IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV 2017-485-445
[2017] NZHC 3186

BETWEEN	NZME LIMITED First Appellant
AND	FAIRFAX MEDIA LIMITED Second Appellant
AND	FAIRFAX NEW ZEALAND LIMITED Third Appellant
AND	COMMERCE COMMISSION Respondent

Hearing:	16−20 October, 24–27 October 2017
Counsel:	D J Goddard QC, A S Butler, S C Keene, T J Pilkington, M W McMenamin and C M Marks for the Appellants J A Farmer QC, J D Every-Palmer QC, F J Cuncannon, P I C Comrie-Thomson and G Spittle for the Respondent
Judgment:	18 December 2017

JUDGMENT OF DOBSON J AND PROFESSOR RICHARDSON
[Public, redacted version]

CONFIDENTIALITY:
The Court made orders on 31 July 2017 to protect the confidentiality of matters that were provided to the Commerce Commission in confidence in the course of its investigation. Those orders are now made permanent, with the effect that no confidential material will be publicly available either in the content of the public version of this judgment, or by search of the Court file.

The unredacted version of this judgment has been distributed on a restricted basis to counsel and nominated representatives of the parties on the date appearing above. After receiving submissions from counsel on the extent to which confidential matters need to be redacted, the redacted version of the judgment was re-issued at 4.00 pm on 19 December 2017.

In a small number of paragraphs, text containing confidential material has been redacted. In a larger number of cases, where it is sufficient to support the content of this judgment by cross-reference, references have been made to confidential content in the non-publicly available version of the

Commission's determination. The scope of entitlement to access that document therefore dictates the scope of entitlement to have regard to that cross-referenced material in this judgment.

Contents

Introduction

[1] The first and third appellants (jointly the appellants, separately NZME and Fairfax) both have substantial media businesses in New Zealand. In May 2016 they applied to the respondent (the Commission) for either a clearance or an authorisation to complete a merger of their New Zealand businesses. On 2 May 2017 the Commission declined both applications and the appellants have appealed from that determination.[1]

[2] In addition to substantive challenges to the correctness of the Commission's determination, the appellants have raised criticisms of the process adopted by the Commission. Those criticisms might have been dealt with separately as an application for judicial review. However, over the Commission's objection, I

1 *NZME Ltd and Fairfax New Zealand Ltd* [2017] NZCC 8 [CCFD].

allowed the appellants to include them as a component of the appeal. We deal separately with the issues raised by those process criticisms towards the end of this judgment. The outcome on them has not had any bearing on arguments raised in the substantive appeal.

Outline of the appellants' businesses

[3] NZME is a media and entertainment business with newspaper interests producing: print publications, namely the New Zealand Herald, the Herald on Sunday and the Weekend Herald; digital publications, including nzherald.co.nz; radio broadcasting businesses, including Newstalk ZB, ZM and Radio Hauraki; and other e-commerce services. NZME also has ownership interests in other newspaper and publishing companies. Its businesses are located in the North Island and include six daily newspapers, two paid weekly papers, 11 online versions of newspaper websites, two lifestyle websites, 10 radio station websites, 16 other websites, six magazines, nine radio stations, and 23 community newspapers.

[4] NZME was, until June 2016, known as Wilson and Horton Ltd and its current business resulted from a demerger from APN News & Media Ltd. NZME is listed on the NZX.

[5] Fairfax is a New Zealand subsidiary of the Australian entity, Fairfax Media Ltd, the second appellant. Fairfax produces numerous print publications, operates websites and tablet and smartphone apps for stuff.co.nz, and has additional media interests by virtue of shareholdings in publishers of other newspapers. It also operates a website providing a private neighbourhood forum for neighbours to talk and share online. Fairfax's principal newspapers include The Dominion Post, The Press and the Sunday Star-Times. In total, it publishes nine daily newspapers of which four are in the North Island and five in the South Island, three paid weekly papers, seven websites, 62 community publications spread throughout the country, and 10 magazines.

[6] The proposed transaction would involve NZME acquiring all of the shares in Fairfax. In exchange NZME would pay NZ$55 million in cash and would issue shares equal to a 41 per cent shareholding in NZME to an Australian subsidiary of

Fairfax Media Ltd. The Commission treated the appellants as each other's strongest competitor in most of their businesses' principal spheres of activity.

[7] In recent years the rapid growth of dissemination of news and information in digital form has caused a radical transformation of the way in which these activities occur. Media businesses such as the appellants have supplemented their traditional print products with digital forms of making news and information available. Both NZME and Fairfax have adopted a "digital first" strategy so that the content prepared for publication is first posted on the digital sites maintained by each of them (nzherald.co.nz for NZME and stuff.co.nz for Fairfax). A sub-set of the items posted since the last print publication are selected for hardcopy publication in the daily newspapers for each, including their masthead papers, namely the New Zealand Herald for NZME, and The Dominion Post and The Press for Fairfax.

[8] This transformation in the mode of dissemination has radically altered the sources of revenue for the businesses. Their circulation of printed products has dropped consistently, taking with it the level of subscription income and receipts from casual purchasers of the printed newspapers. Reduced circulation means that publishers cannot continue to charge at the same rate for advertisements in printed newspapers.

[9] At the same time revenue generated from advertisements on the appellants' digital sites has increased with the growth in users going to those sites as a source of news. Neither of the appellants charge viewers to access their websites or apps, so the sole source of revenue from the digital form of their publications is the payments by advertisers for having their advertisements appear on those platforms. The amounts charged for digital advertising are dictated by the number of visits to the site or app, so that the appellants are incentivised to optimise the quality of their digital format. That supposedly means that they display the most popular content which encourages the largest readership of their digital forms of publication.

[10] One feature of the marketing of digital advertising in New Zealand is a joint venture between NZME, Fairfax, TVNZ and MediaWorks through KPEX Ltd.[2]

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[2] KPEX is an abbreviation of Kiwi Premium Advertising Exchange.

KPEX operates as a clearing house to sell unbooked digital advertising inventory that is available in any of the joint venturers' digital platforms. The matching of advertisers to available digital advertising slots is conducted by algorithms that match the needs in advertising capacity without regard to an individual publisher's requirements. Currently each of the four shareholders hold one quarter of the shares. [

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[11] Media companies such as the appellants do not have the digital media platform to themselves. First, the internet gives readers access to an extensive range of worldwide major newspapers that have adopted similar strategies to the appellants in publishing their newspapers or equivalent content in digital form. Some of the world's best known newspapers charge readers wishing to access their content,[3] some afford access to some part of their content free of charge, but then require payment for full access,[4] and others afford entirely free access to the whole of their publication in digital form.[5] This extraordinarily expanded access to sources of international news means that there is no market within New Zealand confined to New Zealand producers of international news. The focus of any competition analysis is therefore on the production of New Zealand news, opinions, and other information relating to New Zealand.

[12] Second, the internet and digital technologies have facilitated the growth of businesses that collate and redistribute news produced by a range of sources. Internationally, this role is dominated by entities such as Facebook and Google. Their ability to very speedily collate and make available news and information with the facility to tailor content to the algorithmically predicted areas of interest of the viewer has transformed the manner in which news and current affairs information is accessed for those familiar with (and potentially reliant on) communications in digital form.

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3 For example The Times and The Wall Street Journal.
4 For example The New York Times and The Washington Post.
5 For example The Guardian, which does invite donations.

[13] The recent experience in New Zealand reflects similar changes in comparable economies. There has been a great deal of analysis and academic writing about how these financial arrangements can be rebalanced to enable digital forms of media publications previously produced only as printed newspapers to be maintained sustainably. There is a degree of pessimism, at least in some quarters, that a satisfactory outcome will be achieved.

The Commission's determination

[14] The appellants sought a clearance from the Commission under s 66 of the Commerce Act 1986 (the Act), on the basis that their proposed merger would not have or would not be likely to have the effect of substantially lessening competition (an SLC) in a market. Their alternative application was for authorisation of the transaction under s 67 of the Act. The Commission is empowered under that section to grant an authorisation where, despite not having been satisfied that the acquisition will not have or would not be likely to have an SLC in a market, the acquisition would nonetheless result in such a benefit to the public that it should be permitted.[6]

[15] The Commission consulted widely in its consideration of the application. On 8 November 2016 it issued a Draft Determination which signalled the preliminary view that the proposed merger would be likely to substantially lessen competition in certain relevant markets, and that it was not likely to generate sufficient benefits to warrant authorisation. Following release of that draft the Commission convened a public conference to hear submissions for two days in early December 2016. After the conference further submissions and evidence were received and considered.

[16] When considering whether a proposed merger is likely to lead to an SLC, the Commission analyses the scope of the market or markets in which the participants' commercial activities occur. It defines the relevant market or markets as a tool in helping to identify the state of competition in that market as it projects that occurring in both the factual and counterfactual scenarios.

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6 Commerce Act 1986, s 67(3)(b). That section is set out at [181] below.

[17] The Commission found that the appellants' businesses operated in two-sided markets. The first side is a market between each of their businesses as producers of news and related content, and the readers who receive that content. Traditionally, that market represented the sale of newspapers to consumers. The second side is a market between the publishers of the media product and advertisers who pay to display advertisements to promote their goods and services to the readers of the media businesses' product. In essence, the advertisers are paying for the attention of the readers to what is produced in the appellants' publications.

[18] The task of defining the scope of the markets in which the appellants conduct their business is complicated by the distinct relationships between the appellants as producers of news and the consumers who read their publications on the one hand, and the appellants and the advertisers who pay for advertising space in their publications on the other. These two distinct sets of commercial relationships are nonetheless closely interdependent because the quality and reputation of the news produced by the appellants will dictate the extent of readership that they attract, and the demand for and value of the advertising space in their products will depend on the number of readers of their publications. Accordingly the Commission treated the appellants as operating in two-sided markets.

[19] For reasons that we address in considering the appellants' criticisms of the determination, the Commission defined separate markets on both the reader and advertising sides of the platform for national news in the appellants' daily papers (separately in their printed and online forms), for the Sunday newspapers and for community newspapers.

[20] In projecting the way in which the businesses would operate in the next two years both with and without the merger, the Commission considered it appropriate to assess the conduct of the participants on two scenarios: first, that within the relevant time frame the businesses (whether remaining separate or merged) would continue to operate more or less the existing mix of digital and print publications; and second, that the businesses (whether remaining separate or merged) would scale back their print publications to focus increasingly on production of digital news. In some

aspects of its analysis, the Commission made distinctions between the outcomes in these alternative "digital and print" or "digital and limited print" scenarios.

[21] Because of geographical separation of the areas in which their printed daily newspapers circulate, the Commission found there was no likelihood of an SLC in the reader aspect of that market (that is, between producers of newspapers and buyers of them). However, the Commission did identify the likelihood of an SLC in the production of online national news.

[22] The Commission considered the market for Sunday newspapers as a separate one. Fairfax publishes the Sunday Star-Times and the Sunday News. NZME publishes the Herald on Sunday. Only Fairfax Sunday newspapers are circulated in the South Island, but there is direct competition between the Sunday newspapers published by both appellants in the North Island. The Commission determined that there would likely be an SLC in both the reader and advertiser markets for Sunday newspapers in the North Island.

[23] Both appellants have substantial businesses in producing community newspapers. These are typically published weekly and distributed free within defined local boundaries. NZME produces 23 such publications and Fairfax 62 of them. Their publications compete in 10 areas in the North Island.[7] The Commission found that there would likely be an SLC in both the reader and advertiser sides of community newspaper businesses in the 10 areas in which the appellants compete.

[24] Because of the findings of the likelihood of SLCs in those markets, the Commission declined to grant a clearance for the proposed merger. The Commission went on to consider whether it should nonetheless grant an authorisation for the merger.

[25] This task involved an analysis of the projected benefits and detriments of the merger in both quantifiable and unquantifiable forms. Because of the significant

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[7] Whangārei, Hamilton, Rotorua, Taupō, Napier, Hastings, Stratford, Palmerston North, Horowhenua, and Kāpiti.

uncertainties in projecting the circumstances that would pertain in the first years of the merged entity, the range of quantified benefits/detriments outcomes was wide:[8]

Table 17: Estimated net quantifiable impact – 'digital and print' scenario

Time frame	High detriment/low benefits	Low detriment/high benefits
5 years	$41 million	$204 million

Table 20: Estimated net quantifiable impact – 'digital plus limited print' scenario

Time frame	High detriment/low benefits	Low detriment/high benefits
5 years	$55 million	$196 million

[26] These quantifiable benefits arose from projected savings related to overhead costs such as marketing, IT, premises and management costs, as well as employment and other operational cost savings that were likely to follow from the merger.

[27] The Commission acknowledged that there could also be unquantifiable benefits if the merger prolonged the viable life of various print publications and the overall level of editorial resourcing that could result from a strengthening of the businesses' financial position. The Commission took the view that this advantage was likely to be relatively transitory.

[28] The Commission also assessed unquantifiable detriments that it saw as arising from the merger. This focussed primarily on the loss of media plurality which provides a diversity of viewpoints and editorial approaches under the existing competitive ownership structure. The Commission found that plurality of the news media is essential to maintain a well-functioning democracy because it facilitates the availability and exchange of a divergence of views. Given that a merger would result in a single organisation controlling nearly 90 per cent of all print media, New Zealand's two largest news websites and one of New Zealand's two largest commercial radio companies, the Commission was concerned that the merger would

8 CCFD, above n 1, at [1326] and [1329].

result in a level of media concentration unprecedented in a well-established liberal democracy.[9]

[29] The Commission was not persuaded that commitments by the appellants to maintaining divergent editorial policies so as to maintain internal plurality within the merged businesses would be adequate to maintain the external plurality that presently exists. The loss of plurality was found likely to be significant and potentially irreplaceable. The Commission treated the relative importance of maintenance of plurality as so significant that its conclusion on the point was not a finely balanced one.

[30] The Commission also found that the merger would lead to a reduction in the quality of news content as a result of loss of competition. This was classified as a non-price allocative efficiency loss. The Commission treated the extent of this reduction in quality as likely to be significant.[10]

[31] The Commission did not consider that the need to attract audiences in order to attract advertising would constrain the merged entity from cost saving initiatives that would detrimentally affect the quality of the merged entity's product. In addition the Commission saw the appellants as playing a particular role in setting the agenda for news produced by other publishers. The Commission was concerned that a reduction in quality of the appellants' output would also have a flow on effect in reducing the quality of other sources of news.

[32] It concluded that these detriments, although unable to be quantified specifically, were significant, and clearly outweighed the significant quantifiable benefits that were projected to arise from the merger. The Commission accordingly declined to authorise the merger.

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9 At [1728].
10 At [1672].

Nature of the appeal

[33] Section 91 of the Act gives unsuccessful applicants to the Commission a right of appeal against the Commission's determination. This is a general right of appeal, to be conducted by way of re-hearing.

[34] The standard to be applied by the Court on appeal is that described by the Supreme Court in *Austin, Nichols & Co Inc v Stitchting Lodestar*.[11] This requires the Court to form its own views on the merits of the case. The appellants bear an onus of establishing that the Commission's determination is incorrect and, if that point is reached, the Court has jurisdiction to modify or reverse the determination or any part of it. The Court has the powers that could have been exercised by the Commission in relation to the matter that is appealed.[12] If considered appropriate, the Court can send the matter back to the Commission for reconsideration in light of an identified error.

[35] The Court is not obliged to give any particular level of deference to the Commission's views. The Court can have regard to the range of expertise appropriately attributed to the original decision maker, and any advantages the original decision maker had in assessing the evidence and submissions as presented to it.

[36] In this case counsel for the Commission emphasised that the Commission conducts an inquisitorial process for which it is expertly equipped by the range of skills possessed by Commission members and the investigative staff assisting them. The Commission has a reservoir of institutional expertise in investigating and analysing the sequence of issues that arose in dealing with both applications. It was submitted for the Commission that these advantages warrant a usual degree of deference being shown to its decision as that of a specialist body.

[37] It was submitted for the appellants that the Commission had neither experience nor expertise to evaluate the critical issue determined against them on their authorisation application, namely the relative importance of maintaining

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11 *Austin, Nichols & Co Inc v Stitchting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

12 Commerce Act 1986, s 93.

plurality in the mainstream provision of news. Accordingly, no deference should be accorded to the view it came to on that issue.[13]

[38] We agree with the appellants that the Commission did not have expertise in evaluating the relative importance of plurality in the media. On other issues the material evidence was largely documentary so the Commission did not have an advantage in observing it first-hand. Ultimately our decisions on the important issues raised by the appeal are not affected by any measure of the level of deference appropriately given to the views of the Commission.

Grounds of appeal

[39] The appellants challenged the definition of the markets in which the activities occurred, as well as the Commission's findings on the prospect of each of the possible SLCs. These were components of a wider challenge that the Commission ought to have given a clearance to the transaction. On numerous parts of the appeal there were also more detailed levels of criticisms of the approach adopted by the Commission. We deal with the criticisms of the Commission's analysis and decision on the clearance application in the sequence that appears in the contents at the outset of the judgment.

[40] In the event that the appellants are not successful in having their clearance application upheld on appeal, they also argued that the Commission's assessment of benefits and detriments of the merger was wrong in sufficient respects that the Court should grant an authorisation. They contend the sum of the benefits outweighed the sum of relevant detriments. The appellants' primary ground of challenge was that the Commission had taken into account the likely detriment from a loss of media plurality which they argue is outside the Commission's jurisdiction. If that challenge is not upheld, the appellants argue that the Commission's evaluation of detriments when weighed against identified benefits arising from the merger was wrong, so that an authorisation should be granted. Again, the sequence of the issues addressed appears in the contents at the outset of the judgment.

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[13] This argument was secondary to a prior objection that the terms of the Act do not provide any jurisdiction for the Commission to have regard to broad societal concerns so that the Commission exceeded its jurisdiction by having regard to anything beyond economic considerations.

The clearance decision

Market definition

[41] The Commission identified six markets in which the appellants operated that it found were relevant to the competition analysis. These markets comprised the advertising and reader sides for online national news, Sunday (print) newspapers, and community newspapers (in the 10 areas within the North Island where the appellants' publications overlap). The appellants mounted a number of criticisms of the Commission's definition of the scope of these markets.

[42] Numerous judicial decisions have emphasised that market definitions are but a tool used in various competition law contexts to provide a framework for analysis of the relevant competition law concern, in this case constraints on competition. An early description of the function of market definition, reflected in numerous more recent decisions, is that of French J in *Singapore Airlines Ltd*:[14]

> In competition law [market definition] has a descriptive and a purposive role. It involves fact-finding together with evaluative and purposive selection. … In its statutory setting the market designation imposes, on the activities which it encompasses, limits set by the law for the protection of competition. It involves a choice of the relevant range of activity by reference to economic and commercial realities and the policy of the statute. To the extent that it must serve statutory policy, the identification will be evaluative and purposive as well as descriptive.

[43] The parameters of any market as defined are not necessarily determinative of the analysis of competitive constraints on the conduct of participants in that market. Where the market is appropriately defined in narrow terms, constraints from outside the market must still be taken into account if they operate on the state of competition.[15]

The counterfactual

[44] A necessary component of the Commission's analysis is to identify one or more counterfactual scenarios that would apply if the merger did not proceed. Treating the

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[14] *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 (FCA) at 174. See also *Woolworths Ltd v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [270(d)].

