Australian
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Consumer
Commission

ACCC submission to the Convergence Review Interim Report

February 2012

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION SUBMISSION TO THE CONVERGENCE REVIEW INTERIM REPORT

EXECUTIVE SUMMARY

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide its views in response to the Convergence Review Committee's Interim Report[1] (Interim Report). The ACCC refers to the submission it made to the Convergence Review's Framing Paper in June 2011, and reaffirms the views expressed in that submission.[2]

The ACCC supports a review of the existing policy framework applying to media and communications, especially given the market developments that have occurred (and may occur) as a result of convergence. Emerging services, platforms, technologies, and the online environment generally, provide a significant opportunity for new entrants and competition to develop. In order to take advantage of these opportunities, a regulatory framework is required that recognises the social, technological and market shifts that have changed the national and international context in which traditional media and communications businesses operate.

The ACCC recommends any revised regulatory regime should maximise the opportunities for businesses to enter media and communications industries and encourage robust competition between different types of services. The ACCC is of the view that any regulatory intervention should meet broader public interest objectives and be proportional to the market or regulatory failure that has been identified.

The ACCC supports an evidence based approach to assessing potential regulatory reform and believes a review of international regulatory regimes can provide some important insights into potential options for regulatory change. For example, those jurisdictions that have adopted a converged regulatory framework for media and communications and a converged regulator provide useful insight into possible mechanisms for addressing the current regulatory 'silos' and their effects in potentially limiting innovation and competition. However, the ACCC also believes that international comparisons should be carefully distinguished from the Australian context, especially where there are significant differences in the overall regulatory or economic landscape.

[1] Convergence Review Committee, *Convergence Review – Interim Report*, December 2011.
[2] Australian Competition and Consumer Commission, *ACCC submission to the Convergence Review Framing Paper*, June 2011.

The ACCC considers that it is appropriate and timely to provide its views on a number of key issues that have arisen during the course of the Convergence Review. This submission specifically addresses:

- the proposed creation of a new independent content and communications regulator with content-related competition powers;
- the proposed introduction of a public interest test for mergers and acquisitions in the media sector and removal of the current cross-media ownership rules;
- the proposed classification of entities across platforms as 'Content Service Enterprises';
- the proposed deregulation and market pricing of spectrum; and
- exclusive content arrangements and the viability of access to content regimes.

ACCC RESPONSE TO INTERIM REPORT RECOMMENDATIONS

The proposed creation of a new independent content and communications regulator with content-related competition powers

The ACCC notes the proposal for a new content and communications regulator with content-related competition powers, to be exercised in coordination with the economy-wide powers of the ACCC. The ACCC also notes the recommendation that the ACCC's existing powers not be reduced.

The ACCC is responsible for both economy-wide and industry-specific competition regulation. The general provisions relating to fair trading, consumer protection and competition in the *Competition and Consumer Act 2010* (CCA) are complemented by specific regulatory powers in relation to the communications sector in Parts XIB and XIC. Part XIB provides for *ex-post* responses to anti-competitive conduct, where Part XIC relates to *ex-ante* interventions to allow access to carriage and infrastructure.

The Australian regulatory landscape should be distinguished from other jurisdictions (such as the United Kingdom, United States and Canada), where industry specific and general competition powers are divided between regulators. In contrast, the Australian competition regulation model allows the ACCC to regulate specific industries with an overarching perspective of both competition and consumer regulation. In addition, the industry-specific regulations have been developed over time to respond to the particular issues that have arisen in the communications sector in Australia.

The ACCC notes the strong interrelationship between communications and content-related competition issues. The ACCC's market enquiries have revealed that market participants consider the bundling of content and carriage services for consumers will become increasingly important. This interrelationship was also highlighted by the Convergence Review in its consideration of issues such as download caps, metering and must-carry and retransmission arrangements in its discussion paper, *Media diversity, competition and market structure.* The ACCC suggests that any content-related competition regulation should be exercised in close conjunction with the regulation of network and carriage issues.

