KASIA GINDERS

THE PROPOSED FAIRFAX-NZME MERGER AND ITS IMPLICATIONS FOR DEMOCRACY: WHAT THE MERGER REVEALS ABOUT NEW ZEALAND'S LEGAL COMMITMENT TO PROTECTING THE CONSTITUTIONAL ROLE OF NEWS MEDIA

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Abstract

The Commerce Commission is currently reviewing the proposed merger of Fairfax NZ Limited and NZME, which would see nearly 90% of New Zealand's newspaper market held by a single company. However, it is unclear that the review process is designed to ensure that any changes in media ownership result in the right kind of important public consequences: the preservation of the constitutional role of the media. In this paper I seek to analyse what the merger process reveals about New Zealand's legal commitment to protecting the public role of journalism. Ultimately, I conclude that there is a failure to promote diversity in the news media and ensure the right kind of consequence – a thriving democracy.

Public law – media law

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I Introduction

The news media has the power to effect important public consequences, for example, by potentially altering an election outcome,[1] or facilitating public discussion about law change.[2] It plays a vital constitutional role as a pillar of New Zealand's democratic process. It follows that the manner in and extent to which the industry is regulated also has important public consequences. The Commerce Commission is currently reviewing the proposed merger of Fairfax NZ Limited and NZME, which would see nearly 90% of New Zealand's newspaper market held by a single company. However, it is unclear that the review process is designed to ensure that any changes in media ownership result in the right kind of important public consequences: the preservation of the constitutional role of the media. Commercial concerns appear to dominate not only the news media industry itself but also regulation of ownership of the industry.

The initial legal hurdle for the parties in obtaining clearance for the merger gives little weight to the public consequences of news media reporting. The parties must prove to the Commerce Commission that the merger will not (or is not likely to) substantially lessen competition in the market. Public interest considerations are only considered if this test is not met.[3] Competition law primarily aims to protect the market for consumers by promoting economic efficiencies; it is not designed to ensure the marketplace of ideas is functioning as an effective platform for democracy. In this paper I seek to analyse what the merger process reveals about New Zealand's legal commitment to protecting the public role of journalism.

Ultimately, I conclude that there is a failure to promote diversity in the news media and ensure the right kind of consequence – a thriving democracy. The question that remains is how the law could be improved in this respect. I attempt to sketch out several potential options and considerations.

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[1] *Dunne v CanWest TV Works Ltd* [2005] NZAR 577, at [13] and [34].

[2] See discussion of the repeal of the provocation defence below at *II B.*

[3] Commerce Commission *Authorisation Guidelines* (July 2013) at [17]-[18]. See also discussion below at *III A.*

The paper is split into four parts.

In part one, I examine the New Zealand news media market and the background to the merger. First, the proposed merger is briefly explained, followed by an explanation of why the merger matters. The news media's public role and powers in a democracy, the already highly concentrated nature of New Zealand's news media ownership, combined with the increasing pressure on the newspaper market to find revenue online, all create their own challenges to be overcome when seeking to preserve the news media's constitutional role.

In part two I address the merger process itself, beginning by considering the law, the indications the Commerce Commission has given regarding this particular merger, and the possible outcomes. I then assess whether current competition law gives sufficient recognition and protection of the media's constitutional role.

This leads into part three, where I look at the adequacy of other forms of news media regulation as a substitute for preserving the media's democratic role. This comparison draws attention to the need for appropriate ex ante regulation of news media, something the clearance and authorisation processes of competition law are well placed to provide, and yet do not.

Part four is where I consider possible improvements. First, how might the merger authorisation process be altered to better promote the news media's constitutional role? Secondly, fixing the authorisation process is unlikely to be a complete panacea – what other ex ante, proactive options might be necessary to help keep this pillar of democracy standing strong? Not an easy question to answer, but not one that should be ignored in light of the issues raised by the merger.

II Part One: The significance of the merger

A The Fairfax-NZME merger

The proposed merger between NZME and Fairfax was submitted to the Commerce Commission for consideration in March 2016.[4] The application states that the move is a

[4] Fairfax NZ Limited and Wilson & Horton Limited *Notice Seeking Authorisation or Clearance of a Business Acquisition Pursuant to s 67(1) of the Commerce Act 1986* (Commerce Commission, 27 May 2016 (amended 24 August 2016) (*Authorisation Application*).

reaction to a "dramatically transforming media landscape," with increasing competition from global players in the online advertising market and declining levels of readership and revenue in the print market.[5] The planned merger has resulted in NZME separating from its parent company APN News & Media and publicly listing on the New Zealand Stock Exchange. Fairfax is set to take a 41 per cent stake in the merged entity, as well as $55 million in cash in exchange for its New Zealand assets.[6]

The parties submitted in their application that the merger would be unlikely to create substantial competitive overlap in the newspaper market, because the two businesses are already largely complementary in nature. The main areas of competition are in the Sunday newspaper market in the North Island, between regional metropolitan newspapers in the Waikato and Hawke's Bay regions, and between some community newspapers in a number of North Island districts.[7] Additionally, there is competition for the supply of online advertising and supply of digital news between stuff.co.nz (owned by Fairfax) and nzherald.co.nz (owned by NZME). However, the primary argument made by the parties was that the newspaper market was no longer the appropriate market for assessing competition. It was argued that trends towards increasing competition across different types of media made it inappropriate to distinguish between online and print advertising or online and print news. In particular, it was submitted the merged company would face strong competition for readership from TVNZ, MediaWorks, Radio New Zealand, blogs, and international news sites like The Guardian and The New York Times,[8] and "significant" competition for advertising from Google and Facebook.[9]

If the merger did not go ahead, the application stated the parties would continue to operate separately, but their "ability to innovate, diversify and improve their offerings, to reach and engage the same scale of consumers, with diverse and attractive content, would naturally be

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[5] At [1.2].

[6] "Mega media merger deal one step closer" (7 September 2016) RNZ <www.radionz.co.nz>.

[7] *Authorisation Application*, above n 4, at [12.7].

[8] At [14.4]-[14.7].

[9] At [14.11].

more limited."[10] However, the details of the rest of the counterfactual were redacted in the public version. An anonymous submission (that appeared to be from someone working for NZME or Fairfax) to the Commerce Commission on the merger suggested "one of us will probably destroy the other eventually" in the fight for the "scraps" of advertising revenue left behind by Google and Facebook if the merger did not proceed.[11]

Despite these arguments made by the parties in support of their application, the reality is that the merger (in its current form) would leave 89% of the New Zealand newspaper market controlled by one company.[12] Whether or not this would significantly lessen competition given the alleged complementary nature of the businesses and converging markets online, it would at the very least drastically increase the concentration of news media ownership in New Zealand. The following discussion explains why such a change threatens to lead to adverse public consequences. The vital public role and extensive powers of the news media demands a diverse and robust marketplace of ideas. This requirement, which sits somewhat uncomfortably with New Zealand's already concentrated news media ownership and the commercial challenges posed by new media and technologies, suggests this merger may be a symptom of a downward spiral for the news media's contribution to democracy if New Zealand is not careful.

B Why ownership diversity matters: the public role and power of the news media

The news media's ability to access and spread information throughout society effectively renders it the public's "eyes and ears",[13] providing members of the public with knowledge they otherwise would not access. The news media's function in society is typically elevated above a mere source of information though; it is difficult to find a discussion of the importance of the

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[10] At [13.1].

[11] *Anonymous Submission on Statement of Preliminary Issues for NZME/Fairfax Merger – 27 June 2016* (Commerce Commission, 14 July 2016). See also discussion below at *III A*.

[12] Jeremy Rose "Independent publishers question media merger" (14 August 2016) RNZ <www.radionz.co.nz>.

[13] Law Commission *The news media meets 'new media': rights, responsibilities and regulation in the digital age* (NZLC R128, 2013) at [2.1]; Ministry of Justice "In-Court Media Coverage Guidelines 2016" in *Media Guide for Reporting Courts and Tribunals* (Wellington, 2016), Appendix C, cl 2(3).

media without reference to its integral role in democracy. The free press is often praised as a pillar of the constitution in a democracy, despite the fact that it does not fit within any branch of government and is separate from the general public. In fact, the media's constitutional role might best be described as that of a bridge between the public and the branches of government, particularly the legislature and Cabinet. The foundation of this important constitutional role is that the news media keeps citizens informed and provides a platform for diverse views to be heard, enabling citizens to participate effectively in a democratic society. An extension of this view is the news media's well-known role as watchdog for society. Even Winston Churchill jumped onto this notion of the media as a guardian of liberty:[14]

> A free press is the unsleeping guardian of every other right that free men prize; it is the most dangerous foe of tyranny … where free institutions are indigenous to the soil and men have the habit of liberty, the press will continue to be the Fourth Estate, the vigilant guardian of the rights of the ordinary citizen.

