

KEY COMPETITION ISSUES IN AUSTRALIA'S MEDIA AND BROADCASTING MARKETS

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I INTRODUCTION

For nearly two decades, the *Broadcasting Services Act 1992* (Cth) ('BSA') prohibited one person from controlling more than one type of media outlet in the same regional area. This prohibition meant that, for example, the owner of a television station could not seek to acquire the local daily newspaper or a local radio station. In addition, the *BSA* prevented foreign companies from seeking to acquire Australian media companies.

However, recent amendments to the *BSA* allow cross-media acquisitions to occur, and permit foreign companies to acquire Australian media companies, subject to certain rules.

Importantly, all media acquisitions remain subject to s 50 of the *Trade Practices Act 1974* (Cth) ('TPA'), which prohibits acquisitions of shares or assets that would be likely to substantially lessen competition in a market.

In practice, before proceeding with a merger, the merger parties would often approach the Australian Competition and Consumer Commission ('ACCC') seeking what is known as an informal clearance.¹ Informal clearance is essentially a statement by the ACCC that it will not seek an injunction from the Federal Court of Australia pursuant to s 50 of the *TPA* to stop a proposed merger from proceeding.²

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1 On 1 January 2007, amendments to the *TPA* commenced that established a *formal* merger clearance process. Formal clearance provides merger parties with protection from the operation of s 50 of the *TPA*; ie, neither the ACCC nor any other party may initiate legal action on the basis of an alleged contravention of s 50 for a merger which has been granted clearance, so long as the merger takes place in accordance with the clearance. ACCC formal clearance decisions are reviewable by the Australian Competition Tribunal. The ACCC's Formal Merger Review Process Guidelines explain the formal clearance process in detail. See ACCC, *Formal Merger Review Process Guidelines* (2007) <<http://www.accc.gov.au/content/index.php/ml/itemId/776055/fromItemId/655354>> at 30 June 2007.

2 Only the ACCC can apply for an injunction and/or penalties in relation to merger matters. Third parties can apply for declarations and/or divestiture (including setting aside the acquisition in certain cases). Any person suffering loss or damage as a result of a merger or acquisition which breaches s 50 can apply for damages.

Upon receiving a request for informal clearance for a public proposed merger,³ the ACCC conducts a review to determine whether the proposed merger would be likely to substantially lessen competition in any market. The ACCC's Merger Review Process Guidelines provide a detailed explanation of the ACCC's informal clearance process.⁴

This article outlines the analytical framework that the ACCC uses to review media mergers under s 50 of the *TPA*. In August 2006, in anticipation of the cross-media law reforms, the ACCC issued a paper providing guidance on its approach to assessing media mergers, and particularly on the definition of media markets. The paper is available on the ACCC's website.⁵

As set out in this paper, the ACCC will examine whether a proposed merger would be likely to affect competition in markets involving the following broad product categories: the supply of advertising opportunities to advertisers; the supply of content to consumers; the acquisition of content from content owners; and the supply of content by content owners, who may include media outlets, to content acquirers, who may also include media outlets as well as, for example, mobile phone operators.

This article then examines the key competition issues that are likely to arise when reviewing a proposed media merger. These include:

- the impact of changing technology on media markets;
- the degree of substitution for advertisers, consumers and content owners between different media;
- whether potential bundling by a merged media company might give rise to competition concerns;
- how the impact of a media merger on media diversity is relevant to the competition analysis of a merger; and
- barriers to entry to media markets.

The article then outlines the particular characteristics of regional markets and how these would be taken account of in the analysis of a media merger; and finally, the article considers an important way for merger parties to address competition concerns identified by the ACCC – that is, by offering the ACCC an undertaking under s 87B of the *TPA*.

A Australia's cross-media laws

Significant amendments to the cross-media and foreign ownership rules in the *BSA* commenced on 4 April 2007.

3 The ACCC will also review proposed mergers confidentially, although it will only express a preliminary view on the matter to the parties. This preliminary view is always subject to market consultation when the proposed merger is made public.

4 See ACCC, *Merger Review Process Guidelines* (2006) <<http://www.accc.gov.au/content/index.phtml/itemId/740765/fromItemId/655354>> at 30 June 2007.

