

THE FAIR DIGITAL NEWS BARGAINING BILL

JULY 2024

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**THE
NEW ZEALAND
INITIATIVE**

www.nzinitiative.org.nz

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Published July 2024 by

The New Zealand Initiative
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Wellington 6143
New Zealand
www.nzinitiative.org.nz

Views expressed are those of the author and do not necessarily reflect the views of The New Zealand Initiative, its staff, advisors, members, directors or officers.

Research Note
ISSN 2816-0347

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Executive summary

The outgoing Labour government proposed the Fair Digital News Bargaining Bill, legislation requiring large digital platforms such as Google and Facebook to negotiate payment for news content with New Zealand media companies.

While ostensibly aimed at supporting local journalism, this research note argues that the proposed bill is misguided. It risks harming the very news organisations it purports to help, reducing media plurality. It also risks discouraging broader investment in the technology sector if the sector comes to expect arbitrary predation.

The bill is modelled on similar legislation in Australia but with some key differences. This note examines the rationale behind the bill, its potential impacts and why it represents poor public policy. While there is a plausible public-interest case in subsidising public-interest journalism, setting regulatory taxes on one sector to fund an unrelated public good is a poor policy and a worse precedent.

The National-led government has suggested changes to the bill, with increased ministerial discretion, to designate platforms subject to the bargaining framework. The politicisation of an already poor framework worsens it.

Introduction

The media landscape in New Zealand, as in many countries, has undergone significant transformation in recent years. Traditional news organisations have struggled with declining revenues as advertising spend has shifted to digital platforms. In response, the government has proposed the Fair Digital News Bargaining Bill to address perceived imbalances between news media and large technology companies.

In a prior era, news companies used revenue from classified and general advertising to maintain low subscription fees and to fund journalism. Newspapers first lost classified advertising revenue to eBay, Craigslist and Facebook Marketplace in the United States and to TradeMe in New Zealand. Then, newspaper advertising revenue eroded as digital platforms became highly effective in helping companies reach targeted and likely potential customers.

In short, other sectors began directly providing the services that news had used to cross-subsidise news production. News companies had no inherent right to be the only possible home for classified ads or to prevent advertisers from shifting to venues they found more effective.

But, the effect has been a steady decline in newspaper circulation and a corresponding consolidation in the media industry. As readers have migrated to online sources, many newspapers have struggled to maintain their subscriber base. This has led to cost-cutting measures, including newsroom layoffs and, in some cases, the closure of publications. The industry has responded with mergers and acquisitions, leading to increased concentration in media ownership.

The digital revolution has also facilitated the growth of digital-native news outlets and new forms of journalism. These new entrants, unencumbered by legacy costs and traditional business models, have often been more agile in adapting to the digital environment. They have experimented with new formats, revenue models and ways of engaging with audiences. This has brought challenges and opportunities to the media landscape, increasing competition and diversifying the range of voices and perspectives available to consumers.

Furthermore, the digital age has dramatically increased New Zealanders' access to international news sources. While this has broadened horizons and provided more diverse perspectives, it has also intensified competition for audience attention and advertising dollars. Local news organisations now compete not just with each other but also with global media giants and niche publications from around the world.

The change has had benefits. Reduced barriers to entry for new media voices have expanded consumer choice and created opportunities for innovative journalism models. In its report to the Ministry for Culture and Heritage on media plurality, Sapere noted that "The emergence of digital platforms has also been positive from a media plurality perspective by expanding and deepening the market for news and preventing any one media owner or voice having too much influence over public opinion and the political agenda".¹

The challenge, therefore, is not simply to prop up traditional media models but to foster an environment where quality journalism can thrive in the digital age. This requires a nuanced understanding of the complex dynamics at play in the modern media ecosystem.

