



<https://betterpublicmedia.org.nz/>

News Publishers' Association of New Zealand Inc. application for authorisation/provisional authorisation to engage in collective bargaining with Facebook and Google: Submission in Response to the Commerce Commission's Statement of Preliminary Issues¹.

Prepared on behalf of the Better Public Media Trust² for the Commerce Commission (Te Komihana Tauhokohoko)

**Prepared by Peter A. Thompson³
February 2022**

1) Introductory statement: BPM's position

The Better Public Media Trust (hereafter BPM) appreciates the opportunity to submit some observations about the NPA application to the Commerce Commission to authorise their engagement in collective bargaining with Facebook and Google.

BPM is supportive in principle of the Commission's authorisation of some form of collective bargaining arrangement between domestic NZ news media and online platforms/intermediaries as an interim measure. However, this support is premised on some variations to the proposed framework including:

- a) the inclusion of other domestic news/factual content-producers in Aotearoa/New Zealand, such as broadcasters (including- with caveats- public sector media) in the bargaining framework.
- b) the extension of the collective bargaining principle to other relevant online platforms/intermediaries other than Meta (Facebook) and Alphabet (Google) which benefit from revenues generated from the discovery/sharing/hosting of third party-provided news/factual content.
- c) the collective bargaining arrangements proposed in the NPA application should only be authorised as a short-term (e.g. 2-3 year) arrangement.

BPM agrees that collective bargaining measures may help, temporarily, to increase the bargaining power of the NZ-based news media seeking compensation from online platforms/intermediaries and thereby partially ameliorate aspects of the structural imbalances between the online platforms/intermediaries and the domestic content sector. There are some market

¹ <https://comcom.govt.nz/case-register/case-register-entries/news-publishers-association-of-new-zealand-incorporated2>

² The BPM trust <https://betterpublicmedia.org.nz/> is a non-government organisation which advocates for public service principles for broadcasting and other media platforms as well as facilitating educational public debates and commissioning research into media policy. It is not party-political in orientation. Its membership encompasses a wide demographic and the board, which is elected by the members, includes both media practitioners and academic experts. We are currently in the process of applying to become a charitable trust. This report was compiled by Peter Thompson in consultation with the CBB Board.

³ Peter Thompson is an Associate Professor in Media and Communication at Victoria University of Wellington. He is a founding member of the BPM board and has published extensively on media policy issues, including authoring previous BPM submissions on competition in media markets to the Commerce Commission.

justifications for this. There are nevertheless some questions and concerns about the proposed collective bargaining framework (factual scenario):

- i) the extent of any ostensible public benefit conferred by the proposed scheme compared with alternative counterfactuals.
- ii) the extent to which the proposed scheme envisaged is premised on a misconception of the nature of the imbalances between the sectors stemming from a misidentification of the relevant markets.
- iii) the risk that the proposed scheme may inadvertently 'lock in' the fundamental market imbalances in the longer term.
- iv) The risk that the proposed scheme would entail foreclosure of alternative counterfactual scenarios (including statutory policy interventions) which potentially offer greater public benefits and a more fundamental redress of current market imbalances.

These issues will be further explained in the following sections.

2) The digital media ecology: Contextual issues

NPA's application to the Commission stems from a complex intersection of historical junctures which have determined the trajectory of the media ecology both in Aotearoa New Zealand and globally. The submissions from NPA and other interested parties have already provided much of the background, but it worth highlighting a few key contextual issues and points of contention;

