

NZME / FAIRFAX

RESPONSE TO COMMERCE COMMISSION'S COUNTERFACTUAL LETTER

The main points addressed in this response are as follows:

- [ ].
- [ ]:
  - In an authorisation the Commission cannot use a "worst case" (or "most competitive") counterfactual to determine the likely transaction-specific benefits. In an authorisation, the Commission is **required to form a view on the most likely level of benefits and detriments arising, within a given range, and balance them accordingly**. While the detriments arising from the "most competitive" counterfactual would frame the top end of the detriments range, the Commission must look also at the bottom and most likely level of detriments, then do the same for the benefits. The precedent is clear that the Commission can grant authorisation even if there is one likely scenario in which the transaction results in a net detriment if that risk is outweighed by the likely benefit.
  - In weighing those likely benefits and detriments, the Commission places most weight on benefits and detriments that are most likely to occur, soonest, and less weight on those that are less likely to occur, later. In this case, the immediate, real and likely benefit of retention of newspapers and journalists in the regions, and the benefits for those regions of the merger, is highly relevant.
  - The [ ] in the Commission's counterfactual must necessarily and logically have implications for journalistic coverage. The evidence is [ ]. Logically, then:
    - if plurality is relevant,<sup>1</sup> the Commission must weigh **all aspects of plurality** – not just "external plurality" in the form of the number of media shareholders. The Commission's own experts (Foster/Levy) explained the other elements of media plurality – including variety of media, sustainability, diversity of viewpoints, and the extent to which journalism is successfully performing its role. All those elements of plurality are enhanced by the merger. More recently, the Canadian *Shattered Mirror* report warns that the current environment of "content fragmentation, revenue consolidation and indifference to truth has overtaken simple concentration of ownership as the main threat" to the traditional role of the media.
    - the Commission must weigh **all other public benefits** arising from the transaction, including not only the quantified synergies, but also the benefits that arise from facilitating the sustainability of a scale media organisation, including to New Zealand journalism, New Zealand advertisers, New Zealand investors on the NZX, and the New Zealand Government / people by sustaining a media organisation that provides employment to New Zealanders and pays taxes in New Zealand.
- This **merger creates a unique opportunity for New Zealand** to achieve a sustainable path forward for print / digital publishing, provided NZME2 is afforded the runway the merger will allow to invest the synergies in new revenue streams to sustainably fund journalism in New Zealand. Any other decision [ ] through the use of an outdated framework for analysis that does not properly grapple with the structural declines in media and the [ ].

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<sup>1</sup> The parties reserve their position in relation to the legal arguments outlined in previous legal submissions.

## EXECUTIVE SUMMARY

1. NZME and Fairfax are grateful for the Commission's letter of 6 March 2017, in which the Commission set out its current thinking on the relevant counterfactual (the "**Counterfactual Letter**"). There are a number of points in the Commission's Counterfactual Letter that it is important for NZME and Fairfax to comment on.
2. The Counterfactual Letter highlights that, as the Commission is nearing the time at which it must make a final decision on this application, it needs to consider both the number of important developments since the Draft Determination (set out in chronological order in **Appendix One**), and to keep a sharp analytical focus on three key points:
  - (a) **The applicable tests.** In this case there are, of course, two:
    - (i) the s67(3)(a) test under which the Commission must be "satisfied that the acquisition will *not have, or would not be likely to have, the effect of substantially lessening competition in a market* " (the "no substantial lessening" test); and
    - (ii) the s67(3)(b) test under which the Commission must be "satisfied that the acquisition *will result, or will be likely to result, in such a benefit* to the public that it should be permitted" (the "public benefit" test).

The different tests of course require different assessments of the relevant facts, including as to the "likelihood" of, and benefits arising from, the transaction as measured against, the relevant counterfactual. As set out further in this response:

- (iii) When considering whether it can be *satisfied of a negative*, ie whether the Commission can *rule out all likely scenarios* in which a substantial lessening of competition would arise, it is appropriate for the Commission to consider a "*worst case, likely*" counterfactual.
- (iv) However, when considering whether it can be *satisfied of a positive* proposition, that the acquisition is likely to result in such a benefit to the public that it should be permitted, the Commission undertakes an "**on balance" assessment of likelihood, and needs to take into account all "likely" benefits, ie all benefits that have a real chance of arising, which do not need to be more probable than not.** This is consistent with the Commission's orthodox practice of fixing a "likely" level of benefits and detriments, within relevant quantified ranges (as it did in *Godfrey Hirst*).

In paragraph 8 and 9 of Commission's Counterfactual Letter, the Commission states:

In the case of there being multiple counterfactuals, it does not follow that the Commission chooses the counterfactual that we consider has the greatest prospects of occurring, ie, is the "most likely", the Commission conducts its competition assessment against the counterfactual that gives rise to the most competition concerns.

In the final paragraph the Commission states:

[ ].

That final paragraph suggests that there may be a misunderstanding on the part of the Commission about the submissions made by NZME and Fairfax. [ ]. The parties also accept that if the Commission forms the view that any other counterfactual or counterfactuals are likely, then the Commission should take those counterfactuals into account, but in doing so it must consider the relative likelihood of each of those

counterfactuals and of the benefits and detriments associated with each of them. In that regard:

- (i) [ ].
- (ii) [ ], consistent with the case law and the approach that the Commission has contended before the Courts, it needs to consider all likely counterfactuals, and the corresponding likelihood of associated benefits and detriments.

(b) **The relevant case law.** The Commission will be conscious of:

- (i) *Southern Cross*: where the Court reminded the Commission that it is not the relative size of the largest and second largest participants that is relevant (for example, submitters' statements that NZME2 would have four times the number of journalists compared to the next largest competitor), but the combined competitive effect of all of the smaller players together, and the barriers to entry and expansion, which in online news (the only place the parties materially overlap) are demonstrated to be low by actual entry and expansion.

The Court in *Southern Cross* also reminded the Commission not to ignore the constraint of self-supply. As the parties have explained to the Commission, distribution of news and information directly by companies and individuals involved through online mechanisms such as company websites, Facebook, and Google, is an important and growing feature of the competition in the business of distribution of news and information online, and that is a form of self-supply. More than that, it is *deliberately leveraged self-supply, facilitated by large international businesses* that have an ability and financial incentive to grow this source of news and information content that can be accessed by them at effectively no cost, to the detriment of local news organisations like the parties to this application. The way in which the Trump and Brexit campaigns used social media, not traditional media, to achieve their respective successes demonstrates the importance of self-supply through social media – both in terms of influencing public opinion and achieving advertising outcomes.<sup>2</sup>

- (ii) *Brambles*: where the Court reminded the Commission that if it is going to define markets narrowly, it must still account for actual constraints on competitive conduct operating from outside the market. In this case, if the Commission were (incorrectly in our view) to define a market only by reference to the large providers of news and information, TVNZ, RNZ, MediaWorks, and NZME2, then it must also recognise the constraint that alternative forms of news distribution place on competition in that narrowly defined market, and the constraint from digital advertising providers (such as Google and Facebook) in the context of a two-sided market. The Court reminded the Commission that market definition is only a tool in the competitive effects analysis; the Commission cannot define a narrow market and rely on that market definition to exclude actual constraints.

(c) **The full spectrum of benefits to the public.** On the basis that, contrary to the parties' legal submissions,<sup>3</sup> the Commission can consider whether the merger gives rise to plurality detriments, it cannot stop at the simple observation that the merger gives rise to one fewer independently owned media company (i.e. "external plurality")

<sup>2</sup> Richard MacManus "A dangerous new era in social engineering" (20 March 2017) Newsroom. Accessible at: <https://www.newsroom.co.nz/@technology/2017/03/20/15834/micro-targeting-trump-facebook>.

