

## Determination

### News Publishers' Association of New Zealand Incorporated [2022] NZCC 11

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| <b>The Commission:</b>         | Anna Rawlings<br>Tristan Gilbertson<br>Elisabeth Welson<br>Vhari McWha   |
| <b>Summary of application:</b> | The News Publishers' Association of New Zealand Incorporated has applied for provisional authorisation, on behalf of participating news media companies, to collectively negotiate with Meta Platforms, Inc. and Alphabet Inc., until the Commission declines or grants its application for authorisation. |
| <b>Determination:</b>          | The Commerce Commission has decided to grant provisional authorisation, as it is satisfied that it is appropriate to do so.  |
| <b>Date of determination:</b>  | 11 April 2022  |

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

## CONTENTS

|   |           |
|---|-----------|
| <b>DETERMINATION .....</b>  | <b>3</b>  |
| <b>PROPOSED ARRANGEMENT.....</b>  | <b>3</b>  |
| SCOPE OF THE PROVISIONAL AUTHORISATION .....  | 4         |
| <b>BACKGROUND .....</b>   | <b>4</b>  |
| <b>HOW WE ASSESS PROVISIONAL AUTHORISATIONS .....</b>   | <b>5</b>  |
| <b>CONSULTATION .....</b>   | <b>7</b>  |
| PROCESS .....   | 8         |
| <b>OUR ASSESSMENT OF ‘APPROPRIATENESS’ .....</b>  | <b>8</b>  |
| POTENTIAL BENEFITS OF PROVISIONAL AUTHORISATION.....  | 8         |
| <i>Potential benefits of the Proposed Arrangement .....</i>   | <i>9</i>  |
| <i>Urgency in allowing a provisional authorisation before the Commission has fully considered the matter.....</i> | <i>12</i> |
| POTENTIAL DETRIMENTS FROM A PROVISIONAL AUTHORISATION .....   | 12        |
| <i>Permanent market changes unlikely .....</i>  | <i>12</i> |
| <i>Possible harm to competition in the supply of New Zealand news.....</i>  | <i>13</i> |
| <i>Possible harm to news consumers .....</i>  | <i>17</i> |
| CONSISTENCY WITH THE PURPOSE OF THE COMMERCE ACT 1986 .....   | 17        |
| <b>CONDITIONS .....</b>   | <b>18</b> |
| <b>DURATION.....</b>  | <b>18</b> |
| <b>UPDATE TO THE COVID-19 GUIDELINES.....</b>   | <b>18</b> |

## Determination

1. The Commerce Commission (the **Commission**) has decided to grant provisional authorisation in respect of the application for provisional authorisation lodged by the News Publishers' Association of New Zealand Incorporated (the **Applicant** or **NPA**) on 25 November 2021. It is satisfied that it is appropriate to do so because:
  - 1.1 there are potential benefits to be derived from collective negotiation that may reduce over time without provisional authorisation as the pool of participants may reduce in size;
  - 1.2 to the extent these benefits are derived through collective negotiation and agreement with Alphabet Inc<sup>1</sup> (**Google**) and/or Meta Platforms Inc<sup>2</sup> (**Meta**) (**Digital Platforms**), they accrue earlier than would be possible without provisional authorisation; and
  - 1.3 there is little harm to competition likely to result from provisional authorisation.
2. The Commission's view that it is appropriate to grant provisional authorisation is based on our assessment of the evidence available at this time. The Commission has taken into account the factors set out in the Commission's *Guidelines on Approach to Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act (COVID-19 Guidelines)*.
3. The Commission's decision to grant provisional authorisation at this time should not be taken as an indication of what the Commission might ultimately decide in respect of the authorisation application.<sup>3</sup>

## Proposed Arrangement

4. On 25 November 2021, the Commission received an application from the NPA seeking authorisation on behalf of itself, its current and future members, and participating independent New Zealand news media companies (**Participants**) to collectively negotiate with Google and Meta for a ten-year period.<sup>4</sup> As New Zealand was in an 'epidemic period'<sup>5</sup> at the date of the application, the Applicant applied under section 65AA(2) and (3), and in the alternative section 58(1) and (2), of the Commerce Act 1986 (the **Act** or **Commerce Act**).

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<sup>1</sup> The term "Google" is used in this determination to include any subsidiary of Alphabet Inc., related company of Alphabet Inc., or member of the Alphabet Inc. corporate group.

<sup>2</sup> The term "Meta" is used in this determination to include any subsidiary of Meta Platforms Inc., related company of Meta Platforms Inc., or member of the Meta Platforms Inc. corporate group.

<sup>3</sup> COVID-19 Guidelines at [47].

<sup>4</sup> NPA, Notice seeking authorisation of a restrictive trade practice pursuant to sections 65AA(2) and 65AA(3) of the Commerce Act 1986 (23 November 2021).

