Submission 005.2
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Final Submission

Joint Select Committee On Broadcasting Legislation

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5 April 2013

1. Introduction

Nine Entertainment Co (**Nine**) supports the abolition of the 75% reach rule restriction as it no longer has a relevant policy purpose and is hampering investment and growth in the commercial free to air television sector and disadvantages free to air broadcasters vis a vis other forms of content distribution. The removal of the provision will ensure that commercial free to air television broadcasters are better able to compete in an increasingly converged world, making them stronger independent businesses. Removal of the reach rule will facilitate new investment in regional broadcasting and will also help to protect commercial free to air broadcasters' substantial investment in the local production sector over time. The removal of the rule also provides an opportunity for parliament to move to preserve regional news services which are arguably not adequately protected by the current legislation.

Nine believes there is no justification or public benefit for continuing with the reach rule as technology is increasingly circumventing the underlying policy rationale. The objective of ensuring diversity and limiting the influence of television businesses is better achieved under other regulatory regimes administered by the ACCC and the ACMA. Given the ubiquitous nature of digital media, the 75% rule serves as a blunt and ineffective means of ensuring diversity of opinion. Nine believes that the rule should be removed and that relevant safeguards be developed to protect regional news. The failure to remove the rule will ultimately hamper the viability of commercial free to air businesses, it will lessen their ability to continue to invest in Australian content and potentially lead to a loss of media diversity over time.

2. Historical Reason For The Reach Rule

The reach rule limitation was first introduced in 1987 as an amendment to the *Broadcasting Act 1942*. The rationale for its inclusion at that time reflected the limited number of services available to viewers and the significant influence of television at that time. The rule was retained in the *Broadcasting Services Act 1992* although the limit was lifted from 60% to 75% of the population to reflect growth in population in metropolitan centres. The Explanatory Memorandum to the 1992 Act stated:

> *The limits reflect a recognition that commercial television is highly regulated, with limits on the introduction of new competition, and that the pervasiveness of the limited number of sub-services can have a significant degree of influence on community views.*

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The *Broadcasting Services Act 1992* predated the introduction of subscription TV services and the commercial development of the internet. Much of the perceived limits on competition at that time have since been eroded by the introduction of both subscription TV and internet based digital media. As has been recognised by the Convergence Review, the current framework bears no resemblance to the situation in 1992. The Convergence Review Final Report noted:

> *Geographic markets are still relevant for maintaining an adequate level of access to local news and commentary. However, the internet has also made national media outlets accessible across the whole country. Media and communications are increasingly viewed nationally, with catch-up television services and online news websites allowing programming beyond 75 per cent of the population and bypassing geographic borders. The increase in nationally networked content has also diminished the effectiveness of the 75 per cent rule.*

The Convergence Review report concluded that there is little justification for continuing the rule and that diversity is better protected by other means. Nine supports this finding.

3. Why Removal Of The Reach Rule Is Important For The Free To Air Sector

Commercial free to air broadcasters are the only media businesses prevented from reaching more than 75% of the population. Currently the ABC, SBS, commercial radio, Telstra, Foxtel, News Limited, Fairfax, Google, You Tube, Facebook, Twitter, Apple TV and many others all benefit from a national reach. By singularly restricting commercial free to air broadcasters, both regional broadcasters and metropolitan broadcasters are impeded from running efficient competitive businesses, and the rule does not deliver any meaningful public benefit.

Regional broadcasters obtain the majority of their programming from metropolitan networks under affiliation agreements. The majority of the rights to the programs shown under affiliation arrangements are retained by the metropolitan networks. Regional broadcasters are simply granted a licence to broadcast the content into their specific licence area, but are generally not granted additional rights, such as digital rights, to this content. This means that regional broadcasters are prevented from participating in developing revenue streams from sources such as second screen technology or catch up television. Abolition of the rule would mean that regional broadcasters, if they became part of a national network, would have access to these rights.

