

**SUBMISSION BY NZME AND FAIRFAX ON THE
COMMERCE COMMISSION'S DRAFT DETERMINATION DATED 8 NOVEMBER 2016**

EXECUTIVE SUMMARY

1. In its Draft Determination dated 8 November 2016 ("**Draft Determination**"), the primary basis on which the Commission indicated it would decline the application by NZME and Fairfax to merge was its view that the merged entity (which we refer to as "**NZME2**" for ease of reference) would control the media agenda in New Zealand, giving rise to a material loss in media plurality or loss of voices.
 2. The parties' observation is that the Draft Determination highlights several key issues the Commission needs to consider carefully before reaching a final decision in relation to this Transaction. These are expanded upon in this submission and can be summarised into three key areas:
 - (a) **Nature of competition in news media has been misunderstood:** Significant competition and plurality exists in news media beyond the parties in the form of other "traditional" news businesses such as TVNZ, MediaWorks, RNZ, and many others. In addition, any barriers to entry and expansion have been lowered by distribution platforms such as Facebook and Google.
 - (b) **The counterfactual would result in a greater loss of plurality:** The most likely outcome in the absence of a merger is that the parties would each be forced to significantly reduce their investment in front-line journalism in the short to medium term, and this would result in a loss of plurality, particularly as these cut backs would impact "niche" areas including regional and community reporting.
 - (c) **Regulating media plurality is not within the remit of the Commission:** The Commission has stepped outside its jurisdiction under the Commerce Act in reaching a view that despite the economic benefits of the merger outweighing the measurable economic detriments it is entitled to decline the merger on unquantifiable media plurality grounds.
- Nature of competition in news media has been misunderstood***
3. Fairfax and NZME do not agree that the merger will give rise to a material reduction in plurality of voices, if any. In reaching this conclusion, the Commission has failed to properly take into account key features of the way media is produced, consumed, distributed and funded in modern society.
 4. Even if plurality were relevant to the Commission's assessment, the Commission has overestimated the parties' combined impact on the media agenda. Indeed, the Commission's own analysis does not support its concern, for example:
 - (a) The underlying data to the Commission's own analysis demonstrates that TVNZ and MediaWorks each have a greater news audience reach than either Fairfax or NZME.
 - (b) The Commission's multi-sourcing analysis also shows no ability to control the media agenda. It illustrates that Fairfax news consumers also get their news from TVNZ and Newshub, more than they get it from NZME; and NZME consumers also get their news from TVNZ, Newshub and Fairfax equally. Over 80% of people who get their news from Fairfax and NZME also get news from TVNZ and Newshub. Those numbers make sense. There must be few, if any, New Zealanders who get a newspaper who do not also watch the TV

news. The statistics show that online news readers multi-source. The Transaction will not change which newspapers people get, although it should allow those papers to be published for longer than under the counterfactual.

- (c) The Commission also suggests NZME2 will dominate "online news" and in this it relies on a Fairfax survey. That survey reveals that print accounts for only 13% of news consumption, whereas Facebook accounts for 15% of news consumption. Thus, Facebook singlehandedly boasts a share of news consumption greater than all print newspapers (of which the parties are suggested to have 90%). Television accounts for 21% and all New Zealand online news sites combined (including Stuff, NZHerald, 1NEWS NOW, RNZ, NBR, Newshub, The Spinoff and others) account for 25%. Those figures simply do not support the Commission's position that NZME2 will control the media voice.
5. The Commission's argument around the nature of competition is based around the flawed analysis that NZME2 will be the "dominant" provider of news services, particularly in print and online. The Commission has grossly underestimated the countervailing power of Facebook and formal and informal sources of news, and Facebook and Google's impact on the New Zealand media environment. It has wrongly declined to consider the competitive effects of those search engines and social media platforms, dismissing them on the basis that they are merely a distributor of content and therefore not relevant.
 6. The fact that 70 - 80% of every new dollar of digital advertising revenue in New Zealand goes to Facebook and Google cannot be ignored when the parties are dependent on advertising revenue to fund journalism.
 7. Facebook also determines - through its 'like' and 'share' algorithms - which articles appear to users, and keeps users in the Facebook environment (because the user is diverted back to Facebook after an article has been read), materially impacting upon the parties' ability to drive longer dwell times, and obtain consumer data analytics, and so compete for advertising revenue.
 8. Google is not simply a competitor for advertising revenue through Google Adwords. It is also the owner of the software that delivers the parties' advertisements online and therefore takes a cut of that revenue as well. The parties cannot realistically replicate this capability, which is supported by a team of thousands of software developers in the US, given each is a relatively small New Zealand business. In the online world, the parties are very much price takers. They are far from "dominant" in any economic sense of that term, with or without the merger.
 9. Facebook and Google's strength as distribution platforms for content means that there is greater opportunity for a diverse range of voices to receive distribution across large audiences. Any barriers to entry or expansion for smaller players to achieve a share of voice in the growing online environment have been lowered. In the social media environment - which more people get their news from than print - consumers have a greater influence on which content is distributed as they are able to share / like content. Politicians and businesses break their own news, leaving the journalists to follow or comment after the fact. The breadth of distribution is no longer dependent on the traditional physical infrastructure of distribution which historically created barriers to entry.
 10. Facebook and Google have the largest reach as well as the deepest data on consumers and have a combined market capitalisation of close to US\$1 trillion. The merger would give NZME2 a larger scale business with the potential to better compete for advertising dollars in online against these major global online players.

11. There are a number of further significant shortcomings in the Commission's analysis of the news media market which are discussed in this submission. In summary, the Commission fails to fully understand or acknowledge the following:
- (a) In the case of print, only 13% of New Zealanders use print as the primary channel for news. The long-term financial viability of print news media organisations remains at risk globally. The fact that print advertising revenue, circulation and readership has been in year-on-year decline in New Zealand and globally means that it is fundamentally viewed as an insufficiently differentiated product to merit its own market definition.
 - (b) The Commission's comparison of NZME2 with China in terms of aggregation of print ownership is baseless. The media in China is entirely controlled and funded by the state. Facebook and Google are banned, and reporting on the government and its decisions is also banned. The Chinese government has the sorry distinction of leading the world in repression of the Internet, in a country of 1.4 billion Mandarin-speaking people. New Zealand, a country of 4.5m people, has a free, independent and impartial news media, which is subject to the global forces of access to international English-speaking news media, and funded by New Zealand based commercial advertising. It is difficult to think of two media landscapes less similar.
 - (c) The Commission's emphasis on NZME2 having "90% of the print industry" is a meaningless statistic. The Commission has acknowledged that there is no market for "print" in New Zealand and in addition, owning 90% of the "print market" is as much a liability as an opportunity.
 - (d) In the digital advertising market, there is significant pressure from at-scale online players, in particular Facebook and Google, as advertisers shift dollars away from print. This substitution also applies within online, and defining "premium digital" as a separate market of online advertising ignores the fact that advertisers in online base decisions on ROI criteria and readily shift spend across media and advertising forms.
 - (e) Consumers receive information from a variety of sources, including online direct (websites), social media, television, radio and print. Importantly, consumers "multi-source" their news media content rather than relying on a single channel or medium – there is approximately 80% overlap of consumer usage across Fairfax online channels and other media sources such as MediaWorks and TVNZ.

Counterfactual would result in a greater loss of plurality

12. The Commission's analysis of the counterfactual is flawed. It considers two possible counterfactuals in considering the merger:
- (a) The current status quo; or
 - (b) Both NZME and Fairfax independently becoming profitable and sustainable digital-only news providers.
13. Neither of the two counterfactuals considered by the Commission presents a viable future for the parties. The parties have separately provided the Commission with analysis which sets out in detail the economic reality of these scenarios.
14. The status quo cannot persist given the ongoing declines in print advertising and subscription revenues. Print advertising revenue is decreasing globally at upwards of 15% per annum. To put this in context, Fairfax NZ's revenue from print advertising was

approximately \$200m in FY16, and print advertising revenue could therefore continue to decline at \$30m per annum. This contrasts with EBITDA of approximately \$60m, even before taking into account the revenue loss from falling circulation. Digital growth, whilst strong in percentage terms in the recent past, is coming off a small base and cannot get close to compensating for the loss of print revenue.

15. Given the pace of change the media industry is facing, there is unlikely to be a "next time" for this Transaction. The Transaction will deliver critical synergies and a business invested in continuing to deliver printed newspapers for as long as there is viable demand for them. In the absence of a merger, the likely counterfactual is that to maintain financial viability each of the parties would need to aggressively consider cuts to frontline news functions such as reporting.
16. Fairfax NZ and NZME have both been aggressively managing costs across their respective businesses to offset the ongoing decline in revenue. Historically the focus has been on optimising back-office functions, but the opportunities to rationalise these functions are becoming exhausted.
17. To maintain profitability, the parties will each need to consider material cuts to frontline news functions such as reporting. The functions most at threat in this circumstance are likely to be areas that have lower general interest, such as regional and local coverage and minority issues. While no decisions have been made by each of the parties, it is inevitable that in the absence of a merger each of the parties would be forced to pursue this course of action.
18. The counterfactual whereby NZME and Fairfax NZ could each become a purely digital news media company fails to contemplate what is required for this to occur. Fairfax NZ's digital revenue in FY16 was approximately \$32m. Taking into account all of the costs associated with developing and operating a news website and sales team, this would leave minimal revenue to fund journalism. The flow-on impact would be that the level of content and hence audience could also drop, thereby threatening the viability of a digital-only business. Regardless of the viability, a digital-only play would have a significantly reduced news operation.
19. The merger improves the economics of NZME2 in important ways that defray this likely loss of investment in content, namely:
 - (a) Access to further back-office savings resulting from the merger across sales, marketing, technology, head office and corporate functions.
 - (b) The potential to better compete for advertising dollars online against the major global online players. Facebook and Google have the largest reach as well as the deepest data on consumers. The combination of the parties' businesses would better position NZME2 to compete.

Regulating media plurality is not within the remit of the Commission

20. The Commission's view that media regulation in New Zealand is insufficient to protect media plurality post-merger is a social policy judgment that the Commission is not permitted to take into account in preference to economic efficiencies under the Commerce Act authorisation framework.
21. The Commission has in this respect stepped outside its jurisdiction under the Commerce Act in reaching a view that, despite the economic benefits or the merger outweighing the measureable economic detriments, it is entitled to dismiss the merger on unquantifiable media plurality grounds. The Transaction passes the Commerce Act's authorisation test, and should be approved on that basis.

22. The legal grounds for this argument are expanded on in the parties' separate legal submission.

Conclusion

23. The Commission does not rely on economic analysis to support its conclusion but concluded that it would decline the merger due to media plurality concerns, "irrespective of the size of operational benefits" and irrespective of how efficiency enhancing the merger would be.
24. The efficiencies of the merger were found to substantially exceed any possible loss of competition in any specific newspaper or digital market where a substantial lessening of competition might arise. The merger is demonstrably efficiency enhancing. It will give rise to substantial efficiency gains that will benefit consumers, advertisers, journalists and the economy as a whole. There is further detailed discussion on these points in the separate NERA economic analysis.
25. For the reasons outlined above, which are expanded upon in this submission, we submit that in line with international trends: (a) competition will continue to flourish across multiple media sources, and (b) open online distribution channels such as Facebook and Google have lowered any barriers to entry and expansion to news media in New Zealand, leaving the traditional print business model permanently disrupted. In the face of these changes it is essential for journalism to be supported by a strong financial foundation for it to continue to play its important role in modern society.
26. In the absence of the merger, the relevant counterfactual is that both businesses will be unable to maintain their current quality and production levels and remain financially viable. Therefore there is likely to be material reduction in frontline journalism and the production of print publications. The absence of a merger would therefore result in less media investment and less plurality than if the parties were able to merge. In the absence of a sustainable business model for news media organisations the argument of plurality is a moot point – plurality cannot exist unless there is a way to fund it.

INTRODUCTION

27. NZME and Fairfax have now had the opportunity to review the Draft Determination. The parties agree with the primary conclusion in the Draft Determination that the quantifiable public benefit efficiencies arising from the merger significantly outweigh any potential detriments to competition in any relevant market. They say that the Commission is required to approve the Transaction on this basis.
28. NZME and Fairfax see the merger as fundamental to the ongoing sustainable production of New Zealand print news, as well as essential to enable the investment required to maintain and continue to improve the quality of local and regional news, as well as content about life and style, sport, and entertainment.
29. NZME and Fairfax address these points in this factual submission, together with the accompanying legal submission and economic analysis. Both companies look forward to engaging constructively with the Commission throughout the balance of the authorisation process to ensure that the relevant evidence is properly considered and weighed, in accordance with the relevant competition law tests, as the Commission works towards its Final Determination.
30. This factual submission deals with the points raised in the Draft Determination under the following heads:
- (a) Part I: Plurality of media ownership:
- (i) The merger will not harm editorial independence and influence of opinions;
 - (ii) Static focus on print;
 - (iii) No news agenda "dominance";
 - (iv) The UK Foster/Levy Report;
 - (v) Media plurality as a policy issue;
- (b) Part II: Competition law analysis:
- (i) The Counterfactual;
 - (ii) New Zealand is a small, open, English-speaking economy;
 - (iii) The competitive role of Facebook;
 - (iv) Content competition;
 - (v) Constraint from TVNZ, RNZ, MediaWorks and others
 - (vi) NZ Newswire and other content syndicators;
 - (vii) Content quality and paywalls;
 - (viii) Approach to market definition;
 - (ix) Premium digital advertising;

- (x) Sunday newspapers;
- (xi) Community newspapers;
- (xii) Transfers effects; and
- (xiii) Benefits analysis.

PART I: PLURALITY OF MEDIA OWNERSHIP

31. The key conclusion in the Commission's Draft Determination is that, irrespective of the public benefits arising from efficiencies, the Commission's preliminary view is that it would not authorise the merger because:
- (a) of "the fundamental changes this would bring to New Zealand's media landscape";¹
 - (b) "plurality of the media is essential to the maintenance of a well-functioning democracy, and a healthy democracy is dependent on a divergence of views";² and
 - (c) the merged entity would have the ability to "influence opinions and lead the news agenda and the overall detriments to plurality".³
32. The Commission's proposal to decline authorisation is incorrect both legally and factually. In particular, the Commission (a) does not have jurisdiction to consider such factors, and (b) even if it did, the way the media industry operates in New Zealand does not support the concerns the Commission has raised.

NO JURISDICTION TO CONSIDER MEDIA PLURALITY

33. In a separate legal submission, the parties outline the reasons why the Commission, as an economic regulator, does not have the power to find that media plurality issues could allow it to block an otherwise efficiency-enhancing merger.
34. In particular, that submission outlines that Parliament expressly removed the Commission's powers to consider issues of media plurality when it enacted the Commerce Act 1986. In its first newspaper merger decision following that law change, the Commission observed:⁴

The 1986 Act revokes the power of the Commission or the Court to canvass the issues of independence of the press or editorial freedom as reasons for refusing consent to a merger or takeover proposal.

35. In addition to this statement by the Commission, the Courts have subsequently confirmed on numerous occasions since that time that the Commission cannot take social / policy factors into account in fulfilling its role as an economic / competition regulator. As the Court of Appeal has cautioned:⁵ "*... a public authority which is a creature of statute cannot act outside the scope of its express and implied statutory powers*".
36. The enactment of the Commerce Act 1986, and the subsequent case law, makes clear that plurality detriments are not the type of detriments that the Commission can consider and weigh in a merger authorisation process under section 67 of the Commerce Act. The Commission is not a media regulator - it is a competition regulator and must make its decision pursuant to the Commerce Act 1986 framework accordingly.

¹ At [1011].

² At [1013].

³ At [1016].

⁴ *News / Independent Newspapers* (1986) 6 N.Z.A.R. 47 at 16.

⁵ *Commerce Commission v Telecom Corporation of New Zealand Limited* [1994] 2 NZLR 421, (1994) 5 NZBLC 103, 431, (1994) 5 TCLR 482 at 18.

THE MERGER WILL NOT HARM EDITORIAL INDEPENDENCE AND INFLUENCE OF OPINIONS

37. Even if the Commission could take media plurality and ability to influence opinions into account, the merger will not reduce the range of views, opinions, content and coverage that is produced.
38. By creating a sustainable journalistic organisation, the merger will enhance all those unquantifiable factors that the Commission has raised as potential concerns.
39. Indeed, NZME and Fairfax both agree with the Commission that editorial independence and diversity of views are of critical importance to New Zealand society.
40. It is for this reason that both NZME and Fairfax already have charters in place that enshrine principles such as:
- (a) Maintaining a fierce independence free from political or commercial influences;
 - (b) Reporting without fear or favour on events of public interest everywhere;
 - (c) Commitment to the highest standards of accuracy and ethical behaviour; and
 - (d) Standing up for, and advocating on behalf of, the communities they serve.
41. The adherence to those principles is a reflection of:
- (a) the high-quality, professional, and independent journalists that work for each of NZME and Fairfax;
 - (b) the high journalistic standards that New Zealanders expect of their news providers; and
 - (c) the standards that a media organisation needs to maintain in order to attract audience attention and, therefore, advertiser expenditure. This is reflected in the Fairfax Media New Zealand Journalism Charter.⁶
- The continued success of Fairfax Media depends on providing present and future readers of all its outlets with high-quality journalism that they trust and value.
42. Shayne Currie, the Managing Editor of NZME has previously said:⁷

NZME's editorial brands – including the NZ Herald, nzherald.co.nz, the Weekend Herald, and Newstalk ZB – contain broad opinion and perspectives from across the news, business, political, sport, entertainment and lifestyle spectrums.

It would be counter-intuitive to promote or focus on just one side of any debate. In a country the size of New Zealand, we do not have the luxury, as say in the UK, of a press that might be considered “left-leaning” or “right leaning”. Our population base is too small, and the majority of our mass-market media ensure all sides of issues and debates are covered. We foster and encourage healthy comment from across the spectrum.

The NZ Herald is often accused of being “too far right” or “too far left”. In reality, the newspaper takes an editorial stance on an issue-by-issue basis – and after thoughtful consideration and debate among senior editors. We have, for

⁶ Fairfax Media New Zealand Journalism Charter (31 August 2011). Accessible at: <http://www.fairfaxmedia.co.nz/pressroom/NZ/fairfax-media-new-zealand-journalism-charter>.

⁷ NZME response to the Commerce Commission's third request for information, dated 9 September 2016.

example, in recent weeks, supported Helen Clark's bid for the United Nations top role and the Unitary plan for Auckland (with tweaks); criticised the Reserve Bank's monetary policy; supported more liberal liquor laws and light-rail to Auckland Airport; and we have been critical of the Government's "piecemeal" approach to housing, refugees and the care of the mentally ill.

We also ensure that we have diverse voices – many of whom would take an opposing view to that of the newspaper/site. In any one week in the NZ Herald, our readers can indulge in the opinions of Toby Manhire, Raybon Kan, Alan Duff, Lizzie Marvely, Deborah Hill Cone, Audrey Young, Barry Soper, John Roughan, Fran O'Sullivan, Megan Nicol Reed and many, many others. We publish cutting cartoons from the likes of Rod Emmerson, Guy Body and Peter Bromhead.

We encourage our columnists to be thought leaders – and provocative. There are no sacred cows. They will choose their own topics for commentary – editors will only be involved in a selection of topics if requested, but this is extremely rare. Editors will never dictate how a columnist should present their views. While we will read, with interest, the views of columnists in opposing media, this does not affect the way in which our own columnists do their job. If we believe a columnist from an opposition media company has presented a newsworthy view, we will sometimes pick this up as a news story and try to expand on it.

The success or otherwise of a columnist's work comes down to audience numbers, engagement and feedback. This is measured by our internal analytics systems, and through the response to their views and opinions. We continually review our stable of columnists to ensure we have a rich, diverse mix of talent and topics.

In terms of building audience, and creating stronger alliances in different communities, there have been several recent examples of our strategy in this area. Our JV with the Chinese Herald, to create a new Chinese NZ Herald website, is an unashamed attempt to build our audience in the Chinese community.

We do encourage, and publish, feedback to our columns – whether it's letters to the editor, oped submissions or online commentary through our digital and social channels (provided these are carefully moderated). Every week, the NZ Herald contains opinion and columns from readers. Alan Duff, for example, receives negative and positive feedback. We are not afraid to publish the voices of opposition to Duff, as highlighted by these recent examples from Rawiri Taonui
http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11704771 and Dame Anne Salmond:
http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11644786

We also regularly encourage people to have their say: *Dialogue Contributions are welcome and should be 500-700 words. Send your submission to dialogue@nzherald.co.nz. Text may be edited and used in digital formats as well as on paper.*

[...] None of this affects the way in which the newsroom does its job. Our news reporters specialise in topics and issues of public interest and importance – for example, politics, business, education, health, social issues, diversity, consumer affairs and transport. The editorial stance of the newspaper, or the opinion of a columnist or broadcaster, on any particular topic in no way affects the way in which our journalists identify and report the news. We are bound by NZME's own code of ethics, and the Press Council's guiding principles, to be fair, balanced and accurate in the reporting of news stories and current events.

Stories and articles are vetted by editors before publication to ensure they meet the requirement to be fair, balanced and accurate. Complaint procedures are carefully laid out and published each day. We fix errors as quickly as possible.

This is not to say the NZ Herald does not campaign on behalf of its readers – it does so, loudly and proudly, on many occasions. For example, in raising funds

for the Starship children's hospital, or fighting to stop the Ports of Auckland from further expansion into Waitemata Harbour, or to raise fund for Syrian refugees. On these occasions, our campaigns and goals are well labelled.

We take our role and responsibilities seriously, as a free and independent press. It is our duty to hold the powerful to account. For us to comfort the afflicted and afflict the comfortable. This will never change.

43. Fairfax and other publishers in New Zealand take the same approach. Editorial independence is championed throughout both NZME and Fairfax. By way of example, *The New Zealand Herald* and *Herald on Sunday* have different editors and regularly take opposing views on the same issues and topics, as do the various editors across Fairfax's publications.
44. The Commission's concerns that editorial independence and content diversity could reduce as a result of the Transaction do not reflect the reality of the commercial drivers on media organisations or the professionalism and passion of journalists in New Zealand. There is no evidence to support the view that NZME2 would not continue to observe principles of independence, fairness, standards of accuracy, ethical behaviour, and advocacy on behalf of the communities Fairfax and NZME currently serve.
45. In particular, the Commission has not provided any evidence to support its view as to how it considers that a change in shareholders of NZME2 is going to change the range of views, content, and opinion produced by its journalists, columnists and broadcasters, nor any theory as to which particular shareholders it is concerned will exercise such control (recognising that NZME2 will ultimately be an entity listed on the NZX with no single shareholder owning more than a ~9% shareholding, with Fairfax itself also a listed entity on the ASX). It is also expected that over time NZME2 will become an increasingly attractive investment vehicle for New Zealand shareholders - a media company owned by New Zealanders for New Zealanders.
46. The far bigger threat to the critical role that journalists and journalism play in New Zealand is economic - if the companies who employ these journalists can no longer sustain their salaries, it is likely that a number of them will no longer be employed to continue to produce the content they do today. []. The prospect of the Commission preventing the implementation of a merger that will enable NZME2 to achieve the necessary cost savings to create a sustainable journalistic organisation in New Zealand to re-invest in broadening the news coverage of NZME2 is of significant concern to a large number of journalists in New Zealand. []. In fact, such a decision would lead to a reduction in media plurality, journalistic coverage, and content diversity and therefore less plurality than if the parties were able to merge. In the absence of a sustainable business model for news media organisations the argument of plurality is a moot point – plurality cannot exist unless there is a way to fund it.

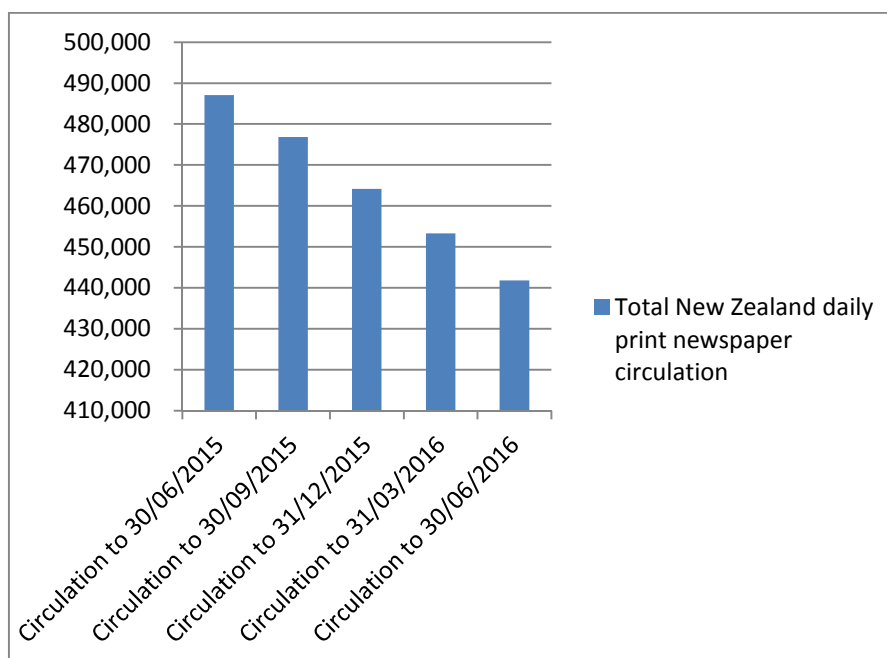
STATIC FOCUS ON PRINT

47. The view that "NZME and Fairfax would have direct control of nearly 90% of daily circulation of all daily newspapers in New Zealand" appears to be an important factor in the Commission's decision-making process. The Commission referred to that statistic in both the executive summary of the Draft Determination and in its media release announcing the Draft Determination.
48. In the context of any accurate plurality discussion, that 90% statistic should not be referred to in isolation from the fact that:
 - (a) Print is the primary news source for only 13% of New Zealanders today (and that number is declining); and

- (b) Print circulation in New Zealand is forecast to half in the decade to 2020.
49. Applying those statistics together will give the Commission a more accurate assessment of any potential influence on the views of New Zealand from ownership of print media in the future.
50. Furthermore, this 90% figure is not a relevant statistic in the competition law framework:
- (a) The primary question for the Commission in relation to a merger is whether it gives rise to a substantial lessening of competition *in a market*;
- (b) It concluded that the *parties' daily newspapers do not compete* in any relevant market, ie there is no national market for print in which NZME's *The New Zealand Herald* competes with Fairfax's *The Dominion Post*; and
- (c) The "90%" figure does not represent a percentage of any relevant market from a competition law perspective.
51. As noted above, it is important to recognise the economic realities facing our print newspaper industry in New Zealand. Once those economic realities are taken into account, it is apparent that "90% of daily print circulation" is unlikely to be 90% of anything that could give rise to market power or undue opinion influence today, let alone beyond that into the medium term.
52. For example, daily newspaper print readership and circulation is declining rapidly in New Zealand. As PwC notes in respect of New Zealand:⁸
- Print circulation is on course to almost half (*sic*) in the decade to 2020, from 629,000 average daily unit circulation print in 2011 to just 321,000 in 2020.
 - Newspapers' reach has shrunk to one-third of adults, most of them in an older demographic.
 - In 2015 more people were using the internet than newspapers at breakfast for the first time, according to Roy Morgan Research.
53. This is also reflected in the significant quarter-on-quarter decline in daily print circulation in New Zealand, as shown in Figure 1 below, which equates to an almost 10% decline in the last year.

⁸ "Data dump: a snapshot of PwC's entertainment and media outlook insights report" (14 June 2016) StopPress. Accessible at: <http://stoppress.co.nz/news/data-dump-snapshot-pwcs-new-zealand-entertainment-and-media-outlook-insights-report-2016-2020>.

Figure 1 - Daily print newspaper circulation in New Zealand (quarter-on-quarter)



Source: ABC.

