Competition regulation of the media

Professor Baxt argues that media acquisitions are a special case requiring advance consideration by an independent body in the light of the public interest

The Trade Practices Commission's first claim to fame in the area of media regulation arose because of the controversial decision that it took in 1987 with respect to the takeover by News Limited of The Herald & Weekly Times group.

In that 1987 decision the Trade Practices Commission chose to seek, without recourse to the courts, a solution to what might otherwise have been a problem takeover by agreeing to a divestiture of part of The Herald & Weekly Times empire to one of the existing players but subject to certain important conditions. The fact that the Northern Star Group eventually moved into television (requiring the sale of the Brisbane and Adelaide Newspapers it acquired as part of The Herald & Weekly Times takeover) could not have been foreseen by McComas and the Commission. Secondly, the Fairfax empire was then in pretty good shape and the Commission could have been quite easily forgiven for thinking that that would continue to provide significant competition to the News Limited group. Thirdly, The Herald & Weekly Times was already in a very powerful position in a number of markets and News Limited's acquisition of that particular empire did not result in dominance. Fourthly, no one foresaw with any certainty the consequences of the recession we have been experiencing. Finally, the terms of the Trade Practices Act were clear — dominance was the appropriate benchmark. I believe, however, that the process adopted by the Commission was wrong — it should have been public and subject to a court order or authorisation (if that was applicable).

Changing circumstances

The collapse of the share market in 1987 together with the re-organisation of the Fairfax empire brought about a different competition scenario. When Northern Star, by virtue of the new cross media rules, decided that it would target television as its primary income producing activity in the media rather than newspapers, the Commission was put in the position where it did not have the opportunity to properly evaluate the sale of the Adelaide and Brisbane newspapers to the management buyouts.

Bob Baxt

Shortly after, the Commission undertook an inquiry into the management buyouts and published a report in 1989 which indicated that, while there were some features of the management buyout which we would have preferred were not present, they did not amount to a breach or likely breach of the *Trade Practices Act*.

However, since 1988 (and even before that) there has been an almost continuous stream of complaints to the Government that it should do something about the so-called concentration in media ownership in this country. The Trade Practices Commission was also concerned that its role in regulating the media was significantly constrained by the fact that the Government did not have what appeared to the Commission a view about how competition in the media should be 'regulated'.

A number of different bodies get involved in media takeovers and in other media activities that may impinge in competition. The Australian Broadcasting Tribunal have one set of criteria that it must apply (and what all would agree is a fairly cumbersome mechanism by which it has to deal with these issues), the Foreign Investment Review Board (which is not accountable as an independent body except to the Treasurer) has another set of criteria that it has to evaluate, and the Commission plays a very marginal role in all of this. That was why the Commission put to the Griffiths Committee (the House of Representatives Standing Committee on Legal and Constitutional Affairs) the view that the Government should rationalise its thinking about competition policy in this area and vest in the Commission a primary role in dealing with mergers and other anti-competitive arrangements in the media generally. That view is not supported by the Griffiths Committee.

The Commission also suggested that mergers which involved sensitive industries (for example, newspapers) should automatically go to Commission for evaluation. That again has been the view that the Commission had put consistently to the Government during my term as Chairman. While the Government has now agreed that large mergers will go the Commission for vetting (through a pre-notification mechanism) it has not singled out the media as an area for special treatment.

Commission — Tribunal link

The Commission was also concerned at the fact that it did not have a formal link with the Tribunal in carrying out its tasks. That became a very clear problem in September 1990 when the Channel Ten Network collapsed and there were concerns that there would be a sale of that particular business to interests where Mr. Beazley feared that problems in relation to competition in the industry might arise.

The Trade Practices Commission became involved in that particular matter, seeking undertakings from the receiver of the Channel Ten Network which were granted in relation to the management of the Channel Ten Network. During the days following the collapse of the Channel Ten Network there were frequent exchanges between the Trade Practices Commission and the Australian Broadcasting Tribunal. These, as far as I was concerned, clearly indicated that we needed a stronger formal link between the two bodies. Peter Westerway and I reached an agreement in principle that we would push for that formalisation and I understand that Michael Duffy and Kim Beazley have now put into place this mechanism. Brian Johns, Deputy Chairman of the Commission, is a member of the Tribunal.