<sup>5</sup> The epidemic period is defined by section 65AA(1) of the Act, as a period within 6-months of the expiration of the Epidemic Preparedness (COVID-19) Notice 2020. At the time of this decision, the Notice was renewed on 21 March 2022, meaning it will expire 3-months from that date, unless it is renewed.

5. At the same time, the Applicant applied to the Commission seeking provisional authorisation for the same collective negotiations outlined above, under section 65AD(2) of the Act, until the Commission declines or grants the authorisation application.<sup>6</sup> This determination only concerns the NPA’s provisional application.
6. The Applicant is seeking to:
  - 6.1 appoint a common negotiating person(s) to collectively discuss and negotiate with each of 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;
  - 6.2 exchange information between the Participants in relation to the above;
  - 6.3 enter into agreements collectively negotiated between the relevant Digital Platform and the Applicant (and/or the Participants); and
  - 6.4 give effect to the provisions of agreements collectively negotiated between the relevant Digital Platform and the Applicant (and/or the Participants),  
(the Proposed Arrangement).
7. The Applicant stated that it will be voluntary for the Participants to participate in the Proposed Arrangement. The Applicant further stated that there is no proposal, and it is not requesting authorisation, to engage in a collective boycott outside the Proposed Arrangement (collective boycott includes but is not limited to any collective refusal to supply (or acquire) goods or services from any person). Any Participant is free to opt out of the Proposed Arrangement and to choose to enter into its own bilateral agreement with either of the Digital Platforms.
8. The term “**Collective**” is used in this determination to refer to the Participants acting collectively in accordance with the Proposed Arrangement.

### **Scope of the provisional authorisation**

9. Consistent with the wording of the NPA’s application, the provisional authorisation covers consideration, grants, funding or other benefits offered by the Digital Platforms, which are subject to discussion by the parties to the Proposed Arrangement, to the extent that such benefits constitute remuneration for the display of content and/or relate to the terms and conditions on which news and journalistic content may be displayed, hosted, featured, linked or summarised on the Digital Platforms’ platforms.

### **Background**

10. The NPA is an industry association whose membership consists of a selection of national and regional New Zealand news media companies. The NPA advocates on

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<sup>6</sup> NPA, Application for provisional authorisation under section 65AD of the Commerce Act 1986 (23 November 2021).

behalf of the news media industry of New Zealand in areas such as government affairs, media regulation and public funding of journalism, including management and promotion of the national media awards. The NPA also offers a centralised national newspaper advertising booking service for accredited media agencies.

11. The NPA applied for authorisation on behalf of news media companies including its members. The NPA currently represents approximately ten news media companies, including NZME Limited, Stuff Limited, Allied Press Limited, The Gisborne Herald Limited, Ashburton Guardian Company Limited, Greymouth Evening Star Co Limited, National Media Limited, The Westport News Limited, The Beacon Printing & Publishing Company Limited and The Wairoa Star Limited.
12. NZME Limited (**NZME**) withdrew from the application on 25 March 2022 following an announcement that it had signed a letter of intent with Google and was negotiating a commercial agreement with Meta.<sup>7</sup>
13. The NPA has also applied for 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 (**OIA**)) and that choose to participate in the 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.
14. The application for authorisation excludes media entities owned or established by the Crown (such as Television New Zealand Limited (**TVNZ**), Māori Television Service and Radio New Zealand Limited (**RNZ**)) and 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**). The Applicant is not minded to expand the scope of its authorisation application to include the excluded news media organisations in the Collective.<sup>8</sup>

### How we assess provisional authorisations

15. The Commission may grant a provisional authorisation under section 65AD(2), if it has received an application under section 58 or 65AA during an epidemic period.<sup>9</sup> The Commission is not required to comply with section 61(6) of the Act, which sets out the jurisdictional threshold for authorisation.<sup>10</sup> Having received an application in

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<sup>7</sup> NZME, “NZME signs letter of intent with Google and updates outlook for 2022” (press release, 25 March 2022) <https://www.nzme.co.nz/news/nzme-signs-letter-of-intent-with-google-and-updates-outlook-for-2022/>.

<sup>8</sup> NPA, Cross-submission in response to NPA Authorisation and Provisional Authorisation (15 December 2021) at [38].

<sup>9</sup> Section 65AD(1) of the Act.

<sup>10</sup> Per section 65AD(3) of the Act. For either conduct likely to lessen competition (section 65(6)) or cartel conduct (section 65(6) as modified by section 65AB(3)).

the epidemic period, the Commission may consider whether granting provisional authorisation is appropriate.

