Application for clearance of a business acquisition under s66 of the Commerce Act 1986

Proposed acquisition by Are Media Limited of the shares in Ovato Retail Distribution NZ Limited

15 July 2021

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Part A – Executive Summary

Proposed Transaction

1. Are Media Limited (**Are Media**) has entered into a conditional agreement to acquire Ovato NZ Limited's (**Ovato NZ's**) magazine retail distribution business. Are Media is proposing to purchase 100% of the shares in Ovato Retail Distribution NZ Limited (**ORD NZ**) and Ovato Retail Distribution Pty Limited (**ORD Australia**) for AU$15M plus the assumption of approximately AU$27M in working capital liabilities, subject to customary adjustments (**Proposed Transaction**).

2. Ovato NZ's other New Zealand businesses – print, marketing and residential distribution – do not form part of the Proposed Transaction and will remain independently owned by Ovato NZ.

The Parties

3. Are Media is New Zealand and Australia's leading premium content and experiences company. A significant part of Are Media's business involves the production of content for print magazines. Are Media is the publisher of a number of titles formerly published by Bauer Media. Are Media is not involved in magazine retail distribution, but its Australian parent does hold a 16.4% shareholding in Ovato NZ's Australian parent company, Ovato Limited (**Ovato**).

4. Ovato is an integrated print, distribution and marketing company with operations in New Zealand and Australia. Ovato is listed on the ASX (ASX: OVT). ORD NZ is a subsidiary of Ovato NZ, and is New Zealand's largest distributor of print magazines and associated products. ORD NZ is not involved in the production of content for print magazines.

Application for Clearance

5. Completion of the acquisition of ORD NZ is conditional on receiving merger clearance from the Commerce Commission, and the satisfaction of other customary conditions.

6. Are Media is seeking clearance from the Commission for the acquisition of ORD NZ as quickly as possible. This is because **[**

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7. Completion of the Australian part of the Proposed Transaction is conditional on receiving clearance from the Australian Competition & Consumer Commission (**ACCC**).

No Prospect of Substantial Lessening of Competition in any Relevant Market

8. As noted above, Are Media is not involved in magazine retail distribution, and ORD NZ is not involved in the production of content for print magazines. There is some minimal overlap at the edges between the Parties for ancillary services involving subscription database management and advertising, but this is limited in nature with alternatives being readily available. Accordingly there is no material horizontal overlap between Are Media and ORD NZ. Instead this is a vertical merger.

9. This means that the key competition issue that arises for consideration in this application is the vertical effects of the Proposed Transaction. On this issue, Are

Media will have no ability and no practical commercial incentive to foreclose or discriminate against other publishers distributing their magazines through ORD NZ because:

9.1 Barriers to entry into retail distribution of magazines are low. For a new entrant, low capital investment would be required. The main requirements for starting up would include obtaining pick & pack and warehousing facilities (which do not need to be large and could likely be outsourced), demand forecasting software (which is available at varying levels of sophistication and is not cost prohibitive), transportation which is generally outsourced to a third party, an invoicing system, a billing system for collecting retailer payments, and a returns function. Barriers to expansion would be even lower for parties with existing distribution networks (for instance in respect of newspaper distribution);

9.2 There are significant constraints on ORD NZ's ability to increase prices regardless of the Proposed Transaction. These include publishers using retail distribution less if it were more expensive, putting more effort into increasing online publishing and subscription sales, stopping selling magazines altogether, delivering their titles directly to distribution centres operated by major retailers, or encouraging Stuff Limited (**Stuff**) and/or NZME to expand and distribute magazines in addition to their newspapers;

9.3 There are alternative sources of distribution that are available for other publishers which limit any ability for Are Media to foreclose against other publishers following the Proposed Transaction. Stuff, which is the second biggest publisher whose magazines are distributed by ORD NZ, is able to distribute its magazines using its own newspaper distribution network and arrangements. Other publishers may also be able to use Stuff's and/or NZME's newspaper distribution networks. All publishers have the ability to increase their distribution online or through subscriptions. Some publishers may also be able to send their magazines directly to major retailers who use their distribution centres to distribute the magazines to their retail outlets;

9.4 Retailers are well placed to exert significant pressure on Are Media (for example, by threatening to reduce prime shelf space available to Are Media's titles) if Are Media attempted to foreclose rival publishers whose titles are popular with the retailers' customers;

9.5 A foreclosure strategy would reduce profits at the distribution level for the merged firm post acquisition. This reduction is likely to be significant because a high proportion of ORD NZ's costs are fixed, and the potentially substitutable titles are published by firms that pay ORD NZ **[**

];

9.6 A foreclosure strategy is not likely to lead to an increase in profits at the publisher level large enough to outweigh the reduction in profits at the distribution level, because:

9.6.1 Foreclosure would lead the merged firm to lose the distribution of all titles of a publisher, whilst only some of the titles of that publisher may be potentially substitutable with one of Are Media's titles;

9.6.2 On average, approximately 40% of magazines distributed are not sold, which effectively means that, if 100 magazines were foreclosed, this would lead to a loss of profit at the distribution level for 100 magazines not delivered, while at the publisher level it is likely that there is only the possibility of capturing 60 lost sales;

9.6.3 Are Media is unlikely to gain many of the sales lost by the potentially substitutable titles; and

9.6.4 Stuff and/or NZME may start to offer magazines distribution services through their newspaper distribution network.

10. Even if there was a prospect of the profits at the publisher level outweighing the losses at the distribution level from implementing a foreclosure strategy, Are Media is unlikely, as a matter of commercial common sense, to risk the near certain losses that ORD NZ would incur from reduced volumes, for speculative gains at the publisher level.

No Risk of Coordinated Effects

11. The Proposed Transaction will not enhance the risk of coordinated effects in any relevant market post-acquisition because:

11.1 The lack of product homogeneity among magazines in New Zealand means that coordination is unlikely;

11.2 None of the relevant markets have a history of or show signs of co-ordinated conduct;

11.3 Retailers like supermarkets and service stations have significant countervailing power and are price sensitive; and

11.4 The Proposed Transaction will not result in the removal of a direct competitor in any relevant markets.

Part B – The Parties

Acquiring Party

12. The acquirer of the shares in ORD NZ is Are Media. Its contact details are:

Are Media Limited
Tenancy 1.4, 317 New North Road, Kingsland
Auckland, 1022
New Zealand

Attention:	Adrian Goss, General Counsel and General Manager - Corporate
Telephone:	+61 02 9282 8071
Email:	Adrian.Goss@aremedia.com.au

13. All correspondence and notices to Are Media in respect of this application should be directed in the first instance to:

Simpson Grierson
Lumley Centre
88 Shortland Street
Private Bag 92518
Auckland 1010
NEW ZEALAND

Attention:	James Craig / Elsie Stone
Telephone:	(09) 977 5125
Mobile:	(021) 497 713
Email:	james.craig@simpsongrierson.com elsie.stone@simpsongrierson.com

Selling Party

14. The seller of the shares in ORD NZ is Ovato New Zealand Limited. Its contact details are:

Ovato New Zealand Limited
44 Dalgety Drive, Wiri
Auckland, 2104
New Zealand

Attention: Tony Edwards, General Manager, Retail Distribution
Telephone: +64 9 928 4400
Email: tony.edwards@ovato.co.nz

15. All correspondence and notices to Ovato NZ in respect of this application should be directed in the first instance to:

Matthew Dunning QC
Telephone: (09) 358 2212
Mobile: (027) 294 7959
Email: matthew@dunningqc.co.nz

Part C – Transaction Details

16. This section contains:

16.1 A description of the Proposed Transaction;

16.2 An explanation of the rationale for the Proposed Transaction;

16.3 A summary of Are Media's intentions for ORD NZ;

16.4 A description of the other competition regulators being notified of the Proposed Transaction; and

16.5 A summary of the remaining information included in the Appendices to this application.

Proposed Transaction

17. Are Media is proposing to purchase 100% of the shares in ORD NZ and ORD Australia (**Proposed Transaction**) for AU$15M plus the assumption of approximately AU$27M in working capital liabilities, subject to customary adjustments. ORD NZ is wholly owned by Ovato NZ, and ORD Australia is wholly owned by Ovato. The Parties are proposing that the sale and purchase of each of ORD NZ and ORD Australia be completed separately.[1]

18. As part of the Proposed Transaction, Are Media will also indirectly acquire 100% of the shares in PMP Digital Limited. PMP Digital Limited was incorporated in 2006 as a subsidiary of ORD NZ. PMP Digital Limited is currently inactive and not trading. As a result, it is not addressed further in this application.

19. A copy of the Agreement for Sale & Purchase of Shares in ORD NZ (the **SPA**) is attached at **Appendix 1.**

20. A diagram showing the target entities to be acquired under the Proposed Transaction is attached at **Appendix 2**.

21. The Proposed Transaction is subject to the satisfaction or waiver of customary conditions, including but not limited to:

21.1 Are Media receiving a notice of clearance under section 66 of the Commerce Act 1986 from the Commerce Commission in relation to the acquisition of ORD NZ;

21.2 the New Zealand Overseas Investment Office granting a reasonably acceptable direction order under section 88 of the Overseas Investment Act 2005;

21.3 Are Media receiving a written communication from the ACCC stating that it does not propose to oppose, intervene or seek to prevent the acquisition of ORD Australia under the Competition and Consumer Act 2010; and

21.4 various counterparty consents from landlords and financiers.

1 See ASX announcement of 2 July 2021, *Update to Sale of Retail Distribution Australia and Retail Distribution New Zealand to Are Media Limited*: https://cdn-api.markitdigital.com/apiman-gateway/ASX/asx-research/1.0/file/2924-02391562-2A1307830?access_token=83ff96335c2d45a094df02a206a39ff4

22. The Parties are seeking to close the Proposed Transaction as quickly as possible in light of [ ] The Parties intend to close the Australian part of the Proposed Transaction by 31 July 2021, and the New Zealand part of the Proposed Transaction by 30 August 2021 or as soon as possible thereafter.

23. Ovato NZ's other businesses – print and residential distribution – do not form part of the Proposed Transaction, and are being retained by Ovato NZ.

Rationale for the Proposed Transaction

24. As described later in this application, the ongoing decline in the print magazine industry has resulted in Ovato experiencing significant financial difficulties.

25. In that context, the Proposed Transaction is [ ] This is because Are Media's predecessor (Bauer Media) independently decided to close its own separate distribution business and contracted its distribution to ORD NZ only five years ago.

