

Plurality and Privacy – the fringes or frontier of competition law?

A recent NZ case study in *Fairfax/NZME*

Sarah Keene, Partner

Background to the merger

- Fairfax (Stuff) and NZME = two largest print companies in NZ
- Industry experiencing disruption:
 - Print subscriptions (still majority of revenue) declining
 - Google and Facebook dominate advertising revenues online
- Merger would 'extend the runway' to pivot into profitable online business
- Applied for clearance / authorisation to merge (May 2016)

NZCC Determination - Clearance

- Aggregation in online news, and paid and unpaid print papers
- Most print markets are already regional monopolies
- 5 to 4 in large scale production of online news: other large competitors = MediaWorks, TVNZ, and RNZ (the national broadcaster)
- NZCC finds SLC in reader side of online news, Sunday papers, 10 community newspapers
- No issues in online advertising or syndication of content

NZCC Determination - Authorisation

- NZCC shall grant authorisation if satisfied transaction would result in such a benefit to the public that it should be approved
- This is a balancing test, comparing benefits and detriments
- At time of application (per NZCC *Authorisation Guidelines*):
 - Balancing exercise approached asymmetrically
 - Broad view of public benefits – non-efficiency / out-of-market
 - Narrow view of public detriments – in-market only

- 37 In our assessment we regard a public benefit as any gain to the public of New Zealand that would result from the proposed transaction regardless of the market in which that benefit occurs or whom in New Zealand it benefits. We take into account any costs incurred in achieving benefits.³⁰
- 38 In contrast, in assessing detriments we only consider anti-competitive detriments that arise in the market(s)³¹ where we find a lessening of competition (whether substantial or otherwise).³²
- 39 To illustrate the difference in our approach to benefits and detriments, if a transaction gives rise to a lessening of competition in market A and benefits in market A and market B, then:
- 39.1 the public benefit is counted across both markets A and B; and
 - 39.2 only those detriments arising in market A are counted.

NZCC Determination - The balancing exercise

- Public benefits:
 - NZCC agreed transaction would result in ~NZ\$40m to \$200m net efficiency gains over 5 years
- Public detriments:
 - NZCC argued transaction would cause a loss of 'plurality'
 - Both in-market (quality) and out-of-market (plurality) effects

Applicants' submissions on plurality

- Parties argued that plurality only relevant as an element of quality:
 - The policy focus of the Commerce Act is on economic welfare
 - The NZCC is not obliged to 'fill' a regulatory gap in the media sector
 - Plurality (as an out-of-market detriment) is not relevant at the clearance stage, so should not be 'unlocked' at the authorisation stage
 - The relevant 'detriments' in the balancing exercise derive from the SLC
 - The 'netting off' in the balancing stage is to net off costs associated with achieving the benefits, not to introduce new public detriments

Microsoft / LinkedIn

The Commission analysed potential data concentration as a result of the merger with regard to its potential impact on competition in the Single Market. Privacy related concerns as such do not fall within the scope of EU competition law but can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor. In this instance, the Commission concluded that data privacy was an important parameter of competition between professional social networks on the market, which could have been negatively affected by the transaction.

European Commission – Press release (6 December 2016)

Prior statements by Commission Chair

*At the outset, it should be said that **the Commerce Commission does not have a brief to protect the public interest generally in respect of those areas in which it has jurisdiction.** Indeed, its ability to examine such questions arises only after there has been found to be some adverse effect on competition. In the case of mergers and takeovers there must be a "dominant position" [i.e. an absence of effective competition] acquired or strengthened as a result of the proposal. In the case of a restrictive trade practice, the practice must either "substantially lessen competition in a market" or otherwise fall within the Act because it is thought to restrict competition by definition or is deemed to restrict competition. **The Commission can not therefore look at other public interest aspects of a merger or takeover, e.g. in the case of a media takeover that it threatens the independence of the press; that the financial gearing of a proposal is such that it would jeopardise shareholders' interests; that the acquirer of an insurance company or bank is not sufficiently sound to protect the interests say of policy holders or depositors. In this respect, the Commerce Commission differs from its various relatives in the United Kingdom the Office of Fair Trading and the Monopolies Commission, who are in certain circumstances charged with a wider responsibility than for competition matters alone.** Under the Commerce Act, the public benefit is simply something which may allow the privilege of a dominant position in the case of a merger or takeover, or the privilege of engaging in a restrictive trade practice as defined by the Act. The Commission does not have a brief for all aspects of the public interest in respect of either mergers and takeovers or restrictive trade practices. Further, any public benefit or detriment must, subject to what will be said later, flow from the dominance or lessening of competition.*

Then-Chairman of the Commerce Act, J.G. Collinge, 'Determining Public Interest Under the Commerce Act: A Review to Date' (presented at a seminar, International Perspectives on the Application of Competition and Consumer Laws, 1987)

Asymmetry was rejected

9. If the merger was to proceed, NZME and Fairfax would have direct control of nearly 90% of daily circulation of all daily newspapers in New Zealand – a recent study suggests that this would be second highest concentration of print media ownership in the world, behind only China.¹

1011. The Commission would be concerned about a merger of this nature irrespective of the size of operational benefits – it would be difficult for the organisational integration achieved by the merger to offset the fundamental changes this merger would bring to New Zealand’s media landscape. That is an essential factor for the Commission to take into account in assessing this merger and is relevant to the importance (or weight) we are attributing to the unquantified detriments.