5 See ACCC, *Media Mergers* (2006) <<http://www.accc.gov.au/content/index.phtml/itemId/758231>> at 30 June 2007.

These amendments allow cross-media mergers to occur only where, post-merger, five independent media ‘voices’ will remain in the mainland state capitals and four elsewhere. Further, the same person may not control more than two out of three types of media (that is, commercial radio, commercial television and associated newspapers).⁶

The media-specific foreign ownership rules in the *BSA* and the newspaper-specific foreign ownership restrictions in the Foreign Investment Policy under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) also ceased as of 4 April 2007. However, the media has been retained as a ‘sensitive sector’ in the Foreign Investment Policy.⁷

The *BSA* continues to prohibit the same person owning more than two commercial radio licences in a licence area; more than one television licence in a licence area; and owning a network of television stations across licence areas whose combined population exceeds 75 per cent of Australia’s population.

The cross-media ownership rules in the *BSA* only apply to free-to-air television stations, commercial radio stations and, in practice, paid daily newspapers. They do not apply to other media, including pay television, online media, magazines, community radio stations and free weekly ‘community’ newspapers.

II ANALYSING MEDIA MERGERS UNDER SECTION 50

Section 50 of the *TPA* prohibits acquisitions of shares or assets that would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in a state, territory or region of Australia. Consequently, the ACCC’s focus will necessarily be on the impact on competition of proposed media mergers. However, the impact of a merger on media diversity may still be relevant, and is discussed later in this article.

A Media Markets

The first step when assessing a media merger is to define the relevant markets. Markets are primarily defined by reference to the products that the merging media outlets supply and acquire, and the geographic areas in which they do this.

When reviewing a media merger, the ACCC will examine whether a proposed acquisition would be likely to raise competition concerns under s 50 in markets in four key areas:

- the supply of advertising opportunities to advertisers;

6 A newspaper is defined in s 6 of the *BSA* as ‘a newspaper that is in the English language and is published on a least 4 days in each week, but does not include a publication if less than 50 per cent of its circulation is by way of sale’.

7 See Foreign Investment Review Board, *Media* (2007) <<http://www.firb.gov.au/content/other/sensitive/media.asp>> at 30 June 2007; ACMA, *Media reform – Key concepts relating to media ownership in the 2006 amendments to the Broadcasting Services Act 1992* (2007) <http://www.acma.gov.au/webwr/_assets/main/lib101061/acma_fact_sheet_key_concepts_media_reform.pdf> at 30 June 2007.

- the supply of content to consumers;
- the acquisition of content from content owners; and
- the supply of content by content owners to content acquirers.

Advertising markets comprise all those media outlets which advertisers consider are close substitutes for advertising with the merging media outlets.⁸ Substitution is often tested by determining which other media outlets, if any, advertisers would be likely to turn to if the merging media outlets were to raise advertising rates by a significant amount.

Markets for the supply of content to consumers comprise all those media outlets which, in the specific case under consideration, consumers consider provide content which is a close substitute for the content provided by the merging media outlets.

It is difficult to analyse consumer preferences by assessing their likely reaction to a price change, particularly as consumers do not pay for free-to-air television and radio. In addition, different media provide quite different types of content and it may be that many consumers do not see much of this content as being substitutable. For example, a morning newspaper seems unlikely to be substitutable for an evening television comedy, although certain types of internet content might be substitutable for an evening television program for some consumers (and the number of these consumers might be increasing).

In practice, the ACCC is likely to focus on the overlap of content, and particularly news coverage, when defining markets for the supply of content to consumers.

The product dimension of advertising and supply of content markets will often be narrower than the supply of advertising opportunities and the supply of content (particularly news) overall, and will depend crucially on the facts of each merger.

For example, an advertising market may be limited to classified advertising in newspapers, or in newspapers and online media. Similarly, the facts of a particular case may lead to a conclusion that the relevant market encompasses newspaper display advertising and television advertising, or that these types of advertising are in separate markets.

Similarly, 'news' markets may be limited to particular types of news. Media outlets generally supply consumers with a 'bundle' of different types of news; for example, political, sports, business, weather and social news, each of which may be local, state, national and international in nature. Different outlets supply different bundles of news so as to best meet the perceived preferences of their target customers.

