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Commerce Commission
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NPA PROVISIONAL AUTHORISATION

- 1 We act for Discovery NZ Limited (**Discovery**).
- 2 We refer to the Commerce Commission's (**Commission**) Statement of Preliminary Issues dated 21 December 2021 (**Statement of Preliminary Issues**) and we set out in Discovery's comments on the likely benefits and detriments of the Proposed Arrangement (as defined in the application for authorisation filed by the News Publishers' Association of New Zealand Incorporated (**NPA**) dated 23 November 2021 (**NPA Application**)).
- 3 We note that on 1 December 2021, Discovery provided submissions on the application for provisional authorisation noting its concerns at a high level in relation to the Proposed Arrangement.
- 4 Discovery supports the need for collective bargaining with the Digital Platforms, as it would benefit the news journalism industry as a whole and is important to address the significant power imbalance between news content producers and the Digital Platforms.
- 5 The NPA submits that the Proposed Arrangement would have a number of pro-competitive effects, including assisting in sustaining ongoing production of valuable news and journalistic content and media plurality and its associated benefits for democracy; and contributing to funding to enable news media

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companies to combat disinformation and malinformation.¹ However, these benefits would not flow to all players in the relevant markets and would provide an unfair competitive benefit to those players who are part of the arrangement, and disadvantage those who are not.

6 The exclusion of certain news content producers from the Proposed Arrangement will have a significant detrimental effect on the market and the news industry as a whole.

7 For these reasons, Discovery is opposed to the Proposed Arrangement in its current form, unless it is amended to include all parties who produce news content, including Discovery.

The issues facing the news media industry and news content producers

8 In New Zealand, as in many other countries such as Australia, there has been a huge change in the way in which news content is published and consumed. The vast majority of news content in New Zealand is now consumed online and in digital format.

9 As set out in the NPA Authorisation Application, there is a significant disparity in bargaining power between the Digital Platforms and news content producers, which has allowed the Digital Platforms to obtain and monetise news content created by others for little or no value exchange.

10 This issue affects all news content producers, and we will therefore refer throughout the submission to "news content producers", which we consider include all those entities who produce and publish news content. This includes NPA members, TVNZ, RNZ, Maori TV and Discovery. This broad category is consistent with the definitions adopted in Australia in the News Media and Digital Platforms Mandatory Bargaining Code (**Media Bargaining Code**), discussed in more detail below.

11 News content producers invest significant amounts in creating news content for publication online. However, despite creating this content, content producers receive very little of the advertising or other revenue generated by this content.

12 Newshub (operated by Discovery) is the 3rd largest digital news offering in New Zealand behind Stuff and the Herald. Discovery has approximately 250 staff in its newsroom and invests significantly in the production of quality news content. News content is a large proportion of Discovery's schedule.

13 While there is some benefit to Discovery from referrals to its Newshub website from the Digital Platforms, this is not sufficient to cover the costs of producing the content, and does not reflect the reality that the Digital Platforms make considerable revenue from content for which they currently have no cost to obtain.

14 Discovery's view is that the relationships with the Digital Platforms, and the current imbalance of bargaining power, are a significant threat to news content providers and the news media industry, and if the current situation were to continue, the ability to invest in

¹ See Statement of Preliminary issues at [36.3]

quality news journalism and the viability of news content producers may be threatened. This would result in a loss of media plurality.

- 15 Discovery therefore supports the proposition that collective bargaining is part of the solution in dealing with the issues. However, any collective bargaining needs to include *all* news content producers. It is as a single and united collective that news content providers will be able to achieve the best results, rather than allowing the Digital Platforms to “divide and conquer”.
- 16 The Proposed Arrangement excludes certain news content producers from the arrangement in a way which is arbitrary and has significant detrimental effect on competition in the relevant markets.
- 17 It is for this reason that Discovery opposes the NPA Application for authorisation of the Proposed Arrangement in its current form.

