

Hon Kris Faafoi
Minister for Broadcasting and Media

STRONG PUBLIC MEDIA – UPDATE ON DRAFTING OF BILL AND FURTHER DECISIONS REQUIRED

Date:	6 May 2022	Priority:	High
Security classification:	In Confidence	Reference:	BR2022/209

Minister	Action Sought	Deadline
Hon Kris Faafoi Minister for Broadcasting and Media	<p>Agree to provide feedback on the draft establishment provisions set out in Appendix 1.</p> <p>Confirm the proposed approach to transition set out in Appendix 2.</p> <p>Agree that the Bill deem that the transfer of shares of TVNZ and RNZ to the new public media entity is not an “acquisition” for the purposes of s.47 of the Commerce Act.</p> <p>Note that we will provide you with an updated copy of the Bill along with a draft LEG paper on 12 May</p>	9 May 2022

Contacts			
Name	Position	Contact	1 st Contact
Liz Stewart	SPM Programme Director	s9(2)(a)	✓
Elisa Eckford	SPM Principal Policy Advisor		

Minister's office to complete <input type="checkbox"/> Approved <input type="checkbox"/> Declined <input type="checkbox"/> Noted <input checked="" type="checkbox"/> Needs change <input type="checkbox"/> Seen <input type="checkbox"/> Overtaken by events <input type="checkbox"/> See Minister's notes <input type="checkbox"/> Withdrawn
Comments:

Purpose

1 This briefing:

- updates you on progress with the drafting of the SPM legislation and the next steps.
- provides you with a draft of the establishment provisions of the Bill for your initial review.
- seeks your views and decisions on a number of details requiring clarification in relation to the Bill, including confirming the broad approach to the transition from RNZ/TVNZ to the new entity.

Key Messages

- 2 Manatū Taonga provided initial drafting instructions on the SPM Bill to the Parliamentary Counsel Office (PCO) on 22 February, the day following the Cabinet decision.
- 3 Over the past few weeks, PCO has provided us with initial versions of the first and second halves of the Bill, with Manatū Taonga continuing to provide feedback to ensure Cabinet's intent is accurately captured.
- 4 This paper attaches a draft of the establishment provisions (the first half of the Bill) for your initial review.
- 5 You agreed that a previous draft version of the establishment provisions be shared with the Establishment Board at their meeting on 4 May. The Board discussed the provisions and identified some areas for further clarification.
- 6 There are a number of features of the Bill you may particularly want to focus on in reviewing this draft, including as a result of feedback from the Establishment Board:
 - the entity's legal name
 - the charter provisions (clauses 11 to 13)
 - provision of content free on first publication (clause 16)
 - provision of commercial-free services (clause 17)
 - inclusion of Te Māngai Pāho in collaboration requirements (clause 19)
- 7 Drafting of the transitional provisions (the second half of the Bill) has been paused to allow us to confirm the details of the approach with you. The proposed approach has evolved slightly from that set out at a high level in the Cabinet paper, and would transfer all staff and functions to the new entity on commencement, with the structure of the new entity essentially comprising two business groups delivering

RNZ and TVNZ functions respectively, governed by an interim executive. The Establishment Board supported this approach.

- 8 Following advice from MBIE and Bell Gully, and engagement with the Commerce Commission, we are also seeking a further decision from you on whether and how the Bill should address issues relating to the application of s47 of the Commerce Act 1986 (which prohibits acquisitions that are likely to substantially lessen competition).

Recommendations

- 9 The Ministry for Culture and Heritage recommends that you:

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|---|---|----------|
| 1 | provide feedback on the draft establishment provisions set out in Appendix 1, including: | |
| | a whether you are comfortable with Aotearoa New Zealand Public Media as the entity's legal name, or have any other views on the legal name | YES / NO |
| | b confirming that you are comfortable with the potential revenue and access implications of cl.16 in the light of the concerns raised by the Establishment board | YES / NO |
| | c confirming that cl.17 is not intended to completely prevent the entity from offering radio services on a commercial basis | YES / NO |
| | d confirming that you are comfortable with the inclusion of collaboration with Te Māngai Pāho (Te Reo Whakapuaki Irirangi) as well as with NZ On Air as part of cl.19 | YES / NO |
| 2 | confirm the proposed approach to transition set out in Appendix 2 | YES / NO |
| 3 | agree that the Bill deem that the transfer of shares of TVNZ and RNZ to the new public media entity is not an "acquisition" for the purposes of s.47 of the Commerce Act | YES / NO |
| 4 | note that we will provide you with an updated copy of the Bill along with a draft LEG paper on 12 May | NOTED |

Liz Stewart
SPM Programme Director

06 / 05 / 2022

Hon Kris Faafoi
Minister for Broadcasting and Media

_____ / _____ / 2022

Progress with drafting the Bill

- 10 Manatū Taonga provided initial drafting instructions on the SPM Bill to the Parliamentary Counsel Office (PCO) on 22 February, the day following the Cabinet decision.
- 11 Over the past few weeks, PCO has provided us with initial versions of both halves of the Bill, with Manatū Taonga continuing to provide feedback to ensure Cabinet's intent is accurately captured.
- 12 This paper attaches a draft of the establishment provisions (the first half of the Bill) for your initial review and notes feedback from the Establishment Board on these provisions relating to their implementation responsibilities.
- 13 Drafting of the transitional provisions (the second half of the Bill) has been paused to allow us to confirm the broad approach with you.

