

Statement of Preliminary Issues

News Publishers' Association: Application seeking Authorisation for Collective Bargaining

21 December 2021

Introduction

1. On 25 November 2021, the Commerce Commission received an application from the News Publishers' Association of New Zealand Incorporated (NPA) seeking authorisation on behalf of itself, its current and future members, and other independent New Zealand news media companies, to engage in collective bargaining with Alphabet Inc¹ (Google) and Meta Platforms Inc² (Meta) (Digital Platforms) (the Application).
2. NPA intends to negotiate with each of Google and Meta about the terms on which the news content of participating news media companies is displayed on each platform. A full description of the proposed collective bargaining arrangement for which NPA seeks authorisation is set out in the Application (the Proposed Arrangement).³
3. As we are in an 'epidemic period', NPA applies for authorisation under s 65AA(2) and (3), and in the alternative s 58(1) and (2), of the Commerce Act 1986 (the Commerce Act). The epidemic period is the period between 16 May 2020 and the close of the 6-month period that starts on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.⁴
4. Temporary amendments were made to the Commerce Act to enable the Commission to better respond to the needs of businesses seeking legal certainty through the authorisation process during

¹ Including any subsidiary of Alphabet Inc, related company of Alphabet Inc or member of the Alphabet Inc corporate group.

² Including any subsidiary of Meta Platforms Inc, related company of Meta Platforms Inc or member of the Meta Platforms Inc corporate group. Meta is referred to in the Application as Facebook.

³ At [5.1] and [5.2]. A public version of the Application is available on the Commission's case register at <https://comcom.govt.nz/case-register/case-register-entries/news-publishers-association-of-new-zealand-incorporated2>

⁴ Currently the epidemic period is due to expire on 19 June 2022.

the epidemic period. These amendments provide two ways for businesses to realise the benefits of authorisation sooner:⁵

4.1 Firstly, the Commission may grant a provisional authorisation under s 65AD of the Commerce Act, enabling conduct to proceed while the Commission considers and consults on the application; and

4.2 Secondly, under s 61 of the Commerce Act the Commission may grant an authorisation without issuing a draft determination or holding a conference.

5. The Commission will authorise the Proposed Arrangement if it is satisfied that the arrangement will result, or be likely to result, in such a benefit to the public that the conduct should be permitted. This Statement of Preliminary Issues sets out the issues we currently consider to be important in deciding whether to grant authorisation.⁶
6. We invite interested parties to provide comments on the likely benefits and detriments of the Proposed Arrangement. We request parties who wish to make a submission to do so by **4 February 2022**. Parties who are unable to make their submission by this date can apply to the Commission for an extension of time to provide their submission.
7. On 25 November 2021, NPA also applied for a provisional authorisation under s 65AD(2) of the Commerce Act (the Provisional Application). The Provisional Application is not the subject of this Statement of Preliminary Issues. The Commission has separately accepted submissions on the appropriateness of allowing NPA to give effect to the Proposed Arrangement while the Commission considers the Application.⁷

The applicant

8. NPA is an industry association whose membership consists of national and regional New Zealand news media companies. NPA represents members' interests in areas such as government affairs, media regulation and public funding of journalism, including management and promotion of the national media awards. NPA also offers a centralised national newspaper advertising booking service for accredited media agencies.
9. NPA seeks authorisation on behalf of itself, together with its current and future members. NPA's membership currently consists of ten news media companies, including NZME Limited, Stuff Limited, Allied Press Limited, The Gisborne Herald Limited, Ashburton Guardian Company Limited,

⁵ See [6] and [7] of our *Guidelines on Approach to Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act (May 2020)* at https://comcom.govt.nz/data/assets/pdf_file/0016/217501/Authorisations-under-COVID-19-guidelines-May-2020.pdf

⁶ The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

⁷ For further details see our media release at <https://comcom.govt.nz/case-register/case-register-entries/news-publishers-association-of-new-zealand-incorporated2/media-releases/news-publishers-association-of-new-zealand-incorporated-seeks-authorisation-and-provisional-authorisation-to-engage-in-collective-bargaining-with-facebook-and-google>

Greymouth Evening Star Co Limited, National Media Limited, The Westport News Limited, The Beacon Printing & Publishing Company Limited and The Wairoa Star Limited.

