

The Broadcasting Reform Act and Getting the Media We Need

CAMLA Young Lawyer Essay Competition Winner, Anna Belgiorno-Nettis, (Graduate, Gilbert + Tobin) takes a look at the economic and democratic questions around our latest media reforms.¹

1. Introduction

On 27 November 2018, the Federal Court of Australia approved the first transaction under Australia's newest media reforms: the Nine – Fairfax merger.² The announcement, which came after parties had gained approval of shareholders and the Australian Competition and Consumer Commission (ACCC), is more than two and half years after those reforms were first introduced to Parliament on 2 March 2016.³ Although largely unchanged from its original form,⁴ Parliament took a year and a half to pass the *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017* (Cth) (**Broadcasting Reform Act**); and only after it underwent every stage of debate available to a proposed Australian law.⁵ These facts allude to the challenge that governments face when determining how to regulate media industries.

Numerous politicians⁶ and journalists⁷ commenting on the Broadcasting Reform Act say that

the challenge stems from the media's unique, fourth estate role of ensuring that a society has news that helps keep in check the power of the other "estates": the government, the judiciary, the legislature and beyond.⁸ Through the Act, Parliament has used a competition law lens to approach this challenge, aiming to address "the sustainability of Australia's free-to-air broadcasting sector"⁹ so that "Australian media companies will now be better placed to compete with the big online media companies from overseas."¹⁰ The ACCC's Digital Platforms Inquiry into how these overseas companies are affecting Australia's journalism similarly focuses on the economic viability of the country's media producers through a competition law lens.¹¹

The importance of the media sector's economic viability is, of course, essential. There is not much point in arguing for democratic Australian media companies if there are no companies at all. However,

questioning how the Broadcasting Reform Act affects the industry's public interest role described above is also essential, since some competition law approaches to markets risk downplaying the negative effect that ownership concentration can have on media's important position in a democracy. A focus on market power over product price can lead to a lack of consideration of other forms of power over; for example, public opinion and political manipulation of citizens.¹²

With reference to the framework articulated by Edwin Baker,¹³ this article looks at whether the Broadcasting Reform Act adopts four assumptions that risk prioritising economic concerns at the expense of democratic ones: unbounded faith in the market; maintaining competition as the key or only policy concern; a willingness to find competition from more numerous directions; and prioritisation of an industry's profit-maximising interests.¹⁴

- 1 The opinions presented in this article are personal to the author and do not represent the views of any organisation or client.
- 2 D. Chau, "Nine's takeover of Fairfax approved by Federal Court, but decision could be appealed", *ABC News* (online article) 27 November 2018 <https://www.abc.net.au/news/2018-11-27/nine-fairfax-merger-approved-by-federal-court/10558578>.
- 3 *Broadcasting Legislation Amendment (Media Reform) Bill 2016* (15 April 2016) Parliament of Australia https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5635.
- 4 Environment and Communications Committee, Senate, *Broadcasting Legislation Amendment (Media Reform) Bill [Provisions]* (2016), 1.9.
- 5 *Making a Law* (2017) Parliamentary Education Office <https://www.peo.gov.au/learning/fact-sheets/making-a-law.html>.
- 6 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2016 (Rebekha Sharkie) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fof8db77b-d8d3-4de1-958b-18847b30d0e2%2F0039%22>; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2016 (Pat Conroy) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fof8db77b-d8d3-4de1-958b-18847b30d0e2%2F0041%22>; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2016 (Adam Bandt) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fof8db77b-d8d3-4de1-958b-18847b30d0e2%2F0049%22>.
- 7 Tim Dwyer, 'Media owners steer government away from reform in the public interest', *The Conversation* (online article) 14 September 2016 <https://theconversation.com/media-owners-steer-government-away-from-reform-in-the-public-interest-65031>; Ben Eltham, 'The Clayton's Inquiry: the 'Media Reform' you have when you're not having a media reform' *New Matilda* <https://newmatilda.com/2017/09/20/the-claytons-inquiry-the-media-reform-you-have-when-youre-not-having-media-reform/>; Ian Audsley, 'Media Reform', *Bunbury Mail* (online article) 7 March 2017 <http://www.bunburymail.com.au/story/4514024/ian-audsley-media-reform/?cs=281>.
- 8 Edwin Baker, 'Media Concentration: Giving up on Democracy' 2002 *Florida Law Review* 54(5) 839, 890-891.
- 9 Explanatory Memorandum, *Broadcasting Reform Act*, 2017 (Cth) 2.
- 10 Prime Minister and Minister for Communications, "A new era for Australia's media" (joint media release) 15 September 2017 http://www.minister.communications.gov.au/mitch_fifield/news/a_new_era_for_australias_media#.WIGIsP1Wi4.
- 11 *Digital Platforms Inquiry* (4 December 2017) The ACCC <https://www.accc.gov.au/about-us/inquiries/digital-platforms-inquiry>.
- 12 Baker, above n 7, 880.
- 13 Ibid.
- 14 Baker, above n 7, 870.