<sup>3</sup> Legal Submission in Relation to Commerce Commission's Jurisdiction to Consider Plurality Issues (25 November 2016), and Update on Legal Submission Arising from Court of Appeal Decision in Godfrey Hirst (23 December 2016). The parties reserve their position in relation to the legal arguments outlined in those submissions.

of shareholders is negatively impacted). It needs to move from that simple observation to engage with all of the plurality (and other) benefits that the transaction gives rise to. Both Fairfax and NZME have provided extensive evidence of those public benefits:

- (i) A **sustainable organisation producing journalism at scale**, which is invested in maintaining the traditions of creating engaging and responsible journalism, to be delivered via whatever platform and through whichever mechanism (print, text, video, or radio) that people want to access it.

[ ]

Many criticise the parties' responses to the current media environment, without acknowledging that the issues are structural and not specific to these companies (as reflected in the Shattered Mirror report and Moody's analysis enclosed) and they therefore can provide [ ].

Fairfax and NZME do have a solution to the continued decline of the businesses, which is to merge into NZME2 and that is backed by careful PwC synergy modelling and analysis, enabling the continued creation of excellent local content. It has an opportunity for success, as it delivers "runway", ie cost savings without cutting into the production of content, recognising that strong local content is pivotal to news organisations' connection with local audiences, and it is that connection from which the new revenue streams can be generated.

TVNZ's CEO Kevin Kenrick made exactly the same points in a recent interview ([ ])4 where he said:

... What we do know is that **audiences will continue to fragment, that advertising dollars will follow audiences**, and the cost base that we have in the business is not sustainable through the medium to long term. ...

... different players, depending on their relative position have got more or less runway within which they can make the change. ...

... what we have been doing over the last few years is squeezing the overhead support costs, really being quite targeted around the labour costs and trying to preserve what we can in the content area. And we're probably going to stay true to those principles in terms of how we approach this redesign.

Kevin Kenrick's comments about convergence of news organisations, the need to prioritise content investment, and the significance of connection with local audiences is equally correct for NZME2. He states that "TVNZ is in a strong position". It is correct to say that TVNZ has more runway from TV compared to NZME and Fairfax from their publishing businesses, because TVNZ has total advertising revenue of \$304m (down 3.3% from the previous year), most of which is TV advertising revenue, where it has a 61.3% share of TV advertising revenue,<sup>5</sup> whereas NZME has total print + digital advertising revenue of \$174m (down 8% from the previous year)<sup>6</sup> and Fairfax NZ has total print + digital advertising revenue of [ ] (down [ ] from the previous year).<sup>7</sup>

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4 [ ].

5 [http://images.tvnz.co.nz/tvnz\\_images/about\\_tvnz/TVNZ%20Financial%20Report%20FY2016\\_FINAL.pdf](http://images.tvnz.co.nz/tvnz_images/about_tvnz/TVNZ%20Financial%20Report%20FY2016_FINAL.pdf)

6 <http://www.nzme.co.nz/media/1102/nzme-full-year-results-investor-presentation.pdf>

7 [ ].

- (ii) **Maintaining journalists in the regions**, where the business case is the weakest but the significance of their role in maintaining a check on local bodies and highlighting local issues, is arguably the greatest. The transaction gives rise to little or no overlap in regional journalists, which is why [ ].

The main centres – Auckland, Wellington, and the press gallery, (where TVNZ, RNZ, Mediaworks and others, including Newsroom, Noted, and The Spinoff) have many journalists, do not need external (shareholder) plurality to be preserved by prohibiting the merger. Indeed, [ ]. By contrast, the regional centres will lose very little shareholder plurality as a result of the merger, given the already limited cross-over between the parties' metro daily, regional daily, and community newspapers, but those regions gain significant public benefits in terms of the sustainability of the media that fulfils an important role in those communities.

- (iii) **Capital market benefits of NZME2 as a listed NZ media stock**, arising [ ] in which New Zealanders and foreign entities can invest, and which will add support to the NZX trading environment. The Treasury tax take also benefits as NZME2 will pay tax in New Zealand commensurate with the profit it derives from New Zealand.

3. This means that the Commission cannot simply set out a "worst case, likely" counterfactual [ ] so the transaction fails to result in such a benefit to the public that it should be permitted. It needs to consider the necessary, logical consequences of the relevant counterfactuals and compare that to the consequences of the likely factual(s), to form an "on balance" view of the most likely public benefits arising from the transaction.

4. Even if the counterfactual set out in the Counterfactual Letter was adopted as the most likely counterfactual (which the evidence provided by the parties does not support), the necessary steps that flow from that, for the analysis of benefits and detriments pursuant to the authorisation test, are:

- (a) To look at **where the next round of cost savings will be likely to come from**. There is strong evidence that [ ]. [ ].
- (b) To model the **likely detriments to output** (measured by number of journalists producing articles, and number of print products in market), **and consequently, in a two-sided market, revenue** that arises from the parties' need to deliver annual cost savings in the order achieved annually over the last few years (or greater, given the trends are accelerating). [ ].

NERA has done simplified modelling of this effect [ ].

- (c) [ ]. [ ].

PwC has provided the Commission (on 17 March 2017) a further letter [ ]. [ ].

- (d) Considering the likely benefits (being all benefits that have a real chance of occurring) against the logical consequence of the Commission's counterfactual [ ].

It is simply illogical to assume that status quo levels of quality would persist in an environment where everything else (capacity, costs and revenues) are changing rapidly, [ ].

Conversely, maintenance and enhancement of the current levels of financial sustainability logically would result in maintenance or enhancement of the current quality of media reporting, as NZME2 works hard to maintain and grow its audience off a journalistic base similar to that available in the two businesses today.

5. Once the necessary logical conclusions are drawn from the counterfactual as stated in the Commission's letter, it is clear that the Commission must be satisfied that, when measured against all the benefits that have a real chance of occurring, the merger must give rise to such a benefit to the public that it should be permitted.
6. The Commission, in its stakeholder briefing in October 2016, commented that it expects its decision and adjudication on this merger to be of interest not only to the New Zealand competition law community, but also internationally.
7. This would suggest it is even more important that the Commission is seen to make its decision in accordance with the applicable legal tests (as discussed above), and that any assessment of media plurality (to the extent that can be considered relevant to the Commission's decision), and public benefits, includes a proper analysis of all relevant factors – and is not seen to be placing a short-term (and in the parties' view false) focus on a simple assessment of number of competitors (an "external plurality" measure of the number of media company owners), and give that one factor precedence over all other factors.
8. To recap, setting aside the simple number of independently owned businesses ("external plurality" of shareholders), the benefits of the merger include:
  - (a) All other aspects of media plurality – including:
    - (i) a wide variety of different types of media (improved, especially through the continuation of print publications in market in the factual);
    - (ii) sustainability of business models (significantly improved);
    - (iii) diversity of viewpoints and sources (improved, especially in the regions);
    - (iv) broad scope of media coverage (improved, especially in the regions);
    - (v) gender equality (neutral); and
    - (vi) a focus on the extent to which journalism is successfully performing its key roles of informing, representing, campaigning, and interrogating (significantly improved).
  - (b) All potentially relevant public benefits – including to:
    - (i) New Zealand journalism (sustaining a scale organisation with the ability to train journalists in the tradition of responsible and accurate news reporting and other key skills that sustainable scale organisations perform in the ordinary course to the significant benefit of the public);
    - (ii) other New Zealand media companies (providing better quality competition in news gathering and distribution, and other collaboration and partnering opportunities to limit the movement of advertising revenue to offshore businesses);
    - (iii) New Zealand advertisers (including by allowing an organisation that has an ongoing ability to invest in advertising innovation, including for local SMEs as well as for large local businesses, providing a credible digital advertising alternative to Google and Facebook);
    - (iv) New Zealand investors on the NZX (having a sustainable NZ media company to invest in); and
    - (v) the New Zealand Government and people of New Zealand generally (having a sustainable New Zealand media organisation that employs people in New Zealand, and pays taxes in New Zealand, instead of almost

all new digital advertising revenues being directed to Google and Facebook).

