Meta submission on the New Zealand Commerce Commission's Draft Determination in relation to NPA's Collective Bargaining Application

PUBLIC VERSION

12 September 2022

Meta welcomes the opportunity to share an update with the New Zealand Commerce Commission (**NZCC**) about new consumer and industry trends that have accelerated in their development since our last submission in March 2022, our ongoing investment in the New Zealand news ecosystem since the start of the year and also to share some comments on the NZCC's draft determination (the **Draft Determination**) on the News Publishers' Association of New Zealand Incorporated's (**NPA**) application for authorisation to collectively bargain with digital platforms such as Meta (**Application**, **Proposed Arrangement**).

Facebook and Instagram users are increasingly interested in more creator driven content, especially video. Watching video is half of time spent on Facebook and Instagram, and Reels is our fastest growing content format by far. In August 2022, we published the latest Widely Viewed Content Report for Q2 2022[1] to provide more transparency and context about what people are seeing on Facebook in the US by sharing the most-viewed domains, links, Pages and posts for a given quarter on Feed. That report confirms that, by far the most common experience in Feed for people, is to see posts without links, from their friends, or from Groups they've joined. Specifically, in Q2 2022, 84.1% of views came from posts shared by people's friends, from Groups people had joined, or Pages they had followed. In total, the news domains that are included in the top 20 most shared domains in Feed accounted for about 1.4% of all Feed content views.

Our users' information consumption preferences are evolving, and as a company, we too must evolve to ensure we continue to best serve people that use our platforms. Consequently, we will continue to provide strategic guidance and share product updates that inform publishers as they adapt their strategies to best meet the needs of their audiences. Given evolving consumer trends towards video and away from political content, if a publishing organisation has primarily used Facebook to promote links to news articles, we would expect organic performance to decrease over time. Like any business, we would expect news publishers to assess the organic value they are receiving from our platforms as they make decisions on what is in their organisation's best interest. Some may decide to adjust their marketing and distribution strategies in the face of these consumer trends, or as Stuff.co.nz has done, choose not to publish on Facebook for extended periods while remaining active on other social media networks such as Tik Tok.

To support Kiwi publishers to respond to these evolving trends, as well as the changing landscape in digital advertising, we have invested in innovation and digital transformation through deals with relevant publishers. We have completed three commercial deals with NZME (the New Zealand Herald), Newsroom, and the Spinoff (which is a participant in the Application), and conversations continue with a number of other media organisations, including broadcasters.

In addition, we have supported New Zealand publishers to digitally transform and develop sustainable business models with multiple funded programs since 2019, including the most recent (beginning March 2022) Meta's Aotearoa Audience Development Accelerator – a platform agnostic digital strategy mentoring, coaching and training programme – and a grant fund totalling [REDACTED] shared across 13 regional, Māori, culturally-diverse and

[1] https://transparency.fb.com/en-gb/data/widely-viewed-content-report/

digital first media entities. In New Zealand's uniquely concentrated media market, this Accelerator programme and grant fund is already having a significant impact in developing a diverse, pluralistic and sustainable sector – including for several members of the Application who are involved.

We remain grateful to the Meta Aotearoa News Innovation Advisory Group, in partnership with the independent NGO the International Center for Journalists, a group of five local industry experts who have advised us on the Accelerator and Grant Fund.

These consumer and industry trends, as well as our recent investment in innovation and digital transformation do not support the conclusions in the Draft Determination. In addition, we note the following concerns with respect to the Draft Determination:

- there appears to be a lack of rigorous analysis against the legal criteria (including the Authorisation Guidelines) to be used when making a Draft Determination to authorise the Proposed Arrangement, which being cartel conduct, is the most serious of type of conduct prohibited under the Commerce Act;

- the justification for "additional funding [being] used to improve the production of news content" is wholly lacking in any robust understanding or analysis of the economic evidence that underpins news content on Facebook's services or indeed the nature of modern news publishers as commercial entities, and therefore there is also no potential basis for any "beneficial wealth transfer"; and

- the NZCC has used an inaccurate counterfactual that sits at odds with Meta's engagement with New Zealand publishers and investment in the New Zealand news ecosystem to date.

Information that is confidential to Meta and not to be disclosed to the public is marked by []

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Our investments in New Zealand to date

During the past three years, Meta has invested substantially in the sustainability of the news ecosystem in New Zealand and globally, through its programmes and tools. In 2021, Meta committed to a multi-million dollar investment in the New Zealand news ecosystem, with a focus on driving greater and more diverse plurality in the sector, while encouraging a digital transition that is key to ongoing viability.

