

Competition and media reform

EXTRACT FROM SPEECH BY GRAEME SAMUEL AO, CHAIRMAN, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, TO INFORMATION COMMUNICATIONS ENTERTAINMENT CONFERENCE, CANBERRA, 24 NOVEMBER 2006

There is no doubt that technological change has arrived, and with the pending introduction of new media ownership laws we will see some reshaping of the media as we know it ... As media owners assess the new media landscape, the arrival of the digital age and convergence and changing advertising patterns will heighten the level of uncertainty of exactly what the future might look like. In these rapidly changing times, the challenge for regulators is to ensure that the Australian public is best positioned to benefit from any developments that occur ... The new tools that have been put on the table recently can probably be best described as primarily diversity safeguards, but the competition safeguards contained in the Trade Practices Act remain in existence and will continue to play an essential role.

In relation to media mergers, there will be a five–four voices rule, which says that in metropolitan Australia, we must have at least five voices; in rural or regional Australia, there must be at least four voices. There's a two-out-of-three rule that's been implemented that restricts one company from owning radio, TV and newspaper businesses in the same market, both regionally and in the cities. They can own two of those, but not all three. These rules will ultimately be administered by ACMA, but perhaps a more important test for the ACCC will be testing proposed mergers against existing legislation contained in the Trade Practices Act that is designed to protect competition.

Competition is the driver of diversity; it promotes lower prices and the incentive for service providers to trump their competitors by striving to offer better services. Consumers are the winners, and reward those businesses that offer them the best services at the best prices ... It's a philosophy that has been successfully followed throughout our economy for more than 30 years and remains one of our

most useful and flexible tools in ensuring the best outcomes for consumers in what by global standards is a relatively small market. At its heart is section 50 of the Trade Practices Act, which prevents mergers that potentially represent a substantial lessening of competition from proceeding ... There was a 44 per cent increase in the number of mergers assessed during 2005–06 compared to the previous year, and the trend is continuing this financial year with 127 matters already considered by October 30.

You might easily pass the five–four rule; you might easily pass the two-out-of-three rule. These in themselves will be important tests that media companies will need to satisfy to gain approval of a merger, and these safeguards will be monitored by ACMA ... It is important to remember that these new hurdles are additional to existing requirements, including the need to satisfy section 50, which will be the ACCC's focus. ACMA will have its job to do in assessing any media mergers that arise, and so will the ACCC.

Companies that may once have been thought of as a newspaper or



radio station, may in the future need to be considered more as 'media companies' ... The evolution of online arms of what have traditionally been media companies confining themselves to a particular media type have made it necessary for all those involved, including regulators, to rethink some of the definitions used in the past ... With newspapers now offering video and audio content, radio and television stations offering written updates and on-demand content and all three embracing blogging, podcasting and other relatively new ways of interacting with their audiences, the evolution of these businesses is making many of our traditional tools for assessing media markets somewhat outdated.

Our focus may shift from the way information is delivered to the actual

products media companies offer ... we'll be focusing on advertising, classified or display, ... news, opinions, sport, entertainment—any range of markets that you can possibly contemplate—as well as different geographic markets ... In local regional markets, the diversity of news and information that might be available is likely to be much more concentrated at present because of the sheer size of the markets than perhaps might occur in major metropolitan cities. A merger in a regional market that further increases an already concentrated environment for news and information is likely to find it much more difficult to pass under the Trade Practices Act than potentially mergers in the major cities.

We'll be asking whether mergers might give rise to competition issues

in relation to the supply of content to consumers ... or acquiring content from content suppliers. In the past, the ACCC has regarded the media as four distinct products—free-to-air television, pay television, radio and print ... As those traditional media boundaries blur, focus may shift from the way information is delivered to the actual products ... If, as we have already noted, television stations, newspapers and radio stations begin offering content in a similar format—take video updates of selected news stories as an example—do they suddenly cease to be different? And does that mean that where in the past they may have been considered to be separate markets, does this now make them direct competitors? For a consumer, it may make little difference if they are downloading their morning update from the ninemsn, *Sydney Morning Herald* or 3AW websites.

