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Commerce Commission
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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

Thank you for the opportunity to comment on the collective bargaining arrangement (**Proposed Arrangement**) proposed by the News Publishers' Association of New Zealand Incorporated (**NPA**).

Our position on the Proposed Arrangement is outlined in our submission of 8 December 2021.¹ Google is committed to finding ways to assist news businesses, regardless of whether authorisation is granted. However, as we work with regulators, governments and news publishers globally to build solutions to support public interest journalism, it's important to take an evidence based approach. Accordingly, we ask the Commission to have regard to the following evidence as it assesses the Proposed Arrangement:

- **Google is already engaging with New Zealand news media businesses and will continue to do so with or without the Proposed Arrangement**

Google News Showcase was launched in Australia in early 2021, and in March that year we announced we would begin outreach to potential Google News Showcase partners in New Zealand.²

Google has since been in active discussions with New Zealand news media businesses about including their content in Google News Showcase. We have already reached agreement with three news businesses, and two are already receiving payment. We have spoken with and made commercial offers to several other New Zealand news businesses. Google plans to continue those discussions, and to commence discussions with more news businesses, even in the absence of any collective bargaining authorisation.

¹ Google submission in response to authorisation applications by the NPA, 8 December 2021. Available here: https://comcom.govt.nz/_data/assets/pdf_file/0020/273053/Google-NPA-Provisional-Authorisation-Submission-8-December-2021.pdf.

² See Google New Zealand Blog, "Furthering our long-term support of the New Zealand News Industry and Countering COVID-19-related Misinformation", 17 March 2020. Available here: <https://newzealand.googleblog.com/2021/03/furthering-our-long-term-support-of-news-in-NZ.html>.

This is in addition to the funding and other programs under the Google News Initiative outlined in our previous submission.

We remain concerned 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. However, this concern is not an attempt to "avoid changes and delay to the status quo".³ To the contrary, Google is actively pursuing commercial solutions to support New Zealand news businesses and will continue to do so, with or without the Proposed Arrangement.

In this context, the desired outcomes of the Proposed Arrangement are likely to be reasonably comparable to those which can already be achieved without the need for authorisation. There is simply no evidence that Google is refusing to engage in meaningful negotiations, or that offers made and agreements entered into to date have not been fair or commercial.

- **There is already a substantial two-way value exchange between Google and news businesses.**

As outlined in our previous submission, Google Search (and News) do not display full news content. They include links, headlines, and short snippets of news content designed to direct traffic to the news publishers' own websites, none of which infringes copyright. News businesses are not paid for these uses because there is no jurisprudential basis in New Zealand law to require payment for them, and because these uses are a net benefit to news businesses. As Tim Berners-Lee, the inventor of the World Wide Web has noted: "*The ability to link freely -- meaning without limitations regarding the content of the linked site and without monetary fees -- is fundamental to how the web operates, how it has flourished till present, and how it will continue to grow in decades to come.*"⁴

The fact that there is no remuneration paid for these uses is not a result of any bargaining power imbalance. If it were, smaller search engines would pay news publishers to link to their sites. To our knowledge though, no search engine in New Zealand, regardless of its size, provides payment to news publishers for crawling, indexing, and showing links and snippets of their content in its search results. Contrary to the NPA's suggestions, the fact that there is no remuneration paid for these uses is also not indicative of "free-riding" or "a wealth transfer from New Zealand-owned news media companies" to Google. It is a 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. News businesses derive substantial value from this referral traffic. In 2020, Google Search and Google News accounted for 628 million visits to large and small New Zealand news businesses for free. Users (from New Zealand and beyond) click from Google Search results through to New Zealand news websites, giving publishers the opportunity to make money by showing ads, requesting contributions or turning users into paying subscribers. We estimate that the value of the traffic we sent to New Zealand news websites in 2020 equates to over

³ See NPA, Cross-submission in relation to its application for authorisation for collective bargaining with Google and Facebook, 15 December 2021 (**NPA Cross Submission**), at para 2(b). Available here: https://comcom.govt.nz/_data/assets/pdf_file/0032/273929/News-PublishersE28099-Association-of-New-Zealand-Incorporated-Cross-submission-15-December-2021.pdf.