8 Media markets would also include all media outlets which, *without significant investment*, could switch to providing advertising opportunities that advertisers would consider to be substitutable for the opportunities provided by the merging parties. In practice, this would be relevant when considering whether, for example, a commercial radio station with a 'talk' format would be in the same market as one with a 'music' format. If the 'talk' station could change to a 'music' format without significant investment, then potentially the two radios may be in the same market. In contrast, it is unlikely that a newspaper could switch to supplying any type of commercial radio without significant investment.

In addition, consumers can access news supplied by radio and television stations discretely; that is, without consuming other content provided by these stations. However, news supplied by newspapers must be acquired along with all the other types of content supplied by newspapers (for example, 'opinion' articles, film reviews, crosswords etc.).

A key issue when analysing the impact of a media merger in advertising and supply of content markets is the degree to which one type of media is substitutable for other types of media, both for advertisers and consumers. This is discussed in more detail later in this article.

The geographic dimension of advertising and supply-of-content markets will depend critically on the merger being analysed. For example, a merger between two community newspapers will likely have quite localised markets closely reflecting the circulation areas of the newspapers in question. In contrast, the relevant market for a merger between two commercial websites may have a considerably wider geographic dimension.

Acquisition of content markets comprise all those media outlets which, in the specific case being considered, content suppliers consider are close substitutes for selling content to the merging media outlets. Competition concerns would arise in such markets if a merged media company would have monopoly power over content owners. In addition, it may be that separate markets would exist for the acquisition of different types of content; for example, a media merger might affect competition in markets for the acquisition of the right to broadcast sporting content (or specific types of sporting content); the acquisition of music broadcast rights; the acquisition of news content; and so on. It seems unlikely though that, for example, suppliers of video content would be competing with suppliers of print or audio content to make sales to content acquirers (other than online media outlets able to supply video, audio and text content to consumers).

Markets for the supply of content to content acquirers comprise all those content suppliers which, in the specific case under consideration, acquirers consider are close substitutes for acquiring content from the merging media outlets. For example, radio stations, particularly in larger cities, supply content to smaller regional stations. A merger between two such radio stations may generate competition concerns if the number of remaining suppliers is limited. A key issue may be whether the content supplied by the remaining radio stations is sufficiently substitutable for these stations to constitute a real competitive constraint on the merging stations, given that the content produced by different radio stations may be quite differentiated.

1 *Relationship between Advertising and Content*

A close relationship exists between the supply of content to consumers and advertising markets. For example, newspapers offer advertisers the opportunity to reach the readers of that newspaper. A newspaper publisher which attempted to exercise market power by increasing its cover price or decreasing the newspaper's quality would risk losing readers and, as a consequence of this, advertisers. Consequently, both the potential loss of revenue from readers and the

potential loss of revenue from advertising must be considered when assessing whether it would be profitable for the newspaper to exercise market power.

In particular, if advertisers have viable alternatives, they are likely to cease or reduce their advertising in the newspaper, potentially making the reduction in quality or increase in cover price unprofitable for the publisher. However, if advertisers do not have viable alternatives, most may continue to advertise in the paper even if their advertising becomes less effective. If that were the case, the publisher would face no real constraints in imposing a small but significant price increase or reduction in the quality of the paper.

B Analysing the Impact of a Proposed Merger on Competition in the Relevant Market

Section 50(3) of the *TPA* provides a non-exhaustive list of matters – the so-called ‘merger factors’ – that must be taken into account when assessing whether a proposed merger would be likely to substantially lessen competition in the relevant markets. These include market concentration; the height of barriers to entry; the dynamic characteristics of the market, including growth, innovation and product differentiation; the likely availability of substitutes in the market; and whether the merger would remove a vigorous and effective competitor.

Ultimately, after taking account of these factors, the ACCC is required to form a view about whether the merged media company would be able to exercise market power in the relevant markets. The ACCC will not grant informal clearance if it considers that, post-acquisition, the merged media company would be likely to be able to exercise market power. Market power might be exercised in a number of ways by a merged media company, and particularly by:

- imposing a small but significant price rise on advertisers and, where relevant, consumers; and/or
- imposing a small but significant reduction in the quality of the content supplied to consumers, potentially including by reducing the diversity of content supplied to consumers.

III KEY ISSUES WHEN ANALYSING A MEDIA MERGER

A Media Sector – Innovation and Change

As noted above, the dynamic characteristics of the market, including innovation, must be taken into account when assessing whether a proposed merger would be likely to substantially lessen competition.

