

**NOTICE SEEKING AUTHORISATION OF A RESTRICTIVE TRADE PRACTICE PURSUANT TO  
SECTIONS 65AA(2) and 65AA(3) OF THE COMMERCE ACT 1986**

**(or in the alternative sections 58(1) and (2))**

23 November 2021

The Registrar  
Competition Branch  
Commerce Commission  
PO Box 2351  
WELLINGTON

Pursuant to sections 65AA(2) and 65AA(3) of the Commerce Act 1986 notice is hereby given seeking **authorisation** of a restrictive trade practice (or in the alternative sections 58(1) and (2)).

## 1. EXECUTIVE SUMMARY

1.1 This is an application for authorisation under sections 65AA(2) and 65AA(3) of the Commerce Act 1986 ("**Commerce Act**"), (or in the alternative s 58(1) and (2)), in respect of collective bargaining (the "**Arrangement**"). The application is made by the News Publishers' Association of New Zealand Incorporated (either "**NPA**" or the "**Applicant**") on behalf of:

- (a) itself;
- (b) NPA's current and future members<sup>1</sup> ("**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 NZX<sup>2</sup> or are otherwise not an "overseas person"<sup>3</sup> (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,  
  
(together "**Participants**").

1.2 In essence, the Arrangement is open for participation by independent New Zealand news media producers ("**Independent NZ News Media**").

1.3 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**").

1.4 In summary, the Applicant is seeking authorisation for 10 years, on behalf of itself and other current and future Participants to:

- (a) collectively bargain (via a common bargaining negotiator) with each of Facebook and Google (the "**Digital Platforms**") to secure fair compensation to individual publishers for the content the Participants produce that appears on Digital Platforms, to reflect the value of that content and the resources required to produce that content;

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<sup>1</sup> Members at the time they choose to participate in the Arrangement.

<sup>2</sup> At the time they choose to participate in the Arrangement.

<sup>3</sup> At the time they choose to participate in the Arrangement.

- (b) engage in discussions and exchange information regarding those collective negotiations; and
  - (c) make and give effect to agreements arising from those collective negotiations.
- 1.5 It will be voluntary for media persons / entities to participate in the Arrangement – that is, any New Zealand news media producer that is within the scope of the Arrangement would be free to opt out of any collective Arrangement and negotiate with the Digital Platforms individually. There is no proposal to engage in collective boycott conduct.
- 1.6 The reason for the Arrangement is because:
  - (a) there is a symbiotic (albeit significantly unbalanced) relationship between Digital Platforms and Independent NZ News Media. Specifically, to attract audiences, Independent NZ News Media have to make their content available to the Digital Platforms to present that content in response to search queries, to present that content on social media news feeds, and for inclusion in their respective "news" products; however
  - (b) as noted, this is not a "balanced" relationship as there is a significant disparity in bargaining power between the Digital Platforms and Independent NZ News Media.
- 1.7 As has been observed by the Australian Competition and Consumer Commission ("**ACCC**"), this "bargaining power imbalance between digital platforms and news media businesses":
  - (a) manifests itself in a number of adverse ways, including "that news media businesses are not able to negotiate for a share of the revenue generated by the digital platforms and to which the news content created by the news media businesses contributes."
  - (b) is occurring in the context of an industry of significantly declining print revenue to news media businesses.
- 1.8 Accordingly, the ACCC had significant concerns about the ongoing sustainability and viability of news media businesses in Australia, and so specific legislation has been introduced in Australia to enable collective bargaining with the Digital Platforms by news media businesses.
- 1.9 However, despite all these same issues occurring in New Zealand (and being acknowledged as problems by the New Zealand Government), no legislation has yet been introduced in New Zealand to allow for collective bargaining by New Zealand news media [ ]. This means that:
  - (a) The Digital Platforms have free and unfettered access to quality journalism and content from Independent NZ News Media, and use that to benefit their own businesses;
  - (b) The Digital Platforms are able to monetise such content on their platforms, but Independent NZ News Media are not able to monetise the benefits to the Digital Platforms of use of that content in any meaningful way. Specifically, the two Digital Platforms are understood to consume the majority of available digital advertising spend in New Zealand. Approximately only ten cents in every dollar spent on digital advertising in New Zealand goes to New Zealand news producers that invest in producing journalism and news content.<sup>4</sup>

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<sup>4</sup> Advertising Standards Authority data for 2020. The relevant dataset will be provided to the Commission.

- 1.10 This lack of fair and appropriate remuneration to Independent NZ News Media, in particular in light of the significant reductions in advertising revenue as a result of successive COVID-19 lockdowns, is one of the factors imperilling the viability and sustainability of the Independent NZ News Media sector.
- 1.11 The landscape for news media has and continues to rapidly and increasingly shift towards the digital space, and to ensure the health and diversity of the New Zealand media landscape, Independent NZ News Media producers must be appropriately compensated for the use and benefits of their journalistic content in order to be sustainable. The Arrangement, by somewhat addressing the bargaining imbalance, would assist in achieving a negotiated outcome to provide compensation to the original creators of New Zealand news and journalistic content from the Digital Platforms in order to assist to sustain the Participants and their respective production of such content.
- 1.12 The Applicant is, therefore, confident that the Arrangement would result in a number of public benefits, including:
- (a) Addressing the significant bargaining imbalance with the Digital Platforms to achieve a competitive outcome in negotiating with Digital Platforms and, therefore, to assist in achieving fairer remuneration to Independent NZ News Media to support their sustainability and viability and, therefore, contribute to greater media plurality and diversity of views in New Zealand news and journalism;
  - (b) Reducing transaction costs in negotiating with the Digital Platforms;
  - (c) Achieving more sophisticated and efficient agreements with the Digital Platforms;
  - (d) Providing the Participants with additional funding to invest in journalistic resources to combat disinformation / malinformation. As the ACCC noted in the ACCC Report: "While public interest journalism contributes to a healthy democracy, disinformation and malinformation does the opposite".
- 1.13 Moreover, the Applicant does not consider that the Arrangement results in any public detriment.
- 1.14 Therefore, the Applicant is confident that the public benefits of the Arrangement significantly outweigh any detriments and, therefore, that the Arrangement should be authorised.



### 3. OTHER PARTIES

#### Parties to the Arrangement

3.1 The parties to the Arrangement (the "**Participants**") are as set out in paragraph 1.1, namely

- (a) NPA;
- (b) NPA's current and future Members<sup>6</sup> that choose to participate in the Arrangement. NPA's Members currently include NZME, Stuff, Allied Press, Gisborne Herald, Ashburton Guardian, Greymouth Star, Wairarapa Times-Age, Westport News, The Whakatane Beacon, and Wairoa Star; and
- (c) any other independent media persons / entities that produce New Zealand focused journalistic and news content that are listed on the NZX<sup>7</sup> or are otherwise not an "overseas person"<sup>8</sup> (as currently defined in the 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, The Spinoff has indicated an interest in participating in the Arrangement should it be authorised.

3.2 In essence, the Arrangement is open for participation by Independent NZ News Media.

3.3 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 the Crown, such as the TVNZ, Māori TV, or 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.

3.4 The names and contact details of the currently identified potential Participants are set out in **Appendix One**.

#### Relationship between the Parties

3.5 In addition to intending to participate in the Arrangement, the following are also Members of the NPA: NZME, Stuff, Allied Press, Gisborne Herald, Ashburton Guardian, Greymouth Star, Wairarapa Times-Age, Westport News, The Whakatane Beacon, and Wairoa Star.

