CROSS MEDIA MERGERS UNDER THE 2006 AMENDMENTS TO THE *BROADCASTING SERVICES ACT 1992*

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I INTRODUCTION

A Focus and Summary

The focus of this article is on the practical transactional implications of the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) ('*OA Act'*) on the market for corporate control of Australian media companies. Part I of this article considers some of the definitional building blocks in the new media diversity laws and the relevant regulatory matrix. Part II of this article offers some practical observations that may assist market participants and their advisers. Part III of this article concludes that despite the reform flavour of the *OA Act*, the regulation of cross media transactions is attended by considerable complexity, remains highly regulated and as at the date of publication is completely untested.

This article is not intended to be a critique of the new law and the impact of the *OA Act* on diversity of control of the more influential media in Australia, as at the date of publication, is unknown and untested. Indeed, the Government admitted in the Explanatory Memorandum to the OA Bill, with commendable candour, that the effects of the new regime could not be quantified and that the benefits of cross media reform were unclear.[1]

In Part IV of this Article some consideration is given to the conditions that should accompany a cross media merger having regard to the new media diversity laws.

B The 2006 Media Ownership Amendments in Summary

On 4 November 2006 the *OA Act* commenced. The *OA Act* amended the *Broadcasting Services Act 1992* (Cth) ('*BSA'*) to, amongst other things, repeal the foreign ownership and cross media ownership laws, but with effect from 4 April 2007. In the words of the Explanatory Memorandum, the *OA Act*

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1 Revised Explanatory Memorandum to the Broadcasting Services Amendment (Media Ownership) Bill 2006 (Cth) 25 [101], 27 [109].

'implements the Government's longstanding commitment to reform of Australia's outdated media ownership laws while protecting the public interest in a diverse and vibrant media sector'.[2]

The *OA Act* was a key part of a package of amendments to the *BSA* which included amendments to effect the implementation of digital television and analogue television switch off[3] and amendments that conferred new powers on the industry regulator, the Australian Communications and Media Authority ('ACMA'), including the power to extract civil penalties, to accept enforceable undertakings, to seek injunctions and to give infringement notices.[4]

The *OA Act* consists of three schedules, each comprising amendments to the *BSA* and each with separate commencement dates. The staged implementation of the *OA Act* amendments was designed to achieve discrete policy objectives. Only Schedules 1 and 2 of the *OA Act* related to media ownership reform. Schedule 1, commenced on 1 February 2007 and Schedule 2 commenced by proclamation on 4 April 2007.[5] The period from 4 November and 1 February, was intended to give ACMA time to prepare for the implementation of the new media ownership law, including the design of the Register of Controlled Media Groups (the Register) which was to be the principal tool for the administration of the quantitative limits as they applied to merger transactions.

Schedule 1 to the *OA Act* set up the essential preconditions to repeal of the ownership and control regime in the *BSA* effected by Schedule 2 of the *OA Act* by implementing key definitions, defining the new media diversity tests, establishing the Register, introducing cross media reporting obligations and extending the *BSA*'s notification requirements to changes in control of associated newspapers.

Schedule 2 commenced on 4 April 2007. The delay in commencement was to permit the resolution of the process for the allocation of datacasting transmitter licences to authorise the provision of new digital services.[6] On commencement, Schedule 2 repealed the object of the *BSA* that Australians have effective control of the more influential broadcasting services,[7] repealed the restrictions on foreign investment in and foreign control of commercial television,[8] repealed the limits on foreign investment in subscription television,[9] repealed the cross media

2 Ibid 2.

3 *Broadcasting Legislation Amendment (Digital Television) Act 2006* (Cth).

4 *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth) ('*Enforcement Powers Act*'). ACMA has published guidelines on its enforcement powers: see ACMA, *Guidelines relating to ACMA's enforcement powers under the Broadcasting Services Act 1992* (25 January 2007). The *Enforcement Powers Act* commenced on 4 February 2007.

5 On 29 March 2007, the Commencement Date of 4 April 2007 was fixed by Proclamation. See Senator Helen Coonan, 'Media Laws Proclaimed' (Press Release, 29 March 2007).

