

## NZME / FAIRFAX

### LEGAL SUBMISSION IN RELATION TO COMMERCE COMMISSION'S JURISDICTION TO CONSIDER PLURALITY ISSUES

25 NOVEMBER 2016

#### Introduction

1. On 8 November 2016 the New Zealand Commerce Commission ("**Commission**") released its Draft Determination on an application from NZME and Fairfax to merge their businesses. The Commission's preliminary view is that it should decline the merger.
2. Among the concerns the Commission raised in its Draft Determination are the impacts of the merger on "plurality" in respect of diversity of views within the media and its flow-on effects. The Commission's draft decision to refuse the merger primarily turns on its view that that proposed merger would reduce media plurality, stating that it would decline the merger due to those concerns, "*irrespective of the size of operational benefits*".
3. This appears to be a statement that no matter how efficiency-enhancing this merger might be, the Commission will not approve it unless it can be persuaded to change its view on the extent to which it affects the plurality of voices in the media.
4. NZME and Fairfax also consider that in adopting this approach the Commission has stepped outside its jurisdiction under the Commerce Act 1986 ("**Commerce Act**") in reaching its preliminary view, for the reasons expanded on below. The Commission's view that media regulation in New Zealand is insufficient to protect media plurality post-merger<sup>1</sup> is a social policy judgement that the Commission is not permitted to make, let alone treat it as outweighing economic efficiency gains, under the Commerce Act authorisation framework.
5. Even if the Commission had jurisdiction to consider and seek social policy outcomes, Fairfax and NZME do not agree that the merger will give rise to a material reduction in plurality of voices. Nor does the data the Commission relies on in its decision support such a conclusion. Those points are developed in the parties' factual submission.

#### The role of plurality considerations in the Draft Determination

6. The Commission's draft decision is to decline the authorisation because it considers the merger would be likely to substantially lessen competition in specific markets and that the merger would not result in such a benefit to the public that it should be allowed. The loss of plurality is a factor that weighed heavily - in fact, ultimately conclusively, in the reasons for the Commission's decision. The Commission concluded:<sup>2</sup>

There is a real chance that the proposed merger would reduce media plurality. The merged entity would operate across a number of media, dominating both online and print New Zealand news services, potentially with a single editorial voice. Given the importance of news media to wider issues of plurality, it is our view that any adverse effects are potentially substantial. [...]

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. [Emphasis added]

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<sup>1</sup> Draft Determination at [927] to [935], [1009].

<sup>2</sup> At [997] and [1011].

7. The benefits of plurality are described by the Commission as editorial choice, different editorial perspectives, news and story coverage, and the extent and choice of investigative journalism.<sup>3</sup> The flow-on effects also include government accountability, editorial independence, and an effective democratic process.<sup>4</sup> The Commission considers these issues are necessary for the promotion of "a well-functioning democracy" because "a healthy democracy is dependent on a divergence of views"<sup>5</sup> and these factors are "essential" to its assessment (receiving high weight and importance).<sup>6</sup>
8. The Commission makes its findings on the basis of the current regulatory environment (including public funding of new information), although it accepts that policy settings could change post-merger.<sup>7</sup> In its view, the current government and industry self-regulatory environment is inadequate in terms of protecting plurality<sup>8</sup> (for example, the internal charters and / or the Press Council, although it spends no time evaluating the effectiveness of these mechanisms). The Commission considers that plurality considerations are particularly important in New Zealand as there are fewer organisations with a public service role compared with overseas,<sup>9</sup> and unfavourably compares New Zealand's regulation of ownership with overseas jurisdictions.
9. The Commission also questions the amendment of the TVNZ Charter and the adequacy of NZonAir funding in the context of maintaining media plurality. It makes no real mention of Government policy work around digital convergence or the Government's role in monitoring and regulating media public interest issues more generally.
10. Further, the Commission appears to acknowledge that any assessment of media plurality is inherently complex and imprecise, noting that the task is further complicated because the post-merger media environment is difficult to predict in the context of rapid technological changes. It is notable that limited attempts are made by the Commission to assess the impact of Facebook and Google on media plurality (which is complex and rapidly changing, as is apparent from questions about Facebook's role in the US presidential election) or the challenges faced by New Zealand in the changing technological environment.
11. In the absence of any tangible analysis, the Commission ultimately concludes that it must stand back and exercise "judgement on the application in the round"<sup>10</sup>, the overall judgement being that the merger could result in fundamental changes to New Zealand's media landscape of a type that could never be offset by efficiency benefits.

### **The Commerce Act 1986**

12. The Commerce Commission is established under the Commerce Act 1986 ("**Commerce Act**"). A basic premise of the rule of law is that every expert tribunal or quasi-judicial body established by an Act of Parliament is limited in the exercise of its powers and functions by the purposes and empowering provisions of its governing legislation.
13. In the Commerce Act context, the Supreme Court has been clear that the purpose of the legislation is one of the two key factors driving its interpretation. In *Commerce Commission v Fonterra Co-operative Group Ltd* the Supreme Court said:<sup>11</sup>

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<sup>3</sup> At [894].