⁴ Tim Berners Lee, Submission to Australian Senate Standing Committees on Economics, 18 January 2021. Available here: <https://www.aph.gov.au/DocumentStore.ashx?id=a9823801-565b-4833-8515-ea4fd57b3d01&subId=700056>

NZ\$44 million.⁵ In the same period, in New Zealand, Google generated less than NZ\$1.6 million in revenue - not profit - from clicks on ads against possible news-related queries. In our view, the value Google derives from news content is outweighed by the value news publishers derive from Google.

- **Google is one of many ways that users access news.** Although we provide news publishers with valuable referral traffic, we are not an unavoidable trading partner or gatekeeper to news content. Our analysis shows that the top 40 New Zealand news websites receive more than 85% of their traffic from sources other than Google.⁶ Users more frequently access these websites by going directly to the publishers' websites via a browser or to the publishers' own apps. This data also ignores that traditional forms of media, such as print or broadcast formats, still remain significant channels for users to access news.

In assessing the Proposed Arrangement, we encourage the Commission to consider the fact that New Zealand news media businesses already derive considerable value from our services, and that we are already willing to engage in good faith negotiations with them, with outcomes that are likely to be reasonably comparable to the Proposed Arrangement. In addition, in **Annexure A**, we:

- make some comments on the market definitions discussed in the Statement of Preliminary Issues; and
- address a number of propositions in the NPA cross-submission of 15 December 2021 ("**NPA Cross Submission**") that are misconceived and unsupported by evidence. There are a number of statements made in the NPA Cross Submission that we do not necessarily agree with, but we have not sought to respond to each of them here. Failure to address a particular issue should not be taken as a concession or general agreement.

If the Commission has any questions or requires further information, please do not hesitate to get in touch.

Yours sincerely,



Caroline Rainsford
Country Director, Google New Zealand

⁵ A Deloitte study in Europe estimated the average value of a single visit to a newspaper publisher website to be between EUR .04 and .06. Using the lower figure of EUR .04 (NZ\$0.07) in the Deloitte report, the value provided to news websites from 628 million clicks amounts to over NZ\$44 million. See "The impact of web traffic on revenues of traditional newspaper publishers: A study for France, Germany, Spain, and the United Kingdom", Deloitte (September 2019). Available here: <https://www2.deloitte.com/content/dam/Deloitte/es/Documents/financial-advisory/The-impact-of-web-traffic-on-revenues-of-traditional-newspaper-publishers.pdf>.

⁶ Data sources and methodology are discussed further in the Annex, Section 3.

Annexure A

1. Market definitions

The Statement of Preliminary Issues indicates that the Commission will test certain potential market definitions, identified in other contexts, and explore whether there are any other relevant markets that may assist its assessment of the Proposed Arrangement.

We do not think it is necessary in this instance for the Commission to define markets which may be affected by the Proposed Arrangement to assess the jurisdictional threshold⁷ or public benefits and detriments.

For the Commission to make conclusive findings about market definition, extensive economic analysis and evidence of the relevant facts in New Zealand would be required. The concluded definition of a relevant market, even if the starting point is a market referred to in other jurisdictions or identified in the context of other legislative provisions, nonetheless requires a fact-intensive analytical and evaluative process. For example, even if the market definitions considered by the ACCC in the context of its broad ranging Digital Platforms Inquiry (DPI)⁸ or the market definitions used in the NZME/Fairfax determination were thought to be useful starting points for an assessment of the impact on competition of the Proposed Arrangement, it would still be necessary to obtain the required factual evidence of the position in New Zealand and analyse that evidence with the appropriate economic techniques.

A more targeted approach in the context of this authorisation is consistent with the *Commerce Act 1986* (which does not refer to markets in the net public benefit test),⁹ the Commission's authorisation guidelines (which do not always require market definition and note that, even when adopted, a precise definition may not be required),¹⁰ and the apparent approach of the NPA, who have not made submissions on market definition.¹¹

In light of this, we have not sought to address the potential markets referred to in the Statement of Preliminary Issues. For completeness, we consider that those markets are either unlikely to be materially affected by the Proposed Arrangement, or do not exist. We would welcome the opportunity to discuss these issues in more detail if, notwithstanding the above, the Commission finds it necessary to fully examine the appropriate market definition.

