Restraints on Media Sector Consolidation
The More Prominent Role of the ACCC

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The need for reform

The regulatory framework governing the control and ownership of Australia's media was developed in an analogue media environment that was dominated by three platforms: free-to-air television, free-to-air radio and print.

While traditional media platforms remain profitable and attract significant audiences (with some exceptions), consumers are moving to new sources of video, audio and news content. Newspaper circulations, for example, have shrunk significantly in recent years and, while digital subscriptions continue to grow, they are not replacing the hard copy readership. The business of commercial broadcasting is hinged on the capacity to amass viewers for advertisers, but audiences have started to decline.

Significant concerns have been expressed that this historic framework restricts traditional media companies from optimising the scale and scope of their operations and from accessing resources, capital and management expertise available in other media sectors.

The reforms implemented in 2017 are a first step in moving Australia towards a legislative framework that is more appropriate for the modern media environment.

Changes to the media diversity rules

On 16 October 2017, the *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017 (Cth)* was enacted. Relevantly, the Act has simplified Australia's complex media cross-ownership rules by repealing the '2 out of 3' rule and '75% reach' rule. Three rules still remain, as summarised above:

Name	Rule	Status
'2 out of 3' rule	A person must not be in a position to exercise control over more than two out of the following three types of media platforms in any CRB licence area: • a commercial television broadcasting (CTVB) licence; • a commercial radio broadcasting (CRB) licence; or • an associated newspaper (essentially a significant local newspaper).	Repealed from 17 October 2017
'75% reach' rule	A person, either in their own right or as a director of one or more companies, must not be able to exercise control of CTVB licences whose combined licence area population exceeds 75% of the Australian population.	Repealed from 17 October 2017
'One-to-a-market' rule	A person, either in their own right or as a director of one or more companies, must not be able to exercise control over more than one CTVB licence in a C licence area.	Still exists
'Two-to-a-market' rule	A person, either in their own right or as a director of one or more companies, must not be able to exercise control over more than two CRB licences in the same CRB licence area.	Still exists
'4/5' rule (also known as the 'minimum voices' rule)	Under a complex points-based system, at least five independent media 'voices' must exist in a *metropolitan* CRB licence area and at least four 'voices' must exist in a *regional* CRB licence area. If there are already less than the minimum number of 'voices', then the number of 'voices' cannot be further reduced. The metropolitan CRB licence areas are the mainland state capital cities. A 'voice' is a CTVB licence, CRB licence, an associated newspaper, or a group of two or more media operations.	Still exists

The repeal of the '75% reach' rule will allow consolidation of control between metropolitan and regional broadcasters. The rule historically prevented the owners or controllers of any one of the major metropolitan commercial networks (Seven, Nine and Ten) from gaining control of (or merging with) any one of the regional commercial networks (Prime, WIN, Southern Cross Austereo). Following repeal of the rule, such consolidation could now occur, delivering cost reductions.

The repeal of the '2 out of 3' rule will allow a person that controls two regulated media platforms in a licence area to acquire control of additional regulated platforms in the same licence area. In most licence areas, no single entity controls media assets from two of the three regulated platforms so repeal of this rule may have little practical impact However, Fairfax Media is one entity that could not historically control a commercial television licence

in Sydney or Melbourne unless it divested its commercial radio or associated newspaper in the relevant licence area.

The elevated role of the ACCC

The removal of two of the statutory restrictions on media cross-ownership, means that the Australian Competition and Consumer Commission (ACCC) will now become more of a gatekeeper for media market consolidation than has historically been the case

Importantly, the ACCC has always been a gatekeeper for mergers in concentrated sectors. The merger rule in section 50 of the *Competition and Consumer Act 2010 (Cth)* applies to all sectors of the economy to protect against excessive concentration of market power. Media sector acquisitions are prohibited if they have the effect, or are likely to have the effect, of substantially lessening competition in any Australian market.

However, the relaxation of the statutory restrictions does mean that the ACCC's future role will be more prominent. The ACCC has recognised this by releasing updated *Media Merger Guidelines* (**Guidelines**) which outline the ACCC's approach to media mergers, both in traditional and new media. The Guidelines update the previous version, dating from 2006, and supplement the ACCC's standard merger guidelines.

In the Guidelines, the ACCC identifies that common areas of competitive overlap in the media sector typically involve one or more of the following activities:

- the supply of content to consumers, either directly or via a firm which acquires and aggregates content for supply to consumers;
- the supply of advertising opportunities to advertisers; and/or
- the acquisition of content from content providers.

The ACCC defines the relevant markets in light of these core activities by considering the extent of substitution, consistent with its usual approach. In doing so, the ACCC will consider substitution between modes of delivery (such as print, radio broadcasting, free-to-air television broadcasting, digital media platforms, and over-the-top video streaming) as well as the extent of convergence between those modes. The ACCC will also consider substitution between different types of content or advertising opportunities (such as sport, entertainment, and quality news content).

Within these markets, the ACCC will consider potential adverse effects arising from any reduction in competition to develop a 'theory of harm'. Consistent with the ACCC's standard merger guidelines, the ACCC will focus on unilateral effects (such as price rises, reduced service quality, and reduced incentive to innovation) and co-ordinated effects (such as greater risk of price co-ordination). It is within this general framework that the ACCC will focus on bespoke issues that tend to be more prominent in media mergers than in other mergers.

