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# Competing Views on Media Mergers: A Comparative Analysis of New Zealand Competition Law

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***Abstract***

*Recent merger activity and academic commentary has renewed public interest in the treatment of media mergers around the world. Yet, it is difficult to formulate robust competition policy for media mergers when there is a fierce divergence in views between businesses and regulators as to the current competitiveness of the media industry. This paper engages with this issue by examining two recent media mergers in New Zealand, the* NZME/Fairfax *and* SKY/Vodafone *mergers, which were controversially declined by the Commerce Commission. Through taking a comparative approach with United States antitrust law and how it was applied in the* AT&T/Time Warner *merger, the paper suggests there are weaknesses in the New Zealand competition law framework and how it is applied. These exacerbate already challenging conditions for New Zealand media firms, faced with tough competition from large international competitors, by limiting their ability to merge and seek economic efficiencies. The paper concludes that Government intervention is required to address these issues in competition policy.*

***Key Words:*** antitrust, AT&T, authorisation, clearance, Commerce Act 1986, competition law, Fairfax, media, mergers and acquisitions, NZME, post-Chicago, SKY, Vodafone

## Table of Contents


**I Introduction** .......... **1**

**II Economic theories of competition law** .......... **2**

- **A Economic rationale for mergers** .......... **3**
- **B Economic theories of competition law** .......... **4**
  - 1 The Harvard School .......... 5
  - 2 The Chicago School .......... 6
  - 3 Post-Chicago Approach .......... 7
- **C Applicability in Mergers and Acquisitions** .......... **9**
- **D Special considerations for vertical mergers** .......... **11**
- **E Special considerations in media mergers** .......... **12**

**III Media mergers in New Zealand** .......... **14**

- **A Law relating to media mergers in New Zealand** .......... **14**
  - 1 Competition law in New Zealand .......... 14
- **B The NZME/Fairfax merger** .......... **18**
  - 1 The parties .......... 18
  - 2 Industry background .......... 19
  - 3 Industry trends .......... 19
  - 4 Commerce Commission determination .......... 20
  - 5 Judgment of High Court .......... 21
  - 6 Judgment of Court of Appeal .......... 22
  - 7 Discussion .......... 24
- **C The SKY/Vodafone merger** .......... **28**
  - 1 The parties .......... 29
  - 2 Industry background .......... 30
  - 3 Industry Trends .......... 31
  - 4 Commerce Commission determination .......... 32
  - 5 Discussion .......... 34

**IV Media mergers in the United States** .......... **36**

- **A Law relating to media mergers in the United States** .......... **36**
  - 1 Industry specific regulation .......... 36
  - 2 United States antitrust law .......... 37
- **B The AT&T/Time Warner merger** .......... **38**
  - 1 The parties to the merger .......... 39
  - 2 Industry background .......... 40
  - 3 Industry trends .......... 41
  - 4 Judgment of the Federal Court .......... 42

**V Comparison of New Zealand and United States approaches .............................. 45**
**A Comparison of the regulatory framework ..................................................................45**
**B Importance of where the onus lies ..................................................................46**
**C Assessment of competitive constraints..........................................................................48**
**VI Conclusion ................................................................................................ 49**

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## *I Introduction*

Internationally, media companies are in the midst of a digital revolution. Rapid social and technological change through the explosion of digital and internet technology has created a multitude of online sources and services for consumers to access information and content, leading to a decline in subscriptions for traditional media sources.[1] This is disrupting traditional business models and creating significant uncertainty for media incumbents.[2] New age media giants, such as Facebook, Amazon, Netflix, and Google are achieving global reach while better understanding a wider range of customer preferences through the use of consumer data.[3] In response to these developments, there has been an increase in media merger activity around the world, increasing concentration in media markets with firms seeking greater economic efficiency.[4] There are numerous strong technological and financial reasons for these mergers and they are commonly regarded as a logical development in the changing media landscape. However, what this rapid change means for the future state of competition in media markets is the subject of fierce debate.[5] Regulators are challenging proposed media mergers claiming the mergers will unduly increase the merged firms' market power and lead to anticompetitive outcomes. Yet, media companies view their proposed mergers as an essential response to a changing media environment where technologies and industries are converging as never before leading to media markets that are more competitive than ever.

This paper aims to explore competition law in New Zealand and how it is applied in the context of media mergers. This will be illustrated by an examination of two recent media mergers in New Zealand which were controversially declined by the Commerce

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1 See Kevin Martin "The Daily Show" *The New York Times* (online ed, New York, 13 November 2007); Karl du Fresne "New Zealand papers are in dangerous decline – here's what's at stake" *Noted* (online ed, Auckland, 19 June 2017); see also John Nichols and Robert McChesney "The Death and Life of Great American Newspapers" *The Nation* (online ed, New York, 18 March 2009).

2 Dr Anna Kingsbury "Media mergers: is competition law enough?" (2017) 38(1) ECLR 8 at 8.

3 See The Boston Consulting Group *The 2018 TMT Value Creators Report: Hardwiring Digital Transformation* (February 2018); Andrew Wallenstein *Media Trends that Will Define 2018* (Variety, n.d.).

4 See Roy Finkelstein *Report of the Independent Inquiry into the Media and Media Regulation* (Department of Broadband, Communications and the Digital Economy (Australia), 28 February 2012) at [3.12].

5 Maurice E Stucke and Allen P Grunes "Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy" (2009) 42 Conn L Rev 101 at 101.

Commission (the Commission). A comparison will then be made with antitrust law in the United States of America and how it was applied in the recent *AT&T/Time Warner* media merger to illustrate differences in the regulatory framework and approach in the two jurisdictions. The United States has been selected as the comparative jurisdiction as it is commonly acknowledged New Zealand competition laws are derived from the United States antitrust statutes.[6] The suggestion will be made that New Zealand's framework for competition law and how it is applied in relation to media mergers has several issues which need to be addressed.

The scheme of this paper is as follows: Part II outlines the underlying economics for why companies merge and the objectives competition law seeks, as well as special considerations that are required when dealing with media mergers. Part III explains how media mergers are regulated in New Zealand and describes how this was approached in the two New Zealand examples: the *NZME/Fairfax* merger;[7] and the *SKY/Vodafone* merger.[8] This is to provide context for a discussion of suggested weaknesses in the New Zealand regulatory framework and how it is applied by the Commission and the courts in relation to media mergers. Part IV explains how media mergers are regulated in the United States and gives the example of the recent *AT&T/Time Warner* merger.[9] Part V compares the regulatory frameworks for media mergers in the two jurisdictions and how it was applied in the test cases. Finally, the paper concludes there are several key lessons which can be observed from the analysis which call for explicit government policy intervention to ensure New Zealand has a competitive and diverse media industry which provides clear rules for media businesses.

## *II Economic theories of competition law*

Competition law is the interface where the disciplines of law and economics meet. This Part seeks to explain the underlying economic rationale for why companies choose to merge and, in turn, what type of behaviour competition law is seeking to influence when

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6 Sherman Antitrust Act 15 USC § 1-7 (1890); and Clayton Antitrust Act 15 USC § 12-27, 29 USC § 52-53; see Part IV.A.2 below for an explanation of United States antitrust law. Harmonisation with Australian competition law was also among the motivations of the Act: see Trade Practices Act 1974 (Cth); see also Mark Berry "New Zealand Antitrust: Some Reflections on the First Twenty-Five Years" (2013) 10 Loy U Chi Int Law Rev 125 at 126.

7 *NZME Ltd v Commerce Commission* [2018] NZCA 389 [*NZME Ltd* (CA)].

8 *Vodafone Europe BV and Sky Network Television* [2017] NZCC 1, *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2 (Commerce Commission New Zealand, Decision Series Project No. 11.04/16008 and 16009, 22 February 2017) [*Sky and Vodafone merger*].

9 *United States v AT&T Inc* 310 F Supp 3d 161 (DC Cir 2018).

regulating mergers and acquisitions. This is not intended to be a comprehensive description of the economic theory or its history, but rather the aim is to provide the contextual background in which competition law has developed and the objectives it seeks.

Competition law is typically concerned with two kinds of situations that give rise to market power: restrictive trade practices, and market structures and conduct (often described as the "market dominance" problem).[10] Mergers, which are the focus of this paper, generally come under the second category as they are usually regulated due to concerns related to structural dimensions of market power.[11] A merger occurs when two separate firms come to a mutual decision to combine their two businesses under common ownership.[12] A merger is distinct from a takeover (or acquisition) which occurs when one firm (usually a larger firm) decides to take control over another firm, usually due to perceived inefficiencies of the target firm or potential synergies with the acquiring firm's existing business.[13]

### *A Economic rationale for mergers*

Often, firms choose to merge for reasons which raise no concerns for competition. Firms may be pursuing improvements in their products and/or efficiency in ways which the firms are unable achieve on their own, including taking advantage of economies of scale and economies of scope.[14] As such, mergers may present significant benefits for competition by reducing prices, increasing output, or improving product quality.[15]

The goal of a merger is usually to create a merged firm which is worth more than the sum of its parts.[16] In doing so, the merging parties may seek to: improve business synergies; decrease costs through coordinating product lines and production processes across the merged firm, eliminating duplicated costs, and combining research and development of new products; diversify risk by merging uncorrelated income streams; replace management

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[10] Lindsay Hampton and Paul G Scott *Guide to Competition Law (*LexisNexis, Wellington, 2013) at 6.

[11] Hampton and Scott, above n 10 at 8.

[12] Einer Elhauge and Damien Geradin *Global Competition and Economics* (Hart Publishing, Portland, 2007) at 799.

[13] In the market for corporate control one motivation for takeovers can be the reduction of agency costs, leading to more efficient management; see Henry G Manne "Mergers and the Market for Corporate Control" (1965) 73 J POL Econ 110 at 113; see also Roberta Romano "A Guide to Takeovers: Theory, Evidence and Regulation" (1992) 9 YJREG 119 at 120.

[14] Economies of scale is where the costs of a company are spread over a larger volume of production, whereas economies of scope is where it is cheaper for a firm to jointly produce two or more goods than it is to do so separately: see Romano, above n 13 at 126.

[15] Herbert Hovenkamp "Antitrust Policy After Chicago" (1985) 84 Mich L Rev 213 at 269.

[16] Hampton and Scott, above n 10 at 283.

which is ineffective or underperforming expectations; or obtain tax advantages (or some combination of the above).[17] However, though mergers may have significant efficiency benefits or cost savings for the merged firm, some mergers also have the potential to increase the merged firms ability to exercise market power and reduce competition in a market.[18]

### *B Economic theories of competition law*

The reason competition law is concerned with merger activity is because some mergers can alter the structure of a market through changing the concentration, size, or other characteristics of the market.[19] Economically speaking, market power is the capacity of a firm to increase price or decrease output beyond competitive levels without making the goods or services unprofitable.[20] Market power can be exercised unilaterally by a single firm or multiple firms can act together in an exercise of coordinated market power.[21] Exercises of market power can lead to decreased output, increased prices, production inefficiency, decreased innovation, or simply the production of the wrong type and quantity of goods.[22] As such, mergers which alter an industry's structure can have long-term effects on competition within an industry where they give the merged firm additional market power.[23]

The following discussion on economic theories of competition law comes from extensive academic debate on the goals and objectives of American antitrust law. Prior to the introduction of the Commerce Act 1986 competition law was viewed as "a peculiarly

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[17] Andrew Gavil, William Kovacic, and Jonathan Baker *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (West Group, St Paul, 2002) at 420-421. see Claire Hill, Brian JM Quinn, and Steven Davidoff Solomon *Mergers and Acquisitions: Law, Theory, and Practice* (West Academic Publishing, St Paul, 2016); Hampton and Scott, above n 10 at 283-284; Manne, above n 13 at 113; Romano, above n 13 128; see also Mark Berry and Paul Scott "Merger Analysis of Failing on Existing Firms Under the Substantial Lessening of Competition Threshold" (2010) 16 Canta LR 272 at 272.

[18] Berry and Scott, above n 17 at 272.

[19] Gavil, Kovacic, and Baker, above n 17 at 418.

[20] William Landes and Richard Posner "Market Power in Antitrust Cases" (1981) 94 Harv L Rev 937 at 937.

[21] Hampton and Scott, above n 10 at 283.

[22] Hampton and Scott, above n 10 at 283.

[23] Frederic Scherer and David Ross *Industrial Market Structure and Economic Performance* (3rd ed, Houghton Mifflin, New York, 1990) at ch 17.

American institution".[24] While New Zealand has not entirely adopted its competition law from the United States, American antitrust is a source of inspiration and reference to the United States antitrust debate is common in understanding the variety of goals and objectives competition law can pursue.[25]

### *1 The Harvard School*

The Harvard School's approach to competition theory is based on the view that industry structure, as determined by the number and size of firms in a market, will control a firm's efficacy and actions.[26] The underlying argument is that the more concentrated a market is, the more likely firms will engage in anticompetitive practices.[27] Thus, Harvard scholars took a welfare-based view where the purpose of regulating competition is to stop large firms from exerting market power over smaller competitors and disadvantaging consumers.[28] The Harvard School approach opposes any form of market concentration by applying per se rules which presume the illegality of any conduct by firms with substantial market power.[29]

The popularity of the Harvard School approach with the United States judiciary and regulatory agencies during the mid-twentieth century had the effect of preventing competitive conduct which may have enhanced companies' ability to provide better services for their customers.[30] Harvard School advocates in the courts and regulatory

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[24] Rex Ahdar "Introduction" in Rex J Ahdar *Competition Law and Policy in New Zealand* (Law Book Company, Sydney, 1991) 1 at 1.

[25] For a detailed discussion of the development of New Zealand Competition law see Hunter M Donaldson "The Development of New Zealand Competition Law" in Rex J Ahdar *Competition Law and Policy in New Zealand* (Law Book Company, Sydney, 1991) 11.

[26] See Joe S Bain *Industrial Organization* (2nd ed, Wiley, New York, 1959); see also Joe S Bain *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Harvard University Press, Cambridge, Massachusetts, 1956); see also Edward S Mason *Economic Concentration and the Oligopoly Problem* (Harvard University Press, Cambridge, Massachusetts, 1957).

[27] Herbert Hovenkamp "The Rationalization of Antitrust" (2003) 116 Harv L Rev 917 at 920.