In the rest of this submission we address a number of propositions that are contained in the NPA Cross Submission that are misconceived and unsupported by evidence. In assessing the

⁷ Google understands that if the Commission considers that the proposed arrangements might contain a cartel provision, then the jurisdictional threshold would appear to be satisfied under section 65AA of the *Commerce Act*. In that context, there is no need to define markets for the purpose of assessing jurisdiction. We appreciate that market definition can be a useful (and sometimes essential) tool for competition analysis, under section 58 of the *Commerce Act*, determining a "lessening" in competition would also not necessitate market definition.

⁸ The ACCC was directed, in December 2017, to "to hold a public inquiry into the impact of digital platform services on the state of competition in media and advertising services markets".

⁹ The relevant threshold is that the Commission be satisfied that the relevant conduct "will in all the circumstances result, or be likely to result in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result therefrom". See Section 61(6) (Determination of applications for authorisation restrictive trade practices) *Commerce Act*. There is no reference to market definition in this test or in the definition of "competition" in section 3 of the *Commerce Act*.

¹⁰ These points are also recognised in the Statement of Preliminary Issues.

¹¹ As noted by the Commission at para 25 of its Statement of Preliminary Issues, the "NPA does not expressly submit what the markets relevant to our assessment are in its Application but refers broadly to the New Zealand media industry."

Proposed Arrangement, including the existence of any relevant markets, it is important to take an evidence based approach, including a clear understanding of our products and business model.

2. Value of news content to Google

The NPA Cross Submission overstates the value of news content to Google, and misunderstands the relevance of Top Stories, Trending Searches and recent Australian deals.

2.1. Overview of Google Search and Search ads as they relate to news

Google Search provides users with high-quality search results for a wide range of queries. In response to a typical search query, there are thousands or even millions of webpages with potentially relevant information. News web pages are a small subset of the 130 trillion web addresses seen by Google. While we recognise the role of news content in educating and informing users, it is not correct to suggest that “news content draws consumers to” Google Search.¹² In 2020, news-related queries made up less than 2% of total queries on Google Search in New Zealand. This is not an outcome unique to New Zealand. An analysis by Sistrix, a search engine optimisation consulting firm based in Germany, based on a sample of millions of queries in Europe, found that only a very small percentage of Google Search queries were news-related (2.65%).¹³

Google Search results can also include ads that link to an advertiser’s site. Google only earns revenue when a user clicks on an ad (as opposed to when an ad is displayed but receives no click). What Google is monetising is therefore not the content displayed along with the ad, but rather the user’s interest in the query topic, which the advertiser hopes to fulfill.

Ads are only displayed if we believe that they’re relevant to the search terms entered by a user. For most searches, we show no ads at all.¹⁴ Ads do not typically appear in response to news-related queries on Search. Such queries typically do not have commercial intent (e.g., a user searching for “volcanic eruption” or “tsunami” is unlikely to be seeking to buy a product or service, and so advertisers are less interested in reaching that user). There are of course exceptions to this, for example a search for “latest iPhone” could both be viewed as a news-related query (if the search was around the time of iPhone releases), and may also return ads because such a term could be considered to have commercial intent. The Sistrix analysis referenced above found that Search ads were included for only 0.11% of news-related Search queries.¹⁵

¹² NPA Cross Submission, at para 13(a).

¹³ See, Johannes Beus, *Copyright Law for Press Publishers in the EU: Journalistic content often irrelevant for Google*, Sistrix (25 June 2019). Available here: <https://www.sistrix.com/blog/copyright-law-for-press-publishers-in-the-eu-journalistic-content-often-irrelevant-for-google/>.

¹⁴ For more information see https://www.google.com/intl/en_au/search/howsearchworks/our-approach/ and <https://blog.google/technology/ads/how-google-search-ads-work/>

¹⁵ See, Johannes Beus, *Copyright Law for Press Publishers in the EU: Journalistic content often irrelevant for Google*, Sistrix (25 June 2019), <https://www.sistrix.com/blog/copyright-law-for-press-publishers-in-the-eu-journalistic-content-often-irrelevant-for-google/>.

