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The Print Media Inquiry

Paul Chadwick analyses the recommendations of the Senate Inquiry into Australia's Print Media

It is no surprise that the report of the House of Representatives Select Committee on the Print Media, excruciatingly entitled *News and Fair Facts*, is an unsatisfying document.

Hindsight shows the inquiry was fruitlessly distracted by the bidding for Fairfax last year. It was intensely party political, yet impartial, independent analysis was desperately needed. Its resources were scant, so it took less than full advantage of the first chance for a thorough, national examination of the state of the print media and the controversies which, although perennial, have grown in intensity with the ownership upheaval of recent years.

It is precisely because of the shallowness of the inquiry's contribution to the debate about appropriate public policy towards this delicate industry, that its recommendations deserve rigorous examination before they are enacted.

The key recommendation to apply to print media mergers stronger tests under the *Trade Practices Act* is ill-considered and seems unlikely to work as its proponents may hope.

The following analysis does not consider in detail the recommendations on foreign investment limits (20 percent unless special case made out), cross-media rules (no change sought) and editorial independence and self-regulation (legislative measures eschewed; unimaginative suggestions made). In all these areas the same shallowness is apparent.

Key findings

In essence, the inquiry found:

- Concentration of ownership is high and this appears to be driven by economic forces (chiefly economies of scale) which inexorably favour monopoly newspapers in a particular market and group ownership of newspapers in different markets.
- The concentration would not be a problem if the threat of entry by new publishers constrained established proprietors. But formidable barriers to entry militate against the successful establishment of new metropolitan or national dailies, and entrants in magazine, suburban or regional publishing would be at a distinct disadvantage because of the predominance of the major publishing groups.
- Competition and diversity of views are inextricably linked. Some committee members conclude that the high concentration is a significant cause of lack of diversity of information and ideas in the Australian press.

"However, a majority of the committee considered that there was insufficient evidence to conclude that the current high level of concentration in the Australian print media has resulted in biased reporting, news suppression or lack of diversity".

"All members agreed that concentration of ownership is potentially harmful to plurality of opinion and increases the potential risk that news may be distorted."

Recommendations on ownership structure

What then, did the majority recommend to ameliorate the risk?

Not divestment. The report says that because of economies of scale, divestment could lead to economic or quality loss, is 'inherently unfair', difficult to implement and would 'raise questions about the continued viability of the resultant units.'

No evidence is provided to back this last assertion, and the report notes in another context that group ownership is not a precondition for viability. Just look at the *Canberra Times* and *West Australian*, it says.

The majority of the committee also rejects fixed limits on the number of titles or on the percentage of circulation any owner may control.

The report is silent about what would happen if, say, the Murdoch family wanted to sell News Limited to someone with no other media holdings. Should this bare transfer of the biggest print media organisation in the country be permitted, or should the breaking down of concentration begin at sale or succession?

Papers are closing and barriers to fresh entrants are high. Does not the committee's aim of increasing competition in the longer term necessitate the fixing of limits above which the next generation of owners may not grow?

The committee's major recommendation is for amendments to the *Trade Practices Act* to provide that print media mergers be assessed for whether they would result in a substantial lessening of competition, not the more lax test of market dominance.

The Lee committee is the third to recommend a return to the pre-1977 'substantial lessening of competition' test in section 50 of the Trade Practices Act (see also the Cooney and Martin reports).

The Print Media Inquiry's proposal would catch mergers involving any metropolitan or national daily or Sunday or regional dailies with circulation of 30,000 or more. Only six of Australia's 38 regional dailies circulate 30,000 copies, yet the public interest justification for limiting further concentration applies equally to all regional dailies.

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PAY TV IN FOCUS

This edition of the Bulletin features several articles on the copyright, technology, programming and regulatory aspects of pay TV. Turn to page 17 for more.

The test would also miss deals involving chains of suburban newspapers and major magazines.

Parties planning a merger would be required to give 10 days' notice to the Trade Practices Commission. This is not the same as requiring prior approval. Nor is it the approach of the 1990 Victorian working party into print media ownership, which recommended a legislative scheme under which print media transactions be void unless authorised. (For opposing views of the Victorian scheme, see *Communications Law Bulletin*, Vol, 11, Nos 1 and 2.)

Under the majority's recommendation, the existing authorisation procedure of the *Trade Practices Act* would appear to be unchanged in that, if the parties did not seek authorisation, the TPC would have to seek to prove in the Federal Court that their merger results in a substantial lessening of competition.

