CPI's Oceania Column Presents:

Extra! Extra! Read All About It! How the Media Bit Back in the ACCC's Digital Platforms Inquiry and What It Means for Media Diversity in Australia

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Introduction

While the final report by the Australian Competition and Consumer Commission ("ACCC") in its digital platforms inquiry addresses various important issues relating to digital platforms,[2] the inquiry is perhaps more revealing for what it tells us about the relationship between competition policy and another industry: news media and journalism.

Born out of a political deal to relax cross-media ownership laws, the inquiry was conducted by the media-savvy ACCC. News media and journalism was the focus of the inquiry's terms of reference, as well as key recommendations in the final report.

News media and journalism are important not only to politicians and competition and consumer regulators: they play an essential role in a democracy like Australia by keeping citizens informed of public affairs, holding those in power to account and facilitating healthy public debate. They are also important for facilitating informed markets, providing valuable information to consumers.

In recent years, a number of countries around the world have experienced concerns about the quality of news and information (or "fake news") being publicly disseminated, particularly online, accompanied by concerns about the quality of the political process and fears of rising political extremism.[3] These are issues that affect us all and underline the importance of fair and accurate news media and journalism.

In its final report, the ACCC endorsed the idea of developing platform-specific codes of conduct to address inequality of bargaining power between Google or Facebook (on one hand) and media businesses (on the other hand). It also proposed government grants for journalism in the public interest – in particular, local and regional journalism relating to local government and local courts. Both measures are both designed to directly assist media businesses.

However, the inquiry must also been seen against the backdrop of the ACCC's decisions to approve two significant media mergers – the proposed acquisition of the Ten Network and Nine Entertainment's acquisition of Fairfax – even though Australia already had one of the highest concentrations of media ownership in the world.[4]

Further, during the course of the inquiry, the Chair of the ACCC made a speech that downplayed the importance of media diversity in applying competition law.[5] He also made clear that the ACCC does not subscribe to the "hipster" antitrust (or competition law) movement, which seeks to fashion competition law as a weapon against the might of tech giants such as Google and Facebook.

And so, while the final report recommends some measures of benefit to media businesses and local journalism, it is certainly not a radical response to the significant challenges raised by digital platforms.

The Origins of the Inquiry

The Inquiry was established in late 2017 as part of a political deal reached between the government and cross-bench Senator Nick Xenophon to relax laws restricting cross-media ownership.[6]

Those reforms were necessary to enable the acquisition of the Ten Network by entities associated with Bruce Gordon and Lachlan Murdoch. Ten is one of Australia's three major free-to-air commercial television broadcasters and, at the time, was in voluntary administration and receivership.

The proposed acquirers already had minority stakes in Ten as well as other media interests. Mr. Gordon controlled WIN (a regional commercial television broadcaster) as well as a minority stake in Nine Entertainment (another major commercial television network). Mr. Murdoch held interests in News Corporation (a major print/online media company), Foxtel (a pay-television operator), 21st Century Fox, Fox Sports Australia and Endemol Shine (content producers), and the Nova Entertainment Group (a commercial radio broadcaster).

The ACCC approved the acquisition under its informal merger clearance process.[7] This was even though the acquisition could not proceed without changes to the cross-media ownership laws. Those changes were passed by parliament but ultimately Ten was acquired by U.S. media company CBS.

In order to gain Senator Xenophon's support, the government agreed to a $60 million fund for regional and small publishers including funding for cadetships – as well as an ACCC inquiry into platforms such as Google and Facebook.[8] At the time, Senator Xenophon had recently alleged in a Senate committee inquiry hearing that Google was abusing its market power, and this was "hurting journalism in this country and that's bad for our democracy."[9]

Consistent with those concerns, the inquiry's terms of reference required the ACCC to consider, among other matters, "the extent to which platform service providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers."[10]

Media Diversity

Two weeks after the cross-media ownership changes were enacted, the ACCC updated its *Media Merger Guidelines*. The guidelines acknowledge "the diversity of media voices is interlinked with a number of issues the ACCC considers in its competition assessment under section 50 of the Act,"[11] and those issues include the level of concentration in a market, reduction of consumer choice and reduction in the quality of media content.[12]

The guidelines do not, however, consider media diversity as an aspect of competition that is itself protected by competition law. This approach is illustrated by two decisions. First, when explaining its decision to approve the joint acquisition of Ten, the ACCC's Chair said:[13]

While this transaction will result in some reduction in diversity across the Australian media landscape, we have concluded it would not substantially lessen competition, which is the test the ACCC is required to assess acquisitions against.