<sup>4</sup> At [896].

<sup>5</sup> At [1013].

<sup>6</sup> At [1011].

<sup>7</sup> At [935] and [936].

<sup>8</sup> At [234].

<sup>9</sup> At [930].

<sup>10</sup> At [1003].

<sup>11</sup> *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 at [22].

**Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose** in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment. [Emphasis added.]

14. The Commerce Act contains an express purpose statement in section 1A, and section 3A specifically provides how benefits are to be considered. Both are focused on competition as a means to economic efficiency. Specifically:

- (a) In 2001 the section 1A purpose was changed from "an Act to promote competition in markets..." to an Act "to promote competition in markets for the long-term benefit of consumers within New Zealand". The Acting Minister of Commerce noted in a Cabinet paper relating to this change that:<sup>12</sup>

While the Act's long title focuses on competition, its text recognises that the Act's overarching goal is **not the pursuit of competition per se. Rather the ultimate goal is to facilitate effective competition to promote economic efficiency** and thus economic growth. [Emphasis added]

- (b) The Court of Appeal in *Giltrap City Ltd v Commerce Commission*<sup>13</sup> noted that the 2001 amended purpose was not materially different from the previous purpose, referring to the description of the previous purpose in *Tru Tone Ltd v Festival Records Marketing Ltd*, which stated that the purpose of the Act:<sup>14</sup>

... is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms **ensures maximum efficiency** in the use of resources. [Emphasis added.]

- (c) Reflecting the section 1A purpose, section 3A of the Commerce Act provides that when assessing benefits to the public, the Commission must have regard to efficiencies resulting from that conduct. It provides as follows:

Where the Commission is required under this Act to determine whether or not, or the extent to which, conduct will result, or will be likely to result, in **a benefit to the public, the Commission shall have regard to any efficiencies** that the Commission considers will result, or will be likely to result, from that conduct. [Emphasis added.]

- (d) Section 3A was inserted by the Commerce Amendment Act 1990. As noted by the Minister of Commerce at the time:<sup>15</sup>

That provision amends the Act to **require the commission to have regard to efficiency when assessing public benefit** in relation to applications for the authorisation of restrictive trade practices and business acquisitions.

That change has arisen out of the desire to ensure that the **presumption in the principal Act in favour of competition as the prime regulator of business activities may be displaced when efficiency gains to the whole economy may arise** from what may appear to be a lessening of competition. [Emphasis added.]

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<sup>12</sup> Hon Trevor Mallard, Commerce Act 1986 - Purpose Statement (2000), Paper to the Cabinet Finance, Infrastructure and Environment Committee, p 3.

<sup>13</sup> *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [786].

<sup>14</sup> *Tru Tone Ltd v Festival Records Marketing Ltd* [1988] 2 NZLR 352, (1988) 2 NZBLC 103,286, (1988) 2 TCLR 542 at 358.

<sup>15</sup> Hansard (26 June 1990) 508 NZPD 2397.

15. Section 1A and section 3A make it clear that a loss of rivalry is not decisive when evaluating a transaction under the Act. The overriding purpose of the Commerce Act is to support economic growth by ensuring the maximum efficiency in use of resources. The Act is directed at economic objectives - and the analytical framework that underpins this, which the Commission and other decision-makers are expected to adopt, is an economic analysis of the implications of transactions. Neither the scheme of the Act nor the expertise of the Commission contemplate reference to wider social policy goals.

### **The authorisation regime**

16. The starting point in considering the authorisation regime under the Commerce Act is that all companies are free to transact with each other as they wish, unless that transaction breaches the law - in this case, the law set out in the Commerce Act, which prohibits business acquisitions which "substantially lessen competition in a market" (section 47).
17. If businesses are concerned that their transaction may have some effect of lessening competition in any market, then section 67 of the Commerce Act allows them to apply for the Commission to provide its view on the transaction. In the case of an application for authorisation of a merger, the Commission must do two things:
- (a) First, it must consider whether the merger gives rise to a substantial lessening of competition in any relevant antitrust markets.
    - (i) If so, that lessening of competition logically must give rise to competition "detriments", which can be modelled by the Commission using conventional economic models. These are the detriments for the purposes of the balancing exercise.
    - (ii) If no substantial lessening of competition arises in any market, the Commission must grant clearance.
  - (b) Second, if a substantial lessening of competition arises in a market, the Commission must nevertheless authorise the acquisition if it is satisfied that the acquisition will result, or will be likely to result, in *such a benefit to the public* that it should be permitted; or decline if it is not satisfied.
18. So as a matter of process, the first stage consideration is of detriments. These are detriments arising in the markets in which a substantial lessening of competition arises. They are competition detriments only.
19. The second stage involves consideration of the benefits the applicant claims should outweigh the detriments. Section 3A says that when the Commission is considering benefits, it "shall have regard to any efficiencies" that result.
20. It may also have regard to other benefits, but only to the extent it is satisfied that:
- (a) those benefits are relevant to the exercise of its powers and functions under the Commerce Act, in light of the purpose of the Act; and
  - (b) those benefits are sufficient to outweigh the efficiency losses in the markets where the substantial lessening of competition has been found to arise.