The exclusions of certain news content producers are arbitrary

- 18 The Proposed Arrangement artificially excludes:
- 18.1 An "overseas person"; and
 - 18.2 Media entities owned or established by the Crown.
- 19 These exclusions have no logical basis because:
- 19.1 All news content producers operate in the same market for the purposes of negotiating with the Digital Platforms;
 - 19.2 The Media Bargaining Code in Australia does not contain similar exclusions;
 - 19.3 The ownership of a news content producer is not a relevant factor in negotiations with a Digital Platform; and
 - 19.4 The basis on which the NPA in its cross-submissions seeks to distinguish those excluded news content producers from NPA members show that the distinction is both artificial and arbitrary.

The relevant markets

- 20 One of the reasons why the exclusions in the Proposed Arrangement are arbitrary is because, for the purposes of assessing the Proposed Arrangement, excluded news content producers (such as Discovery and TVNZ) operate in the same market as NPA members.
- 21 The Commerce Commission (**Commission**) states in the Statement of Preliminary Issues, the NPA:²

² Statement of Preliminary Issues at [25].

- 21.1 *'does not expressly submit what the markets relevant to [the Commission's] assessment are in its Application but refers broadly to the New Zealand Media Industry'; and*
- 21.2 *'considers that NZME Limited and Fairfax New Zealand Limited [2017 NZCC 8 (NZME/Fairfax)] and the ACCC's July 2019 DPI Report 'have informed the Commission's understanding of the New Zealand media industry'.*
- 22 The ACCC's DPI report refers to a market for news referral services.
- 23 For the purpose of analysing the Proposed Arrangement, we consider that there is an additional market for news content, in which Digital Platforms (including Meta and Google) acquire (or obtain) content that is then displayed on their respective platforms. This is likely part of a two-sided market with audience markets for New Zealand news content for publication online.
- 24 For the purposes of negotiation with Meta and Google, the product offered by NPA members is similar to the product offered by Discovery and other excluded news content producers - what Meta and Google are seeking is content that can be used on each of their platforms.
- 25 In relation to format, the Digital Platforms prefer video content, as that drives better engagement. Newshub is traditionally more focused on video than written content than some other content producers, including NPA members. However, Stuff, NZME and other NPA members are increasingly producing video news content in order to meet the demand from both the Digital Platforms and from consumers.
- 26 There is a significant amount of cross-over between the businesses of excluded news content producers and NPA members. For example, three of the companies that the NPA represents cross over considerably with Discovery's model:
- 26.1 NZME has interests in publishing (various newspapers, magazines, websites), 10 radio brands, digital (five websites) and two community events. Further, New Zealand Herald provides not only written content but also video and audio (podcasts) content.³
- 26.2 Stuff Limited (**Stuff**) has interests in publishing (various newspapers as well as lifestyle/entertainment magazines and websites), audio offerings (various podcasts),⁴ a considerable amount of video content ('Play Stuff', an online video streaming service),⁵ a social network ('Neighbourly'),⁶ and

³ <https://www.nzme.co.nz/nzme-brands/>

⁴ <https://interactives.stuff.co.nz/podcasts/>

⁵ <https://play.stuff.co.nz/>

⁶ <https://www.neighbourly.co.nz/community/business>

community/entertainment events.⁷ Stuff's website describes its offerings as follows (emphasis added):⁸

*Stuff is New Zealand's largest website featuring local, national and world news as well as sections dedicated to business, sport, **life & style**, climate change, **entertainment, travel and more**. **Play Stuff is Stuff's own video destination**, powering our news video as well as offering viewers compelling and entertaining content to dip into or binge-watch at will.*

*Our magazines keep Kiwis keep up to date with **the latest entertainment offerings** in The TV Guide, the most **lust-worthy lifestyles** in NZ House & Garden and green-thumbed gardeners and their patches in NZ Gardener. Mags4Gifts is our home for readers to subscribe to magazines and newspapers alike.*

*We also help communities thrive by bringing neighbours together to build stronger, safer and more vibrant communities. **Neighbourly is New Zealand's largest online community platform** with more than 830,000 members throughout the country.*

