



Submission to the Commerce Commission on Wilson & Horton Limited and Fairfax New Zealand Limited – Application for authorisation of a business acquisition

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1.0 Introductory Comments:

The Coalition for Better Broadcasting welcomes the opportunity to make a submission on the Wilson & Horton Limited and Fairfax New Zealand Limited application to the Commerce Commission for authorisation of a business acquisition. The CBB² is an independent charitable trust with a grassroots membership, board of trustees, chief executive and regional committees. The Trust is non-profit, has no political party affiliation or vested interest in any commercial enterprise. Our primary interest is to inform civic debate and policy formation in regard to public service broadcasting, although media convergence extends the scope of our concern to other platforms and content providers, particularly those which support public interest journalism.

It is a fundamental tenet of contemporary democratic society that the news media has to fulfil a civic ‘fourth estate’ function in informing the public and holding powerful institutions to account. In return, the news media gain certain privileges which enable them to fulfil this role, e.g. access to the Parliamentary press gallery, select committees and the courts and the right to withhold information to protect sources. Given that the media’s commercial imperatives do not always align with public interest imperatives, publicly owned and funded media (e.g. Radio New Zealand, Maori Television Service) are generally expected to accept a higher level of civic responsibility than their private, commercial counterparts in upholding the highest standards of journalistic endeavour and investing in the production of the kinds of news and information which might be commercially unattractive to a purely commercial operator.

Nevertheless, for commercial media dealing in the production and distribution of news, there still remains an expectation that they too should uphold professional journalistic ethics and content standards (accuracy, fairness, balance, etc.). Moreover, there is also an expectation on commercial news media, especially those which enjoy a sizable and reliable share of the audience and help ‘set the agenda’ of public debate and shape public opinion, not to abuse their potential editorial influence. Such concerns are moderated to some extent in larger markets with a plurality of news media. In countries like the UK where many newspapers are politically partisan, this is to some degree balanced by a range of editorial outlooks. However, in a small deregulated market like New Zealand, most media sectors have become dominated by just two major market incumbents with a handful of smaller competitors on the periphery. In respect to the organisation of the NZ newspaper sector, a single title often enjoys dominance without any direct competition. Although the domestic press are not so openly partisan as their UK counterparts, there is a much stronger dependence on the dominant companies not only to maintain competition and consumer choice but to act as a check on each other’s editorial integrity and journalistic quality³.

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² See the Coalition for Better Broadcasting website <http://betterbroadcasting.co.nz/about-coalition-better-broadcasting/structure-people/>

³ It is worth noting that one reason the current government has retained TVNZ in public ownership, despite rescinding its public charter, is to ensure competition and counterbalance in the free-to-air market. See: <https://www.tvnz.co.nz/one-news/new-zealand/john-key-government-unlikely-allow-tvz-merger-mediaworks>

Even within a duopoly, in a market environment where revenues and market shares were stable, one might expect intra-sector competition and professional rivalry to help anchor standards. However, the intensification of market competition stemming from structural changes in the media ecology over the past two and a half decades (including deregulation, digital convergence, financialization and consolidation) has made it increasingly difficult for commercial media operators to reconcile public service functions with their commercial priorities. Some technological/free market optimists assume that the proliferation of digital media distribution platforms and reception devices has ushered in a cornucopia of digital plenty where everyone can access the content they want on demand. This may have limited validity considering the vast range of media content now available online, but if one's media aspirations extend beyond streaming Netflix movies on a smartphone, it is apparent that some forms of news and other informative/educational content genres are becoming scarce. When the opportunity costs of investigative journalism have to be weighed up against the higher audience potential of tabloid infotainment or 'clickbait', news media desperately trying to sustain their revenue streams tend to prioritise the latter.

The CBB would emphasise that this analysis should not be interpreted as a criticism of professional failure on the part of individual journalists. Most reporters are still able and willing to undertake critical, investigative 'hard' news reporting if they are given the time, resources and editorial backing to do so. Unfortunately, the commercial pressure on newsrooms has seen round after round of budget cuts and redundancies coupled with creeping expectations on those journalists still in employment to produce more and more copy suitable for multiple platforms and capable of delivering eyeballs/clicks/shares. The proliferation of bloggers, citizen journalists and smaller independent news/information websites does not compensate for the hollowing out of mainstream professional journalism.

Insofar as the news media sector (and particularly in the newspaper subsector) are facing structural challenges which threaten their ability to maintain their core functions, it is no cliché to assert that the fourth estate is in crisis. The CBB believes that addressing these issues in the digital environment requires that publicly-funded news media, including non-commercial radio and television services, remain a central component of the media ecology. It also requires policy makers to recognise the systemic nature of the challenges and to respond by developing new policy frameworks appropriate to the complexities of convergence which help protect and support the functions of the fourth estate across both the public and private media sectors.

Although the CBB acknowledges the crisis faced by the news media, it is not sufficient for the major news media companies to presume that their challenges exempt them from their fourth estate role or from the competition regulations intended to prevent undue levels of market concentration and power being acquired by any single company. The CBB's perspective on the proposed merger between Wilson & Horton Ltd. and Fairfax NZ Ltd. will now be outlined below.

2.0 CBB Summary of Key Points regarding the proposed merger between Wilson & Horton Ltd and Fairfax NZ Ltd.:

2.1 The CBB submits that the proposed merger (factual scenario) between Wilson & Horton Ltd (hereafter NZME) and Fairfax NZ Ltd (hereafter Fairfax) would result in a substantial reduction of competition and editorial plurality/independence in the New Zealand news sector as a whole (especially on the retail/audience side of the market). The merger would also result in an overwhelming reduction of retail-side market competition as well as editorial plurality/independence in the News Zealand newspaper subsector (including online newspapers) which will inevitably reduce meaningful consumer choice even if the current number of publications is maintained. Hirfindahl Hirschman Index projections suggest that the increases in market concentration on the retail side stemming from the merger would exceed any conventional parameters of an acceptable increase in market concentration.

2.2 The case put forward by NZME and Fairfax (the applicants) in support of the proposed merger (factual scenario) is premised on an untenably broad definition of the relevant market and the mutual substitutability of content forms including any and all news and information providers, both domestic and international. On the wholesale (advertising) side of the market, it is apparent that competition for revenues has intensified as online actors have entered the market. This includes companies like Google and Facebook which produce little content of their own but have interspersed themselves into the news value chain by providing links to third party stories (effectively dis-aggregating the content from the news creators' own websites) thereby capturing a share of the news media's advertising revenues. On the wholesale side, therefore, it is possible that advertisers are increasingly inclined to be platform-neutral and relatively content-agnostic so long as the media deliver the desired demographics. In regard to the wholesale/advertising side of the market, the applicant's claims that news media are substitutable with other media providers outside the domestic news/journalism sector has some validity (although this may not apply in the case of local/regional advertisers using local/regional media).

2.3 However, the case put forward by NZME and Fairfax conflates the substitutability of *platforms* on the wholesale side with the substitutability of *content* on the retail side. Specifically, the applicants' very broad market conception on the retail (audience) side makes insufficient distinction between high quality, professional journalism and tabloid infotainment/clickbait, and fails to recognise the massive disparities in market power between incumbent news media corporations and smaller actors such as small independent news websites or individual bloggers. This results in an unrealistic and misleading conception of the relevant market boundary which, crucially, fails to recognise the *non-substitutable* nature of *New Zealand news content* at national, regional, and local levels.

2.4 The applicants' case significantly overstates the likelihood of public benefits and significantly understates the likelihood of outcomes detrimental to the public interest, particularly in respect to the retail side of the market. In particular, the applicants make numerous claims about the potential for the merger (factual scenario) to ostensibly facilitate opportunities for greater investment in 'quality' journalism. Unfortunately, the evidence of other recent consolidations and restructuring of newsrooms within the Australasian news media suggests these inevitably entail newsroom budget cuts and redundancies. Moreover, the supposition that the ownership and management of the merged company post-IPO would ensure a greater sense of noblesse oblige to the fourth estate obligations than the current parent companies is speculative at best. There is no guarantee whatsoever that any future shareholder would not immediately seek to extract maximum dividends by pocketing any savings derived from the merger, further reducing budgets and staffing, closing down existing publications/outlets and homogenising content under the control of a single editor (or a single editorial policy dictated top-down). The fact that the applicants offer *nothing* in the way of a formal, binding undertaking to ensure that plurality and editorial independence continue post-merger suggests that the proclaimed public benefits must be disregarded as dubious if not disingenuous.

2.5 The applicants' case also significantly overstates the extent to which a 2-sided media market functions so as to ensure that the wholesale (advertising) market provides a countervailing force to ensure product quality on the retail (audience) market. It is certainly true that the pressure from advertisers to maximise audience ratings/eyeballs/clicks means that commercial news media need to be sensitive to audience preferences. Unfortunately, the assumption that audiences' collective media consumption patterns incentivise 'quality' conflates 'popularity' with 'quality'. Although most people will individually acknowledge the importance of 'hard' news about social, economic and political issues shaping their lives and the important role of the fourth estate, our collective consumer preferences incentivise media companies to under-provide this kind of content in favour of tabloid infotainment/'clickbait'. Although some serious 'hard' news content can will also have popular appeal, the commercial news media's drive to serve the public's interests in the

sense of individual consumer preferences⁴ will tend to compromise their capacity to fulfil the role of fourth estate and serve the public interest in respect to meeting our collective needs as citizens.