26. Are Media's rationale for the Proposed Transaction is solely to [ ]

27. The operational risks arise because:

    27.1 In New Zealand, all of Are Media's magazine copies are distributed to retailers by ORD NZ;

    27.2 ORD NZ is currently the only distributor of magazines to retailers in New Zealand;

    27.3 Unlike other magazine publishers that distribute magazines through ORD NZ, which could use potential alternative distribution networks such as Stuff's and/or NZME's, there is no alternative potential distribution network for Are Media to utilise because no other potential distributor could handle:

        27.3.1 the large volumes of Are Media's titles (in contrast, other publishers have significantly lower volumes); and

        27.3.2 the 'time sensitivity' of Are Media's titles (in contrast, very few titles of other publishers are highly time sensitive).

28. This means that, [ ]

29. The financial risks arise because ORD NZ collects receipts from retail outlets and holds them as Are Media's agent before remitting them to Are Media. As a result, ORD NZ currently holds receipts owed to Are Media, as well as inventory belonging to Are Media. [ ]

Are Media's intentions for ORD NZ

30. Are Media intends to operate ORD NZ as a financially sustainable stand-alone business. The only way this can be achieved is by continuing to distribute the volumes of magazine copies of third party publishers as well as the volumes of magazine copies of Are Media, **[** **]** Currently, Are Media outsources the primary functions of Circulation, Allocations and Retail Representation to ORD NZ. These services are included in ORD NZ's distribution fee (although they are separated as an additional item). ORD NZ provides to Are Media data on sales, and sales reporting is then done internally by Are Media at its head office in Australia. Are Media only has access to its own data. Are Media intends that this process would continue in the same way post-acquisition. Any financial performance information will be reported at an aggregate level only and managed on distribution performance overall.

31. In this respect, Are Media's intentions for ORD NZ are similar to the way in which Are Media's predecessor (Bauer Media) operated its distribution business (Netlink) until it was outsourced to ORD NZ (under its former name Gordon & Gotch) in 2016. Until that time, Bauer Media (through Netlink) distributed magazines for a significant majority of third party publishers (accounting for approximately 77% of magazine distribution), all of which are now customers of ORD NZ. Bauer Media ran Netlink on an independent, arms-length basis in relation to third party magazine publishers. For example:

31.1 Netlink provided the same services to Bauer Media as it did to third party publishers, including retail representation. Netlink provided allocations and sales reporting to Bauer Media, and performed the same function for third party publishers, managed at a category level. Circulation / account management was managed at a publisher level;

31.2 Bauer Media's publishing division had no visibility from Netlink on the performance or costs of third party publishers. Financial performance was reported to Bauer Media's finance division, and information for third party publishers was aggregated, so any visibility was only at an aggregate level.

Other Competition Agencies Being Notified

32. The ACCC was notified of the proposed acquisition by Are Media of the equivalent distribution business in Australia on 16 June 2021. The ACCC has advised that it is conducting a public review of the Proposed Transaction.

33. Are Media has executed the standard waiver to enable the Commerce Commission to liaise with the ACCC in relation to the respective acquisitions in Australia and New Zealand, and this is included with this clearance application at **Appendix 8**.

Related Transactions

34. There are no other related transactions between ORD NZ and Are Media affecting New Zealand that have not been referred to above.

Required Documents / Information

35. We provide in **Appendices 3** to **7**:

35.1 a copy of, or link to, the most recent annual report, financial statements or management accounts for the relevant business units of the Parties; and

35.2 the names and contact details for the main other magazine publishers, the relevant industry association, and key retailers of magazines distributed by ORD NZ.

Part D – Counterfactual

36. In the absence of this acquisition proceeding, the likely counterfactual involves **[**

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37. Further information regarding this counterfactual will be provided directly to the Commission by Ovato NZ.

Part E – Industry

38. This section contains:

38.1 A description of the Parties and their respective activities;

38.2 An overview of the broader industry and trends, including the general decline in magazine publishing; and

38.3 A description of Ovato's financial difficulties in Australia and New Zealand.

The Parties' and their Respective Activities

Are Media

39. Are Media is a New Zealand and Australian premium content and experiences company, with a range of print and digital publications. In New Zealand, Are Media publishes a number of titles formerly published by Bauer Media.

40. Are Media has an extensive portfolio of well-known brands across the entertainment and lifestyle, fashion and beauty, home and garden, food, parenting, and auto categories. It sells 420,000 magazine copies every month in New Zealand.[2]

<u>Are Media's publications</u>

41. Are Media's popular New Zealand titles, and other relevant publications, are described in the table below:

PUBLICATION	DESCRIPTION	OTHER RELEVANT PUBLICATIONS
The New Zealand Listener 	*The New Zealand Listener* is a weekly current affairs magazine that covers a broad range of topics including politics, social issues, health, technology, arts and literature, food culture and entertainment. The Commission has previously classified *The Listener* as a current affairs magazine.[3] Between January – April 2021, Are Media sold **[ ]** copies of *The Listener*.	There are no other weekly current affairs magazines in New Zealand. Some local publications such as *North & South* contain current affairs stories and are printed less frequently.

2 See 2021 Media Kit, page 4: https://www.aremedia.com.au/wp-content/uploads/2020/11/Are-Media-2021-Media-Kit.pdf

3 NZCC, *Bauer Media Group (NZ) LP and APN Specialist Publications NZ Limited*, 23 January 2014, paragraph 51.

<table>
<tr>
<td>Your Home and Garden[4]

</td>
<td>Your Home and Garden covers home improvement, styling, interior design and practical advice that encourages readers to personalise and improve their homes.

The Commission has previously classified Your Home & Garden as a home and gardening magazine.[5]

Between January – April 2021, Are Media sold [ ] copies of Your Home & Garden.</td>
<td>Other local publications which cover similar topics include Haven (School Road Publishing), NZ House & Garden (Stuff), Homestyle (Pluto Group) and Home (Parkside Media).

Notably, within a broad category many publications have different target markets and therefore Are Media does not consider these to be direct competitors – for example Your Home & Garden and NZ House & Garden are both “home and gardening” titles but target different audiences.</td>
</tr>
<tr>
<td>Woman’s Day[6]

</td>
<td>Woman’s Day features celebrity news, pop culture and lifestyle content. It is New Zealand’s best-selling weekly women’s magazine.

The Commission has previously classified Woman’s Day as a “mass market women’s weekly magazine”.[7]

Between January – April 2021, Are Media sold [ ] copies of Woman’s Day.</td>
<td>Woman (School Road Publishing) contains similar content, as do a selection of imported weekly magazines like Hello! (Marketforce), and EWW (Marketforce).</td>
</tr>
<tr>
<td>New Zealand Woman’s Weekly[8]

</td>
<td>New Zealand Woman’s Weekly is the country’s most read magazine. Coverage in this magazine includes stories of well-known New Zealanders, the royal family, recipes, fashion and practical lifestyle information. The magazine also has a range of local columnists.

The Commission has previously classified Woman’s Weekly as a “mass market women’s weekly magazine.”[9]</td>
<td>Same as above.</td>
</tr>
</table>

4 https://www.yourhomeandgarden.co.nz/
5 NZCC, *Bauer Media Group (NZ) LP and APN Specialist Publications NZ Limited*, 23 January 2014, paragraph 52.
6 https://www.nowtolove.co.nz/womans-day
7 NZCC, *Bauer Media Group (NZ) LP and APN Specialist Publications NZ Limited*, 23 January 2014, paragraph 66.
8 https://www.nowtolove.co.nz/nz-womans-weekly
9 NZCC, *Bauer Media Group (NZ) LP and APN Specialist Publications NZ Limited*, 23 January 2014, paragraph 66.

	Between January – April 2021, Are Media sold **[ ]** copies of *Woman's Weekly*.	
The Australian Women's Weekly (New Zealand Edition)  	*The Australian Women's Weekly New Zealand Edition* is New Zealand's best-selling <u>monthly</u> women's magazine. It covers topics like celebrity news, particularly local celebrities and lifestyle content such as recipes and food. The Commission has previously classified Australian Women's Weekly as a "*women's interest magazine*".[10] Between January – April 2021, Are Media sold **[ ]** copies of *Australian Women's Weekly*.	There are no corresponding monthly publications available in New Zealand. However women's interest weekly magazines contain similar content as do some fashion and lifestyle publications.

42. Other magazines published and sold by Are Media in New Zealand include:

42.1 *Kia Ora Magazine* which is a custom publication for Air New Zealand and covers a broad range of lifestyle topics including new products, home, fashion, food and drink, wellness, beauty, culture and events. It has a particular focus on showcasing the best of New Zealand travel, accommodation, dining and entertainment. Kia Ora is offered for free to Air New Zealand passengers;

42.2 *Lucky Break* and *New Idea*, which are produced editorially from Australia and then printed in New Zealand; and

42.3 a number of other Australian publications, which are printed in Australia and freighted to New Zealand for distribution – these magazines are usually low in volume and on sale much later than local editions. In total, Are Media publishes nearly 40 different titles.

43. Further information about Are Media can be found at: https://www.aremedia.com.au/new-zealand-home/.

Ovato NZ

44. Ovato NZ is a subsidiary of Ovato. It consists of the following three divisions:

44.1 Ovato Print NZ, which provides a range of printing services, including commercial printing, catalogue printing, mass market and special interest magazine and newspaper printing, and packaging. An extensive bindery operation caters to all finishing requirements and also provides a mail-house service for addressed or unaddressed materials, including inserts

10 Paragraph 107.

and flow wrapping. Ovato Print NZ can also meet small run, variable data and digital print requirements, including business cards, notepads, marketing collateral and office materials;

44.2 Ovato Residential Distribution NZ, which provides nationwide or localised direct to letterbox delivery for catalogues, flyers, brochures, magazines, newspapers and other marketing material and collateral; and

44.3 ORD NZ, which manages the distribution of magazines to retail outlets across New Zealand.

45. As set out above, for New Zealand the Proposed Transaction relates only to the acquisition of ORD NZ. The other two divisions will be retained by Ovato NZ and continue to operate independently.

46. More information about Ovato NZ can be found at: https://www.ovato.co.nz/

ORD NZ

47. ORD NZ operates the largest retail distribution network for print magazines in New Zealand. It distributes approximately **[ ]** magazine copies across New Zealand per annum (approximately **[ ]** titles). There are approximately **[ ]** retailers in its New Zealand network, including convenience stores, book stores, supermarkets and petrol stations. It employs **[ ]** staff in New Zealand (**[ ]** warehouse staff and **[ ]** head office staff).

48. ORD NZ operates across the supply chain – managing physical stock, offering client services to publishers and retailers, and arranging freight with third party suppliers. The specific services it provides include:

48.1 Logistics management (such as shipping & freight, scheduling and invoicing);

48.2 Warehousing (such as inwards management, pick & pack, returns / audit, stock management);

48.3 Client services (such as account and circulation management and trade marketing);

48.4 Demand forecasting (such as print run recommendations and modelling); and

48.5 Retail services (such as national account management, category management and range reviews, barcode and price maintenance).

