

Submission to the Commerce Commission on its Draft Determination of 8 November 2016

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The Commerce Commission's (hereafter: the Commission) draft determination is that it is not satisfied that the proposed merger between NZME Limited and Fairfax New Zealand Limited will result, or is likely to result, in such a benefit to the public that it should be permitted. This finding is based on solely on the effect of the merger on quality and plurality in the news media, as the Commission has concluded that "on a purely quantitative basis it is likely there is a positive financial benefit". This submission focuses on the public benefit test. I do not take any position on the earlier question about the likelihood of a substantial lessening of competition. Nor do I wish to dispute the importance of media plurality to a well-functioning democracy. The narrow question that I intend to address in this submission is whether the non-quantifiable plurality detriment, assuming it exists,¹ can be used in the public benefit test under s67(3)(b) Commerce Act to override a finding of net quantitative efficiency gains.

The Commission recognizes in its draft determination that "a plurality detriment would not necessarily be the same as the types of inefficiencies we usually consider". To add to the novelty, these detriments are said to outweigh the quantified net benefits. I have not found an example in existing case law where non-quantifiable detriments were used, let alone to override a net quantified benefit as is proposed in the Draft Determination.

The draft determination holds that the High Court's judgment in *AMPS-A* allows it to take media plurality into account as it is "clearly relevant to the public interest of New Zealand".² While the High Court indeed indicated in the *AMPS-A* case that "efficiency considerations ... do not exhaust society's interest in the business conduct the subject of the Commerce Act",³ the Court's decision was ultimately based on the absence of net quantified efficiency gains from Telecom's acquisition of the *AMPS-A* management rights.⁴ On appeal, the Court of Appeal confirmed that the benefits and detriments in the *AMPS-A* case were "almost entirely efficiency gains and losses". However, the Court disagreed with the calculations and urged the Commission "to attempt as far as possible to quantify

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¹ The merger would reduce external plurality, i.e. the variety of providers owned by different entities. However, a plurality of ownership is not a sufficient condition for the provision of a variety of content and viewpoints, which is what really counts as valuable in a democracy. This is clear from the Expert Review of the Commerce Commission's Draft Determination Document (16 November 2016), at 8, where the experts state that "a competitive market does not necessarily mean that there will be sufficient plurality from a public interest perspective".

² Draft Determination at [65]

³ *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 47, at 528.

⁴ At 534.

detriments and benefits rather than relying on a purely intuitive judgment to justify a conclusion that detriments in fact exceed quantified benefits”.⁵ This case’s value as a precedent on the specific point that factors other than efficiencies can be taken into account is therefore limited; neither the High Court nor the Court of Appeal have given any clear indication as to which interests can be taken into account, particularly in the face of net efficiency gains. There is, however, a clear statement from the Court of Appeal to quantify the detriments and benefits as far as possible.

Most cases where the public benefit test arises involve a situation of net efficiency losses⁶ that are then asked to be justified based on some other public benefit, including non-quantified benefits.⁷ The draft determination deals with the opposite situation: a quantified net *benefit* that is outweighed by a non-quantified *detriment*. In my view that is an important difference. The Commerce Act points explicitly towards the importance of efficiencies,⁸ and while existing cases have entertained the possibility of an unquantified benefit tipping the scale towards authorisation despite net efficiency losses,⁹ none have considered the current scenario where unquantified detriments are used to cancel out net quantified benefits.

The case that comes closest to the current merger on the facts is that of Godfrey Hirst’s challenge to Cavalier’s acquisition NZ Wool Services’ wool scouring assets. Tellingly, the Commission responded to Godfrey Hirst’s argument that “a bare positive margin” was not enough to meet the high test of public benefit, by stating that¹⁰

It is not clear on what basis the Commission could justify declining an authorisation if there was a positive margin in favour of benefits (that is, there were net public benefits). The Applicant would likely have legitimate grounds of complaint in that case, and it would potentially make the outcomes of authorisation applications variable insofar as they would be dependent on the unspecified subjective views of different Commissioners from time to time.

