

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2017-485-

UNDER section 91 of the Commerce Act 1986

IN THE MATTER of a determination of the Commerce Commission in
NZME Limited and Fairfax New Zealand Limited
[2017] NZCC 8.

BETWEEN **NZME LIMITED**, a duly incorporated company,
carrying on business as a media and entertainment
services provider, having its registered office at
2 Graham Street, Auckland Central, Auckland 1010,
New Zealand

First Appellant

AND OTHERS

AND **COMMERCE COMMISSION**, an independent Crown
entity established under section 8 of the Commerce
Act 1986 and having its head office at 44 The Terrace,
Wellington 6011, New Zealand.

Respondent

NOTICE OF APPEAL
26 MAY 2017

Russell
McLeagh

D J Goddard QC
Thorndon Chambers
Maritime Tower
10 Customhouse Quay
Wellington 6140
P +64 4 499 6040
F +64 4 499 6118

S C Keene / A S Butler
P +64 9 367 8000
F +64 9 367 8163
PO Box 8
DX CX10085
Auckland

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FULL LIST OF PARTIES:

BETWEEN

NZME LIMITED, a duly incorporated company, carrying on business as a media and entertainment services provider, having its registered office at 2 Graham Street, Auckland Central, Auckland 1010, New Zealand

First Appellant

AND

FAIRFAX MEDIA LIMITED, an Australian Public Company, carrying on business as a media and entertainment services provider, having its registered office at Level 5, 1 Darling Island Road, Pyrmont, New South Wales 2009, Australia

Second Appellant

AND

FAIRFAX NEW ZEALAND LIMITED, a duly incorporated company, carrying on business as a media and entertainment services provider, having its registered office at Level 7, Spark Central, 42-52 Willis Street, Wellington 6011, New Zealand

Third Appellant

AND

COMMERCE COMMISSION, an independent Crown entity established under section 8 of the Commerce Act 1986 and having its head office at 44 The Terrace, Wellington 6011, New Zealand.

Respondent

NOTICE OF APPEAL

The First Appellant, NZME Limited ("**NZME**"), the Second Appellant, Fairfax Media Limited ("**Fairfax Media**"), and the Third Appellant, Fairfax New Zealand Limited ("**Fairfax NZ**") (together, the "**Appellants**"), give notice that each is appealing to the High Court against the determination of the Respondent, the Commerce Commission ("**NZCC**"), being determination [2017] NZCC 8, dated 2 May 2017 ("**Determination**"), in which the NZCC declined to grant clearance or authorisation pursuant to section 67(3)(a) or (c) of the Commerce Act 1986 for NZME to acquire the assets or shares of Fairfax NZ and for Fairfax Media to acquire up to 50% of the shares in NZME (the "**Transaction**").

The Appellants contend that the Determination is wrong in fact and law and was reached in breach of natural justice and procedural fairness. The specific grounds of appeal are:

ERRORS OF FACT AND LAW

1. The NZCC correctly found in the Determination that:
 - (a) In New Zealand, print newspaper readership and revenues are declining,¹ and online advertising revenues and readership are growing,² but for print publishers online advertising revenues are not growing at a sufficient rate to replace the lost revenues arising from the declines in print newspaper revenues;³
 - (b) Online platforms through which consumers can access news and information, including the news and information produced by NZME and Fairfax NZ (together, the "**NZ Appellants**"), include:⁴
 - (i) news websites,
 - (ii) social media platforms, such as Facebook, Twitter and YouTube, and search engines such as Google and Yahoo (together, the "**Platform Publishers**"), and
 - (iii) news apps on smartphones and tablets;
 - (c) Consumers of online news actively perceive and judge quality;⁵
 - (d) The NZ Appellants, Television New Zealand Limited ("**TVNZ**"), and MediaWorks Holdings Limited ("**MediaWorks**") produce their news and information content for their online channel first ("**digital first**" strategy), and have an increasing focus on presenting news online with video and audio content in addition to text content;⁶
 - (e) No substantial lessening of competition would arise as a consequence of the Transaction in any markets for:

¹ Determination at [28].

² At [30].

³ At [X11].

⁴ At [33].

⁵ At [1670].

⁶ At [35] and [600].