2.6 The CBB recognises that the non-merger scenario (counterfactual) may itself be problematic given the intensified cross-platform competition of the contemporary media market. Multiple factors including deregulation, convergence, financialization and consolidation have combined to undermine the traditional value chains of the news sector, especially newspapers. The structural nature of these challenges and the threat they pose to the applicants' business models, especially in regard to newspapers, constitutes a significant crisis for the sector. However, these conditions are unlikely to be directly alleviated by permitting the merger to proceed, and in some respects the merger will exacerbate, rather than alleviate the problems facing the news media sector. The merger may well confer some commercial advantage to Fairfax and NZME on the wholesale (advertising) side (although Fairfax and NZME already partner TVNZ and MediaWorks in operating KPEX). However, the merger itself will not resolve the structural threats and may further disadvantage the merged company's (much) smaller competitors in the newspaper sector.

2.7 The CBB believes that there is a need for judicious re-regulation of the media ecology and for renewed government commitment to support public service media and public interest journalism, including competition law. Such policy considerations obviously lie outside the immediate purview of the merger issue, but it is worth noting that in 2015, the government did undertake a significant review of regulatory provisions for converged media platforms and content, although it has not yet signalled any imminent response to this substantial exercise. Interestingly, section 12.18 of the merger document notes that 'the Commission can and should revisit historical approaches to market definition as they do not reflect the reality of a converged market. The CBB agrees but would point out that it would seem premature to permit a merger of this magnitude and consequence to proceed before the regulatory framework governing the future shape of the news media market has been determined. This is a compelling reason to defer any decision until the government has completed its review.

On the basis of the above considerations, the CBB concludes that the merger scenario fails the public benefit test, would substantially lessen competition, and would constitute an unacceptable concentration of editorial power. Consequently, we recommend that the Commerce Commission should NOT clear or authorise the proposed business acquisition (the transaction) or other merger arrangement between Wilson & Horton Ltd (NZME) and Fairfax NZ Ltd (Fairfax).

The rationale for this conclusion will be explained and expanded on in the following discussion.

⁴ By way of illustration, at time of writing, the 5 'most read' stories on the NZ Herald website are: 'Woman's incredible tale of gap year in Africa sparks global outrage' / 'Canadian judge Robin Camp could lose job over shocking comments to alleged rape victim' / 'Man's epic carrot battle with Tesco supermarket' / 'Kate Middleton's optical illusion' / 'Hooters waitress reveals secrets of the job'.

3.0 The News Media Ecology In New Zealand

Before evaluating the likely outcomes of the proposed merger between NZME and Fairfax, it is essential to understand the position they occupy in the wide media ecology. Media markets are complex systems and altering the size or function of one market actor often has implications for the media system as a whole. As mentioned in the preliminary comments, the news media are expected to function as the 'fourth estate'⁵ of the political system, enabling informed debate and ensuring the transparency and public accountability of powerful institutions. Since the 1990s, the proliferation of digital media has seen an exponential increase in the availability of media content accessible on-demand via our smart-phones or tablets. Superficially, public access to news and information is unprecedented. However, civic participation in politics, including party membership and voting, is declining⁶. Insofar as we expect the news media to help sustain an informed and engaged citizenry, we must also recognise that they are now facing a crisis which threatens to undermine their business models and ability to sustain high quality reporting.

3.1 There are several important factors to consider here. The first is **deregulation**. The 1990s saw a significant relaxation of controls over foreign and commercial media ownership. By the standards of other OECD economies, New Zealand arguably has the most loosely regulated media market. There are no controls on the level of foreign media ownership or cross-media holdings, and historically, a political tolerance of incumbents with a dominant market position which has often worked against the public interest (e.g. Telecom before local loop unbundling; Sky before SVoD competition). In most media sectors, this has enabled a small number of operators to dominate the market, typically in the form of a core duopoly with a few smaller competitors on the periphery. In free-to-air television, TVNZ and MediaWorks are the main actors (although subscription content providers increasingly compete for content rights). In telecommunications, Spark and Vodafone are the dominant actors (the latter of which has now proposed a potentially controversial vertically-integrated merger with Sky). In radio, NZME and MediaWorks are the dominant commercial actors, although the public service operator Radio New Zealand remains an important news provider. In the newspaper sector, Fairfax and NZME are obviously the two dominant actors, with only Allied Press enjoying meaningful (regional) market share in the South.

New Zealand's relatively small market size makes the economies of scale requires for many forms of media content difficult to attain, while the predominantly English-speaking population means many media forms are readily (and cheaply) substitutable for local content. Free trade agreements like GATS and CER preclude the introduction of local content quotas. Consequently, the opportunity costs attached to local content production mean that, with the exception of a few genres (including domestic New Zealand news and indigenous Maori content), commercial media tend to rely heavily on cheaper content licensed from overseas (even when NZoA or TMP subsidies are available⁷). Indeed, a significant majority of New Zealand's international news is derived from overseas news agencies⁸ (and in the case of children's television the ratio of US content on New Zealand screens has been found to be even higher than in the USA!⁹). There is no anti-siphoning policy to protect significant national cultural/sports events from being captured by subscription providers, and there are no restrictions on advertising levels (except for Sunday morning broadcasting). The upshot of New Zealand's light regulatory regime is that the media sector has been allowed to become increasingly commercialised and, with a few exceptions like RNZ, TVNZ and Maori TV, dominated by foreign media corporations¹⁰.

⁵ Thomas Carlyle attributed the original use of the term 'fourth estate' to a 1787 comment in the British Parliament by Edmund Burke. See Carlyle, T. (1841) *The Hero as Man of Letters*. Johnson Rousseau, Burns. Lecture V. in *Heroes and Hero Worship*. London: James Fraser. Available from: <https://archive.org/details/heroeshoroworshi99carl>

⁶ Civics & Media Project (2015) *The Civics & Media Project- Workshop Proceedings*. Available from: <http://civicsandmediaprojectnz.org/>

⁷ For example, MediaWorks has canned programmes like Media-3 and 3D even when public subsidies were available.

⁸ See Matheson, D. (2012) *People like us: The cultural geography of New Zealand's international news*. In M. Hirst, S. Phelan and V. Rupar (Ed.) *Scooped: The politics and power of Journalism in Aotearoa New Zealand*. Auckland: AUT Press.

⁹ See <http://www.stuff.co.nz/entertainment/8371864/Kiwi-kids-TV-more-American-than-US>

¹⁰ See the annual NZ media ownership reports prepared by AUT's JMAD Centre (authored by Merja Myllylahti) Available here: <http://www.aut.ac.nz/study-at-aut/study-areas/communications/media-networks/journalism.-media-and-democracy-research-centre/journalists-and-projects/new-zealand-media-ownership-report>

3.2 This leads directly to another key factor, **financialization**: Media companies traded on international exchanges including Fairfax, NZME, MediaWorks, Sky, Telecom, Vodafone and Netflix are primarily concerned with meeting the demands of their shareholders. Increasingly these comprise institutional investors and banks whose interest in the core business of a media company often extends only as far as a technical chart on a trading screen or an index-tracking algorithm. This translates into a relentless pressure to maximise profits and optimise stock prices while driving production costs down, often within time horizons which require rapid and disruptive restructuring. Content forms which are costly to produce and under-deliver on sales or advertising revenue are quickly replaced by the most profitable forms.

Particularly where private equity firms buy media companies with a view to making short-term returns on investment, the shareholders rarely consider the non-commercial aspects of media such as the fourth estate role. For example, the acquisition of MediaWorks by Ironbridge Capital loaded the company with unsustainable debt (which led to its liquidation in 2013) which saw Oaktree Capital buy up the distressed company, appoint new management and drive a series of internal restructures aimed at squeezing more revenue out of every content form. From a purely economic perspective such actions are rational attempts to maximize profits. However, when shareholders have no interest in the substance of the content and reward (or penalize) management performance solely on commercial performance, the editorial priorities of the newsroom are always liable to be compromised.

Given that the proposed merger between NZME and Fairfax would entail an IPO of the new entity, there is no certainty that the new shareholders and the management they appoint would be as amenable to delivering the public benefits alluded to in the merger documentation. Some might contend that, as a private commercial entity, a news organisation has no more obligation to ensure the provision of merit goods and (insofar as the fourth estate function of quality news confers a positive externality on society) than a supermarket. Indeed, if NZME and Fairfax decided to stop producing news altogether and produce other forms of content instead, then there is no legal obligation on them to prevent this.

However, any producer of news commanding a substantial share of the audience cannot exempt themselves from the expectation that they will observe journalistic ethics and the codes/standards of the NZ Press Council. Although there is very limited evidence that the media have any direct effects on audiences, the capacity to access a significant proportion of the population on a daily basis and supply them with information about the events and forces shaping their lives confers a form of power. Newspapers remain influential media in shaping the parameters and frames of political discourse and debate and to some degree prioritising which issues, events and voices will be highlighted for public attention. The plurality of editorial outlooks is obviously important to the functioning of democratic debate, and critics would contend- with some justification- that this is already too narrow (e.g. the continuing under-representation of Maori perspectives on many issues). Unfortunately, the relentless drive to optimise commercial performance and cut budgets and staffing puts this at risk as reporters depend more on established (and establishment) sources and information subsidies from PR firms. In this context, the proposal to create a much larger commercial entity with a massively dominant share of the newspaper sector as well as half the commercial radio sector and then sell it to unknown financial investors cannot be regarded as benefiting the public interest.