[28] Thomas J DiLorenzo "The Origins of Antitrust: An Interest Group Perspective" (1985) 5 Intl Rev L & Econ 73 at 74-76.

[29] Donald F Turner "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal" (1962) 75 Harv L Rev 655 at 663-673; see also Massimo Motta *Competition Policy: Theory and Practice* (Cambridge University Press, Cambridge, 2004).

[30] Turner, above n 29 at 663-673; Aluminum Co. of America was found liable for monopolisation of the aluminum manufacturing market by expanding its manufacturing capacity to take advantage of economies of scale and deliver goods to consumers at lower prices than competitors: *United States v Aluminum Co. of America* 148 F 2d 416 (2d Cir 1945).

agencies were quick to find issue with, and prevent, aggressive competition from large firms even if there were benefits for consumers or the conduct would be perfectly acceptable by smaller firms in the market.[31] However, the Harvard School approach also had advantages: it allowed courts to presume the illegality of competitive actions using per se rules, without conducting in-depth economic analysis.[32] This created some certainty for the kinds of competitive conduct large businesses could engage in.

### 2 *The Chicago School*

During the 1960s, scholars from the Chicago School created a divergent economic theory of competition based on laissez-faire beliefs. Chicago School academics argued that competition laws were meant to increase the efficiency of the economy as a whole.[33] Economic efficiency was equated with the maximisation of wealth, such that increases in consumer welfare were achieved by lower costs, increased output, or reduced prices for consumers.[34] Any other possible purpose of competition law was considered irrelevant by the Chicago School, including the Harvard School's view of protecting small firms from exertions of power by larger firms.[35] The Chicago School literature often identified "economic nonsense" upon which previously decided competition cases were based.[36] Chicago School advocates argued efficient, pro-consumer competitive conduct was regularly condemned by the courts and regulators merely because rival firms were hurt.[37] Competition law was protecting competitors, as opposed to competition itself.

Chicago School theorists believed in efficient markets which would self-correct against competitive imbalances in the long-term, without the need for regulatory involvement.[38]

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[31] Thomas A Piraino Jr. "Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century" (2007) 82(2) Ind L J 345 at 349-350.

[32] Piraino Jr., above n 32 at 349-350.

[33] See Robert Bork "Legislative Intent and the Policy of the Sherman Act" (1966) 9 J L & Econ 7.

[34] Robert Bork *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, New York, 1978) at 51.

[35] Bork "Legislative Intent and the Policy of the Sherman Act", above n 33 at 7.

[36] Herbert Hovenkamp "Post-Chicago Antitrust: A Review and Critique" (2001) Colum Bus L Rev 257 at 267. For example, the leverage theory which condemned tying arrangements on the assumption a firm in a single monopoly could use tying to create a second monopoly in a "tied product", thus earning two monopoly products while destroying competition in the tied product's market: see Lester Telser "Why Should Manufacturers Want Fair Trade?" (1960) 3 JL & Econ 86.

[37] Hovenkamp "Post-Chicago Antitrust", above n 36 at 267. A merger was condemned as the post-merger firm would likely be able to make better shoes than rivals for the same price, or undercut rivals price: see *Brown Shoe Co v United States* 370 US 294 (1962).

[38] Eleanor Fox "The Battle for the Soul of Antitrust" (1987) 75 Cal L Rev 917 at 917.

They argued courts and regulators often made poor decisions when regulating competitive conduct and the solutions offered were less effective than those provided by the market.[39] As such, Chicago School scholars reasoned courts and regulators should not intervene based on per se rules. Instead, the courts applied a "rule of reason" which focusses on the economic impact on competition of the relevant competitive constraints.[40] Intervention against competitive conduct should only occur when it could be shown through economic analysis the conduct was clearly anticompetitive and would not result in economic efficiencies.[41] The economic assumptions the Chicago School made in their analysis simplified markets, assuming perfect information was shared among competitors, low barriers to entry, and that firms would act in their rational economic best interest.[42] This focus made it more difficult for regulators to win cases against firms, as these assumptions limit the kinds of anticompetitive conduct that can occur. Further, regulators had to prove the anticompetitive effects through economic analysis as opposed to merely showing an increase in market concentration or market power.[43]

### *3 Post-Chicago Approach*

In the 1980s, following the uptake of the Chicago School approach in the courts and by regulators, some academics questioned the simplistic assumptions of the Chicago School approach. They called for a "post-Chicago" approach to be adopted that built on the best aspects of the Chicago School.[44] Thus, an important claim of post-Chicago theorists is that it "reveals [anticompetitive] outcomes not considered by the Chicago School."[45]

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[39] Piraino Jr., above n 31 at 350.

[40] *National Society of Professional Engineers v United States* 435 US 679 (1978) at 681 and 688; *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma* 468 US 85 (1984) at 107 and 113; *Arizona v Maricopa County Medical Society* 457 US 332 (1982); *Federal Trade Commission v Indiana Federation of Dentists* 476 US 447 (1986); and *Federal Trade Commission v Superior Court Trial Lawyers Association* 493 US 411 (1990).

[41] See Hovenkamp "Post-Chicago Antitrust", above n 36 at 269.

[42] See Michael H Riordan and Steven C Salop "Evaluating Vertical Mergers: A Post-Chicago Approach" (1995) 63(2) Antitrust LJ 513 at 517; Piraino Jr., above n 31; Hovenkamp "Post-Chicago Antitrust", above n 36 at 268-271.

[43] Motta, above n 29 at 8.

[44] Piraino Jr., above n 31 at 363. For example, see Hovenkamp "Antitrust Policy After Chicago", above n 15; Robert Pitofsky "The Political Content of Antitrust" (1979) 127 U Pa L Rev 1051.

[45] Bruce H Kobayashi and Timothy J Muris "Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century" Antitrust LJ (Forthcoming) at 2; see Riordan and Salop, above n 42 at 516.

The post-Chicago approach falls on the spectrum between the Harvard and Chicago School approaches.[46] It combines the clarity given by the Harvard School with the economic intricacy of the Chicago School.[47] While the post-Chicago approach continues to rely on economic analysis to show anticompetitive conduct, the literature accepts some competitive conduct and market structures "are much more likely to have anticompetitive consequences than Chicago School… imagined."[48] As such, the post-Chicago approach is more sensitive to market imperfections as it relaxes key assumptions about competition made by Chicago theorists. Under the post-Chicago approach, competitors may have information asymmetries; there may be high barriers to entry for new firms or existing firms may not be able to be dislodged (e.g. through high switching costs); firms may act irrationally by not acting in their objective economic best interest; and markets may be regulated effectively by regulators.[49]

Indeed, Hovenkamp has suggested "the real value of post-Chicago economics is its renewed recognition of the fact that markets are much more varied and complex than Chicago theorists were willing to admit."[50] Through relaxing assumptions about the robustness of markets, anticompetitive outcomes become more plausible than the Chicago School approach would acknowledge.[51] As such, anticompetitive intervention by regulators may be required to correct competitive imbalances more often than conceded by the Chicago School.[52] In this regard, under the post-Chicago approach, it is suitable for large firms to be precluded from certain kinds of conduct based on presumed harm where such conduct would have been perfectly legitimate if engaged in by a smaller firm. However, the anticompetitive conduct may be acceptable where it can be shown the

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[46] Hovenkamp posits the Harvard School on the left of the spectrum and the Chicago school on the right. Post-Chicago was formed in the last 20 years as "the Harvard School has moved rightward, closer to the Chicago position, while at least some Chicago School members have moderated their position to the left": Hovenkamp "The Rationalization of Antitrust", above n 27 at 927.

[47] Piraino Jr., above n 31 at 363.

[48] Hovenkamp "Post-Chicago Antitrust", above n 36 at 270-271.

[49] See Piraino Jr., above n 31 at 364; Hovenkamp "Post-Chicago Antitrust", above n 36 at 279; Riordan and Salop, above n 42 at 517. See also Patrick Bolton and others "Predatory Pricing: Strategic Theory and Legal Policy" (2000) 88 Geo LJ 2239; Carl Shapiro "Exclusivity in Network Industries" (1999) 7 Geo Mason L Rev 673.

[50] Hovenkamp "Post-Chicago Antitrust", above n 36 at 268.

[51] Marina Lao *Aspen Skiing and Trinko: Intent and "Sacrifice"* (2005) 73 Antitrust LJ 171 at 179; Hovenkamp "Post-Chicago Antitrust", above n 36 at 268.

[52] Piraino Jr., above n 31 at 364; Hovenkamp "Post-Chicago Antitrust", above n 36 at 279.

economic benefits outweigh the detriment to competition.[53] Thus, the post-Chicago approach incorporates aspects of both a welfare-based approach and an efficiency-based approach.

### *C Applicability in Mergers and Acquisitions*

Under competition law, mergers and acquisitions are typically evaluated on the basis of whether a transaction may substantially lessen competition in a market.[54] Until the mid-1970s, American courts and regulators applied Harvard School theory to potential transactions, presuming the illegality of a transaction where one of the firms involved had a substantial share of the market.[55] The courts adopted narrow definitions for the relevant markets and had low thresholds for unacceptable levels of market concentration.[56] Any transaction that increased market concentration beyond those thresholds would be rejected as, according to Harvard scholars, this would increase the concentration of the market and remaining firms would be able to exhibit anticompetitive behavior, such as: charging higher prices, lowering output, reducing product quality (cost saving), or slowing innovation.[57] This was the presumption regardless of whether the transaction actually had the possibility to reduce costs, lower prices, or otherwise benefit consumers.[58]

By the mid-1970's, the Chicago School approach was favoured by the United States judiciary which agreed with the Chicago School's assertions that the presumption of illegality of the Harvard School prevented many transactions which could enhance efficiency in markets.[59] The courts began to hold a merger could not be found to be illegal merely due to the fact the parties held high market shares. Instead, the courts began to require regulators to establish, through economic analysis, how the relevant market may be

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[53] Hovenkamp "Post-Chicago Antitrust", above n 36 at 258 and 267; Hovenkamp "Antitrust Policy after Chicago", above n 15; Piraino Jr, above n 31 at 365.

[54] Clayton Act 15 USC § 18.

[55] *Eastman Kodak Co. v Image Technical Services* 504 US 451 (1992) at 469.

[56] In one case, the Court found that 7.5 per cent of the relevant market was too large of a share, given the market was consolidating at a rapid rate: see *United States v Von's Grocery Co* 384 US 270 (1966) at 301; See also *Brown Shoe*, above n 37; *United States v Philadelphia National Bank* 374 US 321 (1963) at 371.

[57] See *Brown Shoe,* above n 37.

[58] See *United States v Mercy Health Services* 902 F Supp 968 (ND Iowa 1995).

[59] Richard A. Posner *Antitrust Law: An Economic Perspective* (University of Chicago Press, Chicago, 1976) at 112.

affected by the merged parties in the future.[60] However, adoption of the Chicago School approach to fix the shortfalls of the Harvard School created other problems. The courts and regulators now had more responsibility to conduct extensive economic research in competition cases, so as to be able to confirm the specific economic implications of mergers on consumers.[61] This led to widespread rejection of broad, per se rules of illegality.[62] Yet, case law began to exhibit conflicting decisions, and the courts and regulators began to be critiqued as being simply incapable of deciding complex economic issues.[63] This created significant uncertainty for businesses as to when mergers would be acceptable.[64]

The above illustrated that neither the Harvard nor Chicago School was an ideal solution to analyse competitive conduct. It made no economic sense to presume the illegality of mergers that were designed to enhance market efficiency through the use of the Harvard School approach's per se rule, with no consideration of how consumers may be benefitted.[65] However, the Chicago School's modifications went too far; economic efficiency analysis was introduced into merger cases with no clear rules for balancing the proposed efficiencies against any anticompetitive aspects of a merger.[66] As such, the post-Chicago approach became preferred by the courts and regulators during the 1990s.[67] It involved bespoke economic analysis for merger cases, combining the best parts of the Harvard School and Chicago School approaches.[68] The post-Chicago approach is highly fact specific and considers all relevant economic factors of a merger to determine whether the economic efficiencies outweigh any presumed economic harm caused by market

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60 For example, the use of statistical evidence of market share was not sufficient in the face of other economic factors which demonstrated no substantial lessening of competition: see *United States v General Dynamics Corp* 415 US 486 (1974) at 501-502.

61 Piraino Jr. above n 31 at 356; see also Robert J Larner and James W Meehan Jr "Introduction" in Robert J Larner and James W Meehan Jr *Economics & Antitrust Policy* (Greenwood Press, Connecticut, 1989) 1.

62 Richard A Posner "The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision" (1977) U Chi L Rev 1; see Robert H Bork "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division" (1966) 75 Yale LJ 373; see also Kobayashi and Muris, above n 45 at 7.

63 Frank Easterbrook "Vertical Arrangements and the Rule of Reason" (1984) 53 Antitrust LJ 135 at 153.

64 Piraino Jr., above n 31 at 352.

65 Piraino Jr., above n 31 at 362-363.

66 Piraino Jr., above n 31 at 363.

67 *California Dental Association v Federal Trade Commission* 526 US 756 (1999).

68 Piraino Jr., above n 31 at 364.

concentration or any other anticompetitive detriment.[69] Only if a regulator could establish that harm outweighed the benefits would it be acceptable to intervene to prevent a merger.

However, the post-Chicago approach also has disadvantages; while the economic analysis is thorough, it is also complex and a major weakness is the difficulty it creates for courts and regulators to administer.[70] The post-Chicago approach has been criticised as the courts have been unable to make clear rules for considering the complex economic analysis and, in many cases, may be incapable of doing so.[71] Another major critique of the post-Chicago approach in mergers is that the economic analysis is seldom able to be proved in a positive way. More often, all that can be done is to show data which is consistent with the economic theory. However, there are often alternate theories which could explain the data. The post-Chicago approach therefore relies heavily on a Judge's own understanding of the economic implications.[72]

### *D Special considerations for vertical mergers*

Typically, in a horizontal merger analysis, the regulator is trying to argue the merger would create a firm with a large percentage of market share, resulting in a significant increase in the concentration of firms in that market.[73] Under a post-Chicago approach, this would trigger a presumption the merger will be anticompetitive and should be blocked unless there are substantial economic benefits from the merger.[74]

In a vertical merger, the firms do not operate in the same market so there is no sudden shift in market concentration. Consequently, there is no easy way to establish anticompetitive effects. As vertical mergers "are less likely than horizontal mergers to create competitive problems",[75] the regulator and courts must undertake a "highly complex" and "institution specific" analysis to decide whether the merged firm could act as a "clog on competition"

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69 Piraino Jr., above n 31 at 364-366.

