search terms entered by a user.²³ Google earns revenue when a user clicks on an ad. Google Search’s leading position as a general search service is underpinned by the wide relevance of trusted sources that the search engine presents to answer search queries. Because of Google Search’s prevalence and quality of service, people tend to use Google Search as their default search engine. Google accumulates user data from searches, and Google’s

¹⁹ ACCC “Digital Platforms Inquiry Final Report (market study final report, June 2021) (**DPI Report**) at chapter 2.2.1.

²⁰ See also *NZME/Fairfax* [2017] NZCC 8 (**NZME/Fairfax**) at [200]: “... [news media companies] derive revenue by facilitating interactions between two distinct groups of customers: readers and advertisers. Revenue is derived by producing content that attracts readers’ attention, or ‘eyeballs’, and then selling these ‘eyeballs’ to advertisers. The platform on which the [news media companies]’ content is distributed on (newspapers, websites, apps etc.) acts as the intermediary between readers and advertisers.”

²¹ Statcounter “Search Engine Market Share Worldwide Apr 2021-Apr 2022” <<https://gs.statcounter.com/search-engine-market-share>>.

²² Google website “How Search works” <<https://www.google.com/search/howsearchworks/>>.

²³ Google “Google submission in response to the Commerce Commission’s Statement of Preliminary Issues re the Authorisation Applications by the News Publishers’ Association of New Zealand” (10 February 2022) (**Google SOPI submission**) at page 5.

access to this data allows it to provide a high quality ad targeting service. This in turn means advertising on Google Search is more attractive to advertisers than advertising on other search engines.²⁴

21. Google also operates intermediaries (such as Google AdSense and DoubleClick) that enable websites to sell advertising space on their websites and/or assist advertisers effectively to promote goods or services online, known as the advertising technology value-chain. We understand that news publishers, to varying degrees, use Google's services in this regard.
 - 21.1 Google AdSense is a program used by website owners to monetise their online content. AdSense works by matching ads to websites based on the website's content and visitors. The ads are created and paid for by advertisers who want to promote their products.²⁵
 - 21.2 DoubleClick is an integrated ad technology platform that enables advertisers to create, manage and grow digital marketing campaigns.²⁶ It includes a variety of services for advertisers including DoubleClick Bid Manager (a demand-side platform used by advertisers to buy online advertising across ad exchanges), DoubleClick Digital Marketing Manager (ad serving and management solutions for digital advertising campaigns), and Google Analytics (a free, measurement and attribution tool to help agencies and advertisers across their digital marketing efforts).
22. Google also has a news aggregator product, Google News, and a general content aggregator product, Google Discover.²⁷
23. Meta operates social media platforms Facebook and Instagram, which are the world's first and third most popular social media platforms globally.²⁸ Meta's platforms (particularly Facebook) enable users to post content and interact with each other. The Facebook and Instagram Feeds show a scrollable list of content (including status updates, photos, videos, links, app activity, likes from people, Pages and groups that users follow on Facebook), and ads including boosted posts and branded content. Feeds are the primary way Facebook and Instagram users are delivered content. The platforms simultaneously show those users advertisements while they scroll through a selection of content on their Feed.
24. Meta interacts with news media companies when content generated by news media companies is posted on Facebook's Feed, either by the news media companies themselves or by other Facebook users. Facebook also has a separate Facebook

²⁴ DPI Report at chapter 2.3.

²⁵ Google website "How AdSense works" <<https://support.google.com/adsense/answer/6242051?hl=en>>.

²⁶ Google website "DoubleClick Digital Marketing" <<https://support.google.com/faqs/answer/2727482?hl=en>>.

²⁷ Google website "Discover new information and inspiration with Search, no query required" (24 September 2018) <<https://blog.google/products/search/introducing-google-discover/>>.

²⁸ The second most popular is Twitter. See Similarweb "Top websites ranking" <<https://www.similarweb.com/top-websites/category/computers-electronics-and-technology/social-networks-and-online-communities/>>.

News product, but this is not available in New Zealand.²⁹

[³⁰]

Evolution of news media industry

25. The way in which news media companies generate revenue has evolved over time. Historically, news media companies relied on print-based classified and display advertising, as well as print subscriptions. As audiences have shifted online, these traditional sources of revenue have diminished, and news media companies have sought to monetise their online audience through the likes of digital display advertising and in some cases digital subscriptions (implemented through ‘paywalls’), membership fees, sponsorships, partnerships, and donations.
26. In *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8 (***NZME/Fairfax***), we found that changes in technology and consumer demand had resulted in print media revenues steadily falling for a number of years.³¹ This trend has continued. For example, between 2016 and 2021, NZME’s print revenues fell by 34.9% from \$219m to \$155.7m.³² Conversely, NZME’s digital and e-commerce revenues have been increasing, but not by enough to offset the decrease in print revenues. Across the same period, NZME’s digital and e-commerce revenues increased by \$32.3m.
- [³³ ³⁴]
27. Given these trends, many news media companies have increased and developed their online presence. This has involved shifting to a ‘digital first’ strategy, which involves tailoring content to be viewed online as opposed to reproducing digital versions of print stories.³⁵ News media companies typically share or post links to their articles directly on social media sites to develop and grow their audience. They also provide tools to consumers to allow them to share news articles easily (ie, by including buttons on news articles that enable users to share news articles via email, Facebook, Twitter, LinkedIn and Reddit).
28. Many 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. For those reasons, other jurisdictions have contemplated and implemented their own

²⁹ Facebook website “Introducing Facebook News” <<https://www.facebook.com/news/learn-more>>.

³⁰ []

³¹ *NZME/Fairfax* at [28]-[34].

³² NZME “Annual Report NZME Limited for the year ended 31 December 2016” (2016) <<https://www.nzme.co.nz/media/1107/nzme-full-year-2016-annual-report.pdf>>; NZME “NZME Limited Annual Report Keeping Kiwis in the Know for the year ended 31 December 2021” (2021) <<http://nzx-prod-s7fsd7f98s.s3-website-ap-southeast-2.amazonaws.com/attachments/NZM/387755/365209.pdf>> at [2.1].

³³ []

³⁴ []

³⁵ []

³⁵ Relatively new entrants to the market, Newsroom and The Spinoff (established in 2016 and 2014 respectively) do not have print offerings whatsoever.

remedies to address the challenges faced by news media companies. We explain these concerns further in **Attachment A**.

Proposed Arrangement

29. NPA seeks authorisation to:
 - 29.1 appoint a common negotiating person(s) to collectively discuss and negotiate with each of the Digital Platforms the terms on which the Participants' news and journalistic content may be displayed, hosted, featured, linked, or summarised (**Display**) on either Digital Platform's platforms, including (without limitation) in relation to:
 - 29.1.1 remuneration for Display of such content;
 - 29.1.2 the publication format of Display of such content;
 - 29.1.3 the access to user data generated from the Display of such content; and
 - 29.1.4 other benefits to Participants for the creation of such content (such as in the form of search rankings);
 - 29.2 exchange information between the Participants in relation to [29.1] above, including:
 - 29.2.1 offers or proposed offers made or to be made to the Digital Platforms by or on behalf of the Participants;
 - 29.2.2 offers made by the Digital Platforms to the Participants; and
 - 29.2.3 acceptances or proposed acceptances by any Participant of any such offers;
 - 29.3 enter into agreements collectively negotiated between the relevant Digital Platform and NPA (and/or the Participants); and
 - 29.4 give effect to the provisions of agreements collectively negotiated between the relevant Digital Platform and NPA (and/or the Participants).
30. NPA's application is made on the basis that it will be voluntary for news media companies to participate in the Proposed Arrangement. There is no proposal, and the NPA is not requesting authorisation, to engage in a collective boycott outside the Proposed Arrangement (a collective boycott includes but is not limited to any collective refusal to supply, or acquire, goods or services from any person).
31. NPA's application further provides that 'independent' media companies, being media companies that produce New Zealand focused journalistic and news content and that are listed on the NZX or otherwise ultimately owned by a non-overseas person, are permitted to become Participants at any time. Equally, any Participant would be

free to later opt out of the Proposed Arrangement and also to choose to enter into its own bilateral agreement with either of the Digital Platforms.

[^{36]}

32. The term “**Collective**” is used in this determination to refer to the group of Participants acting collectively in accordance with the Proposed Arrangement.

Scope of the Proposed Arrangement

33. The Commission notes that, consistent with the wording of NPA’s application, the Authorisation covers consideration, grants, funding or other benefits offered by the Digital Platforms, which are subject to discussion by the parties to the collective arrangement, to the extent that such benefits are remuneration for the display of content and/or relate to the terms and conditions on which news and journalistic content may be displayed, hosted, featured, linked or summarised on the Digital Platforms’ platforms.

How we assess authorisations during an ‘epidemic period’

Statutory framework

34. A two-stage assessment is undertaken to determine any authorisation application submitted under ss 65AA and 58 of the Act:³⁷
- 34.1 first, establishing whether the Commission has jurisdiction to authorise (the ‘jurisdictional threshold’);
- 34.2 second, assessing whether the associated benefits mean that authorisation should be granted (the ‘public benefit test’).