¹ Jeff Loan, Kieran Murray, Reinhard Pauls and Kelvin Woock, *The implications of competition and market trends for media plurality in New Zealand*, A report for the Ministry for Culture and Heritage, 30 November 2021. <https://www.mch.govt.nz/sites/default/files/projects/sapere-report-media-plurality-nz-feb22.pdf>

The proposed legislation: Fair Digital News Bargaining Bill

The Fair Digital News Bargaining Bill, introduced by Labour's Minister Willie Jackson in the previous Parliament, aimed to address perceived imbalances in the digital news ecosystem by requiring large tech companies like Google and Facebook, to negotiate payment for news content with New Zealand media organisations. The bill shares features with similar legislation in Australia and Canada.

The proposed legislation's key features include a mandatory bargaining framework between platforms and news organisations, an arbitration process if negotiations fail to reach an agreement, and an independent regulator that would designate which platforms are subject to the bill.

Platforms could be subject to the framework if they make news content available by reproducing any part of it on the platform or by facilitating access to news content through any index, aggregation, or ranking of news content. The bargaining process would come into force by 1 July 2025, if not implemented earlier by Order in Council.²

The Bill was introduced to Parliament on 17 August 2023. Submissions to the Select Committee were due 1 November 2023. In the meantime, a National-led coalition took office.

At First Reading, National's spokesperson, Melissa Lee, clearly stated National's opposition to the bill. Her arguments against the bill were sound. She noted that if platforms are violating copyright and intellectual property, there are existing mechanisms to provide remedy.

Lee reminded Parliament that links to news sites provide value to news sites. As she put it, "Facebook doesn't actually make money from [users clicking on news links] but the Minister thinks that they should pay for that. ... We do not need yet another regulatory regime without cause."³

Many who would have submitted against the bill saw little point in doing so. National had clearly signalled that it understood the bill's numerous failures and that the bill would not progress.

Minister Paul Goldsmith has stated that the government will take "immediate action" to support New Zealand's media and content production sectors, with short-term measures to be in effect by the end of 2024.⁴

He also stated that the National-led government would progress the Fair Digital News Bargaining Bill, with amendment to set Ministerial platform designation rather than designation by an independent Authority.

The government's desire to support local journalism is understandable. However, the proposed legislation is based on several flawed premises. It risks creating substantial unintended but easily foreseen negative consequences for media and the New Zealand technological investment environment.

² New Zealand Parliament, *Fair Digital News Bargaining Bill*, New Zealand Legislation, 22 August 2023. <https://www.legislation.govt.nz/bill/government/2023/0278/latest/whole.html>

³ Melissa Lee, *Fair Digital News Bargaining Bill – First Reading*, Hansard, 30 August 2023.

⁴ Paul Goldsmith, *Government taking action to support media sector*, New Zealand Government Press Release, 3 July 2024. <https://www.beehive.govt.nz/release/government-taking-action-support-media-sector>

Analysis: flawed premises of the bill

The Fair Digital News Bargaining Bill attempts to address a real issue.

There is a defensible case that the erosion of news revenue has consequences beyond the affected news companies and journalists. There is a public interest in a vigilant fourth estate. It is harder for voters to make informed choices when governments and opposition face less scrutiny.

And that would make a case for measures like the Public Interest Journalism Fund and Local Democracy Reporting Programme, funded through normal budget processes.

The government and some media companies have instead taken the view that digital platforms unfairly benefit from news content without adequate compensation to news organisations. Consequently, Australia, Canada and New Zealand have sought to shift the burden away from general tax revenue and move toward large multinational online platforms like Google and Meta.

We argue that this is a substantially flawed premise of the Bill.

In 2021, the Ministry for Culture and Heritage commissioned work by Sapere on the media market.⁵ Sapere argued against adopting models based on Australia's News Media Bargaining Code. They noted that news firms derive considerable commercial benefits from being featured on online platforms. Platforms like Google provide short snippets of news allowed by the Copyright Act 1994, with links to the original source.⁶ Traffic to news sites is valuable to news outlets. Some linking will see ads on the news site that provide revenue to the site. Others may choose to subscribe to the outlet if a paywall protects important content.