- i. Particularly since the free market/monetarist reforms from the mid-1980s, the default media policy settings in Aotearoa/New Zealand have generally prioritised light-touch industry-led approaches and eschewed extensive regulatory interventions liable to discourage foreign investment. Apart from periodic efforts to support modest public broadcasting provision and some significant measures in the telecommunication sector (notably local loop unbundling and the UFB initiative), there are minimal restrictions on overseas or cross-media ownership (beyond generic competition law) and successive government efforts to address concerns arising from new digital media have remained fragmented across different ministerial jurisdictions and generally lagged behind market developments. One recent development in the wake of the Covid pandemic was state subsidies of commercial news media including the Public Interest Journalism Fund, as well as the on-going deliberations concerning the regulation of online platforms in the wake of the Christchurch mosque attacks and the ensuing Christchurch Call. However, regulatory responses to the concerns arising from the operation of online platforms/intermediaries have thus far remained limited, partly because their core operations largely fall outside the existing frameworks which apply to content providers/publishers or to common carriers/network providers.⁴
- ii. Over the past two decades, there has been a rapid evolution of digital/online media, notably the development of broadband infrastructures and mobile/wireless computing and telecommunications. This has underpinned a significant acceleration of uptake of online/interactive media services, including streamed video-on-demand, content sharing/hosting platforms and social media, as well as online search/content discovery apps/services. The convergence of online technologies and the availability of video, audio and data services through single platforms and reception devices has blurred previously discrete/distinct media markets (e.g. between print, radio, television) and intensified competition. In turn, these developments have undermined the value-chains and business models upon which many of the traditional media relied. Newspapers in particular, already facing a slow decline of hard copy sales, were affected by the decisions by the major groups to make their content freely-available online, calculating that the expansion of readership could capture sufficient advertising to off-set any decline in hard copy sales. Paywalls were mooted but considered unattractive, especially if substitutable news content provided by rival publishers remained free.

⁴ See <https://www.polecom.org/index.php/polecom/article/view/105/314>

iii. However, the free online news strategy did not recognise the scale of the challenge that was to come from the proliferation of new digital media services and platforms/intermediaries. As competition for audience eyeballs and online advertising revenue intensified across different media, audience behaviour was evolving⁵, notably in respect to a) increasing preferences for ubiquitous, on-demand services accessible through mobile reception devices and b) patterns of content discovery, particularly through web browsers, search engines, social media and other interactive intermediary services which enable the visibility, sharing, and hosting of third party and user-generated content. The online platforms/intermediaries have been able to effectively monetise online audience attention through a) operating at the choke-points in the value chain which interface with and help regulate online audience traffic (notably through dominating search services and the algorithms which shape content discovery) and b) enabling the more efficient targeting of advertising through the mass harvesting of audience data derived from their own online activity (search parameters, social media 'likes' and sharing, etc.)

iv. ASA data⁶ on interactive/digital advertising was first collated in 2003 (just before Facebook was launched), when it had a share of 0.4% (worth \$8m) of the total domestic advertising market. By 2012, this had risen to 16.9% (worth \$366m). By 2016, this share doubled to 34.6% (worth \$891m) and by 2020, the digital/online sector represented 54.8% (worth \$1,341m) of the total spend⁷. Although the precise break-down of these figures for the NZ market is difficult to ascertain, a significant majority of that revenue is evidently captured by the dominant actors, Google and Facebook with some estimates suggesting they enjoy an 80% share of the digital advertising spend in Australia and New Zealand⁸. Interestingly, historical ASA figures show that, back in 1997, the newspaper sector in NZ enjoyed a 41.1% share of the domestic advertising market (worth \$552m) while television had 35.5% (worth \$478m). By 2020, the newspaper sector (including digital/online) share had fallen to just 12.1% (worth \$296m)- a decline of almost two thirds- while television (including digital/online) had fallen to 20.9% (worth \$513m). Meanwhile, newspaper circulations have continued to decline (in the case of the NZ Herald, from roughly 200,000 in 2000 to 100,000 in 2019) and by some estimates the number of journalists employed in NZ has declined by 50% since 2008⁹. Although several social, economic and technological developments have contributed to this decline, the wholesale shift towards platform-based digital advertising has been a critical, and perhaps decisive factor.

v. Although social media and content sharing platforms enable user-user interaction and the distribution of user-generated content, they are becoming an increasingly significant channel through which audiences discover and access third party content- including news, although the extent of this can vary across countries and different platforms¹⁰. Importantly, though,

⁵ See the NZ On Air audience reports- <https://www.nzonair.govt.nz/research/where-are-audiences-2021/>

⁶ <https://www.asa.co.nz/industry/asa-advertising-turnover-report/> Note the 2021 data is not available while the 2020 data has been affected by the response to Covid which saw a significant decline in advertising spend. However, it is the ratios not just the total expenditure which underline the issues here. The Interactive Advertising Bureau also provides useful data but is restricted to members. <https://www.iab.org.nz/>

⁷ Of that, the newspaper sector accounts for \$86m and television \$44m.