[15] *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 (HC) at [137].

scenario that would pertain if the merger is allowed as the factual, for the purposes of comparison the Commission must settle on a counterfactual of the scenario that would pertain without it. The Commission is not obliged to define the counterfactual scenario that it considers to be the most likely if the merger does not proceed and, provided it is within the range of scenarios that are likely, the Commission can adopt the counterfactual that would give rise to the most competition concerns.[16]

[45] Identifying likely counterfactuals in this case is challenging because the state of news media markets is changing, in some respects dramatically and at considerable speed. Assuming continuation of the status quo is therefore unlikely. The Commission adopted a counterfactual in which both applicants would be likely to increasingly focus on developing their online news businesses, and their print products would be likely to continue to diminish in number and comprehensiveness over time.[17] The Commission took the view that the future for the appellants' print publications was likely to be similar in both the factual scenario where the merger proceeded, and in the counterfactual where their businesses remained under separate ownership.[18]

[46] The appellants abandoned criticisms that the Commission had erred in the definition of the counterfactual that it adopted. We have adopted the Commission's counterfactual for the purposes of assessing the appellants' criticisms. In its authorisation decision, the Commission adopted two possible scenarios under which the merged business would either continue more or less its present scale of print publication businesses, or alternatively would maintain a more limited range of print publications.

Functional dimension

[47] One of the criteria recognised by the Commission in its Mergers and Acquisitions Guidelines when testing the prospects of substitution for the goods or services in issue is the level in the supply chain at which the parties operate.[19] On this

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16 CCFD, above n 1, at [63]; *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, (2008) 12 TCLR 194 at 207; and *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZHC 1262, [2016] 3 NZLR 645 [*Godfrey Hirst 2* (HC)] at [70].

17 At [X15].

18 At [183].

19 Commerce Commission *Mergers and Acquisitions Guidelines* (July 2013) at [3.14.3].

aspect of the market definition, the Commission defined "two separate functional markets for New Zealand news" being the upstream production of New Zealand news content and the downstream distribution of that content across two-sided platforms.[20] The appellants criticised the Commission for what they argued was an inaccurate characterisation of a functional market.

[48] The appellants criticised the Commission's approach on the ground that the separate activity involved in producing news content could not constitute a market on its own until there was a supply that was intended to generate a return on the cost of production.

[49] Holding the Commission to what the appellants treated as a separate market for the production of news, they argued that there was no competition issue identified at the functional level of news production. It would then follow that all competition concerns should focus on the distribution or supply of news content, where the merged entity would arguably face significant competition so that no prospect of an SLC could arise.

[50] We do not accept that the Commission did analyse the appellants' activities as involving participation in two separate functional markets. Other comments in this part of the determination treated the appellants as vertically integrated firms that operate at both the upstream and downstream levels.[21] Having identified the two functional dimensions, the Commission commented:[22]

> The primary focus of our competition analysis is in the upstream production of New Zealand news content and how this is accessed by consumers. However, we recognise that the desire to attract consumers at the distribution level influences the quality of content that is produced to some degree.

[51] We agree with the appellants that production alone does not constitute a market standing on its own until the product is traded either to wholesalers or retail consumers. However on an evaluation of the Commission's reasoning, we do not consider that it proceeded on the basis of separate markets. The functional distinction was ultimately

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20 CCFD, above n 1, at [581].
21 At [576].
22 At [582].

not relevant because the Commission, correctly in our view, treated the appellants as being vertically integrated and being the biggest players in both components of the wider functional market including upstream production and downstream distribution.

Distribution of news and information?

[52] Before the Commission the appellants argued that the relevant market should be provision of news and information services. The addition of the latter category was rejected by the Commission.[23] It treated New Zealand news content as a separate product, for which the appellants competed with a limited number of others who also produced it. Irrespective of how definitional difficulties in identifying the scope of information services are resolved, we agree with the Commission that adding such services would erroneously broaden the market. For the purposes of the appellants' applications, the market is appropriately defined as production and dissemination of news.

[53] A related aspect of the appellants' criticism of markets as defined by the Commission being confined to the production and dissemination of news is the line between hard news on topics of national and local interest on the one hand, and items in the nature of gossip on the other. Mr Goddard QC, counsel for the appellants cited comments by a media representative interviewed by the Commission to the effect that while public discussion focused on the merits of high quality journalism, the public tend to be more interested in gossip.[24]

[54] We do not accept that any blurring of the line between news and information contributed to by consumers' misrepresentation of the topics that maintain their interest could justify an expansion of the market for production and distribution of news.

[55] The appellants also argued that collators and distributors of news like Facebook and Google are treated as sources of news by many readers. From their

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23 At [536.2].
24 Transcript of interview CC.FS.4098 at 15.

perspective such distributors are close substitutes for accessing news via the online versions of the producers of news such as the appellants.

[56] The Commission maintained several grounds for distinguishing news content made available by Facebook and similar sites. Those sites channel news that has been produced by others, with the content readers are presented with being haphazard by comparison to the ordered content of sites maintained by online producers. The content offered by such collators is rated by popularity rather than by reliability, timeliness, or its importance. The Commission submitted that readers wanting serious journalism will go to a website or use a news media organisation's app. Mr Every-Palmer QC, counsel for the respondent cited statistics showing that readers who arrive at the online Stuff and Herald websites via Facebook spend much less time on them than those readers who go directly to those sites.

[57] Mr Goddard submitted orally that a New Zealand Law Commission report published in 2013 adopted a more forward-looking and realistic approach to the scope of news media in New Zealand than that adopted by the Commission in the determination.[25] The Law Commission report addressed the need for, and possible scope of, regulation of "new media". Mr Goddard suggested that the Law Commission's approach included collators, commentators and distributors of news as a component of the news media in New Zealand. Arguably the Commission ought similarly to have included them within its market definition.

[58] The Law Commission did, however, maintain the distinction between those generating news and those disseminating the news produced by others:

> [4.56] First, and most significantly, we concluded that this proliferation of publishers is enriching public debate and has the potential to strengthen democracy by increasing participation in public affairs, widening the sources of information available to the public and providing a greater diversity of opinion. It is also providing a new form of accountability for the mainstream news media as bloggers and others critique aspects of the mainstream media's coverage of political and other events.
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> [4.57] However, we also noted a number of caveats: despite the massive proliferation of publishing online, only a small percentage of this new publishing activity is focused primarily on the *generation* and dissemination

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[25] Law Commission *The News Media Meets "New Media": Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013) (citations omitted).

> of original, local, news and current affairs. For example, we identified only a small number of professional, internet-native entities for whom this was the primary focus: these included sites such as *Scoop*, *NewsWire*, *BusinessDesk*, *allaboutauckland.com* and *interest.co.nz*.

We consider that the Law Commission's appreciation of this distinction is consistent with the approach adopted by the Commission in the present determination.

[59] We consider that the distinction between producers of news and collators and redistributors of news produced by others remains a relevant one and the Commission's approach was appropriate. Although it oversimplifies the point, Mr Every-Palmer's distinction that those accessing material via Facebook are accidental rather than deliberate newsreaders has some merit.

Treatment of two-sided markets

[60] The appellants also criticised the way in which the Commission treated the interrelationship between the two sides of each of the markets that operated on a platform – that is, the provision by the appellants of news reports to readers, and the provision by the appellants of publication of advertisements for advertisers.

[61] The arguments on both sides tended to exaggerate the difference between them on the relevance of two-sided markets, and the relative importance of this component of the analysis in correctly defining the nature of the markets in which the appellants presently compete.

[62] Counsel referred us to a range of published articles on the features of different two-sided markets. Those articles included various hypotheses on how such markets should be treated in competition analyses. Apart from media businesses, another tripartite activity often considered in the research is the business of credit card companies. They depend, in interrelated ways, on the number of merchants prepared to accept payment from purchasers by use of their credit card, which involves a cost to the merchant in procuring payment from the credit card company. The relative popularity of the credit card company with consumers will depend, at least in part, on how widely merchants will accept their credit card as a form of payment and its

popularity with merchants will depend, similarly, on how widespread is its use by consumers.

[63] One of the articles we were referred to drew a distinction between the position on the one hand of credit card companies, and on the other hand media businesses where the firm transacts separately with purchasers of the news (in whatever form), and with advertisers. Unlike the second direct transaction between a merchant and a cardholder, the present relationships do not require any relevant transaction between the advertisers and the consumers of the news. The point was expressed in the following terms:[26]

> However, in a case involving newspapers, a product might be in the relevant market on the advertiser's side but not on the readers' side. For instance, suppose that people do not regard TV and newspapers as substitutes because they read newspapers on the metro going to work and watch TV at home in the evening. However, if advertisers are interested in reaching each person only once during a day, they will tend to regard TV and newspapers as substitutes. TV would then be in the same relevant market as newspapers on the advertiser's side but not on the readers' side. The analysis of a merger case involving newspapers should then consider that TV exerts competitive pressure on newspapers in the market for advertising, but not in the market for content.
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> We submit that the crucial element distinguishing a newspaper market from a payment cards market is that, in the latter, a transaction is present between so-called end-users – that is, between customers on the two sides of the market.

[64] We agree with that analysis of the two-sided markets in which the appellants operate. We also agree with the approach adopted by the Commission. It considered each side of the platform individually, but also took into account the constraints arising from the activity on the other side of the platform. As another respected writer on anti-trust economics has observed, the importance of the interaction between the two sides is an empirical question.[27]

[65] An aspect of the treatment of two-sided markets was the appellants' criticism that the Commission did not adequately take into account the extent of strong interdependence or "feedback loops" in assessing the competitive constraints that the

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[26] Lapo Filistrucchi and others "Market Definition on Two-Side Markets: Theory and Practice" (2014) 10 Journal of Competition, Law & Economics 293 at 301 (citations omitted).

[27] David S Evans "The Antitrust Economics of Multi-Sided Platform Markets" (2003) 20 Yale J Reg 325 at 358.

appellants argued for. There is scope for debate on the weight to be given to the nature and effect of the interdependence, but we consider the Commission's appreciation of interdependence was at a point within the correct range on this topic. A preference for any different level of interdependence which would fall within that range would not change the outcome on either market definition or the nature of competitive constraints.

Effect of zero price?

[66] The appellants' readers or viewers (we henceforth refer to them as "readers", irrespective of the form of publication they are accessing) accessing their online news sites do not pay to do so. Adopting an approach used in 2009 and 2012 OECD reports on two-sided markets,[28] the appellants submitted that analysis of competitive constraints must encompass both sides of the market because the pricing and production decisions are so closely interdependent and competitiveness in the entire market should reflect the sum of all prices. Given the Commission's conclusion that there was no SLC on the advertisers' side, that conclusion ought to apply to both sides of the two-sided market. Where the price paid by the advertisers is only added to by the "zero" price the reader pays, arguably the competitiveness should therefore be determined by the competitiveness of the advertiser side of the platform.

[67] We do not agree that this analysis can determine the prospect of an SLC on the reader side of the online news market. It is unnecessary to review in detail the economic analysis on the impact of a zero price when that factor at least sends a warning signal that the reader accepting a "free" service will likely be making a contribution in different form to direct monetary consideration passing to the producer of the online news. As the author of a recent article on the topic observed:[29]

> Human attention, both valuable and limited in supply, is a resource. … It has become commonplace, especially in the media and technology industries, to speak of an "attention economy" and of competition in "attention markets". In the business slang, firms in the attention economy "compete for eyeballs";

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28 *OECD Policy Roundtables: Two-Sided Markets* DAF/COMP(2009)20 (2009); and *OECD Policy Roundtables Market Definition* DAF/COMP/(2012)19 (2012).

29 Tim Wu "Attention Markets and the Law" (unpublished paper, 2017) at 2 (citations omitted). This paper has since been updated and can be found at papers.ssrn.com: Tim Wu "Blind Spot: The Attention Economy and the Law" (unpublished paper, 2017).

> and in another widely used metaphor, whoever gains attention "sucks oxygen" from everyone else.

[68] In this two-sided market, that price is the attention "paid" by readers to the website, necessarily including the advertisements that appear there for which the producer of the news is paid by the advertisers. The cost to readers of giving their attention to a news website is recognised as a form of consideration passing from them, despite the absence of a monetary cost. The number of visits to a publisher's website is monitored and directly affects the cost of an advertisement, which is calculated at a certain cost per given number of visits to the site. In that sense the reader does provide a form of consideration in going to the site and thereby counting as a view that contributes to the advertising revenue earned.

[69] We are not persuaded that the zero price feature of the online news market needs to be treated differently from the way in which it was analysed by the Commission.

Online national news reader market

[70] The Commission rejected the appellants' wider market definition that would include different types of media so that television, radio and printed newspapers would be combined with online news products. In doing so the Commission rejected the approach adopted by its Australian counterpart, the ACCC, in a recent informal review of a merger of media assets in Western Australia.[30] The ACCC did not form a view on whether printed newspapers and online products were within the same market, preferring to focus on the degree of constraint each provided the other. The Commission recognised that other platforms may provide some constraint, but found that it was appropriate to define separate print and online markets.[31] The different approach to that of the ACCC is appropriate given the materially different scale of the merger participants' activities in the areas in which they were operating.

[71] In assessing the reader market for online news, the Commission found that the merger would likely result in a reduction in quality which would be achievable because

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30 *ACCC informal review: Seven West Media Limited – proposed acquisition of the Sunday Times publication and website* (15 September 2016).

31 CCFD, above n 1, a [536.3].

of an SLC. The appellants challenged this conclusion on four grounds. First, it resulted from an incorrect view on market definition. We have dealt with this criticism in the matters we have already traversed.[32] Second, the Commission did not give proper weight to evidence about the pressure from advertisers on the other side of the two-sided market for the producer to maintain quality. Third, the Commission failed to give adequate weight to the extent of constraint on quality that was provided by the range of other online news providers. The second and third grounds require a review of the Commission's analysis on barriers to entry in the production of news, and the relevance of multi-sourcing/ multi-homing. Fourth, the appellants contend the Commission wrongly assessed the prospects of a paywall being introduced by the post-merger business.

Advertising constraints on quality

[72] The appellants submitted that the pressure from advertisers to maintain quality would operate to prevent any SLC. The concept of quality of online news encompasses a number of dimensions. The dimensions considered by the Commission included:

- coverage of important and relevant news topics;
- coverage of a variety of perspectives, opinions and viewpoints on common news topics;
- in-depth analysis and investigation; and
- timely and accurate reporting.[33]

[73] In assessing presentation and delivery as distinct from content, the Commission also recognised these dimensions:

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32 See [47]–[69] above.
33 CCFD, above n 1, at [825].

- the design and format of the online platform; and

- inventive ways of presenting individual stories.[34]

[74] Mr Goddard emphasised there was an economic imperative that he submitted would arise post-merger for the business to maintain and enhance the quality of its online news. It was only by doing so that the business would optimise the circulation and the number of visits to its websites, thereby optimising advertising revenue.

[75] The contrary hypothesis is that the immediate imperative for the merged entity would be to reduce costs. Condensing journalistic and editorial resources would be so compelling an area for cost reduction that it would be difficult to justify completing the merger without doing so in a material manner. The financial imperative to reduce costs [

] would almost certainly be put to management.

[76] Of these competing options, we consider it more likely that the merged entity would adopt the second strategy. We consider it an inevitable part of the rationale for the merger that efficiencies pursued would include scaling back journalistic and editorial resources, as well as managerial resources. One necessary consequence of doing so would be a reduction in quality. We are therefore satisfied that there would be a material reduction in the scope of topics reported upon, and the diversity of views expressed within them. That would constitute a reduction in quality.

[77] We do not consider it a sufficient answer that the merged business would be economically incentivised to provide coverage on what readers want. Dissatisfaction with a reduction in the scope of what is published is unlikely to be conveyed either promptly or effectively enough to influence management decisions on what may appear to be duplicated resources, but which readers would prefer were retained. So too with the level of more arcane topics that are likely not to be covered post-merger. We agree with the Commission that the merged entity could reduce the quality of its output in numerous respects that would not be observed by consumers in any concerted

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34 At [826].

way, so that the reduction in quality could be effected without producing any compelling demand for restoration of the qualities that existed in the competitive era.

[78] We also agree with the Commission that competition between news producers stimulates coverage by each of a wider range of topics than would be covered in a non-competitive environment. If one publication covers a news story, then its rival will be incentivised to cover that story as well, albeit with a different perspective.

[79] We are mindful that senior editorial staff currently employed by the appellants provided assurances of their intentions to maintain variety and diversity of news content. We have no reason to doubt the integrity of the editorial personnel and respect their commitment. The commercial reality is that the extent to which they can achieve variety and diversity of news content will be dictated by management decisions.

[80] We were not referred to any evidence that might enable an arithmetic calculation of the impact of a reduction in quality causing a reduction in the number of visits to an appellant's online site. The competing views are therefore intuitive.

[81] Mr Goddard explained that advertisers usually pay for their advertisement to be shown when readers open a given online page, per specified number of visits to the page. Once the number of visits an advertiser has paid for has occurred, that advertisement will disappear and the next advertiser to have paid will have its advertisement appear.

[82] The decision confronting management of the merged entity can be illustrated by a simple numerical example. We assume, for the purposes of it, that each of two firms, pre-merger, has the same number of readers, reader habits and cost structures. Say that each firm incurs $100,000 in costs to provide news coverage on health matters and that the visits to their sites to read health news coverage generates $110,000 in advertising revenues for each publisher, provided they maintain a measure of diversity and difference in the health topics covered; were no such diversity to be provided consumer demand would be such that only $200,000 of revenues would be created. Each firm then has a clear competitive incentive to provide coverage differentiated from that of its rival, earning profits of $10,000 versus the $0 profit they would earn

from providing identical perspectives. The merged entity could then earn $20,000 in profit by replicating the competitive solution, but could earn $100,000 of profit by, instead, shutting down one of its health news coverage resources, losing $20,000 in revenues but saving $100,000 in costs.

[83] This fictitious example is entirely hypothetical and its exact conclusion would be modified by the presence of meaningful third party competition, but it illustrates that the structure of competition can materially affect a firm's supply decisions; the mantra that 'a firm must supply what the market wants' is overly simplistic. We consider that in numerous choices that would confront the merged entity on rationalisation of news production resources, it is more likely than not that the financially beneficial outcome would be to rationalise the production resource rather than incur a measure of duplicated costs for the sake of maintaining modest or marginal increases in advertising revenue.

[84] The appellants enjoy a strongly dominant position in the New Zealand online news market. On the extent of editorial and journalist resources the merged entity would employ over 300 more editorial staff than the three next biggest mainstream media organisations combined.[35] A survey in the period between February 2016 and January 2017 showed that New Zealanders spent an average 5.5 million hours per month accessing stuff.co.nz and nzherald.co.nz. This is more than seven times the number of hours spent on the three next largest New Zealand news websites, amounting to some 700,000 hours per month for visits to newshub.co.nz,[36] radionz.co.nz and tvnz.co.nz.[37]

[85] Other statistics discussed below demonstrate that they each attract many times more visits than the next most popular sites, and their combined number of visits compounds their dominance in that market.[38] On the basis of the evidence, we consider that they have earned positive reputations because of their longstanding strengths in production of printed daily newspapers with positive reputations for

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35 CCFD, above n 1, at [656].

36 "Newshub" is the collective brand under which the news platforms of MediaWorks operate. Newshub and MediaWorks are used interchangeably in this judgment.