16. The Commission may grant provisional authorisation during the epidemic period where it considers it is appropriate to do so:
  - 16.1 for the purpose of enabling due consideration to be given to the application; or
  - 16.2 for any other reason.<sup>11</sup>
  
17. The Commission does not need to be satisfied that the Proposed Arrangement would meet the 'public benefit test'.<sup>12</sup> Instead, the Commission need only be satisfied that a grant of provisional authorisation would be appropriate. Without limiting the Commission's discretion, the COVID-19 Guidelines outline factors the Commission will consider when deciding whether it is 'appropriate' to grant provisional authorisation:<sup>13</sup>
  - 17.1 the purpose of the Commerce Act, to promote competition in markets for the long-term benefit of consumers within New Zealand;
  - 17.2 the urgency of the application for authorisation, including whether a provisional authorisation is necessary to provide sufficient time for the Commission to fully consider the application for authorisation;
  - 17.3 the potential benefits and detriments based on all information available to the Commission at the time the application for provisional authorisation is considered;
  - 17.4 the extent to which any relevant market may change if a provisional authorisation is or is not granted – provisional authorisation is more likely to be granted when:
    - 17.4.1 it will maintain the market status quo; or
    - 17.4.2 it is unlikely to materially alter the competitive dynamics of the market;
  - 17.5 the possible harm, if any, to the applicant if a provisional authorisation is not granted;
  - 17.6 the possible harm to other parties (such as customers and competitors) or the public if a request for provisional authorisation is granted or not; and

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<sup>11</sup> Sections 65AD(1) and (2) of the Act.

<sup>12</sup> Section 65AD(3) of the Act.

<sup>13</sup> COVID-19 Guidelines at [50] and [51].

- 17.7 the likely scope and duration of the provisional authorisation, and any conditions that might be imposed within it.
18. The overall assessment of whether to grant a provisional authorisation involves balancing the potential benefits against the potential detriments, taking into account all relevant factors, including those listed in paragraph 17.

## Consultation

19. The Commission sought submissions from the public on the application for provisional authorisation. The Commission received six submissions and one cross-submission regarding provisional authorisation. Additionally, the Commission has received nine submissions and two cross-submissions in response to its Statement of Preliminary Issues relating to the authorisation application and it has conducted fourteen interviews of interested parties.
20. A number of submissions received supported the granting of provisional authorisation (some also supported the authorisation application) on the basis that collective bargaining would improve the negotiating power of the Participants, to the benefit of the news industry.<sup>14</sup> A number of submitters considered that the Collective excluded news media organisations that would be placed at a relative disadvantage to the Participants.<sup>15</sup> The Digital Platforms do not consider authorisation is required, noting that the Platforms are already in negotiations to reach (or have already concluded) commercial agreements with various New Zealand media organisations.<sup>16</sup>
21. To the extent the submissions and cross-submissions provided in response to the Statement of Preliminary Issues and interviews supplied information relevant to the

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<sup>14</sup> E tū, Submission in response to NPA Authorisation and Provisional Authorisation Application (8 December 2021); Commercial Communications Council, Submission in response to NPA Authorisation Statement of Preliminary Issues (3 February 2022); E tū, Submission in response to NPA Authorisation Statement of Preliminary Issues (4 February 2022); Association of NZ Advertisers, Submission in response to NPA Authorisation Statement of Preliminary Issues (11 February 2022); and Manatū Taonga, Submission in response to NPA Authorisation Statement of Preliminary Issues (15 February 2022).

<sup>15</sup> RNZ, Submission in response to NPA Provisional Authorisation Application (1 December 2021); TVNZ, Submission in response to NPA Provisional Authorisation Application (1 December 2021); Discovery, Submission in response to NPA Provisional Authorisation Application (1 December 2021); Better Public Media Trust, Submission in response to NPA Authorisation Statement of Preliminary Issues (8 February 2022); and Discovery, Submission in response to NPA Authorisation Statement of Preliminary Issues (10 February 2022).

<sup>16</sup> Meta's engagement with New Zealand news organisations involves investment in innovation, video and technology to support newsroom sustainability. See Meta, Submission in response to NPA Provisional Authorisation Application (8 December 2021) at page 8 and Meta, Submission in response to NPA Authorisation Statement of Preliminary Issues (10 February 2022) at page 10. Google's engagement with New Zealand news organisations involves inclusion of content on Google News Showcase and other funding and programs provided via the Google News Initiative. See Google, Submission in response to NPA Authorisation and Provisional Authorisation Application (8 December 2021) at page 3 and Google, Submission in response to NPA Authorisation Statement of Preliminary Issues (10 February 2022) at page 1.

provisional authorisation, this information has been considered when deciding to grant provisional authorisation.