70 Hovenkamp "Post-Chicago Antitrust", above n 36 at 269.

71 Hovenkamp "Post-Chicago Antitrust", above n 36 at 271.

72 Hovenkamp "Post-Chicago Antitrust", above n 36 at 271-272).

73 A horizontal merger analysis is where two firms operating in the same market merge. In contrast, a vertical merger is where firms operating in different markets along a supply chain merge.

74 *Federal Trade Commission v HJ Heinz Co.* 246 F Supp 3d 708 (DC Cir 2001) at 715; *United States v Anthem Inc* 855 F Supp 3d 345 (DC Cir 2017); *United States v Aetna, Inc* 240 F Supp 3d 240 (DC Cir 2017) at 240.

75 Department of Justice and Federal Trade Commission *Non-Horizontal Merger Guidelines* (14 June 1984) at §4.

through controlling an important supplier for that market.[76] For example, if a merged firm withheld a source of supply from rivals, resulting in rivals paying more for the required inputs for their business, this could in turn harm competition and consumers.[77] However, many vertical mergers generate significant synergies and efficiencies between purchasers and suppliers. Thus, vertical merger analysis must identify and balance the specific sources of pro-consumer positive elements of the merger against the anticompetitive harms.[78]

### *E Special considerations in media mergers*

Mergers and acquisitions involving media companies require special consideration due to the important social and political role of the media.[79] A competitive "marketplace of ideas" has an important role in society as it facilitates the dissemination of "important information and viewpoints" as well as facilitating government accountability.[80] Media mergers can have both positive and negative effects on the marketplace of ideas. They may create a robust source of debate where none existed before. Alternatively, consolidation in media markets may pose a special risk by threatening media diversity and plurality through reducing the number of viewpoints available and, therefore, inhibiting debate.[81] This has important implications for freedom of expression and democracy as the remaining companies may begin to direct political, social, and cultural narratives.[82]

In many jurisdictions, media mergers are regulated with sector-specific ownership rules and content regulation to address the aforementioned public interest considerations. This recognises the need to balance economic efficiency against not only competition concerns, but also democratic concerns surrounding media pluralism and diversity.[83] In some countries, the financial and competition issues experienced by existing media firms has fueled a call to regulators to allow for further media consolidation by allowing firms to merge business operations to stay afloat. It has been argued the internet has increased

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76 David T Scheffman and Richard S Higgins "Vertical Mergers: Theory and Policy" (2004) 12 Geo Mason L Rev 967 at 967; *Brown Shoe*, above n 37 at 324.

77 Riordan and Salop, above n 42.

78 Riordan and Salop, above n 42 at 519.

79 Stucke and Grunes, above n 5.

80 Stucke and Grunes, above n 5 at 105.

81 Kingsbury, above n 2 at 8.

82 Kingsbury, above n 2 at 8.

83 See Howard A Shelanski "Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?" (2006) 94 Cal L Rev 371; Kingsbury, above n 2 at 8.

competition by reducing the barriers to entry previously enjoyed by media incumbents (e.g. high infrastructure costs) and introduced new, more technologically savvy competitors.[84]

However, market consolidation in media industries can create market failures with wider impact than just consumers paying a higher price. News and other media content are “credence goods”, meaning the quality is difficult to determine, even after purchase and consumption, without some form of comparison.[85] Competition allows consumers to decide whether a media firm’s products are high quality through comparison with other firms’ offerings. In this way, competition acts as a constraint on diminishing quality of media and there is a perceived risk that media consolidation can cause a reduction in media quality through the loss of this constraint, as fewer viewpoints may be published.[86]

Media plurality and diversity concerns can be included in competition analysis as a matter of quality. However, as post-Chicago competition analysis is focused on whether economic efficiencies outweigh any anticompetitive harm, where economic efficiency conflicts with the public interest in free speech and democracy, the weight to be given to the various competing values becomes increasingly important and difficult to measure. In such situations, clear rules are useful in determining whether the public interest in media pluralism and diversity is at risk. This paper reasons that while competition law can be applied in analysing such issues, there is a need for a defined legal framework with clear rules for how wider public interest considerations can be properly weighed.

Having addressed the development and objectives of competition law, the next Part will discuss New Zealand’s current approach to competition law and outline some peculiarities when compared with other jurisdictions. Through an examination of two media merger cases, the Part aims to illustrate some proposed deficiencies in the New Zealand framework for competition law and how it is applied in the context of media mergers.

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[84] Stucke and Grunes, above n 5 at 104.

[85] "Credence qualities are those which, although worthwhile, cannot be evaluated in normal use. Instead the assessment of their value requires additional costly information. …The line between experience and credence qualities of a good may not always be sharp, particularly if the quality will be discerned in use, but only after the lapse of a considerable period of time": Michael R Darby and Edi Kami “Free Competition and the Optimal Amount of Fraud” (1973) 16 JL & Econ 67 at 68-69. See Neil W Averit and Robert H Lande “Using the ‘Consumer Choice’ Approach to Antitrust Law” (2007) 74 Antitrust LJ 175 at 207; Stucke and Grunes, above n 5 at 116.

[86] Matthew Gentzkow and Jesse M Shapiro “Competition and Truth in the Market for News” (2008) 22 J Econ Persp 133 at 142.

## *III Media mergers in New Zealand*

### ***A Law relating to media mergers in New Zealand***

Internationally, most jurisdictions regulate media ownership to protect the public interest in democracy, government accountability, and media plurality.[87] However, in New Zealand media ownership is highly deregulated and instead relies solely on generic competition law for the regulatory framework as to whether media companies may merge.[88] This is notwithstanding the fact New Zealand's media industry is highly concentrated when compared internationally.[89] Whether this approach can adequately address the important issues at stake in a media merger is discussed later in this paper.

#### *1 Competition law in New Zealand*

Competition law aspects of mergers and acquisitions in New Zealand are regulated principally under the Commerce Act 1986.[90] It is commonly acknowledged the Act is derived from the United States antitrust statutes.[91] The decision to adopt a regulatory framework based on United States antitrust law was spurred by a desire to increase competition and efficiency in the New Zealand economy.[92] Historically, New Zealand had a heavily regulated economy and the Commerce Act 1986 was a move toward free enterprise and, therefore, a Chicago School approach to competition law.[93] In adopting the new model, it was acknowledged small economies must tolerate higher levels of market concentration to overcome the costs of competing in distant markets and diseconomies of scale.[94]

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87 Kingsbury, above n 2 at 8.

88 Commerce Act 1986.

89 *NZME Ltd and Fairfax NZ Ltd* [2017] NZCC 8 (Commerce Commission New Zealand, Decision Series Project No. 11.04/15933, 2 May 2017) [*NZME Ltd and Fairfax NZ Ltd* (NZCC)] at [X40].

90 The act refers to "business acquisitions": Commerce Act 1986, Pt 3.

91 Sherman Antitrust Act 15 USC § 1-7 (1890); and Clayton Antitrust Act 15 USC § 12-27, 29 USC § 52-53; see Part IV.A.2 below for an explanation of United States antitrust law. Harmonisation with Australian competition law was also among the motivations of the Act: see Trade Practices Act 1974 (Cth); see also Berry, above n 6 at 126

92 Department of Trade and Industry *Commerce Bill 1985: A Background to the Bill and And Outline of its Provisions* (August 1985) at 3 and 10.

93 See Ahdar "Introduction", above n 24 at 1; Donaldson, above n 25 at 22.

94 Trade Practices Act Review Committee *Report to the Minister for Business and Consumer Affairs* (August 1976) at [11.11]. New Zealand markets have notably high levels of concentration, high barriers to entry, and inefficient production levels: see Berry, above n 6 at 127-128 and 146-147.

The purpose of the Act is "to promote competition in markets for the long-term benefit of consumers within New Zealand."[95] This was an amendment introduced in 2001. It was stated at the time of the amendment the "purpose statement makes it clear that the New Zealand Parliament supports a welfare-based, Harvard School approach that puts the interests of consumers first".[96] Yet, the courts have continued to recognise the Act "is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources"; a very Chicagoan approach.[97] Therefore, it is suggested New Zealand follows in the United States footsteps and has a post-Chicago approach. This is supported by the interaction between ss 66 and 67 of the Act as discussed below: protecting competition is the primary concern under s 66, but an anticompetitive merger may still be authorised under s 67 where the efficiencies of other public benefits are shown to exceed the detriment from the lessening of competition.[98]

Section 8 of the Act establishes the Commission as responsible for administering the Act.[99] To conduct the relevant economic and legal analysis required to make decisions, the Commission employs economists, lawyers, and industry experts to undertake investigations and provide the five full commissioners with the relevant information and recommendations required to make decisions relating to transactions.[100] In making decisions, the Commission must identify one or more counterfactual scenarios which could transpire if the merger did not occur for comparison of whether the scenario of the proposed merger going ahead has anticompetitive effects.[101]

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95 Commerce Act 1986, s 1A.

96 (27 February 2001) 590 NZPD 7975.

97 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358. "We are satisfied that the introduction of s 1A should not disturb the Commission's established practice of treating as neutral any wealth transfers between New Zealand consumers and producers"; this view is based on an efficiency interpretation of the Act: *Air New Zealand v Commerce Commission (No. 6)* (2004) 11 TCLR 347 (HC) at [241]:

98 See also *Air New Zealand (No. 6)*, above 97 at [241]; (27 February 2001) 590 NZPD 7972. The Court of Appeal has stated the legislative history of s 67 confirms Parliament's intent that a substantial loss of competition can be overcome by a merger that sufficiently benefits the public through efficiency gains: see *NZME Ltd* (CA), above n 7 at [74].

99 Commerce Act 1986, s 8.

100 Torrin Crowther and Glenn Shewan "New Zealand" in Global Competition Review *The Handbook of Competition Enforcement Agencies* (2015) at 228.

101 Commerce Commission New Zealand *Mergers and Acquisitions Guidelines* (July 2013) at 2.29.

Under s 47 of the Act, any merger or acquisition that "would have, or would be likely to have, the effect of substantially lessening competition in a market" is prohibited.[102] Parties considering a merger where a competition issue may arise can seek voluntary prior clearance for the transaction from the Commission under s 66 of the Act (clearance application).[103] The Commission will grant clearance for the merger to proceed where satisfied the transaction will not, or will not be likely to, substantially lessen competition in a market.[104] The definition of a market is not decisive of the competitive constraints on the participants in a market.[105] Where the market is defined narrowly, constraints on the merging parties from outside the market must still be taken into account if they operate on the state of competition.[106] In assessing a clearance application, the Commission must make a reasonable inquiry.[107] Yet, the burden to show the proposed merger is not likely to substantially lessen competition in a market lies with the merging parties.[108] If the Commission is left in doubt as to whether there will be anticompetitive effects from the merger, the Commission must decline the clearance.[109] The Commission will be "in doubt" where it fails to exclude a real chance of a substantial lessening of competition.[110]

A transaction which would, or is likely to, substantially lessen competition in a market may still be authorised by the Commission under s 67 of the Act (authorisation application).[111] The Commission must authorise a merger where it will result, or is likely to result, in such a benefit to the public that it should be permitted.[112] The Act does not define the term "benefit to the public". However, when the Commission is required to determine whether conduct will result in a benefit to the public, the Commission must have regard to any

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102 Commerce Act 1986, s 47.

103 Commerce Act 1986, s 66. Parties are not legally required to seek prior clearance for a merger. However, it is common business practice to do so as the merged firm risks the Commission, or others, taking enforcement action which can result in significant penalties or a Court reversing the merger after the parties have incurred significant expense: see Commerce Act 1986, ss 83-85.

104 Commerce Act 1986, s 66(3)(a).

105 *NZME Ltd v Commerce Commission* [2017] NZHC 3186 [*NZME Ltd* (HC)] at [43].

106 *Brambles New Zealand Ltd* (2003) 10 TCLR 868 (HC) at [137].

107 *Woolworths Ltd* (2008) 12 TCLR 194 (CA) at [101].

108 *NZME Ltd* (CA), above n 7 at [86]; *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7] and [97].

109 *Woolworths Ltd*, above n 107.

110 *Woolworths Ltd*), above n 107 at [98].

111 This is an interesting point of comparison with the United States framework where no such authorisation mechanism exists.

112 Commerce Act 1986, s 67(3).

efficiencies that will result from the conduct.[113] Thus, for a s 67 analysis, the Commission must balance the harm to competition against any efficiencies created by the merger; this is consistent with a post-Chicago approach.[114] As with a clearance application, the burden is on the merging parties to satisfy the Commission the merger should be authorised.[115]

As such, in addition to being a watchdog for enforcement of competition concerns, the Commission also plays a role of decision-maker for whether a merger or acquisition is allowed, at first instance. This is an important point of difference to other international jurisdictions. For example, in the United States the regulator must file suit in Federal Court to prevent a merger or acquisition which it identifies as presenting concerns to competition, and prove the anticompetitive effects alleged.[116] This is quite different from the regulator being the decision-maker on whether the proposed transaction is anticompetitive. The implications of this difference are important and will be addressed later in this paper.

If the parties to a proposed merger or acquisition disagree with the Commission's decision regarding their application for a clearance or authorisation, then the parties may appeal the decision to the High Court.[117] On appeal, the merging parties have the burden of proof to show the Commission's determination is incorrect and the merger should be allowed to proceed.[118] If the appellants are successful, the Court has all powers which could have been exercised by the Commission in relation to the merger.[119] However, if the parties have chosen not to apply for clearance or authorisation from the Commission, the Commission may commence proceedings in court to seek an injunction to prevent a transaction if the Commission has concerns about its competitive effects. An injunction would be granted if the Commission is able to prove the transaction breaches the Act.[120]

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113 Commerce Act 1986, s 3A. Section 3A was inserted as an amendment in 1990 which followed a series of Commission decisions that had discounted benefits which were not passed on to consumers. This was part of an emphasis on total welfare which seeks to maximise aggregate economic efficiency: see Hampton and Scott, above n 10 at 3. There is significant debate as to whether total welfare ought to be the objective of antitrust law: see Herbert Hovenkamp "Implementing Antitrust's Welfare Goals" (2013) 81 Fordham L Rev 2471.