37 CCFD, above n 1, at [678], fig 5.

38 See [102]–[105] below.

quality and reliability transferring across to the online form of their products. Given that position, it appears likely that management of the merged entity would be confident that their business would withstand a drop in quality caused by rationalisation of resources, without a reduction in the level of online advertising revenue they generate to an extent that exceeded the available cost savings.

[86] The appellants disputed that the merged entity could reduce the quality of its online news product without its readers noticing a drop in quality or using their websites less. If that were so, arguably the appellants would not risk a drop in readership because they would instead be motivated to optimise the numbers accessing their website when it has so direct a bearing on their source of revenue. This risk would be recognised as so likely to follow that the merged entity would not take it. However, we consider it foreseeable that such adverse changes in quality could occur without readers of their online sites being aware that it had occurred. We do not accept that the merged firm would maintain all standards. There are greater financial imperatives to cut costs.

Other business constraints on quality

[87] As to the third ground, the appellants argued that competitive constraints were imposed on the quality of the appellants' online products by a range of other businesses including TVNZ, RNZ,[39] and Newshub. Each of those news producers now have an online presence, accessible in the same way as the appellants' digital products.

[88] The appellants also argued that the online news market included specialist publications, such as the National Business Review (NBR), that produce relatively small amounts of news in niche areas (in the NBR's case, business reporting). The appellants' market definition would also include collators and distributors of national news such as Facebook, Google, Twitter and syndicators such as Spinoff, Newsie and AAP News Wire.

[89] The appellants argued that the Commission had erred in excluding this last group of news distributors from the market for the provision of online national news.

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[39] Formerly Radio New Zealand.

Alternatively, if the market was defined narrowly as the Commission did, then it failed to give appropriate weight to the constraint on anticompetitive behaviour that would be exerted by all of these other online news providers and distributors from outside such a market. Mr Goddard labelled collators who present news produced by others to digital audiences defined by algorithms as "disrupters". He predicted that their power in doing so would expand their influence to an extent that constrained the appellants, despite the disrupters not producing news content of their own.

[90] We are satisfied that the market for online production of national news should exclude collators and distributors such as Facebook and Google, and other operators of websites that package and in some cases comment on news produced by others. Observed patterns of behaviour suggest that readers are likely to access content from sites operated both by producers and by collators. However those providing the content for online news on such sites have carried out distinct functions, with production of original news being a recognisable and distinct feature. In seeking out reliable original news, visitors to collators' sites are likely to discriminate in their level of attention, placing greater credence and therefore spending more time on items from reputable producers of news.

[91] In their competing online formats, the other mainstream producers of national news, namely TVNZ, Newshub and RNZ, do provide a measure of constraint on the potential for the merged entity to reduce the quality of its online product. The appellants submitted that the Commission failed to deal with evidence that those established competitors would have the incentive and capacity to fill any gap in the quality of online national news, by providing enhanced diversity or quality in their own reporting.

[92] Within this category, we agree with the Commission that there are grounds for doubting the capacity of both TVNZ and RNZ to materially expand the scope of their online national news coverage. TVNZ's chief executive had recently announced a reduction in newsroom staff. Other information, provided confidentially by [ ] added to the grounds for the Commission's finding that it would be unlikely to seek to

expand if a gap was left by the contraction of the scope, or reduction in quality, of the merged firm's online websites.[40]

[93] [
], we consider that the prospects of material expansion in the online news coverage by RNZ are limited by the extent to which it is able to procure greater Government funding. In mid 2017, there was a commitment to a measure of increased funding, but it was not calculated to fund any substantial expansion of its capacity to produce online national news.

[94] TVNZ, RNZ and Newshub have all entered the online news market with established brand awareness but, despite that, the data before the Commission on market shares showed that they were getting relatively low online market shares.[41]

[95] Adopting the statutory test, we consider it unlikely that the existence of sites managed by collators and distributors can operate as a meaningful constraint on the quality of the online news product produced by the appellants, or the merged entity post-merger.

[96] The prospects of competition from new entrants are more limited. We are satisfied that a reputation for reliability and quality of news cannot be gained in a short period of time and the requirement for a positive reputation constitutes a significant barrier to entry. It is less relevant that costs of increased distribution of original online product may be insignificant.[42]

Barriers to entry in the production of news

[97] A routine component of the analysis of whether merger participants would enjoy market power is an analysis of the extent of barriers to entry into the market in which they operate. Although this raises many of the considerations we have just dealt with, the focus on this topic in argument bears some repetition when viewed through this lens. The appellants submitted that numerous online news platforms now provide

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40 CCFD, above n 1, at [743]–[744].
41 See [102]–[105] below.
42 Interview with Newsroom principals CC.FS.0848.0002 at 19.

more than adequate competition for the online forms of the appellants' newspapers. They characterised the extent of that activity as increasing rapidly. Arguably, these new ventures require little by way of set-up capital, and a flexible extent of resources to maintain a website that, depending on its quality, can be a valid alternative to the appellants as a source of New Zealand news.

[98] We have dealt at [89] to [95] above with the appellants' arguments that relevant competition includes collators and distributors of news.

[99] Collators and distributors of online news do assist in promoting plurality by inviting readers to access numerous sources of news. However we remain of the view that a valid distinction should still be drawn between the production and distribution of news. Fifteen recyclers of the product of two producers of news are still only making two views available. We therefore do not test barriers to entry by considering the position of entities such as Facebook and Google.[43]

[100] There are significantly fewer alternative producers of news. The five identified in the Commission's analysis were the two appellants, plus MediaWorks, TVNZ and RNZ. An analysis of consumption of news by media type was compiled by the Commission for its determination. The table contained numerous statistics that remain confidential, and the more detailed points arising from it cannot be made without referring to those details.[44]

[101] The table confirms that the appellants' daily circulation of its printed newspapers is overwhelmingly dominant in that part of the market. Despite certain impressions of a wholesale change of reading habits to online sources, the Commission noted elsewhere that a sizeable group of readers continue to consume daily newspapers with total circulation of all daily newspapers being approximately 420,000 per day, which is equivalent to a quarter of all households in the country.[45]

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43 We identify with the final observation in the Levy and Foster report obtained by the Commission that the two functions remain distinct when assessing alternative sources of adequate media plurality, post a merger of the appellants' businesses. David Levy and Robin Foster *Impact of the Proposed NZME/Fairfax merger on media plurality in New Zealand: expert review of the Commerce Commission's Draft Determination Document* (16 November 2016, CC.FS.0649.0001). See [255] below.

44 CCFD, above n 1, at [1522], table 23.

45 At [604].

The appellants' online forms of publication are similarly overwhelmingly dominant in the numbers of browser page views per month, and app page views per month. Because the measurement of resort to television and radio (views monthly versus listeners weekly) is not easily compared with the level of purchase of print forms of newspapers and extent of access to online sites, precise ranking of importance is difficult.

[102] The Commission also cited statistics gathered by Fairfax in a survey it undertook of the habits of New Zealand news consumers in 2016.[46] The results of that survey indicated that, in a typical week in New Zealand in 2016, online sources accounted for approximately 54 per cent of the news consumed, television 21 per cent, traditional newspapers 13 per cent, radio nine per cent and other sources three per cent. The 54 per cent consuming news online was made up of 25 per cent from New Zealand news sites, nine per cent from international news sites, 15 per cent from Facebook, three per cent from other social media and two per cent from blogs or other commentaries.

[103] Both these measurements of news consumption reinforce the relative importance of news producers, and relegate the significance of collator/distributors. The second category are dependent on the first for their product, and the reach achieved is very modest by comparison.

[104] The Commission conducted interviews with some of the collator/distributors, and also with new businesses seeking to produce their own New Zealand news. Smaller online publishers of New Zealand news do not consider themselves competitors of the appellants, whereas they see the appellants as currently competing intensely with each other.[47] Confidential information and opinions conveyed to the Commission justified the view that set-up costs are not the most significant barrier to entry. Nonetheless they do encounter difficulties securing investment capital. A greater barrier is developing trust as a brand of news provider. That trust is fundamentally important to developing a readership, and cannot be achieved in a short

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46 At [1520] and fig 12.
47 At [646] and [648].

or even medium term timeframe.[48] In addition the financial viability of production and distribution of online news remains uncertain. Even well-established news producers in other formats are struggling to establish a viable business structure for their online presence.[49]

[105] In the year from the fourth quarter of 2015 to the third quarter of 2016 research commissioned for Fairfax revealed that the average combined reach of the appellants' websites represented about 60 per cent of New Zealand's population aged 10 years and over per month.[50] In contrast the average monthly reach of the next largest, newshub.co.nz is 22.5 per cent with the equivalent figures for TVNZ's news website at 14.3 per cent, and RNZ's at 12.1 per cent.[51] All of these measures reflect a position of substantial dominance for the merged entity, and on all measures they are inarguably each other's strongest competitor.

[106] It is clear that in the production of national news the scale of established resources is important to the extent of coverage that can be achieved. Each of the appellants has substantially more extensive resources in terms of numbers and national coverage, than any of the other producers of news.[52]

[107] For these reasons, we treat the barriers to entry for new producers of New Zealand news to be significant. Although the barriers are lower for distributors, they are nonetheless material. We do not accept the appellants' proposition that any loss of "voices" caused by a contraction of the number of views expressed by their businesses post a merger would be readily filled by "other voices". Certainly, in specialised niches, small players may attract a following for views and commentaries on politics and other New Zealand news subjects, but those initiatives will not reach statistically significant portions of the consumers of New Zealand news.

[108] Whether viewed as a two to one merger within the part of news production originating with traditional newspapers, or a five to four contraction of the wider

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48 At [725].
49 At [64], [643], [644], [719], 721], [722] and [732.1] (redacted in public version).
50 This comprised an aggregated 2.4 million unique visitors per month, with the individual figure for Fairfax being 2.1 million, and NZME being 1.8 million.
51 At [673] and fig 2.
52 See for example, the statistics at [655] and [656], and confidential numbers at [657] and [741].

online news production market including Newshub, TVNZ and RNZ, the contraction in such markets would be significant, and there would be significant barriers to entry by others.

Multi-sourcing/multi-homing

[109] A feature of the data about those accessing online sites for national news is the extent to which those doing so go to multiple sites or sources of online news. Economics literature on media markets describes this as "multi-homing" or "multi-sourcing". Data compiled by a market research firm that was in evidence before the Commission showed that very high proportions of those who visited each of the appellants' online sites at least once a month also visited the other site.[53]

[110] The appellants cited the extent of multi-homing demonstrated by these statistics as evidencing substitutability between all of the sites which would arguably apply as a constraint on the merged entity if it attempted to use any perceived market power to reduce quality. That data also showed that not insignificant numbers of those visiting these two major sites also visited other sites, at least once a month. For instance, 39.3 per cent of stuff.co.nz visitors visited newshub.co.nz, and 14.1 per cent visited radionz.co.nz. Of nzherald.co.nz visitors, 43.9 per cent also visited newshub.co.nz, and 13.8 per cent visited radionz.co.nz.

[111] Mr Goddard criticised the approach adopted by the Commission in assessing the evolving state of the online news market. He submitted that it was an error for the Commission to have adopted a static analysis of a freeze frame as matters stood at the time of its determination. He went further and characterised the analysis as backward looking when the Commission arguably ought to have projected forward to assess the conditions that were most likely to apply given continuation of present trends. On Mr Goddard's approach, the trend of increased resort to multi-sourcing and the growth in popularity of a range of online news sites should have led to a finding by the Commission that such sites would comprise materially stronger competition and therefore be a stronger competitive constraint than is suggested by the historical data.

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[53] Spreadsheet CC.FS.0214.0001: 87.5 per cent of those accessing stuff.co.nz also accessed nzherald.co.nz and 73.4 per cent of those accessing nzherald.co.nz also accessed stuff.co.nz.

[112] The appellants criticised the Commission's view that multi-sourcing indicated that different sites engendered different and complementary demand.[54] The appellants submitted that this finding set the Commission apart from other competition authorities that have identified multi-homing as indicative of a lack of structural lock-in (that is, fixed patterns of resort by readers to a particular form of news media), and as negating any ability to exercise market power post-merger.

[113] Statistics recording at least a single monthly visit to a site provide a basic picture. We agree with the Commission that the pattern of visiting online sites is more likely than not to reflect the markedly more regular pattern of visits to the dominant sites, with visits likely to be for a greater length of time than the numerically smaller number of visits to the lesser visited sites.

[114] We do not accept that the practice of multi-homing can elevate the less visited sites into a position as meaningful competitors of the appellants. The statistics on monthly visits, viewed in light of the other evidence before the Commission of the difficulty of establishing a reputation for reliability, and the reduced scope of coverage provided by many of the less frequently visited sites, lessens their stature. Treating them as a competitive constraint cannot be justified merely because of evidence that numbers of readers practice "multi-homing".

[115] The appellants' arguments depended on an assumption that recent trends would continue to an extent that the appellants' present dominance in terms of the number of visits to their online news sites would be substantially eroded in the foreseeable future. We accept that there is a prospect of the trend as described by Mr Goddard occurring. Circumstances confronting competition authorities in other jurisdictions may have progressed further with this trend than is apparent on the evidence in New Zealand. However a feature of disruptive technologies in the digital era is the unpredictability of the manner in which trends in behaviour adapting to new technology can change.

[116] Numerous uncertainties exist, and the prospect of others is quite likely. For instance there appears no consensus on how pervasive adblockers will become, or the

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54 CCFD, above n 1, at [589.2].

impact of them on the manner of charging for digital advertising space.[55] The projected ubiquity of Facebook may not develop consistently with recent history. Resistance to the intrusive extent of algorithmic analysis of viewers' areas of interest and concerns over the extent to which it facilitates "fake news" raise the prospect that its development may not continue in an uncontrolled manner.[56] Because of such uncertainties, we do not consider it appropriate to assess the extent of competitive constraints on an increase of the recent trend in matters such as multi-homing.

[117] Considering the proposed transaction as a five to four merger in the market for online New Zealand news, the patterns of usage suggest the appellants are the dominant participants in that market. Their position in the market is helped by the strength of their reputation. We consider there is scope for a reduction in quality to be imposed by the merged entity irrespective of the practice of multi-homing.

Prospect of a paywall

[118] If the operators of a digital news site wish to charge its readers to access the content they publish, it is done by imposing a paywall which requires readers to pay before obtaining access. Such arrangements can include "soft" paywalls where the obligation to pay is only triggered after usage above a certain level or to access certain restricted content.[57] The viability of paywalls is another aspect of the evolution of digital news media that has attracted substantial debate and analysis. Before the Commission, and in the argument on the appeal, consideration of the prospects of a paywall involved reference to commercially sensitive information from the appellants. We are able to explain our own analysis of this point at a level of abstraction that avoids any detailed disclosure.

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55 An adblocker is an app (or a number of apps) developed to allow the user of a digital device to view websites in a way that blocks advertisements the operator of the site is projecting when a particular page is viewed. It was suggested that this can prevent that page view from counting towards the number of readers for which an advertiser pays.

56 Even an elementary internet search on the subject reveals a large volume of writings critical of their unbridled power. For example, Jonathan Taplin *Move Fast and Break Things: How Facebook, Google and Amazon Cornered Culture and Undermined Democracy* (Little, Brown and Co, Boston, 2017); and Christina Larson "Facebook Can't Cope With the World It's Created" (17 November 2017) FP < www.foreignpolicy.com>.

57 For example The Washington Post, The New York Times, and The Australian. The Guardian is an example of a news media website continuing to offer all its content free to readers.

[119] [

]. The Commission reasoned that this competitive pressure for one appellant not to introduce a paywall would be removed when the digital form of both publications were under common ownership. Readers put off the publication that they had to pay for would be likely to migrate to the digital publication available for free, thereby continuing to be readers of the merged entities' online publications.

[120] The appellants disputed this analysis. They cited extensive overseas experience that paywalls have not worked for the digital publishers of mainstream daily newspapers in many other countries. The appellants cited statistics from the Reuters Institute report submitted to the Commission that on average in English speaking countries only around nine per cent of consumers of news were prepared to pay to access general news.[58] The appellants argued that the merged entities would most likely not introduce any form of paywall because of the number of unprofitable experiences for the digital form of newspapers elsewhere.

[121] We do not accept that the merged entities' decision on a paywall for one of its digital productions would be determined by the recent experience [

] because the regulatory and commercial environment in which they operate is materially different. Until 2017, [ ] media markets have been highly regulated in terms of ownership restrictions and a media company unilaterally introducing a paywall for equivalent digital publications [ ] could be sure to face enhanced competition from a number of rivals that are providing their digital publications without charge. That position is comparable to the pre-merger situation here [

]. That competitive constraint would be lost if readers rejecting a digital product available only via a paywall could migrate in substantial numbers to a comparable publication that the merged entity provided for free.

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58 Nic Newman and others *Reuters Institute Digital News Report 2016* (Reuters Institute, University of Oxford, 2016, CC.FS.0540.0001) at 7 and 24–25.

[122] The appellants also argued that a paywall would make the publication less attractive to advertisers, and the pressure from that other side of the platform would contribute to a decision by the merged entity not to introduce a paywall. We do not accept that advertisers would exert any additional influence on such a decision, beyond the projected financial consequences of reduced visits leading to reduced advertising revenue.

[123] Notwithstanding these points, the failures of paywalls in numerous contexts internationally is increasingly compelling. [

]. We take a different view from the Commission and cannot rate the prospect of a paywall being introduced as a sufficient likelihood to take it into account as conduct the appellants would likely undertake as a result of an SLC in the online reader market.

[124] Overall, however, we are not satisfied that an SLC in the reader market for online New Zealand news would not be likely.

Sunday newspapers

[125] The appellants publish all three of New Zealand's Sunday newspapers. In its analysis of them, the Commission recognised that the Sunday News is pitched at a discrete audience with a heavy focus on sport. The Commission accepted the view of the current editor of that newspaper (who is also the editor of the Sunday Star-Times) that readers of the Sunday News include many who would never switch to another Sunday paper.

[126] The two remaining Sunday papers, the Sunday Star-Times and the Herald on Sunday both have wide coverage over the North Island. The Sunday Star-Times is also published in the South Island whilst the Herald on Sunday has a greater penetration north of the middle of the North Island.

[127] The Commission rejected the appellants' characterisation that their two Sunday papers were "essentially complementary". Relying on a number of factors including internal monitoring documents provided confidentially by the appellants, the Commission found that each publisher treated the other Sunday paper as its principal competition.

[128] Both Sunday papers presently have the same or very similar cover prices and both are pitched at essentially the same market of readers wanting in-depth investigative journalism as well as lifestyle and leisure reading appropriate for the weekend. Circulation of Sunday newspapers is dropping consistently with the experience for printed newspapers generally.

[129] The Commission considered that the Sunday papers are not close substitutes for daily metropolitan newspapers, and also not substitutes for magazines such as the Listener, Metro, and North & South.

[130] The Commission's conclusion on the impact of a merger on the reader market for Sunday papers was that it could not be satisfied that there would not be the prospect of an SLC by way of increase in price and reduction in quality.

[131] The appellants criticised the Commission's definition of separate markets for the supply of advertising in the market for Sunday newspapers and the reader market for the supply of Sunday newspapers. In both aspects, the appellants argued that these markets were too narrowly defined because they failed to assess accurately the range of substitutes for both advertisers in Sunday papers, and readers of them.