The news media cannot be viewed as a neutral bridge between the governed and the government though. When disseminating information journalists become the primary storytellers of news, with the power to place special meaning on events or issues. News stories are framed by journalists (or perhaps fitted into a pre-existing frame[15]) in a way that can shape narratives of particular events or issues in public debate, and ultimately influence outcomes. This does not necessarily involve imbalanced or inaccurate reporting; it may simply be the choice to publish a particular news story in priority over others. In arguing that "the role the media has in shaping public opinion is one of its greatest powers," in her book *Reviving the Fourth Estate*, Julianne Schulz notes the aptness of the phrase "the media may not tell us what to think, but what to think about".[16]

The news media may, for example, play a role in constructing or reinforcing stories that can be used to advocate for and encourage law change. The Crimes (Provocation Repeal) Act 2009 is

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[14] Cited in The Rt Hon Lord Justice Leveson *Report of An Inquiry into the Culture, Practice and Ethics of the Press* (The Stationery Office, London, 2012), at 2.1 (Leveson Report).

[15] See Zygmunt J B Plater "Law and the fourth estate: endangered nature, the press, and the dicey game of democratic governance" (2002) 32 *Envtl L* 1.

[16] Julianne Schulz *Reviving the Fourth Estate* (Cambridge University Press, Cambridge, 1998) at 151.

an apt example. Extensive media coverage of the Clayton Weatherston case in 2009 and scrutiny of the provocation defence was closely followed by introduction of a Bill to repeal the defence. Just one day after the publication of an article calling for the defence of provocation to be abolished (the same day Weatherston was found guilty),[17] the Minister for Justice, Simon Powell, announced his intention to repeal the defence,[18] and the Bill was introduced a few weeks later. In contrast, two Law Commission reports recommending repeal released in 2007[19] and 2001[20] failed to provoke a similar response in the news media or such a speedy reaction by the Government.

A number of members of Parliament made reference to the media coverage during debate.[21] Some criticised the excessive coverage of the Weatherston case compared to the Ferdinand Ambach case, which allowed a successful provocation defence (unlike in the Weatherston case) in reaction to unwanted sexual advances from another man.[22] Other members sought to emphasise that the Bill was not simply a "knee-jerk" reaction to the case,[23] although the desire to provide such an assurance suggests the widespread publication of the case was nevertheless a factor. The exact extent to which Weatherston media coverage instigated law change is uncertain, but it does illustrate how narratives constructed by news media coverage of court cases and other public issues in New Zealand may potentially influence public decision-making.

Given the news media's important role in democracy and power to influence society, the regulation of the news media needs to be carefully considered. On the one hand, press freedom

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[17] "Weatherston trial: Call to abolish provocation defence" *The Press* (online ed, 22 July 2009).

[18] Martin Kay and Rebecca Palmer "Sophie's Legacy: Provocation to be scrapped" *The Dominion Post* (online ed, 23 July 2009).

[19] Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007), at [183].

[20] Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001), at [120].

[21] (24 November 2009) 659 NZPD 8248; (18 August 2009) 656 NZPD 5646.

[22] Hon Lianne Dalziel and Grant Robertson, (24 November 200) 659 NZPD 8248.

[23] Jacinda Ardern, Kanwaljit Singh Bakshi, Grant Robertson, Hon Simon Power, Hon Lianne Dalziel (24 November 2009) 659 NZPD 8248; (18 August 2009) 656 NZPD 5646.

is necessary to enable news media to act as a watchdog for society and keep citizens fully informed to enable effective democratic participation. On the other hand, a press that is free and nothing else will not necessarily enhance democracy.[24] The balancing of freedom and regulation is discussed below through the lens of free speech theory. In particular, the role of diversity in the news media is emphasised.

Four main reasons are usually raised in support of freedom of expression, identified by Eric Barendt. They are: discovery of truth, self-fulfilment, suspicion of government, and democratic participation.[25] Generally it is argued that the more a particular type of speech promotes these rationales, the more likely it is to be worthy of protection. With the exception perhaps of self-fulfilment, all can be closely linked to the public interests in the news media exercising its right to free speech. Increased freedom for news media generally promotes these rationales. However, imagining a media with no limitations on free expression reveals some of the flaws in these rationales and reasons for regulation.

The discovery of truth, it is argued (most famously by John Stuart Mill), requires open discussion. Mill states that challenging beliefs will result in "the clearer perception and livelier impression of truth, produced by its collision with error."[26] Arguably the news media provides an ideal public forum for such "collision with error" in order to ascertain truth: it easily reaches most of the country and accesses numerous sources of information to contribute to public debate. A prominent theory regarding discovery of truth is the marketplace of ideas: that competition of ideas in a free and unregulated market is the best method of discovering truth.[27] The news media is probably one of the nation's primary marketplaces of ideas.

Factors that diminish the effectiveness of such a marketplace include imbalance in the market, and motives of profit or pandering to the public that drive some speakers.[28] These flaws are particularly pertinent to the news media. News media companies may access more sources than

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[24] Leveson Report, above n 14, at 2.1.

[25] Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2005), at 6-23.

[26] John Stuart Mill *On Liberty* (Penguin Classics, London, 1974), at 33.

[27] Barendt, above n 25, at 11.

[28] At 12.

ordinary citizens, giving them greater power over information, and a louder voice through which to make their own opinions heard. This power imbalance is particularly worrying in a concentrated media ownership market like New Zealand's.[29] Another concern, as highlighted by the challenge of obtaining online advertising revenue and the submissions on the merger application, are clickbait wars and diminishing content quality. The commercial pressures facing news media cast doubt on whether in pursuing or writing a story, the media is seeking to ascertain the truth or simply searching for the easiest, most salacious story headline in order to attract the most clicks.

These issues suggest that regulation is required for the marketplace of ideas to function effectively. Diversity in the ideas market is especially at risk. If certain voices (the limited number of large news companies in New Zealand) gain too much prominence, certain views may dominate the public sphere while other views are squeezed out. It is submitted that, in light of concerns relating to the suspicion of government rationale for free speech, competition law and the merger review process provide a good opportunity to encourage the necessary balance and diversity within the marketplace of ideas.

Suspicion of government theories hold that even if censorship of expression is desirable, the government cannot be trusted to decide what should be censored. This is because governments are "naturally inclined to suppress speech they dislike; further, they are easily tempted to limit radical or dissenting speech when they act to preserve public order."[30] A pertinent New Zealand example of this tendency is Prime Minister John Key's statement that the New Zealand Government sometimes delays the release of official information because "the Government might take the view that it's in our best interest to do that."[31]

Free reporting plays a role in forcing the government to address difficult or embarrassing issues – it also helps to ensure that a government cannot control its citizens through propaganda. Therefore, state involvement in news media is often perceived as antithetical to its important

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[29] Discussed below at *II C*.

[30] Barendt, above n 25, at 38.

[31] Craig McCulloch "PM admits Govt uses delaying tactics" (16 October 2014) Radio New Zealand <www.radionz.co.nz>.

democratic role as a watchdog on the exercise of political power. State involvement in what information and opinions the news media can or cannot publish inevitably risks favouring government interests over the wider public interest in democracy. However, the Commerce Commission is an independent body dealing not with specific content but with content providers. This puts it in a good position to ensure the market of ideas is remains as diverse as possible without directly interfering with the ability of news media to choose what to publish. In this way, the state could use law to promote diversity while still supporting the news media in its watchdog role.

The news media's more subtle powers to frame news stories and direct public attention to particular issues – thereby shaping and controlling public debate – also heightens the importance of encouraging provider diversity. Ex post facto accountability may struggle to address the subtleties involved in the media's ability to influence public opinion. If the news media are telling the public "what to think about" rather than "what to think", attempts to hold the news media accountable after unsatisfactory coverage of an issue may easily slip into the troublesome area of liability for omissions. While members of Parliament might criticise the media for excessive coverage of the Weatherston case in comparison to the Ferdinand Ambach case, it is difficult to imagine an effective and reliable legal method of censuring the news media for this given the value judgment involved in determining what is or should be news.

Ultimately, the news media's important democratic role and power make ex ante methods of encouraging diversity and thereby democracy highly important. A level of plurality in news media ownership is not a complete panacea to issues of diversity and democracy but it is a key step.

C Why news media ownership is problematic: the current News Zealand news landscape

The already highly concentrated nature of news media ownership in New Zealand makes the diversity issues raised by the proposed merger even more acute; the problem is compounded by commercial challenges facing the industry. There are just two main free-to-air television news broadcasters, Television New Zealand Limited (TVNZ), which runs One News and other assorted news programmes, and Mediaworks, with the recently rebranded Newshub. There are two main radio news stations, one publicly funded, RNZ, with listener numbers at 491,000 a

week,[32] and the other the commercially owned Newstalk ZB, with listeners nearing 400,000 a week.[33] And of course, there are two main newspaper-based news publishers, Fairfax Media and NZME, with three weekday newspapers with readership above 100,000 per issue[34] and two news websites between them.

