Cross-media ownership and the "public interest" test

The Productivity Commission's final report into broadcasting laws has proposed that a media-specific public interest test be inserted into the Trade Practices Act immediately. Lucy Maguire analyses the UK experience and possible lessons for Australia.

Current British legislation requires that when a media merger or acquisition is proposed which crosses a cross-media ownership threshold, the regulator is required to consider the transaction. A test is then applied which seeks to weigh the economic benefits of the proposed merger or acquisition against any expected detriment to the public interest.

The legislation's lack of comprehensive detail about the elements of the public interest test has attracted significant criticism by British media commentators because it affords the regulator a substantial degree of discretion.

The UK test

Under the terms of Paragraphs 9–13 of Part IV, Schedule 2 to the *Broadcasting Act 1996*, the Independent Television Commission and the Radio Authority are charged with applying a test of public interest when considering the acquisition of commercial broadcasting licences by cross-media corporations already controlling one or more newspapers.

The matters relevant to determining whether the cross-holding would operate against the public interest are as outlined in paragraph 13(1):

(a) the desirability of promoting—

(i) plurality of ownership in the broadcasting and newspaper industries, and

(ii) diversity in the sources of information available to the public and in the opinions expressed on television or radio or in newspapers,

(b) any economic benefits (such as, for example, technical development or an increase in employment or in the value of goods or services exported) that might be expected to result from the holding of the licence by that body but could not be expected to result from the holding of the licence by a body corporate which was not, and was not connected with, the proprietor of a newspaper, and

(c) the effect of the holding of the licence by that body on the proper operation of the market within the broadcasting and newspaper industries or any section of them.

The tension arising from these competing public interest claims is obvious. The regulators are forced to balance potential economic benefits of proposed mergers and acquisitions against the values of plurality and diversity and the effects on competition.

Cases

Useful insights into the mechanics of the test appear in examples of the public interest determinations of the Competition Commission (known as the Monopolies and Mergers Commission (MMC) prior to 1 April 1999).

For example, on 5 March 1990, a report was made by the MMC on the proposed transfer to Mr David Sullivan of a controlling interest in the Bristol Evening Post plc (BEP). Mr Sullivan sought permission to increase his current holding of BEP shares to the 25% level.

The MMC was particularly concerned that the proposed acquisition would lead to effective management control of BEP by him. These concerns were essentially founded on Mr Sullivan's other interests, including the publication of a range of magazines, the promotion of films, video recordings and associated products and the operation of telephone entertainment services, most of which were classified as "adult".

The main public interest issue in this case was the likely effect that the transfer would have on the character and content of BEP newspapers. It was found that Mr Sullivan could be expected to influence editorial policy and the character and the content of these papers, harming both the accurate presentation of news and the free expression of opinion.

In the Commission's mind, the evidence from Mr Sullivan's previous involvement with the *Daily Star* suggested that the bid did not raise any significant concerns from the competition policy perspective. Yet the Commission was also of the view that the acquisition could harm the standing of the papers in their community and these could have an adverse impact on circulation. They were unable to recommend any conditions that might be attached to consent to the transfer to prevent it so operating. See: http://www.mmc.gov.uk/274.htm. >

In a more recent case arising in March 1999, the Secretary of State referred to the Commission the proposed transfer of newspaper titles and related assets owned by Mirror Group plc (Mirror Group) to Trinity plc (Trinity) and to Regional Independent Media Holdings Ltd (RIM) respectively.

At the UK level, the proposed transfers were found to give the Trinity/Mirror Group a share of the circulation of all regional and local titles of 24% and the RIM/Mirror Group 17%. However it was decided that these UK concentration figures had little relevance for competition because they were derived by adding circulation figures for titles serving different areas, although there was no significant overlap in the areas served.

The position was different in relation to the Northern Ireland newspapers which were the subject of the merger proposals.

Whilst RIM had no titles in Northern Ireland, Trinity owned the *Belfast Telegraph* (an evening daily), *Sunday Life* and a free weekly series. Mirror Group owned the *News Letter* (a morning daily), the *Derry Journal* (a paid-for bi-weekly) and some free weeklies.

Generally, the *News Letter* has a more distinctly unionist ethos, whilst the *Belfast Telegraph*, although broadly unionist, takes a more middle-of-the-road political stance. The Commission was concerned that if both of these titles were to converge under the ownership of Trinity, the continued representation of unionist opinion would come under threat. This scenario was considered to potentially pose a serious detriment to the public interest.

