

PUBLIC VERSION

**APPLICATION FOR PROVISIONAL AUTHORISATION UNDER SECTION 65AD OF THE
COMMERCE ACT 1986**

23 November 2021

The Registrar
Competition Branch
Commerce Commission
PO Box 2351
WELLINGTON

Pursuant to sections 65AD of the Commerce Act 1986 notice is hereby given seeking **provisional authorisation** in relation to an application for authorisation of a restrictive trade practice made pursuant to sections 65AA(2) and 65AA(3).

2. OTHER PARTIES TO THE ARRANGEMENT

- 2.1 The Applicant is submitting this application for provisional authorisation on behalf of itself, and the parties to the Arrangement (the "**Participants**") for which provisional authorisation is sought.
- 2.2 The Participants include:
- (a) NPA;
 - (b) NPA's current and future members¹ ("**Members**") that choose to participate in the Arrangement. NPA's Members currently include NZME Limited ("**NZME**"), Stuff Limited ("**Stuff**"), Allied Press Limited ("**Allied Press**"), The Gisborne Herald Company Limited ("**Gisborne Herald**"), Ashburton Guardian Company Limited ("**Ashburton Guardian**"), Greymouth Evening Star Co Limited ("**Greymouth Star**"), National Media Limited ("**Wairarapa Times-Age**"), The Westport News Limited ("**Westport News**"), The Beacon Printing & Publishing Company Limited ("**The Whakatane Beacon**"), and The Wairoa Star Limited ("**Wairoa Star**"); and
 - (c) any other independent media persons / entities that produce New Zealand focused journalistic and news content that are listed on the NZX² or are otherwise not an "overseas person"³ (as currently defined in the Overseas Investment Act 2005 ("**OIA**")) and that choose to participate in the Arrangement. That could, for example, include a number of other locally-owned online, regional, suburban, and community publishers. For example, Hex Work Limited ("**The Spinoff**") has indicated an interest in participating in the Arrangement should it be authorised.
- 2.3 In essence, the Arrangement is open for participation by independent New Zealand news media producers ("**Independent NZ News Media**").
- 2.4 For the avoidance of doubt, given their different structure and requirements (including the ability to negotiate international or other arrangements), the Arrangement is not intended to be open to participation by:
- (a) media entities owned or established by the Crown, such as Television New Zealand Limited ("**TVNZ**"), the Māori Television Service (*Te Aratuku Whakaata Irirangi Māori*) ("**Māori TV**"), or Radio New Zealand Limited ("**RNZ**");
 - (b) media entities not currently listed on the NZX or that are otherwise "overseas persons" (as defined in the OIA), such as Discovery NZ Limited ("**Discovery NZ**").

¹ Members at the time they choose to participate in the Arrangement.

² At the time they choose to participate in the Arrangement.

³ At the time they choose to participate in the Arrangement.

3. DETAILS OF THE CONDUCT FOR WHICH PROVISIONAL AUTHORISATION IS SOUGHT

- 3.1 On 23 November 2021, the Applicant submitted the Authorisation Application for the Arrangement.
- 3.2 A copy of the Authorisation Application to which this application for provisional authorisation relates is attached at **Appendix One**.
- 3.3 The Applicant now seeks provisional authorisation in respect of all of the conduct for which authorisation has been sought in the Authorisation Application for the period commencing from the date of the granting of provisional authorisation until such time that the Commission declines or grants the Authorisation Application under section 65AD(5)(c).
- 3.4 In summary, the Applicant seeks provisional authorisation to immediately enable NPA, its current and future Members, and any other Independent NZ News Media that choose to participate (the "**Participants**") in the Arrangement to:⁴
- (a) appoint a common negotiating person(s) to collectively bargain and negotiate with each of Google⁵ and Facebook⁶ (respectively) (together the "**Digital Platforms**") the terms on which the Participants' news and journalistic content may be displayed, hosted, featured, linked or summarised ("**Display**") on either Digital Platform's platforms, including (without limitation) in relation to:
 - (i) remuneration for Display of such content;
 - (ii) the publication format of Display of such content;
 - (iii) the access to user data generated from the Display of such content; and
 - (iv) other benefits to Participants for the creation of such content (such as in the form of search rankings);
 - (b) exchange information between the Participants in relation to the above, including offers or proposed offers made or to be made to the Digital Platforms by or on behalf of the Participants, offers made by the Digital Platforms to the Participants, and acceptances or proposed acceptances by any Participant of any such offers;
 - (c) enter into agreements collectively negotiated between the relevant Digital Platform and the Applicant (and/or the Participants); and
 - (d) give effect to provisions of agreements collectively negotiated between the relevant Digital Platform and the Applicant (and/or the Participants).
- 3.5 It will be voluntary for Participants to participate in the Arrangement. There is no proposal to engage in a collective boycott outside of the Arrangement - any Participant is free to opt out

⁴ The full terms of the Arrangement for which authorisation (and consequently provisional authorisation) is sought can be found in the Authorisation Application at [5.1] and [5.2].

⁵ The term "Google" is used to include any subsidiary of Alphabet Inc., related company of Alphabet Inc., or member of the Alphabet Inc. corporate group.