Since there will likely be other mergers under the Broadcasting Reform Act,¹⁵ it is important that media professionals understand the economic and competition law elements underlying Australia's newest media regulation. This will help them determine whether any current and future media reforms emphasise "power and profits [without] providing the media needed by the...people either in their role as consumers or as citizens".¹⁶ Only after this determination can societies decide whether further safeguards to the media's democratic role are needed.

2. Does The Act Place Unproved Faith in Market Forces?

It is important that the Broadcasting Reform Act does not lead to a regulatory approach that assumes the market's competitive forces in isolation will ensure that concentrated firms provide varied media content. This is a risk if the ACCC, who the Act designates as the media industry regulator, does not adequately prioritise the importance of varied media opinions. The Act removed the rule prohibiting media owners from controlling more than two regulated media platforms in one commercial radio licence area (**2/3 Rule**),¹⁷ and implied the Rule's role could be fulfilled by the ACCC's regulatory oversight.¹⁸ The Senate Committee reporting on the Act similarly cited the ACCC's regulatory scheme as a viable alternative to the 2/3 Rule.¹⁹

Since the ACCC is a competition authority, the question must be asked whether it is as suited to regulating to protect the media's democratic role as the specialised Australian media authority that administered the 2/3 Rule: the Australian Communications and Media Authority (**ACMA**). The ACCC focuses on market competition, which usually means market concentration is only relevant if it impacts competition, rather than if it impacts diversity of media opinions. The regulator's focus on barriers to entry ameliorating concentration issues further highlights its concern with product price. This does not account for democratic media diversity since although threat of entry likely prevents media owners from raising prices, it does not necessarily prevent them from voicing the same ideology.²⁰

The ACCC is aiming to focus more extensively on diversity concerns when regulating media markets. It has published new guidelines for media mergers since the Broadcasting Reform Act was introduced to Parliament, which arguably place greater emphasis on evaluating these mergers according to factors such as consumer choice and media quality.²¹ However, these factors were also considered in the ACCC's earlier media merger guidelines, which stressed, "media diversity is primarily protected by the restrictions on cross-media mergers in the *Broadcasting*

Services Act".²² The 2/3 Rule was the Broadcasting Services Act's only rule that directly restricts cross-media mergers.²³ By abolishing the 2/3 Rule the Broadcasting Reform Act has removed that media diversity protection, without introducing new cross-media regulation.

