Competition and Convergence Regulation: Too Much of a Good Thing?

Kon Stellios and Catherine Bembrick consider whether the new regulatory schemes proposed by the Convergence Review in relation to media ownership and control rules and content related competition issues, are necessary and appropriate having regard to the ACCC's existing powers.

Introduction

In early 2011 the Federal Government established the Convergence Review Committee (the ***Review***) to assess the effectiveness of current media and telecommunications regulation in Australia in achieving appropriate policy objectives for the convergence era. The Review's scope was determined by terms of reference set by the Government which covered a range of issues including media ownership laws and media content standards. On 30 March 2012 the Review published its final report, presenting its findings and providing recommendations to the Government.[1] The Government subsequently released the final report for public comment on 30 April 2012.

The final report makes 31 recommendations to Government. It is currently unclear what the Government's response will be to the Review's recommendations.

This article:

- examines two of the issues covered in the Review, namely, (a) media ownership and control rules and (b) content related competition issues; and
- considers whether the new regulatory schemes proposed by the Review in relation to these issues are necessary and appropriate, having regard to, among other things, the Australian Competition and Consumer Commission's (***ACCC's***) existing powers in the *Competition and Consumer Act 2010* (Cth) (***CCA***).

Guiding principles: the minimum regulation necessary

The terms of reference specifically required the Committee to advise the Government on the appropriate policy framework in a converged environment. As part of its initial deliberations, the Review established a set of 10 principles to guide its work in addressing that issue.[2] The first principle stated:

> Citizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose.

As noted in the final report, the Review's starting point was that unnecessary regulation should be removed.[3] Although the Review concludes that a range of existing regulations no longer serve their objective, in relation to media ownership and control rules and content related competition issues, *additional* regulation is required. Specifically, the Review recommends:

- a new regulator be established with power to oversee the media industry. This regulator would replace the existing Australian Communications and Media Authority;
- a number of rules affecting media ownership, control and programming be removed and replaced with broad policy setting powers vested in the new regulator. The policy framework will regulate significant media enterprises, known as 'content service enterprises' (***CSEs***). Whether an entity is a CSE will be based on its size and scope, rather than the manner in which it delivers content. The Review considers that only the most substantial and influential media groups should be categorised as CSEs. Based on threshold levels suggested in the Review, around 15 enterprises would be categorised as 'content service enterprises', for example, News Limited, Fairfax Media, Seven West Media and WIN Corporation;[4]

the Review's starting point was that unnecessary regulation should be removed

- a 'minimum number of owners' rule should be implemented regarding ownership of media in local markets. The stated objective of the regime is to ensure that no single operator or small group of operators has a dominant influence in a local market for news and commentary. CSEs can apply to the regulator for an exemption from the applicable rule if the transaction would result in a net public benefit in the local market;
- a public interest test should apply to changes in control of CSEs of national significance. The focus of the public interest test would be on 'maintaining diversity at a national level'. It will be the job of the new regulator to administer the public interest test; and
- the new regulator should have flexible powers to make rules on content related competition issues, in order to promote fair and effective competition in content markets.

Each of these recommendations is dealt with in greater detail below.

Overall, the Review suggests that 'black letter law regulation' can quickly become obsolete in a fast-changing converged environment and is also open to unforeseen interpretations. Regulation based on overarching policy objectives and flexible powers should therefore be preferred.[5]

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1 Convergence Review, *Final Report*, March 2012.

2 Convergence Review, *Emerging Issues*, July 2011 pp 8-10.

3 Convergence Review, *Final Report,* March 2012, p viii.

4 The new regulator will define the thresholds for CSEs. The Review considers that essential characteristics of significant media enterprises are those organisations that (i) have control over the professional content they deliver, (ii) have a large number of Australian users of that content and (iii) have a high level of revenue derived from supplying that professional content to Australians. The Review considers that the threshold levels for CSEs should be initially around $50 million a year of Australian sourced content service revenue and audience/users numbering 500,000 per month: Convergence Review, *Final Report*, March 2012, pp ix, 10 and 12.