News companies wishing to block search engine indexation can do so easily. A simple robots.txt file stops search engines from indexing sites. Paywalls can prevent those who have not paid from viewing a site's content. Blocking platforms' access is relatively simple. Why have news publishers not done so?

Sapere's report offered the simplest answer. They noted international research showing that digital platforms, overall, do more to benefit news firms by increasing their reach than they might do to harm news firms when some platform users substitute platforms' snippets of news rather than paying for the newspaper.

Levies on a sector funding work that the sector finds valuable can have merit. Petrol excise levies fund the roads. Various producer checkoff systems fund research to improve the sector; ideally, levy systems check whether those levied find the funded work valuable.

That same nexus does not exist between technology platforms, which would be levied to fund journalism and news companies. The public interest justification for greater media funding relies on the public benefit of a more informed public. That benefit is broadly dispersed rather than being concentrated among technology platforms.

As the Initiative has argued, "if you think that good journalism deserves better funding, you should contribute to it yourself and encourage others to do likewise. If that is not enough to support the

⁵ Loan et. al., op. cit.

⁶ Section 42(3) of the Act sets a fair dealing provision "for the purposes of reporting current events" where it is "accompanied by sufficient acknowledgement."

public goods provided by rigorous journalism, look at measures like the public interest journalism fund".⁷

A minor flawed premise is the belief that government intervention is necessary to correct a market failure in the valuation of news content. This assumption ignores the potential for voluntary agreements and new business models to emerge as the market adapts to technological change. It represents a fundamental misunderstanding of how markets evolve and adapt to disruption.

Paywalls are far more common than they once were, for example.

When those who want news decide which outlets to support with their subscription dollars, news outlets face a market test. If the test instead depends on a political or bureaucratic allocation process, worse outcomes may be obtained – though this problem would be the same regardless of whether taxpayers overall or large tech platforms covered the bill.

Potential negative consequences

The proposed legislation carries several significant risks, including harm to smaller independent news outlets.

One of the most serious risks is the potential for reduced news availability.

As seen in Canada, platforms may respond to such legislation by limiting or removing news content entirely, harming publishers and consumers. When Canada implemented similar legislation, Meta (Facebook) blocked news content rather than be subject to the new rules.⁸

This outcome would be particularly detrimental to smaller news outlets that rely heavily on social media for distribution. It could also reduce overall news consumption, particularly among younger demographics primarily accessing news through social platforms.

The Canadian government proceeded with its legislation based on the premise that platforms derive substantial benefits from facilitating access to news. Meta's exit suggested they did not derive any substantial benefit from allowing users to link to news stories.

Sean Plunket at The Platform, a small independent media company, reported that a source close to Meta indicated Meta was "highly likely" to pull out of the New Zealand market if the Bill passes.⁹ As in Canada, small and independent outlets are likely to be most harmed if Meta blocked links to news rather than be subject to compelled bargaining.¹⁰

Entrenching existing players and business models by throttling smaller independent outlets would stifle innovation and new entrants in the media market. The potential restraint on effective competition is bad enough. However, it is particularly concerning if diversity in news sources makes for a healthier democracy.

⁷ Eric Crampton, *Extortion is a poor business model*, The New Zealand Initiative Insights Newsletter, 14 April 2022. <https://www.nzinitiative.org.nz/reports-and-media/opinion/extortion-is-a-poor-business-model/>

⁸ Eric Crampton, *Canada a cautionary tale for Big Tech paying for news*, The Post Weekend, 5 August 2023. <https://www.thepost.co.nz/a/business/350048688/canada-cautionary-tale-big-tech-paying-news>

⁹ Reported on-air at The Platform during the week of 1 July; subsequently confirmed by email to The Platform.

¹⁰ Chris Lynch's 5 July interview with Sean Plunket, noting the importance of Facebook in his local independent reporting in Christchurch, is on point. <https://theplatform.kiwi/podcasts/episode/what-will-the-fair-digital-news-bargaining-bill-mean-for-local-news>

Meta's exit seems particularly likely given parallels between New Zealand's legislation and Canada's.

