

# The ACCC says oOH No! to the oOH!media – APN Outdoor Merger

The importance of market definition and dynamics in media mergers in Australia has been highlighted by the ACCC opposing the merger between oOH!media and APN Outdoor.

## 1. Introduction

The Australian Government has announced reforms to certain media regulation in Australia that currently restricts media mergers by traditional television, radio and newspaper owners in Australia. See our earlier briefing [here](#).

Irrespective of whether those changes become law, media companies will still need to navigate merger control under section 50 of the Competition and Consumer Act 2010 (Cth) (**CCA**). Market delineation by the Australian Competition and Consumer Commission (**ACCC**) will therefore continue to be important. Of particular relevance in this sector is the changing nature of online and digital media and the impact this has on the definition of particular markets.

This briefing considers this issue in the context of the recent oOH!media and APN outdoor merger proposal that the ACCC opposed.

## 2. Background

On 16 December 2016, the ACCC commenced an assessment of the proposed merger between oOH!media and APN Outdoor. In accordance with a request from the merger parties, the ACCC considered the proposed transaction under its informal merger review process. That review process allows potential merger parties to informally seek the ACCC's views as to whether a merger would have, or would be likely to have, the effect of substantially lessening competition in breach of section 50 of the CCA.

oOH!media primarily provides outdoor and location advertising services using, for example, billboards (both digital and static) next to roads, at airports and in shopping centres as well as in venues such as office buildings, cafes and fitness centres. It has approximately 30 to 35% of the "out-of-home" (**OOH**) or outdoor advertising market in Australia. It also owns a content production business, Junkee Media, which targets

## Key issues

- The oOH!media/APN Outdoor merger analysis by the ACCC highlights the importance of market definitions in media mergers
- The ACCC analysed the market using traditional supply and demand side assessments and while there is some force in the merger parties views that regard should be had to OOH advertising consisting only 5% of total advertising spend, the ACCC found it was determinative that both parties documents and customers views suggested OOH advertising had separate distinct characteristics
- In particular the ACCC's analysis suggested that online/digital was not having such a significant impact on advertising spending compared to that in traditional media such as television, radio and newspapers and therefore this market was separate. Accordingly, the merger in this market was likely to substantially lessen competition
- The ACCC's analysis highlights that online/digital is likely to be more fully taken into account in mergers in traditional media sectors.

advertising at a younger demographic. APN Outdoor provides similar outdoor and location advertising services in Australia. It operates the “Catch” app which, by offering free Wi-Fi and content access, provides an alternative advertising platform for consumers using public transport. APN Outdoor has approximately 20 to 30% of the OOH advertising market in Australia. Both oOh!media and APN Outdoor own a printing services company.

The following table sets out the market shares of the major competitors in the OOH sector:

**Table 1: OOH providers’ estimated market shares by revenue**

OOH provider	Estimated market share range (by revenue)
APO (APN Outdoor)	20-30%
OML (oOh!media)	30-35%
Combined APO-OML	50-65%
Adshel	10-15%
JCDecaux	5-10%
QMS	5-10%
Other	5-10%

Source: ACCC Statement of Issues

### 3. ACCC 's Competition Concerns

The ACCC’s Statement of Issues (SOI), released on 4 May 2017, indicated the ACCC’s preliminary view that the relevant markets for the purposes of its assessment were national markets for:

- the supply of OOH advertising services; and
- the leasing of advertising signs from landlords.

The reasons considered by the ACCC for not considering a broader media advertising services market are discussed further in section 4. A national market was considered by the ACCC on the basis that outdoor advertising packages are generally acquired by the major media agencies, and outdoor advertising campaigns are generally run, on a national basis. Similar considerations also applied to the market for leasing outdoor advertising sites.

Looking at these markets, the SOI identified 3 issues of concern:

- The merger would result in the consolidation of the two largest providers of OOH advertising services in Australia, creating an entity with a more than 50% share of this market. The merged entity would have a substantial share in 3 of the 4 main categories of outdoor advertising, roadside billboards, transport and retail/lifestyle/other, as defined by the Outdoor Media Association (OMA). The only category it would not be dominant in is “roadside other”, which refers to advertising on bus shelters, phone booths, kiosks and the like. Given that it would be unlikely that the purchasers of these services, that is, media advertising agencies, would begin to supply these services themselves, the ACCC was concerned that this would result in a substantial lessening of competition in this market, potentially leading to an increase in prices, a reduction in service levels/quality and less “innovation” (though it is not entirely clear what innovation the ACCC had in mind).
- The ACCC noted the existence of significant barriers to entry, or expansion of existing providers, in the outdoor advertising services market. Its view was that the merger would create the opportunity for “bundling” across different categories of outdoor advertising which other providers would not be able to replicate, meaning there would be the potential to further increase barriers to entry/expansion for other providers, particularly single-category providers.
- The ACCC also considered that there was a potential for lower rents to be achieved by site owners, as a result of the removal of the competitive tension that currently exists between oOh!media and APN Outdoor.

In light of the concerns raised by the ACCC, the two companies made a decision on 19 May 2017 not to pursue the transaction.