5 Convergence Review, *Final Report*, March 2012, p xii.

Finally, the Review recommends that the new rules and prohibitions would 'complement, not duplicate' the ACCC's existing powers, including the general prohibition in the CCA against mergers and acquisitions which substantially lessen competition.[6]

Media ownership and control

The Review concludes that rules preventing the 'undue concentration of ownership' remain an important factor in maintaining diversity of news and commentary. Recommendation 6 of the final report provides that:[7]

(a) ownership of local media should continue to be regulated through a 'minimum number of owners' rule but the existing '4/5' rule should be updated to take into account all entities that provide a news and commentary service and have a significant influence in a **local market;** and

(b) the new regulator should have the ability to examine changes in control of CSEs of **national significance.** It should have the power to block a proposed transaction if it is satisfied, having regard to diversity considerations, that the proposal is not in the public interest.

Related to Recommendation 6(a), Recommendation 7 suggests that existing rules on ownership and control should be removed and replaced with a 'minimum number of owners' rule and a public interest test.

The Review submits that a public interest test focused on media ownership would examine broader issues than the 'economic market analysis'

Recommendations 6(a) and 7: local media

The minimum number of owners rule is intended to reflect the objective of ensuring that no single operator or small group of operators has a dominant influence in a local market for news and commentary.[8] The new rule would apply to all CSEs that provide news and commentary services in a local market.

In recognition of the fact that in some markets there are influential news and commentary services provided by media operators that are not CSEs, the Review recommends that the new regulator should have the power to declare that the rule applies to those media operators in a particular local market if:

- the operator has editorial control over its news and commentary; and
- the number of users for the service reaches a minimum percentage of the population or reaches a minimum number of users in that market on an annual basis. This threshold will be set deliberately high by the regulator to 'ensure that only influential media is captured'.[9]

The Review notes that in some situations there may be a net public benefit in a change of control in local markets and therefore suggests that where a proposed merger would otherwise breach the rule, the proponent should be able to apply to the regulator for exemption on the basis that the transaction would result in a public benefit in the local market. Relevant criteria for establishing the existence of a public benefit could include whether the transaction would lead to a substantial increase in the volume of local news, advertising etc and whether local news would be available across more platforms.

Recommendation 6(b): national CSEs

Recommendation 6(b) addresses a change of control of a CSE at a national level and also contains a test based on the 'public interest'. The Review submits that a public interest test focused on media ownership would examine broader issues than the 'economic market analysis' under merger provisions in the CCA and would complement rather than duplicate the ACCC's existing powers.[10] The Review suggests that under this test:[11]

- the new regulator would develop, maintain and publish a register of CSEs of national significance. At a minimum, the definition of a CSE of 'national significance' should include CSEs that provide a content service in multiple markets and in more than one state or territory. Other factors that the regulator could take account of in determining national significance include whether the CSE has a controlling interest in one or more prominent media operations on different platforms; and
- the onus should be on the regulator to demonstrate that the outcome of the proposed transaction is not in the public interest. The Review suggests that factors the regulator could be required to take into account in making its decision include (a) whether the outcome of the transaction would diminish the diversity of unique owners providing general commentary services, as well as news and commentary at a national level, or the range of content services and (b) whether the person taking control of the CSE would represent a significant risk that the CSE would not comply with its operations.[12]

The national public interest test would operate as follows:

- all nationally significant CSEs must notify the regulator of a potential change in control and seek a preliminary view as to whether the public interest test will apply;
- the regulator should undertake an initial assessment and consult with the ACCC before making a final decision whether to conduct a public interest assessment; and
- if the regulator decides that the transaction requires a public interest assessment, it would conduct a public consultation process to seek industry and community views. Following the conclusion of that process the regulator's board would make a decision as to whether the acquisition contravenes the test.

