Australian Competition & Consumer Commission	**Communications and Media Law Association** **Graeme Samuel, Chairman** **4 May 2010, Sydney**

Good evening and thank you for the invitation to speak to you tonight. I was originally going to speak to on some of the current issues concerning competition regulation in the telecommunications sector.

But as so much of this topic is intertwined with the legislation currently before Federal parliament relating to the National broadband Network (Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill), I trust you will understand if I avoid entering the political arena on this subject.

I will however, briefly address some consumer related issues in relation to telecommunications and then move on to the inexorable convergence occurring in the communications and media sectors and its implications for the industry players, consumers and the regulatory environment.

Telecommunication consumer issues

In my address at the ATUG conference last year, the industry was put on notice – it was time for poor consumer practices that breach the TPA to stop or face increased scrutiny and action.

Mobile premium services, phone cards, “unlimited” call claims and accuracy of broadband speed claims were highlighted as particular issues of concern.

Lifting industry standards is currently a work in progress

Sectoral reform

In the past I’ve referred to that unseemly condition of litigation RSI – where a particular field is so riddled with potential breaches of the Act that we could develop regulator’s repetitive litigation strain injury. I have likened the problem to working that Luna Park machine where a head pops up to be knocked down, then another pops up to be likewise knocked down, and so it continues but with no end to the game.

Telecommunications is, or at least was, one such area. The ACCC has over the last 12 months developed a new sectoral approach – looking to address systemic issues broadly rather than case by case.

The ACCC outlined a number of concerns relating to advertising practices such as the use of certain words – like “unlimited”, “capped” and “free” – and the placement and prominence of qualifying terms and conditions in such advertisements.

The end result invariably led to many consumers being misled or deceived about the nature of the product or services they acquired and appropriate ACCC enforcement action being taken against those providers for breaching the Trade Practices Act.

I'm pleased to say there has been significant progress in resolving this issue.

In August last year, we sat down with the CEOs of the major telecommunication providers, Telstra, Optus and Vodafone Hutchison Australia. They acknowledged that there was a problem, exacerbated by a "race to the bottom" by industry participants in their advertising practices. The CEOs showed a ready willingness to resolve the issue on an industry-wide basis.

After analysing complaints, the ACCC identified the 12 most prevalent types of potential misleading conduct made in telecommunications. Some of these included:

- use of terms such as "free", "unlimited", "no exceptions", "no exclusions" or "no catches" when this is not the case;
- headline price offers in the form of "price per minute" for calls made using mobile phones and phone cards when there are other fees/charges which are not clearly disclosed; or
- headline claims relating to price, data allowances, total time allowances, speeds and network coverage, where the claims cannot generally be achieved by consumers.

The three industry leaders have provided a court enforceable undertaking to review and improve advertising practices so that consumers are better informed about the telecommunications products they purchase. They have undertaken that their advertising will not make these claims in circumstances where they are likely to be misleading to consumers.

Further the majors have also agreed that they will take reasonable steps to ensure that this commitment will extend to any other players with whom they have commercial agreements which allow them to control the advertising and promotion of goods or services.

Furthermore the undertaking provides a fast track process for dealing with any ongoing concerns in this area.

The ACCC has been active in widening the scope of this undertaking provided by the 'Big 3', and has since conducted 'truth in advertising' workshops with second tier industry participants.

These were designed to alert other industry participants, not just those who signed the undertaking, to the range of conduct that concerns the ACCC and to strongly encourage them to review their own advertising practices, and adhere to the standards in the undertaking.

This is a significant step in addressing the important issue of clear and accurate advertising of telecommunications goods and services.

This now means that providers serving 90 per cent of the telecommunications industry have been directly advised of the ACCC's concerns and proposed action, and can be considered to be on notice as to the ACCC's position on truth in advertising.

We will continue to monitor the industry's advertising and the complaints we receive, and will not hesitate in taking action when necessary. However, it would not be overstating the consequences of this sectoral approach to observe that of recent times, consumer complaints warranting enforcement action in this area have dropped off to insignificant levels.

Another broad area of concern is the way in which phone companies handle mobile handset defects and deal with warranty claims.

Everyday consumers across Australia have to deal with the inconvenience of a faulty mobile phone. Often the real frustration begins when the consumer takes the mobile phone back to their telecommunications provider for a remedy."

Common complaints received by the ACCC include:

- consumers face long repair times, sometimes with no loan phone being provided
- consumers experience repeated faults with their mobile phones but each time are told they are only entitled to a repair rather than a replacement, and
- consumers being told that after the initial 12 month period in which the manufacturer's express warranty applies, no remedy is available; this is despite the consumer being locked into a 24 month service contract.

Misrepresentations about consumers' statutory warranty rights will not be tolerated, and here too we hope to achieve a sector wide outcome.

The ACCC has recently accepted court enforceable undertakings from Vodafone Hutchison Australia over warranty issues under which it agreed that customers who acquired mobile phones under a service contract received a retail warranty at no extra cost for the contract's term. There is an exception for Apple phones where the warranty is limited to 12 months, regardless of the term of the service contract.

This means that a customer on a 24-month service contract will receive free unlimited repairs if their handset is faulty for the entire 24 months. Also, VHA customers who had pre-paid contracts from 1 January this year who buy their handset will get an express warranty for 24 months.

The 24 month timeframe is important because it now means that consumers' mobile phones will be covered by a warranty for the entire length of a standard service contract. Current industry practice is that despite consumers being tied into 24 month contracts, the mobile phone handset supplied with the contract is normally only covered by a 12 month warranty.