Therefore, in New Zealand's media marketplace there are only two main competitors in each of the different mediums. If one looks at the market without distinguishing between mediums, an increasingly relevant perspective given convergence and direct competition online (this was the approach advanced by Fairfax and NZME in their application), then there are only five main competitors across the board: Fairfax, NZME (which owns Newstalk ZB), TVNZ, Mediaworks, and Radio New Zealand. All five have been working to increase their online presence. The newspaper companies have explicitly adopted a "digital first" strategy[35] and Radio New Zealand's legislation was amended in April 2016 to enable greater use of new delivery platforms,[36] requiring it to "take advantage of the most effective means of delivery."[37]

Other national notable content providers are: Allied Press, which owns the Otago Daily Times (readership around 90,000 per issue);[38] Scoop, an online, non-profit media outlet (552,000 monthly unique visitors); Bauer Media Group, which owns The Listener, Metro, and North & South magazines, and the National Business Review, a financial news outlet (with 55,000 monthly unique visitors to its online version).[39] Readers are also able to access international news websites like The Guardian online, although these sites are unlikely to offer coverage of

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[32] "Radio New Zealand Annual Report 2014-2015" (2015) RNZ <www.radionz.co.nz>, at 2. It also has the highest online radio audience: "Nielsen Media Trends Report 2016" (2016) Nielsen <www.nielsen.com>, at 18.

[33] "Radio Audience Measurement" (5 May 2016) GfK <www.gfk.com>.

[34] The New Zealand Herald, The Dominion Post, and The Press: "Readership in New Zealand, 12 Months to December 2015" Roy Morgan Research <roymorgan.com.au>.

[35] *Authorisation Application*, above n 4, at [9.3] and [14.32].

[36] Radio New Zealand Act 1995 ss 8B(4) and (5).

[37] Section 8(5)(o).

[38] "Readership in New Zealand, 12 Months to December 2015", above n 34.

[39] "National Business Review 2015 Media Kit" (2015) National Business Review <www.nbr.co.nz>.

New Zealand national and regional news so are less comparable outside of their international news options.

A problem when considering competition and ownership in the news media market is that news media operate in a two-sided market, with readers, watchers and listeners on one side and advertisers on the other. Content is created to attract consumers which in turn attract advertisers. Some publishers may also rely partially on subscriptions to content, but this is usually to cover printing and distribution costs for newspapers and is less applicable to digital content and free-to-air broadcasters. Essentially, commercially owned news media need advertising to survive and make a profit. The current advertising environment is creating challenges for the traditionally newspaper-based market in which Fairfax and NZME operate.

While advertising revenue was a relatively easy thing to obtain for the newspaper industry several decades ago, the advent of new media has introduced significant challenges. Distributed content (which drives advertising revenue to distributors such as Facebook), the increased use of mobiles to access news, and the use of ad-blocking all make online advertising profit difficult.[40] This issue is exacerbated by that fact that most consumers are unwilling to pay for content, particularly in the very competitive English-speaking news world, where an average of 9% of people are willing to pay for online news.[41] Niche content, like newspapers in country-specific languages,[42] or covering specific issues have had greater success in continuing with online subscription – 65% of the National Business Review's content is behind the subscriber paywall.[43]

In New Zealand, total newspaper advertising has sharply declined, while interactive (online) media advertising has dramatically increased over the last decade, overtaking newspaper

[40] Nic Newman "Overview and Key Findings of the 2016 Report" in *Reuters Digital Report 2016* (Reuters Institute for the Study of Journalism, 2016) <www.digitalnewsreport.org>.

[41] See heading "Some of the Key Findings".

[42] See heading "Prospects for Paid Content Online".

[43] "National Business Review 2015 Media Kit", above n 39.

advertising in 2014.[44] However, this has not resulted in a corresponding sufficient increase in digital revenue; although specific figures pertaining to Fairfax and NZME were removed from the public version of its Application to the Commerce Commission for commercial reasons, trends in the United States and England show increasing digital revenue is insufficient to counter lost print revenue.[45]

Online advertising is very competitive, particularly as overseas websites, both news generators or otherwise, are added to the list of competitors. Currently Google has around 37% of the digital advertising revenue in New Zealand, Facebook 16.4%, and Fairfax and NZME 5.8% and 6% respectively.[46] Other groups with noticeable online revenue include TradeMe, Yahoo, TVNZ, and MediaWorks, with Agency Trading Desk getting 7.5% of the market – this includes KPEX, which Fairfax, NZME, TVNZ and MediaWorks own and use to sell programmatic advertising.[47]

The public role and powers of the traditional news media are increasingly affected by the growth of social and other new media in other ways as well. The move to online content has seen publishers losing control of distribution, meaning consumers are less likely to pay attention to the source of information, making brand development and attracting readers more difficult. The influence of algorithms and platforms like social media in determining who sees what news is also increasing.[48] The Reuters Digital News Report 2016 found that 51% of the people surveyed used social media as a source of news each week,[49] with 28% of 18-24 year olds listing social media as their main source of news, overtaking television for the first time.[50]

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[44] "New Zealand Advertising Industry Turnover Report" (March 2015) Advertising Standards Authority <www.asa.co.nz>.

[45] *Authorisation Application*, above n 4, at [6.18]-[6.19].

[46] At figure 13.

[47] At figure 13.

[48] Nic Newman "Overview and Key Findings", above n 40.

[49] See headings "Some of the Key Findings" and ""Rise of distributed news". Regrettably (although understandably) the Fairfax and NZME statistics on how much of their content was reached through social media or Facebook was redacted in the public version of the Application.

[50] See heading "Rise of distributed news".

This change in distribution has been described as the process of social media "swallowing" journalism and the news.[51] It is particularly concerning in the case of a platform like Facebook, which uses algorithms designed to show users more of what they are perceived to want, limiting exposure to opposing views or new content.

Despite this loss of control for publishers, people still "want, value and identify with traditional news brands" according to the Reuters 2016 Report,[52] with the report indicating that digital native brands who focus on distributed media (like Buzzfeed or blogs) may have an increasing reach but tend to focus on softer subjects and are mostly used as secondary news sources. The Law Commission's 2013 report on new media trends and issues also noted that the majority of people still relied on mainstream media for news, with bloggers and social media platforms themselves also depending on mainstream media for primary news gathering.[53]

Therefore, while journalists from traditional media may still be the primary and most trusted storytellers of news, their role and power (and perhaps even ability to operate long-term) is increasingly challenged by the emergence of new technologies, particularly in the case of print-based news media. The introduction of other online competitors in the information and opinion market, whether produced internationally or by ordinary citizens, is surely a positive step for democracy, but the challenge of finding digital revenue to fund New Zealand focused news media and the public service they provide is a significant hurdle for the future of journalism and its contribution to democracy. Opaque algorithms that determine what is "news" for a particular person adds to the problem. The challenge of survival for newspaper companies is one unlikely to have a simple solution, and this paper does not attempt to find one. However, the issue, in conjunction with the already concentrated news media ownership in New Zealand, provides an important context for understanding the rationale and issues behind the proposed merger.

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[51] Emily Bell "Facebook is eating the world" (7 March 2016) Columbia Journalism Review <www.cjr.org>; Katherine Viner "How technology disrupted the truth" *The Guardian* (online ed, 12 July 2016).

[52] See "Conclusions".

[53] Law Commission *The news media meets new media*, above n 13, at [3.17]-[3.48].

The merger proposes to further narrow New Zealand's already limited news media market. The potential consequences of such an outcome go beyond basic competition concerns of price hikes for customers – they threaten to diminish the diversity in New Zealand's marketplace of ideas, perhaps limiting the number of "what to think about" options provided by the news media, and reducing the number of primary news gatherers keeping citizens informed and able to fully participate in the democratic process. Added to this are the challenges of new media, which may not only alter the news distribution process in an opaque way, but also threaten the profitability of newspaper-based news media in particular. It might be difficult to promote healthy competition in the marketplace of ideas when some of its main contributors are struggling to compete in the market for advertising. It may even be that, as noted by former New Zealand Herald editor Tim Murphy, the lesser evil would be enabling the parties to combine forces to avoid "mutually assured destruction".[54] In this sense, the potential loss for democracy resulting from a merger (or a loss of one of the companies) may be inevitable, and simply a symptom of a market which has already been allowed to become highly concentrated, and is now apparently struggling to support its current level of diversity. In summary, the problems raised by the merger are not to be taken lightly.

III Part II: Evaluating the current approach to news media mergers

Having established the significance of the Fairfax-NZME merger, in part two I use the merger as a case study to illustrate how the authorisation process is ill-equipped to protect the news media's constitutional role. First, the rules around changes in media ownership and the authorisation process are laid out. This is followed by an evaluation of these rules, in order to highlight the shortcomings of the authorisation process. This does raise the question of whether the news media's role might be better protected (or is already adequately protected) by other legal mechanisms – this argument was advanced by the parties in their response to submissions from the public. After identifying and assessing the other existing regulatory mechanisms in part three below, I conclude that there is still room for more proactive styles of regulation, such as through competition law. The status quo can be improved on, and the merger authorisation process in particular deserves reconsideration.

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[54] Tim Murphy "Engage, then see: Tim Murphy reads between the lines of the NZME-Fairfax merger bid" (3 June 2016) The Spinoff <thespinoff.co.nz>.