3.6 Furthermore:

- (a) New Zealand Press Association Limited, trading as the Print Media Copyright Agency ("**PMCA**"), is jointly owned by Stuff (49.18%), NZME Holdings Limited (38.82%), Allied Press (7.15%), Gisborne Herald (2.06%), Ashburton Guardian (1.40%), and Greymouth Star (1.39%). The PMCA was established on 1 January

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<sup>6</sup> Members at the time they choose to participate in the Arrangement.

<sup>7</sup> At the time they choose to participate in the Arrangement.

<sup>8</sup> At the time they choose to participate in the Arrangement.

2003 to provide licences to organisations wanting to utilise articles appearing in newspapers and magazines;<sup>9</sup>

- (b) NZME Publishing Limited owns 49% of Gisborne Herald;<sup>10</sup>
- (c) NZME Publishing Limited owns 21% of The Whakatane Beacon;
- (d) NZME Publishing Limited owns 40.41% of The Wairoa Star Ltd;
- (e) NZME, Stuff, and The Spinoff (along with RNZ, TVNZ, Newsroom, and others) are members of the Media Freedom Committee;<sup>11</sup>
- (f) The Members are also members of the New Zealand Media Council (along with many other New Zealand media organisations);<sup>12</sup>
- (g) There are other commercial arrangements in place between the Participants, e.g. some Participants have content licences in place with each other, and NZME Print (NZME's printing business, based in Ellerslie, Auckland) has a contract to print and distribute certain Stuff print publications.

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<sup>9</sup> <https://www.pmca.co.nz/>

<sup>10</sup> This shareholding is held through Essex Castle Limited as a trust company for NZME Publishing Limited.

<sup>11</sup> <https://npa.co.nz/media-freedom-committee/>

<sup>12</sup> <https://www.mediacouncil.org.nz/principles/#membership>

#### 4. INDUSTRY BACKGROUND

4.1 The Applicant understands that the Commission has familiarity with the New Zealand media industry, and the challenges facing the industry, from:

- (a) its consideration of the application for authorisation of NZME Limited and Fairfax New Zealand Limited in 2016/17;<sup>13</sup> and
- (b) the Australian Competition and Consumer Commission's ("**ACCC**") July 2019 Digital Platforms Inquiry ("**ACCC Report**").<sup>14</sup>

4.2 Accordingly, the Applicant does not intend to traverse all the challenges facing the industry in detail in this application, rather it will regard those as understood by the Commission.

4.3 The Applicant will also cross-refer to the ACCC Report as relevant, given the same challenges that face the Australian media industry also face the New Zealand media industry.

4.4 At a high level, this application relates to the relationship between Google and Facebook (the "**Digital Platforms**") and generators of New Zealand news / journalistic content. As the Commission will be aware, there is a symbiotic relationship between Digital Platforms and Independent NZ News Media. Specifically, to attract audiences, Independent NZ News Media have to make their content available to the Digital Platforms to present that content in response to search queries, to present that content on social media news feeds, and for inclusion in their respective "news" products. However, this is not a "balanced" relationship as there is a significant disparity in bargaining power between the Digital Platforms and Independent NZ News Media.

##### **Concerns identified in the ACCC Report**

4.5 These concerns were observed by the ACCC in the ACCC Report in relation to Google and Facebook's operations in Australia. Namely, the ACCC concluded:

- (a) in relation to Google:<sup>15</sup>

A significant number of media businesses rely on news referral services from Google to such a degree that it is an unavoidable trading partner. Many news media businesses would be likely to incur a significant loss of revenue, damaging their business, if Google users could no longer click on links to their website in search results. For commercial news media businesses, having links to their websites on Google is a necessity. The ACCC therefore considers that Google has significant bargaining power in its dealings with these media businesses.

- (b) in relation to Facebook:<sup>16</sup>

Similar to the case with Google, there is a two-way relationship between news media businesses and Facebook. Facebook is a vital distribution channel for a number of media businesses, particularly those seeking to target particular demographic groups. News content enhances users' experience of the Facebook platform, providing a significant benefit to Facebook. While the number of referrals from Facebook to news media businesses has declined since the

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<sup>13</sup> *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8.

<sup>14</sup> Australian Competition and Consumer Commission. Digital Platforms Inquiry. Final Report. June 2019.

<sup>15</sup> ACCC, Page 8.

<sup>16</sup> Page 8 and 9.

Preliminary Report, it remains the case that many news media businesses in Australia would likely lose significant revenue, with adverse impacts on their business, should they forego referrals from Facebook. The opposite is not the case for Facebook. Access to the news content of any one news media business is unlikely to have a material effect on Facebook or its users... The ACCC also considers that Facebook has substantial bargaining power in its dealings with news media businesses.

4.6 Therefore, the ACCC's key finding in the ACCC Report was that there is an "imbalance of bargaining power between Google and media businesses, and between Facebook and media businesses, in relation to news referral services" because:

- (a) "Google and Facebook are 'must have' platforms", which mean that "media businesses cannot afford not to be on the Google and Facebook platforms and therefore, Google and Facebook have become unavoidable trading partners for many media businesses";<sup>17</sup>
- (b) "Google and Facebook are the gateways to online news media for many consumers. The amount of referral traffic that a news media website receives is influenced by the way in which Google and Facebook rank and display news content";<sup>18</sup>
- (c) "Google and Facebook each appear to be more important to the major news media businesses than any one news media business is to Google or Facebook";<sup>19</sup> and
- (d) "Individual news media businesses require Google and Facebook referrals more than each platform requires an individual media business's content."<sup>20</sup>

4.7 The ACCC observed that this "bargaining power imbalance between digital platforms and news media businesses" manifested itself in a number of adverse ways, including "that news media businesses are not able to negotiate for a share of the revenue generated by the digital platforms and to which the news content created by the news media businesses contributes."<sup>21</sup> The ACCC said that this "inability of news media businesses to individually negotiate terms over the use of their content by digital platforms is likely indicative of the imbalance in bargaining power",<sup>22</sup> and observed a number of specific ways in which news media businesses were adversely impacted by this imbalance:<sup>23</sup>

- **News snippets and Google's former FCF policy:** allegations that Google extracts the value of content produced by media businesses by way of news snippets and its previous FCF policy, which it then uses to improve the quality of its own services and thereby profiting from this content.
- **Publication formats:** the restrictive nature of publishing formats offered by digital platforms, such as AMP and Facebook's Instant Articles, limits the amount of advertising that can be displayed, reducing opportunities for monetisation by media businesses. It also reduces the value of media businesses' brand names and consumer brand recognition.

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<sup>17</sup> Page 253.

<sup>18</sup> Page 206.

<sup>19</sup> Page 16.

<sup>20</sup> Page 16.

<sup>21</sup> 2019 – 2020. The Parliament of the Commonwealth of Australia. House of Representatives. The Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020. Explanatory Memorandum.

<sup>22</sup> ACCC, Page 280.

<sup>23</sup> Page 228 and 228.

- **Access to user data:** digital platforms collect and use individual data from consumers when consumers access and consume news on digital platforms. However, digital platforms do not share all data they gather with media businesses. Media businesses claim that this limits media businesses' ability to understand their audience and improve the quality of their advertising services and news content.
- **Recognition of original content:** digital platforms that offer search services do not reward media businesses that invest in and produce original content or break news stories with higher rankings, compared to media businesses that copy such content.
- **Algorithmic transparency:** a lack of transparency in relation to how digital platforms' algorithms rank and distribute news content to consumers, reducing the level of control a media business can exercise in relation to how their news content is distributed to consumers.