⁸ e.g. see;

- https://thepolicyobservatory.aut.ac.nz/_data/assets/pdf_file/0017/202841/google-facebook-and-new-zealand-news-media-merja-myllylahti.pdf
- <https://theconversation.com/google-and-facebook-pay-way-less-tax-in-new-zealand-than-in-australia-and-were-paying-the-price-137075>
- <https://www.nzherald.co.nz/business/how-much-google-and-facebook-made-in-nz-in-2018/IPFLSCEOA55DZX6JAQGK6BEAI/>
- <https://thespinoff.co.nz/money/10-06-2021/google-pays-tax-in-nz-facebook-doesnt-can-a-heralded-new-global-tax-agreement-change-that>
- <https://www.theguardian.com/media/2020/oct/23/google-facebook-and-youtube-found-to-make-up-more-than-80-of-australian-digital-advertising>

⁹ Note this may partly reflect redefinitions of news-worker roles but the trend is clear: See <https://www.nzonair.govt.nz/news/first-funding-injection-public-interest-journalism-boosts-reporting-and-training-across-motu/> , Also:

<https://www.rnz.co.nz/national/programmes/mediawatch/audio/2018672853/the-decline-and-fall-of-local-body-reporting>

¹⁰ e.g see recent Ofcom and Pew Centre reports-

- <https://www.ofcom.org.uk/research-and-data/tv-radio-and-on-demand/news-media/news-consumption>
- https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2021/01/PJ_2021.01.12_News-and-Social-Media_FINAL.pdf
- https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2019/02/PJ_2019.03.05_France-media-attitudes_FINAL.pdf

online sharing or hosting of content/links may divert direct traffic from news content producers' own websites and monetise the audience's attention at a point in the value chain which circumvents or decreases the monetization opportunities for the content producers. As the submissions from NPA, Meta and Google underline, however, there is a symbiotic relationship between the two, but the potential value they add or subtract from each other in respect to audience traffic and advertiser revenue is disputed and dependent on the assumptions underpinning the models used to calculate costs and benefits.

- vi. The online platforms' rapid domination of the online digital advertising market has occurred over the same time-frame during which the traditional media's share had substantially declined. One possible narrative arising here would frame these developments as causally related, entailing, in effect, a direct transfer of digital revenues from the news content providers to the online platforms/intermediaries. At face value, the advertising data could support an argument that the latter has, in effect, intercepted and monetised online audience traffic generated ultimately by the content produced by the former without providing proportionate compensation. It is also apparent that the online platforms/intermediaries primarily operate business models requiring minimal investment in content or distribution/reception infrastructure (beyond servers, software/apps and algorithms), suggesting they are parasitic on the productive sectors which underpin much of the audiences' online experience. Moreover, insofar as the platforms have enabled a wider range of content producers/prosumers to generate and disseminate content, they have enabled a range of dysfunctional social influences such as the proliferation of misinformation and other harmful online activity (e.g. terrorism/extremist content) as well as the facilitation of abuses of personal data (e.g. the Cambridge Analytica scandal)
- vii. Unsurprisingly, the platforms/intermediaries offer a different narrative, arguing that they are not primarily dependent on any particular source or form of content as a driver of audience traffic, and rejecting claims that they have siphoned off digital advertising revenues which could and should have rightly benefited the news sector. Insofar as their rapid expansion has been premised on audience data from online users voluntarily using their platforms to interact with each other and discover data, the platforms argue that, far from being the source of the news sector's problems, they have in many instances, contributed to the net flow of traffic to news websites. Indeed, many news media actively generate revenue from their presence on social media platforms while those which have chosen not to have not suffered a substantial collapse of revenues. Meanwhile, both Meta/Facebook and Google have embarked on initiatives to reinvest a (small) proportion of their profits in various initiatives to support news media such as the *Google News Initiative* and Meta's *Accelerator and Grant Fund*, in addition to making investments in the moderation of online content to reduce potential harms/abuses.
- viii. Both narratives highlight legitimate concerns, but both are partial accounts and neither is entirely valid. The relationship between the online platforms/intermediaries and content providers is more complex and multi-layered than either side acknowledges. More sophisticated analyses of these relations suggest a more ambiguous set of interplaying interests reflecting multiple economic, technological and social factors¹¹. The next section will offer an alternative perspective on the market definitions and normative assumptions underpinning the collective bargaining proposal.