The Review recognises that the introduction of the public interest test may 'increase the regulatory burden on some companies' but suggests that this burden could be reduced by the regulator adhering to strict time limits for administering the test.[13]

The problems with the recommendations

Three criticisms can be made of recommendations 6 and 7:

1. First, the Review does not address whether the proposed reforms are 'necessary' in a converged environment.
2. Second, the recommendations, if implemented, will create considerable uncertainty. The proposed recommendations would vest significant discretion in the new regulator to determine

6 Convergence Review, *Final Report*, March 2012, p x.

7 Convergence Review, *Final Report*, March 2012, pp xvi and 18.

8 Convergence Review, *Final Report*, March 2012, p 21.

9 Convergence Review, *Final Report*, March 2012, p 21.

10 Convergence Review, *Final Report*, March 2012, p 23.

11 Convergence Review, *Final Report*, March 2012, p 24.

12 Convergence Review, *Final Report*, March 2012, p 24.

13 Convergence Review, *Final Report*, March 2012, p 25.

not only the content of the prohibition, but also the persons to whom the new prohibitions will apply.

3. Third, to the extent the new rules are intended to complement the ACCC's existing powers, it is difficult to see how this would work in practice. In particular, there is significant scope for overlap and for the ACCC and the new regulator to reach different conclusions, even when applying what appears to be the same test.

We deal with each of these criticisms below.

No real policy rationale for the reforms

The key issue which has not been adequately addressed by the Review is whether it is necessary, in a converged environment and as a matter of principle, for media regulation to continue to specify a minimum number of owners in each local market or a public interest test for CSEs of national significance.

The answer given by the Review as to why the reforms are necessary, is that they provide a 'safety net' to ensure that a diversity of ownership is maintained. In this respect, the final report relevantly provides:

> …the introduction of new services into a market does not necessarily improve diversity of news and commentary on its own. While there may be multiple publications or outlets through traditional and online media, ***if they are*** owned and controlled by the same people this results in the same number of separately controlled media operators in a market. This is particularly the case in regional markets, where economies of scale naturally promote the tendency towards monopolies or oligopolies. Ownership and control rules provide a ***safety net*** to ensure that a diversity of ownership is maintained.[14] (***emphasis added***)

It is submitted that implementing these reforms in order to provide for a 'safety net' does not provide a sufficient justification on policy grounds. The reforms proposed by the Review are wide-ranging and will provide the new regulator with significant discretion in determining both the scope of the prohibitions and the entities which will be bound by them. They are also likely to impose a significant compliance burden on the media industry. Further, it is clear that there have been structural changes to the media industry. In this respect, it is not controversial that consumers' usage of online media services have changed significantly over the past five years and that recent technological developments have increased the prospect of new content services being available over the internet in the short to medium term. New players have also entered the media industry and existing players have been forced to alter their business case to address these developments. Given these matters, the need for implementing such wide-ranging reforms in a converged environment should be clearly identified now rather than left to be addressed by the regulator when implementing the new laws.

The recommendations will create significant uncertainty

It is a generally accepted principle of good public administration that laws should be certain in their operation and should limit the extent to which they confer discretion on regulatory bodies. Recommendations 6 and 7 do not satisfy that principle. As regards uncertainty, the new regulator will have the power to determine:

- the thresholds to apply in determining which entities constitute CSEs;
- the circumstances in which the 'minimum number of owners' rule will apply to entities which do not constitute CSEs;
- the circumstances in which the public benefit exemption will apply to the 'minimum number of owners' rule;
- the boundaries of the 'local markets' in respect of which the 'minimum number of owners' rule will apply;
- the quantitative limits to be set for metropolitan and regional markets as part of the 'minimum number of owners' rule;
- the circumstances in which CSEs will constitute entities 'of national significance' such that they should be subject to the public interest change of control test; and
- guidelines concerning the application of the public interest test.

