COURT OF APPEAL OF NEW ZEALAND

TE KŌTI PĪRA O AOTEAROA

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MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

***NZME Ltd v Commerce Commission* [2018] NZCA 389**

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

1. The Court of Appeal today rejected an appeal from NZME Ltd and Stuff Ltd and declined to authorise their proposed merger. The Court found that if the appellants were to merge there would be very likely be substantial losses of quality and plurality in various media markets, and those losses clearly outweighed the economic efficiency gains that would flow from the merger.

2. The Court has held as part of its reasoning that the Commerce Act 1986 (the Act) deliberately permits authorisation for mergers on widely-defined public benefit grounds. The Act requires consideration of economic efficiencies arising from a merger, but it does not prevent non-economic factors from being taken into account. Those non-economic factors may be relevant or even determinative in merger applications. The identification and weighting of public benefits (including economic efficiencies) and public detriments is a matter for the Commerce Commission's judgment.

Background

3. The appellants are both major media providers in New Zealand. They sought clearance and authorisation from the Commission for them to merge (the transaction). A clearance application focuses on whether the merger would result in a substantial lessening of competition (an SLC) in relevant markets, and an authorisation application focuses on whether there are public benefits from the merger than nonetheless justify the merger proceeding despite any substantial lessening of competition.

4. The Commission declined clearance and authorisation, finding that there would be an SLC in several relevant markets that both the appellants operated in. It found that the merged entity would be able to rationalise certain costs and generate substantial economic efficiencies compared to each of the appellants alone, though those efficiencies were somewhat reduced by the prospect that the merged entity would introduce a paywall on some of its online news content. It also found that the net efficiencies were clearly outweighed by substantial losses of quality and plurality in media markets.

5. The High Court disagreed that there would be an SLC in one relevant market, and disagreed that a paywall was likely post-transaction. It otherwise agreed with the Commission.

The Judgment

6. The Court of Appeal dismissed the appeal. The Court first considered whether the Commission was able to consider non-economic detriments, such as media plurality. It held that the Commission does have jurisdiction to consider non-economic detriments. Parliament deliberately intended that the Act permit mergers on widely-defined public benefit grounds; this is clear from the legislative history of the Act. The Act makes economic efficiency a mandatory consideration in merger analysis, but other considerations may be relevant or even determinative. Both New Zealand and Australian case law similarly supported a wide approach to public benefit.

7. Having established that the Commission was right to consider media plurality, the Court then turned to the question of whether the Commission or the High Court had erred in the way they had assessed whether particular benefits or detriments were "likely". The Act requires that they be likely, but the High Court had considered a detriment it described as remote: the risk that a foreign owner would exploit the merged entity for political purposes.

8. The Court held that the High Court had erred in doing so. The Act requires that benefits and detriments be likely. Though the consequences of a foreign owner exploiting the merged entity were serious, the chance of that happening was not likely on the evidence and should not have been taken into account. However, the Commission did not make this error and the High Court did not otherwise err.

9. Finally, the Court turned to the merits of the decision not to authorise the transaction. In argument counsel focused on the likelihood that journalism and editorial resources would be cut post-transaction, as that was seen as a proxy for the quality of news in media markets. The Court held that the merged entity would be under a powerful incentive to cut costs and that there would very likely be substantial cuts in journalism and editorial resources, with a corresponding substantial loss of quality.

10. The Court also found that there would very likely be a substantial loss of media plurality post-transaction. New Zealand media markets are highly concentrated by international standards. The merged entity would employ many more journalists and editorial staff than Television New Zealand, Mediaworks and Radio New Zealand combined. The merged entity would be more likely to follow a uniform approach to political issues, and to generate a less diverse range of views in its media.

11. Finally, the Court disagreed with the High Court and held that the merged entity very likely would introduce a paywall on online news content post-transaction. Overall, the economic efficiencies that would flow from the transaction were clearly outweighed by the losses of quality and plurality that would flow from the transaction, and authorisation was accordingly declined.

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