• <https://www.statista.com/statistics/718019/social-media-news-source/>

¹¹ For example, Dwayne Winseck usefully notes that there are vested corporate interests on both sides of these debates and the traditional media sectors have actively promoted the expedient view that it is only the market power of the digital platforms and tech sector which merits regulatory intervention; see <https://www.ingentaconnect.com/contentone/intellect/jdmp/2020/00000011/00000003/art00002>

3) **Market definitions and normative assumptions**

The pretext for the Commission's authorisation of what could conceivably be construed as an anti-competitive trust arrangement in the form of collective bargaining of commercial content licensing agreements is the conferral of a public benefit not present in the counterfactual scenario which outweighs any deficits attributable to the factual scenario. The implicit position of NPA here appears to be that:

- i. News produced by professional news media is a merit-good, i.e. it confers a public benefit beyond the informational value to the individual consumer (e.g. supporting an informed democracy and helping displace/limit the deleterious effects of misinformation or other online harms).
- ii. There is a structural imbalance in the current bargaining position of the news content sector in relation to the online platforms/intermediaries stemming from the latter's dominant market position. This means that news content providers are disadvantaged if they do not engage with platforms (e.g. by operating their own pages of Facebook), enabling the latter to extract a disproportionate economic benefit from the former's provision of news content while bearing none of the costs of its production.
- iii. The counterfactual scenario where collective bargaining is not permitted represents a deficit arrangement in respect to the wider public interest and is likely to lead to further reductions in the quantity or quality of news content and/or increased costs to the public to maintain current provisions.

Positions i) and iii) are both entirely plausible. Assuming any revenues accrued through the collective bargaining framework with Google and Meta a) exceed what would be achievable through individual negotiations, and b) were reinvested in public interest journalism (rather than just being extracted as shareholder profit), then there would be some net public benefit. Meanwhile, assuming the collective bargaining framework does not arbitrarily exclude and thereby disadvantage other news content providers (insofar as they provide content qualifying as a merit good), then any reduction of competition is likely to be minimally harmful to the public in respect of cost or quality of media services.

Position ii) is partially plausible, but it is not the whole story. There is a need to interrogate the nature of the structural imbalance in the news providers' bargaining position- specifically the issue of market definition and the origin of the platforms' ostensible market power. The concern here is that the proposed collective bargaining framework as currently formulated, even if conferring some benefit on the news media and, by extension the public, is unlikely to address the more fundamental market competition issues underpinning the relationship between the news and online platform sectors. In effect, the news media sector is claiming payment for content hosting/linking on platforms and for the opportunity cost of foregone digital advertising.

But platforms are not publishers per se; they enable content discovery/sharing, not only from news media but from a wide range of content providers. Moreover, they primarily derive revenues from their collection of personal user data and ability to target advertising and monetise the online traffic the platforms generate; third party online content, discovered, shared or hosted is a means to that end. The point is that the public deficits stemming from structural imbalances and the market power of the online platforms/intermediaries extend beyond the primary concern of the collective bargaining application with the news media market.

The standard market definition here usually holds that online news media operate in a 2-sided market where the retail side (content) generates audience attention/eyeballs, and this in turn generates advertising revenue (the wholesale side). The critical issue is that content provision is no longer the primary capture point of audience attention or data harvesting. Platforms providing user-user interaction, content sharing and online search services/content discovery also play an increasingly central role in the functioning of media content markets, and insofar as they have become an embedded and indispensable aspect of everyday social interaction, they enjoy network incumbency (i.e. their value to users is premised on the number of other

users in the network, posing a barrier to market entry and limiting substitutable consumer options). There are multiple mediating market layers in the online media ecology. It might be argued that digital media markets need to be considered as four or even five-sided. These other dimensions include-

