

## Fair Digital News Bargaining Bill

### Legislative Statement

This legislative statement is presented to the House in accordance with Standing Order 272.

#### Overview

The purpose of the Bill is to create a fair bargaining environment between New Zealand news media entities (NMEs) and digital platforms to support commercial arrangements for online news content. Where voluntary agreements cannot be reached, the Bill establishes a bargaining and arbitration process that acts as a backstop to support commercial arrangements between companies. The Bill:

- creates a bargaining code to guide negotiations and ensure discussions are held in good faith
- creates a stepped bargaining process for NMEs and digital platforms, ending with final offer arbitration. This process would be used when voluntary agreements cannot be reached
- creates a regime for registering news media entities and operators of digital platforms who are eligible for bargaining
- creates an exemption to the stepped bargaining process for digital platforms. When digital platforms can show they make a fair contribution to the sustainable production of New Zealand news content they can apply for an exemption to the scheme
- establishes the Broadcasting Standards Authority (BSA) as the independent regulator in charge of overseeing the bargaining environment
- enables news publishers to collectively bargain without requiring a Commerce Commission determination
- imposes penalties for not complying with the legislation; and
- defines key terms required for the operation of the legislation that are flexible and futureproofed to ensure the Bill remains robust and effective.

The Bill supports a free and independent news media sector by providing NMEs with a pathway to be viable in a digital marketplace without direct government funding.

#### Part 1: Preliminary provisions

The Bill's preliminary provisions outline the purpose of the Bill, the Bill's definitions, and provisions relating to the Bill's application to operators of digital platforms incorporated outside of New Zealand.

##### *Key definitions under the Bill*

For the Bill to be effective, it was necessary to define key terms, notably:

- **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.

- **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.
- **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 that is produced by NMEs available to people in New Zealand. The number of digital platforms with responsibilities under the legislation will be limited by the registration process and bargaining power imbalance test.
- **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.

The Bill’s key definitions are appropriately flexible and futureproofed to respond to shifts in the digital marketplace.

#### *Bill application to platforms incorporated outside of New Zealand*

Due to many large, multinational, digital platforms being incorporated outside of New Zealand, it was necessary for the Bill to outline how the Bill would apply extraterritorially. The provisions relating to application of the Bill to foreign operators of digital platforms was based upon similar provisions within Part 18 of the Companies Act 1993 with assistance from legal advice provided by the Crown Law Office.

## **Part 2: Registered News media entities and operators**

Part 2 establishes frameworks for news media entities and operators of digital platforms to be registered for eligibility in the Bill’s mandatory bargaining process. Part 2 also imposes duties on news media entities and operators.

#### *Registered news media entities*

For an NME to be eligible for registration they must satisfy the definition of a “news media entity” and that the news content the applicant produces is predominantly directed at a New Zealand audience. The BSA is required to maintain a public register of all registered news media entities. An NME’s registration may be cancelled if they no longer fulfil the registration requirements, or the NME has contravened the Bill. Designated terrorist entities or applicants providing material support to a designated terrorist entity must not be registered.

#### *Registered operators of digital platforms*

Operators of digital platforms may be registered following an assessment by the BSA of the bargaining power imbalance between the operator and a NME or group of NMEs. The bargaining imbalance must be more than minor and must be in favour of the operator. The BSA can take into account a range of factors when considering the bargaining power imbalance, including:

- the size of, and resources available to, the operator and the NME
- the extent to which the NME is reliant on the operator's digital platform to carry on its business
- the extent to which the operator is reliant on the news content produced by the NME to carry on its business
- an estimate of the benefits and detriments for the operator and the NME of news content being made available by the digital platform
- the extent to which the NME has been able to negotiate with the operator; and
- any other matters the BSA considers relevant.

The BSA may also register an operator in respect of every NME if the BSA consider a bargaining power imbalance would exist across all registered NMEs. The BSA must also keep a public register of all registered operators.

Part 2 also requires all NMEs and operators (whether registered or not) to comply with the bargaining code created by the BSA and to bargain in good faith. Persons who contravene these duties are subject to penalties.

### **Part 3: Bargaining process**

Part 3 establishes the mandatory bargaining process that can be triggered by a registered NME. The bargaining process has three stages, as follows:

- negotiation
- mediation; and
- final offer arbitration.

Part 3 also creates an exemption process for operators of a digital platform provided they can show they already make a fair contribution to sustainable production of New Zealand news content.

#### *Negotiation and mediation*

The initial steps for the Bill's bargaining process require the bargaining parties to undertake formal negotiation 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. Mediation requires the appointment of an independent mediator who will oversee the process. Mediators will be selected from a list of persons with the appropriate skills and qualifications, approved by the BSA. If formal bargaining and mediation are unable to conclude successfully, a final offer arbitration process will be triggered.