114 See Part II.B.3 above.

115 *NZME Ltd* (CA), above n 7 at [86].

116 See "Mergers" (21 August 2018) Federal Trade Commission <https://www.ftc.gov>.

117 Commerce Act 1986, s 91.

118 *NZME Ltd* (HC), above n 105 at [34].

119 Commerce Act 1986, s 93.

120 Commerce Act 1986, s 84.

Having outlined the relevant statutory regime and economic basis for analysing competition law issues relating to media mergers in New Zealand, this paper will now consider two recent media related mergers, the *NZME/Fairfax* merger and the *SKY/Vodafone* merger. The approach taken introduces the rationale for each merger before addressing the relevant parties and explaining the market dynamics for how the industry operates. This is essential for understanding the rapid social and technological change and the impact this has on competitive constraints facing the parties. The basis for the approach is to provide background for a discussion of proposed weaknesses of the current framework and how it has been applied.

### *B The NZME/Fairfax merger*

In May 2016, NZME Ltd and Fairfax New Zealand Ltd (Fairfax), the applicants, announced they would merge.[121] The applicants stated the proposed merger was a vital response to the changing media landscape, which has put significant pressure on the two businesses. This has been evidenced by a decline in print readership and revenue alongside intense competition for online news and digital advertising.[122] As such, a merger would provide significant cost reductions while allowing for continued investment in journalism and content and simultaneously providing a more targeted, lower cost, and data rich service to advertising customers.[123]

The parties submitted both an application for clearance or, in the alternative, authorisation to merge as the acquisition would result in a substantial benefit to the public.[124]

#### *1 The parties*

NZME and Fairfax are New Zealand's two main news media companies.[125] Both businesses compete in the same markets meaning a merger between the two would be a horizontal merger.[126] NZME produces six daily newspapers (most notably the New

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[121] Fairfax New Zealand Limited and Wilson & Horton Limited "Notice Seeking Authorisation of Clearance of a Business Acquisition Pursuant to s 67(1) of the Commerce Act 1986" (27 May 2016) Commerce Commission <www.comcom.govt.nz>. Since submitting the applications, NZME (previously Wilson & Horton Ltd) demerged from APN News & Media Ltd, changed its name to NZME Ltd and listed on the New Zealand Stock Exchange: see *NZME Ltd* (HC), above n 105 at [4].

[122] *NZME Ltd* (CA), above n 7 at [1].

[123] *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [36]-[39].

[124] *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [1]. The final estimated benefit to the public from the Court of Appeal decision was $65m - $200m: *NZME Ltd* (CA), above n 7 at [132].

[125] *NZME Ltd* (CA), above n 7 at [1].

[126] *NZME Ltd* (HC), above n 105 at [1].

Zealand Herald), two weekly papers, 23 community newspapers, 11 online news websites, two lifestyle websites, ten radio station websites, 16 other websites, nine radio stations, and six magazines.[127] Fairfax publishes nine daily newspapers (including The Dominion Post), three weekly papers, 62 community publications, seven websites (most prominent of which is Stuff.co.nz), and ten magazines.[128]

### *2 Industry background*

NZME and Fairfax operate in two-sided markets. On one side, they compete over the publication of New Zealand news content (the supply market). This market traditionally represents the supply of news to subscribing consumers (either through a newspaper or other media source e.g. website or radio). On the other, they compete for advertising revenue (the advertisement market).[129] This market traditionally represents the sale of advertising slots to advertisers (on print newspapers, websites, or radio).

The two sides are complementary: the better reputation for quality content a firm has, the more readers (or listeners) they will attract which will increase news subscription sales, and their advertising revenue will increase due to the wider audience viewing the advertising.[130] However, the interdependence of the markets goes both ways: where readership diminishes, the business case for advertisers is less attractive and advertisers may choose to move their advertising budget to other channels of advertising.[131]

### *3 Industry trends*

The recent growth in distribution of news and information online has radically changed the revenue sources for news media businesses.[132] Print media circulation is in steady decline, reducing sales of newspapers and the profitability for advertisements in newspapers.[133] Concurrently, revenue from online advertisements is growing as more users go online to source news.[134] This has made NZME and Fairfax adopt “digital-first” strategies; content is published online, free-of-charge, when it is created and later aggregated into print editions for relevant newspapers.[135] “Digital-first” also includes an increased focus on the

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[127] *NZME Ltd* (HC), above n 105 at [3].

[128] *NZME Ltd* (HC), above n 105 at [5].

[129] *NZME Ltd* (HC), above n 105 at [17].

[130] *NZME Ltd* (HC), above n 105 at [65].

[131] *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X8].

[132] *NZME Ltd* (HC), above n 105 at [7].

[133] *NZME Ltd* (HC), above n 105 at [8].

[134] *NZME Ltd* (HC), above n 105 at [9].

[135] *NZME Ltd* (HC), above n 105 at [7].

production of video and audio news content in addition to written news.[136] The market for digital news media allows for consumers to have expanded access to international news sources, and easier access to other digital news offerings.[137] Additionally, social media businesses such as Facebook and Google collate and redistribute a range of news sources to consumers.[138] This is problematic as NZME and Fairfax are becoming increasingly reliant on digital advertising revenue streams due to the decrease in print readership, but the increase in digital advertising revenue has not been sufficient to offset the decline of other revenue streams.[139]

Businesses such as Facebook and Google have a data advantage over other firms offering digital advertising to businesses which allows them to provide better targeted advertising based on consumer preferences.[140] As such, NZME and Fairfax's revenues are steadily shifting to advertising markets in which they have significantly less market share and competitive advantage than the New Zealand reader markets for national and regional news. This international competition for advertising revenue has negatively impacted profitability for New Zealand media companies and created questions regarding the financial sustainability for producing news media in the future.[141]

### *4 Commerce Commission determination*

The Commission declined both applications.[142] The relevant markets were defined as the supply and advertising markets for online national news, Sunday newspapers, and community newspapers. While the Commission accepted the applicants operated in a challenging and rapidly changing environment that was being disrupted by digital advertisers such as Facebook and Google, they confined the relevant markets to the production of New Zealand news and New Zealand advertising.[143] In doing so, the Commission effectively excluded Facebook and Google from consideration as competitors in the analysis.

The Commission found the merger would substantially lessen competition in markets for supply of online national news, in the supply and advertising markets for Sunday

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136 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X7].

137 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [11].

138 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [12].

139 *NZME Ltd* (CA), above n 7 at [1].

140 See The Boston Consulting Group, above n 3; Wallenstein, above n 3.

141 *NZME Ltd* (HC), above n 105 at [13].

142 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89.

143 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X6] and [X9].

newspapers, and in the supply and advertising markets for ten community newspapers where the applicants compete.[144] In the Commission's view, NZME and Fairfax merging would lead to price increases in both supply and advertising markets as they are each other's largest competitors.[145] Further, the Commission identified the proposed merger would reduce the quality of news provided, considering that NZME and Fairfax compete to be the first to break news stories and produce high quality journalism.[146] If the companies merged, the Commission considered this constraint would not be provided by other competitors.[147] In declining the authorisation application, the Commission accepted the proposed merger would deliver substantial net public benefits by way of productive efficiency gains.[148] However, the Commission assessed these were outweighed by unquantifiable losses in media "plurality" and the quality of media. The Commission acknowledged there were no media ownership restrictions in New Zealand to constrain the firms from merging, but argued the importance of media plurality to a "well-functioning democratic society" was too important to overlook.[149]

### *5 Judgment of High Court*

On appeal, the applicants challenged the following: the Commission's definition of the relevant markets, the Commission's clearance application findings on each identified substantial loss of competition, and in the alternative, the Commission's assessment of the authorisation application.[150] The applicants submitted the relevant market should be defined as the market for the provision of news and information services and that television, radio, and printed news should be included in the market definition as they acted as an effective competitive constraint.[151] Further, the applicants argued the Commission failed to properly consider the interdependence between how the advertiser market acts as a

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144 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X18]-[X31].

145 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X22].

146 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X27].

147 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X23]-[X29]. This view disregarded other constraints, such as: the two-sided nature of the market means the merged entity would not reduce the quality of content it produced as that would result in reduced readership, leading to a decrease in advertising revenue; an internal code of ethics to maintain journalistic integrity and editorial independence in newsrooms; and safeguards provided by the Press Council to ensure quality was maintained: see *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X25].

148 The Commission found an estimated $41m-204m in quantifiable net economic benefits would arise from cost savings and efficiencies in operations: see *NZME Ltd* (HC), above n 105 at [25].

149 *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X45].

150 *NZME Ltd* (HC), above n 105 at [39]-[40].

151 *NZME Ltd* (HC), above n 105 at [39] and [70].

constraint on a reduction in quality or competition in the supply market.[152] In the alternative, the applicants argued the Commission's assessment of loss of plurality was a factor outside its jurisdiction for consideration as it did not relate to competition.[153]

In upholding the Commission's determination, the Court affirmed the Commission's market definitions, stating that including information services would broaden the market definition "erroneously" by including collators, commentators, and redistributors of news as a component of news media in New Zealand.[154] The Court rejected including radio, television and printed news in the market definition, as in the Court's view they did not provide an effective constraint on competition[155] Further, the Court agreed the merger would substantially lessen competition in the relevant markets.[156] The Court denied the authorisation appeal, finding the loss of plurality was within the Commission's jurisdiction for consideration and holding it would create a significant unquantifiable detriment to public discourse and government accountability.[157] Additionally, the Court stated the loss of "voices" in news coverage caused by the merger would lead to a loss of quality in news media as the substantial loss of competition meant the merged organisation would not need to create quality news to attract readers, given the loss of the competitive constraint.[158] These detriments outweighed the estimated net public benefits.[159] The authorisation application was appealed to the Court of Appeal.

### 6 *Judgment of Court of Appeal*

The primary issue for the Court of Appeal was whether the decisions below had erred in considering media plurality as a detriment when assessing the authorisation application.[160] The Court also considered whether the High Court and Commission were wrong on the

152 *NZME Ltd* (HC), above n 105 at [65] and [72]-[86].

153 *NZME Ltd* (HC), above n 105 at [40].

154 *NZME Ltd* (HC), above n 105 at [52]. This was the case even though the High Court observed that the internet has exposed traditional media businesses to new forms of competition through both international news sources (e.g. BBC and Al Jazeera) and news collators (e.g. Facebook and Google): *NZME Ltd v Commerce Commission* (HC), above n 105 at [11]-[12].

155 *NZME Ltd* (HC), above n 105 at [70].

156 There was one exception, with the High Court finding no substantial loss of competition in the advertising market for Sunday Newspapers. However, this is immaterial for the purposes of this paper: *NZME Ltd* (HC), above n 105 at [175]-[176].

157 *NZME Ltd* (HC), above n 105 at [307].

158 *NZME Ltd* (HC), above n 105 at [284]-[288].

159 *NZME Ltd* (HC), above n 105 at [307].

160 *NZME Ltd* (CA), above n 7 at [21].

merits when balancing the benefits and detriments in assessing the authorisation application.[161]

Similarly to the High Court, the appellants argued that plurality was an irrelevant consideration as it is not an economic detriment.[162] The Court accepted plurality was primarily a non-economic consideration as its effects are felt outside the relevant markets and it cannot be easily measured in terms of price-quality.[163] Yet, it took the view it would be an error to exclude a detriment "on the ground the Act is concerned with efficiency alone."[164] Instead, the Act allows efficiency to be balanced alongside any other public benefit which is of importance to the community as a whole.[165] The Court identified the premise of the Act is that consumers benefit from competition among firms which maximises efficiency. But, this is not limited to an efficient allocation of resources, it also includes dynamic and productive efficiency.[166] The Court determined the legislative history confirmed Parliament's intent that authorisation should allow efficiency considerations to prevail over a substantial lessening of competition where the transaction concerned will sufficiently benefit consumers.[167] The Court was of the opinion the converse should also be true. Therefore, it held the High Court was correct in finding the Commission could take into account non-economic or out of market detriments when deciding whether to authorise a transaction.[168]

In declining the appeal, the Court affirmed the views of the High Court and the Commission that the potential detriments from loss of quality and plurality in the media caused by the merger outweighed the potential benefits.[169] The merged firm would be incentivised to cut costs by shedding editorial staff and journalists which would reduce quality through a loss of "voices" in the media.[170] This would correspond with a decrease in media plurality as the "marketplace of ideas" would have less diversity of views due to editorial consolidation.[171]

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161 *NZME Ltd* (CA), above n 7 at [24].
162 *NZME Ltd* (CA), above n 7 at [21].
163 *NZME Ltd* (CA), above n 7 at [29].
164 *NZME Ltd* (CA), above n 7 at [76].
165 *NZME Ltd* (CA), above n 7 at [73].
166 *NZME Ltd* (CA), above n 7 at [74].
167 *NZME Ltd* (CA), above n 7 at [74].
168 *NZME Ltd* (CA), above n 7 at [81].
169 *NZME Ltd* (CA), above n 7 at [133]-[137].
170 *NZME Ltd* (CA), above n 7 at [116].
171 *NZME Ltd* (CA), above n 7 at [125]-[126].

### *7 Discussion*

The decisions above illustrate several issues relating to the framework for competition law in New Zealand and how it is applied, including the lack of industry specific regulation for media businesses and how the relevant market was defined.

#### (a) Industry specific regulation

As noted above, the New Zealand media industry is largely unregulated. Thus, the democratic concerns for diversity and pluralism were included as part of the competition analysis under the authorisation application as an expansion to the public benefit test. This section argues these wider public interest concerns are ill-suited to be addressed in a competition analysis and are better dealt with under industry specific regulation, such as ownership rules.

By addressing the potential loss of media plurality, the Court affirmed the Commission could consider a factor not usually addressed in an analysis under the public benefit test.[172] The public benefit test was introduced with the Commerce Act 1986. Previously, under the Commerce Act 1975, there was a public interest test which was wider and allowed for consideration of "any effects aiding the wellbeing of the people of New Zealand".[173] The introduction of the public benefit test was seen as a narrowing of this wider public interest test. This was confirmed in *Re Proposal by News Ltd*, the first newspaper merger decision following the introduction of the 1986 Act, where the Commission observed "the power of the Commission or the Court to canvas issues of independence of the press or editorial freedom" to refuse an authorisation for a merger had been revoked by the 1986 Act.[174] Similarly, the Commission's *Authorisation Guidelines* state "in assessing detriments we only consider anticompetitive detriments".[175] This is consistent with the 1986 Act, and in particular the public benefit test, being viewed as a shift towards the Chicago School. By considering media plurality, the Court allowed the Commission to deviate from standard practice.[176]

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172 See An Hertogen "NZME/Fairfax: Did the Commerce Commission Knock the Stuffing out of the Public Benefit Test? (2017) 27 NZULR 1162 at 1162.