### **Process**

22. As noted in our COVID-19 Guidelines,<sup>17</sup> the Commission may grant a provisional authorisation at any time during its consideration of the application for authorisation. However, the Commission is most likely to grant a provisional authorisation at or near the beginning of the authorisation process, or at the same time as a draft determination, if any.
23. The Commission considered the application for provisional authorisation in early March 2022 and at that time reached the position that provisional authorisation should be declined. However, in parallel with taking steps to formalise that position, the Commission conducted further investigations and also learnt of NZME's withdrawal from the application on 25 March 2022 following an announcement that it had signed a letter of intent with Google and was negotiating a commercial agreement with Meta.
24. As noted above, the Commission may grant a provisional authorisation at any time during its consideration of the application for authorisation and given the updated information available to it, the Commission reconsidered the issue of provisional authorisation on 11 April 2022. Based on the Commission's assessment of the information currently available to it, we consider that provisional authorisation is appropriate for the reasons explained below.

### **Our assessment of 'appropriateness'**

25. As noted in paragraph 18, the Commission has undertaken a balancing exercise of potential benefits and potential detriments, and has considered all relevant factors, including those set out in our COVID-19 Guidelines, to determine whether it is appropriate to grant provisional authorisation in this case. Based on the information available at the time of this decision, the Commission considers it is appropriate to grant provisional authorisation. We have set out the key factors considered as part of the balancing exercise below.

### **Potential benefits of provisional authorisation**

26. The Commission considers that provisional authorisation is appropriate because there are potential benefits from collective negotiations in accordance with the Proposed Arrangement and these may reduce over time without provisional authorisation as the pool of Participants may reduce in size. The benefits available to the Participants through collective negotiation and agreement with the Digital Platforms also may be available earlier and be potentially greater than would be possible without provisional authorisation, particularly for small news media companies.

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<sup>17</sup> COVID-19 Guidelines at [45].



27. Against this, the Commission considers there is little downside to a provisional authorisation.
28. The Commission reiterates that the decision to grant provisional authorisation is based on the information available to us at this time, and should not be taken as providing any indication of the Commission's ultimate decision on the authorisation application.

*Potential benefits of the Proposed Arrangement*

29. The Commission's view at this stage of the process is that there are potential benefits that may arise from the Proposed Arrangement.
30. Granting provisional authorisation could increase bargaining power, particularly of smaller Participants to the Collective. Redressing any imbalance in bargaining power should lead to more efficient outcomes and greater output. We also consider that collective bargaining may be more efficient compared to individual bilateral negotiations, for instance, by reducing transaction costs and achieving more efficient contracts. The Proposed Arrangement is intended to facilitate and give effect to agreements with each of the Digital Platforms recording the terms on which the Participants' news and journalistic content may be displayed, hosted, featured, linked, or summarised on either Digital Platform's platforms. The Applicant submits that it would address a significant bargaining imbalance so that the Collective can achieve a competitive outcome when negotiating with Digital Platforms and would be more efficient than negotiating bilaterally. This would assist in achieving fairer remuneration for independent news media to support their financial sustainability and viability, content production, and therefore contribute to greater media plurality.
31. We consider there is evidence of a bargaining power imbalance between the Digital Platforms and news media companies: the value created when a link to a news article is used on a digital platform may be largely accruing to the Digital Platforms at present. Maintenance of the status quo would maintain this bargaining power imbalance.
32. Transaction costs should be reduced through collective bargaining, as the Participants avoid the costs of individual bilateral negotiations, and instead pay a share of the costs of a single collective negotiation. We consider this could be the case, while also acknowledging that transaction costs may not be reduced if the cost of coordinating and reaching a collective position outweigh the lower costs of individual bilateral negotiations. For example, differences between the Participants such as scale, business models and digital maturity may complicate reaching a collective position and therefore limit any transaction cost benefits attainable through collective bargaining in this case.
33. In addition, the contracts formed through collective bargaining may be more comprehensive. The higher transaction costs incurred in bilateral negotiations can mean that these negotiations conclude without the effective resolution of 'marginal' issues, in particular those that are considered relatively minor by a party with

stronger bargaining power. By contrast, the reduction in transaction costs possible through collective bargaining can mean that such marginal issues can be more efficiently negotiated and addressed, potentially enabling more efficient contracts to be reached.<sup>18</sup>

34. For instance,  
[ ]<sup>19</sup> We consider it likely that similar types of benefits could be achieved by the Participants.
35. Benefits may also flow from any increase in bargaining power accruing to the Collective. While the Digital Platforms have noted that they are already in commercial bilateral negotiations and/or agreements with some news media companies,<sup>20</sup> at least some Participants to the Proposed Arrangement may achieve a better negotiated outcome from collective bargaining. In particular:
- 35.1 Smaller Participants may be able to access a deal through the Proposed Arrangement that they otherwise would not have the resources to negotiate with the Digital Platforms, or sufficient size and scale to incentivise the Digital Platforms to enter into negotiations in the first place, thus improving the bargaining position of the smaller Participants;<sup>21</sup>
- 35.2 By pooling resources and engaging specialised staff or consultants, the resulting increase in knowledge and expertise could increase the bargaining position of the Participants in negotiations<sup>22</sup>; and
- 35.3 Bargaining as a Collective may provide Participants with greater confidence to negotiate for, and some ability to obtain, better terms.