Jurisdictional threshold

35. The Commission has jurisdiction to consider an application for authorisation under s 58 where a person applies for authorisation of an arrangement that is likely to lessen competition (s 27 of the Act). This is called the ‘competition threshold’.
36. The Commission will have jurisdiction to consider an application for authorisation under s 65AA if the application is made during the epidemic period and the Commission has reasonable grounds to believe the arrangement contains a cartel

³⁶ [

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³⁷ Commerce Commission “Authorisation Guidelines” (December 2020) (**Authorisation Guidelines**) at page 7.

provision.³⁸ It is not necessary for the Commission to determine whether a provision is in fact a cartel provision.³⁹

Public benefit test

37. Although the jurisdictional thresholds differ under ss 65AA and 58, the public benefit test is materially the same:⁴⁰

37.1 In relation to s 65AA, the Commission can authorise an arrangement that contains, or in respect of which there are reasonable grounds to believe it contains, a cartel provision if the Commission is satisfied that the arrangement will in all the circumstances result, or be likely to result, in such a benefit to the public that it should be permitted.⁴¹

37.2 In relation to s 58, the Commission can authorise an arrangement that may lessen competition if it is satisfied that the arrangement will be likely to result in a benefit to the public that would outweigh the lessening of competition.⁴²

38. Where courts have previously considered the various types of authorisation decisions allowed for in the Act, there has been overall consistency in the approach taken to the assessments of public benefit (ie, a facts-based assessment of the benefits and detriments, adopting a quantitative approach where possible).⁴³

39. In each case, the Commission needs to investigate the nature, likelihood and magnitude of any detriments and benefits that might arise from the proposed arrangement.⁴⁴

40. The detriments and benefits must arise from the proposed arrangement for which authorisation is sought.⁴⁵ To determine whether the detriments and benefits are specific to a proposed arrangement, we ascertain:⁴⁶

40.1 what is likely to occur in the future without the arrangement (the counterfactual(s)); and

40.2 what is likely to occur in the future with the arrangement (the factual).

³⁸ Section 65AB(4) of the Act.

³⁹ Section 65AB(4) of the Act.

⁴⁰ Commerce Commission “Guidelines on Approach to Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act” (May 2020) (**COVID-19 Guidelines**) at [37].

⁴¹ Sections 65AB(3) and (4) of the Act.

⁴² Section 61(6) of the Act.

⁴³ See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) at [33] and *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) at [88]-[90].

⁴⁴ COVID-19 Guidelines at [38].

⁴⁵ Authorisation Guidelines at [39].

⁴⁶ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [83] and [86(a)].

41. Once we have established the factual and the counterfactual(s), we assess the benefits and detriments of the factual compared to the counterfactual(s).⁴⁷ If we are satisfied that the factual (ie, the likely position if the arrangement is allowed to occur) will, in all the circumstances result, or be likely to result, in such a benefit to the public that the authorisation should be granted, then the Commission can grant it.
42. As a general principle, detriments and benefits will be considered likely if there is a “real and substantial risk” or “real chance” that they will happen if the arrangement proceeds.⁴⁸

Our assessment of jurisdiction

43. We consider that there are reasonable grounds to believe that the Proposed Arrangement contains a cartel provision.⁴⁹ Horizontal arrangements between competitors (such as companies that compete to supply news content) to collectively set a price for the supply of news content to Digital Platforms, or other terms on which the Digital Platforms will provide funding to news media companies, are likely to amount to cartel conduct. We therefore consider that the Commission has jurisdiction to authorise the entry into and giving effect to the Proposed Arrangement for collective negotiation under sections 65AA(2) and (3).
44. As we are satisfied that we have jurisdiction to authorise the Proposed Arrangement under sections 65AA(2) and (3), we have not also considered whether we have jurisdiction to authorise the Proposed Arrangement under section 58.

Relevant markets

45. The Commission’s jurisdiction to consider this authorisation application has been established on the basis that there are reasonable grounds to believe that the Proposed Arrangement contains a cartel provision (a ‘per se’ offence under section 30 of the Act). As a result, there is no requirement to identify relevant markets for the purposes of establishing a lessening of competition.
46. Additionally, when we consider an application for authorisation, there is no statutory requirement to define markets as part of the net benefit test. Identifying markets may assist our analysis of the likely impacts of a proposed arrangement. However, it may not be necessary to precisely define the boundaries of these markets if the outcome of the assessment is likely to be substantially the same irrespective of the

⁴⁷ In determining the factual, the Commission takes into account all the surrounding circumstances, including any history of negotiations and commercial dealings between the parties to the collective negotiation. We do not, however, make any assumption about the outcome of any such negotiations or contracts: *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1, at [52]. In undertaking this task, 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: *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZHC 1262 (HC) at [64].

⁴⁸ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [83] and [86(a)].

⁴⁹ A cartel provision is a provision of an agreement between competitors that has the purpose, effect or likely effect of price fixing, restricting output, and/or allocating markets: section 30A of the Act.

precise scope of the market. We will consider whether it is appropriate to define the relevant markets on a case-by-case basis.

47. We have considered submissions made by interested parties on the relevant market(s), as well as other materials that canvass potential markets as they pertain to both news media and digital platforms.⁵⁰ Submitters have characterised the markets in which these parties interact in different ways. On the basis that we consider the outcome of our assessment likely to be substantially the same irrespective of the precise scope of the market, we have not found it necessary to precisely define the scope of any relevant market(s) to assess this authorisation.
48. However, to provide context and to inform our assessment of the benefits and detriments likely to arise from the Proposed Arrangement, we have considered the relevant interactions between the various participants in our assessment of the potential benefits of the Proposed Arrangement below. In so doing we also consider the impact of the Proposed Arrangement on the supply of New Zealand news content.

With and without the Proposed Arrangement

49. In reaching our preliminary view we have considered all submissions and evidence received on the likely situations with (factual) and without (counterfactual) authorisation being granted for the Proposed Arrangement.
50. In assessing the situation with and without the Proposed Arrangement, the Commission is necessarily engaging in a future-focussed assessment. As such, there is scope for there to be a range of factuials, as well as a range of counterfactuals.

The situation without the Proposed Arrangement

NPA's submissions

51. NPA submitted that in the absence of the Proposed Arrangement, either:

51.1 [

51.2

] ⁵¹

⁵⁰ NPA "NPA Cross-submission in relation to its application for authorisation for collective bargaining with Google and Facebook" (**NPA SOPI cross-submission**) (8 March 2022); *NZME/Fairfax*; DPI Report, Google SOPI submission; Meta "Meta submission in response to the New Zealand Commerce Commission's statement of preliminary issues on NPA's authorisation application" (11 February 2022) (**Meta SOPI submission**).

⁵¹ NPA Authorisation application at [7].

News media companies' submissions

52. In interviews, some news media companies indicated that in the absence of the Proposed Agreement, they would pursue bilateral agreements with the Digital Platforms where possible. Some news media companies had already entered into preliminary discussions with the Digital Platforms.

53. []⁵²]
[]⁵³]

54. Finally, news media companies expressed doubt that smaller media companies would be able to negotiate with the Digital Platforms at all.⁵⁴
[]

Google's submissions

55. Google indicated that since March 2021, it has "been in active discussions with New Zealand news media businesses about including their content in Google News Showcase" including reaching agreement with three news media companies, two of which were already receiving payment.⁵⁵ As of 18 March 2022, Google indicated that it has approached [] New Zealand publishers, representing [] publications.⁵⁶
[]⁵⁷]

56. Google indicated that it planned "to continue those discussions, and to commence discussions with more news businesses, even in the absence of any collective bargaining authorisation."⁵⁸

52 []
53 []

54 []
[]
].

55 Google SOPI submission at page 1.
56 []
57 []

58 []
Google SOPI submission at page 1.

Meta's submissions

57. Meta submitted that commercial engagements had been occurring without collective bargaining,⁵⁹ [].⁶⁰
58. Meta has provided digital transformation project funding to The Spinoff, NZME and Newsroom.⁶¹ In February 2022, Meta announced that 13 New Zealand news media companies⁶² would be participating in its Aotearoa Audience Development Accelerator, which has an attached grant fund of [] towards a project of their choosing that supports the goals and sustainability of their business, such as audience development or a reader-revenue project.⁶³

Our assessment

59. The evidence before us suggests that in the absence of the Proposed Arrangement, large and medium-sized news media companies (including certain news publishers and the Broadcasters) would likely negotiate and enter into commercial agreements:
- 59.1 with Google regarding Display of content on Google News Showcase, and/or for digital transformation support; and
- 59.2 with Meta regarding Display of video content on Facebook, or (more likely) for digital transformation support.
60. Some smaller news media companies may be able to access limited support from the Digital Platforms for digital transformation (for example, through Meta's 2022 Audience Development Accelerator and Grant Fund and/or Google's News Initiative Program).⁶⁴ However, on the evidence we have obtained, we consider it likely that smaller, regional news media companies would be unable to meaningfully negotiate

⁵⁹ Meta SOPI submission at page 4.

⁶⁰ Meta "Further information to assist the NZCC with its assessment of NPA's application for authorisation" (4 March 2022) (**Meta SOPI cross-submission**) at page 2.

⁶¹ Meta "Australian and Kiwi Publishers Grow Reader Revenue With the Facebook Accelerator" (16 January 2020) <<https://www.facebook.com/journalismproject/accelerator-australia-new-zealand-reader-revenue>>; Meta SOPI submission at page 16.

⁶² Ashburton Guardian, Capsule, Crux Publishing, Indian Weekender, Local Matters, Mandarin Pages, Māori TV, MediaWorks, Allied Press (Otago Daily Times), Pacific Media Network, Radio Bay of Plenty, Shit You Should Care About, and the Wairarapa Times-Age: Meta "Meta announces successful publishers in News Audience Development Accelerator" (2 February 2022) <<https://aotearoanz.fb.com/post/meta-announces-successful-publishers-in-news-audience-development-accelerator/>>.

⁶³ Letter from Meta to Competition Branch (Commerce Commission) providing a response to a request for Information on a voluntary basis (4 May 2022) (**Meta response to Voluntary Information Request**) at [5].