[132] The appellants argued that declining overall revenues including advertising revenues showed that former readers are finding substitutes that must therefore be competing for both readers and advertisers. [

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The reader market

[133] The Commission treated certain evidence [

] as establishing that the competitor's Sunday newspaper effectively constrained Fairfax's behaviour in the reader market in the North Island. [59]

[134] The appellants disputed the factual basis for this. They argued that [

] they are explicable on grounds other than any competitive pressure exerted on Fairfax's pricing behaviour in the North Island.

[135] We do not see the existence or extent of [

] as making out a competitive constraint being exerted by NZME's competing publication in the North Island. Irrespective of this behaviour, the reality is that each appellant treats the other's publication as its principal competitor. The Sunday newspaper reader market is a duopoly so that each firm is the greatest constraint on the other.

[136] The drop in circulation for both papers in recent years must also be a material constraint in decisions about price increases. In the counterfactual, pricing behaviour by the firms is likely to be dominated by two considerations, the first being the conduct of their competitor and the second the risk of exacerbating the reduction in readership.

[137] In contrast, the factual scenario post-merger would see the merged entity free of the previous competitive constraint. We consider that the merger is therefore likely to lead to an SLC that could be exploited by increased prices.

[138] We adopt similar reasoning in relation to the risk of reduction in quality. The same forces will be at work with any perceptible drop in quality likely to cause further drops in readership. A reduction in quality could however occur with materially less risk when the merged entity was free of pressure that would be maintained in the

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[59] [

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counterfactual by the risk that the competitor will maintain previous standards of quality.

The advertising market

[139] The Commission found that the merged entity would likely involve an SLC in the market for advertising in their Sunday newspapers. The Commission acknowledged a measure of constraint from other print publications, including magazines such as the Listener, Metro and North & South, and online sites. However, that constraint was found insufficient to prevent the merged entity increasing the price for advertising in its Sunday newspapers.

[140] The appellants challenged this finding on a number of grounds:

- The Commission had misconstrued the effect of evidence from advertisers.
- The Commission had defined the market too narrowly because it failed to recognise the extent of substitutable products.
- [

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[141] The appellants and the Commission drew very different inferences from interviews and other evidence before the Commission as to the views of advertisers who used Sunday papers, and what could be inferred as to the habits of readers of Sunday newspapers.

[142] The Commission found that some advertisers treated Sunday newspapers as accessing a market with separate characteristics from the audiences for other forms of advertising. Readers of Sunday papers are characterised by advertisers as interested in in-depth investigative journalism, and leisure and travel topics appropriately read

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[60] [ ].

in a less hurried fashion than daily newspapers and of a different character from online news sources.

[143] The appellants criticised the Commission for suggesting there was a practice of large scale advertisers being able to play one company off against the other in negotiating prices for advertising in Sunday newspapers when the appellants considered there was only a single possible instance of this, and that it was mentioned in provisional terms not justifying a finding that the existing publications each constitute a competitive constraint on the prices that can be charged for advertising by the other.

[144] We agree with the appellants that the conclusions the Commission drew from the evidence of advertisers' conduct are not justified. Reviewing all of that evidence provides an inconclusive range of views. There was a single instance of an advertiser appreciating the prospect of playing one publication off against the other when negotiating advertising rates. There is somewhat more evidence that Sunday newspapers comprise a discrete and decreasingly important component of much wider advertising strategies for significant national advertisers.

[145] Certainly, the readership of Sunday newspapers comprise a defined audience that may be efficiently reached via advertisements in those papers, when they are the target audience for an advertising campaign. Some of the advertisers interviewed anticipated that the merger would lead to an increase in rates for advertising, but there was no consistent pattern of acknowledgements that price increases would be tolerated. Rather, there was some evidence that increased prices would cause advertisers to at least reassess the cost effectiveness of alternative forms of advertising.

[146] The Commission made the point that the merged entity would be the only provider of Sunday newspaper advertising in New Zealand.[61] The determination did not address the competition consequences of both firms' attempts to minimise or reverse the trend of reducing demand for advertising in their Sunday papers.

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61 At [339].

[147] We incline to the view that the response to this trend will be similar in both the factual and counterfactual scenarios. The evidence before the Commission on the scope of the market for advertising in Sunday newspapers suggests that advertisers who buy substantial volumes of advertising space in Sunday newspapers routinely review the effectiveness of that advertising against alternatives. They are likely to be sensitive to increases in the cost of using this form of advertising, to an extent that is likely to deprive the merged entity of market power. The drop in demand for advertising is likely to constrain the ability of the publications in both scenarios, to successfully introduce increases in charges for advertising.

[148] We accordingly agree with the appellants' submission that the Commission was wrong to find the prospect of an SLC in the Sunday newspaper advertising market.

Community newspapers

[149] The nature of the appellants' businesses in producing community newspapers is outlined at [23]. The Commission's conclusion on the impact of a merger on the reader market for community newspapers was that there would likely be an SLC.

The reader market

[150] The Commission analysed the prospects of the merged entity being able to reduce the quality of community newspapers in the areas where the publications overlap. It took a similar approach to that adopted in relation to the prospect of a reduction in the quality of online news. The Commission determined that there would be a compelling case for rationalisation, so that some of the community newspapers would cease to be published in the areas of overlap.

[151] The Commission relied on confidential content from PwC's merger synergies report for the appellants. [

].[62]

[152] Given the same imperative to reduce costs in order to produce a financial benefit from the merger, the Commission found that the merged entity would reduce the journalistic and editorial resources employed in producing the community newspapers, and that these prospects would certainly arise in the areas where there are presently overlapping publications.

[153] Given also that the community newspapers are distributed free, as with online national news, negative responses from readers to a reduction in quality may not lead directly to material reductions in the volume of advertising purchased. This is a qualitative consideration and would depend on the extent of the reduction in quality. It is foreseeable that if the standards of journalism dropped to an extent that the community newspaper was treated as junk mail, then a material drop in advertising would be likely.

[154] The appellants adopted arguments they had advanced about the online reader market to challenge the Commission's finding of the prospect of an SLC in the reader market for community newspapers. First, they criticised the extent of distinction maintained by the Commission's analysis between the producer/advertiser side, and the producer/reader side of this two-sided platform. Arguably, when viewed as an entire multi-sided platform, the constraints from other forms of advertising and the perceived need to maintain quality of content in order to maintain the level of advertising space purchased would provide the merged entity with sufficient incentive to maintain quality.

[155] Second, the appellants submitted that the Commission erred in not following its own analysis of the competitive constraints in community newspapers, from its 2005 decision in relation to Times Media Group Ltd.[63] There, the Commission found:[64]

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62 At [ ].
63 *Fairfax New Zealand Ltd and Times Media Group Ltd* (Commerce Commission Decision No 561, 14 October 2005).
64 At [141].

> … the news and information market is inextricably linked to the advertising market. As such, publishers of community newspapers have no opportunity or incentive to decrease the quality of the news/information provision or to charge for the newspaper as this would have a detrimental effect on the ability to attract advertising dollars.

[156] Arguably, the Commission was correct on that occasion, and has erred in the present case.

[157] The Commission adopted the submissions it had made on the correctness of the market definition and the extent of interdependence between the reader and advertiser sides of the two-sided platform. The Commission submitted that the extent of reach was critical to maintaining advertising revenue for community newspapers and that the merged entity could maintain existing reach with rationalised publications in areas of overlap because all the infrastructure was in place so there were no impediments to maintaining existing circulation.

[158] The Times Media Group Ltd decision granted clearance for Fairfax to acquire three community newspapers in the Rodney area. The Commission considered that decision to be distinguishable on the facts.[65] So do we. In that case the Commission found that there was a sufficient measure of competition from other providers of advertising in the area that, when combined with the substantial degree of countervailing power that advertisers had, meant that an SLC was unlikely. The scale of those operations, and the market conditions in which they were operating some 11 years ago are different to the conditions confronting the appellants in the areas of their overlapping community newspapers as they are presently operating.

[159] The financial imperatives to generate improvements in profitability out of the merger are in our view likely to be compelling for management of the merged entity. [

]. We accordingly agree that the prospect of an SLC on the reader side of the community newspapers market in the overlapping areas cannot be said to be unlikely.

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[65] CCFD, above n 1, at [480].

The advertising market

[160] The appellants criticised the Commission for not defining a precise market for advertising in community newspapers. The Commission dealt with this in the following terms:[66]

> In this case, we consider that there is no bright line that separates products that are within a market from those that are outside the market. Community newspapers face differing levels of advertising constraints, including from other community newspapers, other forms of print advertising (including advertising flyers and metropolitan and regional newspapers) and from other media platforms such as radio and digital.
>
> The competition analysis below does not rely on exact delineation of the relevant product market to identify the competitive constraints acting on the merged entity with respect to community newspaper advertising.

[161] The appellants made the superficially attractive submission that it was illogical to find the prospect of an SLC in a market of undefined scope. Arguably, if the conventional test of the market's response to a small but significant increase in price could not be assessed against the extent of competition the merged entity would face in a defined market, there was no basis for finding that an SLC was likely to occur.

[162] The Commission has previously considered an application for clearance of a media merger without defining a precise market.[67] In the present case the Commission recognised that the market for advertising in which community newspapers participate will include a number of different types of advertisers as customers with different requirements. The community newspapers also face a range of alternative forms of advertising, the presence and strength of which is not uniform throughout the areas of the country in which the appellants' publications overlap. Each alternative would present substitutability constraints on the terms for advertising in some community newspapers, potentially in a range of different circumstances.

[163] If the market were defined by aggregating all of the potential range of substitutable forms of advertising together, the result would be an artificially extended market that does not address the substitutability of a given alternative in the context relevant to each community area. For example, in one area where the appellants'

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66 At [403]–[404].

67 *Bauer Media Group (NZ) LP and APN Specialist Publications NZ Ltd* [2014] NZCC 1.

community newspapers compete, some advertisers may see a regional newspaper as a viable alternative if rates for advertising in the community newspaper were increased. In another area an active local radio station, or well-organised flyer distribution may be seen as substitutes. Generally, however, such alternative forms of advertising are not competitors of community newspapers for various reasons such as cost and reach.

[164] Accordingly a degree of flexibility is appropriate in defining the market for advertising in community newspapers to fulfil the aims of being descriptive, purposive and evaluative in terms of the approach described by French J in *Singapore Airlines*.[68] The Commission's reasoning accommodated the prospect of some measure of constraints applying in parts of the market for advertising in community newspapers, from products which fell outside any "bright line". We are not persuaded that the Commission's analysis in respect of this market was faulty because of the lack of a more precise definition.

[165] The parties disputed the effect of the evidence before the Commission about the position of advertisers in areas of overlapping community newspapers. Some of that evidence was received from one or other of the appellants on a confidential basis, and our analysis requires a number of references to the confidential information to be redacted in the published version of our judgment. In other respects the parties invited opposite conclusions from statements made in interviews that the Commission undertook with advertisers who use community newspapers.

[166] The appellants argued that, before the merger raised the prospect of an SLC in the advertising market for community newspapers, the Commission would need to find circumstances in which the merged entity could raise prices above a competitive level without losing sales to an extent that the price increase would become unprofitable.[69] To the contrary, the appellants submitted that the general trend across community newspapers is that the advertising revenue is dropping, and that this trend is similar in the areas where their community newspapers compete. They consider the drop in revenue must be caused by some external factor.

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68 *Singapore Airlines*, above n 14, at [174].

69 The test in these terms is derived from *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [68].

[167] The appellants disputed the relevance of the Commission's reliance on internal documents. [

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[168] The appellants disputed the inference that these documents evidenced a competitive constraint on pricing in areas where the two appellants' community newspapers compete.

[169] The appellants relied on comments from large scale advertisers who use community newspapers that they would switch to other forms of advertising if there were a material increase in price. The Commission cited comments from other interviews to suggest that regular local advertisers would continue to advertise in the community newspapers they were using, even if there were a price increase. Some advertisers in this category consider they do not have viable alternatives.

[170] One explanation for the opposing views attributed to advertisers in community newspapers is that different types of advertisers will respond differently to any use of market power. Larger national businesses are likely to be using community newspapers as one part of a much wider advertising strategy and can more readily explore alternatives for the (likely modest) portion of their total spending on advertising. In contrast local businesses who traditionally rely heavily on advertising in community newspapers are less likely to consider alternatives. They would be resigned to continued use of advertising in community newspapers despite price increases.

[171] [

]. On that basis they argued that the presence of competition in the overlapping area does not make a difference, and that external factors are the cause of the identified trends. [

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[172] The Commission submitted that the evidence demonstrated a different market dynamic. [

]. Moreover, if it reflected a move by some advertisers to using other modes of advertising, the drop in the overall level of demand did not indicate that the merger of the current competitors could not lead to anti-competitive pricing behaviour where they have previously competed at arm's length.

[173] The Commission submitted that the [

] is significant evidence of the prospect that the merged entity could exploit an SLC in the absence of competition in the 10 areas where their publications presently do overlap.

[174] We consider that patterns of advertising for those who use community newspapers are likely to be undergoing change in their own ways, as is occurring in other parts of the markets in which the appellants are operating. Community newspapers will continue for the foreseeable future to provide an outlet for advertisers of certain types that is not readily substitutable by alternative forms of advertising available to them. That position pertains to an extent that there is a real prospect the appellants could more or less sustain existing levels of advertising business despite an increase in the prices charged in the areas where they presently compete. We accordingly consider that the evidence does make out the likely prospect of an SLC in the market for advertising in those areas where the appellants' community newspapers overlap.

Conclusions on clearance appeal

[175] We agree with the Commission that the appellants are unable to establish that SLCs are not likely in the reader market for online national news, in the reader market for Sunday newspapers and in both the advertising and reader markets for community

newspapers in the areas where their publications overlap. We have reached a different view to the Commission on the prospects of a paywall being introduced in one of the merged entity's online news websites operating in the market for online national news. In relation to Sunday newspapers, we have come to the opposite conclusion to the Commission in that we are satisfied that an SLC is not likely in the advertising market for Sunday newspapers.

[176] Accordingly, the appellants have not made out their case for a clearance to be granted in respect of the proposed merger transaction.

The authorisation decision

Relevance of loss of media plurality

[177] The Commission gave substantial weight in its decision not to authorise the merger to the qualitative detriment (or disbenefit) it identified as arising from the loss of media plurality if the appellants were merged under single ownership.[70] The Commission rejected the appellants' arguments that it did not have jurisdiction to take into account matters of a non-economic nature that arose as effects outside the markets defined for the competition analysis.

Scope of Commission's jurisdiction

[178] The Commission was concerned that the appellants' approach requiring it to ignore adverse consequences of a loss of plurality would result in the Commission having to exclude an important category of negative consequences of the proposed merger. The Commission saw that approach as leading to the prospect that it might have to authorise a merger it assessed as not being in the public interest. The Commission considered the language of the Act did not compel an interpretation that some negative consequences would count for the purposes of an authorisation analysis, and some not.

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70 We discuss any need to distinguish detriments from disbenefits at [239]–[241] below.

[179] The Commission relied on the classic observations as to the approach to authorisations under Australian trade practices legislation in *QCMA*, to the effect that the tribunal there would not wish to rule out of consideration any argument:[71]

> … coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

[180] The Commission treated observations by the Court of Appeal in the recent *Godfrey Hirst 2* appeal as confirming its jurisdiction to take into account benefits and detriments broader than the efficiencies it found as likely to result from the merger, in light of the overriding purpose to promote competition in markets for the long term benefit of consumers in New Zealand.[72]

[181] The appellants submitted that the Commission does not have jurisdiction to take into account any detriments that arise outside the market in which the Commission has found the prospect of an SLC or detriments of a type going beyond efficiency issues. They argued that the terms of s 67 of the Act confine the Commission's analysis to an orthodox competition law one of the merged entity's financial and economic ability to raise prices or reduce the quality of products it supplies post the merger. That is, impacts arising in the market or markets as defined by the Commission in determining the related application for clearance. The sequence of considerations required of the Commission under s 67(3) is as follows:

> **67 Commission may grant authorisations for business acquisitions**
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> …
>
> (3) Within 60 working days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall—
>
> (a) if it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or

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71 *Re Queensland Cooperative Milling Association Ltd* [1976] 25 FLR 169 (Trade Practices Tribunal) at 182.

72 *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560, [2017] 2 NZLR 729 [*Godfrey Hirst 2* (CA)] at [31], cited in CCFD, above n 1, at [95].

> (b) 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, by notice in writing to the person by or on whose behalf the notice was given, grant an authorisation for the acquisition; or
>
> (c) if it is not satisfied as to the matters referred to in paragraph (a) or paragraph (b), by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance or grant an authorisation for the acquisition.

[182] Arguably because the decision under (a) relates to the effect of substantially lessening competition in a market, in cases where clearance is not given and the Commission progresses to consider an authorisation under (b), that should similarly be confined to offsetting benefits in the market in which the Commission has decided there is a likelihood of detriment by way of an SLC. On the appellants' argument it follows that if the merged businesses will affect multiple markets, and the Commission has found that there is no likelihood of an SLC in some of those markets, then detriments arising in the markets where the Commission has found no likelihood of an SLC cannot be taken into account in the Commission's evaluation of whether to grant an authorisation under s 67(3)(b).

[183] The appellants submitted that the Commission's wider consideration of out-of-market detriments was contrary to the statutory scheme, unsupported by case law, and contrary to its own previous position. They cited the Commission's Authorisation Guidelines as recognising that the scope of anti-competitive detriments would be limited to those arising in the markets where there has been a finding of the likelihood of an SLC. The Commission's July 2013 Authorisation Guidelines address the point in the following terms:[73]

> 36. In particular, section 3A of the Commerce Act requires us to have regard to efficiencies that likely arise from the transaction in assessing whether a transaction gives rise to public benefits. However, New Zealand courts have made clear that efficiencies are not the only public benefits which can be counted.
>
> 37. In our assessment we regard a public benefit as any gain to the public of New Zealand that would result from the proposed transaction regardless of the market in which that benefit occurs or whom in New Zealand it benefits. We take into account any costs incurred in achieving benefits.

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73 Citations omitted.

> 38. In contrast, in assessing detriments we only consider anti-competitive detriments that arise in the market(s) where we find a lessening of competition (whether substantial or otherwise).
>
> 39. To illustrate the difference in our approach to benefits and detriments, if a transaction gives rise to a lessening of competition in market A and benefits in market A and market B, then:
>
> 39.1 the public benefit is counted across both markets A and B; and
>
> 39.2 only those detriments arising in market A are counted.

[184] In its determination the Commission did not consider that these Guidelines precluded it from taking a wider approach to the scope of potential detriments. It treated the Guidelines as necessarily general and they were to be applied flexibly according to the facts of each application. They were not intended to address every issue that might arise. A footnote to the determination recorded that the Authorisation Guidelines had not been revised to reflect the more recent High Court and Court of Appeal decisions in *Godfrey Hirst 2*.[74]

[185] The appellants also argued that the statutory purpose of the Act, the statutory process for considering applications for clearance and authorisations, and the areas of expertise provided for within the Commission all pointed to the scope of detriments relevant to an authorisation assessment being confined to economic detriments. They could therefore not extend to matters of social policy or politics that were beyond the areas of the Commission's expertise.

[186] The appellants cited an earlier appeal decision involving the Commission and Telecom in which the Court of Appeal observed that:[75]

> … a public authority which is a creature of statute cannot act outside the scope of its express and implied statutory powers.

That decision emphasised that in implying a power to fill any gap in an Act, the Court must be satisfied that it is doing so in order to make the Act work as Parliament must have intended.[76]

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74 CCFD, above n 1, at n 72.