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<sup>18</sup> Stephen King “Collective Bargaining by Business: Economic and Legal Implications” (2013) *UNSW Law Journal* at page 113.

<sup>19</sup> [ ]

<sup>20</sup> For example, Meta has a commercial agreement with The Spinoff concerning technology and product innovation, see Scoop, “The Spinoff and Meta Reach Commercial Agreement” (press release, 13 December 2021) <https://www.scoop.co.nz/stories/SC2112/S00038/the-spinoff-and-meta-reach-commercial-agreement.htm>, and NZME has signed a Letter of Intent with Google concerning the supply of content for Google’s News Showcase, see NZME, “NZME signs letter of intent with Google and updates outlook for 2022” (press release, 25 March 2022) <https://www.nzme.co.nz/news/nzme-signs-letter-of-intent-with-google-and-updates-outlook-for-2022/>.

<sup>21</sup> Hal Singer “Addressing the Power Imbalance Between News Publishers and Digital Platforms: A Legislative Proposal for Effectuating Competitive Payments to Newspapers” (2021) at 27-28 [submitted as written comments in response to U.S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721].

<sup>22</sup> NPA, Authorisation Application (23 November 2021) at [8.12].

36. Any increase in remuneration obtained by Participants negotiating collectively as opposed to individually could generate benefits in the form of more or higher quality news content, and/or beneficial wealth transfers from non-New Zealanders.<sup>23</sup>
37. Any increase in bargaining power to the Collective could result in some improvement in remuneration and/or other terms given that the Digital Platforms appear to obtain some value from the ability to offer users access to New Zealand news content. For instance, Google benefits from being able to provide links to New Zealand-specific news content to its users (including where a user uses Google Search to answer a query relating to New Zealand news),<sup>24</sup> and Meta benefits from monetising user attention, and obtains and retains this attention by providing interesting, meaningful, and relevant content to users. We consider that for at least some users, user attention and engagement is likely to be increased by having New Zealand news stories appearing in those users' Facebook Feeds.<sup>25</sup>
38. On the other hand, to the extent that there is a degree of substitutability between the content of news media companies inside the Collective and the content of news media companies outside of the Collective, any increase in bargaining power from the Proposed Arrangement may be limited. Additionally, one or both of the Digital Platforms may decline to engage with the Collective.
39. However, overall we consider that there is a real chance that at least one of the Digital Platforms will negotiate with the Collective,<sup>26</sup> and that as a result of collective negotiation, at least some Participants may achieve better terms and conditions than if they did not collectively negotiate and these gains could flow through into more or higher quality New Zealand news content.

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<sup>23</sup> It is difficult to estimate what proportion of any increased remuneration would be used to fund additional or improved news content and what proportion would be retained by owners. However, any such split is immaterial to this analysis given that either outcome is likely to give rise to a benefit in the form of a positive overall transfer of wealth from an overseas-owned entity to New Zealand.

<sup>24</sup> Google submitted that news related queries comprised less than 2% of total queries on Google Search in New Zealand in 2020. (Google, Submission in response to NPA Authorisation Statement of Preliminary Issues (10 February 2022) at pages 5 and 6).

<sup>25</sup> Meta submitted that an increase in user engagement on Facebook over the past three years despite its move in 2018 to prioritise user-created content over public content from all Pages suggests that news is highly substitutable with other content for users. (See Meta, Submission in response to NPA Authorisation Statement of Preliminary Issues (11 February 2022) at page 3). However, we note that Meta continues to host news content, even in jurisdictions such as Australia where doing so effectively requires Meta to make what appear to be significant financial contributions.

<sup>26</sup> [ ]  
[ ]

*Urgency in allowing a provisional authorisation before the Commission has fully considered the matter*

40. The Commission did not identify any substantial and irreversible harm that would be avoided in the provisional period<sup>27</sup> if provisional authorisation were not granted. However, we consider in this case that news media companies may benefit from obtaining remuneration earlier. Such remuneration would at least partially mitigate ongoing financial challenges arising from a loss of advertising revenue associated with viewing news media online which has been experienced by independent news media, and would enhance those companies' ability to invest in journalism. This benefit may be particularly pronounced for smaller news media companies.
41. The Commission notes that participation in the Proposed Arrangement is not static, with Participants able to negotiate bilaterally with the Digital Platforms and exit from the Collective if they so choose. NZME has already elected to not participate in collective bargaining vis-à-vis Google.<sup>28</sup> If the Participants are not provisionally authorised to commence collective negotiations, further loss of Participants from the Proposed Arrangement could further reduce the potential benefits available. Any diminished ability to reduce transactions costs, negotiate marginal issues, and/or gain increased bargaining power may disproportionately affect smaller Participants (whom the evidence suggests may be less likely to be able to negotiate bilaterally with the media companies).