There are three main categories the ACCC will investigate as part of its assessment of any proposed merger—the supply of advertising opportunities to advertisers; the supply of content to consumers; and the acquisition of content from content providers. Other more specific products—such as premium content; classified and display advertising; and the delivery of news, information and opinion—may also be critical when considering particular mergers. It may be that the five–four number of voices test may not be the only point at which the different opinions and points of view being offered by media players comes into consideration. That diversity of voices is a particularly pertinent concern in rural and regional areas that do not have the same number of operators as the cities. But the general framework for merger analysis will remain the same for media mergers as it is for all mergers ... the ACCC already has experience dealing with mergers and acquisitions in the media sector.

Not only in Australia as a whole, but also in regional markets, as the Act requires ... there have been

specific concerns raised about the level of media diversity in regional markets that do not enjoy the same level of choice as the larger metropolitan areas ... there are specific protections built into section 50 of the Trade Practices Act that require the ACCC to consider the impact of proposed mergers on markets in regional Australia ... The ACCC understands the importance of local content in these areas and that consumers rely heavily on local suppliers of news and information, compared to consumers in urban

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areas who have greater access to a variety of media choice ... much of the additional choice of the internet and other more global forms of communication is not always a suitable substitute for local information. Competition in those local markets may be more vulnerable following a merger than competition in the larger cities. As such, the ACCC will continue to consider implications at the local and regional level when assessing mergers proposed for those areas ...

What is perhaps even more important is the watch we keep over potentially anti-competitive behaviour. This can occur regardless of the level of ownership an individual may hold in another business. Where there is evidence that they may be attempting to harm a competitor through anti-competitive conduct, be it via a financial interest in that competitor or otherwise, the ACCC stands ready and well-equipped to respond. Questions have been raised over issues concerning recent acquisitions in the sector ... the ACCC is not oblivious to what is happening in the

market right now. We maintain a constant watch over purchases, divestitures and other arrangements and keep in regular contact with all players to determine what their motives might be ...

We also remind those players that there are certain transactions they cannot undertake without first dealing with the regulator. Most are well aware that it makes far more sense to come to us in the first instance and seek a confidential assessment of any potential concerns, rather than simply pushing

ahead with a merger or acquisition, only to find a regulatory brick wall in the way ... Where a merger is likely to raise concerns, the ACCC does not hesitate in seeking injunctions to block deals proceeding, or where they have already occurred, seeking forced divestitures or unwinding of arrangements ...

It is likely that there will be an increase of merger activity coming before us a result of the changes to the cross-media laws. This will mean both the ACCC and ACMA will be required to assess these proposed mergers at the same time, as a result of the new merger tests and the existing ones already in place. I expect that the vast majority of merger parties will wish to be sure that their merger does not raise competition concerns and will therefore seek a clearance from the ACCC. At the same time, parties will need to consider whether their proposed merger is consistent with the new cross-media laws ... the five–four independent media voices test and the prohibition on owning more than two out three types of media. To comply with these rules,

many merger parties may need to obtain an exemption from ACMA. An exemption allows a merger to proceed while requiring the merged business to divest, within a specified period, any media outlets it controls in breach of the cross-media rules.

So the ACCC may be considering a clearance request for a merger at the same time that ACMA is considering an exemption request for that merger. To ensure a process that is as seamless as possible for all parties, ACCC and ACMA officials have already begun working together to achieve this aim ... we are looking at the potential for information-sharing between the two regulators ... the ACCC may be asking merger parties to waive their right to confidentiality to allow information to flow between the ACCC and ACMA ... to significantly speed up the time required to assess proposed mergers, providing certainty for the parties involved ... ACMA and the ACCC have established a working group to identify whether any duplication of processes has arisen or whether it could happen in the future.

No one, including the government, the public or the regulator wants to see the level of competition decrease in our media sector ... change is already on our doorsteps, and ... the most successful technique for ensuring new and existing players are able to embrace new technology to expand the offerings available to their customers is to ensure we do not become trapped in old ways of thinking. By adapting our approach to keep abreast of changes in the industry we are trying to monitor, and ensuring each and every potential merger is assessed on its individual merits with protecting overall competition and choice as our goal, we will be able to do the greatest service to the Australian public as a whole.

The full text of Mr Samuel's speech is on the ACCC website at www.accc.gov.au.