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and reach agreements with one or both Digital Platforms on an individual, bilateral basis for the display of news content.⁶⁵

61. For the purposes of this analysis, we have categorised whether a news media company is “large”, “medium-sized” or “small” based on the number of journalistic staff employed.⁶⁶ On this basis, we have identified:

61.1 “Large” news media companies – over 100 journalists, eg, Stuff (approximately [] journalists), NZME ([] journalists), Discovery (approximately [] journalists), TVNZ (approximately [] journalists), RNZ (approximately [] staff);

61.2 “Medium-sized” news media companies – between 50 and 100 journalists, eg, Allied Press (approximately [] journalists); and

61.3 “Small” news media companies – less than 50 journalists, eg, Wairarapa Times-Age (33 staff).

The situation with the Proposed Arrangement

NPA’s submissions

62. NPA submitted that if the Commission authorises the Proposed Arrangement, parties to the Proposed Arrangement would enter into collective negotiations, discussions, exchanges of information with one another; and enter into, and give effect to, agreements or provisions collectively negotiated with the Digital Platforms.

Meta’s submissions

63. Meta did not explicitly indicate whether it would take part in collective negotiations with the Participants.

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64. Meta also indicated that it was not prepared to negotiate all categories of agreements with the Collective. Meta indicated that it is only prepared to reach agreements for the remuneration of content with “relevant publishers who have the

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[]]

66 []; []; []; [];
[]; []; []; [];
]Wairarapa Times-Age website “About us” <<https://times-age.co.nz/about-us/>>.

67 []]

capacity to provide new content or access content that was not previously available to the Facebook audience.”⁶⁸

Google’s submissions

65. []⁶⁹ Google expressed [] reservations [] about the scope and feasibility of collective negotiations.⁷⁰
66. Google submitted that it does not pay for links and snippets of news content in Google Search.⁷¹ Rather, Google has entered commercial arrangements with news media companies elsewhere in the world to generate new content for its news product, Google News Showcase.⁷²
67. Google has also entered commercial arrangements to provide news media companies with training and/or grants via its Google News Initiative project, to assist news media companies’ digital business growth or to provide training and funding to assist development of new publishing business models.⁷³

Our assessment

68. We have not reached a view on what the possible terms of any collectively negotiated arrangement may be but have considered the likelihood of the Digital Platforms entering into negotiations with the Participants.

Google

69. On balance, it appears likely that Google will enter negotiations with Participants, consistent with Google’s apparent willingness to engage with media companies on a bilateral basis, since the current Participants (ie, the media companies that have

⁶⁸ Meta SOPI cross-submission at page 1. Meta further indicated that it “does not enter into commercial agreements to pay for existing publishing behaviour such as news businesses voluntarily posting links to Facebook.”

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[] [] [].

]Google also raised the concern that “collective bargaining with a diverse group like that contemplated by the NPA’s application may reduce our ability to tailor our offering to the capabilities and needs of individual news businesses.” See Google SOPI submission at page 2.

⁷¹ Google SOPI submission at page 6.[]

⁷² Google News Showcase is a content licensing program whereby news media companies specifically curate a content panel which content is licensed to Google and displayed on Google News or Google Discover. See Google “Google Submission in response to authorisation applications by the News Publishers’ Association of New Zealand” (8 December 2021) (**Google Provisional Submission**) at pages 2 and 3.

⁷³ Google News Initiative programs include the GNI Innovative Challenge, the GNI Digital Growth Program, and previously, the Journalism Emergency Relief Fund, via which media companies received grants to assist with the production of news content in the face of the COVID-19 pandemic – see Google Provisional Submission at pages 1 and 2.

signed up to the NPA’s application at the time of the draft determination) represent a moderately large segment of New Zealand news media companies, including several larger or higher profile Participants such as Stuff, Allied Press and The Spinoff.

70. We consider it likely that a collective arrangement would be reached with Google regarding the Display of the Participants’ content on Google News Showcase (possibly including support from Google regarding digital transformation, linked to Display on Google News Showcase, noting the scope of the Proposed Arrangement discussed in paragraph 33). We do not consider that the diversity of the Participants in the Collective is necessarily fatal to the success of the collective bargaining, since we understand that Google
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- ⁷⁴]However, we cannot exclude the possibility that Google will not engage on a collective basis and will continue to seek to engage with selected news media companies bilaterally.

Meta

71. It is not clear to the Commission whether Meta will enter into collective negotiations with the Participants; we assess this to be more than a mere possibility. We note that like Google, Meta has been willing to engage on a bilateral basis. The Commission cannot exclude the possibility that Meta will not engage on a collective basis and will continue to seek to engage with selected news media companies bilaterally.
72. Meta has indicated that it will not enter into commercial agreements to pay for existing publishing behaviour and is only prepared to remunerate news media companies for new content to which its users do not yet have access.⁷⁵ In New Zealand, we understand that Meta
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- ⁷⁶]It is unclear whether the Participants will be considered by Meta to have the resources to produce the quality and quantity of [
- ⁷⁷]Accordingly, the Commission cannot exclude the possibility that collective negotiations for the remuneration of content displayed on [] would not be successful.
73. From the evidence summarised above, Meta appears willing to provide funding to support news media companies’ digital transformations. Funding provided to support digital transformation would be covered by the Authorisation application where such benefits are remuneration for the Display of content and/or relate to the terms and conditions on which news and journalistic content may be Displayed on the Digital Platforms’ platforms.

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⁷⁵ Meta SOPI cross-submission at page 1.

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Possible factual scenarios

74. The evidence before the Commission suggests that there are a number of potential factual scenarios:
- 74.1 The Participants may be successful in negotiating an agreement with one or both Digital Platforms.
- 74.2 The Participants may not be successful in negotiating an agreement with either of the Digital Platforms.
75. As noted above, discussions are under way between the Digital Platforms and the Broadcasters under the status quo, and ongoing discussions appear likely to proceed with or without the Proposed Arrangement.
76. The Commission has taken each of the above possible factual scenarios into account in its assessment.⁷⁸ However, for the purposes of assessing the benefits and detriments, we have focussed on the factual scenario where at least one Digital Platform will engage in collective bargaining with the Collective to reach an agreement of some form. In doing so we make no assumptions as to the outcome of the negotiation, in respect of the specific terms of any collectively negotiated agreement.⁷⁹

Our assessment of benefits and detriments

77. The Commission will grant authorisation if it is satisfied, on the evidence before it, that the proposed conduct will result, or will be likely to result, in such a benefit to the public that it should be permitted.⁸⁰ In making this assessment, the Commission considers the evidence and makes judgements about how much weight to give to the evidence.
78. In *Godfrey Hirst*, the Court of Appeal observed that the Commission must consider a broad range of benefits and detriments in applications for authorisation. This may include efficiencies and non-economic factors.⁸¹
79. In particular, the Court of Appeal indicated that the Commission must have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits. The Court stated that “[w]here possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform quantitative analysis of qualitative variables.”⁸²

⁷⁸ Authorisation Guidelines at [41].

⁷⁹ *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1, at [42] – [52].

⁸⁰ See section 65AB(3) of the Act and Authorisation Guidelines at [14.2].

⁸¹ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 (CA) at [24] and [31] (*Godfrey Hirst*).

⁸² *Godfrey Hirst* at [36].

80. The Commission’s approach is to quantify benefits and detriments to the extent that it is practicable to do so.⁸³ Regarding the weight that can be given to qualitative factors, the Court of Appeal said in *Godfrey Hirst* that “[q]ualitative factors can be given independent and, where appropriate, decisive weight”.⁸⁴
81. In general, collective bargaining has the potential to cause both public benefits and detriments. Collective bargaining can reduce the costs of negotiating contracts, by reducing the number of negotiations and by allowing advisory costs to be shared, and it can also lead to more sophisticated, and potentially more efficient, contracting arrangements.⁸⁵ Collective bargaining can also redress an imbalance in bargaining power so as to improve overall outcomes, for instance if it leads to an increase in output and/or product quality.
82. Detriments from collective bargaining can arise if the market experiences a loss in allocative, productive, or dynamic efficiency. Allocative efficiency is lost when inefficient (higher) prices result in substitution to less preferred alternatives or the purchase of smaller quantities. Productive efficiency is lost when resources are inefficiently employed in production, typically increasing costs above efficient levels. Dynamic efficiency is typically lost when the incentive to innovate or invest is reduced.

Potential benefits

83. We consider that there are three main categories of potential benefits from the Proposed Arrangement:
- 83.1 avoided transaction costs;
 - 83.2 more sophisticated (efficient) contracts; and
 - 83.3 more and/or better news content.
84. We have also considered other potential benefits submitted.
85. We consider the likelihood and magnitude of these potential benefits throughout the rest of this section.

Avoided transaction costs

NPA’s submissions

86. NPA submitted that a single collective negotiation process with the Digital Platforms would be less costly than the cumulative transaction costs associated with news media companies undertaking individual bilateral negotiations with the Digital

⁸³ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447; *Air New Zealand* at [319]; and *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington API68/96 (16 December 1996) at [47] to [48].

⁸⁴ *Godfrey Hirst* at [38].

⁸⁵ See Stephen King “Collective Bargaining by Business: Economic and Legal Implications” (2013) 36(1) UNSW Law Journal 107 (**Stephen King - Collective Bargaining by Business**) at 113-114.