This investment is an important policy initiative because, many (not all) New Zealand publishers have been slow to transition to a sustainable digital business model. The sector has seen significant change and declining revenues over the last 30 years, since the arrival of the internet and significantly, online classifieds services such as Ebay and TradeMe. However, adaptation, strategic direction, digital expertise development and investment have been lacking over the period. The recent shortages of newsprint in New Zealand have once again brought this fact into focus.

Meta's four-part investment – designed specifically for New Zealand and tailored to support the local industry, especially Māori, regional, digital and culturally-diverse publications – includes:

1. commercial arrangements in video and content innovation with selected publishers based on mutual commercial benefit and product-market fit or a track record of collaboration on audience development projects such as the Accelerator programme;
2. supporting smaller local publishers to develop sustainable digital (though platform agnostic) business models through Meta's Aotearoa Accelerator and Grant Fund;
3. establishing a local Meta Aotearoa News Innovation Advisory Group to assist with the above; and
4. dedicated and scaled training for New Zealand publishers on growing and engaging digital audiences.

Commercial arrangements with publishers in video and content innovation

Publishers control what they choose to share on Facebook, and in turn, Meta provides tools they can use – many free of charge – to distribute their content, grow their audience and make money.

Globally, we estimate that Facebook Feed sent news publishers around the world more than 140 billion clicks in the past 12 months – additional traffic worth more than US$7 billion (NZ$11.6 billion) in estimated value. In New Zealand, we estimate that during the past 12 months we have sent around 390 million clicks to registered New Zealand publishers – additional traffic worth more than US$20 million (NZ$33 million) in estimated value. We've also created a number of ad formats such as in-stream and pre-roll ads in video, that help publishers make money from audiences on Facebook.

New Zealand publishers are beginning to experiment with new approaches to fund the important work they do for their communities. To support this work, Meta has actively engaged in commercial discussions with New Zealand news publishers regarding multi-million dollar investments in innovation, video and technology to promote newsroom sustainability in New Zealand. To date we have signed three commercial deals, with The Spinoff, Newsroom and NZME, and we're in discussions with other media organisations, including broadcasters. After signing agreements with Meta and Google, NZME withdrew from the Application. Given NZME represents around half the digital print media in New Zealand's highly concentrated media market, we believe this should materially impact the analysis of the Application.

It is important to note that these commercial deals, where the parties have issued jointly agreed press releases, have received little media pick-up in New Zealand and/or have been mischaracterised by some. In addition, the intervention in the NZCC process by the Ministry of Culture and Heritage and the delay and eventual interim authorisation of the Application has created a perverse incentive for other publishers with whom we are in [REDACTED].

Aotearoa Accelerator and grant fund

Meta's Aotearoa Audience Development Accelerator and grant funding programme investment of NZ$2.5 million[2] has brought 13 Kiwi publishers (including Māori, regional, digital and culturally-diverse) together to innovate, learn from a dedicated team of internationally-renowned expert coaches, and implement new digital strategies to support the sustainability of their businesses.

Funded and organised by the Meta Journalism Project, and tailored to New Zealand's media industry, the Accelerator has been led by Blue Engine Collaborative — a consortium of world-class coaches focused on driving digital audience growth and revenue, founded by Tim Griggs, a former New York Times executive.

The participating media organisations – which recently received project funding and a tailored training programme of one-on-one expert coaching – are:

- Whakaata Māori
- Pacific Media Network
- Indian Weekender
- Mandarin Pages
- Local Matters
- Ashburton Guardian (a participant in the Application)
- MediaWorks
- Capsule
- Radio Bay of Plenty
- Shit You Should Care About
- Crux Publishing
- Otago Daily Times (**ODT**, a participant in the Application)
- The Wairarapa Times-Age (a participant in the Application)

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[2] This figure reflects the amount Meta has spent. It includes both granting funding, training, partnership and administrative costs.

The aim of the programme is to support news organisations as they develop new technology, strategies and revenue streams to fund news gathering on an ongoing basis. Projects funded by Meta include: reader revenue initiatives such as paywalls, newsletter audience growth projects, digital marketing programmes, podcast studio construction, and technology investments including publishing, marketing and newsletter platforms. We will shortly be producing a case study to highlight the impact this programme is having. In the interim, we note that publishers have announced new paywall strategies and apps associated with this training and grant funding – while other publishers have seen up to 1000% increases in audience numbers, new paying subscribers, new revenue from syndicated content and many more. These are significant results and we suggest the NZCC contacts publisher participants to gather further information.