*Our vibrant **Stuff Events portfolio** showcases the best of New Zealand, whether it's celebrating inspirational Women of Influence, bringing foodies together at the Night Noodle Markets, or enlisting runners of every ability to complete the iconic Ports of Auckland Round the Bays.*

- 26.3 Allied Press Limited's (**Allied Press**) website states that '*Allied Press Ltd is a South Island owned media company with interests in daily and community newspapers, **regional television stations, internet websites and commercial printing operations***' (emphasis added).⁹ As well as providing written news content, Allied Press operates 'Channel 39', a television channel.

Media Bargaining Code

- 27 The News Media and Digital Platforms Mandatory Bargaining Code (**Media Bargaining Code**) was introduced by way of legislation in Australia. The NPA relies heavily on the developments in Australia including the Media Bargaining Code.
- 28 However, the Media Bargaining Code does not contain the arbitrary distinctions included in the NPA Authorisation Application.

⁷ <https://www.stuffevents.co.nz/stuff-events>

⁸ <https://advertise.stuff.co.nz/about-us/>

⁹ <https://www.alliedpress.co.nz/>

- 29 The Media Bargaining Code applies to a "news business", which is defined to include any of the following if it produces and publishes news content¹⁰:
- 29.1 a newspaper masthead;
 - 29.2 a magazine;
 - 29.3 a television program or channel;
 - 29.4 a radio program or channel;
 - 29.5 a website or part of a website;
 - 29.6 a programme of audio or video content designed to be distributed over the internet.
- 30 Nor does the Media Bargaining Code draw any distinctions based on ownership of the news business. The news business does not need to be Australian-owned to be covered by the Media Bargaining Code, although we note that there is both a content test¹¹ and an Australian audience test¹², both of which relate to the content produced rather than the ownership of the business.

Business ownership is irrelevant

- 31 For the purpose of negotiation with the Digital Platforms, what is relevant is the news content, and the production and availability of such content, not whether or not the business in New Zealand owned.
- 32 The exclusion of an "overseas person" is also inconsistent with the fact that NZX listed entities are able to participate, despite the fact that a number of shareholders in such entities are or may be large global institutional investors.
- 33 We note that it may be argued that, as Discovery is a global entity, it may have more bargaining power with the Digital Platforms than New Zealand based entities. This is not correct. We note that:
- 33.1 While Discovery is a global brand, it has news operations in only two jurisdictions, New Zealand and Poland.
 - 33.2 News content is often specific to local jurisdictions and it is hard to leverage on a global basis.
 - 33.3 Discovery's operations outside New Zealand do not provide it with any countervailing power or any leverage in negotiations with the Digital Platforms. In fact, the Digital Platforms choose to negotiate only on a very limited

¹⁰ S52A Competition and Consumer Act 2010 (Australia)

¹¹ S52N Competition and Consumer Act 2010 (Australia)

¹² S52O Competition and Consumer Act 2010 (Australia)

geographical basis, and there is no opportunity for any party to leverage any perceived global power.

- 33.4 In any event, for the purpose of the Proposed Arrangement, what is relevant is Discovery's presence in the New Zealand market as a producer of news content.

Purported distinction between the NPA's members and Discovery

34 The NPA (in its cross-submissions filed on 15 December 2021) purports to distinguish its members from Discovery (and other news content producers who operate a similar business such as TVNZ and Maori TV) on two broad bases:

34.1 First, that its members have their 'genesis' in written publications as opposed to TV or radio broadcasting.

34.2 Second, that Discovery produces more than just news content, offering 'entertainment'.

35 As we discuss below, those purported distinctions confirm that the exclusions are artificial and arbitrary in the context of negotiations with the Digital Platforms.