173 Commerce Act 1975, s 80(b)(vii).

174 *Re Proposal by News Ltd* (1986-1987) 6 NZAR 47 (Commerce Commission) as cited in *NZME Ltd* (HC), above n 105.

175 Commerce Commission New Zealand *Authorisation Guidelines* (July 2013) at 39.

176 See Hertogen, above n 172; See also Rex Ahdar "The Authorisation Process and the 'Public Benefit' Test" in Rex J Ahdar *Competition Law and Policy in New Zealand* (Law Book Company, Sydney, 1991) 217 at 235; Kingsbury, above n 2 at 12; *Gault on Commercial Law* (online looseleaf ed, Westlaw NZ) at [CA67.01]; and Hampton and Scott, above n 10 at 319, 326-330.

This shows the concerns associated with relying solely on competition law for analysis of media plurality and diversity. There is a large gap between how the Commission, and the Court, has previously assessed the public benefit test with how it was assessed in this case. This highlights an inadequacy in the New Zealand regulatory framework for media mergers. Media mergers often have a much wider array of values at stake than mergers in other industries, but an orthodox post-Chicago application of competition analysis does not offer the opportunity for proper consideration of these diverse issues. This is problematic. However, this paper suggests that it is better policy to adopt a media-specific approach to regulation through the establishment of media ownership rules than to expand the public benefit test. A regulatory model for the media industry should offer the opportunity for consideration of the public interest in diversity of voices, pluralism, journalistic quality, and freedom of expression. However, this should exist outside of generic competition law, which should focus on issues of competition and economic efficiency.[177]

By considering media plurality as a relevant factor, the Court shifted the paradigm of the public benefit test to include any negative consequences of a merger, regardless of whether it is related to a competition concern. The Commission's argument, which the Court accepted, was not that it could merely consider media plurality issues specifically, but, instead, that the public benefit test should allow consideration of both anticompetitive and non-competitive detriments of a merger.[178] This effectively expands the public benefit test into a wider public interest test, and represents a shift to the left and the Harvard School's welfare-based approach. Under this wider test, the Commission could decline an authorisation for a merger even though there is significant economic efficiencies if, in the Commission's view, the transaction may cause any unquantifiable negative detriment against the public interest, even if the factor in question has nothing to do with competition.[179] This would require the Commission to adopt subjective policy preferences insofar as it is required to assess perceived detriments to the public interest against any public benefits that may arise under a proposed merger.

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177 The Court of Appeal acknowledged that media plurality is not an economic concern: see *NZME Ltd* (CA), above n 7 at [29].

178 *NZME Ltd* (CA), above n 7 at [81].

179 See Hertogen, above n 172.

(b) Treatment of competitive constraints and defining the relevant market

Defining the relevant market for competition analysis can be complex for media markets.[180] Media products have numerous degrees of variation in the nature of content (e.g. national versus regional news) such that the products are differentiated and compete in a variety of ways.[181] With NZME and Fairfax offering both paid content (newspapers) and content for free on their websites, assessing exactly who their competitors are is a difficult task. The Court's decision to confine the relevant market to the production and dissemination of New Zealand news content assesses the relevant market in a very granular and narrow way.[182]

The Court's approach can be contrasted with a Law Commission report from 2013 on reforming regulation for "new media" which included collators, commentators, and redistributors of news as a component of news media in New Zealand, stating:[183]

> [The] proliferation of publishers [enriches] public debate and has the potential to strengthen democracy by… widening the sources of information available to the public and providing a greater diversity of opinion. It is also providing a new form of accountability for the mainstream news media…

By excluding these forms of "new media" from the relevant market definition, the Court presents a market definition which excludes key emerging competitors for New Zealand news media and neglects the competitive constraints they provide against decline in news quality. While many collators, commentators, and redistributors create little original content,[184] they act as a news publisher and compete with NZME and Fairfax for advertising revenue. As NZME and Fairfax are becoming increasingly reliant on advertising revenue due to declining print readership and zero-price strategies for digital content, failing to include "new media" businesses as competitors ignores the central issue of the merger: the news media market in New Zealand is in structural decline and naturally consolidating already.[185] This is occurring internally for Fairfax and NZME as they impose

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180 See also Shelanski, above n 83 at 402.

181 Kingsbury, above n 2 at 3.

182 See *NZME Ltd* (HC), above n 105 at [52].

183 New Zealand Law Commission *The News Media Meets "New Media": Rights, Responsibilities, and Regulation in the Digital Age* (NZLC R128, 2013) at [4.56].

184 The New Zealand Law Commission found in its 2013 report that only a small percentage of new media publishers were generating news content or providing reportage. See New Zealand Law Commission, above n 183 at [4.57]–[4.61].

185 See Duncan Grieve "News is a privilege, not a right: Why the NZME-Fairfax merger decision is so catastrophically wrong" (3 May 2017) Stuff <www.stuff.co.nz>; see Toby Manhire "The NZME-

staff cuts, consolidate job titles, and exchange news stories for regional papers to avoid duplication of resources.[186] By not recognising this constraint on competition in the relevant market definition, the decision fails to consider one possible counterfactual view of the situation through not properly identifying the interdependence of the two markets the applicants are engaged in.

The effect of zero-price digital strategies is also relevant to deciding the proper relevant market definition. As acknowledged by the Court, readers do not pay for the news they read online. They provide a form of consideration by providing "views" to the website which is used in deciding the price of advertising for the website.[187] This market for views is known as the "market for attention". The market for attention is a very broad market which includes large digital advertisers such as Facebook and Google. The key driver of value in the market for attention is the number of views webpages (and subsequently advertisements) get from consumers spending time on them. It seems counterintuitive for the Court to rely on NZME and Fairfax's engagement in the market for attention to reject the interdependence of the advertising and reader markets as competitive constraints on competition while, at the same time, not acknowledging NZME and Fairfax's engagement in the market for attention by including it within the relevant market definition; NZME and Fairfax compete with these companies for advertising revenue.

Finally, the Court rejected that radio, television and printed news should be combined with online news products in the market definition. This stands in contrast with a recent review of a media merger by the Commission's Australian counterpart, the Australian Competition and Consumer Commission (ACCC). The ACCC's approach recognised that these different forms of news media acted as effective competitive constraints on each other.[188] Therefore, they would further reduce the possibility of a reduction in news quality and related lessening in competition. Radio, television, and printed news share many of the same characteristics the Commission referenced in finding that NZME and Fairfax were

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Fairfax merger is dead. So what does New Zealand journalism do now?" (3 May 2017) The Spinoff <http://thespinoff.co.nz>; See Bill Ralston "Saying no to Fairfax NZ/NZME merger will hurt NZ journalism" (3 May 2017) Stuff <www.stuff.co.nz>.

186 See Grieve, above n 185; see Ralston, above n 185.

187 *NZME Ltd* (HC), above n 105 at [68]; see Tim Wu "Attention Markets and the Law" Antitrust LJ (Forthcoming) at 2. This paper has since been updated and can be found at <https://papers.ssrn.com>.

188 Australian Competition and Consumer Commission *ACCC Informal Review: Seven West Media Limited – proposed acquisition of the Sunday Times publication and website* (15 September 2016).

each-others main competitor: they compete to be the first to break a news story and often they seek to add a new angle on a news story broken by a competitor.[189]

In sum, these factors present a wide view of the level of competition affecting the industry and provide a strong argument that a broader relevant market definition could have been adopted by the Court. The granular relevant market definitions the Court chose to use artificially disguises the competitive pressures that NZME and Fairfax face. The decision in *Brambles New Zealand Ltd v Commerce Commission* makes it clear that even where the market is defined narrowly, constraints on the merging parties from outside the market must still be taken into account if they operate on the state of competition.[190] It is suggested these wider competitive constraints were not reflected adequately in either the Commission's determination or the Court's judgment and, as such, it may be a better approach for a broader relevant market definition to be used in such cases. While such a broad relevant market may be unconventional in competition analysis, it is proposed the current level of convergence on the media industry by other industries warrants such an approach to sufficiently assess the wide array of competitive constraints on media firms.

The ability for the Commission to adopt a narrow market definition places media companies in a difficult position when applying for clearance or authorisation to merge, due to the onus being on the merging parties to satisfy the Commission the merger should be able to proceed. This issue is better illustrated by the *Sky/Vodafone* merger which is discussed next.

### *C The SKY/Vodafone merger*

On 29 June 2015, Sky Network Television Ltd (SKY) and Vodafone New Zealand Ltd (Vodafone) submitted applications to the Commission for clearance to merge their businesses. The proposed merger would be a reverse merger whereby SKY would acquire 100% of the shares in Vodafone, but Vodafone Europe B.V. would acquire 51% of the shares in SKY.[191] From a competition perspective, the proposed merger would be a vertical merger to combine Vodafone's large mobile and fixed telecommunications network with the largest New Zealand based pay-TV provider.[192]

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[189] See *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X27].

[190] *Brambles New Zealand Ltd*, above n 107 at [137].

[191] Vodafone Europe B.V., a wholly-owned subsidiary of Vodafone Group plc, is the current owner of Vodafone New Zealand Ltd: *Sky and Vodafone merger*, above n 8 at [1].

[192] *Sky and Vodafone merger*, above n 8 at [X3] and [2].

The proposed merger was "driven by: the increasing prevalence of high-speed internet; the increasing speed of mobile networks; the low cost of delivering content over the internet; and the changing preferences to consumer video on demand."[193] SKY had not invested enough in providing internet content historically and has been struggling with the competition presented by new, data driven subscription video on demand services (SVODs) that are causing subscriber churn and taking market share from SKY.[194] The merger would help SKY remain competitive in the changing media environment. On the other hand, Vodafone proposed the merger would allow rapid innovation of new digital products by converging communication and viewing preferences, increasing cross-marketing opportunities between the two brands through more attractive packages, and a superior customer experience which would increase the uptake of high-speed internet.[195]

### *1 The parties*

SKY's business revolves around distributing content to its subscriber base. SKY currently offers a range of news, sport, movies, general entertainment, and pay-per-view channels. SKY's primary distribution method is over satellite to its proprietary "SKY box" decoder. Additionally, SKY has online offerings, including: SkyGO, to view linear and on-demand SKY content; FanPass, which is an over-the-top (OTT) service providing access to sporting events on a pay-per-view basis and SKY Sport channels on a short-term subscription basis; and NEON, which is an SVOD service that allows subscribers to access movie and television series on-demand. Further, SKY owns 100% of Igloo, another pay-TV service, and Prime which is free-to-air.[196]

SKY's foremost offering is its SKY Sports package; SKY has exclusive rights to broadcast a significant amount of premium sport content in New Zealand which it distributes to its SKY TV, SkyGO, and FanPass customers.[197] SKY also offers delayed coverage of some premium sports content free-to-air on Prime. SKY is somewhat vertically integrated with regard to the production and distribution of premium sports content within New Zealand and SKY produces its own news programming which is broadcast on a 24-hour news channel. For sports and news content outside New Zealand, SKY purchases distribution rights.[198]

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193 *Sky and Vodafone merger*, above n 8 at [8].

194 See *Sky and Vodafone merger*, above n 8 at [51] and [63]-[65].

195 *Sky and Vodafone merger*, above n 8 at [7].

196 See Sky Network Television Limited *Annual Report* (June 2016).

197 *Sky and Vodafone merger*, above n 8 at [X3].

198 See Sky Network Television Limited; above n 196.

Vodafone is a telecommunications service provider (TSP) in New Zealand which offers fixed and mobile services to retail and business customers. This includes broadband and mobile services.[199] Vodafone is also currently a seller of TV content in bundle packages with its telecommunication services. Customers are provided with SKY TV either online, through a SKY box decoder or Vodafone's own "set top box" called Vodafone TV, while being invoiced solely by Vodafone.[200] Vodafone TV also allows customers to watch free-to-air, YouTube, and Netflix content.[201] SKY and Vodafone's current contract is non-exclusive, meaning SKY could enter into similar reselling arrangements with other TSPs.[202]

### 2 *Industry background*

Like print media, the telecommunications and television broadcasting industries are in a state of rapid technological change as well as experiencing significant adjustments in consumer preferences when engaging with such services.

#### (a) Telecommunications

TSPs in New Zealand make money through selling phone, broadband, and mobile packages to business and retail customers. New Zealand has a large number of TSPs which sell broadband services, the three largest of which are Spark, Vocus, and Vodafone.[203] There are three major mobile network operators in New Zealand providing mobile services: 2degrees, Spark, and Vodafone.[204] This small number of TSPs is a significant driver of price competition in the telecommunications market. Any inability for a TSP to compete for a meaningful number of customers could create a risk of under-investment and reduce competition in the long-run.[205]

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[199] "Vodafone" (8 September 2018) Vodafone <www.vodafone.co.nz>; *Sky and Vodafone merger*, above n 8 at [42]

[200] "TV" (8 September 2018) Vodafone <www.vodafone.co.nz>.

[201] Vodafone "TV", above n 200.

[202] *Sky and Vodafone merger*, above n 8 at [43]

[203] *Sky and Vodafone merger*, above n 8 at [71]. There are many small providers of broadband services as TSPs have regulated access to broadband infrastructure in New Zealand: see Telecommunications Act 2001.

[204] There are also some resellers of mobile services purchased from mobile network operators, although the number of consumers who use these services is low: see Commerce Commission *Annual Telecommunications Monitoring Report 2015* (26 May 2016) at 28.

[205] *Sky and Vodafone merger*, above n 8 at [X12].

In the telecommunications industry (including broadband and mobile), technologies are rapidly evolving. Ultra-fast broadband (UFB) is currently being rolled out across the country and there is an expectation that 5G mobile networks will be available within five years.[206] Alongside the UFB rollout, a "multicast service" is being installed which will allow TSPs to broadcast media content (such as television) to multiple consumers simultaneously.[207] As such, this will offer a new cable distribution channel for television distributors.