This follows previous accelerator programmes Meta has funded for New Zealand publishers including Meta's 2019 Reader Revenue Program that helped publishers increase revenue through audience and subscription programmes. Overall, participating publishers in that Accelerator generated $7 million in lifetime value, 24,000 new subscribers and 160,000 new loyal readers. Publishers included NZME, Newsroom and the Spinoff. The Spinoff was one of the biggest beneficiaries of that investment, seeing over [REDACTED] in lifetime customer value from upskilling and executing its digital strategy, in addition to direct grants of [REDACTED] and emergency pandemic support payments of [REDACTED]. These 2019-20 investments are in addition to the commercial agreement we reached with the Spinoff for content innovation in 2021. Given the considerable benefit The Spinoff has enjoyed from the use of our services – from our programmatic support and from a commercial deal – it is unclear what they are hoping to advocate for as part of the Proposed Arrangement.

Duncan Grieve, founder of the Spinoff, has credited Meta's Accelerator programme with transforming its reader revenue approach and results – and helping support the business through the COVID pandemic. In April 2021, BusinessDesk reported that The Spinoff had hit 10,000 paying members and that revenue "nearly doubled" year-on-year thanks to an influx of membership payments through the worst of the COVID-19 pandemic. The BusinessDesk article included the following quote from Duncan Grieve:[3]

> *"What we've learned in the Accelerator has been quite transformative for our membership programme…Within six extraordinary weeks, we had a huge influx of members come in, which gave us a reliable cash flow stream to replace the very large (advertising) contracts we lost and didn't get back."*

Meta Aotearoa News Innovation Advisory Group

In partnership with International Center of Journalists, Meta has established the Aotearoa News Innovation Advisory Group — a group of five experts, with diverse experience across New Zealand's media industry — to provide guidance on the Accelerator and grant programme.

The Advisory Group includes media personality and academic Scotty Morrison; AUT University communications academic, Khairiah Rhaman; former media executive and

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[3] https://businessdesk.co.nz/article/media/the-spinoff-from-dark-days-to-daylight

editorial director of NZ Newspaper Publishers' Assoc., Rick Neville; media consultant and former MediaWorks News Director, Hal Crawford; and award-winning journalist and media business owner, Brodie Kane.

Meta News Day

Meta hosted a virtual Facebook News Day in New Zealand in November 2021 to provide scaled and dedicated coaching to dozens of small newsrooms across New Zealand. Facebook News Day was designed to equip publishers with existing tools and insights to build, engage and understand their audiences, drive additional revenue and optimise for long-term digital business transformation and innovation. We have found that some publishers are unaware of the valuable – and free of charge – tools they have access to as publishers on our services, and News Day was designed to unlock that value. This includes data and insights and publisher tools for revenue generation.

All newsrooms across New Zealand were invited to attend Facebook News Day, with 68 journalists, social media producers and editors from 38 New Zealand newsrooms, mainly regionally based, attending the training event.

It was following News Day that we opened applications for the Accelerator programme outlined above.

The analysis of benefits and detriments contains a number of errors and omissions

Meta considers that the assessment of the Proposed Arrangement in the Draft Determination deviates from the usual approach in the following ways:

- The draft finding that the Proposed Arrangement is unlikely to generate any meaningful public detriment[4] is not only surprising with respect to an arrangement that contains a cartel provision – the most serious conduct prohibited under the Commerce Act – but also because, despite identifying three potential detriments,[5] none reached a threshold sufficient to generate any meaningful public detriment.

- Once the prospect of detriments is acknowledged, which it must be, it becomes important that there is a full assessment of the likely benefits, to allow proper consideration of whether the likely benefits outweigh the likely detriments. This analysis has not been undertaken.

- In the course of the analysis, relevant evidence and analysis contained in the Sapere Research Group report commissioned by Manatū Taonga (**Sapere Report**)[6] has been disregarded.

It would be surprising if the Proposed Arrangement were unlikely to generate meaningful detriments

Cartel conduct is typically considered to give rise to detriments

The Application seeks authorisation for an arrangement that would fix, control or maintain the price of goods or services (i.e. content) that the Participants[7] supply in competition with one another (i.e. a cartel).[8]

Previous statements from the NZCC, Courts and commentators indicate that cartel provisions (or, price-fixing provisions, as they were previously referred to)[9] will, by their nature, be harmful to competition.[10]

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4 At [176].

5 The potential lessening of competition vis-à-vis the Excluded Broadcasters (at [146]), the potential for the Proposed Arrangement to reduce incentives to compete between Participants if funding is not sufficiently linked to their ongoing performance (at [163]), and the potential inefficiencies that could arise if Digital Platforms passed on cost increases to downstream customers (at [171]). In addition, at paragraph [81], the NZCC recognised that collective bargaining has the potential to cause both public benefits and detriments.

6 Sapere, "The implications of competition and market trends for media plurality in New Zealand – A report for the Ministry for Culture and Heritage", November 2021.

7 As defined in the Draft Determination.

8 Draft Determination, [43].

9 Some of these authorities refer to the previous section 30, but the policy has not varied between the two formulations.