9. A backward-looking [ ] focus on "external plurality" (number of shareholders) of news organisations, which does not also include a proper assessment of all these other aspects of media plurality and public benefits will be, and will be seen by any international observers to be, illogical and incomplete.
10. It would also be seen as a retrograde step in comparison to other regulators internationally that have already identified these trends and their implications. For example, the ACCC showed a forward-looking recognition of these dynamics, and the importance of the two-sided nature of the market, when considering the competitive constraint of online digital platforms in both its recent Queensland and Western Australia media merger decisions, and the Commission itself approved, based on the same convergence trends, an acquisition of magazine titles that gave a similar share of magazine publications to Bauer that NZME2 would have of newspaper titles.

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## THE COMMISSION'S APPROACH TO THE COUNTERFACTUAL ANALYSIS

### Time horizon for Commission's counterfactual

11. The Commission's Counterfactual Letter is not clear about [ ]. [ ].

### Adoption of "most competitive" counterfactual

12. The Commission's Counterfactual Letter indicates that the Commission is proposing to adopt a counterfactual that it considers "gives rise to the most competition concerns" (ie adopting a "worst case" approach, rather than a "most likely" approach) when considering the authorisation application.
13. While that is the correct legal standard for the Commission to apply in clearance applications, in relation to applications for authorisation, that is not an approach that is provided for in either the Commerce Act or case law.
14. There is, of course, a difference between the clearance and authorisation tests because the Commission only needs to consider the authorisation test if it is not satisfied under the clearance test.
15. The Court of Appeal has cautioned against a "starting at shadows" approach in relation to authorisation applications given "acquisitions can increase efficiency and benefit the public unless there is good reason to prevent them":<sup>8</sup>

On the other hand, acquisitions can increase efficiency and benefit the public and thus should be permitted unless there is a good reason to prevent them. A starting at shadows approach to what constitutes an anti-competitive effect might thus be inimical to the public interest.

We agree that this is so, at least broadly. **But it is right to recognise that efficiency considerations are more material to an authorisation than a clearance.** [Emphasis added]

16. This is why, in the authorisation context, the Courts have said the Commission needs to weigh on balance all detriments and all public benefits that have a real chance of occurring, to achieve a "reasonable balance", as opposed to simply adopting a "worst case" comparison:<sup>9</sup>

The Commission could authorise the proposed Alliance under ss 61(6) and 67(3)(b) only if it determined it would result or would be likely to result in a benefit to the public which would outweigh the lessening of competition that would result, would be likely to result or would be deemed to result from the proposed Alliance. That requires a weighing of likely detriments and likely public benefits. For this purpose, the Commission has a responsibility to attempt to quantify detriments and benefits where possible: *Telecom Corporation of New Zealand v Commerce Commission* [1992] 3 NZLR 429, 447 (CA). For this purpose, assumptions of inefficiency should not be made on the grounds of economic doctrine alone – *Telecom* (supra) at p 439 per Cooke P.

For the purpose of quantifying detriments and public benefits, the Commission accepted the approach taken by the appellants of adopting the third year following implementation of the proposed Alliance as representative of what is judged likely to occur over a five-year period. This was seen to achieve a reasonable balance between detriments and benefits which were likely to materialise at differing rates.

<sup>8</sup> *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76].

<sup>9</sup> *Air New Zealand And Anor v Commerce Commission And Ors* HC AK CIV 2003 404 6590 [17 September 2004] at [235] and [236].

17. As a result, in that case the Commission adopted an approach that considered the "most likely" difference between the factual and counterfactual,<sup>10</sup> instead of comparing a "worst case" counterfactual scenario to the factual, even if that counterfactual were less likely than other scenarios.

18. Similarly, in the recent *Godfrey Hirst* litigation, the Commission specifically outlined that the approach to authorisation is different to clearance, and that in the authorisation context the Commission must conduct a weighing exercise that looks at the likely balance of detriments and benefits of the merger into the future - on balance – with the inevitable consequence that it can (and in that case arguably did) grant authorisation even if there is one likely scenario in which the transaction results in a net detriment, ie if there is a "real chance" there will be a net detriment:<sup>11</sup>

... Godfrey Hirst argues that if any one of its grounds of appeal succeeds, it will not be possible to exclude the real chance of a net public detriment and the authorisation could not stand.

Cavalier and the Commission dispute this analysis. They argue that an **authorisation can properly be granted even if there is a real chance that there will be a net detriment so long as the risk of this occurring is sufficiently outweighed by the likely benefit.**

19. Accordingly, in the authorisation context the Commission's task is not to exclude a real chance of a detriment, as the Counterfactual Letter appears to suggest. Instead, in an authorisation the Commission needs to weigh all detriments<sup>12</sup> and all benefits that have a real chance of arising as presented in the evidence to achieve a "reasonable balance" in its assessment of the most likely net position in the future arising from the transaction, based on the evidence before it.

20. In this respect, the approach outlined in the Counterfactual Letter is inconsistent with the Commission's own *Authorisation Guidelines*, where it states it must weigh the likelihood of the various potential scenarios to assess benefits and detriments, rather than simply adopt a "worst case" scenario to block an otherwise efficiency enhancing merger:

We place less weight on the benefits and detriments that are less likely to occur.  
...

As well as considering whether to place less weight on benefits and detriments that are less likely to occur, or for which the evidence is less strong, we also discount future benefits and detriments. This reflects that there is a preference to receive a benefit today, rather than a benefit of the same size in the future, all else being equal.

21. This final observation is particularly apposite. The benefit of keeping journalistic output at close to the same levels as they are today and of keeping newspaper titles open, [ ].

22. Accordingly, in the context of an application for authorisation it is incumbent on the Commission to form a view on the likelihood of benefits and detriments arising in both the factual and counterfactual, and then weigh them accordingly, rather than simply taking a binary approach of taking a "worst case" counterfactual (which will deliver the highest level of detriments), and then measuring none but the most irrefutable benefits against it. That would be inconsistent with the obligation on the Commission to take into account all benefits and detriments that have a real chance of occurring, and to place most weight on the benefits and

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<sup>10</sup> *Air New Zealand And Anor v Commerce Commission And Ors* HC AK CIV 2003 404 6590 [17 September 2004] [278] and [304].

<sup>11</sup> *Godfrey Hirst NZ Ltd v Commerce Commission & Ors* [2016] NZHC 1262 [13 June 2016] at [6] and [7].

<sup>12</sup> Fairfax and NZME reserve their position in respect of their previous submissions on the legal test. This submission proceeds on the basis that the Commission does not agree with those submissions and proceeds with the view expressed in the Draft Determination that it can take into account detriments other than price and quality detriments arising from, and in the markets in which, the lessening of competition is found to arise.

detriments most likely to occur soonest, and progressively less weight on those that are less likely to occur.

### Smaller competitors and self-supply in media

23. In *Southern Cross*, the Court of Appeal observed that a firm is unlikely to be in a position to lower quality or raise prices above competitive levels unless there are barriers to entry protecting it from competition:<sup>13</sup>

Whatever the size of the merged entity's market share, it is elementary that its market power will not be insufficiently constrained unless there are barriers to entry or expansion which protect it from effective rivalrous reaction to the exercise of its market power.

