

## Media merger not the Stuff of a marriage made in heaven

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Last week, the Court of Appeal delivered what may be the final blow to the plans of NZME and Stuff (formerly Fairfax New Zealand) to merge, upholding the Commerce Commission's decision to decline authorisation of the merger under the Commerce Act 1986.

NZME and the owner of Stuff, Fairfax Media, announced their plans for the media merger over two years ago, in May 2016. The parties applied to the Commission for authorisation (or clearance) of the merger. After an extremely thorough investigation, lasting almost a full year, the Commission declined to clear or authorise the merger, describing its decision as "not finely balanced". The parties' appeal to the High Court was rejected in December 2017. That makes the Court of Appeal the third expert body to have rejected the merger, and it is difficult to see how the Court of Appeal's decision does not herald the end of the road for the plans.

### The Commission's decision

The Commission was not satisfied that the merger would produce a benefit to the public that would outweigh the detriment to competition, and declined to grant authorisation. In its assessment, the Commission took into account the disbenefit that would arise from a reduction in media plurality following the merger.

Media plurality refers to diversity within and across news media organisations. It ensures diversity of information, opinions, and perspectives, and that no one media owner or voice enjoys too much influence over public opinion and the political agenda. The merger would result in a single organisation controlling almost 90% of all print media, New Zealand's two largest news websites, and one of New Zealand's two largest commercial radio companies.

### Arguments in the Court of Appeal – what can the Commission take into account?

The Commission's consideration of the effect of a merger of NZME and Stuff on media plurality was the focal point of the parties' challenge to the Commission's decision (and the High Court decision upholding it) in the Court of Appeal.

The parties' appeal challenged the established assumption that the Commission can take into account any effect a merger might have on the public. They argued that the only benefits or detriments that can be taken into account are those that relate to the 'economic' welfare of consumers.

### The Court of Appeal's decision

The Court of Appeal rejected that argument, finding that the Commission was entitled to take into account the detriment that the merger would produce in the form of reduced media plurality. The Court of Appeal also found that, even if media plurality concerns were not taken into account, the merger would be likely to reduce the quality of news content in other ways, to such an extent that the merger should not be allowed.

### What the decision means

The major effect of the Court of Appeal's decision is to reaffirm the long understood principle that, when considering benefit to the public in an authorisation context, the Commission is not limited to only taking into account benefits and detriments that affect the 'economic' welfare of consumers, or their participation in markets affected by a merger or other arrangement. Rather, the Commission is entitled to take into account both 'non-economic' and 'out of market' considerations.

At Buddle Findlay, we are relieved that the Court of Appeal has confirmed our understanding of the position. As the Court of Appeal pointed out, the Commission has previously considered the non-economic interests of consumers in numerous authorisation decisions (including authorisation applications on which we have advised), and those decisions have not been challenged in court. If it were the case that the only benefits to the public that could be taken into account are those that relate to consumers' 'economic' welfare, it would be extremely difficult to define what considerations relate to economic welfare, as opposed to something else.

This difficulty is illustrated by the Court of Appeal's discussion of the two concepts of media plurality and quality. As outlined

above, plurality relates to the diversity of views within and across news media organisations. The quality of news media (which, even on the parties' formulation of 'benefit to the public', would be relevant to the 'economic' welfare of consumers) is also affected by the range and diversity of views on offer, as well as other factors such as the breadth, depth, and timeliness of investigation and analysis, presentation, and investment in journalists and their skills.

The Court of Appeal's judgment included a number of statements about plurality and quality being separate considerations. However, when the Court of Appeal came to analyse the effect of the merger on plurality, it simply carried over its analysis about quality, stating that "our findings on quality apply to plurality". This highlights that the boundary between 'economic' and 'non-economic' considerations is unclear. Economics deals with the concept of utility, which is anything that people place a value on, and does not distinguish the reasons why something might be valued.

## Where to from here?

NZME has stated that it will review the Court of Appeal's judgment, and consider its options. However, despite public statements by NZME and Stuff seemingly keeping open the option of a further appeal to the Supreme Court, it will be interesting to see how much appetite they have to continue pursuing their planned merger.

In particular, the media merger has now been emphatically rejected three times. Even if the parties could persuade the Supreme Court that media plurality is not something the Commission is able to take into account, they would still need to challenge the Court of Appeal's finding that the likely impact of the merger on quality alone, irrespective of plurality, would outweigh any other benefits that it might produce.

Significantly, the parties are no longer bound by their original merger implementation agreement. They have publicly stated that, in light of changes to their businesses and in the media landscape since May 2016, they would need to renegotiate the commercial terms of the deal if their appeal was successful.

Those changes include changes in business strategy and direction. For example, since the Court of Appeal's decision was announced, Stuff has emailed its staff to reassure them that, although the merger has not so far been able to proceed, Stuff has been developing and implementing new business strategies that are unrelated to the merger. Stuff's owner, Fairfax Media, is also planning to merge with Australian television company Nine Entertainment, and rumours are rife that Nine would be eager to sell Stuff to another owner. If that merger proceeds, it is unclear whether Nine would be willing to take on the uncertainty and delay that would be associated with a further appeal to the Supreme Court.

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