**Potential detriments from a provisional authorisation**

*Permanent market changes unlikely*

42. As set out in our COVID-19 Guidelines, provisional authorisation is more likely to be granted if it is unlikely to materially alter the competitive dynamics of the market, either permanently or for a substantial period, if the application for full authorisation is later declined.<sup>29</sup>
43. We consider that provisional authorisation of the Proposed Arrangement is unlikely to result in permanent structural changes to any relevant markets. Any collectively negotiated agreement, reached within the provisional authorisation period, would be contractual rather than structural.
44. We also considered the long-term effect on the supply of New Zealand news content that could result from publishers sharing sensitive information amongst themselves (including negotiating strategies). The obligation rests with the Collective to ensure it implements appropriate information sharing protocols to mitigate against the risk of sharing sensitive information which may facilitate horizontal coordination between Participants, in breach of the Act. Provided appropriate protocols are in place, we do

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<sup>27</sup> The term "provisional period" refers here to the period commencing on the date that provisional authorisation is applied for by the Applicant and lasting for the duration of the provisional authorisation.

<sup>28</sup> On 25 March 2022, a current NPA member, NZME, announced that it had signed a Letter of Intent with Google and updated its forecast outlook for the 2022 financial year. See NZME, "NZME signs letter of intent with Google and updates outlook for 2022" (press release, 25 March 2022).

<sup>29</sup> See COVID-19 Guidelines at [50.4] and [51].

not consider the impact of the Proposed Arrangement likely to be significant, nor lasting, given the decay in relevance of shared information over time.

45. We have also considered whether, due to the exclusion of certain parties from the Collective (including RNZ, TVNZ and Discovery), provisional authorisation could have material and lasting impacts on the market for supply of news content. We address this further in the following sections.

*Possible harm to competition in the supply of New Zealand news*

46. We also considered the potential impact of the Proposed Arrangement on news media organisations excluded from the collective bargaining – most notably, Crown owned or established broadcasting organisations such as TVNZ and RNZ; and foreign owned media companies such as Discovery (including Discovery’s news offering, Newshub).<sup>30</sup>
47. These parties and others submitted that exclusion from the Proposed Arrangement could negatively impact the ability of excluded parties to access funding from the Digital Platforms.<sup>31</sup> This in turn could hinder their ability to compete for resource, such as journalistic talent, ultimately harming their ability to compete effectively to supply New Zealand news content. They also dispute the grounds on which the exclusion has been made (ie, differences in structure and business models),<sup>32</sup> pointing to similarities in the digital offerings of the Participants and excluded news media organisations.<sup>33</sup>
48. In response, the Applicant submitted that:<sup>34</sup>
- 48.1 Some excluded news media organisations (such as RNZ and TVNZ) have or will soon have additional sources of funding (in particular, from the Government);
- 48.2 The differing business models and needs of the excluded news media organisations, who are primarily broadcasters, would complicate collective bargaining negotiations with the Digital Platforms, potentially to the detriment of current Participants;

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<sup>30</sup> RNZ, Submission in response to NPA Provisional Authorisation Application (1 December 2021); TVNZ, Submission in response to NPA Provisional Authorisation Application (1 December 2021); Discovery, Submission in response to NPA Provisional Authorisation Application (1 December 2021); Better Public Media Trust, Submission in response to NPA Authorisation Statement of Preliminary Issues (8 February 2022); and Discovery, Submission in response to NPA Authorisation Statement of Preliminary Issues (10 February 2022).

<sup>31</sup> RNZ submitted that exclusion poses the risk of a “closed shop” being created. See RNZ, Submission in response to NPA Provisional Authorisation Application (1 December 2021).

<sup>32</sup> NPA Authorisation Application at [1.3] and NPA, Cross-submission in response to NPA Authorisation and Provisional Authorisation (15 December 2021) at [3(a)], [4], and [36]-[38].

<sup>33</sup> Discovery, Submission in response to NPA Authorisation Statement of Preliminary Issues (10 February 2021) at [26] and TVNZ, Submission in response to NPA Provisional Authorisation Application (1 December 2021) at [5.4].

<sup>34</sup> NPA, Cross-submission in response to NPA Authorisation Application (15 December 2021) at [34]-[38].