10 *Gault on Commercial Law* (online ed) at [CZ30.17] in relation to authorisation application states "applicants seeking authorisation for a price-fixing arrangement will have a difficult task establishing public benefit arguments. Even if they establish such claims, applicants will have an uphill battle in satisfying the NZCC

This view has been echoed by the NZCC. For example, the Competitor Collaboration Guidelines state, “the cartel prohibition itself reflects a policy decision that cartel conduct is so likely to damage competition that it should be condemned without further enquiry into its actual competitive effects.”[11]

In that context, it is surprising the Draft Determination reaches its draft finding without any reference to the inherent harm caused by cartel provisions. The finding is particularly surprising given the modest probability threshold that is applied to taking into account detriments: that is, in considering an authorisation, the NZCC must assess benefits and detriments that are “likely” to occur.[12] For a detriment to be likely, there need only be a “real chance” (or realistic prospect) of it arising. Again, as the statute assumes that competition will be harmed by cartel provisions, it is surprising that harm to competition could be assessed as having less than a real chance of occurring.

The Proposed Arrangement contains features that would likely give rise to detriments

There is a real chance of considerable harm from reduction in incentives to compete

The Draft Determination makes a draft finding that the Proposed Arrangement would be unlikely to materially reduce incentives for Participants to compete.[13] This finding does not fit easily with NPA’s perspective and indeed the reality of what a collective bargaining group would be seeking to do. NPA appears to be anticipating that agreed prices, and potentially a wide range of non-price terms, which would be collectively agreed with Google and Meta, would replace the relevant dimensions of competition among the Participants to supply content to Google and Meta.[14] Furthermore, on the basis of the Application, NPA appears to consider the terms on which news publishers supply to Google and/or Meta to be material to the Participants’ business.

The Proposed Arrangement therefore appears to have a real chance of detrimentally affecting competition between the Participants. But these aspects do not appear to have

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that the established benefits outweigh the anti-competitive detriment which, in the great majority of price fixing arrangements, is likely to be substantial”. This is also supported by Matt Sumpter *New Zealand Competition Law and Policy* (September 2010) at 602. And by the Court in, for example, *NZCC v Taylor Preston Limited* [1998] 3 NZLR 498 (HC) and *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 at [32]. Furthermore, cartel provisions, when intentional are criminal (Commerce Act, s 82B).

11 Commerce Commission, Competitor Collaboration Guidelines, January 2018, page 3. See also, the NZCC’s submission on the Commerce (Cartels and Other Matters) Amendment Bill (Bill no. 341-1), dated 4 September 2012, at [4.2] where the NZCC recognised that “the Bill maintains the *per se* rule for cartel conduct – that is, cartel conduct is deemed to injure competition without further enquiry into its actual effects.”

12 Commerce Commission, Authorisation Guidelines, December 2020 (Authorisation Guidelines), [39] – [41].

13 Draft Determination, [168].

14 Draft Determination, [29.1] and particularly [29.1.2] - [29.1.4].

been considered in reaching the Draft Determination. Instead, the Draft Determination simply notes:[15]

- the NZCC is "not aware of any observable impacts on competition…in Australia". The Draft Determination nowhere contains an explanation of the basis on which the position in Australia is an appropriate comparison, despite Meta's previous submissions on this point and suggestions in the Sapere Report to the contrary, nor does it explain the steps it has taken to substantiate its awareness (see further below); and

- any funding likely to result from commercial agreements is likely to constitute only a relatively small proportion of news media companies' overall income. This conclusion is directly contrary to the claimed benefits of the Proposed Arrangement (and NPA's decision to pursue it). Further, there appears to be no analysis or explanation as to why the proportion of income in question means any consequent reduction in competition would not be material.

Further, the Proposed Arrangement involves collective bargaining for a very material share of news media publishers (nine news media companies as NPA Participants[16], as well as a number of non-member news media companies who have chosen to participate (e.g. Hex Work Limited (The Spinoff)). As a result, any lessening of competition among them is likely to lessen competition more broadly in news publishing. We have already seen in June this year a closer content and commercial relationship between Stuff and The Spinoff, and the impact of collective bargaining would need to be viewed in light of all aspects of collaboration between the parties.[17]

Meta submits that the Australian Competition and Consumer Commission's (**ACCC**) approach in its Collective Negotiation Determination for Country Press Australia[18] – to which the Draft Determination refers – is not informative in the present case. Not only is it precedent from a jurisdiction with very different market dynamics (including being far less concentrated), but also this determination covered a very confined set of publishers, rather than a significant general scope in a highly concentrated media landscape, as is the case here. The Proposed Arrangement will involve a much greater proportion of the total market, and therefore the potential harm is both much more likely, and more significant.

