Introduction
Thank you once again for the opportunity to address the National Press Club, and to your sponsor Telstra, for not cancelling it when they found out who you invited.

It’s currently a very dynamic time for the ACCC with many changes under way that affect our operations – criminal sanctions for hard core cartels, a new mergers regime, and the imminent start of the Australian Energy Regulator, to name a few.

But I have no doubt, at least as far as this audience is concerned, that the greatest interest right at the moment is in telecommunications and media.

So, today I want to talk about the ACCC’s current role in regulating telecommunications and media, and in particular, the increasing inter-relationships between the two, and what this could mean for competition and the ACCC over the next 5-10 years.

Telecommunications - the ACCC’s role

Let me start with telecommunications. I should say at the outset that the ACCC is agnostic when it comes to the privatisation of Telstra. Whether Telstra is completely, partially or not at all in government ownership is entirely a matter for Parliament. Regardless of the ownership structure the role of the ACCC is to, as far as possible, protect and promote competition in telecommunications.

Significant competition in telecommunications only began in 1997 but even in the short time since, few would dispute the benefits that have flowed to consumers, business, and more broadly the Australian economy.

But the initial benefits of the current telecommunications regulatory regime were almost entirely due to competitors entering at the retail level and making use of regulated interconnection rates to drive down retail costs. While there have been some areas of relatively effective competition - such as in corporate markets and mobile services - it is still somewhat patchy in terms of service offerings and geographic reach, particularly for residential consumers.

Notably, though, the more competitive markets are those in which there is more facilities-based competition. For example, corporate and business customers have benefited to a much greater extent than residential customers, by virtue of infrastructure roll-out by newer players. Similarly, the development of competing mobile networks has put in place the structures for
more durable competition. It’s no coincidence that in these markets, there is also substantially less regulation.

But the overriding issue in this industry is the fact that Telstra continues to be the sole provider of the ubiquitous local access network connecting virtually every home and business in the country. Consequently, even in the more competitive markets those seeking to compete with Telstra often have a continuing reliance on some form of access to its network. This leaves those seeking to compete with Telstra with just two alternatives - either re-selling its services, or bypassing some or all of its network by investing in competing infrastructure.

Investment should only occur when it enhances welfare across society as a whole. As the Minister for Communications noted in her recent speech to the Australian Telecommunications Users Group, it is preferable to avoid situations such as the dual roll out of HFC cable networks that occurred when pay-TV commenced in the 1990s.

But as is demonstrated in the recent agreements between Telstra and Hutchison, and Optus and Vodafone, for sharing of the infrastructure for third generation or 3G mobile services, there is more than one commercial model for investment in competitive infrastructure. It is not simply a case of new networks being built by Telstra or no-one.

Now some people, especially some in this room, may disagree when I say this, but the aim of the ACCC is not to make life tough for Telstra.

To date, the bulk of the ACCC’s activities in telecommunications have been directed towards ensuring that competitors are able to get access to the copper network, where they need it, at reasonable prices and on reasonable terms. By this I mean that they can buy wholesale services from Telstra at prices that still allow them to compete at the retail level. These wholesale services might be a straight re-sale of Telstra’s offerings, or competitors might want to use only some parts of the copper network, for example, the local access networks that run from the exchanges to customers’ premises.

To this end we have a role in arbitrating disputes when parties are trying to get access to critical parts of the network, we assess undertakings about the terms and conditions on which that access is provided, we collect a whole range of accounting information about the costs, revenues, volumes etc, and even look at measures of the comparative quality of services that are provided to internal and external customers. And when there is a seriously anti-competitive act, we can respond quickly by issuing a competition notice which says in the clearest possible terms “this conduct is unacceptable”.

Some of the mechanisms available to us are reasonably effective, some less so. Access regulation does provide better incentives for infrastructure owners to reach commercial agreements with those seeking to use the infrastructure, but it can be a lengthy process, and subject to game-playing.
Furthermore, the detailed rules on accounting separation do not of themselves ensure that all the necessary information is available to the ACCC when it is making access-related or enforcement decisions. The information provided by telecommunications carriers under these arrangements is highly aggregated, which can hide specific instances of anti-competitive behaviour requiring more detailed analysis. It is significant that the Commission has relied on the existing accounting separation arrangements only to a very limited extent in relation to its pricing analysis in specific cases.

