

# Converging Interests: Competition in a Revolutionary Age

Rod Sims, Chairman of the ACCC.

*This is an edited extract of the speech ACCC Chairman Rod Sims delivered at a CAMLA event on 31 October 2017.*

## 1. Media mergers

In 2006, the ACCC was asked by the Government to develop guidelines regarding our approach to assessing media mergers. Looking back at those guidelines is like stepping back in time given the significant changes to the way media is delivered and consumed over the past decade, and the way these changes have altered the nature of competition in media markets.

Significantly, changes to Australia's media control and ownership laws were passed by the Parliament in October 2017. These reforms will create potential for new merger proposals in the Australian media sector between players who had been prevented from merging under the '2 out of 3 rule' and the '75% reach rule'.

While technology and platforms have significantly changed the competitive landscape, the ACCC's approach to merger assessments is not sector specific. The key acronym and concept to keep in mind is SLC – 'substantial lessening of competition'. The SLC test and the analytical framework we apply is the same regardless of the industry or sector under review. However, there are features of the media sector that give rise to some particular issues that are relevant to our analysis.

In order to assist prospective merger parties' awareness of the general issues likely to be of interest to the ACCC when assessing a media merger, the ACCC has revised its Media Merger Guidelines. The revised guidelines reflect the impact of new technology on the media sector and the changes to Australia's

media control and ownership rules and explore competition issues associated with:

- mergers that reduce the number of media rivals, and the potential impact on media diversity
- the impact of technological change and media innovation, and
- the role of premium content.

These have been relevant factors in our recent review of Lachlan Murdoch and Bruce Gordon's proposed acquisition of the Ten Network. The ACCC focussed on how the transaction would result in an expansion of Murdoch interests in Australian media when they already have a significant influence through newspapers, Foxtel, radio stations and television production.

Some of the key issues the ACCC considered included the impact on competition on the supply of news content to consumers, competition from other platforms and the impact on the level of diversity across the Australian media landscape. It is important to reiterate that a reduction in diversity is not the test the ACCC applies; rather, it's the SLC test.

The ACCC looks at diversity from the competition perspective in much the same way that a reduction in choice can be relevant to non-media merger assessments including concentration, closeness of competition and establishing what competitive constraints would be lost if a merger proceeds.

In reviewing the Ten Network matter, the ACCC found that Ten's offering was not unique and there were a range of news and current affairs choices open to consumers which would continue to offer some competitive constraint on Ten, including online news sites.



In the UK, the Competition and Markets Authority is examining 21st Century Fox's proposal to increase its ownership of Sky from 39 per cent to 100 per cent. The CMA is examining whether the merger will give Rupert Murdoch control or influence over the editorial and commercial decisions of Sky, reduce the range of viewpoints and result in too much influence over public opinion or the political agenda.

Closer to home, the New Zealand Commerce Commission declined to authorise the Fairfax NZME merger. The NZCC found that the merged entity would have direct control of the largest network of journalists in New Zealand, employing more editorial staff than the next three largest mainstream media organisations combined.

In declining authorisation the NZCC said that:

... the merger would be likely to reduce 'external plurality' – plurality between organisations – through concentrating media ownership and influence to an unprecedented extent for a well-established modern liberal democracy.<sup>1</sup>

1 <https://www.comcom.govt.nz/dmsdocument/15400>

The NZCC considered the merger under a public benefit test which gave it a broader mandate to consider plurality issues. The decision is under appeal.

## 2. Platform Inquiry

As recently reported in the press, Nick Xenophon has called for the ACCC to conduct an inquiry into platform services and the impact of their growth on competition in media and advertising markets. This has come about as a consequence of negotiations between the government and Nick Xenophon regarding the passage of the media ownership reforms.

For some, the increasing growth by large digital platforms like Google and Facebook into digital advertising is likely to be regarded simply as technology evolution, raising no issues. However, there is a growing perception that the current market position of these platforms in digital advertising is significantly and adversely impacting traditional media, especially its ability to fund the development of content from advertising revenue. Ultimately, the concern is that, with declining revenues, journalistic content and new local content production will be compromised to the detriment of consumer choice.

These are potentially serious issues that warrant a detailed assessment of how these platforms operate to determine whether they are exercising their influence in a manner that is negatively affecting competition for content, advertising and consumer selection and choice.

The objective and value of an inquiry would be to closely examine the rapid changes in technology and interrelationships between players in the industry and the longer-term trends in order to assess and understand the impact of these platforms on the state of competition in media and advertising markets. It would also take into account the choice and quality of news and journalistic content available to consumers. An inquiry may also find

challenges facing traditional media that may not be directly associated with the ACCC's mandate.

While the Australian media industry is relatively concentrated with few large mainstream media outlets, there are many content creators, smaller media operators, platform intermediaries, advertisers, journalists, and consumer and small business interest groups that are likely to be relevant to the inquiry. Consequently, an inquiry would rely on hearing views from across a wide range of these stakeholders.