A The status quo: outlining the current approach

There is currently little in the way of control over news media ownership, as the high concentration of ownership indicates. New Zealand does not have provisions explicitly preventing cross-media ownership or foreign ownership of media, and the merger has already been approved by the Overseas Investment Office.[55] The primary control over concentration of news media ownership is the Commerce Act 1986, which prohibits mergers or acquisitions which would substantially lessen competition in the market.[56]

However, parties can apply to the Commerce Commission for clearance or authorisation for a merger or acquisition. An application for clearance will be granted if the Commission is satisfied the proposed transaction will not, or is not likely to, have the effect of substantially lessening competition in the market.[57] This is done by comparing the likely state of competition in the market if the merger proceeds with the predicted competition if the merger does not proceed.[58] Relevant factors include existing competition, the potential for new competition, and the market power of purchasers.[59] The market is defined as a market in New Zealand for goods and services as well as "other goods and services that, as a matter of fact and commercial common sense, are substitutable for them."[60]

An application for authorisation involves a two-step process that tackles the clearance analysis before considering whether the merger or acquisition should be authorised.[61] The Commission is required to first assess whether competition is likely to be substantially lessened; if this is not the case, a clearance will be granted. If it is, the Commission will then have jurisdiction to

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[55] Tom Pullar-Strecker "Overseas Investment Office approves Fairfax NZ, NZME merger" (22 September 2016) Stuff.co.nz <www.stuff.co.nz>.

[56] Section 47.

[57] Section 66.

[58] *Fairfax NZ Ltd and Wilson & Horton NZ Ltd – Statement of Preliminary Issues* (Commerce Commission, 14 June 2016) (*Statement of Preliminary Issues).*

[59] At [14].

[60] Commerce Act, s 3(1A).

[61] *Authorisation Guidelines*, above n 3, at [8] and [17]; see also Commerce Act, s 67(3)(a).

assess whether the proposed transaction will result in such a benefit to the public that it should be permitted. If this public benefit test is satisfied, the Commission will authorise the merger or acquisition.[62] If not satisfied, authorisation can still be granted subject to an undertaking by merging parties to divest some of their assets or shares; such undertakings are offered by the parties and the Commission decides whether to accept them.[63]

The public benefits test requires a weighing up of the benefits against the detriments arising from a lessening in competition. While benefits will be considered regardless of whether they accrue within the market or more widely, the only detriments taken into account are those within the market where competition is lessened. Benefits and detriments must also be quantified to the extent that it is practical, rather than relying solely on qualitative judgement.[64]

What, then, are these potential "benefits" and "detriments"? A public benefit has been defined in New Zealand courts as:[65]

> …anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

Under s 3A of the Commerce Act, the Commission is also required to regard any economic efficiencies resulting from the transaction as a public benefit, although the weight to be given to these efficiencies is for the Commission to decide.[66] However, increased economic efficiencies are not the only benefit that can be considered. The Commerce Commission's

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[62] Section 67.

[63] *Authorisation Guidelines*, above n 3, at [24] and n 19.

[64] *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) at 447 per Richardson J; *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) at [319].

[65] *Air New Zealand and Qantas Airways Limited v Commerce Commission*, above n 64, at [319], and *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) at 527-530 and 554-555 quoting *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

[66] *Telecom Corporation of New Zealand*, above n 67, at 528, 102,383.

Authorisation Guidelines indicate that other benefits of value to the community generally might include, for example, health or environmental benefits.

Detriments, by contrast, are assessed by direct reference to losses of economic efficiency within the market. Economic efficiencies are assessed under three main categories: allocative efficiency, productive efficiency, and dynamic efficiency.[67] Allocative efficiency means simply that resources are allocated in the most efficient way; a loss in allocative efficiency will lead to increases in price above the competitive level. Two aspects of allocative inefficiency are assessed by the Commission: price effects and non-price effects. Non-price effects refers to the impact of the transaction on service, quality and choice, as well as any other dimension of competition that consumers value. Productive efficiency is the ability to use the minimum amount of resources to produce a certain output volume given available technology. A loss in productive efficiency will result in greater resources being required to produce the same result – this is less likely to happen if shareholders are able to pressure management to avoid costs. Dynamic efficiency is an increase in economic efficiency over time through innovation of new products that create greater demand, or new processes which reduce costs. Whether such innovation is likely to increase or decrease after a lessening of competition depends on context, although competition can be a key driver of innovation.

With the legal specifics of the authorisation process in mind, how is the current merger application proceeding? The Commerce Commission released a Statement of Preliminary Issues in mid-June. The questions raised in the Statement of Preliminary Issues focused on the clearance process, signalling issues like market definition and levels of existing competition.[68] The Commission received nearly 50 submissions from the public and interested parties in response to the Statement of Preliminary Issues, the majority of which were concerned about or opposed to the merger in some way.[69] The parties to the merger submitted a response to the submissions in late July, attempting to discredit the validity (and sometimes the relevancy) of

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[67] See *Authorisation Guidelines*, above n 3, at [16]-[21].

[68] *Statement of Preliminary Issues*, above n 58.

[69] See "NZME Limited and Fairfax New Zealand Limited" Commerce Commission New Zealand <www.comcom.govt.nz> for the public versions of the submissions.

the concerns raised in the submissions.[70] The Commission's final decision on the Fairfax-NZME merger was due to be released on 22 August 2016. However, the Commission has extended the decision deadline to 15 March 2017, citing the complexity of the issue given the number of submissions and the two-sided market concerned.[71]

A draft determination is expected to be released in November, setting out the Commission's preliminary view on "whether the proposed merger would be likely to result in a substantial lessening of competition as well as balancing the public benefits and detriments that it may bring about", after which further submissions could be lodged.[72] There is also the possibility of a public conference in December to allow the Commission to test the views of interested parties and of Fairfax and NZME. The Commission has indicated it will be assessing the likelihood of price increases for advertisers and consumers, and the impact on the quality, accuracy, and range of news media in New Zealand.

Tim Murphy, a former editor of the New Zealand Herald, has suggested the Commission's intention to look into the quality, accuracy and range of news media is relatively novel, something most people might have assumed "this Commerce Commission would not have tended to in great measure."[73] (Although these issues do ostensibly fit within the non-price effects of allocative inefficiency.) Murphy also felt the possibility of a public conference ("almost a hearing") suggested the Commission really was looking into the issues with vigour. However, he thought the merger was likely to go ahead, although perhaps in a different shape.

To sum up the possibilities, there are three potential outcomes once the Commission's final decision is released. Fairfax and NZME will be hoping for a green light from the Commission, resulting in one company controlling 89% of New Zealand's newspaper market (and two, or perhaps one after merging, popular news websites). Another possibility is a red light refusal of the merger altogether, leaving the newspaper companies to come up with another solution to the "dramatically transforming media landscape" they referred to in their application. And

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[70] *Fairfax NZ / NZME Response to Submissions – 29 July 2016* (Commerce Commission, 2 August 2016).

[71] "Morning Report: Fairfax and NZME merger delayed" RNZ (23 August 2016) <www.radionz.co.nz>.

[72] Jonathan Mitchell "Media merger decision expected next year" RNZ (22 August 2016) <www.radio.co.nz>.

[73] "Morning Report: Fairfax and NZME merger delayed", above n 71.

finally, the metaphorical orange light option, whereby the parties undertake to divest some of their assets (perhaps in regions where there is competitive overlap like the Waikato) and receive permission subject to those undertakings. The next question is whether the process outlined above for choosing one of those options makes appropriate provision for preserving the constitutional role of the media.

B What's wrong with the status quo: evaluating the current approach

The quick answer to the question of whether the current approach makes appropriate provision for preserving the media's constitutional role is no, because the current approach is not specifically intended to achieve this goal. This is clearly evident from what is *not* included in the parties' application for authorisation. Tellingly, as one Twitter user commented, "Try and locate the words 'public service' in [the] rationale for the NZME/Fairfax merger. (Hint: they're not there)".[74] The word 'democracy' likewise fails to appear in any part of the application. It seems unlikely that such an omission would be plausible if the factors to be taken into account by the Commerce Commission were designed with the news media's role as a pillar of democracy in mind.

Instead, the merger process seems skewed towards protecting the private marketplace. As a starting point, if the merger will not substantially lessen competition, the potential public interest considerations at issue become irrelevant. Therefore a proposed merger with negative implications for democracy might nevertheless be sufficiently competitive; the 2012 Leveson Report in England noted that "[t]he levels of influence that would give rise to concerns in relation to plurality must be lower, and probably considerably lower, than the levels of concentration that would give rise to competition concerns."[75] The market forces which the Commission seeks to support are insufficient to ensure the production of diverse and quality news. This is because journalism is a "merit good": it produces large positive externalities (such as an informed populace which is vital for democracy) and is required by society, but is

[74] Craig Robertson "Try and locate the words 'public service' in [the] rationale for the NZME/Fairfax merger. (Hint: they're not there)" (26 May 2016) Twitter <twitter.com>.

[75] Leveson Report, above n 14, at Part I, Chapter 9, [4.19]. The Report is discussed in more detail below at *IV A*.

typically undervalued (individuals are unable or unwilling to pay for it), resulting in the market under-producing.[76]

Furthermore, while any potential benefit to the public can be taken into account, the types of detriments these benefits are weighed against are much more limited. The Commission's analysis is restricted to detriments within the markets where competition is lessened. In this case of the merger this includes only the advertising market and the market for consumers of (New Zealand-focused) print news or possibly online news, depending on how the Commission chooses to define the market in light of convergence. Relevant detriments are unlikely to include any negative impact to the broader and more theoretical concept of a marketplace of ideas.