48.3 Excluded media companies such as broadcasters can separately apply for authorisation to collectively bargain with the Digital Platforms if they so choose; and

48.4 [ ]<sup>35</sup>

49. We acknowledge that there is evidence to support submissions that funding and competition for journalistic talent represent significant competitive concerns for media companies.<sup>36</sup> However, on the evidence currently available, the Commission does not consider that provisional authorisation is likely to materially change the ability of the excluded news media organisations to enter into bilateral arrangements with the Digital Platforms if they choose to, or result in materially lower remuneration. Furthermore, we have not identified evidence that any offers made to excluded parties would be sufficiently different to the extent that it would materially impact their ability to compete in the supply of news content compared to any offers they are likely to receive if the Proposed Arrangement were not authorised.
50. The evidence before the Commission suggests that the Digital Platforms are willing to enter into bilateral negotiations, particularly with larger news media organisations such as the excluded broadcasters.
- 50.1 Google stated in submissions that it plans to engage in discussions with media companies, even in the absence of any collective bargaining authorisation.<sup>37</sup>
- 50.2 Meta stated in submissions it considers that the Application is not necessary as it has and will continue to collaborate with New Zealand publishers through investments such as bespoke commercial deals, video clip deals and the Aotearoa Audience Development Accelerator.<sup>38</sup>
- 50.3 NZME's agreement with Google, and continued negotiations with Meta, demonstrate that the Digital Platforms are actively engaging in commercial negotiations bilaterally.

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<sup>35</sup> NPA, Cross-submission in response to NPA Provisional Authorisation Application (21 December 2021) at [35].

<sup>36</sup> Concerns were raised by almost every interviewed party about the limited pool for journalistic talent in New Zealand: [ ];  
[ ] Media organisations face competition for talent not only within New Zealand but increasingly from Australia due to the additional funding available to Australian news organisations from the Digital Platforms and due to border restrictions relaxing in both countries: [ ]

<sup>37</sup> Google, Submission in response to NPA Authorisation Statement of Preliminary Issues (10 February 2022) at page 1; [ ]

<sup>38</sup> Meta, Submission in response to NPA Authorisation Statement of Preliminary Issues (11 February 2022) at page 3 and 4).

51. In the case of the excluded news media organisations specifically, we understand that:

51.1 [ 39]

51.2 [ 40]

51.3 [ 41]

52. The Commission considers that the excluded news media organisations are not likely to receive terms that are sufficiently materially worse because of the Proposed Arrangement so as to be substantially disadvantaged by their exclusion from the collective negotiations:

52.1 [ 42]  
[ 43]

52.2 Meta also noted that it had a separate investment strategy (to do with assisting news companies with digital transformation with its Accelerator programs, trainings, partnerships and video clip deals) that would proceed irrespective of the collective bargaining application.<sup>44</sup> We understand that [ ]

52.3 The Commission considers that the Collective is likely to have some degree of improved bargaining power, that may yield benefits, particularly for smaller Participants who would otherwise be less able to negotiate with the Digital Platforms. However, the limited membership of the Collective (discussed in paragraphs 10 to 14 above) means that this increased power is unlikely to be sufficiently substantial to give rise to outcomes for those in the Collective that render the excluded parties any worse off.

53. Therefore, the Commission does not consider it likely at this stage that the excluded parties would be materially harmed by provisional authorisation of the Proposed

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<sup>39</sup> [ ]  
<sup>40</sup> [ ]

[ ]

<sup>41</sup> [ ]  
<sup>42</sup> [ ]  
<sup>43</sup> [ ]

<sup>44</sup> Meta, Submission in response to NPA Authorisation Statement of Preliminary Issues (11 February 2022) at pages 15-16.

Arrangement. Indeed, there is some evidence which suggests that these news media organisations may have an existing advantage relative to the Collective as a result of their video content production capabilities being typically more advanced than those of the Participants. Such content may be of particular interest to the Digital Platforms as it can attract higher rates of advertising revenue than display advertising associated with text-based content.<sup>45</sup>

[ ]

54. [

]

55. We also considered the broadcasters' concerns that they would be excluded from non-price benefits, such as:

55.1 the prioritisation of news articles as linked on Facebook Feed and Google Search (in other words, their news articles would be deprioritised compared to those of the Participants);<sup>46</sup> and

55.2 [ ]<sup>47</sup>

56. Regarding prioritisation of news articles on Facebook Feed and Google Search:

56.1 Parties cannot negotiate (or even pay) for organic search results to appear higher up on Google Search (including Top Stories).<sup>48</sup> Based on Google's submissions to us, we understand its primary concern regarding Google Search to be ensuring that user queries are answered as effectively and efficiently as possible. Prioritisation of the news articles of certain publishers may jeopardise this intention. Therefore, we consider it unlikely that Google would be willing to incorporate such a non-price term (whether in or out of the Proposed Arrangement).

56.2 Facebook's website indicates that organic (non-advertising) content displayed on an individual's Facebook Feed reflects that person's activity on Facebook (eg, friends, Pages followed), and the Facebook algorithm places content Facebook considers to be the most relevant to the user at the top of the Feed.<sup>49</sup> Third parties can pay to promote their content as "boosted posts",

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<sup>45</sup> Discovery, Submission in response to NPA Authorisation Statement of Preliminary Issues (10 February 2022) at [25].

