

Hon Willie Jackson

Minister for Broadcasting and Media

Fair Digital News Bargaining Bill: Approval for Introduction
Cabinet Material

Published: 13 September 2023

Date of Cabinet Decision: 3 August 2023

Title: Fair Digital News Bargaining Bill: Approval for Introduction
Cabinet Material

Author: Ministry for Culture and Heritage

These documents have been proactively released by the Minister for Broadcasting and Media. This package includes the Cabinet paper and other key decision papers, as listed below.

Title: BR23/312 Fair Digital News Bargaining Bill: Cabinet Legislation Committee
Cabinet Paper
BR23/088 Online News Bill – Approval for Outstanding Policy Decisions and
appendices
Cabinet paper 'Fair Digital News Bargaining Bill: Approval for Introduction'
Cabinet Legislation Committee Minute of Decision (LEG-23-MIN-0123)

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the OIA). Where this is the case, the relevant sections of the OIA that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

- 9(2)(a) to protect the privacy of natural persons
- 9(2)(ba)(i) to protect information where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source
- 9(2)(f)(iv) maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials

Hon Willie Jackson

Minister for Broadcasting and Media

***Fair Digital News Bargaining Bill: Cabinet Legislation Committee
Cabinet Paper***

Date:	27 June 2023	Priority:	High
Security classification	In Confidence	Reference:	BR23/312

Minister	Action Sought	Deadline
Hon Willie Jackson Minister for Broadcasting and Media	<p>Agree to commence Ministerial consultation on the Digital News Media Fair Bargaining Bill and its associated Cabinet Legislation Committee (LEG) paper from 29 June to 12 July 2023.</p> <p>Agree that following Ministerial consultation to lodge Cabinet Paper and Bill on Thursday 13 July 2023 for Cabinet Legislation Committee consideration on 20 July 2023.</p>	29 June 2023

Contacts			
Name	Position	Contact	1 st Contact
Carl Olive	Manager: Media and Broadcasting Policy	9(2)(a)	✓
Jack Nolan	Senior Advisor: Media and Broadcasting Policy		

Minister's office to complete	<input type="checkbox"/> Approved	<input type="checkbox"/> Declined
	<input type="checkbox"/> Noted	<input type="checkbox"/> Needs change
	<input type="checkbox"/> Seen	<input type="checkbox"/> Overtaken by events
	<input type="checkbox"/> See Minister's notes	<input type="checkbox"/> Withdrawn
Comments:		

Proactively

Purpose

- 1 This briefing seeks your agreement to commence Ministerial consultation on the Fair Digital News Bargaining Bill (the Bill) and its associated Cabinet Legislation Committee (LEG) paper (the LEG Paper) and Departmental Disclosure Statement (the Statement).
- 2 Following successful Ministerial consultation, your agreement is sought to lodge the Bill, LEG Paper, and Disclosure Statement on Thursday 13 July 2023 for LEG Committee consideration on 20 July 2023.

Key Messages

- 3 On 23 November 2022, Cabinet agreed to introduce legislation to support news media entities (NMEs) to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms [recommendation 3 of DEV-22-MIN-0288 refers].
- 4 Cabinet authorised you to make further detailed policy decisions relating to the legislation, which you made in March 2023 [recommendation 10 of DEV-22-MIN-0288 and BR23/088 refers].
- 5 The Bill will create a fair bargaining framework between NMEs and digital platforms to support commercial arrangements for news content.
- 6 The Bill requires the Broadcasting Standards Authority (BSA) to create a bargaining code that helps facilitate fair and efficient bargaining and will apply to parties engaged in bargaining.
- 7 The Bill is designed to incentivise media entities and digital platforms to enter commercial arrangements voluntarily. Where necessary, parties can undertake a mandatory bargaining process. In addition to the bargaining framework, the Bill:
 - a. establishes the Broadcasting Standard Authority (BSA) as the independent regulator in charge of overseeing the bargaining environment
 - b. creates a regime for registering companies who are eligible for mandatory bargaining;
 - c. provides the BSA with the minimum information gathering and enforcement tools, including pecuniary penalties, to ensure the Bill can be effectively managed;
 - d. allows registered news media entities to enter collective bargaining agreements for negotiating commercial arrangements;
 - e. requires the BSA develop a bargaining code that facilitates fair and efficient news content bargaining both voluntarily and under the legislation; and
 - f. defines key terms required for the operation of the legislation that are flexible and future-proofed to ensure the Bill remains robust over time.

- 8 The development of the Bill has been informed by feedback from the Legislation Design and Advisory Committee (LDAC), the Parliamentary Counsel Office (PCO), the Commerce Commission (the Commission), the BSA, the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Crown Law, the Ministry of Justice (MOJ), the Ministry of Business Innovation and Employment (MBIE), Te Puni Kokiri, and other government agencies.
- 9 Manatū Taonga has also undertaken extensive consultation with stakeholders from New Zealand's news media industry, representatives of digital platforms, colleagues from likeminded international partners, and arbitration experts. Consultation has assisted officials in the drafting of the Bill.
- 10 Officials are finalising minor and technical changes resulting from departmental and agency consultation and working with PCO to finalise the Disclosure Statement required for lodgement on 13 July.

Recommendations

- 11 The Ministry for Culture and Heritage recommends that you:
 - 1 **Note** that Cabinet agreed to introduce legislation to support news media entities to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms [DEV-22-MIN-0288 refers].
 - 2 **Note** that the Bill requires the Cabinet Legislation Committee's (LEG) approval to be introduced into the House of Representatives;
 - 3 **Agree** to present the Fair Digital News Media Bill (the Bill), Cabinet Legislation Paper (the LEG Paper), and Departmental Disclosure Statement (the Statement) be presented to your Ministerial colleagues for consultation from 29 June to 12 July 2023; YES / NO
 - 4 **Agree** that following Ministerial consultation to lodge the Bill , LEG Paper, and the Statement on Thursday 13 July 2023 for Cabinet Legislation Committee consideration on 20 July 2023. YES / NO

Carl Olive
**Manager: Broadcasting and
Media Policy**

Hon Willie Jackson
Minister for Broadcasting and Media

_____ / _____ / 2023

The Bill is designed to create a fair bargaining environment

Overview of the Bill

- 12 The Bill is designed to create a fair bargaining environment between New Zealand NMEs and digital platforms to support commercial arrangements for news content.
- 13 The Bill does this by incentivising operators of digital platforms to engage with NMEs to determine the value exchange between the parties.
- 14 The BSA will be the independent regulator overseeing the legislation's framework. The Bill requires the BSA to create a bargaining code that helps facilitate fair and efficient bargaining and will apply to parties engaged in bargaining.
- 15 To fulfil these new responsibilities, the Bill will provide the BSA with new information gathering and enforcement tools to monitor compliance with the legislation.

The objective of the Bill is to support the ongoing sustainability of news media

- 16 The objective of the legislation is to support sustainable production of New Zealand news content. The Bill incentivises operators of digital platforms to enter into news content agreements and other arrangements with NMEs, facilitates fair bargaining between the parties, and, where necessary, determines agreements through binding arbitration.

The definitions in the Bill are future-proofed

- 17 For the Bill to be effective, it was necessary to define key terms, including:
 - a. **News media entity** – To be eligible, an NME will have to prove that it is in the business of producing news content; satisfies professional standards; and is subject to oversight by a recognised regulatory body. The intent is to limit the scheme to genuine news content producers and exclude general news commentators who do not adhere to journalistic standards (e.g. bloggers).
 - b. **News content** – Only news content produced by a registered NME will be covered under the legislation. New Zealanders are interested in a wide range of news content that encompasses many different topics (e.g. political, sport, environmental, health, etc.). It was important that the various types of news content valued by New Zealanders were included within the Bill.
 - c. **Digital platform** – The definition of a digital platform includes content hosting, search engines, social media platforms, or other similar internet services that makes news content available to people in New Zealand. The definition is broad to cover the various business models used by digital platforms. However, the number of eligible digital platforms under the legislation will be limited by the bargaining power imbalance test.

- d. **Making news content available** – Under the Bill, a digital platform makes news content available if the news content, or any part of it, is reproduced or otherwise placed on the platform. This approach ensures that the Bill is future-proofed and covers all different ways in which digital platforms make news content available.
- 18 Including journalistic standards as part of the definition of an NME has the secondary effect of requiring more news publishers to adhere to objective standards of accuracy, reliability, and accountability which limits harmful actors from spreading mis and disinformation using the Bill's frameworks.
- 19 Officials consider these key terms are appropriately future-proofed. The Bill's definitions effectively capture the current digital news marketplace, whilst also being sufficiently broad to ensure the Bill maintains applicability, even if there is a significant shift in the market.

News media entities and operators of digital platforms will be registered to determine the Bill's application

- 20 The Bill's registration system acts as a gateway for NMEs and digital platforms entering the mandatory bargaining process and limits the number of companies that will be impacted by the legislation. The BSA will be required to make determinations of an applicant's eligibility as prescribed in the legislation.
- 21 For an operator of a digital platform to be registered, the BSA must consider whether there is a bargaining power imbalance between an NME (or a collective) and a digital platform, and that the imbalance is in the favour of the digital platform.
- 22 The Bill's framework ensures power imbalances are assessed on a case-by-case basis. The BSA can register a platform in respect of all NMEs if it considers a bargaining power imbalance would exist across the entire New Zealand news marketplace. This tool enables the BSA to efficiently register large platforms, such as Google, to avoid requiring a bargaining imbalance test in respect of every NME.
- 23 Officials consider the registration system balances the interests of both NMEs and digital platforms by taking into account the unique circumstances that may exist between NMEs and digital platforms (e.g. different digital platform business models using news content in different ways).

The bargaining code will guide parties engaged in news content bargaining

- 24 The Bill requires the BSA to create a bargaining code that helps facilitate fair and efficient bargaining. The bargaining code requires that parties engaged in bargaining must have access to the information they need to effectively bargain, and that bargaining must take place in a way that respects the cultural and ethnic background of people participating in the process.
- 25 The bargaining code may specify further detail relating to the bargaining process including the procedure followed by the parties, detailed requirements related to good faith bargaining, and imposing obligations on parties engaged in bargaining.

- 26 The bargaining code applies both to parties bargaining under the Bill's mandatory bargaining process and voluntary bargaining occurring outside of the legislation. Providing a wide application for the bargaining code ensures parties uphold positive behaviours during all forms of bargaining and creates a pathway for correcting negative behaviours without requiring a mandatory bargaining process.
- 27 Wide application of the bargaining code is particularly important for smaller NMEs who may not have the resources to undertake mandatory bargaining and arbitration processes, but are still entitled to seek commercial arrangements with digital platforms and not be subject to unfair practices.
- 28 Officials consider the provisions guiding the bargaining code will enable the BSA to craft an effective code that will ensure parties engaged in bargaining are aware of their obligations to each other and that bargaining takes place in a way that respects all parties.

There is stepped bargaining process that ends in final offer arbitration

- 29 The stepped bargaining process acts as a backstop for parties who are unable to arrive at a fair agreement voluntarily and requires registered parties to engage in commercial discussions.
- 30 Providing a backstop gives NMEs a pathway to obtain a fair deal for their news content and holds digital platforms accountable for the news content they make available.
- 31 The Bill ensures that the bargaining process accounts for interests of all parties and is accessible to both large and small NMEs.
- 32 The Bill seeks to prevent mandatory bargaining from becoming the default pathway for all media companies by effectively balancing accessibility and prescriptiveness to incentivise voluntary bargaining.
- 33 The initial steps of the bargaining framework require parties to undertake formal bargaining and mediation processes. These steps enable parties to consider a wide range of matters related to digital platforms making news content available, with the objective of the parties reaching a commercial arrangement. However, if formal bargaining and mediation are unable to conclude successfully, a final offer arbitration process will be triggered.
- 34 Final offer arbitration would be limited to only consider financial compensation between the parties and would always result in a commercial contract between the parties.
- 35 The final offer would be chosen by an arbitration panel made up of accredited members selected by the parties. Final offer arbitration under the Bill would follow the provisions of the Arbitration Act 1996, except in unique circumstances, such as the apportionment of costs between parties.
- 36 When selecting a final offer, the arbitration panel must select the offer that, in its opinion, fairly compensates the NME for their news content that is being made

available by the digital platform. The Bill outlines several criteria to guide the panel's decision-making including:

- a. the benefits and detriments to each party (monetary or otherwise) of the operator's digital platform making the content available;
 - b. the costs to the news media entity producing content and the reasonable cost to the operator making the content available in New Zealand;
 - c. whether the terms of an offer would place undue burden on the commercial interests of either party; and
 - d. the purposes of the Bill.
- 37 The panel must also reject any final offer that is highly likely to have a serious impact on people in New Zealand's access to New Zealand news content or the production of news content for a New Zealand audience, including the quality and quantity of this content.
- 38 Officials consider the panel's decision-making requirements effectively balances the interests of both parties against the overarching objective of the legislation, which is to ensure the sustainable production of New Zealand news content.
- 39 Manatū Taonga considers the Bill's final offer arbitration model, and overall stepped bargaining process, will operate as an effective backstop to ensure fair commercial deals are struck between NMEs and digital platforms.