The 'public benefit' and 'public interest' tests are inherently uncertain. What constitutes a public benefit is open to interpretation and begs questions such as, against what standard is the public benefit to be assessed?; how will the regulator weigh private and public benefits?; what threshold of benefit must be achieved by the transaction? Unless the tests are defined appropriately (and with some specificity), the extensive discretion afforded to the new regulator may make it extremely difficult for CSEs (and other media entities subject to the rules) to assess whether a proposed transaction is likely to be against the public interest and therefore unlikely to be cleared.

The 'public benefit' and 'public interest' tests are inherently uncertain

The Review recommends that the regulator develop and issue guidelines concerning the public interest test, akin to the ACCC's guidelines on mergers. The object of the guidelines will be to provide the media industry with greater certainty concerning the application of the test. As a practical matter, these guidelines will be of limited utility. First, they will more than likely be prepared at a high level of generality in order to provide the regulator with flexibility. Second, given their status as guidelines, the regulator will not be bound by them. At most, the regulator will be bound by an obligation to afford an affected person procedural fairness before departing from the guidelines or taking into account matters not specifically addressed by the guidelines.

These uncertainties engender concern with the proposals, and it is questionable whether the articulated 'public purpose' behind the recommendations is sufficient to justify the scope of the suggested changes.

Significant overlap between the new regulator and the ACCC

The Review suggests that the additional powers conferred on the new regulator will complement rather than duplicate existing powers under the CCA. However, the Review fails to recognise that there will be significant overlap between the role played by the ACCC and/or the Australian Competition Tribunal on the one hand, and the new regulator on the other.

Section 50 of the CCA prohibits mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. The prohibition in s50 applies to mergers in all sectors and industries, including the media. In relation to media mergers the ACCC has published additional guidance material outlining the framework that the ACCC will use to assess media mergers and its approach to defining media markets.[15] The Review suggests that the problem with s50 is that it limits the ACCC to conducting an 'economic market analysis' only. This criticism does not properly describe the analysis conducted by the ACCC in media mergers and the extent to which there will be overlap with the public interest test.

The ACCC's guidelines in assessing media mergers make it clear that the ACCC defines markets by reference to four product segments, including the market for the supply of content to consumers. In determining whether different media platforms compete in this product market, the ACCC has regard to the extent to which consumers view the different sources of content as substitutable. If they do, products will be considered to be in the same market and the ACCC will assess the effect on competition in the supply of content to those consumers. In assessing the effect on competition, the ACCC will have regard

14 Convergence Review, *Final Report*, March 2012, p 20.

15 Australian Competition and Consumer Commission, *Media Mergers*, August 2006.

to whether the quality of the content provided to those consumers will decrease. This includes considering the extent to which there will be a reduction in diversity of content.

By comparison, the Review makes it clear that the new regulator will be required to take into account factors such as whether the outcome of the transaction would be to diminish the range of content services at a national level as well as the diversity of unique owners providing general content services. Given this, there is a real possibility that the ACCC's assessment will overlap with the assessment conducted by the new regulator when applying the public interest test.

In addition, under the CCA a party may also apply to the Australian Competition Tribunal for authorisation to complete an acquisition. The Tribunal will grant the authorisation if it is satisfied that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur. It is not clear how this process will relate to the new proposed process. For example, if the Australian Competition Tribunal grants authorisation on the basis that it is in the public interest, how will that assessment affect the assessment being conducted by the new regulator?

there may be benefits associated with a regulator having the capacity to conduct market investigations

Content related competition issues

The final report considers that in a converged environment, there is a risk that content will be a 'new competition bottleneck' for which regulatory intervention will be required.[16] The Review therefore proposes that the new regulator should have flexible powers to make rules on content-related competition issues. Recommendations 8 and 9 of the final report provide that:

- The new communications regulator should be empowered to instigate and conduct market investigations where potential content related competition issues are identified.
- The new communications regulator should have flexible rule making powers that can be exercised to promote fair and effective competition in content markets. These powers should complement the existing powers of the ACCC to deal with anti-competitive market behaviour and should only be exercised following a public enquiry.