6 See Revised Explanatory Memorandum to the *OA Act*, 51. The policy was presumably that the process of allocation for the new datacasting licences enhanced diversity of media, when proclamation of sch 2 would have potentially reduced diversity by cross media merger transactions previously prohibited under the *BSA*.

7 Previously contained in *BSA* s 3(1)(d). See Item 1 of sch 2 to the *OA Act*.

8 Previously contained in *BSA* ss 57-58. See Item 4 of sch 2 to the *OA Act*.

9 Previously contained in *BSA* s 109. See Item 17 of sch 2 to the *OA Act*.

rules,[10] and was the catalyst for the rescission of the newspaper specific foreign ownership rules under Australia's Foreign Investment Policy (*'FIP'*) that existed up to 4 April 2007.[11] However, media (all forms) remains a sensitive sector under FIP operating under the *Foreign Acquisitions and Takeovers Act* and under the Australia-United States Free Trade Agreement.[12]

New prohibitions on an unacceptable media diversity situation[13] and unacceptable three-way control situations[14] came into force on 4 April 2007 to regulate merger transactions that potentially affect media diversity. The first of the new prohibitions (an unacceptable media diversity situation) is effected by a new quantitative requirement that, after a transaction is completed, there must be a minimum number of points in a Licence Area. Each of those points represents an independently owned media operation[15] or a commonly controlled media group[16] in the Licence Area.[17] In metropolitan Licence Areas, the minimum number of post transaction points is five and in regional Licence Areas the minimum number is four. For this reason, the new diversity test introduced by the *OA Act* is sometimes referred to as the five/four rule. The second of those prohibitions (on an unacceptable three-way control situation) is effected by prohibition on one person being in a position to exercise control of each of the three types of media operation in a Licence Area.

The second prohibition therefore limits the scope of cross media merger transactions to a maximum of two of the three regulated media platforms.

Three relevant consequences flow for mergers from the above analysis.

First, the new media rules have limited application and only apply to transactions involving the defined media platforms, media operations. Unless the target corporation also controls media operations, the new media diversity rules do not apply to merger transactions involving target corporations controlling subscription pay television licences, controlling content on the Internet or controlling commercial television licences or commercial radio licences issued in frequencies other than the broadcasting services bands.

Second, whilst transactions may be Australia wide, the quantitative limits apply on a Licence Area by Licence Area basis.

Third, the quantitative limit in the first prohibition brings with it the theoretical possibility of a race to that threshold. The *OA Act* seeks to regulate that theoretical possibility, and, in particular, seeks to protect the innocent merger acquirer ('first acquirer') from breaches of the quantitative occasioned by the

10 Previously contained in *BSA* ss 60-61. See Item 6 of sch 2 to the *OA Act*.

11 The Government announced the rescission of the newspaper specific foreign ownership restriction in the Foreign Investment Policy concurrent with the commencement date of sch 2 to the *OA Act* in Coonan's Press release, above n 5.

12 See The Treasury, *Summary of Australia's Foreign Investment Policy* (2007) [29]. The policy is available on the website of the Foreign Investment Review Board at <http://www.firb.gov.au/content/policy.asp?NavID=1> at 30 July 2007.

13 See *BSA* s 61AB, supported by offence provisions (s 61AG) and civil penalty provisions (s 61AH).

14 See *BSA* s 61AEA, supported by offence provisions (s 61AMA) and civil penalty provisions (s 61AMB).

15 See definition in *BSA* s 61AA.

16 See definition in *BSA* s 61AA.

17 The number of points in a Licence Area is calculated using a statutory table: see *BSA* s 61AC.

actions of a third party acquirer ('second acquirer') who might be undertaking a merger transaction in a Licence Area at the same time as the first acquirer. The *OA Act* seeks to regulate the rights as between the first acquirer and the second acquirer to achieve regulatory certainty and fairness. The provisions are somewhat complex but their evident intention is to protect the first acquirer as well as the second acquirer who has acted in good faith, without distorting the market for corporate control.