As Meta set out in our submission in response to the Statement of Preliminary Issues (**SOPI**),[19] any material reduction in competition between news media companies – which would necessarily occur under the Proposed Arrangement – can be expected to result in decreased product and supply of news content. This, in turn, will reduce the level of

15 Draft determination, [169].

16 The Participants include Stuff Limited (Stuff), Allied Press Limited (Allied Press), The Gisborne Herald Company Limited (Gisborne Herald), Ashburton Guardian Company Limited (Ashburton Guardian), Greymouth Evening Star Co Limited (Greymouth Star), National Media Limited (Wairarapa Times-Age), The Westport News Limited (Westport News), The Beacon Printing & Publishing Company Limited (The Whakatane Beacon) and The Wairoa Star Limited (Wairoa Star).

17 https://thespinoff.co.nz/media/30-06-2022/the-spinoff-announces-a-new-partnership-with-our-mates-at-stuff

18 Australian Competition and Consumer Commission *Determination – Application for authorisation lodged by Country Press Australia in respect of collective negotiations with Facebook and Google* (5 August 2021).

19 Meta's submission on the SOPI, page 12.

diversity, quality, innovation and ultimately choice for New Zealand consumers. Given the importance of news as a public good, and the already highly concentrated nature of New Zealand's news media industry, these potential detriments are not only likely, but considerable.

Finally, collective bargaining is unlikely to treat all publishers equally, or "fairly". In reality, news content is highly differentiated and there is significant scope for innovation. In that context, there is real scope for collectively bargained arrangements to send inefficient signals, or set inefficient incentives, as to the particular content Meta's users value. Participants may well misunderstand what will be of genuine value to Meta and our users, which is likely to give rise to efficiency losses. Relatedly, collective bargaining reduces Meta's incentive to invest and reduces competition because it restricts the ability to reach bespoke arrangements with innovative publishers.

There is a real chance of allocative efficiency detriments

Despite the Draft Determination accepting that the Proposed Arrangement could amount to cartel conduct, and that it will result in higher costs to the Digital Platforms, it takes the view that there is no realistic prospect of allocative efficiency detriments.[20] Given the Application deals with cartel conduct, it must be capable of reducing allocative efficiency. Nevertheless, the Draft Determination contains only a single paragraph on this issue and does not cite any evidence. Meta submits that further evidence and/or analysis is required for the NZCC to finalise its view.

If detriments are likely, the benefits must be properly assessed

Once the prospect of detriments is acknowledged, which it must be, the authorisation determination must fully assess the likely benefits to properly consider whether the likely benefits outweigh the likely detriments.[21] The Draft Determination does not do this – neither in carrying out a quantitative assessment of where potential benefits are possible, nor considering the likelihood of those benefits arising in each possible factual scenario.

The NZCC will consider all benefits and detriments arising from an agreement in the balancing process – whether quantifiable or not[22] – although the NZCC will seek to quantify the likely benefits and detriments to the extent practical. Where information is incomplete or uncertain, sensitivity testing will be undertaken to test the reliability of any quantification.[23] As such, the Application should be assessed on the basis of quantified

[20] Draft Determination, [172].

[21] Authorisation Guidelines, [42].

[22] Authorisation Guidelines, [44].

[23] Authorisation Guidelines, [47].

benefits (to the extent practicable) that are adjusted for the risk that neither Digital Platform enters into an arrangement even if collective bargaining is authorised.[24]

The benefits must be quantified, or at least assessed

The process described above has not been followed in the Draft Determination. For example, one of the benefits identified in the Draft Determination was avoided transaction costs. In assessing this, the Draft Determination indicates, "we have not attempted to quantify the value of likely transaction costs savings. However, our finding that there is likely a net public benefit does not turn on the precise value of the benefit".[25] There is no mention of:

- what costs may be incurred by the collective, or
- the likely costs incurred in individual bargaining.

Benefits that are identified in the Draft Determination appear practically capable of quantification, albeit with sensitivity testing. As well as avoided transaction costs, the claimed benefits are efficient contract terms, more or better news content and beneficial wealth transfers. All, except perhaps aspects of better news content, relate to costs and economic efficiencies, rather than inherently qualitative factors, and thus the NZCC is likely to have the tools and expertise to carry out some form of quantification.