Under the existing regulatory framework, the ACCC is responsible for competition regulation, including in the communications sector. The ACCC carries out its functions under (a) industry-specific competition and access regulations in the CCA[17] and (b) through provisions in Part IV of the CCA that prohibit corporations from misusing market power and entering into certain agreements that have the purpose or effect of substantially lessening competition.[18]

The Review concludes that:[19]

- the powers available to the ACCC focus on anti-competitive conduct and economic market analysis and are not comprehensive enough to effectively deal with particular aspects of the content market, such as content rights;
- proactive regulatory powers are needed that can respond to fast-moving content-related competition issues and promote competitive outcomes, rather than relying on *ex post* powers; and
- a regulator with proactive powers to make rules and issue directions, as required, in the content market will be better placed to administer regulation that is 'targeted, more responsive and effective' and will be able to deal with issues in a flexible manner.

The Review notes that the regulator's proactive content related competition powers will complement, rather than duplicate or replace, the ACCC's existing powers to deal with anti-competitive behaviour, and recognises that there is a close relationship between the issues that the regulators will have responsibility for.

Are the changes necessary?

Many of the existing powers in Part IV of the CCA are sufficient to address competition issues relating to content, such as the ability to access premium content and the effect of bundling content and services. By way of example, under the CCA a court is entitled to aggregate all of the exclusive programming agreements entered into by a broadcaster in order to determine whether those agreements together have the effect of substantially lessening competition in a market. The ACCC has publicly stated that it is aware of, and concerned about, the potential for exclusive programming agreements to inhibit competition in emerging modes of media.[20]

Despite this, there may be benefits associated with a regulator having the capacity to conduct market investigations and to allow potential content related competition issues to be identified in advance of agreements being entered into. This approach would serve to proactively address potential competition issues associated with access to content and provide the industry with appropriate guidelines as to how to structure agreements without raising competition concerns. The Review does not adequately address why such proactive powers could not be vested in the ACCC. The fact that the new regulator's powers are designed to complement the ACCC's existing powers is again likely to lead to inevitable duplication associated with increased regulation. It is also not clear how the two regulators will operate in circumstances where they may have differing views on what conduct is appropriate.

However, the Review goes further and recommends that the new regulator also have the power to make rules which prohibit certain conduct or arrangements. The Review does not make clear why it is necessary to implement these reforms, other than to state that it is necessary for the new regulator to be able to deal with any emerging issues in a flexible manner. It is submitted that this 'safety net' approach to the issue does not justify such sweeping reforms and the grant of an unconstrained power to a regulator to make rules if the regulator considers it necessary to do so.

Conclusion

The Review's assessment of media and telecommunications regulation in Australia is timely. In the digital age it is important that Australia has in place a regulatory system that can deal with issues associated with the changing media landscape, including ownership and control of the media and content related issues. Recommendations 6 to 9 in the Review's final report attempt to deal with these issues by strengthening the regulatory framework surrounding these questions and by introducing regulatory tests that are seen as more 'flexible'. Although it can be argued that additional ways of dealing with competition in the media sector are useful, the Review has failed to justify sufficiently why the new regulatory schemes are required and why the ACCC cannot take a more proactive role in this area. Instead, the Review's recommendations will increase the regulatory burden on certain media companies while also generating significant uncertainty. More thought must be given as to how these proposals will, and should, operate in practice.

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16 Convergence Review, *Final Report*, March 2012, p 28.

17 CCA Parts XIB and XIC.

18 CCA sections 45, 46 and 47.

19 Convergence Review, *Final Report*, March 2012, pp 28 and 29.

20 The ACCC has not yet commenced proceedings in relation to this issue.