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- (i) online advertising;⁷
- (ii) any metropolitan daily newspapers (including *The New Zealand Herald*, *The Dominion Post* and *The Press*);⁸
- (iii) syndication of news;⁹
- (iv) national print newspaper advertising;¹⁰ or
- (v) any community newspapers in New Zealand, other than in ten overlap areas identified by the NZCC in the Determination (where it incorrectly found a substantial lessening of competition would arise) ("**ten overlap areas**").¹¹

Market definition

2. The NZCC erred in concluding that there were separate relevant markets for:
 - (a) online NZ news services provided to consumers by traditional media, being the NZ Appellants, TVNZ, MediaWorks and Radio New Zealand Limited ("**RNZ**"), (together "**Traditional Media**") ("**Online NZ News Market**");¹²
 - (b) the Sunday newspaper product,¹³ and Sunday newspaper advertising services,¹⁴ provided in the North Island (together "**Sunday Newspaper Markets**"); and
 - (c) the community newspaper products,¹⁵ and community newspaper advertising services,¹⁶ provided in the ten overlap areas (together "**Ten Overlap Community Markets**");

(together, the "**Affected Markets**").
3. In the alternative, the NZCC erred in finding it was not necessary for it to define with precision the relevant product, functional or geographic scope of the Affected Markets.
4. The NZCC erred in identifying a market for online NZ news services provided to consumers, in particular in the following respects:

⁷ At [325].

⁸ At [618].

⁹ At [1027].

¹⁰ At [397].

¹¹ At [518].

¹² At [551], [653]

¹³ At [537.2].

¹⁴ At [326.1].

¹⁵ At [537.3].

¹⁶ At [326.3].

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- (a) the NZCC accepted that online news is provided to readers, for free, in a two-sided platform market,¹⁷ but failed to take into account, or failed to give sufficient weight to, the platform economics of two-sided markets when defining the nature and scope of competition on both sides of the two-sided platform;¹⁸
- (b) the NZCC failed to take into account, or give sufficient weight to the number, variety and nature of:
- (i) other small and large, local and international media organisations that provide online NZ news to the same consumers as the NZ Appellants, including Fourth Estate Holdings Limited (*The National Business Review*), Allied Press Limited (*The Otago Daily Times*), Bauer Media (NZ) Limited, The Spinoff, SunMedia Limited, Newsie Limited, Newsroom NZ Limited, Scoop Media, and Ashburton Guardian Limited (together "**Other Online Media**");¹⁹
 - (ii) other providers of syndicated news content, including Australian Associated Press ("**AAP**"), Content Limited (BusinessDesk), and a number of local and regional newspaper providers such as the Otago Daily Times and SunMedia (together "**Other News Syndicators**");²⁰ and
 - (iii) bloggers, businesses, government entities, local and national politicians and other individuals, and other entities that also provide their own NZ news and commentary online direct to the same consumers as the NZ Appellants (together "**Direct Providers**");²¹

and that Other Online Media, Other News Syndicators, and Direct Providers also provide online NZ news which is, as a matter of fact and commercial common sense, substitutable for the online NZ news provided by the NZ Appellants; and

- (c) the NZCC erred in characterising the Platform Publishers as mere distribution channels for the NZ Appellants' product,²² and failed to take into account, or failed to give sufficient weight to:
- (i) the large, and growing, proportion of online NZ news that is accessed through the Platform Publishers;
 - (ii) the economic incentives that mean those Platform Publishers' business models facilitate Direct Providers and more generally a wide range of providers of online NZ news beyond the Traditional Media; and

¹⁷ At [X7].

¹⁸ At [633.3].

¹⁹ See, for example, [633.1], [635] – [638], [706], [715].

²⁰ At [714.5].

²¹ At [716.2].

²² At [772], [1592].

- (iii) the fact that the Platform Publishers are already taking the large majority of total online advertising revenue.

5. The NZCC erred in its definition of relevant markets for Sunday newspapers and the community newspapers in the ten overlap areas, in particular in the following respects:

- (a) the NZCC failed to take into account, or failed to give sufficient weight to, the nature and degree of substitution between print and online and other advertising services which, as a matter of fact and commercial common sense, limits the NZ Appellants' ability to implement any small but significant, non-transitory increase in price ("**SSNIP**") for print advertising services in their respective Sunday and community newspapers;
- (b) the NZCC failed to take into account, or failed to give sufficient weight to, the nature and degree of substitution between print and online news services which, as a matter of fact and commercial common sense, limits the NZ Appellants' ability to implement a SSNIP in the subscription or cover prices of their respective Sunday newspapers; and
- (c) the NZCC failed to take into account, or failed to give sufficient weight to, the two-sided nature of the markets for Sunday and community newspapers.