Potential ACCC concerns with media mergers

In the Guidelines, the ACCC has identified five key issues to which it may attribute greater prominence in media merger assessments. Where concerns arise, the ACCC will normally be receptive to the parties offering a remedy, usually by way of court-enforceable undertaking:

1. Competition and media diversity

The ACCC views media diversity through the prism of market concentration and competition. A merger that increases market concentration will reduce the number of 'voices', reduce choice for consumers and potentially reduce quality of content, thereby reducing media diversity. In a media context, the ACCC will be concerned not only with adverse price impacts of a merger, but also on non-price impacts, particularly any adverse impacts on the quality of content for consumers.

If a merger party were to seek formal authorisation from the ACCC of a media merger, rather than the usual informal clearance route, recent New Zealand case law also suggests that the issue of media diversity may be relevant to an assessment of public benefits.

A key issue will be the way the ACCC assesses mergers involving converging modes of content delivery. In clearing the proposed joint bid for interests in Ten Network Holdings Limited by Birke Pty Ltd and Illyria Nominees Television Pty Ltd in July 2017, the ACCC considered convergence between different modes of content delivery, but did not form a concluded view as to whether free to air TV, print newspapers and online news sites were in the same or different product markets. The converging nature of different modes of content delivery is an issue that the ACCC will continue to face in future mergers.

2. Impact of technological change

The media sector is inherently dynamic. The ACCC will assess media mergers in light of potential changes over the foreseeable future (typically one or two years). In doing so, the ACCC may consider the scope for technological convergence in that timeframe as well as market innovations that may facilitate competitive entry. However, the ACCC will require credible evidence that such changes will occur and gives little weight to mere speculation.

Similarly, the ACCC will consider the disruptive effects of new technologies. The ACCC may give disproportionate weight to new market entrants with low market shares if there is credible evidence that such firms

will quickly become vigorous and effective competitors. In doing so, the ACCC may look at international trends and examples.

While digital disruption has been viewed as a key driver of competition, the mere presence of digital competitors may not resolve all ACCC concerns. For example, the proposed merger between APN Outdoor and oOh!media was abandoned after the ACCC expressed concerns with competition in the out-of-home advertising market. The ACCC considered that online platforms were not a substitute for traditional billboards.

3. Access to key content

The ACCC has historically considered that insufficient access to premium or compelling content can be a barrier to entry. Such premium content can have a 'halo' effect and attract significant number of customers. Consequently, such content may be subject to exclusive supply arrangements that favour larger providers with deeper pockets at the expense of smaller market entrants.

In considering mergers, the ACCC will consider the extent to which the merger may foreclose third party competitors from acquiring access to key content, thereby reducing competition. This is not a new consideration for the ACCC. For example, Foxtel provided an undertaking to address ACCC concerns about access to exclusive content to proceed with its purchase of Austar in 2012.

The ACCC will also consider the way content holders may have countervailing power such that they may choose alternate platforms for their content.

4. Two-sided markets and network effects

A two-sided market is one in which a platform or intermediary brings together two distinct groups of users which interact with each other. Two-sided markets often arise in the context of services which generate revenue through advertising. Many Internet services involve two-sided platforms, often in the context of a free service. For example, Google provides a free 'search' function to consumers, but simultaneously sells advertisements for a profit to advertisers that can advertise to those consumers.

Network effects are present in a market if the value a user places on a product or service increases if there are more overall users of that product or service. For example, the benefit to an individual user from using a social networking site increases if all their friends also use that site. Network effects can raise the barriers to entry and expansion and impede effective competition from developing. In such cases, the 'winner takes all'.

By raising barriers to entry, network effects may be important in assessing the competitive effects of some media mergers. The level of such barriers to entry may depend on the context. Platform-to-platform competition, for example, can sometimes be viewed as competition *for* the market rather than *in* the market if the network effects are sufficiently transient.

5. Bundling and foreclosure

Bundling (or tying) refers to the practice of supplying or offering to supply complementary products as a package. The practice of bundling may be efficient, and the ACCC is only concerned where these strategies are likely to have the effect of substantially lessening competition. Cross-platform media mergers may provide the merged entity with the opportunity to bundle or tie the supply of products or services, for example content or advertising opportunities, across multiple platforms.

The ACCC will also closely examine any media merger that enables the merged entity to leverage its market power in one market to substantially lessen competition in another market. For example, a vertical merger between a content supplier that produces premium content and a free-to-air network may raise competition concerns if rival networks or competitors on other platforms need access to premium content to compete effectively.

Watch this space…

The reforms to the media cross-ownership rules are to be welcomed in a media sector that is undergoing profound change. The reforms create opportunities for further consolidation in the Australian media sector to enable traditional media companies to respond to competition from innovative new media.

The removal of two of the statutory restrictions means that the ACCC's role will become more visible than has historically been the case. The ACCC has responded by updating its Guidelines. The Guidelines are sensible, but illustrate some of the complexities that the ACCC will face when assessing dynamic markets that are subject to continued innovation and convergence. Watch this space…