The exemption process incentivises voluntary commercial dealings

- 40 The Bill enables the BSA to exempt a digital platform from the stepped bargaining process if the BSA considers the digital platform already makes a fair contribution to the sustainability of the New Zealand news media sector.
- 41 For a digital platform to meet this expectation it must be effectively providing what would be expected if the digital platform was subjected to mandatory bargaining.
- 42 The Bill guides the BSA's decision-making by requiring the BSA to consider a broad range of criteria to ensure the digital platform has made a fair contribution. These criteria include:
- a. the size of, and resources available to, the digital platform;
 - b. the extent to which news content agreements or other arrangements (e.g. establishing innovation funds or sharing audience data) have been entered into. The Bill further qualifies this criterion by requiring agreements to be fair, representative of New Zealand's overall news industry (including requiring deals to be struck with Māori NMEs), and do not contain terms that undermine freedom of expression or journalistic independence;
 - c. whether requiring a digital platform to engage in mandatory bargaining will achieve the purposes of the Bill and how these additional benefits compare to the costs that are likely to be incurred by parties engaging in mandatory bargaining;

- d. the extent to which the digital platform has complied with its obligations under the Bill; and
 - e. whether the digital platform is currently engaged in a mandatory bargaining process.
- 43 Should the BSA decide granting an exemption is appropriate, it can place further terms and conditions to ensure the exemption effectively meets the purpose of the legislation and is able to grant the exemption for a period of up to five years.
- 44 If the BSA suspects a digital platform may no longer be meeting the conditions for its exemption, the BSA can review the digital platform and amend or revoke the exemption if the BSA considers it is necessary.
- 45 Officials consider these requirements provide the news media sector with confidence that exemptions will not be granted arbitrarily, will not be used as a way for digital platforms to avoid their responsibilities, and enable the BSA to ensure digital platforms are consistently meeting their obligations under the exemption.
- 46 Manatū Taonga considered a stepped bargaining exemption for digital platforms was necessary to encourage voluntary commercial bargaining. A similar approach has been adopted in Canada as part of their Online News Act, which has informed some of the drafting of the Bill.

Information gathering and enforcement tools

The information gathering tools are the minimum necessary tools to enable the BSA to undertake its new role

- 47 The BSA required new information gathering tools to undertake its proposed functions under the Bill. The BSA requires information, that may not be readily provided voluntarily in scenarios such as monitoring and assessing compliance with the legislation, investigating complaints it receives, determining the application of the legislation to NMEs and digital platforms, and ensuring bargaining processes are undertaken in good faith.
- 48 The Bill enables the BSA to require persons to supply information, produce documents, or give evidence if the BSA considers it necessary or desirable to perform its functions, powers, or duties under the Bill. This tool is subject to a sufficient threshold and the BSA's exercise of the tool would be subject to Ombudsman oversight. Supporting the use of these tools are criminal penalties to prevent people from refusing to produce information or producing false information.
- 49 The Bill's information gathering tools are aligned with the information gathering tools available to the Commerce Commission and Financial Markets Authority who oversee similar competition environments and follows information gathering tools provided to the Australian and Canadian authorities overseeing their equivalent bargaining frameworks.
- 50 In addition to information gathering, the BSA will also be enabled to share information with domestic law enforcement and regulatory partners as well as the

BSA's international counterparts (such as the Australian Communications and Media Authority and the Canadian Radio-television and Telecommunications Commission).

The enforcement tools provide the BSA with a graduated response model to ensure unfair behaviour under the Bill can be appropriately responded to

- 51 The Bill attaches civil liability to several provisions, such as the duty to comply with the bargaining code, the duty to participate in the bargaining process, and the duty to bargain in good faith, which enables the BSA to apply enforcement measures to prevent or respond to contraventions that could seriously undermine the legislation.
- 52 The Bill adopts a graduated response model when drafting the enforcement tools. This provides the BSA with a wide range of options for managing behaviours. These tools, encompassing warnings, corrective notices, enforceable undertakings, injunctions, and pecuniary penalties, will enable the BSA to effectively respond to contraventions of the legislation in a measured and proportionate way.
- 53 The BSA will be empowered to formally warn persons that their behaviour is, or may, contravene the legislation. The BSA can also require these warnings to be publicly disclosed, which can be an effective tool to publicly shame persons into changing their behaviour. If a warning is unsuccessful in changing negative behaviours, the BSA could consider using a corrective notice.
- 54 Corrective notices would be issued to persons who are likely to, or have, contravened the legislation, and require the person to correct their behaviour. Failure to disclose a warning when required or comply with a corrective notice would result in a penalty.
- 55 In circumstances where redress is required to address negative behaviour, undertakings provide a pathway for contravening parties and the BSA to agree to a reasonable remedy. These agreements would be enforceable by the courts and are an efficient way for the BSA to resolve conflicts without requiring a lengthy court process.
- 56 At the more serious end of the Bill's enforcement provisions are injunctions and pecuniary penalties, which require applications to the High Court. Injunctions would enable the BSA to restrain someone engaging in conduct that contravenes the legislation. Injunctions are an important tool to preserve the positions of parties engaging in bargaining to prevent, for example, a digital platform altering how news content is displayed to affect the outcome of a bargaining process.
- 57 Pecuniary penalties are the last option for ensuring compliance with the legislation and should only be used in instances of serious or repetitive non-compliance. The Bill separates penalties into tiers with thresholds that reflect the seriousness of the contravening behaviour. For example, a failure to bargain when required to represents a significant undermining of the legislation, and as such, attracts the highest level of penalty.

58 The highest possible penalty is Tier 1, which carries maximum penalties of \$10 million for a body corporate (or a higher amount based on 3 times the commercial gain from a contravention or 10% of turnover).

The Bill will allow media companies to collectively bargain without an exemption from the Commerce Commission

59 Registered NMEs under the Bill will be enabled to collectively bargain without requiring a Commerce Commission assessment. Efficient authorisation of collective bargaining will empower NMEs, in particular smaller and regional NMEs, to pool their resources and potentially obtain a better outcome.

60 The Bill achieves this by providing an exemption from sections 27 (restrictive trade practices) and 30 (cartel behaviour) of the Commerce Act 1986, provided the NMEs are registered, and the collective bargaining pertains only to matters relating to a digital platform making their news content available.

61 This process is considerably more efficient than the current pathway for authorising collective bargaining and should enable collective bargaining to occur in months, as opposed to years, as was the case for the News Publishers' Association's collective bargaining application.

62 The Bill's collective bargaining regime ensures robustness by prohibiting specific provisions from collective bargaining agreements that give rise to unjustified inequal application of collective power (e.g. collective boycotting) and enabling the BSA to impose terms or conditions on a collective bargaining agreement.

63 MBIE's Competition policy team and the Commission have been consulted on the development of the Bill's collective bargaining agreement and support its inclusion.

Feedback from agencies and stakeholders on the Bill was mixed

64 Throughout the policy development and Bill drafting processes, Manatū Taonga has engaged with a wide range of stakeholders to inform decision-making and understand the concerns from the news media and digital platform industries. Officials consider the stakeholder engagement has led to an improved Bill overall.

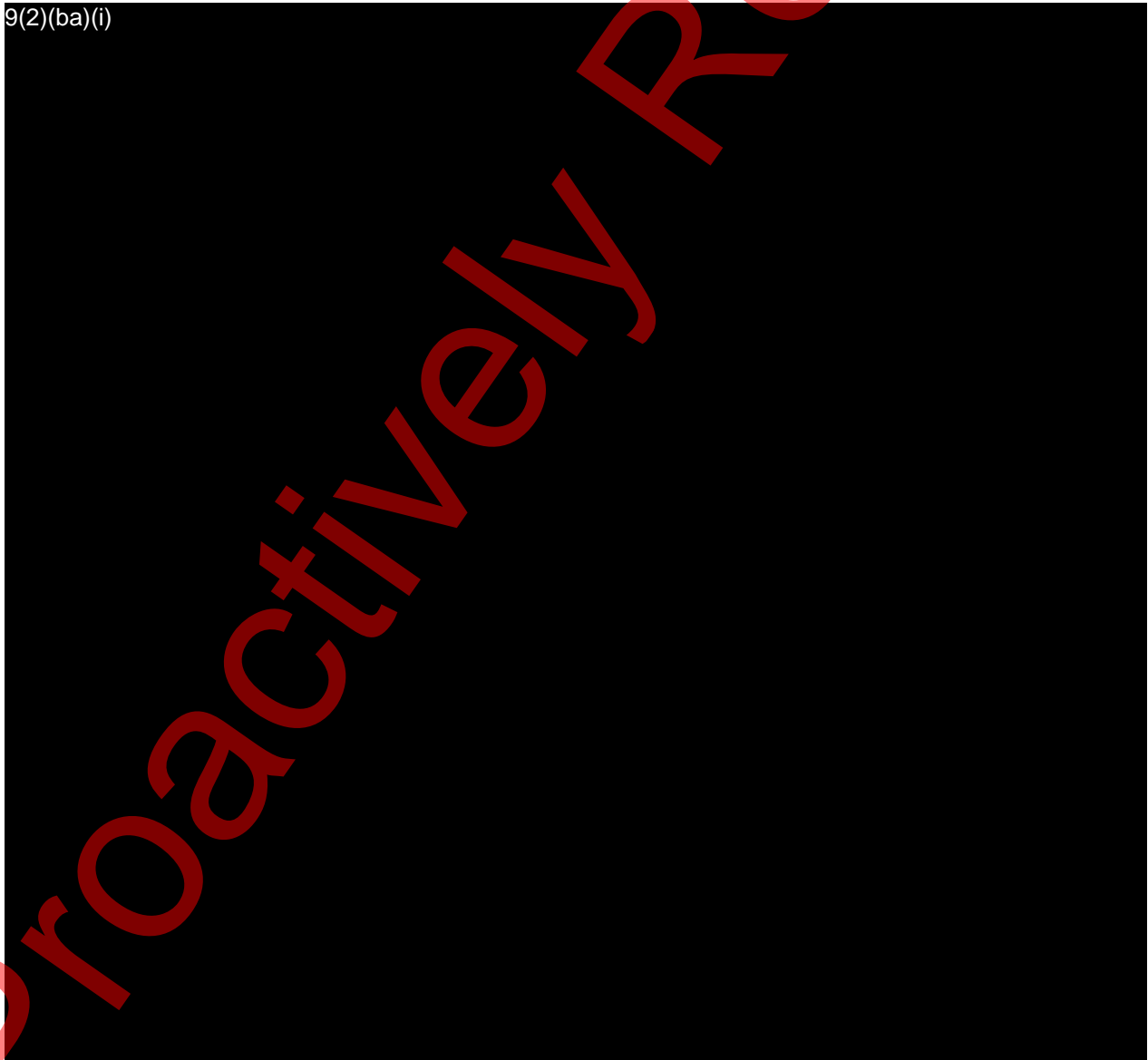
Government agencies are broadly supportive of the Bill

65 During the drafting process, officials proactively consulted with officials from MBIE and the Commission on competition policy issues, the Department of Internal Affairs (DIA) on the Bill's application to digital platforms, and Te Puni Kōkiri on the Bill's inclusion of Te Tiriti o Waitangi principles. These agencies provided useful feedback on the Bill and support its introduction into the House.

66 Officials consulted with LDAC on the design of the draft Bill. LDAC made several comments on the Bill, including in relation to the information-gathering tools, the BSA and its regulatory powers and how should the Bill determine what a "fair" deal is for payment of news content. Officials consider LDAC's advice substantively assisted with the development of the Bill.