10. NPA also seeks authorisation on behalf of non-member news media companies including independent media companies that produce New Zealand focused journalistic and news content that are listed on the NZX or otherwise ultimately owned by a non-overseas person (as defined in the Overseas Investment Act 2005) and that choose to participate in the Proposed Arrangement. This could include a number of locally owned online, regional, suburban and community publishers. For example, Hex Works Limited (The Spinoff) has indicated an interest in participating in the collective bargaining if authorised.

Our framework

11. We undertake a two-stage assessment in any authorisation application under ss 65AA and 58 of the Commerce Act:⁸
 - 11.1 First, establishing whether the Commission has jurisdiction to authorise (the ‘jurisdictional threshold’);
 - 11.2 Second, assessing whether the associated benefits mean that authorisation should be granted (the ‘public benefit test’).⁹

Jurisdictional threshold

12. The Commission has jurisdiction under s 58 of the Commerce Act where a person applies for authorisation of an arrangement that is likely to lessen competition.¹⁰
13. During the epidemic period, a person can also apply for authorisation under s 65AA of the Commerce Act of an arrangement that might contain a cartel provision.¹¹
14. The Commission will have jurisdiction to grant authorisation under s 65AA if it has reasonable grounds to believe the arrangement might contain a cartel provision. It is not necessary for the Commission to determine whether a provision is in fact a cartel provision¹² or whether the proposed arrangement has the purpose or effect of lessening of competition.

⁸ See generally our *Authorisation Guidelines* at [Commerce Commission - Authorising anti-competitive agreements or mergers that will likely benefit New Zealand \(comcom.govt.nz\)](https://comcom.govt.nz/business/merging-or-acquiring-a-company/authorising-anti-competitive-transactions-that-will-likely-benefit-new-zealand/authorisations-under-the-covid-19-response-further-management-measures-legislation-act)

⁹ We note the test for provisional authorisations under s 65AD differs from the public benefit test used under ss 65AA and 58 authorisation applications which, as stated above, the Commission is consulting on separately.

¹⁰ See section 61(6A) of the Commerce Act 1986.

¹¹ Our process for determining s 65AA applications, and applications under s 58 made during the epidemic period, is explained in our *Guidelines on Approach to Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act* at <https://comcom.govt.nz/business/merging-or-acquiring-a-company/authorising-anti-competitive-transactions-that-will-likely-benefit-new-zealand/authorisations-under-the-covid-19-response-further-management-measures-legislation-act>.

¹² Section 65AB(4) of the Commerce Act.

15. NPA submits the Commission has jurisdiction to authorise entry into the Proposed Arrangement under s 65AA(2) and (3) of the Commerce Act.
16. NPA considers that the Proposed Arrangement does not give rise to any substantial lessening of competition issues under s 27 of the Commerce Act, but seeks authorisation under s 58(1) and (2) in the alternative if the Commission considers it does. For the avoidance of doubt, the threshold requirement for the Commission to have jurisdiction under s 58 is that the arrangement is considered likely to lessen competition, and includes a lessening in competition that is not substantial.
17. Whether the Commission has jurisdiction under s 65AA or s 58 of the Commerce Act to authorise the Proposed Arrangement (or any part thereof) is a preliminary issue we are consulting on.

Public benefit test

18. Although the jurisdictional thresholds differ under ss 65AA and 58 of the Commerce Act, the public benefit test is the same:¹³
 - 18.1 In relation to s 65AA, the Commission can authorise an arrangement that contains, or there are reasonable grounds to believe it contains, a cartel provision if it is satisfied that the arrangement will in all the circumstances result, or be likely to result, in such a benefit to the public that it should be permitted.¹⁴
 - 18.2 In relation to s 58, the Commission can authorise an arrangement that may lessen competition if it is satisfied that the arrangement will be likely to result in a benefit to the public that would outweigh the lessening of competition.¹⁵
 - 18.3 While stated differently, the courts have previously held that there is no material difference between the different assessments of public benefits set out in other parts of the Act. We take the same approach here.¹⁶
19. The benefits and detriments must arise from the proposed arrangement.¹⁷ To determine whether benefits and detriments are specific to the conduct, we assess:
 - 19.1 what is likely to occur in the future without the proposed arrangement ('the counterfactual'); and
 - 19.2 what is likely to occur in the future with the proposed arrangement ('the factual').

¹³ *COVID-19 Guidelines* above at [36].

¹⁴ Sections 65AB(3) and (4) of the Commerce Act.

¹⁵ Section 61(6) of the Commerce Act.

¹⁶ See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) at [33] and *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) at [88]-[90].