NZCC Draft Determination (8 November 2016)

Factors for considering plurality

- Foster / Levy recommended four measures:
 - **Production / Availability** (i.e. the number of different sources, and volume of content they produce);
 - **Consumption** (number of consumers using different sources of news, and time spent consumer);
 - **Impact** (influence of news content consumption on how opinions are formed); and
 - **Contextual factors** (such as regulation and oversight of the news media and the impact of those factors on media plurality).

Evaluating the factors

	Production/ Availability	Consumption	Impact	Contextual factors
Parties argued	<ul style="list-style-type: none"> • Strong national and international competition • Comparisons to China etc completely ignore vastly different political climate + general openness • Low barriers to entry online 	<ul style="list-style-type: none"> • Multi sourcing also shows sourcing between parties and other competitors, no one owner could influence the news • Role of social media and aggregators 	<ul style="list-style-type: none"> • Wide range of views available online • Internal plurality is robust in news organisations with multiple papers, driven by economic factors (improved reach) 	<ul style="list-style-type: none"> • Clear language in the statute is needed to give NZCC power to decline on plurality grounds • Internal plurality, codes of ethics and commercial incentives of 2-sided market would constrain parties • Plurality even weaker in counterfactual
NZCC position	<ul style="list-style-type: none"> • NZ highly concentrated market (>China) • Parties are closest competitors 	<ul style="list-style-type: none"> • Consumption surveys show parties are most consumed print and online sources • Parties have largest reach • High degree of multi-sourcing between parties shows complementarity 	<ul style="list-style-type: none"> • Survey (2013) indicates internet is considered most credible news source, with newspapers following • Internal plurality is not as strong as external 	<ul style="list-style-type: none"> • NZCC is required to consider the transaction in the context of an unregulated media • Real chance internal plurality would not constrain

Key challenges

- Conceptual:
 - Canadian policy working group: If efficiencies and fourth estate considerations are evenly balanced, which should prevail? No objective framework to resolve question.
 - NZCC, in particular, has limited tools to resolve behavioural concerns
- Limitations of data:
 - Only available data was self reported (AC Nielsen) and/or limited in what it measured,
 - No data requested or obtained directly from e.g. Google and Facebook
 - Evidence was ad hoc and anecdotal e.g. parties' internal surveys on life cycle of news, anecdotal evidence of editors being told what to write, etc

1743. However, while we cannot quantify the detriments from a reduction in quality and plurality in monetary terms, we consider that they are fundamental to a well-functioning New Zealand society and outweigh the quantified and unquantified benefits from the merger. We therefore decline authorisation for the merger.

The Appeals

- Both High Court and Court of Appeal agreed with NZCC
- Court of Appeal:
 - [69] - NZCC has jurisdiction to consider a loss of plurality
 - [69] - “as a matter of construction Parliament cannot have intended to exclude such considerations where a proposed transaction is likely to cause them”
 - [73] – Act not exclusively concerned with efficiency – can be balanced against public benefits including anything of importance to the community. Nothing in the legislation requires public detriments to be defined more narrowly than public benefits

Type 1 vs Type 2 errors

Five community newspapers to close

Susan Edmunds · 15:12, Apr 24 2018



BUSINESS / MEDIA & TECHNOLOGY

Stuff to cut 28 newspapers and magazines nationwide

5:35 pm on 21 February 2018

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Media giant Stuff, previously known as Fairfax, has announced plans to ditch 28 of its community, rural newspapers and magazines.

MEDIA

MediaRoom: Herald owner's market value plummets



BUSINESS • PREMIUM

NZME cuts dividend as it re-evaluates debt

NZME forecasts a 21% decline in full-year earnings.

NBR Contributor Wed, 21 Nov 2018

NZME MEDIA

NOTED LISTENER NORTH & SOUTH Metro RNZ

New Zealand papers are in dangerous decline – here's what's at stake

by Karl du Fresne / 19 June, 2017

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Concerns as Fairfax drops community, rural papers

By Tim Miller

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• PREMIUM

NZME earnings 'pressured'

Media group's chief executive points to "significant" future paywall revenue.

Tim Hunter Fri, 22 Jun 2018

NZME MICHAEL BOGGS ANNUAL MEETING STUFFME

Loss of local community papers devastating for small-town residents

21/02/2018 Newshub staff

Many will be lamenting the loss of their community newspaper following a decision by Stuff to sell or shut down 28 mastheads on Wednesday.

Several small-town papers will be closed, including the South Canterbury Herald, Waiheke Marketplace, Clutha Leader and Ruapehu Press.

Mediawatch: Big publisher culls community papers



Tuesday, 27 February 2018, 1:12 pm

Article: RNZ

The issues

- Should efficiency-enhancing mergers be rejected on non-efficiency grounds, such as plurality or privacy?
- Should the answer be different if the relevant standard is consumer welfare vs total welfare?
- If so, is a specialist competition regulator the appropriate body to undertake this assessment? And is the merger approval framework the appropriate mechanism?
- If so, how should the regulator go about the balancing exercise?