

FREEDOM OF THE PRESS AND NEWSPAPER MERGERS UNDER THE COMMERCE ACT 1986

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I. INTRODUCTION

Even though some press groups do not appear to impose a uniform editorial policy on their several newspapers, that in itself is no protection for the public, since theoretically the policy could be changed at any time. Any further reduction in the number of major competitors in the mass daily newspaper market might possibly in the future have detrimental implications for a reader's freedom of choice¹

The concern expressed by Walker regarding concentration in the Australian newspaper industry is no less pertinent in this country. As in most Western nations, the New Zealand newspaper industry is highly concentrated with three newspaper groups accounting for some seventy-six percent of daily newspaper circulation.² The special nature of the press and the threat to editorial freedom from increasing media concentration have traditionally received explicit recognition in competition policy internationally. New Zealand's former competition statute, the Commerce Act 1975 was no exception. Under the new Act (the Commerce Act 1986) however, the scope for protecting freedom of the press in New Zealand seems to be diminished.

This article begins by considering the special nature of the press in a democratic society. Next some arguments questioning the danger posed by increasing newspaper concentration are examined. Finally, protection of press freedom under the former legislation is contrasted with the more restricted merger control under the Commerce Act 1986.

II. THE SPECIAL POSITION OF THE PRESS

The integral role that newspapers play in a democratic society has rarely been doubted. Public policy affirms the importance of a diversity of voices. As Learned Hand J explained in the American context.³

[The newspaper] industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

There is widespread recognition in the competition policy of many nations that the press is a special case.⁴ Commissions in various countries have

¹ Walker, "The Trade Practices Act 1974 and the Freedom of the Press" (1980) 54 Aust. L.J. 57 at 59.

² *Brierley Investments/NZ News* (1985) 5 N.Z.A.R. 108 at 110. For an illuminating, albeit somewhat dated international survey see Nixon and Hahn, "Concentration of Press Ownership: A Comparison of 32 Countries" (1971) 48 Journalism Q. 5.

³ *United States v Associated Press* 52 F. Supp. 362 at 372 (S.D.N.Y. 1943). See generally, "Media and the First Amendment in a Free Society" (1972) 60 Geo. L.J. 871 at 891-907.

⁴ See Litvak and Maule, "Competition Policy and Newspapers in Canada" (1983) 28 Antitrust Bulletin 461 at 462; *Brierley Investments*, supra n. 2 at 111-112.

been established to investigate carefully possible dangers to freedom of the press from growing concentration of press ownership.⁵ More importantly, the antitrust regimes of such nations have explicitly recognised the *sui generis* nature of the newspaper industry through specific legislative measures.

In the United Kingdom, for instance, newspapers are singled out and subjected to closer scrutiny than other products.⁶ The Fair Trading Act 1973 provides that the transfer of a newspaper to a proprietor whose papers would then have an average daily circulation of 500,000 or more is unlawful and void without the Secretary of State's consent.⁷ Faced with growing monopolisation of the press, the West German parliament in 1976 approved the Third Amendment to the Act Against Restraints of Competition 1957, thereby subjecting mergers in the newspaper industry to greater scrutiny than previously.⁸ Conspicuously less successful however, has been the Newspaper Preservation Act passed by the U.S. Congress in 1970.⁹ The purpose of this Act is to promote editorial diversity by preserving otherwise failing newspapers in a particular town or region. Accordingly, such financially troubled papers are provided with antitrust exemption should they form a joint operating arrangement satisfying certain criteria. Unfortunately, the Act "creates problems that defeat the Act's purpose."¹⁰ Once a joint operating arrangement is entered into, new papers face an extremely difficult task in getting started in that market.¹¹ Moreover, by permitting newspaper chains to participate, the Act facilitates the trend to increased chain ownership with its incumbent dangers.¹² Ironically by selecting joint operating arrangements as the method of saving troubled newspapers, the Act "foster[s] monopolies and chains not independent voices."¹³

Turning to New Zealand only one specific legislative measure, the News Media Ownership Act 1965 (repealed in 1975) has exclusively focused upon newspaper ownership. This Act was enacted in response to perceived threats of foreign control of domestic papers¹⁴. However, the Commerce Act 1975

⁵ E.g. "Report of Royal Commission on Newspapers" (Ottawa: Minister of Supply and Services, 1981) (Kent Commission); Council of Europe, "Report of the Committee of Experts on Press Concentrations" (Strasbourg, 1974); "Royal Commission on the Press" (Cmd. 6810, 1977) (United Kingdom).