75 *Commerce Commission v Telecom Corp of New Zealand Ltd* [1994] 2 NZLR 421 (CA) at 430 per Cooke P.

76 At 424–425 per Cooke P.

[187] The appellants also argued that extending the Commission's jurisdiction to consider out-of-market detriments, or social and political considerations would render the authorisation process more uncertain and unpredictable, when that should be avoided.

[188] In including an analysis of the detriments likely to arise from loss of plurality in this case, the Commission has assumed jurisdiction where it had previously decided it did not have it. Mr Farmer QC, for the respondent submitted that it was entitled to do so where the factual circumstances and relative importance of the issue warranted reconsideration. Given the relative importance it attributed to the loss of plurality that would follow from this merger, the Commission assumed jurisdiction to take that into account because failure to do so would abrogate the responsibilities it perceived it had, to carry out the purpose of the Act:

> **1A Purpose**
>
> The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.

[189] In the present case the Commission included its consideration of the risks of loss of media plurality on the basis that if the Commission did not have regard to it on the authorisation application, then there was no other source of constraint on aggregation of national media interests that might constitute a material detriment to the public interest. The appellants argued that if confining its jurisdiction to the in-market detriments as contemplated in the Commission's guidelines meant that there was a gap in the New Zealand regulatory framework, then it was not the Commission's role to assume it could fill that gap.

Analysis

(i) Legislative history

[190] In opposing this breadth of jurisdiction the appellants submitted that the scope of the Commission's powers were narrowed under the 1986 Act, relative to the scope of considerations that it could undertake under its previous, 1975 Act. The former Act had a public interest test that allowed the Commission to take into account "any effects

aiding the wellbeing of the people of New Zealand".[77] The appellants submitted, both before the Commission and on appeal, that the former Act was not an economic outcomes-focused piece of legislation, whereas the current Act is.

[191] There is nothing in the wording of s 67(3)(b) to suggest either that some forms of benefit ought not to be taken into account, or that detriments that would also follow from the merger should not be considered across whatever range is material to the transaction in question.

[192] There are no explicit references in Parliamentary debates about what was intended on the scope of relevant detriments, but there are implicit indications on the introduction of the new purpose in s 1A.

[193] The provision that became s 1A was introduced by way of a supplementary order paper in 1999 which was part of a proposed amendment Bill that lapsed, but was adopted as part of wider reform of the Act in 2001.[78] The Select Committee's report on the new purpose statement included the following:[79]

> The SOP seeks to replace the long title of the Act with a new purpose statement. Currently the Act's long title implies that competition is an end in itself. This narrow view is not reflected in the body of the Act, which through such mechanisms as the "public benefit test", takes a wider view of the impact of conduct on the wellbeing of New Zealanders as a whole.
>
> …
>
> The new purpose statement is intended to make transparent the existing policy of the Act by making it clear that competition is not an end in itself but a means to increasing consumer welfare in the long-term. The ultimate goal is to facilitate effective competition to promote economic growth, while accommodating the unusual situation where competition does not improve the welfare of New Zealanders as a whole.
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> …
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> … It is clear that the statement will confirm the existing approach that competition is a means to an end, not an end in itself. The difference is that it does this more explicitly than the existing long title, and clarifies that it is the

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77 Commerce Act 1975, s 80(b)(vii).

78 The legislative background for this reform is not straightforward. The 1999 proposals lapsed and were adopted by the new Government in 2000. A select committee report was completed and reported back in early 2001. The Bill was dropped, for reasons that remain unclear. For equally unclear reasons, the Bill was re-adopted and passed later in 2001.

79 Commerce Amendment Bill 2001 (296-2) (select committee report) at 5–7.

> impact on the long-term welfare of consumers within New Zealand that should be the overarching goal when assessing market behaviour.

[194] When the Bill was reported back from the Select Committee in February 2001, Paul Swain the Minister of Commerce stated:[80]

> The focus on competition in the purpose statement also does not preclude wider public benefit issues being taken into account where appropriate.

[195] It is implicit in these statements during the Parliamentary debates that Parliament contemplated the Commission would be able to have regard to all forms of relevant benefit that were seen as likely to flow from a transaction for which an authorisation was sought. It is inconsistent with Parliament's approach to infer, without any clear indication of such an intention, that Parliament intended to discriminate between the scope of benefits to which the Commission could have regard, and then a narrower subset of detriments.

(ii) The position elsewhere

[196] In disputing that a purposive interpretation of the scope of s 67(3)(b) could extend to out-of-market detriments, the appellants invited comparison with the mode of regulation of the media in other jurisdictions. In some countries regulation of the media falls outside the scope of competition regulation and is the subject of specific media industry regulation, often governed by political processes.

[197] Giving implicit acknowledgement to the relative importance to New Zealand society of maintenance of media plurality, Mr Goddard submitted that control of media plurality is a highly sensitive subject which requires debate in a legislative context and is not a matter where jurisdiction should be asserted by a specialist economic regulator.

[198] In the United Kingdom, legislation provides for intervention in a media merger by the relevant Secretary of State based on public interest grounds. The appellants criticised the Commission's reliance on an Ofcom report *Measuring media plurality* because that report did not arise in the course of Ofcom's usual jurisdiction (which can

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[80] (27 February 2001) 590 NZDP 7972.

be seen as comparable to the Commission's).[81] It instead resulted from a specific direction from the Secretary of State. Ofcom's conclusion was that media plurality questions were more appropriate for Parliament to debate and consider.

[199] In Canada, a Parliamentary inquiry as to whether that country's Competition Act 1985 ought to be amended to create industry specific provisions for newspapers was rejected. The report observed:[82]

> 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 anti trust authorities the world over, towards a more holistic model relying not on economics, but on the disciplines of psychology, sociology and political science.

[200] The absence of a distinct process provided for in legislation to regulate the conduct of media businesses may be seen as either favouring the inclusion of such considerations within the Commission's jurisdiction, or supporting the exclusion of that jurisdiction. On the one hand, it may be that Parliament considers the scope of relevant detriments to be the same as benefits so that the clearance and authorisation regime under the Act is a sufficient check on any undue aggregation of media interests making other regulation unnecessary. On the other hand, the recognition in comparable jurisdictions of the discrete nature of control over aggregation of media interests might indicate that a separate statutory framework is needed to protect the quality of national media as an important element of a healthy democracy. On that approach the competition regulator of general jurisdiction would not be entrusted with discrete concerns arising from aggregation of the media interests.

[201] We are not persuaded that the experience in other countries where comparable competition law regulators do not have jurisdiction to assess the impacts of loss of media plurality can constitute an influence on the intention attributed to New Zealand's Parliament when it has addressed the relevant terms of the Act.

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81 Ofcom *Measuring media plurality: Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport* (19 June 2012, CC.FS.4027).

82 Canada (House of Parliament, Standing Committee on Industry) 2000, 6 as cited by the appellants at [35] of their submissions to the Commission regarding jurisdiction to consider plurality issues.

(iii) Commission's prior conduct and scope of expertise

[202] Consideration of whether an undue degree of influence on public opinion would result from a merger, and concerns for the level of accuracy of the presentation of news had featured in a 1985 Commission decision on a news media merger.[83] The appellants implicitly accepted that the broader public interest test under the 1975 Act entitled the Commission to consider matters such as loss of media plurality.

[203] In contrast, the Commission observed in the first merger decision relating to newspapers following the 1986 Act that:[84]

> 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.

[204] The appellants criticise the alleged inconsistency between the Commission's approach on that application, and on the present one.

[205] Mr Farmer emphasised that that decision related only to a clearance application, and did not reflect the approach the Commission may take on an authorisation application.

[206] We do not consider that either the Commission's previous clearance decisions or the terms of the Commission's 2013 Authorisation Guidelines operate to restrict the Commission's jurisdiction more narrowly than is vested in the Commission by the terms of its statute. Just as parties to proceedings before a court or tribunal established by statute cannot, by consent, vest the decision maker with a jurisdiction beyond its statutory authority, so too a body like the Commission cannot confine its jurisdiction more narrowly by means of its own pronouncements than is vested in it by its empowering statute.

[207] In other circumstances a participant in proceedings before the Commission might complain that the Guidelines gave rise to some form of legitimate expectation, or to an estoppel preventing the Commission going beyond the range of considerations

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83 *Re Proposal by Brierley Investments Ltd* (1984–1986) 5 NZAR 108 (Commerce Commission); and *Brierley Investments Ltd v Commerce Commission* (1986–1987) 6 NZAR 25 (HC).

84 *Re Proposal by News Ltd* (1986–1987) 6 NZAR 47 (Commerce Commission).

that it has previously represented it would take into account. That point was not taken here and it could not be when the Commission's intention to have regard to wider concerns such as loss of media plurality was clearly signalled during its inquisitorial process. The process afforded adequate opportunities for the appellants to make submissions on both the claimed lack of jurisdiction, and on the substance of the nature and effect of any detriments that might arise from the loss of media plurality.

[208] It was submitted for the Commission that detriments or benefits arising in areas that are beyond the range of expertise reasonably expected of Commission members and the staff will be relatively rare, and that the lack of in-house expertise to evaluate such matters cannot arbitrarily deprive the Commission of jurisdiction to take those matters into account. The contrary proposition was put by the appellants to the Commission in the course of dealing with their applications.

[209] The Commission recognised that the nature and relative importance of plurality in the New Zealand media was an area on which it needed evidence from others, and did that by retaining independent experts. The Commission instructed Dr David Levy who is the Director of the Reuters Institute for the Study of Journalism at the University of Oxford and Mr Robin Foster who is a media policy adviser and founder of a consultancy based in the United Kingdom that addresses media issues. They produced two preliminary commentaries on media plurality and then a report in November 2016 providing an analysis of plurality and comments on the Commission's draft determination.

[210] We do not accept that the role envisaged for the Commission by reference to the areas of expertise of those appointed to it can restrict the scope of topics on which it might assess the existence of benefits or detriments when acting pursuant to a statutory purpose. It has certainly evaluated claimed benefits to New Zealand society and weighed their relevance on matters beyond economic impact. We are not persuaded that the Commission lacks jurisdiction to consider identifiable benefits or detriments that arise in areas outside those in which it has recognised expertise.

[211] The manner in which the Commission has informed itself, evaluated all the identified benefits and detriments, and the weight given to them, is a matter on which

the Commission's decision may be vulnerable to challenge. However that is a distinct matter from the question of whether such conduct arises within its jurisdiction.

[212] Nor do we consider that this breadth of jurisdiction leads to any unacceptable unpredictability for those seeking authorisations. Out-of-market considerations are likely to arise in only a minority of merger and acquisition transactions. Further, the Commission's processes mean that such concerns will be raised during the dialogue with an applicant (as occurred here) so that debate can occur before a decision is made.

[213] It will usually be appropriate for the Commission to confine its assessment of detriments on an authorisation application to those arising in the market or markets in which it has decided there is likelihood of an SLC. However we do not consider that constraint is required by the terms of the statute. Proposed mergers will have widely varying levels of impact on New Zealand consumers generally and where those impacts are as broad and as significant as arose here, then it would be inconsistent with the statutory scheme to require the Commission to ignore them. Parliament cannot have intended such an outcome.

[214] The statutory purpose in s 1A of the Act is to promote competition in markets for the long-term benefit of consumers within New Zealand. Achieving that purpose will be frustrated if matters likely to be to the long-term benefit of consumers could only include positive effects resulting in the markets in which anticompetitive conduct was in issue. The Commission has routinely adopted that approach. A balanced approach requires the same attitude to be taken in respect of detrimental matters that should be weighed against the overall benefits.

(iv) Judicial consideration

[215] We note that an early judicial consideration of the benefits and detriments assessment on authorisation appears not to have been criticised subsequently. In the appeal by Telecom from refusal of authorisation for its proposal to hold the radio band frequency for AMPS-A, the Court observed:[85]

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[85] *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) at 527.

> The likely benefits and detriments to be considered are those that would result from implementation of the merger or takeover proposal. We are required to predict the shape of the future with and without the acquisition in question, but at this authorisation stage we go forward to an assessment of the likely ultimate impact upon the interest of society as a whole.

[216] And:[86]

> … the detriments attributable to the strengthening of dominance are not the only detriments that could conceivably be relevant. The very concept of benefit to the public allows for some netting out, in an appropriate case, of any detriments to the public from the acquisition itself …

[217] We respectfully agree. These observations reflect common sense, consistent with the statutory purpose.

[218] In its decision in *Godfrey Hirst 2* the Court of Appeal reviewed the nature of the Commission's task on an authorisation application. The appellant was a New Zealand carpet manufacturer with a direct interest in the state of competition in the New Zealand wool scouring market, in which the merger participants operated. The second appeal was brought on a question as to the absence of quantification of the projected benefits arising from the transaction. The Court of Appeal's analysis of the role of the Commission in considering an authorisation application included the following:[87]

> [31] … In determining whether the subject conduct will meet that threshold [for a grant of an authorisation], the Commission's inquiry was qualified by only one statutory requirement: it was to have regard to any efficiencies it considers will result or are likely to result from the acquisition, as well as broader benefits and detriments in the light of the overriding purpose to promote competition in markets for the long-term benefit of consumers in New Zealand.
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> …
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> [35] The Commission correctly referred to judicial guidance. It highlighted in particular the view of Richardson J in *AMPS-A* CA that a regulatory body such as the Commission must "attempt so far as possible to quantify benefits and detriments [of the acquisition to the public] rather than rely on a purely intuitive judgment". This guidance may imply a dichotomy between strict objectivity and undisciplined subjectivity. It must not be allowed, however, to obscure the Commission's primary function of exercising a qualitative judgment in reaching its final determination. The Commission is a specialist body whose members are appointed for their

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86 At 528.

87 *Godfrey Hirst 2* (CA), above n 72 (citations omitted).

> particular expertise across a range of disciplines and who are expected to exercise their collective knowledge, skill and experience in making what is an essentially evaluative judgment on any application.
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> [36] … the statutory framework and legislative history shows that the Commission's determination must have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits at stake in the relevant market ...
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> …
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> [38] However, in the light of the statutory scheme, we are satisfied that a quantitative analysis of this nature cannot dominate the Commission's approach. In cases where the Commission is able to undertake parallel assessments of a qualitative and quantitative nature, each must be informed by and ultimately integrated within the Commission's determination by exercising its institutional expertise. Qualitative factors can be given independent and, where appropriate, decisive weight; it follows that non-quantifiable factors need not assume a merely supplementary function in a largely arithmetical exercise, as supposed in contemporary practice.
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> …
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> [41] … The statute does not allow for imposition of an artificial construct or gloss on what is a deliberate broad and evaluative test.

[219] That appeal did not deal explicitly with the permissible scope of qualitative benefits or detriments that may be recognised by the Commission, but it is implicit that to achieve the statutory purpose, it is for the Commission to recognise relevance in a projected detriment without needing to exclude any detriments that arise outside the market or markets in which it has found that SLCs are likely to arise. The passages in [31] and [35] of *Godfrey Hirst 2* in particular are inconsistent with there being any distinction between the scope of relevant detriments, and benefits to which the Commission may have regard.

[220] That approach is wider than the approach adopted at the High Court stage of the first *Godfrey Hirst* appeal in 2011.[88] The approach to the Commission's authorisation process in that appeal was as follows:[89]

> [72] The consistent approach of the Commission throughout the legislative changes has been to assess competitive detriments in the relevant markets (that

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88 *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) [*Godfrey Hirst 1*].

89 Citations omitted. The *Telecom* appeal referred to is *Telecom Corp of New Zealand v Commerce Commission* [1992] 3 NZLR 429 (CA) at 435 and 449; and *Telecom*, above n 85, at 533.

> 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.

[221] The broader approach in the Court of Appeal's reasoning in *Godfrey Hirst 2* suggests the detriments that may be taken into account need not be confined to those arising in the relevant market. Non-quantifiable factors may be decisive, and no logical reason for limiting the type of detriments is suggested. Generally, mergers are unlikely to cause material detriments outside the market in which they are to occur.

[222] The vast majority of the Commission's determinations about proposed mergers arise in contexts where there are no material consequences for those who are not consumers in the direct sense of the goods or services that the merger participants deal in. For the purposes of the statute, the consumers in such cases are clearly delineated. They generally comprise a subset of the public and the beneficial or detrimental impacts on those consumers do not impact on the rest of the public beyond that defined subset group.

[223] In the present case, if a consistent definition is applied of "consumers" in both the authorisation and clearance analyses so that the group is confined to those who buy the appellants' print publications and those who access the digital forms of their publications, then the analysis of benefit and detriments would exclude highly material impacts that arise beyond that group, that is, the impacts across members of the public in general. There should not be an artificially limited assessment of detriments if such limitation would prevent the preferable advancement of the long-term interests of consumers. That cannot have been parliament's intention.

[224] Proportionality considerations may well arise. Where detriments are recognised outside the market defined for the competition analysis, then it may need to be compellingly material before its influence on the narrower analysis of in-market detriments and in and out-of-market benefits can be justified.

[225] The appellants cited two passages from the High Court decision in the 2004 appeal from the Commission's refusal to grant an authorisation for a proposed alliance between Air New Zealand and Qantas.[90] The more pertinent of the passages was:[91]

> Determinations of authorisation applications under the Act are properly concerned with balancing any efficiency detriments associated with breaches of the statutory competition standard, against any efficiency gains that may result from the business acquisition or contractual arrangement in question. It is the balancing of these real resource impacts on the economy that best serves the long-term interests of consumers.

[226] That passage is to be read in the context of the substantive issues at stake in that appeal. A party to the appeal had argued that benefits to the public would not count because the terms of s 1A arguably require the exclusion of benefits that did not flow directly to consumers. The quoted passage reflects the Court's rejection of that proposition and confirmation that the public benefit test required on an authorisation application extended to benefits to the public which were intentionally broader than those attributable to consumers of the goods or services generated in the market in question.

[227] We do not treat that reasoning as excluding non-efficiency detriments that may arise outside the markets in question. The rationalisation provided in the context confronting the Court understandably did not contemplate the unusual circumstances where potentially significant consequences of a merger would include detriments to the public in non-economic or non-efficiency terms.

[228] The appellants also cited the *Air New Zealand* decision for the proposition that the test under s 67 is substantially the same as the test under s 61 of the Act which applies to applications for authorisation of restricted trade practices.[92] The relevant part of s 61(6) specifies that the Commission is not to grant authorisation for a restrictive practice unless it is satisfied that the trade practice:

> … will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom.

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90 *Air New Zealand v Commerce Commission (No 6)* (2004) 11 TCLR 347 (HC).
91 At [241].
92 At [33].

[229] That provides the more specific focus on the benefits and detriments likely to arise from a restrictive trade practice than is the case in the more open-textured inquiry into the extent of benefit to the public in s 67(3)(b). In arguing that the focused approach that applies under s 61(6) ought also to be adopted in the authorisation assessment here, Mr Goddard submitted that it was illogical to deny clearance for a proposed merger because of perceived detriments in the nature of an SLC, and then when considering the alterative of a grant of authorisation for such a merger, to evaluate the benefits to the public by having regard to a wider range of detriments than those causing the transaction not to qualify for a clearance.

[230] We do not accept that there is an illogicality in proceeding in this way, nor do we treat it as inconsistent with the statutory scheme. If a proposed merger does not qualify for a clearance because of detriments likely to arise in the markets affected by it, then the Commission is to consider whether it should nonetheless be authorised because an overall weighing of matters relevant to the public establishes that the benefits sufficiently outweigh the detriments. Once the Commission's task on an authorisation assessment is viewed in that light, it would be illogical to exclude consideration of identifiable detriments that affect an overall assessment of the benefits to the public merely because those detriments do not arise in the market in which the merged entity would operate.