This statement appears to draw a distinction between competition (on one hand) and media diversity (on the other) and emphasizes that competition law is concerned with the former.

Second, when the ACCC approved Nine Entertainment's proposed acquisition of Fairfax Media (which combined two of the largest online news providers in Australia), the ACCC explained:[14]

While the merger between these two big name media players raised a number of extremely complex issues, and will likely reduce competition, we concluded that the proposed merger was not likely to substantially lessen competition in any market in breach of the Competition and Consumer Act," ACCC Chair Rod Sims said.

This merger can be seen to reduce the number of companies intensely focusing on Australian news from five to four. Post the merger, only Nine-Fairfax, News/Sky, Seven West Media and the ABC/SBS will employ a large number of journalists focussed on news creation and dissemination.

The ACCC acknowledged that Australian news, including investigative journalism, was the "key issue." It did not, however, expressly address the issue of loss of media diversity. Instead, it appears to have treated differences between the two media businesses as indicating that they did not compete closely with each other: [15]

The ACCC also found that Nine's television operations and Fairfax's main media assets generally do not compete closely with each other. Nine's news and current affairs programs target a mass market audience while Fairfax's print and online publications tend to provide more in-depth coverage, targeting the demographic of its subscription audience.

The ACCC said it "understood" concerns about losing a brand known for independent investigative journalism (Fairfax). However, after considering Fairfax's loss of half its advertising revenue over the past five years, the ACCC concluded that likely future changes to the way Fairfax and Nine operate in the future "would not be, to a significant extent, caused by the merger lowering the level of competition."[16]

The argument here appears to be that Fairfax is unlikely to sustain its current level of independent investigative journalism, but this is for financial reasons (whether or not the merger proceeds) rather than lack of competition from Nine (if the merger proceeds). Again, there is no stated objective of media diversity, which is reduced by the merger itself, regardless of the potential impact of financial pressures in the future.

In the final report of the inquiry, the ACCC portrayed diversity of media ownership as an outdated understanding of media diversity and argued that "diversity of media ownership may contribute to (but does not guarantee) the availability of a higher number of independent editorial voices."[17] The ACCC's concerns regarding the availability of additional editorial voices were focused on local and regional journalism.

Interestingly, the ACCC's proposed measure in response to the media businesses' financial challenges was public funding for local journalism,[18] not the proposed codes of conduct to govern digital platforms' relationships with media businesses. The codes of conduct seem more directed at specific contractual issues arising from an imbalance of bargaining power, although this includes stopping digital platforms from impeding a news media business to monetize its content, and requiring fair negotiations to share any value "directly or indirectly" obtained by a digital platform from such content.[19]

Other Approaches

A stark contrast to the ACCC's approach is provided by the decision of the New Zealand Commerce Commission ("NZCC") to decline to authorize the merger of New Zealand Media and Entertainment ("NZME") and Fairfax in New Zealand. The NZCC explained:[20]

'This merger would concentrate media ownership and influence to an unprecedented extent for a well-established modern liberal democracy. The news audience reach that the applicants have provide the merged entity with the scope to control a large share of the news consumed by a majority of New Zealanders. This level of influence over the news and political agenda by a single media organisation creates a risk of causing harm to New Zealand's democracy and to the New Zealand public,' Dr Berry said.

'Having reviewed all the evidence, our primary concerns remain that this merger would be likely to reduce both the quality of news produced and the diversity of voices (plurality) available for New Zealanders to consume. Competition between NZME and Fairfax leads them to produce higher quality content than would otherwise exist with the merger. This competition

incentivises investment in editorial resources, motivates journalists and editors in their day-to-day work and acts as a safeguard to plurality.'

The NZCC's approach expressly reflects concerns about the role of the media in a liberal democracy, and media diversity for the benefit of consumers and consumer choice.

Further, U.S. commentators have argued that a vibrant media, creating a "marketplace of ideas," is a fundamental for a healthy society in which market competition can take place:[21]

An independent and competitive media, for example, informs policy makers of the unintended social effects of their policies, provides a voice to pressure the government for change, serves as a catalyst for institutional change to promote competition policy, increases political accountability, and reduces corruption, which hampers any competition policy. As Professor Ed Baker writes:

Concentrated communicative power creates demagogic dangers for a democracy, reduces the number of owners who can choose to engage in watchdog roles, may reduce the variety in perspectives among the smaller group of people who hold ultimate power to choose specific (varying) watchdog projects, and multiplies the probable conflicts of interest that can muzzle these watchdogs.

However, even if media diversity is specifically protected by competition law, media mergers may still raise difficult issues. In particular, due to the financial pressures on print media businesses explained in the ACCC's final report, the loss of independence of one media "voice" may be compensated for by what is left of that voice becoming a stronger voice than it otherwise would be because of its improved financial position.