Further, as the internet is not restrained by television licence areas, the programming supplied under affiliation arrangements can be offered online by metropolitan television networks or third party content owners directly to regional viewers. The increasing availability of high speed broadband will provide metropolitan networks with an increased ability to stream content directly to viewers regardless of licence area restrictions, bypassing regional broadcasters and potentially rendering the need to enter affiliation agreements with regional broadcasters obsolete. If the reach rule is not removed, there will be an incentive for metropolitan broadcasters to increase this practice and this will make the viability of regional broadcasting increasingly more difficult over time.

Metropolitan broadcasters are also disadvantaged by the rule. Under affiliation agreements, metropolitan networks receive only a percentage of a regional broadcaster's revenue for the supply of their programming. As programming costs and rights fees for sporting events continue to increase, the 75% reach rule serves to limit the metropolitan broadcaster's ability to offset costs and recoup all of the available revenue for viewing of their content. Under the current affiliation model, revenue shares do not increase relative to cost increases in programming, meaning the increases incurred by metropolitan broadcasters cannot be shared evenly across the viewing population. The limited revenue percentage received under the affiliation agreement effectively means metropolitan broadcasters receive only a portion of the available revenue from the regional market for viewing of their programs. If metropolitan broadcasters are to maintain their investment in Australian content, it will become increasingly important for them to be able to receive the whole of every revenue dollar from the entire Australian audience.

4. The 75% Rule Does Not Ensure Diversity And Creates an Uneven Regulatory Setting

The 75% reach rule does not prevent broadcasters from sharing programming content. As a result, nearly all programming shown by regional broadcasters is provided by way of affiliation agreements from metropolitan networks, ensuring they are effectively integrated with metropolitan broadcasters in a contractual sense. Regional broadcasters get no say in what programs are produced or acquired by the metropolitan broadcasters under these agreements and have little say in the scheduling of them. Much of the voice in regional areas is therefore already that of the metropolitan networks. The affiliation arrangements effectively mean that there is little distinction between metropolitan networks and the regional broadcasters that receive their programming.

A typical broadcast week for WIN in regional Queensland reveals that there is very limited unique programming produced:

Time	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
5:30	Today Show	Today Show	Today Show	Today Show	Today Show	Dora the Explorer	Weekend Today
6:00							
6:30							
7:00						Weekend Today	
7:30							
8:00							
8:30							
9:00	Mornings	Mornings	Mornings	Mornings	Mornings		Wide World of Sports
9:30						Mornings	
10:00							Sunday Footy Show
10:30							
11:00	National Morning News	National Morning News	National Morning News	National Morning News	National Morning News		
11:30							
12:00	The Ellen Degeneres Show	The Ellen Degeneres Show	The Ellen Degeneres Show	The Ellen Degeneres Show	The Ellen Degeneres Show	The Bottom Line	
12:30						Gilligans Island	
1:00	The View	The View	The View	The View	The View	The Middle	Athletics Australia Tour
1:30						Who do you think you are	
2:00	Days of Our Lives	Days of Our Lives	Days of Our Lives	Days of Our Lives	Days of Our Lives		Intrust Cup
2:30						Movie	
3:00	National News Now	National News Now	National News Now	National News Now	National News Now		
3:30							
4:00	Alive and Cooking	Alive and Cooking	Alive and Cooking	Alive and Cooking	Alive and Cooking		Sunday Football
4:30	National Afternoon News	National Afternoon News	National Afternoon News	National Afternoon News	National Afternoon News	Antiques Roadshow	
5:00						News at 5	
5:30	Hotseat	Hotseat	Hotseat	Hotseat	Hotseat	Getaway	
6:00	National News	National News	National News	National News	National News	National News	National News
6:30	WIN News	WIN News	WIN News	WIN News	WIN News	AFHVS	The Voice
7:00	The Voice	The Voice	The Voice	Top Gear	Friday Night NRL		
7:30						Movie	
8:00				The Footy Show			60 Minutes
8:30	House Husbands	The following	The following				
9:00							The Mentalist
9:30	Person of Interest	2.5 Men	Whats your emergency			Movie	
10:00		Anger Mgt		2.5 Men	Movie		CSI Las Vegas
10:30	Person of Interest	Anger Mgt	Embarrassing Bodies	AFL Footy Show			
11:00		The following					CSI Miami

Programs provided under affiliation from Nine (yellow) — WIN generated programs (red)

Analysis of the schedules for both Prime and Southern Cross would produce the same or similar result. The business model of regional broadcasters is such that affiliation agreements are an essential requirement in meeting the range of regulatory programming obligations all broadcasters are subject to. The replication of programming under these arrangements clearly limits the effectiveness of the 75% reach rule as a tool to deliver diversity of opinion and views, given that the overwhelming majority of programming is supplied by the metropolitan networks, including the majority of news services and all current affairs programming.