Genesis

36 The NPA purports to represent '*the interests of "news publishers". That is to say, NPA's core constituency is news producers that have their genesis as news publishers in written form, rather than broadcasters, such as RNZ, TVNZ, and Discovery that have had their genesis in the broadcast of audio or video content (with that content often being general entertainment, and not just news, content)*'.¹³

37 The genesis of any given news provider is irrelevant. Whatever the genesis of a media content provider may be, many providers have evolved to provide content of various types (eg both news and entertainment) in various formats (eg written, audio and/or video). As a result, there is now significant cross-over between news providers either side of the NPA's arbitrary line.

38 As set out above, it is our view that news content providers, whatever their genesis, operate in the same markets, at least for the purposes of negotiating with the Digital Platforms.

39 Overall, the overall web-site offerings of NZME and Stuff are similar to Discovery's web-site offerings, in both format and content. In particular, Newshub (owned by Discovery), much the same as the New Zealand Herald and Stuff, provides written, and video news content.

¹³ NPA cross-submission, at [36].

News and entertainment

40 As set out above, the NPA describes Discovery's (and others') content as '*often being general entertainment, and not just news*'. This suggests that the NPA's members do not produce 'entertainment' content. However, the NPA's members clearly do not exclusively produce 'news', but produce considerable amounts of entertainment (and other non-news) content. For example:

40.1 NZME:

40.1.1 Only one of NZME's 10 radio brands is dedicated to news (Newstalk ZB). The remainder are largely dedicated to entertainment.

40.1.2 Of NZME's various publishing brands: two are dedicated to entertainment (Timeout and Spy), four are a mix of 'lifestyle' and entertainment ('Be Well', 'Travel', 'Viva', Canvas'); and two are trading platforms ('Driven' for motor vehicles and 'Oneroo' for property).

40.1.3 NZME produces two events, neither of which relate to 'news'.

40.1.4 Only one of NZME's five websites is dedicated to news (New Zealand Herald), with the remainder being 'iHeart Radio' (allowing online streaming of NZME's radio brands) and online trading platforms.

40.2 Stuff offers:

40.2.1 A social network ('Neighbourly').¹⁴

40.2.2 A website and mobile app dedicated to video content – with a mixture of entertainment and news ('Play Stuff').¹⁵

40.2.3 A housing magazine ('Stuff Homed').¹⁶

40.2.4 Entertainment and community events ('Stuff Events').¹⁷

40.2.5 'Stuff Podcasts',¹⁸ consisting of a mixture of entertainment and investigative content.

40.2.6 Magazines,¹⁹ mostly entertainment and lifestyle.

¹⁴ <https://www.neighbourly.co.nz/community/business>

¹⁵ <https://play.stuff.co.nz/>

¹⁶ <https://www.stuff.co.nz/life-style/homed/>

¹⁷ <https://www.stuffevents.co.nz/stuff-events>

¹⁸ <https://interactives.stuff.co.nz/podcasts/>

¹⁹ <https://mags4gifts.co.nz/collections/all>

The effect of the Proposed Arrangement on Discovery and on the relevant markets

- 41 If the Proposed Arrangement receives authorisation, then NPA members included as part of that arrangement will be able to negotiate a better return on investment from production of news or current affairs content, but Discovery (and others excluded) will remain disadvantaged.
- 42 The NPA submits that the Proposed Arrangement would have a number of pro-competitive effects, including assisting in sustaining ongoing production of valuable news and journalistic content and media plurality and its associated benefits for democracy; and contributing to funding to enable news media companies to combat disinformation and malinformation.²⁰ However, these benefits would not flow to all players in the relevant markets and would provide an unfair competitive benefit to those players who are part of the arrangement, and disadvantage those who are not.
- 43 The Proposed Arrangement will lessen the ability of Discovery (and others) to compete in the consumer markets for news content and will put the production of quality news and current affairs content at risk.
- 44 There will also be flow on effects in other markets should the Proposed Arrangement be approved, for example Discovery's ability to compete for journalistic talent will be compromised.
- 45 Please contact us if you require any further information.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Alicia Murray'.

Alicia Murray

Partner

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²⁰ See Statement of Preliminary issues at [36.3]