Further, VHA has undertaken to take all reasonable steps to provide a loan phone to customers while faulty phone is being repaired and that the repair will be done in a timely manner.

The ACCC is currently in discussions with Telstra and Optus to bring these companies, their resellers and agents up to the line.

Let me now turn to the future media landscape.

Past predictions

I am sure that if I asked each of you here this evening to forecast the state of play in the media and its convergence with telecommunications, I would receive perhaps 100 different views. So let me repeat some of my own predictions made just a couple of years ago to an audience of mainstream media reporters and members of the business community.[1]

I suggested that internet blogs would become a credible threat to established and mainstream news outlets and that competition to break the latest news would be fiercer than ever.

I said consumers of news and entertainment would abandon brand loyalty to one or two sources and increasingly put their trust in new websites and new technologies

It followed, I argued, that advertisers would chase consumers to these new and different mediums in order to get their messages across to the somewhat nomadic tribe that is the modern media consumer.

With declining advertising revenues and changes to cross-media ownership laws I also foreshadowed that traditional news outlets may need to merge or acquire new territory.

The picture I painted was that soon would come the day when there would be no such thing as a stand-alone newspaper, radio station or television station.

The modern media company would be a blend of all three with an online presence as well delivering content across multiple platforms.

Finally, I said this brave new world would mean that regulators like the ACCC would have a substantial role to play to ensure these changes would benefit competition and consumers.

Two years is a long time – a very long time – in the digital world and I am pleased, perhaps relieved would be more accurate a description, to see that almost all of my predictions were on the money.

I did suggest that YouTube would do away with the need for me give a speech like this in person and in 'real time'. I suppose by being here in Sydney tonight I have failed my own prediction on that front. Perhaps if I am invited back next year, I will send my Avatar, and remain ensconced in my cubicle in Canberra or Melbourne.

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[1] 'Will the media survive the digital revolution', Walkley business lunch, 16 October 2007.

Of course I was not alone in analysing future trends in journalism and the media market. For media proprietors – who are important clients for many of you – there is a great deal riding on being ahead of the next digital wave.

As Rupert Murdoch acknowledged in a speech four years ago:

> *From the wheel to the web, from the printing press to fibre optic cable, it has always been technology that has driven history. Those in the driving seat have always been those who fully understood and used that technology*.[2]

Publisher and chairman of the New York Times Arthur Ochs Sulzberger Jr also accepted that advances in digital technology would result in old formats becoming obsolete when he said:

"I really don't know if we'll be printing The Times in five years, and you know what? I don't care."

Sulzberger said that in 2007 so the clock has two years to run on his prediction.

Both Murdoch and Sulzberger are keenly aware that the media landscape has changed forever but they are struggling to effectively resolve the biggest issue facing media proprietors – how to make the online user pay.

Is content or distribution king?

In general, media companies provide content to the public for free – or at a substantially low cost – and rely on advertising for revenue.

Consequently, media markets can be thought of as 'two-sided', with advertisers on one side and consumers on the other. In order to maximise profitability, media companies need to consider their actions on both sides of the market

For example, if a media company increases the price it charges consumers, its audience may decline, reducing the amount it can charge for advertising.

If consumers can go elsewhere – and at no cost – to get the exact same news and information that was originally produced by the media company, advertisers may miss-out on reaching those consumers and decide to move their advertising elsewhere.

At the heart of this issue are internet search engines and Google in particular. When you type keywords into a search engine, the subsequent search is not of every page on the internet but rather of pages already identified and indexed by Google or other search engines.

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[2] Rupert Murdoch, 'The Dawn of A New Age of Discovery: Media 2006', Speech at the Annual Livery Lecture at the Worshipful Company of Stationers and Newspaper Makers, 13 March 2006.

This is to ensure that relevant results are returned in a short period of time. The search can become narrower still by manipulating search results so that particular pages are ranked higher than others with the aim of directing more people to these ranked sites.

As an aside, I note that the ACCC has taken action against Google and the Trading Post in 2007 for breaching the *Trade Practices Act* in the way their search functions returned and promoted results. These hearings have concluded and a decision by the Federal Court is expected in the coming months.

If I can return to newspapers – some commentators have drawn an analogy between the indexing and ranking process of search engines to ‘old fashioned’ distribution methods like the paper boy delivering the morning papers.

Writing in the online newsletter *Business Spectator* last month, financial journalist Alan Kohler argued that because Google – and search engines generally – 'distribute' the internet by guiding consumers to web pages, restricting access to search engines effectively shuts down content supply to consumers.[3]

He wrote that in order to be distributed by a search engine, a web page must have free access. If it’s not free, Google doesn’t index it at all or the word 'subscription' appears next to the search result indicating it must be paid for.

Mark Day writing in *The Australian’s* Media section in response to Kohler’s piece challenged the theory that if you lose Google you lose your entire audience. He argued – and his boss Rupert Murdoch agrees – that content is what supports the supply chain and drives purchases.[4]

The difficulty so far has been restricting access to content. This is where the iPad comes in – or is set to come in with the Australian release date pushed back due to strong demand in the US when it was released there last month.

Will the iPad be the saviour or death of newspapers?

Depending on who you read, the iPad will either save newspapers by making users pay for content – or by locking content away, it will reduce the number of readers and therefore advertising revenue will decline and newspapers will be worse off.

In a nutshell, media organisations such as *The Australian*[5] will provide content to Apple to distribute via the iPad for a fee, thereby cutting Google and other search engines out of the picture.

To become a successful distribution method this will require consumers to purchase an iPad and a plan from a provider (they retail in the States from US$500) as well as pay for the newspaper application.