The factual scenarios have not been fully considered

Meta submits that the Draft Determination has not properly assessed the relevant factual scenarios. The Draft Determination appears to rely on small benefits that will only occur if certain conditions are satisfied. While no detailed analysis of benefits has been carried out, the assumption appears to be that if the Proposed Arrangement proceeds, an agreement will be entered with at least one of the Digital Platforms, in which case the potential benefits will occur:

- ***There are additional factual scenarios***: the Draft Determination identified two possible factual scenarios that may arise if the Proposed Arrangement is authorised. These scenarios are that the Participants may be successful in negotiating a collective arrangement with one or more of the Digital Platforms (i.e. collective bargaining occurs) or despite authorisation, the Participants are unsuccessful in negotiating with either of the Digital Platforms (i.e. no collective bargaining). In Meta's view there are a range of additional factual scenarios, for example, one Participant may enter a collective arrangement with one of the Digital Platforms but not the others, or some Participants may be successful where others are not. Meta submits that a proper analysis would consider the benefits and detriments in all factual scenarios and then weight those benefits and detriments according to likelihood of the scenario occurring.

- ***There are no benefits in a "no collective bargaining" scenario:*** while the Draft Determination identifies that one of the possible factual scenarios is that the

[24] Authorisation Guidelines, [47].

[25] Draft Determination, [100].

Participants are unsuccessful in negotiating with either digital platform, it does not properly assess the likely benefits in that scenario. For example, in relation to avoided transaction costs, the Draft Determination finds that even if all negotiations with Participants are undertaken bilaterally, transaction cost savings would still occur, but no evidence has been provided for how. Meta submits that if bargaining is not actually undertaken collectively, then it is difficult to see how any benefit would arise given the conduct in question would not take place.

Meta respects NPA and although we disagree with the provisional determination and Draft Determination, we respect the NZCC has given provisional authorisation. We therefore have met twice with the Australian news media representatives whom NPA has engaged as their agents. We have been clear that we have not concluded collective agreements in other parts of the world, including in Australia, and that we will continue to pursue commercial agreements and other investments where there is a product market fit. It has been surprising that NPA [REDACTED]. It seems as though authorisation of the Proposed Arrangement has been treated as simply a necessary milestone by NPA on the path to government intervention in the sector, the prospect of which is itself creating perverse incentives and stalling commercial agreements. Our experience calls into question the likelihood and nature of benefits that would arise from the Proposed Arrangement.

An imbalance of bargaining power has not been established

The Draft Determination finds that collective bargaining may redress the imbalance of bargaining power.[26] Meta's view is that it is far from clear there is an imbalance of bargaining power:[27] The process to date does not suggest detailed and robust analysis has been conducted to test the existence and extent of any such imbalance, for example the Draft Determination cites individual pieces of evidence without drawing a clear connection to the conclusion.[28] Further, the Draft Determination:

- acknowledges that Stuff, NPA's biggest stakeholder, rarely publishes media on Facebook.[29] As a result, it is not reliant on Facebook for any segment of its news consumers. The NZCC does not place any weight on Stuff's conduct, but does not explain why this conduct is of no significance;
- appears comfortable that the excluded Broadcasters will be able to negotiate fair terms by way of bilateral arrangement,[30] which does not sit easily with a finding of an imbalance of bargaining power; and
- indicates that Digital Platforms agree that there is a two-way value exchange in relation to online news content and referral traffic to news websites. This

[26] Draft Determination, [125] and [126].

[27] See Meta's submission on the SOPI, pages 5 and 16-18.

[28] Draft Determination, [121]ff.

[29] Draft Determination, [121].

[30] Draft Determination, [153]ff.

misrepresents Meta's point (which the NZCC cites).[31] Meta acknowledges value exchange, but all evidence indicates the value exchange favours publishers.[32]

This draft finding is also contrary to evidence and analysis in the Sapere Report. The Draft Determination notes that the Sapere Report deals with a different threshold than its own work.[33] Meta agrees this is a difference between the two pieces of work. However, this difference is not an appropriate basis on which to ignore, in a wholesale way, the conclusions, evidence and analysis contained in the Sapere Report. In fact, the Sapere Report presents evidence and makes findings that are directly relevant to the issues that the NZCC is required to consider. In particular the Sapere Report found:[34]

> *We do not agree that, by virtue of Google and Facebook providing links/snippets to news content, they are effectively capturing or reducing advertising revenue that might otherwise flow to news firms. Even though the platforms are almost certainly benefiting from facilitating access to news content, it does not follow that this benefit is coming at the expense of news firms or that they are in a zero-sum relationship with news firms.*
>
> *…*
>
> *if news firms consider that the negative impact that Facebook and Google are having on businesses outweigh the benefits they receive then they can opt-out from having links to their news content or snippets displayed on either platform. Despite the fact that both platforms have become an integral part of the distribution of online news, we might expect news firms to consider restricting the availability of their content if they felt the value exchange had become too one-sided (e.g. by restricting indexing or moving to a paywall).*

Further, the Sapere Report expresses the view that the benefit news media companies derive from the digital platforms driving traffic to their sites was "significant".[35] The difference in approach between the Sapere Report and the Draft Determination is not relevant to this finding, and therefore there is no reason it should not be taken into account.

