



Defining media markets

Juliette Oriti and David Olds from law firm, Clayton Utz, compare the approaches to market definition taken by the Federal Court in *News Limited v ARL* and the ACCC in considering the Foxtel/Australis merger

On 23 February, 1996, Justice Burchett delivered a lengthy decision in *News Limited v. ARL* ('the Super League decision'). He found that News Limited had induced rugby league clubs to breach their contracts and their fiduciary relationship with the ARL. An appeal against the orders which Justice Burchett made has been heard and there will be no Super League games for at least the current football season. It seems likely that News Limited will appeal to the full Federal Court against the decision.

The proceedings were commenced by News Limited which claimed that the ARL had breached the Trade Practices Act by misusing its substantial market power in rugby league and promoting exclusive dealings which prevented the clubs from dealing with News Limited.

Much has been made of the purported effect of Justice Burchett's comments on market definition for pay television. At first glance, his comments seem inconsistent with the Australian Competition and Consumer Commission's (ACCC) most recent decision to refuse the Australis/Foxtel merger.

The ACCC approach

When the TPC approved the initial Foxtel/Australis joint venture in April last year, it was of the opinion that at least in the short term, free to air and pay television were in the one market for consumers. The TPC commented

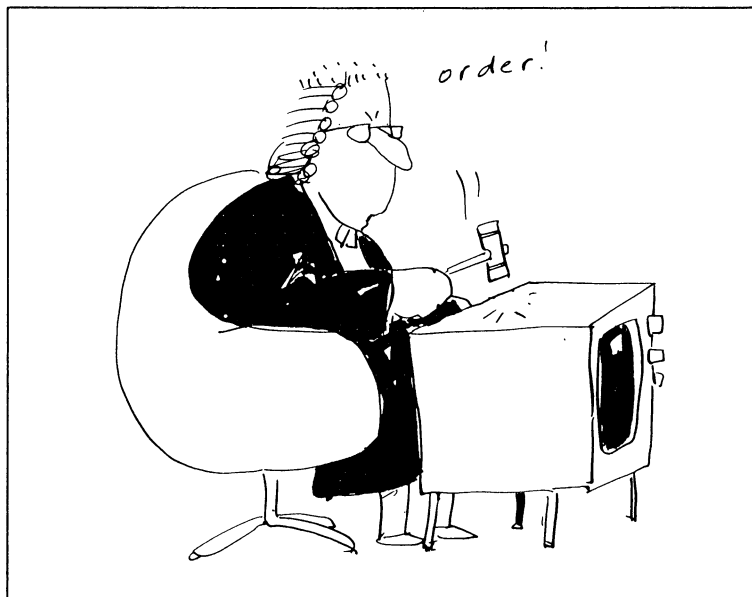
that 'a major potential constraining effect on the exercise of market power by Foxtel and Australis would be free to air television broadcasters'.

The Commission remarked in its press release that it was difficult to analyse an industry which had only just commenced offering services to consumers and the decision to approve the joint venture was based on

From the limited information available, the ACCC's most recent decisions suggest that it now considers free to air and pay television broadcasters are in different markets for consumers.

This was first indicated in the TPC's approval of the Optus Vision consortium in June 1995. The TPC permitted Channel Seven to hold an interest in

the Vision Consortium, commenting that the free to air operator's involvement strengthened competition in pay television and there was no indication of any adverse impact on free to air competition between Channels Nine and Seven. According to its press release, the TPC's 'major area of concern' was the potential 'decrease [in] competition between free to air operators', not the Vision consortium's power in a com-



the 'limited evidence' that pay TV broadcasters considered themselves to be in competition with free to air broadcasters.

Cautious of expressing a final view in a 'dynamic industry', the TPC suggested that pay and free to air television may evolve into separate markets sometime in the future.

TPC and ACCC decisions since April last year have marked a gradual shift in the Commission's characterisation of the pay television market as the industry developed. Any analysis of the ACCC's current view is hampered by the absence of full reports on the reasons behind the Commission's decisions.

mon broadcasting market.