I THE MEDIA DIVERSITY RULES: KEY CONCEPTS AND TERMS

A The Register of Controlled Media Groups

1 *Limits of the Register*

The Register is intended to be central to the administration of the new media diversity rules. However, the Register is of little practical utility during the due diligence phase for merger transactions because of its limited scope: it only contains details of controllers of *media groups*, namely controllers of two or more media operations. The Register will not identify individual media operations unless they belong to a media group that is entered on the Register.

The Register therefore does not provide market participants with an accurate indication of the number of points in a Licence Area. For this reason, and as an aid for market participants, ACMA published on Media Diversity Report.[18] The Diversity Report is regularly updated by ACMA and is in two parts. Part 1 sets out the registered media groups in each Licence Area as well as the other media operations in a Licence Area. It also sets out the number of points in each Licence Area. Part 2 sets out an alphabetical listing of the controllers, by Licence Area, of the media operations in Part 1.

2 *Unconfirmed and Confirmed Entries*

The onus will be on prospective purchasers to search the Register and the Diversity Report to ascertain whether there is scope at that time within the affected Licence Area for the proposed transaction to proceed. The Register will indicate whether a media group is entered on the Register on a confirmed or unconfirmed basis.

The distinction between confirmed and unconfirmed entries is presumably meant to ensure ACMA is given an opportunity to maintain the integrity and accuracy of the Register. For example, to permit ACMA to review an unconfirmed entry, lest ACMA be concerned that a control transaction has occurred in an attempt to game the Register: for example, by taking 15.01 per cent of a media operation in a Licence Area to reduce the number of points in that area in an attempt effectively to foreclose another transaction. Under s 61AZE(6) ACMA is given a broad discretion on the matters that it can examine in the exercise of its powers to confirm an entry in the Register.

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18 See ACMA, 'Media Diversity Report' (2007) ('Diversity Report') <http://www.acma.gov.au/webwr/_assets/main/lib100450/2007_06_13_mdr_001.pdf> at 30 June 2007.

3 *Grandfathering*

Whilst an entry is unconfirmed, it is subject to ACMA review under s 61AZE. Once confirmed, the media group has a protected status as a registered media group which has the character of a form of grandfathering. As a registered media group, subject to limited exceptions, ACMA cannot give a remedial direction to the registered controller of that group (see s 61AN(4) of the *BSA*) if, for example, the number of points in a Licence Area fell below the relevant number through the actions of a third party.

In addition, and relevantly for merger transactions, under s 61AX(1) of the *BSA*, the media group, once confirmed on the Register, would remain a registered media group even if there is a change in the composition of the controllers of that media group. So a controller of a registered media group can dispose of its controlling interest in the group to a bidder and the bidder has the same protection as the selling controller. The legislative intention behind this grandfathering protection is to ensure that the registered media group retains its commercial value.[19]

4 *Order of Receipt*

ACMA must deal with notifications regarding registration, deregistration and alterations to the register, in order of receipt.[20] There is only one qualification to this strict queuing principle: that is, where the Register is frozen in the circumstances discussed immediately below.

5 *Freezing the Register*

The Register is to be frozen (in the sense that no entries or alterations are made to the Register in respect of a particular Licence Area) while ACMA reconsideration or Administrative Appeals Tribunal ('AAT')/court proceedings in relation to the confirmed entry of a registrable media group are pending.[21] Indeed, the Register will remain frozen for 28 days after ACMA/AAT/court decision has been made to enable an affected person to take further steps to appeal the first decision.[22]

ACMA may only enter another registrable media group (the second media group) in the Register in respect of that Licence Area if satisfied that, assuming ACMA's original decision in relation to the first media group is upheld, the inclusion of the second media group in the Register would not result in an unacceptable media diversity situation or a reduction in the points in the licence area.[23]

The practical implications of the queuing of notifications and freezing of the Register are examined at Part III F below.

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19 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Act 2006 Bill (Cth) 61.

20 *BSA* s 61AZCA.

21 *BSA* s 61AZ(5).

22 *BSA* s 61AZ(6), (7), (8), (9) and (10).