⁶ See Korah, *Competition Law of Britain and the Common Market* (3rd rev. ed. 1982) at 74; Merkin and Williams, "Competition Law: Antitrust Policy in the UK and the EEC" (1984) at 273.

⁷ Section 58.

⁸ Act of June 28, 1976 (1976) Bundesgesetzblatt 1 1697. See Hollman, "Antitrust Law and Protection of Freedom of the Press in the Federal Republic of Germany". (1979) 24 Antitrust Bulletin 149 at 154.

⁹ 15 U.S.C. 1801-1804 (1982) See Note, "The Newspaper Preservation Act: The Seattle Application" (1982) 1982 U.Ill.L. Rev. 669.

¹⁰ Ibid at 689.

¹¹ Ibid at 690-691.

¹² Ibid at 693-696. The Note author (A.M. Carlson) argues persuasively and sensibly that the Act should be amended to apply only to independent newspapers.

¹³ Note, "The Newspaper Preservation Act: Why it fails to preserve newspapers" (1984) 17 Akron L. Rev. 435 at 452. See also Note, "Failing Newspapers or Failing Journalism: The Public versus the Publishers" (1970) 4 U.S.F.L. Rev. 465 at 488: "[T]his legislation involves no less than government-sanctioned monopoly. That is the practical result when the barriers to entry in a market become a veritable fortress of price-fixing and profit-pooling."

¹⁴ *Brierley Investments*, supra n. 2 at 112.

recognised the special sensitivity of the press by the inclusion of “the publishing of daily newspapers or both” as a specific item in the Third Schedule of the Act. The 1986 Act continues this particular recognition in its First Schedule, although it differs markedly (as we shall see later) in certain other respects.

Three distinct strands to the danger to press freedom from increased newspaper concentration can be identified.¹⁵ First, and most obvious, is the concentration of newspaper ownership itself and its threat to democratic processes. As Hollman observes:¹⁶

[D]angers in the growing concentration of the press are that newspapers will not be able to maintain their function of criticizing and controlling the political and economic powers in a democratic society and that a few publishers will co-ordinate the publishing policy of a variety of newspapers in one direction. Moreover, the likelihood is great that journalists will feel even more pressure to conform to publishers' and advertisers' wishes in the future, as the number of jobs available in the field continue to shrink ... because of the growing monopolization of the trade.

Second, cross-media ownership (i.e. a combination of different media outlets such as radio/newspapers or television/newspapers) may similarly threaten editorial freedom. Thus in both Canada¹⁷ and New Zealand¹⁸ recently, Ministerial directives have curtailed newspaper enterprises from expanding their media interest into the broadcast media. Third, joint ownership of media and non-media interests may pose problems. The editor of a newspaper belonging to a large diversified corporation may feel stifled in criticising the other business operations of the conglomerate, an issue which arose in *Brierley Investments/NZ News*.¹⁹ American publisher William Randolph Hearst once cautioned:²⁰

I rather think the influence of the American Press ... is declining. This I believe is because so many newspapers are owned or influenced by reactionary interests and predatory corporations, and are used selfishly to promote the welfare of these reactionary interests, rather than the welfare of the public.

III. IS FREEDOM OF THE PRESS REALLY ENDANGERED?

The perceived dangers from increased newspaper concentration are viewed by some as misplaced or exaggerated.²¹ Five such contentions will now be examined.

¹⁵ Litvak and Maule, *supra* n. 4 at 478.

¹⁶ *Supra* n. 8 at 152.

