

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates, 16 & 17 February 2005

Question: Add 1

Topic: ACCC – Media Markets

Hansard Page: Written

Senator Conroy asked:

1. Late last year you made some comments suggesting that the merger provisions of the Trade Practices Act could be used to stop anti-competitive mergers if the cross media rules were repealed. Because the relevant 'market' has changed? How can the Parliament be confident that the ACCC's new interpretation of the relevant market is the one that the courts would accept? Wouldn't a specific provision put the matter beyond doubt?
2. The PC has said that there should be a specific public interest test for media mergers? Does the ACCC agree?
3. The ACCC has recently suggested that pay TV and free to air television may not be in different markets (particularly if free to air multi-channelling was allowed).

The ACCC has previously stated that consideration should be given to Telstra divesting its share of Foxtel.

Has the ACCC considered the impact on competition in the media market of this recommendation given that the other shareholders in Foxtel have a pre-emptive right to purchase Telstra's share and are significant media players in their own right?

Is there a potential conflict between promoting competition in the telecommunications market and promoting competition in the media market?

Answer:

1. Section 50 of the Trade Practices Act 1974 (TPA) prohibits mergers and acquisitions that would have the effect or likely effect of substantially lessening competition in a market. That is, regardless of whether or not the cross media rules are repealed or relaxed, section 50 acts to prevent the occurrence of anti-competitive mergers.

The analysis of mergers pursuant to section 50 of the TPA, and consideration of market definitions as part of that analysis, involves consideration of the particular circumstances of the case at hand and specific facts concerned, including the

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entities involved, their span of interests and activities, the scope and nature of the transaction, and current and likely future market dynamics.

Final determination of the issue of whether or not a merger breaches the TPA is a matter for the Courts.

2. Government makes decisions regarding policy. Regardless of what policy options the Government proposes to implement, the ACCC is firmly of the view that the TPA should continue to apply in its present form to all forms of media. That is, the media (or any subset of media) should not be exempt in any way from the application of the restrictive trade practices provisions contained in Part IV of the TPA as they play an important role in protecting competition in the media sector.
3. The ACCC has previously stated that the current regulation of pay TV and free-to-air (FTA) broadcasting impacts on the ability of these sectors to compete against each other and that multi-channelling would be likely to increase the substitutability of FTA for pay TV services.¹

The ACCC's recommendation that consideration be given to Telstra's divestiture of its interest in Foxtel relates to competition concerns in both the telecommunications and media markets. Whilst the ACCC is aware that the other Foxtel shareholders may be potential purchasers of Telstra's interest, the ACCC does not, as a general rule, conduct a detailed analysis of potential merger scenarios unless a transaction is actually on foot or imminent. The ACCC does not believe competition in telecommunications and media markets are necessarily conflicting objectives.

¹ For example, see "Emerging Market Structures in the Communications Sector, a report to Senator Alston, Minister for Communications, Information Technology and the Arts", June 2003 (available from the ACCC website).