It was therefore concluded that the transfer to RIM of Mirror Group's titles to Trinity would not operate against the public interest in England, Scotland or Wales, it may be expected to do so in Northern Ireland.

The Commission recommended to Trinity that they give an undertaking to dispose of a number of their newspaper titles in Northern Ireland and their related newspaper assets on terms acceptable to the Secretary of State if the proposed transfer of Mirror Group's titles were to go ahead. A six-month limit was given for the disposal of these titles after the completion of any such transfer to Trinity. See http://www.mmc.gov.uk/431.htm

Measuring market shares

Market share is an important measure in the administration of general competition and media specific cross-ownership rules.

The standard approach in competition policy is to use revenues as the basic measure of market power. This approach can be applied in the case of the media. However, by virtue of their power and influence, it may be inappropriate for the media to be treated as simply another commodity market.

As Collins and Murroni suggest, "[I]n spite of technological change, media and communication markets do not fit the paradigms on which competition law is built".

More precisely, they argue that competition policy's emphasis on homogeneity is incompatible with the heterogenous nature of the media. To illustrate this point, the example of product substitution is used. Clearly any attempt to compare the readership of the *Sun* and the *Financial Times* in England is fraught with difficulties.

Efforts have been made to devise an adequate scheme to measure the media's influence within a market by creating an exchange rate to be applied across all of the media. Proposed measurement units put forward to date have included time use, weighted time use, audience share, revenue weighted audience share and reach.

In the consultation paper, *Media Ownership: The Government's Proposals* (1995), the concept of the "market share" played a central part. However attempts to devise a comprehensive "exchange rate" which would allow shares of different media to be equated proved too difficult for the legislation and a modified scheme was introduced to quantify the market share.

Independent bodies, including the British Media Interest Group, have created their own share of voice index, purporting to measure the impact of different media on consumers. This is achieved by aggregating the share of consumption, and thus "influence", of different UK media enterprises. It aggregates regional and national newspaper circulation, radio listening and television viewing. It weighs radio differently, notably by discounting its share, and notionally therefore its assumed influence, by 50%.

> ***"[I]n spite of technological change, media and communication markets do not fit the paradigms on which competition law is built". (Collins and Murroni, 1996)***

Clearly there is more than one method of measuring market shares, and it is unlikely that one will adequately capture all facets of "influence".

Lessons for Australia

Despite the significantly different institutional histories of media in Australia and the UK, both countries are grappling with similar issues about the relationship between competition law and mechanisms to encourage media diversity.

Feintuck believes that, as a concept, the public interest test has been fundamentally undermined by a failure to develop a rational basis for reconciling the competing values pivotal to the regulation of cross-

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media ownership. As a result it has been applied inconsistently. The fact that it hands to regulators substantial, and largely unchecked, discretionary power exacerbates this concern.

Recognising that the recipients of media products have expectations not only as consumers, but also as citizens, provides some kind of logic behind a media-specific public interest test which supplements the framework of general competition law. "To place citizenship at the heart of any meaningful concept of the 'public interest' would seem to be a logical necessity", argues Feintuck.

Further public consultation could provide an Australian perspective to this context. Once the desired outcomes from the application of a public interest test have been clearly articulated, the criteria could be formulated in a comprehensive manner, providing regulators with a clearer rationale and greater accountability for intervention.

Clearly identified goals would also help to ensure that the appropriate balance was struck in drafting the relevant criteria, between overly detailed rules that are both inflexible and rendered unworkable by technological innovations in the media, and impossibly broad statements of principle which turn appeal courts into politicians.

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Consumer Commission, can already look at mergers and acquisitions and potential anti-competitive conduct in relation to these enterprises and assets. But it does so only through the framework of competition.

Competition in media markets is generally a good thing for the quality of the output. But a market may satisfy the economist's goal of competition without satisfying the tougher threshold of a level of diversity, access and openness sufficient to sustain a democratic and culturally complex society.

As the Productivity Commission recommends, a new regulatory test is going to be needed – to supplement rather than replace existing media ownership rules – and new processes for enforcing it.

It's a good idea to remember the starting point for this debate: a country with one of the most heavily concentrated media sectors around.

The opportunities provided by new delivery systems and lower barriers to entry into some parts of the media business are real. But they need to be *grasped* by policy-makers, governments and entrepreneurs, not simply *assumed.* They need to be used creatively to generate a much more diversely controlled media industry, not treated as a convenient rationale for getting rid of rules which have underpinned the very limited diversity we've got.

Jock Given

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