

Chapter 1

Introduction

Media reform bills

1.1 On 14 September 2006, the Senate referred a suite of media reform bills to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts, for inquiry and report by 5 October 2006.

1.2 The bills referred were:

- Broadcasting Services Amendment (Media Ownership) Bill 2006;
- Broadcasting Legislation Amendment (Digital Television) Bill 2006;
- Television Licence Fees Amendment Bill 2006; and
- the provisions of the Communications Legislation Amendment (Enforcement Powers) Bill 2006.

1.3 The Senate also referred a discussion paper to the committee. The paper, *New Services on Digital Spectrum* – on the two channels of spectrum for new digital services – was tabled by the Minister for Communications, Information Technology and the Arts, Senator the Hon. Helen Coonan.

1.4 Later that day, following a committee meeting, the Senate granted an extension of time to report until 6 October 2006.

Conduct of the inquiry

1.5 The committee corresponded with a large number of individuals, media organisations, and key stakeholders and invited them to provide a submission to the committee's inquiry.

1.6 The committee also sought public comment by advertising the inquiry in *The Australian* on Saturday 16 and Tuesday 19 September 2006.

1.7 The committee received 71 submissions to its inquiry (see Appendix 1).

1.8 The committee held two public hearings in Canberra; on Thursday, 28 and Friday, 29 September 2006. The committee heard evidence from a number of witnesses, including representatives of media industry groups, Telstra, the Australian Competition and Consumer Commission and the Department of Communications, Information Technology and the Arts. A complete list of witnesses is provided at Appendix 2.

1.9 A number of questions were placed on notice at the hearing. Those questions and responses are at Appendix 3.

1.10 Published submissions and the *Hansard* of the committee's hearings are tabled with this report, together with supplementary material provided to it following the committee's hearings. Submissions and transcripts of the committee's hearings are available on the Parliament's internet site at www.aph.gov.au.

1.11 The committee acknowledges the assistance and contribution made to its inquiry by those who prepared and provided written and oral submissions to the inquiry. Their work has been of considerable assistance to the committee, particularly given the timeframe of the inquiry.

Structure of the Report

1.12 The inquiry focused on the two principle bills - the Broadcasting Services Amendment (Media Ownership) Bill 2006 (Media Ownership Bill) and the Broadcasting Legislation Amendment (Digital Television) Bill 2006 (Digital Television Bill). These bills provide the major changes in a package which has been regarded, both by the committee and others participating in the inquiry, in its totality.¹ The individual components have been separated so that they can be readily discussed.

1.13 The Media Ownership Bill proposes new media diversity rules which would allow cross media transactions to occur provided a minimum number of separately controlled commercial media groups were maintained in the relevant licence area. Secondly, it proposes the removal of all restrictions on foreign ownership and control of commercial television and subscription television. This bill and the issues raised in relation to the two proposals are discussed in Chapter 2.

1.14 The Digital Television Bill provides for three major policy changes. The first relates to the requirement that commercial television broadcast licensees provide a HDTV simulcast version of their analogue and SDTV services. The second policy issue addressed by the bill is the moratorium on the grant of new commercial free-to-air television broadcast licences and the third relates to non-broadcasting services band licences. These three issues together with associated matters such as the genre restrictions and anti-siphoning list regime are explored in Chapter 3. Consideration of the issues arising out of the discussion paper on the two channels of spectrum for new digital services is also undertaken in Chapter 3.

1.15 The two remaining bills – the Television Licence Fees Amendment Bill 2006 (Licence Fees Bill) and the Communications Legislation Amendment (Enforcement Powers) Bill 2006 (Enforcement Powers Bill) – play important roles in the package but raised little comment during the inquiry. An outline of these bills is provided below.

1 See for example Mr James Hooke, Managing Director New South Wales, Fairfax, *Committee Hansard*, 28 September 2006, p. 2.

Purpose of the bills

Television Licence Fees Amendment Bill 2006

1.16 The Licence Fees Bill amends the *Television Licence Fees Act 1964* as a consequence of provisions in the Digital Television Bill.

1.17 Under the Digital Television Bill, once commercial television broadcasters are able to use their television broadcasting licences to provide an expanded range of digital services, they will be required to pay fees based on their gross earnings across all services.

1.18 The expanded range of services will include a high definition multi-channel from 1 January 2007, a standard definition multi-channel from 1 January 2009, and any number of multi-channels from digital switchover.²

Provisions of the bill

1.19 The bill consists of one schedule which amends the *Television Licence Fees Act 1964*.

1.20 Item 1 amends the definition of 'gross earnings' in subsection 4(1) of the *Television Licence Fees Act 1964* and is related to the amendments to be made in the Digital Television Bill. The bill provides that a commercial television broadcasting licence will authorise the provision of more than one service (or 'channel' of programming) from 1 January 2007.³

1.21 Currently, a commercial television broadcasting licensee may only provide a single service under the *Broadcasting Services Act 1992* (BSA).