(b) Distributors

Television broadcasters in New Zealand receive revenue from the distribution of content to paying subscribers, as well as through selling advertising. Pay-TV and free-to-air content are distributed to consumers in various ways, including satellite, cable, the internet, and terrestrial broadcast (radio-waves).[208] Content is delivered to consumers either as a linear broadcast (programmed television that can be recorded) or on-demand.[209] Free-to-air, OTT providers, and SKY are all content distributors. In recent years, numerous players have entered the New Zealand market, including Amazon Prime, Lightbox (owned by Spark), and Netflix. This increase in competition has increased the costs of acquiring content.[210]

While the content these distributors provide can be viewed as substitute products, there are also complementary aspects of their product offerings given the different types of content they distribute (e.g. live sports, movies, news etc), the way in which it is distributed (scheduled linear broadcast versus on-demand) and the amount of content available.[211] In some circumstances, consumers may choose to use a variety of distributors to get the product mix that suits their needs.

### *3 Industry Trends*

Telecommunications markets and broadcasting markets are beginning to converge in new ways. There is a blurring of boundaries between industries, due to the ability to provide a range of services over a single network or for different networks to carry similar kinds of services.[212] Technologies used to deliver broadband and mobile internet now require

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206 *Sky and Vodafone merger*, above n 8 at [142].

207 *Sky and Vodafone merger*, above n 8 at [75].

208 *Sky and Vodafone merger*, above n 8 at [100].

209 *Sky and Vodafone merger*, above n 8 at [101].

210 Grant Samuel and Associates *Independent Adviser's Report and Appraisal Report in relation to the Proposed Acquisition of Vodafone New Zealand Limited* (June 2016) at 27.

211 *Sky and Vodafone merger*, above n 8 at [102].

212 *Sky and Vodafone merger*, above n 8 at [164].

similar infrastructure to deliver content to consumers.[213] Internationally, these industries are increasingly viewed as one, referred to as the Technology, Media, and Telecommunications (TMT) industry.[214] As this trend has gathered pace, there has been an increase in the number of package bundles that offer both telecommunications services and video content.[215] This increases platform stickiness and reduces churn, as purchasers associate broadband, mobile, and television content purchases as part of the same purchasing decision, therefore using a single supplier for all three.[216] Underpinning the need for high-speed internet infrastructure is growth in the amount of content consumers are consuming over the internet.[217]

This change in consumer behaviour has also impacted the distribution market; the emergence of online OTT video offerings such as Lightbox, Netflix, Neon, and YouTube has seen a rise in video content consumed over the internet and these services have drawn significant numbers of subscribers.[218] Consumers now wish to have content available on-demand when they wish to view it. While many viewers still enjoy watching some special events live, such as sports, consumers are becoming more open to watching such content on their mobile or computer over the internet.[219] These trends are set to continue as mobile data prices continue to decrease and speeds increase.[220]

#### 4 *Commerce Commission determination*

On 22 February 2017, the Commission declined the parties' application for clearance to merge their businesses as the Commission could not "exclude a real chance that the merged entity would leverage its market power over premium live sports content, foreclosing competition in the relevant broadband and mobile services markets over the medium to long term", resulting in a substantial lessening of competition in the telecommunications market.[221]

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213 *Sky and Vodafone merger*, above n 8 at [166].

214 Deloitte *Technology, Media, and Telecommunications Predictions* (2018).

215 *Sky and Vodafone merger*, above n 8 at [32].

216 *Sky and Vodafone merger*, above n 8 at [166] and [185].

217 Increasingly, content is steamed in high-definition formats which requires more data to view, increasing user consumption of mobile data: see *Sky and Vodafone merger*, above n 8 at [153]-[162].

218 *Sky and Vodafone merger*, above n 8 at [127].

219 *Sky and Vodafone merger*, above n 8 at [X17].

220 *Sky and Vodafone merger*, above n 8 at [138]-[144].

221 *Sky and Vodafone merger*, above n 8 at [10].

The Commission found it challenging to be satisfied how the proposed merger would impact the relevant broadband and mobile service markets.[222] As such, the Commission relied on the decision in *Commerce Commission v Woolworths* to decline the merger as the Commission was left in doubt as to whether the merger would have anticompetitive effects.[223] The Commission stated there was a real risk of anticompetitive foreclosure by the merged firm; it could encourage customers to subscribe to their services by making SKY Sport unattractive on a standalone basis and restricting competitor TSPs' access, such that consumers who wished to buy SKY Sport would be induced to buy it through a bundle package from the merged firm.[224]

The Commission reasoned the merged firm would be able to achieve this as it would have control over all premium live sports content, giving the firm substantial market power. Further, the merged firm would have reduced transaction costs, bringing innovative digital products to market quickly as technology and consumer preferences in the telecommunications and broadcasting industries continued to converge. As such, the UFB rollout process would give the merged firm the opportunity to capture market share by offering lower priced bundles than rival firms could offer, since rivals would lack access to premium sports content.[225] The Commission assessed once customers switched to the merged firm, they would become "stickier" and harder for rival TSPs to contest in the future.[226]

While the Commission acknowledged the merger would provide several pro-consumer benefits, such as new and innovative products and lower prices, the Commission suggested these benefits would be limited to the short-term.[227] In the long-term, the Commission was concerned there would be large anticompetitive effects because of the potential popularity of the package bundles the merged firm might offer,[228] with Commission Chair, Dr. Mark Berry, stating:[229]

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222 *Sky and Vodafone merger*, above n 8 at [39].

223 *Sky and Vodafone merger*, above n 8 at [28] and [40].

224 *Sky and Vodafone merger*, above n 8 at [340].

225 *Sky and Vodafone merger*, above n 8 at [340.1]-[340.6].

226 *Sky and Vodafone merger*, above n 8 at [X21].

227 *Sky and Vodafone merger*, above n 8 at [355].

228 *Sky and Vodafone merger*, above n 8 at [357].

229 As quoted in Dan Satherley "Sky, Vodafone merger a no-go" (23 February 2017) Newshub <www.newshub.co.nz>.

> The potential popularity of the merged entity's offers could result in competitors losing or failing to achieve scale to the point that they would reduce investment or innovation in broadband and mobile markets in the future. In particular, we have concerns that this could impact the competitiveness of key third players in these markets such as 2degrees and Vocus.

### *5 Discussion*

The *SKY/Vodafone* merger illustrates the importance of where the onus lies. As mentioned above, in a clearance application it is incumbent on the merging parties to satisfy the Commission the proposed transaction will not lead to a substantial loss of competition in the relevant market(s). If the parties to the merger cannot satisfy the Commission, then they will not be allowed to merge; there is a practical burden of persuasion with the merging parties to show they should be allowed to merge.[230] If the parties disagree with the Commission's determination, then the parties have a right to appeal the determination to the High Court. On appeal, the merging parties retain the onus and must establish the Commission was wrong to not give clearance by showing there is not a substantial loss of competition in the relevant market.

The importance of where the onus lies becomes exaggerated by the rule from the Court of Appeal decision in *Commerce Commission v Woolworths* where the Commission must decline to give clearance to a merger if it is left in doubt as to whether there will be a substantial loss in competition. "In doubt" means a "failure to exclude a real chance of substantial lessening of competition".[231] The source of the doubt does not matter. There is no difference between uncertainty in predicting future events or uncertainty relating to deficiencies in evidence available. In both circumstances, the Commission must decline the merger.[232]

The result of this is that the Commission is able to prevent a merger from proceeding on the basis that it is anticompetitive and will reduce competition without ever needing to prove the merger will result in anticompetitive conduct. It is worth a reminder that there is no legal obligation which requires merging parties to apply for clearance prior to merging as New Zealand operates a voluntary notification regime.[233] As such, if *SKY/Vodafone* merger had proceeded without seeking clearance from the Commission, the Commission

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230 *NZME* (CA), above n 7 at [86]; *Commerce Commission v Woolworths Ltd*, above n 107 at [101].

231 *Woolworths Ltd*, above n 107 at [98].

232 *Woolworths Ltd*, above n 107 at [93].

233 Commerce Act 1986, ss 66 and 67.

would have to bring an action for breach of s 47 of the Commerce Act. Here, the Commission would bear a burden of proof to show the merger was anticompetitive and had resulted, or was likely to result, in a substantial lessening of competition in a market. This illuminates an asymmetry in the law as to where the onus lies. However, there is significant risk if parties to a merger proceed without seeking prior clearance, as a successful action by the Commission can result in the courts reversing the merger after the parties have incurred significant expense in addition to a pecuniary penalty of up to $5,000,000.[234]

Given the seemingly high threshold for showing a lack of substantial lessening of competition, as well as the fact that it is very hard to prove economic theories positively in a competition analysis, the merging parties have a hard task should they wish to contest a determination of the Commission and show a merger will not result in a substantial lessening of competition. This was the case for Vodafone and SKY when they announced they would not appeal the decision; it was commercially unacceptable when the process would take up to a year and would incur significant costs without any guarantee they would be successful.[235]

This paper takes the view that a better framework would involve a merger being able to proceed where the Commission is left in doubt as to whether or not it is anticompetitive. By giving clearance for a merger, the Commission does not give up its other powers for enforcing anticompetitive conduct. Alternatively, the Commission could require the merging parties give undertakings about anticompetitive conduct that would void the clearance if contravened.[236] Additionally, this paper suggests that the Commission should bear the onus for the burden of proof if a determination is appealed. There should not be an asymmetry in the law where the parties have chosen to use the voluntary notification regime and apply for clearance prior to merging. The burden should always remain with the Commission to show the merger or acquisition is anticompetitive due to a substantial lessening of competition. Given the detail of the determinations which the Commission produces, it would likely be able to produce at least a prima facie case the merger is anticompetitive, at which point it would be incumbent on the merging parties to present evidence which shows an alternate scenario to the Commission's theory of harm. This would allow the voluntary notification regime under the Act to be used as a filtering system by the Commission for which mergers it wishes to challenge, as opposed to making it the

[234] Commerce Act 1986, ss 83-85.

[235] "Sky, Vodafone drop plans for merger" (26 June 2017) Radio NZ <www.radionz.co.nz>.

[236] Commerce Act 1986, ss 69A and 69AB.

decision-maker in whether a merger can proceed and switching the onus onto the merging parties.

Having identified several proposed weaknesses in New Zealand's competition law framework and how it is applied to media merger cases, this paper will now take a comparative look at the *AT&T/Time Warner* media merger in the United States, to illustrate a different framework for competition law and how it can be applied in the context of media mergers.

## *IV Media mergers in the United States*

### *A Law relating to media mergers in the United States*

Media mergers in the United States are regulated in two main ways. First, there is industry specific regulation which places limits on the level of media ownership to promote competition, localism, and media plurality.[237] Second, there is the general regulation of competition law which applies to all merger and acquisition transactions in the United States to protect competition.[238]

#### *1 Industry specific regulation*

Regulation of media in the United States is overseen by the Federal Communications Commission (FCC). The FCC has a regulatory mandate to create rules for interstate communications, including media ownership. In doing so, the FCC takes account of competition considerations and wider diversity and democratic considerations relating to media plurality to protect the "public interest".[239]

These media ownership rules place strict limits on the number of radio and television assets any company can own.[240] They also limit the ability of companies to operate broadcast stations and newspapers; it is prohibited to have common ownership of a daily newspaper and any AM, FM, or television broadcast station covering the city that newspaper is published in.[241] Television station ownership, in particular, is restricted to 39 per cent of

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[237] 15 USC 80a-3, 47 CFR §73.3555; 47 USC 155, 47 CFR §73.658; see Congressional Research Service Report *The FCC's Broadcast Media Ownership Rules* (RL34416, 8 August 2008)

[238] Sherman Antitrust Act 15 USC § 1-7 (1890); and Clayton Antitrust Act 15 USC § 12-27, 29 USC § 52-53.

[239] See Shelanski, above n 83 at 386–389.

[240] Kingsbury, above n 2 at 13.

[241] 47 CFR §§73.3555; 47 CFR §73.658; see Congressional Research Service Report, above n 237.

all United States television households.[242] Additionally, there is a rule explicitly prohibiting any merger between the four major United States television networks (ABC, CBS, FOX, and NBC).[243]

The FCC rules have the effect of placing significant restrictions on merger and acquisition activity in media markets. This has resulted in many media companies calling for rules to be updated to acknowledge changes in the modern media landscape. However, there is still considerable merger and acquisition activity in media markets, such that many critics argue further consolidation in the industry would not be in the public interest.[244] One of the key benefits of having industry-specific regulation to protect the public interest is that when mergers and acquisitions occur in the media industry, it splits the competition issues from the public interest issues. It allows the competition regulators and courts to focus on analysis and judgment of the competition issues at stake while leaving the FCC to deal with concerns relating to the public interest in media plurality.

*2 United States antitrust law*

In the United States, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) share responsibility for enforcing federal antitrust laws found in the Clayton Act.[245] The parties for proposed mergers which meet certain thresholds must file notice with the regulators.[246] If potential competition issues arise, the regulator will typically engage with the parties to see if a consent agreement can be reached which allows the beneficial aspects of the transaction to go forward while eliminating the threat to competition. If the competitive problems cannot be resolved through a consent agreement, then one of the regulators may instigate proceedings in federal court to enjoin the merger.[247]

Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect

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[242] 47 CFR §§73.3555; 47 CFR §73.658; see Congressional Research Service Report, above n 237.

[243] See Federal Communications Commission *FCC's Review of the Broadcast Ownership Rules* (4 November 2015).

[244] See Maurice E Stucke and Allen P Grunes "Why More Antitrust Immunity for the Media is a Bad Idea" (2011) 105 NWULR 1399 at 1413; See also Stucke and Grunes, above n 5.

[245] The two regulators co-ordinate with one another when they find competitive issues in a proposed transaction to avoid duplicating enforcement efforts: "Enforcers" (21 August 2018) Federal Trade Commission <https://www.ftc.gov>.

[246] See the Hart-Scott-Rodino Antitrust Improvements Act of 1976 15 USC §18a.