Current policy

What is so disappointing to me, not only as a former regulator but as an Australian citizen, is the fact that the Government seems even 12 months later not to be able to come to grips with the basic problems that are being faced by the Australian community in relation to the regulation of the media. The deficiencies in the broadcasting legislation, and the fact that the *Trade Practices Act* might not apply to cross-media takeovers (except insofar as they related to part of the market) were issues that were put to the Government time and again. The scrambling around that we see at the moment in relation to how the media laws (in particular the *Broadcasting Act*) should be changed at a time when the Fairfax properties are about to be disposed of by the receivers and managers is quite disturbing.

Surely, we should not be expecting business groups who are investing over $1 billion in one of the most sensitive and important industries in Australia to have to guess at what the law is going to be and how it is going to be interpreted during the course of this particular sale. The nonsensical situation of the foreign ownership limits being set by a Caucus Committee of 23 persons has been the subject of a stream of newspaper and other comment. There is no guarantee that the Government will accept the recommendations of the Caucus Committee, and even if it does, no guarantee of these rules being relevant to the current matter (and should they be?). The Tribunal has been calling for wider powers to be able to evaluate the particular acquisitions, and the Commission has also clearly been getting information in relation to the relevant matters. What we have is total confusion.

The Government has been on notice of these matters for some time and should have sorted out just where it was going in this area. In my view they should have provided the Tribunal with the appropriate power to evaluate each acquisition in the context of the current legislation, rather than have the matter being held up in the courts for months to come if we do not proceed through a clear and sensible mechanism. The so called ability to go to court in this area is just a bizarre solution. The same department has gone out of its way to ensure that AUSTEL has very wide discretions in the telecommunications area to avoid having to go to court. Of course one cannot guarantee that an unhappy bidder might still not challenge the decision of the Tribunal. But that 'scenario' could also be dealt with by specific legislation.

Media a special case

I am opposed in general to the notion of retrospective legislation and legislation to deal with particular scenarios. Legislation should be general in its approach unless there is special grounds for creating industry specific approaches to particular areas.

'The Government ... should have sorted out where it was going in this area'

The media, however, is a special case and in the light of the consistent pressure from bodies such as the Tribunal and the Commission (as well as other pressure from political sources as well as community sources) it is not surprising that the Government felt it necessary to create a mechanism to deal with the problems that it envisaged might arise from the acquisition of this very important media asset. I would have favoured a position whereby the Tribunal would have been given the right to have reviewed each of the bids for the Fairfax newspapers in the light of the broadcasting legislation. I would have gone even further and suggested that the acquisition should have been evaluated in the context of 'national interest issues'. It is much better for these matters to be evaluated by an independent body such as the Tribunal than it is by Caucus Committees, Ministers (distracted by other issues such as leadership disputes) or other political groups.

Public participation

The Tribunal could be given directions as to matters that should be given special attention in the evaluation of the particular acquisition (such a direction may be given, for example, by the Minister to the Trade Practices Commission in its consideration of any authorisation application — see section 29 of the *Trade Practices Act*); and there are other mechanisms that can be put in place to ensure that wide community interests are taken into account.

The beauty of the Trade Practices authorisation process is that it is a very public process, interested groups in the community can make representations, the Commission usually holds a conference at which interested parties can attend (but lawyers cannot formally address the Commission conference thus keeping the matter away from the legalities that may otherwise arise); usually a draft determination is published for comment. Such a draft determination is not published in the case of a merger because of the speed at which it needs to move and it may not be possible for it to apply in such a scenario. The public process is one that clearly means that we have a greater opportunity for the interests of the community to be properly aired.

While we are dealing with private property in one sense we are of course dealing with issues where public interests are very much at the heart of the ownership of that private property. The barriers to entry to newspaper publication are not insignificant. It will be extraordinarily difficult for another major newspaper to commence operations in Australia to compete effectively with News Limited and whoever owns the Fairfax newspaper. Therefore, it is essential that any acquisition of those interests are evaluated in the context of broad community interests. This is one of only a few industries where such an approach should be adopted.

Regrettably, there has been total disarray in the Government's thinking in relation to this area. The Government has been slow to respond to the requests of bodies such as the Tribunal and Commission in dealing with this problem area. The response that we have seen is both disjointed and inconsistent. In the meantime, the acquisition of a very important asset will have taken place in the midst of this confused environment.

What we need is a situation where there can be an open, independent and public evaluation of the bids in the context of our media laws. Anything less than that will leave the impression that the Government has somehow or other wanted to pull the strings on how this matter should finish up.

Robert Baxt is a Partner with Arthur Robinson & Hedderwicks of Melbourne and is a former Chairman of the Trade Practices Commission. This paper is an edited version of a paper presented to the 1991 CIRCIT seminar 'Broadcasting and its Regulation in The New Area.' The views expressed in this paper are Professor Baxt's personal views.