- 67 The Arbitrators and Mediators Institute of New Zealand (AMNIZ), although not a government agency, are the subject matter experts for arbitration and mediation. AMINZ provided invaluable advice on the design of the mandatory bargaining process in the Bill and support their inclusion as recognised accreditors for mediators and arbitrators for the legislation’s framework.
- 68 The BSA is supportive of the legislation and is looking forward to the implementation of the legislation. The BSA provided some crucial advice relating to the operation of the legislation and the administration of their new responsibilities under the Bill.
- 69 MOJ was consulted on the appropriateness and quantum of the suggested civil and criminal penalties with the Bill. MOJ is supportive of the Bill’s graduated response model as a way of ensuring compliance with the Bill without relying solely on pecuniary penalties.
- 70 The Attorney General’s Office is still assessing the Bill’s compliance with the New Zealand Bill of Rights Act 1990. Manatū Taonga has been informed that we will receive their advice a week before the Bill will be lodged with Cabinet but expect any suggested changes to the Bill to be minor.

9(2)(ba)(i)



9(2)(ba)(i)

The Bill has financial implications for government

9(2)(f)(iv)

The Bill supports commercial outcomes for fair payment of news media content

- 82 The Bill is designed to underpin a free and independent media sector in New Zealand that is not reliant on ongoing government subsidies. The Bill supports media companies to make the transition to a digital future by ensuring fair payment for online news content.
- 83 The Bill is largely cost neutral for the Government as it supports commercial outcomes for media companies to be viable in the future, with minimal government intervention. The Bill's intent is to provide pathways for NMEs themselves to bargain for the value of their news content.

Next steps

- 84 Following successful Ministerial consultation, officials will lodge the Bill, Paper, and Statement for LEG Committee approval to introduce the Bill into the House.

Officials expect LEG consideration to occur on Thursday 20 July and introduction into the House later in July or August 2023.

- 85 Officials will continue to work through minor changes to the Bill prior to lodgement on 13 July.
- 86 Following Ministerial consultation, officials will provide you with talking points for LEG Committee and prepare a package to support the Bill's introduction into the House.

Commencement of the Bill

- 87 The Bill states that it comes into force on 1 July 2024, except for the mandatory bargaining provisions, which come into force on a date set by Order-in-Council.
- 88 Providing a lead-in period of the mandatory bargaining was considered necessary to enable voluntary bargaining to take place prior to mandatory bargaining and to enable the BSA to obtain the resources required to oversee the framework.

Appendices

Appendix 1: Fair Digital News Bargaining Bill: Approval for Introduction

Appendix 2: Fair Digital News Bargaining Bill (v11.0)

Appendix 3: Departmental Disclosure Statement

Proactively Released

Office of the Minister for Broadcasting and Media
Cabinet Legislation Committee

Fair Digital News Bargaining Bill: Approval for Introduction

Proposal

- 1 This paper seeks approval for the introduction of the Fair Digital News Bargaining Bill (the Bill) to the House of Representatives in August 2023. The Bill is attached at *Appendix 1*.
- 2 The Bills purpose is to create a fair bargaining environment between New Zealand News Media Entities (NMEs) and digital platforms to support commercial arrangements for news content.

Background

- 3 In November 2022, the Cabinet Economic Development Committee agreed to the development of legislation that supports news media organisations to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms [DEV-22-MIN-0288 refers].
- 4 I have made further detailed policy decisions in line with Cabinet's delegation required for the operation of the Bill [recommendation 10 of DEV-22-MIN-0288 refers].

Objectives of the Bill

- 5 The Bill promotes voluntary commercial agreements and provides a backstop to address the bargaining imbalance between multinational global digital platforms and local New Zealand media outlets.
- 6 The Bill establishes equitable treatment for all companies (including smaller, rural/regional media organisations, Māori media companies, ethnic and community media organisations and public media) by creating a good faith bargaining environment to support commercial negotiations.
- 7 The Bill results in minimal financial cost and compliance burden on the affected parties and government when implementing the framework.
- 8 The Bill supports a free and independent news media sector by providing a market-based approach to provide media companies pathways to be viable in a digital marketplace.
- 9 The overall objectives of the Bill include to:

- 9.1 create a fair bargaining environment by establishing a bargaining code that will be developed and overseen by the independent regulator;
- 9.2 where agreements cannot be reached, establish a stepped bargaining process to facilitate fair and equitable outcomes;
- 9.3 empower the Broadcasting Standards Authority (BSA) as the independent regulator overseeing news content bargaining;
- 9.4 provide authority for NMEs to collectively bargain; and
- 9.5 outline civil penalties for non-compliance with the legislation.

Bargaining code

- 10 The Bill requires the BSA to create a bargaining code that helps facilitate fair and efficient bargaining and will apply to parties engaged in voluntary bargaining and bargaining under the Bill.
- 11 The bargaining code specifies the procedure bargaining parties must follow in the stepped bargaining process and specifies obligations outside the stepped bargaining process, including requiring parties to share information needed to effectively bargain.
- 12 The bargaining code guarantees that bargaining must take place in a way that respects the cultural and ethnic background of people participating in the process, such as respecting tikanga in negotiations with Māori media entities.
- 13 The bargaining code will be developed by the BSA, in consultation with the industry, and will be published alongside the Bill's bargaining process provisions coming into force.

Registration of bargaining parties

- 14 The Bill's registration system limits the number of companies that have responsibilities under the legislation. The BSA will be required to make determinations of an applicant's eligibility as prescribed in the Bill.
- 15 For an operator of a digital platform to be registered, the BSA must consider whether there is a bargaining power imbalance between an NME (or an NME collective) and a digital platform, and that the imbalance is in the favour of the digital platform. The bargaining imbalance test is assessed and undertaken on a case-by-case basis.
- 16 The BSA can register a platform in respect of all NMEs if it considers a bargaining power imbalance would exist across the entire New Zealand news marketplace. This tool enables the independent regulator to efficiently register large platforms, such as Google, to avoid requiring a bargaining imbalance test in respect of every NME.

Stepped bargaining process

- 17 Companies are able to enter into voluntary commercial agreements outside the bargaining process at any time. The Bill promotes voluntary arrangements by providing a lead-in period of six months before companies can enter the stepped bargaining process.
- 18 Where a commercial arrangement cannot be entered into voluntarily. The stepped bargaining process consists of:
 - 18.1 formal bargaining over a period of 90 days and is limited only to matters which relate to news content produced by registered news media entities and made available by digital platforms;
 - 18.2 mediation over a period of 90 days that is overseen by an independent accredited mediator and subject to a procedure agreement; and
 - 18.3 final offer arbitration that is overseen by an independent arbitration panel and whose decision will result in a commercial arrangement between the parties.
- 19 Parties to the stepped bargaining process will be obligated to engage and to do so in good faith. Failure to adhere to these duties would result in civil penalties and other enforcement mechanisms.
- 20 Final offer arbitration under the Bill follows the principles and processes of the Arbitration Act 1996, with bespoke arbitration provisions where necessary such as the apportionment of costs between parties.

Exemption process

- 21 The Bill enables digital platforms to apply for an exemption from the Bill's stepped bargaining process if it can show that it is currently providing a fair contribution to New Zealand's news media industry.
- 22 An exemption framework incentivises digital platforms to enter commercial arrangements voluntarily and supports their continued engagement in the New Zealand marketplace.
- 23 A digital platform must meet specified criteria for the exemption to apply and the exemption lasts no longer than five years. Specifically, a fair contribution from digital platforms must include commercial agreements with Māori media entities. The BSA can apply conditions and exemptions can be reviewed and revoked at any time if the BSA suspects the digital platform is no longer complying.

Independent Regulator

- 24 The Bill appoints the BSA as the independent regulator to determine application of the legislation and monitor bargaining between NMEs and digital platforms. Under the Bill, the BSA will be obligated to:

- 24.1 register NMEs and digital platforms who meet specified criteria under the Bill, including whether a bargaining power imbalance exists between the parties;
 - 24.2 introduce a bargaining code that will require parties to bargain in good faith, require clear communication between parties through open information sharing, and respect parties' unique cultural and ethnic considerations as part of the bargaining process; and
 - 24.3 annually report on the commercial value of arrangements between news media entities and digital platforms to enhance the transparency of the framework.
- 25 To fulfil these new obligations, the Bill updates the BSA with:
- 25.1 information gathering tools to require persons to produce documents and share information with domestic partners and international counterparts; and
 - 25.2 enforcement mechanisms for non-compliance with the framework including corrective notices, formal warnings, injunctions, and the ability to accept undertakings.
- 26 The BSA's new information gathering tools and enforcement mechanisms are aligned with the Commerce Act 1986 and Financial Markets Authority Act 2011 and are subject to appropriate thresholds and safeguards such as the Privacy Act 2020.

Collective bargaining exemption

- 27 The Bill establishes an exception to sections 27 (restrictive trade practices) and 30 (cartel behaviour) of the Commerce Act for registered news media entities to collectively bargain in relation to digital platforms making their news content available.
- 28 The collective bargaining exception prohibits specified anti-competitive behaviour, such as collective boycotting, allows parties to the exception to share information only when reasonably necessary, and enables additional terms and conditions to be imposed on a collective bargaining agreement through Order in Council.

Civil penalties

- 29 The Bill imposes civil penalties for non-compliance with the legislation. Civil pecuniary penalties have been separated into tiers reflecting the severity of legislative non-compliance with proportionate fines.
- 30 The quantum of civil penalties and other fines under the Bill reflect the substantive resources available to parties captured by the Bill. A higher quantum was considered necessary to ensure that the penalties under the Bill would reasonably dissuade a party from contravening the legislation.

Key definitions under the Bill

- 31 For the Bill to be effective, it was necessary to define key terms, including:
- 31.1 **News media entity** – To be eligible news media entity companies will have to prove that it is in the business of producing news content; satisfies professional standards and is subject to oversight by a recognised regulatory body. The intent is to limit the scheme to genuine news content producers and exclude general news commentators who do not adhere to journalistic standards (e.g. bloggers). A Māori news media entity is separately defined as one that produces content primarily for a Māori audience, or that primarily relates to Māori issues and events.
 - 31.2 **News content** – only news content produced by an NME will be covered under the legislation. This ensures the wide range of news content New Zealanders enjoy (e.g. political, sport, environmental, health, etc.) were included within the Bill.
 - 31.3 **Digital platform** – the definition of a digital platform includes content hosting, search engines, social media platforms, or other similar internet services that makes news content available to people in New Zealand that is produced by NMEs. The number of digital platforms with responsibilities under the legislation will be limited by the registration process and bargaining power imbalance test.
 - 31.4 **Making news content available** – under the Bill, a digital platform makes news content available if the news content, or any part of it, is reproduced or otherwise placed on the platform. Specifically defining how digital platforms make news content available was considered necessary to focus bargaining on the value exchange between parties, rather than the ways in which digital platforms utilise news content.

Impact analysis

- 32 A Regulatory Impact Statement (RIS) was prepared in accordance with the necessary requirements and was submitted in November 2022 at the time Cabinet considered my policy proposals for supporting commercial bargaining for online news [DEV-22-MIN-0288 refers].
- 33 A cross-agency Quality Assurance Panel from Manatū Taonga and the Department of Internal Affairs (DIA) reviewed the RIS and considered it partially met the quality assurance criteria set out in the RIS framework. The panel did not consider the RIS fully met the criteria as there was limited consultation on the options presented.

Compliance

- 34 The Bill complies with each of the following:

- 34.1 the principles of the Treaty of Waitangi through acknowledgement of the special interests of Māori media as being vital to the protection of Māori taonga, particularly te reo Māori. The Bill does this by ensuring Māori media participation and protection during the bargaining through:
- 34.1.1 the exemption process which has Māori media as a separate and mandatory criterion;
 - 34.1.2 respecting tikanga in the bargaining processes;
 - 34.1.3 separately defining Māori media as one that is specific to Māori audiences and issues, and requiring the BSA to report on Māori media outcomes as a result of the Bill;
- 34.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
- 34.3 the disclosure statement requirements which have been completed and provided at *Appendix 2*;
- 34.4 the principles and guidelines set out in the Privacy Act 2020;
- 34.5 relevant international standards and obligations; and
- 34.6 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee (LDAC).