In Canada, platforms could ultimately be subject to binding arbitration with final offer selection – and vast uncertainty about the amount they could be compelled to pay.

New Zealand's bill allows news sites to initiate compulsory bargaining that can culminate in an arbitrator deciding which offer "fairly compensates the news media entity party for that party's news content being made available."

The simplest way to avoid uncapped risk is to stop facilitating access to news. The decision is particularly easy when allowing users to link to news, which provides the platform with little discernible benefit.

The bill has other unfortunate consequences.

Forcing payments for links and snippets undermines the open nature of the web. Traditionally, websites are free to link to other websites without charge. A website wishing to charge readers can set a paywall. And a site owner who does not wish the website to appear in searches can block search engines.

A system of compelled regulatory payments from one industry to another in cases where neither a beneficiary-pays argument nor a polluter-pays argument applies is anathema to New Zealand's overall tax policy stance. As Melissa Lee put it at first reading, "This is not a fair bargaining code. This is literally, as someone actually called it, a shakedown. We do not support this bill."¹¹

Tax policy generally aims to collect necessary revenue across the broadest possible base at the lowest rate that meets the government's revenue goals. Tax changes work through the Generic Tax Policy Process, which makes tax policy more rigorous and predictable. The compelled negotiation framework setting the burden of funding media onto a particular sector is poor policy.

Similarly, spending policy, ideally, sees different objectives compete during budget bid processes. The government has limited resources. Ideally, funding allocations go where the next dollar does the most good. The National-led government's signalled return to investment approach helps get the most good from each dollar spent. By contrast, a fund of regulatory charges imposed by a compelled arbitration structure, or imposed arbitrated regulatory bargains between platforms and individual news outlets, could lead to media being under-funded or over-funded, relative to an ideal when subsidies to journalism must compete against other worthy projects.

Tying the two systems together creates a perverse dynamic.

Rather than trying to make the most compelling case for assistance in cases where there is a public good worth funding, companies will instead have an incentive to find a politically disfavoured industry that might be asked to pay.

Two decades ago, Seattle voters rejected a 10-cent-per-cup levy on espresso that would have funded early childhood education.¹² The measure failed, but the political attractiveness of this kind of

¹¹ Melissa Lee, op. cit.

¹² Sarah Kershaw, 2003, *Voters in Seattle, Where Coffee is King, Reject a Tax on Espresso*. The New York Times. 17 September. Available at <https://www.nytimes.com/2003/09/17/us/voters-in-seattle-where-coffee-is-king-reject-a-tax-on-espresso.html>. I was able to find the old story thanks to a simple Google search. On opening the page, I saw an ad sponsored by Te Mana Papawhenua, the New Zealand Real Estate Authority, noting the government's property-checking service. Because I clicked the link, the Times will have received a small amount of money from the New Zealand government. Had I not been able to use Google's small snippet to tell that that was the story I needed to cite, all three of us would have been worse off.

proposition is dangerous. It is unlikely to stop with levies on technology platforms to fund news media.

As the Initiative has previously argued, “Taxing a sector you do not like to fund a sector you do like is not a good basis for tax policy. One might as well impose a tax on hipsters’ beard oil to fund tieke recovery programmes”.¹³

If there is a public interest case for supporting journalism, it would be more transparent and economically efficient to do so through direct subsidies rather than forced transfers from one sector to another.

Furthermore, the regulatory overreach inherent in the bill creates the potential for political interference in media markets.

The ministerial designation power raises concerns about press freedom and the independence of the media from government influence. It may not be obvious at first glance. Where funding ultimately lands would depend on the compelled bargains struck, with or without Ministerial designation.

But it is not hard to imagine some future ministers making clear to platforms that they could avoid being designated if they struck particular bargains with some outlets and not others. The Minister’s favour would be valuable to outlets wishing to extract payments from Twitter and others.