4.8 The ACCC observed that this imbalance of bargaining power between the Digital Platforms and Australian news media was occurring in the context of an industry of significantly declining revenue to news media businesses:

Media businesses, particularly traditional print (now print/online) publishers, have experienced a significant fall in advertising revenue as advertisers follow audiences who have migrated online to access news and other content. This has coincided with strong growth in online advertising, which now accounts for half of all advertising expenditure. Google and Facebook together account for nearly two-thirds of online advertising expenditure.<sup>24</sup>

4.9 Accordingly, the ACCC had significant concerns about the ongoing sustainability and viability of news media businesses in Australia. The ACCC also did not consider that, in the absence of intervention, the significant issues arising from the imbalance of bargaining power would resolve themselves, noting:

- (a) "past evidence suggests that Google and Facebook have been slow to react to the issues that affect news businesses";<sup>25</sup> and
- (b) "because of the significant imbalance of bargaining power, it is unlikely in the absence of some form of intervention that either Google or Facebook would reach an agreement with news media businesses that optimises outcomes for media businesses, platforms and consumers. Accordingly, the ACCC considers that intervention is necessary to equalise the bargaining imbalance between digital platforms and news media businesses".<sup>26</sup>

4.10 Accordingly, the ACCC recommended that the Digital Platforms "be required to provide a code of conduct to the Australian Communications and Media Authority (the ACMA) to govern their commercial relationships with news media businesses",<sup>27</sup> and that such codes:<sup>28</sup>

should ensure that they treat news media businesses fairly, reasonably and transparently in their dealings with them, and contain at least the following commitments:

- the sharing of data with news media businesses
- the early notification of changes to the ranking or display of news content

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<sup>24</sup> Page 280.

<sup>25</sup> Page 255.

<sup>26</sup> Page 255.

<sup>27</sup> Page 16.

<sup>28</sup> Page 257.

- that the digital platform's actions will not impede news media businesses' opportunities to monetise their content appropriately on the digital platform's sites or apps, or on the media businesses' own sites or apps
- where the digital platform obtains value, directly or indirectly, from content produced by news media businesses, that the digital platform will fairly negotiate with news media businesses as to the how that revenue should be shared, or how the news media businesses should be compensated.

4.11 The Australian Government agreed that regulatory intervention was necessary, and therefore introduced laws to bring about the codes recommended by the ACCC, because:<sup>29</sup>

- “of the public benefit provided by the production and dissemination of news, and the importance of a strong independent media in a well-functioning democracy”;
- “the advice of the ACCC that digital platforms and news businesses were unlikely to reach voluntary agreement on the key issue of revenue-sharing” and the “ACCC considered it unlikely that any voluntary agreement would be reached with respect to the key issue of remuneration for content”;
- “the Australian media sector was already under significant pressure, which was being exacerbated by a sharp decline in advertising revenue driven by the Coronavirus”.

#### **Identical concerns arise in New Zealand**

4.12 All these same issues observed by the ACCC in Australia are also occurring in the New Zealand market, namely:

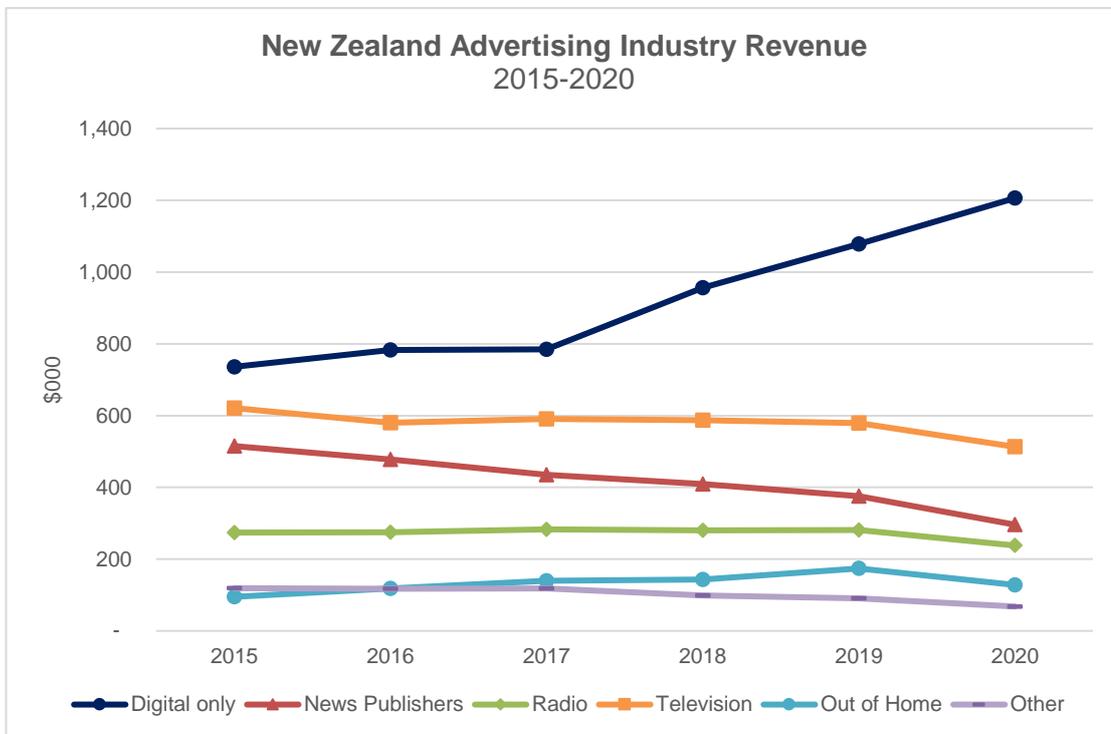
- Independent NZ News Media are reliant on the Digital Platforms for audience and referrals. [ ];
- The Digital Platforms have free and unfettered access to quality journalism and content from Independent NZ News Media, and use that to benefit their own businesses;
- The Digital Platforms are able to monetise such content on their platforms, but Independent NZ News Media are not able to monetise the benefits to the Digital Platforms of use of that content in any meaningful way. Specifically, the two Digital Platforms are understood to consume the majority of available digital advertising spend in New Zealand. Approximately only ten cents in every dollar spent on digital advertising in New Zealand goes to New Zealand news producers that invest in producing journalism and news content.<sup>30</sup> Chart [1] below illustrates the increase in digital advertising spend over the past five years (of which the Digital Platforms are understood to receive the majority), and the associated decline of advertising spend through other media; and
- 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. Chart [2] below provides a snapshot of the negative impact on

<sup>29</sup> 2019 – 2020. The Parliament of the Commonwealth of Australia. House of Representatives. The Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020. Explanatory Memorandum.

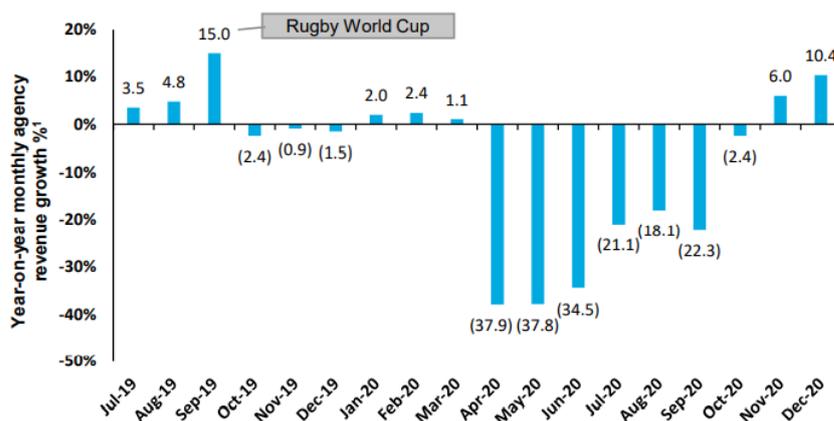
<sup>30</sup> Advertising Standards Authority data for 2020. The relevant dataset will be provided to the Commission.

advertising revenue of COVID-19 lockdowns of 2020 (which occurred between 21 March to 8 June, and again from 12 August to 7 October). The recent lockdowns of 2021 will similarly have significant impacts.