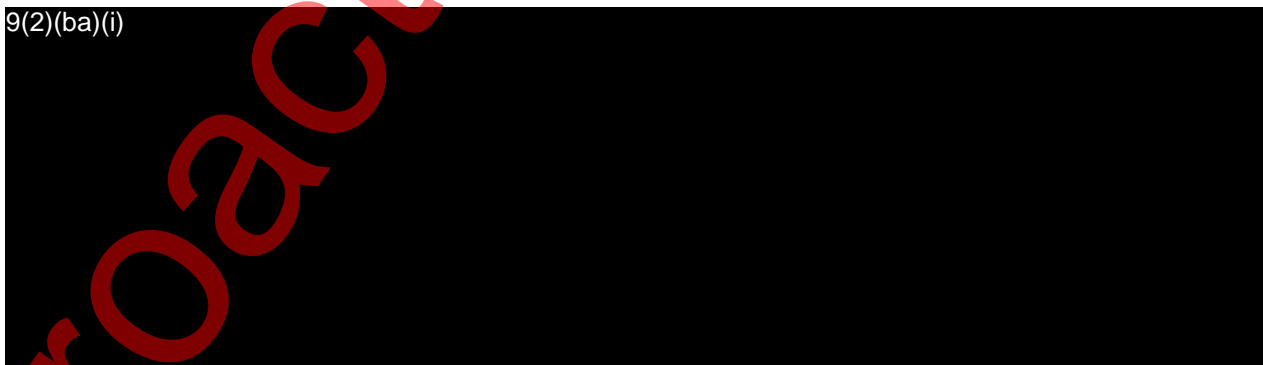
Consultation

Agency views

- 35 The following agencies were consulted with: BSA, Commerce Commission, Crown Law Office, Department of Internal Affairs, Department of the Prime Minister and Cabinet, Inland Revenue Department, Ministry of Business, Innovation and Employment, Ministry of Ethnic Communities, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Pacific Peoples, Office of the Privacy Commissioner, Parliamentary Counsel Office, Te Puni Kōkiri, Te Kawa Mataaho, and Treasury.

News media industry views

9(2)(ba)(i)



Digital platforms views

9(2)(ba)(i)



Other experts' views

43 My officials have been in contact with the Australian Treasury and the Department of Canadian Heritage as international counterparts who have, or are in the process of, passing legislation similar to the Bill. International counterparts' perspectives on the policy objectives have been invaluable and reinforced the need for a consistent global approach to supporting the news media industry.

44 The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) was also engaged on the finer detail of the Bill's arbitration processes. AMINZ's advice ensures that final offer arbitration under the Bill is fit for purpose and achieves the Bill's policy objectives.

Binding on the Crown

45 I propose that the Act will be binding on the Crown [DEV-22-MIN-0288 refers].

Creating new agencies or amending law relating to existing agencies.

46 The Bill does not create a new agency, amend law relating to existing agencies, or amend the existing coverage of the Ombudsman Act 1975, the Official

Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

Allocation of decision-making powers

47 The Bill does not involve the allocation of decision-making powers between the executive, the courts, and tribunals.

Associated regulations

48 Regulations will not be required to bring the Bill into operation. The regulation-making powers created by the Bill are listed under clause 123.

Other instruments

49 The Bill enables the BSA to create a bargaining code that will be secondary legislation. The bargaining code's purpose is to facilitate fair and efficient news content bargaining and will have narrow application to NMEs and digital platforms who are engaging in bargaining.

50 A bargaining code, established as secondary legislation, was considered necessary to provide greater detail on the technical details of parties engaged in news content bargaining and ensure that good faith bargaining is appropriately upheld. Technical details include specifying the procedure that must be followed by people involved in bargaining and provisions prescribing more detailed requirements relating to good faith obligations.

51 The bargaining code does not amend primary legislation but does impact the interests of parties engaged in bargaining if they fail to adhere to the code. Non-compliance with the bargaining code can result in actions taken under the legislation, such as deregistration of a news media entity, or in more serious contraventions, imposing a civil pecuniary penalty.

52 Acknowledging the possible impact the bargaining code could have on parties' interests, the BSA must consult with the Minister and persons that the BSA considers will be substantially affected by the code. Consultation will ensure that the bargaining code is fit for purpose and does not unjustifiably limit people engaged in news content bargaining.

53 I consider the BSA's power to create a bargaining code meets the principles identified in the Deemed Regulations Report of the Regulations Review Committee and this is outlined in the Bill's explanatory note.

Commencement of legislation

54 I propose the Bill will come into force on 1 July 2024.

55 I expect the Order in Council governing the commencement of the bargaining process provisions will be progressed alongside the passage of the Bill and

enable the bargaining process provisions to commence sooner than the longstop date of 1 July 2025.

Parliamentary stages

- 56 I propose that the Bill will be introduced to the House of Representatives in August 2023 and should be passed by June 2024.
- 57 I propose that the Bill will be referred to the Economic Development, Science and Innovation Committee.

Proactive Release

- 58 I propose to proactively release this paper 30 business days after the Bill has been introduced into the House of Representatives.

Proactively Released

Recommendations

59 I recommend that the Cabinet Legislation Committee:

- 1 **note** that the Fair Digital News Bargaining Bill holds a category [4] priority, to be introduced into the House of Representatives this year, on the 2023 Legislation Programme;
- 2 **note** that the Bill aims to create a fair bargaining environment between New Zealand news media entities and the digital platforms that make their news content available, which will contribute to the overall sustainability of New Zealand's news media industry;
- 3 **approve** the Fair Digital News Bargaining Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 4 **agree** that the Bill be introduced in August 2023;
- 5 **agree** that the government propose that the Bill be:
 - 5.1 referred to the Economic Development, Science and Innovation Committee for consideration; and
 - 5.2 enacted, if possible, by 1 July 2024.

Authorised for lodgement

Hon Willie Jackson

Minister for Broadcasting and Media

Appendix 2: Fair Digital News Bargaining Bill (v11.0)

Available Online at: <https://www.legislation.govt.nz/bill/government/2023/0278/latest/whole.html>



Appendix 3: Departmental Disclosure Statement

Available Online at: <https://www.legislation.govt.nz/bill/government/2023/0278/latest/whole.html>



Proactively Released

Hon Willie Jackson

Minister for Broadcasting and Media

Online News Bill – approval for outstanding policy decisions

Date:	24 February 2023	Priority:	High
Security classification:	In Confidence	Reference:	BR23/088

Minister	Action Sought	Deadline
Hon Willie Jackson Minister for Broadcasting and Media	Agree to the proposed recommendations to address outstanding policy decisions required for the Online News Bill; and Approve Manatū Taonga issuing further drafting instructions based on the agreed recommendations.	3 March 2023

Contacts			
Name	Position	Contact	1 st Contact
Carl Olive	Manager Policy (Media)	9(2)(a)	✓
Jack Nolan	Senior Policy Adviser (Media)		

Minister's office to complete

<input checked="" type="checkbox"/> Approved	<input type="checkbox"/> Declined
<input type="checkbox"/> Noted	<input type="checkbox"/> Needs change
<input type="checkbox"/> Seen	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> See Minister's notes	<input type="checkbox"/> Withdrawn

Comments:

Proactively Released

Purpose

- 1 This briefing seeks your agreement to several outstanding policy decisions required for the Online News Bill (the Bill).
- 2 *Appendix 1* provides detailed recommendations for your approval. *Appendix 2* illustrates the stepped bargaining process.

Key Messages

- 3 Following Cabinet's approval to draft legislation to support commercial bargaining for online news in November 2022, you were delegated authority to consider several outstanding detailed policy decisions required for effective operation of the legislation (recommendation 10 of DEV-22-MIN-0288). These include:
 - a **The specific functions and powers of the independent regulator** – to administer and monitor the legislation, the Broadcasting Standards Authority (BSA) will require new powers, including being able to make regulations, gather information required to fulfil its responsibilities, and publicly disclose commercially sensitive information that is in the public interest.
 - b **Information disclosure requirements** – that respect commercial sensitivities and ensure effective system monitoring. The new requirements will enable the BSA to gather and receive information required to perform their functions.
 - c **The code of conduct** – the BSA will be empowered to develop a code of conduct that upholds standards of fairness and transparency to ensure open communication between negotiating parties. A code of conduct would be established through secondary legislation created by the BSA.
 - d **Penalties and enforcement mechanisms** – to ensure compliance, civil penalties aligned with the restrictive trade practices under the Commerce Act 1986 have been chosen for non-compliance with the legislation. The Bill will also provide for a suite of additional enforcement mechanisms to enable the BSA to have a graduated response to non-compliance.
 - e **Collective bargaining provisions** – that provide an exception to the Commerce Act for eligible news media entities to collectively bargain for the payment of their news content made available by digital platforms. The exception will be tightly constrained to prevent any unintended restrictive trade practices occurring in the media sector.
 - f **The exemption regime for digital platforms** – the precise parameters and terms of the legislative exemption to permit collective bargaining; prescribing the circumstances in which an exemption granted by the regulator to a digital platform can be granted, varied, or revoked by the regulator.

- g **The BSA's reporting obligations** – extension of the BSA's annual reporting obligations to include information related to the performance of its functions under the Bill.
 - h **A stepped bargaining process** – that operates as a backstop should voluntary negotiations be unsuccessful. The stepped bargaining process will consist of a formal bargaining process, mediation sessions, and final offer arbitration.
 - i **Minor and technical details** – to include a five-year legislative review provision.
- 4 You may also want to forward this briefing to the Minister of Commerce and Consumer Affairs to progress a possible amendment to section 42 of the Copyright Act 1994 which clarifies that eligible digital platforms may not rely on the fair dealing exception for the purpose of reporting current events to avoid their obligations under the Bill.
- 5 Following your agreement to the policy proposals, Manatū Taonga will instruct the Parliamentary Counsel Office (PCO) to complete their drafting of the legislation for a proposed introduction date of July 2023.

Recommendations

6 The Manatū Taonga Ministry for Culture and Heritage recommends that you:

- | | | |
|---|---|--|
| 1 | Note that on 23 November 2023, Cabinet agreed to the development of legislation to support commercial bargaining for online news [recommendation 3 of DEV-22-MIN-0288]; | <input checked="" type="radio"/> NOTED |
| 2 | Note that you were authorised to make further detailed policy decisions relating to the proposals in the paper under DEV-22-SUB-0288 [recommendation 10 of DEV-22-MIN-0288]; | <input checked="" type="radio"/> NOTED |
| 3 | Agree to expand the functions and powers of the Broadcasting Standards Authority (BSA) to enable it to administer and monitor the legislation; | <input type="radio"/> YES <input type="radio"/> NO |
| 4 | Agree that the BSA is provided with effective powers for gathering and receiving information in relation to exercising their functions under the Bill; | <input type="radio"/> YES <input type="radio"/> NO |
| 5 | Agree that the BSA is empowered to draft a code of conduct that adheres to mandatory criteria outlined in the Bill and can incorporate discretionary criteria also outlined in the Bill; | <input type="radio"/> YES <input type="radio"/> NO |
| 6 | Agree that the scale of civil penalties under the Bill is aligned to pecuniary penalties for restrictive trade practices under the Commerce Act 1986 and introduce a suite of graduated response mechanisms to ensure compliance with the legislation; | <input type="radio"/> YES <input type="radio"/> NO |

IN CONFIDENCE

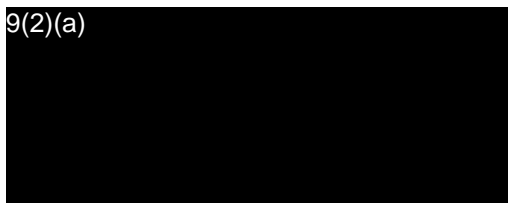
- 7 **Agree** that the Bill enables eligible news media entities to enter into collective bargaining agreements that create an exception to sections 27 and 30 of the Commerce Act, only for the purposes of collectively bargaining in relation to the making available of their news content; YES NO
- 8 **Agree** that the BSA can grant, vary, or revoke an exemption from the stepped bargaining process for digital platforms if the digital platform meets specified criteria outlined in the legislation; YES NO
- 9 **Agree** to expand the BSA's annual reporting requirements to include information relating to the outcomes of commercial bargaining between news media entities and digital platforms, as well as any other information that supports transparency; YES NO
- 10 **Agree** that the Bill creates a stepped bargaining process consisting of formal bargaining, mediation, and final offer arbitration that is overseen and enforced by the BSA; YES NO
- 11 **Agree** to include a five-year legislative review provision within the Bill; YES NO
- 12 **Approve** Manatū Taonga to issue further drafting instructions to the Parliamentary Counsel Office, based on the agreed recommendations above; YES NO
- 13 **Agree** to forward this briefing to the Minister of Commerce and Consumer Affairs so that they may consider progressing an amendment to section 42 of the Copyright Act 1994 that clarifies the fair dealing exception for the purposes of reporting current events does not apply to eligible digital platforms regulated under the Bill; YES NO
- 14 **Agree** to forward this briefing to the Minister for the Digital Economy and Communications for their information. YES NO