### *Final offer arbitration*

Final offer arbitration under the Bill follows the provisions of the Arbitration Act 1996, except in unique circumstances, which are outlined in Schedule 2 of the Bill. Final offer arbitration would be limited to only consider financial compensation between the parties and will always result in a news content agreement.

The final offer will be chosen by an arbitration panel consisting of accredited arbitrators, approved by the BSA, and selected by the parties. The Bill enables the BSA to remove and replace members of the arbitration panel if there is a conflict of interest. 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:

- the benefits and detriments to each party (monetary or otherwise) of the operator's digital platform making the news content available
- the reasonable cost to the NME of producing news content
- the reasonable cost to the operator of making the news content available in New Zealand
- whether the terms of an offer would place an undue burden on the commercial interests of either party; and
- any other matters the panel considers relevant to achieving the purpose of the Bill.

The panel must also reject any offer that is highly likely to have 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. If both offers fairly compensate the NME, the panel must select the offer that better supports sustainable production of New Zealand news content.

The costs of mediation are to be split between the parties, unless the BSA considers apportioning the costs differently is appropriate to meet the purposes of the Bill. The costs of final offer arbitration are to be decided between the parties. If the parties are unable to agree, the panel may apportion costs. When considering how to apportion costs, the panel must consider the conduct of the parties during arbitration and each party's ability to pay the costs.

### *Exemption from bargaining process*

The Bill enables an operator of a digital platform to apply for an exemption from the Bill's bargaining process. The BSA may grant the exemption if the operator already makes a fair contribution to sustainable production of New Zealand news content, the exemption is necessary or desirable to promote the purposes of the Bill, and the exemption is not broader than necessary to achieve its purpose. The Bill guides the BSA's decision-making by requiring consideration of:

- the size of, and resources available to, the operator

- the extent to which the news content agreements the operator has entered and any other arrangements the operator has put in place to support production of New Zealand news content:
  - provide fair compensation to news media entities
  - make a fair contribution to a diverse range of news media entities, including Māori news media entities; and
  - do not contain terms that give rise to commercial pressures that have the potential to undermine freedom of expression or journalistic independence.
- the extent to which requiring the operator to engage in the bargaining process is likely to result in news content agreements
- how those additional benefits compare with the costs that are likely to be incurred by the operator and news media entities when engaging in the bargaining process
- the extent to which the operator has complied with its obligations under the Bill; and
- whether the operator is currently engaged in bargaining under the Bill's bargaining process.

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. If the BSA suspects an operator may no longer be meeting the conditions for its exemption, the BSA can review the operator and amend, or revoke, the exemption if the BSA considers it is necessary.

#### **Part 4: Information gathering**

Part 4 provides the BSA with additional information-gathering and information-sharing tools necessary to fulfil their responsibilities under the Bill. Information gathered, shared, or held by the BSA is subject to strong statutory protections.

##### *Information-gathering*

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 oversight by the Ombudsman. Supporting the use of these tools are criminal penalties to prevent people from refusing to produce information or producing false information. The BSA is also empowered to receive evidence.

The Bill's information-gathering tools are aligned with the tools available to the Commerce Commission and Financial Markets Authority who oversee similar competition environments. The information-gathering tools also follow the tools provided to the Australian and Canadian authorities overseeing their equivalent news content bargaining frameworks.

##### *Information-sharing*

The Bill enables the BSA to provide information to a law enforcement or regulatory agency or an overseas regulator (e.g. the Australian Communications and Media Authority and the Canadian Radio-television and Telecommunications Commission) if it considers the information may assist the agency or regulator to perform its functions. The Bill also allows the BSA to use information given to it by a law enforcement or regulatory agency or overseas regulator.

### *Protection of information*

The Bill provides strong protections for information held by the BSA. Any unlawful disclosure of information or failure to adhere to conditions imposed on information are subject to substantial fines. Any personal information held by the BSA is subject to the requirements of the Privacy Act 2020. These protections continue to apply to information that is transferred to a law enforcement or regulatory agency or overseas regulator.

## **Part 5: Enforcement**

Part 5 creates new enforcement tools to ensure positive behaviours are maintained by people interacting with the Bill's frameworks. The Bill's enforcement tools are intended to be a graduated response model. 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 in a measured and proportionate way.

### *General enforcement tools*

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 for changing behaviours. If a warning is unsuccessful in changing negative behaviours, the BSA could consider using a corrective notice.