- i. **The telecommunication infrastructures and devices which provide data transmission, reception and storage/retrieval, and the stacks of software and apps comprising the World Wide Web.** These are not provided by the online platforms/intermediaries but by the telecommunication and network companies, so in effect, the online user/audience pays the cost of providing the basic internet access upon which search engines and social media rely for their operation.
- ii. **The systems of online navigation/browsing/searching and the algorithms/apps shaping content discovery, recommendations and content visibility in social media feeds.** The operation of these intermediary services obviously influences media content markets and audience behaviour, but they are distinct functions. At present, they are geared to optimizing monetisable user traffic for the online platforms and advertising clients, although they have been implicated in a range of online harms (e.g. enabling the proliferation of harmful/extreme content¹²) and arguably represent a deficit to the public interest.
- iii. **The collection and collation of online user data and its use to prioritise content and target advertising.** Although online service users ostensibly sign up as free market agents to terms of service which permit platforms to harvest and use their data in return for free access to their services (and in principle they could elect not to use those services) it is apparent that a) most users have minimal understanding of the value and usage of the personal data they allow platforms to collect, and b) even if they have concerns about these arrangements, the embeddedness of online platforms and their network incumbent status (and lack of direct substitutability) may inhibit opting out in practice because of the cost of foregoing social connectivity.
- iv. **Audience attention as a zero-sum resource in a media-saturated attention-economy¹³.** Insofar as the platforms' network incumbency provides them with a 'captive audience' whose attention can be co-opted and directed towards (or away from) particular content forms (such as targeted advertising or material intended to retain and monetise their online engagement), they are arguably detracting from alternative, more socially beneficial deployments of user attention. Commercial media markets have historically presumed a right to compete for audience eyeballs on the basis that consumers freely choose what content meets their needs. However, in a content-saturated digital media ecology every consumption choice and interaction (e.g. sharing content) which can be monetised has potential merit or demerit value; a choice to spend time engaging with and sharing fake news or live-streaming terrorist attacks harms others as well as the consumer. Moreover, this would simultaneously constitute a choice not to engage with reliable, factual content which could confer social benefits. The point is that online platforms' business models are premised on the private commodification or 'enclosure' of public attention and carry the opportunity cost/deficit of reducing the potential for that attention to be employed in more socially beneficial ways.

To explain and redress the structural imbalances in the relation between the online platforms, content providers and public users, these dimensions of market power in the digital media market need to be taken into account. However, this complicates any calculation of the relative value provided by news content creators alone and suggests that the collective bargaining model is, at best, intended to treat the symptoms of the platforms' market power rather than address the underlying sources.

¹² See <https://www.polecom.org/index.php/polecom/article/view/105/314>

¹³ See, for example <https://www.tandfonline.com/doi/abs/10.1080/21670811.2019.1691926?journalCode=rdij20>, and <https://www.technologyreview.com/2021/01/10/1015934/facebook-twitter-youtube-big-tech-attention-economy-reform/> and <https://bjr.sbpjor.org.br/bjr/article/view/1332>

4) **Some limitations of the collective bargaining framework**

The collective bargaining framework may confer a net public benefit as a short-term measure, but addressing the deeper structural issues stemming from other segments of the digital media market (outlined in the preceding section) requires a broader policy approach- and this is likely to extend beyond the jurisdictional purview of the Commerce Commission. Although BPM is generally supportive of moves to rebalance the relationship between the providers of news content and the online platforms, there is a need to consider how far a collective bargaining agreement intended to more effectively extract commercial concessions from Google and Meta/Facebook may inadvertently preclude the development of more substantial regulatory arrangements which could secure better public interest outcomes for the media sector and civil society as a whole. Insofar as this is a possible outcome of the authorisation and has implications for the public benefits/deficits, it is germane to the Commission's deliberations.