¹⁷ “Direction to the C.R.T.C. on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors” (July 29, 1983). See Townsend, “Regulation of Newspaper/Broadcasting, Media Cross-ownership in Canada” (1984) 33 U. New Brunswick LJ 261.

¹⁸ Policy directive to the Broadcasting Tribunal from the Minister of Broadcasting (15 November 1984). See *Brierley Investments supra* n.2 at 112.

¹⁹ See *supra* n. 2, at 113 and 120.

²⁰ Quoted in Litvak and Maule, *supra* n. 4 at 478.

²¹ See e.g. Loevinger, “Media Concentration: Myth and Reality” (1979) 24 Antitrust Bulletin 479 at 481: “Most of those who loudly proclaim mass media ‘concentration’ ... recite a litany of clichés and buzz words, which merely repeats the same rhetoric that has been used by media critics for at least the last 50 years, regardless of changing technological, economic and social circumstances.”

See also the submission of NZ News in *Brierley Investments supra* n.2 at 115: “[T]he ‘independence of the press’ was a wonderful topic which gave all and sundry the opportunity to berate the so-called proprietors of the day”.

(1) *Erroneous market definition*

Concerning the appropriate market definition when evaluating the impact of increasing newspaper concentration, Litvak and Maule ask:²²

Do daily newspapers compete only with the other daily newspapers in the same regional market, or do they compete with other weekly newspapers, periodicals and the broadcast media (radio and television) as well?

Loevinger strongly argues, for instance, in favour of a broad market definition. When newspapers are seen as part of the broad mass communication market then concern is unjustified for “the mass media field is far from being concentrated or monopolistic”.²³ The Canadian Kent Royal Commission however gave two important reasons for preferring a narrow market definition.²⁴

First, [print] is the medium of record, which generally gives more detail than the others, which explores issues in more depth, and which stands as the source to which people refer back. Second, the daily newspapers are still the main originators, gatherers and summarizers of news.”

Moreover in both the United States²⁵ and New Zealand, newspapers have been recognised as constituting a distinct submarket separate from other media. In *Brierley Investments/NZ News* the Commerce Commission stated:²⁶

We think, in this context, that the product market is that of daily newspapers rather than that of the media generally ... Newspapers perform distinctly different and important functions from the news dissemination activities of other media - particularly in coverage, depth and availability at a time convenient to the consumer. We have taken into account that there is nevertheless competition between all media and that there are news services provided by television, radio, weeklies, magazines etc. However, we are guided by the special place which newspapers presently have in the market, their price, and the fact that industry sources appear to consider that newspapers are an identifiable market segment.

2. “*Natural monopoly*”

Some argue that natural economic forces dictate that a town or region retain only one daily newspaper.²⁷ Thus one-newspaper cities are “natural monopolies”.²⁸ Coupled with the economies of scale explanation is what has been termed the “downward spiral” or “vicious cycle” theory. Carlson

²² Supra n. 4 at 469.

²³ Supra n. 21 at 486.

²⁴ *Report of Royal Commission on Newspapers*, supra n. 5 at 216.

²⁵ See *United States v Times Mirror Co* 274 F. Supp. 606 at 617 (C.D. Cal. 1967): “[T]he daily newspaper business is a distinct line of commerce and is a product separate and distinct from any other product. It has sufficient peculiar characteristics and uses which make it distinguishable from all other products” (per Ferguson J).

²⁶ Supra n. 2 at 119.

²⁷ See Loevinger, supra n. 21 at 483: “[W]hat has happened in the daily newspaper field is that only large cities have been able to support multiple metropolitan dailies and so competition has increasingly become intercity and regional rather than intracity”. See also Comment, “Local Monopoly in the Daily Newspaper Industry” (1952) 61 Yale LJ 948 at 1005.