23 *BSA* s 61AZ(5)(c).

B An Unacceptable Media Diversity Situation

The prohibition is breached if after a transaction is completed there are less than five points in a metropolitan Licence Area and less than four points in regional Licence Area. If an unacceptable media diversity situation already exists in a Licence Area, a person will also breach the prohibition if after a transaction is completed there is a reduction in the number of points in that Licence Area.

Because an acquirer may be acquiring a target with multiple media operations in multiple Licence Areas, the acquirer can deal with potential breaches of the five/four test by means of prior approval of a temporary breach under s 61AJ of the *BSA*. The prior approval process enables a merger to be completed without committing an offence or incurring a civil liability, with the post completion disposal of media operations in the Licence Areas that are in breach.

C An Unacceptable Three-Way Control Situation

This prohibition is breached if post transaction a person is in a position to control more than two out of the three media operations in a Licence Area. The prior approval process, discussed at Part II E below, also enables the merger transaction to complete without committing an offence or incurring a civil liability, with the post completion disposal of one of the media operations in the relevant Licence Area to remedy the breach.

D The statutory control rules

The term *statutory control rules* was introduced by the *OA Act* as an amalgam expression to capture those ownership and control rules that were not repealed by Schedule 2 to the *OA Act*. Compliance with the statutory control rules is a necessary condition to a media group being entered into the Register.[24] The statutory control rules include the 75 per cent audience reach rule,[25] the commercial radio two to a market rule,[26] the prohibition on control of a commercial television broadcasting licence and a datacasting transmitter licence[27] and the directorship limits supporting those rules.[28]

It is important to note that a media operation will comply with the statutory control rules if a person is in breach of any of the above prohibitions, but ACMA has given prior approval to that breach under s 67 of the *BSA*.[29]

24 See *BSA* s 61AC(1): for example, item 1(b).
25 *BSA* s 53.
26 *BSA* s 54.
27 *BSA* s 54A.
28 See *BSA* ss 56-56A
29 See *BSA* s 61AD(b).

E Prior Approval Regime

1 *Process for Application*

The *OA Act* introduces a new role for ACMA to give prior approval to merger transactions which result in either or both of an unacceptable media diversity situation or an unacceptable three-way control situation. See *BSA* ss 61AJ and 61AMC respectively.

This prior approval regime is similar to and operates alongside the long standing provision for approval of temporary breaches under s 67 of the *BSA*. Under s 67 of the *BSA*, the applicant acquirer must show that the breach of the statutory control rules is incidental to the main merger transaction. In practice, that is typically done by emphasising that the relevant breach is a subsidiary and relatively unimportant element of the merger transaction taken as a whole.

Under the prior approval regime for the new diversity tests it is not necessary to show that the breach is incidental to the merger transaction. However, it is necessary to adduce facts and evidence to ACMA to show that the applicant (or another person) will take action to ensure that the relevant contravention will not continue beyond a certain date.

Importantly, because ACMA now has the power to accept enforceable undertakings (see Part II G) it would be possible to couple the application for prior approval with an enforceable undertaking to sell the relevant media operation (which would cause a breach of the relevant media diversity prohibition in a Licence Area, but for the prior approval) in accordance with a particular sale program.

ACMA may approve an application if it is satisfied that such action will occur within 2 years for an unacceptable media diversity situation or a reduction in points, or within 12 months for an unacceptable three-way control situation.

For the assistance of market participants ACMA published a Briefing Paper which makes it clear that ACMA takes a broad view of its discretion to grant or refuse an application for a prior approval of a temporary breach. Relevantly, ACMA will have regard to the likely impact of a prior approval on other parties who may be seeking to engage in media merger transactions in a Licence Area.[30]

2 *Periods and Extensions of Prior Approval*

The maximum period that the temporary breach of the unacceptable media diversity situation prohibition may subsist is two years (s 61AJ(5)). The maximum period that the temporary breach of the unacceptable three-way control situation prohibition may subsist is 12 months (s 61AMC(5)).