In a converged digital media environment, given the amount of shared programming, it is meaningless to assess diversity on the basis of who owns what television licence in a particular licence area. The internet has ensured that there are many new voices available to people in regional Australia and the continued development of high speed broadband will facilitate further increases in digital media businesses over time. Nine maintains that the most effective way of ensuring diversity of media opinion in regional Australia is to ensure that existing broadcasters remain viable and capable of continuing investment in local content. An important means of delivering this outcome is to ensure that those media businesses compete on a level regulatory playing field.

At present commercial free to air television broadcasters are subject to a range of regulatory constraints that other competing media businesses are not subject to. This includes statutory oversight of news and current affairs, requirements to broadcast Australian content (including requirements to produce new drama, children's television and documentaries), limits on the amount of advertising allowed and restrictions on what type of programing can be shown when. While the policy rationale for many of these restrictions may still be valid today, the existence of these regulatory constraints places broadcasters at a competitive disadvantage to all other unregulated media businesses. The 75% rule is a further regulatory constraint that serves to unfairly limit the ability of commercial free to air broadcasters to compete. However, it is a rule that no longer delivers on its objectives of ensuring media diversity and therefore has no public benefit.

5. **Broadcasters Are Likely To Exceed The Current Reach Limits**

The current reach rule does not even provide an equitable and effective way of limiting broadcasters reach. Data used by the ACMA to calculate the current reach of broadcasters shows:

Broadcaster	% of Population Reached
ABC	Unrestricted (100%)
SBC	Unrestricted (100%)
Seven Network	74.19
Ten Network	66.7
Nine Network	62.92
WIN Network	38.9
Southern Cross/Austereo	34.1
Prime Media Group	24.4

Source: ACMA Licence Area Population Data www.acma.gov.au/licplan/population/area.html

Given that these population figures are calculated on the 2006 Census data, it is likely that the Seven Network in particular already exceeds the 75% limitation. When analysis of the population data from the 2011 Census is complete, a mere 0.82% shift in population to metropolitan centres or regional Queensland since 2006 would result in the Seven Network exceeding the 75% cap. The current provisions of the *Broadcasting Services Act* do not require divestment where a broadcaster exceed the 75% reach limit due to population migration to existing licence areas. This means that the Seven Network would be permitted to remain in breach of the provision. As more of the population continues to centre around metropolitan areas, the creep beyond the 75% limit will continue to occur and would also be likely to lead to other metropolitan broadcasters exceeding the limit over time.

The fact that certain broadcasters are permitted to exceed the cap while other broadcasters would be prevented from doing so further illustrates the absurdity of the rule. The operation of the rule under the present regime not only ensures that commercial free to air broadcasters are at a disadvantage against other forms of media, but it also treats broadcasters within the commercial free to air sector differently based on the time of the acquisition of their licences.

6. Existing Regulatory Safeguards Already Ensure Competition And Diversity

The removal of the 75% rule will still leave in place a range of statutory regimes and laws designed to assess the impacts of any merger or acquisition on competition and diversity in regional areas. These rules are overseen by both the ACMA and/or the ACCC and comprise:

- Statutory Control Rules - the current provisions of the *Broadcasting Services Act* require that a person must not be in a position to exercise control of more than one commercial television licence in the same area and separately that a person cannot control more than two commercial radio licenses in the same area. These restrictions also extend to directors of a company or companies that between them control more than the required number of television or radio licences.
- 2 out of 3 rule – The *Broadcasting Services Act* also restricts cross media ownership preventing a person from being in a position to control a commercial television licence, a commercial radio licence and an associated newspaper.
- 5/4 rule - the *Broadcasting Services Act* also provides rules that prohibit acquisitions or common ownership where it would result in less than 5 voices in a metropolitan market and less than 4 voices in a regional market.
- Competition Law – the ACCC has a range of powers to assess proposed mergers or acquisitions. Before approving any merger or acquisition, the ACCC can assess the likely impact on competition and prevent any acquisition where it would result in a

substantial lessening of competition in a market. The ACCC's powers are sufficient for it to adequately assess matters referred to it by way of complaint from third parties or by other means such as press reports.