²⁸ This term has been defined as a:

“monopoly resulting from economies of scale, a relationship between the size of the market and the size of the most efficient firm such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering that business. In this situation, competition may exist for a time but only until bankruptcy or merger leaves the field

explains the the relationship between the quality, circulation and advertising revenues of a paper as follows:²⁹

Newspapers derive most of their revenue from the sale of advertising space. Advertisers prefer the newspaper with the largest circulation ... A newspaper with a smaller circulation attracts fewer advertisers and therefore has less money to spend on its news and editorial departments. The resulting lower quality of the paper leads to a loss in circulation, which in turn leads to lower advertising revenues; the cycle continues until the newspaper folds.

However as Roberts points out no study has been made to establish the minimum size a city or region must be before competition can economically be sustained.³⁰ Furthermore, even granting the hypothesis that 'downward spiral' forces dictate one-newspaper cities, this does not mean that *nationally* concern is unwarranted (viz nationwide chain ownership). It is one thing to accept that natural economic forces dictate non-competition within cities, it is another to assert that economics similarly dictate that nationally, newspapers must be owned by chains. That one or more chains are 'natural monopolies' throughout a nation is clearly more tenuous.

3. *Empirical evidence lacking*

Some view the pursuit of press pluralism as a public policy goal as "little more than an article of faith resting upon a theoretical foundation".³¹ The empirical validity of the concentration-uniformity hypothesis is challenged:³²

No objective study appears to have been made of the effect of group ownership on the independence of local editors in determining news and editorial policy.

Obviously there are severe difficulties in empirically testing such subjective matters as newspaper quality or editorial independence. The relatively little empirical research that has been undertaken in this area ³³ tends to favour the link between newspaper concentration and greater uniformity however.³⁴ Summarising early studies Roberts observed:³⁵

Several studies since 1952 have compared monopolistic with competitive newspapers. Although they do not detect spectacular differences, the studies do counter the argument in favour of monopolies.

A later review by Carlson likewise concluded that newspapers in a chain do tend to present similar viewpoints and editorial opinions.³⁶ For example, Thrift found that an independent newspaper's editorials became less vigorous

to one firm."

Ovitron Corp. v General Motors Corp. 295 F. Supp. 373 at 377 n. 3 (S.D.N.Y. 1969). For discussion of natural monopolies see Sharkey, "The Theory of Natural Monopoly" (Cambridge University Press, 1982). An interesting statistic noted by Patkus is that only 29 U.S. cities have two or more independent daily newspapers: see *supra* n. 13 at 446.

²⁹ *Supra* n. 9 at 671-672.

³⁰ "Antitrust Problems in the Newspaper Industry" (1968) 82 Harv. L. Rev. 319 at 354.

³¹ Comment, *supra* n. 27 at 1007.

³² Oppenheim and Shields, *Newspapers and the Antitrust Laws* (1981) at 241.

³³ Compaine, *Who owns the Media* (Crown Publishers, 1979) at 26.

³⁴ One dissenting voice is Compaine, *ibid* at 42 (few differences between competitive and non-competitive newspapers concerning editorial product).

³⁵ *Supra* n. 30 at 323.

³⁶ *Supra* n. 9, at 695.

and argumentative after acquisition by a chain.³⁷ All this assumes that the onus is upon media ‘watchdogs’ to establish the harmful link. Equally however, the burden could be placed upon media apologists to show increasing newspaper concentration is innocuous.

4. *Information overload*

Echoing sentiments developed by Toffler,³⁸ Loevinger argues that a greater problem than media concentration is the much sought after diversity of opinion which produces “a confusion arising from the plethora and cacophony of voices”.³⁹ The public is being deluged with an overload of media messages. However, this justification for media uniformity seems to the present writer specious. To reiterate,⁴⁰ any possible confusion engendered from a wealth of diverse communication would surely be outweighed by the social loss incurred through rationed, possibly partisan information.