As the Initiative has consistently argued, “The government should not consider advancing Labour’s bill in any way”.¹⁴ The potential for political manipulation of which platforms are subject to the legislation is a significant concern.

And as the Initiative has previously argued, “Breaking basic principles of public finance and the basic principles on which the web was founded, to compel tech companies to fund journalism – that belongs only in bad modern-day gangster movies. Not in New Zealand public policy”.¹⁵

A final additional risk should concern a government seeking more significant international investment and tech sector development.

The link between platforms and news outlets is tenuous. But the political argument for the scheme is plausible. Platforms were seen as having harmed media outlets by being better at matching advertisers with potential customers. Platforms are large and have substantial assets, especially compared to local media outlets. So taxing a disfavoured group to fund a favoured group seemed politically viable.

Tech companies would be right to worry that they could be subject to similar predation should they invest here. Again, as Melissa Lee pointed out at the bill’s First Reading, “I think it is really ridiculous when platforms like Google have supported an estimated \$16.5 billion worth of economic benefit in 2022 alone for New Zealand businesses to actually work on the platforms and on the digital economy. We should actually support innovation.”¹⁶

There can be real public goods aspects to public interest journalism. This Bill is not an appropriate way of solving that problem.

¹³ Eric Crampton, 2021, *When does ‘collective bargaining’ become a cartel?* The Post, 13 December. <https://www.stuff.co.nz/business/opinion-analysis/127258524/when-does-collective-bargaining-become-a-cartel>

¹⁴ Eric Crampton, *O Canada ... what have you done to news platforms?*, Newsroom, 13 February 2024. <https://newsroom.co.nz/2024/02/13/o-canada-what-have-you-done-to-news-platforms/>

¹⁵ Eric Crampton, *When does ‘collective bargaining’ become a cartel?*, The Dominion Post, 13 December 2021.

¹⁶ Melissa Lee, op. cit.

International comparisons

While proponents of the Fair Digital News Bargaining Bill point to Australia's experience as a success story, closer examination reveals a more complex picture. The Australian News Media Bargaining Code, implemented in 2021, has had mixed results and raised several concerns relevant to the New Zealand context.

Initially, the Australian legislation faced strong resistance from digital platforms. Facebook temporarily blocked news content on its platform in Australia, highlighting the potential for platforms to take drastic measures in response to such regulations. While agreements were eventually reached, the contentious process highlighted the complexities of forcing negotiations between digital platforms and news organisations.

The deals struck in Australia have been largely opaque, making it difficult to assess their true value and impact. While some large media companies have reported significant financial benefits, the effect on smaller publishers and overall media diversity remains unclear. There are concerns that the legislation has primarily benefited large, established media companies at the expense of smaller, independent outlets.

With the framework now under renegotiation, the Australian government has been considering potential responses if Meta blocks news as it has in Canada. Worryingly, one potential response is forcing Meta to carry news¹⁷ so that it could be subject to the bargaining regime.

So, a framework founded on the premise that platforms were somehow stealing from news companies may result in those platforms being compelled to serve up news they do not wish to provide.

Canada's experience with similar legislation has been even more problematic. Meta's decision to block news content on its platforms in response to the Online News Act has significantly harmed smaller news outlets.¹⁸

The University of Ottawa's Canada Research Chair in Internet and E-commerce Law Dr Micheal Geist is Canada's leading expert on the Canadian news bargaining regime. He draws a direct link between the harms caused to media companies by the Canadian legislation, and the Canadian government's subsequent proposal to boost the labour tax credit provided to news companies.¹⁹

In other words, Canada's version of the legislation was so successful that the government considered a media bailout was appropriate - at an estimated cost of \$129 million over five years.²⁰

Regulating complex digital ecosystems is fraught.