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[3] Alan Kohler, ‘Publish and be damned’, Business Spectator, 9 April 2010. Republished in Crikey.
[4] Mark Day, ‘iPad could save newspapers and attract ad dollars’, The Australian, 12 April, 2010.
[5] Ibid.

There has been a great deal of hype generated by the latest offering from Apple but it is worth noting that neither a mobile platform for reading books or large documents is new – Amazon released the Kindle in 2007 – and paywalls for content have been in place at media outlets like the *Financial Review* in Australia and the *Wall Street Journal* for some years.

In June this year British titles *The Times* and *Sunday Times* will have paywalls and from January 2011 the *New York Times* website will have a 'hybrid' system where a visitor to the website will be allowed to view a certain number of articles free each month but to read beyond that, the reader must pay a flat fee for unlimited access, much like the 10 article per month limit imposed on registered but unpaid readers by the *Financial Times.*[6]

I currently use a Kindle to purchase and read the latest books – although I can't let this opportunity pass to note my increasing frustration at the restrictions imposed by publishers on what I can download to my Kindle – restrictions imposed simply because I am an Australian resident.

I am also well served by my Blackberry which has all but replaced paper and ink in my daily life. The thud of newspapers at 6am on my doorstep has been superseded by the buzzing of my Blackberry at 3am with tomorrow's headlines and news clips sent directly to my email inbox.

Throughout the day I receive updates from *The Australian*, the ABC and *The Age* and twice a day I get a summary of business news from some of Australia's best financial journalists writing for online outlet, *Business Spectator*.

At the end of each day I receive the latest analysis from some of Australia's most credible economists writing for the CORE Economics website. And each day I receive international analysis from the likes of the Global Competition Review, the Lowy Institute's Interpreter and the International Crisis Group.

Oh and by the way, The Australian is delivered to the front lawn, but generally too late to be read at the breakfast table, so online on the laptop becomes the preferred medium. The office supplies my daily copy of the AFR.

I look forward to owning an iPad – probably the second generation – after a few more functions have been built in to it. The laptop will then be consigned to the pile of "past use by date" technology tools!

But with all these techno gadgets, we need to accept that the future is not all mobile and wireless. Indeed wireless will probably never replace fibre optic cables when it comes to another growth area for digital media – IPTV.

[6] Paul Harris, 'Rupert Murdoch defiant: 'I'll stop Google taking our news for nothing'', The Guardian, April 7 2010.

Drivers for high speed broadband – IPTV and other uses of fibre optic cables

Last month ISP iiNet announced it had teamed with content aggregator FetchTV to be the first in Australia to offer this IPTV service later this year[7]. Telstra has announced its T-Box download and streaming service.

These IPTV products will compete with existing internet enabled devices including Foxtel IQ; TiVo; and Sony's PlayTV accessory to the PlayStation 3 console.[8]

And for some time now a number of ISPs have been offering unmetered downloads of audio visual content, for example the ABC's iView.

I note that senior management at Foxtel consider free-to-air channels on the digital platform as their serious competition, but I wonder if they should be glancing over their shoulder at the new entrants in the IPTV market as the potential challengers to Foxtel's dominance of Pay TV.

While entertainment is obviously a strong driver for high speed internet data transmission, there are a range of other important social, environmental and economic benefits of a fully operational high speed broadband network.

I will refrain from entering the political debate over the Government's NBN project. Whether we achieve the ultimate objective of high speed broadband by extensive fibre or wireless networks is a policy decision that will be debated and ultimately resolved by our legislators in Canberra.

But I think it is fair to say that there is overwhelming agreement that Australia needs to develop a high speed broadband network.

Such a network could offer serious advantages in a range of critical areas. For example, it could support smart grids and assist in the reduction of carbon emissions. This carbon foot print reduction is likely to be assisted by increased use of video conferences as an alternative to business travel.

High speed broadband also offers prospects for improved health and aged care through telemedicine and can contribute to improving distance learning opportunities.

Blogs a credible threat?

Two years ago I suggested that internet blogs would become a credible threat to established and mainstream news outlets and that competition to break the latest

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[7] Jordan Chong, 'iiNet signs online TV deal with Fetch TV', Australian Associated Press, April 12 2010.
[8] Thomas Hunter, ''T-Box' unveiled as Telstra spruiks superfast broadband' The Age, November 19 2010.

news would be fiercer than ever. Many in the mainstream media then and now treat weblogs with derision.

Tonight I'll just share three examples of well resourced blogs that are taking it up to traditional publishing houses.

I have already mentioned *Business Spectator* – a free financial news source which has been giving the websites of major newspapers a run for their money since it launched in late 2007. This is not surprising when you consider that its writers are former heavy hitting reporters from *The Age* and *The Australian.*

Overseas, American political blog *The Huffington Post* was rated in 2008 by both *Time Magazine*[9] and *The Observer*[10] as the most powerful blog in the world. Like *Business Spectator* it recruited professional columnists and it has attracted high-profile guest contributors.

At the other end of the news spectrum, celebrity news website, *TMZ* – which is owned by Warner Bros – has been responsible for breaking news such as the death of Michael Jackson and socialite Paris Hilton's jail-term for driving offences.

Interestingly TMZ started as a website but now has a television show that recently screened on Go! – the free-to-air digital channel owned by Channel Nine. This is an example of convergence where-by a media brand exists across platforms and is not limited to print, audio or visual communication.

Reputable mainstream media organisations, must be nervously wondering what to do as they watch the newcomers, the bloggers, slowly but surely creeping their way up the ladder like pirates with daggers between their teeth.