An inquiry would pose its own particular challenges given the highly technical nature of the architecture and functions underpinning online search and aggregation, and need to assess qualitative factors such as the impact on diversity of voices and the economic evaluation of complex, multi-sided platform markets.

## 3. Communications market study + NBN speeds

On 31 October 2017 the ACCC released the *Communications Sector Market Study Draft Report*. The market study is an important and timely inquiry into a sector that is undergoing fundamental change: we are at the midway point of the rollout of the National Broadband Network; service providers are expanding into new markets, offering consumers both fixed and mobile services; and consumers are using traditional services in new ways, seeking ubiquitous and on-the-go connectivity.

Some of the key findings include:

- That the nature of competition is evolving, and where there used to be a focus on disparate access networks – fixed and mobile – these networks are now converging with increased competition from over-the-top services. As a consequence, service providers are moving towards greater horizontal integration offering both fixed and mobile services to consumers.

- That there is strong price competition in voice and broadband services on fixed and mobile networks, but we do have some concerns about the current extent of non-price competition on the NBN, particularly around speed and service quality.
- That there is currently significant new investment in data centres, content delivery networks and new networks to support the internet of things that will support the future use of broadband services.
- That the ACCC continues to watch how competition for these services progresses to ensure that the long-term benefits of competition are realised.

The inquiry also examined how well competition has been delivering benefits to consumers. While we are seeing evidence of lower prices and some product differentiation, there does not appear to be significant switching between service providers. This suggests consumers may not be able to take advantage of the choice available and may face a number of potential barriers when looking to change their service provider, including inadequate information to make informed purchasing decisions.

Consumers have strong expectations that the NBN will bring better services for little or no extra cost, in part due to marketing and service providers' tendency to put consumers on 'nbn ready' plans and a strong level of price competition within the retail broadband market during the migration period.

If left unresolved, this clash of expectations may have severe consequences for longterm competition and consumer outcomes, including disgruntled consumers as TIO NBN-related complaints already indicate. In particular, there are coordination issues arising from new supply chains, as well as new processes, systems, technologies and devices that need to be bedded down.

While the ACCC may have a role to play in working with industry to resolve these issues, we do have a role in ensuring consumers are not adversely impacted and are able to benefit from competition in this new market. For the first time, consumers are able to access a network that is capable of delivering a broad range of different speeds, which brings a new aspect of choice and questions for the consumer, such as: what speeds do they need and how to select a plan speed that meets these needs? And, can they have confidence that their service provider will deliver the speeds advertised and expected by the consumer?

Consumers now face a potential dilemma: do they get the 'cheap and cheerful' speed plan or do they try out the more expensive, faster, Rolls Royce plans?

While it's great that consumers have more choice, our role is to ensure they have sufficient information and easily accessible tools to help them understand how to make the best choice for their needs as these services are quite technically complex. Consequently, there has never been a greater need for service providers, and others that engage with the public on broadband speeds, to provide consumers with clear information and guidance to help them identify the plans that meet their needs and expectations.

While we think this is principally the role of service providers, the ACCC has a significant role to play to help steer service providers in the right direction and to that extent we have developed, and already started to implement, a three-part strategy, encompassing broadband speed monitoring, an update on broadband monitoring rollout and enforcement investigations.

### **Broadband speed guidance**

In August 2017, the ACCC released our *Broadband Speed Claims: Industry Guidance* to provide retailers clear guidance on how we think they can provide meaningful, accurate information in a way that

complies with Australian Consumer Law. This includes guidance on how to give consumers information on fixed-line next generation broadband services that, in our view, meets this pre-existing legal standard. Retailers should also move away from unhelpful statements like 'up to', 'boost' and 'fast', and from advertising theoretical maximum speeds that are based only on wholesale product specifications. Instead, consumers should be presented with information based on the realistic speeds they can expect to experience, particularly during busy periods.

Some changes can already be observed and consumers should expect further improvements ahead of the Guide's implementation period expiring in late November.

The second of our three strategies relates to broadband monitoring.

### **Update on broadband monitoring rollout**

Since we called for volunteers for broadband monitoring on 19 June we have received just over 8000 expressions of interest from members of the public. The number of responses and comments we've received demonstrates that Australians are interested in more information about their broadband performance.

We will be reporting on the most popular plans on the most popular brands, while also monitoring the performance of smaller internet service providers and some legacy technologies. We expect to begin collecting data within the coming months.

The third strategy relates to enforcement.

### **Update on enforcement investigations**

In 2017, the ACCC began investigating matters relating to misleading conduct around broadband speeds, including practices that fail to meet the consumer guarantees provided by the Australian Consumer Law.



This is a priority activity of the agency and we anticipate being able to discuss some matters publicly in the near future.

If we get the competition parameters right, Australia will benefit significantly from the forthcoming telecommunications revolution. If you thought the past decade was exciting, buckle up for the next one.