[247] "Mergers", above n 116.

of such acquisition may be substantially to lessen competition".[248] To establish the anticompetitive effects of a merger requires a comprehensive examination of the particular market's structure, history, and probable future.[249] This means a court has the "uncertain task" of balancing the parties' competing visions of the future for the relevant market and the impact the merger will have on it.[250] The allocation of the burden of proof is of particular importance in this analysis,[251] as the regulator "has the ultimate burden of proving a s 7 violation by a preponderance of the evidence."[252] First, the regulator must establish a prima facie case that the proposed merger is likely to "substantially lessen competition" in a market.[253] If successful, the defendant companies will have an evidentiary burden to show "the *prima facie* case inaccurately predicts the probable effect on future competition."[254] The defendants can do this through showing that "post-merger efficiencies will outweigh the merger's anticompetitive effects."[255] If satisfied, the evidentiary burden then shifts back to the regulator to provide additional evidence of harm from the merger and joins with the ultimate burden of proof which is with the regulator at all times.[256] Certainty of harm to competition is not required to prove a s 7 violation. But, a "mere possibility" of harm will not be sufficient.[257] Failure to meet the burden of proof by the regulator in any respect will mean the transaction will not be enjoined.[258]

### *B The AT&T/Time Warner merger*

On 22 October 2016, AT&T announced it had agreed to acquire Time Warner in a deal valued at US$109 billion. The deal would merge Time Warner's large content and advertisement library with AT&T's extensive network relationships and leading distribution for broadband, mobile and television.

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[248] Clayton Antitrust Act 15 USC § 18.

[249] *General Dynamics Corp*, above n 60 at 498; *AT&T Inc*, above n 9 at 176. The relevant market comprises both a product market and a geographic market: *Anthem Inc*, above n 74 at 349.

[250] *United States v Baker Hughes Inc* 908 F 2d 981(DC Cir 1990) at 991.

[251] *Baker Hughes Inc*, above n 250 at 991.

[252] *United States v H & R Block Inc* 833 F Supp 2d 36 at (DDC 2011) at 49.

[253] See *Federal Trade Commission v Arch Coal Inc.* 329 F Supp 2d 109 (DDC 2004); *Baker Hughes Inc*, above n 251 at 982 and 991.

[254] *Anthem Inc*, above n 74 at 349.

[255] *Federal Trade Commission v HJ Heinz*, above n 74 at 721.

[256] *Anthem Inc*, above n 74 at 350; *Baker Hughes Inc*, above n 250 at 983; *H & R Block Inc*, above n 252 at 49.

[257] *Baker Hughes Inc*, above n 250 at 984.

[258] *Arch Coal Inc*, above n 253 at 116.

AT&T and Time Warner viewed the proposed merger as an essential response to the intense competition they were facing from data driven, vertically integrated SVODs and digital advertisers.[259] AT&T lacked control over the video content it offered and had limited access to advertising inventory.[260] Additionally, AT&T was experiencing substantial bargaining friction when attempting to negotiate innovative program offerings with programmers.[261] Time Warner could give AT&T programming flexibility and allow AT&T to attempt innovative ways of delivering content to its wireless consumer base.[262] AT&T has access to significant customer data, which Time Warner lacked, that AT&T could supply to Time Warner to aid the creation of popular new content, increase customer experience, and develop targeted advertisements to increase the value of Time Warner's advertisement inventory.[263]

*1 The parties to the merger*

AT&T is a world leader in communications and digital entertainment services.[264] It is a distribution company that provides wireless, high-speed broadband, voice, and pay-TV services to consumers.[265] With more than 170 million unique direct to consumer distribution connections across its wireless, video, and broadband businesses, it is the largest provider of traditional multi-channel video programming distribution in the United States.[266] AT&T has several television products: DirecTV, a satellite-to-dish service; U-Verse, a "telco" offering that operates over the same line as a customer's telephone; and DirecTV Now, an online linear television platform;[267] AT&T is steadily shifting its business away from traditional television products by trying to migrate customers onto more innovative services.[268] This includes investing heavily in 5G wireless technology to enable streaming of higher quality content.[269]

Time Warner is in the entertainment business. It has three distinct brands: HBO; Turner Networks; and Warner Bros. HBO is a premium subscription based video service that

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259 *AT&T Inc,* above n 9 at 181.

260 *AT&T Inc,* above n 9 at 182.

261 *AT&T Inc,* above n 9 at 182.

262 *AT&T Inc,* above n 9 at 182-183.

263 *AT&T Inc,* above n 9 at 182-183.

264 "Company Profile" (22 August 2018) AT&T < https://about.att.com>.

265 "AT&T to Acquire Time Warner" (22 August 2018) AT&T <http://about.att.com>.

266 *AT&T Inc*, above n 9 at 177-178.

267 "TV" (22 August 2018) AT&T <www.att.com>.

268 *AT&T Inc*, above n 9 at 178 and 248.

269 "AT&T to Acquire Time Warner", above n 265.

creates original content. HBO relies solely on subscription and affiliate fee revenue, which makes its business model reliant on broad distribution through traditional television, online television, and SVOD distributors. HBO also distributes through its own OTT streaming platform, HBO Now.[270] Turner Networks offers ten linear cable networks that produce live television. Turner is the largest of Time Warner's business units and the most contentious part of the merger dispute. Turner's business model seeks to distribute its content as broadly as possible so as to maximise both advertising and affiliate fee revenue. Alongside its content, Turner has a large amount of advertising inventory.[271] Warner Bros creates movies, television programs, video games, and other video content which is then licensed to Time Warner's other businesses for distribution through affiliates and third parties.[272]

### 2 *Industry background*

The video programming and distribution industry is a three-stage chain comprised of "content creation, content aggregation, and content distribution."[273] The players are video programmers and distributors. Traditional video programmers, such as Time Warner, and distributors, such as AT&T, are reliant on each other to produce and deliver content to consumers, having historically entered arm's length commercial arrangements agreed on through "very tough" negotiations.[274]

#### (a) Programmers

Video programmers, such as Time Warner, operate in two-sided markets. They create content for which they receive affiliate fees in exchange for granting distributors the right to show the programmers content on their television platforms. Additionally, programmers sell advertising space to advertisers during slots between programs on their network.[275] Over the past decade, affiliate fees have steadily increased, in part due to the rising costs of producing "higher quality" content for consumers.[276] Success for video programmers comes from wide distribution of their content, as the number of consumers who view programmers content increases, the more programmers receive in affiliate fees and advertising revenue.

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270 "About HBO" (21 August 2018) HBO <www.hbo.com>.

271 "About Us" (21 August 2018) Turner <www.turner.com>.

272 "Company Overview" (21 August 2018) Warner Bros <www.warnerbros.com>.

273 Christopher S Yoo "Vertical Integration and Media Regulation in the New Economy" (2002) 19 Yale J Reg 171 at 220.

274 *AT&T Inc*, above n 9 at 171 and 200.

275 *AT&T Inc*, above n 9 at 167-168.

276 *AT&T Inc*, above n 9 at 168.

(b) Distributors

There are three types of distributors in the United States: traditional multi-channel video programming distributors (MVPDs), which offer linear television content alongside libraries of on-demand content directly to television through satellites, cable, or telecommunication lines in exchange for a subscription fee;[277] "virtual" MVPDs which offer a similar product to MVPDs but over an online platform;[278] and SVODs which offer large libraries of on-demand content over the internet.[279] Currently, a majority of American households receive television through MPVDs.[280] However, that number is beginning to decline steadily as consumers shift to lower cost and more convenient virtual MVPDs and SVODs.[281] This has serious implications for traditional distributors' revenues through reduced subscription fees. It also affects programmers in the form of declining viewership, thus reducing affiliate fee and advertising revenue prospects.[282]

*3 Industry trends*

Like New Zealand, the United States television industry is currently undergoing "tectonic change".[283] Similarly to the experience of Vodafone and SKY, consumers are beginning to view media in less traditional ways, preferring online subscription video services to traditional television distribution services, hurting video subscription rates and increasing churn for distributors.[284] Vertically integrated SVODs such as Netflix, Hulu, and Amazon have been incredibly successful in providing cheap, on-demand video content directly to consumers.[285] Being directly connected to consumers gives SVODs two key advantages over traditional MVPD's. First, it reduces the friction inherent in arms-length affiliate

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277 MVPD services are often offered to consumers as part of a "bundle" of services, such as cable television, wireless internet, and home and mobile phone services. See *AT&T Inc*, above n 9 at 169-170.

278 *AT&T Inc*, above n 9 at 170.

279 SVODs are a category that includes Netflix, Hulu, and Amazon Prime. These leading companies are vertically integrated and invest billions of dollars each year in original content creation to be distributed over their platform. For example, Netflix spends more on content per year ($8 billion) than all of Time Warner and its subsidiaries: see *AT&T Inc*, above n 9 at 170.

280 *AT&T Inc*, above n 9 at 170 and 196.

281 For example, AT&T's DirecTV lost 1.2m subscribers in 2017. It is estimated that 20% of American households have cut the cord and departed MVPD services for SVODs since MVPD peaked. See *AT&T Inc*, above n 9 at 174, 235, and 236. In contrast, Netflix added 2 million subscribers in the last quarter of 2017 alone: *AT&T Inc*, above n 9 at 170.

282 *AT&T Inc*, above n 9 at 174-175.

283 *AT&T Inc*, above n 9 at 164.

284 See *AT&T Inc*, above n 9 at 170 and 175.

285 *AT&T Inc*, above n 9 at 170.

negotiations between programmers and distributers;[286] Second, it allows SVODs to have superior access to customer data. This data is able to be used to improve customer experience, determine what programs are popular and create similar content, and create targeted advertisement preferences at the individual consumer level, making advertisements more lucrative.[287]

This shift toward targeted digital advertising is beginning to impact the revenues of video programmers, like Time Warner.[288] Facebook and Google have used data-driven strategies to create more effective digital advertisements than traditional television is able to provide.[289] This has seen advertisers reallocate their budgets towards digital advertising, causing programmers' advertising revenues to flat-line, with the gap expected to widen significantly in coming years.[290] Because of programmers' dual revenue streams, if advertising revenue decreases, programmers will need to negotiate higher affiliate fees to continue to create "high quality" content. Ultimately, this cost will have to be passed onto the dwindling subscriber base and increase the price for consumers. At the same time, innovative SVODs are pushing consumers price point lower with innovative low-cost offerings.[291]

### *4 Judgment of the Federal Court*

Following a lengthy investigation, the DOJ instigated a claim in Federal Court in November 2017 claiming the merger would substantially lessen competition in the distribution market through the ability of the merged firm to: charge higher prices to rival distributors; act unilaterally or in coordination with Comcast-NBCU to undermine the growth of virtual MVPDs; and cause harm to rival distributors by preventing them from using HBO as a promotional tool. [292] In refusing to enjoin the transaction, the Court held the DOJ had failed to meet its s 7 burden to show the merger was likely to substantially lessen competition for all three types of harm it identified.

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286 *AT&T Inc*, above n 9 at 173.

287 *AT&T Inc*, above n 9 at 173-174.

288 *AT&T Inc*, above n 9 at 174-176.

289 Digital advertisements are able to be better tailored to individual consumers and can provide their customers with confirmatory data of how effective their advertising campaigns are. Video programmers do not have access to this data and are stuck programming advertisements across "broad demographics" which is now seen as an inferior product offering to digital advertising. See *AT&T Inc*, above n 9 at 176-177.

290 *AT&T Inc*, above n 9 at 164 and 180.

291 *AT&T Inc*, above n 9 at 174.

292 *AT&T Inc*, above n 9 at 194.

Judge Leon defined the relevant market as the MVPD market. This focused on the downstream distribution of live TV content and would have excluded both the programming market and SVODs from the analysis.[293] However, accepting the DOJ's proposed market did not make the programming market or the rising impact of SVODs on the MPVD market irrelevant, as the DOJ's identified types of harm incorporated those factors in different ways. As such, Judge Leon stated that it was not possible to evaluate the DOJ's identified harms without considering the massive changes "transforming how consumers view video content".[294]

(a) Turner's ability to charge higher prices

For this claim, the DOJ's argument was premised on the fact that Turner's content was "must-have". Therefore, Turner would be able to threaten a "blackout" by refusing to enter into a distribution agreement with rival distributors, unless they were willing to pay a higher price.[295] Long-term blackouts have large negative consequences for both programmers and distributers. Programmers lose affiliate and advertising revenue and distributors may lose subscribers or fail to attract new subscribers.[296] But, entering a long-term blackout to try and steal subscribers from other distributors would be counterproductive to a value maximising strategy for the merged firm as Turner makes money through increasing affiliate fees and advertising revenues; profit maximisation requires distributing Turner content as widely as possible.[297]

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[293] Therefore, firms such as Amazon Prime, Hulu, and Netflix were excluded from the market definition. See *AT&T Inc*, above n 9 at 196.

[294] *AT&T Inc*, above n 9 at 176 and 197.

[295] The threat of distribution "blackouts" is often used as a bargaining chip in tough negotiations between distributors and programmers. However, in practice they are infrequent and often quickly resolved before they come to pass: see *AT&T Inc*, above n 9 at 200-201.

[296] *AT&T Inc*, above n 9 at 172.

[297] Notably, this was acknowledged by the DOJ's expert economist who conceded that Turner would not be "incentivized to *actually* engage in long-term blackouts" as it would not be profitable to the merged entity. See *AT&T Inc*, above n 9 at 201. Further, there was no evidence that Turner's content was actually "must-have" and statistical analysis of prior vertical integration in the industry showed no evidence it would lead to increased content prices. To the contrary, there was significant testimony that distributors had saved money by dropping Turner content: See *AT&T Inc*, above n 9 at 202 and 218.

(b) Undermining the growth of virtual MVPDs

According to the DOJ, the proposed merger would have the effect of giving the merged firm the ability to slow the growth of emerging virtual MVPDs, either by acting unilaterally or in coordination with Comcast-NBCU.[298] However, Judge Leon found this unlikely.[299] AT&T's large wireless customer base and DirecTV Now virtual MVPD service, in conjunction with Time Warner's strategy to distribute content as widely as possible, would position the merged firm to ride industry tailwinds of increased online video consumption in the future. Both the merged firm and Comcast-NBCU were positioned to profit from growth in virtual MVPDs, and AT&T believed its large customer base was a source of competitive advantage. As such, Judge Leon was of the opinion there was no persuasive reason why the merged firm would act, either unilaterally or in coordination with Comcast-NBCU, to slow the growth of the virtual MVPD market.[300]

(c) Restrict distributors' use of HBO as a promotional tool

The DOJ argued the merged firm could refuse to allow competitors access to HBO for promotions, or only give such access on anticompetitive terms.[301] This was based on the view HBO can be used by distributors to draw subscribers, thus making the merged firm lose potential customers and creating an incentive to withhold consent for using HBO in marketing or bundles.[302] Judge Leon disagreed for two reasons. First, there was no economic incentive for the merged firm to foreclose; HBO relies solely on subscriber revenue and affiliate fees. As such, HBO benefits when distributors' promotions reach end users. If HBO's level of promotion through distributors decreased, the entire business model would fall apart.[303] Second, there was no evidence HBO promotions are so valuable that withholding them from competitors would drive customers to the merged firm. Some companies had reduced their use of HBO in promotions and replaced them with substitute premium content providers such as Netflix without loss.[304] Additionally, expert evidence was given that this tactic would not have such a big impact as to substantially lessen competition in the market.[305]

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[298] *AT&T Inc*, above n 9 at 194.