**Chart [1]: Digital Advertising versus Other Advertising<sup>31</sup>**



**Chart [2]: Impact of the 2020 COVID-19 lockdowns on advertising revenue growth**



4.13 These issues have been observed by the New Zealand Government with, for example, Broadcasting and Media Minister Fafoi:

<sup>31</sup> Chart [1] excludes magazine advertising revenue (including both print and digital magazine revenue) as that was not reported in this dataset in 2020.

- (a) meeting with Google and Facebook in February 2021 "to encourage them to have commercial discussions with traditional media";<sup>32</sup> and
- (b) stating in March 2021 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.<sup>33</sup>
- 4.14 However, despite those initial statements from the New Zealand Government, commercial arrangements with the Digital Platforms have not been reached, and there is no public indication yet of any Government intervention to introduce specific regulation as there has been in Australia.
- 4.15 Accordingly, in the absence of Independent NZ News Media being able to negotiate appropriate revenue-sharing and remuneration arrangements with Digital Platforms, it is inevitable that for the foreseeable future the significant challenges facing Independent NZ News Media will not only continue, but worsen.
- 4.16 Furthermore, the issue of Digital Platforms accessing the content of Independent NZ News Media without compensation is exacerbated by the fact that Independent NZ News Media have to incur costs to counter misinformation on certain digital platforms. As the ACCC noted in the ACCC Report, "Digital platforms may also provide unique incentives for the creation and spread of disinformation".<sup>34</sup> For example, as Stuff has observed in relation to its "The Whole Trust – Covid-19 Vaccination" project (which did receive some funding from the Google News Initiative):<sup>35</sup>
- Misinformation is a cancer of the social media era - so pernicious and pervasive it's been deemed an infodemic. Covid-19 vaccination misinformation is particularly malignant. If you haven't fallen victim to it personally, chances are some of your loved ones have. At Stuff, we've dedicated a team of journalists to countering misinformation with trustworthy, accurate, verified information about the vaccines.
- 4.17 In addition, while Google and Facebook benefit from journalistic content in the form of increased viewership and advertising revenue, they do not assume the legal responsibility for accuracy, fairness, balance or other legal or ethical obligations that are placed on the producers of journalist content. This is another example of how the costs and the risks of producing news media continue to be borne by news media businesses, while the Digital Platforms enjoy the benefit of that content without contributing to those costs.

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<sup>32</sup> (3 March 2021). Kris Faafoi hopeful meaningful talk will occur between Facebook, Google and local media. Retrieved from: <https://www.nzherald.co.nz/nz/kris-faafoi-hopeful-meaningful-talk-will-occur-between-facebook-google-and-local-media/EZZMAFJ76TWYEQXCMGVPCWIYD4/>

<sup>33</sup> (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/>

<sup>34</sup> ACCC, Page 354.

<sup>35</sup> (29 July 2021). The Backstory: How we fight the fire of misinformation. Stuff. Retrieved from: <https://www.stuff.co.nz/about-stuff/125909912/the-backstory-how-we-fight-the-fire-of-misinformation>

## 5. THE PROPOSED AGREEMENT

### Proposed agreement

5.1 The Applicant seeks authorisation on behalf of itself, together with current and future Participants that choose to participate in the Arrangement, for a period of 10 years to:

- (a) appoint a common negotiating person(s) to collectively discuss and negotiate with each of Google<sup>36</sup> and Facebook<sup>37</sup> (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 5.1(a) 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).

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

### Jurisdiction to grant authorisation

5.3 The Arrangement described at paragraph 5.1 above, including:

- (a) the appointment by the Participants of a common negotiating person(s) to collectively discuss and negotiate with the Digital Platforms;
- (b) the exchange of information between the Participants in relation to those negotiations;
- (c) the entry into contracts produced by collective negotiations, or containing common terms between the Participants; and / or

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<sup>36</sup> 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.

<sup>37</sup> 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.

- (d) the giving effect to the provisions of contracts produced by collective negotiations, or containing common terms between Participants,

amounts to an arrangement between the Participants that would or may contain a cartel provision by fixing, controlling, or maintaining the price (and terms) at which the Participants make news and journalistic content available for Display on the Digital Platforms' platforms. As has been noted in academic literature:<sup>38</sup>

An agreement to form a collective bargaining group that actively engaged in coordinated pricing or contracting with a counterparty and whose members were in competition with each other in an upstream or downstream market, would almost certainly be a cartel provision.

- 5.4 There is therefore jurisdiction to authorise the entry into the arrangement for collective negotiation under sections 65AA(2) and 65AA(3), and there is no need for the Commission to assess whether or not the Arrangement will give rise to any lessening of competition. Section 65AB(4) also makes it clear that it is not necessary for the Commission to determine whether a provision is, in fact, a cartel provision, as long as there “are reasonable grounds for believing it might be”.
- 5.5 Furthermore, while the Applicant does not consider that the Arrangement gives rise to any substantial lessening of competition issues under section 27, if the Commission did, then in the alternative authorisation is sought under section 58(1) and (2).

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<sup>38</sup> King, S.P. (2013). Collective Bargaining by Business: Economic and Legal Implications. UNSW Law Journal, volume 36(1), 107 – 138, at footnote 16.

## 6. RATIONALE

6.1 The rationale for the Arrangement is to:

(a) **Achieve more efficient and effective negotiations with Digital Platforms.**

The Arrangement would provide Independent NZ News Media with a vehicle to engage in negotiations with the Digital Platforms in an efficient, informed, and productive way.

The ACCC recognised in its Country Press Australia ("**CPA**")<sup>39</sup> and Commercial Radio Australia ("**CRA**")<sup>40</sup> authorisation decisions that information sharing and collective discussions by CPA and CRA members may enable members to become more informed and improve their input into contracts due to members benefiting from greater levels of resourcing and expertise available; and that collective negotiating is likely to lead to more efficient contracts, as it may lead to terms that are more comprehensive and that better reflect the circumstances of the members and the relevant digital platform.<sup>41</sup>

(b) **Reduce transaction costs in negotiating with the Digital Platforms.**

The resources of Independent NZ News Media are scarce, in part because what resources they have are focused on producing journalism content and countering misinformation on certain digital platforms (see paragraph 4.16) and because revenue is declining significantly (and this has been exacerbated by the effects of COVID-19). A significant contributing factor to this revenue decline is 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.

The ACCC recognised in its CPA and CRA authorisation decisions that it is generally prohibitive for each member to negotiate individually with Facebook and Google, from a cost and practical perspective; that individual members (as well as Facebook and Google) would incur transaction costs in the form of obtaining professional advice and incurring management time when negotiating separate agreements; and that reduced transaction costs are likely to arise through sharing the costs of negotiation across multiple parties and enabling CPA / CRA to negotiate comprehensively to reach (more efficient) agreements at a lower cost than multiple individual agreements.<sup>42</sup>

(c) **Provide additional funding for smaller regional and community titles.**

The Arrangement enables smaller Independent NZ News Media businesses (such as regional and community titles) that would have no realistic ability to negotiate with Digital Platforms outside of the Arrangement to achieve payment for content (and, therefore, enables smaller media businesses a greater ability to invest in growth, journalism, and digital capability).