6. The NZCC should have found that the relevant markets were:

- (a) a single two-sided platform market for:
 - (i) on the advertiser side, the provision of print and online advertising services to advertisers; and
 - (ii) on the reader side, the production and distribution of print and online news and information, including news and information provided by Other Media, Other News Syndicators, Direct Providers and Platform Publishers to consumers in New Zealand.
- (b) In the alternative, separate online and print markets as follows:
 - (i) a single two-sided platform market for:
 - (aa) on the advertising side, the provision of online advertising services to advertisers; and
 - (bb) on the reader side, the production and distribution of online news and information, including news and information provided by Other Media, Other News Syndicators, Direct Providers and Platform Publishers to consumers in New Zealand;
 - (ii) a single two-sided platform market for:

- (aa) on the advertising side, the provision of national advertising services to advertisers in national news and information publications, including Sunday newspapers, magazines and online news sources; and
- (bb) on the reader side, the production and distribution of national news and information publications, including Sunday newspapers, magazines and online news sources;
- (iii) a single two-sided platform market for:
 - (aa) on the advertising side, the provision of advertising services to advertisers in local news publications, including community newspapers;
 - (bb) on the reader side, the production and distribution of local news publications, including community newspapers.

No substantial lessening of competition

7. The NZCC erred in concluding that a substantial lessening of competition would arise in the Online NZ News Market. In particular the NZCC erred in:
- (a) finding that TVNZ, MediaWorks and RNZ would provide only a weak constraint in that market;²³
 - (b) failing to take account of, or giving insufficient weight to, the evidence that:
 - (i) TVNZ and RNZ are government-owned and as such are more likely to remain adequately funded into the future, and TVNZ and MediaWorks obtain a much larger share of total New Zealand advertising revenues than the NZ Appellants;
 - (ii) Newshub more than doubled its unique visitors between March 2016 and November 2016, from 400,000 to 900,000. Similarly, RNZ has more than doubled its audience between September 2014 and November 2016, from 200,000 to almost 500,000;²⁴ and
 - (iii) video and audio-based news is growing, and TVNZ, MediaWorks and RNZ have particular strengths as a news medium online in the production and distribution of video and audio news online; and
 - (c) failing to take into account, or to give sufficient weight to, the number and nature of the Other Online Media businesses that have entered

²³ At [706].

²⁴ NZME and Fairfax response to NZCC Conference Questions (23 December 2016) at [40].

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and expanded in the last two years alone, demonstrating the ease of entry and expansion in any Online NZ News Market;

- (d) failing to take into account, or failing to give sufficient weight to, the evidence that:
- (i) a very high proportion of consumers obtain their news from a number of sources including online, print, free-to-air TV, and radio; and
 - (ii) as a matter of fact and commercial common sense, multi-sourcing of NZ news permits consumers to detect and respond to any reduction in the quality of the NZ Appellants' online NZ news product by reference to the NZ news products produced and distributed by the Traditional Media, Other Online Media, and Direct Providers;
- (e) giving undue weight to:
- (i) the current number of journalists that would be employed by the First Appellant immediately post-Transaction as compared with TVNZ, MediaWorks and RNZ, while giving insufficient weight to the fact that employing journalists is a variable cost and journalists can, and do in fact, move between media businesses, and can be employed simultaneously by more than one media business at any point in time;²⁵
 - (ii) the current and historic online audience of²⁶, and volume of articles published by²⁷, the NZ Appellants as compared with TVNZ, MediaWorks, RNZ, and Other Online Media, while giving insufficient weight to the lack of barriers to online consumers of news switching between online providers at the click of a mouse or swipe of a mobile phone or tablet in response to any reduction in quality or increase in price, and despite finding that volume of articles is not important to audience reach, and that consumers of online news actively perceive and judge quality;²⁸
 - (iii) the current closeness of competition between the NZ Appellants, while giving insufficient weight to the ability and incentive of other Traditional Media and Other Online Providers to expand if the First Appellant were to increase price or reduce the quality of its online NZ news service; and
 - (iv) the financial pressures on TVNZ and MediaWorks when considering their ability to expand their production of online NZ news, [REDACTED]

²⁵ Determination at [656] – [657], [741], [1516] – [1518].

²⁶ See, for example, [670] - [671], Figure 1, [678], Figure 5.

²⁷ At [655], Table 8, [665], [816], [825].

²⁸ See, for example, [166].