1.22 Under the terms of the Digital Television Bill, from 1 January 2007, a commercial television broadcasting licence will be authorised to provide more than one service (or 'channel' of programming). The changes will enable commercial broadcasters to provide a non-simulcast high definition (HDTV) service (HDTV multi-channel) from 1 January 2007, one standard definition (SDTV) multi-channel from 1 January 2009 and any number of multi-channels from the end of the simulcast period.

1.23 Commercial television licensees are required to pay licence fees under the *Television Licence Fees Act 1964*. Under current arrangements, the fees payable are calculated on the basis of the 'gross earnings' of the licensee. A consequential amendment to the definition of 'gross earnings' is required to reflect the fact that commercial television broadcasting licensees will be able to earn revenue from the provision of multiple services in the future.

2 Second Reading Speech, Television Licence Fees Amendment Bill 2006, p. 1

3 Explanatory Memorandum, Television Licence Fees Amendment Bill 2006, p. 2

1.24 The effect of this amendment is that all revenue derived by a commercial television broadcasting licensee from the televising of advertisements (or other matter) on all services provided by the licensee, will be included for the purposes of calculating the licence fees payable for the commercial television broadcasting licence. During the inquiry some concerns were expressed in relation to this proposal. Those concerns are considered in Chapter 3.

Communications Legislation Amendment (Enforcement Powers) Bill 2006

1.25 The Australian Communications and Media Authority (ACMA) – Australia's broadcasting and communications regulator – is responsible for ensuring the media sector complies with both legislative obligations and audience expectations.

1.26 There have been concerns for some time about the ACMA's ability to regulate the broadcasting industry. Of particular concern is the limited range of enforcement options available to the ACMA to fulfil its responsibilities under the BSA. To address this issue, the Enforcement Powers Bill will provide the ACMA with a larger range of enforcement options, which are designed to allow it to respond in a more flexible and appropriate way to breaches of the regulatory framework.⁴

1.27 The Enforcement Powers Bill will also allow the ACMA to carry out the regulatory function required of it under the new regulatory scheme being introduced by the government through its media reform package. Under the new arrangements, one of the ACMA's primary roles will be to ensure that diversity of media ownership and content are protected under changes to the regulation of media ownership.

1.28 The Enforcement Powers Bill will not create new offences, but will enhance the ACMA's broadcasting regulatory role under the BSA by providing the ACMA with new powers, including:

- civil penalties;
- injunctions;
- enforceable undertakings; and
- infringement notices.⁵

Civil penalties

1.29 Under the current legislation, many breaches of the provisions of the BSA, or of basic BSA licence conditions, are subject only to criminal penalty. This requires the ACMA to refer prosecutions to the Commonwealth Director of Public Prosecutions

4 Second Reading Speech, *Communications Legislation Amendment (Enforcement Powers) Bill 2006*, p. 1

5 Explanatory Memorandum, *Communications Legislation Amendment (Enforcement Powers) Bill 2006*, p. 1

(DPP), establish the breach to the criminal standard of proof and demonstrate intent to breach.

1.30 The bill establishes civil penalties in relation to a number of breaches of the BSA and licence conditions.⁶ Civil penalties provide some advantages, in that they do not require a referral to the DPP who must prove an offence to the criminal standard of proof and, where a 'strict liability' approach has been adopted, there is no requirement to prove intent.

1.31 These are proposed through amendments to the BSA which are set out in Schedule 1 of the bill (see items 1 to 8, 20, 21, 27, 28, 33, 36, 37, 39, 40, 42 and 49).

Injunctions

1.32 The bill also grants the ACMA the power to seek an order from the Federal Court to prevent unlicensed broadcasting. Injunctions to prevent unlicensed broadcasts are principally aimed at licensees outside commercial broadcasting categories, such as narrowcasters (which are licensed to provide only niche services) that provide commercial broadcasting services.⁷ The provision of additional injunctive powers is discussed in Chapter 2.

Enforceable undertakings

1.33 The bill makes it possible for the ACMA to accept enforceable undertakings in relation to its broadcasting, datacasting and internet content regulatory functions.⁸ These are in addition to other powers granted to the ACMA under the provisions of the Media Ownership Bill.