3.3 The trends outlined above have been exacerbated by **convergence**- the capacity of digital technologies to transmit and receive audio-visual and textual content across previously discrete media platforms to any reception device. While many of us enjoy the benefits of such technologies, an important side-effect has been the disruption of the traditional business models and value-chains upon which the majority of our news media still depend. In particular, the online availability of newspaper content has seen a significant drop in hard copy sales and an inability to regenerate that revenue through online advertising. As the applicant documents duly note, revenue from small ads has dissipated across new online trading platforms such as Trade-me, while social media and search engines like Facebook and Google have soaked up advertising share by linking audiences to disaggregated content (to which they make minimal, if any, contribution). Over the last decade, the hard copy newspaper sector's share of advertising has declined from \$833m (37.2%) in 2005 to \$484m(20.3%) in 2014¹¹.

Across many media sectors, the proliferation of online content and subscription content providers has seen a gradual fragmentation of the audience. This trend should not be overstated, however, and it is important to recognise that new digital media have often complemented rather than supplanted the traditional platforms¹².

¹¹ See the Advertising Standards Authority (2004-2015), *Annual Advertising Turnover Reports*. Latest Reports available from: <http://www.asa.co.nz/industry/asa-advertising-turnover-report/>.

¹² NZ On Air/ Colmar Brunton (2014) *Where are the audiences? Benchmark survey of New Zealanders' media consumption*. Available from <http://www.nzonair.govt.nz/document-library/2014-audience-research-full-report/>

Indeed, the applicant's own document (fig 16) indicates that 36% of audiences still rely on print newspapers as their source of news/information. Nevertheless the changes in the ways audiences seek out and access content has destabilised the traditional media's capacity to reliably access mass audience demographics as predictably as in the past. In turn, this has destabilised the commercial viability of some key content genres. In particular, there has been a long trend of declining 'hard' content in news and current affairs¹³ because the uncertainty of revenue streams makes media managers risk-averse and less willing to accept opportunity costs. Populist, lowest-common-denominator formats which guarantee preferred demographics are therefore prioritised, whether in the form of celebrity 'click-bait' online or populist chat-show-style current affairs in prime time television. For example, MediaWorks' controversial decision to axe Campbell Live in 2015 was symptomatic of the increasingly ruthless intolerance for commercial underperformance. The long-standing head of news, Mark Jennings, subsequently resigned in the wake of the Newshub restructure, while the new head of MediaWorks' NewsHub, Hal Crawford, has suggested that 'quality journalism should be left to die'¹⁴).

The use of new audience metrics derived from online and social media (e.g. monitoring the number of times a story is clicked-on, 'shared' or 'liked', and the amount of browsing time it elicits) are increasingly being fed back into editorial decisions about news content priorities. In turn, this raises important questions about the news values which prevail if a choice to devote resources to cheaper, more popular 'soft' news or less popular, but more important 'hard' news has to be made¹⁵.

3.4 This leads to the fourth key factor: **consolidation**- the process by which news media companies seek to protect their market position and reduce commercial risks through restructuring their operations. There are two related modes of consolidation- the external form entails mergers and acquisitions with external parties to increase market share and/or diversify revenue (or possibly divestment and out-sourcing to off-load less profitable parts of the business). The internal form, meanwhile, entails internal restructuring of production to create efficiencies and reduce costs. For example, in 2014, APN group bought out The Radio Network (which comprises half of New Zealand's commercial media duopoly) along with online commerce company GrabOne. These were merged with its NZ newspaper holdings (the NZ Herald group) to form the new subsidiary NZ Music & Entertainment (NZME). Consequently, the news operations of the press and radio holdings were integrated into a single operation, ostensibly to take advantage of synergies in a converged market. MediaWorks likewise amalgamated its radio, television and online news into a centralised operation, Newshub..

The consolidation of newsrooms either in the form of creating cross-platform production synergies within an existing company and/or through horizontal mergers with existing competitors may well be economically rational. Returns on investment can be increased if such moves facilitate economies of scale or scope and if technology allows fewer newswriters to produce content that that can be syndicated and distributed across multiple platforms and publications. Such arrangements may eliminate the duplication of labour or the need to maintain multiple publications aimed at the same audience. Unfortunately, such efficiency gains almost always result in reduced newsroom budgets and journalistic redundancies. For example, in 2002, up to 90 jobs were lost when INL merged The Dominion with The Evening Post¹⁶. More recently, in 2015, the restructuring of NZME's news operation led to a series of redundancies, particularly among senior journalists, one of whom described the purge as a 'bloodbath'¹⁷. In March 2016, Australian Fairfax journalists went on strike after the company announced 120 job cuts¹⁸. Meanwhile, MediaWorks CEO Mark Weldon

¹³ See Atkinson, J. (1994). Structures of Television News. In P. Ballard. (Ed.) Power and responsibility. (pp. 43-74) Wellington: Broadcasting Standards Authority.

Also see: Baker, S.J. (2012). The Changing face of Current Affairs Programmes in New Zealand 1984-2004. AUT University PhD Thesis. Retrieved 31 October 2015 from <http://aut.researchgateway.ac.nz/bitstream/handle/10292/5552/BakerS.pdf?sequence=3>

¹⁴ Crawford, H. (2011) Why 'Quality Journalism' Should be Left to Die. Commentary in Mumbrella, September 20. Retrieved February 28 2016 from <http://mumbrella.com.au/why-quality-journalism-should-be-left-to-die-58311>

¹⁵ See Cherubini, F. & Nielsen, R.K. (2016) Editorial Analytics- How news media are developing and using audience data and metrics. Oxford Reuters Institute Digital News project. Available from: <http://www.digitalnewsreport.org/publications/2016/editorial-analytics-2016/>

¹⁶ See http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=2048381

¹⁷ Grant, N. (2015, September 18) Experienced journos excluded from NZME integration. National Business Review. Retrieved September 29 from: <http://www.nbr.co.nz/article/experienced-journos-excluded-nzme-integration-ng-178939>

¹⁸ See <http://www.nbr.co.nz/article/fairfax-journalists-strike-after-redundancy-announcement-ca-186419>

resigned in May 2016 after a backlash from staff over resourcing and staffing cuts (particularly in the Newshub restructure) and the estimated 150 redundancies incurred under his tenure¹⁹. In fairness, there will be some new jobs created by these restructures (e.g. in online marketing and technical platform-support roles) but the unmistakable pattern is that mergers and consolidations result in fewer journalists and subeditors doing more and more news work. It is also worth noting that media companies inflicting cuts and redundancies are unlikely to find their own reporters supplying critical reports of such decisions²⁰, although the existence of a significant competitor in the same news sector at least helps ensure such reports will be not be compromised by vested interests.

It is interesting to note that Fairfax and NZME used to be the main actors in the cooperative news agency, NZPA. Fairfax's decision to withdraw rather than continue to cooperate with its commercial rivals led to its closure in 2011 after 131 years, placing the smaller independent and regional newspapers at a significant disadvantage²¹. Despite persistent rumours of paywalls being imminent, neither NZME nor Fairfax have thus far moved to introduce such a model before their respective rival, leaving both in a potentially unsustainable financial position (although whether a merger is a viable response to this is another question). There is doubtless a concern that paywalls might drive consumers who have become accustomed to free online access to news content to other providers. NBR's model has worked because it has a specialist audience able and willing to pay for business news. But for the mainstream news media, a tension exists between an approach that seeks to maximise audience traffic to drive advertising revenue and a paywall model that aims to attract a lower level of paying readers²². The latter is more difficult to implement in a small market and the concern is that the decline in overall traffic and reduction of advertising revenues will exceed any revenues the paywall can generate.

There are obviously different models of paywalls such as the 'freemium' approach (e.g. free clickbait but a modest fee for in-depth content) or systems that allows casual browsing of a small number of news items but require payment for more frequent access. Interestingly, section 9.2 of the merger document notes several Reuters statistics for 'unwillingness to pay' for online news/information indicating 75% refusal rate in the UK and 63% in Australia. Nevertheless, that still means that between 25% and 37% *would* be willing to pay something. Given that NZ consumers currently are not asked to pay anything, it would be premature to abandon the paywall option as partial solution to the revenue decline faced by newspapers. Of course, market research that asks consumers whether they want to start paying for a product or service they currently get for free inevitably elicits averse responses, so the real challenge here is that it is difficult to be certain just how effective any given paywall model might be without actually implementing it.