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[REDACTED]
[REDACTED],²⁹

- (f) failing to apply the correct test for whether TVNZ and MediaWorks would expand when faced with an exercise of market power by the First Appellant post-Transaction;
 - (g) failing to take into account, or in giving insufficient weight to, the impact of the Platform Publishers on the ability and incentive of the First Appellant to increase price or reduce the quality of its online NZ news services post-Transaction;
 - (h) failing to take into account, or in giving insufficient weight to, the two-sided nature of the market when considering the likely impact of the Transaction on the quality of online NZ news;
 - (i) failing to take into account, or to give sufficient weight to, [REDACTED] and other factual evidence that demonstrated the reasons why the First Appellant would have no ability or incentive to introduce a paywall for the large majority of its online NZ news post-Transaction; and
 - (j) considering the competitive impact of the Transaction in only a two year timeframe.³⁰
8. The NZCC erred in concluding that a substantial lessening of competition would arise in Sunday Newspaper Markets. In particular, the NZCC erred in failing to take into account, or to give sufficient weight to:
- (a) the evidence of competitive constraints on Sunday newspaper advertising from other forms of media, such as online, radio, television, and other print publications including flyers and magazines, including evidence:
 - (i) from advertisers that they consider that they have multiple alternative advertising options that they can, and do, switch between;
 - (ii) from advertisers that they do not consider the Appellants' respective Sunday newspaper titles to be substitutable with one another; and
 - (iii) that Sunday newspaper advertising volumes and pricing have been decreasing for all Sunday newspaper titles, which demonstrates that there are other (non-print) competitive constraints on Sunday newspaper advertising;
 - (b) the substitution by consumers from print to online sources of news content including evidence that circulation of all Sunday newspapers are declining, which demonstrates that consumers are switching to alternative content options; and

²⁹ At [717] – [723].

³⁰ See, for example, [141], [151] – [152], [154] - [156].

- (c) the evidence that changes in the cover prices of Sunday newspapers have been consistent with the changes in cover prices of Saturday newspapers (which already face no direct competition from other newspapers).
9. The NZCC erred in concluding that a substantial lessening of competition would arise in the Ten Overlap Community Markets. In particular the NZCC erred in:
- (a) failing to take into account, or give sufficient weight to the evidence of competitive constraint on community newspapers from other forms of media, such as online, radio, and flyers, including evidence that:
- (i) community newspaper advertising pricing has been decreasing in most areas irrespective of the number of community newspaper publishers; and
- (ii) community newspaper advertisers would cease/reduce their expenditure on community newspaper advertising or switch to alternative forms of advertising if faced with a price increase;
- (b) failing to take into account, or give sufficient weight to the two-sided nature of community newspaper markets and the impact on community newspapers of losing advertising revenue; and
- (c) giving undue weight to [REDACTED]
[REDACTED]
[REDACTED].
10. The NZCC should have found that it was satisfied that no substantial lessening of competition was likely in any relevant market (whether the market described at [6] above, or the Affected markets, or some other market(s)), having regard to:
- (a) the two-sided nature of the relevant market(s);
- (b) constraints from existing participants in the relevant market(s);
- (c) constraints from firms outside the relevant market(s); and
- (d) the absence of any material barriers to entry or expansion in the relevant market(s).

The Counterfactual

11. The NZCC failed to apply the correct legal test, in that it failed to compare the Transaction against a "likely" counterfactual. In particular, the NZCC erred in adopting the counterfactual adopted in the Determination,³¹ because the

³¹ At [150] – [155].

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evidence did not demonstrate it was in fact "likely", and the NZCC failed to take into account, or to give sufficient weight to:

- (a) [REDACTED], and analysis of the NZ Appellants' options in the absence of the Transaction, provided by the NZ Appellants; and
 - (b) [REDACTED].
12. The NZCC should have assessed the effect of the Transaction only by reference to counterfactuals that were "likely" to arise, as a matter of fact and commercial common sense, in which case it would have found:
- (a) no substantial lessening of competition would arise in any relevant market, so clearance should have been granted; and
 - (b) even if it were not possible to exclude a real chance that a substantial lessening of competition might arise, the detriments arising from the Transaction will be insignificant, and plainly outweighed by the benefits of the Transaction, so authorisation should have been granted.

Benefits and Detriments

13. The NZCC erred in finding that a paywall would be likely to be introduced by the First Appellant post-Transaction.³² In the alternative, if such a paywall were likely, then the NZCC erred in:
- (a) failing to take into account:
 - (i) the benefit of any such paywall for the quality of the online NZ news distributed, despite finding there was a real chance that a paywall "may even be necessary to cover costs previously met by retrenched or rationalised publications";³³ and
 - (ii) the benefits to the First Appellant's business that would arise from the revenue derived from such a paywall; and
 - (b) the quantification of the detriments arising from such a paywall.³⁴
14. The NZCC erred in its quantification of the detriments, and in discounting a number of the benefits, arising from the Transaction.³⁵
15. The NZCC erred in finding that there was not any material benefit in prolonging print.³⁶
16. The NZCC erred in its application of the legal test for authorisation of a business acquisition under s 67 of the Commerce Act 1986 by taking into

³² At [802], [813].