## Balancing benefits and detriments

21. The Court in *Godfrey Hirst v Commerce Commission* summarised the appropriate test under section 67 of the Act as follows:<sup>16</sup>

[52] Since the Act's inception the Commission and the Courts have discussed how the "such a benefit to the public" test should be approached. The leading case is *Telecom Corporation of New Zealand Ltd v Commerce Commission*. It is the first (and only) time the Court of Appeal has considered the s 67(3)(b) test. In that case, the Court of Appeal accepted that the test involved a "balancing" of likely public benefits from the acquisition and likely public detriments from (what would now be read as) the lessening of competition in a market as a result of the acquisition. **It was accepted that the relevant benefits and detriments were almost entirely efficiency gains and losses.** Richardson J commented that the Commission had a "responsibility" to "attempt so far as possible to quantify detriments and benefits rather than rely on a purely intuitive judgment to justify a conclusion that detriments in fact exceed quantified benefits."

[53] Since then it has been the standard practice of the Commission to do just that. **Consistent with economic theory, detriments (welfare losses) are quantified (as far as practicable) under three categories of efficiency losses: allocative, productive and dynamic. Efficiency benefits (welfare gains), recognised pursuant to s 3A, are also quantified.** Other benefits claimed by a party seeking an authorisation are quantified if possible. The Commission then forms its view on the range, magnitude and likelihood of all the claimed benefits (those quantified and any that are not quantifiable).

[...]

[72] The consistent approach of the Commission throughout the legislative changes has been **to assess competitive detriments in the relevant markets (that is those markets in which dominance was likely to be strengthened/acquired or competition substantially lessened) and compare those detriments (or welfare losses) with the public benefits claimed to flow from the acquisition.** That approach was sanctioned by the High Court and Court of Appeal in *Telecom* when s 47 was in its previous form but the authorisation test was in its present form. [Emphasis added.]

22. The situation in *Telecom v Commerce Commission* was not dissimilar to that set out in the Draft Determination, in that significant efficiencies arising from the transaction had been demonstrated and quantified. Richardson J held:<sup>17</sup>

... **In this case certain major efficiency gains were quantified for Telecom** at some \$75 m. While both the commission and the Court did not accept elements in that quantification, both bodies considered that there would be significant efficiency gains if Telecom had management rights over both AMPS-A and AMPS-B. **In those circumstances there is in my view a responsibility on a regulatory body to attempt so far as possible to quantify detriments and benefits rather than rely on a purely intuitive judgment to justify a conclusion that detriments in fact exceed quantified benefits.** [Emphasis added.]

23. As noted by the Court in *Godfrey Hirst*, the reason for quantifying efficiencies as far as possible is that rigorous analysis is vital to ensuring that the Commission's balancing test does not degenerate into mere speculation or intuition:<sup>18</sup>

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<sup>16</sup> HC WN CIV 2011-485-1257 (23 November 2011).

<sup>17</sup> [1992] 3 NZLR 429, (1992) 4 NZBLC 102,724, (1992) 4 TCLR 648 at 666 and 667.

<sup>18</sup> *Godfrey Hirst v Commerce Commission* HC WN CIV 2011-485-1257 (23 November 2011).

[92] In directing that detriments which are efficiency losses should be quantified where possible, **the Court of Appeal was concerned that the claimed detriments arising from the proposed acquisition in Telecom were "theoretical and speculative", whereas there was a solid basis for finding that Telecom would achieve economies and that the public would benefit from a more efficient Telecom service.** It said that the direction to have regard to efficiencies in s 3A should not be "circumvented by assuming inefficiencies on grounds of economic doctrine". Avoiding speculation was also considered to be necessary when considering whether the dominance threshold was met. That test involves a "value judgment" which should be "as informed by practical evidence as possible". **"Pure speculation...and simple intuition" were viewed by the Court of Appeal in Telecom as "no substitute for hard data drawn from empirical studies and evidence from participants in the industry".**

[...]

[101] We consider that the authorities show that the role of the quantitative assessment is to underpin and facilitate the balancing exercise that the statutory test requires. It informs the judgment that must be made as to whether the acquisition is "likely" to result in "such a benefit to the public" that it "should be permitted". In so doing **it seeks to avoid the speculation and intuition that might otherwise come into play in that judgment without the discipline and rigour of the facts-based quantitative assessment.** Like the value judgment that must be made as to whether an arrangement or acquisition is likely to substantially lessen competition in a market, **the quantitative assessment for authorisation purposes relies as far as practicable on available evidence rather than economic doctrine.** [Emphasis added.]