**Operational separation of Telstra**

This highlights the most significant impediment to the effectiveness of the telecommunications-specific provisions of the *Trade Practices Act* in promoting competition - the lack of transparency. Being unable to determine the way that Telstra’s retail and wholesale operations interact makes it difficult for the ACCC to detect if anti-competitive behaviour is occurring, and to obtain the information necessary for carrying out other regulatory functions.

The primary limitation of the current accounting separation arrangements is that they require only a *notional* allocation of costs across the wholesale and retail businesses. They do not require the carrier to reorganise its internal affairs and operate as if it were running two or more separate discrete businesses – a process that has recently been labelled “operational separation”. Stronger measures along the lines of operational separation would offer a superior means of both detecting and fixing anti-competitive behaviour.

There has been some confusion about what is meant by operational separation and how this differs from structural separation.

The essential difference between the two is that of ownership. Both types of separation involve establishing some parts of Telstra as separate business entities. Under structural separation these separate business entities would be sold to new owners and would no longer be part of Telstra. Under operational separation these separate business entities remain as part of Telstra.

Operational separation is a concept that seems to be finding favour with a number of significant stakeholders in the debate over the future of Telstra – these include Government and Opposition spokesmen, Telstra’s competitors and it seems, from media reports, possibly even elements of Telstra itself. The ACCC is strongly supportive of the concept of operational separation.

At the risk of repeating some of my earlier comments on this issue, I want to be perfectly clear about what I see as meaningful operational separation: it is a clear internal separation between a ‘retail business’ supplying services to end-users, and a ‘network business’ supplying wholesale services to both the Telstra retail business and its competitors.
In order to be effective, any process such as this would need to be underpinned with formalised arrangements, including requirements that the two businesses:

- deal with each other on a commercial, arms-length basis, including explicit pricing, invoicing and billing;
- maintain fully separate accounts and reporting systems, capable of capturing all transactions between the businesses; and
- maintain separate staff at all levels, with staff remuneration tied exclusively to the performance of the relevant separated business.

Most importantly, this model would increase the competitive discipline around the internal businesses, and reduce the need for regulatory intervention. With genuine arms-length dealings with all retail customers (including Telstra retail), the network business will have stronger incentives to drive a hard bargain in maximising its returns from all its activities, rather than favouring its own retail business. In like fashion, the Telstra retail unit will face the same commercial pressures as the Primuses, the AAPTs etc, in terms of negotiating with the network business over terms and conditions for wholesale services.

You would think this must also provide efficiency benefits for Telstra and its shareholders. A network business and a retail business are fundamentally different, and to drive the maximum value out of the company as a whole you need to understand the costs and relative value of each part.

**Facilities-based competition**

The other key to increasing competition and reducing regulation in telecommunications is for competitors to invest in their own infrastructure.

An example of this is mobile phones. I won’t say these markets are perfect, but there are 4 players with networks out there – Telstra, Optus, Vodafone and Hutchison - which creates the environment for much more effective and sustainable competition, and much less regulation.

It’s this degree of infrastructure competition that the ACCC would like to see between fixed-line networks.

My more cautious colleagues call me an “embryonic technophile” and an optimistic one to boot. And it is true that the verges of the information superhighway are littered with the gravestones of failed technologies, but I strongly believe emerging technologies are increasingly the answer for those looking for alternatives to Telstra’s network.

Wireless local loops are one new model being pursued. Another critical development is the increasing availability of much higher capacity ADSL2+ broadband. This runs at speeds up to around 20 megabits, compared to the recent maximum of around 1.5 megabits. To give those numbers some context, it generally takes about 6 megabits, using current technologies, to get live DVD quality TV delivered over the internet.
This tenfold capacity increase is being driven by competitors’ installation of what are called “DSLAMs” in Telstra’s exchanges. These are switching devices which allow competitors to bypass large sections of Telstra’s own switching and physical network, providing quasi facilities-based competition. I would point out, though, that while we’ve heard a lot of talk about DSLAMS from Telstra’s competitors, we’re still waiting to see the rubber hit the road from many of them. In the meantime, Telstra will shortly start its own deployment.

Another new technology is fibre, all the way to customers’ premises. I notice the National Party has recently been calling for a feasibility study into the costs involved in rolling out a national fibre network.

There can be no harm in seeing the outcomes of such a study. But it is worth remembering where the action is at the moment. There is little doubt it is happening on the plain old copper network, and looks like it will be for the next 3-5 years, driven primarily by ADSL2+ and the DSLAM roll-outs.