24. The Court went on to make the point that the relative size of the players in the market is not determinative of market power; rather, larger firms can be constrained by a collection of more specialist rivals:<sup>14</sup>

The low level of new entry or expansion (and the level has increased in recent years) and the lack of significant erosion of Southern Cross' share do not raise anti-competitive concerns. The recent Tower/AXA merger and the Sovereign/ASB marketing initiatives suggest the market in recent times has been quite dynamic. **As Professor Brunt has said, the leading firms can be constrained by a collection of more specialist rivals:** Australian and New Zealand Competition Law and Policy (1992) 19th Fordham Corporate Law Institute – Annual Proceedings, at 32. [Emphasis added]

25. This dynamic is evident in respect of New Zealand news, where smaller competitors such as Spinoff, Newsie, Newsroom, Bauer (Paperboy, Noted, Listener, North & South, Metro), and NBR, provide material competitive constraint on the parties in respect of certain aspects of news (whether that be breaking commodity news, cultural commentary, business news, investigative journalism, etc), in addition to the constraint provided by the large news producers such as TVNZ, Newshub, RNZ, and ODT (although, as noted in the past, it is impossible to see any clear break in the chain of substitution between small and large providers so as to permit definition of a separate market in digital news).<sup>15</sup> There are no barriers to those smaller competitors expanding - as Spinoff founder, Duncan Greive, said recently in launching the Spinoff App:<sup>16</sup>

It felt like we're saying we aren't content to be a small business, we want our voice to get louder and our reach to expand and our audience to grow' and this felt like a powerful signal that we're in it for the long haul and want to be a significant piece of the New Zealand media landscape.

26. The coordinators of Newsie, Sun Media, have made a similar point about the ability of that digital news platform to upscale and add further journalistic content from around New Zealand:<sup>17</sup>

To fill it, Newsie pools the resources of New Zealand-owned and independent news companies by publishing their stories to provide a balanced range of national news.

There's also international news that impacts the lives of New Zealanders to keep them in touch with what's happening beyond the country's shores.

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<sup>13</sup> *Commerce Commission v The Southern Cross Medical Care Society* (2001) 10 TCLR 269, at [86].

<sup>14</sup> *Ibid* at [88] (emphasis added).

<sup>15</sup> NERA Report, "Fairfax/NZME: response to submissions on Statement of Preliminary Issues", 29 July 2016, section 3. This report is **attached** again for ease of reference.

<sup>16</sup> Erin McKenzie "The importance of an app for The Spinoff" (8 February 2017) *idealog*. Accessible at: <http://idealog.co.nz/design/2017/02/why-spinoff-needed-app>.

<sup>17</sup> Erin McKenzie "Banding together: Newsie gives regional news national reach" (21 March 2017) *StopPress*. Accessible at: <http://stoppress.co.nz/news/banding-together-newsie-gives-regional-news-national-reach>.

Those involved span the length of the country, including the Kaipara Lifestyler, Howick and Pakuranga Times, Advocate South, Nelson Weekly, The Post and the Wanaka Sun alongside many others.

It plans on adding many more to the pool in the coming months.

27. In addition, in the *Southern Cross* High Court decision, the Court also stressed the importance of paying more than mere lip service to the prospect of self-supply:<sup>18</sup>

Yet, despite acknowledging that complementarity with the public health system in its general review of health insurance (para 17) and recording Southern Cross' and other informants' views on the reasons for the declining market (paras 46, 88 and 95) **the references to self-funding and the public health system in the Commission's conclusions (para 98) do not, in the Court's view, constitute an adequate response to its necessary inquiry into the appropriate market, its extent, the likelihood of other insurers moving into the market and New Zealanders continuing with or effecting health insurance in the future.** When all the evidence available to the Commission was that the coverage of the health insurance market had declined from something over half of New Zealand's population in 1990 to an estimated one third in 1999, a rather deeper inquiry into those matters was, in the Court's view, called for as part of the discussion of the available market, of substitutability (s 3 (1A)), of dominance in the market and, in particular, in considering the extent to which Southern Cross, following the purchase of Aetna, was likely to be constrained by the conduct of the State as the major supplier of goods and services in the health field (s 3(9)(a) (c)). **Declining population coverage of medical insurance and self-funding by New Zealanders should also have been considered as a constraint on Southern Cross following its acquiring Aetna.**

28. Given this failure to consider such factors as self-supply in sufficient detail, the Court was "driven to conclude that the Commission's investigation of the available market and the shares currently achieved or likely to be attained in the future was insufficiently broad or deep".<sup>19</sup>
29. In the media context, of course, platforms like Facebook, Google, LinkedIn, and others, provide a distribution channel for self-supply that gives similar (and increasingly better)<sup>20</sup> prominence to individuals' and businesses' own news and information about themselves.<sup>21</sup>

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<sup>18</sup> *Southern Cross Medical Care Society v Commerce Commission* (2001) 10 TCLR 25 at [64] (emphasis added).

<sup>19</sup> *Ibid*, at [65].

<sup>20</sup> At the Conference on 6 December 2016, Robert Hutchinson from Fairfax noted (at p 23, line 20) that:

Facebook explicitly constrain us because they have slowly pushed down the organic reach we have on Facebook. What I mean by that is we have people who like the Stuff page and in 2013 approximately 12 per cent of them would have seen any article that we put up, and now it's 6 per cent and that's just a deliberate pushing down of the organic reach that publishers have, for example.

Duncan Greive, the founder of Spinoff, has made similar comments:

Last year, Facebook rolled out algorithm changes to its newsfeed that prioritised posts from the user's friends and family and reduced the number of posts by brands and organisations. It was a move celebrated by users who use the site as a means of connecting with people, but it sparked alarm bells for publishers who used Facebook as a distribution channel.

"It made us think about how tenuous our relationship with our audience was if Facebook was the only method of engaging with them, or by far the dominant," says The Spinoff editor and publisher Duncan Greive. (See: <http://idealog.co.nz/design/2017/02/why-spinoff-needed-app>).

The article describes that Spinoff created an App in response to this observed action by Facebook.

<sup>21</sup> In the parties Factual Submission on the Commission's Draft Determination (25 November 2016), it was argued at [147] to [159] that Facebook is a powerful diffuser of news and information which is adept at dis-intermediating the provision of news and information to ultimate consumers, diminishing the importance of scale for any individual news organisation and prioritising content. At [160] to [163] it was argued that this potential as diffuser

The Facebook "Manifesto", released since the Commission's Draft Decision and conference, exploits this obvious fact with an articulation of Facebook's stated ambition to be the primary interface between the citizens and government.<sup>22</sup> This is not academic or inconsequential levels of self-supply. This is deliberately leveraged self-supply, facilitated by large international businesses that have an ability and financial incentive to grow this source of news and information content that can be accessed by them at effectively no cost, to the detriment of local news organisations like the parties to this application. The founders of Newsie make the point well that their "real competition" is from Google and Facebook:<sup>23</sup>

**"It's a matter of New Zealand media banding together and the real competition is beyond the media, it's with Google and Facebook and those giant international companies that are pillaging traditional media income streams,"** Brian says. [Emphasis added]

30. It is important the Commission's Final Determination properly reflects the implications of this competition from Google / Facebook and the importance of self-supply in today's 2017 environment – both in terms of influencing public opinion and achieving advertising outcomes.<sup>24</sup> For example, the way in which the Trump and Brexit campaigns used social media, not traditional media, to achieve their respective successes demonstrates the importance of self-supply through social media, and the disintermediated state of traditional media today and into the future:<sup>25</sup>

A big part of the reason why Trump won is the incredible job done by his digital team, who used a new form of micro-targeting to push their messages, influence potential voters, and raise money. Much of this was done on social media, and in particular Facebook.