[231] Accordingly we are satisfied that the Commission did not err in asserting jurisdiction to have regard to the detriments arising from any material loss of media plurality that it found would result from the proposed merger.

Weight given to loss of plurality

[232] The issue of loss of media plurality attracted substantial attention during the Commission's investigation and determination. Its reasoning on this concern occupied a material part of the entire determination.[93] In the Executive Summary it was described as "the fundamental detriment".[94] In its conclusion, the Commission

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93 CCFD, above n 1, at [1393]–[1738].
94 At [X37].

observed that its weighing of the positive and negative consequences of the merger was not finely balanced.[95]

[233] The Commission listed a number of other unquantified benefits and detriments in its determination.[96] Mr Farmer submitted that the loss of media plurality was not the determinative detriment on its own. He referred to in particular the Commission's concern about reduced quality in reader markets. The Commission's reasoning treated both of these unquantifiable detriments as being of "significant" magnitude.

[234] On the other hand, Mr Goddard characterised the relative importance attributed to loss of plurality in the Commission's determination as pivotal. Arguably, sufficient detriments could not be identified to withhold an authorisation if the Commission erred in assuming jurisdiction to take into account loss of plurality.

[235] It is unnecessary for us to decide whether the weight attributed to loss of plurality by the Commission was decisive to the outcome of its authorisation decision. After our own analysis of the relative importance of loss of plurality, we provide our view of the weight to be attributed to it, as a matter of our judgment.

The plurality debate

[236] Assuming we are correct in treating consideration of the potential loss of media plurality as a matter within the Commission's jurisdiction, there remains the appellants' substantive criticism of the manner in which it was assessed, and the weight given to it. The appellants argued that the Commission's view on loss of media plurality was speculative; not justified on the evidence before it; and that the risk was sufficiently remote that it ought either not to have been taken into account at all, or otherwise given substantially less weight than it was. An aspect of this criticism was that the Commission's approach on this potential detriment was binary, in the sense that once the Commission found that loss of media plurality represented a detriment it could take into account as arising from the merger, then axiomatically it was one of

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95 At [1737].
96 At [1705]–[1714].

sufficient importance to outweigh the substantial quantified and unquantified benefits that were also recognised.

[237] The plurality debate can be addressed under two headings:

- the relative importance of media plurality; and
- the adequacy of internal plurality.[97]

[238] First, however, we consider the Commission's approach in treating the loss of plurality as a "disbenefit".

[239] The Commission characterised the loss of media plurality that would follow from the merger as a disbenefit, which we understand to be a term of art distinguishing the costs (economic or otherwise) associated with procuring a benefit that would accrue from the transaction in question. A disbenefit is to be distinguished from a detriment because a disbenefit only arises from the costs associated with procuring a benefit.

[240] The appellants advanced a separate criticism that if loss of media plurality became relevant as a disbenefit, then the negative value attributed to that adverse consequence could not be greater than the positive value of the related benefit, the creation of which was the trigger for incurring the disbenefit. Arguably, in its authorisation assessment, the Commission could not attribute a greater negative value to disbenefits arising from the impact on media plurality than the value of the advantages of maintaining the fourth estate that arose from the merger.[98]

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97 Internal plurality refers to the internal range of views within the proposed merger. External plurality means the range of views within the media industry.

98 The term "fourth estate" is commonly understood to refer to news media. The first use of the term in reference to the press or news media is attributed to Edmund Burke who, in 1787, while commenting that there were three estates of Parliament (the Lords Spiritual, the Lords Temporal and the Commons), pointed to the press gallery and said there sat a fourth estate, far more important than the others. See Thomas Carlyle "On Heroes, Hero-Worship, and the Heroic in History, Lecture V: the Hero as a Man of Letters, Johnson, Rousseau, Burns" (Tuesday 19 May 1840) as reproduced in Thomas Carlyle *Sartor Resartus and On Heroes, Hero Worship* (London, Dent, 1908) 383 at 392.

[241] Given the view that we have come to on the breadth of matters legitimately taken into account by the Commission under an authorisation assessment, there is no requirement for relevant negative consequences of a merger that arise outside the market in which the need for authorisation arises to be tied to a benefit perceived as arising from the merger. In our analysis there is accordingly no distinction necessarily drawn between a detriment and a disbenefit. Further, given our finding that a detriment for the purposes of an authorisation assessment need not be tied to a benefit, there is consequently no need for the negative value of a detriment that does relate to a benefit to be limited by the value of that benefit.

Relative importance of media plurality

[242] Before the Commission, and on appeal, the appellants made a relatively muted challenge to the proposition that maintaining media plurality is an important societal value in maintaining a strong and well-functioning democracy.[99]

[243] The appellants' submissions to the Commission included the following quotation:[100]

> According to another commentator, "notions of pluralism, diversity and the market place 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.

[244] We agree with the Commission, and what we treat to be the preponderance of views on the point, that maintaining diversity of control over the mainstream media is an important component in the functioning of a healthy democracy. Without a sufficient measure of diverse views expressed by competing voices, the risk arises that undemocratic or improper conduct by those in positions of power will not adequately be brought to the public's attention. The editorial process also depends importantly

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99 Significantly greater emphasis was given to the distinct criticism that the Commission had given excessive weight to the unquantifiable concern at loss of media plurality.

100 Karl Karppinen *Rethinking Media Pluralism* (Fordham University Press, New York, 2013). The reference to Tambini is to Damian Tambini *Communications: Revolution and Reform* (Institute of Public Policy Research, London, 2001) at 26.

on providing sufficient coverage of competing views on national and local differences in the political and social life of the country.

[245] On the basis of the statistics discussed below New Zealand already has an unusually high level of concentration of media ownership. However there were no strong concerns expressed in the arguments on the appeal, or relied on by the Commission, that the existing media ownership arrangements deprived New Zealand of adequate plurality.

[246] We note four factors that have had a minor influence on our consideration of this topic. We accept our views are formed as non-experts. The influence of our view on these points has not been decisive, but it is appropriate to acknowledge them given passing references to them during argument.

[247] First, the range of political views in mainstream New Zealand politics is relatively limited. Mr Goddard acknowledged this as a feature in passing.[101] We see the lack of greater diversity in the political landscape as an influence on the mainstream media when it reflects largely centrist political views and expectations. Society is provided, by and large, with political initiatives, and reporting on them, within the range that New Zealand society wants. The focus we perceive on centrist politics in the mainstream media may reflect a risk influencing editors to think that if they report or espouse more extreme views of political thinking, they may discourage their core audiences without the prospects of generating sizeable alternative audiences.

[248] Our second observation is that New Zealand's mainstream media is relatively responsible in recognising the value of accuracy, objectivity and balance in its reporting.[102] As the Chairman of the Press Council, Sir John Hansen, observed in an interview with the Commission, New Zealand does not have "screaming" tabloids that Sir John saw as a feature of English newspapers.[103]

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101 His reference was to the observation some years ago by United States political commentator Thomas Friedman that the whole of the New Zealand political spectrum would fit within one half of the United States Democratic party.

102 We appreciate that this observation may not be accepted universally, with some minorities and interested observers having concerns about unconscious bias.

103 Interview of Press Council CC.FS.2825 at 14.

[249] Both these features arguably lessen to a small extent the relative importance that should be attributed to the maintenance of adequate media plurality to ensure a healthy range of reporting on political and social issues. We acknowledge that there is no certainty that either of these features will apply permanently. However both have been present for substantial periods and there is no signal that this may change, at least in the near future.

[250] An important countervailing consideration is the relative fragility of New Zealand's constitutional arrangements. In the absence of a written constitution, the balance of power between the executive, legislative and judicial branches of Government depends on continued respect for conventions and other sources of our unwritten constitution. An important check on the prospects of abuse of power is the monitoring of all those who can exercise it, by the fourth estate. Robust and inquiring media organisations therefore continue to play a vital role in ensuring maintenance of the rule of law.

[251] Another factor, noted by Levy and Foster, is the absence of a strongly supported public broadcasting system, such as the state funds in other comparable jurisdictions.[104] The existence of state funded but editorially independent media organisations is partly because of the recognition of the importance of a healthy level of reporting on political, economic and social affairs.

[252] In New Zealand RNZ is the only participant in the mainstream media that discharges that function.[105] It is of more limited scope than comparable public broadcasters in the United Kingdom and United States.

[253] The report obtained by the Commission from Dr Levy and Mr Foster on its draft determination drew stark contrasts between the level of concentration of media control in New Zealand, and the position in other countries.[106] Their report cited another recent analysis:[107]

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104 Levy and Foster, above n 43, at 22.

105 We do, however, acknowledge, the growing significance of Māori Broadcasting entities that receive state funding and discharge important functions.

106 Levy and Foster, above n 43, at 8–10.

107 At 9 (citations omitted).

> In the Bertelsmann Foundation's Sustainable Governance Indicators, under the rubric "To what extent are the media characterised by an ownership structure that ensures a pluralism of opinions?", on the basis of their analysis New Zealand currently rates at 4 out of a 10 point scale compared to Australia at 5 and other similar sized countries, namely Finland, Denmark, Norway and Sweden at 9 and Ireland at 8.

[254] The authors also expressed the following views:[108]

> … the New Zealand news market is already more concentrated, there is relatively little routine use of news sources from outside New Zealand, certainly compared say to Ireland which as stated has widespread use of UK news sources, and as noted above the level of public service provision in New Zealand is relatively low.

[255] The authors characterised Australia as a country that has an unusually high level of media concentration with News Ltd having a 57.5 per cent share of the Australian newspaper market making it the highest share of any democratic country studied. In contrast, if the merger were concluded, New Zealand would have an even higher degree of print media concentration than Australia. That part of the report concluded with the following:[109]

> Finally, while some have argued that the rise of online news renders redundant approaches to plurality based on newspaper or broadcast sources, this is not currently the case in countries such as New Zealand where the most regularly used news sources online are provided by the dominant providers offline. The argument that online news makes traditional concerns for plurality obsolete does not – at least at present – stand up to scrutiny given existing patterns of news provision, use and impact.

[256] The Commission adopted the view expressed in this last observation, rejecting the appellants' argument that dramatic changes in the manner in which online news is made available to readers is rapidly becoming an adequate alternative source of media plurality.

[257] In their presentations to the Commission, the appellants relied on two opinions from Professor Randal Picker of the University of Chicago Law School. The earlier of those commentaries ended with this observation:[110]

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108 At 10.

109 At 11.

110 Randal C Picker *Commentary on News Media Quality Issues in Fairfax/NZME Proposed Acquisition* (15 October 2016, CC.FS.0614.0001) at [56].

> A number of submissions appropriately emphasize the critical role of the media in democratic societies. But the internet has put media firms on the run and media have to be financially sustainable if they are to play their important Fourth Estate role.

[258] In Professor Picker's second commentary which was on the Commission's draft determination he assumed that internal plurality would be maintained. He opined that the Commission had paid too little attention to the incentives of the merged firm to produce news with different perspectives. He criticised the Commission for not considering the incentives the merged firm would have to provide different perspectives "if that is what New Zealanders want".[111]

[259] The attitude of the appellants' expert was therefore not that plurality in the media was unimportant, but that the Commission had failed adequately to appreciate that it could be maintained by the merged entity.

[260] The Commission received a substantial volume of submissions opposed to the application that raised concerns at the loss of media plurality. These included submissions from 11 former editors of newspapers (including those published by the appellants), which reflected concerns that the merger would be detrimental to the public and that it would not be healthy in a society where there are so few checks and balances in New Zealand's constitutional arrangements.

[261] The Commission interviewed a number of those former editors, including Dr Gavin Ellis who had been Editor-in-Chief of the New Zealand Herald and is now a lecturer at Auckland University, and Mr Tim Pankhurst whose previous roles included Editor at the New Zealand Press Association and of a number of newspapers.

[262] Generally these submitters held positive views about the relatively high standards of New Zealand journalism, but considered the extent of aggregation of ownership that would result would threaten existing standards. For instance Mr Pankhurst projected a rationalisation of resources within the parliamentary press

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111 Randal C Picker *Commentary on Draft Determination of New Zealand Commerce Commission re Fairfax/NZME Proposed Acquisition* (25 November 2016, CC.FS.0015.0001) at [13]. We do not accept that the production of news by the merged entity would be dictated solely by what its managers perceived New Zealanders wanted. That may not accord with the financial imperative to improve performance as much as possible. See our example at [82]–[83] above.

gallery, leading to a narrowing of voices which he considered "a significant threat to our democratic process".[112]

[263] The Commission also received a joint submission from six academics who opposed the merger.[113] Their concerns were similar in that they saw greater public benefits being derived from journalism where it was diversified in open markets. They considered that democracy functions best when there are many voices and perspectives. They saw the concentration of "voices" that would result from the merger as reducing the plurality and diversity of New Zealand news coverage.

[264] The Commission received submissions raising similar concerns from the New Zealand Political Studies Association and the Coalition for Better Broadcasting.

[265] The Commission was given a different perspective from an experienced media editor in a confidential session with X [

]. X saw a number of similar challenges facing the media in New Zealand, both with and without the merger. X was more confident than other submitters that editors for separate newspapers under joint ownership would strive to maintain their independence, and their pursuit of a range of views. X's comments suggested that any reduction in the range of views being produced by the merged firm would create opportunities for others, [ ], to replace the wider range of views currently provided by the appellants' newspapers and separate websites. To this extent, X did not undermine the importance of media plurality but suggested a range of views could still be provided, despite the merger.

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112 Interview of Tim Pankhurst, CC.FS.0820.003 at 3.

113 Dr Julienne Molineaux (Auckland University of Technology), Associate Professor Donald Matheson (University of Canterbury), Dr Merja Myllylahti (Auckland University of Technology), Dr Sean Phelan (Massey University Wellington), Dr Peter Thompson (Victoria University Wellington) and Associate Professor Geoff Lealand (University of Waikato).

[266] X did not see a substantial change occurring in the short term after the merger, but treated the future as being more uncertain two to four years away. X accepted that there would be less content produced by a merged company because the need for cost savings would involve rationalisation of the journalistic resources. X was confident that, in the short term at least, the merged firm would maintain adequate internal plurality but acknowledged that that would be uncertain in the longer term future.

[267] On all the evidence before the Commission, we consider that it is appropriate to attribute material importance to maintaining media plurality. It can claim status as a fundamental value in a modern democratic society.[114] We cannot be certain that a material loss of plurality will occur because of the factors we review that would hopefully assist in maintaining it. However the risk is clearly a meaningful one and, if it occurred, it would have major ramifications for the quality of New Zealand democracy. In our analysis on the clearance application appeal we have recognised material barriers to entry in the market for production of New Zealand news.[115] We agree with the Commission that a substantial loss of media plurality would be virtually irreplaceable.

Adequacy of internal plurality

[268] As to the diversity of opinions likely to be promoted because of editorial independence, we have acknowledged the good faith of existing editors' ethos in striving to publish a range of views and to maintain the breadth of New Zealand news that is reported.[116] In terms of editorial standards the appellants criticised the Commission for giving inadequate weight to the capacity of the Press Council to encourage maintenance of standards of editorial independence.[117]

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114 And not so modern. As Thomas Jefferson put it: "The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them." Letter from Thomas Jefferson to Edward Carrington (16 January 1787) as reproduced in Paul Leicester Ford (ed) *The Works of Thomas Jefferson Vol 5* (GP Putman's and Sons, New York, 1904) 251 at 253.

115 See [97]–[108] above.

116 Observed at [79] above.

117 This criticism includes one of the process complaints, discussed below, that the Commission did not re-interview Press Council representatives after doubts were expressed in post-conference interviews with opponents about the Council's effectiveness in influencing behaviour by the merged entity.

[269] The Commission made the point that the Press Council could intervene only after complaints are made about non-complying conduct committed by a member of the Press Council. Membership of the Press Council is voluntary, and it has no power to enforce standards prospectively. The appellants argued that position overlooks the pressure to meet standards that are acceptable to the Press Council, which constrains the editorial policies adopted by Press Council members. The appellants also argued that relegating the influence of the Press Council on these grounds failed to give appropriate weight to the confidence expressed by the chair of the Press Council in its ability to influence journalistic standards.

[270] To evidence its ongoing commitment to membership of the Press Council, NZME completed a deed poll in favour of the Press Council on 9 February 2017 which committed the merged entity to continued membership of the Press Council and to the maintenance of standards of accuracy, balance, professional conduct, integrity and independence.

[271] We do not treat the position of the Press Council as an answer to the loss of external plurality. There is no reason to doubt its efficacy in its present self-regulatory regime, and the extent to which its presence is a prospective constraint on editorial standards. However it cannot be expected to be a bulwark against change in an important area where we are satisfied that material change would occur post the merger because of the financial imperatives for such change to occur. Nor are we persuaded that NZME's deed poll adds materially to the prospect of internal plurality being maintained in the same way as the present competitive forces that are a feature of the present plurality of ownership of these dominant media organisations.

[272] Mr Goddard invited the Court to take judicial notice of the healthy state of competition that existed between the Dominion and Evening Post newspapers in Wellington, during the period in which both those newspapers were published daily and were under common ownership. The former was published as a morning paper and the latter as an evening paper, and readers' perception was certainly that healthy competition existed. However that activity was in a very different market from the present one. Printed newspapers enjoyed relatively much wider circulation than is now the case, and it was pre-internet, so no online sources of news existed.

[273] We are also mindful that if the merger does not proceed, then a material extent of retrenchment of journalistic and editorial resources is likely to occur in the counterfactual scenario. The comparison cannot be made on the difference between the status quo continuing and the extent of rationalisation we project is likely if the merger proceeds. Rather, it is an issue of how extensive the difference of degree is between retrenchment assessed as viable in an ongoing competitive situation, and the retrenchment that becomes possible when the publications are in common ownership.

[274] We are satisfied that the extent of retrenchment would be influenced to a material extent by the presence or otherwise of competition. The concern is that a greater level of retrenchment will occur when approached from the perspective of removal of duplicated resources, and when the constraint of another major player is removed.

[275] By comparison with the extent to which major media organisations in other jurisdictions identify with political parties, the level of political influence over media owners in New Zealand is relatively slight. Given that, and given the initial listed company ownership structure, we accept that the risk of a dominant ownership position of the merged entity being exploited for political purposes is somewhat remote. Of course a single ownership structure that creates even a remote risk of such serious adverse change is deserving of some weight.

[276] The larger risk is that financial imperatives will pressure a significant loss of plurality, despite the aspirations of editorial staff. We therefore treat the best intentions expressed in that regard as inadequate to materially reduce the detriment arising from the loss of external plurality. Ultimately, as Mr Every-Palmer submitted, internal plurality is a discretionary matter whereas competitive forces provide an external constraint that is materially more compelling in providing for diversity of views and quality of news reporting. Any internal plurality is therefore inadequate to meet broader plurality concerns associated with the proposed merger.

Other unquantified benefits and detriments

[277] The Commission assessed a number of other potential benefits and detriments that were projected to result if the merger ensued. In doing so the Commission

disagreed with the appellants on a number of unquantified benefits and detriments, but no separate challenge was advanced to these conclusions on the appeal. Instead the Commission's rejection of the propositions advanced for the appellants formed a part of the appellants' criticisms of the Commission's analysis of the prospect of an SLC, when dealing with the clearance application.