A person who has been given a prior approval notice may apply in writing to ACMA for an extension of that period.[31] Whilst ACMA has the discretion to grant an extension if it is of the opinion that an extension is appropriate in all the

30 ACMA, *Media Ownership Reforms – Prior Approval Processes for Certain Media Mergers* (Briefing Paper, 27 March 2007) ('Briefing Paper') <http://www.acma.gov.au/webwr/_assets/main/lib101061/briefing per cent20paper per cent20- per cent20media per cent20reform per cent20-per cent20prior per cent20approvals.pdf> at 30 June 2007.

31 See *BSA* ss 61AK(1), 61AMD(1).

circumstances,[32] it is theoretically possible that an applicant who has received the maximum two year approval or maximum 12 month approval could receive an extension of 12 months and six months respectively.

ACMA may only grant one extension. Proper attention to these periods may assist in the disposal of excess media operations in particular Licence Areas as an integral part of planning a merger transaction.

F Remedial Directions

1 *Circumstances in Which Directions Can Be Given*

If ACMA is satisfied that an unacceptable media diversity situation or an unacceptable three way control situation (unacceptable situation) exists in relation to a Licence Area, ACMA may give a person a written remedial direction for the purpose of ensuring that the situation ceases to exist.[33]

For most acquirers, in respect of known potential breaches of the unacceptable situation prohibitions in a Licence Area, a prior approval to the temporary breach can be obtained, and the acquirer (first acquirer) has no risk of a remedial direction during the period of the temporary approval. However, there is the potential for the unknown or unplanned breach of those prohibitions as a result of the actions of a third party (the second acquirer) which, for example, completes a merger transaction in a particular Licence Area prior to the first acquirer, notwithstanding that the first acquirer has carefully checked the Register and the Diversity Report.

In that event, the remedial directions may include (see ss 61AN(2) and 61ANA(2)) a direction requiring the first acquirer to dispose of shares or interests in shares or a direction or restraining the first acquirer from exercising any rights attached to shares or interests in shares.

2 *Timeframes for Compliance*

A direction must specify a particular timeframe within which the action must be taken.[34] Adopting a similar temporal structure to the prior approval regime, the maximum periods permitted to be specified under a direction are:

- two years for breaches causing an unacceptable media diversity situation;[35] and
- 12 months for breaches causing an unacceptable three-way control situation.[36]

If ACMA is satisfied that the person acted flagrantly in breach of the prohibition against an unacceptable situation, the period specified in the direction must be one month.[37] In the factual situation outlined, it is unlikely that the first

32 *OA Act* ss 61AK(2), 61AMD(2).
33 *BSA* ss 61AN(1), 61ANA(1).
34 *BSA* ss 61AN(5) and 61ANA(4).
35 *BSA* s 61AN(6).
36 *BSA* s 61ANA(5).
37 *BSA* ss 61AN(8) and 61ANA(7).

acquirer has acted flagrantly. If ACMA is satisfied that the first acquirer acted in good faith, took reasonable precautions, and exercised due diligence to avoid an unacceptable situation from occurring, then the period specified in the direction must be the maximum period permitted for each type of situation (as specified above).[38] In a merger transaction, it may be sufficient that the first acquirer conducted careful due diligence, regularly checked the Register and the Diversity Report and was in early dialogue with ACMA concerning the proposed merger.

The *BSA* makes provision for an application to extend the period specified. ACMA may only grant one extension and the maximum period of the extension is three months.[39]

Whilst the first acquirer is in considerable difficulty as a result of the actions of the second acquirer, it at least has a period of, potentially, two years three months to dispose of the relevant media operation that caused the relevant diversity prohibition to be breached. This assumes, of course, that the first acquirer completes its merger: the *BSA* does offer the first acquirer the option of a conditional transaction to solve this particular dilemma. See Part II H below.