In the final weeks of the Presidential campaign, Hillary Clinton outspent Trump in TV adverts – traditionally a key factor in swaying voters. She spent \$72m on TV ads, compared to \$39m by Trump. However, despite raising significantly less money overall than Clinton, Trump's team spent big on digital at the end of the campaign. While Clinton dropped about \$16m on the Internet, Trump spent \$29m. Trump's Digital Director, Brad Parscale, decided to use most of that on micro-targeting.

...

In the UK's controversial Brexit vote last year, Facebook likes turned out to be crucial. Andy Wigmore, the communications director for Leave.EU, told The Guardian that a Facebook like was their most "potent weapon". It told the Leave campaign "all sorts of things about that individual and how to convince them with what sort of advert". What's more, it gave them useful clues to what their friends liked as well. This data turned out to be gold.

...

Regardless of my own lack of success using micro-targeting, it is here to stay and is particularly powerful for political campaigns. New Zealand has a general

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of news extends beyond media companies to the individuals or companies involved in the news itself, allowing these people or companies to bypass the traditional media entirely by breaking their own news.

<sup>22</sup> The Conversation, "If Facebook ruled the world: Mark Zuckerberg's vision of a digital future" (22 February 2017) (accessed at <http://theconversation.com/if-facebook-ruled-the-world-mark-zuckerbergs-vision-of-a-digital-future-73459>). See also Toby Manhire "Media shivering in Facebook's shadow" (24 February 2017) NZHerald. Accessible at: [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11806392](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11806392).

<sup>23</sup> Erin McKenzie "Banding together: Newsie gives regional news national reach" (21 March 2017) StopPress. Accessible at: <http://stoppress.co.nz/news/banding-together-newsie-gives-regional-news-national-reach>.

<sup>24</sup> This point was made in the 27 February 2017 "taking stock" letter sent to the Commission:

Going back to the question at the heart of the market definition and competitive effects analysis, "Who is eating my lunch?", none of the alternative, potential wished for Plan Bs that have been postulated for either business make any difference to their financial trajectory, nor to their ability to maintain the quality of journalism which they currently produce.

<sup>25</sup> Richard MacManus "A dangerous new era in social engineering" (20 March 2017) Newsroom. Accessible at: <https://www.newsroom.co.nz/@technology/2017/03/20/15834/micro-targeting-trump-facebook>.

election coming in September, and you can bet the main political parties will use social media micro-targeting to influence voters. And to be frank, we only have ourselves to blame. By using social media products – especially Facebook – multiple times every day, we are constantly revealing useful data points about our political leanings. In effect, Facebook and Twitter have conditioned us to give political parties (and businesses) the data they most want: what we ‘like’, what we willingly follow, how we respond to certain messages, and so on.

The result: organisations like the Trump and Brexit campaigns know precisely which information will provoke a desired response in us. They also know that eventually, just like laboratory rats, we will nibble their dangling cheese. Bear that in mind next time you head to a voting booth.

31. Finally, even if the Commission is minded to define markets narrowly, it must still take into account any constraints on the merged entity from outside of that market (including from the above group of more specialist rivals), so as not to under-estimate the level of overall constraint. This has been noted by the High Court in *Brambles*:<sup>26</sup>

It is important to recognise that market definition is a tool for competition analysis rather than an end in itself. **A decision to define the market by reference to crates only can provide an appropriate basis for analysis of the competition issues which need to be decided, but defining the market in that way should not lead to any under-estimation of the potential substitutability and level of constraint on market participants in that narrowly defined market, from cardboard packaging both premerger and post-merger.** While counsel for the appellant urged us to adopt a broader market definition, including cardboard, he acknowledged the real issue was the degree to which cardboard was recognised as a constraint, whether it was included within the product market or not. We think that was a realistic assessment. CHEP's primary submission to us was that the Commission had misinterpreted the evidence before it and this had led it to under-estimate the degree of constraint imposed by cardboard. We accept that submission.

32. Therefore, if the Commission is minded to (incorrectly in the parties' view) define a narrow market by reference only to the largest providers of news and information – TVNZ, RNZ, MediaWorks, and NZME2 – then it must also recognise the constraint acting on the players in that narrow market from the smaller, more specialist competitors outside of the market and the constraint from Google and Facebook.

[ ]

33. [ ].

34. [ ].

35. [ ].

36. [ ].

37. [ ].

38. [ ].

39. [ ]:

(a) [ ]; or

(b) [ ].

40. [ ].

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<sup>26</sup> *Brambles New Zealand Limited v Commerce Commission* (2003) 10 TCLR 868 at [137] (emphasis added).

41. [ ]:<sup>27</sup>

[ ]

42. [ ]:<sup>28</sup>

[ ].

43. [ ].

44. [ ].

45. [ ].

#### COMMISSION'S COUNTERFACTUAL RESULTS IN REDUCED QUALITY/PLURALITY

46. The Commission has advised that [ ].

47. [ ].

48. However, the Commission then needs to follow that view of the counterfactual through to its logical and likely conclusion, based on the information and financial data provided to the Commission. In particular, the Counterfactual Letter:

(a) does not outline a view on what that counterfactual will mean for journalistic quality and media plurality in the absence of the merger; and

(b) [ ].

#### Impacts on plurality and quality

49. As noted above, the Counterfactual Letter does not outline [ ] will mean for journalistic quality and media plurality in the absence of the merger. Given the sole ground on which the Commission indicated, in its Draft Determination, that it was minded to decline the merger was media plurality, that is a fundamentally relevant factor that is not discussed in the Commission's Counterfactual Letter.

50. In particular, the Commission must weigh what [ ] will mean for journalistic coverage in New Zealand.

51. The Commission's Levy/Foster report (the "**UK Report**") outlined that ownership is only one of many factors to consider when considering media plurality, and is not the most important, with other relevant factors being:

(a) Access to a wide variety of different types of media;

(b) Sustainability of business models;

(c) Diversity of viewpoints and sources;

(d) Broad scope of media coverage;

(e) Gender equality; and

(f) A focus on the extent to which journalism is successfully performing its key roles of informing, representing, campaigning, and interrogating.

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<sup>27</sup> [ ].

<sup>28</sup> [ ].

52. Accordingly, to form a view on the merger, the Commission must assess what a [ ] counterfactual will mean for each of those aspects of plurality (assuming media plurality is within the Commission's jurisdiction, which the parties say it is not) – including [ ].
53. In summary, every other factor in an assessment of plurality is either neutral or enhanced by the proposed transaction. Only external shareholder plurality benefits from a refusal to authorise it, at significant cost to the other elements of media plurality.
54. Furthermore, to the extent the Commission indicated in its Draft Determination that NZME/Fairfax's journalism is "prominent" and plays a role in setting the news agenda such that a reduction in their quality could have "flow-on effects" to TVNZ, MediaWorks, and RNZ,<sup>29</sup> the Commission must also take into account those "flow-on effects" from [ ].
55. A decision that purports to be based on an assessment of media plurality, but does not methodically work through each of the criteria of media plurality, will be (and will be seen to be by any international observers) illogical and incomplete.
56. Certainly, Ofcom (whom the Commission quoted in its Draft Determination) has cautioned against promoting shareholder diversity over sustainability, in assessing media plurality, recognising that:<sup>30</sup>

...in trying to secure multiple voices, there is a risk of ending up with none.

57. Similarly, the Canadian *Shattered Mirror* report reflected that in today's environment there are significantly more important factors at play in considering plurality than simply diversity of shareholders:<sup>31</sup>

In the decades since Senator Davey declared the media mirror "uncertain," it has cracked and now appears shattered. The odd blend of content fragmentation, revenue consolidation and indifference to truth has overtaken simple concentration of ownership as the main threat to holding public officials to account and reflecting Canadian society back to its citizens.