What is even more worrying for these traditional media organisations is that some of their assumptions about users trusting known brands are starting to look a little shaky.

For a growing base of users, blogs are all equally valid sources of news, information, entertainment, and gossip, and users are not necessarily discriminating between traditional and new sources.

Where once media companies could reassure themselves that audiences would always default back to traditional houses of journalism, this is becoming less and less the case, although it must be said old media companies do still dominate many of the most visited sites.

So what does that mean for those of us here today?

Quite a lot actually. For the media it means finding new ways of remaining relevant to an increasingly fragmented and disloyal audience. For regulators like the ACCC, it means ensuring regulation relied on during the last century, does not become an irrelevant fallback position that fails to serve the public's best interests.

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[9] Tom McNichol, 'Time.com's First Annual Blog Index', Time Magazine (online edition) 2008.
[10] Staff reporters, 'The world's 50 most powerful blogs', The Observer, 9 March 2008.

Let’s have a look first at what all this means for the journalists, media proprietors and business community, before we talk about the task ahead of regulators.

A media under siege

I referred earlier to publisher and chairman of the New York Times Arthur Ochs Sulzberger Jr statement that:

“I really don’t know if we’ll be printing The Times in five years, and you know what? I don’t care.”

His statement was not meant to be a morbid prediction that one of the world’s great ‘old’ media brands would soon be dead. What he was trying to say was that old media companies could no longer rely on revenues of the past and needed to develop ways of drawing money out of new technologies.

In a sense he was stating the obvious. It is no secret that traditional media revenues are wilting on the vine. The rivers of gold that once flowed through the classifieds pages of our broadsheets and the advertising departments of broadcasters are drying up.

According to the *2007 State of the News Media* report, the news business hit a pivotal point that year and entered a new phase whereby most media companies were accepting the need to become more niche players.

Not only does the report – compiled by journalists – warn that major broadsheets may find themselves irrelevant during this phase, but that advertisers may also not rely on media in the way they once did. Where once media represented the town square of public debate, this was becoming increasingly less the case.

Some have tried to stem the tide by constructing their own Maginot line around their businesses and trying to lock up their premium content.

But with such a seemingly unstoppable sea of change, some media companies are thinking seriously about no longer swimming against the tide, but trying to go with it.

New models emerging

Every major newspaper, radio station and television station in this country has to some degree embraced the digital age. Blogs, moderated by journalists, now sit alongside traditional articles and commentary on newspaper websites. Television stations are increasingly making their content available on-line and radio is finding a new lifeline through podcasting and streaming on-demand content.

The rise of illegal video downloads, made possible by faster internet speeds has seen some television stations respond by showing popular series on the same day they are aired in the US. There is of course little value for an advertiser, if most viewers of the show they are paying to be part of have already downloaded and watched it months ago.

In recognition of the rise of blogs, some companies are taking a leap of faith and trying to sever ties with the old world altogether.

The defection a couple of years ago, of a number of the country's most highly regarded business commentators to on-line start-up, Business Spectator, is proving to be an interesting experiment. This site, with an array of free content (including international content) from highly respected journalists has thrown down the challenge to accepted mainstream financial newspapers, including *The Australian Financial Review.*

But what's particularly interesting in some of these experiments to keep up with the bloggers is that media organisations are starting to lower the drawbridge just a little and allow some of the raiders inside.

Internationally leading media outlets have moved into dedicated facilities designed to integrate the on-line and 'dead tree' versions, complete with studios for recording video and sound content for the variety of platforms the company now uses to communicate with its audience.

Rather than simply asking journalists to contribute to their websites, some organisations have flirted with the idea of allowing readers to publish their own blogs on their sites.

This is a big leap of faith, as editors can't possibly hope to vet all content going out through these channels – and inappropriate blogs posted on mainstream websites highlights the potential dangers of editors relinquishing too much control over the content that goes out under the organisation's name.

South Korean-based OhmyNews.com started with a handful of traditional reporters and a similar number of editors whose task it was to check contributions sent in by the public. Under the slogan, "Every citizen is a reporter" it has grown to the point where today around 160 articles from a wide range of contributors are published every single day. In-house reporters only account for around 20 per cent of the total published content. Not only did this business survive the dot.com crash, it has become highly influential, won international journalism awards and has been credited with having an impact on national elections.

Similar experiments are underway in India, Europe and North America. At thedailyacts.com becoming a journalist is easy – you just click the button at the top of the page.

These are still experiments, and many are likely to fail.

Lastly, let's not forget about those reorganisers of news, rather than the generators. If trawling through national newspapers looking for stories of relevance on the pending election takes more time than you're prepared to invest, Google's dedicated election website can send you an alert any time an issue in your electorate pops up. Even our politicians have been by-passing the usual channels by launching policies on YouTube, Facebook and their own, dedicated sites.

In Australia this trend of convergence has continued and in the last two years three major news outlets have dramatically changed their online presence.

For example the ABC – a radio and television broadcaster – created its version of a broadsheet newspaper's opinion page of when it launched *The Drum* late last year. For the first time ABC journalists have been writing analysis of a political or economic issue.

The Drum launched after News Limited created a one-stop opinion website for all of its Australian newspapers called *The Punch.* And *The Age* and *Sydney Morning Herald* mixed a new website with nostalgia when it re-branded its online opinion pages as *The National Times* after the weekly Fairfax publication of the seventies and eighties.