The numbers speak for themselves. BigPond has just announced annual growth of 140% in the number of retail customers getting ADSL broadband. The ACCC’s broadband report to December 2004 showed the total DSL market growing at 160% over the previous twelve months. By contrast, broadband over HFC cable grew at a relatively modest 61%.

And one of the areas of considerable dispute in the industry is the prices Telstra is charging to have competitors’ DSLAMs connected to the local copper loop - $90 to have somebody go to the exchange and physically change the connection from a Telstra DSLAM to the competitor’s. This is one of the matters the ACCC is currently considering in relation to Telstra’s ULLS and LSS undertakings.

In capacity terms, are these DSL broadband services really any different to those delivered over fibre? Telstra’s ADSL2+ roll-out – in response to the moves by competitors - is estimated to cost $210m. This is a fraction of the “tens of billions of dollars” Telstra’s Bill Scales last month told a Senate Committee it would cost to roll out a fibre network to more than 90% of homes.

While declines in the number of line rentals have been touted by some as a sure sign of the switch from fixed to mobile telephony, it is quite possible that it is more reflective of a switch from dial-up internet access to broadband, and a corresponding reduction in the number of homes with a second line.

And the emphasis some have given to Telstra’s falling voice revenues from fixed lines overlooks the fact that these are substantially offset by increases in broadband revenue. So that last sweat of the copper network may have some way to go yet. Indeed, Telstra itself has suggested there are 15-20 years of useful life in front of it.
Telecommunications companies will undoubtedly have the capacity to use that copper to deliver more than just telephone and internet services and increasingly, we see them moving into the delivery of broadcasting services.

And this is where telecommunications regulation meets possible media deregulation. Although convergence between telecommunications and media is often talked about, some may not find this an obvious leap.

Media regulation is about who may control different modes of retail distribution for conveying information. It is about who may control the newspapers, free to air and subscription TV channels and radio stations used to convey news and entertainment – the content – to individuals and households.

However at a time when an ever increasing proportion of our population is now rejecting the traditional modes of conveying the content in favour of the internet, how people get the content they desire, and at what speed, will be increasingly determined by the control of the telecommunications networks – the pipes – that connect homes and businesses.

It is also the case that as we get greater competition in the ways in which content can be delivered to our homes, the more important will become the control of the production and distribution of the content itself.

As Rupert Murdoch said in his speech to the American Society of Newspaper Editors earlier this month:

> What is happening is, in short, a revolution in the way young people are accessing news. They don't want to rely on the morning paper for their up-to-date information. They don't want to rely on a God-like figure from above to tell them what's important. And to carry the religion analogy a bit further, they certainly don't want news presented as gospel.

> Instead, they want their news on demand, when it works for them. They want control over their media, instead of being controlled by it.

**Media deregulation**

As I did with telecommunications, I should state here that whatever changes are made to the laws controlling media ownership or broadcasting spectrum are entirely a matter for federal parliament.

Whether or not more than three commercial free to air TV channels are to be permitted, for example, is up to parliament. I therefore won’t be commenting on such policy matters.

But there has been a lot of speculation about possible acquisitions in the event that the current cross-media ownership restrictions are eased, and more common ownership of newspapers, free-to-air television and radio is permitted.
In my view, much of this speculation misses the point I was driving at regarding telecommunications networks. It’s possible that the emphasis of potential media acquirers will shift from one end of the media spectrum – the retail distribution businesses (newspapers, radio stations, free-to-air TV, pay-TV, the internet), which may be using outdated technology or business plans – to control of the pipes that are increasingly being used to deliver media content, and control of the content itself.

Relative to most industries, the Australian media is highly regulated. Protection of the free-to-air television networks is the cornerstone of this regulation, on the grounds that it ensures diversity in the services available to Australians at large.

There is an outright prohibition on new entry into free-to-air television markets. Existing free-to-air broadcasters also have first rights of refusal over the most popular sporting content, with competition from pay-TV precluded by anti-siphoning legislation. Other potential competitors have spectrum available, but are defined as datacasters and subject to extensive limitations on the types of content they can offer.

On the flip-side, there is a prohibition on free-to-air broadcasters using currently available technology and spectrum capacity to start multi-channelling; that is, offering additional channels and choices to consumers, either on a subscription or free-to-air basis. This lessens the competitive pressures faced by pay-TV providers.

But these protective regulations are dependent not only on continuing government support, but on the maintenance of the existing top down structure of the Australian media, and it’s now clear the environment is ripe for change.