Platforms.⁸⁶ NPA noted that the Commission and the ACCC have previously acknowledged that there are likely to be benefits from collective bargaining due to reduced transaction costs when compared to individual bargaining.⁸⁷

87. NPA submitted that collective bargaining would result in transaction cost savings in the order of [].⁸⁸ NPA submitted the transaction cost savings would arise on account of saved [] fees across [] Participants participating in the Proposed Arrangement instead of negotiating agreements separately.⁸⁹ NPA estimated that, assuming negotiations were to take [] that the costs of a single party negotiating with each of the Digital Platforms would be [], and [].⁹⁰ NPA also submitted that collective bargaining would create additional internal transaction cost savings by reducing the management time required for negotiations.⁹¹

88. In interviews, Participants indicated that transaction costs were considerable compared to overall revenues and would be barriers to smaller news media companies undertaking these types of negotiations.⁹² For example,
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⁸⁶ NPA Authorisation application at [8.12(b)].

⁸⁷ NPA Authorisation application at [8.12(b)]; Waikato – Bay of Plenty Chicken Growers Association Incorporated [2017] NZCC 37 at [69]; Determination - Application for authorisation A91275 (Abbot Point Coal Export Terminal Producers) [2012] ACCC A91275 at [4.19].

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⁹⁰ NPA Authorisation application at [8.12(b)].

⁹¹ NPA Authorisation application at [8.12(b)].

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89. NPA referred to commonality among Participants in that, they have similar business models due to their genesis in news publishing in written (text) form, and each face similar challenges in their business models.⁹⁶

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Google's submissions

91. Google submitted that the Collective contains a diverse group of news media companies with disparate operations and needs. Google noted that the Authorisation application does not specify a fixed list of news media companies and would permit any independent New Zealand news media company to participate, subject to certain ownership criteria. Google considered these differences may impede the negotiating process,⁹⁹ and reduce Google's ability to tailor its offering to the capabilities and needs of individual businesses.¹⁰⁰ For example, larger news media companies may not share the interests of smaller news media companies in establishing brand recognition through distribution, discovery, and referral traffic created by Google.¹⁰¹

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⁹⁶ NPA, Cross-submission in response to NPA Authorisation and Provisional Authorisation (15 December 2021) (**NPA Provisional cross-submission**) [36] and [38].

⁹⁷ See [

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⁹⁹ Google Provisional Submission at page 4.

¹⁰⁰ Google SOPI submission at page 2.

¹⁰¹ Google Provisional Submission at page 4.

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Meta’s submissions

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Our assessment

95. Parties involved in collective bargaining can share negotiating costs and achieve economies of scale in transacting. If there are several parties seeking to negotiate with a single counterparty, those parties can save on transaction costs by sharing the cost of a single, collective negotiation, as opposed to multiple, bilateral negotiations.¹⁰⁸

96. These benefits have two caveats:

96.1 First, collective negotiations can be more complex than bilateral negotiations if the parties have diverse interests and the contract must cater to the interests of all of those party to the arrangement. Therefore, efficiencies will only be realised if the savings associated with incurring negotiation costs vis-à-vis each Digital Platform only once (rather than multiple times for each individual bilateral negotiation) outweigh the costs associated with any increased complexity from negotiating as a collective bargaining group.¹⁰⁹

96.2 Second, if parties in the collective bargaining group are heterogeneous, they may incur costs negotiating amongst themselves due to their diverse needs and interests. Therefore, any transaction cost savings between the collective bargaining group and the counterparty may be offset by internal transaction costs within the collective bargaining group.¹¹⁰

97. In the absence of the Proposed Arrangement, the Commission considers it likely that the larger and medium-sized Participants and some smaller Participants would attempt to enter into bilateral negotiations with the Digital Platforms. To the extent that bilateral negotiations eventuated, these Participants would incur transaction costs, such as obtaining professional advice and management time. Likewise, if the Digital Platforms chose to negotiate with these Participants, the Digital Platforms would also incur costs in each negotiation.

98. In this case, a public benefit in the form of reduced transaction costs is likely to arise from collective bargaining. However, the Commission considers that the magnitude

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108 Stephen King - Collective Bargaining by Business at page 113.

109 Stephen King - Collective Bargaining by Business at page 113.

110 Stephen King - Collective Bargaining by Business at page 132.

of this benefit is unlikely to be as large as that submitted by NPA for two main reasons:

- 98.1 There is a degree of heterogeneity among Participants, particularly in terms of scale, sophistication,¹¹¹ and digital maturity.¹¹² This is likely to give rise to some additional negotiating costs under the Proposed Arrangement.
- 98.2 We consider it is likely that without the Proposed Arrangement some Participants would be unable to meaningfully negotiate and reach individual, bilateral agreements with the Digital Platforms. In some cases, if the cost of participation in bilateral negotiations was too high for some Participants and/or Digital Platforms, and they chose not to negotiate at all, then no transaction costs would be incurred, and very few transaction costs may be incurred if negotiations were short and unsuccessful.¹¹³ For example, to date there has been limited meaningful negotiation between small news media companies and Digital Platforms,¹¹⁴ with offers to small companies (if an offer is made at all) framed either on a “take or leave” basis, or with very limited avenues for negotiation.¹¹⁵
- 99. Nevertheless, despite the savings being less than submitted by NPA, a benefit in the form of avoided transaction costs is likely from the Proposed Arrangement because collective negotiations are likely to incur lower total costs than the total sum of costs incurred for individual bilateral negotiations. Even if all negotiations with Participants were ultimately undertaken bilaterally, transaction cost savings may still arise if, for example, the Participants were able to share the cost of professional advice.
- 100. Generating a quantitative estimate of these benefits is difficult because of uncertainty regarding the length and cost of negotiations (both bilaterally and on a collective basis), and the number of individual bilateral negotiations that would

¹¹¹ For example, some Participants are exclusively digital publications and/or operate sophisticated websites with live links to content, while other smaller Participants display a ‘PDF’ version of their print publication on their website.

¹¹² For example, the Ashburton Guardian has paywalled content. Other Participants, including Westport News, Whakatane Beacon, and The Wairoa Star offer digital versions of their publications for a fee.

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¹¹⁴ [].

[] See also []

¹¹⁵ Although there would be no transactions costs avoided if negotiations were not to proceed with some Participants without the Proposed Arrangement, there would nevertheless be other benefits likely to arise if these Participants were able to obtain funding with the Proposed Arrangement. These benefits are discussed in more detail in the ‘Improving an imbalance in bargaining power’ section below.

occur without the Proposed Arrangement. We have not attempted to quantify the value of the likely transaction costs savings. However, our finding that there is likely a net public benefit does not turn on the precise value of this benefit (see ‘Balancing of benefits and detriments’ section below).

More efficient contracts

NPA’s submissions

- 101. NPA submitted that the Proposed Arrangement is likely to achieve more sophisticated and efficient contract terms in any agreements reached with the Digital Platforms. This is because Participants would be able to pool their resources, share information, and engage specialised staff to negotiate with the Digital Platforms.¹¹⁶ NPA submitted that exploiting economies of scale in negotiations may enable the Participants to bargain more effectively, resulting in better, more efficient contracts.¹¹⁷
- 102. NPA also pointed to the ACCC’s Commercial Radio Australia (**CRA**) determination.¹¹⁸ The ACCC considered that relative to individual negotiations, collective bargaining may offer increased opportunities for Participants to provide input into the negotiated terms of agreements made with the Digital Platforms. Its view was that this could ultimately lead to contract terms that are more comprehensive, and better reflect the circumstances of Participants and the relevant Digital Platform.¹¹⁹

Google’s submissions

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Meta’s submissions

- 104. As noted above, Meta has stated that it does not enter, and has not entered, into commercial agreements to remunerate news media companies for existing published content. However, in some cases it does reach commercial agreements for new or additional content which Meta considers will benefit the users of its

¹¹⁶ NPA Authorisation application at [8.12(c)].

¹¹⁷ NPA Authorisation application at [8.12(a)]; Stephen King - Collective Bargaining by Business.

¹¹⁸ NPA Authorisation application at [6.1(a)] and [8.12(c)].

¹¹⁹ NPA Authorisation application at [8.12(c)]; Determination – Application for authorisation lodged by Commercial Radio Australia on behalf of itself and its current and future members in respect of collective negotiations with each of Facebook and Google concerning payment for content produced by those members and featured on those platforms [2021] ACCC AA1000565 at [4.15]; Stephen King - Collective Bargaining by Business.

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¹²¹ []

platforms []¹²²It also supplies funding in some cases to assist with digital transformation.¹²³

105. Meta does not consider that every media organisation is suited for a commercial deal, as a media organisation may not have capacity to enter into complex agreements or have the capacity to support new product or content development. It states that this is why it invests in partnership support, access to monetisation tools, programs, and financial grants to aid smaller media companies' digital transformations.¹²⁴ For example, on 11 April 2022, Meta announced the Country Press Australia Newsroom Sustainability and Digital Transformation Fund. This is a fund to be dispersed to CPA members over a three-year period to support the digital transformation of regional newsrooms in Australia.¹²⁵

Our assessment

106. Allowing negotiation and transaction costs to be shared across parties can make collective bargaining relatively less expensive for parties to effectively negotiate and resolve marginal issues. This is likely to enable more sophisticated, efficient, and mutually beneficial contracts to be reached.¹²⁶
107. We consider that [] is an example of this type of benefit. In particular, Google said that []¹²⁷]
108. Our understanding of [], gives us greater confidence that such contracting efficiencies may arise in negotiations with Google. The evidence is less clear on whether such efficiencies will arise in relation to negotiations with Meta.
109. On balance, the Commission considers that collective bargaining is more likely to produce more sophisticated and efficient contract terms than individual negotiations. Small Participants, who may otherwise have little ability to effectively negotiate with the Digital Platforms bilaterally, are particularly likely to benefit in this way.
110. The magnitude of this benefit will depend on the outcome of negotiations. Generating a quantitative estimate of these benefits is difficult and we have not attempted to quantify the benefits. However, our finding that there is a net public

¹²² [] Meta SOPI cross-submission at page 1.