The ABC is also testing other approaches in the convergence space. The first episode of the new season of *Doctor Who* was available on the ABC's iView service well before the show went to air. Despite 112,000 downloads on the weekend between iView availability and the episode airing on Sunday evening, the show achieved more than a million viewers on the night.

Perhaps even more telling as a convergence issue are the other ABC statistics for that week. It was the biggest in the history of the ABC's catch-up viewing service with 224,000 visitors, 540,000 visits and 2.8 million page views. [11]

Social media – the explosion of public journalism

One aspect of the new digital world that I don't think anyone realised the full potential of, was social media websites in particular Facebook and Twitter.

The Australian Federal election in 2007 and the American Presidential election in 2008 saw these digital platforms put to enthusiastic use by candidates as a way to directly reach an audience without relying on traditional media.

Most Australian politicians have a Facebook page and/or a Twitter feed and increasingly use these to make policy announcements or give updates throughout their daily pursuits.

During Question Time in the Federal parliament, Canberra Press Gallery journalists tweet commentary on the performance of the Government and Opposition members and in doing so completely bypass their newsdesks and editorial control.

I do note that Australian Associated Press (AAP) editor-in-chief Tony Gillies has banned reporters from tweeting while at work in a bid to protect the wire agency's brand. It will be interesting to see if more news outlets follow suit.[12]

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[11] Staff reporters, 'ABC scores 112,000 video streams for Doctor Who premiere' mUmBRELLA online, 19 April 2010.
[12] Amy Simmons, 'AAP puts 'strict curb' on tweeting reporters', ABC Online March 12 2010.

Along with content, social media sites have created a new market for advertising.

Facebook has allowed advertising for some time and a joint study released by Nielsen Company and Facebook last month reported that advertisements placed in a 'social' context where a Facebook user can become a 'fan' of the product or service advertised had more impact than standard webpage advertising. It is worth keeping mind that Facebook is a co-author of that report.[13]

In the last fortnight Facebook announced it was sharing the identity of a Facebook user who became a 'fan' of or 'liked' a particular advertisement with other websites.

For example if you click 'like' on the Rolling Stones in Facebook, when you next visit participating internet radio station Pandora it will immediately offer up The Stones and other music based on what you've chosen to "like" on Facebook. [14]

Twitter is soon to enter the advertising arena with 'promoted' tweets being trialled in the US by big corporate advertisers such as Starbucks and Sony Pictures.[15]

And advertisers are chasing consumers to whatever new platforms are adopted by users. And media proprietors are, from commercial necessity examining the opportunities for acquisition and merger, recognising the ever changing landscape for sources of revenue, in the form of advertising dollars and content subscription fees.

In this evolving media landscape there is a substantial role for regulators to play to ensure changes benefit competition and consumers.

New roles for regulators

We have now experienced several years under the new regime passed into law last decade bringing about significant reforms to Australia's foreign and cross-media ownership laws.

These rules limit owners to controlling no more than two of the three media platforms of television, radio or print in any one market.

There is of course also a voices test in the legislation, which prevents the number of independent media operators falling below five voices in metropolitan areas and four in regional and rural markets.

These in themselves are important tests that media companies need to satisfy to gain approval of a merger, and these safeguards will be monitored by ACMA.

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[13] Jack Neff, 'Nielsen: Facebook's Ads Work Pretty Well', Advertising Age Online, April 19, 2010.
[14] Peter Farquhar, 'Facebook founder Mark Zuckerberg tells f8 he expects 'a billion likes' on first day', news.com.au April 22 2010.
[15] Mikael Ricknäs and Juan Carlos Perez, 'Update: Twitter to start pushing advertising to users' Computer World Online, April 13 2010.

It is important to remember that these hurdles are additional to existing requirements, including perhaps one of the most important tests, the need to satisfy section 50 of the Act, which is the ACCC's focus.

Section 50 of the TPA specifically requires the ACCC to consider the dynamic characteristics of the market. This presents a challenge in an industry characterised by constant changes in technology and consumer taste.

As has already occurred, there are likely to be times when both the ACCC and ACMA are looking at a proposed merger at the same time, each applying its own tests. The two regulators as a matter of practice, request a waiver from merger parties allowing confidential information provided to one agency to be shared with the other.

This is done in such a way as to protect the privacy of the parties providing the information, but at the same time allowing the regulators to conduct a smooth, coordinated assessment of the various aspects of a proposal. This arrangement has many benefits, including potentially speeding up the assessment and investigation process, avoiding repeated requests for the same information and avoiding the risk of parties providing different information to the two parties.

ACMA has its job to do in assessing any media mergers that arise, and so will the ACCC. Working in a more coordinated way allows both agencies to do their job more efficiently, which of course also benefits the parties involved.

Regardless of what other tests media companies need to pass before mergers can proceed, they will not be allowed to proceed if they appear likely to lead to a substantial lessening of competition.

It is important to remember that the prohibition contained in section 50 is against any acquisition of shares or assets that "would have the effect, or be likely to have the effect, of substantially lessening competition in a market".

In connection with its assessment of the application of this prohibition to any acquisition of shares, the ACCC must consider whether the acquisition gives rise to circumstances which, after taking account of the analysis of relevant markets, and competition in those markets, would be likely to lead to a substantial lessening of competition.

The Act does not prescribe the circumstances where the acquisition of specific shareholding interests, for example small minority shareholdings, might give rise to these competition concerns. That becomes a matter for examination by the Commission having regard to all the relevant circumstances.

Without being prescriptive, issues that we would initially examine are whether the shareholding interest concerned either alone or taken together with other "friendly" or "supportive" shareholding interests would enable one or more parties to control or substantially influence the operations of the target company.