The proposed collective bargaining framework has a number of shortcomings, most of which can be addressed with some adjustments or conditionalities:

- i. The NPA application explicitly excludes companies not listed on the NZX and crown entities. Although there is provision to include other news content providers, those excluded from the collective bargaining framework may be at a relative disadvantage compared with the NPA group. There is an argument that including entities whose primary business is not domestic news provision will complicate any negotiation with the platforms. However, insofar as other actors actively invest in the production of domestic news content which is discovered/shared/hosted through the digital platforms then it would be reasonable in the first instance to include their claims in respect to news/factual content. If this proved unworkable then it would still be possible to enter into separate negotiations. (Some specific considerations pertaining to public entities is discussed separately in a later section).
- ii. The application identifies Meta (including Facebook, Instagram, WhatsApp) and Google (Alphabet group including YouTube) as the counterparties. These are doubtless the largest market actors in respect to their share of the digital advertising market. However, there are other online intermediaries and social media platforms which could potentially be subject to claims from news content providers, such as Twitter. In principle, therefore, if collective bargaining is authorised by the Commission, this should extend in principle to negotiations with other comparable online platforms where applicable.
- iii. Although the NPA application does indicate the potential for revenues accrued through collective bargaining to be reinvested in quality journalism, the conferral of a net public benefit requires that this be a formal condition, not merely an aspiration. Otherwise, there is nothing to prevent any additional revenues from being retained by shareholders or invested in forms of content which have dubious public value¹⁴. Enabling more revenue to be transferred back to shareholders is a private economic benefit, which while arguably justified, should not be conflated with public benefit. Indeed, while the applicants doubtless do produce much news content with merit-good value (e.g. in-depth reporting of political, economic and social issues), there are many forms of news content which are less obviously publicly-beneficial, including 'soft' news, 'native advertising' and other editorial content or 'puff pieces' which align with the

¹⁴ This is also an obvious weakness of the Australian Mandatory Bargaining Code which favours the larger corporate news actors over smaller/regional news media. See <https://theconversation.com/is-the-news-media-bargaining-code-fit-for-purpose-172224>

interests of sponsors and advertisers. It is interesting to note that the NZ On Air *Public Interest Journalism Fund*¹⁵ set out quite stringent eligibility requirements to ensure the funding motivated an incremental extension of existing news production toward under-represented genres, audiences and regions. Although the PIJF obviously involved public funding, insofar as the collective bargaining authorisation entails a public benefit rationale, some sort of conditional obligation to ensure any revenue would be reinvested in publicly-meritorious content would be justified.

- iv. The process through which different news actors could come to some agreement with the platforms when they provide different amounts/forms of news and possibly have separate private licensing or subsidy arrangements with Meta or Google (e.g. the Meta for Journalism or the GNI Digital Growth Program) is unclear. Although some smaller/regional news media will be eligible to be included, the process determining what, if any, remuneration they will receive compared with the larger actors is not specified. Moreover, there is nothing in the proposed collective bargaining arrangement which sets out benchmarks for any level of remuneration agreement with Meta or Google. The negotiations will ultimately be framed on the terms of the online platforms, including what levels of payments are deemed to be realistic and acceptable (inviting a 'take-it-or-leave-it' scenario). This will also set default reference points and normative expectations against which future regulatory proposals in other jurisdictions might be framed. By way of contrast, France's competition authority recently fined Google €500m for failing to negotiate adequate licensing deals with publishers and news agencies 'in good faith' under its new Digital Copyright laws¹⁶. This is precisely the sort of enforceable statutory framework which the online platforms/intermediaries urgently want to circumvent in other countries.
- v. Although Meta and Google have expressed scepticism of both the normative and technical/economic pretext for the collective bargaining proposal, their overriding strategic concern is to avoid statutory regulation of those aspects of their value chain central to their business models (underlined by Facebook's temporary move to block Australian news content in opposition to the introduction of the Mandatory Bargaining Code and repeated threats to withdraw its service from the EU over opposition to restrictions on its sharing of user data¹⁷). Informal industry-based regulatory arrangements which incur moderate expenses but help to defer/inhibit more substantive interventions while 'locking in' the structural conditions which secure the platforms' long-term profits and market power are likely to be seen as an attractive strategic investment. In that regard, even if the collective bargaining arrangement is authorised, the relatively minor costs to Meta and Google could be off-set by setting up a patron-client relationship which the news media would then have a vested commercial interest. This could potentially inhibit critical reporting of market or regulatory issues affecting the interests of the online platforms, including the merits of the collective bargaining arrangement itself.
- vi. Perhaps the most significant concern about the collective bargaining scheme is therefore not the proposal itself but the potential for such an arrangement to become an impediment to more substantive regulatory reform addressing the deeper structural imbalances, not only in the relation between the online platforms and content providers, but also between the platforms and their users and perhaps society as a whole. Although NPA's cross-submission has noted that the proposed bargaining arrangement is not intended to have any implication for future regulatory interventions or competition deliberations, BPM is concerned that this may well be the outcome in practice. For this reason, the