Draft establishment provisions

- 14 The draft establishment provisions are attached as **Appendix 1** for your initial review. This part of the Bill sets out the purpose, functions, governance and obligations of the entity. This draft was shared with the Establishment Board for their meeting on 4 May.
- 15 In reviewing this draft, you may particularly want to focus on the following areas, and on the Establishment Board's feedback on them, where applicable.

Entity name

- 16 s9(2)(h) [REDACTED] The entity is likely to have a legal name which will be used in the legislation and a 'trading' name which will be used day-to-day (similar to the Broadcasting Commission/NZ on Air - Irirangi te Motu).
- 17 The Establishment Board has considered alternatives to Media New Zealand and has suggested "Aotearoa New Zealand Public Media" as the legal name. We would appreciate your views on this name and/or any alternatives.
- 18 Note that we will be seeking the Board's advice on an approach to develop the entity's trading name later in the establishment process.

Definition of 'content' and 'broadcasting'

19 s9(2)(h) [REDACTED]

20 [REDACTED]

Charter provisions

22 The entity charter is set out in clauses 11 to 13 of the Bill. Technically, the ‘charter’ is defined as the functions of the entity (cl.12) performed in accordance with its objectives (cl.11) carried out in a particular manner - i.e. its operating principles (cl.13) This way of structuring the charter provisions ensures alignment with the Crown Entities Act 2004.

23 Proposed clause 13(2) of the Bill provides that implementing the charter is a statutorily independent function – this affords significant protections to the entity in that it can’t be directed by Ministers in relation to how it implements its charter.

24 As agreed by Cabinet, the responsible Minister is still able to direct the entity to undertake additional functions as long as they are consistent with the charter (cl.15(5)).

Free content on first publication

25 Clause 16 gives effect to the Cabinet decision that content must be broadcast free of charge on the content’s first publication in New Zealand.

26 Cabinet also required that the entity maximise access to public media content – this is given effect to in the entity’s charter, particularly clause 12(1) which provides that the entity will select and broadcast freely-available, accessible and high-quality content across all genres.

27 Some members of the Establishment Board have raised concerns that the restrictions potentially imposed by clause 16 may impact on the commercial opportunities open to the entity and potentially work against its ability to ensure that all New Zealanders can easily access content (if it restricts future platforms that key audiences such as young people or particular ethnic communities might be using). Their specific concerns include that this will:

- prevent the entity from launching content, or providing content exclusively, on subscription platforms, even where this could help improve access (e.g. getting podcasts to a wider audience, or reaching a particular underserved group that engages almost exclusively with a specific subscription platform)
- make it difficult to secure rights (e.g. to sports events) where there is a need to provide some content on a subscription or pay-per-view basis (either because of contractual arrangements or to be able to afford the cost of acquiring the content)
- make it harder to respond to new developments in the way audiences access content, e.g. in relation to the ‘metaverse’, where content creators may want

to use the new entity's platforms to connect with audiences in virtual spaces, but would need to be able to generate revenue from that content

- rule out a model where new content could be charged for as a premium service but made available for free later – which could potentially still achieve the same objectives of generation of commercial revenue/free access to content, especially if that content would have been too expensive to purchase/create without generating that revenue
- generally limit the entity's opportunities to earn commercial revenue to ensure funding sustainability and inhibit its ability to pay for content for niche or underserved audiences.

28 In keeping with the Cabinet decision, clause 16 prevents the new entity from charging for content of any sort unless it has been provided for free first. The effect of this clause is not to prevent content being charged for altogether – so it would be possible under this clause, for instance, for the entity to put content on a subscription platform where it has previously been available for free (notwithstanding archiving obligations), or to offer a subscription platform to view content without advertising where that content can be viewed for free with advertising elsewhere. But it would not be able to launch content exclusively on a paid platform, screen live content (e.g. sport) on a subscription platform, or to charge for new content initially and make it available for free subsequently.

29 In addition to this, the charter provisions impose a broad obligation on the new entity to ensure that it provides content that is “freely-available” and “accessible¹” but do not specify that all content must be provided free of charge. This would allow for the possibility for the entity to put content on a subscription-only platform if it could be shown that this would enhance availability/access – for instance if a particular platform was the best way of ensuring a particular group had access to content.

30 In Manatū Taonga's view, the drafting of the bill accurately reflects the intent of the Cabinet decision. However, you may wish to confirm that you are comfortable with the potential implications of this decision in the light of the concerns noted above.