Under the current media ownership legislation, owners of one form of media in a market, say, a newspaper, are not allowed to control another form of media in the same market, for instance a radio or television station. Normally, acquiring more than 15 percent of another form of media is regarded, by the media ownership legislation, as gaining control.

Some interpret this limit of 15 percent as the point where ownership begins to look more like a controlling interest under the Trade Practices Act, and thus potentially throws up questions of competition. Others would point to other numbers as the point where alarm bells should start ringing.

However the matter is more complicated than a simple line in the sand. Many here today will remember Kerry Packer famously testing that 15 percent limit when he purchased a 17.7 percent stake in newspaper company Fairfax in 1995. Despite crossing that threshold, Packer, the owner of a television network, was found by an Australian Broadcasting Authority investigation not to have been in a controlling position because his share in the company was still less than that owned by rival Conrad Black.

Parallels can be drawn with the current debate over control. An ability to influence control over a company may kick in well below the 15 percent mark, if for example two significant shareholders decide to use their combined voting powers to influence the direction of a company. But it is impossible to give a concrete answer on when competition concerns might be triggered, as every case is unique. I note simply for comparison that under the Corporations Law, the threshold at which control becomes an issue in the context of a takeover is generally accepted to be 20 percent.

Our analysis is an exhaustive process of examining and defining the market, talking to involved parties, their competitors and their customers and making a sober, informed decision on the level of competition based on the facts, rather than emotive responses or comment in the press.

What is perhaps even more important than individual ownership levels is the watch we keep over potentially anti-competitive behaviour. This sort of activity can occur regardless of the level of ownership an individual may hold in another business. Where there is evidence that they may be attempting to harm a competitor through anti-competitive conduct, be it via a financial interest in that competitor or otherwise, the ACCC stands ready and well-equipped to respond.

Companies are not required to notify the ACCC of mergers before they proceed. However, we encourage them to do so, as the ACCC will conduct its enquiries regardless of whether the parties involved have approached us in the first instance or not. Where a merger is likely to raise concerns, the ACCC does not hesitate in seeking injunctions to block deals proceeding, or where they have already occurred, seeking forced divestitures or unwinding of arrangements.

Media merger guidance

Before we can make any assessment of whether a merger is likely to raise competition concerns, the ACCC first needs to define the markets that the two parties involved operate in, and how much overlap there is and whether they provide competitive tension for each other.

In mid 2006 the ACCC released a paper providing broad guidance on the Commission's approach to assessing future media mergers. This paper is available on the ACCC's website.

In the past, the ACCC has regarded the media as four distinct products – free-to-air television, pay television, radio and print. Those products have been thought of as having little overlap in content or advertising.

With the technological changes I have just mentioned under way, it is clear we can no longer rely on these neat pigeon holes that have been reasonably reliable in the past. No longer can traditional media boundaries be used to define separate markets when there is an increasing blending of the lines between mediums. And as we witness even further levels of convergence in the market, it is likely that how a market is defined will need to evolve over time.

As those traditional media boundaries blur, focus may shift from the way information is delivered to the actual products media companies offer. If, television stations, newspapers and radio stations begin offering content in a similar format - let's take video updates of selected news stories as an example - do they suddenly cease to be different? And does that mean that where in the past they may have been considered to be separate markets, does this now make them direct competitors?

For a consumer, it may make little difference if they are downloading their morning update from the NineMSN, Sydney Morning Herald or 3AW websites.

In this regard, we now consider there are three main categories the ACCC will investigate as part of its assessment of any proposed merger: the supply of advertising opportunities to advertisers; the supply of content to consumers; and the acquisition of content from content providers.

Other more specific products – such as premium content; classified and display advertising; and the delivery of news, information and opinion – may also be critical when considering particular mergers.

It may be that the 4/5 number of voices test may not be the only point at which the different opinions and points of view being offered by media players comes into consideration. That diversity of voices is a particularly pertinent concern in rural and regional areas that do not have the same number of operators as the cities, and I will come back to this issue in a moment.

But having said this, the general framework for merger analysis will remain the same for media mergers as it is for all mergers.

So if we take supply of content as an example, if the price of one source of content rises, or its quality falls post merger, the question is the same one that arises in all mergers – what are the real alternatives for consumers?

Where new services develop or look likely to do so in the foreseeable future, we will take them into account in assessing media mergers and acquisitions under the provisions of the Act. But we won't base our decisions on mere speculation.

And at all times, the ACCC will be looking closely at any content, advertising or news and information markets where concentration appears to be occurring.

Not only in Australia as a whole, but also in regional markets, as the Act requires.

Regional markets

As I mentioned, there have been specific concerns raised about the level of media diversity in regional markets that do not enjoy the same level of choice as the larger metropolitan areas. It is a perfectly valid concern from those living in regional areas that they not be left with reduced choice as the result of mergers or acquisitions proceeding. This has been an issue of particular concern to operators of radio stations in regional areas, who have expressed concern that diversity safeguards introduced with the new media rules may impose onerous obligations that threaten the viability of some of their operations.

There are specific protections built into section 50 of the Act that require the ACCC to consider the impact of proposed mergers on markets in regional Australia. Consequently, the ACCC will take into account the differing circumstances in rural and regional Australia compared with urban areas. The ACCC understands the importance of local content in these areas and that consumers rely heavily on local suppliers of news and information, as compared to consumers in urban areas who have greater access to a variety of media choice. We also understand that much of the additional choice being opened up by the internet and other more global forms of communication is not always a suitable substitute for local information. CNN or the BBCWorld Service might be very handy for finding out what's happening in the Middle East, but you're likely to be disappointed if what you really want to know is what time the local dog show starts.

