

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

3rd article of 3

March 2018

Speed Read

This is our third and final article about the NZME/Stuff merger application, now heading to a second appeal in the Court of Appeal. Our two earlier articles in the series are [here](#) and [here](#).

NZME. stuff

In this article we address disruptive technologies and then turn to the big area of media plurality, which is all about enhancing democracy and controlling abuses by those in power by maintaining multiple media news sources. The Commerce Commission was concerned that the NZME/Stuff merger would result in a level of media concentration that is, it said, unprecedented in well-established liberal democracies, leading to potentially irreplaceable and substantial impacts.

When the court weighed up this tricky issue, they largely agreed, but also found that loss of plurality produces loss of quality of services to consumers, and that is a negative economic impact. This reason alone was enough to stop the merger going ahead.

This article was originally published in the [National Business Review](#).

The Detail

Won't disruptive technologies in the future change things to produce competitive pressure?

NZME/Stuff submitted that the Commission focussed too much on the circumstances today (and earlier) instead of what in fact is relevant: what may happen in the future. It's well established that only the future is relevant in this area. What has happened so far is only material as a signpost as to what may happen in the future.

The future is addressed when dealing with factors such as the limited prospect of new entrants creating competitive constraints, as noted above. Disruptive technologies however appear to be only addressed explicitly in the judgment on a narrow point around online readers going to multiple sources (so called multi-homing). The unpredictability of consumer behaviour

adapting to new disruptive technologies was noted. Such uncertainties, said the court, meant that it was not appropriate to assess the extent of competitive constraints relating to trends such as multi-homing.

We found this part of the judgment a little hard to follow, perhaps due to some shorthand in an already long judgment (in fairness, they are darned hard judgments to write). We suppose underpinning this might be the idea that (a) if there is too much uncertainty, the particular point is decided against the appellants or (b) broadly speaking the Commission and the court need to do a worst-case scenario assessment of the future as to SLC implications – the cases use different words for that - and the worst case has SLC. But we are not sure.

It may be in any appeal, NZME and Stuff would pursue that need to focus on the future across the board, including disruptive technologies.

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In the second phase (the clearance application addressed in our [first article](#) is the first phase), why was there no authorisation?

The clearance having been declined due to SLC, the next steps is the application for authorisation, for which NZME/Stuff must show overall net benefit to consumers and NZ Inc. For the authorisation, the Commission netted off various economic quantified benefits and detriments. They also threw into the mix media plurality and loss of quality, which could not be quantified. The latter two items outweighed the quantified economic net benefits former and so the authorisation was not granted.

What's media plurality about and why is this issue lurking in an economics assessment?

The court concluded that non-economic benefits and detriments, such as plurality, could be taken into account on its interpretation of the legislation. That conclusion may be hard to dislodge on appeal, meaning the focus as to plurality may be on the degree to which it is taken into account, relative to economic factors.

Media plurality is about having multiple media news sources to maintain a well-functioning democracy because (a) that facilitates the availability and exchange of a diversity of views and (b) that reduces the risk of undemocratic or improper conduct by those in power, as that conduct is brought to the public's attention.

The Commission was concerned that the merger would result in a single organisation controlling nearly 90% of all print media, New Zealand's two largest news websites and one of the two largest commercial radio companies. The result would be a level of media concentration that is, it said, unprecedented in well-established liberal democracies, leading to potentially irreplaceable and substantial impacts.

The court therefore concluded that the risk from loss of plurality is meaningful, with, in that instance, major ramifications for the quality of NZ democracy. With material barriers to entry for production of NZ news, as noted above, the plurality would be "virtually irreplaceable".

The idea that so-called internal plurality (eg different media voices from the Stuff and Herald website editorial teams) would provide sufficient plurality was dispatched by the Court.

What was the overall conclusion on the authorisation?

The court, like the Commission, weighed up the quantified economic net benefits with the unquantifiable detriments, particularly loss of plurality, and, as dealt with below, loss of quality due to loss of multiple voices/competition. While net quantified benefits increased as the court decided, contrary to the Commission, that the merged entity would likely not introduce online paywalls, the court also said that the detriments, particularly plurality, were so significant that the case for authorisation was not made out.

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Weighing up economic quantified net benefits with non-economic unquantifiable plurality is chalk-and-cheese tricky, but has to be done.

Loss of plurality, said the court, also produces loss of quality of services to consumers and that is a negative economic impact. That alone, if they were wrong on the media plurality argument, was enough to stop the authorisation. If that is right, it takes away the controversy around plurality.

Anything else?

Competition lawyers and economists can pore over plenty of detail in the judgment, one of which is two sided markets.

We were surprised to learn from the judgment that daily newspapers still have quite a strong foothold. The equivalent of a quarter of all NZ households still get the dailies.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.