[299] *AT&T Inc*, above n 9 at 243.

[300] *AT&T Inc*, above n 9 at 243-249.

[301] *AT&T Inc*, above n 9 at 194.

[302] *AT&T Inc*, above n 9 at 249-252.

[303] HBO is "low-hanging fruit" for customers looking to shave monthly expenses. This results in high churn for HBO, making the business reliant on promotions run by distributors: see *AT&T Inc*, above n 9 at 251.

[304] *AT&T Inc*, above n 9 at 251-252.

[305] *AT&T Inc*, above n 9 at 252.

As all three identified harms failed to meet their s 7 burden, Judge Leon denied the DOJ's request to enjoin the proposed merger.[306]

## *V Comparison of New Zealand and United States approaches*

This Part seeks to compare how the proposed weaknesses of New Zealand competition law from Part III are dealt with in United States antitrust. This part will compare the regulatory frameworks for media mergers in the United States with New Zealand before discussing two key points of comparative significance between the cases: first, the importance of whether the onus lies on the regulator or the merged parties; and second, defining the relevant markets and the assessment of competitive constraints.[307]

### ***A Comparison of the regulatory framework***

The regulatory frameworks of New Zealand and the United States, while similar in assessing whether there has been a substantial lessening of competition, have significant differences – namely the existence of media ownership rules to protect the public interest instead of using competition law.[308] The media ownership rules were not a concern in the *AT&T/Time Warner* merger as it would not have increased concentration in ownership of media assets. Even if there had been market consolidation, it would not have warranted discussion in the Federal Court decision as the public interest concern with media plurality would have been subject to enforcement by the FCC. Concerns of media diversity and government accountability are therefore segregated from competition analysis in the United States.

In comparison, by finding the Commission could take into account non-economic or out of market detriments when deciding to authorise a transaction, the New Zealand Court of Appeal effectively expanded the public benefit test into a broader public interest test and merged concerns of media plurality with competition analysis. While the Court stated it did not see it as novel for non-economic detriments to be included in the competition analysis, review of the relevant literature shows this was a deviation from standard

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306 *AT&T Inc*, above n 9 at 253.

307 An important caveat to the analysis is the *AT&T/Time Warner* merger was a vertical merger and would not have caused any immediate market concentration. As such, it does not allow for a direct comparison of some aspects with the *NZME/Fairfax* merger which was a horizontal merger and would have increased market concentration.

308 It is worth noting the United States does not have a comparable pre-merger authorisation process.

practice.[309] In effect, it permits the Commission to act as the regulator of any public interest aspect of a merger, instead of the regulator of competition which is what the statutory framework provides.[310] In doing so, the Court allowed the Commission to fill a perceived gap in media regulation even though "the Act manifestly is not designed to regulate the media".[311] The Court allowed this while recognising that accounting for non-economic detriments would generally come outside the Commission's internal expertise and that consideration of such issues would further complicate merger analysis, introducing additional uncertainty as to what mergers are likely to be accepted. This paper proposes this represents a shift further to the left of New Zealand's current post-Chicago approach on the spectrum of competition law theories, closer to the Harvard School.[312]

While it is recognised that a regulatory model for media mergers should consider the public interest in diversity of voices, pluralism, journalistic quality, and freedom of expression, this paper suggests the United States approach of specific media ownership rules are a better conduit for doing so. This is preferable as it allows an orthodox application of post-Chicago competition analysis that focusses on the relevant competitive issues and whether a merger should be allowed to proceed based on economic efficiencies which benefit consumers. Further, it prevents the courts or regulators from adopting subjective policy stances as the public policy concerns have already been addressed by the Government when forming clear rules for how the public interest should be addressed.

### *B Importance of where the onus lies*

Both the *SKY/Vodafone* and *AT&T/Time Warner* mergers were cases where it was difficult to assess the future state of the market, given the fast-changing media landscape. In such cases, where the onus of proof lies is extremely important.

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309 *NZME Ltd* (CA), above n 7 at [74]; See Hertogen, above n 172; See also Ahdar "The Authorisation Process and the 'Public Benefit' Test", above n 176 at 235; Kingsbury, above n 2 at 12; *Gault on Commercial Law*, above n 176 at [CA67.01]; Hampton and Scott, above n 10 at 319 and 326-330.

310 See Hertogen, above n 172 at 1168.

311 The Court rejected the notion the Commission was filling a perceived gap in media regulation: *NZME Ltd* (CA), above n 7 at [78]. However, the Commission recognised that if it did not address the public interest in media plurality it would not be addressed at all, signaling it was filling a perceived gap: see *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [117]. Further, the Commission acknowledged there were no media ownership restrictions in New Zealand to constrain the firms from merging, but stated the importance of media plurality to a "well-functioning democratic society" was too important to overlook: *NZME Ltd and Fairfax NZ Ltd* (NZCC), above n 89 at [X45].

312 This is not a perfect analogy as the United States antitrust theories are limited to economic considerations. However, consideration of the public interest is linked closest to the Harvard School's welfare-based approach and aims of consumer protection.

In the *AT&T/Time Warner* merger, there was no immediate consolidation in market share leading to a presumption of anticompetitive conduct. Thus, the DOJ retained the burden of proof under s 7 of the Clayton Act. Notably, Judge Leon found the regulator failed to establish anticompetitive effects of the merger, not that they could not have existed.[313] Given the technical nature of the case and the in-depth, fact specific economic analysis required, it is arguable that had a presumption of harm applied due to increased market concentration, the result may have gone the other way. As such, the *AT&T/Time Warner* merger serves as a useful illustration of the high threshold required to prove the anticompetitive effects of a merger, and why the onus can be such a powerful tool.[314] Conceivably, the onus can even be the cause of harm to mergers when it applies in circumstances where the regulator may not have been able to produce sufficient evidence to satisfy the burden of s 7. This approach is pro-business as it allows mergers to proceed where the regulator fails to meet the burden of proof.[315] The United States pre-merger notification regime merely operates to allow the regulator time to file suit to prevent the merger. It does not operate to switch the onus onto the merging parties as it is still the regulator which must decide whether to file suit to prevent the merger if there are concerns of a substantial lessening of competition. It also acknowledges the other powers of the FTC to regulate competition issues ex-post.

In comparison, in the *SKY/Vodafone* merger the onus was firmly on the merging parties to satisfy the Commission there was no substantial lessening of competition when seeking clearance for the merger.[316] This not a formal standard of proof, but means the Commission or court must come to “the required affirmative conclusion” to grant a clearance.[317] As the Commission was left “in doubt”, it declined the clearance even after acknowledging it was challenging to assess how the proposed merger would impact the relevant markets.[318] As such, the merger was declined even though it is unlikely the Commission could ever have proved the merger would have been anticompetitive. This acts as a serious constraint on merger activity in New Zealand. The Commission’s position as decision-maker operates to

313 *AT&T Inc*, above n 9 at 253.

314 Notably, the last merger case the FTC lost was also in a case where the presumption of anticompetitive effects due to market consolidation did not apply: Federal Trade Commission “FTC Dismisses Complaint against Steris and Synergy” (press release, 30 October 2015).

315 *Arch Coal Inc*, above n 253 at 116.

316 The same also applies to authorisation applications: see *NZME Ltd* (CA), above n 7 at [86]-[88].

317 *Robertson v Police* [1957] NZLR 1193 at 1195 (SC) per Adams J; see *Z Dental Complaints Assessment Committee* [2008] NZSC 55 at [26] per Elias CJ.

318 *Sky and Vodafone merger*, above n 8 at [39].

change the burden of proof from being on the Commission, if it was to challenge the merger under s 47, to a burden on the merging parties to show the Commission was wrong if they choose to appeal the Commission's determination to the High Court.[319] The "in-doubt" rule extends this asymmetry as the factual and counterfactual scenarios the Commission must assess are often "necessarily incapable of accurate assessment".[320] The result is that the Commission is able to prevent a merger from proceeding on the basis it is anticompetitive without ever needing to prove the merger will result in anticompetitive conduct. Nonetheless, firms will not wish to merge without seeking prior clearance as there are significant penalties at risk in addition to being de-merged.[321]

The outcomes in these two cases are very different. This paper suggests New Zealand's approach channels the Harvard School as it allows anticompetitive conduct to be presumed while not being proved through either economic analysis or an increase in market concentration.[322] This is inconsistent with the post-Chicago approach applied throughout New Zealand's competition law. It is proposed a better framework would allow a merger to proceed where the Commission is left in doubt as to whether or not it is anticompetitive. Additionally, this paper suggests that the Commission should bear the onus for the burden of proof if it wishes to stop a merger from proceeding. There should not be an asymmetry in the law where the parties have volunteered to use the notification regime. The onus should continue to lie with the Commission regardless.

### *C Assessment of competitive constraints*

While defining the relevant markets in media mergers is a difficult task, the treatment of competitive constraints when deciding the relevant markets and performing the competition analysis in the *AT&T/Time Warner* merger stands in stark contrast with how it was approached in the *NZME/Fairfax* merger. Where the Federal Court took a forward-looking approach that considered the changing industry landscape presented by vertically integrated, data driven content giants such as Netflix, Hulu, and Amazon, the Commission and High Court assessed that other forms of media outside of newspapers and digital news and the shift to digital advertising provided very little by way of competitive constraints for NZME and Fairfax.[323]

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[319] See *NZME Ltd* (CA), above n 7 at [88]. However, if the Court reaches a different conclusion on the merits then the Commission was wrong "in the only sense that matters": *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 at [16].

[320] *Woolworths Ltd*, above n 107 at [75].

[321] Commerce Act 1986, ss 83-85.

[322] See Part II.B.1 above.

[323] See *NZME Ltd* (HC), above n 105 at [52]; see also *AT&T Inc*, above n 9 at 176 and 197.

The approach in defining the relevant markets was similar between the cases, with both adopting narrow market definitions.[324] This makes the different treatment of competitive constraints all the more perplexing when one considers the common experiences of the merging parties. Parties to both mergers were: operating in industries in structural decline; facing changes in consumer preferences for engaging with media over the internet; experiencing declining subscriber levels; trying to adjust their business models to digital strategies; and suffering reduced revenue due to advertisers switching more of their budgets to targeted digital advertisers such as Facebook and Google.[325]

With the parties to both mergers having similar experiences, one could wonder why this intense competition was acknowledged overseas yet neglected in New Zealand. It begs the question – why do the Commission and High Court not view digital advertisers, such as Facebook and Google, or others news media offerings as providing any sufficient competitive constraints on traditional media companies? One explanation is that the *AT&T/Time Warner* decision takes a future-looking approach to competition that acknowledges globalisation, cross-market competition, and the fast-changing media landscape, where the Commission appears to be stuck looking at the media industry with a strong historic focus and limited emphasis on the unprecedented convergence currently occurring globally in the media industry. The approach of the Commission and High Court most closely aligns with the Harvard School by utilising a narrow market definition which understates the wider competitive constraints faced by the merging firms and does not acknowledge the significant economic benefits through efficiencies.[326] However, the approach of the Federal Court is also not ideal as it artificially constructs a way to assess the wider competitive impact in the competition analysis while not acknowledging the firms compete in the relevant market. As such, a suggested approach is for a broader relevant market definition to be used in such cases. It is proposed the current level of convergence on the media industry by other industries warrants such an approach to sufficiently assess the wide array of competitive constraints on media firms.

## *VI Conclusion*

Internationally, media markets are rapidly being disrupted by massive social and technological change.[327] There is fierce debate surrounding what this change means for the

[324] See *AT&T Inc*, above n 9 at 196; *NZME Ltd* (HC), above n 105 at [175].

[325] See *AT&T Inc*, above n 9 at 170-175; *NZME Ltd* (HC), above n 105 at [3]-[13].

[326] See Part II.B.1 above.

[327] Kingsbury, above n 2 at 8.

future state of competition which has led to divergent treatment of media mergers in New Zealand and the United States.[328] This paper explored New Zealand's regulatory framework for competition law and how it is applied in the context of media mergers before making comparisons with the approach taken in the United States. It was suggested the economic basis for competition law in New Zealand is recognisable on the spectrum between the contrasting Harvard and Chicago School approaches as a post-Chicago approach. Through examining the *NZME/Fairfax* and *SKY/Vodafone* mergers and comparing these with the *AT&T/Time Warner* merger, this paper has illustrated several proposed weaknesses for how media mergers are addressed under New Zealand competition law, namely: the lack of industry-specific rules which address the public interest in media plurality, leading to the public benefit test being widened to incorporate non-economic detriments in competition analysis; the onus being on the merging parties to satisfy the Commission the merger should be able to proceed; and the assessment of competitive constraints in media merger cases and the definition of the relevant markets.

The proposed weaknesses tend to compound together in media merger cases, making it hard for media companies to receive clearance or authorisation to merge. This has increased uncertainty for media executives as to what mergers will be allowed. The Commission and the courts must take a future-looking approach to the assessment of competitive constraints on media firms to allow New Zealand firms to better position themselves for increasing competition from large global companies. With many traditional revenue sources shrinking, and global barriers to competition being broken down by the internet, many New Zealand media firms are likely to face tough times as they transition to new business models and revenue sources in markets where they have significantly less market share. This process will likely be exacerbated if the current aversion for media mergers is not abated.

In conclusion, this paper suggests there are several key lessons which can be observed for New Zealand's regulatory framework of competition law and how it applies to media mergers. The existing model is inadequate to meet the developing needs of the media industry and the cases have taken a shift left towards the Harvard School approach. There is a need for explicit government intervention to develop a better framework to ensure New Zealand has a competitive, diverse and successful media industry in the future.

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