Competition in those local markets may be more vulnerable following a merger than competition in the larger cities. As such, the ACCC will continue to consider implications at the local and regional level when assessing mergers proposed for those areas, as we did in the Macquarie Bank case.

Media diversity

One of the major issues has been the issue of diversity, and it's about that that I want to make a few comments.

It's been suggested that the issue of diversity is purely a social issue, and not an economic one, and thus not able to be dealt with under section 50 of the Trade Practices Act. Let me say quite clearly that diversity is not, in the view of the ACCC, solely either a social or an economic issue; it's both. We cannot guarantee diversity into the future, but lest this is interpreted as saying that the ACCC cannot deal with reductions of diversity flowing from media mergers, I want to make it quite clear what our position is.

Diversity needs to be seen from three perspectives: content producers such as editors and journalists in the context of news and information, advertisers, and consumers. A lot of the current debate about diversity is flowing from content producers - editors and journalists - who have their own views as to the desirability of the diversity of opinion from their viewpoint as producers of that content. But diversity is about providing a choice of content, views and style. Competition motivates and forces suppliers of content to serve the diverse needs and demands of advertisers and consumers. As to content, in terms of entertainment, news, information and opinion, and as to the means of distributing that content to consumers so that they can receive it in the manner that they want to receive it.

Inevitably there is a desire by media outlets to distinguish themselves from their competitors. Competition will force content producers to produce diverse content. Above all, competition is directed towards and ensuring that, as far as possible - and this is important - it's the demands and preferences of consumers that are the drivers, not the views of legislators, media proprietors or content producers.

How would these principles apply to a media merger? Simply put, one way a media merger would generate competition concerns would be if the merged company could substantially reduce the quality of the content it supplies to consumers. Taking newspapers as an example, a publisher who is less constrained by competition could downgrade the general presentation and layout of its newspaper. The proportion of advertising to content could be increased. The use of colour might be decreased, and so on.

But the publisher could also reduce the quality of its newspaper by reducing the diversity and coverage of content provided to readers. Clearly, the potential for the newspaper to do this is increased if consumers do not have alternative sources of equivalent content, for example, news content.

But newspapers also earn revenue from advertisers and there is an important connection between local content and advertising that is important in discussions about diversity. For free-to-air television networks and radio, advertising is their only source of revenue. And any advertiser would be concerned about their advertising reaching fewer prospective customers because the media proprietor has reduced the quality and diversity of its content.

Acquisitions or mergers can adversely affect the quality of a newspaper for example by downgrading the general presentation or layout of their publication or by reducing the diversity of its content.

In the short term, cutting content may reduce the costs to the owners of the newspaper, but in the longer term, it is likely to impact on the number of readers bothering to pick it up.

Even in markets where a community paper may be delivered free to front lawns, it is possible to hurt readership by making the product less appealing. Our investigations tell us the most likely way a community paper would try to exercise market power would be by reducing quality.

But with a reduced readership comes the issue of less appeal for advertisers. Advertisers after all are primarily interested in having their products and messages displayed to the largest number of eyeballs possible. If readership declines the paper loses advertising appeal and therefore revenue, thereby only hurting its own business.

In the case of suburban newspapers, there is a strong incentive for owners to continue to provide relevant local content, as this is what appeals most to readers of these publications, potentially increasing the number of readers and therefore making them attractive to advertisers.

This is why measuring the potential effect on advertisers is a critical aspect of assessing how diversity might be affected in the context of potentially reduced competition.

Lessening the total number of media owners in an area may have the effect of reducing diversity of content, but it is important to remember that owners are constrained to a point by the reader/advertiser relationship. It is also worth noting that retaining separate owners in a market does not guarantee quality or diversity. Owners are always free to unilaterally change their format, increase the ratio of advertising to content or narrow the range of content they provide in an attempt to cut costs.

Mergers do not therefore automatically mean diversity is likely to be reduced if it is commercially sensible for the new owner to maintain it. Likewise, separate ownership does not necessarily always ensure diversity for customers.

So, in any media merger, the ACCC will also be considering whether advertisers have real alternatives to the merged media company. If they don't, again this would increase the potential for a media merger to substantially lessen competition.

I would stress that, in all media mergers, the ACCC will carefully consider all evidence provided to it suggesting that a media company would be likely to reduce the diversity of its content post-merger. But the ACCC is not the diversity police. A reduction in diversity could occur, and indeed can occur right now under current law, by the unilateral action of an existing media proprietor. Specifically, commercial conditions may push proprietors to broaden or narrow the range of content they provide, because such a change would protect their profitability.

But in a merger context, a reduction in competition can lead to a reduction in diversity. Where this arises, the ACCC will take this into account as part of its competition assessment under section 50 of the Trade Practices Act.

I might note that at the time of the 2007 legislative changes relating to cross media ownership, I suggested that some of the breathless predictions then being made of a merger frenzy involving the media barons were unlikely to emerge in reality.

In fact the number of applications for media mergers under the new laws has not been especially high. The commission has overseen the acquisition of Rural Press by Fairfax and the acquisition of Southern Cross Broadcasting by both Fairfax and the Macquarie Media group, but not the subsequent exits by each organisation from Southern Cross.

Ensuring access to news content in the digital media environment

As some of you will no doubt be aware, the ACCC played a role as mediator rather than regulator in mediating solution between media outlets and key sporting organisations over access to sporting news in the digital media environment.