54. [] [], but also the fact that because of the fixed cost nature of newspaper printing and the reliance on advertising revenue to fund it, there will come a tipping point when it is no longer viable to print newspapers on a daily basis:⁹

The problem with print is that the advantageous returns to scale from physical distribution of newspapers become disadvantageous when scale shrinks. The ad revenue from a print run of 500,000 would be 16 percent less than for 600,000 at best, but the costs wouldn't fall by anything like 16%, eroding print margins. There is some threshold, well above 100,000 copies and probably closer to 250,000, where nightly print runs stop making economic sense.

55. Failing to give this proper weight and giving prominence to the 90% figure, mischaracterises the forward-looking test that the Commission must apply and gives readers of the Draft Determination an incorrect impression that there is a relevant market in which the parties might hold a 90% share.

56. In contrast, the ACCC gave prominence to the declining nature of print in clearing a merger of the two main newspaper publishers in Western Australia.¹⁰

"On the consumer side, **the large decline in print newspaper readership formed a major part of our analysis.** Many consumers in Western Australia are now getting their news online or from other sources," Mr Sims said. [Emphasis added.]

57. In its Draft Determination, the Commission also compared the New Zealand daily print newspaper industry post-Transaction to China. That comparison is not relevant for the

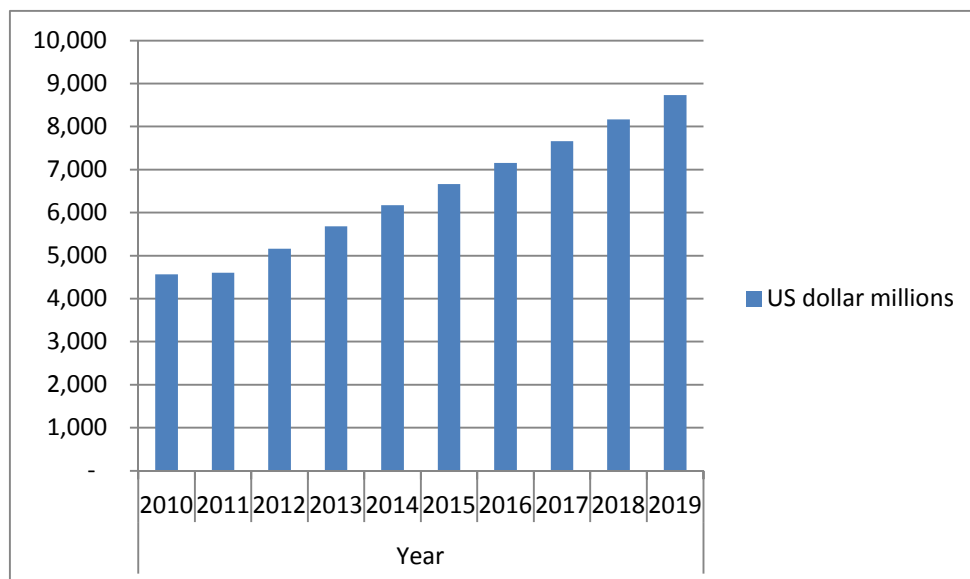
⁹ Margaret Sullivan "A 'Darker Narrative' of Print's Future From Clay Shirky" (10 April 2015) The New York Times. Accessible at: http://publiceditor.blogs.nytimes.com/2015/04/10/a-darker-narrative-of-prints-future-from-clay-shirky/?_r=0.

¹⁰ Australian Competition and Consumer Commission "ACCC will not oppose Seven West Media's proposed acquisition of The Sunday Times and perthnow.com.au" (media release, 15 September 2016). Accessible at: <https://www.accc.gov.au/media-release/accc-will-not-oppose-seven-west-media%E2%80%99s-proposed-acquisition-of-the-sunday-times-and-perthnowcomau>.

purposes of the competitive effects analysis. There are fundamental differences between the media landscape in China and New Zealand, including that:

- (a) China has a single print owner in the Chinese Government, and state-sanctioned content monitoring;
- (b) Neither Google nor Facebook is allowed in China; and
- (c) Print circulation in China is growing - see Figure 2 below (it is worth considering the likely direct relationship between these points at (b) and (c)).

Figure 2 - Newspaper publishing circulation revenue in China



Source:¹¹ PwC / Ovum / Informa Telecoms & Media/World Association of Newspapers and News Publishers / The Advertising Association of Thailand.

NO NEWS AGENDA "DOMINANCE"

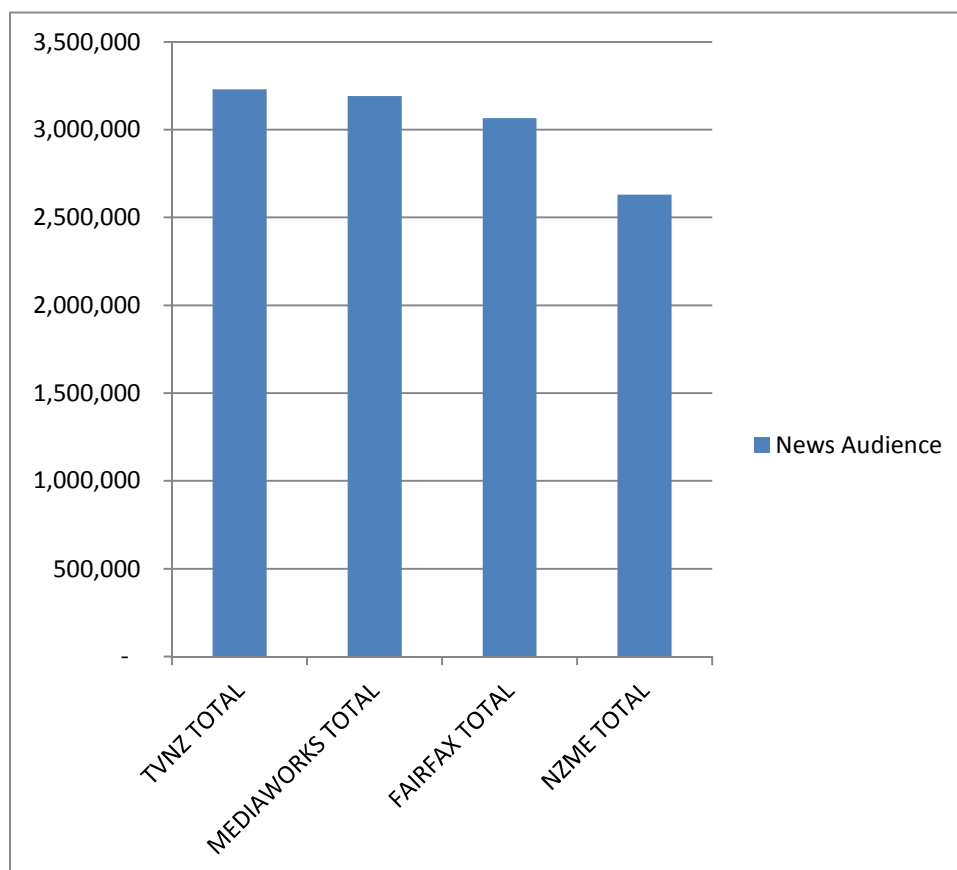
- 58. The Commission's Draft Determination asserts that NZME2 will have control over the "news agenda" in New Zealand, for example saying: "it is clear that the merging parties *dominate print and online*",¹² and "the Commission considers the merging parties to be the *dominant providers of news services*, particularly in print and online"¹³ (emphasis added).
- 59. But the Commission's own analysis does not bear out a conclusion that NZME2 would have the ability to shape the "news agenda". Nor does the underlying data that the Commission relied on in conducting its analysis support that view. For example, the underlying data that the Commission relied on in preparing its "multi-sourcing" analysis actually demonstrates that both TVNZ and MediaWorks have a larger news audience than either Fairfax or NZME, as set out in Figure 3 below:

¹¹ PricewaterhouseCoopers *China entertainment and media outlook 2015-2019*. Accessible at: http://www.pwccn.com/webmedia/doc/635775886983165765_cn_em_outlook_2015_2019.pdf

¹² At [952].

¹³ At [966].

Figure 3 - Reach of New Zealand News Organisations



Source: Nielsen Data collated for the Commerce Commission.

60. The Commission also provided a "multi-sourcing" analysis at Table 18, which sets out multi-sourcing by major news organisations for 2016. Looking at this data:
 - (a) Fairfax readers use TVNZ news (83.2%) and MediaWorks news (82%) more frequently than they use NZME's news products (74.1%);
 - (b) NZME news users visit all three products approximately equally (86.4% to Fairfax, 83.6% to TVNZ and 82.6% to MediaWorks); and
 - (c) In all cases, over 80% of the people who read Fairfax and / or NZME products also go to TVNZ and MediaWorks for news.

61. The absence of RNZ, another important news provider in New Zealand both on radio and online, in that multi-sourcing analysis understates the range of products which New Zealand consumers have available to them.¹⁴

62. As with the Commission's reference to "90%" share, the parties are disappointed the Commission uses the term "dominance" in its decision to refer to something other than market power in a relevant market, and in a way that is not supported by the data.

63. In a similar vein, Figure 11 in the Commission's Draft Determination, based on a survey carried out by Fairfax, has been interpreted by the Commission as indicating that "online news now dominates as the primary news source", with the Commission ascribing a figure of 54% of people using online news as their primary news source.

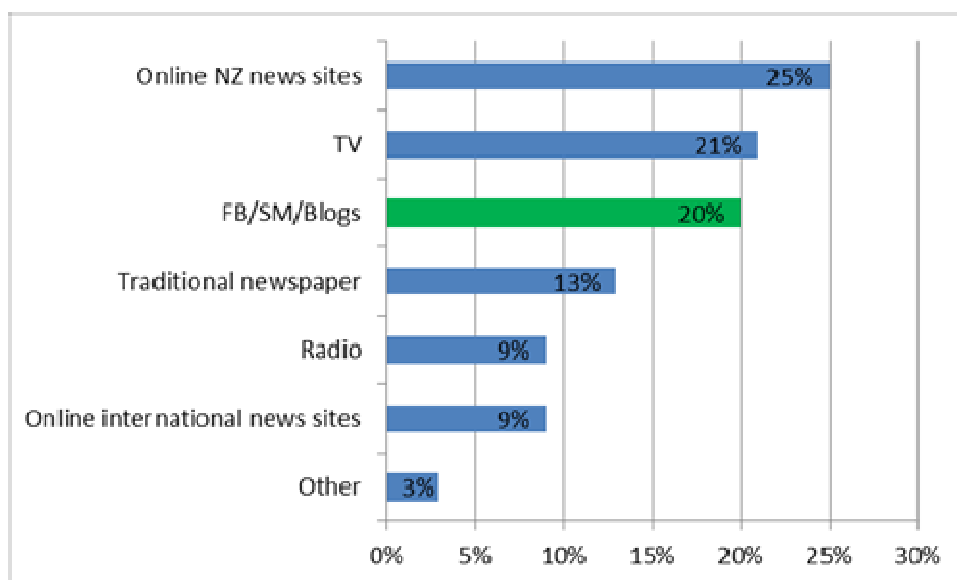
¹⁴ At [965].

64. While NZME and Fairfax agree that online is becoming an increasingly important news source for New Zealanders, it is necessary to go to the next level of analysis to unpick which are the online media sources being used by New Zealanders as their primary news source. When that next level of analysis is conducted, it is clear that New Zealand sources of online news are far from "dominant" as the primary news source to New Zealanders. In particular:

- (a) Online New Zealand news sites are the primary news source for 25% of New Zealanders, which are only marginally ahead of TV news at 21%;
- (b) Facebook, social media and blogs are the primary news source for 20% of New Zealanders; and
- (c) Print newspapers are the primary news source for just 13% of New Zealanders.

65. A more detailed portrayal of those survey results is set out in Figure 4 below.

Figure 4 - Shares of news consumption in a typical week in New Zealand, 2016



Source: Fairfax survey 2016 (Referred to by the Commerce Commission at [953] of the Draft Determination).

66. The importance of new media to the distribution of news is also illustrated in the way that government organisations now operate. Governments no longer rely on traditional media outlets to share information. Press releases and other information are published via Twitter and social media channels in addition to the traditional means of dissemination via media organisations. This was illustrated during the recent South Island earthquakes. The fact that the Government places that degree of importance on social channels to share essential messages reflects the prevalence of this channel as a direct source of news. The Commission itself publishes its news releases on Facebook and Twitter, and disseminates compliance information via YouTube, so it is difficult to reconcile the Commission dismissal of those channels as sources of information in its Draft Determination with its own in-market behaviour.

THE UK FOSTER / LEVY REPORT

67. In the context of the Commission's comments on media plurality, NZME and Fairfax have reviewed the report that the Commission commissioned from Dr David Levy and

Robin Foster (the "**UK Report**"). The UK Report is focused on assessing whether the Draft Determination is consistent with the regulatory framework in the UK under the UK Communications Act.

68. The UK framework is significantly different from New Zealand, and an assessment of whether the Commission's proposed approach is consistent with another country's regulatory framework is not relevant to the economic competition law framework that the Commission is obliged to enforce under New Zealand's Commerce Act.
69. Even then, within its discussion of plurality, the UK Report notes that ownership is only one of many factors to consider when considering plurality, and is not the most important, with other relevant factors being:
- (a) Access to a wide variety of different types of media;
 - (b) Sustainability of business models;
 - (c) Diversity of viewpoints and sources;
 - (d) Broad scope of media coverage;
 - (e) Gender equality;
 - (f) A focus on the extent to which journalism is successfully performing its key roles of informing, representing, campaigning, and interrogating.
70. The Commission's Draft Determination draws no evidential link between the Transaction and any harm to these other aspects of plurality referred to in the UK Report, and simply asserts without foundation that a change in ownership leads to a reduction in plurality.
71. The UK Report also asserts, without any analytical consideration of the financial information provided to the Commission or consideration of the differences in economies or impacts of language differences and proximity to Europe, that because there are currently more media entities in Scandinavian countries than New Zealand that the Transaction is bad for New Zealand. That line of reasoning draws no real link, however, to the question the Commission is required to examine under the Commerce Act - namely the impact of the Transaction on competition and efficiencies in comparison to a situation in New Zealand without the Transaction. Indeed, the UK Report expressly notes:¹⁵
- We have not been asked to examine the underlying economics of commercial news provision in New Zealand.
72. However, that is the fundamental question that the Commission is required to consider under the Commerce Act's authorisation framework.
73. To the extent that the UK Report does refer to the competition in markets the authors note that competition does not necessarily lead to media plurality:¹⁶

It should be noted by the way that a competitive market does not necessarily mean that there will be sufficient plurality from a public interest perspective. For example, commercial providers of news, even in a reasonably competitive market, may decide it is not profitable to cover certain issues or cater for certain audiences.

¹⁵ At 21.

¹⁶ At 8.

74. This statement is consistent with the report submitted by Professor Randal Picker, which drew on the traditional competition law and economic effects framework to also conclude that in two-sided markets with one-sided prices, greater competition does not necessarily lead to greater diversity of news coverage.
75. The identified potential for inconsistency between the competition framework and policy goals of the Commerce Act and the policy goals of achieving media plurality / diversity itself demonstrates why the Commission should not conclude it has jurisdiction to deal with the latter set of issues.
76. Furthermore, setting aside the discussion of the UK regulatory regime, if there is one overriding theme that can be garnered from the UK Report it is that "rapid changes in news markets could before long raise further questions around long term sustainability of high quality news in New Zealand, and the most effective structures and regulatory framework to secure it for the future".¹⁷
77. NZME and Fairfax agree that is the fundamental issue facing the news media in New Zealand. However, consideration of the effective policy structures and frameworks for securing high quality news production for the future is not an issue within the Commission's jurisdiction or its expertise.

MEDIA PLURALITY AS A POLICY ISSUE

78. The reason the Commerce Commission is not tasked with assessing the issue of media plurality, opinion diversity, and news agenda influence is that these are issues that are properly within the jurisdiction of the Government and Parliament, because only the Government has the range of policy instruments to address those issues; the Commission does not.
79. Indeed, in 2013 the Law Commission prepared a report to the Government examining precisely those issues. The foreword to that report demonstrates the number of complex and interlinked policy considerations that go into forming a cohesive and fit-for-purpose media regulation regime.¹⁸

In a recent address on the impact of technology on adolescents, Sir Peter Gluckman, the Prime Minister's Chief Scientist, expressed the view that the internet and digital technology have brought about the most profound change in how humans communicate since our species first acquired speech.

This report is about how the law should respond to this challenge. It addresses two distinct but related questions arising from the digital revolution. The first of these concerns the "news media", who currently enjoy a special legal status, and how this class of communicator should be defined and held accountable to the public in an age when anyone can now break news and broadcast it to the world.

The second question relates to all citizens exercising their rights to freedom of expression. It concerns the laws which are designed to protect our interests in privacy, reputation and the right to a fair trial and how they can best be adapted and enforced in the digital age.

The law has always struggled to keep pace with technology – never more so than now, given the unprecedented pace and impact of technological change. But we are not alone in grappling with these issues: our review has taken place against the backdrop of a number of major international inquiries into news media standards and the impacts of technological and content convergence on the regulatory environment.

¹⁷ UK Report at 22.

¹⁸ New Zealand Law Commission *The News Media meets 'New Media'* (Report 128, March 2013). Accessible at: <http://r128.publications.lawcom.govt.nz/uploads/NZLC-R128-The-news-media-meets-new-media.pdf>.

Law reform in such dynamic times demands a first principles approach. It requires us to identify the enduring public interests the law is intended to protect. And to provide solutions which are proportionate and appropriate in the New Zealand context.

Underpinning all the recommendations in this report is our recognition of the fundamental importance of freedom of expression. Alongside this there is a clear public interest in ensuring those who are significantly harmed by unlawful communication have access to meaningful remedies.

Our report also recognises that in this age of abundant information there continues to be a vital public interest in being able to distinguish information which purports to provide a reliable and authoritative account of what is happening in our country and the world. **For this we need a news media which is responsible, independent, and genuinely accountable to the public on whose trust they depend. This is so irrespective of whether these communicators belong to what we describe as the “mainstream media” or whether they are part of the burgeoning new media who are increasingly fulfilling many of the essential functions of the fourth estate.**

[Emphasis added.]

80. A full three years later, when the influence of "new media" has unquestionably grown, the Commission fails to reflect in its plurality analysis the role of that media that was observed to be "increasingly fulfilling many of the essential functions of the fourth estate".
81. The 2013 Report also demonstrates that regulation of media ownership cannot be looked at in isolation, as there are also a number of other fundamental policy issues that are interwoven into the consideration of how media is regulated, including:
- (a) the statutory privileges and legal exemptions afforded to the news media;
 - (b) the standards and expectations imposed on the news media, some enshrined by law and others by professional and ethical codes, such as whether information they disseminate conforms to basic standards of accuracy and fairness; and that they are held accountable for any abuse of their power; and
 - (c) privacy laws.
82. The Law Commission's Report makes clear that it is not possible to simply consider one aspect of media plurality, such as ownership, without considering the myriad of other interlinked policy issues. That is why the Commerce Commission is not tasked with considering such issues. It is not surprising that the Law Commission's report does not make any mention of the Commerce Commission having oversight or a role in the regulation of the media. What is surprising is that the Commerce Commission's Draft Determination makes no reference to the policy work that the Law Commission has done in this area, but purports to base its decision on plurality grounds.
83. In relation to the issues the Commerce Commission has sought to raise in its Draft Determination, the Law Commission's review made a number of relevant observations about the news media in New Zealand such as:
- (a) **"New Zealanders now have access to a plethora of news sources ranging from global media brands through to the spectrum of “new media” providers** generating, aggregating, and commenting on news. Most significantly, the public are now able to generate, debate and distribute news and opinion themselves, without reliance on the mainstream media."¹⁹
[Emphasis added.]

¹⁹ At 7.

- (b) "[A]n **acknowledgment that the commercial model which has funded primary news gathering is under threat** and that the institutional news media may not survive the paradigm shift brought about by the internet. At the same time **the virtual elimination of barriers to publishing now makes it possible for any individual or organisation to undertake the core democratic functions assigned to the news media.** This has the potential to strengthen democracy and increase the accountability of Parliament and the courts, and other powerful public and private institutions."²⁰ [Emphasis added.]
- (c) "**Our review has not found any evidence to challenge the mainstream media's own assertion that New Zealand has an ethical and trustworthy news media.** Although the Big Picture Research indicates some concern over the accuracy of the New Zealand media, it did not reveal a wholesale loss of confidence. For this and for other reasons we discuss in chapter 7, we conclude that it is not in the public interest to impose statutory regulation on the New Zealand news media. Instead, in line with the principles outlined above, we believe accountability to an external standards body should be entirely voluntary. However, as we outline in the following section, membership of our proposed new body will bring with it advantages which in our view will be of considerable value to those willing to be subject to its jurisdiction."²¹ [Emphasis added.]
84. In response to that report the National-led Government decided not to establish any media regulatory body, and stated that policy options would be kept in mind "should reform be necessary in the future".²²
85. Those are all policy considerations outside the framework of the Commerce Act 1986. Indeed, the numerous media articles in the last week about the impact of the effects of Facebook on news dissemination during the 2016 US election reinforce that the effects of Facebook on media plurality is an important issue, but not an issue that can be dealt with within the confines of a competitive effects analysis.
86. Indeed, the issue of "fake news" and the role that the pervasive news distribution networks, such as Facebook, play in amplifying not only minority or niche voices, but also news that is not prepared to the standards that mainstream media impose, is becoming an increasingly important issue and is receiving focus from governments around the world from a social policy perspective.²³

The problem of misinformation online, once relegated to discussions of Russian propaganda, has drawn the attention of the president of the United States and the president-elect – albeit in different ways. On Thursday, Obama told reporters that the discrediting of news organizations and spread of misinformation threatened institutions.

"If we are not serious about facts and what's true and what's not, if we can't discriminate between serious arguments and propaganda, then we have problems," he said at press conference.

"If everything seems to be the same and no distinctions are made, then we won't know what to protect," he went on. "We won't know what to fight for. And we can lose so much of what we've gained in terms of the kind of democratic freedoms and market-based economies and prosperity that we've come to take for granted."

²⁰ At 31.

²¹ At 37.

²² Craig Foss and Judith Collins "Government responds to news media report" (media release, 12 September 2013). Accessible at: <https://www.beehive.govt.nz/release/government-responds-news-media-report>.

²³ Alan Yuhas "Facebook announces new push against fake news after Obama comments" (19 November 2016) The Guardian. Accessible at: <https://www.theguardian.com/technology/2016/nov/19/facebook-fake-news-mark-zuckerberg?CMP=tw a-media b-gdnmedia>.

87. Similarly, in the context of rapidly declining revenues for print newspaper publishers in Canada, the Department of Canadian Heritage is currently engaging in a wide-ranging policy review of Canada's broadcasting, media, and cultural industries, including considering what the media landscape would look like without Canada's two largest newspaper companies.²⁴

The way Canadians access content is changing with new platforms and technologies... The shifts that are happening as a result are significant. One of the objectives of our Canadian content consultations is to assess how to best support the production of news information as well as local content that is credible and reliable.

88. The multi-faceted consideration of the impact of digital convergence, Google, and Facebook on media plurality and content diversity is highly complex, and requires a clear frame of reference and specialist media skill-set. That these important issues need to be considered in the context of a broader policy debate, by the appropriate policy and law makers, has been eloquently articulated by the Chair and CEO of RNZ in a submission to the Ministry of Culture & Heritage.²⁵

Convergence is empowering audiences and opening up a new world characterised by greater choice of content for free at lower prices. The transformation also liberates media entities to work in new ways across platforms. But **convergence is simultaneously fundamentally challenging the business models that in the past have enabled the commercial market to meet many of their audiences' needs.** Those challenges are most profound in the publishing industry but they are also affecting revenues and audience behaviour in broadcasting (free-to-air and as well pay TV).

This raises an issue of sovereignty for New Zealand. Most of the commercial media entities in New Zealand are overseas-owned. Until now these entities delivered good outcomes for New Zealanders in terms of quality and breadth of local content. But **as those foreign-owned entities are increasingly squeezed by digital disruption there is a clear risk that their ability and appetite to invest in New Zealand stories and content - including the robust journalism that is the lifeblood of any democracy - will diminish.** A further threat exists. The vast, and enormously rich, platforms Google, Apple, Amazon, and Facebook are now seeking to become the main conduit supplying content to hundreds of millions of people worldwide. This creates a dilemma for media outlets which may have no choice but to provide their content to these companies if they wish to remain relevant to audiences.

The current policy interventions will need to be adapted to meet these challenges. [Emphasis added.]

89. The nature of the issues referred to in the extract from the RNZ submission to the Ministry of Culture & Heritage, further reinforces the fact that the Commerce Act framework does not contain the necessary policy instruments to deal with these issues. That observation underscores why any attempt by the Commission to override its own (positive) efficiencies analysis with plurality concerns, without the proper remedial tools, social policy framework or legislative oversight, is highly likely to lead to counterproductive outcomes for the New Zealand media industry, for New Zealand media plurality, and for New Zealanders as a whole.

²⁴ Sean Craig "Trudeau government assessing a future without Canada's two largest newspaper companies" (17 November 2016) Financial Post. Accessible at: <http://www.financialpost.com/m/wp/news/blog.html?b=business.financialpost.com/news/trudeau-government-assessing-a-future-without-canadas-two-largest-newspaper-companies>.

²⁵ RNZ submission on Ministry for Culture and Heritage Content Regulation in a Converged World discussion paper (14 October 2015). Accessible at: [http://www.mch.govt.nz/sites/default/files/RNZ%20Convergence%20submission%20\(D-0638157\).PDF](http://www.mch.govt.nz/sites/default/files/RNZ%20Convergence%20submission%20(D-0638157).PDF).

PART II: COMPETITION LAW ANALYSIS

90. Even setting aside the media plurality issues raised by the Commission, which are outside its jurisdiction, Fairfax and NZME consider that the Commission has not correctly conducted its competition law assessment - including in relation to its assessment of the likely counterfactual and its assessment of the competitive constraints on NZME2 in the relevant markets.

THE COUNTERFACTUAL

91. Fairfax and NZME consider that the Commission has formed an incorrect view of the counterfactual(s) in the Draft Determination. It is possible that the lack of any material discussion of the impact of social media and other distribution channels is a contributor to the Commission's incorrect formulation of the likely future with and without the Transaction.
92. In analysing the effect or likely effect of a merger the Commission is of course obliged to compare "the likely state of competition if the acquisition proceeds ('the factual') against the **likely** state of competition if it does not ('the counterfactual')" [emphasis added].²⁶
93. In selecting the two counterfactual scenarios that it has settled on in the Draft Determination to assess the Transaction, the Commission has acknowledged that it has not followed the usual legal test:²⁷

As with the status quo, we do not consider this scenario to be likely, but we have used this scenario to assist with our qualitative analysis.

94. In this respect, the comments of the Full Federal Court of Australia in *ACCC v Metcash* are apposite and useful reminders of the way to approach the analysis. As the Commission is aware, the Full Federal Court of Australia:
- (a) emphasised the importance of assessing mergers in the context of **commercial realities**, rather than reaching conclusions based on theory or speculation; and
 - (b) criticised the ACCC's approach, which placed less weight on evidence which ran contrary to the ACCC's theory and speculation about what might happen with and without the merger.²⁸
95. Likewise, the courts in New Zealand have made it clear that counterfactuals must be based on the facts, rigorously applying economic theory to the question of how market participants will react, including what an economically rational person will do in light of those facts. For example:
- (a) In *Air New Zealand v Commerce Commission*²⁹ the High Court stated that the counterfactual cannot be established without the aid of economic analysis to determine the likely future situations:³⁰

Predictions of the likely behaviour of firms in a dynamic market at some point in the future typically involve the application of economic theory, previous experience (in the market or other markets having shared characteristics) and known facts about the structure of the market and the behaviour of competitors and potential competitors.

²⁶ *Commerce Commission v Woolworths Ltd* [2008] NZCA 276 at [63].

²⁷ At [109].

²⁸ *Australian Competition and Consumer Commission v Metcash Trading Limited and Pick n Pay Retailers (Pty) Limited* [2011] FCA 967.

²⁹ (No 6)(2004) 11 TCLR 347.

³⁰ At [117].