[278] The appellants claimed that the merger would reduce the current duplication of resources and free up journalistic resources to report on an increased number of stories. This projection relied on Professor Picker's analysis which suggested that whilst the two news organisations presently competed to provide content that appealed to the core majority of reader preferences across both publications, once they were merged the core content could be produced more efficiently so that the remaining resources would be available to add diversity.

[279] Another aspect of this was that, because the core of news reporting would be produced more efficiently, there would be proportionately less loss of intellectual property in the news content from so called "free riding". This refers to the practice of other publishers feeding off the product of quality content that the appellants produce, such as resulting from investigative journalists' work. The merged entity would more easily obtain a return on the product of such resources, leaving free riders less scope to recycle the published product of such endeavours.

[280] Consistently with the view it adopted on other parts of its reasoning, the Commission did not accept that efficiencies achieved by removing duplication of journalistic resources would be committed to the production of more diverse items in the merged entities' publications. Although the Commission accepted the possibility of a reduction in free riding, it did not see that as a material benefit.

[281] The appellants also contended that the efficiencies to be obtained from the merger would strengthen the merged entities' financial capability to prolong the life and quality of print publications. This was on the premise that an improved financial position would lessen the pressure that is presently leading to reductions in print publications. Mr Goddard put this as "lengthening the runway" (that is, the period

during which it would remain financially viable for the merged entity to continue print publications that are otherwise under more pressing threat).

[282] The Commission's analysis of this claimed unquantified benefit dealt separately with the position it projected in the digital plus limited print scenario and in the digital plus print. In the former scenario the Commission accepted there would likely be greater financial resources available. However the Commission doubted that the resources would be committed to continuing production of print publications that are no longer profitable on a standalone basis, so that the future for such publications is gloomy, regardless of the proposed merger. The Commission did accept that there might be a degree to which the retrenchment of publications or prolonging the decisions to rationalise them might arise from a lower level of financial pressure on their operators.

[283] On the other side of this evaluation the Commission accepted that there might be a greater downsizing of editorial resources in the digital plus limited print scenario if the merger does not proceed. Overall on these considerations the Commission did not accept there would be a significant benefit in the event the merger proceeded.

[284] In terms of the quality of the product produced for readers, the Commission considered the merger would reduce competition, which would lead to lower overall quality. Lack of competition would lessen the incentive for journalists and editors to produce high quality news and also lessen the incentive on the merged company to invest in journalistic and editorial resources. This approach was consistent with the Commission's rejection of the proposition that the merged businesses would face sufficient competition for advertising revenue for it to be incentivised to optimise numbers of readers and viewers so as to optimise demand for advertising space. Rather, the imperative would be to gain financial advantages by achieving efficiencies by reducing costs.

[285] The result, on the Commission's analysis, was that there would be a material but unquantifiable detriment in the reduced quality of output available to readers. This was seen by the Commission as likely to involve a significant reduction in quality.[118]

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[118] CCFD, above n 1, at [1674].

[286] We have reviewed the competing contentions on these potential unquantifiable benefits and detriments. We do not agree with the Commission on its projection that the merged entity would introduce a form of paywall for the online version of one of its publications. Whilst we accept that common ownership of the two presently competing online versions of their newspapers would remove a compelling reason that presently exists for not introducing a paywall, we are not satisfied that the prospects of introducing a form of paywall on terms where the revenue it generated exceeded the overall loss of advertising revenue are sufficiently likely for that initiative to be undertaken.

[287] We have previously explained our view that the financial imperatives following the proposed merger would lead to a reduction in the quality, including some reduction in the scope of the news produced in the appellants' print and online publications. In assessing the materiality of this reduction in quality as a detriment in the authorisation assessment, we are mindful of the parties' opposing views on the ability of the appellants to reduce quality without affecting the level of readership and thereby the level of advertising revenue. The appellants' position is that if any material reduction in quality occurs, it will be noticed by readers to an extent that it harms the advertising revenue because readers will read their publications less. The Commission's view is that in this market there are opportunities for a reduction in quality that either goes unnoticed, or, despite being material in an objective assessment of quality, does not cause a reduction in readership.

[288] We prefer the Commission's approach. In the context of the appellants' position in the media markets, their dominance is likely to make the level of readership relatively more resilient to changes because of their established reputations, and because they occupy by far the broadest position in the mainstream media. In terms of coverage, for many readers if they do not resort to either one or the other, then their range of interest is unlikely to be satisfied elsewhere.

[289] For our part we see the unquantified detriments of reduction in quality of the online news products, in the Sunday newspapers and community newspapers (where they overlap), as well as the loss of plurality, as highly material but unquantifiable detriments that would follow from the merger.

Quantified benefits and detriments

[290] We have reservations about the quantification of benefits and the availability of the sums quantified as resulting from the efficiencies that would apply to the merged business. The merged entity could not be required to apply the financial benefits derived from efficiencies available to the merged entity to improve the quality or reduce the price of the products produced. The owners of the merged entity can be expected to apply any surplus generated by efficiencies in the best interests of their shareholders. That might well include a combination of commitment of additional capital to improve the quality of their products, and a return to shareholders of part of the benefits of the merger, by way of dividends.

[291] The Commission's projections as to the extent of quantifiable benefits included the gains arising from efficiencies resulting from reduced costs.[119] The Commission recognised as a generality that wealth transfers from New Zealanders to non-New Zealanders may give rise to a detriment to New Zealand.[120] On this point the Commission cited the decision in *Godfrey Hirst 2* in the High Court.[121] Judgments on such appeals have taken context-specific views about the prospect of monopoly rents, arising both from an ability to impose increased prices or savings from delivery of reduced quality. The Courts have also appreciated that repatriation of returns on investment to foreign shareholders may not automatically constitute a detriment to the New Zealand consumer if that is the price of the investor's provision of ongoing capital support.[122]

[292] In this case the appellants provided a confidential projection of the likely percentage of the merged entity that would be New Zealand owned.[123] [

]. The Commission projected net detrimental wealth transfer to non-New Zealanders in a range between approximately $1 million and $6 million per year.[124] The Commission deducted amounts for New Zealand shareholders and for tax

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119 The projections are set out at [25] above.
120 CCFD, above n 1, at [72].
121 *Godfrey Hirst 2* (HC), above n 16, at [39].
122 *Godfrey Hirst 2* (CA), above n 72, at [42].
123 CCFD, above n 1, at [1284]–[1297].
124 At [1304] and table 12.

on dividends payable to foreign shareholders. These focus on the figures adopted by the Commission in its digital plus print scenario.

[293] We agree with the Commission's approach to wealth transfers and the sequence of its calculations, but our different conclusion on the prospect of a paywall reduces this range to an upper number of approximately half the projection as calculated by the Commission.

[294] The Commission undertook an equivalent analysis for the digital plus limited print scenario, arriving at the same range of $1 million to $6 million for detrimental wealth transfers.[125] Consistently, we would approximately halve that range to exclude the impact of wealth transfers from a paywall.

[295] If we are wrong in reaching the opposite conclusion to the Commission about the prospects of a paywall being introduced for one of the merged entity's publications, we would then acknowledge the existence of wealth transfers being generated by the presence of a paywall. While we agree with the appellants' criticism that the Commission's quantification of allocative efficiency detriments erred significantly in this respect in its modelling of the likely demand facing a site behind a paywall, that criticism does not impinge on the analysis of wealth transfers, estimated at [ ] over a five year period by the Commission, who acknowledged that that number is, "likely to be overstated".[126]

[296] The appellants challenged the Commission's approach to wealth transfers, disputing that improved financial performance post-merger could be treated as supra competitive rents. [ ], Mr Goddard submitted that the projected returns could not be reasonably viewed as a supra-competitive return on assets.[127]

[297] The competing views on this point depend on whether [

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125 At [1319] and table 14.
126 At [1317].
127 [ ].

]. That is not a difference we can resolve. The Commission stated that, [

]128 but provided no particular reasoning or rationale for taking this view. On balance we consider that the doubts surrounding this position are such that the prospect of wealth transfers as detriments is a factor that should not be given any material weight.

The overall assessment

[298] If the total quantifiable benefits of the merger were put at, say, $200 million then in broadest economic welfare terms the country would be better off if the transaction were completed so long as the value attributed to all the detriments was less than $200 million. Put another way, the appellants would submit the unquantifiable detriments have to be attributed a value greater than the total of the quantifiable detriments ($200 million) before they should be recognised as sufficient to outweigh the recognised benefits.

[299] We do not accept that the assessment of all benefits and detriments is able to be tested in this way. Material unquantifiable detriments are simply unquantifiable. In this case concerns for the preservation of media plurality as a support for a strong democracy, when measured as to its impact on the whole economy, has a significance that outweighs the significant quantifiable benefits that have been acknowledged.

[300] We certainly do not accept any characterisation that the projected extent of benefits would be a sum "available to New Zealand", in the sense that it accrues for the public good and could somehow be committed, if necessary, to provide substitute forms of media plurality by way of public broadcasting initiatives.

[301] As the concerns pursued by Godfrey Hirst in those appeals demonstrate, it can be frustrating for participants in an authorisation application to be confronted with an outcome that is determined by findings of unquantifiable benefits or detriments. As the Court of Appeal confirmed in *Godfrey Hirst 2*, a decision on such matters must

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128 [ ].

strive not to rely on a purely intuitive judgment and is to avoid undisciplined subjectivity. An outcome determined by application of unquantifiable factors (detriments and/or benefits) is a matter of qualitative judgement, informed as in this case by expert opinion.

[302] The projected extent of quantifiable benefits, after netting off of the quantifiable detriments which on our approach are reduced because of the absence of the likelihood of a paywall, produces a range of significant amounts. The Commission projected the total quantified benefits in the digital plus print scenario between $145 million and $210 million. After setting off the summary of quantified detriments in that scenario, the Commission projected over a five-year timeframe a range of high detriment/low benefits of $41 million and low detriment/high benefits of $204 million. The Commission's projections in the alternative digital plus limited print scenario produced a range of total quantified benefits between $144 million and $199 million. Offsetting quantified detriments produced net quantifiable impact over the five-year timeframe between high detriment/low benefits of $55 million and low detriment/high benefits of $196 million.

[303] The appellants accepted the range of quantified benefits projected by the Commission. However the appellants criticised the extent of quantified detriments and submitted that if they were reduced to close to zero, the net quantifiable benefits from the transaction were in a region between $140 million to $200 million. On either view the projected economic outcome of the merger is strongly positive.

[304] Requiring the owners of businesses whose conduct is otherwise lawful to forego such significant efficiency gains, and bearing in mind the indirect efficiency gain of at least a portion of such benefits to the New Zealand economy, an unquantifiable detriment of sufficient importance to outweigh that recognised benefit must be of some national significance.

[305] We are satisfied that maintaining media plurality and the quality of the media produced are fundamental values of benefit to the public and of real and national significance.

Conclusion on authorisation appeal

[306] Weighing all aspects of the opposing views put to us, our own view is that the importance of the likely loss of plurality, and the prospect of reduced quality of the products produced by the merged entity comprise detriments justifying greater weight than the quantifiable and unquantifiable benefits we have identified.

[307] We accordingly agree with the Commission that the application for authorisation should be declined. The Commission did not allocate relative levels of importance to the unquantifiable detriments to which it had regard. The parties were at odds in attempting to rank the importance attributed to loss of media plurality.[129] An issue does arise as to the weight to be given to the remaining unquantifiable detriments if we are wrong in taking the loss of plurality into account as a relevant factor in the s 67 evaluation.

[308] We accept that the weighing of all detriments against all benefits would be a lot nearer to being evenly balanced, if that were the case. We treat the loss of quality of what would be produced by the merged entity as a significant unquantifiable detriment.

[309] If reduction in quality was to be assessed without loss of media plurality as a separate detriment because detriments to the public at large had to be ignored, then loss of media plurality would become an important additional component of the reduction in quality of the products delivered to the consumers of all of the merged entities' products. Given the reach of the appellants' publications, on a confined in-markets analysis a substantial component of the wider loss of media plurality detriment also arises. Those reading the appellants' publications are likely to contribute, at least proportionately to the part they comprise of the general population, to debates on social and political issues. It is possible that they may make a disproportionately larger contribution to such debates. The quality of consumers' contributions to social and political debate is likely to be diminished as a result of the merger. It is unnecessary to be definitive, but we incline to the view that assessed in

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[129] See [232]–[234] above.

this light, the reduction of quality would still be likely to outweigh the net benefits as otherwise identified.

Process complaints

[310] The appellants' notice of appeal included criticisms that the Commission had failed to follow a fair process.[130] I overruled an objection on behalf of the Commission to the inclusion of these process complaints within the appeal, rejecting the Commission's arguments that they were in the nature of judicial review and ought to have been separately pursued as such.

[311] The Commission sought particulars of the allegations which were provided by way of a letter dated 3 July 2017. The scope of the criticisms at their widest caused deponents for the Commission to respond in four affidavits. [131] The matters responded to included an allegation of predetermination or apparent bias on the part of a member of the Commission. When the appellants filed their separate submissions on the process complaints on 25 September 2017 the range of complaints were reduced to two respects in which the Commission had allegedly failed to abide by the principles of natural justice and procedural fairness.

[312] The two remaining complaints were, first, that the Commission had solicited and conducted interviews selectively with third parties who were known to oppose the merger after the conference on 6 and 7 December 2016, with transcripts of those interviews only being disclosed belatedly, and then on a counsel only basis. Second, the appellants criticised the lack of balance and inadequate process involved in the Commission's request for a report from BDO Wellington Ltd (BDO) in April 2017, to respond to matters raised in reports prepared for the appellants by PwC.

Conduct of post-conference interviews

[313] After the Commission's conference on 6 and 7 December 2016, it initiated contact with a number of third parties who the appellants reasonably saw as being

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130 Notice of Appeal, 26 May 2017, at [19(a)]–[19(c)].

131 The affidavits were from the Chair of the Commission, Dr Berry, [ ] and two from Ms Katie Rusbatch, Competition Manager for the Commission.

opposed to their merger. Between 19 December 2016 and 10 February 2017 the Commission conducted interviews with eight individuals (one of those on two occasions) and with a pair of experienced participants in New Zealand media businesses.

[314] The appellants criticise the Commission's conduct in seeking further information and comments from those known to oppose the merger whereas no follow up occurred with submitters who had supported the merger. The appellants complained that this process gave third parties who were opposed to their merger an inappropriate level of influence over the Commission's analysis. This disadvantage was exacerbated by the content of such interviews being provided on a counsel only basis to the appellants' counsel, rather than to the appellants, where wider disclosure was arguably necessary to enable them to test the content. Matters conveyed by the interviewees included numerous opinions later referred to in the Commission's determination and on which the appellants had competing views.

[315] As to the standard reasonably expected of the Commission, Mr Butler, for the appellants relied on the High Court decision in *New Zealand Co-operative Dairy Co Ltd*.[132] That case addressed process complaints in equivalent circumstances where dialogue had occurred between the Commission and interested parties after the conduct of a conference held on an application for clearance or authorisation. The stance adopted was explained in the following terms:[133]

> We recognise that the procedure which the commission normally follows, ie the circulation of a draft determination inviting responses, and the holding of a conference of the interested parties at which evidence and submissions in response to the draft are received, goes a long way towards meeting the requirements of fairness. But the commission must always be alert to ensure that the fairness encouraged by that procedure is not undermined by what occurs thereafter. In other words the procedure to that point does not necessarily exhaust the requirement of fairness. It may be necessary to go further by ensuring that any matter of substance which may then emerge and which is likely to be material to the final determination is made known to the applicant or principal participant with an opportunity for reply. In the end it is a matter of degree, weighing the practicalities of the sometimes tight time restraints under which the commission must operate against the importance of the material involved. While basic fairness must be preserved the desire to conform to the niceties may have to be tempered by the need for an urgent

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132 *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC).
133 At 638–639.

> commercial solution, bearing in mind at the same time, that the issues to be resolved, at least in a merger situation, are not so much the resolution of legal rights between adversaries as the less precise task of weighing private commercial interests against those of the public, of which the commission is in a sense the guardian.
>
> Ultimately the commission must stand back and ask itself whether the use it is intending to make of a particular idea or item of evidence is fair, without first inviting a response from those whom it might affect. We apprehend a useful test might be for a tribunal such as this to ask itself if it is satisfied that its decision on the point would have been the same without adopting that idea or item of evidence. If the new material is merely a make-weight to reinforce an otherwise supportable conclusion, the exigencies of the commission's procedures and the need for a prompt result may justify no further reference. But if the new material is the only means by which a particular conclusion could be reached then to do so without reference is likely to result in unfairness or, which is equally undesirable, in a reasonable apprehension of unfairness.

[316] The Commission accepts this description of the extent of its obligations, emphasising that the requirements of natural justice in any given case are inherently fact and situation specific. Mr Farmer cited the approach in *Contact Energy Ltd v Electricity Commission* where a change of stance partway through a consultation process would require further consultation if the change was a fundamental one, but no further consultation obligation arose if the new material does not alter the proposals in a material way.[134]

[317] The Supreme Court has considered the scope of consultation obligations under the Biosecurity Act 1993 in *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* where promulgation of provisional import health standards are being considered.[135] The Director-General was challenged for not undertaking a second round of consultation. The Supreme Court drew a distinction between work of a "tidy up" nature that is unlikely to trigger a further obligation to consult, and work that raises a substantial change, where further consultation may be required.[136]

[318] In this case some of those interviewed after the conference had either not had an adequate opportunity to convey views to the Commission in the time allowed, or

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134 *Contact Energy Ltd v Electricity Commission* HC Wellington CIV-2005-485-624, 29 August 2005 at [30]–[36].

135 *New Zealand Pork Industry Board v Director-General and Minister for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477.

136 At [168], [172]–[173].

in a small number of cases had been unable to attend or remain at the conference. The Commission denied that any of the content of the post conference interviews was sufficiently significant, or new in a sense that an obligation was triggered to invite a response from the appellants about it.

[319] The Commission disputed that it had any obligation to be even handed in choosing those it conferred with after the conference. It submitted that in conducting its inquisitorial process it could not be constrained in the range of persons from whom it sought information and views. It was submitted for the Commission that it had heard extensively from the appellants and supporters of the merger before and at the conference. It perceived there were gaps in the depth of understanding it had on topics that it considered to be relevant.

[320] The standards of procedural fairness reasonably required can vary with, for example, the complexity of an inquiry and the extent to which the decision maker is constrained by time frames. In the case of another Commission inquiry in *Wellington International Airport*, this Court observed:[137]

> In evaluating the submissions and information received from interested persons, the Commission must be able to clarify matters for itself, including by obtaining expert advice. If it is required to test on interested persons any change in its view or refining of its position, the Commission's inquiry will indeed never end.

[321] Mr Farmer characterised the content of the post conference interviews as providing more extensive detail on themes that the Commission was previously aware of.

[322] It is difficult to measure the state of information available to the Commission at the point at which it had produced its draft determination and conducted the two day conference on the issues, and then to contrast that with the enhanced state of knowledge acquired by the time the post conference interviews had been completed.

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[137] *Wellington International Airport Ltd v Commerce Commission* (2002) 10 TCLR 460 (HC) at [70(a)].