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 to do so or comply with a corrective notice would result in a penalty.

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 court process.

### *Civil liability remedies*

Civil liability remedies, injunctions and pecuniary penalty orders, are available for specified clauses where serious harm could occur from contravention. Civil liability provisions include duties to:

- comply with the bargaining code
- bargain in good faith
- participate in the bargaining process

- comply with the terms and conditions of an exemption from the bargaining process; and
- comply with corrective notices and disclosure notices.

Injunctions would enable the BSA to apply to the court to restrain someone engaging in conduct that contravenes the legislation or require a person to do something to ensure that they comply with the Bill.

The BSA can apply to the High Court to impose a pecuniary penalty against a person who has contravened the Bill, attempted a contravention, or been involved in a contravention. The Bill separates pecuniary penalties into three tiers with thresholds that reflect the seriousness of the behaviour. For example, a failure to engage in bargaining when required represents a significant undermining of the Bill, and as such, attracts the highest level of penalty. The highest possible penalty is Tier 1, which carries maximum penalties of \$10 million for a body corporate (or a higher amount based on three times the commercial gain from a contravention or 10% of their turnover) or \$500,000 for an individual. In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, for example, the nature and extent of the relevant conduct and the loss or damage caused by that conduct.

The Bill enables more than one civil liability remedy to be given from the same conduct, however, only one pecuniary penalty may be given for the same conduct.

## **Part 6: Miscellaneous**

Part 6 includes provisions that do not easily fit in to the other parts listed above. Notably, these include provisions for the creation of the bargaining code and the Commerce Act 1986 exemption for collective bargaining. Part 6 also lists the various regulation-making tools under the Bill, as well as the new functions and responsibilities for the BSA.

### *Bargaining code*

The Bill requires the BSA to create a bargaining code that helps facilitate fair and efficient news content bargaining. The BSA must consider consult with the Minister for Broadcasting and Media and persons who the BSA considers will be substantially affected by the code.

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. The code must specify further detail relating to the bargaining process, including the procedure followed by the parties, detailed requirement related to good faith bargaining, and imposing obligations on parties engaged in bargaining.

The bargaining code applies both to parties bargaining under the Bill's mandatory bargaining process and voluntary bargaining. 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.

### *Collective bargaining exemption*

News media entities under the Bill will be enabled to collectively bargain without requiring Commerce Commission authorisation. The Bill achieves this by exempting registered news media entities from sections 27 (restrictive trade practices) of the Commerce Act and from sections 30 and 30C(1) (cartel behaviour) of that Act to the extent they apply to price fixing.

To be eligible for collective bargaining, a NME must be registered under the Bill and submit a collective bargaining agreement to the BSA that does not include a prohibited provision (e.g. provisions enabling collective boycotting or provisions prohibiting a collective bargaining party from ‘splitting off’). The collective bargaining exemption only applies for registered news media entities collectively bargaining with operators of digital platforms on matters relating to a digital platform making their news content available.

The BSA will be empowered to approve collective bargaining agreements, impose any terms or conditions on the collective bargaining agreement it considers necessary, and maintain a public register of all collective bargaining agreements entered under the Bill.

### *Regulations*

Regulations made under the Bill largely relate to prescribing procedures, requirements, and other matters for registers created and maintained under the Bill. There are also several other regulation-making provisions regarding:

- amending definitions of “law enforcement or regulatory agency”, “recognised regulatory body”, and “digital platforms”
- bringing in the bargaining process provisions earlier than the Bill’s longstop date
- prescribing any additional mandatory or optional terms for final offers
- enabling the BSA to create a bargaining code
- specifying additional prohibited provisions from collective bargaining agreements; and
- prescribing any manners in which a notice may be served under the Bill.

### *BSA functions and responsibilities*

The Bill outlines the functions of the Authority, that will be performed by the BSA, as including:

- administrating the bargaining process and facilitating fair and efficient news content bargaining
- monitoring, investigating, and enforcing compliance with the Bill; and
- reviewing and reporting on domestic and international developments relating to news content made available by digital platforms, and the impact of the Bill on the production of New Zealand news content.

The BSA must also include within its annual report an assessment of the value of New Zealand news content agreements, information about how those agreements are distributed, and an evaluation of the effect news content agreements are having on the



production of news content. The BSA must also provide information on digital platform exemptions it has granted with a summary of the reasons for granting the exemption. However, the BSA must not include any commercially sensitive information within its annual report unless it consults with persons likely to be affected by disclosure and the BSA is satisfied there is sufficient public interest in disclosure.

The Bill also requires that the Minister for Broadcasting and Media review the Bill within five years.