3 *Remedial Directions and Registered Controllers*

ACMA cannot give a remedial direction to a registered controller of a registered media group in relation to an unacceptable media diversity situation,[40] except in the following circumstances:

- ACMA has given prior approval to the registered controller, ACMA's notice specified action required to be performed within a specified time and the registered controller has failed to comply with that notice in the specified time;[41] or
- ACMA has made a decision to enter, confirm the entry of, affirm a decision to confirm the entry of or revoke a decision to cancel the entry of a registrable media group in the register (the 'original decision'); and there was a reconsideration, review or appeal of this decision; and the original decision was set aside or revoked; and after the original decision was set aside or revoked, another group (the 'other group') was registered in relation to the same licence area; and the AAT or court then made a decision to restore or affirm the original decision.[42] Note that in this case, ACMA can give a direction requiring the *other group* to cease to be in a position to exercise control of any media operation in that other group.

These exceptions operate alongside the requirements for freezing the register noted at Part II A(5). They are productive of some practical complexity, as indicated at Part III F below.

38 *BSA* ss 61AN(7) and1ANA(6).
39 *BSA* s 61AP(5).
40 *BSA* s 61AN(4).
41 *BSA* s 61AN(4A).
42 *BSA* s 61AN(4C).

G Enforceable Undertakings

This is a new power conferred on ACMA under s 61AS of the *BSA*. For example, ACMA may accept undertakings offered by a person to the effect that:

- The person will take specified action to ensure that an unacceptable media diversity situation does not exist;[43] or
- The person will take specified action to ensure that an unacceptable three-way control situation does not exist.[44]

Once accepted by ACMA, the undertakings are enforceable in the Federal Court.[45] In a merger transaction, this is an additional tool available to acquirers to deal with known potential breaches in particular Licence Areas, by coupling an enforceable undertaking with an application for prior approval.

H Conditional Transactions

Most merger agreements, or in the public company sphere, merger implementation agreements (either for an agreed bid or for a scheme of arrangement), will have conditions precedent to completion of the acquisition. The *BSA* now provides that if, for example, a proposed merger transaction is subject to the condition that ACMA enters a media group's entry in the Register,[46] then ACMA may update the Register on an unconfirmed basis to reflect the proposed transaction. However ACMA will only do so if it is satisfied that the parties to the transaction are acting in good faith, and that the proposed transaction will be completed within five business days after the update of the Register.[47]

Therefore, it would be possible to include a condition in a merger implementation agreement to the effect that the acquirer be entered onto the Register, preferably on a confirmed basis. This would appear to be the most effective method to ensure that the acquirer is protected from the actions of third parties. It is always open to the acquirer to waive that condition, should commercial circumstances dictate or rely upon it to terminate the merger implementation agreement. If the merger implementation agreement is terminated, it would be incumbent upon the acquirer to notify ACMA of that fact in order to ensure that the unconfirmed entry on the Register is rectified.

I The Jurisdiction of the ACCC

Most media mergers will remain subject to the *Trade Practices Act* 1974 (Cth) ('*TPA*') and, in particular, to the requirements of s 50 of the *TPA* which prohibits any merger or acquisition that would have the effect of substantially lessening competition in a market.

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43 *BSA* s 61AS(1)(a).
44 *BSA* s 61AS(1)(c).
45 *BSA* s 61AT.
46 *BSA* s 61AZD(1).
47 *BSA* s 61AZD.

Because it is likely that the ACCC and ACMA could be examining a media merger at the same time, both regulatory authorities will be requesting a waiver from merger parties to permit confidential information provided to one agency to be shared with the other.[48]

In addition, and for the assistance of market participants, the ACCC published in August 2006, a Media Mergers Guidance Note that provides a general framework that the ACCC intends to use to assess future media mergers and general guidance on its approach to defining media markets.[49]

Specifically, the ACCC indicates that it will consider the impact of media mergers on market concentration, as well as whether a merged media business could exercise market power by reducing the quality and diversity of the content it provides. The ACCC will also assess the ability of new players to enter the market. The ACCC also suggests that if the barriers to entry are low, then a merger that leaves only a few media outlets in a market might not raise competition concerns.[50]

J The Jurisdiction of the Foreign Investment Review Board

On 4 April 2007, the newspaper specific ownership restrictions in Australia's Foreign Investment Policy ('FIP') were removed. However, the media are retained as a *sensitive sector* under the FIP administered by the Foreign Investment Review Board ('FIRB'). As such, almost all proposals by foreign interests to directly invest in the Australian media sector, irrespective of size, will remain subject to prior approval by the Treasurer, acting on the advice of the FIRB. The only exception are portfolio investments of less than five per cent.