<u>ORD NZ's customers – print magazine publishers</u>

49. ORD NZ has **[ ]** publisher customers for print magazines, of which Are Media is the largest. ORD NZ's other customers can be divided into two categories:

49.1 domestic publishers, such as Stuff and School Road Publishing; and

49.2 overseas publishers and distributors, such as Seymour International Limited and Marketforce.

50. ORD NZ is vertically integrated with Ovato NZ's printing business. Its customers can also therefore be divided by:

50.1 Those whose publications Ovato NZ prints and distributes though ORD NZ, such as some Are Media publications; and

50.2 Those whose publications Ovato NZ (through ORD NZ) distributes but does not print, such as some Are Media publications and those of Lovatts Media Group.

51. ORD NZ distributes around **[ ]** magazine copies for Are Media in New Zealand. Are Media's magazines represent **[ ]** of ORD NZ's gross volumes for distribution.

52. The percentage of copies distributed by ORD NZ by its 30 largest publishers is set out in the table below. It shows that Are Media is the largest publisher whose publications are distributed by ORD NZ followed by Stuff and then a long tail of smaller publishers[11]**:**

53. The further table below provides a brief overview of the largest publishers that distribute their titles through ORD NZ.[12]

PUBLISHER	KEY TITLES	VOLUME P.A.
Are Media	*The Listener, Woman's Day, Kia Ora Magazine, Australian Women's Weekly*	**[ ]**
Stuff Limited	*NZ House & Garden, TV Guide, New Zealand Gardener*	**[ ]**
Market Force	*Hello, English Women's Weekly, Chat, Country Life, Country Homes & Interiors S/F, Pick Me Up* and others	**[ ]**

11 **[ ]**

12 Data based on 52 weeks to 13 June 2021

PUBLISHER	KEY TITLES	VOLUME P.A.
Seymour International	*Airfix Model World, Angelina Ballerina, Autocar UK,* various *BBC magazines*, *Boat International, Classic & Sports Car, Cosmopolitan UK, Country Living UK, Octane*, and others	**[ ]**
Lovatts Media	*Lovatts Crossword & Puzzles, Puzzle Fun for Kids, Inklings, Breathe, Nourish, Mindful Parenting*	**[ ]**
DC Thomson	*People's Friend, My Weekly, People's Friend Special, Jacqueline Wilson, Beano*	**[ ]**
School Road Publishing	*Woman, Haven, Thrive, Scout*	**[ ]**

<u>Distribution of print magazines</u>

54. Print magazines can be distributed to retail outlets or delivered directly to consumers' homes. Retail outlets such as book stores, convenience stores, service stations and supermarkets provide the overwhelming majority of magazine sales.

55. The distribution of magazines across ORD NZ's distribution network involves the following:

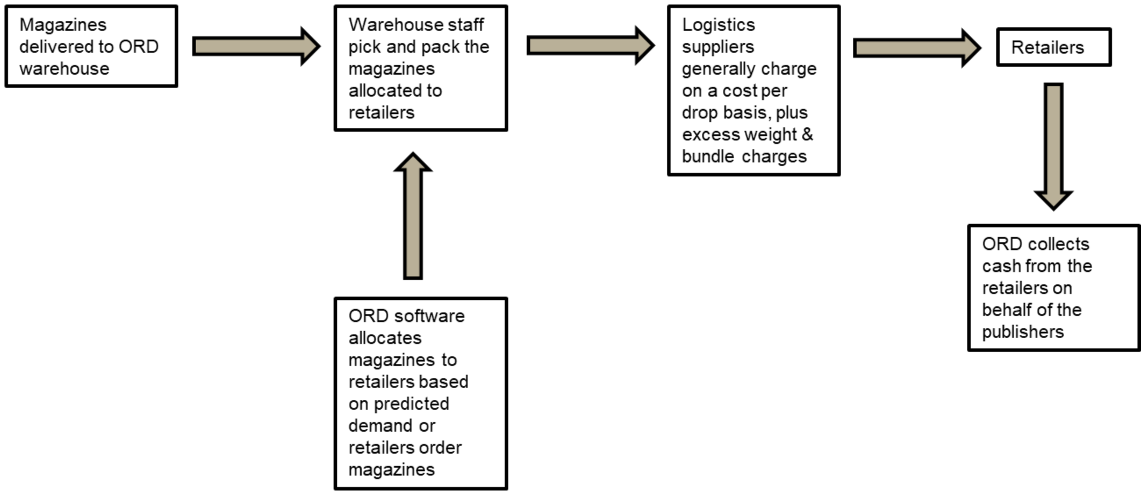
55.1 Magazines are delivered in bulk to ORD NZ's distribution centre in Auckland. Some of the magazines delivered are printed by Ovato NZ's printing business, and other magazines are printed by third party printers or shipped to New Zealand from overseas;

55.2 Magazines are allocated to retailers using an IBM statistical package together with TM1 software (called Spectrum), which predicts consumer demand for magazines by retailer. In some cases, ORD NZ will also receive specific orders for magazines from retailers;

55.3 Once packed for dispatch, magazines are collected by third party freight providers which deliver the magazines to retail premises across New Zealand. These third party freight providers predominantly charge on a cost per drop basis plus excess weight and bundle charges. ORD NZ uses NZ Post for all linehaul and instore deliveries; and

55.4 ORD NZ collects cash from retailers for payment to publishers.

56. The activities of ORD NZ are diagrammatically summarised below.



57. Domestic magazine publishers are charged either a distribution fee (charged per copy distributed) or a commission (based on the cover price of the magazine and inclusive of all distribution and freight costs), and international publishers are charged a commission (based on the cover price of the magazine and inclusive of all distribution and freight costs).

58. ORD NZ charges each publisher a single rate or commission (as the case may be) for the distribution of all of the publisher's titles except for limited circumstances in which ORD NZ charges a different rate to reflect the higher cost of distributing a particularly large publication (e.g. a special edition cook book). ORD NZ seeks to **[**

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<u>Retail sales channels</u>

59. ORD NZ has individual commercial arrangements with retailers. Under these arrangements, ORD NZ provides support in relation to stock and logistics, as well as data analytics and insights on the magazine industry to ensure the right allocation of magazines for each store.

60. Retailers are typically paid a commission (based on the cover price) for each magazine copy sold in store.

61. Supermarkets are the key retail channel for print magazines, representing a majority of ORD NZ's sales. Supermarkets also have a broad range of magazines.

62. A breakdown of the types of retailers ORD NZ distributes to and the number of relevant outlets is set out below:[13]

RETAILERS	DISTINCT COUNT OF OUTLETS
Convenience	**[ ]**
Service Stations	**[ ]**
Supermarkets	**[ ]**

13 ORD NZ data for the 13 weeks to 14/06/2021.

RETAILERS	DISTINCT COUNT OF OUTLETS
Bookstores	[ ]
Other	[ ]
Grand Total	**[ ]**

Delivery of time sensitive publications

63. A significant percentage of Are Media's titles (by volume) are 'time sensitive' and, from the time that they are printed, must be picked, packed, and delivered to retail outlets in just a couple of days. Titles can be time sensitive because the content reports on current events, or because they need to be distributed to align with particular promotions or events, for example the final episode of a popular TV show. ORD NZ estimates approximately half of the sales of weekly titles across all channels are sold in the first two days of the title being made available for sale.

64. 'Time sensitive' titles published by Are Media include weekly publications such as *Woman's Day* and the *NZ Woman's Weekly*.

65. ORD NZ is the only distributor in New Zealand that has the warehouses and processes capable of delivering large volumes of time sensitive titles on a national scale.

66. Most other publishers do not produce 'time sensitive' titles. In particular, titles that are delivered to New Zealand by sea freight (which includes the vast majority of United States, United Kingdom and Australian titles) arrive in New Zealand weeks after the on sale date of that title in their home country but remain relevant for New Zealand customers. Titles imported from the United States or the United Kingdom typically arrive in New Zealand around six weeks after the on sale date in those countries, while titles imported from Australia typically arrive around two weeks after the on sale date in Australia. These titles can be delivered to retail outlets in New Zealand over a number of days or weeks without becoming obsolete.

Other Distributors

67. ORD NZ is the only major independent distributor of magazines to retailers in New Zealand at present.

68. Are Media's predecessor (Bauer Media) operated its distribution business (Netlink) until it was outsourced to ORD NZ (under its former name Gordon & Gotch) in 2016. Until that time, Bauer Media (through Netlink) distributed magazines for a number of third party publishers, many of which are now customers of ORD NZ.

69. Stuff has its own contractors for retail distribution of its daily newspapers in the lower North Island and South Island of New Zealand. Are Media understands Stuff uses NZME's distribution network for distribution to retailers in the upper North Island. Stuff uses a system called Matrix for managing the demand forecasting and allocations for their newspaper volumes. This system could be converted for use with magazines.

70. If the price for distributing Stuff's magazine publications such as *NZ House & Garden, TV Guide, New Zealand Gardener* through ORD NZ became too high, Stuff could use its own newspaper distribution network (or NZME's) as an alternative.

71. Other channels to consumers that magazine publishers could adopt as an alternative to retail distribution include subscriptions, direct online sales and direct delivery to the distribution centres operated by major retailers.

Industry Decline

New Zealand

72. In its 2014 decision granting clearance to Bauer Media to acquire competing magazine publisher APN Specialist Publications, the Commission discussed various trends evident in NZ's magazine publishing industry, including declining magazine circulation and the increasing constraint of online media.[14] For example, the Commission noted that the internet was likely to be a source of content which was a close substitute for many consumers of women's mass market weekly magazines, such as *NZ Woman's Weekly*.[15] Circulation of such magazines had been declining since 2006[16] with PWC forecasting at the time that consumer spending on print magazines would fall by 2.5% per annum between 2012 and 2016.[17] This decline was suggested to be due in part to economic conditions as well as consumers switching to digital media.[18]

73. In addition to the constraint posed by online media, New Zealand's Covid-19 lockdowns caused significant disruption to New Zealand's magazine publishing industry. When New Zealand entered level 4 lockdown, Bauer Media discontinued its New Zealand business and all staff were made redundant. When lockdown ended, Are Media commenced distributing Australian publications in New Zealand, but did not publish any New Zealand publications. Are Media acquired certain of the titles previously published by Bauer Media and, in September 2020 Are Media recommenced publishing *The Listener, Your Home and Garden*, *Kia Ora* and *NZ Woman's Weekly*.

