Updated Media Merger Guidelines issued by ACCC for public consultation

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In brief

The Australian Competition and Consumer Commission (**ACCC**) has released draft media merger guidelines (**Draft Guidelines**) to highlight particular issues relevant to the ACCC's assessment of media mergers under the *Competition and Consumer Act 2010* (the **Act**).

The Draft Guidelines are an update to the guidelines originally released in August 2006 (**2006 Guidelines**). The update is motivated by the significant changes in the delivery and consumption of media since 2006 and the proposed changes to Australia's media control and ownership rules, currently set out under the Broadcasting Services Act 1992 (**Media Reform Bill**). These changes, if passed, will create the potential for new mergers in the Australian media sector.

The ACCC is seeking comments on the Draft Guidelines, and intends to release the final version later this year after considering the feedback received. Comments are to be submitted to the ACCC by 14 October 2016.

In detail

Regulation of media sector

The media sector is regulated under the Broadcasting Services Act, and media diversity, in particular, is protected by the restrictions on control and cross-media mergers under that Act. In light of the significant changes in media delivery and consumption of the past ten years (many of these changes enabled by advances in technology), and to support the viability of local and traditional media as they face increasing global competition in an ever changing digital landscape, the proposed Media Reform Bill seeks to remove restrictions that prevent one person or company controlling:

- commercial television broadcasting licences that collectively reach more than 75% of the Australian population (the "**75% audience reach rule**", commonly referred to simply as the "**reach rule**"); and

- more than two of the three regulated forms of media (commercial radio, commercial TV and associated newspapers) in one commercial radio licence area (the "**cross-media ownership rule**", commonly referred to as the "**2 out of 3 rule**").

Other rules to protect competition and media diversity that will continue to apply are the:

- '5/4' rule: requiring at least five independent media 'voices' in metropolitan commercial radio licence areas (mainland state capital cities) and at least four in regional commercial radio licence areas;

- 'one-to-a-market' rule: ensuring that a person must not control (or be able to exercise control over) more than one commercial television broadcasting licence in a licence area; and

- 'two-to-a-market' rule: ensuring that a person must not control (or be able to exercise control over) more than two commercial radio broadcasting licences in one licence area.

The Senate inquiry report on the proposed Media Reform Bill is due by 7 November 2016.

Role of ACCC

The ACCC considers particular issues when it considers the impact of media mergers on competition. The ACCC first published its Media Merger Guidelines in 2006 to explain the regulator's approach to assessing media mergers.

The Draft Guidelines give guidance as to the likely issues the ACCC will focus on when considering media mergers, particularly given the changing nature of media related technology and the disruptive impact that this has on the media market. This will be useful for merger parties when structuring a media transaction and to seeking merger clearance from the ACCC.

The revised Draft Guidelines complement the ACCC's general Merger Guidelines and both guidelines should be referred to by merger parties. This LegalTalk Alert only focuses on the factors set out in the Draft Guidelines.

Relevant Market

The Draft Guidelines outline a general framework to define the market and the substitutes between the merger parties, specific to each case. In addition, it identifies three markets that are likely to be effected by a media merger:

- supply of content to consumers, either directly or via an aggregator;

- supply of advertising opportunities to advertisers; and

- acquisition of content from content providers.

In addition to more traditional factors including the extent of substitution and overlap, the ACCC will define the "market" taking into account the operations of parties, the emergence of new technologies and the types of content supplied (news, sport, entertainment). The Draft Guidelines note that convergence in different modes of delivery may result in different platforms (such as subscription TV and IPTV) competing more closely.

Potential Competition Issues

The Draft Guidelines highlight some of the key issues facing media mergers. These factors are not exhaustive and the relevance and weight of each factor will vary from merger to merger.

- Competition and media diversity: Diversity is referred to as the "range of media voices" available to consumers. A reduction in "choice" or "quality" of media product and services offered to consumers could lead to a reduction in diversity. Furthermore, choice or quality could decrease as a result of market concentration leading to a reduction in the number of media outlets or types of content available to consumers post-merger.

- Impact of technological change: The Draft Guidelines recognise the significant role technology plays in competitive dynamics of media markets by influencing competition between traditional and new media platforms, increasing convergence, reducing or raising barriers to entry and/or producing vigorous and effective competitors. However, it expressly provides that the ACCC will consider current technology and credible evidence of likely changes in a one-two year range, and will not put any material weight on speculation about future technology. It further recognises that markets that are characterised by rapid product innovation may be unstable such that any increased market power gained through a merger may be transitory, and that not all technological changes are necessarily pro-competitive (e.g., network effects).

- Access to key content: Controlling access and/or having exclusive access to premium or compelling content can be a barrier to entry. While the ACCC recognises that assessing such control or exclusivity will depend on various factors such as:

    - nature of premium or compelling content changing over time (depending on consumers viewing patterns); and

    - technological advances facilitating new delivery modes,

  it also notes that the benefits to incumbents of having exclusive access to premium content may continue to be a barrier to entry.

- Two-sided markets and network effects: Network effects of two-sided markets have been recognised as raising barriers to entry in previous ACCC decisions and this theme continues in the Draft Guidelines. Network effects are present in a market when the value a user places on a product or service increases if there are more overall users of that product or service. The media sector is prone to network effects as there are different types of users of a media platform, i.e., the advertisers, content providers and consumers. An increase in any one group will likely lead to stronger usage from the other groups leading to strong network effects.

- Bundling and foreclosure: The Draft Guidelines indicate that the ACCC will closely examine any media merger that enables the merged entity to leverage its market power in one market to substantially lessen competition in another market. The removal of restrictions to cross-platform media mergers may provide the opportunity to bundle or tie products and services across multiple platforms and may foreclose the merged firm's rivals.

- Minority shareholdings: Acquisition of smaller shareholdings would also be reviewed by the ACCC if they resulted in the acquisition of a controlling interest. While the Draft Guidelines refer to the Merger Guidelines for further details, some of the relevant factors stated in the Draft Guidelines include size and significance of shareholding and ability to appoint directors to the target's board.

The ACCC applies a forward-looking analysis when considering the effects of a merger and focuses on the nature of competition in the foreseeable future (generally one-to-two years). While the ACCC's primary focus will be on unilateral effects, where appropriate, it will also consider co-ordinated effects resulting from a media merger. The Draft Guidelines also feature a number of case studies from past media mergers to illustrate the ACCC's approach.

The takeaway

The ACCC's Draft Guidelines provide an important indication as to the issues likely to be of relevance to the ACCC in a media merger review (particularly in the face of media industry disruption, technological developments and changing consumer behaviour).

The ACCC's consultation process gives interested parties an opportunity to make submissions as to what they consider to be important or alternatively, less significant factors affecting competitive dynamics of media markets. This is an important opportunity to inform and supplement ACCC's current thinking (and the final form of the guidelines).

The consultation period on the Draft Guidelines closes on Friday, 14 October 2016. If you need any assistance to make a submission, please get in touch.

Let's talk

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