Arming the public interest

Any 'public interest' test applying to proposed media acquisitions must contain substantial investigative procedures, argues ***Paul Chadwick***

If the government and Senate were to be persuaded that media ownership and control should be regulated solely by competition law, then that law and its administration must adapted to take account of the unique public responsibilities of media businesses.

Past Australian inquiries considering the adaptation of competition law to media have tended to borrow from the English experience, as media-specific criteria were first incorporated into UK monopolies legislation in 1965. The Norris (Victoria, 1981), Mathews (Victoria, 1990) and Lee (House of Representatives, 1992) inquiries were all influenced by section 59 of the UK Fair Trading Act. But they were influenced in different ways. Norris and especially Mathews augmented the English criteria in forming their models. Lee, on the other hand, copied the UK criteria without appearing to sufficiently consider the failures of that scheme or the differences between the British and Australian media scenes.

Recent media reports suggest the federal government may be about to do the same, with unnamed sources talking airily of replacing cross-media rules with competition law and such 'public interest' as whether a proposed acquisition would adversely affect 'free expression of opinion', the 'accurate presentation of news' or 'editorial independence'.

But the English cases tend to show that neither criterion works to prevent further concentration. On the contrary, such tests are so broad they are very difficult for the regulator to apply and impossible to enforce once a merger has been approved and control cemented.

A third suggested test, that the regulator (perhaps the ACCC) consider the effects of a proposed merger on editorial independence, has two chief problems: it would be impossible to apply satisfactorily in practice and, to the extent that it required Parliament to provide an enforcement mechanism, would be objectionable in principle.

This article sketches some of the hazards of legislators convincing themselves that all will be well if only the forthcoming amendments to media ownership laws include comforting terms like 'free expression', 'fair and accurate news presentation' and 'editorial independence'.

Why broad, simple criteria won't work

It is not impossible to adapt competition law to the uniqueness of media, but it requires more sophistication than policymakers have so far shown.

In practice, the broad criteria 'free expression of opinion' and 'fair and accurate presentation of news' would draw the ACCC into an analysis of two vexed areas of the media: editorial independence and media ethics.

Say Company K, which owned a television network and several magazines, wanted to take over Company Z, a major newspaper publisher, and the ACCC had to apply the tests. To make a sensible assessment of effects of the transaction on the free expression of opinion it would have to consider at least:

- the objective diminution of plurality of owners as a result of K controlling Z's titles as well as its own, *regardless of editorial independence policies K adopted towards Z* (this is required because of the potential for K to exercise ultimate power over Z's output, regardless of any initial commitments K might make); and
- the probable consequences of the control by K of Z's titles on the editorial independence of those who produce Z's titles. This would be a subjective judgment.

The second task would require an investigation of the editorial independence which the owners and managers of K have in the past granted to the journalists and editors producing the content in magazines and TV programs of Company K.

To apply a criterion such as 'fair and accurate presentation of news', the ACCC would need to conduct a broad-ranging inquiry into the journalistic performance of Company K - and perhaps, for comparison, Company Z - in order to make a judgment about the effect of the proposed transaction on presentation of news. Again, this would put the ACCC into a position where it would need to investigate and decide all manner of claims of ethical breaches which might be alleged against K and its employees.

The English cases give a sense of the difficulties involved. The Monopolies Commission has tended to accept at face value or with minimal inquiry the assurances of would-be acquirers that they already grant editorial independence and will continue to do so. The UK regulator has been concerned to maintain a balance among papers with clear and declared political positions. Yet the Australian press differs greatly in that papers do not tend expressly to align themselves politically in the way that,

say, the London Daily Telegraph is emphatically of the Right and the Guardian of the Left.

Without deciding whether it is asking too much of the ACCC to require it to judge prospects for free expression of opinion and accurate presentation of news, it is at least clear from the cases that such an assessment is a delicate process and is outside the usual role of a competition regulator.

How far should Parliament go?

If Parliament requires a regulatory agency to make the kinds of judgments implied by the broad criteria, it strays too far into the regulation of media content. It empowers the executive to determine who may own and control media outlets on the basis of whether, in the opinion of one of the executive's agencies, a person's stewardship has in the past led to 'free expression' or 'fair and accurate presentation' and will do so in future if a transaction is approved. These are highly subjective assessments which no one can sensibly make without considerable inquiry.

In the absence of such inquiry, the exercise becomes token and the finding potentially misleading to the extent that it may create the false impression that an applicant, when approved, is a 'good' or 'suitable' media proprietor. The argument from freedom of the press principles is that such judgments are not just impracticable but objectionable and ought not to be made at all.

To be sure, there is a counter-argument that the intense concentration of the media in Australia means the pure freedom of the press argument must give ground. But study of the English experience suggests that it should not give so much ground that the Trade Practices Act creates media-specific criteria as broad as the UK Fair Trading Act or the Lee Committee's reworking of them.

Proposals for any adapted competition law model

Experience teaches that:

- any amendments to the Trade Practices Act to incorporate media-specific criteria should be framed in narrow terms, not broad platitudes, to direct the ACCC to particular issues which, as far as possible, can be investigated and assessed objectively;
- the processes should be open;
- the onus should lie on those who, by their proposed transactions, would worsen concentration;
- parties other than those involved in the transactions should be able to participate;
- ministerial discretions should be minimised; and
- as Norris advised and the Mathews Committee also recommended, the ACCC should be directed by parliament always to exercise its powers in ways which enhance freedom of expression.

'Variety of sources' test

Diversity of content is not the same as multiplicity of outlets. Technology and the market alone cannot guarantee diversity.

One aspect of diversity is the variety of sources of information, opinion and entertainment available. Much evidence shows that one of the consistent effects of greater concentration of media ownership and control has been a decline in the number of separate sources of print and electronic information and entertainment sources available to Australians.

That evidence, chronicled over many years by the CLC among others, includes: the extent of networking of programming in radio and TV; syndication of news and commentaries in newspaper groups; collapse of AIM, the ABC-Fairfax pay TV venture; absence of any fresh and significant pay TV news service and instead the re-packaging for pay TV of local news prepared for the free-to-air networks; absorption of Australis Media (Galaxy) into the orbit of PBL (Nine Network and Optus Vision); high rate of newspaper closures.

Several avenues are open to Government to arrest the decline and to seed new sources of media content, but they will not be pursued here. My immediate purpose is only to recommend that a 'variety of sources' test be made one of the criteria which a regulator would be required to apply to any proposed transaction among media and communications entities.

A transaction which would have the effect of diminishing the variety of sources would prima facie be contrary to the public interest and not permitted unless the applicants could demonstrate such public benefit would result from the transaction that the transaction should be authorised.

The term 'sources' should embrace information, opinion and entertainment sources in any medium including film and TV production and online services a well as traditional media fare. The provision should be technology neutral. A rich conception of the word 'variety' would include assessments of independence and control as well as differences in content. For instance, where a publisher of frothy magazines wanted to acquire weighty newspapers, the test should not just be whether the two types of publication would continue, but whether both types would be under the same control. If so, the variety of independence would diminish.

If predictions of a convergence of technologies prove correct, the variety of independent sources will determine the health of diversity in media more powerfully than control of the technological means of delivering those sources.❑

Note: the author was a member of the Mathews Committee.