One recent NZ study found that, although consumers were disinclined to pay for online access to individual publications, they were more willing to pay for a package of news and other content if it was bundled²³. This could have merit if the newspaper groups were allowed to collaborate in introducing a shared paywall giving access to a wide range of NZ (and maybe some Australian) newspaper content. Such a proposal might have the appear to entail anti-competitive price-fixing (and the Commerce Commission would necessarily scrutinize it), but this model would at least retain separate news groups, editorial control and ensure a degree of ongoing competition. It is ironic that the demise of NZME may have served to foreclose a more cooperative approach to tackling this issue. Meanwhile, insofar as the applicants are concerned about losing revenue to search engines and social media which link to their content while collecting the advertising revenue from the traffic, the possibility of developing new online architectures which mitigate against this could be explored (e.g. by taking users linking to content by proxy to the home page). Of course, it is not within the purview of Commerce Commission or the current submission process to recommend alternative

¹⁹ See <http://www.radionz.co.nz/news/national/303105/weldon-added-'insult-to-injury'-as-he-resigned>

²⁰ For example, consider this NZ Herald report on NZME's restructured newsroom:
http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11537424

²¹ See Hannis, G. (2010) Ownership, Cooperation and the News- a case study of the New Zealand Press Association. In V. Rupar (Ed) Journalism and Meaning Making- Reading the Newspaper. New York: Hampton Press Available from:
<https://www.massey.ac.nz/massey/fms/Colleges/College%20of%20Business/Communication%20and%20Journalism/Staff%20research%20files/GDHannis/NZPA%20ownership.pdf>
See also: <http://www.newshub.co.nz/nznews/nzpa-closure-huge-loss-for-nz-journalism-2011040621#axzz4Dn6wuAF2>

Also See NewsHub (2011, April 7). Regional papers to Lose in NZPA Closure:
<http://www.newshub.co.nz/nznews/regional-papers-to-lose-in-nzpa-closure-2011040720#axzz4D9PGx4Mw>

²² See Myllylahti, M. (2014) Newspaper Paywalls- the hype and the reality. Digital Journalism 2(2): 179-194

²³ See Clark, A. (2015) News Renewed- Funding News in the Digital Age. Available from <http://www.fundingnews.co.nz/>

business models to the applicants, or to argue that the government should introduce regulatory/policy reforms. However the CBB would contend that the merger is unlikely to be the solution to the crisis NZME and Fairfax are facing and that alternative approaches have not yet been exhausted.

3.5 Any of the factors identified above are problematic for the news media's role as Fourth Estate. Together, though, they constitute a structural crisis for the sector. Given that many of the problems stem from the inefficiencies of commercial media markets, it is reasonable to expect the government to implement policies to compensate. Unfortunately, current government policy settings may be part of the problem rather than part of the solution. The current framework is premised on the assumption that broadband infrastructure investment will improve the distribution and access to content, and, coupled with market forces, ensure diversity and quality. Unfortunately this framework is premised on a misunderstanding of how digital media markets operate in practice. The proliferation of new platforms for content creation, distribution and reception has seen a significant expansion of media content and services. For example, the arrival of subscriber video-on-demand (SVOD) services like Netflix and Spark's Lightbox services to compete with Sky/Neon arguably gives consumers more choice. For audience members who can afford to pay, the range of movies and dramas available on demand has undoubtedly expanded. But those who want in-depth news and current affairs to meet their needs as New Zealand citizens will find none of these new subscriber services invests in such content. Indeed, even though BBC World is on Sky and Al Jazeera is on Freeview, these provide no regular investment in domestic NZ-based news and current affairs).

The proliferation of online news and information content likewise does not ensure either quality or diversity. The blogosphere, citizen journalism and independent websites like Scoop may enrich the news media ecology and indeed, the mainstream media have developed a symbiotic relation with such websites (for example, blogger comments on mainstream news topics may get picked up on social media and then fed back into mainstream news coverage). Unfortunately, these peripheral websites cannot adequately compensate for the declining investment in professional journalism. The political blogosphere is also characterised by partisan political bias even among the (few) commentators with a reasonable understanding of political and economic issues, and the majority of intelligent blogosphere commentary still depends on mainstream journalism to do the ground-work and break the vast majority of stories. Occasionally the blogosphere will introduce new themes into mainstream political debate (albeit not always for the right reasons, as Dirty Politics revealed), but overall, the blogs have limited relevance to the majority of citizens and primarily provide an echo chamber for those already engaged in political debate.

Citizen journalism is not widespread in New Zealand, and its most common form comes in the form of unpaid audience opinion pieces picked up by the mainstream media for the purpose of generating clicks (e.g. Stuff Nation). Again, citizen journalism can sometimes contribute to the news ecology, given its potential to source news from localities not routinely covered by mainstream newsbeats. However, the apparent immediacy provided by a local eyewitness with a camcorder is often delivered without professional considerations of context and balance. So while citizen journalism can in some instances extend the scope of the mainstream news media it cannot provide a substitute for professional reporting, and certainly cannot be regarded as serious commercial competition. Meanwhile, there have been several efforts to try and create a viable platform for public interest journalism outside the mainstream commercial sector but New Zealand's small population and limited economy of scale means viability is always a challenge. For example, Scoop Independent Media, which primarily serves as a publisher of third-party news releases established a foundation for public interest journalism and managed to raise around \$50,000 to back it. Unfortunately this is obviously insufficient to employ anything close to a full newsroom with full-time reporters and editors. At best, such initiatives are going to be complementary to the mainstream news media.

Having provided some contextual considerations for understanding the likely impact of the merger in the NZ news media ecology, the next section will consider market definitions and the issue of product substitutability in more detail.

4.0 Market Definitions & Substitutability

4.1: The Commerce Act 3 (1A) states that *'Every reference in this Act, except the reference in section 36A(2)(b) and (c), to the term market is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them'*. The definition of 'market' is obviously important to the determination of whether or not a merger represents an undesirable degree of concentrated market power or the public benefit criteria. The wider the range of goods and services assumed in the market definition, the greater the level of consumer choice and competition will appear to be. Conversely, if the market is defined narrowly, including a smaller number of products/services then there will appear to be less consumer choice and competition (see for example, Dobbs, 2002²⁴; Jamison, 2014²⁵). The Commerce Commission Statement of Preliminary Issues rightly identifies the need (para 32) to 'consider the extent to which content is created with a specific platform (print, digital or radio) in mind' and 'assess whether there are separate 'content' markets defined by the subject matter or focus of the news/information (for example New Zealand or regional news)'. The Commerce Commission also rightly identifies the need (paras 35-36) to 'assess the extent to which websites such as TVNZ.co.nz and newshub.co.nz compete with the merging parties for readers and the extent to which international media companies are able to offer comparable content to New Zealand based parties.'

4.2 Following the precedents of the recent Bauer Media acquisition of several APN magazine titles, the merger documents acknowledge that media markets are two-sided, characterized by i) a wholesale market for advertising; i.e. the capacity to engage the attention of the audience with a desired message, the payment for which subsidises the cost of content creation/dissemination and ii) a retail market; i.e. public access to/consumption of the media content form itself, which in turn comprises the eyeballs/clicks which the advertiser pays to access. Although the wholesale retail and advertising markets are inter-related, the relationship between them can be complex. For example, advertisers' desire to access a specific audience demographic of a particular size may be content-agnostic and platform-neutral in the sense that the advertiser is unconcerned with whether the audience is reading the business section of a hard copy newspaper or streaming a rugby game on a smart-phone.

4.3 The broad market definition is arguably valid in the case of the wholesale (advertising) side of the market where the aim for global brands is often to maximise eyeballs, clicks and online traffic regardless of platform, content, location or demographic. As the applicants rightly point out, the newspaper sector in particular has lost advertising share to online operators like Facebook and Google. However, this argument would not extend so easily to local/regional advertising in NZ; for example, a local business in Invercargill is unlikely to benefit from eyeballs from the North Island or overseas. Nevertheless, the argument that the merger would not unduly restrict the supply of wholesale-side advertising on a national/global scale is plausible, especially considering the existence of the KPEX advertising exchange which Fairfax, NZME, TVNZ and MediaWorks already control.

4.4 Insofar as the applicants broad definition of the market has some validity on the wholesale side, it is regrettably invalid to suppose this applies equally well to the retail (audience) side. The definition of a platform-neutral, content-agnostic, fully-converged and globalised digital media market is untenably broad and assumes that digital convergence has rendered all audiences and all content forms substitutable for each other. The merger document lists a wide range of other ostensible competitors on the retail side (e.g. sections 14 and 16; Appendix 8), many of which are not news media competitors at all and numerous others which provide news/information forms but which are self-evidently not substitutable for New Zealand news content. Such a conception of the retail market entails a categorical error for two reasons; firstly because it conflates the substitutability of *platforms* on the wholesale advertising side with the substitutability of *content* on the retail side, and secondly, because news self-evidently does not substitute for other media content genres. Movies on Netflix do not fulfil the informational function of news and international news does not substitute for domestic NZ news (the BBC doesn't cover daily events in Kaitia or Te Anau).