It should be noted in both of the ACCC merger decisions referred to above (Ten and Nine-Fairfax) there were concerns about the financial position of the media business being acquired. However, based on its explanations, it appears the ACCC did not directly engage with the benefits and detriments to media diversity arising from the proposed mergers.

Hipster Antitrust

The ACCC's Chair provided an insight into the ACCC's thinking regarding media diversity at an economics conference during the course of the digital platforms inquiry.[22] The speech explained how the so-called "hipster antitrust" movement has re-opened old debates about whether competition law should focus exclusively on the economic "consumer welfare standard" or take a broader range of considerations into account.

One of the main concerns of the "hipster antitrust" movement has been the new economy.[23] As the ACCC's Chair explained:

Around the world there is increasing competition concern about the rise of a new type of dominant firm — digital platforms with a dominant position in their market, such as Amazon, Google, or Facebook.

There is increasing concern that these players are large enough to control access to the market, or to distort normal competitive processes; but some argue it is not clear that this behaviour can be picked up through a narrow focus on consumer welfare.

Whether or not you consider Amazon to be a bottleneck, it does not seem to have resulted in higher prices to consumers. Does this mean that, under the consumer welfare standard, Amazon should get a free pass under the competition law?

The ACCC's Chair rejected calls for a broader approach to competition and, in this context, specifically commented on media diversity:

As I said earlier, this renewed questioning of the economic foundation of competition law has led to calls to expand the range of considerations in competition law, to include both broader economic considerations (such as income inequality, low wage growth, or unemployment) and non-economic considerations (such as concentrations of political power, financial stability, media diversity, or environmental protection).

In my view, it is inadvisable and counterproductive to import these considerations into the core of competition law. Competition law is enforced by an independent authority, not by elected officials, so the objectives must be clear. Competition law and policy should be first and foremost about protecting and promoting competition for the welfare of consumers.

…

Properly applied competition law should go well beyond price effects and so can significantly assist media diversity, but they are not the same things; they are not completely overlapping sets.

This raises a number of important points. Although the ACCC is an unelected body, parliament has chosen to pass laws that protect competition and to give the ACCC powers under those laws.[24] The issue is not whether the ACCC should pursue media diversity as an objective separate to competition; the issue is whether and to what extent media diversity is an aspect of competition that is protected by competition law.

The final paragraph quoted seems to acknowledge that competition law and media diversity overlap, albeit incompletely. Granted, they are not identical. However, that does not prevent media diversity from being critical for competition – not just competition for news media services, but competition in markets generally, in the same way that media diversity is critical ingredient for a liberal democracy.

While the ACCC argues that the objectives of competition law must be clear, this overstates the certainty of a narrow focus on economic considerations.[25] Economic considerations are not necessarily able to be stated, or applied, more clearly than non-economic considerations such as media diversity.

This is not to suggest that all non-economic concerns should be taken into account.[26] Nor is it to dispute the importance of economic considerations in identifying the existence of competition in particular industries or markets, as recognized by the then Trade Practices Tribunal in the famous *QCMA* case.[27]

In that case, the Tribunal described "competition" as "such a very rich concept (containing within it numbers of ideas)" that "may be valued for many reasons as serving economic, social and political goals," and cautioned against attempting any final definition that might be unduly restrictive.[28] The concept is not defined in the *Competition and Consumer Act 2010* (Cth).

Further, it is not the case that the ACCC's roles and responsibilities are limited to purely economic considerations and it lacks the requisite capability with respect to non-economic considerations. The ACCC already has broad powers, in relation to conduct that would otherwise breach competition law, to authorize that conduct on the basis that the conduct would result in a net public benefit despite its anticompetitive nature or effect.[29]

As explained in Part II above, the impetus for the inquiry was a concern that Google's alleged abuse of market power was harming journalism and consequently democracy. There may be limits to how well competition law can protect media diversity, and such protection

necessitates a deliberate, considered and transparent approach to enforcement, but that protection remains important nonetheless.[30]

Conclusion

News media and journalism are not the only industry to be significantly disrupted by the digital age. However, given their importance to the political process and society generally, it is perhaps unsurprising they prompted the digital platforms inquiry.

In the final report, the ACCC made recommendations designed to assist media businesses. However, the ACCC's media merger decisions and public comments have downplayed the importance of media diversity in competition law. The ACCC's final report did not canvass the differing views regarding the role of competition law in protecting media diversity, or recommend changes to competition law to strengthen that protection.