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<sup>39</sup> Australian Competition and Consumer Commission, *AA1000551: Country Press Australia* (5 August 2021).

<sup>40</sup> Australian Competition and Consumer Commission, *AA1000565: Commercial Radio Australia* (29 October 2021).

<sup>41</sup> CPA Decision, at [4.12] - [4.14] and CRA Decision, at [4.15] - [4.16].

<sup>42</sup> CPA Decision, at [4.16] - [4.19] and CRA Decision, at [4.18] - [4.20].

The Arrangement would prevent a situation whereby smaller Independent NZ News Media businesses that do not have a material digital presence are excluded from the possibility of discussions with the Digital Platforms. Equally, it would prevent a situation whereby smaller Independent NZ News Media businesses enter into discussions with each of the Digital Platforms but are unable to extract appropriate value for their content given their lack of resources or experience in negotiating this type of arrangement.

The ACCC recognised in its CPA and CRA authorisation decisions that small businesses are often at a disadvantage when negotiating with larger businesses due to fewer resources, access to information and less negotiating experience.<sup>43</sup>

(d) **Enable the Parties to achieve a competitive outcome in negotiating with Digital Platforms.**

The Applicant has already discussed the significant challenges Independent NZ News Media currently face, and the impact on their financial position (in particular see paragraph 4.12(c) and Chart [1] above). The Applicant considers that the Arrangement would enable the Participants to be more fairly compensated for the content they produce, which would have the consequence of assisting the Participants to remain financially viable (and therefore compete) in the production and supply of news content in New Zealand, as well as the supply of digital advertising space (in relation to which, the ACCC has recently concluded that Google has a dominant position in key parts of the ad tech supply chain).<sup>44</sup>

The ACCC recognised in its CPA and CRA authorisation decisions that the negotiated outcomes made available through the authorisations would support the commercial viability of the CPA and CRA members.<sup>45</sup>

(e) **Assist in contributing to the sustainability of Independent NZ News Media.**

The Applicant is concerned that if Independent NZ News Media do not have the opportunity to be fairly compensated for their content, this creates a material risk of Independent NZ News Media having a reduced ability to produce original and local news and journalist content. As the head of journalism at NZ On Air, Raewyn Rasch, has observed, there is a need to fund "journalists back into newsrooms particularly at regional and local levels [to] help redress the drastic reduction in journalist numbers over the past few years and ensure the sector has the workforce to deliver strong public interest journalism."<sup>46</sup> These sustainability issues are as a result of the confluence of the reduction in the circulation of print newspapers in the print space, formerly the cornerstone for the funding of news and journalism content,<sup>47</sup> and the approach of the Digital Platforms to use and benefit from news and journalist content in the digital space without fair compensation for that.

As Gavin Ellis, a former editor of The New Zealand Herald, told the Epidemic Response Committee last year in relation to the challenges facing the New Zealand media sector: "The elephant in the room in all of this is the impact of the social media

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<sup>43</sup> CPA Decision, at [4.15] and CRA Decision, at [4.17].

<sup>44</sup> ACCC, Page 128.

<sup>45</sup> CPA Decision, at [4.24] and CRA Decision, at [4.25].

<sup>46</sup> 27 September 2021. Pacific National Radio Trust welcomes public funding boost for Pasifika journalism. Asia Pacific Report. Retrieved from: <https://asiapacificreport.nz/2021/09/27/pacific-national-radio-trust-welcomes-public-funding-boost-for-pasifika-journalism/>

<sup>47</sup> Circulation figures for New Zealand publications are available at <http://abc.org.nz>

companies, Google and Facebook in particular, that are siphoning off at least 70% of the \$1.26 billion spent on digital advertising each year."<sup>48</sup>

Having acknowledged that the ACCC Report had found that there was a continuing trend that local coverage was at significant risk of under-provision, the ACCC recognised in its CPA and CRA authorisation decisions that the availability of a wide range of high quality news and journalism provides significant benefits to society and is important for the healthy function of democracy.<sup>49</sup> The ACCC also considered that the negotiated outcomes made available through the authorisations would provide a degree of assistance to sustain independent and diverse media across its membership.<sup>50</sup>

[ ]

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<sup>48</sup> 15 April 2020. Journalism in crisis: NZ media bosses as the Covid-19 committee. The Spinoff. Retrieved from: <https://thespinoff.co.nz/media/15-04-2020/journalism-in-crisis-nz-media-bosses-at-the-covid-19-committee/>

<sup>49</sup> CPA Decision, at [4.20] and CRA Decision, at [4.21].

<sup>50</sup> CPA Decision, at [4.20 and 4.23] and CRA Decision, at [4.21 and 4.25].

**7. COUNTERFACTUAL**

7.1 [ ]

7.2 The Applicant considers that in the absence of the Arrangement, [ ]:

(a) [ ]; or

(b) [ ],

and in both scenarios the concerns about falling revenue for Independent NZ News Media, and under-investment in the production of journalistic and news content, will continue (as outlined in paragraphs 4.1 to 4.16 above). Furthermore, each individual Independent NZ News Media business, and the relevant Digital Platform, would be faced with costs (and time) to arrange and enter into any individual contracts (if any could be reached).

## 8. PUBLIC BENEFITS AND DETRIMENTS

### PUBLIC BENEFITS

8.1 The Commission must authorise an agreement where it is satisfied that the agreement will be likely to result in a benefit to the public that would outweigh the lessening in competition.<sup>51</sup>

8.2 New Zealand's courts have defined a public benefit as:<sup>52</sup>

anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

8.3 However, the courts have more recently recognised that benefits or detriments can relate to other matters (not just efficiencies), including media plurality. In *NZME*, the High Court stated that:<sup>53</sup>

the Act is not exclusively concerned with efficiency but rather allows it to be balanced alongside other public benefits that may include anything of importance to the community as a whole. Nothing in the legislation requires that public detriments be defined less comprehensively.

8.4 As outlined in paragraphs 4.1 to 4.16 above:

- (a) Independent NZ News Media businesses have experienced a significant fall in advertising revenue as advertisers follow audiences who have migrated online to access news and other content (which has coincided with significant growth in the advertising revenue of the Digital Platforms);
- (b) the Independent NZ News Media sector was already under significant pressure, and that has been exacerbated further by a sharp decline in advertising revenue growth driven by the COVID-19 lockdowns; and
- (c) Independent NZ News Media are reliant on the Digital Platforms for audience as the consumption of news and journalistic content has significantly shifted towards social media and digital platforms like Google and Facebook. The Digital Platforms benefit from displaying Independent NZ News Media content as this content provides users another reason to visit their platform. However, there is a significant bargaining imbalance between the Digital Platforms and Independent NZ News Media businesses, which means that Independent NZ News Media are not appropriately remunerated for the benefit that their content delivers to those Digital Platforms.

8.5 To ensure the health and diversity of the New Zealand media landscape, Independent NZ News Media producers must be compensated appropriately for the content they produce. The landscape for news media has and continues to rapidly and increasingly shift towards the digital space, and the news media businesses must be appropriately compensated for the use and benefits of their journalistic content in order to be sustainable. The Arrangement, by somewhat addressing the bargaining imbalance, would assist in achieving a negotiated and more competitive outcome to provide compensation to the original creators of New Zealand

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<sup>51</sup> Commerce Commission's Authorisation Guidelines at [14.2].