24. The Commission has echoed this position in its own Authorisation Guidelines,<sup>19</sup> and it has been explained and supported in an academic paper by Dr Berry.<sup>20</sup> Dr Berry observed that while benefits other than efficiency benefits may be advanced by an applicant, "in practice it is rare for any such benefits to carry much weight".<sup>21</sup>

25. This approach is also consistent with:

(a) The observations of the Commerce Committee, which emphasised the economic focus of the Act in respect of authorisation determinations.<sup>22</sup>

... there is a presumption that the goal of benefits to consumers will be achieved through the promotion of competition. However, this presumption may be rebutted **if the long-term benefit to consumers is likely to be achieved through efficiency gains** that outweigh any anti-competitive detriment. [Emphasis added.]

(b) New Zealand's contribution to the OECD Working Party topic "Public Interest Considerations in Merger Control", which observed (citing para [72] of *Godfrey Hirst* above):<sup>23</sup>

[11] **A public benefit is regarded 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**

<sup>19</sup> New Zealand Commerce Commission *Authorisation Guidelines* (July 2013) at [49] to [52].

<sup>20</sup> Dr Mark N. Berry *New Zealand Anti-Trust: Some Reflections on the First Twenty-Five Years* 10 (2013) LoyUChilnt'ILRev 10(2) 125.

<sup>21</sup> At 150.

<sup>22</sup> Report (296-2) at 6.

<sup>23</sup> Working Party No. 3 on Co-operation and Enforcement *Public Interest Considerations in Merger Control* (14-15 June 2015) DAF/COMP/WP3(2015)3. Accessible at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2016\)7&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)7&docLanguage=En).

whom in New Zealand it benefits. The Commission will take into account any costs incurred in achieving benefits.

[12] By contrast, **in assessing detriments the Commission will only consider anti-competitive detriments that arise in the market(s) where there is a lessening of competition.** [Emphasis added.]

- (c) The rationale for the authorisation regime, which is to permit a transaction that is otherwise in breach of the Act, ie to:
- (i) assess the effects of the substantial lessening of competition; and
  - (ii) consider whether, notwithstanding those effects in those particular detrimentally affected markets, the transaction as a whole is efficiency-enhancing or otherwise relevantly economically "beneficial".
- (d) The approach to balancing benefits and detriments in authorisations of contracts, arrangements or understandings that would otherwise substantially lessen competition (section 61). Section 61 expressly provides that the Commission must assess whether the benefits "*outweigh the lessening in competition*". The Courts have held that the only detriments relevant to the balancing exercise are those arising in the markets in which the lessening of competition occurs. The test that applies in relation to authorisations of mergers is the same as a matter of substance, despite some differences in the language used in the two provisions.<sup>24</sup>

26. The Commission appears to correctly acknowledge that detriments in the analysis are limited to anti-competitive detriments in the market, stating that:<sup>25</sup>

As set out in our Authorisation Guidelines, in assessing detriments we consider anticompetitive detriments that arise in the market(s) where we find a lessening of competition (whether substantial or otherwise).

27. The Commission goes on to state that:<sup>26</sup>

Plurality effects are treated as extending beyond these markets, and as having an impact on New Zealand society more generally.

28. In summary, as set out above, the Commission's inclusion of plurality effects in its detriment analysis is contrary to the statutory scheme, its previous positions, case law and its own restatement of the correct legislative framework within the Draft Determination.

### **Parliament expressly removed plurality as a relevant consideration**

29. This issue has been considered before, and a conscious choice was made to require the Commission to focus on economic outcomes rather than broader (and more intrinsically contestable and incommensurable) social policy goals. When Parliament repealed the previous merger test in the Commerce Act 1975, the former provision had a "public interest" test that allowed the Commission to take into account "any effects aiding the well-being of the people of New Zealand" (s 80(b)(vii)). The Commerce Act 1975 was not a competition / economic outcomes-focused piece of legislation. The broad "public interest test" under the 1975 Act was interpreted by the Commission, in media mergers, to enable it to consider whether:<sup>27</sup>

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<sup>24</sup> *Air New Zealand v Commerce Commission (No 6)* AK CIV 2003 404 6590 (17 September 2004) at [33].

<sup>25</sup> Draft Determination at [60].

<sup>26</sup> At [64].

<sup>27</sup> *Brierley Investments / NZ News* (1985) 5 NZAR 108.

... a merger causes an undue degree of influence on public opinion. It also may include questions such as whether the proposal may affect the accurate presentation of news, and the free expression of opinion, and whether the editor may without dictate of management decide what is printed in the paper.

30. Parliament made the decision to repeal that general discretion and replace it, in the authorisation process, with the test that the Commission is now obliged to apply in accordance with the new, economic efficiency-based purpose, which was also introduced in the 1986 Act.

31. In its first newspaper merger decision following the enactment of the 1986 Act, the Commission observed:<sup>28</sup>

The 1986 Act revokes the power of the Commission or the Court to canvass the issues of independence of the press or editorial freedom as reasons for refusing consent to a merger or takeover proposal.