The statutory oversight of any acquisition following the removal of the 75% rule would still result in strong protections to guard against unacceptable concentration of media ownership.

7. Technology Will Continue To Make The Rule Ineffectual

The continued rollout of the National Broadband Network, together with the sale of the broadcasting spectrum known as the "digital dividend" this year will further facilitate the delivery of video content over the internet and through wireless technology. These technologies are not restricted by licence areas and as streaming of content is not considered broadcasting[1], services delivered to viewers using this technology will not be caught by any of the restrictions under the *Broadcasting Services Act*. In fact specific conditions have been developed by the government as part of its auction framework to ensure that incoming owners of the digital dividend are exempt from the 75% reach rule. While viewing over the internet may not yet occur in large numbers, these two specific government initiatives are expressly designed to facilitate and promote this outcome.

8. Acquisitions Are Unlikely To Result In Significant Regional Job Losses

While regional broadcasters transmit into regional areas, their operations and corporate headquarters are based almost entirely in large metropolitan centres. Prime Media's corporate offices are located in Sydney, Southern Cross/Austereo in Melbourne and WIN TV in Wollongong. Their major playout facilities are also located in metropolitan areas. These facilities manage all essential aspects of compiling and distributing the broadcasters' channels in regional Australia and these facilities employ many people. WINTV operates a joint playout facility with the ABC in Revesby in western Sydney, while both Prime and Southern Cross operate their facilities in Canberra. Those employed in regional locations are principally in sales or news gathering roles.

While there would undoubtedly be efficiencies as part of any acquisition between metropolitan and regional broadcasters, these would almost exclusively be confined to the areas where regional broadcasters and metropolitan broadcasters currently duplicate facilities. The 75% reach rule has led to an artificial industry structure under which regional networks are essentially contractually integrated with the metropolitan broadcasters, but

[1] Determination under paragraph (c) of the definition of "broadcasting service" (No. 1 of 2000)

have maintained their own dedicated facilities to transmit the content and administer their businesses. As a result there is significant duplication in functions between them. Staff employed in sales and news gathering in regional areas are not a duplicated resource and are an important part of the success of the regional broadcasting business model.

9. Protection Of Local News Services

One of the most common justifications offered for the reach rule is that it protects the provision of regional news. This outcome was never a stated objective of the 75% reach restriction and it does not serve as a mechanism to ensure there are regional news bulletins. The current local regional content provisions under the *Broadcasting Services Act* are unrelated to the 75% reach rule and they do not require regional broadcasters to produce news content. Instead they merely require regional broadcasters in some areas to broadcast content of local significance. The type of local news services currently provided by some regional broadcasters are therefore not guaranteed by the reach rule provisions, as evidenced by the fact that in recent times, many regional news services have been reduced or removed entirely such as the recent example where WIN TV stopped its news service in regional South Australia.

As news is for the most part the only content produced by regional broadcasters, it represents a largely discretionary expense. As the current provisions do not require the production of news bulletins of the type currently produced by WIN and Prime, it is likely that those broadcasters will continue to cut local news programming over time as their businesses come under increasing pressure from the decline in the advertising market and increased competition for viewing from other platforms. Simply requiring regional broadcasters to produce news bulletins without removing impediments such as the 75% reach rule that constrain the growth of regional businesses would further damage the regional broadcasting model.

Nine has a long and proud tradition of producing news. Through its regional licences in Darwin and Northern NSW, Nine is the only regional broadcaster to produce local news bulletins in regional markets every day of the year. Nine would welcome and support measures that protect news production and news staff in regional areas as part of the removal of the 75% reach rule. This would provide an appropriate safeguard for regional viewers and ensure that regional broadcasters are no longer constrained by obsolete restrictions that limit the ability to compete.