4.5 The contention that newspapers and their corresponding websites compete for readers' attention and money against all other media and information providers is superficially valid insofar as anyone could, for

²⁴ See Dobbs, I.M. (2002) The Assessment of Market Power and Market Boundaries Using the Hypothetical Monopoly Test. Newcastle University School of Management Working Paper. Available from: <https://www.staff.ncl.ac.uk/i.m.dobbs/Files/market%20definition%20ijbe%20n.pdf>

²⁵ Jamison, M. (2014) Defining Relevant Markets in Evolving Industries. University of Florida Public Utility Research Center Working Paper. Available from: https://warrington.ufl.edu/centers/purc/purcdocs/papers/1317_Jamison_Defining%20Relevant%20Markets%20in%20Evolving%20Industries%20Final.pdf

example, choose to share cat videos on Facebook rather than read the local newspaper. But the distinctive 'product' made by Fairfax NZ and Wilson and Horton primarily comprises original New Zealand news content. As the Commerce Commission has noted, 'A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense'. In respect to the *functional* aspects of the product, domestic New Zealand news produced by professional journalists must be considered distinct from other forms of ostensibly factual information content such as blogs or academic commentaries (although these may, in some cases, entail journalistic elements and constitute news, the product is distinct and complementary rather than substitutable).

4.6 Despite the widespread references in the merger document to the need to respond to global competition from a wide variety of multi-platform news/information content providers, it is significant that section 12.24 a/b identifies the relevant markets for assessing the transaction more narrowly. On the wholesale/advertiser side, the merger document notes that 'The New Zealand market for the provision of print and online services to advertisers' (although it goes on to assert that this conservative and should include other platforms). Meanwhile, on the consumer (retail/audience side) it states that the relevant market to consider is 'the New Zealand market for the provision of print and online news and information services' without further qualification. This is certainly a more realistic delineation of the market boundary, but the scope of what counts as 'online' or 'information service' remains unclear (e.g. that could be construed to include SVOD services like Netflix or global news operations like CNN received by domestic NZ audiences). The NERA document (section 2.3.3.1) cited redacted figures which they claim 'strongly suggest that newspapers are subject to competitive pressure from news websites on the reader side. While there is little in the economics literature addressing the question of precise market definition on the reader side, a substitutability relationship between newspapers and news websites is supported'. The decline of newspaper sales and the increase in the number of readers accessing newspaper websites for free confirms this in principle. However, what the NERA document does not demonstrate is that domestic New Zealand news online is substitutable with non-NZ news provided by overseas news media. It may well be the case that New Zealand audiences go to the BBC or New York Times for their international news, but that does not mean this is substitutable with domestic news content- in most cases it will complement domestic news consumption.

4.7 The domestic newspaper sector (both print and their online versions) should therefore be acknowledged as the primary point of horizontal integration for any Fairfax and NZME merger. The applicants therefore have far fewer genuine competitors offering a substitutable product than the merger documents suggest. If one includes radio and television (and their respective websites) in the market definition, then Television New Zealand, Radio New Zealand and MediaWorks are the only significant rivals with comparable daily news audience reach and scope (i.e. the range of stories covered). If one defines the market solely in terms of the newspaper sector (and their respective online versions) the applicants' other direct competitor for the daily NZ news audience is Allied Press (which has a much smaller market share than either NZME or Fairfax). Other print news media such as the NBR and small regional independent newspapers and news-oriented websites are at best partial competitors with a much smaller audiences, either with a niche product or geographic catchment covering only a fragment of the domestic news market in which the applicants operate.

4.8 NZME and Fairfax do have other commercial interests which extend beyond the news market, of course, and it may be evidence for global cross-platform competition for other forms of content or services where substitutability on the retail side is more plausible. Crucially, though, *this does not apply to the domestic New Zealand market for news content* either on a national level or (especially) on a regional/local level. As the NERA paper submitted by the applicants notes (table 4) there is limited substitutability on both the advertising and retail side for local/regional newspapers and thus limited price competition. This analysis also noted that the news content between metropolitan and regional newspapers is different, and concedes in (section 3.1.1) that although other media may impose some degree of price constraint, 'offline platforms like television are not technically in the same antitrust market'. This would seem to complicate the applicants' argument that media convergence/homogenisation implies a single market.

4.9 The claims in the merger document concerning the fundamental shift in audience news consumption patterns (e.g. section 6.28-6.34) are also overstated. The integration of traditional media platforms into online platforms has not resulted in the sudden obsolescence of traditional news media forms. On the retail side, the audience is a long way from being completely platform neutral or content agnostic. Although audience fragmentation (and revenue fragmentation) is occurring, the new platforms complement traditional media. In many instances where reception device preferences have shifted, the demand for important content like reliable news does not fundamentally change. The applicants' understandable consternation that online companies like Google and Facebook have gained a significant proportion of advertising share stems not from an audience preference for news created by search engines and social media, but for news provided by traditional news media through new architectures of access and channels of distribution.

4.10 Audience research suggests that many new media platforms complement rather than directly supplant traditional media usage. Indeed, the applicants' own document (fig 16) cites Nielsen research showing that 36% of weekly NZ audiences for news/information use print-only, while a further 31% use both print and online (suggesting newspapers are still used by 67% of the public) and just 33% who rely solely on online news. The 2014 NZoA Colmar Brunton NZ audience study²⁶ likewise found that 78% of people still access newspapers (both online and print), while 52% of people still read newspapers on a daily basis. Clearly, the newspaper sector's importance as a news medium has not dissipated at the same rate as its revenue streams.

4.11 The NZoA/Colmar Brunton report also found that 83% of people watch linear TV on a daily basis. TV One and TV3, which provide the majority of TV news have a 48% and 35% audience share respectively (although this includes non-news content). Meanwhile, 67% listen to live radio on a daily basis, and in regard to news/information-oriented stations this includes audience shares of 12% for RNZ National, 8% for NZME's Newstalk ZB, and 4% for MediaWorks' Radio Live. In contrast, the report notes that new digital/online media rarely have an audience reach of over 10% on a daily basis, suggesting newspapers, radio and television still have a relatively high profile as a common public information source. Interestingly, the study also found that New Zealand audiences typically access radio and newspapers (including online versions) earlier in the day while television is more prevalent in the evening. Coupled with the evidence of a declining but still substantial newspaper readership, this would support the notion that, even if new information sources accessed by social media are becoming more important, traditional audience routines in news consumption have not yet fundamentally changed and that the different platforms remain substantially differentiated as sub-markets.

4.12 Even if rival news media such as radio and television companies are now providing some textual news content on their websites, text/print news of the form provided primarily by the newspapers companies continues to occupy a central position within the news media ecology. The NERA document notes the distinctiveness of non-news websites and observes that (appendix table) 'we think it is unlikely that there would be material competition on the listener/reader side of the market, as there is no overlap in radicand the nature of radio compared to other products (print and websites) is distinct. Given that the majority of the population still accesses newspapers, and a sizable minority (36%) depend on them as their principle source of news (merger document fig 16), an argument could be made that the newspaper sector itself (along with their websites) should be considered a discrete submarket for the purpose of determining questions of market concentration. Newspaper titles, whether in hard copy or in their online versions, continue to form a critical part of the informational fabric of public life and the news routines of the majority of the New Zealand public. This is actually supported by the newspaper sector's own marketing to potential advertisers. For example, Fairfax itself argues that news papers offer superior audience credibility and engagement: 'Readers feel better informed after reading their paper and feel it is a good use of their time, not a 'blobbing out' experience such as TV. Newspaper readers are focused on reading the newspaper and are not engaged in other activities at the same time, unlike some other media that become 'wallpaper' or background noise' and that, 'Research shows that consumers find newspapers to be leading source for trustworthy, believable ads, well ahead of magazines, TV, radio or online ads. Newspapers ads are seen as less intrusive and are not as likely to take away from the enjoyment compared to other media.'²⁷

4.13 Given that the proposed NZME/Fairfax merger would place over almost 90% of the newspaper market (including online newspaper versions) under the control of a single corporate entity, questions about editorial plurality and independence as well as the potential for agenda-setting influence need to be raised. Even if such question are not generally deemed germane to arguments about market competition, a substantial part of the applicants' claims about the long-term benefits to the consumer hinge on their claims that the factual will ensure greater diversity and quality of product. These claims are highly suspect and completely out of alignment with the recent empirical evidence concerning newsroom mergers.

4.14 At the very least, the retail (audience) side of the *domestic New Zealand news market* must be considered discrete for the purposes of the Commerce Commission's determination of the proposed NZME/Fairfax merger. There is also a case for considering whether the *domestic newspaper* subsector should be classed as a discrete market in its own right, especially on local/regional level. Either way, there is

²⁶ NZ On Air/ Colmar Brunton (2014) Where are the audiences? Benchmark survey of New Zealanders' media consumption. Available from <http://www.nzonair.govt.nz/document-library/2014-audience-research-full-report/> For other useful data see Nielsen (2016) Media Trends 2016 Report .Available from https://www.tvnz.co.nz/content/dam/images/tvz-sales/Insights/TM_New%20Zealand%20Media%20Trends%202015_Summary.pdf

²⁷ See Fairfax (no date) Advertise in Newspapers. Available from: <http://www.fairfaxmedia.co.nz/portfolio-nz/advertising-in-newspapers>

a substantial risk that an over-concentration in market power and substantial reduction in competition on the retail side would arise were the merger scenario to proceed.