¹⁷ *Authorisation Guidelines* above at [39].

20. Once we have identified all likely benefits and detriments, we assess the value (including likelihood and magnitude) of those benefits and detriments. When making that assessment, we consider how the conduct may affect:
- 20.1 allocative efficiency – whether the conduct would raise or lower prices; and whether it would reduce or improve quality, choice or other elements of value to consumers;
 - 20.2 productive efficiency – whether the conduct could improve or worsen production processes; and
 - 20.3 dynamic efficiency – whether the conduct could assist or hinder innovation in products or processes.
21. The Commission is not limited to considering efficiencies. New Zealand courts have recognised efficiencies are not the only benefits and detriments which are relevant to the Commission’s assessment.¹⁸ Ultimately, the Commission seeks to assess what benefits accrue to the public in the circumstances of any given case.¹⁹
22. Our decision whether to grant authorisation is informed by a balancing exercise of the quantitative and qualitative benefits and detriments. Having assessed the value (including likelihood and magnitude) of benefits and detriments, if we are satisfied that the benefits of the arrangement likely outweigh the detriments, we will grant authorisation. If we are not satisfied, we will not grant authorisation.²⁰

Market definition

23. Usually when we consider an application for authorisation of a potentially restrictive trade practice, we assess the competitive effects that the practice could have within a relevant market(s) in New Zealand.
24. We define markets in the way that we consider best isolates the key competition issues that arise from the proposed arrangement. In many cases, this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined as a matter of fact and commercial common sense.²¹
25. NPA does not expressly submit what the markets relevant to our assessment are in its Application but refers broadly to the New Zealand media industry. NPA considers that *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8 (*NZME/Fairfax*) and the Australian Competition and Consumer Commission’s (ACCC’s) July 2019 Digital Platforms Inquiry Report (DPI Report) have informed the Commission’s understanding of the New Zealand media industry.
26. In *NZME/Fairfax* we identified the following markets in New Zealand, which may be relevant here:

¹⁸ *NZME Ltd & Ors. v Commerce Commission* [2018] NZCA 389 at [81].

¹⁹ *Authorisation Guidelines* above n3 at [37] and [38].

²⁰ *Authorisation Guidelines* above n3 at [45].

²¹ Section 3(1A) of the Commerce Act. See *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

- 26.1 a broad market for the supply of digital (or online) advertising services;²²and
- 26.2 reader markets for New Zealand news content for publication:
 - 26.2.1 online;
 - 26.2.2 in Sunday newspapers; and
 - 26.2.3 in community papers.
- 27. In the DPI Report, the ACCC considered the following markets, as they pertain to Meta and Google, in Australia.²³
 - 27.1 a market for the supply of general search services;
 - 27.2 a market for the supply of social media services;
 - 27.3 a market for the supply of search advertising; and
 - 27.4 a market for the supply of display advertising.
- 28. The ACCC also stated in its DPI Report that, while it was not required to come to a firm conclusion on whether there is a market for news referral services, such a market probably exists.²⁴ We will consider the nature of these services in New Zealand when deciding how to define the market. We will also consider whether there is a market for the supply of news and journalistic content to digital platforms in New Zealand.
- 29. We will test the markets set out above and explore whether there are any other relevant markets that may assist our assessment of the Proposed Arrangement. This may also include the market for the acquisition of user data.

With the Proposed Arrangement

- 30. NPA submits that if the Commission authorises the Proposed Arrangement, it would enter into collective negotiations, discussions, exchanges of information, and enter into, and give effect to, agreements or provisions collectively negotiated with the Digital Platforms.
- 31. We will test NPA's submissions and look to understand the scope of the Proposed Arrangement.

Without the Proposed Arrangement

- 32. NPA submits that in the absence of the Proposed Arrangement:

²² Encompassing video, search, social media, display, programmatic, homepage takeovers, native advertising, and mobile interstitials. *NZME/Fairfax* at [285].

²³ DPI Report at 2.3, 2.4, 2.6 and 2.7.

²⁴ DPI Report at 2.8.4.

32.1 [

32.2

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33. We will test NPA’s submissions. We also will consider what the parties would do if the Proposed Arrangement was not entered into, including the likelihood of news media companies entering into bilateral arrangements with the Digital Platforms and any other possible counterfactuals.
34. The Commission may be required to consider multiple counterfactuals to determine all likely benefits and detriments relevant to its authorisation assessment.