2.2. Top Stories and Trending Search data are not useful in assessing the value of news content

The NPA Cross Submission¹⁶ suggests that content produced by news media businesses is important to Google because “... between 8 and 14 percent of Google Search results trigger a “Top Stories” result...”.¹⁷ However, Top Stories is not a proxy for news-related searches, nor is it indicative of the value that Google derives from news content.

Top Stories is a type of Search result that is displayed when a user may be searching for results where recency is important. This can include news results, but can also include results such as information about new products. For example, Top Stories results are displayed in response to a search for “headphones”. It is a mistake to infer, simply from the inclusion of Top Stories results in Search, that a user was searching for news content. Many of the Top Stories results may not be news at all.

The Top 5 Google Trending Searches are also not indicative of the importance of news to Google.¹⁸ Trending Searches are results that had the highest spike in a year as compared to the previous year. As a result, the Search terms naturally reflect current events which are covered by news sources (although not exclusively). They do not necessarily reflect the most searched for terms. For example, COVID-19 was the number 1 Trending Search in 2021.¹⁹ A user searching for “COVID-19 NZ” may be searching for news, information from the Ministry of Health, statistics on case numbers, or other resources.

As noted above, our analysis shows that in 2020, news-related queries made up less than 2% of total queries on Google Search in New Zealand.

2.3. Relevance of Australian deals and Google’s use of content

The NPA Cross Submission²⁰ also suggests that Google’s recent agreements with news publishers in Australia are indicative of the commercial value derived from the use of news content.

Google does not pay any Australian news publishers for links and snippets of news content in Google Search. Google’s agreements with news publishers globally and in Australia are bespoke agreements, the terms of which are strictly confidential. Google remains committed to discussing the possibility of similar agreements with New Zealand publishers with or without the Proposed Arrangement. However, such agreements would be proportionate to the size of the relevant news media business, the nature of its publications and its audience size.

It is important to remember that Google Search (and News) do not display full news content. These products include links, headlines, and short snippets of news content designed to direct traffic to the news publishers’ own websites, none of which infringes copyright. If publishers do not want their content to be indexed in Google Search or Google News, they can easily and simply opt out, either for their entire site or for only particular pages. Publishers can also choose whether snippets are displayed in Search results and determine the length of snippets.

¹⁶ NPA Cross Submission, at para 8.

¹⁷ ACCC, *Digital Platforms Inquiry Final Report*, June 2019 (**DPI Final Report**), p.15. Available here: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.

¹⁸ NPA Cross Submission, at para 16.

¹⁹ See <https://trends.google.co.nz/trends/yis/2021/NZ/>.

²⁰ NPA Cross Submission, at paras 9-11.

When Google is not helping users to locate content on third-party sites, and is instead providing users with informational or entertainment content to consume on Google's own properties, we have a longstanding licensing program and compensate content owners and publishers fairly for licensed content we display. Examples include dictionary content, weather content or sports scores, which are displayed on Search. It is not correct to suggest Google is "free-riding" by not paying news publishers for showing links and snippets of their news content.²¹

3. Google is not an unavoidable trading partner and New Zealand media are not reliant on Google for traffic

Google Search is one of many ways consumers can access news content.

The NPA Cross Submission cites data from a Reuters Institute Report to suggest that Google is an important gateway for consumers to access news content.²² This data does not include New Zealand - either individually or as part of the global statistics. The data is also limited to ways consumers access news content *online*.²³ The figures do not account for the fact that non-digital media formats (i.e. TV, print and radio) remain important sources for consumers to access news content. In Australia, for example, the DPI Final Report recognised that print and broadcast media remain significant in the consumption of news with around 55 per cent of Australians still using these formats as their main source of news.²⁴

Even within just the online channel, there are many other ways users access news in New Zealand, including via news publisher apps, social media, advertising and going directly to a news publishers' website through a browser. In fact, analysis of SimilarWeb and AppAnnie data shows that the top 40 New Zealand news websites receive more than 85% of their traffic from sources other than Google.²⁵

²¹ NPA Cross Submission, at para 14.