4.15 If this perspective on the relevant market definitions and boundaries is still subject to disputation, it is worth considering the conclusions drawn by the 2013 Law Commission report 'The News Media Meets New Media'²⁸. Some relevant extracts are quoted at some length below, with emphases added in bold where relevant:

The News Media Meets New Media: Sections 3.22-3.25:

While acknowledging the step-change brought about by the digital revolution, we reached the preliminary conclusion that, for the moment at least, **there remained a public interest in continuing to recognise the news media as a special class of publisher with distinguishing rights and responsibilities arising from the functions they perform**. We based this conclusion on the following arguments. First, the type of communication engaged in by the news media has unique characteristics linked to its distinct purpose. These characteristics, including a commitment to accuracy, distinguish it from other types of expression. In discussing the role of new actors engaged in 'news like' activities there is often a failure to recognise these distinctions. Advocacy, propaganda, public relations, activism – these are all legitimate forms of communication, but they serve a different function, and involve a different process, than the reasonably dispassionate gathering and disseminating of news of public interest. **While alternative sources play an increasingly important part in the news ecosystem, for the moment at least mainstream media outlets play a critical role as primary news gatherers**, and as an efficient mechanism for amplifying, verifying and making sense of the information released to the world.

Second, **while newspaper revenues and circulations may be in serious decline in many western-style democracies, this does not mean the news media has lost its power or influence**. Much of the mainstream media's power derives from its ability to coalesce mass audiences. It provides a mechanism by which citizens are given access to the same body of information, on which they can rely to make informed judgements, at roughly the same time. This allows societies to debate issues and reach consensus based on common knowledge. It is a vital role the mass media performs in a democracy. Digitisation and new communication technologies have amplified the reach and influence of mass media, allowing it to coalesce global audiences on a previously unimaginable scale. Arguments for relaxing the responsibility requirements for news media fall down in the face of these realities.

Third, while the digital idealists argue that the public can now source information and news horizontally and so no longer depend on institutional news media, the facts do not yet support this democratised ideal. Despite the plethora of sources and fragmentation of audiences, there are in fact few alternative primary news gatherers and market research clearly shows that for the moment at least the public continues to rely on mainstream media sources or their news – regardless of whether it is accessed via social media or via traditional channels.

Sections 3.40-3.42:

The dynamic and symbiotic relationship between traditional and new media is increasingly evident in the news agenda, as news broken within the blogosphere percolates up into the mainstream media – either through strategic alliances or more organically through the use of social media and search engines. At the same time, mainstream media is moving to incorporate the values and tools of social media in their own processes and products. Readers and viewers are invited to supplement reporters' coverage of live news events and to comment on stories. Facebook and Twitter are routinely used to interact with audiences, promote the sharing of content, source information and build brands. Most recently, Fairfax Media, publishers of Stuff, launched a separate section, Stuff Nation, allowing users to contribute their own material to the national website.

But revolutionary as these changes are, they have not, in our view, eliminated the public's need for ready access to credible and authenticated sources of information about what is happening in their communities and the world at large. Nor have they eliminated the need for primary news gatherers – people and organisations who gather information in a

²⁸ NZ Law Commission (2013) The News Media Meets New Media – Rights, Responsibilities and Regulation in the Digital Age Report 128 <http://r128.publications.lawcom.govt.nz/uploads/NZLC-R128-The-news-media-meets-new-media.pdf>

reasonably dispassionate manner for the express purpose of disseminating that information to the public, rather than because they gain some personal, political or organisational advantage from doing so. Nor have they eliminated the public's need for fair and accurate reports of the activities of the private and public institution whose decisions impact on the lives of ordinary citizens. Nor have they eliminated the need for the impartial scrutiny of Parliament, legislators and the courts.

5.0 Public Benefits and Detriments

5.1 NZME and Fairfax contend that their proposed merger would confer significant public benefits and carry no detrimental consequences for the public interest. Specifically, the applicants assert that the merger (factual scenario) would result in greater efficiencies of production and distribution and thereby free up revenue which could be reinvested in 'quality' journalism.

For example, in section 1.9 it is asserted that; 'Studies²⁹ show improvements in quality and diversity from a merger of publishers. The reason for this is clear; the merged group's financial success depends on it being able to attract the widest range of audiences possible in competition against all other forms of content. The merged business will be incentivised to retain talented journalists across the spectrum of views to expand that audience reach'.

In section 1.1.2 (b), it is claimed that 'the quality of news/information content will be improved by the ability of the merged entity to invest in quality editorial content. The merged entity will be incentivised to invest because the creation of quality local news/information will continue to be the way it differentiates its digital offering from other media from the multitude of consumer and other third-party generated content available online'. This ignores the overwhelming evidence that commercial pressures from advertisers are a crucial factor in driving news providers toward 'soft' populist content and away from serious, investigative 'hard' news.

In section 6.48 (a) it is claimed that, 'the Transaction will enhance the abilities of the parties to create high quality journalistic content by rationalising their assets and operations and lowering their combined cost base. By rationalising their assets and sharing fixed costs, the Parties will have proportionally more revenue to allocate to high-quality content creation for consumers.' The applicants neglected to add that, on the other hand, the savings might be redistributed to shareholders as dividends- which is the far more likely scenario.

Section 20, subtitled 'Public Benefits' likewise makes a series of assertions regarding the ostensible public benefits of the merger. These include-

'to provide the Parties with the opportunity to deliver a market-leading offering rich in local content, to engage more consumers and advertisers in the New Zealand market' (20.1). This is an understandable commercial goal for a private media company, but engaging more consumers and advertisers would be entirely compatible with a shift to more populist content and further reductions of newsroom resources and reporters undertaking serious investigation.

'to support the investment required to continue to deliver high quality local and regional news [...] both companies must continue to restructure/adapt their businesses to deliver advertising customers a more targeted, lower cost, more data rich, higher ROI [return on investment] and more diversified multi-product offering' (section 20.20). Again, this is a commercial benefit to the company shareholders and arguably advertisers, not a conferral of any public benefit.

To enable 'a sounder financial foundation to address the rapid, and long term, structural changes affecting the industry' (20.3b). Likewise, this is an understandable goal but it implies increasing the market power of the merged entity which would have implications for competitors.

'coverage of a greater number of issues/stories by de-duplicating coverage so that journalists' time can be freed up to cover a broader spectrum of issues' (20.4d). This seems to be a tacit admission that redundancies would ensue under a merger scenario. The suggestion that journalists would be reassigned to broaden the scope of coverage does not align with the evidence of recent newsroom restructures, it also raises questions about newspaper reports depending on a single journalistic perspective syndicated across all the other publications. This removes the checks and balances³⁰ which arise from having multiple reporters covering the same issue and increases the likelihood of errors not being corrected.

'From their own experience of the New Zealand media market, the Parties are confident that the Transaction will give rise to improvements in both the quality and diversity of the content provided by the merged entity. The need for the merged company to engage consumers from across the spectrum of views

²⁹ No studies are actually cited.

³⁰ It is also worth noting that the merged entity would have significant influence over the NZ Press Council which would be completely dependent on its revenues.

in an increasingly crowded digital content market, and the need to support the relevance of print in the light of the combined group's investment in those assets, will ensure that this will continue to be the case' (20.17). This sounds laudable but the commercial pressures to maximise audiences are unlikely to incentivise quality or diversity. The purported benefits fall well short of a formal undertaking to ensure that these would indeed be the outcome of the merger.

5.2 Section 6.48c comments on the counter-factual scenario and claims that 'If the Parties continue to operate separately, there is a risk that in the short to medium term, continued decreases in print circulation/ advertising revenue will result in the rationalisation of incrementally more publications and accordingly a greater risk that the tipping point is reached at which print becomes irrelevant to a sufficiently large number of New Zealanders that all but the most popular titles are no longer viable.' However, this ignores a more fundamental point that these risks are unlikely to diminish significantly under the factual scenario of a merger, and indeed, the possibility (if not probability) that such outcomes would be expedited by new financial shareholder demands.

On a related point, Section 12.4 and 12.7 acknowledge some degree of substitutability and competition with a variety of smaller local/regional newspapers whose position in the current media ecology could well be compromised by a merged entity's capacity to compete more aggressively in the domestic advertising market. Section 6.48 b notes that the merged entity will compete more effectively with global competitors on the wholesale side in regard to a 'New Zealand focussed, targeted, data rich offering'. Whether or not this is correct, what it neglects to mention is the extent to which this also implies winning advertising share from *existing competitors in the NZ market*, including its smaller competitors in the struggling newspaper sector. These smaller publications are no less affected by the various market pressures NZME and Fairfax are trying to respond to (a point acknowledged by the applicants in section 14.28), but they have far less market power and financial clout to respond. The further consolidation of the two major newspaper sector operators surely carries a risk of increasing the precarity of these smaller competitors. Ironically, the merger document suggests that such commercial pressures on smaller publications will have the effect of incentivising them to maintain news quality (section 14.32 iv). But if that is true for these smaller actors, why then is it not also true for NZME and Fairfax without the need for a merger?