This was confirmed by the High Court which added that¹¹

the Commission is not required to overlay some kind of social policy judgment (enabling it to decline an authorisation even if the merger specific efficiencies accepted by the Commission outweigh the efficiencies likely to be lost through the SLC or conversely to grant an authorisation where losses exceed gains). ... Such an approach would invite the kind of speculation and intuition (and corresponding unpredictability) which Telecom directed against.

In the Draft Determination, the Commission refers to the same judgment to argue that it is not restricted to a quantitative assessment and can make a qualitative assessment.¹² The High Court indeed confirmed that the Commission should not conduct a purely quantitative assessment.

⁵ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA), at 447, per Richardson J.

⁶ For example *Ravensdown Corporation Ltd v Commerce Commission* HC Wellington AP 168/96, 16 December 1996; *Air New Zealand v Commerce Commission* (No 6) (2004) 11 TCLR 347.

⁷ As for example in *Air New Zealand v Commerce Commission* (No 6)

⁸ Commerce Act, s3A.

⁹ See for example *Air New Zealand v Commerce Commission* (No 6), above note 6, where these unquantified benefits were ultimately found not to tip the scale in such a way, see at [430].

¹⁰ Decision No. 725 at [56]

¹¹ *Godfrey Hirst v Commerce Commission* (2011) 9 NZBLC 103,396 at [114].

¹² Draft Determination, at [1003] (citations omitted).

However, its discussion about qualitative assessment refers to judgments about the quality of the available quantitative information, allowing the Commission to attach less weight to quantitative information it judges to be of a lesser quality.¹³ This suggests that the qualitative assessment is in the quantification process, but if the net effect of the quantifiable information, as adjusted based on the Commission's qualitative assessment of that information, is positive, the public benefit test has been met. The Court indeed concluded that "[w]hile a 'check' at the end of the process may still be useful, it is not to be elevated to a necessary second step in which subjective preferences come into play".¹⁴ An applicant does not have to justify the merger beyond net efficiencies and the Commission cannot speculate about detriments, such as about "what a monopolist might do".¹⁵

I would submit that in the current merger, by reversing a finding of net quantified benefits based on non-quantifiable detriments, the Commission has invited unpredictability and let subjective preferences come into play. Unpredictability and subjective preferences are of particular concern when non-quantified detriments outweigh a net efficiency gain, as it would mean that the efficiency analysis, mandated by s3A, will become largely irrelevant. It is one thing to authorise a merger based on non-quantifiable benefits despite the presence of a net efficiency loss, but quite another to block a merger that creates a net quantified gain based on incommensurable detriments.

In the end, the proposed merger reveals a fundamental problem for competition law: it has long been able to protect plurality of media ownership, which is but one dimension of media plurality in a democratic society. We may now have reached the point where the matter of protecting media plurality should be left to other types of regulation that can address media plurality more holistically than competition law. Forcing competition law to bear the burden of protecting media plurality in this case, by the unprecedented move of refusing authorisation based on non-quantifiable information, may be too much for competition law to bear, no matter how laudable the goal of ensuring media plurality in a democratic society (assuming that the ownership restrictions can indeed safeguard media plurality). This move would create uncertainty in future competition cases in different sectors, as the final decision about authorisation will come down to a social policy judgment even if there is a net quantified benefit. There is no indication as to which values ought to be taken into account as detriments nor about what level the net quantified benefits ought to be to outweigh non-quantified detriments. It will make future authorisation decisions even harder to make. The public benefit test, which allows for the authorisation of conduct despite the effect of substantially lessening competition, should, given its status as an exception, be narrowly defined rather than being opened up to invite all kinds of non-quantifiable claims in favour or against authorisation.

In making this submission, I have not taken a position —nor do I wish to do so— on the substantive assessment of the various benefits and detriments that the proposed merger is likely to bring about. My concern is solely with the workability of the public benefit test, and the certainty of the competition law regime. The Commission was correct when it spoke in its 2011 Cavalier decision about the danger of subjectivity involved in allowing non-quantifiable considerations to outweigh net efficiencies,¹⁶ and in my view the Draft Determination, as currently drafted, insufficiently addresses those concerns.

¹³ *Godfrey Hirst v Commerce Commission*, above n 11, at [115]. See also at [325].

¹⁴ At [117].

¹⁵ At [115].

¹⁶ See above n 10