74. Since lockdown, several new independent publications have emerged in New Zealand. For example, the former editorial director of *NZ Woman's Weekly* and *NZ Woman's Day* joined School Road Publishing and launched four new titles: *Woman*, *Haven*, *Thrive* and *Scout*.[19]

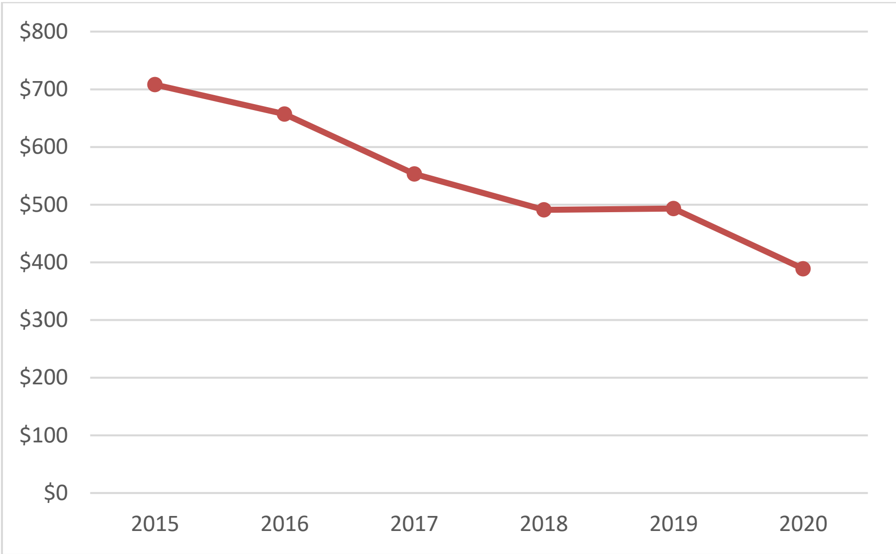
75. Some previous Bauer Media titles have also been revived under new private ownership, including *North & South* and *Metro,* which both relaunched in November 2020. *Fashion Quarterly* and *Home* were also bought by Parkside Media and relaunched.[20]

14 NZCC, *Bauer Media Group (NZ) LP and APN Specialist Publications NZ Limited*, 23 January 2014, paragraphs 43 - 44.
15 Paragraph 87.
16 Figure 2, paragraph 89.
17 Paragraph 90.
18 Paragraph 92.
19 https://thespinoff.co.nz/media/31-03-2021/one-year-after-the-nz-magazine-apocalypse/
20 https://thespinoff.co.nz/media/31-03-2021/one-year-after-the-nz-magazine-apocalypse/

Australia

76. Similarly to New Zealand, over the past decade in Australia the magazine publishing industry has faced a substantial and sustained decline in print magazine sales.[21] This is illustrated below.

Consumer magazine circulation[22]



77. In its Digital Platforms Inquiry, the ACCC identified the primary cause for this decline as rapid technological advancements which have changed the way consumers access media and advertisers target consumers.[23] The content that was previously curated into print magazines is now atomised and available for free, across increasingly personalised digital platforms. In turn, digital platforms provide advertisers with the opportunity to reach narrower target audiences more efficiently.

78. These industry dynamics have resulted in the closure of a number of magazine titles and the consolidation of publishers. **[**

.[24]

[25]

.[26]**]**

21 The ACCC recognised the long-term structural decline of the print magazine industry in its assessment of Bauer Magazine's acquisition of Pacific Magazines (see: ACCC, Public Mergers Register, *Bauer Media Pty Limited – Pacific Magazines Pty Ltd* (https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/bauer-media-pty-limited-pacific-magazines-pty-ltd)).

22 Source: PWC Industry Outlook, Consumer Magazines 2020 (https://www.pwc.com.au/industry/entertainment-and-media-trends-analysis/outlook/consumer-magazines.html).

23 ACCC, Digital Platforms Inquiry Final Report, 26 July 2019, page 168.

24 **[ ]**

25 **[ ]**

26 **[ ]**

79. **[** **]** is that the cross-elasticity of retail demand for magazines is not high **[** **]**

Ovato's Financial Difficulties

80. As a result of the substantial and progressive print industry decline and its high fixed costs, Ovato's financial position is currently very precarious:

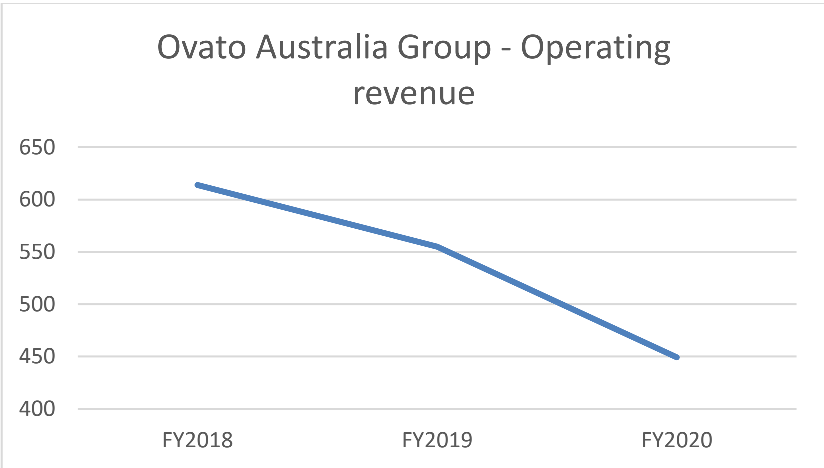
80.1 In the 12 months to 31 May 2021, Ovato suffered an 81% decline in its share price (as at 31 May 2021, Ovato's share price was $0.004, representing a market capitalisation of approximately $48 million); and

80.2 In FY2020, Ovato suffered a net loss after income tax of $108.8 million.

81. **[** **]**

82. The diagram below sets out the decline in the Ovato Australia Group revenue over the past few years.

Ovato Australia Group operating revenue[27]



83. In 2020, the compounding effects of ongoing declining revenues and the impacts of the Covid-19 pandemic put Ovato in serious financial difficulties and forced it to undertake an emergency A$40 million capital raising to restructure its balance sheet. Are Media's Australian parent contributed A$10 million in order to avoid any retail distribution disruption and, following a further placement of shares by Ovato on 18 March 2021, currently has a 16.4% shareholding in Ovato.

84. Ovato also undertook a number of steps to address its financial difficulties, including:

84.1 A new $17 million secured debt facility;

84.2 Write downs of $11 million in liabilities owed to certain creditors. Outside the scheme, bond holders had the value of corporate bonds reduced from $40 million to $15 million, which was then converted into equity in Ovato;

27 Ovato Annual Report2020, page 109.

84.3 Liquidating four companies;

84.4 Closing the Clayton printing facility and consolidating its production at Warwick Farm; and

84.5 Rationalising the workforce, including 300 redundancies at its Clayton facility and the introduction of a new enterprise agreement.

85. The capital raising and these steps have not stabilised Ovato's business. In particular, print volumes have not returned to the levels expected, and Ovato's suppliers have not returned Ovato to normal trading terms **[**

] This has meant that in the first half of FY21:

85.1 Sales were down 28.2% as against the first half of FY20; and

85.2 Ovato suffered a half year net loss before significant items of ~A$3.3 million and a net loss after significant items of ~A$9.7 million.

86. In order to ensure its print business remains viable, Ovato needs to sell its non-core assets, such as ORD Australia and ORD NZ.

Challenging Economics for ORD Australia and ORD NZ

ORD Australia

87. **[**

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[**]**[28]

28 **[**

]

[ ][29]

ORD NZ

88. Over the last three years, ORD NZ's EBITDA averaged **[ ]**. ORD NZ has experienced the same macro trends as those for ORD Australia set out above – in particular, declining magazine distribution volumes, offset by increasing prices.

89. Distribution volumes have declined, with ORD NZ heavily impacted in Q4 FY20 due to Covid-19 lockdowns (volumes declined by **[ ]** in FY20 and have since returned to trend). **[ ]**

[ ]

90. **[ ]**

90.1 **[ ]**

90.2 **[ ]**

29 ORD revenue for FY21 are estimates.

91. [ ]

Part F – Market Definition

92. This section contains:

92.1 A description of relevant past considerations by the Commerce Commission and the ACCC; and

92.2 An overview of the markets relevant to this application.

Past Consideration by Commerce Commission and ACCC

Commerce Commission

93. In its 2014 decision granting clearance to Bauer Media to acquire competing magazine publisher APN Specialist Publications, the Commission considered that it was unnecessary to reach a conclusion on the precise scope of the relevant market, as it was sufficient for the purposes of the decision to use various categories of magazine content to frame its analysis.[30] The product categories used to frame the Commission's analysis in that decision were:[31]

93.1 Current affairs magazines. The Commission considered *The Listener* as part of this category and noted that it did not have any close NZ competitors (as *Metro* and *North & South* had differing content and readers), although some constraint remained from newspapers and other current affairs media;[32]

93.2 Mass market women's weekly magazines, including *NZ Woman's Weekly* and *NZ Woman's Day*. The Commission considered that, if prices for these publications were raised post-merger, sufficient consumers would switch to online content to the extent that maintaining increased prices would be unprofitable for the merged entity.[33] The Commission noted that online media was a "*strong substitute*" for these magazines and that "*circulation of women's weekly magazines has fallen considerably in recent years*";[34]

93.3 Women's interest magazines, including *The Australian Women's Weekly*. The Commission considered that magazines in this category were constrained to a degree by other magazines in various categories, including fashion and cooking magazines, due to the similarities between readerships;[35]

93.4 Magazine advertising. In its assessment of whether the proposed merger would have unilateral effects in magazine advertising, the NZCC considered that the merged entity would be constrained by other forms of advertising, such as online advertising and television.[36]

94. In that decision the Commission discussed concerns which had been raised regarding the vertical effects of the proposed merger. These concerns specifically related to whether:

30 NZCC, *Bauer Media Group (NZ) LP and APN Specialist Publications NZ Limited*, 23 January 2014, paragraphs 43 - 44.
31 Paragraph 44.
32 Paragraphs 57 - 58.
33 Paragraph 86.
34 Paragraphs 87 - 88.
35 Paragraphs 110 - 112.
36 Paragraphs 121 - 122.