9(2)(a)



Carl Olive
Manager Policy (Media)

9(2)(a)



Hon Willie Jackson
Minister for Broadcasting and Media

7 / 03 / 2023

Further policy decisions require your approval

Functions and powers required of the independent regulator

- 7 The BSA will require new powers to administer the legislation, including being able to make regulations to govern administrative aspects of the Bill, gather information required to fulfil its responsibilities, and publicly disclose commercially sensitive information that is in the public interest.
- 8 To introduce new powers for the BSA, the Online News Bill will need to expand upon the BSA's functions under section 21 Broadcasting Act 1989 (BA).
- 9 Manatū Taonga consider that there are minimum functions required for the BSA to administer the framework, including:
 - a determining which news media organisations and digital platforms are covered by the legislation;
 - b drafting a code of conduct to ensure good faith bargaining, facilitate the bargaining and arbitration processes;
 - c oversee the bargaining, mediation, and arbitration processes; and
 - d monitoring industry compliance with the legislation, receive complaints regarding the framework, and administer penalties for non-compliance.
- 10 The Bill will be based on the functions and powers of the Commerce Commission (ComCom) and Financial Markets Authority (FMA) under the Grocery Industry Competition Bill (GICB) and the Financial Markets Authority Act 2011 (FMA Act) respectively. In addition, officials have assessed the proposed expansion of the functions and powers for the Canadian Radio-television and Telecommunications Commission under Canadian Bill C-18 (the Canadian Online News Bill).
- 11 Manatū Taonga considers that the proposed new functions for the BSA are appropriate and in line with the powers of New Zealand's other competition and market regulators. The BSA's role in overseeing and monitoring a diverse media market with competition issues will be similar to the work done by ComCom and the FMA. Therefore, the BSA requires similar legal powers.
- 12 The new functions are designed to enable the BSA to act both reactively (i.e., in response to complaints) and proactively (i.e., by monitoring industry compliance), thereby ensuring the BSA is not limited in its ability to effectively administer the legislation.

Information disclosure requirements

- 13 For the BSA to properly fulfil its new obligations under the legislation, it will need to be able to gather and receive information in the course of its business.
- 14 To effectively administer the legislation, the BSA will require appropriate information disclosure powers (set out in *Appendix 1*). The powers will require

persons to supply information, produce documents, or give or receive evidence when the BSA considers it is necessary or desirable to perform their functions.

- 15 Information gathering tools are an important mechanism for the BSA to monitor and assess compliance with the legislation, investigate complaints it receives, determine the application of the legislation to news media organisations and digital platforms, and ensure bargaining processes are undertaken in good faith.
- 16 As a regulator overseeing marketplace competition, the information gathering tools available to ComCom and the FMA are appropriate to effectively enable the BSA to undertake its functions.
- 17 Similarly, Canada recognised that its radio and telecommunications regulator would require powers like its competition regulators and included these provisions within the Canadian Online News Bill. We propose adopting the same approach.

Information gathering tools have appropriate thresholds and safeguards to prevent misuse

- 18 To ensure information gathering tools are effective, the thresholds will be set at an appropriate level to enable the regulator to obtain information it considers necessary or desirable to fulfil its obligations.
- 19 Information sharing and confidentiality orders will also assist the BSA in performing its duties. Domestic and international information sharing provisions are necessary tools for the BSA to execute its functions, as information may be required to undertake joint investigations with other regulators or be shared with international counterparts to ensure there is global parity with commercial arrangements for the payment of news content.

Code of conduct

- 20 As part of the BSA's functions, it will need to be empowered to develop a code of conduct that upholds standards of fairness and transparency to ensure open communication between parties negotiating for the payment of news content made available by digital platforms.
- 21 A code of conduct would be established through secondary legislation created by the BSA; however, the Bill will need to state what the code must and may contain as a guide.
- 22 Mandatory contents for the code of conduct will be based on ensuring news media organisations and digital platforms bargain in good faith and establish clear communication to facilitate bargaining. The mandatory contents will also require respect for parties unique cultural and ethnic backgrounds. This acknowledges that Māori and Pacific Peoples have different approaches to negotiation processes that should be upheld in any discussions relating to the payment of news content.
- 23 Discretionary contents will be more open to whatever the BSA considers important to ensure fair and transparent bargaining, such as any provisions that may be prohibited in commercial arrangements.

24 In considering the contents for a code of conduct, Manatū Taonga has assessed the Codes of Good Faith in Collective Bargaining under the Employment Relations Act 2000 and the proposed mandatory and discretionary contents for a code of conduct in the Canadian Online News Bill. These frameworks create codes that require good faith bargaining in scenarios where there is a power imbalance between the parties. Therefore, incorporating aspects of these frameworks into the Bill is appropriate.

Penalties and enforcement mechanisms

25 Civil penalties are required for the Bill to operate as an effective regulatory backstop and to ensure digital platforms are responsive to bargaining obligations. Civil penalties under the Bill would be imposed for any non-compliance with the legislation. Both Australia and Canada are imposing similar civil penalties for non-compliance with their legislation, recognising that penalties are required for the legislation to be effective.

26 The current penalty of a fine not exceeding \$100,000 NZD under section 14 BA is insufficient to deter big multinational companies. Given the significant revenue that is generated by global digital platforms, this fine is unsubstantial to act as an effective deterrent to non-compliance with the legislation. For example, in the second quarter of 2022, Google's revenue was over \$69bn USD¹ and Meta's annual revenue in 2021 was \$117.92bn USD.²

27 The pecuniary penalties for restrictive trade practices and cartel behaviour under section 80 of the Commerce Act 1986 (CA) provide a more appropriate framework for penalties under the Bill. In line with the updated approach in the Commerce Act, the Bill will include penalties:

- a in the case of any individual, \$500,000; or
- b in any other case, the greater of the following:
 - i either, –
 - 3 times the value of any commercial gain resulting from a contravention of the legislation; or
 - 10% of the turnover of the person and all its interconnected companies in each accounting period in which a contravention of the legislation occurred.

28 Manatū Taonga considers contravention of the proposed legislation is similar to restrictive trade practices and cartel behaviour. Therefore, the scale of the penalties discussed above are at an appropriate level considering the size of the businesses involved. This approach aligns with the penalties set by Australia and Canada.

¹ Alphabet Q2 2022 Earnings, page 9 (https://abc.xyz/investor/static/pdf/2022Q1_alphabet_earnings_release.pdf?cache=d9e9d97).

² Meta Platforms Annual Report 2022, page 96 (<https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/e574646c-c642-42d9-9229-3892b13aabfb.pdf>).

29 There is an option of introducing a flat fine for contravention of the legislation (e.g., a fine not exceeding \$10m NZD), however this was not considered to be future focussed. Digital platforms' revenues can change over time and a fine that may appear to be dissuasive currently could become obsolete in the future.

Introducing a graduated response model would provide more tools for the BSA to ensure compliance with the legislation

30 In addition to civil penalties for non-compliance, Manatū Taonga also proposes including other enforcement mechanisms. Additional enforcement tools, include proactive compliance notices, warnings, injunctions, and undertakings are important powers that provide a graduated response model for correcting harmful behaviour under the legislation.

31 Having additional enforcement tools means that the BSA is not forced to consider applying high pecuniary penalties in every instance of non-compliance with the legislation, which in some scenarios can act as a barrier to responding to behaviour that contravenes the Bill.

32 The GICB introduced similar enforcement powers for ComCom as part of their graduated response model, and a similar approach to support the BSA is warranted.

33 Further detail on the proposed scale of civil penalties and other enforcement mechanisms is provided at *Appendix 1*.

Collective bargaining exception

34 Cabinet has agreed to create an exception for collective bargaining. Further decisions on the detail are required to ensure that only media companies dealing with digital platforms are covered.

35 Applying for an authorisation under the Commerce Act can be a lengthy process. However, given the frequency with which commercial arrangements may be sought, granting a general exception to a class of news media entities specifically participating in bargaining for the payment of their news content is necessary.

36 Both ComCom and the Ministry of Business, Innovation and Employment (MBIE) advised that if the Bill is to provide a class exemption for collective bargaining it must be specific and tightly constrained. A tightly constrained framework will ensure there are not any unintended restrictive trade practices brought on by competitor collaboration in the media sector.

37 To ensure that the class exception is appropriately constrained, the Bill will need to specify:

- a who is covered by the exemption (i.e., eligible news media entities defined under the Bill);
- b the precise circumstances where collective bargaining would be authorised; (i.e., only in circumstances for collective negotiation with digital platforms in relation to the making available of their news content);

- c any provisions within a collective bargaining agreement that would be prohibited (i.e., the Bill will prohibit any provisions for collective boycotting which would prevent, restrict, or limit the supply of news content by any member of the collective to a digital platform. Prohibiting these activities will tighten the exception and ensure that any collective bargaining remains within the public interest);
- d any information sharing between parties to a collective bargaining agreement;
- e prescribing any additional terms and conditions through regulations; and
- f requirements to notify the regulator of collective bargaining.

38 The Bill would also state that if parties to a collective bargaining agreement engaged in any conduct that was not authorised under the exception, that the agreement would not apply. However, because application of serious penalties under sections 27 and 30 of the Commerce Act could be disproportionate to minor or technical non-compliance with the exception, Manatū Taonga proposes that civil penalties established in regulations would apply and would not void the exception.

39 Further detail on the proposed exception to the Commerce Act to enable collective bargaining is provided at *Appendix 1*.

Digital platform exemption from bargaining process

40 As part of its regulatory functions, the BSA will need to be able to consider applications from eligible digital platforms to be exempt from mandatory bargaining requirements. Further decisions are required for the circumstances in which an exemption can be granted, varied, or revoked.

41 The DEV paper at paragraph [77] set out that the factors that the BSA would consider when granting an exemption are including:

- a the platform's overall level of compensation for news content;
- b the range of news media organisations with which deals have been struck, in particular whether Māori, rural/regional, Pacific, ethnic, and other smaller and independent media businesses are supported;
- c the nature of any non-financial or reciprocal arrangements (including matters relating to algorithm changes and data collection), which would also help to ensure any corporate influence does not undermine journalistic independence and freedom of expression; and
- d compliance with relevant legislative and code of conduct requirements.

42 Manatū Taonga supports continuing with the factors agreed in the DEV paper with the ability for further factors to be added or altered through Order-in-Council. In addition to these factors, an exemption for the bargaining process would have a duration of no more than five years and the BSA may impose any further conditions it considers necessary.

- 43 The BSA would be empowered to review an exemption it has granted at any time. However, Manatū Taonga envisions that reviews will likely occur following a complaint regarding an exempted digital platform's behaviour. Following a review, the BSA would then be able to vary an exemption by imposing any conditions it considers necessary to ensure that the criteria outlined above are being met, or revoke the exemption if the BSA is of the opinion that the digital platform:
- a is acting in a manner inconsistent with the legislation or the code of conduct;
 - b the criteria for the exemption are no longer being met; or
 - c a condition on an exemption is no longer being met.
- 44 An exempted digital platform can apply to the BSA, prior to their exemption expiring, for an extension of up to an additional five years if they can continue to display that they meet the criteria for granting the exemption.
- 45 The exemption framework provides a balanced approach that guides the BSA's decision-making through definitive criteria whilst future proofing by not being overly prescriptive. The framework also enables the BSA to be agile through exemption reviews and consider unique circumstances by imposing conditions. This approach aligns with the Canadian Online News Bill.
- 46 Further detail on the proposed process for granting, varying, or revoking an exemption to the stepped bargaining process for digital platforms is provided at *Appendix 1*.

The BSA's reporting obligations

- 47 Annual reporting on the application of the legislation is important to ensure the accountability of the BSA overseeing the framework and to inform the public of the effectiveness of the legislation. The BSA is covered by the reporting obligations under the Crown Entities Act 2004. However, additional reporting obligations can be added through the legislation.
- 48 Manatū Taonga proposes that the BSA would be required to annually report on the total value of commercial arrangements, information relating to the distribution of the value of those arrangements, and information relating to the effect of the arrangement on news media entity's expenditures. As well, for transparency, the BSA would be required to report on information relating to the exercise of their enforcement tools.
- 49 The BSA would not be required to disclose commercially sensitive information, unless the BSA considers disclosure is necessary and in the public interest. For example, this may involve disclosing the value of commercial arrangements involving public broadcasters and information relating to the BSA exercising its enforcement tools. This disclosure was considered necessary to enhance transparency of the overall framework and enhance public awareness of the sustainability of New Zealand's news media ecosystem. If commercially sensitive information is publicly disclosed, measures would be taken to ensure that the data

is appropriately protected. These reporting obligations are consistent with the Australian and Canadian frameworks.