The practical effect of this is that any control transaction involving foreign interests must be subject to a condition precedent that the relevant approval by the Treasurer is given under *Foreign Acquisitions and Takeovers Act* 1975 (Cth) *('FATA')* or under the policy, or that relevant time limits under *FATA* have expired without action by the Treasurer.

II PRACTICAL IMPLICATIONS

A The Regulatory Matrix

After 4 April 2007, any cross media merger transaction occurs within the following regulatory matrix:

- compliance with a new *media diversity test* (or the five/four rule) and a new two out of three rule;
- compliance with the *statutory control rules* (see Part II D above) ;

48 See, eg, Graeme Samuel, 'Regulating media and broadcasting networks in a changing media environment' (Speech delivered at the Australian Broadcasting Summit, Sydney, 5 March 2007), 5 at <http://www.accc.gov.au/content/index.phtml/itemId/781929/fromItemId/8973> at 30 June 2007.

49 ACMA, *Media Mergers* (Guidance Note, 9 August 2006) ('Media Mergers Guidance Note') <http://www.accc.gov.au/content/index.phtml/itemId/758231/fromItemId/3737> at 30 June 2007.

50 Ibid 8 [12] and [13].

- confirmed entry of a media group on the Register (see Part II A(2) above);
- the potential jurisdiction of the ACCC under s 50 of the *Trade Practices Act 1974* (see Part II I above);
- for foreign acquirers in a control transaction, the continuing application of Australia's Foreign Investment Policy that regards media as a sensitive sector under *FATA* (see Part I J above); and
- the new powers of ACMA to accept enforceable undertakings (see Part II G above) and to give remedial directions in relation to breaches of the new media diversity rules (see Part I B above).

There are a number of practical implications that flow from that regulatory matrix.

B Due Diligence

During transaction planning stages for a cross media merger, it is a mandatory requirement that the prospective acquirer ascertain the number of points in all Licence Areas affected by a control transaction. The Diversity Report is a recommended aid in that respect. It is advisable that prospective acquirers take into account both confirmed and unconfirmed entries on the Register, and open a confidential dialogue with ACMA (simultaneously with the ACCC because of their information sharing guidelines) in order to establish a foundation to ACMA that the prospective controller has at all times acted in good faith.

For example, if the acquirer has acted in good faith, and through the unanticipated actions of a third party there is a breach of the new diversity rules, the acquirer must be granted the maximum period of time under the *BSA* to dispose of the excess media operation in the relevant Licence Area.

C Merger Implementation Agreement

Most cross media transactions will be agreed deals. This is because the acquirer would usually be wary about proceeding with a merger without the benefit of due diligence on the target. In a consensual transaction format, it is open to the parties to provide for conditions to completion that, in particular, protect an acquirer from adverse regulatory intervention. So, for example, it would be typical for a merger that is subject to the jurisdiction of the ACCC and the FIRB to have at least two principal conditions to completion:

- a no objection letter from the ACCC; and
- a no objection letter from the FIRB in terms of FIP and *FATA*.

To these conditions could be added a condition, for the sole benefit of the acquirer, that the acquirer be registered as a media group on the Register on a confirmed basis. However, it needs to be recognised that even that condition may not save an acquirer who has come on to the Register in the example given in Part III F below.

D The First Mover Advantage

Because the five/four test is a quantitative test per Licence Area, there is the theoretical possibility of a race to that threshold. The adverse implications of that race for an innocent acquirer due to the actions of an equally innocent third party acquirer can, in part, be addressed through the conditional transaction strategy.

