

28 February 2017

Dr Berry  
Chairman  
Commerce Commission  
44 The Terrace  
Wellington CBD  
Wellington 6011

By email

Dear Dr Berry

We noted with interest the Commission's decision on Vodafone/Sky last week.

We appreciated the Commission's clear statement, particularly in the context of dynamic media markets, that its merger control analysis is necessarily forward-looking, considering not just the immediate, but also the medium and longer term effects of the transaction before it. We understand the Commission is continuing to consider carefully the likely future for our businesses without the proposed transaction, and we agree that is an important focus.

In making its decision on Vodafone/Sky the Commission appears to have acknowledged:

- the convergence of media across different platforms – in Vodafone/Sky's case, convergence across broadcasting to internet channels;
- the increasing competition for NZ content suppliers from global competitors - in Vodafone/Sky's case, Netflix, Apple TV, Google Play Movies, Google Youtube, Microsoft Films & TV - which led the Commission to the view that had the merger dealt with anything other than a business that held all sport, it would have approved it;
- the increasing uptake and usage of internet – for example, Vodafone had submitted that 3.1 million NZers use the internet on a weekly basis, average broadband speeds continue to increase, and the Commission appears to have taken this on board as a feature of its analysis; and
- the increasing usage of mobile networks to deliver content, and the change in consumer demand to consume content anywhere, anytime on mobile devices,

but it seems that the Commission simply could not be satisfied that no lessening of competition would arise, due to the "must have" nature of the exclusive premium sport content controlled by Sky TV.

Of course, that is the point at which the two media mergers diverge. While SKY has periodic monopolies over premium sports content, such as an All Blacks' test, and rigorously protect those rights, NZME and Fairfax do not have similar rights over their primary source of content, which is news.

Other news/information providers such as NewsHub, OneNewsNow, RNZ, ODT, and all of the national news websites like Bauer's noted.co.nz, and Sun Media's new, national digital news website, Newsie launched last week (described as a "cooperative effort of independent publishers the length and breadth of New Zealand"), the Spinoff or Murphy/Jennings' newsroom.co.nz, and the international agencies with newsrooms in NZ (ie AAP, AP and Reuters) are all equally able to produce similar content, reporting on an All Blacks test, and equally can show a "fair use" video clip of relevant portions of an All Blacks test to report the news.

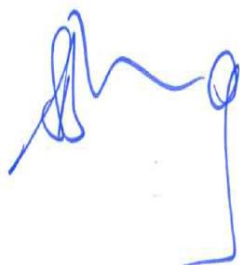
There is no copyright in the facts. Stories can easily be rewritten and published by competitors. To the extent there is some (poorly protected) copyright in the articles themselves, the content can be and is freely syndicated and can be freely linked to, as the Commission has already found in its draft determination.

You will recall this key difference was emphasised by Professor Picker at the conference, in explaining why Google and Facebook are such a significant constraint on the news media in New Zealand, as elsewhere in the world. Two recent articles put these points well and we attach them for your interest.

We look forward to continuing to engage with the Commission staff to assist the Commission to resolve the remaining issues that it is working through in order to reach a final determination in relation to our application. We are grateful for their continued hard work to understand and test the likely state of the market, and the benefits that we are clear will flow from the merger for all New Zealanders.

The most significant of these is, as you have heard from us before, the maintenance of a strong news industry. As Mark Zuckerberg himself noted, quoted in the article attached, "There is more we must do to support the news industry to make sure this vital social function is sustainable." That effort is, of course, at the heart of our application.

Yours sincerely



Simon Tong



Michael Boggs