94.1 Post-acquisition, Bauer Media would be able to foreclose its competitors in magazine publishing from accessing prime shelf space in retail stores; and[37]

94.2 Post-acquisition, Bauer Media would direct its consolidated volume of magazines to its internal distribution network, Netlink, and thus foreclose Netlink's only competitor (ORD NZ, under its former name Gordon & Gotch) from the volume it needed to effectively compete.[38]

95. The Commission ultimately concluded that neither of these foreclosure concerns were likely to happen, and that therefore the merged entity was unlikely to have the ability and/or incentive to foreclose rival publishers and/or distributors and substantially lessen competition.[39]

ACCC

96. Similarly, in its 2019 Statement of Issues for Bauer Media's acquisition of Pacific Magazines, the ACCC's preliminary view was that there were separate markets for the supply of various categories of magazine content.[40] The ACCC identified the following categories in which the parties overlapped:[41]

96.1 Home & garden;

96.2 Celebrity;

96.3 Fashion & lifestyle;

96.4 Health & fitness;

96.5 Puzzles;

96.6 Food; and

96.7 Parenting.

97. It also considered that any market for the supply of advertising services would incorporate a range of channels, including print magazine and online advertising.[42]

Overview of Relevant Markets for this Application

98. For the purposes of assessing the Proposed Transaction, the Parties do not consider it is necessary to identify or rely on any particular market definition (or series of market definitions) as the Parties are not present to a material extent in the same horizontal market (as expanded on below), and the Proposed Transaction is not likely to have the effect or likely effect of substantially lessening competition in any market, regardless of the definition.

37 Paragraph 162.1.
38 Paragraph 162.2.
39 NZCC, Bauer Media Group (NZ) LP and APN Specialist Publications NZ Limited, 23 January 2014, paragraph 163.
40 ACCC, *Bauer Media – proposed acquisition of the business assets of Pacific Magazines*, Statement of Issues, 19 December 2019, paragraph 35.
41 Paragraph 8.
42 Paragraph 43.

99. Nonetheless, for completeness, the table below sets out potential product market definitions which encompass the parties' respective operations:

PRODUCT DIMENSION	ARE MEDIA	ORD NZ	GEO-GRAPHIC DIMENSION	DESCRIPTION
Distribution of print magazines	x	✓	**National**	This would include the warehousing and sorting of magazines, as well as delivering (or arranging for the delivery of) magazines to the retail channel (including newsagents, supermarkets, and convenience stores).
Supply of media content to consumers	✓	x	**National**	The Parties do not consider it necessary to form a conclusion on the precise market definitions for the supply of content to consumers. For the purposes of assessing the Proposed Transaction, the parties consider it is only necessary to note the following competitive dynamics: • **[ ]** ○ There is limited substitution between: ▪ the various categories of content identified by both the Commission and the ACCC **[ ]**; and ▪ the various titles within a category; and ○ **[ ]** • Content from online media imposes significant competitive constraints on magazine titles.
Supply of advertising services	✓	✓	**National**	Consistent with the two decisions described above, the Parties consider that any market for the supply of advertising services would incorporate a range of channels, including print magazine and online advertising.

Part G – Competition Assessment

100. The Proposed Transaction will not have the effect or likely effect of substantially lessening competition in any relevant market in New Zealand for the following reasons.

There is no material horizontal overlap between Are Media and ORD NZ

101. Are Media and ORD NZ do not compete with one another for supply of media content to consumers. The parties operate at different levels of the print media supply chain.

102. There is some minimal overlap at the edges for ancillary services between the Parties for subscription database management and advertising, but this is limited in nature with alternatives being readily available. Expanding on this:

102.1 ORD NZ provides a subscription database management service for **[ ]** publishers, and Are Media provides a subscription database management service. However ORD NZ has only provided this service **[ ]** and publishers can equally provide or obtain their own database management services (including from overseas providers). Accordingly, it is not a material horizontal overlap for present purposes; and

102.2 Since 2020 ORD NZ has been selling print advertising on behalf of a group of **[ ]**, as a secondary alternative to direct selling by those publishers of space in their magazines to advertising agencies. Are Media also sells advertising in relation to its titles. However, the advertising being sold by ORD NZ relates only to **[ ]**, and the audience is quite different from that of the more frequently published titles of Are Media. Moreover, the publishers that ORD NZ assists with advertising all have their own direct relationships with advertising agencies (i.e. ORD NZ is a second option for obtaining advertising services). In addition, as noted above, the Parties consider that any market for the supply of advertising services would incorporate a range of channels, including print magazine and online advertising. Again, for these reasons, any horizontal overlap for advertising is minimal in terms of its effects.

103. The Proposed Transaction will therefore not lead to any material horizontal aggregation in any relevant market.

104. As recognised by the Commission's Merger Guidelines, "*A merger between suppliers (or buyers) who are not competitors but who operate in related markets is less likely to result in a substantial lessening of competition than a merger between competitors. This is because such mergers do not lead to a direct loss of competition between the merging firms*."[43]

105. The Commission's Merger Guidelines note that the key issue to assess for vertical mergers is whether the merged firm would have the ability and/or the incentive to foreclose its competitors, and the likely effect of any such foreclosure on competition.[44]

43 NZCC, *Mergers and Acquisitions Guidelines* (July 2019) at page 35, at para. 5.1.
44 NZCC, *Mergers and Acquisitions Guidelines* (July 2019) at page 35, at para. 5.6.

Low barriers to entry

106. There are low barriers to entry for retail distribution of magazines.

107. For a new entrant, low capital investment would be required. The main requirements for starting up would include:

107.1 Demand forecasting software:

107.1.1 This is currently managed by ORD NZ using their "Spectrum" allocations software which forecasts the number of copies needed per outlet per issue based on historical sales and overlays variables such as promotions, seasonal variations e.g., holidays to determine the number of copies per title;

107.1.2 The current complexity with this is the number of titles/outlets and distribution days ORD NZ manages. The software not only allocates the number of copies but also aggregates the titles into a picking list for distribution – i.e. titles being distributed together on the same day to an outlet are "picked" together at outlet level. This information is also then used for invoicing purposes;

107.1.3 With a smaller number of titles, particularly monthlies, it is feasible to be able to calculate the number of copies within an advanced Excel based system with advanced analytics tools;

107.1.4 There are also systems available that are used by many industries for managing inventory which could be employed for allocations;

107.1.5 Magazines are effectively a push model – the allocation of magazines is determined by the supplier based on sales, ranging and other variables. For outlets such as Countdown and Whitcoulls it would be an option to look at a pull model where the retailer determines quantity;

107.2 Pick & pack and warehousing facilities:

107.2.1 The current ORD NZ process uses "pick to light" systems, but this is used primarily to manage the volume of publications currently processed by ORD NZ. Distributors dealing in smaller volumes could easily use a basic manual picking process;

107.2.2 Leasing of a warehouse would only need to be commensurate with the planned volume and basic pallet racking, palletising, strapping and wrapping needed to meet the requirements to service these functions;

107.2.3 Other options would be to outsource this function to one of the freight providers or fulfillment companies that provide this service to other manufacturers;

107.2.4 Another option would be to send required bulk amounts into the distribution centres of large retailers, where they could be sorted and distributed. However, this would work best for non-time sensitive products;

107.3 An invoicing system:

107.3.1 The spectrum system at ORD NZ sends the information to their JDE system which generates the invoice and manages billing;

107.3.2 At a basic level this could be managed by sending data to an ERP system to manage invoicing and collection of payments;

107.4 Transportation, which is generally outsourced to a third party e.g. ORD NZ currently uses Courier Post and Post Transport (both of which are part of NZ Post), but equally other courier companies could be used;

107.5 A billing and returns function:

107.5.1 ORD NZ currently bills retailers on delivery;

107.5.2 The retailer then remits to ORD NZ any unsold product as a credit against the payable amount, with some differences in process depending on the particular retailer;

107.5.3 Depending on the type of retail relationship, a publisher or new entrant could process returns manually and, if able to process data from the retailer, this process could be followed and managed by an accounts payable team.

108. Not all of the above requirements are needed on day one of operation. Some could likely be acquired as volume increases.

109. Barriers to expansion would be even lower for parties with existing distribution networks (for instance in respect of newspaper distribution). As discussed in more detail below:

109.1 It would be relatively simple for Stuff and/or NZME to adapt their existing newspaper distribution networks to distribute magazines;

109.2 Large retailers such as Foodstuffs, Countdown or Whitcoulls could distribute magazines through their distribution centres; and

109.3 Distributors of merchandise to retailers could also adapt their existing networks to distribute magazines.

110. Given these low barriers, new entry or expansion into retail distribution of magazines would be likely in the event of an increase in price by the merged entity post-acquisition. It would not take much time or investment to set up a competing magazine retail distribution business. Such entry and/or expansion would be sufficient in extent to constrain the merged firm because the loss of even a few publishers' titles would be likely to have a material impact on ORD NZ (as discussed further below).

There are constraints on ORD NZ's ability to increase prices regardless of the Proposed Transaction

111. ORD NZ is, and will remain, constrained in the prices it sets for retail distribution by:

111.1 The risk that publishers would use retail distribution less if it were more expensive, and put more effort into increasing online publishing and subscription sales:

111.1.1 This would reduce revenue and so profits for ORD NZ, and also increase the cost to ORD NZ of distribution per copy for the lower volumes that would remain; and

111.1.2 Lower retail sales also increases the risk that retailers would allocate less space to magazines, and some may stop selling them altogether – this is the greatest risk to ORD NZ both now and after the Proposed Transaction;

111.2 Publishers may stop selling magazines altogether – the magazine industry has been in decline for some time as set out above, and higher distribution prices would reduce profits for publishers further;

111.3 Publishers could deliver their titles directly to the distribution centres operated by major retailers (e.g. Foodstuffs, Countdown and Whitcoulls) who could distribute those titles to their retail stores;

111.4 Publishers could encourage Stuff and/or NZME to expand and distribute magazines in addition to newspapers; and

111.5 Publishers could move to an advertising commercial model whereby publishers give their magazines away for free and earn revenue through advertising alone – in this case, publishers would not need to use the retail distribution channel. For example, *Autotrader* changed to be distributed as a paid for magazine through the retail sector to a free model in 2008.[45]

112. These constraints are such that **[**

.[46]

] This is consistent with ORD NZ facing significant constraints to its conduct.

113. The Proposed Transaction does not affect these constraints, and so it will not be possible for ORD NZ to increase prices and earn greater profits at the distribution level. ORD NZ would have already increased its prices if this were possible.

No ability to foreclose against other publishers due to alternatives available

114. The ability to foreclose rivals refers to the extent to which the merged firm will be able to prevent or restrict rivals from distributing their magazines in New Zealand. This depends on the alternatives available to publishers.

115. In this case, there are alternative methods of distribution that are available for other magazine publishers which limit any ability of Are Media to foreclose or discriminate against other publishers post-acquisition of ORD NZ. These are:

115.1 All publishers have the ability to increase their distribution online or through subscriptions. In particular:

45 Auto Trader, *Auto Trader repositions brand*, 24 September 2008, available at: https://www.autotrader.co.nz/blog/auto-trader- repositions-brand/, accessed 3 June 2021.