¹²³ []

¹²⁴ Meta SOPI cross-submission at page 1.

¹²⁵ Meta "106 Regional Publishers Awarded Country Press Australia Newsroom Sustainability and Digital Transformation Fund" (press release, 11 April 2022) <<https://www.facebook.com/formedia/blog/meta-announces-recipients-of-country-press-australia-news-fund>>.

¹²⁶ Stephen King - Collective Bargaining by Business at page 119.

¹²⁷ []

benefit does not turn on the precise value of this benefit (see ‘Balancing of benefits and detriments’ section below).

More or better news content

111. Where collective bargaining addresses an imbalance of bargaining power, collective bargaining can have the effect of achieving agreements where otherwise there would be none. Collective bargaining can also result in the negotiation of better terms (for example, increased funding) than the members of the Collective would have achieved individually. In this section we consider (a) whether, and in what respects, there is likely to be an imbalance of bargaining power between the Digital Platforms and the Participants; and (b) if so, whether the Proposed Arrangements are likely to redress that imbalance.
112. We then go on to consider the likelihood of any additional benefits achieved as part of the Proposed Arrangement resulting in improved production of news content, with associated public benefits.

Improving an imbalance in bargaining power

NPA’s submissions

113. The NPA submitted that the Proposed Arrangement is likely to improve the balance in bargaining power that exists between media companies and the Digital Platforms. The NPA submitted that the Digital Platforms are “unavoidable trading partners” for New Zealand news media companies, who rely on the Digital Platforms for audience and referrals.¹²⁸ The NPA submitted that the Proposed Arrangement would at least partially address a bargaining imbalance as:¹²⁹
- 113.1 smaller Participants would gain the opportunity to achieve fair remuneration where they would not have had the resources to otherwise; and
- 113.2 even the largest Participants would be at a significant financial and administrative resource disadvantage in individual negotiations with the Digital Platforms.

Google’s submissions

114. Google submitted that it is not an unavoidable trading partner and therefore, no bargaining power imbalance exists between it and the news media platforms.¹³⁰
115. Google submitted that the majority of online news traffic to news media companies comes from sources other than Google, with 85% of the traffic received by the top 40 New Zealand news websites not originating from referrals from Google.¹³¹ It also noted that news media businesses can distribute their content by a number of means other than Google.

¹²⁸ NPA Authorisation application at [4.6(a)].

¹²⁹ NPA Authorisation application at [8.6].

¹³⁰ Google Provisional Submission at page 6; Google SOPI submission at pages 7, 8.

¹³¹ Google SOPI submission at page 3.

116. Google disputed that the display of links, snippets, and thumbnails of news content on its platform was indicative of “free-riding” or “a wealth transfer from New Zealand owned news media companies” to Google.¹³² Rather, that this usage is the natural consequence of the fact that search engines use links, snippets, and thumbnails to generate free referral traffic to publishers, which creates a non-monetary value exchange between search engines, publishers, and users.¹³³ Google submitted that in 2020 Google Search and Google News led to 628 million visits to New Zealand news media companies, both large and small, without financial charge.¹³⁴
117. Google also submitted that there is a two-way value exchange, with news media companies obtaining a significant volume of referral traffic at no charge.¹³⁵ This referral traffic provides value to news media companies by providing them with the opportunity to increase advertising revenue, attracting more paying subscribers, or request contributions. Google estimated that the value to New Zealand news websites of this traffic in 2020 exceeded \$44 million, whereas Google itself generated approximately \$1.6 million in revenue from news-related queries.¹³⁶ However, Google considers the value it receives is not substantial.
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Meta’s submissions

118. Meta also submitted that it is not an unavoidable trading partner, and that news media companies can access the Facebook audience through a variety of channels.¹³⁸ These alternatives include direct engagement with their audience, news apps and aggregators, and many other digital platforms such as YouTube, Twitter, Snapchat, TikTok, Apple News, Viber, WeChat, Telegram, Reddit, and LinkedIn. Meta noted that Stuff ceased publishing links on Facebook in July 2020, but despite this did not suffer a significant drop in traffic.¹³⁹ Meta submitted that data demonstrated that the majority of traffic to Participants’ websites (69%) came from visitors navigating directly to those websites, with 19% coming from online search, and 7% from all social media networks (Facebook, Twitter, etc).¹⁴⁰
119. Meta also considered that the alleged imbalance in bargaining power is not consistent with its previous and current contributions to the news media sector in New Zealand, as well as the provision of tools and benefits that it provides to news media companies free of charge.¹⁴¹

¹³² Google SOPI submission at page 2.

¹³³ Google SOPI submission at page 2.

¹³⁴ Google SOPI submission at pages 2 and 3.

¹³⁵ Google SOPI submission at pages 2 and 9.

¹³⁶ Google SOPI submission at pages 2 and 3.

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¹³⁸ Meta SOPI submission at page 16.

¹³⁹ Meta SOPI submission at page 17.

¹⁴⁰ Meta SOPI submission at page 17.

¹⁴¹ Meta SOPI submission at page 17.

120. Meta noted that news content is not very important for Meta users, or Meta itself. First, Meta submitted that news-related content formed a relatively small share (4%) of content shared on Meta’s platform.¹⁴² Second, Meta told us that when it changed the algorithm to prioritise user-created content, engagement increased, which shows that users prefer user-created content.¹⁴³

Our assessment

121. The participating news media companies and Digital Platforms both agree that there is a two-way value exchange in relation to online news content and referral traffic to news websites.¹⁴⁴ With the exception of Stuff’s limited use of Facebook, the fact that no Digital Platform or media company has withdrawn from the exchange demonstrates that both parties receive value from it.¹⁴⁵
122. Despite this two-way exchange in value, individual news media companies are likely to be in a relatively weak bargaining position. This is because New Zealand news content from an individual news media company is typically relatively substitutable for news content produced by one or more of its rivals (eg, news content produced by Stuff may be relatively substitutable for content produced by NZME, Discovery, RNZ and/or TVNZ from the Digital Platforms’ perspectives). If a news media company makes it relatively unattractive for the Digital Platforms to link or host that company’s content, the Digital Platforms can instead link or host content from that company’s rival(s).¹⁴⁶
123. 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.¹⁴⁷ Additionally, the Digital Platforms have greater resources to dedicate to negotiations, and greater financial sustainability and security with which to hold out during any negotiations.¹⁴⁸

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¹⁴³ Meta SOPI submission at page 3.

¹⁴⁴ Google SOPI submission at page 2; Meta SOPI submission at page 3; NPA Authorisation application at [1.6(a)].

¹⁴⁵ We note that news media companies cannot prevent third party users from sharing links on Facebook. See: []

¹⁴⁶ Although some news consumers are likely to have strong brand loyalty to one news media company, and others may value plurality and seek to obtain content from a variety of sources, others are likely to view news as more of a commodity product such that the content of different news media companies is relatively substitutable. []

¹⁴⁷ This position is consistent with that of the ACCC, see DPI report at [5.3.1], and “The implications of competition and market trends for media plurality in New Zealand” commissioned by Manatū Taonga, (2021) (**Sapere Report**) at [78].

¹⁴⁸ Google and Meta have annual revenues of \$392 billion and \$178 billion respectively in 2021, and have market capitalisations of \$383 billion, which is far in excess of the largest Participant, Stuff, which reported revenue of \$129 million in the first half of 2019/2020 Financial Year. Figures for Digital Platforms are converted at an exchange rate of 0.66 NZD/USD. See: Alphabet Inc “Form 10-K Annual

124. An increasing number of jurisdictions either have imposed, or are considering imposing, requirements on Digital Platforms to provide funding to news media companies and/or to enable news media companies to bargain collectively.¹⁴⁹ While this is a possibility in New Zealand,¹⁵⁰ we are unable to assess the likelihood or possible form of future regulatory intervention with any certainty and so we assess the threat of future regulation to be insufficiently strong at present to mitigate the imbalance of bargaining power between the Digital Platforms and media companies.¹⁵¹
125. We consider collective bargaining by news media companies could redress the imbalance in bargaining power despite there remaining news media companies with whom the Collective's news content is relatively substitutable outside of the Collective, for example, Discovery, TVNZ, NZME and RNZ.^{152, 153}
126. Smaller news media companies appear most likely to gain from membership of the Collective to the extent the Proposed Arrangement facilitates successful negotiations with the Digital Platforms that would not otherwise occur. Absent the Proposed Arrangement, the Digital Platforms may have less incentive to engage meaningfully with these smaller news media companies given the relatively low volume and value of their content. For instance, there are reports that Meta has refused to negotiate with The Conversation in Australia.¹⁵⁴ This is particularly the case given the

Report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2021" (2021) https://www.sec.gov/Archives/edgar/data/1652044/000165204422000019/google-20211231.htm#i0ef93c820da04204a9c5a49f49a3b2eb_130; Meta Platforms, Inc "Form 10-K Annual Report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2021" (2021) < <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/14039b47-2e2f-4054-9dc5-71bcc7cf01ce.pdf>>. "Stuff posts 3 per cent rise in revenue, 'remains held for sale'" *Stuff* (26 February 2020), available at: <https://www.stuff.co.nz/business/119817314/stuff-posts-129m-revenue>

¹⁴⁹ See **Attachment A** for more details.

¹⁵⁰ Manatū Taonga submitted that "[f]inancial agreements for news media content are primarily a commercial matter" and it is focused on encouraging New Zealand media companies to reach commercial arrangements with the digital platforms. Manatū Taonga also told us that because there has been a lack of progress in commercial discussions between the Digital Platforms and the news media companies, Manatū Taonga is considering policy options to support news media companies in reaching commercial agreements with Digital Platforms. They went on to note that "[d]eveloping effective regulatory solutions commonly takes years". Manatū Taonga "Submission in response to NPA Authorisation Statement of Preliminary Issues" (4 February 2022) at page 2.