32. It is unclear why the Commission has chosen to depart from this clear statement in the present Draft Determination.

### **Public policy supports certainty of regulatory decision-making**

33. There are good public policy reasons why the Commission should not be able to block transactions on uncertain grounds that extend beyond the scope of its economic / competition expertise, that cannot be predicted in advance by applicants as potential issues, nor tested / quantified post-fact for the robustness of the way they have been applied (to consider, for example, appeal rights). In relation to media plurality, it has been observed:<sup>29</sup>

According to Denis McQuail (2007b, 42), arguments for pluralism or diversity "sound at times like arguments on behalf of virtue to which it is hard to object." Yet the inclusiveness and multiple meanings of the concept also expose some of its limits, so "we should perhaps suspect that something that pleases everyone may not be as potent a value to aim for and as useful a guide to policy as it seems at first sight"(ibid).

According to another commentator, "notions of pluralism, diversity and the marketplace for ideas are at best vague and malleable, at worst adjusted to the purpose of whoever invokes them" (Tambini 2001, 26). Looking at contemporary media policy debates and the range of objectives advocated by the positive value associated with the concepts of pluralism and diversity, it is easy to agree."

34. The distinction between competition (antitrust) and media plurality issues has been observed in overseas jurisdictions. For example, in the United Kingdom and Canada it has been recognised that Parliamentary direction is required before media public interest considerations can be taken into account when assessing a merger (see below). In the United Kingdom legislation was introduced to enable the Government to consider media public interest issues in relation to a media merger (as discussed at paragraphs 51 and 52 below).

35. Relevantly, the role of media public interest considerations in antitrust legislation was fully considered under a Parliamentary inquiry in Canada. The inquiry considered whether to amend Canada's Competition Act 1985 ("**CCA**") to create industry-specific provisions for newspapers, and allow for consideration of "social capital" issues (recognising that, without amendment, social issues did not fall within the competition

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<sup>28</sup> *News / Independent Newspapers* (1986) 6 NZAR 47.

<sup>29</sup> Karl Karppinen *Rethinking Media Pluralism* (Fordham University Press, New York, 2013).

objectives of the CCA). Several arguments were made against such an amendment including the following:<sup>30</sup>

In essence, there are simply no analytical models for expressing social concepts in an objective and meaningful way. Ultimately, to challenge a proposed transaction, the [Competition] Commissioner must be able to provide compelling and objective analysis detailing the expected impact of the deal on markets. **Expanding the objectives of the Act to take account of such considerations would require Canada to make a complete paradigm shift, away from the analytical approach currently used by antitrust authorities the world over, towards a more holistic model relying not on economics, but on the disciplines of psychology, sociology and political science.** [Emphasis added.]

36. The Canadian Parliamentary inquiry also briefly considered a hybrid model that mixes traditional antitrust analysis along with a more "holistic" view. This was immediately critiqued by some rhetorical questions:<sup>31</sup>

Which of the two factors would be given greater weight? The economic or social? How would the Tribunal gauge the merit of the parties' arguments on the social impact of the transaction?

37. Enabling the Commission to import any vague, subjective and unquantifiable concepts into its decision making (in effect, benefits / detriments are in the eye of the beholder) would enable the Commissioners to make decisions without constraint or limitation. In addition to this being contrary to the limitations imposed by the Commission's regulatory regime, it would also fail to meet the need for certainty and consistency that flows from New Zealand society's endorsement of the rule of law. There are also risks that such a subjective process could be corrupted by highly political decision making.
38. These international comparisons confirm that media diversity / plurality considerations are quite distinct from competition and efficiency considerations, and sit outside the orthodox scope of inquiry under a modern competition statute. Clear language would be needed to expand the remit of the Commission in this way. Not only is there no such language in the Commerce Act, but its legislative history reveals a clear intention to narrow the Commission's focus to exclude broader social policy factors of this kind. The Commission acknowledged this in 1986 in its *News / Independent Newspapers* decision, and Parliament has not seen fit to legislate to provide for a different, broader role since that decision was delivered.

#### **The Commission cannot "stand back" and overlay a social policy judgement**

39. The established obligation to quantify detriments and benefits does not mean that the Commission cannot consider the reliability of the overall conclusion of the detailed quantification exercise, or take into account detriments and benefits that cannot (reliably) be quantified. In *Ravensdown Corporation Ltd v Commerce Commission*, the Court accepted that it was appropriate to run the granular modelling of each detriment and benefit and then to 'stand back' and look at the balancing exercise holistically as a second step.<sup>32</sup>
40. This approach was seized upon by the appellant in *Godfrey Hirst*, who argued that the Commission in that case, "having completed its quantitative analysis in the manner directed and sanctioned by the Courts, should then embark upon a second step", which "would require the Commission to ask itself why this acquisition, which is a prohibited acquisition, should nevertheless be permitted".<sup>33</sup> Godfrey Hirst submitted that this was

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<sup>30</sup> Canada (House of Parliament, Standing Committee on Industry) (2000, 6).