Other evidence of the ACCC's increasing concern with safeguarding democratic media can be seen in the previously mentioned Digital Platforms Inquiry. The ACCC is actively seeking a greater understanding of the level of choice and quality of Australian news content.²⁴ The ACCC has acknowledged that the Inquiry has been a learning process, and that media quality concerns are new grounds for the regulator.²⁵ Therefore there was merit to the Media, Entertainment & Arts Alliance's recommendation that the ACCC wait until it finished the Inquiry before determining whether to approve the Nine-Fairfax merger.²⁶ In any case, the Act's reliance on the ACCC means that, to avoid an approach that places excessive faith in market forces, then either the regulator must be all the more focused on protecting the media's democratic function. Or, given ACCC Chair Rod Sims' recent confirmation that public interest considerations such as media diversity are not at the core of what the ACCC aims to achieve, other public policy instruments, as Sims himself says, are needed.²⁷

15 See, eg, ACCC, *Media Merger Guidelines*, 2017, 1; and P. Chambers, "ACCC's Rod Sims on the shifting media landscape and future mergers" (Sims online interview) *AdNews* 18 September 2018 <http://www.adnews.com.au/news/accc-s-rod-sims-on-the-shifting-media-landscape-and-future-mergers>.

16 *Ibid* 871.

17 Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) sch 2.

18 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth)18.

19 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth)18; Environment and Communications Legislation Committee, above n 2, 6-5.

20 ACCC, *Merger Guidelines*, 11/10, November 2008 updated November 2017, 36-38.

21 ACCC, *Media Merger Guidelines*, 2017, 7.

22 ACCC, *Media Merger Guidelines*, August 2006, 5, 44.

23 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) 6-7.

24 *Digital Platforms Inquiry: Terms of Reference*, 4 December 2017.

25 R. Sims, "Gilbert + Tobin seminar: the data economy" (conference) 15 October 2018, <https://www.accc.gov.au/speech/gilbert-tobin-seminar-the-data-economy>; ACCC, "ACCC seeking views on news and digital platforms inquiry" (media release) 26 February 2018, <https://www.accc.gov.au/media-release/accc-seeking-views-on-news-and-digital-platforms-inquiry>.

26 Media, Entertainment & Arts Alliance, "Outline of Submissions opposing the Nine Entertainment Co Holding Limited with Fairfax Media Limited" 12 September 2018 file:///C:/Users/abelgior/Downloads/180912_MEAAsub-Nine-Fairfax.pdf

27 R. Sims, "Competition law should remain focused on consumer welfare" (media release) 29 November 2018 <https://www.accc.gov.au/media-release/competition-law-should-remain-focused-on-consumer-welfare>.

3. Is The Act Disproportionately Concerned With a Lack of Competition?

Another assumption that leads to legislation eliminating ownership restrictions and jeopardising public interest media is when lack of competition, or inefficient monopoly power, becomes the major or only policy concern.²⁸ There are various elements of the Broadcasting Reform Act that show it does not exclusively focus on competition without regard for the media's democratic role. One element the Act introduced is the requirement that media companies with broadcasting licences covering over 75% of Australia's population produce specific amounts of local content (**Local Programming Requirements**).²⁹ These Local Programming Requirements have a democratic focus as they prioritise local media products irrespective of how competitively those products are priced. Furthermore the ACMA will monitor the Requirements, which will likely encourage regulation that values the media's fourth estate function. However, although local programming facilitates media diversity, it does not ensure it. Media companies can produce local material that nevertheless promulgates the same political perspective. The Requirements also do not address media diversity in non-regional Australia. Therefore they are still a flawed alternative to the 2/3 Rule and another rule the Act abolished, which prevented media owners from having broadcasting licenses areas that cover over 75% of Australia's population (**Reach Rule**).³⁰