¹⁵¹ The situation may be compared to *New Zealand Bus Limited and Wellington Regional Rail Limited/Tranz Metro* [2001] Decision No. 450, where the applicant suggested there may be legislative change. In that case, we considered that there was nothing before Parliament that we could properly take notice of as there was no Act that had been passed but was yet to come into force and no Bill before Parliament.

¹⁵² We also note that Authorisation of the Proposed Arrangement would not enable the Participants to organise a collective boycott of the Digital Platforms.

¹⁵³ The exclusion of Discovery and TVNZ in particular appears to limit the bargaining power of the Collective in relation to Meta. []

¹⁵⁴ Also SBS. See The Guardian "Rod Sims says Facebook should be forced to negotiate with SBS under news media bargaining code" (22 May 2022) <<https://www.theguardian.com/media/2022/may/23/rod-sims-says-facebook-should-be-forced-to-negotiate-with-sbs-under-news-media-bargaining-code>>.

transaction costs associated with bilateral negotiations with each of these Participants.

Improving production of news content

NPA's submissions

127. NPA submitted that benefits would arise from agreements successfully negotiated between the Participants and the Digital Platforms via the Proposed Arrangement that resulted in the payment of “fair compensation” by the Digital Platforms to the Participants. Any such additional funding (beyond that which is currently provided) would contribute to the sustainability of an independent and diverse news media industry and improve Participants’ ongoing ability to produce news and journalistic content, in turn enhancing media plurality,¹⁵⁵ which is a relevant public benefit.¹⁵⁶ NPA submitted that this in turn would offset costs the Participants incur countering misinformation present on certain platforms.¹⁵⁷

Participants' comments

128. [

158]

Digital Platforms' submissions

129. The Digital Platforms recognised the public benefits associated with a sustainable news ecosystem, both for New Zealand democracy and society generally,¹⁵⁹ but considered that a collective bargaining arrangement is not necessary to reach these outcomes.¹⁶⁰ Both Digital Platforms detailed the various initiatives they have already implemented to contribute to the sustainability of news media companies.
130. Meta submitted that it has its own processes in place for combatting misinformation on its platforms, for example, by removing content or disabling fake accounts, using third-party fact checkers and displaying warnings about misleading information, and developing tools that promote and connect users to reliable information from trusted resources.¹⁶¹

¹⁵⁵ NPA Authorisation application at [8.7].

¹⁵⁶ NPA Authorisation application at [8.8].

¹⁵⁷ NPA Authorisation application at [4.16] and [8.12(d)].

¹⁵⁸ [

]

¹⁵⁹ Meta “Meta submission to the New Zealand Commerce Commission on NPA’s provisional authorisation application” (8 December 2021) (**Meta Provisional Submission**) at page 2; Google Provisional Submission at page 8; Meta SOPI submission at page 2.

¹⁶⁰ Meta SOPI Submission at page 5; Google SOPI Submission at page 2.

¹⁶¹ Meta Provisional Submission at pages 10 and 11.

131. Both Digital Platforms considered that the level of funding provided to news media companies would be similar both with and without the Proposed Arrangement.¹⁶² Therefore, they do not contemplate the possible impact of higher revenue under collective bargaining.

Our assessment

132. The Commission considers it likely that some portion of any additional funding would be used to improve the production of news content.¹⁶³ This could occur directly through the funding of greater journalistic resources or indirectly through other investments that promote the operation or sustainability of Participants' businesses.
133. We consider that the smaller Participants, many of whom are local or regional news media companies, are the Participants most likely to obtain an increase in funding as a result of the Proposed Arrangement. This is because they are most likely to be unable to obtain commercial agreements with the Digital Platforms without the Proposed Arrangement, because transactions costs are likely to be relatively high and/or they lack sufficient bargaining power when attempting to negotiate in isolation. Relevant to this is the trend of ongoing decline in public interest news in smaller urban centres.¹⁶⁴ We note that local investigative journalism often covers stories on local institutions that are of less interest to, and so are often not covered by, national news media companies.¹⁶⁵
134. Other smaller Participants that may obtain funding or obtain increased funding as a result of the Proposed Arrangement could include recent or future entrants, such as online-only news outlets, of which The Spinoff and Newsroom are examples.
135. We note the position outlined in the Sapere Report commissioned by Manatū Taonga in 2021, which is that regulating to require payments to news media companies from the Digital Platforms would not necessarily lead to an increase in public interest journalism.¹⁶⁶ We note that Sapere was tasked with evaluating whether a policy intervention such as an Australian-style News Media Bargaining Code would be effective in New Zealand. In the context of this application, we must consider a different threshold: whether potential benefits of the Proposed

¹⁶² Meta SOPI submission at page 16; Google SOPI submission at page 2.

¹⁶³ For the purposes of assessing the Proposed Arrangement, we have broadly considered the supply of New Zealand news content, encompassing all formats of news content (text, audio, video), irrespective of media type (online, print, radio, television). To streamline our analysis this also encompasses potential regional or local news markets.

¹⁶⁴ Between 2014 and 2019 the number of regional reporters fell by 28%. Sapere Report at page 20.

¹⁶⁵ United Kingdom Department for Digital, Culture, Media & Sport "The Cairncross Review a sustainable future for journalism" (12 February 2019) (**Cairncross Review**) at page 21 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf>.

¹⁶⁶ In particular, Sapere's view was that "requiring the Digital Platforms to pay specific news firms in order to link their content will improve the finances of those news firms, but there is no clear basis to believe that this will result in additional public-interest journalism or better quality journalism". Sapere Report at page 79. Sapere acknowledges that its view on the rationale for intervention differs from that in Australia.

Arrangement have a “real chance” of eventuating if the arrangement proceeds.¹⁶⁷ We consider that the evidence we have obtained demonstrates that there is a real chance that some proportion of any increased funding resulting from commercial negotiations under the Proposed Arrangement would be used to produce more or better public interest news content.

136. 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.¹⁶⁸ Accordingly, we consider there is a real chance that some proportion of any additional funding achieved under the Proposed Arrangement would be used to fund the production of news content, even if some funding would be used for other purposes, including covering other costs or investments, or being distributed to shareholders.

Overall assessment of benefits arising from more news content

137. On balance, we consider 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. The magnitude of these benefits will depend on the outcomes of any negotiations.

Other potential benefits

138. In its Authorisation application, the NPA submitted that there are other public benefits that would arise from granting authorisation:
- 138.1 preventing an existing wealth transfer from the Participants to the Digital Platforms’ foreign shareholders, which is caused by the Digital Platforms’ use of the Participants’ content;¹⁶⁹
- 138.2 reducing the need to draw on scarce public funding to sustain the New Zealand news media industry, which is a public benefit;¹⁷⁰ and
- 138.3 mitigating the need for specific Government regulation through the introduction of a mandatory bargaining code, which would generate a public benefit as it would allow the time and resources spent by Parliament and policy agencies to be deployed elsewhere.¹⁷¹

¹⁶⁷ As explained in the ‘How we assess authorisations during an ‘epidemic period’ section’, paragraph [42] above. *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [83] and [86(a)].

¹⁶⁸ In particular, because we expect that any additional funding received by news media would not be significant enough in the context of overall revenues to reduce the reliance of media companies on other sources of revenue. In addition, funding is likely be roughly proportional to the size of these news media companies. Media companies will therefore remain incentivised to compete, in particular by attracting advertising revenue through the production of news content. [];

[];

¹⁶⁹ NPA Authorisation application at [8.12(e)].

¹⁷⁰ NPA Authorisation application at [8.12(f)(i)].

¹⁷¹ NPA Authorisation application at [8.12(f)(ii)].

139. We have considered these submitted benefits under the following headings:

139.1 Beneficial wealth transfers; and

139.2 Avoiding regulatory and/or public funding costs.

Beneficial wealth transfers

140. As explained above, we consider that public benefits are likely to arise if additional funding resulting from the Proposed Arrangement is used to improve the production of news content. However, it is possible that some proportion of any additional funding may be used for other purposes, such as being retained by shareholders. We note that a wealth transfer from a foreign owned business to New Zealanders does not necessarily constitute a benefit to the New Zealand public. However, if this transfer is sourced from functionless economic rents¹⁷² derived by the foreign owned business, it may constitute such a benefit.¹⁷³

141. We consider it is likely that some proportion of any additional funding gained by the Participants through the Proposed Arrangement would be used to improve the production of news content.¹⁷⁴ Given this likely benefit, along with the other likely benefits discussed above and the lack of likely detriments discussed below, we do not consider it is necessary to further assess whether any funding retained by the owners of New Zealand news media companies would constitute a beneficial wealth transfer.

Avoided regulatory and/or public funding costs

142. Avoiding costs associated with regulation or public funding may constitute a public benefit in certain circumstances.¹⁷⁵ However, it is not clear that the Proposed Arrangement would give rise to these benefits since there is no certainty that regulation may be imposed or may be avoided if authorisation is granted. Therefore, we have not assessed and do not place weight on these claimed public benefits.

Potential detriments

143. We consider that there are three main potential detriments that could arise from the Proposed Arrangement:

143.1 A potential lessening of competition in the supply of New Zealand news content if news media companies excluded from the Proposed Arrangement were disadvantaged in obtaining funding from the Digital Platforms relative to news media companies in the Collective, and as a result are less able to compete against the Participants;

¹⁷² 'Functionless economic rents' are 'supranormal profits' that arise neither from cost savings nor from innovation, where "supranormal profits" refer to profits above a normal (competitive) rate of return.