In February this year, the ACCC refused to approve a complete Foxtel/Australis merger, presumably on the basis that separate markets have now evolved for free to air and subscription services. The ACCC has not issued a detailed report on the Foxtel/Australis merger and there is, thus, no clear indication of the reasons for its change in attitude towards Foxtel/Australis over the last 10 months. If the ACCC still considered free to air and pay television to be in the same retail market, it would have been difficult to argue that a merged Foxtel/Australis was dominant in that market.



Burchett - Rugby League is not unique

Justice Burchett's discussion of broadcasting rights in the Super League decision centres on his finding that there is not an exclusive market for the rugby league content on either free to air or subscription television. There are sufficient substitution possibilities for programming content that rugby league content is in competition with content from other sources, including sports such as soccer, basketball and rugby union.

Justice Burchett made no findings whether pay and free to air television are one market. Nor was he required to do so in the course of his reasoning. He did emphasise that subscription television 'differs from free to air television in a number of respects', not least of which was that free to air operators sought viewer ratings for particular programs while pay television operators sought subscription fees for an entire service.

One market for content

Despite Justice Burchett's comments on the difference between pay and free to air television, there have been suggestions that his decision was based on the notion of a 'common market' between free to air and subscription television.

The confusion has arisen because his Honour considered free to air and pay television markets together, rather than separately, when examining potential substitutes for rugby league content.

The most that can be said is that Justice Burchett's approach was based on the view that free to air and pay television were in a 'common market for programming content.'

However, the fact that there is one market for programming content does not mean that there is only one market for consumers. If the ACCC's view is that there are separate markets for consumers, nothing in Justice

Burchett's decision suggests that view is incorrect.

The former Trade Practices Commission adopted the same approach to content market definition as Justice Burchett in its Report on the Allocation of Subscription Television Broadcasting Licence A to UCOM Pty Ltd (16 June, 1993). The TPC found that free to air and subscription television broadcasters compete for the same content in the context of 'windows' set by the content provider.

Just as movies are released on video before they are broadcast on television, the ARL may sell free to air broadcasting rights over some games and separately sell the subscription television rights over others to maximise revenue from different broadcasting platforms.

A pay television or free to air broadcaster may purchase broadcasting rights on the other broadcasting platform to increase the exclusivity of its programming content (by preventing the content being shown on the other platform) but such exclusive arrangements will be at a premium for the content provider.

In Australia, such arrangements are, in part, inhibited by the anti-siphoning regulations which prevent pay television or free to air broadcasters 'hoarding' programming content.

Market power through range of content

Justice Burchett considered that the range of content was the most important single factor in the promotion of the subscription television operators' product because 'the decision to subscribe will, in very many cases, be a family decision'. Justice Burchett commented that movies and other content will be as important as sports when consumers make the choice between pay television broadcasters.

The TPC made similar observations in June 1995 when it permitted

Australis and Continental Century to cooperate in the provision of pay television infrastructure and content. The Commission's press release stated that one of the most important factors which swayed the Commission was evidence that sports and movies are the 'drivers of pay TV subscriptions' and subscription broadcasters must provide a 'variety of programming' to succeed in the market for consumers.

These comments raise interesting questions about how market power will be defined in subscription television. Clearly the number of potential subscribers (or 'homes passed' to use network roll out jargon) will be an important factor. Justice Burchett's decision suggests that the range of content which a subscription service provider has available will also be important. It could be argued that a broadcaster, which has a range of content that the other operators duplicate, is in a position of substantial market power. Hence, programming content providers could be restrained from contracting to sell their broadcasting rights to that broadcaster under the Trade Practices Act. Alternatively, if Foxtel wins the race in network roll out, it could argue that its resulting market power is offset by Optus Vision's wider range of programming content. Optus Vision's prized ARL broadcasting rights could count against it in future litigation with its main competitor.

Justice Burchett's decision is not inconsistent with what appears to be the current ACCC approach to market definition in pay television. Although pay television and free to air broadcasters are in competition for programming content, they are not in competition for consumers of subscription services. The range of content offered by any pay television provider may define the amount of power that a broadcaster has over the market. □

This article represents the personal views of the authors, not those of their firm or its clients.