

NZME and Fairfax's appeal: Will they win? FAQs

1st article of 3

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Speed Read

The high profile Fairfax (now Stuff) and NZME merger application, now heading to a second appeal in the Court of Appeal, raises multiple issues at the bleeding edge, such as:



- How media plurality (which is all about supporting democracy and reducing abuse by those in power) fits with the economics world under the Commerce Act: that's an apples and pears scenario;
- Why the Commerce Commission and the court so far is saying that they can't merge when Google and the likes mean that the papers are getting a pasting from loss of ad revenue etc. Why can't they merge to fight this huge competitive pressure?
- What about disruptive technologies in the future and new services coming onstream and online? Doesn't that mean there's enough competition and media plurality?

In this first article, we'll set up the framework for the approach to such issues under the Commerce Act, including describing the clearance and the authorisation processes, and the big focus on analysis of particular markets. We need that ground work before heading to our second article on the impact of Google, disruptive technologies, plus the impact of the newspaper being a platform between advertisers and eyeballs (so called, two sided markets). We'll wrap up in the third article by addressing media plurality and the conclusion so far that in fact there is a parallel economics concern too based on facts for the plurality issue.

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The Detail

On Monday 5 February, NZME and Fairfax (now called Stuff) said they would appeal to the Court of Appeal. In this series of three articles we outline by FAQs:

- Will an appeal succeed?
- Why is this NZME/Stuff merger scenario so interesting?
- What are the implications of the decisions so far?
- Why can't NZME and Stuff merge when there are so many players such as Google, Facebook, bloggers, and online content producers/distributors? Doesn't that mean this is a crowded market and that the merger would not cause market problems?
- Google, etc, are thrashing NZ media by redirecting ad revenue to Google, etc: surely NZME and Fairfax should be able to merge as they wither away with a thousand cuts?

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FAQs

- What's the impact of future disruptive technologies and services on the appeal? Aren't new technologies and services going to provide enough competition?
- Why is media plurality such a big issue here? Why should plurality's Fourth Estate and democracy focus enter the arcane world of dollars and regulatory economics?

What's the big point on the appeal?

According to NZME/Fairfax's announcement on Monday 5 February, the main issue is that there is so much net dollar and economic benefit to consumers from the merger that this outweighs the downside of lost media plurality. We'll deal with this issue in more detail in our last article, but in summary:

- Media plurality is all about enhancing democracy and the Fourth Estate, by having multiple media voices ("*which are diminished by the merger*" says the Commission and the High Court). The High Court trebled the Commission's net dollar benefits assessment, at the lower end of the range, say NZME/Fairfax. They say that outweighs the lost media plurality
- Net \$/welfare benefits to consumers - the core focus of the Commission - is all about economics. Often too, but not always, this can boil down to quantified \$ figures.
- But, when weighing up such \$ net benefits with media plurality downsides, where the latter cannot be quantified and is a conceptually different thing, the Commission and the courts must weigh up chalk and cheese. While in theory that exercise is principled, it can be no more than largely impressionistic.

- It's in that context that the Court of Appeal needs to weigh up the position. Does trebling the lower end of the net \$ benefits range (assuming that assessment holds) trump the negatives of media plurality? NZME and Stuff say it does.

Can NZME and Fairfax successfully appeal to the Court of Appeal?

That's complex, with many relevant facts confidential and much of the detail buried in parties' submissions. So, it's foolhardy to predict the prospects of success outside the tent.

The appeal probably won't just be about the \$ benefits/plurality trade off either. I expect there will be a big focus in the appeal on, for example:

- The possibility that future disruptive technologies and services will bring enough competition to enable the merger to go ahead (I deal with this in my third article); and
- The fact that the newspapers are located in between advertisers and readers (in the economics jargon, they are the platform in a "two-sided market"). As there is competitive pressure and cross-impacts between advertisers and readers, it is said there is enough competition to allow the merger to go ahead. I deal with this in my second article.

But even with low odds, if it suits commercial objectives, they might appeal, for there is much at stake. And an appeal may fit a broader commercial plan too.

These Commerce Commission merger applications do involve difficult and often controversial judgment calls, the more so in this case given they raise new and challenging issues such as media plurality and the interface between new online media and legacy media. No one outside the tent can reliably estimate the odds of success but I can understand why they would appeal.

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Why is the decision interesting?

Do the new media sources such as Google, bloggers, the prospect of RNZ becoming a stronger voice in media with Government funding, and other online media services mean there is enough competition (current and potential) so there is little harm to competition due to the merger? What about future disruptive technologies, stepping in to fill gaps and enhance competition?

Are non-economic issues such as media plurality, which is about supporting democracy and restraining abuses by those in power, relevant under the Commerce Act?

And how is plurality to be weighed up with (a) other voices such as radio, online, TV, bloggers, etc and (b) economic factors, where the primary focus is normally about enhancing competition?

Can NZME and Fairfax rework the deal to make it compliant down the track?

Yes, maybe, although they have challenges in multiple areas that, from outside at least, make that look quite difficult to structure. No one beyond NZME and Stuff can reliably guess that, but expect Plans B, C, D, and E to have been white boarded in detail.

Some technical context: What are the two phases involved in this: clearance and authorisation?

This helps us to understand why the plethora of providers such as Google and bloggers aren't enough to allow the merger to go ahead, according to the decisions so far. Jump to the next article if you want less detail.

To win on appeal, NZME/Stuff must reverse the Commission and High Court decisions that neither a clearance nor an authorisation under the Commerce Act should be granted. First, they seek a clearance, which they can only get if there is little prospect that, in the next two years or perhaps more, depending on selected time periods, the merger will not likely lead to

"substantial lessening of competition" (SLC) relative to no merger happening. The SLC threshold is pivotal in this phase.

If there is SLC so that a clearance is not granted, parties can seek an authorisation, with the same outcome: the merger is approved. To get this, NZME and Fairfax must show that the public benefits to consumers outweigh the public detriments. This is where media plurality comes in.

In both phases, the perspective is that of competition and innovation to benefit the long-term interests of consumers. It's not about the benefits to Fairfax and NZME: it is about consumers (although economic gains for Fairfax and NZME are taken into account on the authorisation).

What is the role of "markets" in the clearance phase?

A standard regulatory economics analytical tool is to assess SLC in the context of a defined market. Figuring out the parameters of the market can be controversial. Take for example community newspapers in the areas where both NZME and Stuff publish. There is a downstream market for supply of those papers to readers (or, more accurately on all these reader-side markets, a market for producing and distributing such content to eyeballs). And there is a closely related upstream market for supply of community newspaper advertising services to advertisers in those areas: they provide the revenue to enable free papers for the public.

The Commission and the Court excluded the likes of online, radio, other print media, and TV from those markets. Notably, that choice drives many of the outcomes leading to the clearance being declined.

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Said the Commission and the Court, "*there is SLC in each of those two community newspaper upstream and downstream markets*".

That alone is enough to stop the clearance as SLC in only one market is sufficient. But the Court concluded that there is enough SLC to stop the clearance in 2 other markets:

- News reader market for Sunday Newspapers (*The Herald* and the *DominionPost* on weekdays and Saturdays largely do not compete nationally but the Sunday papers do compete in overlapping areas); and
- Online New Zealand news production and distribution: notably, this is about NZ not offshore news.

So, to win a clearance, NZME/Stuff would have to win as to all those markets, which, just playing the numbers only, is more challenging (although that can change if, for example, there is a common thread through each market analysis that changes).

My next article turns to the impact of Google, etc and two-sided markets.

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