<sup>46</sup> [ ]

<sup>47</sup> [ ]

<sup>48</sup> "Tip: There is no way to request or pay for a better local ranking on Google." See Google Business Profile Help, "How Google determines local ranking" <<https://support.google.com/business/answer/7091?hl=en#zippy=%2Crelevance%2Cdistance%2Cprominence>>.

<sup>49</sup> Akos Lada, "How Does News Feed Predict What You Want to See?" (26 January 2021) <<https://about.fb.com/news/2021/01/how-does-news-feed-predict-what-you-want-to-see/>>.



which are advertisements created from posts on a user’s Facebook Page.<sup>50</sup>  
The Collective may wish to negotiate terms relating to boosted posts.  
However, excluded parties could also negotiate over such terms.<sup>51</sup>

57. Regarding the second potential non-price benefit,  
[  
] <sup>52</sup> the broadcasters may not  
benefit from such a term in any event  
[ ]

*Possible harm to news consumers*

58. We have considered the likelihood of potential harm to consumers of New Zealand news arising from any reduced competition between Participants that could result from the Proposed Arrangement. We received evidence that the Participants would be likely to continue to compete to supply news content.<sup>53</sup> The current Participants primarily compete by supplying news content to readers and viewers, to obtain revenue through advertising and/or reader-generated revenue. Although there may be agreement on how to approach negotiations with the Digital Platforms and/or shared agreement(s), this is unlikely to impact the existing market dynamics between the Participants that drive them to compete for readership and the subsequent advertising and subscription revenue in print and online. Parties interviewed indicated that if remuneration was received, this would represent an additional but not primary<sup>54</sup> source of revenue that would enable the Participants to supply more and/or higher quality news content in more innovative ways.<sup>55</sup>  
[  
] <sup>56</sup>

**Consistency with the purpose of the Commerce Act 1986**

59. In this case, we consider that granting provisional authorisation would be consistent with the purpose of the Act, which includes granting authorisation to agreements which are efficiency enhancing or of a benefit to New Zealand as a whole. Granting provisional authorisation to allow collective bargaining may enhance the efficiency of the negotiation process for the smaller news media companies involved.

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<sup>50</sup> Meta, “About boosted posts”  
<<https://www.facebook.com/business/help/240208966080581?id=352109282177656> >.

<sup>51</sup> [ ]  
<sup>52</sup> [ ]  
<sup>53</sup> [ ]  
<sup>54</sup> Parties interviewed suggested that any lessening in competition in the supply of news content was only likely to arise if the Participants derive a significant amount of revenue from the Proposed Arrangement.  
[ ]  
[ ]  
<sup>55</sup> [ ]  
<sup>56</sup> [ ]

## Conditions

60. The Commission has the power to grant a provisional authorisation subject to conditions. Discovery submitted that “it may be necessary to widen the scope of the proposed arrangement in order to address the potential anti-competitive effects”.<sup>57</sup> However, we do not consider conditions are appropriate in this case in order to realise the benefits of the provisional authorisation or to address any potential downsides. The Commission will give further consideration to the possibility of conditions on any authorisation granted ultimately.

## Duration

61. Under s 65AD(5) and (6), a grant of provisional authorisation remains in force until:
- 61.1 the end of a determined period;
  - 61.2 the application is revoked;
  - 61.3 the application is granted, declined or withdrawn; or
  - 61.4 the end of such a period imposed as the Commission sees fit.
62. The NPA applied for provisional authorisation of the Proposed Arrangement on 25 November 2021. It seeks a grant of provisional authorisation until the Commission either declines or grants the authorisation. The Commission considers it appropriate for the provisional authorisation to remain in force until the authorisation application is granted, declined, revoked or withdrawn.

## Update to the COVID-19 Guidelines

63. The Commission acquired the power to grant provisional authorisation in respect of an application for authorisation during a defined epidemic period in May 2020. The *Guidelines on Approach to Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act* were published in the same month. The COVID-19 Guidelines include a section relating to the grant of provisional authorisations.
64. However, from 5 May 2022 the Commission will permanently acquire a power under the Commerce Act to grant interim authorisations.<sup>58</sup>
65. In light of this change in legislation applying to the grant of provisional or interim authorisations, the Commission intends to review and revise its guidance in the near future.

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<sup>57</sup> Discovery, Submission in response to NPA Provisional Authorisation Application (1 December 2021).

<sup>58</sup> This law change means that the Commission’s power is not limited to the epidemic period, as noted by Meta. (See Meta, Submission in response to NPA Provisional Authorisation Application (8 December 2021) at page 14).

Dated this 11<sup>th</sup> day of April 2022

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Anna Rawlings  
Chair