...

Competition law has long focused on economic marketplaces and questions about whether undue concentration was being used to raise prices, lessen competition and ultimately harm consumers. That may have been fine under the assumptions of the day. But now it may be time for governments to reconsider media concentration through the lens of a robust marketplace of ideas. Information and ideas constitute markets that must operate freely and with sufficient diversity of voice (competition) that news and opinion have a chance to clash and inform democracy.

The extraordinary dominance of platform companies, particularly Google and Facebook, raises issues beyond economic harm in the usual sense. After all, news is being widely disseminated and advertising prices are being reduced through enhanced efficiencies.

The issue at play begins with the relationship between the growing economic might of a handful of platform companies engaged in distribution and their effect on the capacity of news originators to provide the goods that nourish the marketplace of ideas. Without news, opinion and understanding, democratic decision-making cannot be well informed.

...

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<sup>29</sup> At [590] and [591].

<sup>30</sup> Measuring media plurality: Ofcom's advice to the Secretary of State for Culture, Olympics, Media, and Sport. Ofcom, 19 June 2012.

<sup>31</sup> THE SHATTERED MIRROR. News, Democracy and Trust in the Digital Age. © 2017, Public Policy Forum.

The problem can be understood, says Canadian academic Mike Ananny, a professor at the University of Southern California's Annenberg School for Communication and Journalism, only by understanding that both platforms can set the conditions under which news disseminates (i.e., which types of news are favoured, which types of distribution are more likely to occur) and set the conditions under which advertisers reach audiences through this news distribution. "It's this structural double whammy of dominating ideas and money that's the real third rail of platform power," he says.

- 58. The Commission must grapple with (and cannot ignore) these powerful dynamics in comparing the counterfactual to the factual and, therefore, in assessing the submitted benefits of the transaction. The Commission has an opportunity to demonstrate that it has understood the rapid and structural decline of the news publishing industry, the fundamental structural changes in how news is developed and distributed, the fast-changing economics of media organisations and the rise of platforms, and what that means for antitrust assessment of media mergers in today's environment. It is important that the Commission takes that opportunity, and does not [ ] through the use of an outdated view of the counterfactual or for fear of being among the first regulators to properly grapple with these trends. It should be noted that some regulators internationally have already identified these trends and their implications: the ACCC showed a forward looking recognition of these dynamics, and the importance of the two-sided nature of the market, when considering the competitive constraint of online digital platforms in both its recent Queensland and Western Australia media merger decisions. The Commission itself approved an acquisition of magazine titles that gave a similar share of magazine publications to Bauer that NZME2 would have of newspaper titles, based on the same convergence trends.

**Assessments based on optimism, not data**

- 59. Furthermore, it is also apparent that the Commission is currently adopting a view [ ], rather than being grounded in market modelling based on financial and economic realities of the markets the parties operate in.
- 60. [ ].
- 61. Of course NZME and Fairfax NZ each have the objective of increasing revenues, reducing cost, and investing in their businesses. Anything less than trying to achieve those outcomes would be a disservice to these companies and their shareholders.
- 62. [ ]:
  - (a) [ ]:
    - (i) [ ]:
      - (aa) [ ]; and
      - (bb) [ ].
    - (ii) [ ].<sup>32</sup> [ ]. [ ].
  - (b) [ ]:
    - (i) [ ]; and
    - (ii) [ ].

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<sup>32</sup> For example: see [ ], [ ], and [ ].

[ ]:

(iii) [ ];

(iv) [ ].

Those declines are not just isolated to Fairfax NZ and NZME, they are structural and consistent with what is being observed overseas, for example in the US Moody's has forecast that "the industry's organic EBITDA will decline by 7% to 10% through early to mid-2018" (see further at **Appendix Four**).

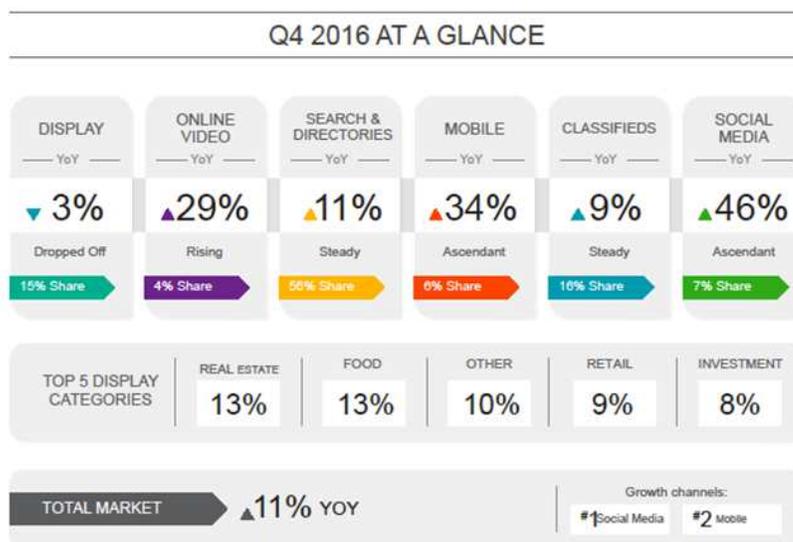
In addition, as explained to the Commission, it is accepted in the industry, based on both New Zealand and overseas developments, that the current growth in digital revenues is not sustainable, and is likely to slow significantly in the coming years – in particular for publishing-based businesses such as NZME and Fairfax NZ (as opposed to for Google / Facebook who together are taking 80%+ of new advertising expenditure).

For example, the most recent data from New Zealand demonstrates that:

- (v) digital advertising expenditure on social media advertising (i.e. to the likes Facebook) is increasing significantly (up +46% YOY); and
- (vi) digital advertising expenditure on online video (where TVNZ and MediaWorks have natural strengths) is increasing significantly (+29% YOY); yet
- (vii) digital advertising expenditure on display advertising (which is the type of advertising primarily offered by publishers such as NZME and Fairfax NZ) is declining (-3% YOY).

Those trends are set out in Figure 1 below.

Figure 1 - Digital advertising expenditure in New Zealand in 2016<sup>33</sup>



Similarly, in Australia, which is widely regarded as tracking a couple of years ahead of New Zealand in term of digital maturity, while the overall "digital" category has continued to grow at ~14% over the last year, that growth has largely been to Facebook and Google. The major Australian online publishers (Fairfax, News, Yahoo7 Nine, Bauer, MCN) are down -7% over this same period – see Figure 2 below (with any growth for News and MCN largely due to acquisitions).

Figure 2 – Australia SMI Agency Booking data for major publishers

Agency Bookings by Major Publisher						
	Jan 13 - Dec 13	Jan 14 - Dec 14	Jan 15 - Dec 15	Jan 16 - Dec 16	\$ Change	% Change
News Digital****	67,005,123	73,659,383	81,003,055	91,414,743	10,411,689	12.9%
Fairfax Digital**	97,644,286	88,775,668	89,468,636	79,752,348	-9,716,288	-10.9%
Nine Digital	89,521,943	89,029,317	85,073,209	65,745,547	-19,327,662	-22.7%
Yahoo!7	60,598,866	68,433,232	74,447,499	54,236,318	-20,211,181	-27.1%
MCN Digital***	28,392,933	29,914,749	39,699,055	46,900,836	7,201,781	18.1%
Bauer Xcel Media*	63,801	225,470	6,514,153	10,238,470	3,724,317	57.2%
<b>Grand Total</b>	<b>343,226,952</b>	<b>350,037,819</b>	<b>376,205,606</b>	<b>348,288,262</b>	<b>-27,917,344</b>	<b>-7.4%</b>

SMI Financial Booking Data at January 11, 2017  
 \*Excludes Bauer  
 \*\*Includes Allure Media  
 \*\*\*Includes Ten Digital  
 \*\*\*\*Includes NewsLifeMedia Digital

Again the Commission needs to reflect those in-market revenue trends and forecasts, in its forward looking assessment of the future for these businesses, and what that means for media quality, diversity, and plurality. Speculation, and optimism, without any robust evidential foundation, do not provide a basis for disregarding in-market commercial realities.