- (b) In *Commerce Commission v Bay of Plenty Electricity Ltd* the High Court said that the counterfactual test requires a consideration of the future conduct that a firm **would rationally** take.³¹
- (c) The Court of Appeal in *ANZCO v AFFCO* accepted evidence from the economic expert witness, economist James Mellsop, that determination of the counterfactual involves assessment of what the "rational forward-looking" decision maker would do.³²
96. Significant volumes of "ordinary course of business" internal documents and data on the effects that the decline of print, and rise of Google and Facebook, are having on NZME and Fairfax respective businesses have been provided to the Commission at its request, and it is surprising that this type of evidence is not materially reflected in the counterfactual analysis in the Commission's Draft Determination.
97. The parties have appointed an expert to form an assessment of the counterfactual based on these internal documents. **Enclosed** with this submission are two papers from PwC that reveal that neither the status quo nor a "digital-only" plus community newspapers scenario is a likely counterfactual.
98. When discussing these internal documents and each of NZME's and Fairfax's underlying financial materials with the applicants, the Commission put to Fairfax and NZME during its enquiries that they were not []. This has been reinforced by the High Court:³³
- []
99. Furthermore, as the Commission will be aware [].
100. NZME and Fairfax trust that the Commission will give weight to the evidence filed to date, including the two PwC papers **enclosed** in its Final Determination.

Evidence on the counterfactual

101. Declines in print newspaper circulation, readership, and advertising revenue are leading to rapid change to news publishers' businesses.³⁴

Newspapers are suffering an accelerating drop in print advertising, a market that already was under stress, forcing some publishers to consider **significant cost cuts and dramatic changes to their print and digital products**.

Global spending on newspaper print ads is expected to decline 8.7% to \$52.6 billion in 2016....

That decline is hitting every major publisher, increasing pressure on them to boost digital-revenue streams even faster to make up for lost revenue and, in some cases, even **reconsider the format of their print products and the types of content they publish**.

Many newspapers have trimmed costs to cope with the worse-than-expected revenue decline. The New York Times Co. and Wall Street Journal-owner News Corp, likely have **further head-count reductions on the way, and the Guardian and the U.K.'s Daily Mail recently eliminated jobs**. Analysts such

³¹ CIV-2001-485-917 High Court Wellington Registry (12-16, 19-23, 26-28 February, 1, 2, 5-8 March, 13 December 2007) per Clifford J at [317] - [318].

³² *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 at [178].

³³ [].

³⁴ [] 25 October 2016 email to [], citing: Suzanne Vranica and Jack Marshall "Plummeting Newspaper Ad Revenue Sparks New Wave of Changes" (20 October 2016) The Wall Street Journal. Accessible at: <http://www.wsj.com/articles/plummeting-newspaper-ad-revenue-sparks-new-wave-of-changes-1476955801>.

as Jefferies & Co. have pared back their third-quarter estimates for publishers including the Times and Gannett Co.

"We operate in a time of rapidly changing market conditions, especially in the world of print advertising," Gerard Baker, editor in chief of The Wall Street Journal, wrote Wednesday in a memo to employees. **"These are days of accelerating change in the newspaper business."**

[...]

Newspapers have been in a race against time to grow their digital revenues to make up for the collapse of print advertising. They have made strides, but face challenges on that front, including the dominance of Facebook and Google in the digital market and difficulty making money on mobile products.

[...]

"There's been acceleration in the downturn this year" in print advertising, said John Ridding, chief executive officer of the Financial Times. "That is partly structural towards digital and mobile and the major platforms, such as Facebook and Google." [Emphasis added.]

102. This decline in print revenue is not being replaced by anything close to a commensurate basis by digital advertising - with the majority of the growth in digital advertising going to Google and Facebook. As noted by Morgan Stanley in its 2016 "Australia Media, Internet and Technology" report:³⁵

When we talk to our industry contacts one message is clear, the rate of structural change brought about by technology is not abating, if anything it has quickened in the last 12 months and will again in C2016. This is the most significant issue facing every company in our coverage universe.

Key conclusion: Global tech players are taking all the ad market growth, and then some. In C2016E we estimate global media/ad tech players, including the likes of Google and Facebook, will collectively extract A\$4bn-A\$5bn worth of ad revenue - representing 35-40% share of the total pool of ad revenues in Australia (A\$13.9bn). It's a big number and critically, its growing fast - we estimate the leakage to global players increased 24% or ~A\$1bn in C2015. Why is this important for our investment universe? because if the total Australian ad market only grew ~A\$300m and global players collected an extra ~A\$1bn, that means the revenue pool left for domestic media to compete for actually shrank by ~A\$700m. Which hurts, and explains why most domestic media companies reported lower F2015 earnings.

Very negative read-across for Australia traditional media companies. Put simply, the more ad spend shifts from traditional media (e.g. TV/Print) to new media (e.g. Internet/Online), which it will, following the trends of how Australians consume their media, the more \$s will shift offshore to global media/ad tech companies and leave Australia. Therefore, the reality is, the pool of ad dollars left for local traditional media companies is not growing; it's shrinking.

[...]

Newspaper ad spend we forecast to decrease sharply by -7% to -8% p.a. out to C2020E, based on continuing declines in readership and circulation and falling consumer usage.

[...]

We believe the implications are significantly negative for revenue (and therefore EPS) of the domestic media companies in our universe ... in a nutshell we see a 'crowding out' of domestic media.

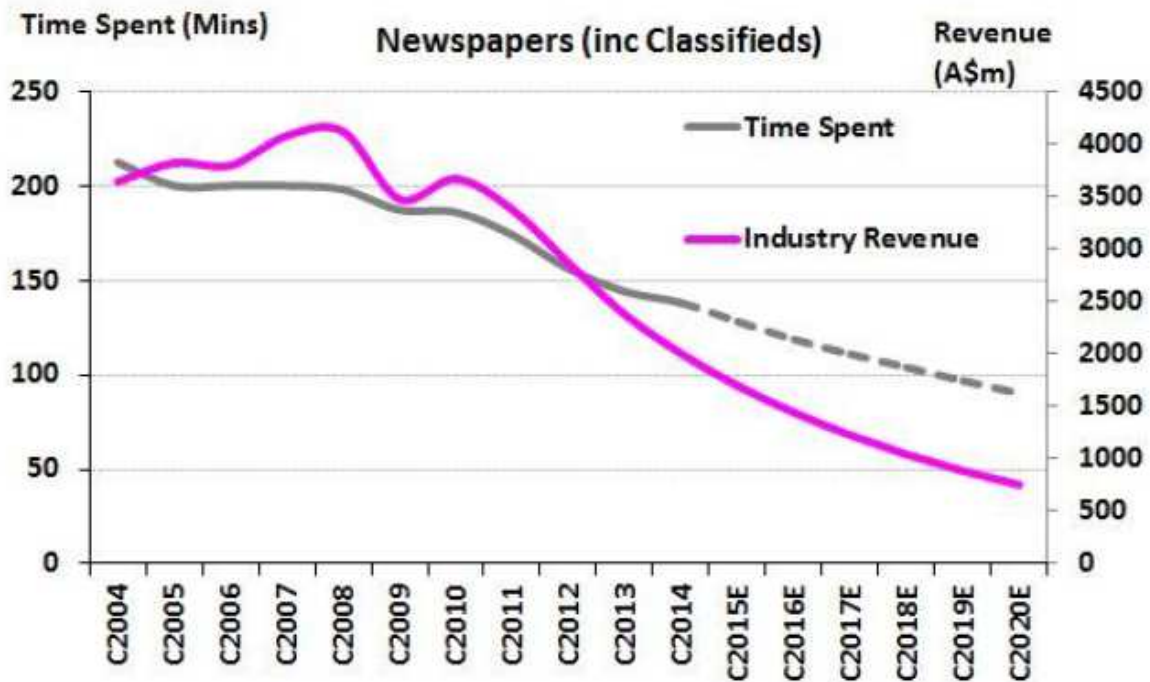
³⁵ Morgan Stanley *Australia Media, Internet and Technology* (27 January 2016). See **Appendix One**.

[...]

And, importantly, we can't see [global media/ad tech players] loosening their grip loosening any time soon. Why? Because the global players have a huge scale advantage in terms of data/analytics etc, which is increasingly driving the destination for adspend and marketing. That advantage enjoyed by the big global players, if anything, continues to increase. Thus, it's not surprising that despite their already substantial size in this market, we estimate Google and Facebook still grew revenues between +29% to +61% in Australia in C2015.

- 103. Forecasts in the Morgan Stanley report from Australia clearly indicate that the status quo cannot be considered to be a relevant counterfactual, as demonstrated in Figures 5 and 6 below:

Figure 5 - Newspaper Adspend and Time Spent



Source: Morgan Stanley.

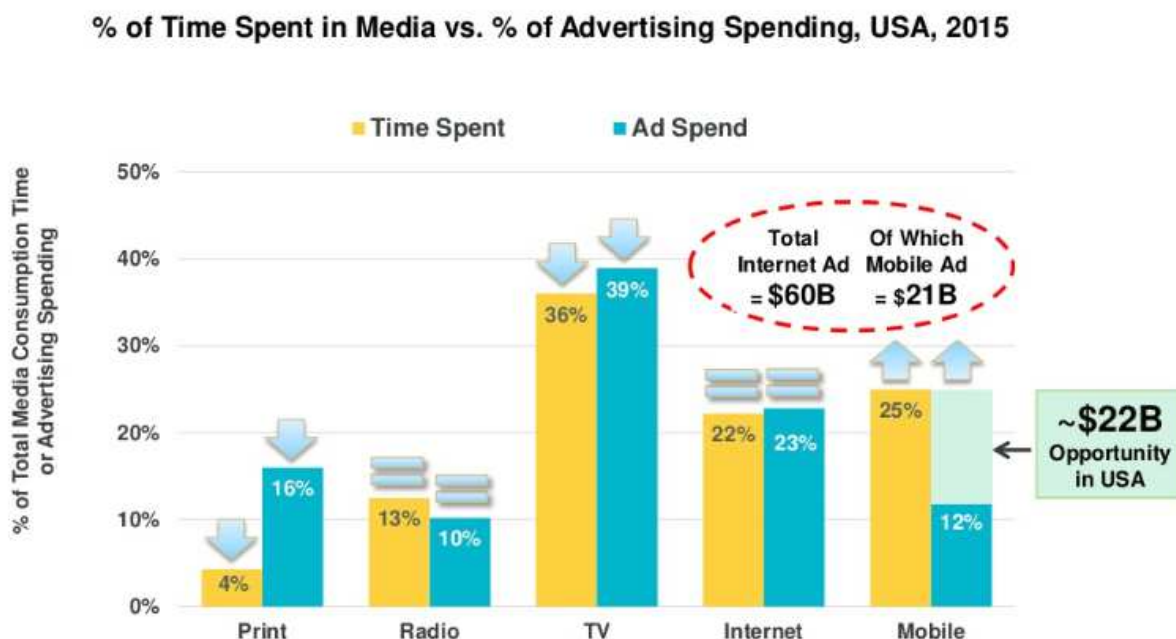
Figure 6 - Global leakage vs. domestic media providers' advertising revenues



Source: Morgan Stanley.

- 104. A copy of this Morgan Stanley report is enclosed for context with this submission as **Appendix One**.
- 105. The KPCB 2016 Internet Trends Report also illustrates that print newspaper advertising decline is expected to decline further to reflect that consumers are increasingly consuming content through other media channels, as outlined in Figure 7 below.

Figure 7 - Percentage of Time Spent in Media vs Percentage of Advertising Spend



Source: KPCB 2016 Internet Trends Report.

106. Further international examples of the challenges facing print publishers, from the last month, are also provided for the Commission at **Appendix Two**.

Fairfax evidence

107. Fairfax has provided the Commission with significant volumes of evidence of the effects that the decline of print, and rise of Google and Facebook, is having on its business.

108. [].

(a) [].

(b) [].

109. In light of this evidence and the PwC2 report, it is clear, on a proper forward looking economic analysis, that neither the status quo nor a "digital-only + community print newspaper" counterfactual is a relevant counterfactual for Fairfax in assessing the Transaction. In particular:

(a) [];

(b) []³⁶; and

(c) [].

110. The likely counterfactual for Fairfax, in the absence of the merger, [].

NZME evidence

³⁶ []

111. NZME has also provided the Commission with significant volumes of "ordinary course of business" internal documentation that was created before the Transaction was contemplated that describe the effects that the decline of print, and rise of Google and Facebook, is having on its business.

112. To summarise that evidence:

(a) []. This is reflected in Figure 8 below:

[]

[]

(b) []. This is reflected in Figure 9 below:

[]

[]

(c) []. This is reflected in Figure 10 below:

[]

[]

(d) [].

(e) [].

(f) [].

(i) [].

(ii) [].

(iii) [].

[]

[]

113. []

(a) [];

(b) [];

(c) [];

(d) [];

(e) [];

(f) [];

(g) [];

(h) [];

- (i) [];
 - (j) [];
 - (k) []; and
 - (l) [].
114. [].
115. [].
116. [].
117. In light of this evidence and the PwC2 report, it is clear that also from NZME's perspective neither the status quo nor a "digital-only + community print newspaper" counterfactual is a relevant counterfactual. In particular:
- (a) [];
 - (b) [];
 - (c) [];
 - (d) []³⁷; and
 - (e) [].
118. The likely counterfactual for NZME is that, in the absence of the merger, the NZME Group will [].

Concluding comments

119. This evidence makes it clear that if the Commission considers that it is preserving competition between NZME and Fairfax by blocking the merger, or that it is preserving media plurality, this will be a very short term outcome, and will be to the longer-term detriment of New Zealand consumers.

"Real options" analysis

120. The Commission cannot assume that it can simply wait and see if NZME and Fairfax can survive by themselves and that it can preserve the option to approve the merger at a later date [].
121. The question the Commission must answer under s 67 of the Commerce Act is not which market structure it might prefer if it could choose between all possible outcomes,³⁸ but rather whether the transaction for which authorisation has been sought passes the statutory test (ie economic efficiencies outweighing detriments to competition).
122. Secondly, even if the Commission were inclined to discount the counterfactual based on its view that other transactions were also a possibility, none of the transactions suggested deliver either the synergies, nor the investment in the future of print that this Transaction delivers. In addition, [].

³⁷ [].

³⁸ [].

123. [].³⁹

[]

124. [].

[]

125. [].

NEW ZEALAND IS A SMALL, OPEN, ENGLISH-SPEAKING ECONOMY

126. In its analysis and conclusions the Commission has also failed to give appropriate consideration to the size of New Zealand and what that means for minimum efficient scale, profitability, and viability for print media in the context of significant ongoing declines in print media circulation and advertising revenue.

127. While the Commission has drawn superficial comparisons with China, Turkey, and Romania, more relevant cross-country comparisons for the Commission to note would be that, with a population of 4.5 million, New Zealand has:

- (a) a smaller population than Sydney (~5 million);
- (b) a smaller population than Melbourne (~4.6 million);
- (c) a smaller population than Queensland (~4.7 million); and
- (d) a population less than two times larger than Western Australia (~2.6 million), where the ACCC recently cleared a merger between the two main newspaper publishers.

128. The Commission also stated that New Zealand's population is comparable to Ireland's. While that is true, New Zealand does not benefit from any financial support from the European Union nor proximity to the UK (with UK-owned media making up a significant proportion of titles in the Ireland market), and, at about a quarter of the total geographic area of New Zealand, the Irish publishers do not face the same economic challenges to the production and delivery of local and regional news at an efficient scale.

129. The fact that New Zealand is English-speaking is also highly relevant to the competition dynamic. News media organisations with a local language advantage have a much stronger position in the market, as they face less competition from global content providers than English language newspapers whose point of difference is local content. There is massive diversity of information sources available to English language readers – therefore, although on an individual basis other news sources may only have small numbers of unique browsers – when combined it presents a much more accurate view of the scale of the international news sources in competition for New Zealand audience's attention, which does not impact news media in non-English-speaking countries (as in Scandinavia, referred to in the UK Report) to nearly the same extent.

130. The parties ask the Commission to give proper weight to the fact that New Zealand is a small open economy, which means it is often necessary to have a higher concentration of market shares in order to achieve efficient scale. This approach has been taken by the Commission in other decisions.⁴⁰

³⁹ Leslie Picker and Sydney Ember "Gannet Abandons Effort to Buy the Newspaper Publisher Tronc" (1 November 2016) The New York Times. Accessible at: http://www.nytimes.com/2016/11/02/business/dealbook/gannett-drops-tronc-bid-tribune.html?_r=1.

⁴⁰ Paula Rebstock speech presented at the 5th Annual Transactions and Acquisitions Summit 2006 (6 March 2008). Accessible at: <http://www.scoop.co.nz/stories/BU0603/S00100.htm>.

New Zealand's small economy raises a number of significant issues when considering a merger or acquisition application. First, markets often have very few firms of reasonable size and are therefore relatively concentrated. Secondly, firms are generally small on a world scale.

There is inherent tension in small economy industries between the potential for market power based on concentration and sub-optimal firm size. This tension is likely to mean that small economies will need to pay relatively greater attention to specific efficiency considerations. It can also mean that concentrated markets can facilitate unilateral or coordinated market power.

The vast majority of mergers are economically beneficial, and the consequences of declining applications are particularly significant in a small economy like New Zealand's.

The Commission does take into account New Zealand's market conditions when applying the substantial lessening of competition test, and making merger and acquisition decisions.

131. This approach is consistent with international commentary on how competition law should be applied in small economies; for example:⁴¹

In small economies, large firm or plant size may be required in order to achieve efficient scales of production. One key implication of this fact is that high levels of concentration may be a necessary evil in order to achieve efficiency. Accordingly, competition law should be sympathetic to the enhancement of output by individual firms, through either internal growth or mergers, which allows for the exhaustion of economies of scale that were not exhausted by previous market structures, and could not be exhausted in less anticompetitive ways.

132. Also see Evans and Hughes (2003), which expressly cautions against direct comparison with other jurisdictions:⁴²

In small isolated economies there can be expected to be a larger fraction of domestic markets that are concentrated, although competitive industries may also exist. Where domestic markets are concentrated in such economies it is important that case-by-case application of the efficiencies criteria are applied to mergers and practices, **particularly at the expense of rote application of competition rules of thumb derived from other jurisdictions.** [Emphasis added.]

133. The Evans and Hughes paper has been endorsed by the Court of Appeal:⁴³

We accept Mr Gray's submission **that in a small economy such as New Zealand's, markets are inevitably much more concentrated than in larger economies** (see Evans L and P Hughes, Competition Policy in Small Distant Open Economies: Some Lesson from the Economic Literature, New Zealand Treasury Working Paper 03/31, Wellington, December 2003). [Emphasis added.]

134. Indeed, statistically speaking, 5-to-4, 4-to-3, 3-to-2, and even 2-to-1 mergers are far more commonly approved in New Zealand than they are declined, due to these factors. A statistical analysis prepared by the former Chief Economist of the Commerce Commission showed that over the time period analysed, 0% of 4-3 mergers, 16% of 3-2 mergers and 44% of 2-1 mergers were declined by the Commission (at the time of the

⁴¹ Michal Gal *The effects of smallness and remoteness on competition law - the case of New Zealand* (2 November 2006) New York University Law and Economics Working Papers, Paper 76 at 12. Accessible at: http://lsr.nellco.org/cgi/viewcontent.cgi?article=1080&context=nyu_lewp.

⁴² L Evans and P Hughes *Competition Policy in Small Distant Open Economies: Some Lesson from the Economic Literature* (Wellington, December 2003) New Zealand Treasury Working Paper 03/31. Accessible at: <http://www.treasury.govt.nz/publications/research-policy/wp/2003/03-31/twp03-31.pdf>

⁴³ *Commerce Commission v Woolworths Ltd* [2008] NZCA 276 at [200].

analysis), as compared with the USA, where, for example, 97% of 2-1 mergers are challenged.⁴⁴ Even in a traditional media framework, excluding new media, given the range of significant news sources, the Transaction is at worst characterised as a 4-to-3 merger (with TVNZ, RNZ and MediaWorks remaining significant media competitors, post-Transaction).

135. If the Commission wishes to make international comparisons to assist it in its analysis, the parties ask that those comparisons be put into proper context by reference to language, population, population density and geographic dispersion, efficiencies, minimum efficient scale, or fixed cost / variable cost ratios of the print newspaper industry, as well as the rate of uptake of broadband and mobile usage.

THE COMPETITIVE ROLE OF FACEBOOK

136. The Draft Determination dismisses the relevance of Facebook (and other social media) to news providers in a single paragraph on the basis that "Facebook (and other social media platforms) do not hire journalists nor do they produce New Zealand news content".⁴⁵ The Commission states that Facebook, and other social media, are simply news distributors and that the Commission does not "consider the market for the distribution of news further as part of our analysis".⁴⁶
137. Facebook does not currently generate news content itself. But companies do not need to perform exactly the same role in order to act as material constraints upon each other within the same market. If the Commission were to apply the same logic to NZME and Fairfax as it has to Facebook then, for consistency, the Commission should dismiss as irrelevant any audience reach or website views that NZME and Fairfax receive from distributing others content, for example syndicated news content from NZ Newswire, AAP, Reuters, Business Desk, freelance and contributed content and opinions (such as Stuff Nation), and Fairfax's distribution of TVNZ and RNZ content on Stuff. In that case, the Commission would be defining markets, and considering competitive dynamics, by reference to a media company's internal employment relationships with journalists, rather than by reference to competition, substitutability, and competitive constraint. But that is not the correct frame of reference for a competitive effects analysis.
138. Throughout the world, Facebook has superseded the role of traditional newspaper publishers in a number of areas. News media organisations traditionally controlled the entire process from content creation to newspaper delivery – Facebook has replaced the distribution elements of news – the only element that they have not yet replaced is the content creation. However, they have paved the way for anyone to create content and distribute it across their platforms. The content distribution functions adopted so successfully by Facebook and funded by the lions' share of available online advertising are a key part of the business and revenue model of traditional newspaper publishers including Fairfax and NZME – the traditional model is permanently structurally disrupted and Facebook's role cannot be discounted. Facebook and other new media constrain the parties' ability to increase price and / or decrease quality, and they will continue to do so after the merger through the facilitation of alternative distribution platforms to print, and their data-rich approach to selling audience attention.
139. It is incorrect to dismiss the relevance of Facebook on the grounds that it does not write articles itself. This misses the entire point of what is driving the structural decline in the revenues that used to support traditional media, and the point of the discussion in many international forums on the competitive dynamics within the modern news media markets.

⁴⁴ Michael Pickford, *A Comparison of Transaction Regulation in New Zealand with the United States* (2012) 20 CCLJ 95.

⁴⁵ Draft Determination at [446].

⁴⁶ Draft Determination at [447].

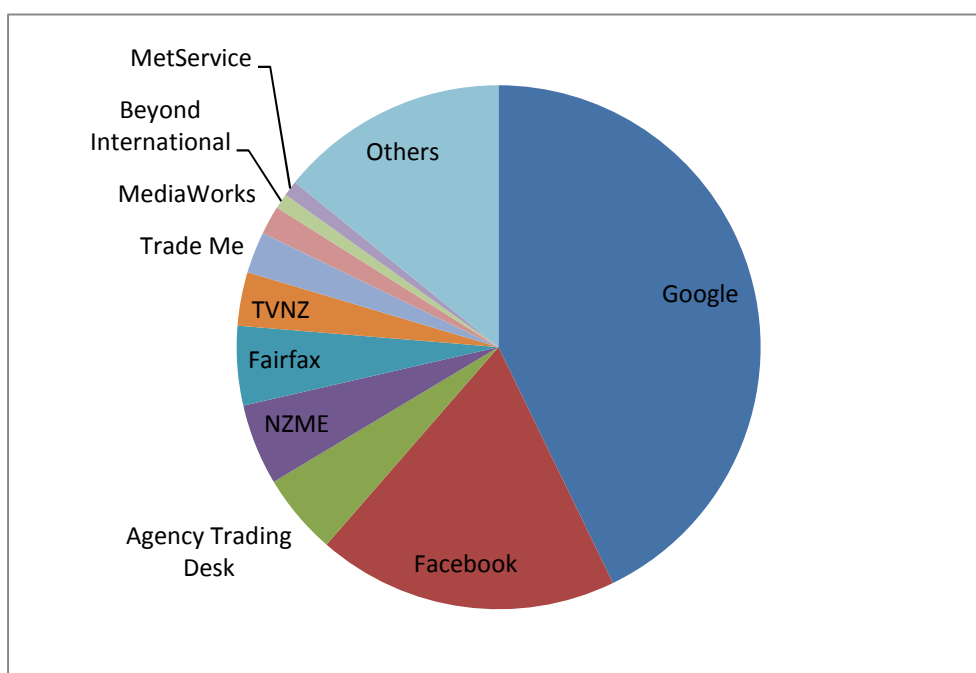
140. The parties are not claiming that Facebook does the same thing that they do - they are claiming that Facebook constrains their ability to increase price and / or decrease quality in a number of key ways, and it will continue to do so after the Transaction. By simply dismissing the influence of Facebook on the grounds that it does not write articles itself, the Commission has misunderstood the competitive dynamics of the modern news media, and neglected to consider an important competitive constraint within the market. As 2016 Nieman Fellow at Harvard University, Greg Piechota, has said:⁴⁷

Digital platforms - social networks and messaging apps - can no longer be considered geeky novelties in media houses, the concern only of the newsroom, or just another promotional channel for our marketing department. For a growing part of the news audience, platforms have become the internet. Social media strategy is becoming digital strategy.

Constraints arising from the two-sided market

141. When deciding where to allocate its advertising dollars, an advertiser has a multitude of options. Facebook and Google receive two-thirds of all digital advertising expenditure in New Zealand, account for 81% of new digital advertising revenue,⁴⁸ and have stronger audience data and much greater audience reach than other online advertising competitors,⁴⁹ as reflected in Figure 12 below:

Figure 12 - Digital agency advertising share in New Zealand YTD (September 2016)



Source: SMI.

142. The test for competition is substitution. It is evident that consumers are substituting away from accessing content directly from a publisher's news platform to accessing that content via an intermediary such as Facebook. Advertisers are similarly switching their

⁴⁷ Greg Piechota *Publishers vs. Platforms Distributed Content Strategies* (Harvard University).

⁴⁸ SMI July to September 2016.

⁴⁹ And to compare cost bases, the parties note that Facebook is understood to have only one employee in New Zealand.

advertising expenditure away from publishers' news platforms to Facebook, Google, and other social media:⁵⁰

Audiences have migrated away from news websites and toward Facebook and other social media destinations, which for a competitive price can provide advertisers access to larger and more finely targeted groups of people, challenging the value of a publisher's own channels.

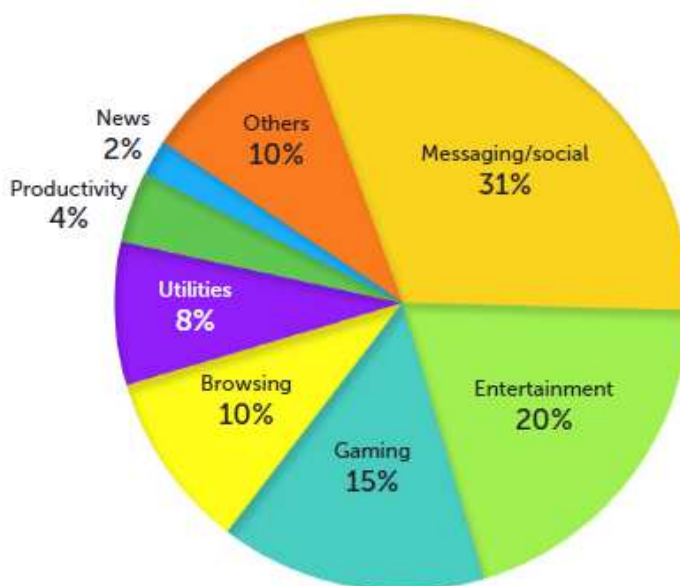
143. That there is substitutability between Google / Facebook's platforms and content creators' own websites is "because of the way that they aggregate and share headlines and offer their own way to quickly scan the basics of stories without needing to click into publishers' own sites, making it a challenge to institute subscriptions or paywalls around that content, or even benefit from an uptick in traffic that can be used to promote ad sales".⁵¹

144. As Professor Picker noted in his paper to the Commission:⁵²

The enormous growth of firms like Google and Facebook—each of which is predominantly supported by advertising—has had substantial consequences for all other firms receiving advertising dollars, but the competition as to users may be just as fierce. Fifty minutes a day on Facebook has to come from somewhere.