<sup>31</sup> Ibid.

<sup>32</sup> *Ravensdown Corporation Ltd v Commerce Commission* HC WN AP168/96 (16 December 1996).

<sup>33</sup> *Godfrey Hirst NZ Ltd v Commerce Commission* HC WN CIV 2011-485-1257 (23 November 2011) at [107].

the "stand back and notice" requirement set out in *Ravensdown*. Specifically, Godfrey Hirst submitted that the Commission needed to "step back" and consider that this will mean a merger to monopoly and the loss of a significant constraint.

41. The Commission disagreed. The Court upheld the Commission's approach, noting that "*the word "monopoly" adds nothing to the factual assessment which the Commission has to make.*" It held that:<sup>34</sup>

Any concern that the sole remaining competitor will have a high level of discretionary market power, leading to potential detriments in the market, is something which should be accounted for in the factual/counterfactual comparison and in the related quantitative analysis.

42. The High Court articulated the boundaries of the 'standing back' approach, by observing that it should not be used as an opportunity to import subjective value judgments.<sup>35</sup>

[114] We also consider that **the Commission is not required to overlay some kind of social policy judgment (enabling it to decline an authorisation even if the merger specific efficiencies accepted by the Commission outweigh the efficiencies likely to be lost through the substantial lessening of competition or conversely to grant an authorisation where losses exceed gains).** At times, Godfrey Hirst's submissions seemed to suggest that such judgment was required as part of the "second step". **Such an approach would invite the kind of speculation and intuition (and corresponding unpredictability) which *Telecom* directed against.**<sup>36</sup> It could also be contrary to the total welfare approach (which does not require judgments about wealth transfers) which has been accepted as appropriate to the assessment of detriments and benefits.<sup>37</sup> [Emphasis added.]

[115] That said, a purely quantitative assessment is not sufficient. A judgment (also referred to as a qualitative assessment) is required as to whether the Commission is satisfied on the evidence before it that the public benefits do outweigh the detriments such that an authorisation should be granted. That judgment will include an assessment of the quality of the information on which the quantitative analysis was carried out. **If the quantitative analysis, allowing for uncertainties, shows that efficiency gains outweigh efficiency losses and if unquantifiable factors are not sufficient to "tip the balance", we consider it would be wrong then to stand back and ask what is so "good" about this merger that it should be permitted.** An applicant for an authorisation does not have to produce any other reason for why the acquisition should be permitted. It would also be wrong at that juncture to introduce speculation as to what a monopolist might do. That would be contrary to what was said in *Telecom* and would cut across the facts-based assessment that the High Court cases have required in accordance with *Telecom*. [Emphasis added.]

- (a) The Court also rejected the notion that the "standing back" referred to in *Ravensdown* was even an essential component of the analysis, and emphasised that, if employed, it

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<sup>34</sup> At [113].

<sup>35</sup> At [113].

<sup>36</sup> As long ago as 1968, Oliver E Williamson, in an article which introduced the "efficiency defence to antitrust merger analysis" ("Economics as an Antitrust Defense: The Welfare Tradeoffs" (1968) 58:1 American Economic Review 18) asked "can economies be dismissed on the grounds that market power effects invariably dominate? If they cannot, then a rational treatment of the merger question requires that an effort be made to establish the allocative implications of the scale economy and market power effects associated with the merger" (at 18-19). He referred to refinements in the tools for assessing these effects which "will permit both the courts and enforcement agencies to make more precise evaluations" (at 34). More recently this analysis is discussed in relation to monopsonies: Roger D. Blair, *Merger to Monopsony: An Efficiencies Defence* (2010) 50:3 The Antitrust Bulletin 689. In New Zealand, the Court of Appeal in *Telecom* has said that this kind of evaluation is required.

<sup>37</sup> *Air New Zealand v Commerce Commission (No 6)* AK CIV 2003 404 6590 (17 September 2004) at [241].

should simply be used as a "check on the balancing exercise" to test the robustness of the evidence:

[117] We see no difficulty with "standing back" to perform an overall check on the balancing exercise - whether or not detriments and net public benefits are finely balanced - especially in circumstances where a significant constraint will be removed in the factual by the acquisition of the only remaining competitor. This 'check' could be directed at the robustness of the market power and constraints analysis, the material assumptions underlying that analysis, and the quantification (and likelihood) of the material detriments and benefits identified. However, this "check" may already have occurred as part of the Commission's assessment of each detriment or claimed public benefit. **While a "check" at the end of the process may still be useful, it is not to be elevated to a necessary second step in which other subjective preferences come into play.** [Emphasis added.]