Although there is no evidence of any such race to the threshold in any Licence Area to date, there is nevertheless a first mover advantage that applies to the merger transaction that can be effected first in a market. Obtaining registration of a new media group on a *confirmed* basis after the control transaction has completed is a vital step in any merger and acquisition activity. Doing so promptly will increase the acquirer's chance of securing the first mover advantage, as ACMA is required to deal with notifications regarding registration in order of receipt. Registration will also protect purchasers from remedial directions requiring divestment or restraining of interests, as ACMA cannot issue a remedial direction to a registered controller of registered media group, subject to the exception discussed at Part III F below.

The execution of a first mover advantage requires a well framed merger proposal taking account of all relevant regulatory agencies in addition to ACMA, particularly the ACCC and the FIRB.

E Using the Prior Approval Mechanism and Enforceable Undertakings

In respect of known potential breaches of new media diversity rules in particular Licence Areas, prior approval for a temporary breach is the recommended strategy. As has been noted at Part II G above, the prior approval process can be assisted by the acquirer offering, and ACMA accepting, an enforceable undertaking to dispose of the relevant excess media operation in the relevant Licence Area in accordance with, for example, a defined timetable and sale process.

F Freezing the Register and Remedial Directions

Reference has been made at Part II A(5) above to the provisions relating to freezing of the Register if a first media group (Media Group A) has its confirmed entry challenged and Media Group B subsequently comes on to the Register after an initial period of legal or administrative challenge has ended, but during a subsequent period of judicial review. Media Group A is the first mover and as can be seen, the first mover has the winning advantage over Media Group B.

The *BSA* sets out the following order of events in such a situation:[51]

i) A decision is made by ACMA to enter/confirm/revoke a media group's (called Media Group A's) registration in a Licence Area. In this example, Media Group A is the first mover in the relevant Licence Area.

51 *BSA* s 61AN(4C).

ii) An application is made for the decision in Step (i) to be reconsidered/reviewed/appealed. The period commencing on the date of the applicable application and ending 28 days after relevant decision is made is called pending period.

iii) During the pending period a registrable media group comes into existence in the relevant Licence Area, called Media Group B. The Register is frozen during that pending period. Media Group B would be aware of this and would not be able to be registered.

iv) The decision in Step (i) is set aside or revoked.

v) The pending period, and the freezing of the Register, then continues to run until the expiration of the period of 28 days from the date of the decision in Step (iv).

vi) After the end of the pending period, Group B is registered on an unconfirmed basis in relation to the same Licence Area.

vii) Within the next 28 days, ACMA must either cancel Media Group B's entry or confirm it. If ACMA does not make a decision within 28 days, ACMA is deemed to have confirmed Group B's entry and is taken to have done so at the end of that 28 day period.

viii) Media Group A then applies for reconsideration/appeal of decision made in Step (iv). (Note that notwithstanding that Media Group B has been confirmed, the Register is frozen whilst this decision is pending.)

ix) The AAT or the Court restores or affirms the original decision in Step (i).

In those circumstances, Group B will be issued with a remedial direction the consequence of which will be the requirement that it ceases to be in a position to exercise control of any media operation in that group in that Licence Area. The purpose of this provision, which operates harshly against Media Group B, is to protect the first mover. As outlined at Part II F(2) above, from Media Group B's perspective, its only solace must be that it at all times acted in good faith and can therefore expect to receive the maximum permitted period to divest its interest in the Licence Area.

IV CONCLUSION

The practical operation of the new media diversity rules and the two out of three rule administered by ACMA strongly suggest that the ownership and control of Australian mainstream media industry is still highly regulated. Reform has not brought simplicity.

Any cross media merger strategy needs to be carefully developed and must give considerable weight to a regulatory strategy for each of ACMA, the ACCC and the FIRB.

The *OA Act* is a very skilful attempt to balance the interests of private parties and transactions with the public good implicit in media diversity, albeit permitting consolidation of media operations in Licence Areas subject to the new media diversity prohibitions. However, the regulatory edifice is substantial and, in some respects, extremely complex. As at the date of publication (and these could be famous last words) there is no evidence that the regulatory edifice will be called into aid to regulate a race to the new, lower threshold for media diversity that the new rules permit.