145. In the two-sided market NZME and Fairfax must produce quality content to attract audiences and, therefore, advertisers from Facebook, Google, and many other non-news producing media organisations. This is demonstrated in the range of other activities / content competing for consumers' attention on their smartphones, as reflected in Figure 13 below:

Figure 13 - Top Mobile Apps / Activities in the USA (ranked by shares of total time spent)



Source: Flurry Analytics, June 2015.

⁵⁰ John Herrman "How Sponsored Content Is Becoming King in a Facebook World" (24 July 2016) The New York Times. Accessible at: http://www.nytimes.com/2016/07/25/business/sponsored-content-takes-larger-role-in-media-companies.html?_r=0.

⁵¹ Ingrid Lunden "Google's DNI fund puts €24M into 124 news projects across Europe" (17 November 2016) TechCrunch. Accessible at: <https://techcrunch.com/2016/11/17/google-dni-news-fund/>.

⁵² Randal C. Picker *Commentary on News Media Quality Issues in Fairfax/NZME Proposed Acquisition* (15 October 2016).

Source: Greg Piechota *Publishers vs. Platforms Distributed Content Strategies* (Harvard University).

146. Therefore, Facebook and other social media act as a strong constraint on ensuring that news media maintain the quality of their offering.

Facebook magnifies the reach of smaller competitors, brand is irrelevant

147. Even putting aside the two-sided nature of the market, it is not possible to properly analyse the news media markets in 2016 without considering the impact that social media platforms such as Facebook are having on the dynamics of news consumption through their role as news distributors:⁵³

A study has come out showing that more than fifty percent of all web users see Facebook as a way of receiving news and getting news information.

The study also showed that the most used site to get this news is Facebook, apparently. The research was conducted by the Reuters Institute for The Study Of Journalism which discovered that 44 percent of Facebook users use the social media network as a major news source.

The news is unsurprising as it shows Facebook's growing user base and influence, which was also highlighted by the company's first quarter profits which were posted at \$5.38 billion. The result exceeded anything the experts expected. The company now has over three million firms advertising their wares through them. Most of these firms are small and medium-sized businesses which in the olden days, used to buy newspaper space.

Mark Zuckerberg has been transparent about his plans when it comes to the Internet. He wants to monopolize the digital ad news distribution system. He intends to have Facebook Instant Articles section become the average person's, "primary news experience." In some cases, it already is, as highlighted by the survey done by the RISJ.

For millions of Facebook users across the globe, the tech giant is their Daily Me, their light access, and information channel. It has come and given users a chance to provide private and personal messages to friends and in the process rendered newspapers useless.

Add in the bit about it offering local news, national news and international tidbits here and there; then the newspapers are blown out of the water. [Emphasis added.]

148. Facebook is not simply a "dumb" channel whereby users happen to see the news articles that friends post. It is an active news distributor with, as noted above, the stated aimed of monopolising the digital news distribution system, as well as using algorithms to act as an editor to aggregate, curate and select the news and views that it will distribute to consumers. Indeed, Facebook has demonstrated that it will go to significant editorial and curation lengths to achieve its stated aim of monopolising the news distribution system; including, for example, developing a content suppression tool to encourage the Chinese government to permit Facebook in China.⁵⁴
149. Facebook is also the key platform where audiences interact with news content – replacing the traditional role of "Letters to the Editor". Audiences have a much broader ability to interact with news, share their views via comments and shares, experiences and photos, and so on. During significant events such as the US election or the recent

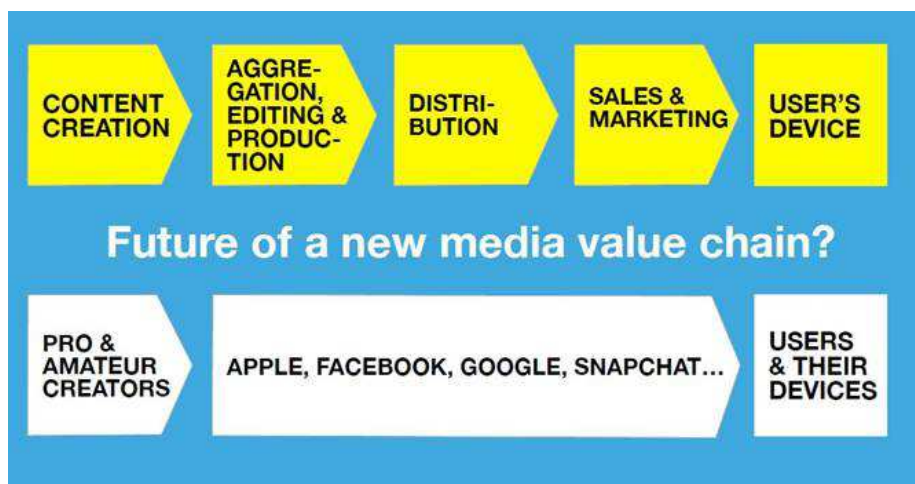
⁵³ Ali Raza "Newspapers at Risk of Becoming Extinct if Facebook Continues its Growth" (16 June 2016) OppTrends. Accessible at: <http://www.opptrends.com/2016/06/newspapers-at-risk-of-becoming-extinct-if-facebook-continues-to-grow-as-it-is/>.

⁵⁴ James Titcomb "Facebook 'prepares to suppress posts in bid to enter China'" (23 November 2016) Telegraph. Accessible at: <http://www.telegraph.co.uk/technology/2016/11/23/facebook-prepares-suppress-posts-bid-enter-china/>.

earthquakes, news websites continuously consolidate information that is being shared on social media in one place for their readers – it is meaningless for the Commission to analyse one medium without the other.

- 150. Facebook, along with other search and social media giants, Facebook has proven extremely effective at dis-intermediating the provision of news / information to ultimate consumers. Figure 14 below compares the legacy media value chain to today's media value chain facilitated by Facebook and others.

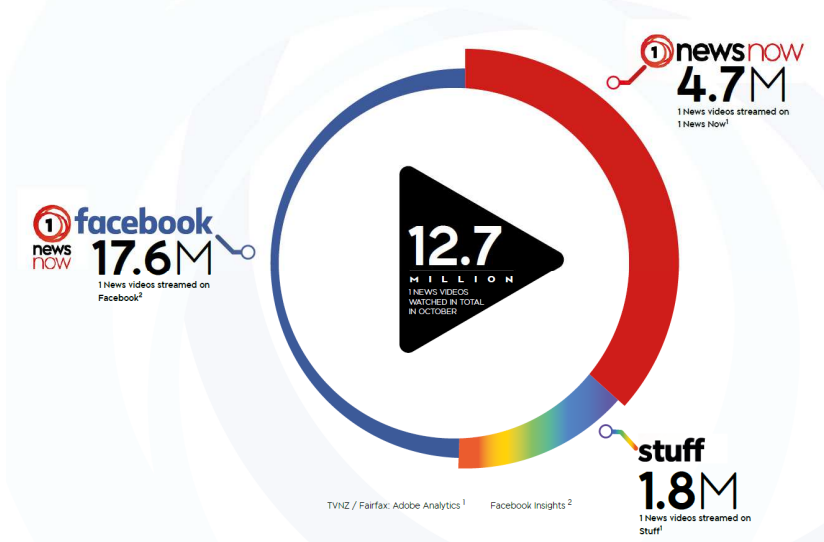
Figure 14 - The new media value chain



Source: Greg Piechota *Publishers vs. Platforms Distributed Content Strategies* (Harvard University).

- 151. Reflecting this, 73% of TVNZ's 1 News Now videos are already accessed via Facebook, as reflected in Figure 15 below. The Commission has been informed that [] of nzherald.co.nz, and [] of Stuff's news content is accessed via Facebook, and that is expected to materially increase over the next six months.

Figure 15 - TVNZ's online 1 News Now video views during October 2016



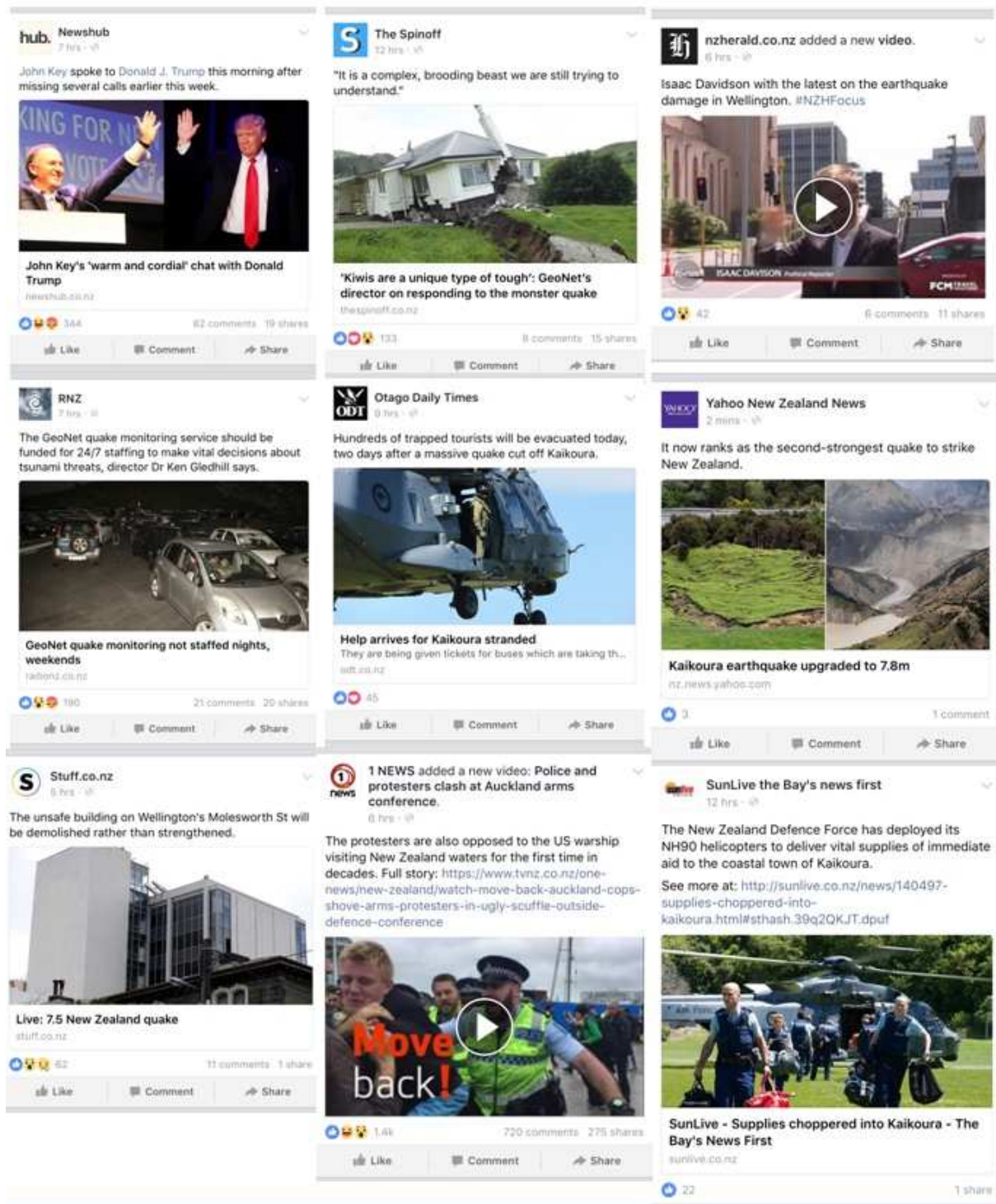
Source: TVNZ.⁵⁵

⁵⁵ TVNZ *Digital update October*. Accessible at: <https://www.tvnz.co.nz/content/dam/images/tvnz-sales/Insights/digital%20updates/TVNZ%20Digital%20Update%20-%20October%202016.pdf>.

152. The Commission's suggestion in its Draft Determination that TVNZ lacks the digital reach to be an effective digital news competitor to NZME and Fairfax fails to acknowledge the fact that more than 70% of TVNZ's digital news content is accessed via Facebook, which has significantly greater reach than either NZME or Fairfax.
153. As more and more content is accessed via Facebook, the reach or brand of any individual news organisation becomes less important, while the quality / attractiveness of the content itself becomes the key to achieving audience and, therefore, advertising revenue. As noted by Professor Randal Picker in his commentary submitted to the Commission on 15 October 2016, "The strong recent rise of social media - first and foremost Facebook and its allied properties - especially among young users means that many people consume news without ever encountering the underlying content or the news organisation that produced it".⁵⁶
154. This enables all content posted by those news media organisations to be distributed by the same channel, with Facebook as the distributor, choosing which entities' news content is disseminated to consumers based on user engagement algorithms developed by Facebook, including the "likes" on previous stories by a user and the user's friends.
155. All content that is deemed newsworthy / relevant by those algorithms is presented on the same platform, side-by-side with other providers' content regardless of the source and with the same audience reach to each other - as reflected in Figure 16 below.

⁵⁶ At 2.

Figure 16 - A selection of NZ news articles posted on Facebook, 16 November 2016



156. This has been described in the following terms:⁵⁷

This change was facilitated by the rise of mobile platforms. More and more (and more and more!) people are getting news and information via their phones, but, as we all know, websites just aren't as functional on a phone as they are on a

⁵⁷ Tim Dunlop "Further proof that distribution, not content, is king" (26 March 2015) ABC News. Accessible at: <http://www.abc.net.au/news/2015-03-26/dunlop-the-technological-disruption-won't-end-with-media/6350048?pfmredir=sm>.

laptop or a desktop. So we have seen content migrate to apps. Indeed, the new Apple Watch does not even support Apple's own web browser, Safari.

Increasingly, too, the new mobile operating systems are offering ways for audiences to interact with news without even going to apps. Thus you see updates and notifications that allow people to read, share, like or comment on content without ever actually leaving the update or the notification. So who needs a browser? (Indeed, users only spend an average of seven minutes of each hour of mobile phone use on browsers.)

While you try to get your head around all that, you also have to be aware that another revolution is under way.

News sites, mass and niche, have become captives of social media in general, and of Facebook in particular. Contrary to the pronouncements of certain moguls, content is not king. It turns out, distribution is.

Part of the reason websites - homepages - are dying, is because they are no longer destination sites for readers. That is, people don't log on and open the homepage for The Age, or The New York Times, or, indeed, The Hoopla. Their interaction with such "brands" comes instead via links to particular articles that people leave on social media.

The ramifications of this are enormous.

It means for many websites that the majority of their traffic now comes from social media, and from Facebook in particular. So the traffic that allows them to generate advertising revenue is pretty much regulated by Facebook.

Facebook, of course, is not a neutral platform but a business whose content is controlled by an algorithm (a mathematical formula for choosing what stuff appears in your feed) that is constantly tweaked by Mr Zuckerberg and co. in order to maximise profit.

Thus Facebook has enormous influence over what stories succeed and what don't, and an adjustment to their algorithm can cost a site millions of readers (just ask Upworthy). As a recent NY Times piece noted:

With 1.4 billion users, (Facebook) has become a vital source of traffic for publishers looking to reach an increasingly fragmented audience glued to smartphones.

Facebook is trying to leverage this power by offering news sites incentives for creating content within the Facebook timeline rather than using Facebook to generate traffic on their own sites, but the risks for news sites are enormous:

Such a plan would represent a leap of faith for news organisations accustomed to keeping their readers within their own ecosystems, as well as accumulating valuable data on them...

(But) Facebook intends to begin testing the new format in the next several months, according to two people with knowledge of the discussions. The initial partners are expected to be The New York Times, BuzzFeed and National Geographic.

Overall, we are seeing the rise of what is called "distributed content": sites like NowThis and Reported.ly have abandoned homepages altogether and create content designed to live within apps like Facebook's, SnapChat and Instagram. Buzzfeed retains a website, but has just announced the creation of distributed content division that creates content that will appear only in such apps, not on their homepage.

In such a situation, the very idea of a "paywall" looks totally antiquated. If you put your content behind a paywall in order to generate revenue, you instantly rob yourself of access to distribution via Facebook and other apps. Thus your

attempt to make money from your content impedes your ability for people to see it, and thus reduces your traffic and your revenue.

It's a hell of a Catch 22.

157. Commentary on what this means for competition between news media providers is clear.⁵⁸

What does this mean for content marketing?

Competition, competition, competition. Instant Articles is a new platform for you to promote your business, but that also means that your competitors have a new outlet as well. Every new platform for content distribution makes it easier and cheaper for people to publish content. As the market expands and as technology and algorithms become smarter and pickier, increased quality in the content that is distributed will become the key to gaining visibility.

158. In the same way that no competitive assessment of the provision of accommodation can exclude Airbnb (which owns no real estate, but is the largest provider of accommodation), and no assessment of taxi services can exclude Uber (which owns no taxis), no assessment of the media industry can fail to take into account the huge impact of social media platforms like Facebook. Though it does not generate content itself, Facebook is a significant constraint on the competitive strategies of the parties, by:

- (a) competing for advertising revenue, meaning the parties are constrained in their ability to decrease quality of content (or increase prices by implementing a paywall) by virtue of the dynamics of the two-sided market;
- (b) providing a platform with unprecedented reach to all of the parties' competitors in the market, allowing them to disseminate their content instantly to the entire country (and beyond), in an ever-expanding web of connections; and
- (c) rendering individual media brands irrelevant, as individual articles are unbundled from their parent source and distributed amidst a stream of other news content.

159. Indeed, this is what TVNZ's CEO has said about the extent of competition on its media organisation from the likes of Google and Facebook:⁵⁹

The local media companies all have rivals far bigger than each other: the offshore online giants Facebook and Google, which dominate the placement of online ads here and suck up the vast majority of the income from them.

"The fundamental challenge is competing with them. Local players are competing just to be the tallest dwarf," Mr Kenrick told *Mediawatch*. "We need to get more reach and we're really open to new partners".

[...]

"I don't lose any sleep worrying about competition from local media companies. To me those are interesting skirmishes that get more attention that they're really worth. The real competition is the big global players who have more cash in the bank than New Zealand's GDP. They could wipe us out in a heartbeat. That's what we've got to be focused on".

160. Nor does Facebook's potential as a diffuser of news apply only to media companies. It also facilitates the spreading of news by the very individuals or companies involved in

⁵⁸ Diana Prodan "6 Things You Need to Know about Facebook's Instant Articles" (18 May 2016) Advance Ohio. Accessible at: <https://www.advance-ohio.com/6-things-you-need-to-know-about-facebooks-instant-articles/>.

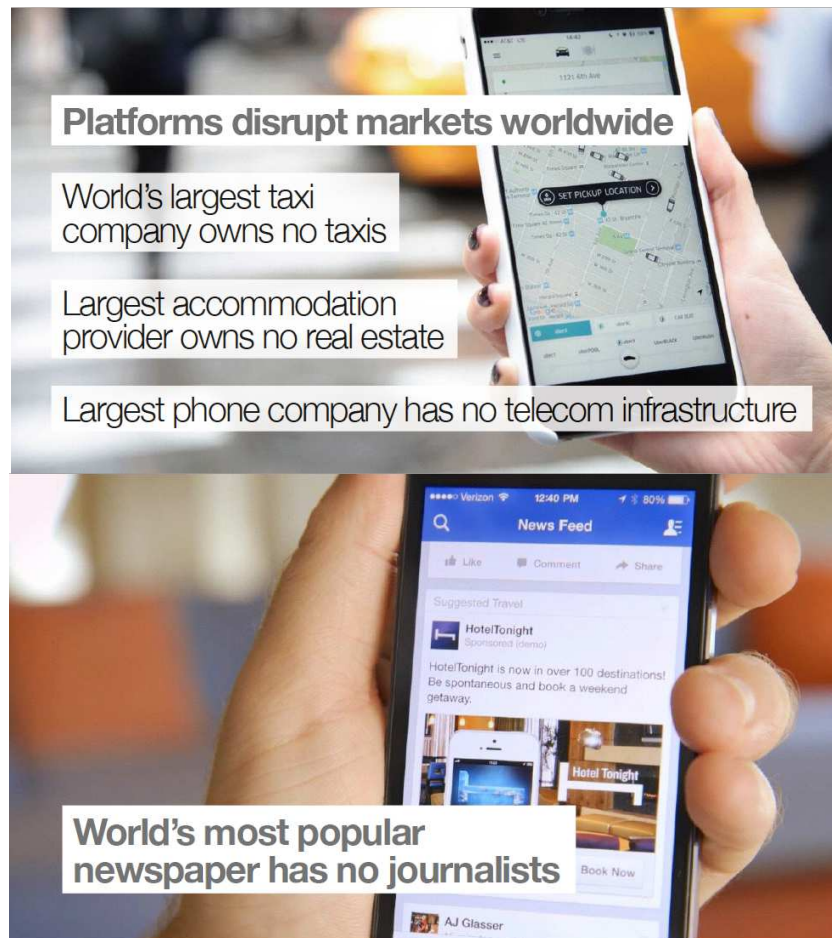
⁵⁹ Mediawatch "Keeping your enemies close" (8 May 2016) RNZ. Accessible at: <http://www.radionz.co.nz/national/programmes/mediawatch/audio/201799163/keeping-your-frenemies-close>.

the news itself - essentially allowing those people or groups to break their own news to the masses before media companies get the chance. In this sense, Facebook poses an existential threat to the very idea of news organisations as news breakers.

161. As the Commission has itself noted based on a Fairfax survey,⁶⁰ print accounts for 13% of news consumption and Facebook accounts for 15%. Thus, Facebook singlehandedly boasts a share of news consumption greater than print.
162. Within the Facebook platform, private individuals, organisations or companies are able to directly disseminate news to consumers, usurping the role of media organisations and contributing immeasurably to plurality of voice. To take just a few political figures as an example, as of 23 November 2016:
- (a) John Key has 246,965 'likes' on his Facebook page. This is equivalent to two of New Zealand's largest companies, Spark (with 221,299 likes) and Vodafone (with 263,774 likes). This means that if Mr Key were to post news, policy updates, or messages to his Facebook page (which he does, often daily), he would potentially reach nearly a quarter of a million people. If any of those quarter of a million people were to like or share Mr Key's post, their own personalised network of friends could also be shown that post, and so on.
 - (b) The Green Party has 89,812 likes on its Facebook page, only slightly below the NZ Police (109,496 likes) and ANZ (106,036 likes). The National Party and Labour Party have 63,727 likes and 51,786 likes respectively.
 - (c) Jacinda Ardern has 46,635 likes, more than the Auckland Council (45,102 likes) and Fonterra (35,526 likes).
 - (d) Chloe Swarbrick (20,879 likes), Grant Robertson (16,202 likes), Nikki Kaye (15,489 likes), Metiria Turei (13,046 likes) and Bill English (12,790 likes) all have substantial online presences, equivalent to, for example, the NZ Transport Agency (15,027 likes).
163. While this direct reach is an important feature of the modern political landscape, it is also a significant distribution channel that is unfiltered by independent commentary of professional journalists. Through this channel, which is larger than print, public figures and businesses break their own news. The media organisations are left to editorially comment on that news, in the same way as any blog site can.
164. The parties set out at **Appendix Four** a series of screenshots that compare the reach and audience engagement achieved by the originator of the news, with the reach and engagement achieved by the subsequent reporting on that news by Fairfax / NZME.
165. Given these factors, the parties ask the Commission to reconsider attributing more weight to the role of Facebook (and, indeed, Google, Twitter, and other search and social media giants that are siphoning advertising revenue and attention from the parties) in its competitive effects analysis.

⁶⁰ Fairfax Annex 67, [Mini Brand Health Study (June 2016) [slide 8].

Figure 17 - Publishers vs. Platforms

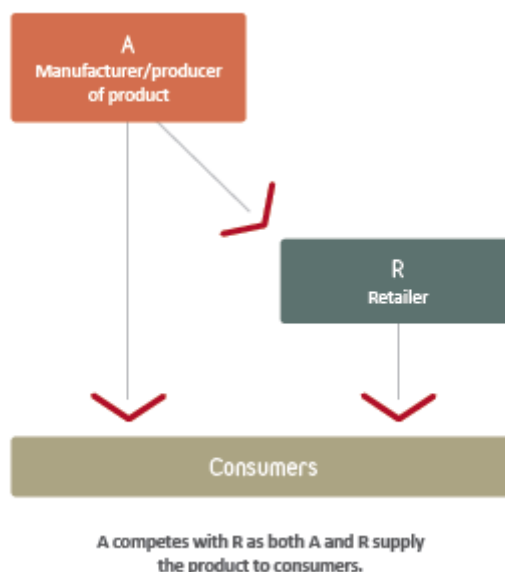


Source: Greg Piechota *Publishers vs. Platforms Distributed Content Strategies* (Harvard University).

The Commission's usual approach to constraint from distributors

166. Applying traditional competitive effects analysis, there is no basis to exclude the competitive constraint from a distributor such as Facebook. The Commission takes these constraints into account in other contexts. For example, in its Competitor Collaboration Guidelines the Commission considers that a manufacturer that sells directly to consumers, and a distributor that sells to consumers, are competitors, as reflected in Figure 18 below, taken from the Commission's Guidelines.

Figure 18 - Diagram from the Commission's Guidelines of "An arrangement with horizontal and vertical aspects"



167. The Commission also recognises the important role that distributors can have in influencing competitive dynamics in other industries. For example, in insurance, the Commission recognises that the banks' role as distributors of insurance products has significant implications for the price and quality of insurance to consumers despite the banks not being insurance underwriters themselves.⁶¹

Given the competition the banks face in the re-sale of insurance products, as well as the suite of banking products they sell in conjunction with insurance, we do not consider it likely that they would simply pass-through any increase in insurance premiums. Rather they are likely to attempt to negotiate not only favourable contractual terms for themselves, but also favourable insurance prices for their customers.

168. Similarly, Facebook has significant countervailing power in its dealings with news media providers. It can largely dictate the portion of the advertising revenue that it keeps and if Facebook's algorithms do not dictate a news provider's content to be "quality" then that news provider will receive no postings, page views, or revenue. In this market context, the quality of news media organisations' content is not driven by competition at the upstream news generation level, but rather by the need to deliver content that is considered quality, newsworthy, and timely by Facebook's algorithms. It is submitted that this is entirely consistent with the competitive effects analysis, and countervailing power of distributors, that the Commission observed in respect of banks and insurance providers.

169. The significant role that news distributors, such as Facebook and Google News, play in the competitive dynamics facing news media is illustrated from a natural experiment that occurred when Google News exited Spain in 2014 (due to a law change):⁶²

For example, results from a recent study examining the impact of the closure of Google News in Spain found a net decrease in online news consumption of around 16% (measured in terms of articles read) among former Google News users, which suggests that some traffic was genuinely incremental. However, the top five news websites viewed in Spain saw their usage increase after

⁶¹ *Re IAG (NZ) Holdings Limited and Lumley General Insurance (N.Z.) Limited* [2014] NZCC 12 at [103].

⁶² "An era of negotiation: news publishers and online intermediaries October 2016" Oxera. Accessible at: <http://www.oxera.com/Latest-Thinking/Agenda/2016/An-era-of-negotiation-news-publishers-and-online-i.aspx>.

Google News's closure (again, among former users of Google News), which suggests that Google News also partially substituted for direct, 'unmediated' consumption of the main news services and effected a degree of reapportionment of market shares away from the largest publishers in favour of niche/smaller publishers.