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10. Proposed New Legislative Framework

As a part of the process to remove the 75% reach rule, Nine proposes that a requirement applicable only to broadcasters who control licences that exceed more than 75% of the population be developed. Under this proposal those broadcasters would be required to produce 30 minute regional news bulletins each week day in all local licence areas owned by that broadcaster. This requirement will mean every local area that currently gets its own news service will continue to do so. It is a legislative safeguard that that will mean the types of news services currently provided in regional markets today will continue. The requirement would form part of a broadcaster's licence conditions and would be enforced by the ACMA.

Nine estimates that in order to meet this requirement, it would need to have approximately 200 journalists and news production staff employed in regional areas. This represents a significant investment in news at a time when many media businesses are reducing the number of journalists employed. **Annexure 1** sets out a draft legislative framework that could achieve this outcome. The adoption of this framework would represent significant and much needed reform of the commercial free to air sector, however it would not require complex changes and could be quickly and easily adopted into law.

11. Conclusion

Nine believes that the Committee should recommend the abolition of the 75% reach rule and develop a content standard to secure regional news services.

The continuation of the 75% reach rule will confine regional broadcasters to terrestrial only business model in an environment where other unregulated providers are able to provide that same content for viewing by people in regional areas. It would also continue to disadvantage metropolitan broadcasters who invest in local content as they are prevented from offsetting costs across the entire country and recouping all the available revenue for viewing of their programs. This outcome was not intended at the time the 75% restriction was introduced into law and it is a restraint that does not apply to any other content producer or media business operating in Australia. It is unfair and discriminating.

The rule serves no justifiable purpose in the converged media environment and its removal represents real media reform that can lead to enhanced services for regional Australia and will help ensure that commercial free to air broadcasters are capable of maintaining their investment in local news and Australian programming into the future.

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Amendments to the Broadcasting Services Act 1992

1 Section 53

Repeal subsection (1).

2 Before section 122

Insert:

[***Note: numbering carries on from*** **Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013.**]

*"**121H – Regional licence area news commitments***

(1) *If a person comes into a position to exercise control of commercial television broadcasting licences whose combined licence area populations exceed 75% of the population of Australia, then, for so long as that person is in a position to exercise control of commercial television broadcasting licences whose combined licence area populations exceed 75% of the population of Australia, each commercial television broadcasting licensee in a regional licence area in respect of which that person is in a position to exercise control must ensure that:*

(a) *it complies with the **regional area news commitment**;*

(b) *it complies with the **local area news commitment**; and*

(c) *it complies with the **local area employment commitment**.*

(2) *For the purposes of this section, **regional area news commitment** means a requirement to broadcast in a regional licence area news that relates directly to that regional licence area each day of the week between Monday and Friday inclusive, between 5pm and 8pm, for no less than an average of 22 minutes for each of those days, measured across each of the periods 1 January to 31 March, 1 April to 30 June, 1 July to 30 September and 1 October to 31 December each year.*

(3) *For the purposes of this section, **local area news commitment** means a requirement to broadcast in each local area in the regional licence area news that relates directly to that local area for each day of the week between Monday and Friday inclusive, between 5pm and 8pm, no less than an average of 16.5 minutes for each of those days measured across each of the periods 1 January to 31 March, 1 April to 30 June, 1 July to 30 September and 1 October to 31 December each year.*

(4) *For the purposes of this section, **local area employment commitment** means a requirement to employ or retain in the local area at least the following people responsible for gathering and producing news that relates directly to the local licence area or the regional licence area:*

(i) *one journalist;*

(ii) *one camera operator; and*

(iii) *one producer.*

(5) *For the purposes of this section,* ***local area*** *has the meaning given in section 7 of the Broadcasting Services (Additional Television Licence Condition) Notice dated 8 November 2007 as at [****date****].*

(6) *For the purposes of this section,* ***regional licence area*** *has the meaning given by section 61AA.*

(7) *For the avoidance of doubt, news relating directly to a local area within a regional licence area contributes to both the local area news commitment and the regional area news commitment for that regional licence area.*

(8) *The Minister may, by legislative instrument, give directions to the ACMA in relation to the exercise of its powers under this section.*

(9) *The ACMA must comply with a direction under subsection (8).*