In addition, while the definition of public benefit is wide enough to include the contributions the news media makes to a democracy, the relevant detriments are limited to those pertaining to losses of allocative efficiency, productive efficiency, or dynamic efficiency. Neither dynamic efficiency nor productive efficiency is easily linked to the news media's constitutional role. (Although it is arguable that greater dynamic efficiency may result in more innovative and diverse news products, thereby contributing positively to the marketplace of ideas and democracy.) Changes in allocative efficiency, in particular the non-price effects, are more relevant to the potential effects on democracy following the merger. The effect of the transaction on choice for the consumer can be related to news media diversity. Likewise, the impact on quality could be interpreted broadly as referring to the overall quality of news media offerings in New Zealand in light of the role news media plays in a democracy. However, these connections link implicitly rather than directly to the underlying concerns of democracy. News media actions may have important public consequences, but in respect of media mergers it appears these consequences are currently, if at all considered, inadvertently dealt with through the lens of allocative efficiency. There is no explicit requirement for consideration of the public role and power of media.

[76] Victor Pickard *America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (Cambridge University Press, Cambridge, 2014) at 213-214.

This is evident in the Commission's approach to the Fairfax-NZME merger. The Statement of Preliminary Issues released by the Commission focused primarily on identifying issues to help determine whether there would be a significant reduction in competition. The Commission's stated intention to consider the predicted accuracy, quality and range of reporting, which seems to come under the umbrella of changes in allocative efficiency, does appear to leave more room for public issues like maintaining a balanced and diverse marketplace of ideas in service of democracy to gain ground against the private commercial interests. However, the Commission does not explicitly refer to these factors in recognition of the news media's constitutional role, which remains apparently sufficiently undefined in the context of competition law, enough to prompt Fairfax and NZME to refer somewhat dismissively to "myriad" different beliefs on what that role is.[77]

The commercially-focused approach to authorisation is also evident in other aspects of how Fairfax and NZME were able to argue their case. Commercial issues like advertising revenue dominated the Fairfax-NZME application, and were used as evidence to show incentives to produce a certain quality and range of news.[78] Concerns about plurality were dismissed with reference to these commercial incentives and existing competition in the parties' response to submissions from the public. And significantly, the parties were prepared to argue that public interest concerns about the news media's contribution to democracy raised in submissions were irrelevant and inappropriate considerations. This argument would be less viable if the Commission were explicitly required to consider the potential wider public benefits and detriments for journalism when news media mergers were proposed, regardless of competition issues. The approach of Fairfax and NZME illustrates how the current legal framework for mergers is more supportive of a private marketplace than the public marketplace of ideas. This failure to recognise the media's constitutional role shows disappointing lack of commitment to democracy.

It will be interesting to see which direction Commerce Commission takes the assessment, in particular the potential conference in December. Given the emphasis in submissions on apprehension about the merger's impact on journalism's role in democracy and the status of

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[77] *Fairfax NZ / NZME Response to Submissions*, above n 70, at [7].

[78] At [20.6].

the fourth estate, it may be that the Commission feels compelled to consider this aspect. However, the system should not be dependent on the Commission of the day taking the initiative in exploring the public consequences for democracy of a news media merger. A decision to focus on the likely accuracy, quality and range of reporting following a news media merger needs to be more than an unexpected, relatively novel approach. It would be preferable to adopt a method of approaching news media ownership regulation that reflects the public concern (highlighted in the submissions) for maintaining the news media's constitutional role from the beginning of the process.

IV Part III: The (in)adequacy of other methods of news media regulation

Even if competition law as it now stands provides for inadequate consideration of the constitutional role of the news media, one might submit that there is no need for change given the role of other forms of news media regulation. This argument was advanced by Fairfax and NZME in their response to public submissions. Their response claimed the submissions sought to make the decision a "hard case" because of the myriad different perceptions of the role of the media. It was submitted that the Commission should be primarily concerned with:[79]

> … the statutory competition law framework, and leave the protection of what is 'valuable' news/information for the market to resolve through the incentives on the parties, operating in a two-sided market, to produce content that is appealing to consumers given that is essential to their advertising-funded business model.

They parties went on to argue that if there were any "broader public policy issues" outside the competitive law framework, they should be dealt with through other policy tools, such as "'public good' broadcasting via state-owned media and public funding of the media more generally."[80] It was further argued that more specifically, fourth estate concerns, quality judgements about valuable news, and plurality of media ownership, being assessments that hinged on public policy preference, were not appropriately assessed in a competition/economic quantification process.[81] This part of the paper assesses the validity of this argument by evaluating whether other existing regulatory mechanisms are appropriate mechanisms for

[79] At [7].

[80] At [7]

[81] At [11].

implementing "broader public policy issues". In light of this analysis, I submit there is still room for a new and improved approach to news media ownership within the competition law framework.

The Government is still considering the impact of digital convergence in New Zealand following the Law Commission's 2013 report on the challenges of new media. This means that currently, the regulatory environment for news media in New Zealand is a patchwork of judicial review cases, different regulatory bodies, torts, and a number of statutes giving special privileges to journalists. I focus first on judicial review before considering a broader range of other regulatory mechanisms.

A Judicial Review

Judicial review offers what appears to be a golden opportunity to implement broader public policy issues in news media regulation because it deals specifically with actions that have "important public consequences".[82] This seems like an open door to discussions of the news media's constitutional role and contribution to democracy. However, there are two significant barriers to the efficacy of judicial review in regulating the news media. One is the problematic public/private dichotomy and the other the practical constraints of judicial review such as limited time and the specificity of individual cases. These hurdles are discussed in order below.

When considering how to control, structure or hold a particular entity accountable, there is an understandable tendency to attempt to locate that entity and its actions within either the public or the private sphere. A public body is (usually) judicially reviewable, and subject to public law norms. A private body is (usually) not. A public body is required to serve the public good (or what the Executive and Parliament perceives as the public good). A private body can (within reason) choose its own aspirations. This is understandable in the sense that different norms have evolved in relation to public and private law. However, the strict dichotomy between public and private becomes problematic when the overlap in reality between public and private

[82] *Dunne v CanWest*, above n 1, at [34].

is taken into account. For example, a private body, like a sporting association, can make decisions with important public consequences both nationally and internationally.[83]

Regulating the news media in New Zealand is a clear example of overlapping public and private interests. Most news media are private companies, but they provide essential public services: gathering and disseminating information on important issues; acting as a watchdog over the powerful, and providing a forum for diverse voices and views. In other words, private bodies are playing a vital role in New Zealand's system of democracy. Balancing the public and private interests involved poses a challenge for the courts that tends to come through as a jurisdictional issue or when considering how much weight (or deference) should be given to the original decision-maker's reasoning.

English law has tended to take a more conservative approach towards jurisdiction, requiring exercise of a governmental or statutory power, while New Zealand jurisprudence is more relaxed, considering simply whether the power being exercised is public in nature or has important public consequences. Already, New Zealand courts have indicated a willingness to judicially review news media in the context of election debates. This was the case in both *Dunne v CanWest*[84] and *Craig v Mediaworks*,[85] where leaders of smaller political parties successfully used judicial review to ensure they were included in live television debates. Drawing on *Royal Australasian College of Surgeons v Phipps*,[86] the court in *Dunne* noted the "important public consequences" of television debates in the lead up to an election, holding that this justified the review of the decision to exclude the candidates.[87] *Craig v Mediaworks* drew closely from *Dunne* in finding that the decision was reviewable and quickly established an arguable case to satisfy the interim injunction applied for. Both cases are an illustration of judicial review being used to promote diversity in service of democracy.

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[83] *Finnigan v New Zealand Football Rugby Union* [1985] 2 NZLR 159 (CA).

[84] *Dunne v CanWest*, above n 1.

[85] [2014] NZHC 1875.

[86] [1999] 3 NZLR 1 (CA).

[87] *Dunne v CanWest*, above n 1, at [34].

The commercial nature of news media has three potential influences on judicial review that detract from its suitability as a method of implementing policy concerns regarding the news media's public role outside the realm of election debates. First, is a factor speaking against amenability to review. Second, the commercial factors driving decision making would encourage greater deference to the original decision-maker even if a decision is deemed reviewable. Finally, review is likely to be limited to situations where there is a distinct and easily predictable important public consequence. Even if the actions of the news media over a long period of time are likely to have important public consequences, the decision of one company to publish a certain series of articles or a single article may struggle to meet the threshold in most circumstances. This means expansion of review beyond the established impact of election debates and the clear-cut consequences of election results may be difficult.