⁶ The term "Facebook" is used to include any subsidiary of Meta Platforms, Inc, related company of Meta Platforms, Inc, or member of the Meta Platforms, Inc corporate group.

PUBLIC VERSION

of the Arrangement and to choose to enter into its own bilateral agreement with either Digital Platform.

4. REASONS FOR SEEKING PROVISIONAL AUTHORISATION

4.1 The Applicant seeks urgent provisional authorisation for the Arrangement to enable the Participants to commence collective bargaining with the Digital Platforms as soon as possible. The Applicant submits that there is an urgent need to engage in the conduct for which provisional authorisation is sought for the reasons set out below.

Urgency

4.2 The Applicant has already discussed with the Commission the significant challenges Independent NZ News Media currently face, and the impact on their financial position. This is the result of:

- (a) A significant decline in advertising revenue in recent years, due to:
 - (i) the changing nature of how audiences source their news content. There has been a shift away from more traditional forms of media towards the digital space (where the Digital Platforms have a substantial degree of power). Advertisers follow these audiences that have migrated online;
 - (ii) the proportion of advertising revenue that the Digital Platforms now account for, and the fact that Independent NZ News Media are not compensated by Digital Platforms for the value that their content provides to those Digital Platforms; and
 - (iii) the COVID-19 pandemic and consequent lockdowns. The impacts of successive COVID-19 lockdowns on the New Zealand advertising markets, and consequently on advertiser-funded Independent NZ News Media, has been significant. The recent and ongoing lockdowns of 2021 will similarly have significant impacts.
- (b) The costs that the Independent NZ News Media have had to incur to counter misinformation on certain digital platforms, particularly in the context of the COVID-19 pandemic. As discussed at [4.16] in the Authorisation Application, Independent NZ News Media outlets, including Stuff, have seen it necessary to establish a team of journalists specifically responsible for "countering misinformation with trustworthy, accurate, verified information about the vaccines." This need to invest already scarce resources into preventing the spread of harmful misinformation is a new and costly issue that the industry is facing.

4.3 A delay in the ability to begin collectively negotiating fairer compensation from Digital Platforms until the Commission decides upon whether full authorisation should be granted will prolong the financial challenges that Independent NZ News Media face in light of the above. Every passing day prolongs the above. []. The very rationale behind the Authorisation Application for which provisional authorisation is sought is to support the financial viability of the NZ Independent News Media. The sooner that the Participants can commence and potentially benefit from collective bargaining with the Digital Platforms, the sooner that they may be able to mitigate some of the financial challenges discussed above.

Benefits of provisional authorisation

- 4.4 The benefits that will arise from the Arrangement if provisional authorisation is granted are as set out in the Authorisation Application in relation to the Arrangement as a whole.
- 4.5 Although the Commission does not need to be satisfied that the Arrangement will meet the public benefit test before granting provisional authorisation under section 65AD(3) of the Commerce Act, there are compelling public interest reasons that support the granting of the provisional authorisation. Doing so will likely promote competition in markets for the long-term benefit of consumers within New Zealand by contributing to the viability and sustainability of Independent NZ Media, which the Commission has identified as a relevant factor in determining whether provisional authorisation has granted.⁷

Detriments of provisional authorisation

- 4.6 The Applicant does not consider that provisional authorisation of the Arrangement will result in any public detriment.

⁷ Commerce Commission's Guidelines on Approach to Authorisations (May 2020) at [50.1].

5. CONSEQUENCES OF REFUSAL TO GRANT PROVISIONAL AUTHORISATION

Harm to the Applicant and NZ Independent News Media

- 5.1 The Applicant submits that without provisional authorisation, the significant challenges faced by the NZ Independent News Media will not only remain, but worsen (as outlined at 4.2 and 4.3 above).

Other public interest factors

- 5.2 The Applicant understands that achieving fairer remuneration from the Digital Platforms for Independent NZ News Media is an outcome that the Government has been seeking to achieve. In March 2021, Broadcasting and Media Minister Kris Faafoi stated that the Government "would like some speed in some of those conversations about any commercial arrangements" between the Digital Platforms and New Zealand news media producers.⁸ This is further described in the Authorisation Application at [4.12] and [8.9]. The Applicant considers that a grant of provisional authorisation is consistent with Minister Faafoi's statements indicating that "speed" in achieving commercially negotiated outcomes is in the public interest.

⁸ (31 March 2021). 'A bit more speed:' Social media giants under pressure by the Government to work with media. The New Zealand Herald. Retrieved from: <https://www.nzherald.co.nz/nz/a-bit-more-speed-social-media-giants-under-pressure-by-the-government-to-work-with-media/BJN74UR3GBKAC2EOAWUNUHKVW4/>

PUBLIC VERSION

I, **Brook Cameron**, have prepared, or supervised the preparation of, this application seeking provisional authorisation.

To the best of my knowledge, I confirm that:

- all information known to NPA which is relevant to the consideration of this application has been supplied, and
- all information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to this application.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director/officer of NPA and am duly authorised to submit this notice.

Brook Cameron, General Manager, News Publishers' Association of New Zealand Incorporated

Name and title of person authorised to sign:

Sign: _____

Date: _____