Details of the stepped bargaining process

- 50 The intent of the Bill is to incentivise news media entities and digital platforms to voluntarily negotiate for commercial arrangements. However, if voluntary arrangements are unable to be reached, parties can initiate mandatory negotiation processes that require parties to bargain and engage in good faith.
- 51 Cabinet agreed in November 2022 that this would be a stepped bargaining process, beginning with formal bargaining, then mediation following unsuccessful bargaining, and then final offer arbitration as a last resort. Following Cabinet's decision, you are required to make further final decisions on the details of bargaining process.
- 52 The Bill will be designed similar to recently introduced New Zealand legislation that deals with commercial negotiations, including the Fair Pay Agreements Act 2022, the Screen Industry Workers Act 2022, and the Fuel Industry Regulations 2021.
- 53 Manatū Taonga has considered the bargaining processes outlined by Part IVBA of the Competition and Consumer Act 2010 (Australian media bargaining codes) and the Canadian Online News Bill, as their systems have been designed to achieve the same outcome as the Bill. This provides a consistent bargaining framework across jurisdictions that may incentivise global digital platforms to engage in bargaining.
- 54 Given the novelty of online news bargaining legislation internationally, there is no best practice framework. The bargaining process that will be outlined in the Bill is designed to provide a clear system that is accessible to eligible news media entities but does not disincentivise voluntary negotiations.
- 55 At each step of the bargaining process, the BSA will have obligations to facilitate negotiations, investigate complaints of breaches of the bargaining process, and ensure compliance with legislative and code of conduct requirements. A diagram of the stepped bargaining process is provided at *Appendix Two*.

Formal bargaining

- 56 It is proposed that six months after the Bill comes into force, formal bargaining would be able to be initiated by eligible news media entities at any time if they have been unable to reach a commercial arrangement with a digital platform voluntarily.
- 57 Bargaining sessions would take place over a period of 90 days and would be limited to matters related to the payment of news content produced by eligible news media entities made available by eligible digital platforms.
- 58 There will be duties on eligible digital platforms to engage in the bargaining process once initiated and an overall duty that parties participating in the bargaining process must do so in good faith. Parties would also have to adhere to the code of conduct developed by the BSA.

59 The scope of bargaining and the duties of good faith and bargaining apply across all steps of the bargaining process.

Mediation

60 If, after the 90-day period, or at an earlier date agreed between the parties, a commercial arrangement has not been reached, the mediation process will begin. Mediation processes will be overseen by an independent mediator, who is accredited by either the Arbitrators and Mediators Institute of New Zealand (AMINZ) or the Resolution Institute, and agreed to by the parties. The BSA can also decide on a mediator where there is an absence of agreement between the parties within a reasonable period. Mediation will take place over 90 days.

61 To guide the mediation process, the parties and the mediator must enter into an agreement relating to the procedure of the mediation (procedure agreement). The procedure agreement would be binding and could include the following matters stipulated in legislation:

- a who has authority to represent and bind the parties;
- b who may attend the mediation, including any interested parties, legal counsel, and experts;
- c requirements as to confidentiality and privilege in respect of the mediator, the parties, and any other persons attending the mediation, including who may be informed about any confidential matter;
- d whether the mediator may engage an expert adviser for a stated or any other purpose;
- e whether any liability of the mediator is excluded;
- f withdrawals from mediation or other termination of mediation;
- g how the procedure agreement may be varied or terminated; and
- h any other matter that the mediator and the parties agree is appropriate to best meet the needs and interests of the parties.

62 Mediation may end if the parties reach an agreement on a commercial arrangement, the 90-day period ends without a resolution, the mediator decides to terminate the mediation if they consider there are no reasonable prospects of the parties reaching agreement, or the parties agree to terminate the mediation early and move on to arbitration.

63 Each party to the mediation must pay their own costs and expenses and must share the fees and expenses of the mediation equally.

64 The BSA will be able to augment, through regulations, the details for the mediation processes, such as the decision-making process for a mediator or the details relating to a mediation procedure agreement.

Final offer arbitration

- 65 If the mediation process is unsuccessful, the parties will be referred for final offer arbitration. Arbitration would take place over 90 days and would be overseen by an arbitration panel of at least three qualified arbitrators, selected by the parties, from a roster of qualified arbitrators maintained and published by the BSA. Arbitration panel members can be selected from outside the roster with the mutual agreement of the parties. The BSA would be responsible for the final selection of the arbitration panel and would be required to consider any possible conflicts of interest between the parties and the panel members selected.
- 66 During arbitration, the parties will be able to request information from parties if it is reasonable for the party to have the information as part of the arbitration process. For example, requesting information pertaining to other commercial arrangements a digital platform has entered or information relating to algorithmic prominence of news content. A party would be able to challenge a request made for information and does not have to provide information if the party can show that it is not reasonable for the party to make the request. Parties would also be able to refuse to supply any personal information or information that would disclose a trade secret.
- 67 The BSA will also be able to assist the panel by providing any information (including confidential information) it holds if it considers the information would assist the panel in making a balanced and informed decision. All information shared within final offer arbitration would be confidential.
- 68 The parties must each submit a final offer to the panel, expressed as a lump sum, that it considers the remuneration amount for the news content should be. Parties may be able to provide supplementary material for their submissions, however these will be limited to prevent artificially elongating the arbitration process.
- 69 In making the decision in the final offer arbitration, the panel must take the following factors into account:
- a the value added, monetary or otherwise, to the news content in question by each party, as assessed in terms of their investments, expenditures, and other actions in relation to that context;
 - b the benefits, monetary and otherwise, that each party receives from the content being made available by the digital platform in question; and
 - c the bargaining power imbalance between the news media entity and the digital platform in question.
- 70 Additionally, the panel must dismiss any offer that, in its opinion:
- a allows a party to exercise undue influence over the amount of compensation to be paid or received;
 - b is not in the public interest because the offer would be highly likely to result in serious detriment to the provision of news content in New Zealand; or

- c is inconsistent with the purposes of enhancing fairness in the New Zealand digital news marketplace and contributing to its sustainability.

- 71 The decision made by the panel is final and, for the purposes of enforceability, is considered an agreement entered by the parties for the payment of news content produced by the eligible news media entity and made available by the eligible digital platform. The panel must prepare a report and provide reasons for its decision to the parties and the BSA.
- 72 The factors selected to inform the panel's decision-making were chosen to ensure that news media organisations can fully maximise the benefits they receive from producing content whilst acknowledging the power imbalance between news organisations and digital platforms.
- 73 The costs of the arbitration panel will be met between the parties. If the parties cannot agree within a reasonable timeframe how to share the costs, the panel will determine the apportionment of the costs. When deciding, the panel must consider each party's ability to pay, their conduct during arbitration, and any other factors the panel considers relevant.
- 74 Final offer arbitration will follow the principles and processes of the Arbitration Act 1996 where possible, with bespoke arbitration provisions to be included in the Bill where necessary, such as to embrace tikanga principles and practices.
- 75 Further detail on the recommendations for the stepped bargaining is provided at *Appendix 1*.

Minor and technical details

- 76 Both Australia and Canada have introduced review periods for their legislation. The recent review by the Australian Treasury of their bargaining codes showed positive early returns for their news media entities since the introduction of their legislation. Recent New Zealand legislation, such as the Russia Sanctions Act 2022 and the Screen Industry Workers Act 2022, has also included legislation review provisions as a matter of good practice.
- 77 Officials propose that the Bill provides that the Minister of Broadcasting and Media must, before the fifth anniversary of the Bill's commencement, undertake a review of the operation of the Bill and prepare a report on that review that is presented to the House of Representatives.

Possible amendment to the Copyright Act 1994

- 78 As well, section 42 of the Copyright Act 1994 creates an exception to copyright when dealing in works for the purpose of criticism, review, and news reporting. There is a risk that this exception would interfere with commercial arrangements for the payment of news content and any prior licensing arrangements.
- 79 You may wish to raise this possible risk with the Minister of Commerce and Consumer Affairs so that MBIE may progress an amendment to the Copyright Act.

This possible amendment has been discussed with the Corporate Governance and Intellectual Property Policy Team at MBIE.


Consultation

80 The following agencies were consulted on the briefing and its recommendations: the BSA, ComCom, Crown Law, the Department of Internal Affairs, the Department of the Prime Minister and Cabinet, the Inland Revenue Department, the Legislative Design Advisory Committee, MBIE, the Ministry for Ethnic Communities, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the Ministry for Pacific Peoples, Te Puni Kōkiri, Treasury, and the Parliamentary Counsel Office.

81 In developing the policy proposals, Manatū Taonga also consulted with the Australian Treasury, Competition Bureau Canada, and the Department of Canadian Heritage.

Financial implications

9(2)(f)(iv)



Next steps

85 Following your agreement to the outstanding policy considerations, Manatū Taonga will issue a second set of drafting instructions to PCO for inclusion within the Bill that is currently being drafted.

86 Manatū Taonga will be undertaking targeted stakeholder consultation with specific New Zealand news media entities and digital platforms to obtain early feedback on our proposals before the Bill is introduced and to maintain collaborative engagement.

87 Officials propose Cabinet Legislation Committee (LEG) consideration of the Bill in June 2023 with introduction into the House of Representatives in July 2023 before the Parliament shutdown period.

88 An indicative timeline for introducing the Bill is provided below:

IN CONFIDENCE

Action	Timeframe
Second tier policy decisions made	Early/Mid-March 2023
Additional drafting instructions issued to PCO	Mid/Late March 2023
Full Bill drafting, LEG paper writing, and targeted stakeholder consultation	April – May 2023
Bill and LEG paper agency consultation	Late May/early June 2023
LEG paper lodged	22 June 2023
LEG paper considered	29 June 2023
Bill introduction	27 July 2023

Proactively Released

Appendices

Appendix 1: Detailed overview of recommendations

Appendix 2: Diagram of stepped bargaining process

Proactively Released

Appendix 1: Detailed overview of recommendations

89 As per your delegated authority under recommendation 10 of DEV-22-MIN-0288, Manatū Taonga proposes the following recommendations relating to further detailed policy decisions for the Online News Bill (the Bill):

a **agree** to expand the functions and powers of the Broadcasting Standards Authority (BSA) to include (per recommendation 10.1):

i *new functions:*

- determining which news media entities and digital platforms are considered eligible according to the criteria set out in legislation for the purposes of the legislation;
- determining which digital platforms may be exempt from the legislation if they satisfy the statutory criteria;
- maintain a list of digital platforms which are covered by the legislation;
- draft a code of conduct to ensure good faith bargaining and guide negotiations;
- facilitate the formal bargaining, mediation, and arbitration processes under the legislation;
- monitor industry compliance with the legislation;
- receive complaints about various matters related to the framework; and
- administer penalties and other enforcement mechanisms for non-compliance with the legislation.

ii *new powers:*

- draft regulations to govern administrative aspects of the legislation;
- gather and receive information required to fulfil its responsibilities;
- appear in Court proceedings and be heard;
- accept undertakings; and
- disclose commercially sensitive information in the public interest.

- b **agree** that the Bill provides for a stepped bargaining process with the following procedural details (per recommendation 10.2):
- i the creation of an initial *formal bargaining* process that can be initiated by an eligible new media entity six months after the Bill comes into force and:
 - takes place over a period of 90 days;
 - is limited only to matters (1) where there is payment to eligible news media entities and (2) which relate to news content produced by eligible news media entities and made available by digital platforms;
 - related to the payment of news content produced by eligible news media entities made available by digital platforms;
 - places a duty on eligible digital platforms to bargain; and
 - places a duty on parties participating in the bargaining process to act in good faith;
 - ii the creation of a *mediation* process that must be entered into if the formal bargaining process is unsuccessful, that:
 - takes place over 90 days;
 - is overseen by an independent accredited mediator, agreed to by the parties;
 - is subject to a procedure agreement agreed upon between the parties and the mediator;
 - can be terminated early by the mediator or the parties;
 - requires the parties to the mediation to pay their own costs and expenses and equally share the fees and expenses of the mediation; and
 - enables the BSA to augment the details of the mediation process by regulation;
 - iii the creation of a *final offer arbitration* process that must be entered into if the mediation process is unsuccessful, that:
 - takes place over 90 days;
 - is overseen by an arbitration panel, selected by the parties, and confirmed by the BSA;

IN CONFIDENCE

- allows parties to request information from one another where it is reasonable for the parties to have that information as part of the arbitration process, to challenge requests for information if a party can show that it is unreasonable for the other party to have the requested information, and excludes personal information and information revealing trade secrets from an information request;
 - requires parties to submit a final offer to the panel that it considers the remuneration for news content should be;
 - requires the panel to consider factors relating to the value and benefits that the parties receive from content being made available by digital platforms, the power imbalance between parties, public interest, and digital news marketplace sustainability into account when decision making;
 - confirms the decision made by the panel as final and is considered to be an agreement between the parties;
 - requires the panel to give reasons for its decision and express them in writing to the parties and the BSA;
 - requires the costs of the panel to be shared between the parties, with apportionment being decided by the panel where the parties cannot agree; and
 - the BSA has the responsibility of maintaining and publishing a list of accredited arbitrators, deals with any conflicts of interest arising between the parties and the panel, and providing information to the panel that the BSA considers would assist panel decision making.
- c **agree** as part of the Bill that the BSA is provided with the information disclosure powers to (per recommendation 10.3):
- i require persons to supply information, produce documents, or give evidence when the BSA considers it is necessary or desirable to perform their functions;
 - ii authorise a specified person to enter and search a place, vehicle, or thing where there are reasonable grounds to suspect there is, or will be, a contravention of the legislation; and reasonable grounds to believe that the search will find evidential material;
 - iii receive evidence in relation to performing their functions;
 - iv share information with domestic and international agencies where the BSA considers the sharing of information would assist those agencies in performing their functions, powers, or duties under legislation;

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- v disclose commercially sensitive information if it is considered necessary in the public interest; and
- vi make an order prohibiting the publication or communication of any information obtained by the BSA.
- d **agree** that the code of conduct for the Bill (per recommendation 10.4):
- i include the following *mandatory* contents:
- requiring parties to bargain in good faith, regardless of whether the bargaining occurs as a result of the legislation or voluntarily;
 - enabling clear communication between parties through open information sharing; and
 - respecting parties' unique cultural and ethnic considerations as part of the bargaining process;
- ii include the following *discretionary* contents:
- specify any provisions that may be prohibited in commercial arrangements;
 - set out examples of unfair behaviour that could arise during bargaining; and
 - any other matters the BSA considers are required to ensure fair and transparent bargaining.
- e **agree** to introduce the following enforcement mechanisms into the Bill (per recommendation 10.5):
- i civil penalties aligned to the pecuniary penalties for restrictive trade practices and cartel behaviour under section 80 of the Commerce Act 1986 (CA);
- ii compliance notices that require a person to undertake a specified action stated in the notice within a specified timeframe;
- iii warnings that the behaviour a person is displaying is inconsistent with the legislation and a requirement that the warning must be publicly disclosed if required;
- iv injunctions that require a person to preserve the status quo during the bargaining process, stop conduct that a person is engaging in that would constitute a contravention of the legislation, or require a person do something they have refused to do where that failure would be a contravention of the legislation; and

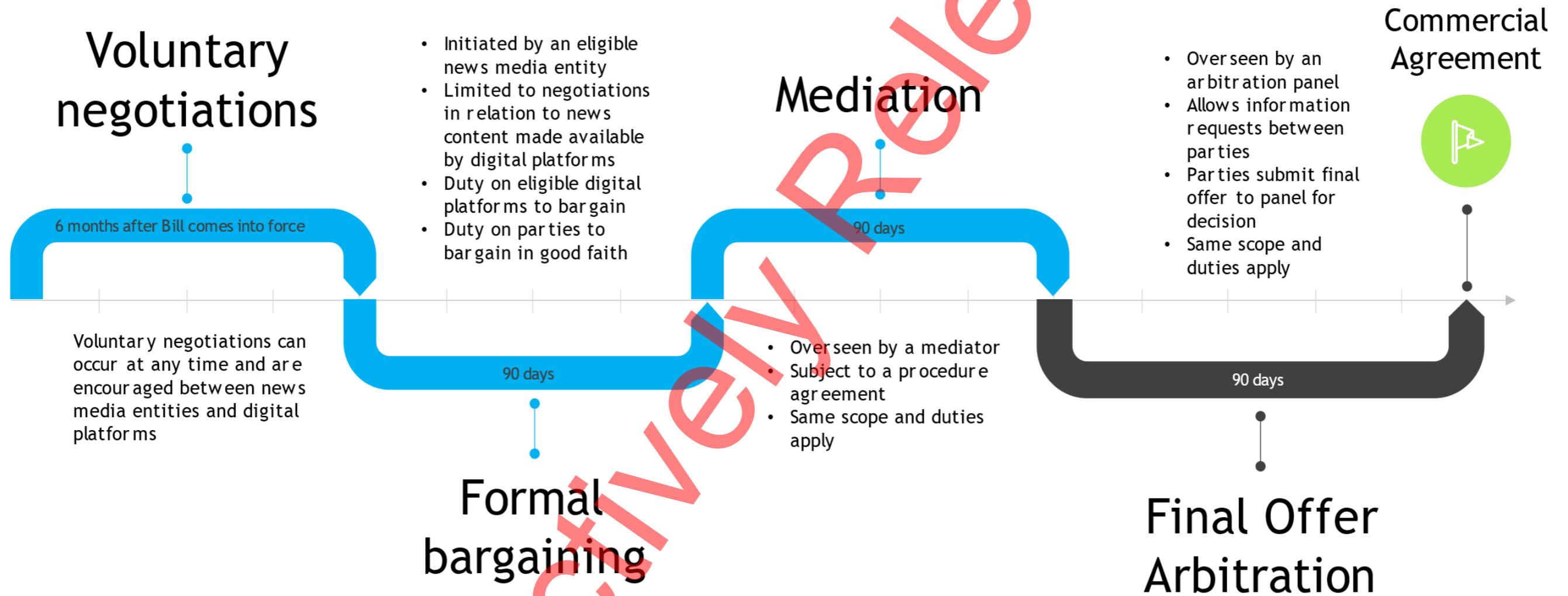
IN CONFIDENCE

- v accept undertakings in connection with a matter in relation to which the BSA is performing any of its functions, powers, or duties under the legislation.
- f **agree** that the Bill provides an exception to sections 27 and 30 CA with the following prescribed details (per recommendation 10.6):
- i specifies that only eligible news media entities may enter into a collective bargaining agreement, and only for the purposes of collectively bargaining in relation to the making available of their news content;
 - ii prohibits provisions within a collective bargaining agreement that:
 - enables collective boycotting by parties to the collective bargaining agreement;
 - enables a party to the collective agreement to enter into a commercial arrangement other than in accordance with the collective bargaining agreement; or
 - any other matter specified in regulations;
 - iii enables parties to a collective bargaining agreement to share information only when it is reasonably necessary to facilitate collective negotiations and that this information is appropriately protected;
 - iv enables additional terms and conditions to be imposed on a collective bargaining agreement through Order-in-Council and that parties to a collective bargaining agreement must comply with those terms and conditions;
 - v provides that conduct not specifically authorised by the exception or did not comply with an exception's set terms and conditions would void the collective bargaining agreement, unless other civil penalties established in regulations apply;
 - vi requires parties to a collective bargaining agreement to notify the Commerce Commission and the BSA, within a reasonable timeframe, that they have entered into an agreement; and
 - vii requires the BSA to maintain and publish a register of all current collective bargaining agreements. The register must include the date the agreement was entered into and the members of the negotiating group.
- g **agree** that the Bill include the following requirements for an eligible digital platform to be exempted from the bargaining processes under the Bill (per recommendation 10.7):
- i that the BSA may:

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- grant an exemption if criteria outlined in the legislation have been met;
 - impose any other conditions on the exemption it considers necessary;
 - review an exemption at any time; and
 - vary or revoke an exemption following a review;
- ii enable exemption criteria to be altered or added through Order-in-Council; and
- iii that an exemption lasts no longer than five years unless extended by the BSA.
- h **agree** to expand the BSA's annual reporting requirements to include (per recommendation 10.8):
- i information relating to the total commercial value of agreements entered into, both voluntarily and under the legislation;
 - ii information relating to the distribution of the commercial value of those agreement among eligible new media entities, including relative to the expenditures of those entities on their newsrooms;
 - iii information relating to the effect of the agreement on those expenditures;
 - iv information relating to the exercise of the BSA's enforcement tools in respect of the legislation; and
 - v any other information that the BSA considers supports the transparency of the Bill on the New Zealand online news marketplace.
- i **agree** to include a five-year legislation review provision within the Bill as a minor and technical detail (recommendation 10.9).

Appendix 2: Diagram of stepped bargaining process



Note: the bargaining process can be terminated at any point in the process leading up to Final Offer Arbitration through agreement by the parties.

Office of the Minister for Broadcasting and Media
Cabinet Legislation Committee

Fair Digital News Bargaining Bill: Approval for Introduction

Proposal

- 1 This paper seeks approval for the introduction of the Fair Digital News Bargaining Bill (the Bill) to the House of Representatives on 8 August 2023. The Bill is attached at *Appendix 1*.
- 2 The Bills purpose is to create a fair bargaining environment between New Zealand News Media Entities (NMEs) and digital platforms to support commercial arrangements for news content.

Background

- 3 In November 2022, the Cabinet Economic Development Committee agreed to the development of legislation that supports news media organisations to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms [DEV-22-MIN-0288 refers].
- 4 I have made further detailed policy decisions in line with Cabinet's delegation required for the operation of the Bill [recommendation 10 of DEV-22-MIN-0288 refers].

Objectives of the Bill

- 5 The Bill promotes voluntary commercial agreements and provides a backstop to address the bargaining imbalance between multinational global digital platforms and local New Zealand media outlets.
- 6 The Bill establishes equitable treatment for all companies (including smaller, rural/regional media organisations, Māori media companies, ethnic and community media organisations and public media) by creating a good faith bargaining environment to support commercial negotiations.
- 7 The Bill results in minimal financial cost and compliance burden on the affected parties and government when implementing the framework.
- 8 The Bill supports a free and independent news media industry by providing a market-based approach to provide media companies pathways to be viable in a digital marketplace.
- 9 The overall objectives of the Bill include to:

- 9.1 create a fair bargaining environment by establishing a bargaining code that will be developed and overseen by the independent regulator;
- 9.2 where agreements cannot be reached, establish a stepped bargaining process to facilitate fair and equitable outcomes;
- 9.3 empower the Broadcasting Standards Authority (BSA) as the independent regulator overseeing news content bargaining;
- 9.4 provide authority for NMEs to collectively bargain; and
- 9.5 outline civil penalties for non-compliance with the legislation.

Bargaining code

- 10 The Bill requires the BSA to create a bargaining code that helps facilitate fair and efficient bargaining and will apply to parties engaged in voluntary bargaining and bargaining under the Bill.
- 11 The bargaining code specifies the procedure bargaining parties must follow in the stepped bargaining process and specifies obligations outside the stepped bargaining process, including requiring parties to share information needed to effectively bargain.
- 12 The bargaining code guarantees that bargaining must take place in a way that respects the cultural and ethnic background of people participating in the process, such as respecting tikanga in negotiations with Māori media entities.
- 13 The bargaining code will be developed by the BSA, in consultation with the industry, including people with the appropriate knowledge and experience to advocate for Māori rights and interests in the sector, and will be published alongside the Bill's bargaining process provisions coming into force.

Registration of bargaining parties

- 14 The Bill's registration system limits the number of companies that have responsibilities under the legislation. The BSA will be required to make determinations of an applicant's eligibility as prescribed in the Bill.
- 15 For an operator of a digital platform to be registered, the BSA must consider whether there is a bargaining power imbalance between an NME (or an NME collective) and a digital platform, and that the imbalance is in the favour of the digital platform. The bargaining imbalance test is assessed and undertaken on a case-by-case basis.
- 16 The BSA can register a platform in respect of all NMEs if it considers a bargaining power imbalance would exist across the entire New Zealand news marketplace. This tool enables the independent regulator to efficiently register large platforms, such as Google, to avoid requiring a bargaining imbalance test in respect of every NME.