¹⁵ <https://www.nzonair.govt.nz/funding/journalism-funding/>

¹⁶ See <https://www.bbc.com/news/technology-57811953> and <https://www.cnbc.com/2021/07/13/google-fined-500-million-euros-in-france-over-news-copyright-row.html>

¹⁷ See <https://www.npr.org/2021/02/17/968723929/facebook-blocks-news-in-australia-over-government-plan-to-force-payment-to-publi> and <https://www.vox.com/recode/22287971/australia-facebook-news-ban-google-money> Also: <https://www.theguardian.com/technology/2020/sep/22/facebook-says-it-may-quit-europe-over-ban-on-sharing-data-with-us> and <https://www.bloomberg.com/news/articles/2022-02-07/meta-may-pull-facebook-instagram-from-europe-over-data-rules>

ten-year term of authorisation proposed could ‘muddy the waters’ of other current policy developments. To offset this risk, a shorter period is recommended (e.g. 2-3 years). The rationale for this position is explained in the section below.

5) **The regulatory counterfactual to the collective bargaining scheme.**

The strategic motivation of the online platforms/intermediaries is to avoid or minimise any statutory interventions which entail significant compliance costs (such as duty-of-care obligations to monitor and minimise harmful online content) or opportunity costs (such as restrictions on the mass harvesting of user data and its use to enable targeted advertising), and where regulations are unavoidable, to quarantine the scope of intervention to ensure these do not undermine their business models.. Non-statutory, non-enforceable content licensing arrangements serve to appease (and perhaps co-opt) the content providers and reduce the pressure on governments to seek more robust regulatory action. Although Meta and Google have offered arguments against the collective bargaining arrangement, it would be a far preferable arrangement than the recent statutory measures adopted in France or Australia. Indeed, although their official position is to deny the NPA rationales for seeking collective bargaining, it could nevertheless be a strategic victory for the platforms were this to be authorised by the Commission, especially if the news sector itself was then inclined to endorse their collective bargaining arrangement with the platforms over more substantial regulatory upheavals (a bird in the hand, so to speak).

There are at least two counterfactual scenarios to consider here however. The first is the **status quo scenario**, which seems the more likely short-term outcome. This would see a continuation of the current imbalances and the relative disadvantage of the domestic news sector in being under-remunerated for the value of the news content and audience traffic they bring to the platforms. In terms of net public benefit, this would compare unfavourably with the factual scenario (assuming the noted shortcomings are addressed) in respect to there being no improvement in news provisions.

However, the second counterfactual scenario which, while less likely in the short-term, would be one in which the government seeks to **introduce a statutory framework** to redress the public current structural imbalances between the domestic news sector and the online platforms/intermediaries. Interestingly, the government is currently undertaking work on its Content Regulatory System Review which includes consideration of regulatory arrangements for online platforms. Thus the prospect of some form of significant regulatory intervention is certainly plausible in the medium-long term.

An approach that BPM has proposed is the introduction of a levy on digital advertising carried by online platforms/intermediaries (and other commercial media revenues) which is then used to subsidise public interest media production (such as paying for an indefinite continuation of the NZ On Air Public Interest Journalism Fund). Apart from the fact that the amount levied would not be determined by whatever the online platforms decided they could get away with paying, this sort of statutory arrangement would deliver a greater public benefit. The reason is that introducing a levy as part of a statutory model would mean that the revenues would be transparent and disbursed by an independent agency according to public interest criteria (as with the PIJF), rather than the priorities of private shareholders. This would increase the likelihood of the revenues supporting the plurality, diversity and quality of news as an essential but under-provided merit good in a democracy increasingly facing scarcities (not to mention a surplus of ‘demerit’ goods such as misinformation) in a zero-sum attention economy.