Public versus private debate aside, there are other practical restrictions to take into account. Time is one – due to the nature of widespread publication, the harm caused by decisions may be difficult to undo completely once implemented. *Dunne v CanWest* and *Craig v Mediaworks* were heard on the same day and the day before the proposed television debates respectively. This places significant time pressure on the court to make a decision, perhaps inhibiting full consideration of the issues at stake. The claimant in *Craig v Mediaworks* only needed to establish an arguable case to get his interim injunction and the debate was unable to go ahead the next day without him, despite the fact there had not been a full decision on whether the decision to exclude him was made properly. The fact that there is no abstract review in New Zealand also means courts only deal with the specific cases where a person is negatively impacted and decides to seek judicial review. It make take a while to build a substantial body of case law that provides sufficient guidance to news media. Certain issues, where there is no one who is both sufficiently impacted by news media action and able and willing to seek judicial review, might never be addressed by the courts.

Thus, the public/private divide and the largely ex post facto nature of court decisions make judicial review of limited use in addressing broader policy concerns like promoting democracy through diversity. The lack of effective ex ante controls on media is also a theme throughout the range of other forms of media regulation canvassed below.

B Other regulatory mechanisms

There are a variety of other legal procedures and rules which guide the operation of news media. Three types are assessed in this section: regulatory bodies, statute, and case law relating to media freedom (other than judicial review).

a) Regulatory bodies

There are currently three main statutory and contractual regulatory bodies targeted at regulating broadcast and print media. They are: the Broadcasting Standards Authority (BSA), the Press Council, and more recently, the Online Media Standards Authority (OMSA). The latter was created by New Zealand's main broadcasters to regulate their online content, which is not covered by the Broadcasting Standards Act 1989.

The BSA is a creature of statute: broadcasters (television and radio) are licensed by the government and are subject to the Broadcasting Standards Act 1989. Under the Act they may be reviewed by the BSA following a complaint. In contrast, the Press Council and the OMSA are forms of industry self-regulation, voluntary in nature and dependent on member co-operation. Online and print publishers may sign up to the jurisdiction of these authorities and agree to follow the standards for news reporting set by the Press Council and the OMSA.

The powers of these review bodies vary as a result of their different sources of power. Press Council decisions must be published with fair prominence by publishers, and the Press Council may order a retraction, correction, right of reply or take down in relation to the material complained about.[88] However, it has no ability to make an order for compensation or costs, and nor does the OMSA, which offers similar remedies to the Press Council.[89] On the other hand, the BSA has the power to order publication of a specified statement about the decision, order an advertising ban for 24 hours, or order the broadcaster to go off-air for 24 hours.[90] Both 24 hour orders are used very rarely. The BSA may also make an order for compensation in privacy cases and for a penalty to be paid to the Crown if the complaint is upheld in exceptional cases. The BSA, unlike the Press Council and the OMSA, also has powers to require disclosure of

[88] "Statement of Principles" New Zealand Press Council <www.presscouncil.org.nz>, at [12].

[89] "Code of Standards" Online Media Standards Authority <www.omsa.co.nz>, at Part D.

[90] "Remedies – BSA orders" Broadcasting Standards Authority <bsa.govt.nz>.

information and compel the giving of evidence.[91] A right of appeal to the High Court (akin to an appeal from a discretion) is available following a BSA decision.[92]

The standards in news reporting emphasised by each review body are similar, although they do differ slightly. Notably, the number of standards and the commentary/explanation of each one diminishes noticeably if one looks first at the radio and free-to-air television codes of the BSA, then the principles of the Press Council, and lastly the OMSA's code of standards. However, all three refer to balance and accuracy in relation to information broadcast or published, although complaints regarding the latter are upheld more often by the BSA, with both the BSA and the Press Council allowing news media a fair amount of discretion about whose views they choose to include.[93]

The Press Council places particular emphasis on freedom of expression, stating that it will give "primary consideration to freedom of expression and the public interest" when dealing with complaints, although it also endorses the principles and spirit of the Treaty of Waitangi and the Bill of Rights Act 1990.[94] The BSA, as a statutory body, is required to apply the Bill of Rights when making its decisions, which includes the section 14 right to freedom of expression, but this must be balanced against a broadcaster's obligation to avoid harm to individuals and society.[95] The OMSA also notes briefly that freedom of speech and social responsibility underpin the code.[96]

While all three bodies act as ex post facto accountability mechanisms when dealing with complaints (they are not able to initiate their own investigations into breaches of standards), they also provide ex ante guidance for news media in their standards and through their decisions, which are published on their websites. The BSA in particular provides extensive commentary on each standard, and has issued multiple practice notes for guidance on how each

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[91] Steven Price "Broadcasting Standards Authority" Media Law Journal <www.medialawjournal.co.nz>.

[92] Broadcasting Standards Act 1989, s 18.

[93] Steven Price, "Broadcasting Standards Authority" and "Press Council", above n 95.

[94] "Statement of Principles", above n 88, Preamble.

[95] "Statement of Intent 2014-2018" Broadcasting Standards Authority <bsa.govt.nz>.

[96] "Code of Standards", above n 89, Introduction.

standard has been approached in the past.[97] The Press Council principles are less helpful in this respect. They are worded more generally, and a complaint does not have to be made with reference to any of the principles,[98] making them helpful but perhaps not a fool-proof defence against complaint. More detail was recommended by the Law Commission in its 2013 report.[99] However, this flexibility reflects the view of the Press Council that decisions about responsible journalism and whether to publish something are usually better made by the editors and journalists of the news media,[100] perhaps an unsurprising view given it is an industry regulator.

b) Other statutory controls

A number of statutory provisions relating to the news media provide special privileges in recognition of its role in public life. Section 68 of the Evidence Act 1968 and s 198 of the Criminal Procedures Act 2011 are examples of statutes that provide special privileges to the media, but the caveats they come with are worth noting. Section 68 creates a presumption against revelation of a journalist's source, but requires balancing the public interest in disclosing the identity of the informant against the public interest in the communication of information to the media and the media's access to such sources of information. This illustrates how the public interests served by the media may be subject to other public interests. However, the news media is also exempt from the Privacy Act 1993 in relation to its gathering and dissemination of news without a similar requirement,[101] and receives other privileges under the

[97] See "Practice Notes" Broadcasting Standards Authority <bsa.govt.nz>.

[98] "Statement of Principles", above n 88.

[99] Law Commission, *The news media meets new media*, above n 13, at [5.114].

[100] At [5.95].

[101] Section 2(1) definition of "agency" (b)(xiii); and the definitions of "news activity" and "news medium". Section 29(1)(g) provides Radio New Zealand and Television New Zealand Limited with a right of refusal to disclose information on similar grounds to s 68 of the Evidence Act.

Electoral Act 1993,[102] Human Rights Act 1993,[103] and the Fair Trading Act 1986[104] without any such restriction.

Section 198 of the Criminal Proceedings Act enables a member of the media to remain in court even if the public have been excluded under s 197, but there are some restrictions. Section 198(2)(a) defines a "member of the media" as a person working for an organisation subject to a code of ethics and the complaints procedures of the BSA or the Press Council. This indicates a clear preference towards media organisations which follow some form of regulation.

c) Case law on media freedom

Three main areas of case law (other than judicial review) are worth noting for their promotion or restriction of press freedom: the torts of defamation and breach of privacy, and contempt of court. All three provide guidance to news media on how to balance public interests against other public interests or private interests, acknowledging the power of freedom of expression but recognising that other concerns must also be taken into account.

The torts of defamation and privacy both emphasise the important role of the media. In the case of defamation, numerous defences are available. The *Lange* extension of the defence of qualified privilege gives particular weight to the media's role in public life. The defence enables a publisher to avoid liability for widespread publication of defamatory information if it is in the context of a genuine political discussion and concerns the non-private actions and qualities of elected officials.[105] This clearly supports the media's role in promoting democracy and debate. However, because of the greater harm caused by widespread publication, the defence does demand slightly more care on the part of the publisher than the traditional qualified privilege defence, requiring that they did not act in a way that was irresponsible or reckless in the circumstances.[106]

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[102] Section 197(1)(g)(i).

[103] Section 61(2).

[104] Section 15.

[105] *Lange v Atkinson* [2000] 3 NZLR 285 (CA).

[106] At [48]-[49].

The breach of privacy tort notes that the public interest in publication of some information may diminish a person's right to privacy, something which might be used to promote press freedom. But the courts have been careful to distinguish between something that is *in* the public interest and something merely *of* public interest: the former may justify publication but the latter is highly unlikely to.[107] That is, serious information pertaining to a political issue is likely to be in the public interest while salacious gossip is probably not.

Contempt of court proceedings may be used to limit freedom of the press where a publication might undermine the administration of justice. The most applicable to the news media are interference with a person's right to a fair trial or scandalising the court. While both relatively rare,[108] contempt for interfering with a fair trial rights is more common. Courts have accepted that fair trial rights and freedom of expression should both be accommodated as far as possible, but where they conflict, fair trial rights will prevail.[109] This may put some significant limits on the media's ability to publish information about a trial, but generally it is only a delay of expression rights (until that case is decided) and not a permanent suppression. The counter-argument to this – that discussion of a particular social issue is more likely to gain public interest in the immediate context of an unfolding news event – has been rejected by the courts.[110]

C Evaluating regulation methods

Most of the legal controls on New Zealand media discussed above make reference to or are allusive of its role in providing information as a public good and promoting democracy. Protection of the democratic principles supported by news media is evident even in areas of private law such as defamation. These other methods of regulation are already better designed to acknowledge and protect the news media's contribution to democracy than the merger authorisation process. However, they do not provide a complete solution. Three problems in

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[107] *Hosking v Runting* [2005] 1 NZLR 1 (CA), at [133]; *TV3 Network Services v Broadcasting Standards Authority* [1995] 2 NZLR 720 (HC) at 733.