<sup>52</sup> *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) at 527-530 citing *Re Rural Traders Co-operative (WA) Ltd* (1979) ATPR 40-110 at 18,123, as cited in the Authorisation Guidelines, at [35].

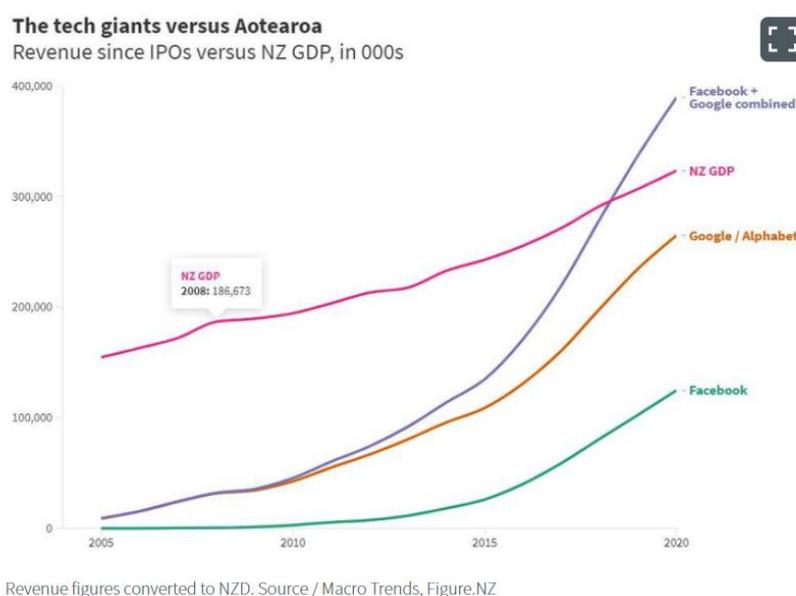
<sup>53</sup> *NZME*, at [68]-[73].

news and journalistic content from the Digital Platforms in order to assist to sustain the Participants and their respective production of such content.

8.6 A collective bargaining arrangement would allow both large and small Participants to overcome the existing bargaining imbalance which is preventing efficient outcomes:

- (a) Smaller participating media businesses (such as regional and community publishers) would have, in reality, no ability to negotiate with the Digital Platforms outside of the Arrangement to achieve payment for the Display of their content. Therefore, the Arrangement will better enable smaller media businesses to achieve fair remuneration to assist in investing in growth, journalism, and their digital capability; and
- (b) Even the largest participating media businesses would be at a significant disadvantage, both in terms of financial and administrative resources, if they have no option but to negotiate individually with Facebook and Google given their reliance on those Digital Platforms, the significant bargaining imbalance, and given Facebook and Google are two of the largest companies in the world, with combined revenues in excess of New Zealand's GDP – see Chart [3] below.

**Chart [3] – Digital Platforms' revenue since IPOs versus New Zealand's GDP<sup>54</sup>**



8.7 Accordingly, the Applicant considers that the Arrangement will contribute to the sustainability and viability of the Participants' businesses and their production of New Zealand news and journalistic content and, therefore, enhance media plurality in New Zealand.

<sup>54</sup> (3 October 2021). Google and Facebook are brilliant, but dangerous and entirely out of control. The Spinoff. Retrieved from: <https://thespinoff.co.nz/business/03-10-2021/we-regulate-big-oil-and-big-tobacco-its-time-to-do-the-same-for-big-tech/>

### Media plurality is a public benefit

- 8.8 It has been confirmed that media plurality is a relevant public benefit for the purposes of the Commission's authorisation assessment, namely the Court of Appeal has confirmed that a loss of media plurality is a relevant public detriment for the purposes of the Commission's authorisation assessment,<sup>55</sup> and that is recognised in the Commission's Authorisation Guidelines.<sup>56</sup> It is, therefore, axiomatic that an enhancement in media plurality is a relevant public benefit for the purposes of the Commission's authorisation assessment.
- 8.9 Furthermore, that the achieving of fairer remuneration from the Digital Platforms for Independent NZ News Media is a public benefit is demonstrated by the fact that it is an outcome that the Government has been seeking to achieve:<sup>57</sup>

Broadcasting and Media Minister Kris Faafoi met with Google and Facebook executives, as early as February of this year.

"I reiterated to the social media platforms we would like some speed in those conversations about getting commercial arrangements that they may come to.... with some idea on how long it would take before they would be able to assist our local media companies," said Faafoi at the time.

### Public benefits identified in the ACCC Report

- 8.10 The public benefits of sustainable and viable news media were also identified by the ACCC in the ACCC Report:
- (a) "In promoting the public interest, journalism is an important contributor to the 'public sphere', democracy and the economy, and has a place within much broader constructs of societal communication and debate... Ultimately, journalism can promote public interest by providing a volume, range and depth of information and analysis that would not otherwise be readily available;"<sup>58</sup> and
  - (b) "The availability of a wide range of high quality news and journalism provides significant benefits to Australian society and is important for the healthy functioning of democracy";<sup>59</sup>
- 8.11 Again, the fact that achieving fairer remuneration from the Digital Platforms for news media is regarded as a public benefit in Australia is demonstrated by:
- (a) the Australian Government's decision to introduce the News Media and Digital Platforms Mandatory Bargaining Code as "a mandatory code to help support the sustainability of public interest journalism in Australia" by "enab[ling] eligible news businesses to bargain individually or collectively with digital platforms over payment for the inclusion of news on the platforms and services" in order to address "bargaining power imbalances between digital platforms and Australian news businesses";<sup>60</sup>
  - (b) the ACCC's decisions to grant authorisation to CPA and CRA. In these decisions, the ACCC references the ACCC Report's conclusion that the availability of a wide

<sup>55</sup> *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [126].

<sup>56</sup> Commerce Commission's Authorisation Guidelines at [57.1].

<sup>57</sup> (12 August 2021). Government slow to make Google pay for local news. Newsroom. Retrieved from: <https://www.newsroom.co.nz/government-slow-to-make-google-pay-for-local-news>

<sup>58</sup> ACCC, Page 284.

<sup>59</sup> ACCC, Page 280.

<sup>60</sup> <https://www.acma.gov.au/news-media-bargaining-code>

range of high quality news and journalism provides significant benefits to society and is important for the healthy functioning of democracy.<sup>61</sup> The ACCC also considered that it was relevant to demonstrating a public benefit that the Australian Government encouraged agreements to be formed (which is similar to the New Zealand Government's position as noted above in paragraph 8.9). The ACCC concluded that to the extent collective bargaining enabled CPA and CRA and their members to reach agreements with Facebook and Google that will support the commercial viability of its members, then this would likely result in a public benefit in the form of "contributing to the sustainability of Australian news businesses" including in regional and rural areas.<sup>62</sup>

### Other important public benefits

8.12 In addition to the public benefits from assisting the sustainability of a diverse and independent media sector in New Zealand, there are also a number of other public benefits, including:

- (a) Collective bargaining shifts the imbalance of bargaining power to some extent by enabling Participants to pool resources and engage specialised staff to negotiate with the Digital Platforms. As has been noted in academic literature:<sup>63</sup>

By exploiting economies of scale in negotiation, collective bargaining may allow individual businesses to bargain more effectively, resulting in better contracts. Thus, when considering the WABGA application the ACCC noted that 'the WABGA member growers are, in general, small primary producers with often limited resources and expertise to engage in effective negotiation with businesses with the size and negotiating experience of the processors.