The diversity of offerings means it is not clear that there is a real chance benefits will arise

The Draft Determination finds that:

- With collective bargaining, negotiations are likely to incur lower total costs than the sum of individual bilateral negotiations.[36] Meta does not agree. Given the diversity of offerings from Participants, it is not clear this would be the case. If negotiations were to try and address all of the interests of different Participants, this may even result in increased transaction costs. If they did not do so, then inefficiencies and detriments to competition (as described above) would be exacerbated.

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31 Draft Determination, [121].

32 Meta's submission on the SOPI, page 3.

33 Draft Determination, [135].

34 Sapere Report, page 78.

35 Sapere Report, page 43.

36 Draft Determination, [99].

- On balance, collective bargaining is likely to produce more sophisticated and efficient contract terms than individual negotiations.[37] Meta reiterates that if collective bargaining is not successful, there will not be any benefits of this type. Further, given the diversity of offerings by Participants, it is not clear how this is achievable in practice.

- There is a real chance that some proportion of additional funding achieved under the Proposed Arrangement would be used to fund the production of news content.[38] The Draft Determination suggests that this would lead to more / better news content. Meta disagrees with this proposition. It is also contrary to findings in the Sapere Report, including that "requiring Digital Platforms to pay specific news firms in order to link their content will improve [their] finances… but there is no clear basis to believe that this will result in additional public-interest journalism or better quality journalism". The difference in threshold that is applied in the Sapere Report does not render this finding irrelevant, particularly given the strength of the finding ("no clear basis") and furthermore the following supporting evidence has clear and direct relevance to the NZCC's analysis:[39]

    - Compensation (outside of mutually beneficial commercial arrangements) would likely benefit existing business models, which in turn may disincentivise news firms from innovating and exploring new business models.[40]

    - Some smaller firms Sapere interviewed considered that following the Australian model of encouraging commercial negotiations "would only benefit larger news firms and that smaller start-ups would miss out."[41]

    Both of these points have application to the analysis in the Draft Determination, in terms of potential sources of harm or detriment, as well as the likelihood and likely extent of potential identified benefits.

There is no basis to assess beneficial wealth transfers as a benefit

The NZCC considers one potential benefit from the Proposed Arrangement as being "preventing an existing wealth transfer from the Participants to the Digital Platforms' foreign shareholders,[42] which is caused by the Digital Platforms' use of the Participants' content".[43]

37 Draft Determination, [109].

38 Draft Determination, [136]

39 Sapere Report, page 79.

40 Sapere Report, page 79.

41 Sapere Report, page 79.

42 It is also important to note that Meta is not wholly owned by offshore shareholders. For example, the NZ Super Fund is a Meta shareholder.

43 [138.1].

The NZCC does not consider it necessary to assess this potential benefit (due to the other likely benefits and the lack of detriments).[44] Nevertheless Meta considers it important to note that the Draft Determination does not contain any economic analysis to support the existence of "functionless economic rents" (i.e. supra-normal profits), which would be capable of transfer from off-shore to New Zealand. (See above for our comments on the likelihood of additional funding and its use to improve the production of news content.)

Further, as a factual matter, Facebook does not actively reproduce, or scrape, content produced by New Zealand publishers. All news content from New Zealand news organisations on Facebook is published – or links to that content are published – on the platform voluntarily by those organisations. News content and links appear on Facebook either because local publishers choose to post or link their content on to Facebook, or because users choose to share a link to a news article on Facebook mostly at the encouragement of publishers who include sharing links on their content within their own websites.

[44] [141].

Meta provides additional evidence and analysis in relation to the appropriate Counterfactual

The Draft Determination takes the view that, absent the Proposed Arrangement, large and medium news media companies would likely negotiate and enter into commercial agreements with Meta and/or Google,[45] whereas smaller, regional news media companies would likely be unable to do so.[46] Further, smaller news media companies could only access "limited support" for digital transformation via, for example, Meta's 2022 Accelerator programme.[47] We would again point to the significant impact the Accelerators have had in New Zealand and the commercial agreements concluded with smaller publishers in challenging the characterisation as "limited support".

Meta submits:

- the counterfactual in the Draft Determination appears to overlook that Meta has engaged, and continues to engage, in commercial discussions with smaller news media companies and reached agreements;
- the extent of Meta's engagement with news media companies is driven by commercial realities, i.e. whether the news media company offers a product that has value to Meta, not how many journalists it employs; and
- Meta has made significant investments in the New Zealand news ecosystem. The support available to smaller news media companies from Meta, via the Accelerator or otherwise, cannot properly be described as "limited".