Consequently, if the factual scenario were to eventuate, establishing a news sector-online platform collective bargaining arrangement would likely result in a sub-optimum outcome in respect of public benefits because-

a) Although potentially beneficial to the news sector in the short term, compared with the first counterfactual (status quo) in the medium-long term, the collective bargaining arrangement could still be deployed as a pretext to defer or inhibit the introduction of statutory measures intended to address the deeper structural issues underpinning the online platforms’ market power (stemming from control of the means of content discovery, mass harvesting of user data, and the monetisation of online audience attention through targeted advertising).

b) The collective bargaining arrangement would deliver less public benefit than the second counterfactual scenario wherein a statutory framework is adopted, requiring the platforms to financially contribute to the costs of news (or other public interest) content production, and disbursing that revenue back to the news sector according to public interest criteria.

6) Consideration of the crown entities inclusion in the collective bargaining framework

In respect to their potential interest in being included in the collective bargaining arrangements, the publicly-owned media operators, TVNZ, RNZ and MTS are all in somewhat different positions. TVNZ is a Crown Entity but is currently commercial in operation and competes with other broadcast media for audience and advertising¹⁸. However, news is only one of many genres produced and aggregated by TVNZ, so if the premise for being included in the collective bargaining agreement is that news is a merit-good, then this leaves a question of what proportion and what forms of TVNZ's content would be eligible for inclusion. One might contend that NZ local content of any form is under-provided in the commercial media market, but then this complicates the pretext for the authorisation because a) not all forms of local content are necessarily merit-goods, and b) a substantial quantity of local broadcast content receive public subsidy through NZ On Air (or Te Māngai Pāho, particularly in the case of MTS) and are often sourced by independent producers who generally retain some intellectual property rights and might arguably contend that they too are entitled to participate in any bargaining with the online platforms.

Māori Television, meanwhile, is in a different position to TVNZ because of its specific cultural and language remit and the fact that only a small proportion of its revenues are commercial in origin, with most being derived from Te Puni Kōkiri and TMP (the latter both direct and contestable). Although one could make a convincing case for Māori content being classified as a merit good, given its historic under-provision and its role in supporting language revitalization, there are possibly some similar complexities in respect to intellectual property where content is sourced from independent producers. Moreover, given the Crown's obligations to support Māori media, there are questions over the policy implications of a public media service needing to bargain with the online platforms for additional revenue; a) would this potentially decrease the willingness of future governments to provide adequate public subsidy, and b) would the prospect of additional revenues derived from the platforms exert any influence on operational decisions (e.g. the prioritisation of content/commissioning decisions or editorial consideration for the way news about the platforms is reported?)

RNZ, meanwhile, has a public service remit and the majority of its content (at least on RNZ National) is news/factual. It is fully funded, albeit modestly, through the Ministry for Culture and Heritage (via NZ On Air) and RNZ is not permitted to carry advertising (although this has arisen on other platforms where RNZ has shared its content on social media or content sharing platforms). There is a provision permitting RNZ to earn revenue from international licensing although this is a minimal revenue source. Domestically, RNZ has entered into content-sharing agreements with several domestic commercial/independent news media, although these arrangements are not commercial in function; rather, they extend the audience reach of RNZ's publicly-funded content while providing third party news providers access to RNZ content. The policy questions arising in relation to RNZ's potential inclusion in the collective bargaining scheme are similar to those of MTS: a) would this reduce government willingness to fully fund RNZ were it to derive revenues from the platforms, and b) might such an arrangement have an influence on operational or editorial priorities?

BPM's position is that, insofar as these entities are content producers in a comparable relationship to the online platforms as other domestic news media, then in principle, they should be eligible to participate in collective bargaining with the NPA members. However, this should not compromise any existing public service commitments or reduce any government commitment to providing adequate public funding. Given the current uncertainty in the developments regarding a potential merger arrangement between RNZ and TVNZ, their inclusion may need to be renegotiated were a new entity to be established.

¹⁸ Although its privately-owned rivals have attempted to argue that TVNZ enjoys an unfair market advantage as a public-owned entity, such claims are generally overstated; see <https://thepolicyobservatory.aut.ac.nz/publications/mediaworks-television-death-of-a-thousand-cuts>