**Technological revolution and the media**

So cast your minds forward 5-10 years, and imagine the developments I was talking about before, but taken to the next level again. Every home has super-fast internet access linking us to everyone else. We don’t have ‘a’ connection, we have a dozen. For many homes these are provided over the traditional copper phone-line, but using ADSL5+++, for some it comes over powerlines, others are getting it beamed through wireless networks or over satellites, and some may have it sent via super-fast fibre going all the way into our living rooms, our studies, bedrooms, kitchens.

Companies have been building these high-capacity arteries into our homes, but now they have them they need to get the blood circulating. So what are they sending down the next generation networks? Phone calls, video calls, information, IPTV, music, movies, games, TV on demand, home videos.

The devices we are receiving all of this content on are becoming smarter. Personal computers and TVs don’t look so different, and are capable of seamless, wireless communication. Personal Digital Recorders and TV
downloads make it effortless for us to pick and choose the programs we want to watch, and when we watch them. Media research has found that some 80% of the programs we watch are pre-recorded, so in the future high-capacity devices will be required for consumers to store their preferred viewing. At 1.5 gigabytes for an hour of high-definition television viewing, and with storage capacity of 300-500 gigabytes already available at relatively low cost it is already possible to satisfy end users needs for pre-recording the news and entertainment they view.

The next generation of compression technologies will continue to reduce the transmission capacity needed to send the information, and the space required on our personal devices. This means that technological advance may reduce the current focus on increasing the capacity and speed of the pipes needed to transmit and download information as it becomes easier for news and entertainment to be pre-recorded and viewed at the consumer’s leisure.

Our 3G/4G/5G mobile phones are equally capable of such dexterity - maps, transport information, music, email, all available at the touch of a finger. You can order lunch from the local café, video-call the office or just unwind on the trip home with a few minutes of your favourite TV show and goal of the day. Or perhaps you use the personal organiser for all that, because you like a bigger screen.

Online advertising has continued its strong growth. Classifieds are searchable anywhere, any time, on the mobile phone, TV, computer. Maybe they are still being printed in the newspapers, maybe not.

This revolution seems inevitable. So it is pretty clear that the internet will be a key driver of the next wave of competition to the current media players, and the markets we have traditionally defined as ‘media’ will change. And the possibility is there for not one, but hundreds of new competitors to today’s broadcasters.

What does all this mean for the free-to-air and subscription broadcasters of today? What does it mean for newspapers and radio? And what does it mean for current regulation of the media?

Unlike traditional media, the emerging online players are not subject to substantive limitations on content, ownership, geography or anything else. They can pick and choose the audiences they target, the content they buy, and the way they provide it, in much the same way that other businesses face myriad commercial choices.

Don’t get me wrong – I’m not saying that there should be a rush to restrict these new competitors in terms of content or services which they can provide. Quite the contrary, it is the pressure that these new competitors can bring to bear on the current players that will provide the stimulus for higher quality, lower prices, and greater diversity for consumers.

But it poses challenges for policy-makers and regulators alike.
Media and telecommunications convergence

I talked before about the next generation networks which are creating the potential for redefining the nature of competition. And for this to happen, there are significant investments in the various enabling networks that have to take place. And this in turn suggests that your generous sponsor, Telstra, has a major role to play.

As I said before, what the ACCC is about is developing, to the best extent possible under the existing structure, a truly competitive environment in all aspects of telecommunications.

But it must be recognised that the networks over which telecommunications services are currently provided, and which in future may well be the conduit for a whole array of media services, often have monopoly characteristics which will continue to differentiate these markets from the more traditional media.

In this respect, it’s absolutely crucial that existing network owners not be allowed to use their market power to close down new forms of competition. This could happen either through the roll out of new technologies and networks being impeded or through existing network owners obtaining exclusive control of the content that could be offered on the new networks.

Increasingly, video and TV services will be provided together with internet and traditional telephone services as part of what the telcos call the ‘triple play’.

Crucial to the success of any ventures using these new technologies will be content rights, and control of premium sporting content, such as AFL, rugby, rugby league, cricket and tennis, could be pivotal.

It is vital therefore that no single network owner acquires exclusive rights to all that content and effectively locks out the potential competition.

There is a risk that the exclusive acquisition of such rights for new and emerging markets like DSL broadband and 3G mobiles will allow the rights holders to shut out competition across a range of services delivered over these new networks. Ultimately, this could deprive consumers of choice and quality not only for broadcasting, but also voice, internet and innovative services such as video calls and determine the success or failure of a new competitor. I like to put it this way: if you can’t control the arteries, what you do is get hold of the blood.