The ACCC looks forward to reviewing further detail in the Final Report regarding the proposed new regulator's competition-related powers and how they would interact

with the ACCC's current functions and responsibilities. The ACCC acknowledges that convergence and emerging market structures may lead to competition issues that cannot be addressed in the current legislation. These issues will require further consideration, as is noted in the section below entitled 'Exclusive content arrangements and the viability of access to content regimes'. However, the ACCC considers the overarching framework for media and communications regulation, including the division of responsibilities between existing regulators in Australia, is sound.

The proposed introduction of a public interest test for mergers and acquisitions in the media sector and the removal of the current cross-media ownership rules

The ACCC notes that the Interim Report proposes that a new regulator be given powers to administer a public interest test for the purpose of better assessing market concentration and diversity issues in relation to mergers involving Content Service Enterprises (CSE) that are 'significant at a national level' and that certain existing cross-media rules be abolished.

The Interim Report provides limited detail regarding the scope or application of the proposed public interest test. It appears to recommend two alternative diversity tests which may apply, depending on whether an acquisition involves CSEs in local markets or CSEs with a significant influence at a national level. This raises questions including how 'significant influence at a national level' is defined (and who determines which CSEs have significant influence at a national level) and whether there is some overlap between the tests.

The ACCC notes and supports the Interim Report's comments that the ACCC should continue to conduct its functions under the general competition provisions of the CCA, which include the mergers test in section 50 of the CCA. Section 50 prohibits acquisitions which have the effect, or are likely to have the effect, of substantially lessening competition in a market. The prohibition on anti-competitive mergers applies to acquisitions of shares or assets and performs an important regulatory function within the Australian economy, including the media sector.

While in some cases the enforcement of section 50 may have the effect of leading to a greater level of media diversity in a particular market, its purpose is quite separate and distinct from a specific media diversity test of the type that is being proposed in the Interim Report. The ACCC therefore considers it is important to ensure that any proposed public interest test focuses on media diversity and not on other issues that are already covered by the CCA or other laws.

However, it is noted that a competition element may form one part of the public interest test, in a similar way to the national interest test administered by the Foreign Investment Review Board. In this circumstance, the ACCC is concerned to ensure that any such public interest test does not adversely impact on the purpose of section 50 or the ACCC's ability to enforce it. The ACCC therefore encourages the Convergence Review to take into account the following issues in its considerations:

- If a competition element will form part of the proposed public interest test:

    - the ACCC has a strong preference that the proposed new regulator be required to take into account the outcome of a section 50 assessment undertaken by the ACCC when applying the public interest test; and
    - notes that if this does not occur, it will be necessary to determine which assessment is conducted first and the circumstances in which the second test will be applied, or whether the tests will be conducted simultaneously. This may impact on the length of time it will take a proposed acquirer to obtain the necessary regulatory approvals to make a proposed acquisition. There would also be a risk that the ACCC and the proposed new regulator will form different views about issues relevant to the application of both tests (such as the impact of an acquisition on consumers) and resources from both agencies will need to be deployed to consider every proposed acquisition;
- similarly, the ACCC suggests consideration be given to how the proposed public interest test will interact with or impact on the merger authorisation process (conducted by the Australian Competition Tribunal) and the formal merger clearance process (conducted by the ACCC) under Part VII of the CCA;
    - for example, will the public interest test apply to mergers authorised by the Australian Competition Tribunal under section 95AT of the CCA.

Other issues not directly related to the ACCC's role in administering section 50, but which the Review might wish to take into account in its consideration of the public interest test, include:

- the exact nature of the public interest test, including:
    - what the proposed new regulator will be assessing in applying the test;
    - how 'significance at a national level' will be measured;
    - whether specific media-related criteria must be considered by the proposed regulator when applying the test; and
    - whether there will be any static caps on ownership and control, or market power within the dynamic media industry (and if so, how they will be determined);
- will the public interest test prohibit acquisitions which are not in the public interest or provide that an acquisition cannot be completed unless it is in the public interest;
- whether it will be compulsory for proposed acquirers to notify the proposed new regulator of proposed acquisitions (noting that there is currently no requirement in the CCA that parties notify the ACCC of a proposed acquisition that would be subject to section 50); and
- whether there will be a right to appeal the proposed new regulator's decision and if so, to which body and within what time frame that right to appeal will need to be exercised.