²² Reuters Institute Digital News Report 2021. Available here: <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2021>

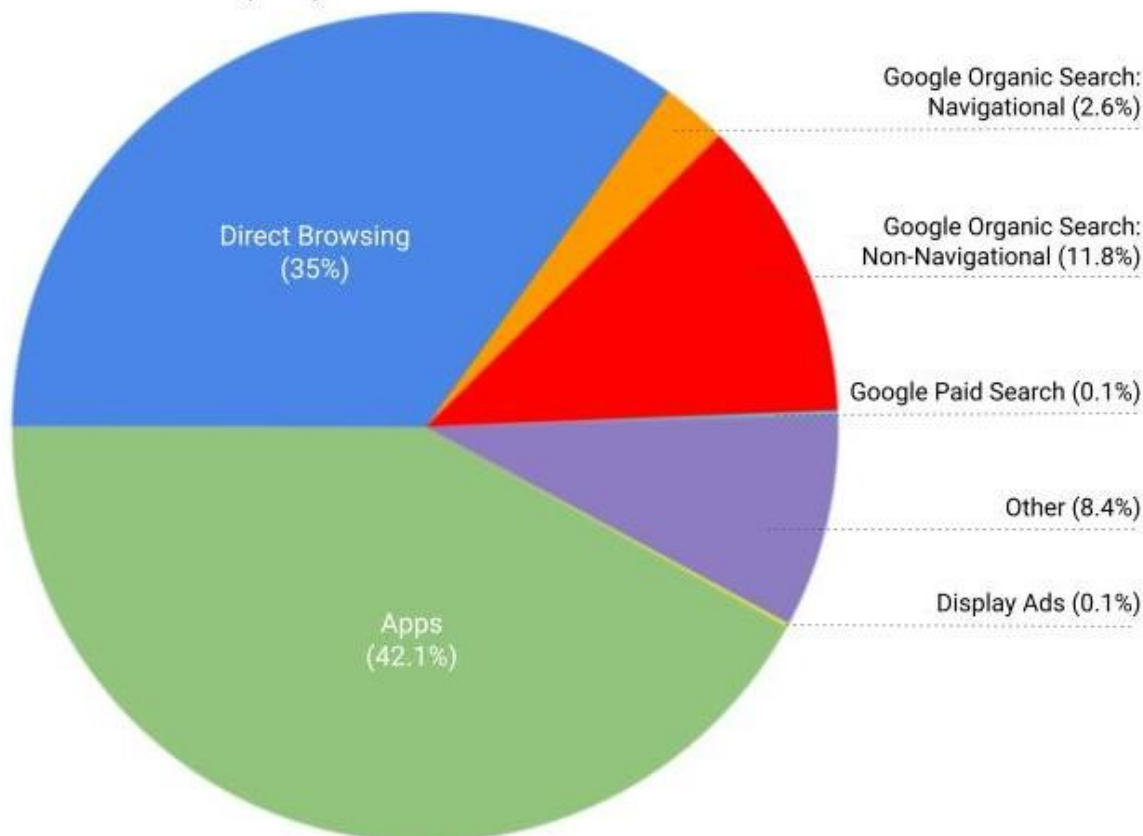
²³ NPA Cross Submission, at para 13(a). In any event, the report suggests that only 25% of consumers use Search as their main way of accessing news online.

²⁴ DPI Final Report, at 290 referencing Roy Morgan Research, 'Consumer Use of News', prepared for the ACCC, November 2018, p. 14. In the ACCC News Survey 2018, around 32 per cent of Australians used television as their main source of news, compared to 15 per cent for radio, and 8 per cent for print sources.