46 **[**

]

115.1.1 Publishers can distribute their content to users online through a website or digital editions of their magazine (i.e. through an app or an aggregator like Apple News+);

115.1.2 Publishers could also increase the residential delivery of their print magazines, by selling subscriptions online or through print magazines, and then using NZ Post, or other logistics companies, to have the print magazines delivered directly to consumers' houses; and

115.1.3 Publishers could deliver their titles directly to major retailers (e.g. Foodstuffs, Countdown, and Whitcoulls) who could distribute those titles to their retail stores using their distribution centres.

115.2 Stuff, which is the second biggest publisher whose magazines are distributed by ORD NZ, is able to distribute its magazines using its own newspaper distribution network and arrangements.

115.3 Other publishers may also be able to use Stuff's and/or NZME's newspaper distribution networks.

116. A relatively small reduction in volumes distributed by ORD NZ as a result of publishers redirecting volumes to other channels is likely to have a material impact on ORD NZ given its high fixed base.

117. Further, retailers have significant countervailing power and could threaten to harm Are Media's titles (for example, by removing them from prime shelf space) if Are Media attempted to foreclose a rival publisher that published popular titles sold by that retailer.

118. Stuff's existing newspaper distribution network delivers newspapers to retail outlets and has many of the same characteristics as ORD NZ's retail distribution network, including:

118.1 A national footprint (Are Media understands that Stuff's distribution network covers the lower North Island and South Island of New Zealand and that Stuff uses NZME's network to distribute to the rest of New Zealand);

118.2 The capacity to handle large volumes of time sensitive titles (delivering newspapers every day);

118.3 Delivery services to the same retail outlets (e.g. newsagents, supermarkets and convenience stores); and

118.3.1 To the best of ORD NZ's knowledge, existing sub-contracts for the majority of its distribution logistics with third party logistic providers.

119. NZME's existing distribution network could also be an alternative, as it has similar characteristics to that of Stuff.

120. In order to transition to magazine distribution, ORD NZ expects that Stuff and NZME would need to develop additional 'pick and pack' functions in their warehouses and amend their relationships with retailers to include magazines. However, ORD NZ considers that these changes would not be overly burdensome on either entity.

No incentive to foreclose against other publishers

121. Any analysis of Are Media's incentives to foreclose or discriminate involves calculations of losses from reduced volumes distributed and profits from increased sales. It is important, in undertaking this analysis, to take into account Are Media's perceptions of the likelihood of the losses and gains. The respective probabilities are not equal. The losses from reduced distribution volumes and the fixed costs of that business are highly likely, if not certain. The gains are, by comparison, very speculative. Are Media is unlikely, as a matter of commercial common sense, to risk near certain losses for speculative gains.

Profits at the distribution level for ORD NZ would be reduced

122. A foreclosure strategy would reduce profits at the distribution level for the merged firm post acquisition. This reduction is likely to be significant because:

122.1 A high proportion of ORD NZ’s costs are fixed, which means that ORD NZ’s margin on additional sales is high; and

122.2 The potentially substitutable titles published by other firms pay ORD NZ **[ ]**

123. Expanding on this, firstly ORD NZ has a high proportion of fixed or semi-fixed costs, including:

123.1 A lease for its warehouse, storage and distribution centre and a lease for its corporate head office;

123.2 Capital goods, including the ‘TWI pick to light’ production line;

123.3 Staff, including management, administrative, and ‘pick and pack’ staff;

123.4 Software, including systems for billing and management of magazine allocations; and

123.5 Delivery costs, which are mostly ‘cost per drop’ plus excess weight and bundle charges (i.e. dependant on the number of retail stores serviced rather than the volume of magazines provided).

124. These large fixed and semi-fixed costs make incremental revenue important to ORD NZ’s profitability. The corollary to this is that ORD NZ’s profitability is very sensitive to reductions in volume. Specifically, ORD NZ is unable to materially reduce costs as volumes decline (or publishers cease trading).

125. Secondly, payments to ORD NZ vary greatly, i.e., for FY21 to May 2021 they are approximately:

125.1 **[ ]**

125.2 **[ ]**

125.3 **[ ]**

126. This illustrates that ORD NZ earns **[**

]

127. Only around **[ ]** of ORD NZ's sales by volume came from the distribution of Are Media titles. ORD NZ is therefore significantly dependent on sales of other publishers' magazines in order to maintain revenue. ORD NZ would not be financially viable without the revenue from other publishers.

It is highly improbable that profits at the publisher level would be sufficient to outweigh the profits lost for distribution

128. Any foreclosure strategy would likely lead to only a small increase in profits at the publisher level for Are Media relative to the reduction in profits at the distribution level, because:

128.1 Foreclosure would lead the merged firm to lose the distribution of all titles of a publisher, whilst only some of the titles of that publisher may be potentially substitutable with one of Are Media's titles;

128.2 On average, approximately 40% of magazines distributed are not sold which effectively means that, if 100 magazines were foreclosed, this would lead to a loss of profit at the distribution level for 100 magazines not delivered, while at the publisher level it is likely that there is only the possibility of capturing 60 lost sales;

128.3 Are Media is unlikely to gain many of the sales lost by the potentially substitutable title; and

128.4 Stuff and/or NZME may start to offer magazines distribution services.

129. We deal with each these points in more detail below.

<u>Foreclosure would lead the merged firm to lose the distribution of all titles of a publisher, whilst only some of the titles of that publisher may be potentially substitutable with one of Are Media's titles</u>

130. First, a large proportion of the magazines sold by some of the publishers that sell potentially substitutable titles do not in fact compete with those of Are Media. Foreclosure of a publisher is unlikely to be profitable when it means that the merged firm loses a large volume of distribution that does not lead to a corresponding gain at the publisher level.

131. There are not many titles that directly compete with titles published by Are Media (i.e. that include the same type of content directed towards the same audience). For example:

131.1 In the 'health and fitness' category, Are Media publishes a magazine called 'Better Homes and Gardens Diabetic Living', which is a lifestyle magazine for people with diabetes that includes health information, recipes, services and advances in diabetes health. Of the other titles delivered by ORD NZ in the 'health and fitness' category, none of these other titles focuses on diabetes living, and therefore none are likely to be considered competitive constraints on Are Media's Diabetic Living; and

131.2 In other categories where there are more obvious similarities between magazine content, those similarities are often superficial, and a closer analysis reveals important differences that mean the titles are rarely substitutable for customers. For example, *Womankind* is a magazine published by The Bull Publishing Pty Limited that is included in the broad 'Women's Interest' category. Superficially, Womankind could be considered similar to Are Media's magazine *Marie Claire Australia*, as both titles are directed towards female audiences and include general lifestyle content. However, there are significant differences in the type of content featured in each magazine which makes it unlikely that consumers would consider them substitutable: *Womankind* focuses on art, psychology, philosophy, and social issues. In contrast, *Marie Claire Australia* focuses on fashion, beauty, and general lifestyle content. Further, *Womankind* is an advertisement free magazine. A customer looking for the art and philosophical ad-free content in *Womankind* would be unlikely to consider *Marie Claire Australia* as a substitute.

132. Any direct competition that does occur between Are Media and other publishers occurs at the title level rather than the publisher level. However, ORD NZ's prices are set at **[ ]**

132.1 **[ ]**

132.2 **[ ]**

133. This means that, even where there are titles with substitutable content to Are Media's titles, it would be impractical to directly target those titles. Are Media would have to apply any foreclosure or discrimination strategy to the publisher's entire portfolio. This would have the effect of amplifying the likely distribution volume lost to ORD NZ, and therefore increase the risk that ORD NZ would not be able to cover its fixed costs.

134. For example, Seymour International's portfolio in New Zealand includes, among other titles, *Take a Break* magazine. If Are Media wished to discriminate or foreclose against *Take a Break* magazine (which it does not), it is unlikely that Are Media could target a foreclosure strategy only at *Take a Break* magazine since it would be likely that Seymour International would switch its entire portfolio to an alternative in response to that conduct. In other words, the distribution revenue at risk would not just be the revenue from the **[ ]** copies of *Take a Break* magazine distributed by ORD NZ annually, but also the revenue from the copies of magazines in Seymour International's portfolio distributed by ORD NZ annually.

<u>A proportion of magazines distributed are not sold, in which case foreclosure would lead to a loss of profit at the distribution level for the merged firm, without a gain at the publisher level</u>

135. On average, approximately 40% of magazine copies distributed are not sold. It follows that foreclosure will lead to a greater volume of distribution lost for the merged firm than magazines that could be purchased.

136. For example, in the 52 weeks ending 13 June 2021, **[ ]**

Are Media is unlikely to gain many of the sales lost by the potentially substitutable title

137. Are Media is likely to gain much less than all of the sales lost by competing publishers because:

137.1 Some customers will switch to a different publisher as a result of the foreclosure;

137.2 For some customers, titles that are similar are not substitutes (e.g. some people purchase all of the magazine titles that relate to a particular topic and therefore may already purchase the relevant Are Media title);

137.3 Customers may increase the content they view online and reduce magazine purchases all together; and/or

137.4 Some customers may choose not to consume the content at all.

138. Consistent with the points above:

138.1 **[** **]** the cross-elasticity of demand between magazine titles is not high **[** [47]**]**

138.2 The analogous experience of Are Media in Australia is that **[** **]**

138.2.1 **[** [48]**]**

138.2.2 **[** [49]**]**

47 **[** **]**

48 **[** **]**

49 **[** **]**

139. The closure of a magazine is a bigger change than that being considered in relation to a potential foreclosure (i.e. a magazine being available in fewer locations). Accordingly, any attempted foreclosure would have a smaller effect on the sales of Are Media's magazines than would a rival magazine closing down.

Stuff and/or NZME may start to offer magazines distribution services

140. Lastly, a publisher that is refused supply from the merged firm may seek distribution services from Stuff and/or NZME, which each have a newspaper distribution network as set out above.

No risk of coordinated effects

141. The Proposed Transaction will not enhance the risk of coordinated effects in any relevant market post-acquisition because:

141.1 The lack of product homogeneity among magazines in New Zealand means that coordination is unlikely;

141.2 None of the relevant markets highlighted above have a history of or show signs of co-ordinated conduct;

141.3 The Proposed Transaction will not remove any unique factors preventing co-ordination in the status quo. Nor would it lead to the emergence of a new factor which would provide an incentive for co-ordination in the future;

141.4 Retailers like supermarkets and service stations have significant countervailing power and are price sensitive; and

141.5 The Proposed Transaction will not result in the removal of a direct competitor in any relevant markets.

142. Notably, in its 2014 decision granting clearance to Bauer Media to acquire competing magazine publisher APN Specialist Publications, the Commission did not identify any concerns about an increased risk of coordinated effects, despite the fact that at the time Bauer Media still operated its own distribution division, Netlink, which distributed Bauer Media's publications as well as third party publications to NZ retailers.[50]

50 Commerce Commission, *Bauer Media Group (NZ) LP and APN Specialist Publications NZ Limited*, 23 January 2014, paragraph 20.