170. This natural experiment illustrates two key points:
- (a) Overall consumption of news by former Google News users dropped by 16% after the change. This demonstrates Google News was an important driver of additional news consumption in Spain.
 - (b) Traffic to the top five news websites in Spain increased. This is because Google News was providing a platform for the news offerings of a number of smaller news websites in Spain. When Google News exited, consumers reverted back to going to the bigger news sites directly. This demonstrates the amplification power of the media distribution platforms: smaller sites get visibility and significant audience reach via Google News.
171. As this scenario illustrates, Google News was accounting for a material amount of genuinely incremental news traffic, and it was also diverting audience traffic away from the bigger news media websites to smaller news providers - an amplification of the competitive constraint facing bigger news media websites as well as an amplification of media plurality available to consumers.
172. One need only look at the vast array of smaller news media outlets that have their content placed on Google News' New Zealand news offering to see that the same is true in New Zealand. Google News New Zealand aggregates content from many providers, including: TVNZ, RNZ, Newshub, Voxy, WeatherWatch.co.nz, Allied Press (Otago Daily Times), Gisborne Herald, Scoop, Techday,⁶³ ShareChat, BusinessDesk, Maori Television, etc.
173. Given Facebook's significant growth in becoming the news distribution channel of choice for an increasing number of New Zealanders, if the same natural experiment were to be run in New Zealand with an exit of Facebook, the results would be even more stark again.
174. This substitution from digital news media's own platforms to accessing news via Facebook (and other social media) is having significant impacts on the revenue of those news media organisations, as social media competes with news media organisations to have the direct relationship with audiences and to collect audience data for the purposes of better monetising advertising:⁶⁴

Across the globe, Facebook is the dominant social media platform for news; 44% say they use Facebook for news, according to Reuters Institute's 2016 Digital News Report. "The strategy is to get on Facebook, it's to connect with readers where they are, instead of getting them to come to where we are," said Hana Greiner, Community Manager of Miss Magazine in Austria.

Facebook's expanding influence on politics was recently featured in a New York Times Magazine article where "it became clear that Facebook wasn't just a source of readership; it was increasingly, where readers lived" and it is becoming "a self-contained marketplace to which you have been granted access but which functions according to rules and incentives that you cannot control".

⁶³ "Asia Pacific's leading source of technology news", which includes NetGuide, Educators NZ, bizEDGE, ChannelLife, ITBrief, SecurityBrief.

⁶⁴ Chia Lun Huang "The 2016 Global Report on Online Commenting, Chapter 2: The Facebook Factor" (17 October 2016) World Association of Newspapers and News Publishers. Accessible at: <http://blog.wanifra.org/2016/10/17/the-2016-global-report-on-online-commenting-chapter-2-the-facebook-factor>.

As a consequence of its increasing influence, Facebook is taking away a growing chunk of crucial online advertising on which news organisations depend. Former Guardian Editor Alan Rusbridger estimated that Facebook sucked up nearly 20% of the Guardian's digital advertising revenue last year.

Losing touch with readers and control

However, Greiner of Miss recently noticed that the articles they posted were getting only half the reach or less than before, while videos and Instant Articles seemed to perform better. "Facebook changes its algorithm and does not necessarily tell us. We just notice the difference," she said.

Earlier this year, Facebook's method of selecting trending news came under attack for bias. It said it would rely more on algorithms instead of humans. Yet within three days of the change, it made a mistake, trending fake news. Facebook's newest changes in algorithm to show more links from families and friends was another blow to news organisations on which 40% of their traffic depends.

Emily Bell, Founding Director of the Tow Center for Digital Journalism at Columbia Journalism School has consistently questioned how social media platforms are living up to their expanding role as publishers and the risk that traditional publishers are taking when ceding reader relationship and data to them.

In the most recent preliminary research on the issue, she pointed out the biggest tension at the heart of the relationship between publishers and platforms: Is a reader of The New York Times on Facebook a New York Times reader, or a Facebook user reading The New York Times?

"We shouldn't expect Facebook to act in the best interests of the news organisation," said Coral Project leader Losowsky. More importantly, social media sites have their own priorities and needs, which may be in direct competition with news organisations.

175. The most recent statistics on the role of Facebook as a distributor of news (including fake news in the US) were considered as a result of the examination of the role of Facebook in the recent US election, and those statistics show that that 66% of Facebook users access news through Facebook.⁶⁵
176. For this reason, many news publishers now describe Google and Facebook as their "biggest competitors".⁶⁶ In these circumstances, it is artificial and wrong for the Commission to exclude the impact of news distribution competition from Google, Facebook, and other social media from its competitive effects analysis.

CONTENT COMPETITION

177. The Commission acknowledged that there is no material competitive overlap between NZME and Fairfax's regional and metropolitan newspapers, ie, that they are in separate markets.⁶⁷
178. However, the Commission concluded that because NZME and Fairfax operate on a "digital first" basis (ie, they prioritise the creation of digital editorial content with select content converted to a print format):

⁶⁵ Hannah Jane Parkinson "Click and elect: how fake news helped Donald Trump win a real election" (14 November 2016) The Guardian. Accessible at: <https://www.theguardian.com/commentisfree/2016/nov/14/fake-news-donald-trump-election-alt-right-social-media-tech-companies>.

⁶⁶ Jonas Cho Walsgard "Nordic Media Giants Merges Tech Operations to Take on Google" (7 September 2016) Bloomberg. Accessible at: <http://www.bloomberg.com/news/articles/2016-09-07/nordic-media-giant-merges-tech-operations-to-take-on-google>.

⁶⁷ Draft Determination at [456].

- (a) It is competition between NZME and Fairfax, in an online news market, that is the key driver of quality in the provision of their respective news content - ie "Competition between the Applicants to generate online content drives increased variety and volume across their own media platforms",⁶⁸
 - (b) Because it is this competition between NZME and Fairfax that drives content quality, a reduction in that online news competition "may also affect the quality of New Zealand news that is published in NZME and Fairfax's regional and metropolitan newspapers, despite the minimal overlap across these newspapers",⁶⁹ and
 - (c) Other media organisations monitor NZME and Fairfax's websites to "pick stories up and seek new angles"⁷⁰ and, therefore, that this online news competition between NZME and Fairfax has impacts on the "wider domestic news market".⁷¹
179. This is the type of analysis that the Full Federal Court in *Metcash* warned against. It is at best speculative, and does not reflect the market realities or what the available evidence demonstrates drives content quality. This can be illustrated practically by a "real world experiment":
- (a) The Commission correctly observes in its Draft Determination that NZME and Fairfax each (as well as TVNZ and MediaWorks) made the move to a "digital first" operation "within the last two years". Prior to that shift to "digital first", each of NZME and Fairfax primarily created content in the first instance for their respective print publications, with those daily print publications, as described in the Commission's own analysis, each operating within their own separate regional market (ie there is no material circulation overlap between NZME and Fairfax's respective regional and metropolitan newspapers).
 - (b) Accordingly, up until two years ago there was no direct competition between NZME and Fairfax in the creation of content, as content was primarily created for print publications in separate markets. If the Commission's hypothesis is correct, ie that online news competition between NZME and Fairfax is the key driver of content quality, then it must also be true that approximately two years ago there was a significant increase in content quality of NZME, Fairfax, and all other media organisations that monitor their websites, when NZME and Fairfax came into direct content creation competition for the first time.
 - (c) If there was not such a step-change in content quality across NZME, Fairfax, and the "wider domestic news market" two years ago then the Commission's theory is incorrect.
180. Of course, there was no such step-change improvement in content quality at that point in time. That is because it is not direct content competition between NZME and Fairfax that drives content quality. Rather the factors that drive content quality are:
- (a) from a journalistic perspective - journalists are professionals with high professional standards, vocational aspirations and journalistic competitiveness within their own organisation. They are self-driven to deliver the very best stories and to champion the communities they serve; and

⁶⁸ Draft Determination at [16].

⁶⁹ Draft Determination at [456].

⁷⁰ Draft Determination at [16].

⁷¹ Draft Determination at [16].

- (b) from an organisational perspective - the need to create quality content within the context of a two-sided market to attract audience and, therefore, advertising revenue.
181. For most of the last 25 years, *The New Zealand Herald* has been the only (or only substantial) daily print newspaper in Auckland. *The New Zealand Herald* has delivered its print readers in Auckland quality content that is varied, accurate, and objective, not because of the fear of losing readers to, say, Fairfax's *Dominion Post* in Wellington, but because that is what journalists do and that is what is necessary to attract readers in order to attract advertising revenue.
182. The ACCC recognised the competitive constraint from the two-sided nature of the markets in its recent decision to clear the merger of the two print newspapers and online news sites in Western Australia:⁷²
- The ACCC also considered that, in the face of growing competition from alternative advertising opportunities, the need for SWM to maintain readership levels in order to ensure advertising revenues would constrain SWM and likely limit its ability to increase prices to consumers or decrease quality as a result of the proposed acquisition.
183. The ACCC also concluded that content competition between different kinds of media, eg print newspaper, online, TV, and radio would be a constraint on the merged entity:⁷³
- [T]he ACCC concluded that overall, a sufficient range of news choices would remain available to Western Australians, with competing online options **including Fairfax's WAtoday and ABC online, as well as TV and radio news.** [Emphasis added.]
184. Applying an orthodox competition law approach in two-sided markets, as well as using the benefit of in-market evidence and observing the outcomes of the natural experiment of shifting to "digital first" demonstrates that the theory of harm posited in the Commission's Draft Determination is speculative.

CONSTRAINT FROM TVNZ, RNZ, MEDIAWORKS, AND OTHERS

185. The Commission concluded that the merged NZME / Fairfax would "have increased market power in the online New Zealand news market" and that, as a result, it could introduce a paywall or reduce the quality of the news content produced.
186. The Commission reached this view despite comments that:
- (a) "Within the last two years NZME, Fairfax, TVNZ and MediaWorks have shifted to 'digital-first' operations to deliver content to consumers. This means that each of the main media firms typically publish their stories online first, rather than waiting to break the story on TV, print or radio";⁷⁴
- (b) "TVNZ and MediaWorks said that their respective websites compete with NZME and Fairfax to break stories",⁷⁵ for example that "newshub.co.nz breaks stories during the day";⁷⁶ and

⁷² Australian Competition and Consumer Commission mergers register "Seven West Media Limited - proposed acquisition of The Sunday Times publication and website from News Limited" (15 September 2016). Accessible at: <http://registers.accc.gov.au/content/index.php/itemId/1198464/fromItemId/751046>.

⁷³ Ibid.

⁷⁴ Draft Determination at [429].

⁷⁵ Draft Determination at [469].

⁷⁶ Draft Determination at [470].

- (c) RNZ is "putting a lot of "energy" into its website as well as distribution of its content on social media platforms",⁷⁷ and advising the Commission that "the digital world is dirt cheap".⁷⁸

187. In particular, the Commission reached the view that it did not consider "existing competitors are sufficiently well placed to replace the competition that will be lost as a result of the merger." But *replacement* of competition is not a question the statutory test poses - the Commission is obliged to assess whether there will be a *substantial lessening of competition*.

188. As William Kolasky, then Deputy Assistant General of the DOJ's Antitrust Division, has noted:⁷⁹

Antitrust enforcers should not be in the business of picking winners or protecting losers. **We should keep in mind that preserving "competition" does not mean taking action to ensure that a market remains populated by a static number of relatively equally matched players.** In the merger context, this means resisting the temptation to use the antitrust laws to make life easier for complaining competitors by blocking efficient transactions that give the merged firm the ability to lower prices. [Emphasis added.]

189. Indeed, the ACCC recently recognised in a 2-to-1 newspaper merger in Western Australian that *replacement* of competition is not the relevant standard.⁸⁰

"While **no single alternate form of advertising would replace** the constraint that News currently imposes on SWM, the ACCC considered that the various advertising **alternatives, including online, radio and TV, would collectively impose sufficient constraint** on SWM post-acquisition." [Emphasis added.]

190. The parties ask the Commission to remain focused on a forward looking assessment of barriers to entry and expansion. The need for this approach was set out in the leading case of *Commerce Commission v Southern Cross Medical Care Society*.⁸¹ In that case, it was said:

Market share is relevant to the level and significance of market power but it is not in itself the determinant of market power. What level of market power a firm has, as a result of its market share, will depend substantially **on the level of barriers to entry and expansion which apply to the market. If the barriers are low, a high market share is unlikely to result in an insufficiently constrained level of market power**.... The level of market share and the level of market power have no direct relationship in themselves. The levels of barriers to entry and expansion provide the linkage and must be brought to account when considering the level of a firm's market power. The lower the barriers to entry or expansion, the more an incumbent firm with a high market share is constrained from using its position in a supra-competitive way.

[...]

... the fundamental economic thinking that links market shares to market power also indicates circumstances in which a large market share will not necessarily confer market power. **This will be the case where competitors, even though they have a small market share, are able and willing to expand output quickly and at a relatively low cost.** In other words, market share will not

⁷⁷ Draft Determination at [472].

⁷⁸ Draft Determination at [510].

⁷⁹ William Kolasky presentation to the International Bar Association Conference on Competition Law and Policy in a Global Context (Cape Town, South Africa, 18 March 2002). Accessible at: <http://www.justice.gov/atr/public/speeches/10845.htm>.

⁸⁰ Australian Competition and Consumer Commission mergers register "Seven West Media Limited - proposed acquisition of The Sunday Times publication and website from News Limited" (15 September 2016). Accessible at: <http://registers.accc.gov.au/content/index.phtml/itemId/1198464/fromItemId/751046>.

⁸¹ (2001) 10 TCLR 269 (CA) at para. At [68] and [71] (emphasis added).

confer market power when small competitors face low barriers to expansion and, thus, are able to contest the whole of the relevant market. [Emphasis added.]

191. The judgment continued to analyse in greater depth the relationship between barriers to entry and barriers to expansion. It concluded, relying on economic literature, that even where barriers to entry are high conditions of the market may be such that **barriers to expansion** by existing firms may be low.⁸²
192. In this respect it is noted that even if the Commission's conclusion is correct that there are "significant barriers to entry in the online news market, given both the costs of running a national news organisation and the creation of content"⁸³ (which the parties say it is not), it is only barriers to expansion that would be relevant in respect of the competitive constraint imposed by TVNZ, MediaWorks, and RNZ given they are already competitors in the online news market in New Zealand.⁸⁴
193. The Commission dismissed the competitive constraint from, and ability to expand of, TVNZ, MediaWorks, and RNZ for the following reasons:
- (a) The difficulty of monetising digital news - "creating additional content is not necessarily profitable... media firms need to be able to attract readers to their website to monetise their advertising inventory";⁸⁵
 - (b) Brand - "the possession of an established news brand may be a major advantage in attracting and retaining audiences online"⁸⁶ and "investment in brand development to attract readers and advertisers to compete against the merged entity is inherently risky";⁸⁷
 - (c) Audience - "the reach of these competitors is not as comprehensive as the merged entity. These competitors would have to grow significantly to have the same presence as the merged entity in the online New Zealand news market"⁸⁸, and "TVNZ said that the business case to make the investment needed to develop the requisite level of online capability is dependent on the advertising revenue the platform is able to generate, which in turn is dependent on the audience reach";⁸⁹

⁸² Walker, *London Economics: Competition and Regulation Bulletin*, 8th ed. (Dec. 1997). Among other passages, the Court of Appeal (at [71], page 293) cited with approval the following statement:

"There are good arguments in support of the use of market share as an indicator of dominance. However, the fundamental economic thinking that links market shares to market power also indicates circumstances in which a large market share will not necessarily confer market power. This will be the case where competitors, even though they have a small market share, are able and willing to expand output quickly and at a relatively low cost. In other words, market share will not confer market power when small competitors face low barriers to expansion and, thus, are able to contest the whole of the relevant market."

⁸³ Draft Determination at [900].

⁸⁴ Indeed the dynamics of the internet facilitate the entry/expansion of competitors. As NERA noted in a submission to the Australian Competition Policy Review:

Traditional impediments that smaller players faced when entering markets, expanding their business or competing with big business have been reduced by the internet and mobile computing in three key areas— connecting with customers, brand awareness and quality, and costs.

See: NERA Economic Consulting, "Levelling the Playing Field: The Role of the Internet and Mobile Computing in Improving the Efficiency and Competitiveness of Australian Small Business" (17 November 2014) at (iii), accessible at <http://competitionpolicyreview.gov.au/files/2014/12/Google.pdf>

⁸⁵ Draft Determination at [513].

⁸⁶ Draft Determination at [901].

⁸⁷ Draft Determination at [513].

⁸⁸ Draft Determination at [499].

⁸⁹ Draft Determination at [507].

- (d) Number of journalists - "for TVNZ or MediaWorks to increase their coverage to the extent of the merged entity would require significant investments",⁹⁰
- (e) Regional coverage - "the evidence of the competing firms is that they do not have the same regional focus",⁹¹
- (f) Because RNZ takes a "more "pure" news approach covering stories that reflects its obligations as a publically-funded broadcaster".⁹² The Commission also discounts Bauer as a New Zealand media competitor on the basis that it focuses on "investigative journalism".⁹³
194. NZME and Fairfax disagree on each of these points, and outline why below. Indeed, it is recognised worldwide that media companies are converging on digital delivery channels as the business model of the future - accordingly, TVNZ, MediaWorks, and RNZ must be intending to expand further into digital and, indeed, their public statements and recent initiatives demonstrate expansion.

The difficulty of monetising digital news

195. The Commission's starting point seems to be that TVNZ and MediaWorks are somehow minnows in comparison to NZME and Fairfax, and that Fairfax and NZME are each somehow better placed to invest in and monetise digital content than each of TVNZ and MediaWorks.
196. The reality is very different. Each of TVNZ, MediaWorks, Fairfax, and NZME are, from a revenue perspective, of a similar size to one another.⁹⁴
197. While NZME and Fairfax agree that monetising digital content (and content, including news) is challenging for New Zealand media businesses, that is not due to the positions of either NZME or Fairfax, rather it is due to the dominance of global giants such as Google and Facebook who are together receiving of 81%⁹⁵ of every new dollar in digital advertising revenue in New Zealand.
198. Furthermore, TVNZ and MediaWorks each capture a significantly larger share of overall agency advertising expenditure than NZME and Fairfax, as reflected in Figure 19 below.

⁹⁰ Draft Determination at [512].

⁹¹ Draft Determination at [482].

⁹² Draft Determination at [472].

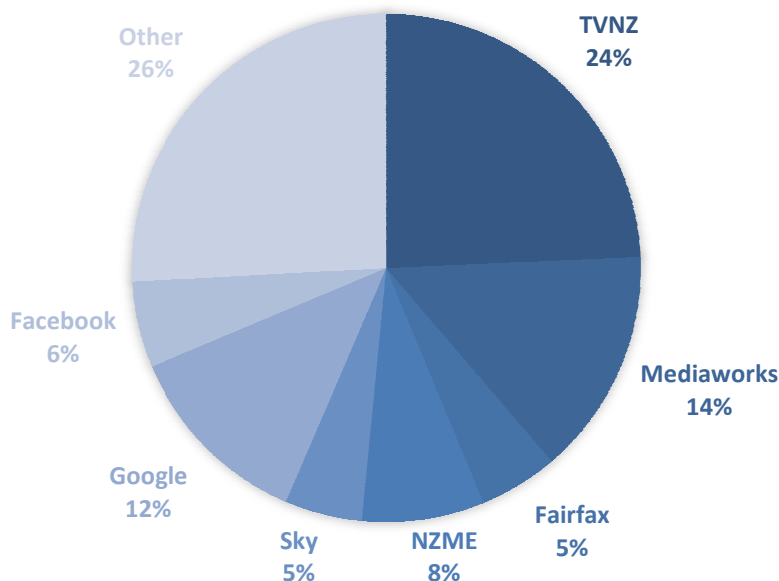
⁹³ Draft Determination at [603].

⁹⁴ For example:

- TVNZ Annual Report Financial Year 2016. Accessible at: http://images.tvnz.co.nz/tvnz_images/about_tvnz/TVNZ%20Financial%20Report%20FY2016_FINAL.pdf.
- Chelsea Armitage "MediaWorks earnings tumble on flat revenue" (1 June 2016) National Business Review. Accessible at: <https://www.nbr.co.nz/article/mediaworks-earnings-tumble-flat-revenue-ca-189794>.
- "NZME reports stable earnings, dividend declared" (NZX/ ASX media release, 26 August 2016). Accessible at: <http://www.nzme.co.nz/media/1081/h1-16-interim-results-release.pdf>.
- Fairfax Media Annual Report 2016. Accessible at: <http://www.fairfaxmedia.co.nz/ArticleDocuments/193/FAIRFAX%20Annual%20Report%202016.pdf.aspx?Embed=Y>.

⁹⁵ SMI July to September 2016.

Figure 19 - Total agency advertising expenditure in the 8 months YTD August 2016



Source: SMI.

199. Post-merger, the combined NZME / Fairfax will still achieve a significantly smaller portion of total agency advertising expenditure than TVNZ, and a marginally smaller proportion than MediaWorks.
200. Accordingly, to the extent there is an economically rational opportunity to invest in monetising digital news content, TVNZ and MediaWorks ought to be considered to have the same abilities and incentives as either NZME or Fairfax. If there is no such opportunity, then the Commission cannot assume that only TVNZ and MediaWorks will act rationally, and that NZME and Fairfax will act irrationally and continue to invest in digital news despite there being no profit opportunity to do so (in particular, given the evidence submitted above about the rapid decline in the print industry).
201. Indeed, given their cross-platform capabilities (eg TVNZ in TV and MediaWorks in TV and radio), they have a number of additional capabilities that they can leverage into their digital news offerings, as noted in previous submissions to the Commission:
- (a) TVNZ describes itself as the country's leading free-to-view video content provider, highlighting that it reaches 2.2 million New Zealanders every day and 3.7 million every month via its main broad channels (TVNZ1 and TVNZ2) as well as its TVNZ OnDemand and 1 News Now online services;⁹⁶
 - (b) MediaWorks describes itself as New Zealand's largest independent cross-platform media company, reaching 3.7 million Kiwis and providing news and entertainment content across TV, radio and digital properties, including Newshub, which it describes as "New Zealand's only 24/7 TV, radio and digital news service".⁹⁷
202. TVNZ and MediaWorks are plainly at least equally capable of monetising digital news content as NZME and Fairfax. Indeed, for the Commission to suggest that TVNZ and

⁹⁶ TVNZ submission on the Commerce Commission's Statement of Preliminary Issues (14 September 2016) at 1.1.

⁹⁷ MediaWorks Holdings Limited submission on the Commerce Commission's Statement of Preliminary Issues (30 September 2016) at 1.2.

MediaWorks will not further expand in digital media⁹⁸ begs the question: what other media channels do they see as the future of their respective businesses? It is well accepted worldwide that online / digital is the future of all media businesses, so it would be highly speculative for the Commission to suggest that TVNZ and MediaWorks are going to swim against the global tide and retrench from their recent investments in digital media.

203. It would also be contrary to the public statements each of TVNZ and MediaWorks have made about their respective future strategies. For example:

(a) TVNZ in its most recent Annual Report stated:

In an increasingly fragmented content market TVNZ has focussed on driving its audience reach across 1, 2, DUKE, OnDemand **and 1 NEWS NOW**. For the last financial year, TVNZ reached an average 2.2 million viewers per day.

[...]

TVNZ's people and talent strategy is focused on ensuring our people have the capability and confidence to succeed in an industry which is rapidly changing on a global scale.

This year we have: ... **grown digital confidence and aligned the business around a rapidly evolving viewer lens.**

[...]

Providing digital capability training to our people. [Emphasis added.]

(b) MediaWorks as recently as July 2016, in launching a new digital news offering, has stated:⁹⁹

In this case we are developing and further investing in our digital news content, connecting our award-winning reporters with audiences in a new way, reinforcing our 24/7 news service, and providing a new way for Kiwis to find information on the platforms they're utilising most often.

204. In contrast to the suggestion in the Commission's Draft Determination that somehow NZME and Fairfax are uniquely placed to monetise digital content, the reality is that TVNZ considers it is in a better position to monetise digital content than traditional print publishers.¹⁰⁰

TVNZ commercial director Jeremy O'Brien says ad viewability is largely an issue for static online ads rather than video centric offerings.

"As such it hasn't been as big an issue across TVNZ's portfolio as it has been for others in the market. This speaks volumes about the way engaged audiences respond to a premium video environment and how we balance our ad load with the viewer experience," he says.

"TVNZ OnDemand and One News Now already have near 100 percent viewability. Our experience tells us it is very unusual for a viewer to initiate an ad stream ahead of a piece of content they have actively chosen to engage with, and then choose to drop out of that experience before they have viewed the content. We are of course open to constantly reviewing our offering and believe we well exceed the market standard."

⁹⁸ Draft Determination at [511] - [512].

⁹⁹ Erin McKenzie "Beyond the midday bulletin: Newshub launches its explainer platform" (26 July 2016) StopPress. Accessible at: <http://stoppress.co.nz/news/newshub-explains>.

¹⁰⁰ Holly Bagge "Digital reassurance: MediaWorks enables 100 percent viewable banner ads and unblockable video" (31 March 2016). Accessible at: <http://stoppress.co.nz/news/mediaworks-viewability>.

205. In addition, there is RNZ. As RNZ does not need to monetise digital content from advertising, it will continue to invest in such content in accordance with its charter, as its CEO has noted:¹⁰¹

The challenge for all of those organisations is that they're doing a hell of a lot of work, some of them further ahead than others. But where does it end? Because the business models are just under such pressure; it's not like they get to a bit of clear space in the jungle and they can have a breather; they've got to keep going. And there is a thinning out of journalists, you can see happening. Some fantastic work still being done by all of the commercial players I have to say, but they're under a lot of pressure.

So when we think about that it makes us feel lucky that what our job is is to provide a real public service and a point of difference, and that fixed funding is tough for an organisation, particularly after eight or nine years. But it's not a bad place to be given the kind of cost cutting that's having to be imposed by all those organisations, and the disruption to their commercial model.

So that's one thing – to do the best job we can, because we understand that journalism is being thinned out, as you've said.

206. Furthermore, demonstrating that businesses recognise the opportunity to monetise news content in the online environment is the recent launch by Bauer of its new Noted.co.nz news platform. This is an online platform that brings together Bauer's content from NZ Listener, North & South, Metro and Paperboy. Bauer has also signed content deals with RNZ and *The New York Times*. As reported by StopPress, Bauer head of digital Michael Fuyala "looked closely at the editorial and business models used at Atlantic Media and Mic".¹⁰²

However, like Atlantic Media, Bauer has also been investing heavily in digital. Over the last 18 months, Fuyala has had his hands full launching a number of digital products.

It started with FQ.co.nz in April last year, then came Food to Love and Homes to Love in May, followed by Women's Weekly in November and now Noted has also been added to the mix. The old sites have already been switched off, and Bauer stopped offering paid-for digital subscriptions in the lead-up to this launch (as Paul Dykzeul, Bauer's CEO, said in his inimitable style in an earlier interview: "[The Listener paywall] was done very badly, incredibly poorly. It was a disaster. It just didn't work, and it was never going to work. That doesn't mean it won't ever work. But we basically got rid of it.>").

"It's not just the Atlantic.com but the broader group. They've launched a lot of really interesting products off the back of their premium content as well as a lot of digital-only products [like qz.com]. What we liked about them was they were a legacy or a heritage publisher that were also really innovating in the online space and they managed to get the best of both worlds.

Fuyala says Bauer's digital portfolio already reaches over 1.3 million readers per month, and he expects Noted to give this a decent upward nudge—especially given these publications still command strong print circulation numbers.

The Listener has a circulation of 47,500 copies, *North & South* is at 23,800 and *Metro* sits further back at 7,500.

¹⁰¹ Duncan Greive "'Think of Us as Yeast' - An Interview with Paul Thompson, Head of RNZ" (27 November 2015) the Spinoff. Accessible at: <http://thespinoff.co.nz/featured/27-11-2015/media-think-of-us-as-yeast-an-interview-with-paul-thompson-head-of-rnz/>.

¹⁰² Damien Venuto "The Atlantic of New Zealand? Bauer brings its current affairs titles together in new online hub, aims for quality over quantity" (18 November 2016) StopPress. Accessible at: <http://stoppress.co.nz/news/atlantic-new-zealand-bauer-brings-its-current-affairs-mags-together-new-online-hub>.