Preliminary issues

35. At this stage of our investigation, our focus is to identify and assess the detriments and benefits that are likely to arise from the Proposed Arrangement (and to the extent to which it is practicable, quantify the likely detriments and benefits).
36. NPA submits that the Proposed Arrangement will not likely give rise to any detriments, and therefore the public benefits that are likely to arise would justify authorisation being granted.
- 36.1 NPA submits that the Proposed Arrangement is likely to achieve more efficient outcomes as, due to the benefits of having greater levels of resourcing and expertise through pooled resources, participating news media companies will have an opportunity to:
- 36.1.1 engage specialised staff to negotiate with the Digital Platforms;
 - 36.1.2 save on external transaction costs []; and
 - 36.1.3 negotiate for, and achieve, more sophisticated and efficient agreements where terms and conditions may be more comprehensive and better reflect the circumstances of the news media companies and relevant Digital Platform.
- 36.2 Furthermore, NPA submits the Proposed Arrangement is likely to address bargaining power imbalances by increasing the bargaining power of participating news media companies in negotiations with the Digital Platforms. In particular, NPA submits that the Digital Platforms are “unavoidable trading partners” upon which New Zealand news media companies are reliant on for audience and referrals. NPA therefore submits that the Proposed Arrangement would somewhat address the bargaining imbalance for the participating news media companies:
- 36.2.1 smaller participating news media companies would gain the opportunity to achieve fair remuneration where they would not have had the resources to otherwise; and
 - 36.2.2 even the largest participating news media companies would be at a significant financial and administrative resource disadvantage in individual negotiations with the Digital Platforms.

- 36.3 NPA also submits that any agreements successfully entered into with the Digital Platforms as a result of the Proposed Arrangement are likely to achieve a more competitive outcome whereby participating news media companies will be more fairly compensated for the content they produce which will assist participating news media companies to remain financially and commercially viable. NPA submits that this would in turn:
- 36.3.1 assist in sustaining ongoing production of valuable news and journalistic content and media plurality and its associated benefits for democracy;
 - 36.3.2 contribute to funding to enable news media companies to combat disinformation and malinformation;
 - 36.3.3 prevent a wealth transfer from New Zealand-owned news media companies to the foreign-owned Digital Platforms from no, or artificially low, remuneration for the display of content;
 - 36.3.4 reduce the need to draw on public funding in lieu of fairer remuneration from the Digital Platforms; and
 - 36.3.5 mitigate the requirement for specific regulation and thereby avoid the imposition of societal costs, including the time and resources spent by Parliament and policy agencies, associated with enacting such regulation.
37. We will test NPA's submissions. We will also consider if the Proposed Arrangement could have any other effects on competition that would create likely benefits or detriments. For example, we will consider how, if at all, the Proposed Arrangement could affect:
- 37.1 competition between news media companies in the relevant markets, including in print and online markets, and a possible market for the supply of news and journalistic content to the Digital Platforms; and
 - 37.2 competition between participating news media companies and news media companies outside the Proposed Arrangement, such as Crown-owned or established news media companies and non-NZX or overseas-owned news media companies.
38. We will also consider, to the extent possible, broader factual matters such as:
- 38.1 the likelihood that New Zealand news media companies would be supported by public funding in the long term; and
 - 38.2 the likelihood that a bargaining code similar to Australia's News Media Bargaining Code would be enacted, that could enable New Zealand news media companies to successfully enter into agreements with the Digital Platforms with outcomes that are reasonably comparable to the Proposed Arrangement.

Next steps in our investigation

39. The Commission is currently scheduled to decide on whether or not to authorise the Proposed Arrangement by **9 June 2022**. However, this date may change to an earlier or later date as our investigation progresses.²⁵
40. Prior to making our final decision, we will publish a draft determination and seek submissions on the draft. The draft determination sets out our preliminary view on whether we are likely to grant an authorisation, and the reasons for that view.
41. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above. This may impact our investigation timeline.
42. The Commission will make a decision as soon as practicable on NPA's Provisional Application.

Making a submission

43. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "NPA Authorisation" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **4 February 2022**.
44. If you are unable to make your submission by the above date, you can apply to the Commission for an extension of time to provide a submission. Please email us at registrar@comcom.govt.nz with the reference "NPA Authorisation extension request" in the subject line of your email and explain the basis for the request and extension period required.
45. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
46. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

²⁵ The Commission maintains a case register on our website at <https://comcom.govt.nz/case-register> where we update any changes to our deadlines and provide relevant documents.