### Plurality also not a "dis-benefit"

43. The Commission acknowledges media plurality concerns are not the same as the type of efficiencies it usually considers. However, as justification for treating these concerns as detriments in the case, the Commission asserts that:

- (a) Media plurality concerns can be included in the detriment assessment here simply because "media plurality is clearly relevant to the public interest of New Zealand".
  - (i) The Act does not enable the Commission to consider any factor it considers to be a detriment and take it into account. Otherwise, it could equally consider environmental effects, employment effects, and other wide ranging issues, which are already acknowledged to be outside the categories of detriments appropriately considered under the Commission's efficiency-focused mandate to analyse the net economic impact of conduct under a total welfare standard.
- (b) Media plurality detriments are the sort of detriments referred to in *AMPS-A* when it discussed "netting out" public benefits. The Commission refers to the applicants' claim that the merger would lead to increased "content plurality" (ie a greater range of stories covered). This is, effectively, a hook, to enable the Commission to import its media voices / editorial plurality concerns - ie, to infer that if the applicants have claimed it as a benefit, so the Commission can include the other side as a dis-benefit.
  - (i) The applicants did claim "content plurality" as a benefit. The applicants' claim is an orthodox economic argument, focused on productive economic efficiency; ie, due to synergies, the merged entity can produce more output (more stories) and serve a wider range of customers with differing preferences with the same or fewer resources (reduction in duplication).
  - (ii) In contrast, the Commission's concerns around media plurality relate to concepts such as diversity of views and editorial preferences, with the aim of promoting "a well-functioning democracy, and a healthy democracy is dependent on a divergence of views".<sup>38</sup>
  - (iii) These social policy judgements do not amount to relevant factors in the Commission's analysis, which should be focused on economic factors, in particular efficiency gains and detriments. It is not

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<sup>38</sup> Draft Determination at [1013].

consistent with the purpose of the Commerce Act to treat these as detriments – as the legislative history of the Act and the drafting of s 61 confirm – and it is not appropriate to bring them in by the back door as “dis-benefits” when they cannot properly be counted as detriments.

44. For the reasons set out above, under the Commerce Act detriments may only be competition detriments arising from the merged entity's financial or economic incentives to raise price or reduce quality in markets in which the merged entity is likely to have a degree of market power due to the merger substantially lessening competition in those markets.
45. On the other hand, the benefits may include a wide set of benefits to New Zealand, with a focus on economic benefits, especially efficiency gains. The cost of achieving those benefits is appropriately deducted from the claimed benefit, but those costs must be so closely associated with the benefit that they are properly treated as a cost of achieving that claimed benefit. For example, if an efficiency gain is claimed to arise from a reduction in headcount, then the redundancy costs associated with that headcount reduction must be deducted so as to derive the net benefit of that headcount reduction. Such costs, however, can only ever reduce the value of the benefit claimed. The lowest value a "benefit" can contribute to the balancing exercise is zero. Benefits cannot sit on the negative side of the ledger. On the negative side of the ledger are only competition detriments.

#### **It is not the Commission's job to fill any perceived regulatory gap**

46. Despite this body of case law, policy materials, academic articles, and its own guidance and decisions, the Commission chose in the Draft Determination to reach an interim conclusion that the net efficiency benefits outweighed the detriments, but it could not authorise the transaction due to a loss of media plurality. The Commission observed that the need to take that step was because it considered the current regime to be inadequate.<sup>39</sup>
47. The Court of Appeal responded to similar arguments put forward by the Commission in *Commerce Commission v Telecom Corporation of New Zealand Ltd* that it had broad powers under the Act, and a liberal interpretation was required in relation to the matters it could consider.<sup>40</sup> In disagreeing with the Commission, the Court noted "... a public authority which is a creature of statute cannot act outside the scope of its express and implied statutory powers".<sup>41</sup> It went on to explain that:<sup>42</sup>

...Courts will be ready to discern implications or to fill gaps in an Act if this is necessary to make the Act work as Parliament must have intended. **But it is all-important in such a context to appreciate the basic structure and principles of the Act, for obviously the Courts could not hold a term to be implied if it were contrary to the legislative scheme.** Inevitably therefore one has to undertake a reasonably full scrutiny of the legislation.

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<sup>39</sup> When the New Zealand Law Commission considered news media regulation in a 2013 report "The News Media Meets 'New Media'" the report recommended, among other things, that a single and independent news media standards authority be established with the role of regulating online and print news media. The new body was intended to be statutorily prescribed and neutral in respect of technology. The then Broadcasting Minister outlined that "the Government is well aware of fostering a well-functioning and independent fourth estate" and that the proposal would be kept in mind for the future (Judith Collins and Craig Foss "Government responds to news media report" (press release, 12 September 2013). Accessed at <https://www.beehive.govt.nz/release/government-responds-news-media-report>.

<sup>40</sup> *Commerce Commission v Telecom Corporation of New Zealand Ltd* [1994] 2 NZLR 421, (1994) 5 NZBLC 103,431, (1994) 5 TCLR 482).

<sup>41</sup> At 491 per Cooke P.

<sup>42</sup> At 425 per Cooke P, then 436 per Casey J.

