

SUBMISSION BY DR. GAVIN ELLIS IN RESPONSE TO THE COMMERCE COMMISSION'S DRAFT DETERMINATION ON A MERGER APPLICATION BY NZME AND FAIRFAX MEDIA.

My name is Gavin Peter Ellis. I am a media researcher and commentator. I am a senior lecturer in media, film and television in the School of Social Sciences at the University of Auckland. I hold masters and doctoral degrees in political studies. I am a former editor-in-chief of *The New Zealand Herald* and have had an association with journalism for more than 50 years. This submission is in response to the commission's draft determination and experts' report and follows an earlier submission on the application.

1. The Commission has dealt comprehensively with the issue of plurality and has been supported in its view by the experts' report by Dr David Levy and Robin Foster. I support the finding that "there is a real chance that the proposed merger would reduce media plurality" and that "any adverse effects are potentially substantial".
2. While the draft determination addresses many of the concerns I raised in my earlier submission I wish to take this opportunity to address an issue that may yet present itself.
3. The applicants have stated that they do not believe that issues of media plurality are relevant of the Commission's analysis and fall outside the scope of the merger authorisation process (Draft Determination para 905). I believe that such statements signal the possibility that the final determination may be taken to judicial review on jurisdictional grounds. While a ruling in the applicants' favour may not force the Commission to approve the merger, it would nonetheless reduce the range of detrimental effects that could be taken into account in rejecting the application.
4. I therefore urge the Commission, in its final determination, to address in much greater detail the weaknesses of New Zealand's media regulatory systems in order to signal to the industry and to Government that substantially more rigorous systems are required.
5. I submit that there are inherent weaknesses in the following areas:
 - Media ownership
 - Editorial content
 - Intellectual property
6. **Media ownership:** The transfer of ownership of the majority of New Zealand's newspapers and a substantial portion of its broadcasting assets into foreign hands proceeded unchecked and there are few if any safeguards on future changes of ownership to foreign or domestic buyers. The extreme weakness of media stock prices makes them particularly vulnerable to future takeover with little ability to ensure the suitability of new owners. This is in spite of the fact that media organisations fulfil significant civic and social functions that directly affect the fabric of society.

7. **Editorial content:** The applicants are subject to adjudicate on complaints by the public to any of three separate regulatory bodies. Two are self-regulatory and the third, the Broadcasting Standards Authority, is a statutory body. Each was established to adjudicate on a single medium – print, broadcasting or online – but most media organisations now produce material in multiple formats. Importantly, none is equipped to address the issues of plurality highlighted in submissions and in the commission’s draft determination. In addition, the dominating position of a merged NZME/Fairfax would call into question the ability of the Press Council to maintain – at least in terms of public perception – any semblance of independence. Internally, the media organisations have systems of editorial governance and accountability that are opaque and which stand in contrast to organisations such as *The Guardian* and the *Financial Times* in the United Kingdom. I support Rod Oram’s submission on codes of conduct in response to the draft determination.
8. **Intellectual property:** The applicants have correctly identified a significant problem relating to their ability to derive the full financial benefit from material they produce. I believe that part of the regulatory and financial weakness that besets the media in New Zealand is the absence of mechanisms by which they can share in revenue derived from the re-use of their material on social media such as Facebook and Google. The solution lies in the protection of media intellectual property rights. Such protection should be in exchange for accepting a higher level of editorial accountability and transparency.
9. Various jurisdictions have addressed media regulation in recent years. Far-reaching recommendations were produced by the Leveson Inquiry in the United Kingdom, by the 2006 Canadian Senate Inquiry, by the Finkelstein Report in Australia and by the New Zealand Law Commission’s *The News Media Meets New Media* report. It is fair to say that in every case the need for change was manifest and in every case any resulting change was inadequate. The failure to implement much-needed change has been a result of ideology and pressure, not a result of wiser minds prevailing.
10. It is not the intention of this submission to do more than signal the need for the Commission to address the matter of media governance and regulation in its final determination. Dr Levy and Mr Foster allude to that need in their report (the emphasis is mine): “The parties also argue that it would be possible to secure editorial diversity and independence after the merger, as this would be a continuation of current editorial practice. However, *in the absence of any form of tough and independent behavioural regulation the delivery of such promises could not be guaranteed.*”
11. I endorse that statement and submit that the Commission’s final determination must be accompanied by the strongest recommendation to Government for the creation of a comprehensive media regulatory environment covering all of the areas identified above and embracing all types of news media. The desire by NZME and Fairfax will not be the last attempt by media to see their future in consolidation and cooperation. Some of those attempts may come before the Commission. Others will be informal arrangements that do not interfere with corporate structures but which, nonetheless, have some or many of the effects

outlined in the Draft Determination. In either case, the need for comprehensive and effective oversight is manifestly in the public interest.

12. Should the Commission decide that the final determination is not the place to address this pressing matter, I submit that the issue is of such public interest that the Commission should separately advise Government of the need for significant change to regulatory frameworks that may be a mixture of statutory and self regulation. The state of the media industry and the needs of citizens suggest this is a matter of urgency.

I would be willing to participate in the planned conference in December should the commission wish to hear further on these matters.

A handwritten signature in black ink that reads "Gavin Ellis". The signature is written in a cursive style with a long horizontal stroke underneath the name.

Gavin Ellis ONZM MA PhD