The media sector worldwide is experiencing dramatic long-term change. This change is being driven by technological innovation. In particular, by the digitisation of content and the roll out and take-up of internet services that enable digital content to be delivered to a range of new devices. Digitisation allows a single media outlet, for the first time, to supply consumers with text, audio and moving images.

Consumers can access digital content on computers and on mobile devices. However, new platforms are continuing to emerge. For example, it is reported that some computer games consoles may soon be able to deliver internet protocol TV. The reach and capacity of the broadband access network has grown considerably over time. Continued advances in digital technology are increasing the amount of content that can be delivered to consumers over both fixed line and wireless networks. Maximum broadband download speeds for retail users are increasing; in most cases, speeds are now sufficient to deliver DVD quality television. Broadband take-up in Australia is growing significantly.⁹ The rollout of 3G mobile networks is proceeding apace, with the major mobile phone carriers rolling out 3G mobile networks nationally. Short video clips are already available on 3G mobile handsets. Finally, the Australian Government has announced it will allocate two currently unassigned channels of television broadcasting spectrum for new digital services. One channel could well be used to provide mobile television services.¹⁰

1 *Implications for Media Merger Review*

Technological developments in the media sector, and the impact of these changes on consumer behaviour, are no doubt changing the nature of competition in media markets, and will continue to do so over the long term. New markets may emerge, and existing markets might expand to include, in particular, online media.

However, the implications of technological developments for individual media merger reviews need to be assessed at the time that those reviews take place. When assessing media mergers, the ACCC will base its assessment on what the relevant markets are likely to look like in the following two or three years. Analysis will be based on hard evidence, not hypothetical views of what the future might look like. This means that:

- media mergers that, based on the best available evidence, are unlikely to substantially lessen competition should not be hindered on the basis of speculation of what technology might bring in the future, and
- media mergers that, based on the best available evidence, are likely to substantially lessen competition will not be granted informal clearance on the basis of speculation about future technological developments.

B Degree of substitution between media

As noted above, cross-media mergers were, until April 2007, prohibited. However, such mergers are now able to proceed subject to the current cross-media laws.

9 The latest Australian Bureau of Statistics ('ABS') figures estimate that as at 30 September 2006, broadband take-up across business and household users has increased by over 2.1 million services, or 117 per cent from the March 2005 figure of around 1.8 million: ABS, *Internet Activity Survey*, ABS Cat No 8153.0 (2007).

10 Senator Helen Coonan, 'New Digital Services for Australians' (Press Release, 12 September 2006).

A key issue when assessing a cross-media merger will be whether the merging media outlets are significant competitors for advertisers, consumers and/or content owners, despite being different types of media (for example, one being a television company and the other a radio company, both broadcasting in the same region).¹¹ The merger parties would be significant competitors if a significant number of advertisers and/or consumers considered them to be close substitutes.

1 Advertising

Many advertisers, and particularly larger advertisers, run advertising campaigns across a range of different media. This suggests that different media are, to some degree, supplementary to each other rather than substitutes for each other.

This may reflect a recognition by advertisers of the different characteristics of different media, which then affects their choice of medium. For example, television advertising might be used to convey the visual aspects of the advertisers' product or to build brand awareness. Repeated short radio advertisements might be used to highlight, for example, that a product is discounted for a period of time. Print advertising might be used to provide more detailed information about a product.

Different media may also be accessed by consumers at different and predictable times of the day. For example, some consumers might read a newspaper in the morning, listen to the radio while commuting to work and watch television in the evening. An advertiser might then choose to use different media to reach consumers at different times of the day.

On the other hand, advertisers might alter the mix of media they use if the price of advertising on one medium rose; that is, advertisers might buy less advertising on this medium and more advertising on other media. If so, this would suggest a degree of substitutability between different media.

2 Consumers

As discussed above, the ACCC is likely to focus particularly on markets for the supply of news to consumers.

The analysis of consumer news media preferences raises similar issues to the analysis of advertiser preferences. On one hand, consumers may utilise different media to access text, video or audio news, or to access news at different times of the day. On the other hand, consumers might alter the mix of media they use over a day if the quality of the news supplied on one medium was perceived to fall; that is, consumers might obtain less news from this medium and more news from other media. It should be noted that measure of quality can be subjective, which can make the analysis more difficult.