[323] The appellants were aware that the Commission was conducting the further interviews. Transcripts of four of the interviews were provided to counsel for the appellants on 15 February 2017 and further transcripts were provided on 1 March 2017. On 31 March 2017 the appellants presented a further submission on the transcripts of interviews that had been held since the conference. Because of confidentiality constraints, the appellants' counsel were unable to refer the content of those transcripts to the appellants so that their submission in response was completed without counsel being able to take specific instructions on those responses. However the issues had by then been relatively well canvassed, and the topics covered were likely to have been the subject of substantial dialogue between the appellants and their counsel at earlier stages of the Commission's inquiry.

[324] The transcripts do suggest that the interviewees provided firm and well-reasoned views for the concerns they raised about the consequences of the proposed merger. They appear to have been presented persuasively, with the interviewees speaking from positions of authority on the topics that they addressed. They could provide added justification for the views of the Commission subsequently expressed in the determination, in particular about loss of media plurality.

[325] However the views expressed and the conclusions they led to were not new at that stage of the inquiry. There is no evidence that the post-conference interviews caused the Commission to change its views on topics covered by the interviewees.

[326] The Commission cannot dismiss the post-conference interviews as insignificant. Nonetheless we are not persuaded that they contained matters of significance that signalled a change in the direction the Commission might take and which would require the Commission to open that fresh topic for a further round of consultation with the appellants.

[327] Given the inevitable pressure on the Commission to complete its determination, the position at the end of those interviews was that if it treated them as requiring a further round of consultation with the appellants then they would be risking, as foreshadowed in *Wellington International Airport*, circumstances where their inquiry "will indeed never end".

[328] A discrete complaint about this aspect of the Commission's process is that the constraint preventing counsel from giving appellants' representatives access to the transcripts was procedurally unfair because it hampered the preparation of an effective response. The Commission's submissions indicated that it first learnt that this was a complaint on behalf of the appellants when they saw the appellants' submissions on the process complaints. Further, the arrangement for disclosure of the transcripts on a basis that was restricted to counsel was one offered by the appellants' counsel. Certainly there is no suggestion that a complaint was made at the time about counsel's inability to share the content with the appellants, or of any proposals for partial or particular disclosure to named representatives of the appellants where counsel were hampered in preparing a response.

[329] The submission commenting on the transcripts and file notes of interviews of third parties that had been received since 5 December 2016 was lodged on a confidential counsel-only basis.[138] The overall tone of that submission is very positive, drawing on various comments recorded in the interviews that were characterised as supporting the application. The submission does not advert to any concern about an inadequacy in the time for it to be prepared, or the inability to take instructions from the appellants on any particular points.

[330] The only content that might be taken as implying criticism of the Commission's process is that one interviewee had been given "a final – and non-transparent – right of reply".[139] That criticism related to information conveyed on a topic that was disputed by the appellants, but which has not featured on the appeal. In other respects the submission dealt head-on with opinions recorded in the transcripts that opposed the appellants' case. For example, the submission challenged the credibility of an identified interviewee to proffer adverse opinions, and in other respects an interviewee's observations were criticised for containing "emotive hearsay".[140]

[331] There is no comment in the submission that the post-conference interviews had raised fresh matters that were material, and on which the appellants had an inadequate

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138 Submission on NZCC transcripts/file notes of interviews with third parties received since 5 December 2016 (31 March 2017, CC.FS.0920.0001).

139 At [33].

140 At [28] and [38].

opportunity to respond. The appellants' written submissions on the process aspect of their appeal included some four pages of matters that had been covered by interviewees in the post-conference interviews, which the appellants argued were relevant to the Commission's final determination. For instance, the appellants cited the Commission's observation in its final determination that it was "persuaded by the views of existing competitors as to their position in the market relative to the Applicants".[141] To the extent that that conclusion relies on post-conference interviews, their content is generally confirmatory of the range of views previously conveyed to the Commission. Furthermore the appellants' submission in response engaged on their contrary view of the position of existing competitors.

[332] We are satisfied that the appellants were afforded sufficient opportunity to adequately respond to the matters raised in the post-conference interviews.

[333] A specific criticism about the one-sided choices the Commission made in identifying those that it would interview post-conference is its failure to re-interview representatives of the Press Council. The appellants' case was that the self-regulatory standards enforced by the Press Council would be effective in maintaining plurality. Some of the post-conference interviewees doubted the effectiveness of the Press Council to achieve this, and the appellants argued that a balanced process required the Commission to seek a rejoinder from the Press Council before accepting the opinions of those who doubted its ability to prevent a material loss of plurality.

[334] The Commission found that the Press Council (and internal codes of conduct) may ensure a level of fairness, balance and integrity, but that it could not influence editorial decision-making of the merging parties. The Commission referred to doubts expressed by the expert it had retained, Mr Foster, about the efficacy of internal plurality.

[335] In rejecting the appellants' specific criticism, the Commission submitted that its view on the role of the Press Council had been signalled in the draft determination, which did not result in any further comment from the Press Council, although it did submit a comment on a third party submission. The Commission also submitted that

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141 CCFD, above n 1, at [653].

the appellants had not identified any material new information that might have been conveyed by the Press Council in a subsequent interview, had the Commission elected to do so.

[336] We consider those points are valid. We are not persuaded that the different views about the role of the Press Council received in post-conference interviews obliged the Commission to put such views to Press Council representatives before settling on a view as to the role it might play in maintenance of media plurality post-merger. Overall, we are not persuaded that the Commission's post conference process was deficient.

Terms and timing of instructions to BDO

[337] The appellants advanced a number of criticisms of the process adopted by the Commission in instructing BDO, and receiving a report from it.

[338] By mid-March 2017 the appellants had submitted three reports from PwC to the Commission in support of their applications. These comprised separate counterfactual forecasts for each of Fairfax and NZME provided on 25 November 2016, and a report on projected merger synergies provided on 17 March 2017. In addition to those reports, the appellants also provided, on 22 March 2017, an expert response from NERA to the Commission's then thinking on the nature of the counterfactual that had been conveyed in a letter from the Commission to the appellants on 6 March 2017.

[339] At that point the Commission elected to engage BDO as independent accounting experts to comment on PwC's merger synergies report and also on the earlier counterfactual reports. The Commission engaged BDO on 4 April 2017 on terms that the appellants complain were slanted in respects suggesting that the Commission was looking for views opposed to those of PwC.

[340] BDO provided its report to the Commission on 19 April 2017. That same day the Commission provided it to counsel for the appellants.

[341] After an inquiry from counsel for the appellants the Commission advised them on 21 April 2017 that it would consider any response to the BDO report provided it was received by 27 April 2017. The Commission also indicated that if that time frame was inadequate for a response to be prepared, the Commission would contemplate an extension of time. An extension for some few days was possible without disrupting the Commission's timing for the issue of its determination, but the Commission indicated that if any extension for a longer period was required then that would involve deferral of the Commission's decision until late June 2017. Counsel for the appellants confirmed that they did not want an extension.

[342] Some days before the 27 April 2017 deadline the appellants provided the Commission with critiques of the BDO report, one prepared by the appellants, and the other by PwC. The two complaints about the Commission's process in relation to the BDO report that have subsequently been raised in the appeal were not raised at that time.

(i) Terms of instructions

[343] The terms of the Commission's instructions to BDO were repeated in the firm's 19 April 2017 report, and were accordingly conveyed to the appellants' counsel when the report was copied to them. The specific questions posed by the Commission were in two parts, dealing first with the PwC counterfactual reports for NZME and Fairfax, and second with PwC's Impact of Synergies letter. The instruction in relation to the first set of reports included the following:[142]

> 1. What are the shortcomings in the scenarios suggested in the PwC counterfactual reports?
>
> 2. If the Commerce Commission can't take PwC at face value, why not? What are the gaps in the analysis? What else would the Commerce Commission want to know?
>
> …
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> 4. Please highlight any other issues that you have identified with the counterfactual reports, e.g. potential inconsistencies with other documentation, etc.

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[142] BDO *NZME/Fairfax Merger: Review of PwC Counterfactual and Synergies Submissions for NZME Limited and Fairfax NZ Limited* (19 April 2017, CC.FS.0930.0001) at 3–4.

[344] The instruction on PwC's letter about the Impact of Synergies included the following:

> 1. The Commerce Commission are interested in whether the merger would necessarily prolong the lifespan of struggling … print publications … that are not profitable on a standalone basis. Specifically, can the Commerce Commission be satisfied that it is likely that they would use the cost savings from the merger to subsidise unprofitable parts of the business?
>
> 2. If not, why not?
>
> 3. [The] Commerce Commission are also interested in whether the merged entity would necessarily use merger-related cost savings to reinvest in the merged entity. Specifically, is there a real chance that such reinvestment would not occur, e.g. if merger savings were used to fund dividends to shareholders?
>
> 4. In light of these queries, please provide any other relevant comments you have regarding this letter, or specific paragraphs therein.

[345] The appellants criticised the closed form of the questions and terms of the instructions to BDO which they characterised as inviting criticisms of PwC and therefore not inviting a properly independent assessment. The deficiency in the terms of instruction was arguably compounded by the limited information provided by the Commission to BDO, and the relatively tight timeframe they were given to complete their report. Arguably the terms of the instructions suggested that the Commission wanted answers that found fault with PwC's analyses which would pressure BDO to undertake its task in a way that produced the result the client wanted. Mr Butler submitted that the closed form of some of the questions risked BDO approaching their task with a less than fully open mind.

[346] In the first of two affidavits sworn in response to the process criticisms, Katie Rusbatch, the Competition Manager for the Commission, provided an explanation for the terms in which the instructions to BDO were cast. Those terms were settled by Commission staff and not the division members. The context as explained by Ms Rusbatch was that the Commission had conducted a substantial analysis of submissions and expert reports. Preliminary views had been formed. The Commission did not necessarily disagree with the methodology that PwC had adopted in its counterfactual reports but was concerned about the validity of the underlying key assumptions behind PwC's findings. The focus was accordingly on whether an

independent accountant confirmed the reasonableness of PwC's underlying assumptions. Ms Rusbatch denied that the instructions were cast in terms seeking a report to support a particular view.

[347] If the Commission's letter of instruction to BDO had been prepared by solicitors for a defendant in commercial litigation, inviting a critique of an expert report that was to be relied on by the plaintiff, then the lack of an open invitation to form views about the content of the work being critiqued would be relevant to challenging the objectivity and therefore the weight that might be given to the report provided in response. Instructions in those terms would certainly afford grounds for arguing that little or less weight should be given to a report produced in response to such instructions, compared with the weight that could be given to opinions that were sought in entirely open terms.

[348] However that was not the context in which the Commission sought an opinion from BDO in the latter stages of this inquiry. The Commission already had its own provisional views. It does not appear to have been intent on rejecting any particular component of the assumptions that PWC had worked on, where reliance on them was likely to influence the Commission's ultimate analysis. In those circumstances there is not the same basis for criticising instructions in terms that focused BDO on the areas of concern to the Commission.

[349] It was reasonable for the Commission staff to adopt the view that if the instructions were cast in entirely open terms, it would have been more difficult for it to focus BDO on the matters on which it wanted their opinion. Time was relatively short. As independent accountants, if BDO agreed with the scenarios that PwC had suggested in their counterfactual reports, then it was open to them to respond that they did not identify material shortcomings. We are not satisfied that inadequacies in the terms of instructions provided to BDO ought to have required the Commission to reject BDO's report provided in response to those instructions.

[350] Ultimately the determination cited the BDO report on only one point. This was to reject one aspect of PwC's analysis as to [

].[143] In adopting a likely outcome inconsistent with that in PwC's November 2016 analysis, but which was supported by BDO, the determination also noted that PWC's last contribution of 23 April 2017 acknowledged the prospect of that different scenario, consistently with that put to the Commission by BDO.[144]

[351] The Commission retained BDO because it wanted to test a number of the assumptions that PwC had relied on in that firm's proposals as to the nature of the counterfactual. To the extent, if any, that the Commission adopted a different counterfactual from that PwC contended for (and without assessing what influence on that different definition of counterfactual that BDO's report had) the Commission's counterfactual has not been challenged on appeal.

[352] The practical upshot is that there is no material prejudice to the quality of the consideration given to all the submissions presented by the appellants that can be attributed to any deficiency in the terms in which BDO was instructed.

[353] The appellants advanced a related criticism of the Commission's instructions to BDO, in that the Commission was selective in the information provided, and did not provide BDO with sufficient background and information to enable it to competently carry out the instructions the Commission gave it. BDO's report noted a limitation on its work by virtue of the limited extent of information and also acknowledged the absence of opportunity to talk with PwC or the appellants' counsel.

[354] This was not advanced as a criticism of BDO. Rather, that the Commission erred in considering that it could obtain a report that was based on adequately informed consideration, when it was as selective as it was in provision of information to BDO. The appellants did not advance any respects in which they contended that the views expressed by BDO were wrong because BDO were unaware of other material information.

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143 [ ].
144 At [170].

[355] Again, the materiality of such criticism depends on the extent of reliance ultimately placed by the Commission on BDO's report. We are not persuaded that that level of reliance was such as to treat any inadequacy in the information provided to BDO as constituting material error in the Commission's process. Similar considerations to those noted in [349] above apply to the choices confronting Commission staff when they decided to instruct BDO at the stage of the inquisitorial process when that occurred.

(ii) Limited time to respond

[356] The second criticism of the Commission's handling of the BDO report was that it was provided to the appellants only seven working days prior to the publication of the determination. Arguably that was insufficient time for the appellants to provide a thorough response, and also too near the Commission's decision on its final determination ("in a real politik sense") for any response the appellants provided to be adequately taken into account.

[357] The Commission's response to these criticisms is that the sequence of events demonstrated that the appellants' advisers were sufficiently resourced to provide a response some three days before the deadline, that no complaint was made at the time indicating the time allowed was too short and indeed that the appellants rejected an invitation to seek either a short or longer extension of time. Further the adequacy of the rejoinder on behalf of the appellants tends to be confirmed by the absence of any new grounds for criticising the BDO report, beyond those raised in April 2017, as being material on the appeal.

[358] We agree that the Commission's points are a sufficient answer to the complaint of inadequate time for the appellants to provide a response.

[359] The appellants' related concern was that the timing of receipt of their reply to the BDO report left too little time between receipt of that response and completing its determination for the Commission to give meaningful consideration to the appellants' criticisms of the BDO report. The Commission's first response to this was to dispute any obligation to provide the BDO report to the appellants at all. That is not

persuasive. We consider it was appropriate for the Commission to provide the BDO report, and invite the appellants to comment on it, as it did.

[360] Having afforded that opportunity and received comments on the BDO report, the Commission was obliged to consider the appellants' response. The Commission submitted that the BDO report was in the nature of clarification about a matter on which the appellants had made submissions. The Commission is right to characterise the BDO report as part of its deliberative process and there is no evidence to suggest that the Commission had closed its mind to any new or compelling contrary arguments raised in the appellants' response to the BDO report.

[361] We accept the reasonableness of this response for the Commission. It is a question of fact as to how important the BDO report was in a relative sense to the Commission's determination, and how different the outcome would have been if the Commission was then persuaded to reject any part of the BDO report it was otherwise intending to rely on, because of the final submissions on behalf of the appellants. They did not draw our attention to any content of that final response which was different from matters previously put to the Commission and which was not acknowledged by the Commission but arguably ought to have been. We accordingly reject this aspect of the appellants' process criticism.

Nature of any relief

[362] We therefore do not find any material errors of process committed by the Commission on the criticisms advanced for the appellants. Had we done so, we would have real reservations about relying on such findings to grant any measure of the type of relief requested by Mr Butler in his oral submissions. The appellants' proposition was that if any of their criticisms were upheld, then the appropriate relief was for the Court to disregard the content of the BDO report (or, depending on the criticisms upheld, the post-conference interviews) and ensure that no weight was placed on those matters. Mr Butler described this as a nuanced evaluation that could be left with the Court as an open invitation.

[363] Our analysis of the extent of the appellants' opportunity to respond to the post-conference interviews negates any prospect of excluding them from the evidence in

the appeal. The content of the BDO report does not figure materially in any aspect of our analysis of the merits of the appeal. Even if that had been the case, we would be disinclined to alter the substantive outcome by ignoring evidence that was before the Commission merely because of some inadequacy in the process by which that evidence was obtained by the Commission, or the opportunity the appellants were given to comment on it.

[364] We accordingly dismiss the process complaints, and reject the invitation that they should influence the evidence available on the appeal.

Costs

[365] The Commission is entitled to costs. Counsel for the Commission requested that, if the Court dismissed the process complaints, they be afforded an opportunity to make submissions in support of increased costs on this aspect of the appeal. Counsel for the appellants responded that, if their process complaints were entirely unsuccessful, the manner in which that part of the appeal had been pursued would not justify an increased award of costs in the Commission's favour.

[366] My provisional view on costs for the whole appeal is that it warrants an award of costs on a 3C basis, with certification for second counsel throughout.

[367] I accept that the Commission was required to respond at short notice to a range of process criticisms that were then not pursued. This included preparation of affidavits, and some of the criticisms raised relatively serious matters. The responses would have taken significant resources of a time when their focus would otherwise have been on preparation of the Commission's case on the substantive appeal.

[368] Had timing issues not been relevant, the appellants could well have been required to plead these process criticisms in a separate judicial review. The scale of work on allegations not proceeded with, and the discrete nature of the process criticisms that might equally have been advanced in a separate proceeding (and therefore result in a separate costs award on unsuccessful completion) do warrant an uplift. However, my provisional view is that there is no justification for its quantum to be increased to reflect criticism of the manner in which process criticisms were

advanced for the appellants. My provisional view is that a separate award for the Commission's successful opposition to the process complaints of approximately $4,000 is likely to be warranted.

[369] I leave the parties to reflect, and hopefully confer, on an appropriate outcome on costs. If not agreed, the Commission may file a memorandum, not exceeding 10 pages, within 42 working days of delivery of this judgment. If such a memorandum is filed, the appellants are to respond, with the same limit as to length, within 10 working days of service of the Commission's memorandum.

Summary

[370] We have dismissed the appeal against the Commission's clearance decision. We have not found a likelihood of an SLC in the advertising market for Sunday newspapers, and dismiss the prospect of one of the appellants introducing a paywall for their online publication, post a merger. In other respects we come to the same conclusions as the Commission on the prospects of an SLC in the reader market for online national news, reader market for Sunday newspapers, and both advertising and reader markets for community newspapers in the 10 areas in the North Island where the appellants' existing community newspapers compete.

[371] We have also dismissed the appeal against the Commission's refusal to grant an authorisation for the proposed merger. We have upheld the jurisdiction of the Commission to consider detriments beyond economic or financial detriments applying in the market in which the Commission had found the likelihood of an SLC, and in particular for the Commission to take into account the material detriment arising from loss of media plurality. The Commission was also entitled to place significant weight on the prospect of reduced quality of the products produced by the merged entity.

[372] In the evaluation of public benefits and detriments, we have found that sufficient benefit to the public to warrant an authorisation cannot be made out.

[373] The appellants' complaints of inadequate or improper process on the part of the Commission in the course of its work on its determination do not constitute criticisms that require us to assess the merits of the substantive appeal any differently.

It was legitimate for the Commission to select those with whom it conducted post-conference interviews, and whilst the terms of the Commission's instructions to BDO as an external accounting expert might have been dealt with more felicitously, that aspect of the Commission's process does not lead to a justiciable error.

[374] The Commission is entitled to costs.

Dobson J

Solicitors:
Russell McVeagh, Auckland for Appellants
Meredith Connell, Wellington for Respondent