There are, it is submitted, good reasons for recognizing media diversity as important to effective competition, and carefully considering the implications for media diversity when they arise in competition law cases. This does not mean that the end result is straightforward – as shown by the case of the acquisition of a failing media business – but it is preferable to engage directly with the issue. Competition law should not be limited to purely economic considerations, with everything else dismissed under the label of "hipster." While economic considerations may ordinarily be sufficient for routine merger matters, there will also be situations where broader issues are at stake.

If ever there was a time when competition law should be looking to protect the important role of news media and journalism in our society, it may be now.

[1] Competition Partner, Arnold Bloch Leibler, Melbourne. The views expressed in this article are the author's own and do not necessarily represent those of his firm or its clients. The author acted in relation to the proposed acquisition of the Ten Network, which is referred to in this article, for a client that was not one of the parties to that proposed acquisition.

[2] Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (2019).

[3] See e.g. Reuters Institute for the Study of Journalism, *Digital News Report 2019* (2019); Australian Broadcasting Corporation, *Fake News: The Battle of the Social Networks*, FOUR CORNERS (broadcast September 16, 2019); European Broadcasting Union, *Democracy in the Online World* (October 7, 2019) https://www.ebu.ch/news/2019/10/democracy-in-the-online-world.

[4] Tim Dwyer & Denis Muller, *FactCheck: is Australia's level of media ownership concentration one of the highest in the world?* THE CONVERSATION (December 12, 2016) https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437.

[5] Rod Sims, Chair, Australian Competition and Consumer Commission, Address to the 2018 Annual RBB Economics Conference (November 29, 2018).

[6] Richard Baines, *Media industry facing major shake-up as Government strikes Senate deal with support of Nick Xenophon*, ABC NEWS (September 14, 2017) https://www.abc.net.au/news/2017-09-13/media-reforms-set-to-pass-senate/8943266. The changes scrapped the "two out of three rule" and the "reach rule." The former meant that a person was not allowed to control more than two of commercial radio, commercial television or newspaper in the same licence area. The latter meant a person was not allowed to control commercial television licences that, in combination, broadcast to more than 75 percent of the population of Australia: Australian Communications and Media Authority, *Changes to media control and diversity rules* (February 18, 2019) https://www.acma.gov.au/theACMA/changes-to-media-control-and-diversity-rules.

[7] Media Release, Australian Competition and Consumer Commission, ACCC will not oppose Birketu and Illyria's proposed acquisition of Ten (August 24, 2017).

[8] Baines, *supra* note 6.

[9] Hansard, Senate Select Committee on the Future of Public Interest Journalism, committee hearing, Sydney (August 22, 2017) 31. See also at 30.

[10] Commonwealth of Australia, *Inquiry into Digital Platforms*, Terms of Reference (December 4, 2017).

[11] Section 50 of the *Competition and Consumer Act 2010* (Cth) prohibits mergers and acquisitions that substantially lessen competition.

[12] Australian Competition and Consumer Commission, *Media Merger Guidelines* (2017) 6-7.

[13] Media Release, Australian Competition and Consumer Commission, ACCC will not oppose Birketu and Illyria's proposed acquisition of Ten (August 24, 2017).

[14] Media Release, Australian Competition and Consumer Commission, ACCC will not oppose Nine-Fairfax merger (November 8, 2018).

[15] *Id.*

[16] *Id*.

[17] Australian Competition and Consumer Commission, *supra* note 2, at 287.

[18] *Id* at 334, Recommendation 10.

[19] *Id* at 256, Recommendation 7.

[20] Media Release, New Zealand Commerce Commission, Commission declines NZME/Fairfax merger (May 3, 2017).

[21] Maurice E. Stucke & Allen P. Grunes, *Towards a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy*, 42 CONNECTICUT LAW REVIEW 101, 107 (2009), citing C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (2007) 120-1.

[22] Sims, *supra* note 5.

[23] Most famously, Lina M. Khan, *Amazon's Antitrust Paradox* 126, YALE LAW JOURNAL 710 (2017).

[24] For completeness, it should be noted that the interpretation of those laws is ultimately a matter for the courts. The ACCC's approach is of significant importance, however, especially when, in effect, it commonly determines the application of competition law to proposed mergers through its informal merger clearance process.

[25] Robert Pitofsky, *The Political Content of Antitrust*, 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1051, 1065 (1979).

[26] *Id.* at 1058.

[27] *Re Queensland Co-operative Milling Association Limited*, 8 ALR 481, 511 (1976).

[28] *Id*.

[29] *Competition and Consumer Act 2010* (Cth) Part VII, Division 1.

[30] Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?* 94 CALIFORNIA LAW REVIEW 371 (2006).