1.34 Under current arrangements, the ACMA can accept voluntary undertakings in relation to its telecommunications regulatory functions, and may also do so under the *Spam Act 2003*, but unlike the Australian Competition and Consumer Commission or the Australian Securities and Investment Commission, it cannot enforce any undertakings it has accepted. By contrast, enforceable undertakings have proven to be an effective regulatory tool in other sectors, and are regarded by industry as providing

6 Item 27 inserts new Division 1A of Part 10 of the BSA, which provides civil penalties for unlicensed services. Part 14B introduces machinery provisions to support the new civil penalties introduced by other Items.

7 Explanatory Memorandum, *Communications Legislation Amendment (Enforcement Powers) Bill 2006*, p. 2. Part 14C enables the Federal Court to grant injunctions in relation to contraventions or proposed contraventions of the provisions in the BSA which deal with unlicensed broadcasting.

8 Part 14D gives the ACMA the ability to accept undertakings to ensure compliance with the BSA and registered codes of practice. Once accepted by the ACMA, undertakings would be enforceable by the Federal Court. Item 52 inserts new Part 5.8 of the *Radiocommunications Act 1992* which would give ACMA the ability to accept undertakings to ensure compliance with the Radiocommunications Act.

a worthwhile alternative to sanctions. Undertakings will remain voluntary, but giving the ACMA the power to enforce undertakings made by industry, will bring the ACMA into line with its regulatory peers.

1.35 The ACMA will also be granted a similar power to accept enforceable undertakings in relation to regulatory obligations under the *Radiocommunications Act 1992*.

Infringement notices

1.36 The bill will provide the ACMA with the power and flexibility to issue infringement notices (rather than employ the process of criminal sanctions) in relation to the following types of breaches⁹:

- failure to report changes of control and directorships; and
- failure to submit annual financial returns, keep records and make records available to the ACMA.

1.37 Although these would be relatively minor breaches, there has been an ongoing issue of non-compliance in relation to these requirements over recent years. The ability to address non-compliance will be of particular benefit to the ACMA in monitoring industry's notification of changes in control. Notification of changes in control will be of particular importance to the effective protection of diversity of media ownership under the government's proposed changes to the media ownership regulatory framework.

1.38 The proposed infringement notice scheme will be implemented in accordance with the Australian Law Reform Commission guidelines.

Guidelines

1.39 The bill requires the ACMA to develop guidelines, in consultation with industry, regarding the appropriate use of enforceable undertakings, infringement notices and civil penalties.¹⁰ In developing these guidelines, the ACMA can also issue guidelines in relation to its exercise of existing enforcement powers, such as referral for criminal prosecution or suspension or cancellation of licences.

Remaining provisions of the bill

1.40 The bill contains proposed amendments to the BSA and the *Radiocommunications Act 1992*.

9 See Schedule 1 of the Communications Legislation Amendment (Enforcement Powers) Bill 2006, Items 1 to 8, 11. Part 14E sets up a system of infringement notices for contraventions of designated infringement notice provisions established under Items 11, 30 and 32.

10 Item 50, Communications Legislation Amendment (Enforcement Powers) Bill 2006, new section 215.

1.41 Items 9 and 10 amend section 41 of the BSA so that in addition to past criminal convictions for breaches of the BSA, past civil penalties will also be relevant to a person's suitability to hold a licence.

1.42 Item 22 inserts new sections 121FJA–121FJD of the BSA. The new remedial directions provisions introduced under this Item have been modelled on the remedial directions provisions in clause 53 of Schedule 6 of the BSA and the *Telecommunications Act 1997*. This ensures that the ACMA's powers in relation to these types of notices are consistent.

1.43 The current distinction between satellite and other subscription television broadcasting services is no longer important. As a consequence, Item 25 repeals the current penalty and substitutes a standard penalty of 2,000 penalty units for all unlicensed subscription television broadcasting.

1.44 Items 29 to 32 make special provision for breach of the licence conditions relating to financial records and reporting (paragraphs 7(1)(ia) and 8(1)(ha) of Schedule 2). Item 43 is consequential to Items 30 and 32. It inserts a note at the end of section 205B which explains how section 205B is to be enforced.

1.45 Item 34 repeals sections 141 and 142 and substitutes new sections 141, 142 and 142A of the BSA. This Item inserts a new section which gives the ACMA the power to give remedial directions in relation to breaches of licence conditions for commercial, community and subscription services, breaches of class licences and breaches of codes of practice for a subscription radio broadcasting service, a subscription narrowcasting service or an open narrowcasting service.

1.46 Item 53 provides that the amendments of section 205D of the BSA (Items 44, 45 and 46) apply to an additional fee that relates to a licence fee if the due date for the licence fee is after the date on which this Item commences.

1.47 Item 54 clarifies that the power to issue formal warnings and infringement notices (new Part 14E) may only be exercised by the ACMA in relation to a contravention that occurs after this Item commences.