5. *Legislative intervention itself an affront*

In *Brierley Investments*, the public submission from the Otago Daily Times challenged the fundamental assumption of intervention, namely whether restrictions as to circulation, shareholding etc. should be applied at all?⁴¹ In their view it was presumptuous for anyone other than the individual reader to judge an undue degree of influence on public opinion or news accuracy.⁴² However as the Commerce Commission emphasised, intervention is not with any intent to take away fundamental property or publication rights. The power to intervene arises instead because the exercise of such rights (especially where oligopolistic market structures are appearing) may impinge upon democratic ideals.⁴³ The U.S. Supreme Court explained the compatibility of antitrust law and press freedom:⁴⁴

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public ... Freedom to publish is guaranteed under the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from government interference under the First Amendment does not sanction repression of that freedom by private interests.

³⁷ “How Chain Ownership Affects Editorial Vigor of Newspapers” (1977) 54 *Journalism Q.* 327. See also Wackman et al “Chain Newspaper Autonomy as reflected in Presidential Campaign Endorsements” (1975) 52 *Journalism Q.* 411 (chains not independent in their political endorsement editorial policies); Grotta, “Consolidation of Newspapers: What happens to the Consumer?” (1971) 48 *Journalism Q.* 245 (benefits from chain ownership are not passed on to consumers).

³⁸ See Alvin Toffler, *Future Shock* (1970) at 250: “[T]here comes a time when choice, rather than freeing the individual becomes so complex, difficult and costly, that it turns into its opposite. There comes a time, in short, when choice turns into overchoice and freedom into unfreedom”.

³⁹ *Supra* n. 21, at 489.

⁴⁰ See Ahdar, “Regulating Mergers upon Socio-Political Grounds in New Zealand” (1986) 12 *N.Z.U.L.R.* 49 at 56.

⁴¹ See *supra* n. 2 at 116.

⁴² *Id.*

⁴³ *Ibid* at 118.

⁴⁴ *Associated Press v United States* 326 U.S. 1 at 20 (1944) (per Black J).

IV PROTECTING FREEDOM OF THE PRESS UNDER THE COMMERCE ACT

To understand better the change brought about by the Commerce Act 1986 it is necessary to begin with an examination of newspaper mergers and press freedom under the former legislation.

1. *Newspaper mergers under the Commerce Act 1975*

The broad scope of the Commerce Commission's inquiry in respect of newspaper mergers under the former Act was defined in the leading decision *Brierley Investments/NZ News*⁴⁵. The Commission stated the position then as follows:⁴⁶

...[T]he Commerce Commission is given an 'at large' discretion in relation to merger or takeover proposals. The Commission is directed by s.80 of the Act when considering any such proposal, to determine whether it is or is likely to be contrary to the public interest, and in particular to have regard [in s.80(b) (vii)] to 'any effects aiding the well-being of the people of New Zealand.' Such a determination may include questions as to whether any concentration of ownership caused by any such proposal restricts competition, or causes an undue degree of influence on public opinion. It also may include questions such as whether the proposal may affect the accurate presentation of news, and the free expression of opinion, and whether the editor may without dictate of management decide what is printed in the paper.

On appeal to the High Court, Brierley argued inter alia that the Commission was not entitled to consider such matters as editorial freedom under s.80(b)(vii).⁴⁷ Because of the finding on the facts, it was unnecessary for Davison CJ to deal with this point.⁴⁸ The issue was deferred "to await a future case when the question becomes essential to the decision",⁴⁹ a time which would never eventuate due to the emergence of the 1986 Act.⁵⁰

The *Brierley Investment* decision raised many interesting issues. Brierley sought to increase its existing 40% shareholding in NZ News to over 50%. The Commission, in view of the national importance of the proposal, invited and received public submissions.⁵¹ Four main issues arose. First, did the proposal restrict competition? second, what (if any) were the appropriate limits on circulation in New Zealand by any one group? third, was Brierley's concentration of ownership in NZ News objectionable? and fourth, did the proposal impede editorial independence? Regarding competition, the Commission found no major anti-competitive effect resulted.⁵² Furthermore, as daily newspaper circulation was unaffected by the proposal, there was no need for the Commission to express a definitive view on the circulation limits for New Zealand.⁵³ On the latter two issues however, the proposal

⁴⁵ *Supra* n. 2.