- (b) Efficiencies resulting from transactional cost savings. These cost savings arise because collective negotiation through the Arrangement avoids bilateral negotiations between each Participant and the respective Digital Platform including bilateral negotiations in relation to contractual disputes and contractual variations. The ACCC has acknowledged that a primary source of benefit from collective bargaining is the sharing of the costs of negotiation:<sup>64</sup>

The ACCC considers there are transaction costs (including time related costs) associated with contracting. These transaction costs can be lower where a single negotiating process is employed, such as in collective bargaining arrangements, relative to a situation where a series of individual negotiation processes are necessary. The ACCC considers that to the extent these transaction cost savings do arise they are likely to constitute a public benefit.

The Commission has similarly observed that "there are likely to be benefits from collective bargaining (compared to individual bargaining) as a result of the reduction in transaction costs."<sup>65</sup>

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<sup>61</sup> CPA Decision, at [4.20] and CRA Decision, at [4.21].

<sup>62</sup> CPA Decision, at [4.24] and CRA Decision, at [4.25].

<sup>63</sup> King, S.P. (2013). Collective Bargaining by Business: Economic and Legal Implications. *UNSW Law Journal*, volume 36(1), 107 - 138.

<sup>64</sup> Australian Competition and Consumer Commission, *A91275: Abbot Point Coal Export Terminal Producers* (16 February 2012) at [4.19]. As noted in King, S.P. (2013):

The relevant cost savings identified by the applicants included a decrease in the number of hours spent negotiating; a decrease in the cost of legal and expert advisors; and efficiencies in the pooling of the limited resources of the smaller applicants: at [4.17]. See also Australian Competition and Consumer Commission, *Determination: Application for Authorisation A91347*, 24 January 2013, [12] regarding collective bargaining by Queensland chicken growers.

<sup>65</sup> *Waikato - Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC 37 at [69].

In terms of the estimates of saved transaction costs, at a high-level, it is estimated that:

(i) [ ]; and

(ii) [ ]

[ ]. Furthermore, as recognised as a public benefit by the ACCC, there would also be additional internal transaction cost savings in the form of not "incurring management time when negotiating with Facebook and Google for payment of news content featuring on those platforms".<sup>66</sup>

- (c) Collective negotiation will likely result in more sophisticated agreements that are likely to have efficiency benefits. As has been noted in academic literature:<sup>67</sup>

bargaining groups allow buyers and sellers to exploit economies of scale in negotiation to improve contractual outcomes. The gains from these negotiations can then be shared by the buyers and the sellers, so that each party gains from the more economically efficient contracts....

In the absence of collective negotiation, individual firms will reach economically inefficient contracts due to bargaining costs...

In many cases, the ACCC has identified that individually, businesses have a limited degree of input into their contracts being offered take it or leave it terms and conditions. These circumstances do not always lead to the most efficient contract. The ACCC has often accepted that collective bargaining arrangements can provide participants with an opportunity for greater input into contracts and accordingly deliver the opportunity for more efficient contracts.

The ability for media organisations to have improved input into negotiations, and therefore achieve more sophisticated and efficient contracts, was recognised by the ACCC in authorising CRA's recent application for collective bargaining with Facebook and Google for payment of news content featuring on those platforms:<sup>68</sup>

The ACCC considers information sharing and collective discussions by CRA members for the purpose of collective negotiations with Facebook and Google may enable members to become more informed and improve their input into contracts than individual negotiations. In particular, each CRA member would benefit from CRA negotiating contractual issues on their behalf at a lower cost and in many cases from the greater levels of resourcing and expertise available to CRA.

The ACCC considers the Proposed Conduct is likely to provide increased opportunities for CRA members to provide input into the negotiated terms of agreements made with the relevant platforms than may be the case if those members negotiated individually. This may lead to terms that are more comprehensive and that better reflect the circumstances of CRA members and the relevant digital platform.

The ACCC therefore considers that the Proposed Conduct is likely to result in a public benefit from improving the opportunity for input that CRA members have in negotiations with Facebook and Google, which is likely to provide more efficient contracts.

<sup>66</sup> CRA Decision, at [4.15].

<sup>67</sup> King, S.P. (2013). Collective Bargaining by Business: Economic and Legal Implications. UNSW Law Journal, volume 36(1), 107 - 138.

<sup>68</sup> CRA Decision, at [4.15].

- (d) Collective bargaining will provide the Participants with additional funding to invest in journalistic resources to combat disinformation / malinformation. As the ACCC noted in the ACCC Report: "While public interest journalism contributes to a healthy democracy, disinformation and malinformation does the opposite."<sup>69</sup>
- (e) Any wealth transfer from the Digital Platforms to New Zealand owned Participants that results from collective bargaining constitutes a public benefit to New Zealand because the Digital Platforms are foreign owned. The Commission's revised Authorisation Guidelines confirm that that "a transfer of wealth from another country to New Zealand may be a public benefit".<sup>70</sup> Although described as a wealth transfer to the Participants, in reality what is under consideration is the prevention of a wealth transfer from the Participants to the Digital Platforms' foreign shareholders which would be caused by no, or artificially low, remuneration for the display of content on the Digital Platforms' platforms in the counterfactual. Here, any increase in price paid to the Participants is simply caused by an evening up of bargaining power (i.e. reduction in the Digital Platforms' market power). The wealth transfer caused by that price increase to be paid by the Digital Platforms as a foreign-owned firm can then properly be termed a public benefit in the same way that the Commission accepts that a wealth transfer to foreign shareholders from price rises can be termed a public detriment. This is also consistent with the Commission's earlier acceptance in the New Zealand Grape Growers Council case that there would be a public benefit in "equalising bargaining power if the buyer was in a position of such strength as to be able to exercise monopoly power".<sup>71</sup> This public benefit argument was only not accepted in the Grape Growers case because Montana faced competition from other wineries. By contrast, in the present case, the Digital Platforms have market power (as recognised in the ACCC Report).
- (f) Furthermore, even if in the counterfactual it could be assumed that the Government would provide additional tax-payer funding through regulation to fund New Zealand owned Participants (in lieu of fairer remuneration from the Digital Platforms), or introduce a mandatory bargaining code to better facilitate fairer negotiations with the Digital Platforms:
- (i) The avoidance of that need to draw on scarce public funding by better enabling the negotiation of a fairer remuneration model with the Digital Platforms is plainly a public benefit; and
- (ii) The Commission has previously recognised that enacting "regulation would impose societal costs, including the time and resources spent by Parliament and policy agencies" and, therefore, mitigating the requirement for specific regulation "generates a public benefit, as these resources could be productively deployed elsewhere".<sup>72</sup>

## PUBLIC DETRIMENTS

- 8.13 The Applicant does not consider that the Arrangement results in any public detriment.
- 8.14 In particular, the Applicant does not consider that the Arrangement results in any:

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<sup>69</sup> ACCC, Page 22.

<sup>70</sup> Commerce Commission Authorisation Guidelines at [85].

<sup>71</sup> *Re The New Zealand Grape Growers Council Inc* (1991) 2 NZBLC (Com) 104,573 at [35.3].

<sup>72</sup> *Infant Nutrition Council Limited* [2015] NZCC 11.

