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MEDIA MERGERS AND ACQUISITIONS IN AUSTRALIA – WILL AUSTRALIAN COMPETITION LAWS PUT YOUR MERGER IN THE HEADLINES?

In recent weeks there has been a lot of focus and speculation surrounding the recent amendments to Australia's media ownership laws, and the outcomes that are likely to take place once those amendments take effect between February 2007 and January 2008.

Although the amended media ownership laws will still contain some safeguards, it seems likely that there will be a flurry of merger and investment activity once the new media laws take effect. Even now a number of Australian media companies and investors are positioning themselves for the new laws to take effect.

WHAT ROLE WILL THE TRADE PRACTICES ACT PLAY?

Even where a media merger complies with Australian media legislation, the merging parties will still need to consider whether the merger risks contravening merger laws contained in the Trade Practices Act (TPA).

The TPA prohibits mergers and acquisitions which will have the effect or likely effect of substantially lessening competition in any market.

The Australian Competition and Consumer Commission (ACCC) will analyse proposed media mergers or acquisitions and decide whether to grant clearance to or oppose those transactions.

A contravention of the TPA's merger laws may result in a court:

- imposing penalties of up to \$10 million against each party involved in the merger, or even more under amendments currently being made to the TPA; and

- ordering an injunction restraining the merger from proceeding, or alternatively the divestment of any of the shares or assets already acquired as part of the merger.

WHAT ARE THE RELEVANT MARKETS?

Market definition is the first key step in any merger analysis under the TPA, but rapidly changing technology and changing consumer preferences are bound to have a significant impact on the way markets are defined in the media sector.

There is likely to be a number of relevant markets involved in any media merger. Typically they will include:

- the market for the acquisition by media companies of content – eg. sporting, entertainment, movie, information or other content/programming;
- the market for the supply of advertising services and advertising space by media companies to advertisers; and
- the market for the supply of content to consumers.

In some cases a relevant market may be even narrower than those listed – for example, a market for the supply of real estate advertising services to advertisers.

The delivery mode of advertising and content will also play an important part in defining the relevant markets.

In the past the ACCC has considered television, radio and newspapers to be in separate markets. However with the introduction of alternative media forms such as the internet, digital television, and wireless handheld devices

such as mobile phones, IPODs and laptops, which are all capable of being used to download and view or hear media content, the ACCC may consider that these “traditional” media markets have converged with other markets.

The geographic boundaries of the relevant markets will be another key factor in market definition. The geographic boundaries of some product markets are likely to have broadened in the past decade with the introduction and increasing use of the internet as a form of media delivery.

WILL A MEDIA MERGER SUBSTANTIALLY LESSEN COMPETITION?

The impact of a merger on competition must be considered in each market in which the merged business will operate.

Relevant factors include:

- Market Share - the size of merged entity’s market share in each relevant market and, in particular whether it exceeds the ACCC’s thresholds;
- Remaining Competitors - the number of remaining competitors in each relevant market and whether those competitors will be able to compete effectively against the merged entity;
- Barriers to Entry – are there any barriers to new entry into the relevant markets and, if there are, how significant are they – in other words, what is the likelihood of another party being able to successfully enter the market if the merged entity raises its prices or behaves in an anti-competitive manner?;
- Control of Exclusive Content – will any exclusive content rights held by the merged entity have a material impact on other operators’ ability to compete against the merged entity? Will the exclusive content rights held by the merged entity create a barrier to new entry into the relevant market?;

- Import Competition – is the relevant market subject to competition from imported products or services and how strong is any import competition?;
- Countervailing Power – will other parties, such as the merged entity’s customers, suppliers or viewers/listeners be in a position to constrain the merged entity from raising its prices, reducing the quality of its content or services, or otherwise behaving in an anti-competitive manner?

CONSORTIA

The TPA’s merger laws must also be considered where a consortium is acquiring a controlling interest in a media business in Australia and the consortium or any of its members (or their related entities), already has a controlling interest in another Australian media business.

WHAT IF THE ACCC CONSIDERS THAT A MERGER WILL CONTRAVENE THE TPA?

If the ACCC considers that a media merger is likely to substantially lessen competition in a relevant market, it may deny clearance or, alternatively make clearance of the merger subject to the merger parties agreeing to certain conditions (which may include divestiture of assets). Such an agreement will usually take the form of court enforceable undertakings. It is common for the ACCC to make clearance of mergers which raise competition concerns subject to divestiture of particular assets or operations by the merged entity in the markets for which the competition concerns exist.

TPA REGULATORY PROCESSES

Currently merger parties may seek:

- informal merger clearance from the ACCC in accordance with the ACCC’s Merger Guidelines; or
- authorisation of the merger from the ACCC on public benefit grounds.

Following amendments to the TPA which will come into effect shortly, there will also be a formal merger clearance system in place in the near future. Under the formal process, the ACCC will have 40 business days to consider a merger application (although the parties can agree to a longer period, and the ACCC may also extend the 40 business day period by a further 20 business days).

Where the ACCC does not grant clearance to a merger under the formal clearance process, the merger applicant(s) may appeal to the Australian Competition Tribunal to review the ACCC's decision.

Under these amendments merger parties may apply directly to the Australian Competition Tribunal (rather than the ACCC) for authorisation of a merger.

CORRS' COMPETITION AND TRADE PRACTICES GROUP AND MEDIA SPECIAL INTEREST GROUP

Corrs' competition solicitors have extensive experience in applying the TPA's competition provisions to mergers and acquisitions in a range of industries, including media, and dealing with the ACCC on these types of matters. Corrs also has a Media Special Interest Group comprised of solicitors with extensive experience acting for media operators in a range of areas of law, including mergers and acquisitions, competition, tax and media content laws.

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