Part H – Confidentiality

143. Both public and confidential versions of this clearance application have been provided to the Commission.

144. Confidentiality is sought in respect of the information in the confidential version of this application that is highlighted in coloured shading. Confidentiality is sought under:

144.1 Section 9(2)(b)(ii) of the Official Information Act 1982 (**OIA**) on the grounds that the making available of that information would be likely unreasonably to prejudice the commercial position of the Party who supplied or is subject to the information;

144.2 Section 9(2)(ba)(i) of the OIA on the grounds that the information is subject to an obligation of confidence, and the making available of the information would be likely to prejudice the supply of similar information and it is in the public interest that such information should continue to be supplied; and

144.3 Section 9(1) of the OIA on the basis that the good reasons for withholding information on the grounds above are not outweighed by other considerations which render it desirable in the public interest to make that information available.

145. A schedule is provided in **Appendix 7** which identifies the confidential information and sets out the reasons for each confidentiality request with reference to the grounds in the OIA.

146. Are Media requests that it be notified of any request made to the Commission under the OIA for release of the confidential information, and that the Commission seeks its views (and those of Ovato NZ where applicable) as to whether the information remains confidential and commercially sensitive at the time responses to those requests are being considered.

147. The above applies equally in respect of any additional information subsequently provided to the Commission that is expressed to be confidential.

Part I – Declaration

I, **Adrian Goss**, have prepared, or supervised the preparation, of this notice seeking clearance.

To the best of my knowledge, I confirm that:

- all information specified by the Commission has been supplied;
- if information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to the applicant 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 an officer of the applicant and am duly authorised to submit this notice.

Name and title of person authorised to sign:

Sign: ___________________________ **Date:** ___________________________

Adrian Goss

General Counsel and General Manager - Corporate

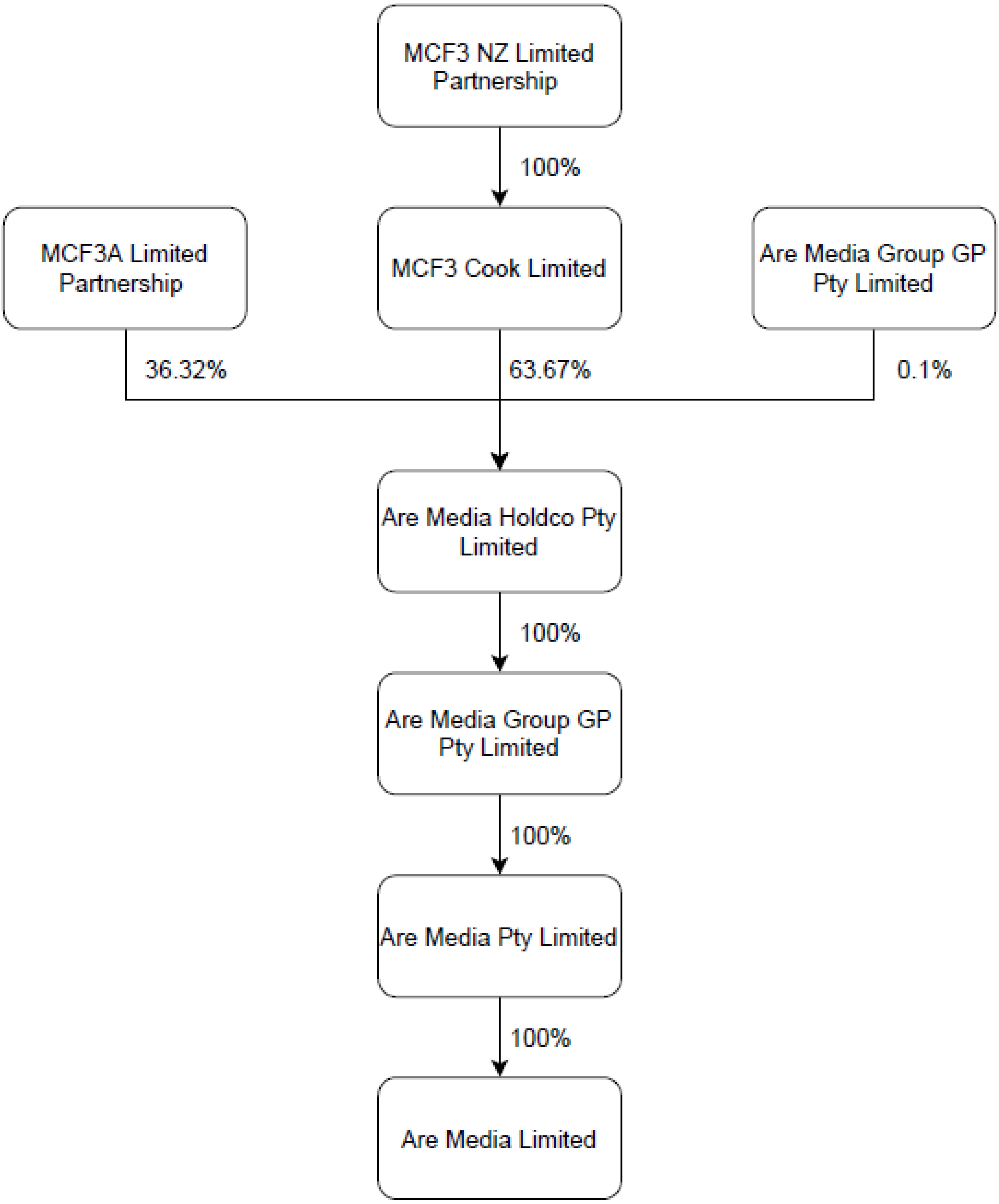
Are Media Limited

Appendix 1 – Transaction Documents

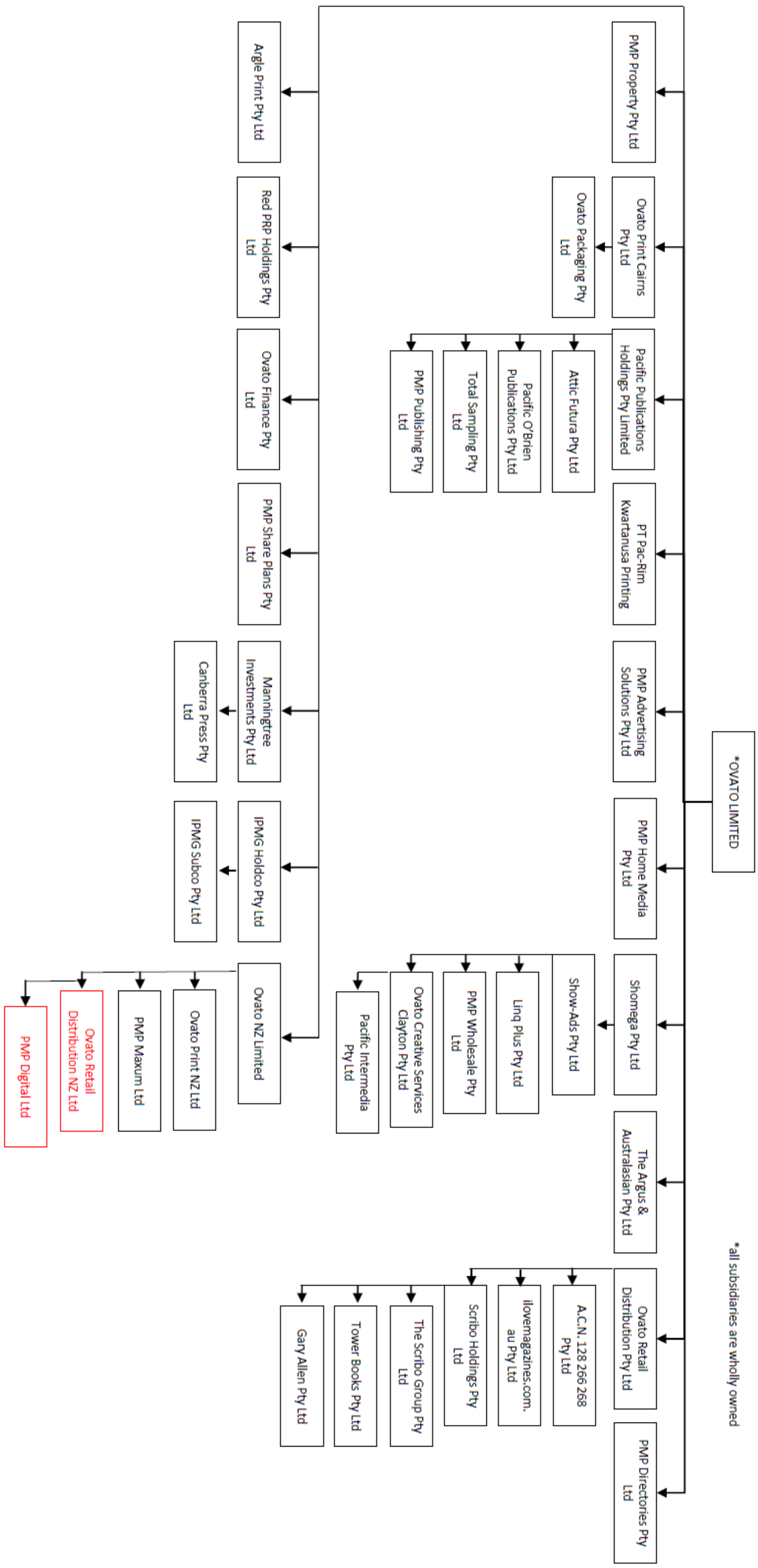
[ ]