31 The Establishment Board Chair, Tracey Martin, is seeking a meeting with you to discuss this issue.

Commercial-free services

32 Clause 17 of the Bill requires the entity *to provide services in a commercial-free manner if they are the same, or substantially the same, as services provided by RNZ before the commencement date.*

33 The Establishment Board raised the issue of whether this would prevent the new entity providing any commercial radio services in the future – i.e. whether ‘radio’ generally would be considered a “service” under clause 16.

¹ Note that “freely-available” and “accessible” in this context has a variety of dimensions including in relation to platforms, disabilities, internet access, language and location – as well as ability to pay.

34 Manatū Taonga's understanding of the intent of this clause was not to prevent radio services being offered on a commercial basis entirely, but to prevent advertisements being put into current programmes and services such as RNZ Concert, Morning Report etc. We are discussing the impact of the current wording of this clause with PCO and will update you on this issue. In the meantime, we would appreciate your confirmation that our interpretation of Cabinet's intent on this issue is correct.

Inclusion of Te Māngai Pāho in collaboration requirements

35 The original Cabinet decision was that the entity should be required to work collaboratively with NZ On Air (and vice versa) in relation to funding decisions. Based on PCO advice, the Bill includes collaboration with Te Māngai Pāho (Te Reo Whakapuaki Irirangi) as well (see cl.19) – reflecting that NZ On Air currently has an obligation under the Broadcasting Act to have regard to Te Māngai Pāho in its funding decisions.

36 If you are comfortable with this addition, we can seek Cabinet agreement through the LEG paper.

Approach to transitional provisions

37 The second half of the Bill will comprise the transitional provisions - provisions setting out how RNZ and TVNZ will be subsumed into the new entity.

38 The high-level approach set out in the Cabinet paper envisaged that RNZ/TVNZ would transfer into the new entity as Crown entity subsidiaries, with both entities retaining their board for a transitional period and continuing to deliver public media services until the new entity is fully operational. The rationale for this approach was the constrained timeframes (which would make it difficult to do any restructuring of current arrangements), the desire for continuity for both staff and audiences, and the intent to avoid triggering any non-assignment clauses in TVNZ's current international content agreements.

39 Because the approach set out in the Cabinet paper was a high level one, Manatū Taonga has been working to provide more specific detail to support drafting of the transitional provisions in the Bill. This includes developing a picture of what the governance, structural and other arrangements will look like at all stages of the transition process.

40 As a result of this further work, the proposed approach has evolved from that envisaged in the Cabinet paper to one where all staff and functions immediately transfer to the new entity on commencement, with the structure of the new entity essentially based on two business groups delivering RNZ and TVNZ functions respectively, governed by an interim executive. In Manatū Taonga's view, this approach is the simplest way of transitioning RNZ and TVNZ to the new entity while still achieving the objectives set out in the Cabinet paper (and avoiding creating issues in relation to TVNZ's content agreements). It also has the advantage of offering more clarity to current staff regarding transitional employment arrangements.

41 The table included as **Appendix 2** sets out what would happen during each phase under this approach. Note that the table focuses on the details needed to draft the empowering legislation – there will be significant further work needed to fill out the details of the transitional process, organisational structure etc.

42 The Establishment Board was comfortable with the broad approach, although they were concerned generally about the timing available for appointment of a new Chief Executive and executive following commencement. We have undertaken to go back with further thinking on this – but it will not affect the transitional provisions in the legislation (which will simply provide for the disestablishment of the existing RNZ/TVNZ Boards and the appointment of a new Board on commencement).

43 We are keen to confirm this broad approach with you to enable final drafting of these provisions by PCO.

Application of s.47 of the Commerce Act 1986 – legally privileged

44 s9(2)(h)

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Next steps

50 Following your feedback on this paper, we will:

- instruct PCO to reflect the agreed approach in the transitional provisions of the Bill
- instruct PCO to reflect any agreed changes in the establishment provisions of the Bill.

51 We will also reflect any further decisions needed in the LEG paper, and provide you with a draft of the LEG paper and next version of the complete Bill on 12 May.

52 The following table sets out key dates in the process for your information. Note that the timelines are very tight and will require some things to happen at the same time rather than consecutively (for instance, we will need to go out for departmental consultation at the same time as providing you with a copy of the LEG paper and Bill).

Activity	Date
Updated copy of Bill provided to you along with draft LEG paper	12 May
Departmental Consultation	12 to 16 May
Ministerial Consultation	18 to 25 May
Lodgment for LEG Committee	1 June
Bill at LEG committee	9 June
Bill at Cabinet	20 June

Appendices

Appendix 1: Media New Zealand Bill – draft establishment provisions

Appendix 2: Proposed approach to transition

Appendices 1 & 2 are withheld under s9(2)(g)(i). Note: the bill, now known as Aotearoa New Zealand Public Media Bill is available at:
<https://www.legislation.govt.nz/bill/government/2022/0146/latest/LMS647920.html#d610079e2>.