³³ At [1269].

³⁴ At [1257] – [1274], Table 11.

³⁵ Section 6, [1095] – [1340].

³⁶ At [1368].

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account "plurality" considerations of the Transaction, being considerations as to the impact of the Transaction on the role of media in a well-functioning democracy.³⁷ In particular:

- (a) the NZCC is an economic regulator;
- (b) Parliament has mandated the NZCC to have primary regard to efficiencies in assessing the benefit to the public of a transaction for which authorisation is sought;
- (c) the NZCC is required to quantify benefits and detriments to the greatest extent possible to guard against the Commission's assessment degenerating into "pure speculation" or "mere intuition"; and
- (d) it is inconsistent with the scheme of the Act for the NZCC to have regard to non-economic social and political considerations when evaluating a transaction under the Commerce Act 1986.

17. In the alternative, even if the NZCC were permitted to take into account plurality considerations, it erred in the weight it gave to this factor in light of the evidence. In particular:

- (a) it attributed insufficient weight to the evidence that showed plurality would not be adversely affected given:
 - (i) there was little to no overlap in regional coverage of the NZ Appellants' publications;
 - (ii) print is not the primary source of news with fewer consumers relying on newspapers for their news. NZ news is sourced by consumers from multiple sources;
 - (iii) it found that only 10% of households receive a Sunday newspaper;³⁸
 - (iv) there will remain a diverse range of views, from online and print competitors, including in Auckland, which is the only major centre where there is any material overlap between the NZ Appellant's journalistic coverage; and
 - (v) sustainability and quality of media coverage would be enhanced by the merger; and
- (b) in the context of the small level of modelled economic detriments and significant modelled benefits arising from the Transaction, it attributed too great a weight to its perceived plurality detriments.

18. The NZCC erred in failing to find that the likely benefits of the Transaction outweighed the likely detriments.

³⁷ From [1391] – [1659],

³⁸ At [969].

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NATURAL JUSTICE AND FAIRNESS

19. The NZCC acted in breach of the rules of natural justice or otherwise in a procedurally unfair manner. In particular:

(a) the NZCC failed to follow a fair process by granting extensive anonymity and confidentiality to a large number of third parties submitting in opposition to the Appellants' application;

(b) the NZCC failed to follow a fair process because it failed to advise the Appellants in a timely manner of the "likely" counterfactual that it would assess the transaction against. In particular:

(i) the draft determination did not contain any description of a "likely" counterfactual (the counterfactuals outlined in the draft determination were described as "unlikely"); and

(ii) the first description of a "likely" counterfactual was provided to the Appellants on 5 March 2017, less than three weeks before the NZCC's final determination was due, at which point in time the Appellants' application had been on foot for over ten months;

(c) [REDACTED]; and

(d) the process adopted by the NZCC, including the NZCC's interaction with the media in relation to announcements of its draft determination and extensions, has been affected by the appearance of predetermination.

As a result of the errors of law and fact, and the breaches of natural justice and procedural fairness, referred to above, the Determination (not granting clearance or authorisation) should be quashed.

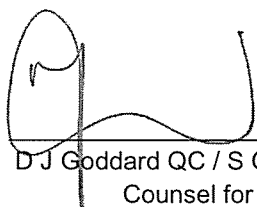
The Appellants seek the following relief:

1. orders pursuant to s 93 of the Commerce Act 1986 allowing their appeal;
2. orders pursuant to s 93 of the Commerce Act 1986 granting clearance or, in the alternative, granting authorisation for the Appellants to proceed with the Transaction.

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This notice of appeal is given pursuant to s 91(2) of the Commerce Act 1986 and High Court Rules 20.4 and 20.6.

Dated at Wellington this 26th day of May 2017



D J Goddard QC / S C Keene / A S Butler
Counsel for Appellants

This document is filed by Sarah Caroline Keene, solicitor for the Appellants, of Russell McVeagh. The address for service of the Appellants is Level 30, Vero Centre, 48 Shortland Street, Auckland 1010.

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- (a) posted to the solicitor at PO Box 8, Auckland 1140; or
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