⁴⁶ *Ibid* at 113. This passage was reaffirmed by the Commission in *John Fairfax/Fourth Estate Holdings* (1985) 5 NZAR 283 at 287.

⁴⁷ *Brierley Investments v Commerce Commission* (1986) 6 NZAR 25 at 31-32.

⁴⁸ The High Court examination of the evidence showed no reasons for concluding that the proposal would be contrary to the public interest because of any perceived effects upon editorial independence: *id.*

⁴⁹ *Ibid* at 32.

⁵⁰ Within three months of the High Court decision (3 February 1986), the Commerce Act 1986 was passed (28 April 1986) and came into force (1 May 1986), repealing the 1975 Act.

⁵¹ See *supra* n. 2 at 113-118 (submissions from five organisations summarised).

⁵² See *ibid* at 119.

⁵³ Although the Commission did proffer a "tentative view ... that no one newspaper group should aspire, by merger or takeover, to more than one third of total circulation of daily newspapers in New Zealand": *ibid* at 120.

founded. A maximum 40% ownership by any single person or company (i.e. Brierley's present shareholding in NZ News) in any one of the three major newspaper chains was viewed by the Commission as the maximum permissible in the interests of safeguarding editorial freedom.⁵⁴ Accordingly, Brierley was curtailed in its attempt to increase its shareholding. Secondly, assurances from Brierley as to continued editorial freedom post-merger were rejected, the Commission taking the view (implicitly) that in the present case editorial independence standing alone would not be preserved.⁵⁵ Thus consent to the proposal was denied.

Both of these grounds were successfully challenged by Brierley on appeal. If Brierley by virtue of its 40% shareholding already had effective control (or 'dominance') in NZ News, then the rationale for prohibiting the acquisition disappeared.⁵⁶ Expert evidence confirmed that Brierley already had "actual de facto control" of NZ News.⁵⁷ Domination of a major chain already existed, thus the increased shareholding made no difference. Secondly, the High Court viewed the silence of the Commission on exactly how editorial independence was threatened as damning. The High Court's view of the evidence found it fell "far short of making any finding that there exists a danger to editorial independence."⁵⁸ In reversing the denial of consent however, the Court considered it "prudent" to impose three conditions reflecting preservation of editorial freedom.⁵⁹

Before considering the position under the new Act, two features emerging from pre-1986 caselaw merit mention. First, the impact upon competition from the newspaper merger proposals was almost invariably evaluated by the Commission as neutral or benign.⁶⁰ Having defined the market, there was simply the creation of a larger shareholder after acquisition, there being no increase in market share. The acquirer and acquired firm operated in different regions. In antitrust parlance, the mergers can be described as geographic market extension mergers,⁶¹ a type of conglomerate merger. Attributing competitive detriment to conglomerate mergers has been

⁵⁴ Ibid at 1201-21. The Commission was careful to emphasise this was no comment upon Brierley Investments personally: Ibid at 121.

⁵⁵ Ibid at 122.

⁵⁶ See supra n. 47 at 30.

⁵⁷ Ibid at 31.

⁵⁸ Id.

⁵⁹ Ibid at 32. Although by then academic, the Commission in *New/Independent Newspapers*, infra n. 66 at 55, pointed out that conditions under the 1975 Act, could only be imposed where there was a positive finding that the proposal was or was likely to be contrary to public interest (see s. 78 of the 1975 Act). No such finding was made by the High Court in *Brierley Investments*.

⁶⁰ See *Brierley Investments*, supra n. 2 at 119; *Wilson & Horton/United Publishing and Printing*, Commerce Commission Decision No. 106 (19 December 1984) at para 6; *Independent Newspapers/Timaru Herald* Commerce Commission Decision No. 107 (19 December 1984) at para. 7; *John Fairfax/Fourth Estate Holdings*, supra n. 46 at 286. The newspaper industry is basically regional in nature in New Zealand as it is overseas. Thus 'head on head' competition rarely exists except in the regions or cities of sufficient size to support two newspapers. Most newspapers operate in 'natural monopoly' areas: see Comment, "Antitrust Malaise in the Newspaper Industry: The Chains Continue to Grow" (1976) 8 *St Mary's L.J.* 160 at 161-162.