“In a year, these publications reach one in four New Zealanders in terms of cumulative readership, and two out of three of these readers sit in the top three socio-economic brackets, so we’ll so we’ll definitely be looking to engage that audience and use it as a key selling point for advertisers,” says Fuyala.

- 207. Similarly, as foreshadowed in Fairfax and NZME's original application to the Commission, the imminent launch of a new New Zealand news website, NewsRoom.co.nz, by Tim Murphy (former editor-in-chief of The New Zealand Herald) and Mark Jennings (former group head of news for MediaWorks) demonstrates there are no barriers to entry and that businesses that recognise the opportunity to monetise digital news content will make that investment.
- 208. It is understood that NewsRoom.co.nz will focus on national journalism, and is marketing its news offering as outlined in Figure 20 below.

Figure 20 - Extract of marketing material for Newsroom.co.nz

<ul style="list-style-type: none"> • A new, independent site doing in-depth news for thinking people • The Things that Matter • Beyond gossip, crime and celebrity • Reinvigorating specialist news and current affairs 	<ul style="list-style-type: none"> • Moving from ‘Clicks to Clocks’ • Highlighting the good and exposing the bad • Using clever video storytelling to enhance quality reading • Created for a mobile World, shared on Social
<ul style="list-style-type: none"> • High-appeal, quality journalism • Calm and in context • Expert staff writers and freelancers with personality 	<ul style="list-style-type: none"> • In-depth reads and ‘interpretative’ style • Additional content from top-class NZ and overseas sources • Aggregating quality content and linking out

Source: Newsroom marketing material.

- 209. A copy of this Newsroom.co.nz marketing material is **enclosed** with this submission.
- 210. It is understood that Newsroom.co.nz has a team of at least ten journalists, plus contributors, lined up - including:
 - (a) Mark Jennings and Tim Murphy (co-Editors);
 - (b) Melanie Reid (Investigations Editor);
 - (c) Bernard Hickey (Economics Editor);
 - (d) Steve Deane (Sports Editor);
 - (e) Suzanne McFadden (Contributor, Sports and Inspiration);
 - (f) Rod Oram (Contributor, Business and the Environment); and
 - (g) Eloise Gibson (Environment and Science Editor).

Brand

- 211. The Commission noted that given New Zealand's small size, and the number of large, established media brands that compete in the market, "investment in brand development to attract readers and advertisers to compete against NZME is inherently risky".¹⁰³

¹⁰³ At [513].

212. But TVNZ, MediaWorks, and RNZ already have significant brand awareness across New Zealand. They are long-established media outlets, with wide reach and strong brand awareness:

- (a) Both MediaWorks and TVNZ have won the Media Brand of the Year award at the CAANZ Beacon Awards in recent years, reflective of their pervasive reach.¹⁰⁴
- (b) Fairfax has already provided the Commission with an Ipsos study that found TVNZ to be the 9th most influential brand in New Zealand, higher than any other media brand (including significantly higher than either NZME or Fairfax).¹⁰⁵
- (c) TVNZ markets its 1 News service as the "most trusted" news service in New Zealand:¹⁰⁶

News and current affairs is the cornerstone of TVNZ 1's content offering in 2017," said Latch. **"The agenda-setting 1 NEWS team continues to be New Zealand's most watched and most trusted news."** [Emphasis added.]

And:¹⁰⁷

1 NEWS is New Zealand's most watched and most trusted TV news. On air and online, the 1 NEWS team keeps New Zealanders up with the play by delivering news across a range of different mediums throughout the day. 1 NEWS NOW is a mobile-centric portal dedicated to delivering up-to-the-second news; 24hrs a day. [Emphasis added.]

- (d) MediaWorks markets its Newshub brand as "New Zealand's new leading news and current affairs brand".¹⁰⁸

TV3, our radio and digital platforms are home to New Zealand's new leading news and current affairs brand, Newshub, providing news throughout the day across TV3, Radio, Web and Mobile.
- (e) RNZ describes itself as "the trusted voice of New Zealand and the Pacific"¹⁰⁹ with "trusted and high quality programming and journalism".¹¹⁰

213. It is evident that all three of these competitors (TVNZ, MediaWorks, and RNZ) already have well-known and trusted brands known for delivering quality news content, and that they would not need to make any material additional investment in their brand to grow their audience. Indeed, the TV networks have the benefit of large existing advertising

¹⁰⁴ See, for example: "MediaWorks TV wins Media Brand of the Year" (2 May 2014) MediaWorks. Accessible at <http://www.mediaworks.co.nz/MEDIAWORKS-TV-WINS-MEDIA-BRAND-OF-THE-YEAR/tabid/1532/articleID/2127/Default.aspx>; and TVNZ "TVNZ reports 164% increase in underlying earnings". Accessible at: <http://tvnz.co.nz/tvz-corporate-comms/reports-164-increase-in-underlying-earnings-4904420>.

¹⁰⁵ Fairfax Annex 73 - "Ipsos. The Most Influential Brands in New Zealand 2015" at slide 6, submitted to the Commerce Commission on September 2016.

¹⁰⁶ TVNZ "TVNZ 2017: new content, new blood, new thinking" (media release, 29 September 2016) Scoop. Accessible at: <http://www.scoop.co.nz/stories/BU1609/S00975/tvz-2017-new-content-new-blood-new-thinking.htm>.

¹⁰⁷ TVNZ "TVNZ reports 164% increase in underlying earnings". Accessible at: <http://tvnz.co.nz/tvz-corporate-comms/reports-164-increase-in-underlying-earnings-4904420>.

¹⁰⁸ MediaWorks "Our Brands". Accessible at: <http://www.mediaworks.co.nz/OurBrands.aspx>.

¹⁰⁹ Aidan Bennett "A chat with... Paul Thompson" (November 2015) Channel Mag. Accessible at: <http://www.channelmag.co.nz/features/interviews/a-chat-with-paul-thompson/>.

¹¹⁰ RNZ "Memorandum of Understanding between RNZ and Māori Network" (media release, 31 August 2016) Scoop. Accessible at: <http://www.scoop.co.nz/stories/BU1608/S01050/memorandum-of-understanding-between-rnz-and-maori-network.htm>.

revenue, along with their brands, to assist in executing their transition to digital. They also have the benefit of having waited to observe the publishers attempt the transition to digital first, in order to take learnings from that process. As Bauer has noted, there is not necessarily any 'first mover' advantage in the digital space, with its head of digital, Michael Fuyala (formerly of NZME), suggesting that Bauer Media NZ's comparatively late pivot into digital is an advantage:

So does Fuyala believe that Bauer can catch up to the likes of NZME and Fairfax, both of which have introduced a slew of changes in the last year?

"We're extremely optimistic about our digital business," he says. "We've got a team of around 70 digital experts, developers, user-experience professionals, digital marketers and audience development guys."

And in some ways, he sees starting later as something of an advantage.

"The ways things are built today is very different from the way things were built ten or 15 years ago. And this actually gives us some advantages in terms of being the latest to market, in that we've got a lot of flexibility in the way we can build. We can be very agile. We can learn a lot about where others have failed, and avoid that in our building."

214. Reflecting this, as noted above, Bauer in just the last week has made further investment into a new online news brand, Noted.co.nz, for the provision of journalism content to New Zealanders. Of that website, Bauer notes:¹¹¹

No other website in New Zealand brings together so many trusted and diverse journalism sources. Noted helps you navigate what's happening in New Zealand currently, from a diligent look at money matters, health and politics to the diversions of travel, culture, best eats and satire. If it's happening in New Zealand, it's Noted.

215. It is evident that TVNZ, MediaWorks, and RNZ have made the necessary investments in their respective news brands and compete vigorously to be New Zealand consumers' online news brand of choice, including by competing to have the most interesting content and competing to be the first to break news.
216. This dynamic of competition between the various news brands is depicted in Figure 21 below, which displays a screenshot of the 'lock screen' of a mobile phone on 22 November 2016 showing a number of 'push notifications', which are alerts sent to the phone by news apps as soon as an important story is broken. Fairfax, NZME, TVNZ and MediaWorks all compete to break stories as quickly as possible, with each competitor breaking the story within minutes of each other.

¹¹¹ Noted "About". Accessible at: <http://www.noted.co.nz/about/>.

Figure 21 - Push notifications on a mobile phone, 22 November 2016



217. This in-market evidence demonstrates that other media entities are, and will be, willing to make the investment in an online news brand if they identify market opportunities.
218. The parties also do not accept that in a market of 4.5 million people there is the same need to build brand awareness as there is in, for example, the UK with over 63.5 million people, or even Australia with about 24 million. The brand popularity of the Spinoff as a news medium (launched only two years ago) has readily demonstrated that.

Audience

219. TVNZ, MediaWorks, and RNZ already have news products that are equivalent in terms of audience reach to those owned by the parties, as the Commission's own reach analysis demonstrated.
220. To the extent that it is not news products the Commission is concerned about, but pure "clicks", and that is regarded as a relevant measure of audience reach, there is no reason why TVNZ, MediaWorks, and RNZ could not make incremental investment to increase their online audience.
221. Indeed, those businesses' ability to grow their audience is likely to be enhanced by the Transaction, given consumers' strong preference to multi-source. Any reduction in quality by any news provider would quickly lead to audience growth for others.

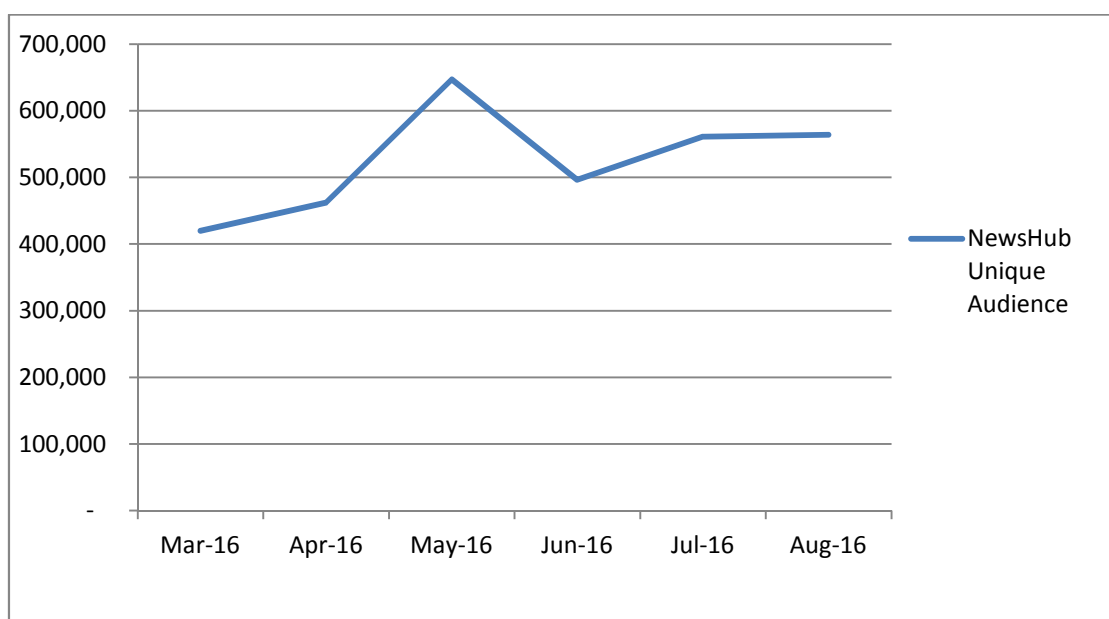
222. The ephemeral nature of readership / audience has been recognised by the Commission previously in media mergers:¹¹²

The Commission, as a result of the information received from industry participants set out above, is of the view that if the acquisition were to proceed and MediMedia were to exercise market power by charging for, or reducing the quality of, the general information publications, a new entrant would be able to obtain the advertising revenue required to enable it to produce a general information publication that could compete successfully with MediMedia.

The Commission therefore considers that access to advertising revenue would not be a barrier to entry.

223. Evidence of this can be seen in the audience growth that MediaWorks has achieved since it launched Newshub at the start of the year, as demonstrated by Figure 22 below.

Figure 22 - Newshub Unique Audience March to August 2016



Source: Nielsen Online Ratings.

224. In July 2016 MediaWorks stated that the audience on its Newshub app "spends almost three million minutes per month using the app, and it's a figure that continues to climb".¹¹³

225. Similarly:

(a) TVNZ has recently noted:

TVNZ's 1 NEWS NOW online platform streamed 62 million videos – a **227% increase year-on-year**.¹¹⁴ [Emphasis added.]

And:¹¹⁵

¹¹² New Zealand Commerce Commission Decision No. 516 *MediMedia (NZ) Limited / Adis International Limited* (18 December 2003) at [202] to [203].

¹¹³ Erin McKenzie "Beyond the midday bulletin: Newshub launches its explainer platform" (26 July 2016) StopPress. Accessible at: <http://stoppress.co.nz/news/newshub-explains>.

¹¹⁴ TVNZ Annual Report Financial Year 2016. Accessible at: http://images.tvnz.co.nz/tvnz_images/about_tvnz/TVNZ%20Financial%20Report%20FY2016_FINAL.pdf.

We're seeing mobile devices **driving huge growth in online video consumption** with TVNZ OnDemand and *ONE News Now* delivering an average of 10 million video streams per month. [Emphasis added.]

And:¹¹⁶

Online performance across OnDemand and 1 NEWS NOW – streams across all devices delivered a massive 128 million, up from 97 million in FY2015.

(b) RNZ has noted:¹¹⁷

I think the audience is starting to see that gel, which is fantastic. **The other side of it is we started to take the online audience a bit more seriously and we've just seen that boom, both in terms of people coming to our website.** It is different to other news websites in New Zealand, probably because of a different mix of content, different types of journalism, but also on demand audio, all of that. [Emphasis added.]

And:¹¹⁸

Aidan Bennett: What will be the measure of your success at Radio New Zealand?

Paul Thompson: We have set the goal of reaching one million people a week by 2020 across all platforms. That requires us to roughly double our reach and, when we achieve it, RNZ will be in fine fettle. More broadly my job is to ensure RNZ has a sustainable plan that allows us to keep doing the important work we do in a rapidly changing environment.

226. TVNZ and MediaWorks already have significant cross-media platforms and audiences, meaning they are well placed to market their online presence to, and seek to attract to their digital platforms, audiences on other media:

(a) MediaWorks:¹¹⁹

Michael Anderson said: **"MediaWorks reaches 3.7 million NZers every month or 95% of all Kiwis** - on our Radio, TV and Digital platforms. They are highly engaged with our content and this drives our desire for creativity to be at the centre of everything we do. Our scale, great content - and our unrivalled talent pool - is our point of difference in this market. [Emphasis added.]

(b) TVNZ:¹²⁰

This year, 1 NEWS and Seven Sharp have reached twice the audience of their nearest competitors. Flagship current affairs programme Sunday reaches an average of 919,000 New Zealanders each episode and consumer rights champions Fair Go reach an average of 816,000 New Zealanders. The new-look

¹¹⁵ Tom Pullar-Strecker "Audience gain fails to compensate TVNZ for weaker advertising market" (26 August 2016) Stuff. Accessible at: <http://www.stuff.co.nz/business/industries/83615417/audience-gain-fails-to-compensate-tvzn-for-weaker-advertising-market>.

¹¹⁶ TVNZ Annual Report Financial Year 2016. Accessible at: http://images.tvnz.co.nz/tvzn_images/about_tvzn/TVNZ%20Financial%20Report%20FY2016_FINAL.pdf.

¹¹⁷ Duncan Greive "Think of Us as Yeast' - An Interview with Paul Thompson, Head of RNZ" (27 November 2015) the Spinoff. Accessible at: <http://thespinoff.co.nz/featured/27-11-2015/media-think-of-us-as-yeast-an-interview-with-paul-thompson-head-of-rnz/>.

¹¹⁸ Aidan Bennett "A chat with... Paul Thompson" (November 2015) Channel Mag. Accessible at: <http://www.channelmag.co.nz/features/interviews/a-chat-with-paul-thompson/>.

¹¹⁹ "MediaWorks Announces 2017 Programming Line-Up" MediaWorks (media release, 20 November 2016). Accessible at: <http://www.mediaworks.co.nz/news.aspx>.

¹²⁰ "TVNZ 2017: new content, new blood, new thinking" TVNZ (media release, 29 September 2016). Accessible at: <http://www.scoop.co.nz/stories/BU1609/S00975/tvzn-2017-new-content-new-blood-new-thinking.htm>.

Breakfast, hosted by Hilary Barry and Jack Tame, is the most watched early morning show – reaching more viewers than its nearest rival every day since the new team started. [Emphasis added.]

227. Indeed, in launching its 1 News Now offering in July 2015 TVNZ noted: "We're clear leaders on air, and want to see this translate across into digital".¹²¹
228. A look at TVNZ's figures from September 2016 demonstrates the significant reach it has achieved on its 1 News Now digital offering since that launch in July 2015. In particular, in September:
- (a) 1 News Now had 2.7 million unique visitors; and
 - (b) 5.3 million videos were watched on 1 News Now.
229. This is demonstrated in TVNZ's marketing shown in Figure 23 below.

Figure 23 - 1 News Now - September 2016 statistics



Source: TVNZ.¹²²

230. The significant competitive position of TV broadcasters in digital news is a common feature of most comparable English-speaking jurisdictions. It is common across English-speaking countries for the largest FTA TV broadcasters to successfully migrate their TV audience to their digital offerings and become the most visited digital news providers in their country. The fact that TVNZ and MediaWorks, as the nation's largest FTA TV broadcasters, or RNZ (as the publicly funded broadcaster), do not already have the largest digital news audience is itself unusual by international standards. In comparable overseas English-speaking jurisdictions, including the UK, Australia,¹²³ Canada, and Ireland, it is one of the FTA broadcasters that does in fact have the largest digital audience (or very close to it in Australia).¹²⁴ The fact that TVNZ and MediaWorks have not achieved that position already likely reflects that, in comparison to broadcasters overseas, they have only shifted their focus to their digital offerings more recently, in the last 12 - 18 months.
231. Furthermore, given that consumers like to multi-source news across various sources, as illustrated in the data referred to in the Draft Determination, it is inevitable that the Transaction will provide opportunities for each of TVNZ, MediaWorks, and RNZ to grow their audience further.

¹²¹ "TVNZ launches ONE News Now" (6 July 2015) TVNZ. Accessible at: <https://www.tvnz.co.nz/one-news/entertainment/tvz-launches-one-news-now-q00163>.

¹²² TVNZ Digital update September. Accessible at: <https://www.tvnz.co.nz/content/dam/images/tvz-sales/Digital%20updates/TVNZ%20Digital%20Update%20-%20September%202016.pdf>

¹²³ ABC recently achieved the largest audience in Australia for the first time. See: "July a record for ABC News" (press release, 30 August 2016) ABC. Accessible at: <http://about.abc.net.au/press-releases/july-a-record-for-abc-news/>.

¹²⁴ Further information of the position of those broadcasters in those jurisdictions is set out in **Appendix One** of the submission sent to the Commission on 10 October 2016.

232. For example, as the Court of Appeal has noted previously, key to a proper competition assessment is the ability of competitors to expand, not the expansion that they have achieved to date.¹²⁵

To infer dominance from lack of substantial entry or expansion by others, when objectively the reason appears to be the existence of the type of market which the Act is designed to encourage, would be to draw an inference against Southern Cross from the very thing which competition law is designed to foster.

Number of journalists

233. The Commission notes that "for TVNZ or MediaWorks to increase their coverage to the extent of the merged entity would require significant investments",¹²⁶ with the Commission in that context referring to the employment of journalists.

234. However, the Court of Appeal has defined a barrier to expansion as follows:¹²⁷

Anything is capable of being a barrier to entry or expansion if it amounts to a significant cost or limitation which a person has to face to enter a market or expand in the market and maintain that entry or expansion in the long run, being a cost or limitation that an established incumbent does not face. The height of the barrier is a function of the degree of the differential.

235. Applying that test:

- (a) Journalists can be employed incrementally, so a competitor can scale up over time;
- (b) Journalists are mobile, and can switch between different media entities as opportunities arise; and
- (c) The costs of employing journalists (ie salaries, benefits, etc) are costs that the NZME2 entity will also continue to face.

236. Accordingly, there is no proper basis at competition law to consider the employment of journalists as a barrier to expansion. BusinessDesk is a good example, [].

Regional coverage

237. The Commission accepts in its Draft Determination that each of TVNZ, MediaWorks, and RNZ has strong journalistic coverage of events of national importance, but suggests that their ability to cover regional stories limits their ability to expand and compete with NZME and Fairfax.

238. It is important to note that NZME does not currently have anything approximating nationwide regional journalistic coverage. This is not reflected in the Draft Determination.

239. For example, NZME does not have any material regional journalistic coverage in the South Island (just four reporters in Christchurch and one in Dunedin, primarily reporting for its radio brands), which is an area that represents one-quarter of the population of New Zealand. If the Commission were to apply the same logic to NZME as it is applying to TVNZ and MediaWorks, then NZME should also be regarded by the Commission as currently limited in its ability to compete with Fairfax on the basis that it has, in terms of

¹²⁵ *Commerce Commission v. Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [84].

¹²⁶ Draft Determination at [512].

¹²⁷ *Commerce Commission v. Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [73] per Tipping J.

nationwide breadth, even more limited regional coverage than either MediaWorks or TVNZ.

240. In any event, regional coverage is not an economic barrier to expansion. The employment of a journalist in a particular region is an incremental cost. In addition, technology such as laptops / mobile phones etc means that a journalist could be hired to work from home and cover stories across a region. It has not been necessary for a media entity to invest in a "newsroom" in a particular region to achieve journalistic coverage in that region for over a decade.
241. To the extent that TVNZ, MediaWorks, and RNZ consider that regional coverage is important / necessary to expand their reach, there are a number of ways that they could each expand their regional coverage without needing to even employ additional journalists. For example, as previously outlined to the Commission, there are a number of independent media outlets that have regional coverage across a wide swath of different regions in New Zealand, including:¹²⁸
- (a) *Local Matters* and *Bream Bay News* in Northland;
 - (b) Sun Media in the Bay of Plenty;
 - (c) Beacon Media in the Bay of Plenty;
 - (d) *The Gisborne Herald* in East Cape;
 - (e) *The Wairarapa Times-Age* in the Wairarapa;
 - (f) Wellington Suburban Newspapers in Wellington;
 - (g) Star Media in Canterbury;
 - (h) Allied Press in Otago and Southland;
 - (i) Westport News on the West Coast;
 - (j) River City Press in Whanganui;
 - (k) Page Media / Nelson Live in Nelson;¹²⁹
 - (l) *The Blenheim Sun* in Marlborough; and
 - (m) many others.
242. To the extent TVNZ, MediaWorks, and RNZ wish to have additional regional coverage, in addition to their national news coverage, that could readily be achieved through content sharing arrangements (ie without even the need to hire additional journalists).

"Pure news" of RNZ and "investigative journalism" of Bauer

243. The Commission seeks to downplay RNZ as a competitor on the basis that it can take a "pure news" approach, rather than needing to "chase popular stories to attract eyeballs",¹³⁰ as well as downplaying Bauer as a competitor on the basis that it produces long-form investigative journalism.

¹²⁸ NZME and Fairfax have previously provided the Commission with a map showing the extent of regional coverage of other journalists. This is reproduced at **Appendix Three**.

¹²⁹ "Contact us" Nelson Live. Accessible at: <http://nelsonlive.co.nz/contact-nl/>.

¹³⁰ Draft Determination at [472].

244. Again these comments do not reflect the nature of competition in two-sided markets.
245. NZME and Fairfax are very much in competition with RNZ and Bauer for audience. Every audience member page view lost to RNZ or Bauer is lost advertising revenue for NZME or Fairfax, and so they are incentivised to seek to cover as wide a range of news topics as possible.

NZ NEWSWIRE AND OTHER CONTENT SYNDICATORS

246. No reference was made to AAP's Newswire service in the Commission's decision.
247. AAP's Newswire, as well as other news syndicators, is a source of additional New Zealand generated news content that the likes of TVNZ, MediaWorks, RNZ and others can use on their online platforms. For example:
- (a) AAP established NZ Newswire in New Zealand in 2011. It employs 13 journalists in its editorial / news team. It describes itself as follows:¹³¹

... an independent and cost-effective multimedia news and information service available to all publishers and broadcasters in New Zealand and the Pacific.

New Zealand Newswire (NZN) is owned and operated by Australian Associated Press. Its New Zealand team of journalists are passionate about the country, ensuring they fairly and accurately report events and issues of interest to New Zealanders.

[]. It is unclear why there is no mention of AAP's NZ Newswire in the Draft Determination in that context.

- (b) Content Ltd provides a business news / information wire service (under the brand name BusinessDesk). BusinessDesk has six journalists across Auckland and Wellington.¹³² []. This is in-market example of the ability news entrants to enter and expand in the provision of online news content.
248. In addition to being another source of news content in their own right, the availability of these news syndication services provides additional content for news media platforms to attract audiences to their platforms, which will assist them in expanding their growth / reach further as a complement to incrementally hiring additional journalists.

EXPANSION BY OVERSEAS MEDIA

249. In relation to the prospect of expansion by overseas news media organisations the Commission found:
- (a) NZME and Fairfax did not point to any actual entry in the provision of New Zealand news by international news organisations, apart from Vice Media and freelance journalists;
- (b) Given the minimal amount of New Zealand news these providers currently produce, the Commission does not consider that they would be a competitive constraint on NZME2;

¹³¹ "New Zealand Newswire" AAP Newswire. Accessible at: <http://www.aapnewswire.com.au/NZNewswire>. AAP is 47% owned by Fairfax, 45% owned by News Corp, and 8% owned by Seven West. AAP operates wholly independently of Fairfax.

¹³² "FAQ's" BusinessDesk. Accessible here: <http://businessdesk.co.nz/FAQ.aspx>.

- (c) "The relatively small size of the New Zealand market means that new entry from major international news brands is less likely than elsewhere";¹³³ and
- (d) Any new entry would be unlikely to be of sufficient extent to be an effective constraint on NZME2.
250. This analysis is static, rather than forward looking, and does not reflect the evidence provided to the Commission that entry by overseas news media organisation is very much a credible threat.
251. Fairfax provided the Commission with evidence of the recent expansion of international news organisations into Australia, with both the *Daily Mail Australia* (entered 2013) and *Guardian Australia* (entered 2014) having climbed into the top five positions of the Australian Nielsen Digital Ratings (Monthly) news rankings by May 2016.¹³⁴ Fairfax noted that these companies have achieved considerable audience growth and success in Australia by pairing their known international brands and content with key Australian journalists in comparatively smaller Australian newsrooms.
252. Fairfax's experience in Australia has been that these new entrants - such as *Daily Mail Australia*, *Guardian Australia*, and *Huffington Post Australia*, are vigorous and formidable competitors for local media organisations to compete against - they have built audience by hiring key journalists to provide local content. These journalists focus on producing a large volume of stories in key verticals to ensure sufficient local content is available (for example, Huffington Post Australia journalists are required to produce [] stories per day). That local content is then supplemented with the organisations' superior global coverage.
253. In NZME and Fairfax's view, these competitors represent a very credible threat, particularly given the fact local journalists are a highly mobile profession in New Zealand.
254. Indeed, *The Daily Mail's* owner, Daily Mail and General Trust plc ("**DMGT**"), has a stated strategy of "diversifying internationally through both our B2B operations and MailOnline... DMGT's long-term strategic objective is to develop into a global growth company."¹³⁵ In relation to its recent expansion to US and Australia, DMGT has noted its ability to rapidly grow audience and advertising revenue.¹³⁶

MailOnline is unmatched as news provider in the UK, and has growing editorial coverage across the US and Australia. Journalists in these two markets have underpinned MailOnline's international traffic growth. DailyMail.com, as it is known in the US, has developed its brand significantly....

...The Mail brand is the number one newspaper brand in the UK and has achieved scale in other geographic markets, including the US and Australia... The primary driver of international growth for dmg media is through MailOnline's operations overseas, particularly in North America and Australia.