²⁵ Sources: SimilarWeb; App Annie. Notes: Top 40 New Zealand news websites were identified based on SimilarWeb "News and Media" category excluding weather websites, ranked by SimilarWeb monthly visits by NZ users in December 2021. All traffic other than apps is from browsing activity. Includes desktop and mobile devices. Mobile-specific traffic is imputed based on desktop-only shares if mobile-specific shares are not available. SimilarWeb visits include website subdomains. "Other" includes other search, social, emails, and third-party site referrals, but doesn't capture all instances and so may be understated. App traffic calculated by multiplying monthly active user count by monthly sessions per user. Average sessions per user for iOS apps are assumed to be identical to Android. Missing monthly active users and/or monthly sessions per user are estimated as the average of active users or sessions per user for months where data is available. SimilarWeb records a value of "<5,000" visits for some websites and time periods, which is assumed to be 4,999 visits.

Just under 12% of online traffic to news sites in New Zealand comes from ‘non-navigational’ queries on Google.²⁶ And, as noted above, this only accounts for these publishers’ *online* readership.

Top 40 New Zealand News Website Traffic Sources
New Zealand Users (2021)



4. Value of data to Google for advertising

The NPA’s Cross Submission overstates the value of user data to Google for advertising.²⁷

Google generates the majority of its revenues from Search advertising. Search ads are targeted primarily based on the user’s search query. A search query is a strong signal of what a user is interested in and therefore highly effective at targeting ads.²⁸ For example, a fridge manufacturer may want to advertise to a user who enters a Search query such as “best fridge”. Google can effectively match ads from that fridge manufacturer to the interested user based on that query, without needing to know a lot of pre-existing data about the user.

Users also have granular control over the data that Google collects. Most Google services can be used without needing to sign into a Google account. Google also provides a range of privacy

²⁶ Navigational queries (e.g., “New Zealand Herald”) do not, by definition, generate “referral traffic” and are therefore not counted as referrals from Google. Users that conduct navigational queries do not rely upon Google for website selection; their website selection is predetermined and they use Google as an alternative to typing in the website URL.

²⁷ NPA Cross Submission, at para 13.

²⁸ For further detail see Andres V. Lerner, *The Economics of Network Effects and User Data in the Provision of Search, Search Advertising, and Display Ad Intermediation*, 15 May 2019, at pp. 33 - 35. Available here: <https://www.accc.gov.au/system/files/Google%20Submission%203%20%28May%202019%29.pdf>.

controls which allow users choice as to what information Google may collect and use and the ability to delete data Google has collected.²⁹

5. Snippets benefit users and publishers

Google, like other search engines, displays “snippets” in our search results, which are short extracts of text from websites, to help users decide whether a particular site’s content is relevant before they click the link. The NPA’s Cross Submission³⁰ suggests that snippets reduce the likelihood of users clicking through to publishers’ pages, but the studies cited by the NPA do not support this conclusion.

The Outsels study cited by NPA does not provide any indication that it assessed whether the presence or absence of snippets had any impact on whether users click on the results. The second study cited by NPA, conducted by the European Commission³¹ does not purport to conclude anything about the impact of snippets on user click-through rates. Nor does the survey specifically consider Google Search.

On the contrary, there is credible evidence to suggest that it is valuable to both users and publishers to show a snippet.³² A user is able to assess whether a Search result is in fact relevant to their query, and if so, the user is more likely to click through to the webpage. For example, the Cairncross Review in the UK concluded the “experiences in Germany and Spain suggest that, overall, the snippets of publishers’ content included on platforms’ websites encourage more readers to go to publishers’ websites, rather than discourage them (because, for instance, the information they read on the platform is all they need).”³³

However, to the extent that publishers are concerned that snippets in Search reduce the likelihood that users will click on their sites, they have the choice to elect not to have snippets shown for their news articles, or to alter the length of the snippets.³⁴ Google has found that most publishers do not opt-out of snippets.

²⁹ An overview is available here: <https://safety.google/privacy/privacy-controls/>.

³⁰ NPA Cross Submission, at para 22.

³¹ European Commission, Directorate-General for Communications Networks, Content and Technology, Flash Eurobarometer 437: Internet users’ preferences for accessing content online, (September 2016). Available here: <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2123>.

³² This applies to the general Search results and the News tab of Google Search.

³³ Dame Frances Cairncross, *The Cairncross Review: A sustainable future for journalism*, February 2019, at p.70. Available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf.

³⁴ See <https://developers.google.com/search/blog/2019/09/more-controls-on-search>.