⁶¹ I.e. the situation where the merging firms manufacture of market the same products but in different geographic markets. See von Kalinowski, *Antitrust Laws and Trade Regulation* (1983) Vol. 3, at para. 17.05 [1].

notoriously difficult.⁶² Second, the Commission on several occasions was strongly influenced in granting consent by voluntary assurances from the acquirer of continued editorial freedom.⁶³ Such a practice is not without drawbacks. Ensuring compliance might involve onerous monitoring and even upon recognition of a breach, difficult questions of enforceability remain.⁶⁴ Arguably the approach of the Commission in *Brierley Investments*⁶⁵ (i.e. that editorial independence stand on its own unbuttressed by assurances) was wiser.

2. *Newspaper Mergers under the Commerce Act 1986*

Explicit clarification of the scope of the new Act so far as protection of press freedom is concerned, came in the first merger proposal decided under the 1986 Act. In *News/Independent Newspapers*⁶⁶ the Commission gave a clearance to proposal whereby News Ltd (a wholly owned subsidiary of Rupert Murdoch's multinational News Corporation) increased its shareholding from 21.68% to 40% in one of New Zealand's major newspaper groups, Independent Newspapers Ltd.⁶⁷ The decision confirmed an earlier view expressed by the present writer that potential socio-political harm from mergers is irrelevant.⁶⁸ The creation or strengthening of market dominance is now the sole ground of illegality for mergers.⁶⁹ The clear position is that:⁷⁰

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

As with newspaper merger determination under the former legislation, the Commission found no serious adverse effects upon competition from the acquisition before them. Because of the "visible" rivalry presented by the other two major newspaper chains (NZ News and Wilson & Horton) the Commission "[did] not think that the proposal could be said to result in either News Corp. or News or INL having a dominant position in daily newspaper publishing."⁷¹ In granting clearance, the Commission did not

⁶² See the recent statement by the former U.S. Assistant Attorney General (Antitrust), J.P. McGrath, "Merger Policy Today" 5 Trade Reg. Rep. (CCH) at para 50, 463. The difficulty stems from the fact that conglomerate mergers do not result in the elimination of a competitor nor in the direct foreclosure of competition. Moreover since the acquisition merely substitutes one owner for another it does not have any direct or immediate effect on concentration in the acquired firm's market: See von Kalinowski, *ibid* at para. 17.04[3].

⁶³ See *Wilson & Horton/United Publishing and Printing*, *supra* n. 60 at para. 10; *Independent Newspapers/Timaru Herald* *supra* n. 60 at paras 5 and 9; *John Fairfax*, *supra* n. 46 at 285 and 288.

⁶⁴ See Reisenkampff and Gerber, "German Merger Controls: The Role of Company Assurances" (1977) 22 Antitrust Bulletin 889 at 903 and 906; Windblicher, "Informal Practices to avoid Merger Litigation in the U.S. and West Germany: a comparison" (1980) 25 Antitrust Bulletin 619 at 645 and 654.

⁶⁵ See *supra* n. 2 at 122.

⁶⁶ (1986) 6 N.Z.A.R. 47.

⁶⁷ Thereby giving the Murdoch corporation "actual de facto control" of Independent News to use the reasoning of the High Court in *Brierley Investments*.

⁶⁸ See Ahdar, *supra* n. 40 at 50.

⁶⁹ See *News*, *supra*, n. 66 at 49: "Under the 1986 Act, the Commission ... can only refuse consent to the [merger or takeover] proposal upon competition grounds".

⁷⁰ *Ibid* at 54-55.

⁷¹ *Ibid* at 53.

adopt Independent Newspapers' written undertakings (prompted by the Examiner) as to continued editorial independence nor impose them as a condition of its consent. As the Commission explained:⁷²

[T]he 1986 Act does not empower the Commission or the Court or impose conditions (of any kind at all) in granting consent to a proposal.