- (a) substantial lessening of competition in a market. It simply seeks to address a significant bargaining imbalance, and does not in any way lessen how the parties compete in the rest of their respective businesses. In such circumstances, there is no prospect of a substantial lessening of competition in the supply and sale of news / journalistic content to the Digital Platforms. For example, the ACCC has dismissed anticompetitive concerns where the counterparty is a monopolist.<sup>73</sup>

'[T]he target of the collective bargaining is a monopoly provider, reducing the probability that the collective bargaining group will achieve inefficiently low prices'.<sup>74</sup>

- (b) allocative efficiency losses in the supply and sale of news / journalistic content to the Digital Platforms given the Digital Platforms will continue to have significant bargaining power such that it would be impossible for the Participants to bargain for prices above competitive levels; and
- (c) productive or dynamic efficiency losses in broader digital advertising or online New Zealand news markets,<sup>75</sup> given the Participants would still all be incentivised to maximise the volume and attractiveness of their respective content to maximise revenue from other sources (such as advertising sales, digital subscriptions, and print subscriptions), and because Participants would be able to opt out of the Arrangement, so those who considered they could negotiate a better arrangement with the Digital Platforms (by, for example, being more productive, efficient, or innovative) would be able to do so.<sup>76</sup>

8.15 Instead, for the reasons discussed above, the Arrangement would result in significant transactional costs savings and other efficiency benefits.

#### **ACCC CPA Authorisation and CRA Draft Authorisation**

8.16 The Applicant's view that the Arrangement would not result in any public detriment is consistent with the ACCC's view in its recent CPA and CRA authorisation decisions.

8.17 The ACCC has found that collective bargaining between each of the CPA and CRA and the Digital Platforms is unlikely to result in significant public detriment. Specifically, the ACCC has indicated that collective bargaining:

- (a) was unlikely "to lessen competition in any meaningful way between participating CPA members in supplying news content for display on Facebook and Google's platforms or more generally"<sup>77</sup> and was "unlikely to significantly reduce competition between CRA members to have their news surfaced by Facebook and Google".<sup>78</sup>

In reaching these conclusions, the ACCC accepted that the CPA and CRA collective bargaining proposal would not limit or prevent CPA or CRA members from competing vigorously and would not enable the members to raise prices, reduce quality, choice or innovation or to coordinate in the creation and provision of content because:

<sup>73</sup> King, S.P. (2013). *Collective Bargaining by Business: Economic and Legal Implications*. UNSW Law Journal, volume 36(1), 107 – 138 at footnote 75.

<sup>74</sup> Australian Competition and Consumer Commission, *A91275: Abbot Point Coal Export Terminal Producers* (16 February 2012) at [4.37].

<sup>75</sup> As the markets were defined in *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8.

<sup>76</sup> This was regarded as relevant in *Waikato - Bay of Plenty Chicken Growers Association Incorporated* [2017] NZCC 37 at [82], [83] and [85].

<sup>77</sup> CPA Decision, at [4.32].

<sup>78</sup> CRA Decision, at [4.34].

- (i) in relation to the CPA, the members were geographically dispersed and produced location-specific content; and
- (ii) in relation to the CRA, the members produced services that have a point of difference from others in the market.

This is also an applicable consideration in the current application. Many of the potential Participants largely serve distinct and diverse audiences, and even to the extent there is overlap in potential audience the Participants would still all be incentivised to maximise the volume and attractiveness of their respective content to maximise revenue from other sources (such as advertising sales, digital subscriptions, and print subscriptions). That is because competition in those other areas will be wholly unaffected by the Arrangement, and all of the Participants will remain incentivised to maximise their engagement with audiences that consume news via other sources (such as audiences that visit news websites directly, audiences that view print content, etc), both to maximise print and digital subscriptions from such audiences, but also to maximise advertising revenue by having the largest audience possible for their news content. This same dynamic of the broader competitive dynamic not being impacted by collective bargaining with the Digital Platforms was recognised by the ACCC in authorising CRA's recent application for collective bargaining with the Digital Platforms:<sup>79</sup>

CRA submits that there are few, if any, instances of substantially overlapping products among its member stations, as all stations compete with each other for audience share and advertising revenue within their respective markets. CRA notes that stations attract audience and revenue by producing services that have a point of difference from others in the market.

CRA submits, therefore, that the Proposed Conduct would not limit or prevent its members from competing vigorously, and would not enable CRA members to raise prices, reduce quality or choice, reduce innovation or coordinate in the creation and provision of content.

The ACCC considers the Proposed Conduct is unlikely to significantly impact competition between CRA members for the supply of news generally because the Proposed Conduct is limited to news surfaced by Facebook and Google.

The ACCC considers the Proposed Conduct may impact competition between CRA members to have their news surfaced by Facebook and Google. However, the Proposed Conduct is unlikely to result in significant public detriments including as a result of any lessening of competition.

While CRA members may compete to have their news surfaced by Facebook and Google, the Proposed Conduct is unlikely to significantly reduce competition between CRA members or result in any significant public detriment because the main area of competition between commercial radio stations remains competition for advertisers and audiences within commercial radio licence areas.

- (b) would not result in reduced negotiating efficiency due to an overly broad and indeterminate bargaining group. In its CPA decision, the ACCC recognised that Facebook would be able to continue to work with CPA and make investment offers outside the collective bargaining arrangement given the proposal would be voluntary. In this case, the scope of the Participants is defined by clear criteria, and the NPA

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<sup>79</sup> CRA Decision, at [4.10] – [4.33].

will appoint a common bargaining negotiator on behalf of the Participants. Therefore, like in the ACCC's CPA decision, the Arrangement would not result in reduced negotiating efficiency, and therefore could not give rise to a public detriment.

## **9. CONCLUSION**

- 9.1 For the reasons outlined above, the Applicant is confident that the Arrangement results in significant public benefits, and does not result in any public detriment and, therefore, should be authorised.

**10. FURTHER DOCUMENTATION / INFORMATION**

**Names and contact details of key customers**

10.1 [ ]

**Names and contact details of key competitors**

10.2 See confidential material **enclosed** with this application.

**Names and contact details of other relevant market participants and interested parties**

10.3 See confidential material **enclosed** with this application.

**Other relevant internal documents**

10.4 These will be provided separately by relevant Participants.

## **11. CONFIDENTIALITY**

### **REASONS FOR SEEKING CONFIDENTIALITY**

- 11.1 Confidentiality is sought in respect of the information in this application that is contained in square brackets (with confidentiality indicated by the coloured highlighting). Confidentiality is sought for the purposes of s 9(2)(b) of the Official Information Act 1982 on the grounds that:
- (a) The information is commercially sensitive and valuable information which is confidential to the Applicant; and
  - (b) Disclosure would be likely to unreasonably prejudice the commercial position of the Applicant, as the entity providing the information.
- 11.2 The Applicant requests that it is notified of any request made to the Commission under the Official Information Act 1982 for release of the confidential information. The Applicant also requests that the Commission seek and consider the Applicant's views as to whether the information remains confidential and commercially sensitive at the time responses to such requests are being considered.
- 11.3 The foregoing equally applies in respect of any additional information provided to the Commission by the Applicant or any Participant that is expressed to be confidential.

**12. DECLARATION**

I, Brook Cameron, have prepared, or supervised the preparation of, this notice seeking clearance.

To the best of my knowledge, I confirm that:

- all the information specified by the Commission has been supplied;
- if the information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to me that is relevant to the consideration of this notice 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 the notice.

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 the company and am duly authorised to submit this notice.

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**General Manager of the News Publishers' Association**

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**Signature**

**Date**