... In terms of audience, there were 72 million average unique US browsers per month and 3.7 million average daily unique US browsers in the year to September 2015, with average growth during the whole year of 22% and 23% respectively. Rest of World (notably Australia and India) average unique browsers per month and daily unique browsers stood at 78 million and 4.4

¹³³ [902].

¹³⁴ Miranda Ward "Daily Mail Australia and The Guardian reach the top five Nielsen news rankings" (27 June 2016) Mumbrella. Accessible at: <https://mumbrella.com.au/daily-mail-australia-guardian-reach-top-five-nielsen-news-rankings-376578>.

¹³⁵ *Daily Mail and General Trust plc Annual Report - Chief Executive's Review* at 10. Accessible at: <http://www.dmgt.com/~media/Files/D/DMGT/documents/dmgt-ar15-ceo-review.pdf>.

¹³⁶ *Daily Mail and General Trust plc Annual Report* at 3. Accessible at: <http://www.dmgt.com/~media/Files/D/DMGT/reports-and-presentations/100-51081.pdf>.

million respectively in the year to September 2015, also demonstrating strong growth.

255. As recently as its half year results in May 2016 DMGT has noted:¹³⁷

Particularly strong in the US yeah that's right. MailOnline in the US grew by 36% half over half. Elite Daily grew by 127%, but then I'm benefiting there from small numbers in absolute terms but it's a good percentage number. And all in, if you put the MailOnline US and Elite Daily together growing at 55% in the first half of the year. And Australia as well, we shouldn't forget Australia. We bring Australia in now because we fully own that business. That grew half on half 24% in Australia. So three good territories, UK, US and Australia all growing very nicely, £44m of revenue in total. And we are going to get into the 90s as we move towards 100. We may not get to 100 but we're going to get very close.

256. Now that it has established a presence in Australia, with New Zealand being a neighbouring and English-speaking nation, expansion to New Zealand would seem to be a logical next step in DMGT pursuing that expansion strategy.

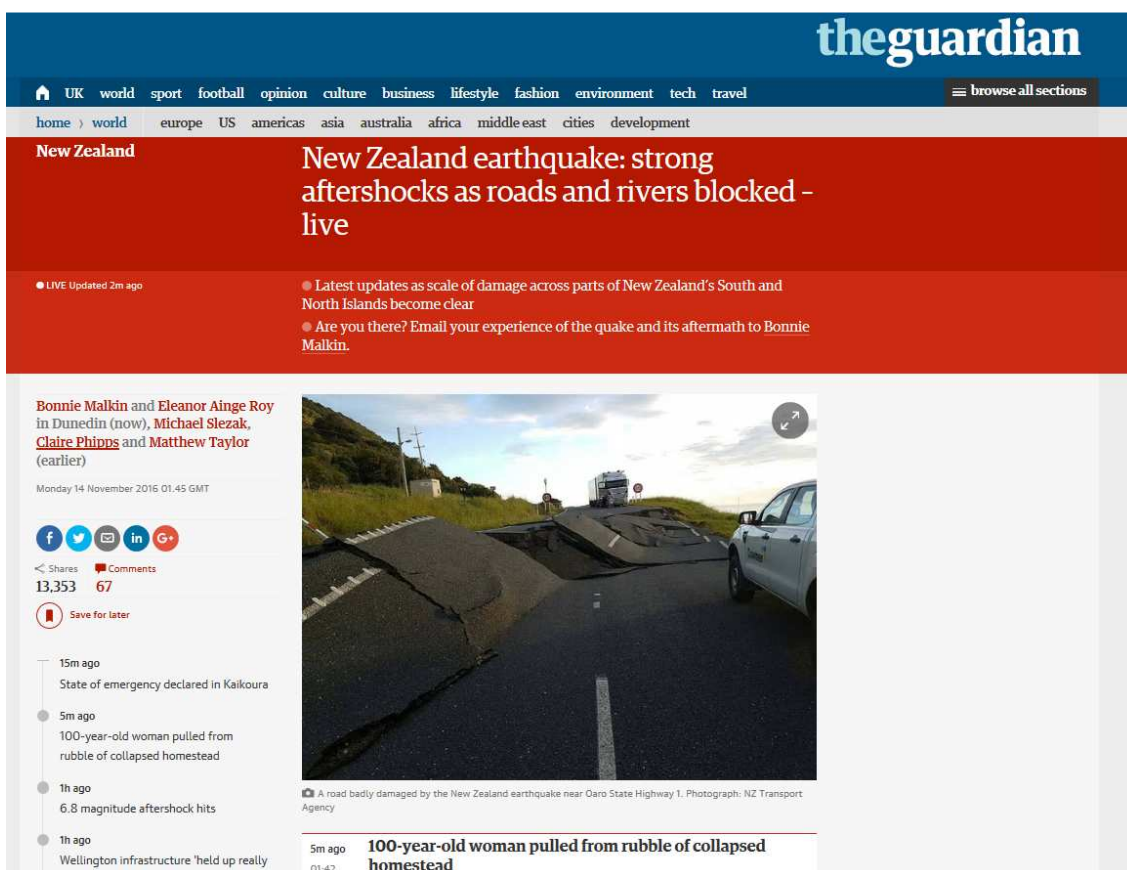
257. The Draft Determination also does not reflect the fact that international news media, such as *The Guardian*, are already competing with NZME, Fairfax, TVNZ, MediaWorks, and RNZ for New Zealand audience - including in respect of New Zealand content.

258. For example, on the day of the Kaikoura earthquake, *The Guardian's* website had live rolling coverage of last week's earthquakes (see Figure 24 below). It had five journalists contributing to the live coverage - including one based in New Zealand. This demonstrates:

- (a) *The Guardian* has the ability, and incentive, to produce New Zealand specific content; and
- (b) That, with technology, location of journalists is no impediment to producing New Zealand specific content.

¹³⁷ DMGT Half Year Results 2016 (26 May 2016) at 13. Accessible at: <http://www.dmgt.com/~media/Files/D/DMGT/reports-and-presentations/transcript-dmgt-half-year-results-2016-26-05-16.pdf>.

Figure 24 - The Guardian's live coverage of last week's earthquake



259. This news is being read by a number of New Zealanders, either on *The Guardian* website or via dissemination through social media, which is a particularly effective means of ensuring that content reaches those people likely to value it the most.

260. As the Commission is aware, it is not necessary for NZME and Fairfax to point to actual entry to date for that to be a competitive constraint - it is sufficient to be able to point to low barriers to entry and expansion. For example, the High Court in *Fisher & Paykel Ltd v Commerce Commission* noted:¹³⁸

It is only when for some reason it is **not rational or possible** for new entrants to participate in the market that a firm can have market power: (see *Continental Can* at p 248; p 227 of CMLR). [Emphasis added.]

261. Similarly, it is not the "size of the New Zealand market" that is relevant in making that assessment, it is whether a new entrant would be incentivised to enter the market should market opportunities arise - eg if the existing competitors were to price above competitive levels or were to produce quality below competitive levels.

262. The Commission has previously been cautioned by the Court of Appeal¹³⁹ for taking an improperly static approach to considering entry and expansion; not properly assessing whether there are barriers to entry / expansion; and not properly taking a forward looking view of how new entrants would react to market opportunities.¹⁴⁰

¹³⁸ [1990] 2 NZLR 731 at 75, quoting *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* [1989] HCA 6, (1989) 167 CLR 177, 63 ALJR 181, 83 ALR 577, (1989) ATPR 40, [1989] ATPR 40-925, [1990] FSR 23, [1989] 3 CMLR 169 at 189.

¹³⁹ *Commerce Commission v. Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA).

¹⁴⁰ At [87].

We do not consider that the Commission’s decision or its submissions gave sufficient attention to the context in which the height of barriers to expansion must be addressed. **That context is the hypothesis that the merged entity, having the ability, engages in supra-competitive pricing. The Commission’s premise that there has been little, if any, expansion or entry into the market in the past ... does not in our view justify the inference that supra-competitive pricing by the merged entity would also be met by little, if any, entry or expansion.** [Emphasis added.]

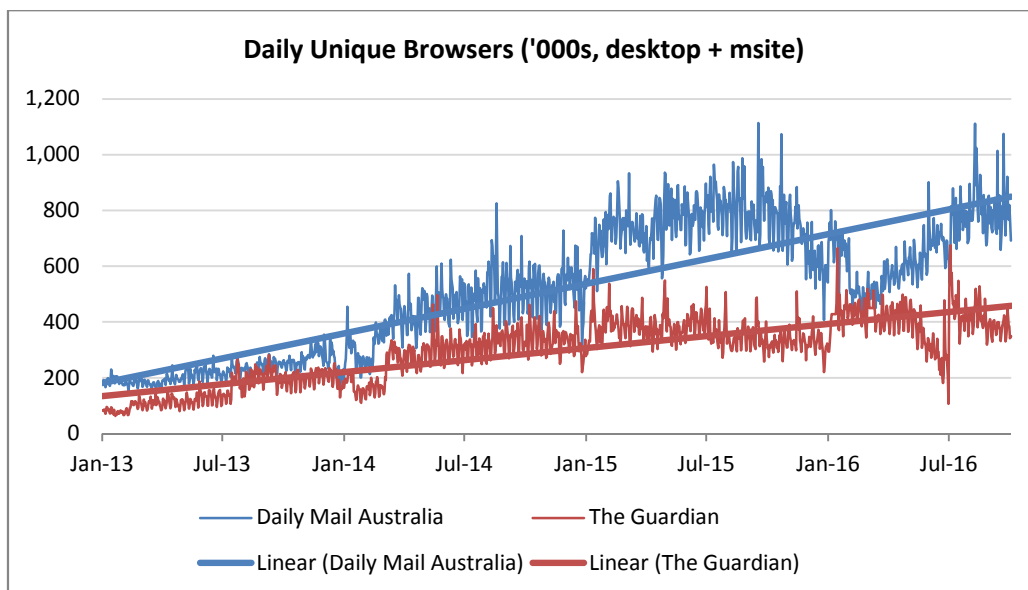
263. In this case, of course, the international competitors are already in market, albeit on a small scale; so the only question is of their ability to expand.

264. In the Commission's first newspaper media merger decision following that Court of Appeal hearing, this concept was properly reflected in its decision-making:¹⁴¹

Extent of entry will largely depend on market conditions at any given time. Should conditions change so as to **create attractive opportunities** for entry there are many players that would consider entering the markets under consideration to a significant extent to constrain the merged entity. [Emphasis added.]

265. The evidence that Fairfax has previously provided the Commission in relation to the *Daily Mail* and *The Guardian* in Australia demonstrates that there are no barriers to entry or expansion for international news media organisations (indeed they have achieved rapid expansion), and that such international media organisations will react to perceived market opportunities. This evidence is set out in Figures 25 and 26 below.

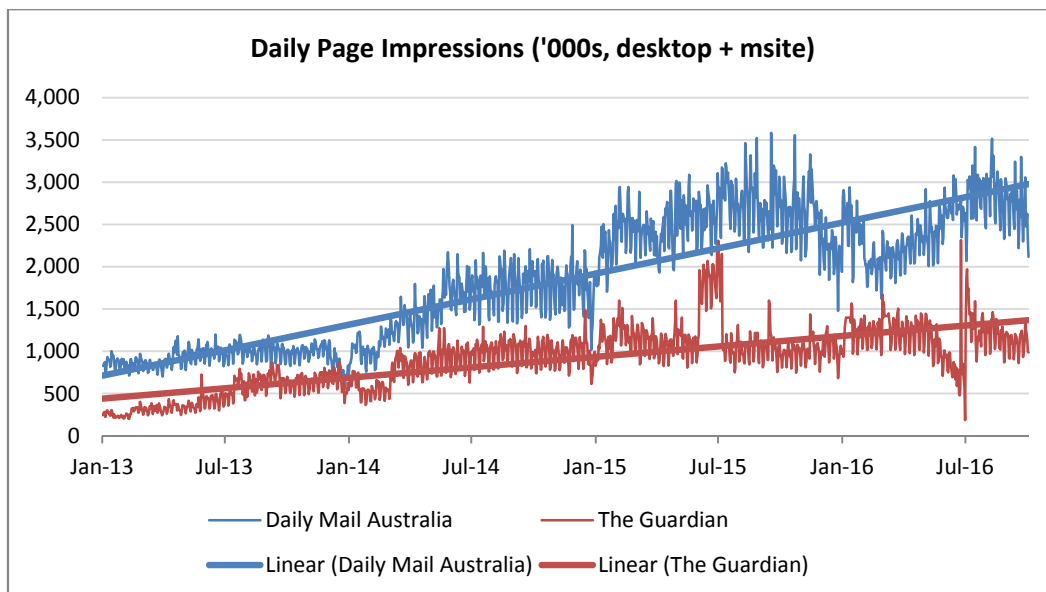
Figure 25 - Nielsen Australia Daily Unique Browsers - Daily Mail and The Guardian



¹⁴¹ Decision No. 445, *Wilson and Horton Limited / Power Plant Productions Limited* (7 December 2001) at [96].

Source: Nielsen.

Figure 26 - Nielsen Australia Daily Page Impressions - Daily Mail and The Guardian



Source: Nielsen.

- 266. Furthermore, the small size of New Zealand, in comparison to Australia, means that an international news organisation, such as The Daily Mail, could achieve entry into New Zealand with a proportionately smaller investment - a country only 1/5th the size of Australia will only require 1/5th the number of journalists to achieve a similar coverage. Any New Zealand entry could also be achieved as a satellite operation to the operations already established in Australia.
- 267. Given that the Australian evidence demonstrates that there are no insurmountable barriers to entry or expansion, the Commission should properly take the potential entry by such entities into account as a credible competitive constraint.

CONTENT QUALITY AND PAYWALLS

- 268. The Commission has concluded that NZME2 would have such a strong position in the online market that it could reduce quality or introduce a paywall without putting a significant amount of advertising at risk - including the statement that "the number of articles on the Applicants' websites could reduce; however, the total page views could remain high".¹⁴²
- 269. The Commission's Draft Determination does not reflect:
 - (a) the way consumers interact with content;
 - (b) the way online advertising is sold; and
 - (c) the data NZME and Fairfax have provided to the Commission in relation to paywalls.

¹⁴² Draft Determination at [583].

The way consumers interact with content

270. Consumers view articles / content that they consider to be of interest, value, and / or newsworthy. That is how they evaluate quality content. The Commission's theory of harm is that NZME2 will be able to degrade content quality, including by reducing the volume of articles, while still attracting audience to their platforms.

271. This theory is inconsistent with the reality of how consumers access information on the Internet. As RNZ's CEO has previously stated:¹⁴³

In a world where the audience has more choice than ever before their attention will always shift to those media sources which best meet their needs.

In effect the audience will call the shots, not us, and the first thing they will shoot is any content which is sub-standard.

272. Consumers are not going to NZME's or Fairfax's websites because anyone forces them to - *they are going there to read content / articles that they consider are quality*. When they see an article that they are interested in, they click on it. That creates a page impression / page view. The Commission's theory that NZME2 could achieve the same number of page views, whilst producing fewer articles, is logically inconsistent.

273. In addition, in the context of a market where alternative news sources are only ever a mouse click or finger swipe away, the suggestion that NZME2 could maintain the same audience levels whilst producing poorer quality content denies commercial reality, as RNZ's CEO so clearly describes it.

The way advertising is sold

274. Digital advertising is sold to advertisers on the basis of the number of consumers that will be reached by that advertising, and (with limited exceptions) digital advertising revenue is only realised when a page impression is created (ie when a consumer clicks on a particular news article).

275. This means that to drive advertising revenue, a news platform needs to create (a) quality content, and (b) a large volume of quality content, in order to generate digital advertising revenue.

276. In a digital world, advertisers will, broadly speaking, pay the same amount for a page impression by a particular consumer type regardless of the digital platform. To that end, if a news platform only produces 10 articles a day that 10 consumers are interested in clicking on then it will earn only 1% of the revenue compared to if it produces 100 articles a day that 100 consumers are interested in clicking on. Advertising revenue is a direct function of the quality and volume of content created. There is no hypothetical scenario where NZME2 could achieve the same advertising revenue from fewer page impressions.

Paywalls

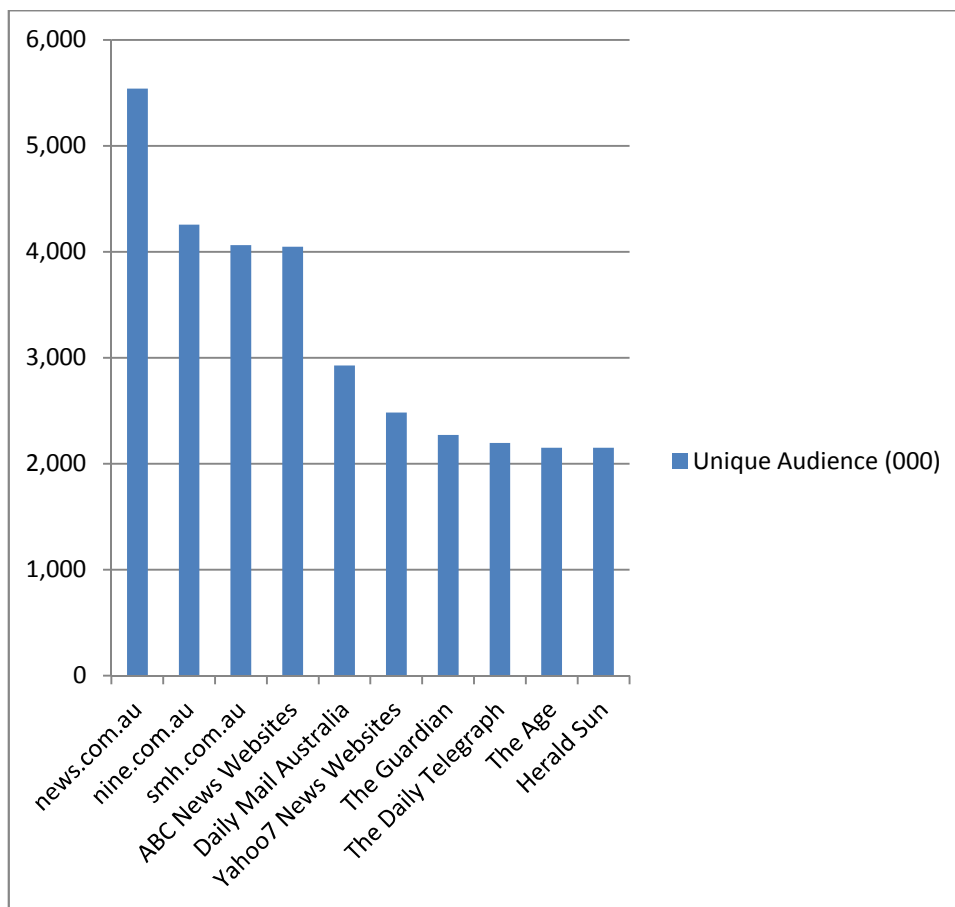
277. The Commission has posited a hypothetical scenario in which NZME2 is able to successfully implement a paywall. The Commission's theory is contrary to [] (eg consumers will switch to the equivalents of TVNZ, RNZ, MediaWorks, Yahoo NZ that will remain in New Zealand as competitors post merger).

278. This dynamic is reflected in Australia where significant numbers of consumers use news sources from non-publisher news media organisations, such as traditionally TV and

¹⁴³ "RNZ takes a global look at digital age" (12 May 2014) RNZ. Accessible at: <http://www.radionz.co.nz/news/national/244137/rnz-takes-a-global-look-at-digital-age>.

radio based news media organisations, or from new international entrants such as *The Daily Mail* or *The Guardian*, as reflected in Figure 27 below.

Figure 27 - Top 10 News Websites by Unique Audience in Australia (September 2016)



Source: Nielsen Digital Ratings (Monthly) – September 2016.¹⁴⁴

- 279. NZME and Fairfax have also provided the Commission with survey data noting the striking unwillingness of consumers to pay for online general news / information content.¹⁴⁵ The Commission's theory is contrary to both [] and that consumer behaviour evidence.
- 280. The projected year-on-year increase in consumers accessing content via Facebook will only increase the difficulty for online news / information providers to implement paywalls:¹⁴⁶

When the paywalls went up for mass market news brands it was hard to foresee the extent of the migration from owned sites to social distribution platforms. The frustration engendered by encountering links to content on Facebook and Twitter that turn out to be behind a wall is real and the model is anachronistic. In a scenario where revenue share deals through the likes of Instant Articles become a major source of revenue, those brands whose content lie behind walls will fall behind.

¹⁴⁴ "Nine site makes charge for top" (27 October 2016) NewsMediaWorks. Accessible at: <http://www.newsmediaworks.com.au/nine-site-makes-charge-for-top/>

¹⁴⁵ Reuters Institute, "Reuters Institute Digital News Report 2016" (2016) at 79.

¹⁴⁶ Nick Baughan "Do Facebook, Twitter and Google offer news publishers salvation?" (15 September 2015) The Guardian. Accessible at: <http://www.theguardian.com/media-network/2015/sep/15/facebook-twitter-google-apple-news-publishers-instant-articles>.

281. NZME and Fairfax have also previously provided the Commission with evidence from the International News Media Association ("INMA") World Conference in May 2015 in New York, where the general consensus was that paywalls for general news / information were not successful / sustainable. In particular, the parties described the evidence of a straw poll of the attendees on their experience of paywalls. This has been described as follows:¹⁴⁷

If there was one moment that stood out at the International News Media Association (INMA) 2015 World Congress this week it was when Australian moderator, and former Sydney Morning Herald editor, Robert Whitehead polled the room full of top media executives, from around the world, on their support for paywalls.

Whitehead first asked everyone who had a paywall to stand and, in a room of 200-300 people, maybe 75 per cent stood up.

He then asked (without naming anyone) for those who didn't think their paywall was working for them to sit. Around a third of those standing sat.

Whitehead then polled the room again asking those who had reservations or who would not recommend paywalls to another publisher to sit, leaving only those "who thought they were doing it really well". This left only around ten newspaper executives standing.

Those left standing (and yes for the record: News, Fairfax and APN were all in the room) were representatives from the big media brands of the world: The New York Times, Washington Post and Wall Street Journal.

Media brands with a deep reach who have achieved mass audience and are making it pay on the basis of their global audience.

Now while this straw poll was highly unscientific it is indicative of a broader concern among the global publishing community that paywalls aren't working, at least not for smaller, local publishers whose news content is, to quote executives from the Toronto Star, "ubiquitous".

The Toronto Star became the paywall case study in chief, this week at INMA, among those who think its time to pull up stumps after the Canadian broadsheet joined other North American publishers, like The Dallas Morning Star in taking down its paywall, arguing as it was 'expensive' and had a 'high churn' rate but wasn't sustainable.

282. NZME and Fairfax note that one of the publications that remained standing (ie indicating they thought their paywall was a success) at that Conferece was *The South China Morning Post*. They have of course also now removed their paywall (in April 2016).¹⁴⁸
283. All the evidence supports the fact that it is not competition between NZME and Fairfax that will determine whether or not their websites can implement paywalls on their websites, but rather the:
- (a) unwillingness of consumers to pay for news content online;
 - (b) willingness of consumers to switch to alternative sources of online news content (including from traditional TV and radio media providers); and

¹⁴⁷ Mumbrella "Can Aussie publishers make paywalls work or are we approaching the ceiling?" (15 May 2015). Accessible at: <https://mumbrella.com.au/can-aussie-publishers-make-paywalls-work-or-are-we-approaching-the-ceiling-294022>.

¹⁴⁸ PR Newswire "South China Morning Post Announces Removal of SCMP.com Paywall" (5 April 2016). Accessible at: <http://www.prnewswire.com/news-releases/south-china-morning-post-announces-removal-of-scmpcom-paywall-300246228.html>.

- (c) prevalence of consumers' accessing their news content via distributors such as Facebook.

284. This is based on observed evidence in market and data.

APPROACH TO MARKET DEFINITION

285. The Commission's Draft Determination does not apply the orthodox approach to market definition required under the Commerce Act. For example, the Commission stated that it would proceed "on the basis that there are separate relevant markets for print advertising and digital advertising" on the basis that:¹⁴⁹

- (a) Advertisers have different methods of engaging with consumers;
- (b) Advertisers have different views on the relative strengths of different platforms; and
- (c) Many different forms of advertising are selected as part of a wider advertising strategy.

286. Section 3(1A) of the Act defines a market as "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 question is not whether different methods are used, or whether different methods have different strengths, but whether there is substitution between different forms of advertising.

287. Indeed, the Commission earlier in its Draft Determination sets out that the standard method for defining markets is to consider substitutability, including whether a supplier could profitably raise prices by a small, yet significant, non-transitory ("**SSNIP**") amount, but its subsequent discussion on reaching a view on advertising market definition makes no reference to that test or considerations of substitution in light of long run price incentives, which is the approach mandated by the Courts:¹⁵⁰

[81] ... But it must be recognised that the *ssnip* test used by the Commission to determine substitutability is an analytical tool which will not always be able to be applied with confidence. That may be because of a lack of accurate data or because of significant product differentiation, which makes it hard to assess and compare the available data. In that event, the Commission or Court should always be alive to other evidence which can assist in identifying the appropriate market in accordance with commercial common sense.

[...]

[132] We are mindful that the *ssnip* is a hypothetical test. It is a way of determining (to use the words of QCMA p 517) what is "**the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive**". This was a case where there was significant product differentiation and therefore real difficulties in applying the *ssnip* test. It is appropriate to make a common sense assessment, based on the evidence before the Commission....

[...]

[135] This was a case where the market definition required the application of commercial common sense. As the High Court of Australia noted in *Queensland Wire Industries Pty v BHP Co Ltd* (1989) 167 CLR 177; 83 ALR 577; ATPR 40-925 (HCA) at 196 (Deane J): market definition 'involves value judgments about

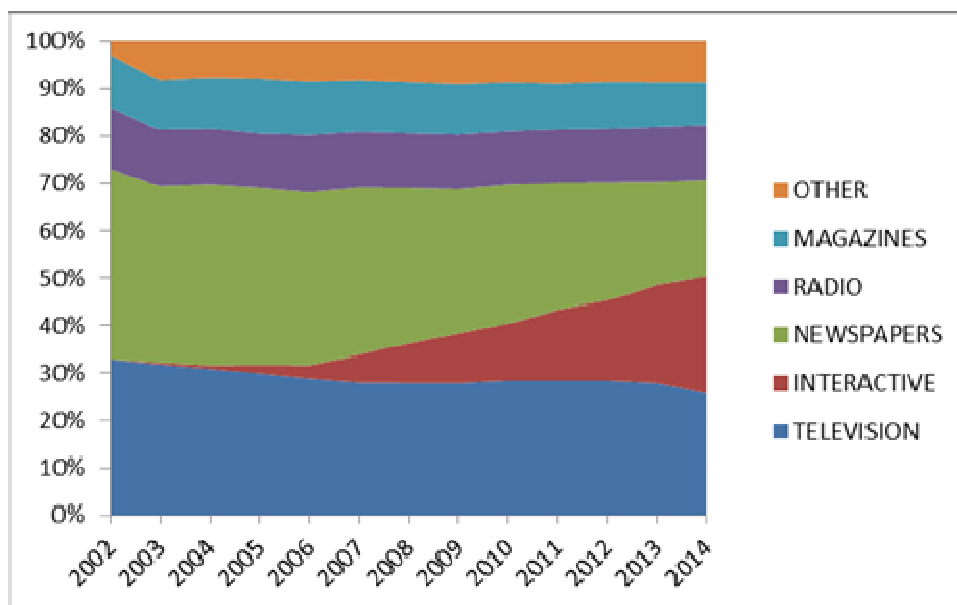
¹⁴⁹ At [151] and [152].

¹⁵⁰ *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868.

which there is some room for legitimate differences of opinion’.” [Emphasis added.]

288. That there is significant substitutability between print and online advertising is made clear in Figure 28 below.

Figure 28 - Advertising expenditures (as % of total) across different media, 2002-2014



Source: ASA data.

289. NZME and Fairfax request that the Commission consider this evidence of print to online advertising substitution, and the tests as specified by the Courts, in reaching a view on market definition in its Final Determination.