As noted above, the ACCC emphasises that a public interest test should focus on media diversity and not on other issues which may have already been addressed by the CCA or other laws.

The proposed classification of entities across media platforms as 'Content Service Enterprises'

The ACCC looks forward to further detail from the Convergence Review Committee in its Final Report regarding the criteria it proposes will be used to determine whether an enterprise is a CSE, and the regulatory obligations that will fall on these parties. The ACCC agrees with the statements contained in the Interim Report that emerging services, start-up businesses and individuals should not be captured by unnecessary requirements and obligations in the context of the CSE framework. The ACCC would be concerned to ensure that any broadening of regulation to previously unregulated entities did not place onerous regulatory burdens on those entities.

The ACCC considers the principle of technology-neutrality useful when considering regulatory approaches to convergence and the limits of platform-specific regulation. However, the ACCC notes there remain relevant technological differences (at least in the short to medium-term) which should also be considered if there are to be significant changes to the ways in which certain entities are regulated.

In the ACCC submission to the Convergence Review Framing Paper, the ACCC recommended that any new regulatory settings be designed to promote robust competition in the industry and targeted at specific market failures. The ACCC suggests these principles may assist the Convergence Review Committee in developing its final recommendations regarding the detailed categories and criteria used to define CSEs and their respective obligations under the proposed new framework.

The proposed deregulation and market pricing of spectrum

The ACCC welcomes the Convergence Review Committee's recommendation of a market-based pricing approach to the use of spectrum and the proposed separation of the licensing of spectrum and content obligations.

The ACCC considers that in addition to the digital dividend, there is scope for unused spectrum capacity, suitable for digital television broadcasting, to be made available under a competitive market process to new entrants. Accordingly, the ACCC reiterates its position that a competitive market pricing process, consistent with the objectives of the *Radiocommunications Act (1992)*, will ensure that spectrum is allocated to its highest value use.

Exclusive content arrangements and the viability of access to content regimes

The ACCC notes that although there were no specific recommendations included in the Interim Report in relation to content acquisition issues, they were raised by some stakeholders in response to the issues canvassed in the Convergence Review's earlier *Media diversity, competition and market structure* discussion paper. The ACCC is of the view that issues connected to content acquisition, in particular exclusive content arrangements, raise potentially significant competition concerns.

Content markets are becoming more complex due to convergence and rapid changes in content-related technologies, distribution models and services. There are opportunities for new entrants and existing communications businesses to enter content markets and increase competition, especially in relation to the bundling of content services with voice and data services. However, the extent of participation will partly depend on access to content, which could be frustrated by issues such as the use of market power by dominant communications and content aggregation providers.

The ACCC recognises the competitive dynamics in content markets are evolving quickly. Recent or near-future major market developments include the establishment of the National Broadband Network (NBN); the development of new content delivery services and devices (such as IPTV and mobile TV); and accessibility of long term evolution (LTE) wireless technologies. The traditional drivers for full-service, linear subscription television services (such as AFL/NRL content) may not be required in order to provide an attractive, alternative IPTV service (given the significant cost of this content).

The ACCC is continuing to consider the specific regulatory options that could potentially be utilised to address content acquisition issues in Australia. The ACCC is also closely monitoring and analysing international regulatory approaches, including the most effective international access to content regimes. The ACCC recommends that regulatory intervention be considered if recent or near future developments do not result in improved opportunities for competition in content acquisition. The ACCC notes that if Australia wished to implement an access to content regime similar to those in operation in overseas jurisdictions, legislative amendments would be required.

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