In deference to the issues at stake however, it was careful to emphasise that:⁷³

Needless to say, the Commission endorses ... the principle of independence of the press and editorial freedom and welcomes the long established and continuing policy of INL and its willingness to give such undertakings.

3. *Future prospects under the 1986 Act*

Following *News/Independent Newspapers* the scope for curtailing newspaper mergers and safe guarding editorial freedom appears diminished. Notwithstanding the exclusion of danger to press independence as a ground for prohibition, it seems unlikely however, that the current tripartite oligopoly in the daily newspaper industry will become a duopoly. In other words, the market dominance test should prevent one of the 'Big Three' newspaper groups from acquiring the other. The equivalent Australian merger test (upon which the New Zealand provision is closely modelled) was viewed by Walker as effective to prevent a reduction in the number of major Australian newspaper competitors:⁷⁴

... s.50 would seem to prevent any further concentration in the ownership of major newspapers, since the acquisition by any of the three major groups - John Fairfax Ltd, News Ltd, and HWT [Herald and Weekly Times Ltd] - of a controlling interest in any of the others, as they stand, could not fail to result in a position of control or dominance in the markets in one of more States.

However, the possibility seems open that one of the major New Zealand chains might acquire small independents and thereby increase its circulation share⁷⁵. As none of the major chains is currently in a dominant market position, systematic acquisition of tiny independent papers could not create or strengthen a dominant position in any single chain at least up to a certain point.

V. CONCLUSION

The daily newspaper industry in New Zealand is highly concentrated. Given the extreme unlikelihood of deconcentration occurring in the near future, we must live with concentrated ownership. Perhaps the time has come to consider efforts such as West Germany's emerging legislative attempt

⁷² Ibid at 55. This point was confirmed in *Wrightson NMA/Dalgety Crown* (1986) 6 N.Z.A.R. 152 at 154.

⁷³ Supra n. 66 at 55.

⁷⁴ Supra n. 1 at 58. For fuller discussion of Australian merger control see Walker, "The Trade Practices Act 1974 and Mergers in the Newspaper Industry" (1981) 9 A.B.L.R. 322.

⁷⁵ As this article was being sent to the printers, two recent decisions of the Commission have borne this out: See *NZ News/New Plymouth Star*, Commerce Commission Decision No. 176 (2 October 1986) and *Independent Newspapers/Thames Valley News*, Commerce Commission Decision No. 180 (5 November 1986)

to neutralise existing press concentration by pursuing pluralism within the existing concentrated structure.⁷⁶ As Hollman contends:⁷⁷

As there is not a large number and variety of different independent newspapers, the variety and diversity of opinions within a newspaper must be secured by establishing an internal freedom of the press i.e. by insuring certain rights and independence of journalists against their publishers or the newspaper concern they are employed by.

Certainly, there is no cause for complacency. In the past year, two of the three major newspaper chains have been acquired by large conglomerates; NZ News by a domestic conglomerate (Brierley) and Independent Newspapers by a foreign multinational (News Corp.). Furthermore the Commerce Act 1986 might be termed a retrograde step so far as safe guarding freedom of the press through antitrust policy is concerned.

A call for vigilance might be construed by some as unnecessary alarmism. Yet is not being alarmist surely to reiterate the view that “[n]othing is more vital to democratic processes than the reporting of news events and the dissemination of editorial comment and analysis and no industry is more important in the performance of these functions than the newspaper industry.”⁷⁸

⁷⁶ A proposed statute was drafted by the Federal Ministry of the Interior, 25 September 1974, seeking to protect the general journalistic orientation of a newspaper. For discussion see Hollman, *supra* n. 8 at 167-168.

⁷⁷ *Supra* n. 8 at 165.

⁷⁸ Statement by the co-sponsors of the Newspaper Preservation Act 1970 (U.S.): Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcomm. of the House of Comm. on the Judiciary, 91st Cong., 1st Sess. 105 at 279 (1969). Quoted in Note, *supra* n. 9 at 669 n. 1.