¹⁷ Taylor, Josh. 2024. "Forcing Meta to carry news on Facebook and Instagram a scenario being considered by Australian government." *The Guardian*. 25 June. Available at <https://www.theguardian.com/media/article/2024/jun/25/facebook-meta-news-ban-australia-government-enforced>

¹⁸ Eric Crampton, *Canada a cautionary tale for Big Tech paying for news*, The Post Weekend, 5 August 2023. <https://www.thepost.co.nz/a/business/350048688/canada-cautionary-tale-big-tech-paying-news>

¹⁹ Professor Michael Geist, *Bill C-18 Bailout: Government announces plans to pay for 35% of journalist costs for news outlets as it more than doubles tax credit per employee*, available at <https://www.michaelgeist.ca/2023/11/bill-c-18-bailout-government-announces-plans-to-pay-for-35-of-journalist-costs-for-news-outlets-with-116-increase-in-tax-credit-per-employee/>

²⁰ Department of Finance Canada, *2023 Fall Economic Statement*, p. 67.

The Canadian case is particularly relevant for New Zealand, given the similarities in compulsory bargaining frameworks. The challenges Canadian news organisations face in the wake of Meta’s content blocking should serve as a cautionary tale for New Zealand policymakers.

New Zealand’s smaller market size makes risks here higher. The time and attention required for negotiating with media outlets will not vary considerably with their size, nor would the costs of learning to deal with each country’s bespoke compulsory bargaining framework. The risk of platforms simply excluding New Zealand news content rather than enter into negotiations is a real concern.

Alternative approaches

The government should not progress the Bill.

To the extent that there are issues in taxing digital services provided by multinational companies, those issues are best addressed through multilateral negotiation and the generic tax policy process. They should not be dealt with through this Bill.

If improved international tax policy settings result in higher revenue for the Crown, that money can be aimed where it might deliver the most value – reducing the deficit, reducing other taxes, or boosting funding for effective spending programmes.

To the extent that there is a public interest case for subsidising greater provision of public interest journalism, expanding initiatives like the Local Democracy Reporting scheme can fill identified gaps in coverage.

Reviewing existing regulations is also crucial. There are outdated rules that disadvantage local media companies competing with global platforms. Sapere’s report for the Ministry for Culture and Heritage highlighted that “current advertising restrictions prohibiting television and radio broadcasters from advertising on Sunday mornings and public holidays are outdated in a digital age and should be removed”.²¹ Such anachronistic regulations create an uneven playing field and should be addressed as part of a broader strategy to support local media.

And, laudably, Minister Goldsmith has signalled that those advertising restrictions will be lifted.²²

We fear that the Bill has been supported not because it is likely to work but because it demonstrates the government’s recognition of the problem facing news companies. Solving the problem is not simple. However, a bill that could redound to the detriment of many news companies seems worse than incrementally expanding existing funding for public interest journalism.

Conclusion

While well-intentioned, the Fair Digital News Bargaining Bill represents a misguided approach to supporting journalism. It risks undermining the innovation and plurality needed for a healthy media ecosystem.

The Bill is based on flawed premises about the relationship between digital platforms and news organisations, ignores the potential negative consequences of such intervention and fails to address the real challenges facing quality journalism in the digital age.

²¹ Loan et. al., op. cit. p. viii.

²² Goldsmith, op. cit.

International experiences, particularly in Australia and Canada, highlight the risks and unintended consequences of such legislative approaches.

Instead of pursuing this legislation, policymakers should focus on targeted support for public interest journalism and creating an environment that encourages innovation and competition in the digital age. The Minister's willingness to revisit advertising restrictions that further reduce news media revenue is laudable. It should not have taken the collapse of newsmagazine programmes like TVNZ's Sunday for the government to rethink the merits of banning advertising on Sundays.

The challenges facing journalism in the digital age are real. The solution lies not in heavy-handed government intervention but in fostering an environment where innovation, diversity and quality can thrive.

As media companies navigate the digital transformation of the media landscape, policy responses must be grounded in sound economic principles and recognise market dynamics. The Fair Digital News Bargaining Bill falls short on both counts.

It is time to abandon this flawed approach.

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