Unique Role of Print Media

The old problems of whether the regulator would have the resources for such litigation, and the courts' disinclination for "unscrambling eggs" would apparently remain.

If the parties did seek authorisation, the TPC would have to consider whether a net public benefit would result from the proposed merger, even if it would substantially lessen competition.

The committee majority say that the unique role of the print media means that the TPC needs to the be able to consider more than just economic effects. It recommends that the TPC examine the likely impact of the merger on:

i. free expression of opinion;
ii fair and accurate presentation of news;
iii the economic viability of the publication if the merger were not to proceed.

These criteria are borrowed from Part V of the UK *Fair Trading Act*, which was inserted to deal expressly with newspaper mergers in 1965. It was a diluted version of measures recommended by the 1962 Royal Commission into the Press and, on the whole, has failed in Britain to prevent further concentration. (For a useful overview, see Geoffrey Robertson's *People Against the Press*, Quartet Books, London, 1983 chapter six).

But the Australian committee has made an unhelpful addition to the British mode in adapting it. Section 59(3) of the *Fair Trading Act* permits the Monopolies Commission, when assessing a merger proposal, to take into account all matters which appear in the circumstances to be relevant and, in particular, the need for accurate presentation of news and free expression of opinion.

The addition of "fair" in the Australian proposal exacerbates the difficulties of applying the criteria.

Consider a hypothetical merger which comes before the TPC for authorisation under the proposed scheme; Publisher A, who already owns several metropolitan dailies, wants to acquire another one. How does the TPC apply the first two criteria in assessing whether there is a net public benefit in authorising the transaction?

Does it somehow investigate and decide whether Publisher A's existing papers permit free expression of opinion, or publish news fairly and accurately? How? Does it extract commitments from Publisher A that this is what he or she will do with the target paper? If so, how would these commitments be enforced?

It may be argued that the two criteria are intended to be applied to the print media industry as a whole, viewed as if the merger had gone ahead and competition was substantially lessened. How does the TPC go about assessing whether opinion would be expressed less freely, and news reported less fairly and accurately?

It seems to be both wrong in principle and unworkable in practice to try to imply the public interest into the TPC's deliberations using the first two recommended criteria. (Economic viability is a necessary and workable test.)

The committee is correct that narrow assessments of proposed mergers purely in economic terms are inadequate. The challenge is to devise a scheme which permits broader social factors to be considered but sticks to two guiding principles for reform laid down by Sir John Norris in his 1981 report into Victorian newspaper ownership:

"1. The means to be employed to allow the press to function as it should must not themselves threaten its freedom;
2. Any legislation to regulate ownership and control must be so drawn as to not interfere with the content of the press, or with the liberty of persons to publish. Any concept of licensing the press or regulating its content must be eschewed..."

Any legislative criteria applying expressly to the print media should as far as possible require the TPC to make objective judgments. They should not invite judgments about the character or beliefs of the parties to the merger or the contents of the papers involved.

The Victorian working party took this view and fashioned criteria from various foreign sources and the TPC's own authorisation case involving the Perth Daily News in 1990, in which the TPC drew on US anti-trust cases dealing with newspapers.

Alternative Criteria

The Victorian draft legislation would outlaw transactions which worsened concentration unless the regulator authorised them because it was satisfied that the public would benefit. In exercising its discretion, the regulator may have regard to any matters it considers relevant, including:

(a) other offers;
(b) whether good faith efforts have been made to find alternative buyers;
(c) the effect on employment of granting authorisation or refusing it;
(d) the reasons for the proposed transaction;
(e) the likelihood of the paper being folded or merged if authorisation is granted or refused;
(f) where it is said the paper will be closed or merged unless authorisation is granted:
  (i) whether attempts to reorganise management have been made;
  (ii) whether applicant satisfies regulator that the paper will continue unmerged if authorisation granted;
(g) the effect of the transaction on other papers;
(h) the aggregate newspaper circulations controlled by the prospective buyer and seller;
(i) the buyer's other media interests;
(j) the buyer's other commercial and financial interests

These criteria are less high-sounding than those recommended by the committee, but, taken together, they might work better.

Paul Chadwick is Victorian co-ordinator of the Communications Law Centre and was a member of the Victorian Government's working party on print media ownership in 1990.

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