"PREMIUM" DIGITAL ADVERTISING

290. Reflecting the unorthodox approach taken to market definition, the Draft Determination identifies a separate "premium" digital advertising market (encompassing homepage takeovers, mobile interstitials and native advertising),¹⁵¹ which the Commission regards as a distinct market from the market for digital advertising (encompassing video, search, social media, display and programmatic advertising).¹⁵²

291. There is no separate market for "premium" digital advertising. It is unclear whether the Commission digested the information provided by the parties on this point, given the Draft Determination does not refer to the economic report from NERA (provided on 7 October 2016) demonstrating, from an economic perspective, why no such separate "premium" digital advertising market exists.

292. The Commission appears to have sought to define a separate market on the basis of comments made by two specific customers. However, the Draft Determination includes comments from a greater number of customers that suggest that they switch between so-called "premium" digital advertising and all other forms of advertising. One of the customers that the Commission relied on to support defining a separate market for "premium" digital advertising actually said that it considered NZME and Fairfax to be complements, not substitutes, in the provision of that "premium" digital advertising "as it

¹⁵¹ At [168].

¹⁵² At [168].

considers that they have different audiences."¹⁵³ So even using the unscientific basis of customer comments there is no overlap.

293. There were a number of comments in the Commission's Draft Determination that do not support the theory of there being a separate "premium" digital advertising market. For example:

- (a) "[] would assess whether it was more efficient to invest the money in other digital advertising types";¹⁵⁴
- (b) "[] on the other hand, did not have a concern. It gave a recent example which illustrates the comparable effectiveness of the homepage takeover compared to other forms of digital advertising".¹⁵⁵

294. For there to be a separate antitrust market based on the demand-side dynamics, the Commission would need to show that:

- (a) there is a particular type of customer that primarily purchases per day online advertising, and that this customer would not have the ability, in the event of a SSNIP by a hypothetical monopolist, to switch its advertising to other ad types, including other online advertising priced on a cpm basis; and
- (b) suppliers to these customers are aware that those customers are in a weak bargaining position due to their particular requirement for per-day online advertising and, therefore, can price discriminate to those customers on that basis.

295. If NZME2 could not price discriminate and charge any segment of customers a higher price, then those inframarginal customers will be protected from a price rise by the marginal customers that buy across the broader suite of digital advertising products.

296. In contrast, paragraphs 199(a) and 199(b) of the Draft Determination, that underpin the Commission's market definition, are primarily assertion, and run contrary to the facts identified in the Commission's analysis. In particular the Commission:

- (a) identified that a number of customers can, and do, switch between "premium" digital advertising and other digital advertising products (in fact, more customers than the Commission identified as saying that they would not);
- (b) did not find, nor was there a basis to find, that NZME2 would be able to identify which customers would be reluctant to switch and, therefore, to price discriminate on that basis. In fact, the Commission's analysis did not suggest any evidence of likely price discrimination; and
- (c) identified a number of competitors that provide these "premium" digital advertising products, to a greater or lesser extent, including TVNZ, MediaWorks, Trade Me, and MetService - with the presence and offering of those competitors further undermining any prospect of any customer being price discriminated against.

¹⁵³ At [232].

¹⁵⁴ At [225].

¹⁵⁵ At [226].

SUNDAY NEWSPAPERS

Advertising

297. The evidence collected from advertising customers demonstrated that most customers do not consider the *Sunday Star-Times* and *Herald on Sunday* to be substitutes, but rather they are complementary products. For example:
- (a) "[] indicated that the readership of the *Sunday Star-Times* and *Herald on Sunday* is different as they have different geographic footprints";¹⁵⁶
 - (b) "[] considered that the choice of which Sunday newspaper to advertise in depends on the audience it is looking to target. It considered that the *Sunday Star-Times* is more focused on the lower-North Island and the South Island, while the *Herald on Sunday* is focused on the upper-North Island";¹⁵⁷
 - (c) "PHD said that the decision of which newspaper to advertise in depended on the media strategy for a particular client and that if the strategy was about reaching people in a print environment, then it would choose both papers. PHD considered that it could reach more Auckland readers if it used both the *Herald on Sunday* and the *Sunday Star-Times*."¹⁵⁸
298. The Commission also made the statement that readership and circulation of the Sunday newspapers is not declining at the same rate as other newspapers (with the exception of the *Sunday News*). From that it inferred that competition between the *Sunday Star Times* and *Herald on Sunday* is likely to continue longer into the future than daily print newspapers. However, the Commission's conclusion is not correct and is based on outdated information. NZME and Fairfax provided the Commission with Audit Bureau of Circulations ("**ABC**") circulation data for the 12 months to 30 June 2016. This data showed that the decline of Sunday newspaper circulation is broadly similar, and in some cases greater, than the decline of other newspapers and was summarised in the following terms:¹⁵⁹
- The total newspapers sold in NZ in the period to 30 June 2016 declined -9.8% YoY.
 - NZME declined -7.8% YoY, with:
 - NZ Herald volume declining - 7.7% YoY.
 - Herald on Sunday volume declining -7.2% YoY.
 - Fairfax declined -12.5% YoY, with:
 - Dominion Post volume declining -14.7% YoY.
 - The Press volume declining -9.8% YoY.
 - Waikato Times volume declining -11.7% YoY.
 - Sunday Star Times volume declining -12.7% YoY.
- Sunday News volume declining -19.3% YoY.

¹⁵⁶ At [278].

¹⁵⁷ At [290].

¹⁵⁸ At [281].

¹⁵⁹ Email from [] to [] on 13 September 2016.

299. More importantly, it is not readership or circulation that determines the ongoing viability of a newspaper, it is profitability. Fairfax and NZME have each provided the Commission with evidence about the profitability of their respective Sunday newspaper titles.
300. Furthermore, the conclusion is inconsistent with the approach of the ACCC in its recent decision to clear a merger between the two main newspaper publishers in Western Australia. In that decision, the ACCC reached the following conclusions in relation to advertising competition:¹⁶⁰

The ACCC noted that **the importance of print newspaper advertising has declined for many categories of advertisers, who have a range of other advertising choices available to them.** There has been a significant reduction in newspaper advertising revenue.

Although some advertisers raised concerns about the loss of competition for advertising opportunities, most acknowledged that **print advertising was of declining importance and identified other advertising options they could switch to if WAN attempted to increase rates.**

Advertising expenditure in print newspapers in Perth is in steep decline. Most of the advertisers we spoke to after publishing the Statement of Issues **are spending less on print newspapers than a few years ago and are finding alternative ways of reaching target audiences, including via digital media.**

[E]ven advertisers who were concerned about the proposed acquisition were often able to point to alternate media that they could use for some or all of their advertising if SWM attempted to increase advertising rates post-acquisition.

While no single alternate form of advertising would replace the constraint that News currently imposes on SWM, the ACCC considered that the various advertising alternatives, including online, radio and TV, would collectively impose sufficient constraint on SWM post-acquisition.

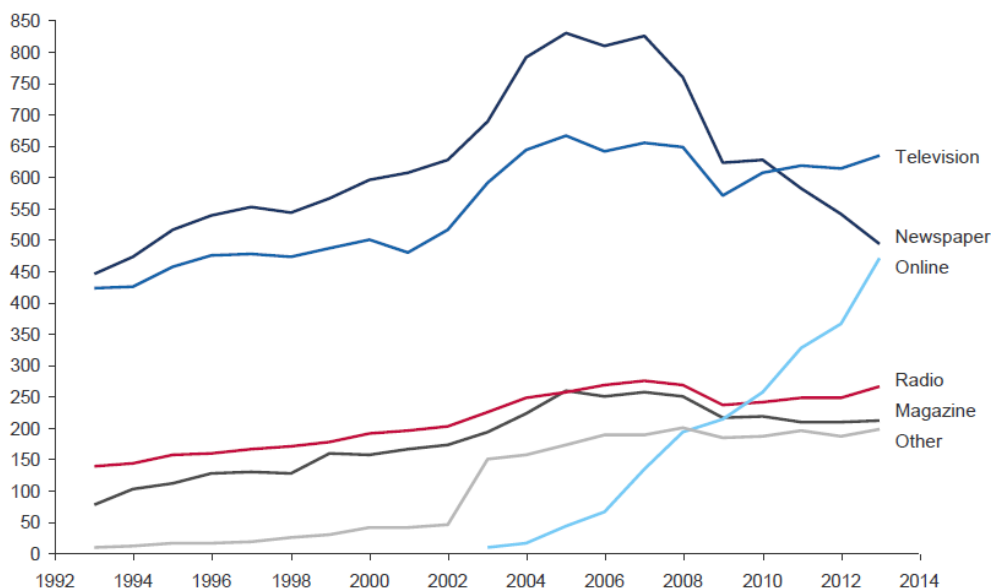
[Emphasis added.]

301. NZME and Fairfax consider the ACCC's approach accurately captures the range of competitive advertising options and constraint on their respective Sunday newspaper titles.
302. Finally, the Commission concluded that because Fairfax charges South Island advertisers the same prices for advertising in the *Sunday Star Times* as North Island advertisers, despite the fact that Fairfax faces no Sunday newspaper competition in the South Island, that the resulting price increase from the Transaction will be "felt nationwide".
303. That conclusion is not supported by the facts described. The logical conclusion from the facts described is that Fairfax charges South Island advertisers the same prices for advertising in the *Sunday Star Times*, despite not facing any competition, because it is not competition with NZME's *Herald on Sunday* that constrains the pricing in the *Sunday Star Times*. It must therefore be the constraint from the range other advertising options, such as online, radio, and TV, that constrains Fairfax's *Sunday Star Times* prices.
304. The Commission's conclusion is also inconsistent with the evidence that NZME and Fairfax have provided showing the relationship between the decline in newspaper advertising revenues and the incline in online advertising expenditure. That data, as

¹⁶⁰ Australian Competition and Consumer Commission mergers register "Seven West Media Limited - proposed acquisition of The Sunday Times publication and website from News Limited" (15 September 2016). Accessible at: <http://registers.accc.gov.au/content/index.phtml/itemId/1198464/fromItemId/751046>.

reflected below in Figure 29 below and Figure 28 above, demonstrates the significant degree substitutability of print for online advertising:

Figure 29 - Advertising expenditures (\$) across different media, 1992-2014

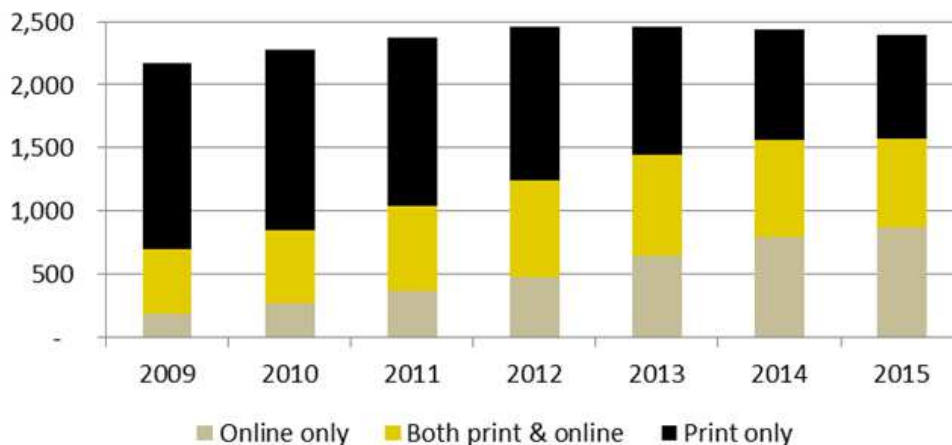


Source: ASA data

Sunday newspaper content

- 305. The same points that are made above in relation to the advertising side of Sunday newspaper markets apply equally on the reader side. The respective Sunday newspapers, given their different distribution footprints, are predominantly complementary rather than substitutable.
- 306. There is significant and increasing substitution of readers from print newspapers to online platforms, see Figure 30 below.

Figure 30 - Substitution between print and online news in New Zealand



307. These dynamics were reflected by the ACCC in its recent decision to clear a newspaper merger between the main newspaper publishers in Western Australia.¹⁶¹

"On the consumer side, the large decline in print newspaper readership formed a major part of our analysis. Many consumers in Western Australia are now getting their news online or from other sources," Mr Sims said.

"[T]he ACCC concluded that overall, a sufficient range of news choices would remain available to Western Australians, with competing online options including Fairfax's WAtoday and ABC online, as well as TV and radio news."

"The ACCC also considered that, in the face of growing competition from alternative advertising opportunities, the need for SWM to maintain readership levels in order to ensure advertising revenues would constrain SWM and likely limit its ability to increase prices to consumers or decrease quality as a result of the proposed acquisition."

308. NZME and Fairfax believe that the ACCC's approach accurately captures the range of competitive options and constraint on their respective Sunday newspaper titles. It is not competition between the *Herald on Sunday* and *Sunday Star Times* that is the driver of content quality for their respective publications, but rather it is the need to produce quality content to attract audience in order to attract advertising revenue to a print platform increasingly under pressure from online competition.

Sunday newspaper cover price

309. The Commission claims that the merged entity would be likely to increase prices for Sunday newspapers post-merger in the North and South Islands, "as a result of the competitive constraint currently imposed by the merging parties in this market".¹⁶²

310. The Commission reaches this conclusion despite acknowledging that "Fairfax currently appears to be operating a one-price model and it has not appeared to price discriminate in the South Island where it has considerably lower numbers of subscribers".¹⁶³

311. As set out in greater detail in NERA's submission on the Draft Determination, the Commission has not satisfactorily explained how this demonstrated lack of price discrimination is consistent with its conclusion that the parties currently act as material constraints on each other in the market.

312. Indeed, as NERA points out:

- (a) A plausible alternative view of the competitive dynamics in the Sundays segment, which would be consistent with Fairfax's one-price model across North and South Islands, is that the stronger constraint acting upon *The Sunday Star-Times* comes from the internet, and impacts the paper nationwide.
- (b) As shown in Figure 31 below, the average annual percentage change in cover prices for the Saturday editions of the metro papers (which already face no competition from other newspapers) are similar to those for the Sunday newspapers, suggesting that any constraint acting on the Sunday newspapers is also acting on the Saturday metro newspapers.

¹⁶¹ Australian Competition and Consumer Commission "ACCC will not oppose Seven West Media's proposed acquisition of The Sunday Times and perthnow.com.au" (media release, 15 September 2016). Accessible at: <https://www.accc.gov.au/media-release/accc-will-not-oppose-seven-west-media%E2%80%99s-proposed-acquisition-of-the-sunday-times-and-perthnowcomau>.

¹⁶² Draft Determination at [595].

¹⁶³ Draft Determination at [596].

[]

[]

313. The parties therefore do not consider that the Commission has adduced any evidence, nor does the Commission's market investigation, support its claim that the parties' Sunday newspapers currently act as constraints on each other, the loss of which would lead to an increase in price. Rather, as NERA observes, cover price data trends are best explained by considering the main constraint in the market to be Internet substitution.

COMMUNITY NEWSPAPERS

314. In its consideration of competition for community newspaper advertising in 10 areas of community newspaper overlap, the Commission's conclusion in its Draft Determination is that it is not satisfied that a substantial lessening of competition will not arise because local advertisers told the Commission that "they would continue to advertise in community newspapers... at a price increase of at least 5-10%".¹⁶⁴
315. However, that is not the forward-looking legal test that the Commission needs to consider. On a forward looking analysis, the data that each of NZME and Fairfax have provided the Commission to date demonstrates that no substantial lessening of competition can be considered likely as a result of the Merger.
316. As set out by the High Court in *Brambles*, the test that the Commission needs to consider is as follows:¹⁶⁵

In the words of QCMA, the merged entity would not - as a direct result of CHEP's removal- acquire such power as "to choose its level of profits by giving less and charging more" and would not be "**sufficiently free from market pressures to 'administer' its own production and selling policies at its discretion**". **We do not accept therefore that the merged entity would be able to pursue a unilateral and unconstrained strategy of price elevation and price discrimination with a view to extracting additional profits from independent retailers.** Put another way, we do not agree that any increment in unilateral market power is likely to be substantial. [Emphasis added.]

317. The data that each of NZME and Fairfax has provided the Commission makes clear that NZME2 will not be free from market pressures to pursue a unilateral and unconstrained price elevation strategy in area. Indeed, the data shows that community advertising pricing has fallen in almost all areas of New Zealand and that there is no linkage between the rate of decline in those community newspaper advertising prices and whether or not NZME and Fairfax directly compete with one another in a particular circulation area. This is demonstrated in Figures 32 and 33 below.

[]

[]

[]

[]

318. The logical conclusion from this data is that it is not competition between NZME's and Fairfax's respective community newspapers that is driving advertising competition; it is the constraint from the range other advertising options, such as online, radio, flyers and in particular the Internet, that constrains the pricing of community newspaper

¹⁶⁴ At [345].

¹⁶⁵ *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 at [197].

advertising. Therefore, focusing on the effect of the Transaction, it is clear that the Transaction will not enable NZME2 to be "free from market pressures to 'administer' its own production and selling policies at its discretion".

319. In this context, NZME and Fairfax note that the Commission considered that online advertising placed a greater degree of competitive constraint on community newspapers in 2005 (where it regarded digital / internet advertising alternatives "as a major constraint on newspapers as a whole"),¹⁶⁶ than it has in this case in 2016. NZME and Fairfax's respective data demonstrates that the constraint on community newspaper advertising from other forms of advertising is significant, is increasing, and is leading to lower advertising prices regardless of whether or not there is community print newspaper overlap between NZME and Fairfax.
320. Accordingly, the data demonstrates that NZME2 will continue to be constrained in the prices it can charge for community newspaper advertising and, given the two-sided nature of the market, will also continue to be constrained in the quality of the content in its community newspapers, which is a dynamic that also previously been recognised by the Commission:¹⁶⁷

... the news and information market is inextricably linked to the advertising market. As such, publishers of community newspapers have no opportunity or incentive to decrease the quality of the news/information provision or to charge for the newspaper as this would have a detrimental effect on the ability to attract advertising dollars. This conclusion is strengthened due to the fact that advertisers have a large degree of countervailing power in the advertising market and due to the fact that community newspapers are dependent on advertising revenue to remain viable.

TRANSFER EFFECTS

321. In relation to the detriments analysis, the parties do not agree with the Commission's estimation of transfers.

NERA's IRR analysis

322. On 27 September 2016 NZME and Fairfax submitted to the Commission an analysis by NERA Economic Consulting (the "**IRR analysis**"), which set out that, even assuming for the sake of argument that there would be price increases post-Transaction, those price increases would be unlikely to result in "functionless monopoly rents" because on the evidence available, [] and [] which is strongly suggestive of the proposition that any post-merger price increase should be regarded as simply enabling NZME2 to have a better chance of covering its costs and investing (ie, rents would be functional, not functionless).
323. On 19 October 2016 NERA submitted a follow-up note to the Commission, responding to the Commission's requests for additional information on the methodologies used by NERA in the IRR analysis.
324. The Commission did not refer to NERA's IRR analysis or follow-up note in its Draft Determination, nor did it rebut it. Rather, the Commission states:¹⁶⁸

We consider that in the status quo, current prices would be more than sufficient to incentivise investment into the various markets affected by the merger. Any increase in price would suggest that the shareholders would be deriving

¹⁶⁶ Commerce Commission, Decision No. 561 *Fairfax New Zealand Limited / Times Media Group Limited* (14 October 2005) at [123].

¹⁶⁷ Commerce Commission, Decision No. 561 *Fairfax New Zealand Limited / Times Media Group Limited* (14 October 2005) at [141].

¹⁶⁸ [].

economic rents. In such a scenario, we consider that any incremental transfer of wealth from New Zealanders (eg, New Zealand advertisers or news readers) to non-New Zealand shareholders of the merged entity that arises from an increase in price would constitute a detriment of the Transaction.

325. The Commission offers no evidence, economic or otherwise, for the assertion that current prices would be "more than sufficient to incentivise investment", and that assertion is contrary to the economic evidence provide to the Commission by NERA.

New Zealand shareholding

326. The Commission has also taken a static approach to assessing the level of NZME's shareholding post-Transaction and, therefore, an incorrect approach to calculating any potential transfers.
327. Simply assuming / asserting that NZME will have the same number of New Zealand shareholders in the future as it did at 25 October 2016 does not reflect the forward-looking assessment that the Commission is required to take.

328. [].¹⁶⁹

329. Accordingly, while it is not possible to accurately predict the specific level of future New Zealand shareholding in NZME, it is likely to be at a level significantly above []. In accordance with the guidance laid down by the Court of Appeal, if the Commission does not accept NERA's report, then the parties ask the Commission to make a forward looking assessment of what it considers to be a likely level of New Zealand shareholding in NZME post-merger.

BENEFITS ANALYSIS

Business premises

330. Turning to the benefits analysis, the Commission discounts PwC's estimated cost savings analysis in respect of business premises on the basis that:

- (a) The Commission did not agree that lease costs on the parties' respective premises are as scalable as claimed by the parties. The Commission claimed that while [].¹⁷⁰¹⁷¹

331. [] and \$[] million, instead of \$[] to \$[] million.

332. PwC, NZME, and Fairfax remain of the view that the \$[] to \$[] million range is the more likely cost saving that will be achievable in respect of premises. This is because:

- (a) As discussed, [];
- (b) [][].

333. The parties therefore remain of the view that the PwC report represents the best estimate of the likely cost savings achievable from the Transaction.

¹⁶⁹ [].

¹⁷⁰ Draft Determination at [735].

¹⁷¹ Draft Determination at [736].

APPENDIX ONE

Morgan Stanley Report *Australia Media, Internet and Technology*

[Attached]

APPENDIX TWO

SELECTION OF MEDIA FROM THE LAST TWO WEEKS

**The New York Times Scrambles to Avoid Print Advertising
Cliff**

<http://fortune.com/2016/11/02/nyt-print-cliff/>

2 November 2016

Wall Street Journal Begins Layoffs, Cuts Sections

<http://fortune.com/2016/11/02/wall-street-journal-layoffs-cuts-sections/>

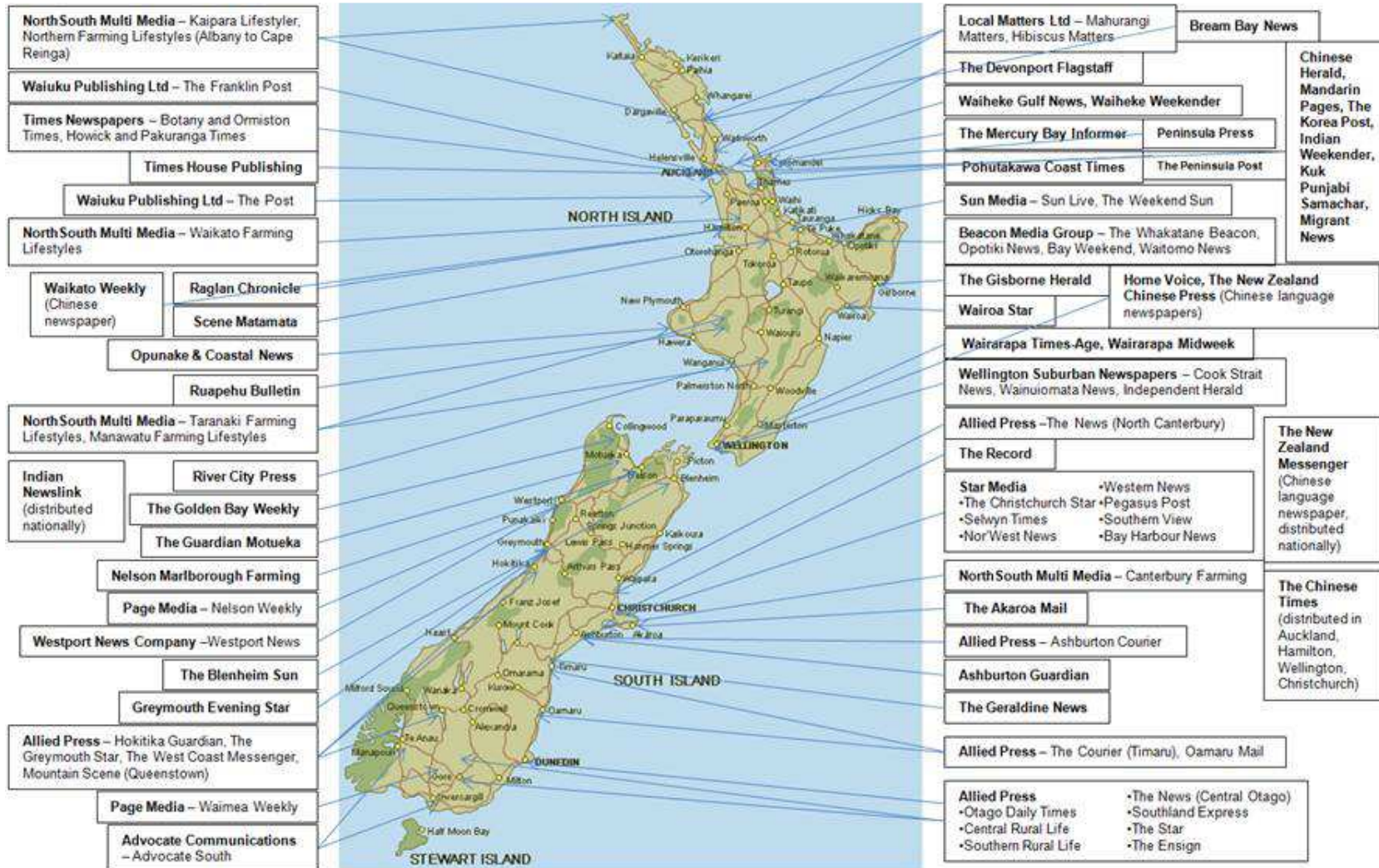
2 November 2016

More Wretched News for Newspapers as Advertising Woes Drive Anxiety

<http://www.nytimes.com/2016/10/28/business/media/buyouts-wall-street-journal-bad-news-for-newspapers.html>

27 October 2016

APPENDIX THREE - NATIONWIDE DISTRIBUTION OF INDEPENDENT REGIONAL AND COMMUNITY PRINT NEWSPAPERS



APPENDIX FOUR - SCREENSHOTS OF NEWS DISSEMINATED ON FACEBOOK



John Key
November 16 at 10:41am · 🌐

This morning I spoke with United States President-elect Donald J. Trump and we had a very warm and cordial conversation.

Mr Trump offered his sympathies for the earthquake, and I congratulated him on his election.

We discussed the New Zealand economy, trade and agreed the relationship between New Zealand and the United States is in great shape.

👍 Like 💬 Comment ➦ Share

👍 🗨️ 🥰 7.5K Top Comments ▾

205 shares 475 Comments



Stuff.co.nz ✓
Published by Paul Harper (P) · November 16 at 10:17am · 🌐

"Mr Trump offered his sympathies for the earthquake, and the Prime Minister congratulated him on his election."



Donald Trump calls John Key to offer sympathies after earthquake

STUFF.CO.NZ

8,539 people reached Boost Post

👍 Like 💬 Comment ➦ Share 🌐 ▾

👍 🗨️ 🥰 Peter Neilson, Rachel Morgan and 60 others Top Comments ▾

12 shares 26 Comments

John Key's original announcement gets 7,500 reactions and 205 shares from Facebook users; Stuff's news article gets 60 reactions and 12 shares.


Chloe Swarbrick
18 September · 🌐

I want to be your Mayor because I love our city, and I know our potential. My policies are the product of talking with you, consulting with academics, community leaders, researching best practice internationally, and new, creative ways of doing things.

Your Mayor is there to serve you. They are there to bring you into the conversation on our city's future. Show me any other candidate who has worked tirelessly to listen and and truly engage Aucklanders this election.

I implore you to be passionate in voting. Boredom breeds status quo. Right now, Auckland needs strong leadership, and a bold vision. As your Mayor, I will deliver.

Thank you to Q+A for having me on the show.



237k Views

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👍👎👨👩👧👦 Lucy Hannon, Courtney Reid and 5k others Chronological

1,708 shares

View previous comments 2 of 555

Chloe Swarbrick posts an interview on Q+A, which gets 5,000 reactions and 1,708 shares.