Appendix 2 – Corporate Structure Charts

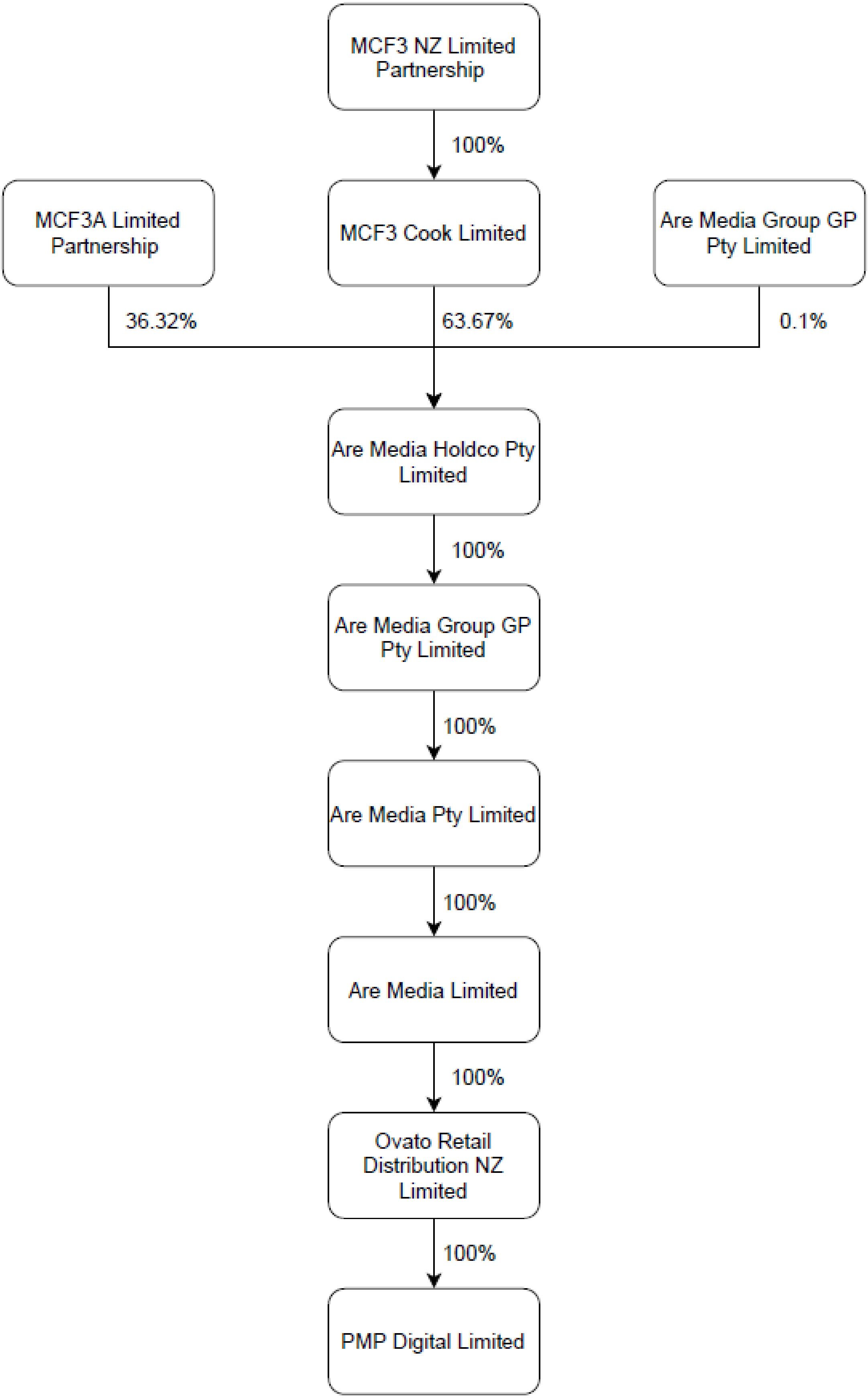
Are Media



Ovato NZ / ORD NZ



Are Media – Post Proposed Transaction with ORD NZ & PMP Digital



Appendix 3 – Ovato Limited Annual Report

See document **attached** to this application.

Appendix 4 – [ ]

[

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[ ]

[

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Appendix 5 – [ ]

[ ]

Appendix 6 – Details of Key Publishers, Industry Association & Retailers

Key Other Publishers of Magazines

Other Publishers	Contact Details
Stuff Limited	Liz Badenhorst Sales Operation Manager [ ] [ ]
Seymour International	Tracey O'Sullivan Managing Director [ ] [ ]
Lovatts Media	Rachael Northey CEO [ ] [ ]
School Road Publishing	Sido Kitchen Group Publisher [ ] [ ]
Marketforce UK Limited	Richard Salsbury Head of International [ ] [ ]
Parkside Media	Greg Vincent Publisher [ ] [ ]
North & South Media	Martine Skinner General Manager [ ] [ ]
McHugh Media	Michael McHugh CEO & Editor-in-Chief [ ] [ ]

NZ Industry Association

Association	Contact Details
Magazine Publishers Association	Phone: [ ] (Sally Duggan – Executive Director) Address: PO Box 911168 Victoria Street West Auckland 1010 Website: Home | Magazine Publishers Association (mpa.org.nz)

Key Retailers

Name	$ RSV value[51]	Contact
Foodstuffs NI	**[ ]**	Maddie Corkill Category Manager – GM (excl Seasonal) **[ ]** **[ ]**
Countdown	**[ ]**	Brian Gribben Category Manager – General Merchandise **[ ]** **[ ]**
Foodstuffs SI	**[ ]**	Kaitlyn Peterson Category Manager **[ ]** **[ ]**
Paper Plus Group	**[ ]**	Jenni Keestra Category Books & Magazines **[ ]** **[ ]**
Whitcoulls Group	**[ ]**	Joan McKenzie Book Manager **[ ]** **[ ]**
Supervalue / Fresh Choice	**[ ]**	Kyle Bradbury Category Manager **[ ]** **[ ]**

51 **[ ]**

Appendix 7 – Confidentiality Schedule

PARA	REASON FOR CONFIDENTIALITY	RELEVANT OIA SECTION
6.	[ ]	Section 9(2)(b)(ii).
9.5	[ ]	Section 9(2)(b)(ii)
22.	[ ]	Section 9(2)(b)(ii)
25.	[ ]	Section 9(2)(b)(ii)
26.	[ ]	Section 9(2)(b)(ii)
28.	[ ]	Section 9(2)(b)(ii)
29.	[ ]	Section 9(2)(b)(ii)
30.	[ ]	Section 9(2)(b)(ii)

36.	**[ ]**	**Section 9(2)(b)(ii)**
41.	**[ ]**	**Section 9(2)(b)(ii)**
47.	**[ ]**	**Section 9(2)(b)(ii)**
49.	**[ ]**	**Section 9(2)(b)(ii)**
51.	**[ ]**	**Section 9(2)(b)(ii)**
51.	**[ ]**	**Section 9(2)(b)(ii)**
52.	**[ ]**	**Section 9(2)(b)(ii)**
53.	**[ ]**	**Section 9(2)(b)(ii)**
53.	**[ ]**	**Section 9(2)(b)(ii)**
58.	**[ ]**	**Section 9(2)(b)(ii)**
62.	**[ ]**	**Section 9(2)(b)(ii)**
78.	**[**	**Section 9(2)(b)(ii)** **Section 9(2)(ba)(i)**

	]	
79.	[ ]	Section 9(2)(b)(ii) Section 9(2)(ba)(i)
81.	[ ]	Section 9(2)(b)(ii)
85.	[ ]	Section 9(2)(b)(ii)
87.	[ ]	Section 9(2)(b)(ii)
88.	[ ]	Section 9(2)(b)(ii)
89.	[ ]	Section 9(2)(b)(ii)
90.	[ ]	Section 9(2)(b)(ii)
91.	[ ]	Section 9(2)(b)(ii)
99.	[ ]	Section 9(2)(b)(ii) Section 9(2)(ba)(i)
102.1	[ ]	Section 9(2)(b)(ii)
102.2	[ ]	Section 9(2)(b)(ii)
112.	[ ]	Section 9(2)(b)(ii)
122.2	[ ]	Section 9(2)(b)(ii)

125.1	[ ]	Section 9(2)(b)(ii)
125.2	[ ]	Section 9(2)(b)(ii)
125.3	[ ]	Section 9(2)(b)(ii)
126.	[ ]	Section 9(2)(b)(ii)
127.	[ ]	Section 9(2)(b)(ii)
132.	[ ]	Section 9(2)(b)(ii)
134.	[ ]	Section 9(2)(b)(ii)
136.	[ ]	Section 9(2)(b)(ii)
138.	[ ]	Section 9(2)(b)(ii) Section 9(2)(ba)(i)
Appendix 1	[ ]	Section 9(2)(b)(ii) Section 9(2)(ba)(i)
Appendix 4	[ ]	Section 9(2)(b)(ii)
Appendix 5	[ ]	Section 9(2)(b)(ii)
Appendix 6	[ ]	Section 9(2)(b)(ii) Section 9(2)(a)
Appendix 7	[ ]	

Appendix 8 – ACCC Confidentiality Waiver

Background

1. Are Media Limited (**Are Media**) is proposing to purchase 100% of the shares in Ovato Retail Distribution NZ Limited (**ORD NZ**) (**Proposed Transaction**). ORD is wholly owned by Ovato NZ Limited (**Ovato NZ**).

2. An application for informal merger clearance in respect of the Proposed Transaction has recently been lodged with the Australian Competition and Consumer Commission (**ACCC**).

3. The New Zealand Commerce Commission (**NZCC**) will be considering the application pursuant to its powers and obligations under section 66 of the Commerce Act 1986 (**NZCC Purpose**).

4. As part of the proposed application for merger clearance, Are Media has provided, and will continue to provide, the NZCC with information confidential to Are Media for the NZCC Purpose (**Confidential Information**).

5. The Confidential Information that is to be provided to the NZCC is subject to confidentiality obligations arising from all relevant statutes, regulations and other laws (including the provisions of the Official Information Act 1982) (**Confidentiality Obligations**).

Waiver

6. Are Media consents to the NZCC sharing the Confidential Information with the ACCC subject to the conditions set out below (**Confidentiality Waiver**).

Conditions

7. Prior to disclosing any Confidential Information to the ACCC the NZCC must receive written confirmation[52] from the ACCC that the ACCC will apply the confidentiality protections under all relevant statutes, regulations and other laws that would be applicable if Are Media had provided the documents and information directly to the ACCC.

8. The Confidentiality Waiver granted is limited to Confidential Information given to the NZCC in the course of performing its duties for the NZCC Purpose and does not apply to information obtained in the course of any other review of any case either now or in the future.

9. Where the NZCC has provided Confidential Information to the ACCC in accordance with the terms of this document, a failure by the ACCC to treat that information in the manner described in paragraph 8 above will not give rise to any liability on the part of the NZCC.

10. The Confidentiality Waiver does not constitute a waiver by Are Media or ORD NZ of their rights under the Confidentiality Obligations with respect to the protection afforded to Are Media or ORD NZ against the direct or indirect disclosure of information to any third party other than the ACCC.

52 If the ACCC has a written statement or policy confirming that the ACCC will apply the confidentiality protections in the manner described above, written confirmation from that authority is not required.

11. The Confidentiality Waiver does not extend to any materials asserted by Are Media or ORD NZ to be privileged.

12. The Confidentiality Waiver does not limit the ability of the NZCC to disclose information that it would otherwise be able to disclose in accordance with relevant laws, including the NZCC's ability to provide compulsorily acquired information and investigative assistance to recognised overseas regulators under sections 99B to 99P of the Commerce Act 1986.

Name and title of person authorised to sign:

Adrian Goss
General Counsel and General Manager – Corporate
Are Media Limited

Signature:

Date: