

Departmental Disclosure Statement

Fair Digital News Bargaining Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by Manatū Taonga Ministry for Culture and Heritage.

The Ministry for Culture and Heritage certify that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

[19/07/2023]

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Part One: General Policy Statement

The Bill's purpose is to enable fair bargaining between New Zealand news media entities and operators of digital platforms to support commercial arrangements for news content.

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.

The Bill supports a free and independent news media industry by providing a way for news media entities to be viable in a digital marketplace.

Background

There has been a shift in the way that people consume news and media content. News media is now accessed via online digital platforms. This shift has undermined the viability of traditional media business models.

Online digital platforms aggregate and display news content to attract attention to their sites, and make money through advertising and other services, but do not pay news creators for the use of their content. Attempts by news media entities to bargain for the value of their news content are often unsuccessful.

It is not desirable for the Government to continue funding the news media industry directly, because it increases risks of eroding public trust in the media. However, some intervention is necessary to create an even playing field for the industry and support the ongoing production of New Zealand news content.

High quality news content supports democracy, counters misinformation, and enhances social cohesion and ultimately the wellbeing of New Zealanders by trustworthy information.

Supporting the efforts of New Zealand media companies to secure revenue for the use of their content online will provide a critical revenue stream and mean that the sector will not be reliant on government funding in the future.

Government funding is not required if news media entities are empowered to bargain for the value of their news content. Accordingly, commercial bargaining will better maintain trusted, independent news media, as well as ensuring the financial sustainability of the industry in a digital environment.

Objectives of the Bill

This Bill ensures fair revenue sharing between operators of digital platforms and news media entities by:

- creating a fair bargaining environment by providing for a bargaining code that will be established by the independent regulator and operate as secondary legislation;
- requiring bargaining parties to comply with the bargaining code and to bargain in good faith, as well as requiring parties registered under the legislation to participate in the bargaining process;
- promoting voluntary commercial agreements between digital platforms and news media organisations, with minimal government intervention;
- where agreement cannot be reached, creating a stepped bargaining process to facilitate fair and equitable outcomes;
- providing for collective bargaining by news media organisations; and
- establishing civil penalties for non-compliance with the legislation.

This Bill aims to:

- support news media entities to maximise the benefits they receive from the content they create that is aggregated and displayed on digital platforms.
- ensure that implementation of its provisions will impose a minimal financial cost and compliance burden on the affected parties and government;
- create equitable treatment and support for New Zealand's diverse news media sector, including smaller and rural/regional media organisations, and ethnic media organisations, and, specifically, Māori media organisations; and
- support a free and independent news media sector by enabling media companies to be viable in a digital marketplace.

Broadcasting Standards Authority will be the independent regulator

This Bill appoints the Broadcasting Standards Authority (the Authority) as the independent regulator to oversee the bargaining environment established by the Bill and monitor parties' compliance with the duties and responsibility established by the Bill. To give the Authority time to prepare to fulfil the proposed new statutory responsibilities, the Bill provides for commencement of its bargaining process provision by Order in Council with a backstop date of 1 July 2025.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p><i>Digital Platforms Inquiry</i>, Australian Competition and Consumer Commission, June 2019 (https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf)</p> <p><i>Review of the News Media and Digital Platforms Mandatory Bargaining Code</i>, Australian Treasury, April 2022 (https://treasury.gov.au/sites/default/files/2022-04/c2022-264356_0.pdf)</p> <p><i>News Publishers' Association of New Zealand Incorporated – Authorisation Final Determination</i>, Commerce Commission of New Zealand, November 2022 (https://comcom.govt.nz/_data/assets/pdf_file/0025/306772/2022-NZCC-35-News-Publishers-Association-of-New-Zealand-Incorporated-Authorisation-Final-Determination-2-November-2022.pdf)</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p><i>Regulatory Impact Statement: Recognising news media's value in a digital environment</i>, Manatū Taonga Ministry for Culture and Heritage, 17 August 2022 (https://mch.govt.nz/sites/default/files/projects/cab-rel-online-news-151222.pdf)</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
The RIS did not meet the threshold for RIA Team assessment.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<i>Regulatory Impact Statement: Recognising news media's value in a digital environment, Manatū Taonga Ministry for Culture and Heritage, 17 August 2022 (https://mch.govt.nz/sites/default/files/projects/cab-rel-online-news-151222.pdf)</i>	
2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<i>Regulatory Impact Statement: Recognising news media's value in a digital environment, Manatū Taonga Ministry for Culture and Heritage, 17 August 2022 (https://mch.govt.nz/sites/default/files/projects/cab-rel-online-news-151222.pdf)</i>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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Upon examination of the Ministry of Foreign Affairs and Trade's Treaties Register Database, Manatū Taonga considers the Fair Digital News Bargaining Bill is unlikely to be inconsistent with New Zealand's international obligations.
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Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Manatū Taonga has consulted with both Te Arawhiti and Te Puni Kōkiri on the policy development and the drafting of the Bill. Both agencies are supportive of the legislation and understood the value the Bill could provide Māori news media entities, which are often overlooked despite being an important source of Māori current affairs and storytelling, both of which can be recognised as taonga requiring enhanced duty of care by the government. We asked both agencies during the drafting process how the Bill could better ensure Māori interests could be incorporated into the legislation's framework which included increased prominence for Māori news content within the definition of "news content", requiring voluntary deals to be struck with Māori news media entities for a digital platform to be eligible for an exemption, and requiring the Broadcasting Standards Authority (BSA) to include how the Bill is improving outcomes for Māori news media entities within their annual reporting.

Manatū Taonga has engaged with Māori media including Whakaata Māori and E-Tangata. These media entities were wary of engaging with digital platforms due to the bargaining power imbalance and were keen to protect their taonga, feedback which supported the collective bargaining clause to ensure Māori media were not left on their own, and the clause on respecting cultural backgrounds during negotiations.
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Manatū Taonga considers these additions enhance the operation of the legislation and ensures consistency with Te Tiriti o Waitangi principles.
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Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

The Ministry of Justice's (MOJ) New Zealand Bill of Rights Act 1990 (NZBORA) vetting team was engaged on the Fair Digital News Bargaining Bill. The advice we received indicated that there were no unjust limitations on the NZBORA arising from the Bill.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
<p>Criminal offences</p> <ul style="list-style-type: none"> • Clause 111 “Offences relating to information-gathering powers and misleading or deceiving Authority” <p>Clause 111 was considered necessary to ensure that the proposed new information gathering tools would have sufficient penalties for non-compliance. A failure to provide information when required to do so, or presenting false information that may alter the legislation’s application or substantively change how an arbitration decision is made, significantly undermines the Bill. The mischief clause 111 is seeking to penalise are analogous to obstruction of similar competition regulators, such as the Commerce Commission and Financial Markets Authority, and was considered necessary to ensure the BSA could effectively oversee the framework.</p> <p>Civil penalties</p> <ul style="list-style-type: none"> • Clauses 84 – 86 “Undertakings”: enables the BSA to accept an undertaking to pay compensation to avoid, remedy, or mitigate any actual or likely adverse effects arising from a contravention. • Clauses 87 – 89 “Corrective notices”: enables the BSA to issue notices if a person has, is likely to, has attempted to, or has been involved in a contravention of the legislation. The notice may require the person to take steps to avoid, remedy, or mitigate any effects arising from a contravention, ensure that a contravention is not repeated, or ensure a contravention does not occur. • Clauses 90 – 93 “Warnings”: enables the BSA to issue a warning about any matter relating to a person under the Bill and may require the warning be prominently disclosed. • Clauses 95 – 99 “Pecuniary penalties”: enables the BSA to apply to the High Court for a pecuniary penalty order if the court is satisfied the person has, attempted to, or been involved in, a contravention of a civil liability provision. Pecuniary penalties under the Bill have been separated into tiers that reflect the severity of the contravention with proportionate penalties. • Clauses 100 – 103 “Injunctions”: enables the BSA to apply to the High Court for an order restraining a person from engaging or continuing to engage in conduct that does or may constitute a contravention. The injunctive order may also require a person to do an act or a thing if refusal or failure to do so would be a contravention of legislation. <p>Civil penalties were considered necessary to generally ensure compliance with the Bill and prevent harm from occurring through contravention. Manatū Taonga has adopted a graduated response model for the BSA to manage unlawful behaviour under the Bill. We consider this approach enables the BSA to be flexible in how it approaches non-compliance and has the tools to incentivise positive behavioural change without requiring pecuniary penalties as a first measure.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>MOJ was consulted on the appropriateness and quantum of the suggested civil and criminal penalties with the Bill. MOJ was supportive of the Bill's graduated response model as a way of ensuring compliance with the Bill without relying solely on pecuniary penalties. MOJ also queried whether the quantum for pecuniary penalties was set at the right level, considering fines for similar behaviour in other legislation were set at a lower level.</p> <p>Manatū Taonga clarified that the high level of fines was considered appropriate given the substantive resources available to parties that may be captured by the Bill. It was essential that penalties under the Bill were both proportionate to the mischief being penalised as well as sufficiently dissuasive to prevent parties from paying fines to circumvent their obligations.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>Part 4 empowers the BSA to obtain or share information where it is necessary or desirable to fulfil their obligations under the Bill. Although Manatū Taonga considers information obtained or shared under Part 4 to primarily include commercial information, there is scope for personal information to be included. Manatū Taonga considers Part 4 does not detract from, or limit, the Privacy Act 2020 or its Information Privacy Principles (IPPs). The Bill reaffirms the Privacy Act's IPPs by ensuring that personal information is only collected and shared where there is a lawful purpose that is connected with the BSA's statutory functions. The Office of the Privacy Commissioner has been consulted on the Bill.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Manatū Taonga has undertaken consultation with news media entities, digital platforms, mediation/arbitration experts, and international likeminded partners on the Fair Digital News Bargaining Bill. The feedback from stakeholder is summarised at <i>Appendix 1</i>.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
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Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Registration of news media entities and operators of digital platforms</p> <p>The Bill will enable the BSA to make determinations that will decide whether a news media entity or an operator of a digital platform can be required to enter mandatory bargaining under the legislation. A registration decision has the potential to substantively impact the interests of a news media entity or a digital platform. The Bill provides prescribed criteria that the BSA must follow when making a registration decision, including an assessment of the bargaining power imbalance between the parties, and clear procedures for how a registration decision is made, including consultation requirements. The BSA would also be required to maintain a public register of registration decisions, with reasons provided for the decision. The BSA will be funded under Budget 24 to obtain the necessary resources and expertise to make registration decisions and can seek additional guidance from competition experts. Registration decisions made by the BSA are not final and can be appealed under ordinary processes of judicial review.</p> <p>Digital platform exemption</p> <p>The Bill will also enable the BSA to determine whether a digital platform should be exempt from registration, and therefore, exempt from the stepped bargaining process. A digital platform exemption pathway was considered necessary for the Bill to incentivise digital platforms to enter commercial arrangements voluntarily. An exemption decision can impact digital platforms by changing their obligations under the legislation and the interests of news media entities who may be relying on mandatory bargaining to obtain a deal. The Bill provides clear procedures for a digital platform applying for an exemption and robust criteria to guide the BSA's decision-making including whether the digital platform is already making a fair contribution to the sustainability of the New Zealand news media sector, the size and resources available to the digital platform, and the extent to which news content agreements have been entered into voluntarily (including agreements with Māori news media entities). The BSA would also be required to consult with parties that would likely be affected by an exemption decision and publicly register the decision to ensure affected parties are aware of the decision and the reasons for why the decision was made. Exemption decisions made by the BSA are not final and can be appealed under ordinary processes of judicial review.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>Regulations that define or amend a term in an Act</p> <ul style="list-style-type: none"> • Clause 4: amending the definition of “law enforcement or regulatory agency” • Clause 4: amending the definition of “recognised regulatory body” • Clause 7: amending the definition of “digital platforms” <p>Creation of these clauses was considered necessary to ensure the Bill can remain current with changes in a flexible and dynamic technology sector, as well as the media regulation sector that may be undergoing significant change as part of a government review. Manatū Taonga consider these clauses are sufficiently limited and are consistent with the provisions and intent of the Bill.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Regulations, in addition to those described in 4.7, include:</p> <ul style="list-style-type: none"> • Clause 2(3): bringing in the bargaining process provisions earlier than the Bill’s longstop date • Clause 45(2)(d) and 45(2)(e)(ii): prescribing any additional mandatory or option terms for final offers • Clause 112(3): enabling the independent regulator to create a bargaining code • Clause 117(3): specifying additional prohibited provisions from collective bargaining agreements • Clause 123(1)(a): prescribing procedures requirements, and other matters for any register kept under this Act • Clause 134(1)(e): prescribing any manners in which a notice may be served under the Bill <p>These regulations were considered necessary as they cover matters of technical detail that would not be appropriate to utilise Parliamentary time. As well, the matters these regulations cover, such as register requirements, prescribing fees, and service of notices, need to be sufficiently flexible to ensure they are fit for purpose and may need to be changed frequently.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>The Bill provides for an exemption to sections 27 (restrictive trade practices), 30, and 30C (cartel behaviour) of the Commerce Act 1986 for registered news media entities engaging in news content bargaining as a collective (clauses 115 – 122). These clauses provide a streamlined pathway for news media entities to collectively bargain without needing to apply to the Commerce Commission. This provision was considered necessary to enable New Zealand’s relatively small news media sector to bargain effectively collectively which helps reportion the bargaining power imbalance that exists between large digital platforms and news media entities. The status quo pathway under the Commerce Act was considered too time consuming for news media entities who may need to seek a commercial agreement urgently to maintain sustainability and lower the bar to entering collective bargaining for smaller news media entities. Manatū Taonga consulted with the Commerce Commission and the Ministry of Business, Innovation and Employment’s competition team to ensure the collective bargaining exemption was not broader than necessary to achieve the intent of the legislation or enabling any behaviour that may be damaging to competition.</p>	

Appendix One: Further Information Relating to Part Three

External consultation – question 3.6

Manatū Taonga has undertaken extensive targeted stakeholder consultation with parties who have an interest in the operation of the Fair Digital News Bargaining Bill. Broadly, targeted stakeholder consultation has included:

- News Media Entities
 - Allied Press
 - Discovery
 - E-Tangata
 - MediaWorks
 - News Publishers' Association
 - New Zealand Media and Entertainment
 - Pacific Media Network
 - Radio New Zealand
 - Scoop
 - Stuff
 - Spinoff
 - Whakaata Māori
- Digital Platforms
 - Google
 - Meta
 - Microsoft
 - Snap
 - TikTok
- International Likeminded Partners
 - Australian Treasury
 - Department of Canadian Heritage
- Mediators and Arbitrators
 - Arbitrators and Mediators Institute of New Zealand

The overall views from stakeholders is summarised below:

News media entities

News media entities are overall supportive of the Fair Digital News Bargaining Bill. News media entities currently struggle to operate online which threatens the sustainability of New Zealand news media industry. News media entities expressed frustration with the lack of progress made trying to enter voluntary commercial arrangements with digital platforms, and those entities who had struck commercial deals with platforms were concerned whether they accurately reflected the market value for the content they produce.

Digital platforms

The digital platforms who will likely be captured by the legislation were less homogenous in their view of the Fair Digital News Bargaining Bill, this is likely due to the variance in business models that are used by different digital platforms and therefore changes the way digital platforms utilise news content. Generally, digital platforms that use news content more to drive engagement as their business model, such as Google and Meta, were more opposed to the legislation and disagreed with the concept that news content deserves compensation. Whereas platforms with more varied business models, such as Microsoft, appeared to be more accepting of the legislation. The engagement from digital platforms with Aotearoa New Zealand was also varied. Some digital platforms have strongly committed to supporting the New Zealand news media industry or committed to remaining within the New Zealand market should the Bill pass, but some other digital

platforms have indicated to Manatū Taonga that they would exit the New Zealand news media marketplace if the legislation is introduced.

International likeminded partners

International partners were supportive of New Zealand's decision to progress the Fair Digital News Bargaining Bill. Given the inherent global nature of many of the digital platforms, similar legislation in partner jurisdictions provides consistency and robustness to frameworks seeking to regulate web-based services.

Mediators and Arbitrators

Officials consulted with the Arbitrators' and Mediators' Institute of New Zealand to engage their subject matter expertise on the provisions relating to the Bill's mandatory bargaining process and the Bill's interaction with the Arbitration Act 1996.