¹⁷³ See Authorisation Guidelines at [77]; *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZHC 1262 at [36]-[38] and *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 at [50].

¹⁷⁴ []

¹⁷⁵ See for example *Infant Nutrition Council Limited* [2018] NZCC 20 at [114].

143.2 A potential lessening of competition in the supply of New Zealand news content that could arise if increased payments from Digital Platforms to the Participants resulting from the collective bargaining process limit the incentives of the Participants to compete with each other in the supply of news content, and/or if competitively sensitive information shared between Participants in the process of negotiating were to alter the competitive dynamics; and

143.3 A loss in allocative efficiency, if any increased costs to Digital Platforms of operating in New Zealand flow through into higher prices borne by the consumers of their services (users or advertisers) and there is lower usage of these services as a result.

144. We consider that none of these detriments are likely to arise.

Potential lessening of competition from exclusion of Broadcasters

145. As noted above,¹⁷⁶ the Proposed Arrangement explicitly excludes state-owned media organisations and media entities that are not currently listed on the NZX or that are otherwise "overseas persons" (as defined in the OIA), including Discovery (*Newshub*), TVNZ, RNZ and Māori TV.

146. If the Proposed Arrangement was to increase the bargaining power of the Participants relative to the excluded Broadcasters, the Participants could obtain superior commercial agreements compared to those obtained by the Broadcasters. A subsequent relative increase in funding and associated resourcing advantage obtained by the Participants could disadvantage the Broadcasters in the supply of New Zealand news content. However, we consider that the Proposed Arrangement is unlikely to generate commercial arrangements granting a substantial competitive advantage to the Collective relative to the Broadcasters.

NPA's submissions

147. NPA considers it unlikely that the Proposed Arrangement would lead to a substantial lessening of competition in any market. NPA submitted it was not likely that excluded news media companies would be disadvantaged because:

147.1 Some excluded news media companies (such as RNZ and TVNZ) have or will soon have additional sources of funding (in particular, from the Government);¹⁷⁷

147.2 Excluded news media companies such as the Broadcasters can separately apply for authorisation to collectively bargain with the Digital Platforms if they so choose;¹⁷⁸ and

¹⁷⁶ In the 'Proposed Arrangement' section.

¹⁷⁷ NPA Provisional cross-submission at [36].

¹⁷⁸ NPA Provisional cross-submission at [35].

147.3 []¹⁷⁹

148. Furthermore, NPA considered that the inclusion of the Broadcasters could lessen the benefits that could be achieved through collective bargaining. NPA submitted that this is because the Broadcasters have substantially different business models to the Participants, which would increase the heterogeneity amongst Participants, reducing transaction cost benefits.¹⁸⁰

Broadcasters' submissions

149. []¹⁸¹ Discovery indicated that access to additional funding would give the Participants a competitive advantage, particularly in relation to the acquisition and retention of journalistic talent.¹⁸² []¹⁸³

149.1 RNZ submitted that the Collective would create a “closed shop”, which would afford a first mover advantage to the Participants in negotiations with the Digital Platforms. RNZ considered there was potential for excluded parties to be disadvantaged.¹⁸⁴

149.2 []¹⁸⁵

149.3 []¹⁸⁶

149.4 []¹⁸⁷

150. Broadcasters were generally of the view that their inclusion in the Collective would not significantly increase heterogeneity. []¹⁸⁸

¹⁷⁹ NPA Provisional cross-submission at [35].
¹⁸⁰ NPA Provisional cross-submission at [35].
¹⁸¹ []; []; []
¹⁸² Discovery “NPA Provisional [sic] Authorisation” (10 February 2022) (Discovery SOPI submission) at [44].
¹⁸³ []; []; []
¹⁸⁴ RNZ, “NPA Provisional Authorisation” (1 December 2021) (**RNZ Provisional Submission**).
¹⁸⁵ []
¹⁸⁶ []
¹⁸⁷ []
¹⁸⁸ []

Google's submissions

151. Google told us that it intends to negotiate with news media companies [], regardless of the news media company's inclusion or exclusion from the Proposed Arrangement.¹⁸⁹

Meta's submissions

152. Meta submitted that it has collaborated, and will continue to collaborate, with New Zealand publishers, including the Broadcasters where relevant, through investments such as bespoke commercial deals, video clip deals, and the Aotearoa Audience Development Accelerator.¹⁹⁰

Our assessment

153. We consider that the Proposed Arrangement is unlikely to generate a substantial competitive advantage to the Collective relative to the Broadcasters. It appears that the Broadcasters are likely to be able to enter bilateral negotiations with the Digital Platforms regarding commercial arrangements for funding. Both Digital Platforms told us that they intend to negotiate fairly with all parties regardless of whether they are included in the Collective or not.
154. As outlined above, we consider it is unlikely that the increased bargaining power of the Collective will be substantial, particularly following the exit of NZME. The Broadcasters, negotiating with the Digital Platforms on an individual and bilateral basis may not be significantly disadvantaged. In addition, as noted above, we consider that larger Participants (ie, Participants of a comparable size to the Broadcasters and with whom the Broadcasters compete against most directly) will gain relatively less benefit from addressing the bargaining power imbalance. Therefore, we consider that the relative outcomes for the Broadcasters if the Proposed Arrangement proceeds are likely to be broadly the same as if the Proposed Arrangement does not proceed.
155. We consider that NZME's decision to negotiate individually and enter bilateral arrangements with the Digital Platforms outside of the Proposed Arrangement is consistent with this view. This is particularly the case given that NZME in several regards has greater similarities to the Broadcasters than any of the remaining Participants.¹⁹¹
156. Furthermore, the video content production capabilities of Discovery and TVNZ are currently more advanced than those of the Participants. We understand that this content is of particular interest to the Digital Platforms, []. This is likely because video-based content typically attracts higher rates of engagement than display advertising associated with

¹⁸⁹ Google SOPI submission at page 1-2; []

¹⁹⁰ Meta SOPI submission at page 3 and 4.

¹⁹¹ NZME is a relatively large news media company that has a national news focus across a wide range of news categories, has a substantial (radio) broadcasting presence, and produces a significant volume of multi-media content, including video.

text-based content.¹⁹² This may give the Broadcasters an advantage in negotiating commercial agreements with Meta.

157. Additionally, it does not appear likely on the evidence currently before us that there would be a substantial ‘first mover advantage’ for the Collective relative to the Broadcasters. Such an advantage could exist if the Digital Platforms had fixed budgets available for providing funding to New Zealand news media companies, and the Proposed Arrangement provided a significant improvement in bargaining power for Participants relative to the Broadcasters. However, it is not clear that the Digital Platforms are limited by a fixed budget for any funding to be provided to New Zealand news media, but rather by consistency with []. We note that:

157.1 [¹⁹³]
 [¹⁹⁴] and

157.2 Meta stated it has a separate investment strategy aimed at assisting news companies with digital transformation with its Accelerator programs, trainings, partnerships and video clip deals. Meta stated that it would proceed with this strategy irrespective of the Proposed Arrangement.¹⁹⁵

158. We consider that the Digital Platforms have a strong incentive not to deviate from their [] approaches to funding news media companies. This suggests that the Broadcasters are unlikely to receive substantially less advantageous terms to those in the Collective.

159. In this regard,
 [¹⁹⁶]

160. We also consider that it is unlikely that any Participants would be able to obtain preferential non-funding related terms (such as preferential positioning in Google Search results or users’ Facebook Feeds) that could give rise to a competitive advantage over the Broadcasters:

160.1 In relation to Google, we consider it is unlikely that any New Zealand news media companies (whether in or out of the Collective) would be able to successfully negotiate for their content to be posted more prominently in the organic search results for Google Search queries (including Top Stories).¹⁹⁷

¹⁹² Discovery SOPI submission at [25].

¹⁹³ []

¹⁹⁴ []

¹⁹⁵ Meta SOPI submission at pages 15-16.

¹⁹⁶ []

¹⁹⁷ “Tip: There is no way to request or pay for a better local ranking on Google”: See Google Business Profile Help, “How Google determines local ranking” <<https://support.google.com/business/answer/7091?hl=en#zippy=%2Crelevance%2Cdistance%2Cprominence>>.

Prioritisation of content from certain news media companies would jeopardise Google’s commitment to neutrality in the returning of search results. Therefore, we consider it highly unlikely that Google would be willing to incorporate this type of non-price term regardless of the Proposed Arrangement (and we are unaware of Google agreeing to such terms in other jurisdictions).

160.2 In relation to Meta, organic (non-advertising) content displayed on a users’ Facebook Feed typically reflects that user’s activity on Facebook, such as friends, Pages followed, etc. Facebook’s algorithm seeks to place content Facebook considers to be the most relevant to the user at the top of the Feed.¹⁹⁸ Third party content producers such as news media companies can already pay to promote their content as “boosted posts”, which are advertisements created from posts on a user’s Facebook Page.¹⁹⁹ While the Collective could attempt to negotiate better terms (for example, a reduction in price for boosted posts), for the reasons identified above we do not consider that the excluded Broadcasters would be disadvantaged in any negotiations they might similarly have with Meta regarding the same terms.²⁰⁰

161. Regarding other non-price terms, such as content requirements which may form part of any commercial agreements,

[

]²⁰¹

However, the Broadcasters do not fall within this category of publishers and so would not benefit from these types of terms in any event.

[

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162. Given we consider that it is unlikely that the excluded Broadcasters (negotiating on an individual and bilateral basis) would be materially disadvantaged relative to the Collective in commercial negotiations with the Digital Platforms, we consider that that there are unlikely to be material detriments to competition in the supply of New Zealand news content arising from the exclusion of the Broadcasters from the Proposed Arrangement.