[108] Simon Mount "The Interface Between the Media and the Law" (2006) *NZ L Rev* 413, at 42; see also Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014), at [6.34].

[109] *R v Rickards (No 2)* HC Auckland CRI-2005-063-1122, 25 May 2006, at 574-575.

[110] *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (HC), at 574.

particular are highlighted below: the shortcomings of ex post facto controls; the failure to address commercial pressures; and the overall ad hoc approach to law relating to journalism.

A number of the controls on news media operate ex post facto and therefore tend to deal with specific infringements and are inappropriate for addressing broader issues like overall diversity in the way that the Commerce Commission could. Plurality in media ownership is often perceived as a necessary step in encouraging plurality in reporting,[111] and the competition law framework is already well placed to address plurality issues in a broader sense than pre-existing, largely ex-post facto regulators like the Press Council. The publication of a correction in relation to biased reporting is likely to come too late to remedy public opinion. The substantive guidelines and commentary provided by the BSA are one form of more proactive control that seeks to promote diversity of views and balanced reporting. The Press Council and the OMSA standards lack the same level of guidance as the BSA. However, all three regulatory bodies rely to an extent on journalists deciding to pay heed to the guidelines, and give considerable leeway to journalists in relation to issues of balance. The Commission, by contrast, is able to consider diversity issues at the beginning, which limits the need for value judgements about particular news items or opinions.

There is also a lack of recognition in current regulation of the way commercial pressure may control decision-making with public consequences. This echoes the focus on ordinary competition concerns – allowing companies greater freedom to focus on profit – instead of the public role of news media in the structure of the merger authorisation process. It may be desirable for regulation to provide greater proactive support for journalism in order to protect the news media's public role. Complete freedom from commercial controls may seem idealistic, but the measures of success for news media outlets are telling. Commercial news media outlets are valued predominantly by market share, viewer numbers, or circulation – numbers then used to garner better advertising figures. In contrast, the sole statutory news media broadcaster, RNZ, reports not only on listener numbers but on the extent to which the

[111] See discussion of the Leveson Report below at *V A.*

public believes it is fulfilling its objectives under its charter – such as promoting informed debate and contributing to the development of an informed society.[112]

The challenge of online advertising makes this issue increasingly relevant for print-based mediums in particular, who have lost revenue faster and do not have recourse to funding from NZ on Air. These commercial pressures are perhaps not easily dealt with by the Commerce Commission, but the possible necessity of the proposed merger due to commercial difficulties draws attention to a broader failure to consider the contributions of newspapers to democracy. In reaction to quickly declining newspaper circulation statistics, New Zealand journalist Bernard Hickey recently commented, "The NZME Fairfax merger is designed to buy an extra year or two. A corporate hospice exercise now."[113]

The ad hoc approach to journalism law has also resulted in a patchwork of different regulatory bodies, statutory provisions and case law more suited to dealing with specific issues and platforms (as the BSA, PC, and OMSA demonstrate). Ultimately, the ad hoc approach to regulation of news media in New Zealand means it struggles to comprehensively and consistently address (and protect) the public role and powers of the media. The Fairfax-NZME merger process is a key example of this issue. It is submitted a rethinking of the approach to competition law for news media mergers is a necessary step in creating a model to appropriately protect the media's constitutional role that operates cohesively across the smorgasbord of law affecting news media.

It may be that the Fairfax-NZME merger in fact poses little threat to diversity and democracy, given the other offerings readily available online or on television or radio and the largely complementary nature of their current print operations. It may also be that it does result in more high quality content, as the parties allege, or is the best option for promoting the public benefits of the media given the potential "mutually assured destruction" otherwise. It will certainly be difficult to quantitatively evaluate this until after the merger has taken place. However, the merger draws attention to a flaw in New Zealand's news media regulations: a lack of cohesive

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[112] See "Radio New Zealand Annual Report 2014-2015", above n 32.

[113] Bernard Hickey "@MacFinlay not far away. The NZME Fairfax merger is designed to buy an extra year or two. A corporate hospice exercise now." (7 October 2016) Twitter <twitter.com>.

ex ante controls or structures in place to ensure the news media can fulfil its vital public role in a democracy.

V Part IV: Sketching solutions to the issues raised by the merger

A number of problems brought to the fore by the merger have been identified. The lack of consideration for the news media's role in New Zealand's democracy in the merger authorisation process is one. The overall inconsistent approach to news media regulation in New Zealand law, exemplified by the authorisation process, is another. The fact that the diversity of news media offerings appears set to diminish whether the merger is approved or not is a more challenging issue. The need for more ex ante forms of control is also something that could be improved. The first issue may be largely straightforward to solve; the others less so. In this part of the paper, I attempt to sketch and reflect on several possible solutions to these issues. I consider not only the authorisation process itself, but also the potential development and evolution of case law and the possibility of public funding options.

A Changing the status quo: a new approach to news media mergers

It has already been submitted that the authorisation process for mergers provides an opportunity for ex ante control of the media, a mechanism better placed to address diversity issues than an ex post facto regulatory mechanism. The next step is to assess how the current process could be altered to better protect the media's democratic role. An obvious starting point is to create a process which places the concerns of democracy at the forefront of the analysis. I draw on the English approach to issues of news media plurality as an example.

The Leveson Report, released in 2012 in England, was an independent inquiry into the culture, practice and ethics of the press, prompted by the phone-hacking scandal involving News International. Although it was instigated as a result of ethical issues, the report also considered issues of plurality and competition law in relation to news media. It emphasised the importance of plurality for democracy; something more than a broadcasting code was required:[114]

> The requirement of the broadcasting code for broadcast news to be impartial provides some degree of assurance that the public will have access to unbiased news coverage, but it remains vital to

[114] Leveson Report, above n 14, Executive Summary at [139].

> ensure that there are many different sources of news, controlled by many different people, and reaching the public by many different routes. It is only through this plurality, specifically in relation to news and current affairs, that we can ensure that the public is able to be well informed on matters of local, national and international news and policy and able to play their full part in a democratic society.

Competition law was found to be an insufficient measure for establishing plurality. Evidence given to the inquiry noted that the media's difference from other industries as a "uniquely powerful force in democracy and debate" meant that ordinary competition law could not guarantee the necessary plurality of ownership for democracy to work.[115]

The Report also proposed the Government consider whether to adopt periodic plurality reviews or extend the public interest test in competition law in order to deal with plurality concerns arising from organic growth. Currently, media mergers of a certain size are liable to intervention by the Secretary of State on media public interest grounds.[116] The Secretary of State can also issue an Intervention Notice if it is believed that a merger operates or may be expected to operate against the public interest, following which Ofcom, the independent regulator and competition authority for the United Kingdom, provides a report with advice and recommendations on the specified media public interest considerations. The relevant considerations include issues like sufficient plurality of views and accuracy of news.

In contrast to England, New Zealand does not have a long history of media owners using national newspapers to promote their own views. Concerns about owner influence were a prominent factor in the 2012 Leveson Report; in the New Zealand Law Commission Report in 2013 they were barely mentioned (although the focus was on the challenges of new media, one would expect a mention of ownership influence issues if they existed). Further, the New Zealand news media market can be expected to be more compact than England's given the relative population sizes of each country. However, this does not mean that plurality is irrelevant in New Zealand – the description of plurality and its necessity for democracy is a compelling argument, even without the more immediately pressing concerns of ownership

[115] At Part I, Chapter 5, [5.47].

[116] See discussion in Leveson Report, above n 14, Part I, Chapter 9.

influence. The concerns about the insufficiency of ordinary competition law – and the public interest test that aims to remedy this – are still persuasive in a New Zealand context.

Adopting a process like the media public interest test used in England for news media mergers of a certain size would be a relatively straightforward way of bringing the news media's public role into consideration within the competition law framework. It is worth noting than in England, the merger of Fairfax and NZME, with a combined market share of nearly 90%, would easily qualify as both a 'relevant' and 'specific' merger situation justifying intervention on media public interest grounds.

The less straightforward issue is what regulatory body is best placed and best qualified to make the necessary public interest assessment. One option is to leave it to the Commerce Commission, simply altering the clearance and authorisation processes for news media so as to require proof of sufficient diversity of views following a merger, and bringing the public interest analysis to the start of the process rather than waiting for a likely substantial lessening of competition to be established. However, it is arguable the Commission's experience is geared towards standard competition issues, and that developing the expertise necessary for applying a special public interest test for news media would require unnecessary cost given the likely number of substantial news media mergers in a small country like New Zealand.