¹¹ Other issues when examining a cross-media merger could include whether, for example, community radio stations were substitutable for commercial radio stations, whether commercial radio stations using a 'talk' format were substitutable for those with a music format (see above n 8) or whether free weekly community newspapers were substitutable for paid daily newspapers (eg for print classified advertising).

3 *Assessing Substitutability*

Assessing the substitutability of different media for advertisers and consumers is essentially an empirical question. When reviewing a media merger, the ACCC will request the views of interested parties (competitors, suppliers and consumers) on the extent to which different media – particularly television, newspaper, radio and the internet – are substitutable for each other, or supplementary to each other, and why this is the case. The ACCC will also seek access to available consumer surveys and research to assist it to understand consumer media preferences.

In addition, the ACCC will request views on how advertising and consumer media usage might evolve in the future (as far as this can be reasonably foreseen), particularly taking into account the internet. The ACCC will also seek views on whether there are differences between the preferences of advertisers and consumer in different parts of Australia, and particularly between metropolitan and rural advertisers. As regards advertising, there may also be differences between the preferences of large and small advertisers.

C **Bundling**

Even if different media outlets do not compete significantly for advertisers and consumers, a cross-media merger might still raise competition concerns by facilitating tying and/bundling of products by the merged firm. Bundling may enhance efficiency by reducing the cost of producing or distributing a product. Consumers may value a bundle of products more than they value the products individually.

However, in certain circumstances, bundling may be anti-competitive where it provides a way for a firm with market power to extend that power by harming potential competitors or raising barriers to entry.

For example, bundling may be used as a vehicle for predatory pricing, and would be more difficult to detect than ‘direct’ predatory pricing. Indeed, bundling might be used to disguise predatory pricing. A media company publishing the only paid daily newspaper in a city and operating a television station could bundle newspaper and television advertising so as to disguise the fact that television advertising was being sold at below competitive prices. The usual conditions for predatory pricing would need to hold; for example, the merged company would need to be able to recoup the television advertising profits it forgoes in the short-term.

Bundling may also create competition concerns by raising barriers to entry. For example, bundling television and newspaper advertising may deter new television entrants as new entrants would know that any advertisers they attract from the merged firm would reduce the merged firm’s advertising revenue from both television and newspaper. Consequently, new entrants could expect the merged firm to react more aggressively to new entry than if the merged firm did not bundle its products. This expectation may deter entry. However, as discussed below, entry barriers to media markets may well be high already in many cases, often for regulatory reasons.

Overall, a media merger is most likely to raise competition concerns by facilitating anti-competitive bundling where:

- the merged firm has market power in a product market (for example, a newspaper markets) and is potentially subject to competition in the other product market (for example, television or radio);
- the merged firm does not sell individual products (for example, television or newspaper advertising) at prices that are comparable to the price for the bundle; and
- customer valuations are positively correlated over the bundled products.

D Media Diversity

A key purpose of the *TPA* is to protect competition in markets in Australia, including media markets. Media diversity is primarily protected by the restrictions on cross-media mergers in the *BSA* (as set out above).

However, the ACCC will consider the impact of media mergers on market concentration, and therefore on the number and market share of media outlets in a market. The ACCC will also consider whether a merged media business could exercise market power by reducing the quality of the content it provides consumers, which could include reducing the diversity of the content it provides.

For example, a newspaper with market power may choose to exercise that market power by increasing its cover price and/or reducing the quality of the newspaper's layout or its content. In particular, a publisher might reduce the quality of its newspaper by reducing the diversity of content it supplies to readers.

The ACCC will not grant informal clearance where the evidence before it indicates that a merged media business would be likely to exercise market power, including by reducing the diversity of content supplied to consumers. As discussed above, a key issue is whether viable alternatives exist for consumers and advertisers to the merged media company. If not, the publisher of the newspaper would face no real constraints in imposing a small but significant reduction in the quality and diversity of the newspaper.