5.3 The various assertions concerning the ostensible increases in journalistic investment and news quality assertions must be regarded with scepticism. There is no formal undertaking implied in the documents that would bind the current or future shareholders and managers to any such undertaking. Of significant concern is the studious oversight of the recent evidence of newsroom consolidations, all which have resulted in significant journalistic redundancies and newsroom budget cuts (see section 3.4, this document). The merger document also overlooks half a century of research³¹ into media industries that demonstrates a strong pattern of intensified commercial pressures and media consolidation driving media content towards the least risky and most profitable content genres and audience demographics, with a consequent decline in the depth and substance of investigative 'hard' news. There seems to be a blanket refusal to acknowledge any potential for detrimental outcomes. Such omissions may be expedient but they do not engender confidence in the objectivity of the merger document. The reader is just being asked to believe the applicants' own self-interested assertions. The merger proposal then goes on to declare (section 6.43) that the consolidation of their respective operations is 'necessary and desirable' -presumably for their shareholders rather than the public.

5.4 To summarise, then, the central claim of the NZME/Fairfax proposal that the efficiencies gained through the merger (factual scenario) would permit additional investment in quality journalism. The arguments presented do not stand up to examination. There are four key themes of criticism:

a) The applicants cannot yet know who will own the merged entity after an IPO. Hypothetically, it could end up being controlled by a private equity firm like Oaktree or Ironbridge or another major media group headed by a mogul like Rupert Murdoch. The former would probably result in newsroom cuts and extraction of every last cent from the operation while news production became focused solely on the most cost-effective news genres (i.e. 'soft' news/clickbait not 'hard' investigative news). The latter would probably pursue a similar

³¹ For example, see:

Golding, P. & Murdock, G. (1997) (Eds.) *The Political Economy of the Media Vols. I & II*. Cheltenham: Edward Elgar.
Wasko, J., Murdock, G., & Sousa, H. (2011) (Eds.) *The Handbook of Political Economy of Communications*. London: Blackwell.
Winseck, D. & Jin, D-Y. (2011) (Eds.) *The Political Economies of Media- the transformation of the global media Industries*. London: Bloomsbury.
Birkinbine, B. Gomez, R., & Wasko, J. (2016) (Eds.). *Global Media Giants*. London: Routledge.

strategy over a different strategic time-frame, but would facilitate the centralised dictation of the managing director dictating editorial outlook over the entire portfolio. Either way, plurality and editorial independence would be put at risk, not guaranteed.

b) Even in the (unlikely) event that the merges sees all current news publications maintained, no journalists made redundant, and extra resources invested in news production, the ostensible plurality would be undermined by increased cross-title syndication of content across titles and platforms and an increased concentration of editorial power over a substantial segment of the NZ news media ecology. Under the merger scenario, almost 90% of the daily newspaper market (retail side) would fall under the control of the new merged entity. Given the evidence that 36% of the audience still rely on print news media as the primary source of their news, the continuing routinised consumption of newspapers and their websites as a source of everyday information, and the newspaper sector's own claims about the continuing level of reader engagement, there is a legitimate concern about the political influence that could potentially be wielded. The major newspaper titles contribute significantly to the overall shape and parameters of political discourse and the scope of the daily news agenda (a concern that would be magnified in respect to the composition of the Parliamentary Press Gallery). A plurality of publication titles is necessary but not sufficient to ensure a plurality of outlooks and editorial independence. Consequently, placing so many titles under the control of a single entity constitutes an invitation for abuse.

c) The assumption that in a 2-sided media market, the advertising side exerts a countervailing force on content pricing and quality (see merger document sections 12.10, 14.13, 14.27, 20.7) misconstrues 'quality'³² as merely a function of sales/eyeballs (while the NERA document duly notes the complexity of modelling this quantitatively and sidesteps the question). In respect to news content, there is overwhelming evidence that the commercial pressure to maximise ratings/eyeballs/clicks is the driving force behind the increased focus on populist trivia (e.g. celebrity news and cat videos) and the concomitant decline of 'hard news' and investigative, in-depth reporting. Indeed, many commercial news media are now using social media metrics and audience browsing habits to inform editorial policy and prioritise news values- but the 'efficiencies' this creates makes quality journalism harder, not easier to sustain.

d) The NZME/Fairfax merger proposal fails to demonstrate that the factual scenario would confer public benefits without detrimental outcomes. The converse is more probable. The overall justification for the merger seems to be premised on an expedient conflation of the applicant's own private commercial interests and the public interest. The merger proposal is essentially demanding that competition law accommodate not only the applicants' need to defend their business models to ensure their continued commercial survival but extend to them the prerogative to restructure their operations to secure returns on investments deemed acceptable to their shareholders without regard for detrimental consequences (including the survival of other, smaller newspaper companies). In effect, the merger requires the public to shoulder the risk of detrimental market and democratic outcomes in order to allow two already major news media companies to consolidate their market position for the benefit of their Australian parent companies. This falls well short of any public interest criteria.

³² We note that both the NZME/Fairfax merger document and the supporting NEPA document acknowledge the difficulty of defining and measuring quality. It is certainly a fraught concept, but it seems obtuse to premise core arguments for the merger on the ostensible increases in 'quality' and then side-step the definition. For reference, an overview of different frameworks of analysing media quality along with several case studies, can be found in: Thompson, P.A. (2006) Approaches to Measuring Quality in Broadcasting. Report commissioned by the NZ Broadcasting Commission (NZ On Air)

6.0 Modelling Market Concentration under the factual and counter-factual scenarios

6.1 The NERA document submitted in support of the merger outlines several formal econometric approaches to modelling the proposed merger. However, it also acknowledges at various points the complexity of applying these models to a 2-sided media case (sections 2.3.4/ 3.1/ 3.1.1.2/ 3.2) and the potential that these may not be entirely valid. The figures in the document are so heavily redacted that it is impossible for a third party to discuss the findings in any detail. However, it is difficult to follow the precise reasoning for the conclusions suggesting minimally detrimental consequences and confirming public benefits. We suspect that even if the various calculations are valid, the interpretation of the findings has been shaped by some of the assumptions about the intrinsic benefits of efficiency gains without considering the more qualitative (but arguably more substantive) evidence of recent patterns of institutional behaviour in the news media sector. We also note that the arguments tend to support the merger more strongly on the wholesale (advertising) side than the retail (audience) side (the Bertrand and Cournot simulations were not applied to the retail side). As such, the NERA document cannot be considered definitive in its conclusions.

6.2 It is interesting that a fairly standard and mathematically straight-forward method for gauging market concentration and potential risks from a merger has not been deployed in the NERA discussion, namely the Herfindahl Hirschmann Index³³. The index is calculated as the sum of the squares of percentage market shares for all the actors in a given market. A 100% monopoly would score 10,000 (100 x 100). While 100 firms competing with a 1% share each would score 100 [(1 x 1) + (1 x 1) + (1 x 1) etc.]. Conventionally, a score of < 100 indicates a high level of competition; a score of <1000 is regarded as indicating a competitive market, a score of 1000-1800 is regarded as a moderately concentrated market, while a score > 1800 is regarded as a highly concentrated market with limited competition. Mergers which increase the HHI index by > 100 points invite anti-trust concerns. (The US Department of Justice now takes a more relaxed definition and considers markets of between 1500-2500 to be moderately concentrated while mergers increasing the index by >200 raise antitrust concerns³⁴).

6.3 The analysis below attempts to calculate an HHI index for both the factual and counter-factual scenario based on a retail side market defined by *daily audience shares* of New Zealand news sources. The figures have been adjusted to try and reflect the overall audience ratio for the 15+ population. Two calculations are presented, the first for the major news media including newspapers, television, radio, including their online versions, and the second just for the newspaper sector (again including their online versions). Magazines have been excluded (few of which are specifically news oriented) as have the smaller regional and weekly newspapers, although NBR is included because its online version has daily traffic (although note that including these would increase the relative market share for Fairfax and NZME and thus their respective and merged HHI scores). The reason for focusing on daily news audiences is that these can be regarded as a better indicator of broad audience routines and the potential for persistent media influence and editorial power than occasional publications.

6.4 The inclusion of other radio and television news media is premised on the applicants' claim that they are competing across platforms with all other information providers. While we do not accept the breadth of the applicants' market definition (including international news media and blogs), the above analysis does try and reflect all the significant New Zealand sources of daily news in New Zealand. In the case of broadcasting, only the major evening news audience of the two main channels (TV One and TV3 Newshub) are included (MediaWorks supplies Sky/Prime's news) while in the case of radio, the overall audiences for RNZ National, Newstalk ZB and Radio Live are included because they are the main news providers (and other commercial stations within the respective NZME and MediaWorks groups do not produce their own news).

6.5 As with the NZME modelling, it is essential to provide several caveats about the calculations. Given the heavy redaction of commercial figures in the merger papers several figures (notably for online audiences)

³³ See Investopedia: Herfindahl Hirschman Index. Available from: www.investopedia.com/terms/h/hhi.asp also see US Department of Justice <https://www.justice.gov/atr/herfindahl-hirschman-index>

³⁴ The relaxed US parameters are arguably an accommodation of the major corporate media interests in the US who have been lobbying for relaxed controls to facilitate cross-platform mergers, especially those involving telecom/internet sector takeovers of media content companies. There is ample evidence of very active media lobbying against any constraint on mergers and acquisitions; e.g. <http://www.smh.com.au/business/media-and-marketing/scrap-crossmedia-ownership-rules-fairfax-20140224-33chq.html>

Also see <http://www.bloomberg.com/gadfly/articles/2016-04-15/a-look-at-corporate-lobbying>

Also see: http://www.epi.org/publication/books_cross-ownership/

have been estimated from other data sources and may be imperfect³⁵. If the Commerce Commission considers this data to be problematic, we would welcome the publication of more complete and accurate HHI indexes for the merger. As it stands, the online audience figures for Stuff and NZME are probably too conservative (although that favours the applicants in the calculation). Nevertheless, as ballpark estimate of how competition in the New Zealand market for news (retail audience side) will be affected by the proposed merger, the HHI indexes here should be considered plausible and reasonably valid.