Stepped bargaining process

- 17 Companies can enter voluntary commercial agreements outside the bargaining process at any time. The Bill promotes voluntary arrangements by providing a lead-in period of six months before companies can enter the stepped bargaining process.
- 18 Where a commercial arrangement cannot be entered voluntarily, bargaining parties can progress with the Bill's stepped bargaining process. The stepped bargaining process consists of:
 - 18.1 formal bargaining over a period of 90 days and is limited only to matters which relate to news content produced by registered news media entities and made available by digital platforms;
 - 18.2 mediation over a period of 90 days that is overseen by an independent accredited mediator and subject to a procedure agreement; and
 - 18.3 final offer arbitration that is overseen by an independent arbitration panel and whose decision will result in a commercial arrangement between the parties.
- 19 Parties to the stepped bargaining process will be obligated to engage and to do so in good faith. Failure to adhere to these duties would result in civil penalties and other enforcement mechanisms.
- 20 Final offer arbitration under the Bill follows the principles and processes of the Arbitration Act 1996, with bespoke arbitration provisions where necessary, such as the apportionment of costs between parties.

Exemption process

- 21 The Bill enables digital platforms to apply for an exemption from the Bill's stepped bargaining process if it can show that it is currently providing a fair contribution to New Zealand's news media industry.
- 22 An exemption framework incentivises digital platforms to enter commercial arrangements voluntarily and supports their continued engagement in the New Zealand marketplace.
- 23 A digital platform must meet specified criteria for the exemption to apply and the exemption lasts no longer than five years. Specifically, a fair contribution from digital platforms must include commercial agreements with Māori media entities. The BSA can apply conditions and exemptions can be reviewed and revoked at any time if the BSA suspects the digital platform is no longer complying.

Independent Regulator

- 24 The Bill appoints the BSA as the independent regulator to determine application of the legislation and monitor bargaining between NMEs and digital platforms. Under the Bill, the BSA will be obligated to:
- 24.1 register NMEs and digital platforms who meet specified criteria under the Bill, including whether a bargaining power imbalance exists between the parties;
 - 24.2 introduce a bargaining code that will require parties to bargain in good faith, require clear communication between parties through open information sharing, and respect parties' unique cultural and ethnic considerations as part of the bargaining process; and
 - 24.3 annually report on the commercial value of arrangements between news media entities and digital platforms to enhance the transparency of the framework.
- 25 To fulfil these new obligations, the Bill updates the BSA with:
- 25.1 information gathering tools to require persons to produce documents and share information with domestic partners and international counterparts; and
 - 25.2 enforcement mechanisms for non-compliance with the framework including corrective notices, formal warnings, injunctions, and the ability to accept undertakings.
- 26 The BSA's new information gathering tools and enforcement mechanisms are aligned with the Commerce Act 1986 and Financial Markets Authority Act 2011 and are subject to appropriate thresholds and safeguards such as the Privacy Act 2020.

Collective bargaining exemption

- 27 The Bill establishes an exception to sections 27 (restrictive trade practices) and 30 (cartel behaviour) of the Commerce Act for registered news media entities to collectively bargain in relation to digital platforms making their news content available.
- 28 The collective bargaining exception prohibits specified anti-competitive behaviour, such as collective boycotting, allows parties to the exception to share information only when reasonably necessary, and enables additional terms and conditions to be imposed on a collective bargaining agreement through Order in Council.

Civil penalties

- 29 The Bill imposes civil penalties for non-compliance with the legislation. Civil pecuniary penalties have been separated into tiers reflecting the severity of legislative non-compliance with proportionate fines.
- 30 The quantum of civil penalties and other fines under the Bill reflect the substantive resources available to parties captured by the Bill. A higher quantum was considered necessary to ensure that the penalties under the Bill would reasonably dissuade a party from contravening the legislation.

The Bill will support Māori media to bargain with digital platforms

- 31 There are several mechanisms which will support Māori media to increase their bargaining power and increase their ability to protect their rights and interests in media and particularly the use of taonga such as te reo Māori, including:
- 31.1 Māori media organisations are defined separately.
- 31.2 Supporting Māori media organisations is a specific and separate requirement under the digital platform exemption process. This means digital platforms would need to come to arrangements with Māori media to be successful in gaining an exemption from the bargaining process.
- 31.3 Collective bargaining would support Māori media through sharing of knowledge and expertise and increase bargaining power through the increased strength of the collective group.
- 31.4 The need to respect cultural backgrounds in negotiation processes under the Code would help to protect tikanga Māori.
- 32 These mechanisms support Māori interests and rights under the Treaty and Treaty principles, as the Crown would ensure participation of, and protection for Māori, in this process.

Key definitions under the Bill

- 33 For the Bill to be effective, it was necessary to define key terms, including:
- 33.1 **News media entity** – to be eligible, an NME will have to prove that it is in the business of producing news content; satisfies professional standards or is subject to oversight by a recognised regulatory body. The intent is to limit the scheme to genuine news content producers and exclude general news commentators who do not adhere to journalistic standards (e.g. bloggers). A Māori news media entity is separately defined as one that produces content primarily for a Māori audience, or that primarily relates to Māori issues and events.
- 33.2 **News content** – only news content produced by an NME will be covered under the legislation. This ensures the wide range of news

content New Zealanders enjoy (e.g. political, sport, environmental, health, etc.) were included within the Bill.

- 33.3 **Digital platform** – the definition of a digital platform includes content hosting, search engines, social media platforms, or other similar internet services that makes news content available to people in New Zealand that is produced by NMEs. The number of digital platforms with responsibilities under the legislation will be limited by the registration process and bargaining power imbalance test.
- 33.4 **Making news content available** – under the Bill, a digital platform makes news content available if the news content, or any part of it, is reproduced or otherwise placed on the platform. Specifically defining how digital platforms make news content available was considered necessary to focus bargaining on the value exchange between parties, rather than the ways in which digital platforms utilise news content.

Impact analysis

- 34 A Regulatory Impact Statement (RIS) was prepared in accordance with the necessary requirements and was submitted in November 2022 at the time Cabinet considered my policy proposals for supporting commercial bargaining for online news [DEV-22-MIN-0288 refers].
- 35 A cross-agency Quality Assurance Panel from Manatū Taonga and the Department of Internal Affairs (DIA) reviewed the RIS and considered it partially met the quality assurance criteria set out in the RIS framework. The panel did not consider the RIS fully met the criteria as there was limited consultation on the options presented.

Compliance

- 36 The Bill complies with each of the following:
- 36.1 the principles of the Treaty of Waitangi through acknowledgement of the special interests of Māori media as being vital to the protection of Māori taonga, particularly te reo Māori. The Bill does this by ensuring Māori media participation and protection during the bargaining through:
- the exemption process which has Māori media as a separate and mandatory criterion;
 - respecting tikanga in the bargaining processes;
 - separately defining Māori media as one that is specific to Māori audiences and issues, and requiring the BSA to report on Māori media outcomes as a result of the Bill;
- 36.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;


- 36.3 the disclosure statement requirements which have been completed and provided at *Appendix 2*;
- 36.4 the principles and guidelines set out in the Privacy Act 2020;
- 36.5 relevant international standards and obligations; and
- 36.6 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee (LDAC).

Consultation

Agency views

- 37 The following agencies were consulted with: BSA, Commerce Commission, Crown Law Office, Department of Internal Affairs, Department of the Prime Minister and Cabinet, Inland Revenue Department, Ministry of Business, Innovation and Employment, Ministry of Ethnic Communities, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Pacific Peoples, Office of the Privacy Commissioner, Parliamentary Counsel Office, Te Puni Kōkiri, Te Kawa Mataaho, and Treasury.

9(2)(ba)(i)



9(2)(ba)(i)

Other experts' views

- 45 My officials have been in contact with the Australian Treasury and the Department of Canadian Heritage as international counterparts who have passed legislation similar to the Bill. International counterparts' perspectives on the policy objectives have been invaluable and reinforced the need for a consistent global approach to supporting the news media industry.
- 46 The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) was also engaged on the finer detail of the Bill's arbitration processes. AMINZ's advice ensures that final offer arbitration under the Bill is fit for purpose and achieves the Bill's policy objectives.

Binding on the Crown

- 47 I propose that the Act will be binding on the Crown [DEV-22-MIN-0288 refers].

Creating new agencies or amending law relating to existing agencies.

- 48 The Bill does not create a new agency, amend law relating to existing agencies, or amend the existing coverage of the Ombudsman Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

Allocation of decision-making powers

- 49 The Bill does not involve the allocation of decision-making powers between the executive, the courts, and tribunals.

Associated regulations

- 50 Regulations will not be required to bring the Bill into operation. The regulation-making powers created by the Bill are listed under clause 123.

Other instruments

- 51 The Bill enables the BSA to create a bargaining code that will be secondary legislation. The bargaining code's purpose is to facilitate fair and efficient news content bargaining and will have narrow application to NMEs and digital platforms who are engaging in bargaining.

- 52 A bargaining code, established as secondary legislation, was considered necessary to provide greater detail on the technical details of parties engaged in news content bargaining and ensure that good faith bargaining is appropriately upheld. Technical details include specifying the procedure that must be followed by people involved in bargaining and provisions prescribing more detailed requirements relating to good faith obligations.
- 53 The bargaining code does not amend primary legislation but does impact the interests of parties engaged in bargaining if they fail to adhere to the code. Non-compliance with the bargaining code can result in actions taken under the legislation, such as deregistration of a news media entity, or in more serious contraventions, imposing a civil pecuniary penalty.
- 54 Acknowledging the possible impact the bargaining code could have on parties' interests, the BSA must consult with the Minister and persons that the BSA considers will be substantially affected by the code. Consultation will ensure that the bargaining code is fit for purpose and does not unjustifiably limit people engaged in news content bargaining.
- 55 I consider the BSA's power to create a bargaining code meets the principles identified in the Deemed Regulations Report of the Regulations Review Committee and this is outlined in the Bill's explanatory note.

Commencement of legislation

- 56 I propose the Bill will come into force on 1 July 2024.
- 57 I expect the Order in Council governing the commencement of the bargaining process provisions will be progressed alongside the passage of the Bill and enable the bargaining process provisions to commence sooner than the longstop date of 1 July 2025.

Parliamentary stages

- 58 I propose that the Bill will be introduced to the House of Representatives on 8 August 2023 and should be passed by June 2024.
- 59 I propose that the Bill will be referred to the Economic Development, Science and Innovation Committee.

Proactive Release

- 60 I propose to proactively release this paper 30 business days after the Bill has been introduced into the House of Representatives.

Recommendations

61 I recommend that the Cabinet Legislation Committee:

- 1 **note** that the Fair Digital News Bargaining Bill holds a category [4] priority, to be introduced into the House of Representatives this year, on the 2023 Legislation Programme;
- 2 **note** that the Bill aims to create a fair bargaining environment between New Zealand news media entities and the digital platforms that make their news content available, which will contribute to the overall sustainability of New Zealand's news media industry;
- 3 **approve** the Fair Digital News Bargaining Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 4 **agree** that the Bill be introduced on 8 August 2023;
- 5 **agree** that the government propose that the Bill be:
 - 5.1 referred to the Economic Development, Science and Innovation Committee for consideration; and
 - 5.2 enacted, if possible, by 1 July 2024.

Authorised for lodgement

Hon Willie Jackson

Minister for Broadcasting and Media



Cabinet Legislation Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Fair Digital News Bargaining Bill: Approval for Introduction

Portfolio **Broadcasting and Media**

On 3 August 2023, the Cabinet Legislation Committee:

- 1 **noted** that the Fair Digital News Bargaining Bill (the Bill) holds a category 4 priority, to be introduced into the House of Representatives this year, on the 2023 Legislation Programme;
- 2 **noted** that the Bill aims to create a fair bargaining environment between New Zealand news media entities and the digital platforms that make their news content available, which will contribute to the overall sustainability of New Zealand's news media industry;
- 3 **noted** that in November 2022, the Cabinet Economic Development Committee authorised the Minister for Broadcasting and Media to make further detailed policy decisions required for the operation of the Bill [DEV-22-MIN-0288];
- 4 **noted** that the Minister for Broadcasting and Media has made further detailed policy decisions as outlined in Appendix 3 to the submission under LEG-23-SUB-0123;
- 5 **approved** the Fair Digital News Bargaining Bill [PCO 24917/19.0] for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 6 **agreed** that the Bill be introduced on 8 August 2023;
- 7 **agreed** that the government propose that the Bill be:
 - 7.1 referred to the Economic Development, Science and Innovation Committee for consideration; and
 - 7.2 enacted, if possible, by 1 July 2024.

Rebecca Davies
Committee Secretary

Present:

Hon Grant Robertson (Chair)
Hon Willie Jackson
Hon Andrew Little
Hon Ginny Andersen
Hon Dr Duncan Webb
Tangi Utikere, MP (Chief Government Whip)

Officials present from:

Office of the Prime Minister
Officials Committee for LEG