Reduced incentive to compete between Participants

163. The Proposed Arrangement could reduce their incentives to compete if Participants were to secure a significant source of funding that is not tied sufficiently closely to their ongoing performance in attracting audience by supplying New Zealand news content. In such circumstances, Participants may be less likely to compete to supply

¹⁹⁸ Akos Lada “How Does News Feed Predict What You Want to See?” (26 January 2021) <<https://about.fb.com/news/2021/01/how-does-news-feed-predict-what-you-want-to-see/>>.

¹⁹⁹ Meta “About boosted posts” <<https://www.facebook.com/business/help/240208966080581?id=352109282177656>>.

²⁰⁰

[

]

²⁰¹

[

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news content to users (and for the associated advertising dollars), if page views and audience reach become less important.

NPA’s submissions

- 164. NPA submitted that there would remain an incentive for news media companies to compete, and that the incentive to maximise the volume and attractiveness of their content would continue. Furthermore, the NPA notes that parties are not bound to participate in the Proposed Arrangement and can seek bilateral agreements if they so wish.²⁰²
- 165. This view was echoed by media companies (both in and out of the Collective) on the basis that it was highly unlikely that funding secured from the Digital Platforms would obviate the need for other sources of income. 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.²⁰³ Media companies noted that the funding secured in other jurisdictions (such as Australia), whilst meaningful, was insufficient to reduce the incentive to compete in this way.

Digital Platforms’ submissions

- 166. Meta considered that the Proposed Arrangement could lessen competition between members of the Collective. Meta highlighted that competition between news media companies is important for media plurality.²⁰⁴ In contrast,
[]²⁰⁵

- 167. The Digital Platforms noted that the funding that they offered outside of the Proposed Arrangement included incentives for Participants to continue to compete:

167.1 []²⁰⁶

167.2 []²⁰⁷

²⁰² NPA SOPI cross-submission at page 20.

²⁰³ []; []

²⁰⁴ Meta SOPI submission at page 4.

²⁰⁵ []

²⁰⁶ []

²⁰⁷ []

Our assessment

168. We consider the Proposed Arrangement would be unlikely to materially reduce the incentive for Participants to compete. We are 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.
169. Evidence we have obtained suggests that any funding likely to result from commercial agreements is likely to constitute only a relatively small proportion of news media companies' overall income.²⁰⁸ Consequently, 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.
170. Furthermore, we do not consider it likely that any loss to competition would arise from Participants sharing competitively sensitive information. The Collective has implemented information sharing protocols to mitigate against the risk of sharing sensitive information which may facilitate horizontal coordination between Participants, in breach of the Act. Given protocols are in place, we do not consider it likely that any loss to competition would arise for this reason.

Potential allocative efficiency detriments from higher costs to Digital Platforms

171. If the Proposed Arrangement leads to increased funding to at least some Participants, in principle the Digital Platforms could seek to pass on these funding costs to their downstream customers, such as platform users or advertisers. Any such price increases in downstream markets could generate allocative efficiency detriments if the output in these markets subsequently falls.

Our assessment

172. We consider that any increased funding provided by the Digital Platforms as a result of the Proposed Arrangement would be akin to an increase in fixed costs associated with their New Zealand operations. We consider any such increased costs are unlikely to lead to higher downstream prices for advertising services, or to higher costs for users of these platforms which are typically zero priced. Therefore, there is likely to be little, if any, impact on usage of the Digital Platforms. Additionally, we do not consider that any increased funding provided by the Digital Platforms because of the Proposed Arrangement would be of a sufficient magnitude to reduce their incentive to continue operating in New Zealand, nor to reduce the news content they host or link. As a result, we do not consider there are likely to be any allocative efficiency detriments arising in from higher costs to the Digital Platforms from authorisation.

²⁰⁸ [] NZME "NZME Limited 2021 Full Year Financial Results" (23 February 2022) <[>](https://www.nzme.co.nz/news/nzme-limited-2021-full-year-financial-results/#:~:text=2021%20Operating%20EBITDA1%20of,to%20%2479.5%20million%20in%202021>)

Balancing of benefits and detriments

173. On the basis of the available evidence, our preliminary view is that authorising the Proposed Arrangement is more likely than not to lead to a net public benefit. In reaching this view, we are preliminarily finding that the Proposed Arrangement will be likely to result in such a benefit to the public that its entry and effect should be permitted.
174. Given the difficulty in producing quantitative estimates for several of the likely impacts, and given that we do not consider quantitative estimates are necessary to enable us to reach a view on the likely net public benefit, we have made this assessment qualitatively in accordance with the Court of Appeal’s decision in *Godfrey Hirst*.
175. In summary, we consider that the Proposed Arrangement is likely to result in the following public benefits:
- 175.1 Benefits from transaction cost savings and more efficient contracts.
- 175.2 Increased funding (including funding where no funding would otherwise eventuate) to at least some Participants as a result of addressing the imbalance of bargaining power between media companies and the Digital Platforms. Any increased funding is likely to lead to benefits in the form of improved production of news content, particularly in relation to local or regional news.
176. It is possible that the Proposed Arrangement could generate additional benefits from foreign wealth transfers and/or avoided regulatory costs. However, we have not assessed the likelihood or scale of any such benefits, nor placed weight on any such benefits as part of our assessment. We do not consider that the Proposed Arrangement is likely to generate any meaningful public detriment and so we are satisfied that authorisation would be likely to generate a net public benefit and such a benefit to the public that it should be permitted.

Length of the Proposed Arrangement

177. The Commission can grant authorisation for such period as it considers appropriate.²⁰⁹
178. The Better Public Media Trust (**BPM**) suggested that authorisation of the Proposed Arrangement for the full 10 year term may prevent or substantially delay the introduction of a more comprehensive statutory intervention that would better address the structural issues underpinning the Digital Platforms’ market power.²¹⁰ Instead, BPM considered that the Proposed Arrangement should only be authorised for a shorter time period, eg, two or three years.

²⁰⁹ Section 61(2) of the Act.

179. We do not speculate on the duration of any collectively negotiated agreement and consider that the parties would likely negotiate in accordance with the relatively dynamic nature of the industries in which they operate. We therefore consider that it would be appropriate to authorise the Proposed Arrangement for ten years.

Dated this 20th day of June 2022

Anna Rawlings
Chair

Attachment A: Global approaches on issues faced by news media companies

180. As we noted in our section on Industry Background, news media companies around the world have faced both considerable challenges, much like in New Zealand. Advertising revenues earned by news media companies have fallen in Australia, the United States, Canada, amongst other countries.²¹¹
181. Similarly, other jurisdictions noticed that a significant share of local advertising revenues has been captured by Google and Facebook.²¹² Taken together with the fact that Digital Platforms are often both rivals to news media companies and acquirers of news content, other jurisdictions have taken interest in the interactions between the Digital Platforms and news media companies.²¹³
182. In investigating the interaction between Digital Platforms and news media companies, many reports identify imbalances in the relationship between the Digital Platforms and news media organisations. To remedy this, the following remedies have been proposed:
- 182.1 Australian News Media Bargaining Code, introduced in 2021;
- 182.2 Canadian Online News Act, introduced in 2022;
- 182.3 Journalism Competition and Preservation Act, introduced to Congress in 2021; and
- 182.4 European Union’s Copyright Directive, introduced in July 2019.
183. In Australia, the News Media Bargaining Code was a mandatory code of conduct designed to encourage good faith commercial negotiation between the Digital Platforms and the news media companies. If these negotiations were unsuccessful, the Digital Platforms could be ‘designated’, which meant they would be subject to ‘final-offer’ arbitration and collective bargaining by news businesses. In these arbitrations, each party submits an offer to the arbitrator, and the arbitrator must choose one of the two offers.
184. In Canada, the Canadian Online News Act is a bill that seeks to ensure fair revenue sharing between the digital platforms and news media companies. Similar to the Australian Code, the Act intends to promote commercial negotiations in the first instance, with an arbitration regime in place if negotiations are unsuccessful.²¹⁴

²¹¹ DPI report at page 18; News Media Alliance “Support the ‘Journalism Competition and Preservation Act” <http://www.newsmediaalliance.org/wp-content/uploads/2018/08/Safe-Harbor-JCPA-Fact-Sheet_4-26-21.pdf>.

²¹² News Media Alliance ‘Support the “Journalism Competition and Preservation Act”’ (2021) <http://www.newsmediaalliance.org/wp-content/uploads/2018/08/Safe-Harbor-JCPA-Fact-Sheet_4-26-21.pdf>.

²¹³ DPI report at [4.2.1].

²¹⁴ Government of Canada “The Online News Act” <<https://www.canada.ca/en/canadian-heritage/services/online-news.html>>.

185. In the United States, the Journalism Competition and Preservation Act intends to create a safe harbour for news media companies to collectively bargain with the Digital Platforms.²¹⁵
186. In the European Union, amendments were made to copyright law to give news media companies greater protections on their content. These additional copyright protections for digital news content sought to facilitate the creation of a licensing market for digital news content.²¹⁶ In response to the European Union’s Copyright Directive, Google announced it would pay publishers in the European Union to show an extended preview of their content to resolve copyright and antitrust concerns.²¹⁷

²¹⁵ 117th Congress “S.673 – Journalism Competition and Preservation Act of 2021” (2022) <<https://www.congress.gov/bill/117th-congress/senate-bill/673/text>>.

²¹⁶ European Commission “Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market” (2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0288>>.

²¹⁷ Tono Gil “Google outlines new 'preview' deals for EU news publishers to head off regulatory concerns” *MLex*, (11 May 2022) <<https://mlexmarketinsight.com/news/insight/google-outlines-new-preview-deals-for-eu-news-publishers-to-head-off-regulatory-concerns>>.