I can accept that its educative, adjudicative and enforcement functions aimed at serving the promotion of competition call for a generous view of the ancillary powers it may exercise in carrying out those functions. **I cannot see, however, the need for the Commission to question the effectiveness of the regulatory regime which the Government saw fit to impose ...** [Emphasis added.]

48. Applying the reasoning in *Telecom*, while the Commission has the necessary ancillary powers to exercise its functions aimed at promoting competition, it is not the role of the Commission to take issue with the Government's approach to regulation of the media. Media plurality and independence are matters well beyond the scope of the competition focus of the Commerce Act and the Commission's functions.
49. The Government has considered these issues but decided there was no need to legislate in this area, including because of the generally responsible way in which the media organisations in New Zealand report on news. The Government's view was that, unlike the United Kingdom, there was no crisis of public confidence in the mainstream media. Nothing in the Commission's decision suggests that the general approach to reporting news in New Zealand will change in any way as a result of the transaction. If it did, then the Government could equally change its approach to the question of regulation.

#### **Ofcom report does not support the approach**

50. The Commission relies heavily on the Ofcom report "Measuring Media Plurality" for its framework into assessing plurality, and references it heavily throughout the Draft Determination.
51. However, the UK framework is significantly different from New Zealand. UK legislation specifically provides for intervention in a media merger by the Secretary of State based on public interest grounds. These issues are otherwise outside Ofcom's scope. In addition, even when Ofcom provided a report under direction from the Secretary of State, it concluded that media plurality questions were more appropriate for Parliament to debate and consider.
52. "Media public interest considerations" are defined in the UK Enterprise Act as follows:<sup>43</sup>

58 (1) The interests of national security are specified in this section.

(2) In subsection (1), "national security" includes public security; and in this subsection, "public security" has the same meaning as in article 24(1) of the EC Merger Regulation.

(2A) The need for—

(a) accurate presentation of news; and

(b) free expression of opinion;

in newspapers is specified in this section.

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

2C) The following are specified in this section—

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<sup>43</sup> United Kingdom Enterprise Act 2002.

- (a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;
- (b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- (c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

53. The "Measuring Media Plurality" report was the result of the UK Secretary of State asking for a review of a specific merger, and following that review, commissioning the more fulsome report, which the Commission has relied on in its Draft Determination. That is, Ofcom was reporting:

- (a) at the direction of the Secretary of State;
- (b) outside of the competition assessment; and
- (c) pursuant to a legislative framework with no equivalent in New Zealand.

54. Even within this framework, Ofcom concluded that questions on media plurality required the exercise of judgement of the type which is for Parliament to consider:<sup>44</sup>

An effective framework for measuring media plurality is likely to be based on quantitative evidence and analysis wherever practical. However, there are also areas where a high degree of judgement is required. **The appropriate approach to exercising such judgement is ultimately for Parliament to debate and determine.** [Emphasis added.]

The applicants agree with Ofcom.

### **Conclusion**

55. For the reasons set out above, the applicants are of the view that plurality detriments are not a type of detriment that the Commission can consider and weigh in a merger authorisation process under section 67 of the Commerce Act. Even if the applicants are wrong on that point, and the Commission could conceptually consider plurality detriments, it is clear that its consideration of those issues must be in the context of a structured inquiry, and cannot be based on supposition or instinct.

56. The inquiry into plurality is different in nature to the orthodox competition law analysis of the merged entity's financial and economic ability and incentives to raise price or reduce the quality of products or services it supplies post-transaction (by "giving less and charging more"), because those claimed plurality detriments are different in kind from, and incommensurable with, such economic benefits. That is why the better view is that they are not detriments that the Commission can properly take into account.

57. More specifically, media plurality issues are inherently complex and speculative, and any assessment requires a high degree of intuition and subjective judgement - including, for example, to assess the merits of parties' arguments on the social impacts of a transaction where a number of competing positions and values are at play. As

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<sup>44</sup> Ofcom "Ofcom's report on measuring media plurality" (media release, 29 June 2010) at [1.4]. Accessible at: <https://www.ofcom.org.uk/consultations-and-statements/category-1/measuring-plurality/statement>.

acknowledged by the Commission, any meaningful assessment of these complex and abstract concepts is made considerably more difficult when considered in the context of a media environment that is undergoing rapid and unknowable technological change.

58. Apparently accepting that media plurality considerations are incapable of meaningful economic assessment, the Commission states that it is required to stand back and exercise "judgement on the application in the round", concluding that it would be unlikely to authorise the transaction on the basis of media plurality concerns, notwithstanding the extent of assessed economic benefits.
59. However, at the very least, the Commission must identify a principled and coherent way of assessing the significance of these issues, rather than simply stating they are so large that "*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*". The balancing of benefits and detriments mandated by section 67 of the Commerce Act requires the Commission to undertake a rigorous and robust, data-focused analysis describing the impact of the deal on markets in New Zealand and the way in which that impact outweighs the demonstrated efficiencies arising from the transaction.