E Barriers to Entry

The height of barriers to entry to the markets relevant to individual media mergers must be assessed on a case by case basis, taking into account the specific facts of that case. However, the following factors suggest that barriers to entry to media markets may be high in many cases, at least in the near future:

- The Australian Government announced on 13 July 2006 that no new commercial television licences will be allocated until television switches from analogue to digital, which is to occur over the period between 2010 and 2012.¹²

12 Senator Helen Coonan, 'New Media Framework for Australia' (Press Release, 13 July 2006).

- There are only a limited number of examples of recent new entry into Australian radio licence areas.¹³ New entry by analogue commercial radio stations may be impeded by broadcasting service band congestion, and by the introduction of digital radio. In addition, on 14 October 2005, the Australian Government announced a moratorium on the issue of new digital commercial radio licences (on broadcasting services bands) for a period of six years following the commencement of digital radio services in state capital markets.¹⁴
- The ACCC is not aware of any instances of a new daily paid print newspaper entering an Australian market in recent times. This appears to reflect the strong economies of scale inherent in publishing daily newspapers and a long-term incremental decline in demand for newspapers. In addition, particularly as regards classified advertising, new entry might be inhibited by the incentive for advertisers to advertise where other advertisers advertise, and where consumers expect to find advertising; that is by so-called 'network effects'.
- Entry into some kinds of online markets, other than on a small scale, may be impeded by, for example, potentially substantial sunk costs that would need to be incurred in advertising and promoting a new website (for example, supplying online news). Online classified advertising markets may also be impeded by the existence of network effects.

Where barriers to entry are high, competition concerns may arise unless, for example, existing competitors in the relevant market would be likely to constitute a significant competitive constraint on the merged media company.

IV REGIONAL MARKETS

Section 50(6) of the *TPA* specifically requires the ACCC to consider the impact of proposed mergers on markets in regional Australia. Consequently, the ACCC will take into account the differing circumstances in rural and regional Australia compared with urban areas.

For example, in April 2007, the ACCC completed a review of the acquisition of Rural Press Ltd by Fairfax Media Ltd. Fairfax and Rural Press newspapers overlapped in a number of areas, including Newcastle and the lower Hunter Valley. Fairfax and Rural Press published the only significant free community newspapers in these two areas. After conducting extensive market inquiries, the ACCC was satisfied that other forms of advertising were generally not substitutes for advertising in free community newspapers in the two areas. The ACCC was also satisfied that barriers to entry were sufficiently high for competition concerns to arise. Consequently, the ACCC concluded that the acquisition was

13 See ACMA, *ACMA Communications Report 2005-06* (2006) Table 3.4.1, Appendix 3.4, 255 <http://www.acma.gov.au/webwr/_assets/main/lib101030/append_per_cent203_cr_per_cent2005_06.pdf> at 30 June 2007.

14 Senator Helen Coonan, 'Framework for the introduction of digital radio' (Press Release, 14 October 2005).

likely to give rise to competition concerns in markets for the supply of general retail display advertising in free community newspapers in the two areas.

On 18 April 2007, the ACCC announced that it would not oppose the acquisition of Rural Press by Fairfax after accepting an undertaking by Fairfax that Fairfax will divest two free community newspapers in Newcastle and the lower Hunter Valley (this undertaking is discussed further below).

The outcome of the Fairfax-Rural Press matter can be contrasted with the outcome of the ACCC's review of the acquisition by News Ltd of the Community Media Group of the Federal Publishing Co, which involved free community newspapers published in metropolitan Sydney.

Potential competition concerns arose in northern and inner western Sydney where FPC and News Ltd published the major community newspapers. However, following extensive market inquiries in these areas, the ACCC concluded that a range of advertising alternatives existed for advertisers in these community newspapers, although individual advertisers had different ranges of alternatives and some had more alternatives than others.

Overall, the ACCC concluded that the acquisition would generate a small, but not a substantial, lessening of competition in northern and inner-western Sydney. Consequently, on 17 January 2007, the ACCC announced that it would not oppose this acquisition.

These two merger reviews illustrate how the potentially different circumstances existing in metropolitan and regional markets, as revealed by market inquiries conducted by the ACCC as a central part of its merger review process, can lead to different outcomes.