This resulted in a new Code of Practice for Sports News Reporting that was announced by the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, in March this year.

The emergence of digital media created new opportunities for content such as sporting scores to be transmitted over new technologies. As such, digital content became a new and potentially lucrative commodity in the market place.

On the one hand you had sporting organisations such as Cricket Australia and the AFL recognise the value of sporting information and images and maximising this value by restricting access to a handful of media outlets who, in turn, traded on this exclusivity.

On the other hand, you had other media outlets excluded from this information and images and they were forced to purchase the content – if they could afford it – off their competitors to use in their own publications and broadcasts.

What sort of newspaper, website or mobile phone application would be without sports coverage? Some smaller regional newspapers had no choice. APN News and Media – a publisher in northern NSW and Queensland, did not run a contemporary AFL picture for two years. And independents, such as Shepparton News, had to restrict images, too.

Publishers faced other issues, such as restrictions on the number of updates of match reports and how many photographs could be published or sold on.

As lawyers – some of you no doubt represent media outlets or sporting organisations – you would appreciate that with so many vested interests this task was always going to be difficult. Indeed the same groups had been at loggerheads for years.

In early 2009 a Senate standing committee on Environment, Communications and the Arts recommended that media outlets and key sporting organisations negotiate among themselves access to sporting events for bona fide journalists and photographers, regardless of the technological platform they use to distribute information and images.

A further recommendation of the committee was that failing a successful resolution between parties, a mandatory code of practice under the *Trade Practices Act* be developed.

The Minister, Senator Stephen Conroy, asked the ACCC to find a way forward and following a number of roundtable meetings mediated by the ACCC, a voluntary code of conduct was achieved.

There now exists a voluntary code supported by an administration committee on which sit the major players from sport – including the AFL, the NRL, Cricket Australia, Tennis Australia and Australian Rugby Union – and the major players from the media – Fairfax, News Limited, APP, Getty Images and Agence-France Press.

The code requires these organisations to allow all bona fide news organisations, to be accredited to report sporting news subject to the principles of fair dealing and where syndication occurs, the recipients of the content should be bound by the same principles of fair dealing.

Protecting the public interest

This brings me to the question of how we go about ensuring the public is the winner as a result of all this upheaval. Convergence is potentially opening up a vast array of new channels for distribution of audio visual and print entertainment, news, information and opinion. With new delivery channels comes the possibility of new forms of content emerging as well, thereby potentially increasing choice for consumers.

The ACCC's challenge during this evolution of the media market will be to promote competition and not allow incumbents to impede the development of competitive choices for consumers.

Thus, the ACCC is focussing on ensuring minimal roadblocks to efficient investment in new infrastructure that will open up channels of distribution. Where it is economically inefficient to duplicate infrastructure our job will be to ensure access is provided on reasonable terms to competitors and the owners of the infrastructure, thereby providing competitive choices to consumers. In other words, we'll be trying to keep the pipes clear of blockages.

The ACCC is also focussing on control of content and content producers. With an increasing diversity in distribution channels, it is essential that content and content production is not concentrated in a manner that can inhibit competitive choices for consumers. As regulators we need to ensure that content does not become locked in the hands of the few, to the detriment of consumers or advertisers.

Where content isn't locked – and in fact there is an increasing range of distribution methods such as IPTV – it is important that the content available provides greater choice for consumers rather than more of the same over a different platform.

This is the process whereby the *Trade Practices Act 1974* and the ACCC can make a contribution to preserving and potentially enhancing diversity in the media offered to the Australian community.

On first blush it would appear convergence is already working in the consumer's interest by providing a range of new content. New forms of distribution, be it over the net, portable devices, time-shifting, IPTV or other formats promise more flexibility and new services. Extra competition is also good news, as it means potentially better prices, more innovation and wider choices for advertisers and consumers.

But as *The State of the News Media* report reminds us, just because there are more outlets providing content doesn't mean a broader range of content is being presented.

From experience we also know the old guard isn't about to roll over and accept its fate without a fight.

Empire building seems to be a natural tendency in the media world, as indeed it is for many industries, and we have already seen substantial reorganising of a number of Australia's major media brands as a result of new media ownership regulations. 'Old' media companies have also been quick to snap up a number of promising internet businesses.

Despite the apparent increase in diversity that the digital age promises, there are still very real risks that we may end up the poorer if we do not keep our eye on just where control lies for the material we want to receive. As I've mentioned before, with the actual distribution models constantly changing, second-guessing and trying to control the dominant platforms isn't likely to be a successful strategy.

What remains important is access to eyeballs, and the content those eyeballs are seeking is becoming increasingly important to our considerations when assessing media mergers and other arrangements.

What is important here is that the way we assess media is evolving to reflect the changes in the marketplace.

While things are changing, one certainty continues to remain a feature of the media market – that being that demand for news and entertainment is infinite.

The suppliers and methods of supply for this content are not as infinite, but I'm sure that if I speak to you next year, there will be new platforms and potentially new players in the media market.

Conclusion

Rupert Murdoch thinks the last newspaper will be printed in 2040 – and maybe he'll be right. After all, the world scoffed in 1975 when Bill Gates predicted the world would one day have a computer in every home.

But even predicting the death of newspapers is becoming old-hat and it seems the death of broadcast TV is now firmly on the pessimists' agenda. How long will it be before we are talking about the imminent demise of the internet?

Coping with change will require flexibility from both the media and regulators and that change will only continue to accelerate. But the legacy of that change is that technology and the growing swell of community input is placing the future of the industry in the hands of the public.

I for one can't wait see what they do with it.