The counterfactual does not reflect Meta's engagement model with news media companies

As highlighted in Meta's cross submission on the SOPI, Meta has commenced, and is actively pursuing, commercial discussions with a number of New Zealand news media companies. These discussions include larger and smaller media companies, as well as public, regional and Māori publishers.

To date, Meta has concluded three commercial deals with New Zealand news media companies including smaller companies. These are with the Spinoff, Newsroom and NZME. As we have shared previously with the NZCC, we have a number of other negotiations that are in market and ongoing.

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45 In Meta's case, the NZCC's view is that such agreements would be for the display of video content on Facebook or, more likely, for digital transformation support. In terms of Google, the NZCC's view is that such agreements would be for the display of content on Google News Showcase and/or for digital transformation support. Draft Determination, at paragraph 59.

46 Draft Determination, [59] and [60].

47 Draft Determination, [60].

The counterfactual does not reflect Meta's commercial engagement model with news media companies, particularly smaller companies nor the investment in 13 Kiwi publishers through the Accelerator and Grant funding.

Commercial arrangements reflect a mutual value exchange, not an organisation's size

Implicit in the view set out in the Draft Determination is that smaller size means less (presumably, quantity of) content to offer to Meta, less bargaining power and less ability to secure agreements. This is incorrect. As Meta has set out in various submissions, it is not accurate to assume that every publisher in New Zealand is suited for a commercial deal – this is not related to size.

Where news media companies produce content of commercial value to Meta, then Meta has been willing to (and has) compensated them for it in a mutually acceptable commercial arrangement. This is irrespective of the size of the media company.

The digital industry, and therefore the type of content that is valuable, is undergoing rapid change. As further substantiated in the introduction to this submission, Meta has observed a fundamental shift in consumers' preferences in the last 12 months away from news content in the form of traditional articles toward short-form video and creator content. Meta also regards the role that Facebook plays in providing news has continued to shrink. For example, the percentage of Australians using Facebook for news has dropped from 45 percent to 33 percent since 2016.[48] As consumer demand evolves, so too will Meta's engagements with news media companies: if their content does not align with what users wish to engage with, it is less commercially viable for Meta to enter into agreements.

Meta invests significantly in the New Zealand news ecosystem

Meta rejects the suggestion that it offers news media companies "limited support",[49] whether through the Accelerator or otherwise. Meta has made, and continues to make, significant investments into the New Zealand news ecosystem, particularly into smaller news media companies.[50]

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48 S Park et al., Digital News Report: Australia 2021, 23 June 2021, https://apo.org.au/sites/default/files/resource-files/2021-06/apo-nid312650_0.pdf.

49 Draft Determination, [60].

50 Meta's submission on the SOPI, page 11: Meta is continuing to make investments in the New Zealand news ecosystem to support greater diversity and plurality of digitally enabled publishers. In November 2021, Meta committed to a new set of investments. The multi-million dollar investment from the Meta Journalism Project includes:

- supporting local publishers to develop sustainable business models through Meta's Accelerator and Grant Fund (a platform agnostic digital strategy mentoring, coaching and training programme) – this will bring 13 publishers from Māori, regional, digital and culturally diverse publications together;
- establishing a Meta Aotearoa News Innovation Advisory Group, in partnership with the independent NGO the International Center for Journalists, made up of a group of five industry experts, with diverse experience across New Zealand's media industry to advise us on the Accelerator and Grand Fund; and
- dedicated training for New Zealand publishers on growing and engaging digital audiences through a Facebook News Day hosted virtually on 26 November 2021.

Meta has invested millions of dollars in funding publishers of all sizes through our Accelerator programs and grants in New Zealand since 2019. This includes the most recent Aotearoa Audience Development Accelerator, which has seen Meta invest project funding for all the publishers in the Accelerator, being Ashburton Guardian, Capsule, Crux Publishing, Indian Weekender, Local Matters, Mandarin Pages, Māori Television, MediaWorks, Otago Daily Times, Pacific Media Network, Radio Bay of Plenty, Shit You Should Care About and The Wairarapa Times-Age.[51] Outside of the Accelerator initiative, Meta invests in partnership support, new tools to optimise monetisation and grant funds to assist all publishers with building strong commercialisation models utilising Meta's services. Additional information is set out in the introduction to this submission.

51 https://www.facebook.com/formedia/blog/new-zealand-challenge-2022-participants.

Conclusion

In summary, we have real concerns about both the legal analysis and factual basis in respect of a number of the draft findings in the Draft Determination and encourage a proper examination and testing of the evidence underlying the draft findings. Please do not hesitate to contact us if you require further information regarding our submission, and we look forward to further engagement as the process continues.