V REMEDYING COMPETITION CONCERNS

Where the ACCC concludes that a merger raises competition concerns, the merger parties may either decide:

- not to proceed with the merger;
- attempt to proceed with the merger and then defend legal action brought by the ACCC to obtain an injunction; or
- where possible because of the nature of the competition concerns identified by the ACCC, resolve these concerns by offering the ACCC an undertaking pursuant to s 87B of the *TPA*. Section 87B undertakings are enforceable in the Federal Court of Australia.¹⁵ The ACCC's strong preference is for undertakings to address competition concerns by divesting part of the merged business, although on occasion the ACCC might accept a

¹⁵ If a s 87B undertaking is breached, the ACCC may seek orders from the Federal Court directing compliance with the undertaking, the giving up of any financial benefit gained from the breach, compensation for any other loss or damage as a result of the breach, or any other appropriate orders.

behavioural undertaking¹⁶ from merger parties to supplement a divestiture undertaking.

As noted above, on 18 April 2007, the ACCC accepted an undertaking offered by Fairfax Media Limited to resolve competition concerns arising from Fairfax's acquisition of Rural Press Limited. The undertaking requires Fairfax to divest two free community newspapers in Newcastle and the lower Hunter Valley.¹⁷ The undertaking is not a behavioural undertaking.

Fairfax's undertaking contains several key features which the ACCC would expect to see in future undertakings.¹⁸ Broadly, these are:

- the two community newspapers must be divested to a purchaser or purchasers approved by the ACCC;
- Fairfax may not make any material adverse changes to the divestiture businesses prior to divestiture;
- Fairfax must appoint an independent manager, approved by the ACCC, to manage the divestiture businesses separately from Fairfax's business, until divestiture; and
- if the sale of the divestiture businesses has not been completed within a confidential divestiture period, an independent divestiture agent, approved by the ACCC, must be appointed to sell the divestiture businesses within a specified period of time.

Importantly, the undertaking requires that its provisions be given an interpretation that promotes the purpose or object of the undertaking over an interpretation that would not do this. In addition, the undertaking requires Fairfax, when directed by the ACCC, to provide information or documents to the ACCC, or attend the ACCC to answer any questions the ACCC may have, that relate to Fairfax's compliance with the undertaking.

VI CO-ORDINATION WITH OTHER REGULATORY AGENCIES

Media companies proposing to merger may wish or need to obtain clearance from the ACCC and from other regulatory agencies, particularly the Australian Communications and Media Authority ('ACMA').

For example, a media merger between a television network and a radio network might breach the cross-media laws – for example, the rule prohibiting a merger resulting in fewer than five independent 'voices' in mainland state capitals and four independent 'voices' in all other regions – in only a small number of regions relative to the number of regions covered by both networks in total. The merger parties may then approach ACMA seeking an exemption from

16 A behavioural undertaking is one that requires the merger parties to do certain acts, possibly in accordance with a set of rules and conditions, or to not do certain acts.

17 They are *The Newcastle & Lake Macquarie Post* and *The Hunter Post*.

18 See ACCC, *Fairfax Media Limited – Proposed Acquisition of Rural Press Limited* (2006) <<http://www.accc.gov.au/content/index.php/ml/itemId/784990/fromItemId/751046>> at 30 June 2007.

the relevant cross-media rules while they divest the media outlets placing them in breach. They may need to provide ACMA with an undertaking setting out which media outlets are to be sold and the sales process.

At the same time, the merger parties may have approached the ACCC seeking informal clearance, and the ACCC may have identified competition concerns in these same areas. The merger parties may then contemplate offering the ACCC an undertaking to resolve competition concerns in these areas.

This example highlights the need for the ACCC and ACMA to work together to ensure that their merger review processes run smoothly and effectively alongside each other. On 5 March 2007, the ACCC and ACMA jointly announced that they intend to establish a mechanism under which merger parties who provide confidential information to either agency will be asked to agree to that information being provided to the other agency.¹⁹

VII CONCLUSION

The ACCC expects to consider an increased number of media mergers in coming years as a result of the recent changes to Australia's cross-media laws. Some of these may well be major matters, with potentially significant implications for competition in Australian media markets, and ultimately for Australian consumers.

The ACCC will comprehensively review all significant media mergers coming before it for informal clearance, in accordance with the analytical framework set out in this article. The outcome of these informal clearance processes may well turn on the resolution of the key issues identified in this article.

19 See ACCC and ACMA, 'ACCC and ACMA seeking to share confidential media merger information' (Press Release, 5 March 2007) <<http://www.accc.gov.au/content/index.php/ml/itemId/781932/fromItemId/621419>> at 30 June 2007.