Another option, then, could be to establish an independent regulatory and competition authority akin to that of Ofcom. Such an entity could combine the duties of the BSA, Press Council and OMSA and take responsibility alongside the Commission for regulating competition in the news media industry. This would be an apt opportunity to create a more cohesive approach to media regulation, and the combining of the current regulatory bodies to create a News Media Standards Authority has already been recommended by the Law Commission.[117] However, the Government response to the Law Commission's recommendation was to wait and see how digital convergence continued to develop, citing difficulties of definition in distinguishing 'news' from 'entertainment' among other things.[118] Such an option would also risk greater state

[117] Law Commission *The news media meets new media*, above n 13 at [39]-[43].

[118] "Government Response to Law Commission report on *The News Media Meets "New Media": Rights, Responsibilities and Regulation in the Digital Age*" (Government Response to NZLC R128), at 6.

interference in news media regulation; print media in particular has long been a self-regulated industry.

Regardless of whether a media public interest test for authorisations is implemented by the Commerce Commission or a yet-to-be established media regulator, it would surely provide better consideration of the potential public consequences of a transaction like the proposed Fairfax-NZME merger. However, it will not necessarily be able to address all those consequences; other methods of structuring news media actions and addressing such concerns are also relevant.

B Evolving common law doctrine

Even if regulatory bodies are reformed to better cater to the public interests served by news media, the ability of the courts to more flexibly respond to issues as they arise should not be forgotten. Election debates are one example; the development of a wider qualified privilege defence to defamation is another. The challenge of balancing the public and private interests at stake is highlighted above, particularly in relation to judicial review. I suggest that courts could adopt a values-based approach that attempts to balance these interests within a particular activity like journalism, using the public and private issues raised by the Fairfax-NZME merger as an example.

Peter Cane argues the distinction between public and private should "not be used to prevent the consideration of issues of public interest by classifying the context in which they arise as 'private.'"[119] His comment, although directed at jurisdictional issues of judicial review, seems highly applicable to the approach in the Fairfax-NZME Response to Submissions, which sought to dismiss public interest issues raised in submissions in favour of focusing on the more private company-friendly competition law. Cane advocates for a values-based approach that avoids the flaws of the public/private distinction, submitting that the effectiveness of an accountability mechanism "can only be judged in light of a normative theory of how power ought to be distributed."[120]

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[119] Peter Cane "Accountability and the Public/Private Distinction" in Nicholas Bamford and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oregon, 2003), at 264.

[120] At 275.

Gaunther Teubner also takes a more values-based approach, one discussed by Cane in his consideration of the public/private conundrum. While Teubner rejects the traditional public/private distinction in terms of a state/non-state dichotomy, he still finds the distinction of value. He believes social life should be understood in terms of distinctive activities (such as journalism) submitting that the law's task is to "regulate social activities by striking a balance between competing public and private interests in relation to particular activities."[121] This can be achieved through fragmentation of private law into specific types, like journalism law, and "its transformation into a form of constitutional law of social activities which, in relation to each activity, reflects a distinctive mix of private and public concerns."[122]

The following discussion identifies the public and private interests arising in relation to journalism and the proposed merger specifically and suggests how they could be balanced.

The public interest in journalism is outlined in detail in the above discussion of the news media's public role and powers in society.[123] The particular public consequences involved in news media mergers are easily readily identified from the submissions on the merger application: issues like loss of plurality and quality content and associated threats to the news media's constitutional role and contribution to democracy. These are significant considerations, but they must still be balanced against the private interests at issue. Interestingly, the private profit interests of most news media can be linked to the public benefits given the commercial incentives to offer a range of quality news, but this mutual benefit is not guaranteed.

Newspapers run on money, not the public benefits of diverse, high quality reporting. News media needs to remain profitable in order to survive and continue to provide the public services it does – in this sense, protecting the private interests of a company trying to make a profit also provides a measure of protection for the public interests at stake. Freedom to pursue profit may also protect the private rights of consumers to read information they want to read – if audiences want light news entertainment, profit seeking news media will provide it. This supports public

[121] At 273.

[122] At 273.

[123] See *II B.*

interests as well: if the audience expects investigative journalism or diverse views on issues, the news media will have an economic incentive to provide these things, as indicated by Fairfax and NZME in their merger application. In this sense, reluctance to interfere with decisions of private news companies is understandable both in terms of public and private interests. Interfering with the merger of two private companies whose decision to merge is based primarily on commercial considerations (as indicated in their application and as would be expected of any private company) would fly in the face of the reasons for this reluctance. Excessive legal interference with private commercial decisions and interests may threaten the ability of the news media to make those decisions and have a chilling effect on the industry.

The issue is whether leaving issues like the quality and diversity of reporting to be determined by the market is likely to provide sufficient protection for the public interests at stake. As mentioned above, journalism is a merit good: undervalued and therefore under-produced by the market. It may be a slightly paternal approach, but it is arguable that what the public wants is not necessarily what is best for the public. For this reason, it may be desirable to tip the balance slightly in favour of public interests in the field of common law relating to journalism. Further, the government could take action to stimulate production of the merit good of journalism through financial incentives; this option is discussed below.

C Meeting the challenge of commercially driven news

Despite issues with the merger and the application, several have suggested that the merger may be the only option for the two companies to survive given the bleak online advertising market and falling revenues.[124] This possibility highlights the fact that changes to the process of authorising news media ownership or a new approach to journalism in the common law will be insufficient to preserve the news media's constitutional role without other measures. It would be unhelpful if changes to the authorisation process turned out simply to be the proverbial shuffling of deck chairs on the Titanic for quality New Zealand print-based news media. The

[124] See Chris Keall "My top five 'kill me now' moments in the NZME-Fairfax merger application" (29 May 2016) National Business Review <www.nbr.co.nz>; Tim Murphy, above n 54; Bernard Hickey, above n 113; *Anonymous Submission on the Statement of Preliminary Issues*; above n 11.

prediction may seem somewhat dramatic, but it is intended to emphasise that the issues raised by the merger cannot be solved merely by choosing not to allow it to proceed.

One of the options endorsed by the Leveson Report in response to similar issues was public funding or incentives. It was suggested that public funding or "placing obligations in relation to news and current affairs on existing providers in return for some benefit," could be an appropriate solution, one that as "particularly appropriate where commercial provision of the content required is not sustainable."[125] The notion of the news media being widely funded by the government raises some obvious concerns regarding suspicion of government (and overall diversity) but the possibilities of increased public backing of the media are worth considering. Another state broadcaster (or perhaps some kind of state print media) could be one possibility; public funding for journalism, akin to (or expanding) the broadcast-specific funding available through NZ on Air is another. Notably, this was also one of the suggestions of Fairfax and NZME in their Response to Submissions.

There is already some state funding for journalism, including investigative journalism, but it is indirect, applied for in the name of funding broadcast programmes, and inaccessible for print-based media. As a recent Spinoff article noted:[126]

> Aside from RNZ, [the programme–driven paradigm which drives NZ on Air funding] has been essentially the only way journalism has been able to sneak into the public funding sheet: by dressing itself up as something else, and contorting itself to a programme or documentary-like posture.

Programmes like Q&A, The Nation, and Sunday receive public funding for producing journalistic content, but such support has remained elusive for print-based news media like Fairfax and NZME's newspaper operations. This distinction appears less justifiable in light of the fact that distinctions between print, audio and visual platforms are fading in an online context.

Such funding could enable (or perhaps require) news media companies, even if private, to explicitly focus on their contribution to democracy, particularly as a watch dog for society.

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[125] Leveson Report, above n 14, Part I, Chapter 9 at [4.18].

[126] Duncan Greive "Stuff Circuit and the weird dance we do around publicly funding journalism" (16 August 2016) The Spinoff <thespinoff.co.nz>.

Funding could also be spread among a variety of different news media companies or journalists in order to promote diversity and balance in the marketplace of ideas as much as possible. Of course, the concern is that there is an opportunity to skew the marketplace of ideas even further out of shape and give priority to certain voices (even more cynically, to voices the Government prefers). The appearance of bias would also need to be minimised, lest the public lose faith in the media as an independent watchdog. The method of funding allocation and the independence of the decision-making body would need to be carefully designed; this may be difficult.

Receiving public funding for a particular project or aspect of a news media company's operations (such as investigative journalism) may also need to come with greater forms of public accountability. Creating a public funding model for journalism provides an opportunity to support a competition law framework that better promotes diversity and democracy, hopefully within a more cohesive approach to media regulation.

D Conclusions

The solutions touched on above are unlikely to be a complete panacea for the struggles faced by news media in New Zealand. Each option has its flaws, and simply creating more ex ante structures to guide and support journalism does not mean that ex post facto accountability is less relevant. The news media still need to be accountable for the public consequences of their actions. However, this paper has sought to demonstrate how an absence of proactive approaches to controlling and structuring news media fails to adequately balance the public and private interests at stake in a situation like the proposed merger.

The important role the news media play in informing democracy gives it a place in the New Zealand constitutional structure that should not be ignored. The proposed Fairfax-NZME merger may not be an immediate disaster for democracy, and may even be necessary, but the authorisation process and other methods of media regulation reveal a lack of legal commitment in New Zealand to protecting the public role of journalism. We can do better.

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