Another measure in the Act that, according to Parliament, can "ensure preservation of existing levels of media diversity"³¹ is the previously existing rule requiring at least five independent media voices in metropolitan licence areas and at least four such voices in regional areas (**Minimum Voices Rule**).³² However, relying on the Minimum Voices Rule to protect media diversity is questionable. Legislatively, the 2/3 Rule was drafted to address media ownership concerns while the Minimum Voices Rule was drafted to address media diversity concerns.³³ Yet there is no record of the ACMA investigating a breach of the Minimum Voices Rule.³⁴ Instead the ACMA frequently used the 2/3 Rule to investigate concentrated media ownership.³⁵ The ACMA may begin using the Minimum Voices Rule more, now that the 2/3 Rule is abolished and other industry initiatives, such as Nine's pledge to agree to Fairfax's charter of editorial independence, may help maintain diversity of media voices even when media ownership concentration increases.³⁶ However, these possibilities are not certain safeguards for media diversity as the 2/3 Rule's way of ensuring media-specific authorities investigated concentrated media power. More certainty is arguably needed in respect of something as important as the media's role to inform the public about corruption in power.

A third element that shows the Broadcasting Reform Act's concern with democratic media values is in the supplementary policy measures

that were introduced along with the Act. These measures are a \$60 million Regional and Small Publishers Jobs and Innovation package, the Digital Platforms Inquiry and the Government's promise that it would legislate before the end of 2017 to establish: a public register of foreign-owned media, a community radio package, and rules to enhance the ABC's focus on rural and regional Australia, fairness, balance and transparency.³⁷ However, at the time of writing (November 2018), the only legislation that has been introduced is an Act to add "fair" and "balanced" to section 8 of the *Australian Broadcasting Corporation Act 1983* (Cth).³⁸ Therefore these supplementary measures amount to: substantial but inevitably finite financial support; an inquiry that may, not must, lead to further reform; and promises for regulation that have not yet eventuated. None of them are fixed regulation that can immediately uphold the 2/3 Rule's focus on maintaining diverse Australian media ownership, and the diverse Australian media voices that entails.

4. Does The Act Represent a Willingness to Find Increased Competition?

Another assumption that characterises antitrust-over-fourth-estate focused regulation is a legislative willingness to find competition in increasing sources. This kind of willingness can be seen in policy that, for example, describes all media as competing with each

28 cf Baker, above n 7, 871.

29 Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) sch 3.

30 *Broadcasting Services Act 1992* (Cth) s 53.

31 Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) 18.

32 *Broadcasting Services Act 1992* (Cth) ss s61AG-AM.

33 As Rules' headings in the *Broadcasting Services Act 1992* (Cth): ss61AG-AM 'Prohibition of transactions that result in an unacceptable media diversity', ss61AMA-AMF 'Prohibition of transactions that result in an unacceptable 3-way control.

34 No section on 'media diversity' investigation reports: *Concept of Control* (28 April 2017) ACMA <<http://www.acma.gov.au/Industry/Broadcast/Media-ownership-and-control/Media-control-and-diversity-rules>>; no investigation reports use 'media diversity' s 61AH: *Ownership and Control investigation Reports* (20 July 2016) ACMA <<http://www.acma.gov.au/Industry/Broadcast/Media-ownership-and-control/Ownership-and-control-rules/ownership-control-investigation-reports-ownership-control-rules-acma>>.

35 All reports use 2/3 Rule: Ibid.

36 T. Boyd, "Nine's challenge is to preserve Fairfax's unique journalism culture", *Australian Financial Review* (online article) 26 July 2018 <https://www.afr.com/brand/chanticleer/nines-challenge-is-to-preserve-fairfax-unique-journalism-culture-20180725-h135kk>.

37 Prime Minister and Minister for Communications, "A new era for Australia's media" (joint media release) 15 September 2017 http://www.minister.communications.gov.au/mitch_fifield/news/a_new_era_for_australias_media#.WIGls5P1Wi4.