(c) [ ]

[ ]

<sup>33</sup> "Interactive ad spend exceeds \$850 million in 2016 as social media and mobile dominate" (21 March 2017) StopPress. Accessible at: <http://stoppress.co.nz/news/interactive-ad-spend-2016>.

[ ].

[ ].

[ ].

[ ].

[ ].

It is in this respect, that the counterfactual is materially different from the factual – in particular:

(i) [ ]; and

(ii) [ ].

[ ].

As that is a key rationale for the merger (as a comparison between the factual and counterfactual is key to responding to the Counterfactual Letter), further information on how NZME and Fairfax see the factual differing from the counterfactual is set out paragraphs 69 to 77 below.

[ ]

63. [ ].

64. [ ]:

(a) [ ].

(b) [ ].

(c) [ ]:

(i) [ ];

(ii) [ ]; and

(iii) [ ].

(d) [ ]:

(i) [ ].

(ii) [ ].

(iii) [ ].

[ ]

65. [ ].

66. [ ].

67. [ ].<sup>34</sup>

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<sup>34</sup> [ ].

[ ]

68. [ ]:

(a) [ ].

[ ]:<sup>35</sup>

[ ]

[ ]:

[ ]

[ ].

[ ].

[ ].

(b) [ ]:

(i) [ ];

(ii) [ ];

(iii) [ ].

[ ].

[ ].

[ ]:

[ ].

[ ].

[ ]:

[ ].

[ ]

**THE FACTUAL**

69. While this response is in reply to the Commission's Counterfactual Letter, it is also important to reiterate NZME and Fairfax's views on the factual and how that is materially different to each of NZME and Fairfax's individual counterfactuals.

70. [ ].

71. PwC's letter, sent to the Commission on 17 March 2017, demonstrates, from a financial perspective, how the merger will enable NZME2 to extend the longevity of its print publishing operations, and [ ] – including that:

(a) the anticipated synergies will reduce the publishing cost base and spread remaining costs over a broader base, extending the economic lifetime of print publishing in its entirety and that of the individual publications;

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<sup>35</sup> [ ].

- (b) the anticipated synergies will, all else being equal, enable the merged entity to reinvest an additional [ ] into adjacent areas (eg Stuff Fibre, GrabOne) in which it could successfully exploit the combined customer databases and other intellectual property, and those new revenues could then be re-invested in the publishing business and / or content creation [ ];
- (c) [ ]; and
- (d) [ ].

72. In addition, the Merger will achieve:

- (a) economies of scale from single investment in platforms and new advertising technology – native advertising, mobile, data etc – rather than duplicated investment in the same platforms; and
- (b) a broader local coverage that will provide NZME2 with comparable reach to Facebook across local markets, instead of that local advertising expenditure increasingly being lost to Facebook.

73. As a result, Fairfax and NZME are clear that there are a number of public benefits arising from the merger, in addition to the synergies themselves, including that:

- (a) NZME2 can [ ], invested in maintaining the traditions of creating engaging and responsible journalism, to be delivered via whatever platform and through whichever mechanism (print, text, video or radio) that people want to access it.
- (b) NZME2 has an opportunity for success, of which this transaction is an integral part as it delivers "runway", ie cost savings without cutting into the production of content, which is itself pivotal to connection with audiences, from which the new revenue streams can be generated. The business proposition of NZME2 is in that respect similar to the TVNZ vision of its future although TVNZ's CEO correctly makes the point that "TVNZ is in a strong position". This is true – it has a strong tradition of news and information delivered via video which is the primary growth area for mobile users, and it has total advertising revenue of \$304m (down 3.3% from the previous year), most of which is TV advertising revenue, where it has a 61.3% share of TV advertising revenue,<sup>36</sup> whereas NZME has total print + digital advertising revenue of \$174m (down 8% from the previous year)<sup>37</sup> and Fairfax NZ has total print + digital advertising revenue of [ ], (down [ ] from the previous year).<sup>38</sup>

TVNZ's CEO, Kevin Kenrick, could have been speaking as CEO of NZME2 (or Fairfax or NZME) when he made the observations below late last week ([ ]):<sup>39</sup>

Well I think, you know you can extrapolate out a set of numbers and you can paint scenarios of what things look like. **What we do know is that audiences will continue to fragment, that advertising dollars will follow audiences, and the cost base that we have in the business is not sustainable through the medium to long term.**  
[...]

I think the changes have been evident for some time in terms of the shift in competition and **I think different players, depending on their relative position have got more or less runway within which they can make the change. TVNZ is stronger than many. We reach over two million New Zealanders every day. We're in a strong position in our market but at the same time we're not shielded**

<sup>36</sup> [http://images.tvnz.co.nz/tvnz\\_images/about\\_tvnz/TVNZ%20Financial%20Report%20FY2016\\_FINAL.pdf](http://images.tvnz.co.nz/tvnz_images/about_tvnz/TVNZ%20Financial%20Report%20FY2016_FINAL.pdf)

<sup>37</sup> <http://www.nzme.co.nz/media/1102/nzme-full-year-results-investor-presentation.pdf>

<sup>38</sup> [ ].

<sup>39</sup> [ ].

**from the realities of the market that confronts all local media players. [...]**

What we are seeing is, in total terms, we're seeing a growth in consumption of video content. Ordinarily you'd say that's a great thing. **The challenge with it is that it's fragmented across multiple different devices and different networks and different mechanisms of how people go about accessing it and that adds complexity and the complexity typically carries cost. That's really what everyone is grappling with right now. [...]**

From a cost point of view, in our business, the costs you can broadly group them into three buckets. You know **the most significant one by far is the investment in content and you want to preserve that as much as you possibly can.** The second biggest bucket is labour costs and then you have a whole lot of broadly you could call them overhead or support costs. **So what we have been doing over the last few years is squeezing the overhead support costs, really being quite targeted around the labour costs and trying to preserve what we can in the content area. And we're probably going to stay true to those principles in terms of how we approach this redesign.**

What we are focussed on is what our sustainable points of difference are and the intersection between that and what is most demanded or valued by viewers and we have high confidence that there is sustainable demand and interest in local content and hearing from local talent, local voices. What we do know is that **New Zealanders want the best of local and the best of global. So we will strive to do both but our sustainable point of difference has to be local and that's something that we're going to prioritise.**

Kevin Kenrick's comments about convergence of news organisations, the need to prioritise content investment, and the significance of connection with local audiences is equally correct for NZME2, and indeed, his comment that different players have "more or less runway within which they can make the change" may even be a direct reference to the comments at the conference by the parties and their advisors about the transaction providing the necessary runway for the parties to this transaction. Nothing in this interview suggests that TVNZ will not continue to be a strong competitor in digital news/information into the future if the transaction were to proceed.

- (c) NZME2 can maintain journalists' jobs, their content creation, and the production of smaller local newspapers [ ].
- (d) NZME2 can maintain journalists in the regions, where the business case is the weakest but the significance of their role in maintaining a check on local bodies and highlighting local issues, is arguably the greatest.
- (e) capital markets will benefit [ ] in which New Zealanders and foreign entities can invest, which will add support to the NZX trading environment, and which will pay tax in New Zealand commensurate with the profit it derives from New Zealand.