### 4. Market delineation of this matter in a digital/online environment

Both companies were disappointed with the ACCC’s views, particularly its narrow definition of the advertising services market. The CEO of oOh!media was quoted as stating that only looking at the market “through the prism of the out of

home advertising market" was "preposterous". However, as noted in above, the ACCC had pointed to several factors in determining that their view of the market was correct, based on both supply side and customer demand side considerations. Indeed the ACCC Chairman responded in the media that it was the customers of the merger parties who were the ones who complained loudly about the merger and that:

***"The issue is that it's the question of the substitutability of one form of media for another ... the idea of advertising on Google [substituting] advertising on the billboard of Sydney airport is far-fetched".***

Accordingly, given the focus on market definition in this matter, it is worthwhile considering it in some detail.

The ACCC pointed to the merger parties' recent prospectuses as evidence of how their management viewed the relevant markets:

- SOI paragraph 60 –"For example, the APO Prospectus states that "management believes that there are a number of characteristics that make outdoor advertising a unique medium that delivers benefits to advertisers", going on to list a number of such benefits, including "targeted advertising" and "captive audience and repeat exposure". It also refers to OOH advertising as being "complementary to other advertising mediums".
- SOI paragraph 61 "Similarly, the OML Prospectus summarises the differentiating characteristics of OOH as an advertising medium as follows: Out Of Home companies with broad and diverse advertising platforms, such as oOH!media, have the differentiated ability to both broadcast widely and capture a large audience through the use of certain media (e.g. roadside billboards), and be highly focused and address a targeted audience due to its location-based nature (e.g. outside supermarkets) which facilitates one-on-one engagement with the consumer."

Second, notwithstanding the growth of online in most media markets and the reduction in spending on advertising in other media segments, the ACCC noted that the growth of OOH advertising as a percentage of total advertising spend also appeared to underline its importance to advertisers. The ACCC pointed to OMA's figures showing that, as a percentage of total advertising spend, OOH has increased steadily from 4.6 per cent in 2011 to 5.3 per cent in 2015, while, with the exception of online advertising, advertising spend on most other advertising media has declined. This

is shown in Table 2 below. Importantly the ACCC noted that growth in online advertising has come at the expense of newspaper, magazine and television advertising, but has not led to falls in OOH advertising which suggests that it is a different market.

### SOI Table 2: Share of advertising spend

#### Share of advertising spend by media results (%)

Share of advertising spend by media results (%)					
	2011	2012	2013	2014*	2015
OOH	4.6	4.6	4.8	5.1	5.3
Cinema	0.7	0.8	0.9	0.8	0.9
Newspaper	22.1	18.9	16.6	15.0	12.7
Magazine	5.6	4.4	3.5	3.0	2.4
TV	33.1	31.8	30.6	29.3	26.7
Pay TV	3.7	4.0	4.4	4.1	4.0
Radio	9.4	9.3	9.0	9.0	8.7
Online	19.0	24.5	28.4	32.9	38.3
Other Print**	1.8	1.7	1.8	0.8	1.0

Source: OMA and CEASA (excluding classified and directories) where CEASA is the Commercial Economic Advisory Service of Australia

\*2014 figures have been adjusted to reflect changes in online media reporting methodology

\*\*Other print includes business and rural publications

To further support its view, the ACCC pointed to the oOH!media prospectus which attributed this growth to OOH signage "typically being 'unmissable' to passers-by", in contrast to "the audience fragmentation believed to be impacting FTA [free-to-air] TV, radio and other forms of media which can be turned off, skipped, or fast-forwarded by consumers as new alternative technologies emerge".

In this situation the ACCC adopted a standard market delineation and stated that:

***"In the light of the above, the ACCC's preliminary view is that OOH has special characteristics that distinguish it from other advertising media such that advertisers and media agencies will continue to require OOH advertising even if OOH providers were to raise prices by five to 10 per cent. Therefore, the ACCC's preliminary view is that the supply of OOH advertising services forms a separate relevant product market for***

*the purposes of the ACCC's assessment of the proposed merger."*

## 5. Conclusion

The ACCC analysis highlights the need to be mindful of ensuring market definition is correct in initial public offering documents and any other public documents as a party will be held by the ACCC to these documents, as well as any other internal company statements as to the parties' views on the market.

Second, the ACCC analysis highlights the importance of assessing the characteristics of the particular market from both a supply side and demand side perspective.

In this respect, the ACCC's analysis does not seem too dissimilar to the approach undertaken by the United States Department of Justice (DOJ) in the consent decree relating to the merger of Clear Channel Outdoor Holdings Inc and Fairway Media Group in December 2016 (<https://www.justice.gov/atr/case-document/file/924906/download>), where the DOJ heavily focused on the market from an advertiser's perspective. The DOJ stated in relation to market definition that:

*"Outdoor advertising possesses a unique combination of attributes that sets it apart from advertising using other types of media, like radio, television, the Internet, newspapers and magazines. Outdoor advertising is suitable for highly visual, limited-information advertising, because consumers are exposed to an outdoor advertisement for only a brief period of time as they travel through specific geographic areas. Outdoor advertisements typically are less expensive and more cost-efficient when compared to other media at reaching an advertiser's target audience. Many advertisers use outdoor advertisements when they want a large number of exposures to consumers at a low cost per exposure. Such advertisers do not view other advertising mediums or platforms as close substitutes. Outdoor advertising is available in a variety of sizes and forms for advertising."*

This ACCC preliminary decision as set out in the SOI is also interesting as it does highlight the impact that online advertising is having in the more traditional media sector, which is the focus of the Government's current media reform proposals. This impact is demonstrated in Table 2 above.

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