38 Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017 (Cth).

other, or that argues the Internet, with its potential to fragment information sources, provides all the necessary competition.³⁹ The Broadcasting Reform Act appears to reflect this approach since it classifies Australia's media market in terms of their form. The Act separates the media market into an audiovisual one (covering Netflix, streaming services, pay-based and free-to-air television) and an audio one (with Spotify, iTunes Radio, and broadcasted radio), while implying the problem is "significant fragmentation...with so many market players [from which] audiences have an unprecedented variety to choose".⁴⁰

Another approach the Broadcasting Reform Act could have taken was to classify media products in terms of the different opinions (or lack thereof) that they portray. That would help determine how concentrated Australia's media opinions are. It would consequently help determine whether there are too few Australian media players; which is likely to be the case as the diversity levels in our media opinions barely reach the minimum required by the Minimum Voices Rule.⁴¹ Such an approach would also raise questions about whether safeguards are needed to deter media owners from promulgating the same opinion across all the media platforms they may own. There would likely be various flaws with this approach to classifying media products. However – despite all the stages of parliamentary debate the Act went through – it has been critiqued for not having public interest parameters or a clear policy framework, and for not involving consultation outside the media industry itself.⁴² Better practice policy-making may be required for regulation as challenging as this.

In the meantime, as highlighted above, the Local Programming Requirements, the Minimum Voices Rule and the Act's supplementary measures may not do enough to address such criticisms.

5. Does The Act Prioritise Profit-Maximising Interests?

This final regulatory assumption is about prioritising media industry profits and encouraging less government restraint on ownership concentration.⁴³ The Broadcasting Reform Act lessens its concern with media ownership concentration by removing the 2/3 Rule – enabling media owners to cover newspaper, television and radio platforms – and by removing the Reach Rule – enabling media owners to cover all of Australia's broadcast media consumers.

The Act's Explanatory Memorandum primarily justifies the Rules' removals because they: limited media operators' ability to respond to financial pressures; were outdated; and did not achieve their purpose of maintaining media diversity.⁴⁴ The argument of media operators' inability to profit is a legitimate concern. The argument that the Rules were outdated also has merit since, for example, the 2/3 Rule divided the market into newspaper, television and radio platforms without considering digital media. However, the argument that the Rules did not help maintain media diversity is questionable since, as seen above, ACMA frequently used the 2/3 Rule to investigate media concentration. Therefore the two less questionable reasons given for removing the Rules – media profitability and outdatedness – do not address the anti-democratic potential that any removal of media regulation risks having.

Irrespective of how successful the Rules were at facilitating a democratic media, the Broadcasting Reform Act's abolition of them necessitates revisiting how to facilitate public interest media in other ways. Removing regulation without addressing the issue that regulation aimed to solve means the issue returns. Rather than introducing regulation to address media diversity concerns, the Act either points to regulation that has not previously been used to address such concerns, or introduces non-regulatory measures that may address such concerns. It is possible that those previously unused regulations and that these new non-regulatory measures may successfully address media diversity concerns. However, is an uncertainty in how we inform ourselves of undemocratic or improper conduct by those in positions of power an uncertainty with which we are prepared to live?⁴⁵

6. Conclusion

This article has asked whether the Broadcasting Reform Act embodies four antitrust assumptions that tend towards ignoring the negative influence of ownership concentration on democratic values. It is clear that these are challenging questions to answer, particularly since media companies must function both as businesses and as public interest entities. It is also clear that, as the industry becomes increasingly affected by regulation that is influenced by competition law and economics, media professionals need to understand these influences; so they can also understand what democratic safeguards may be necessary alongside that regulation. In this way, we may be able to maintain the media that we need; both as consumers and as citizens.

³⁹ Ibid.

⁴⁰ Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) 11-12.

⁴¹ Department of Communications, *Media Control and Ownership*, Policy Background Paper No. 3, June 2014, 17-18.

⁴² M. Lesh, "Evidence Based Policy Research Project" *Institute of Public Affairs*, October 2018, 28.

⁴³ Baker, above n 7, 871.

⁴⁴ Explanatory Memorandum, Broadcasting Legislation Amendment (Media Reform) Bill 2016 (Cth) 8.

⁴⁵ cf *NZME Limited v Commerce Commission* [2018] NSCA 389 [244].