74. NZME and Fairfax are committed to [ ]:

- (a) supports local journalism,
- (b) is publically listed in New Zealand, and
- (c) pays New Zealand tax,

[ ].

75. Accordingly, NZME and Fairfax see this as a unique opportunity for New Zealand – New Zealand may be one of the few countries in the world able to [ ], provided NZME2 is afforded the runway that the merger will allow. The alternative will [ ] further entrench Google and Facebook as the only digital advertising providers of any scale/audience/data reach in New Zealand.
76. In that context it is clear that there are a number of stakeholders beyond NZME2 itself that will benefit from the significant public benefits likely to arise from the merger, including:
- (a) New Zealand journalism – by sustaining a scale organisation with the ability to train journalists in the tradition of responsible and accurate news reporting and other key skills that sustainable scale organisations perform in the ordinary course to the significant benefit of the public;
  - (b) other New Zealand media companies – by providing better quality competition in news gathering and distribution, and other collaboration and partnering opportunities to limit the movement of advertising revenue to offshore businesses;
  - (c) New Zealand advertisers (including significantly the New Zealand government and other public bodies that collectively represent a large proportion of digital advertising expenditure in New Zealand) by providing a credible digital advertising alternative to Google and Facebook;
  - (d) New Zealand investors on the NZX (again including those like ACC and NZSF that are interested in New Zealand-specific investment opportunities); and
  - (e) the New Zealand Government and people of New Zealand generally from having a sustainable New Zealand media organisation that employs people in New Zealand, and pays taxes in New Zealand, instead of almost all digital advertising revenues being directed to Google and Facebook.
77. Again, given the Commission is obliged to conduct an assessment that weighs all public benefits and competitive detriments arising from a transaction, it must include an assessment of the benefits above in its final determination. A backward-looking and, in their view, false, [ ] focus on "external plurality" of news organisations shareholders, which does not also include proper assessment of all these other public benefits (which were not mentioned in the Draft Determination) will be (and will be seen to be by any international observers) as illogical and incomplete.

## APPENDIX ONE

## Chronology of relevant events since the Draft Determination (8 November 2016)

Event	Date
<b>New competitor:</b> Bauer launches "online current affairs content site, dubbed Noted, that features content from its Listener, North & South, Metro and Paperboy brands (as well as a couple of other external partners). "The breaking news aspect is covered really well elsewhere, but what we can do is go behind the headlines and provide a different perspective with more depth"".40	18 November 2016
<b>Recognition of digital constraint and two-sided market dynamics:</b> The ACCC clears News Corporation's proposed acquisition of APN's Australian Regional Media Division, including: <ul style="list-style-type: none"> <li>• Taking into account the two-sided nature of the media markets;</li> <li>• The need for News to maintain readership levels in order to ensure advertising revenues in the face of growing competition from alternative advertising opportunities.</li> <li>• "Declining readership and reduced advertising revenues for hard-copy publications [being] important factors in the ACCC's assessment."</li> </ul>	8 December 2016
<b>Shattered Mirror report:</b> Canadian analysis finds that the news industry in Canada "is reaching a crisis point as the decline of traditional media, fragmentation of audiences and the rise of fake news pose a growing threat to the health of our democracy."	26 January 2017
<b>Deed poll:</b> NZME executes irrevocable deed poll mandating that it will maintain and adhere to its Editorial Code of Ethics, remain a member of NZPC, and comply with the NZPC rulings.	9 February 2017
<b>Facebook Manifesto:</b> Facebook founder Mark Zuckerberg expresses Facebook's intention to be primary interface between citizens and government.41	16 February 2017
<b>ACCC again recognises decline of print:</b> The ACCC again recognises the structural decline of print products, and increasing digital competition, and it is apparent it took into account the synergies available from the merger, the financial position of the parties and their ongoing viability, and the declining nature of the print industry (without the ACCC needing to go so far as to apply a failing firm framework).	17 February 2017
<b>New competitor:</b> Launch of the website Newsie.co.nz. Newsie is owned by the owners and general manager of Sun Media, and is described as a "cooperative effort of independent publishers the length and breadth of New Zealand".42	20 February 2017
<b>Newspapers are "doomed":</b> Warren Buffett, a significant owner of newspapers in the USA, says the only newspapers that have a sustainable future at present are New York Times, the Wall Street Journal, and possibly the Washington Post.	28 February 2017
<b>Fairfax NZ revenue continues to decline:</b> Fairfax Media results released - NZ results (as compared to the previous year): <ul style="list-style-type: none"> <li>• EBITDA -6.2%.</li> <li>• Revenue -4.1%.</li> <li>• Advertising -9.9%.</li> </ul>	22 February 2017

40 <http://stoppress.co.nz/news/atlantic-new-zealand-bauer-brings-its-current-affairs-mags-together-new-online-hub>

41 The Conversation, "If Facebook ruled the world: Mark Zuckerberg's vision of a digital future" (22 February 2017) (accessed at <http://theconversation.com/if-facebook-ruled-the-world-mark-zuckerbergs-vision-of-a-digital-future-73459>). See also New Zealand Herald, "Media shivering in Facebook's shadow" (24 February 2017) (accessed at [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11806392](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11806392)).

42 <https://www.sunlive.co.nz/news/147751-national-news-service-goes-live.html>

<ul style="list-style-type: none"> <li>• Circulation revenue fell.</li> <li>• Digital growth of 21% (off a small base).</li> </ul>	
<p><b>NZME revenue continues to decline:</b> NZME Full Year results released:</p> <ul style="list-style-type: none"> <li>• Trading revenue declined -6%;</li> <li>• Trading EBITDA was flat compared to FY 2015 - supported by a 6% reduction in operating costs [ ].</li> </ul>	24 February 2017
<p><b>Print circulation continues to decline:</b> ABC circulation data for 12 months ending 31 December 2016, showing the significant and accelerating decline in print production. <b>NZME</b> declined -8.6% YoY (compared to -7.8% from 12 months ending 30 June 2016) and <b>Fairfax</b> declined 12.5% YoY (compared to -12.5% from 30 June 2016 YoY), with:</p> <ul style="list-style-type: none"> <li>○ NZ Herald volume declining -7.9% YoY;</li> <li>○ Herald on Sunday volume declining -8.5% YoY;</li> <li>○ NZME Regional titles declining -9.9% YoY.</li> <li>○ Dominion Post volume declining -12.4% YoY;</li> <li>○ The Press volume declining -10.3% YoY;</li> <li>○ Waikato Times declining -11.3% YoY;</li> <li>○ Sunday Star Times declining -13.5% YoY; and</li> <li>○ Sunday News declining -19.1% YoY.</li> </ul>	Data released 2 March 2017
<p><b>New competitor:</b> Jennings/Murphy launch Newsroom. "Newsroom is an independent, New Zealand-based news and current affairs site. We deliver in-depth storytelling for thinking audiences with an interest in the people, progress, and democracy of Aotearoa. Our team of experienced, award-winning journalists produces quality written and video stories that set the national news agenda and inform intelligent conversations at every level of New Zealand life."<sup>43</sup> [ ].</p>	13 March 2017

<sup>43</sup> <https://newsroom.co.nz/@about>

APPENDIX TWO

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**APPENDIX THREE**  
**MOODY'S US NEWSPAPER ANALYSIS**

**20 March 2017**

[https://www.moodys.com/research/Moodys-US-newspaper-magazine-publisher-outlook-negative-as-ad-revenue--PR\\_363853](https://www.moodys.com/research/Moodys-US-newspaper-magazine-publisher-outlook-negative-as-ad-revenue--PR_363853)

**Moody's: US newspaper, magazine publisher outlook negative as ad revenue slide persists**

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