The Trade Practices Act has always recognised the potential for exclusive contracts to be anti-competitive. Section 45 of the Act prohibits companies from entering any arrangements that result in a substantial lessening of competition. Section 47 of the Act is even more explicit: exclusive dealing that causes a substantial lessening of competition is illegal.

It is perhaps too early to judge how rights will be divided up, or whether the bundle of content that is compelling on your TV is the same as the bundle that
is compelling on a mobile phone. But the ACCC will continue to closely scrutinise the acquisition of exclusive rights to content to ensure that no carrier is able to use them to create a major barrier to entry into infrastructure markets. And we will continue to engage with the key industry players to hear their views on these trends in the market-place.

So the relationship between content and new networks is one area in which the ACCC may have an involvement. But as the regulator charged with protecting and promoting competition, in telecommunications specifically but more importantly in the economy as a whole, the ACCC has another substantial role.

**Media mergers and section 50**

I refer, of course, to Section 50 of the Trade Practices Act, which prevents mergers or changes in ownership between two or more entities which result in a substantial lessening of competition.

It is the very strong view of the ACCC that regardless of whatever changes are made to media ownership laws, Section 50 should continue to preserve competition in the media by preventing undue concentration or accumulation of market power which would result in higher prices or lower quality service for consumers.

Now the traditional approach when considering mergers in the media market has been to regard television, radio and newspapers as separate markets, while acknowledging they are part of a much wider media and communications sector.

The traditional view on media markets was that print was print and electronic was electronic and if print acquired electronic then it didn't involve a greater concentration.

However, we’re now doing a lot of research on how you define media markets and the more research we do the more it confirms my initial assessment that convergence is making those traditional definitions of media markets largely irrelevant.

In the future a media market might be defined by the content, such as, for example, classified advertising, or even just employment advertising, rather than the medium used to convey the content.

So, in other words, the ACCC won’t simply be saying, “one newspaper, one radio and one TV” doesn’t amount to a substantial lessening of competition. In certain markets, that may no longer be the case.

We might be focusing on markets such as classified advertising, maybe even markets as small as classified advertising for jobs, for motor vehicles, for real estate, display advertising.
A substantial lessening of competition in any one market could raise implications under Section 50 and be possible grounds for us to intervene.

Now, some have suggested this would amount to a de facto cross media ownership rule. This is entirely false. It is no different from the way competition law applies to every other industry, and there is no reason why it should not apply to the media.

Nor should it be assumed that the markets we will be looking at will be narrower than the conventional media markets. The technological developments I referred to earlier will mean that individuals and households will have a much wider range of choice in the ways they obtain the news and entertainment they are seeking.

Hence while we may focus on a market such as classified advertising this could be classified advertising provided through the print media, internet, mobile phone, TV, etc. The content delineation of a market may be narrower but there could be many more mediums used to convey that content than has been the case in the past.

The way in which media markets are defined will inevitably change. However, the new market definitions could be either broader or narrower than the conventional media market definitions. It is also the case that the impact of convergence and technological developments on media market dynamics and market definitions may be much sooner than many might expect – indeed it could be happening already.

**Conclusion**

On September 16 next year it will be just 50 years since Bruce Gyngell told a few thousand people in Sydney “Good evening and welcome to television”.

It sparked a revolution in Australian information and entertainment that within a few decades had effectively killed off the music halls and local cinema and signalled the end of the afternoon newspaper.

Now we are in the midst of another technological revolution which threatens to make the introduction of television look like a mere blip in the evolution of distribution of news, information and entertainment.

The question for regulators and government alike is do these technological developments result in:
- a consequent diminution in the importance and relevance of traditional modes for conveying information
- the need for a significant re-examination of the relevant markets affected by acquisitions in the media
- an answer to concerns that reduced regulation of the media will lead to diminishing diversity of news and information services
- the increasing irrelevance of existing regulations impacting on so many sectors of the media.
In short, is the technology making many of our existing concerns about media regulation irrelevant?

These are questions that will need to be addressed by policy makers and regulators as we face the inexorable impact of new technology on consumer demands and preferences.

As I've made clear today, it is not the job of the ACCC to decide whether it is better for people to access their news and entertainment through the TV, or ADSL2+ or fibre or wireless or even through the mobile phone.

But it is our job to ensure that existing players not be allowed to use their market power to close down new forms of competition, and that, as far as possible, it be left to consumers to decide what form this revolution takes and what services and content they wish to access.