Fig 1) Estimated Daily News Audience Share in New Zealand: All Media + HHI Market Concentration figures

Controlling Media Group	News Medium/Publication	Approximate daily news audience	Approximate % News Audience Share per group	Herfindahl-Hirschman Index score (rounded)
Radio New Zealand ³⁶	RNZ National	444,000 ³⁷	20.3%	412
	RNZ Online & Wireless	52,000 ³⁸		
TVNZ	TV One News	647,000 ³⁹	27.5% (3.4% online market)	756
	TVNZ Ondemand ⁴⁰	27,000		
MediaWorks	Newshub TV3 ⁴¹	230,000 ⁴²	15.9% (1.4% online market)	253
	Newshub Online ⁴³	11,000		
	Radio Live	148,000 ⁴⁴		
NZME	Newstalk ZB ⁴⁵	286,000 ⁴⁶	22.0% (6.0% online market) (204,000 total press NZME)	484 (1062 if merger proceeds)
	NZME Online Media	48,000		
	NZ Herald ⁴⁷	134,000		
	BOP Times	15,000		
	Rotorua Daily Post	7,000		
	Hawkes Day Today	20,000		
	Northern Advocate	12,000		
	Wairarapa Times Age	6,000		
	Wanganui Chronicle	10,000		
Fairfax	Stuff.co.nz	47,000	10.6%	112
	Dominion Post	59,000		

³⁵ It is worth noting that the 2016 NZoA/Colmar Brunton audience report observed that: ‘As technology expands and evolves, and audiences fragment in the face of ever-widening choice, it becomes more difficult to measure consumer behaviour across all sources. For instance there is no single source measurement of on air and online behaviour, and such a development looks to be at least several years away in New Zealand. There is therefore no way to measure duplicated or exclusive reach across different platforms.’ The difficulty of applying economic models to a converged media market was also acknowledged by the NEPA analysis commissioned by the mergees.

³⁶ Data calculated from <http://www.radionz.co.nz/about/audience-research> plus NZ on Air/Colmar Brunton 2014 audience report <http://www.nzonair.govt.nz/document-library/2014-audience-research-full-report/> plus Statistics NZ population data.

³⁷ 12% of 15+ audience share identified in NZOA/Colmar Brunton 2014 audience report, calculated in ratio to Stats NZ 2016 NZ population figures

³⁸ Based on RNZ monthly audience figures for the Wireless and RNZ Online divided by 31-possibly an underestimate.

³⁹ Nielsen data cited in http://www.nzherald.co.nz/entertainment/news/article.cfm?c_id=1501119&objectid=11603105

⁴⁰ Online audience estimated from SMI digital advertising data, Audit Bureau of Circulation Figures <http://www.asa.co.nz/wp-content/uploads/2015/06/ASA-Advertising-turnover-report.pdf>, and the 2016 Nielsen Media Trends report https://www.tvnz.co.nz/content/dam/images/tvz-sales/Insights/TM_New%20Zealand%20Media%20Trends%202015_Summary.pdf Specifically, the audience levels are estimated by projecting the overall online audience from the total daily newspaper circulation then (assuming a more-or-less linear relation between audience size and advertising revenue) dividing this by the online market shares for each company- see NZME/Fairfax merger document, fig 13 & fig 16).

⁴¹ Note that Mediaworks Newshub is currently the provider of news content for Sky and Prime TV.

⁴² Calculated as for TV One news.

⁴³ Estimate calculated as for TVNZ Online

⁴⁴ 4% of 15+ audience share identified in NZOA/Colmar Brunton 2014 audience report, calculated in ratio to Stats NZ 2016 NZ population figures.

⁴⁵ Newstalk ZB has been included as NZME’s main news-oriented radio station. Other radio stations would carry news but NZME is the one primarily dedicated to news/information. The overall radio news figure for NZME would be higher.

⁴⁶ 8% of 15+ audience share identified in NZOA/Colmar Brunton 2014 audience report, calculated in ratio to Stats NZ 2016 NZ population figures

⁴⁷ Daily Newspaper stats from Audit Bureau of Circulation rounded to nearest 1000.

	The Press	59,000	(5.8% online market) (212,000 total press Fairfax)	
	Manawatu Standard	11,000		
	Nelson Mail	11,000		
	Southland Times	21,000		
	Taranaki Daily	17,000		
	Timaru Herald	10,000		
	Waikato Times	24,000		
Allied Press	Otago Daily Times	35,000	2.0% (39,000 total press Allied)	4
	Greymouth Star	4,000		
	Allied Press online ⁴⁸	9000		
Independent	Ashburton Guardian	4,000	0.2%	0.04 (neg)
Independent	Greymouth Star	4,000	0.2%	0.04 (neg)
			Total 455 ,000 all daily newspapers	
Scoop Foundation	Scoop Independent News ⁴⁹	15,000	0.6%	0.4
National Business Review	NBR print edition ⁵⁰	13,000	0.8%	0.6
	NBR online edition	7,000		
TOTAL		2,447,000⁵¹		
			HHI Counter Factual (no Fairfax/NZME merger)	2085
			HHI Factual (Fairfax/ NZME Merger Permitted)	2551

6.6 As the analysis shows, the retail (audience side) market for news is relatively concentrated in New Zealand, with five major news media companies predominating. With NZME and Fairfax considered separately (counter-factual), the overall HHI score is 2085, which even on the looser US scale, indicates a moderately high degree of market concentration. The critical issue, however, is that the HHI score increases to 2551 in the event of a merger (factual) between NZME and Fairfax- an increase of 466 which must be regarded as highly problematic for its anti-trust implications. On that basis, the merger must be interpreted as creating an entity with an undue level of market power, not only in respect to its potential to influence pricing but in the concentration of editorial control under a single commercial entity and its implied capacity to the shape the national daily news agenda and frame political debates and issues. In short, the HHI increase suggests the merger constitutes a substantial reduction of competition and editorial plurality in the news media ecology.. If one breaks down the news market further and recognises the continuities in the way audiences access news content through traditional media platforms⁵², for example continuing audience routines following news through newspapers and radio earlier in the day and television in evening, then there is a case to be made for considering the newspaper and their online counterparts as a discrete sub-market.

Fig 2) Company- Newspaper and Online Print market⁵³	Audience (to nearest 1000)	%	HHI
NZME (not including radio)	252,000	43%	1849
Fairfax	259,000	44%	1936
Merged Entity	511,000	87%	7569
Allied press	48,000	8%	64
Ashburton Guardian	4,000	0.01 (neg)	-
Greymouth Star	4,000	0.01 (neg)	-
NBR	20,000	0.3	0.1 (neg)
Total:	587,000		
	HHI Counter Factual (no Fairfax/NZME merger)		3849
	HHI Factual (Fairfax/ NZME Merger Permitted)		7633

⁴⁸ Estimated from the ratio of overall Allied Press circulation to NZME and Fairfax, projected to online.

⁴⁹ Estimated from Scoop monthly online traffic calculated for a daily basis: <http://www.scoop.co.nz/about/about.html>

⁵⁰ Estimated from NBR weekly readership data calculated for a daily basis: <http://www.nbr.co.nz/article/quality-recession-boosts-nbr-readership-103339>

⁵¹ This figure would include duplication for people who use multiple news sources throughout the day.

⁵² NZ On Air / Colmar Brunton (2014) Survey of Regional TV Audiences. Available from: <http://www.nzonair.govt.nz/document-library/regional-tv-audiences-research-2014/>

⁵³ All data calculated as with previous HHI table.

6.7 Obviously this narrower market definition diverges from the claims that the applicants have made in respect to market definition. However, insofar as they also note (figure 16) that 36% of the weekly news audience uses print news media exclusively, while a further 31% uses both print and online, this would surely suggest a significant proportion of the public for whom print news and hard-copy newspapers remain a primary source of news and information. Given that consideration, it is far from irrelevant to consider the shape of the newspaper/press sector in its own right. What the HHI figures suggest is that this is *already* an unacceptably concentrated market with existing anti-trust concerns. The proposed merger between Fairfax and NZME increases the HHI by a massive 3784. This constitutes a massive and substantial reduction in the level of competition and a commensurate increase in centralised editorial power in this sector,. Indeed, the merged entity would control 87% of the newspaper/online print market- a level bordering on a *de facto* monopoly- which must be regarded as an unacceptable loss of editorial plurality in the newspaper sector.

7.0 Conclusion

On the basis of the above considerations, the CBB concludes that the merger scenario fails the public benefit test, would substantially lessen competition, and would constitute an unacceptable concentration of editorial power. Consequently, we recommend that the Commerce Commission should NOT clear or authorise the proposed business acquisition (the transaction) or other merger arrangement between Wilson & Horton Ltd (NZME) and Fairfax NZ Ltd (Fairfax).